SHAREHOLDER PROPOSALS AND SOCIAL POLICY

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I. INTRODUCTION

Public company shareholders enjoy the right to propose resolutions to be voted on at the corporate annual meeting.[1] Federal securities laws govern this right and are subject to modest ownership requirements and content limitations; putting a shareholder resolution to a vote is relatively easy to accomplish.[2] Rule 14a-8[3] of the United States Securities and Exchange Commission (SEC)[4] and related authorities govern the making of shareholder

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1 *See generally* 17 C.F.R. § 240.14a-8 (2013).

2 *See generally id.*

3 *See generally id.*

4 *See id.* for an explanation of the differences between the "Staff" and the "Commission." Where necessary to analyze, this article makes reference to the Staff and the Commission; otherwise, this article simply refers to the SEC.

proposals for public companies.[5] This Article explores how social policy[6] affects whether a shareholder proposal appears for a vote.

Shareholder proposals appear in the corporate proxy statement.[7] Proposals are commonplace and take the form of various requests made to boards of directors and senior management.[8] These sometimes address environmental and social policy (E&S)[9] concerns.[10] According to data compiled by the SEC, between 2017 and 2021, shareholders submitted 3,560 proposals.[11] Of these, 54% related to corporate governance, 31% to social issues, and 11% to environmental matters.[12] Index funds vote large blocks of shares and comprise among the largest holders in publicly traded companies.[13] An index fund's principal investment responsibility is to cause its shares to track the relevant index.[14] Because of their considerable voting power, index funds such as Vanguard,[15] BlackRock,[16] and State Street[17] play a meaningful role in determining the direction and impact of shareholder

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5 *See generally id.*

6 The term "social policy" is ascribed to the meaning in relevant SEC Releases and other publications and authorities. Earlier authorities used the term "substantial policy" in this context. *See* Amendments To Rules On Shareholder Proposals, 41 Fed. Reg. 52994, 52998 (Dec. 3, 1976) (to be codified at 17 C.F.R. pt. 240).

7 For a discussion of the proxy voting process, *see* Marcel Kahan & Edward B. Rock, *The Hanging Chads of Corporate Voting,* 96 GEO. L.J. 1227 (2008).

8 *See id.*

9 The acronym "ESG" (environmental, social and governance) may be more familiar to the reader. This Article does not discuss governance, hence the use of the term E&S.

10 *See* Kahan & Rock, *supra* note 7.

11 Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8, Exchange Act Release No. 34-95267, IC-34647, 87 Fed. Reg. 45052, 45064 (July 27, 2022) [hereinafter 2022 Proposed Rule], available at https://www.govinfo.gov/content/pkg/FR-2022-07-27/pdf/2022-15348.pdf.

12 *Id.*

13 *Id.*

14 S&P Dow Jones Indices, *S&P 500*, S&P DOW JONES INDICES, https://www.spglobal.com/spdji/en/indices/equity/sp-500/#overview (last visited Jan. 27, 2024) (explaining that the Standard and Poor's 500 is an example of one such index. "The S&P 500 is widely regarded as the best single gauge of large-cap U.S. equities. . . . [A]n estimated USD 15.6 trillion is indexed or benchmarked to the index. . . .").

15 *See* VANGUARD, 2022 INVESTMENT STEWARDSHIP SEMIANNUAL REPORT 8 (2022) (explaining that in its 2022 Semiannual Report, Vanguard reports equity assets under management of $2.2 trillion).

16 As of March 2023, BlackRock had $9.1 trillion of assets under management and equities comprised slightly over 50% of these. *BlackRock Inc,* ADV RATINGS, https://www.advratings.com/company/blackrock (last visited Jan. 27, 2024).

17 State Street's 2022 Annual Report shows $3.1 trillion of assets under management (the annual report does not specify the equity segment). State Street undertakes a variety of governance initiatives. Under State Street's Fearless Girl Initiative, the bank pressures issuers to appoint women directors to boards. STATE STREET, ANNUAL REPORT 2022 (2022), available at https://investors.statestreet.com/files/doc_financials/2022/ar/SSC_AR_2022_Final_Web.pdf.

proposals.[18] Persuading any large shareholder to support a proposal will attract the attention of the board of directors and senior management.[19]

In tandem with index funds, proxy advisors, such as Institutional Shareholder Services and Glass Lewis, develop benchmark corporate governance policies that support the funds' voting decisions.[20] One study in 2020 found 114 institutional investors managing over $5 trillion voted in lockstep with proxy advisors' recommendations.[21] Proxy advisors effectively control these votes without capital at risk.[22] Index funds and proxy advisors have been accused of using their influence to attain an array of E&S goals,[23] sometimes to the detriment of shareholders.[24]

Regulators and securities exchanges may also foster E&S concerns.[25] For example, issuers that trade on the Nasdaq exchange must publicly disclose board-level diversity data and report the race, sex, and sexual orientation of their boards of directors.[26] Index funds and proxy advisors deny their efforts relate to anything other than long-term shareholder welfare, characterizing their activities as "investment stewardship,"[27] "custom-made policies that are tailored to specific unique circumstances,"[28] and setting benchmark policies that demonstrate "a nexus to shareholder value."[29] Regardless of whether the critique of institutional actors such as index funds, proxy advisors, and Nasdaq has merit, it is undisputed that these actors often

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[18] *See* VANGUARD, *supra* note 15, at 8 (explaining in its 2022 Semiannual Report, Vanguard reports equity assets under management of $2.2 trillion); *see also BlackRock Inc,* ADV RATINGS, https://www.advratings.com/company/blackrock (last visited Jan. 27, 2024); *see also* STATE STREET, *supra* note 17.

[19] *See, e.g., id.*

[20] *See generally* PAUL ROSE, PROXY ADVISOR AND MARKET POWER: A REVIEW OF INSTITUTIONAL INVESTOR ROBOVOTING (MANHATTAN INST. 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3851233.

[21] *See generally id.* at 4.

[22] *See generally* Marlo Oaks & Todd Russ, *A Historic Breach of Fiduciary Duty,* THE WALL ST. J. (May 15, 2023), https://www.wsj.com/articles/a-historic-breach-of-fiduciary-duty-shareholder-proposals-proxy-adivsory-climate-43baa5ba?adobe_mc=MCMID%3D28358085983983583794070087200115694352%7CMCORGID%3DCB68E4BA55144CAA0A4C98A5%2540AdobeOrg%7CTS%3D1686256682.

[23] *See generally id.*

[24] *See generally id.*

[25] *See generally id.*

[26] Rule 5605(f), Nasdaq Rulebook, 5600. Corporate Governance Requirements, available at https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/Nasdaq%205600%20Series.

[27] *See* VANGUARD, *supra* note 15; BLACKROCK, IT'S ALL ABOUT CHOICE EMPOWERING INVESTORS THROUGH BLACKROCK VOTING CHOICE (2022), available at https://www.blackrock.com/corporate/literature/publication/its-all-about-choice.pdf.

[28] Letter from Gary Retelny, President & CEO, Institutional Shareholder Services to Editorial Board of The Wall Street Journal (June 13, 2023) (submitted to Wall St. J.), available at https://insights.issgovernance.com/posts/commentary-our-proxy-advice-is-apolitical/.

[29] Letter from Nichol Garzon, Glass Lewis, to Glass Lewis State Treasurers and Chief Financial Officers (July 3, 2023), available at https://www.glasslewis.com/state-treasurers-glass-lewis-response-letter/.

determine whether a shareholder proposal has consequences for the enterprise.[30] The SEC oversees the shareholder proposal process, and while the agency has established mechanisms to serve as a referee, it has failed to communicate what comprises social policy in this context.[31]

Issuers[32] commonly resist shareholder proposals and have considerable influence over the process because they prepare and disseminate proxy statements and tabulate votes.[33] Once a shareholder proponent has met certain ownership criteria, an issuer may successfully resist a proposal if one or more of Rule 14a-8's thirteen exclusions apply.[34] This Article concentrates on one exclusion: an issuer need not submit to shareholders a proposal that addresses the issuer's ordinary business operations.[35] To do this requires one to critique SEC approaches to shareholder proposals generally, and this Article shows that the process as a whole suffers from a lack of meaningful judicial review and is plagued by an SEC internal structure that hinders the development of authoritative law. Despite the abundance of SEC pronouncements and secondary materials, the system lacks the workable authority needed to interpret Rule 14a-8.[36] As a result, public guidance suffers. Among the most problematic are SEC determinations of social policy as they affect shareholder proposals that apply to ordinary business operations.[37] The SEC's review of these proposals too often lacks transparency and applies arbitrarily.[38] Social policy in these matters will be the centerpiece of this Article's analysis.

As noted, under Rule 14a-8, issuers may reject proposals that relate to their ordinary business operations.[39] However, the ordinary business exclusion may be unavailable if the proposal involves significant social

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30 *See, e.g.,* Rule 5605(f), Nasdaq Rulebook, 5600. Corporate Governance Requirements, available at https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/Nasdaq%205600%20Series; *see also* VANGUARD, *supra* note 15; BLACKROCK, IT'S ALL ABOUT CHOICE EMPOWERING INVESTORS THROUGH BLACKROCK VOTING CHOICE (2022), available at https://www.blackrock.com/corporate/literature/publication/its-all-about-choice.pdf.

31 *See* Shaun J. Mathew, *How Companies Should Approach Shareholder Proposals This Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 3, 2023), https://corpgov.law.harvard.edu/2023/01/03/how-companies-should-approach-shareholder-proposals-this-proxy-season/.

32 References in this article to an "issuer" are publicly traded companies whose shares are registered under the Securities Act of 1933 and are typically the object of a shareholder proposal. Unless otherwise specified, reference to a "company," "registrant," or "corporation" should mean and be a reference to an issuer.

33 *See* Reilly S. Steel, *The Underground Rulification of the Ordinary Business Operations Exclusion,* 116 COLUM. L. REV. 1547, 1570 (2016).

34 17 C.F.R. § 240.14a-8 (i)(1-13) (2013).

35 *Id.*

36 *See generally id.* at § 240.14a-8.

37 *Cf. id.* at § 240.14a-8 (i)(7).

38 *See* Steel, *supra* note 33, at 1570.

39 *Cf.* 17 C.F.R. § 240.14a-8 (i)(7) (2013).

policy matters.[40] There is a history of unresolved disagreement and confusion over what a social policy issue is.[41] What comprises social policy matters is not fixed and is at the core of many of the problems with the SEC's handling of the ordinary business exclusion.[42] One commentator showed SEC determinations (which largely control whether a proposal will appear) vary based on non-public staff-imposed subject matter categories.[43] The SEC will not explain why it favors or disfavors any specific social policy subject matter.[44] This has left the SEC open to accusations of bias in its application of the difficult-to-discern social policy exception to the ordinary business exclusion.[45]

The SEC also considers not just the subject matter of the proposal but how it is to be implemented.[46] Even proposals involving approved[47] social policy concerns may nonetheless fail if they seek to "micromanage" the business.[48] Micromanagement generally occurs when a proposal imposes detailed requirements and specific timelines on the board or management.[49] A prohibition on micromanagement means proponents must fashion their requests in broad generalities, often recommending only study and not precise action.[50] Index funds have developed a code phrase for proposals that micromanage—they are considered "overly prescriptive."[51]

When a shareholder submits a proposal, what is the process to determine whether it will appear? Issuers turn to the SEC's no-action letter process to resist proposals.[52] No-action letters are nonbinding, informal Staff opinions recommending the SEC take no enforcement action when an issuer declines to publish a proposal.[53] Ordinarily, these are not judicially reviewable and are not binding as precedent on the SEC.[54] However, no-action letters generally have a controlling influence over whether a proposal

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40 *See* Steel, *supra* note 33, at 1570.

41 *See id.* at 1549.

42 *See generally id.*

43 *Id.* at 1568 (explaining that staff will not exclude proposals related to climate change, fundamental business strategy, human rights, political activity and senior executive compensation).

44 *Id.* at 1570 (explaining that staff will not exclude proposals related to climate change, fundamental business strategy, human rights, political activity and senior executive compensation).

45 *See, e.g.,* Petition for Review from an Order, Nat'l Ctr. for Pub. Pol'y Rsch. v. SEC, No. 23-60230) (5th Cir. 2023).

46 *See* Steel, *supra* note 33, at 1570.

47 As will be discussed, the SEC does not publish what social policies it approves or describe how it decides which ones to recognize.

48 *See* Steel, *supra* note 33, at 1570.

49 *See id.*

50 *See id.*

51 *See* VANGUARD, *supra* note 15; BLACKROCK, IT'S ALL ABOUT CHOICE EMPOWERING INVESTORS THROUGH BLACKROCK VOTING CHOICE (2022), available at https://www.blackrock.com/corporate/literature/publication/its-all-about-choice.pdf.

52 *See* Steel, *supra* note 33, at 1570.

53 *See id.*

54 *See id.*

will appear.[55] When an issuer requests and obtains a no-action letter, the proposal will not appear.[56] In that case, while a spurned proponent can, in theory, bring a declaratory judgment action to force the submission of a proposal, this happens with extreme rarity.[57]

Those proposals that are presented to shareholders trigger a variety of results.[58] Some of these are non-events; others may prompt changes, both real and cosmetic.[59] Proposals subjected to a vote can have an impact even if rejected by a majority.[60] But even shareholder proposals embraced by a majority are usually merely precatory—they do not require the board of directors and managers to do anything.[61] Still, boards pay attention in order to avert disruption (such as proxy contests and "withhold vote" recommendations) and avoid public opprobrium.[62] At times, "the threat of a proposal often motivates companies to engage with investors in good faith."[63] Proxy advisors also increase the likelihood that directors will face automatic "withhold vote" recommendations if they fail to implement proposals approved by shareholders.[64] The election of a director will fail if they do not receive a majority of votes cast.[65] Proxy advisors also increase scrutiny of a

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55 *Id.* at 1553-54 n.44.
56 *Id.* at 1552-53.
57 *Id.* at 1553.
58 *See generally* Steel, *supra* note 33.
59 *See Global Access to COVID-19 Vaccines*, MODERNA (Apr. 28, 2022), https://investors.modernatx.com/Statements--Perspectives/Statements--Perspectives-Details/2022/Global-Access-to-COVID-19-Vaccines/default.aspx; *Significant number of Moderna and Pfizer shareholders support vaccine technology transfer*, OXFAM INT'L (Apr. 28, 2022), https://www.oxfam.org/en/press-releases/significant-number-moderna-and-pfizer-shareholders-support-vaccine-technology; *Moderna investors reject proposal to transfer vaccine tech*, FIN. TIMES (Apr. 27, 2022), https://www.ft.com/content/731ae6a6-fa0d-4781-a6e3-0725e68ce060; Julie Wokaty, *Worker Justice Rises to the Top of Investors' Agenda at 2023 Annual Meetings*, INTERFAITH CTR. ON CORP. RESP. (Apr. 27, 2023), https://www.iccr.org/worker-justice-rises-top-investors-agenda-2023-annual-meetings/; H. Rodgin Cohen & Glen T. Schleyer, *Shareholder vs. Director Control over Social Policy Matters: Conflicting Trends in Corporate Governance*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 81, 128-29 (2012). *Cf.* John C. Coffee, *The Coming Shift in Shareholder Activism: From "Firm Specific" to "Systematic Risk" Proxy Campaigns (and How to Enable Them)*, 16 BROOK. J. CORP. FIN. & COM. L. 45, 54 (2021) (describing proxy contest—not a proposal—but instruct of the range of outcomes).
60 *See* Steel, *supra* note 33, at 1591.
61 *See id.* at 1552 n.33.
62 *See id.*
63 Letter from Interfaith Center on Corporate Responsibility to Secretary, Vanessa A. Countryman, SEC (Sept. 9, 2022), available at https:/www.sec.gov/comments/s7-20-22/s72022-20138864-308567.pdf (commenting on 2022 Proposed Rule).
64 H. Rodgin Cohen & Glen T. Scheyler, *Shareholder vs. Director Control Over Social Policy Matters: Conflicting Trends in Corporate Governance,* 26 NOTRE DAME J. L. ETHICS & PUB. POL'Y, 81, 84 (2012).
65 *Id.*

board's handling of a shareholder proposal that garners substantial minority support.[66]

This Article argues that the SEC should discard social policy as a consideration in shareholder proposals. This Article discusses Rule 14a-8's ordinary business operations exclusion (as affected by social policy) in six Parts. Following this Introduction, Part II supplies background and addresses when a shareholder proposal concerns ordinary business. Part III analyzes the ordinary business exclusion. The critique contained in Part IV explains inconsistencies and deficiencies in SEC guidance. Part V contains this Article's recommendations, and Part VI concludes.

II. BACKGROUND

As noted, SEC Rule 14a-8 governs shareholder proposals.[67] A shareholder proposal is a shareholder's "recommendation or requirement that the company and/or its board of directors take action."[68] The proposals are presented at a shareholder meeting.[69] Under current Rule 14a-8, to submit a shareholder proposal, a shareholder must continuously hold a minimum market value of the issuer's securities over specified minimum time periods.[70] The shareholder must hold (a) securities with a market value of at least $2,000 for at least three years,[71] (b) securities with a market value of at least $15,000 for at least two years,[72] or (c) securities with a market value of at least $25,000 for at least one year.[73] Generally,[74] "the proposal must be received at the company's principal executive offices not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting."[75]

The requirement that the minimum market value be continuously held for the required holding period creates problems.[76] Brokers and banks may be unwilling or unable to verify whether the holder has continuously satisfied the minimum market value over time because brokers and banks do not issue

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[66] *See generally* Lucian A. Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence and Policy,* 119 COLUM. L. REV. 2029 (2019).

[67] *See generally* 17 C.F.R. § 240.14a-8 (2013).

[68] *Id.* at § 240.14a-8 (a).

[69] *Id.*

[70] *Id.* at § 240.14a-8 (b)(3).

[71] *Id.* at § 240.14a-8 (b)(i)(A).

[72] *Id.* at § 240.14a-8 (b)(i)(B).

[73] 17 C.F.R. § 240.14a-8 (b)(i)(C) (2013).

[74] *Id.* at § 240.14a-8 (e)(2) (2013) ("However, if the company did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting, then the deadline is a reasonable time before the company begins to print and send its proxy materials.").

[75] *Id.*

[76] *Id.* at § 240.14a-8 (b)(1)(i).

daily statements.[77] Share values could momentarily dip below the minimum during an interim, unmeasured period.[78] This has led to hypertechnical objections to valuations submitted by proponents.[79] In these situations, the proponent will be at the mercy of the recordkeeping systems of the brokers and banks.[80] Hypertechnical objections by issuers have been used to suppress unwanted shareholder proposals irrespective of the proposal's merit under Rule 14a-8.[81]

Share ownership is measured solely by reference to the proposing shareholder and may not be aggregated with other persons.[82] The Rule makes no mention of how holders under common control by the proponent or pension holdings would be treated for purposes of measuring share ownership.[83] Given the lack of guidance, applying the Rule's literal terms, treating each nominal shareholder as a discrete owner for purposes of the Rule, appears to be a plausible interpretation.[84]

In addition to required ownership values and holding periods, Rule 14a-8 requires the shareholder to prove ownership.[85] This can be accomplished in one of two ways. First, the shareholder can be a "registered holder" of the relevant securities, which requires the shareholder's name to appear in the company records as a shareholder.[86] Most shareholders, who hold through intermediaries such as banks and brokers in "street name," will not qualify for this status.[87] For these shareholders, the issuer will not know of the

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77 *See, e.g., How often will I receive my account statements?,* CHARLES SCHWAB, https://www.schwab.com/help/account-statements#:~:text=How%20often%20will%20I%20 receive,expect%20a%20 statement%20each%20month (last visited Jan. 27, 2024) ("If you opt to receive paperless statements, you can expect a statement each month.").

78 *Cf.* 17 C.F.R. § 240.14a-8 (b)(1)(i) (2013).

79 *See* Letter from Latham & Watkins LLP to SumOfUs (September 3, 2021).

80 *See id.*

81 *See, e.g., id.* (discussing objections submitted by Latham & Watkins to Jane M. Saks, as proponent, which noted such deficiencies as incorrect company name, no evidence of bank/broker's DTC membership (likely attributable to name confusion), failure of bank/broker to certify continuously value thresholds during required holding period).

82 17 C.F.R. § 240.14a-8 (b)(1)(vi) (2013).

83 *See generally id.* at § 240.14a-8.

84 *See generally id.*

85 *Id.* at § 240.14a-8 (2)(ii)(A)(B) (2013).

86 *Id.* at § 240.14a-8 (b)(2)(i) (2013). In the leading judicial ruling involving a hypertechnical objection, Apache Corp. v. Chevedden, 696 F. Supp. 2d 723, 728 (S.D. Tex. 2010), the issuer, Apache Corporation, incorrectly argued the law required proponent Chevedden to obtain a letter from Depository Trust Company ("DTC"), the record holder of the Apache shares. DTC cannot and will not submit statements supporting share ownership. DTC only knows the interests of its direct participants (banks and brokers) and not their customers or their customers' customers. Apache's legal approach, if embraced, would have effectively ended the ability of shareholders to make proposals, save for those willing to reduce ownership to physical, paper certificates registered with the issuer's transfer agent. Such registration would present a number of obstacles to trading and lending that would have adverse consequences for securities servicing and the capital markets. Chevedden nevertheless lost the case on the grounds of untimely submissions. *Id.*

87 *Apache Corp.*, 696 F. Supp. 2d at 734.

existence of the shareholder, nor will it know the number of shares held.[88] These shareholders must prove their ownership through a "written statement from the 'record' holder of [the] securities (usually a broker or bank)," verifying required ownership, required market value, and required holding periods necessary to establish eligibility.[89] The shareholder must also furnish a written statement that they intend to continue to hold the requisite shares through the date of the shareholders' meeting for which the proposal is submitted.[90] Proposals are subject to a 500-word limit,[91] and each shareholder may submit only one proposal per meeting.[92] Once the shareholder has proved requisite ownership and holding period, the shareholder or a representative under state law must attend the meeting to present the proposal,[93] either in person or by electronic media if the meeting is conducted in that manner.[94]

When the proponent timely submitting a proposal has satisfied requirements to demonstrate ownership in sufficient amounts for requisite time periods, the issuer must include, at its expense, the proposal in its proxy materials unless it can demonstrate the proposal is properly excludable under Rule 14a-8.[95] The issuer must file its reasons for the exclusion with the SEC within eighty calendar days before it files its proxy statement and form of proxy.[96] The placement of the burden on the issuer explains the abundance of no-action letters and no-action requests from issuers seeking to resist shareholder proposals. Even if desired, judicial review may be unavailable to an issuer desirous of resisting a proposal.[97]

Using the ordinary business exclusion as the locus of analysis, this Article searches for any discernable principles that can be derived from the SEC (principally, no-action letters) to determine if a proposal involving ordinary business operations, which also carries colorable social policy issues, must appear in the proxy statement.[98] To understand these issues, one must first understand Rule 14a-8's thirteen proposal exclusions.[99] Among these exclusions are proposals that are not in compliance with state corporate

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88 *See, e.g.,* Daniel Liberto, *Street Name: Meaning, Overview, Advantages and Disadvantages*, INVESTOPEDIA (May 12, 2023), https://www.investopedia.com/ask/answers/185.asp.

89 17 C.F.R. § 240.14a-8 (b)(2)(ii)(A) (2013).

90 *Id.*

91 *Id.* at § 240.14a-8 (d).

92 *Id.* at § 240.14a-8.

93 *Id.* at § 240.14a-8 (h).

94 *Id.* at § 240.14a-8 (h)(2).

95 17 C.F.R. § 240.14a-8 (g) (2013).

96 *Id.* at § 240.14a-8 (j).

97 Steel, *supra* note 33, at 1553 n.44.

98 17 C.F.R. § 240.14a-8 (i)(7) (2013).

99 *Id.* at § 240.14a-8 (i)(1-13).

law,[100] that violate law,[101] that violate proxy rules,[102] that air personal grievances,[103] that do not relate to a relevant business segment,[104] that concern problems that the company has no power or authority to resolve,[105] that concern election of directors,[106] that conflict with a proposal made by the issuer,[107] that have already been substantially implemented,[108] that duplicate another proposal previously submitted and put to a vote,[109] that amount to a resubmission as defined by the Rule,[110] and that relate to a specific amount of dividends.[111] This Article will concentrate its analysis on matters related to ordinary business operations.[112]

III. ANALYZING THE ORDINARY BUSINESS EXCLUSION

This Part analyzes Rule 14a-8's ordinary business exclusion, which has been the source of continuing disagreement between issuers and proponents.[113] It begins with the origins and history of the exclusion, then discusses the seminal Cracker Barrel no-action letter that upended years of SEC policy, followed by the reaction to Cracker Barrel, and the confusion created much later by short-lived Staff Legal Bulletins, and completes the analysis with problems with the current SEC approach. These various SEC machinations provide some evidence that the social policy exception has been controversial and unsettled.[114] Before the analysis, a brief juxtaposition of recent SEC reforms to Rule 14a-8 unrelated to the ordinary business exclusion is in order.[115] Recall that there are thirteen possible exclusions, one of which this Article explores in depth.[116] This does not mean other exclusions have not been the source of turmoil, and on occasion, the SEC

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100 *Id.* at § 240.14a-8 (i)(1).
101 *Id.* at § 240.14a-8 (i)(2).
102 *Id.* at § 240.14a-8 (i)(3) (This includes proposals containing false and misleading statements).
103 *Id.* at § 240.14a-8 (i)(4).
104 17 C.F.R. § 240.14a-8 (i)(5) (2013) (The Rule places this under the heading of "Relevance." "If the proposal 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.").
105 *Id.* at § 240.14a-8 (i)(6).
106 *Id.* at § 240.14a-8 (i)(8).
107 *Id.* at § 240.14a-8 (i)(9).
108 *Id.* at § 240.14a-8 (i)(10).
109 *Id.* at § 240.14a-8 (i)(11).
110 17 C.F.R. § 240.14a-8 (i)(12) (2013).
111 *Id.* at § 240.14a-8 (i)(13).
112 *Id.* at § 240.14a-8 (i)(7).
113 *Id.* at § 240.14a-8 (i)(7).
114 *See* Steel, *supra* note 33.
115 17 C.F.R. § 240.14a-8 (i)(1-13) (2013).
116 *Id.*

acts to resolve these problems.[117] For example, in 2022, the SEC proposed to amend Rule 14a-8 to revise provisions that address duplicative proposals,[118] resubmissions,[119] and already implemented proposals.[120] At the time of this writing, the Commission has not acted on these changes to Rule 14a-8.[121] While change in these areas may have been warranted,[122] problems with the ordinary business exclusion remain unresolved.[123]

A. Origins and History of Ordinary Business Exclusion

Rule 14a-8(h)(7) excludes proposals that deal with a company's ordinary business operations.[124] Ordinary business operations involve

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117 2022 Proposed Rule, *supra* note 11, at 45064.

118 *Id.*

119 *Id.*

120 *Id.* The amendment will change the text of Rule 14a-8(i)(10) to exclude proposals where the issuer "has already implemented the essential elements of the proposal," which previously required the issuer to have "substantially implemented" the proposal. Without expressing an opinion on whether the reforms are curative, there are examples of how the previous standard worked unfairness to issuers. The SEC denied Apple's no-action letter request in connection with a proposal concerning forced labor policies by the company and its supply chain. Apple, 2021 WL 4963232 (Dec. 20, 2021). After failing to exclude the proposal on proof of ownership issues, Apple contended in its no-action letter request that it had substantially implemented the measures described in the forced labor proposal. *See* Letter from Sam Whittington, Assistant Secretary of Apple to Office of Chief Counsel, Division of Corporate Finance, Securities and Exchange Commission (October 18, 2021), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/saksapple122021-14a8.pdf. In support, the company communicated that it had performed over 1,100 audits and interviewed more than 57,000 workers to uphold its strict standards. *See id.* The SEC's denial of Apple's request for a no-action letter stated: "based on the information you have presented it does not appear that either the Company's public disclosures or the level of the board engagement compare favorably with the requests in the Proposal." *See id.* In short, in the eyes of the SEC, Apple failed to demonstrate that it had already addressed the issue. The SEC also rejected Costco Wholesale Corporation's request for a no-action letter in response to a shareholder proposal related to food equity. In Costco, a group of shareholders led by American Baptist Home Mission Societies proposed that Costco's board of directors "prepare a report, at reasonable cost and omitting proprietary information, describing if, and how, Costco applies its Sustainability Commitment to its core food business to address the links between structural racism, nutrition insecurity, and health disparities." Costco Wholesale Corporation, 2021 WL 5323617 (Oct. 15, 2021). Costco contended the proposal should be excluded because it had already implemented what was being proposed and cited its September 2021 Report on Food Security to support its case. This report discussed the Costco value proposition versus competition as well as its offering of fresh and organic foods. *Id.* at Exhibit B, p. 1. Costco raised a number of reasons to show it had substantially implemented the proposal. It began with an attempt to clarify that Costco's philanthropic efforts are relevant to the proposal, contending these are part of its core business goal of increasing access to food. Costco also disputed the contention that it offered less healthy food options in communities of color. It also contended the proposal "confused a desire for substantive action which the proposal does not request) and the delivery of a report that states the facts." *Id.* The SEC rejected Costco's no-action letter request without explanation. *Id.*

121 17 C.F.R. § 240.14a-8 (h)(7) (2013).

122 2022 Proposed Rule, *supra* note 11, at 45064.

123 *See id.; cf.* 17 C.F.R. § 240.14a-8 (h)(7) (2013).

124 17 C.F.R. § 240.14a-8 (h)(7) (2013).

functions "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."[125] This includes matters such as management of the workforce, production, and suppliers.[126] Since 1954, proposals that affect "ordinary business operations"[127] could be excluded.[128] SEC interpretations of the Rule have varied over time.[129] As the discussion to follow will show, rather than amend the Rule, SEC interpretations have materially changed the Rule's scope and effects over time.[130]

In 1976, Exchange Act Release 34-12,999[131] (the 1976 Release) allowed management to exclude a proposal if it (1) concerns "business matters that are mundane in nature" and (2) does not involve "any substantial policy or other considerations."[132] When adopted, the SEC viewed this SEC Release as an experiment, entailing a series of observations under study, with proponents and issuers as the study subjects:

> The Commission wishes to emphasize that the amendments which it has adopted are not intended as a final resolution of the questions and issues relating to shareholder participation in corporate governance and, more generally, shareholder democracy. The Commission intends to study these issues on a broader basis and the staff is presently formulating proposals for such a study. In the interim[,] the staff will monitor the operation of these shareholder proposal provisions to assess their impact on the proxy soliciting process.[133]

The 1976 Release describes how proposals and timing questions can impact issuers in different ways.[134] For example, it describes how untimely submitted proposals can affect printing costs.[135] For many years, the SEC applied this extratextual gloss "in a manner that was, according to many commentators, neither consistent nor appropriate."[136] The text of the 1976 Release created its own difficulties, including: What was the meaning of

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125 Amendments To Rules On Shareholder Proposals, Exchange Act Release No. 34-40018, 63 Fed. Reg. 29106, 29108 (May 21, 1998) (to be codified at 17 C.F.R. pt. 240). For the history of changes related to social policy, *see* Cohen & Scheyler, *supra* note 64, at 84.

126 *Id.*

127 Phillip R. Stanton, *SEC Reverses Cracker Barrel No-Action Letter,* 77 WASH. U. L. Q. 979, 981-82 (1999).

128 *Id.*

129 *Id.* at 981.

130 *Id.*

131 Adoption To Rules On Shareholder Proposals, 41 Fed. Reg. 52994, 52998 (Dec. 3, 1976) (to be codified at 17 C.F.R. pt. 240).

132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.*

136 Stanton, *supra* note 127, at 983.

"substantial policy" and what other events and occurrences would be addressed by "other considerations"?[137] Did "substantial policy" require a matter of social policy or public policy? Is there a difference?[138]

The 1976 Release attempted to shed light on the meaning of "substantial policy" in an example of a nuclear power facility.[139] In this example, building such a facility, with the economic and safety considerations it entails, would place it outside ordinary business.[140] However, this example was not especially helpful because it exemplified what was not ordinary business and, therefore, did not need to address "substantial policy" or "other considerations."[141] Unless another exclusion applies, a proposal not involving ordinary business operations cannot be excluded.[142] Because a decision to build a nuclear power plant is not ordinary business, there is no need to reach the question of whether this decision involves substantial policy issues. The nuclear power plant also goes to the question of materiality (which would be present in the case of a nuclear power facility), but the SEC does not phrase this hypothetical in those terms.[143] Indeed, Rule 14a-8 makes no reference to materiality, a concept otherwise present in securities laws.[144] For example, even the Rule's provision that excludes proposals related to *de minimus* percentages of assets and revenues is couched in "relevance"[145] and not materiality.[146] Meanwhile, the SEC (through the no-action letter process) ruled to consider substantial policy in several matters involving employment practices involving race and sex, which required issuers to include these proposals in proxy materials.[147]

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[137] *See* Caroline A. Crenshaw, *Statement on Adoption of Amendments to Proxy Rules Governing Proxy Voting Advice & Proposal of Amendments to Rule 14a-8*, U.S. SEC. & EXCH. COMM'N (July 13, 2022), https://www.sec.gov/news/statement/crenshaw-statement-proxy-voting-amendments-071322; *see also Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)*, U.S. SEC. & EXCH. COMM'N (Nov. 3, 2021), https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals?# (stating that the 1976 Release "provided an exception for certain proposals that raise significant social policy issues, and which the Commission subsequently reaffirmed in the 1998 Release.").

[138] *See id.*

[139] *See id.*

[140] *See id.*

[141] *See id.*

[142] *See id.*

[143] *See generally* 17 C.F.R. § 240.14a-8 (2013).

[144] *See, e.g., id.* at §240.10b-5 (1951) (trading on basis of material nonpublic information); Section 11 of Securities Act of 1933, 15 U.S.C. § 77k(a) (mandating plaintiff to allege a misstatement or omission of material fact). *Cf.* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (holding that materiality requires a substantial likelihood that disclosure of an omitted fact would have been viewed by a reasonable investor as having significantly altered the "total mix of information.").

[145] 17 C.F.R. § 240.14a-8 (i)(5) (2013).

[146] *Id.*

[147] Stanton, *supra* note 127, at 983-84.

B. Cracker Barrel

In 1992, the SEC issued a no-action letter to Cracker Barrel Old Country Store that addressed the company's desire to exclude a shareholder Proposal to abolish discriminatory employment practices for gay and lesbian persons.[148] The Cracker Barrel no-action letter announced a new SEC policy: proposals related to employment practices would be excluded on ordinary business grounds, even if they trigger social policy concerns.[149] In one of the first judicial challenges to the Cracker Barrel rule, the United States District Court for the Southern District of New York declined to follow the new approach.[150]

In *Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc.*,[151] a shareholder brought an injunctive action to order Wal-Mart to include a proposal to prepare and distribute reports about Wal-Mart's equal employment opportunity and affirmative action policies, together with a description of Wal-Mart's efforts to publicize these policies with suppliers and to purchase goods and services from minority-owned suppliers.[152] These would normally be excluded under Cracker Barrel as employment-related matters.[153] In addressing whether the court was bound to follow Cracker Barrel, the court held that an individual no-action letter is not an expression of agency interpretation (whether adjudication or rulemaking) to which a court must defer.[154] The *Amalgamated Clothing* court noted that a change in the SEC's position does not necessarily involve capricious action by the agency: "Changes in conditions and public perceptions justify changes in the SEC's construction of the 'ordinary business operations' exception."[155] However, in this instance, the court did not defer to Cracker Barrel because it "sharply deviates from the standard articulated in the 1976 Interpretive Release."[156] According to the court, Cracker Barrel improperly ignored the

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148 Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,418 (Oct. 13, 1992).

149 *Id.*

150 *See* Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, 821 F. Supp. 877 (S.D.N.Y. 1993).

151 *Id.*

152 *Id.* at 879.

153 *See* Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,418 (Oct. 13, 1992).

154 Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, 821 F. Supp. 877, 885 (S.D.N.Y. 1993) (citing Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 427 n.19 (D.C. Cir. 1992)).

155 *Id.* at 886.

156 *Id.* at 890.

1976 Release's requirement that there be "no substantial policy consideration."[157]

Unlike no-action letters, the court treated the 1976 Release as agency rulemaking that the SEC was bound to follow.[158] By treating the 1976 Release as a rule within the meaning of the Administrative Procedure Act, the Staff's disregard for this rule without taking rulemaking steps would not create authority a court could follow.[159] The court differentiated between agency rulemaking and the internal procedures of the agency, even though a no-action letter is not about internal procedure.[160] In any case, such rulings are scarce in comparison to the number of matters which, as we will see, are largely governed by no-action letter decisions of the Staff.[161] No-action letters can be seen to function as administrative adjudications without the safeguard of applicable administrative review standards.[162]

Cracker Barrel inspired litigation from the New York City Employees Retirement System involving Cracker Barrel's practices that sought to exclude the retirement system's proposal on the subject of employment discrimination against gay and lesbian employees.[163] Cracker Barrel requested the no-action letter based on its belief that the proposal concerned day-to-day hiring practices, fell within the scope of the ordinary business exclusion of Rule 14a-8, and could be excluded from proxy materials.[164] After the SEC issued the no-action letter to Cracker Barrel (issued by the Staff and affirmed by the Commission), the retirement system brought suit against the SEC.[165] The retirement system alleged that the SEC's departure from past practice required notice and comment rulemaking under the Administrative Procedure Act, which the SEC had not performed.[166] After the United States District Court for the Southern District of New York ruled

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157 *Id.* (citing Amendments To Rules On Shareholder Proposals, 41 Fed. Reg. 52994, 52998 (Dec. 3, 1976)).

158 *See id.*

159 *See id.* at 890 n.13 ("The court's holding today is limited solely to the proposition that a court should not defer to a position taken by the SEC in a no-action letter that is inconsistent with an SEC interpretation offered in the context of formal notice and comment rulemaking.").

160 *See* Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, 821 F. Supp. 877, 890 n.13 (S.D.N.Y. 1993).

161 *See, e.g.*, Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 925–26 (1998) ("[C]ourts frequently rely on no-action letter authority in the course of resolving legal disputes.").

162 *See* Steel, *supra* note 33, at 1554 n.52; *see also id.* at 945 ("In cases where the Commission has refused to review a no-action letter issued by the staff, direct judicial review under either the federal securities statutes' review provisions or the APA is generally foreclosed because there is no final agency action to review.").

163 *See* 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, 532–38 (1999).

164 *Id.* at 534 n.135.

165 *Id.* at 535 (citing New York City Emps.' Ret. Sys. v. SEC, 843 F. Supp. 858 (S.D.N.Y. 1994), *rev'd in part*, 45 F.3d 7 (2d Cir. 1995).

166 New York City Emps.' Ret. Sys. v. SEC, 45 F.3d 7, 9 (2d Cir. 1995).

in favor of the retirement system, the United States Court of Appeals for the Second Circuit reversed and upheld the SEC's position.[167] The Second Circuit found the SEC's action to involve an interpretive rule, not a legislative rule.[168] This confused the issue, which could have been resolved by the court refusing jurisdiction over a no-action letter that is not an agency adjudication or rulemaking.[169] The retirement system sought relief against the SEC and not Cracker Barrel, and this procedural posture of review of agency action doomed the case for the retirement system.[170] The case resulted in questionable authority that no-action letters involve interpretive rulemaking, which must still pass judicial scrutiny, albeit at a more lenient level.[171]

Cracker Barrel departed from SEC policy expressed in the 1976 Release and no-action letters forming the progeny of the 1976 Release.[172] The Cracker Barrel no-action letter stood for the proposition that matters of employment should be excluded from shareholder proposals because these matters constitute ordinary business, irrespective of substantial policy consequences.[173] Under the 1976 Release, the SEC provided scant guidance on what constitutes "substantial policy" questions.[174] In any case, in the momentous Cracker Barrel no-action letter, the SEC stated its new policy as follows:

> The fact that a shareholder proposal concerning a company's employment policies and practices for the general workforce is tied to a social issue will no longer be viewed as removing the proposal from the realm of ordinary business operations of the registrant. Rather, determinations with respect to

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167 *Id.*

168 *Id.* at 12.

169 *See id.* After all, in *Amalgamated Clothing & Textile Workers Union v. SEC*, the Second Circuit held that federal jurisdiction did not exist after ruling that staff no-action letters, which do not bind the SEC, the parties, nor the courts, are interpretive. Amalgamated Clothing & Textile Workers Union v. SEC, 15 F.3d 254, 257 (2d Cir. 1994).

170 *See* New York City Emps.' Ret. Sys., 45 F.3d at 14. Specifically, the Second Circuit explained that it "may not even entertain the claim against the agency . . . if the plaintiffs have an adequate alternative legal remedy against someone else – a remedy that offers the same relief the plaintiffs seek from the agency." *Id.* The retirement system, the Court noted, had an effective alternative to suing the SEC, which was to sue Cracker Barrel or any other offending company under Rule 14a-8. *Id.*

171 *See* Part IV.B *infra*.

172 *See* Ayotte, *supra* note 163, at 530 (explaining that the SEC retained the two-part test established in the 1976 Release until 1992, when, in the Cracker Barrel No-Action Letter, "it reversed its own interpretation of the Rule without much explanation or procedure").

173 *See* Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,418 (Oct. 13, 1992).

174 *See* Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,812, at 87,123, 87,130–31 (Nov. 22, 1976).

> any such proposals are properly governed by the employment-based nature of the proposal.[175]

Unless a proponent could surmount the formidable obstacle of ordinary business operations for an employment matter, these matters were excluded under Cracker Barrel, no matter the weighty policy issue involved.[176]

What is commonly known as the 1998 Release expressly repudiated Cracker Barrel.[177] The SEC explained this as a process of evolution:

> [I]n light of experience dealing with proposals in specific subject areas, and reflecting changing societal views, the Division adjusts its view with respect to "social policy" proposals involving ordinary business. Over the years, the Division has reversed its position on the excludability of a number of types of proposals, including plant closings, the manufacture of tobacco products, executive compensation and golden parachutes.[178]

Cracker Barrel rested on the idea that no social policy issue could vitiate a valid ordinary business exclusion in the employment context.[179] The 1998 Release restored and reaffirmed the 1976 Release's view that social policy could be considered in the employment setting depending on the facts and circumstances.[180] These decisions would be handled on a case-by-case basis.[181] As the reader will see, the Staff's case-by-case methodology to ascertain and apply social policy is problematic. The 1998 Release largely governs these issues today.[182] Also, the 1998 Release used for the first time

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175 Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,418 (Oct. 13, 1992).

176 *See id.*

177 *See* Amendments To Rules On Shareholder Proposals, Exchange Act Release No. 34-40018, 63 Fed. Reg. 29106, 29108 (May 28, 1998) (to be codified at 17 C.F.R. pt. 240).

178 *Id.*

179 *See* Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,418 (Oct. 13, 1992). While Rule 14a-8 precedent is largely set by the SEC in no-action requests, some caselaw exists. *See, e.g.*, New York City Emps.' Ret. Sys. v. SEC, 45 F.3d 7, 14 (2d Cir. 1995) (explaining the general nature of no-action letters in the context of Rule 14a-8). Such caselaw can affect whether a social policy exception might apply differently to another Rule 14a-8 exclusion unrelated to ordinary business operations. *See, e.g.*, Lovenheim v. Iroquois Brands, Ltd., 618 F. Supp. 554 (D.D.C. 1985). For example, *Lovenheim v. Iroquois Brands* established a judicially created social policy concern that prevented application of the relevance (e.g. materiality) exception. *See id.* at 560-61. The shareholder proposal concerned methods of producing pate de fois gras, a business that did not contribute to net income and comprised less than 0.05 percent of assets. *Id.* at 558-59. The court denied usage of the relevance exception on social policy grounds and required submission to shareholders of the proposal. *See id.* at 561-62.

180 *See* Amendments To Rules On Shareholder Proposals, Exchange Act Release No. 34-40018, 63 Fed. Reg. 29106, 29108 (May 28, 1998) (to be codified at 17 C.F.R. pt. 240).

181 *See id.* ("Reversal of the *Cracker Barrel* no-action position will result in a return to a case-by-case analytical approach.").

182 *See* Virginia H. Ho, *From Public Policy to Materiality: Non-Financial Reporting, Shareholder Engagement, and Rule 14a-8's Ordinary Business Exception*, 76 WASH. & LEE L. REV. 1231, 1248–

in a Rule 14a-8 Release the term "social policy."[183] The 1976 Release referred to "substantial policy."[184] The extent to which these terms differ in meaning is not fully developed.[185]

C. Current SEC Approaches and Problems

This Part discusses the current SEC approaches to the ordinary business exception, with particular emphasis on shareholder proposals related to discrimination in employment. Much of the ordinary business disagreement between issuers and proponents exists in the E&S fields of employment discrimination, global medical equity, and corporate environmental policies (among other subjects).[186] The discussion to follow will show that the SEC's view changes over time and cannot be reduced to a standard to guide issuers and proponents.

As noted, a proposal may be excluded if it "deals with a matter relating to the company's ordinary business operations."[187] In 2022, James McRitchie submitted a proposal to Tractor Supply Company for its annual meeting that year.[188] The proposal provided:

> **RESOLVED,** shareholders ask that the board commission and publish a report on (1) whether the Company participates in compensation and workforce practices that prioritize financial performance over the economic and social costs and risks created by inequality and racial and gender disparities and (2) the manner in which any such costs and risks threaten returns of diversified shareholders who rely on a stable and productive economy.[189]

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52 (2019) (explaining the 1998 Release and the challenges the SEC and the courts have faced in applying it).

[183] *See* Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, 63 Fed. Reg. 29106, 29108 (May 28, 1998) (to be codified at 17 C.F.R. pt. 240) ("Reversal of the *Cracker Barrel* no-action position will result in a return to a case-by-case analytical approach."); *cf.* Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416 (D.C. Cir. 1992) (decided on grounds of "substantial policy").

[184] *See* Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,812, at 87,123, 87,130–31 (Nov. 22, 1976).

[185] *See, e.g.*, Kevin W. Waite, *The Ordinary Business Operations Exception To The Shareholder Proposal Rule: A Return To Predictability*, 64 FORDHAM L. REV. 1253, 1256 (1995) ("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.").

[186] *See, e.g.*, Ho, *supra* note 182, at 1233 (noting how climate change risk and corporate environmental impacts are among the top subjects of shareholder proposals).

[187] 17 C.F.R. § 240.14a-8(i)(7) (2023).

[188] *See* Tractor Supply Co., 2022 WL 110300 (Mar. 9, 2022) [hereinafter Tractor Supply Co.].

[189] *Id.* at 13.

Citing generalized data about the effects of inequality on Gross Domestic Product (GDP), McRitchie's supporting statement voiced concerns that Tractor Supply permitted or even caused racial disparities in compensation.[190] This, according to McRitchie, contributed to GDP loss, harming the returns of the holders of diversified portfolios.[191] Even accepting the data as true, such an impact by one issuer on an entire economy would be trifling.[192] Besides this flaw, McRitchie contended that the drop in GDP would reduce returns on other investments entirely unrelated to Tractor Supply.[193] Such a contention, even if correct, would not seem to implicate the issuer and would have no relevance to the welfare of Tractor Supply Company shareholders. Because the proposal related to employee compensation, the ordinary business exclusion would apply absent a social policy issue.[194] Counsel for Tractor Supply did not attack the logic of the supporting statement (as the author has done) or attempt to show its fanciful nature.[195] Instead, it portrayed the references to overall portfolio returns as an attempt to concoct a social policy concern where none existed.[196] Perhaps McRitchie did this to place the request into a business context. In any case, Tractor Supply argued that mere reference to the effects of a policy (e.g., the decline in GDP that harms portfolio returns, rather than the performance of Tractor Supply) did not remove the proposal from the ordinary business

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190 *See id.* at 10–11.

191 *Id.* at 10.

192 Using a real-world example involving an activist seeking to impose climate change policies on an issuer, Professor Coffee formulates two classes of activists: those that are firm-specific and others that focus on systemic risk. John C. Coffee, *The Coming Shift in Shareholder Activism: From "Firm Specific" to "Systematic Risk" Proxy Campaigns (and How to Enable Them)*, 16 BROOK. J. CORP. FIN. & COM. L. 45, 45-48 (2021). The latter takes a portfolio approach where losses in the issuer burdened with the shareholder proposal (viz. climate change) are offset by gains in other sectors that benefit by avoidance of climate change. *Id.* at 47-48. Under Professor Coffee's rubric, McRitchie would simply be classified as a systemic risk investor; however, the author of this Article would counter by inviting McRitchie to quantify the benefit to the aggregate portfolio. Professor Coffee appears to take at face value the motives of the systemic risk investors and does not describe them as social justice activists seeking to change the world through idiosyncratic corporate action in lieu of legislation, with returns subordinated to that goal (or ignored). *See id.* at 47-52. Professor Coffee also largely illustrates the systemic risk approach in the context of climate change but does not describe how other activists' movements (e.g., diversity, forced labor, human rights, animal rights, defense, firearms, tobacco, and medical welfare in the third world) would function within the systemic risk approach. *See id.* at 49. Perhaps this means climate change may be treated as *sui generis* among activist causes.

193 Tractor Supply Co., *supra* note 188, at 10.

194 *See* 17 C.F.R. § 240.14a-8(i)(7) (2023).

195 *See* Tractor Supply Co., *supra* note 188, at 6-9.

196 *See id.* at 7 ("Assuming, *arguendo*, that racial and economic inequality and their effects on the portfolio returns of diversified shareholders is a significant social policy issue, like in *Western Union* and *Wells Fargo*, that issue is not the crux of the Proposal.").

exclusion.[197] Relying on Staff Legal Bulletin No. 14L,[198] the SEC denied Tractor Supply's no-action request, stating the proposal "raises human capital issues with a broad societal impact."[199]

New approaches by the SEC appear to have doomed Tractor Supply's no-action letter request.[200] Specifically, Staff Legal Bulletin 14L materially revised the standards for the exclusion of ordinary business matters with questions of significant social policy.[201] Formerly, a company could satisfy the exclusion if it could show that even a significant social policy generally applicable was not actually significant to the company.[202] The new standard abandoned the company-specific approach, which was in effect only from 2017-2021, making it more difficult for issuers to exclude proposals.[203]

Staff Legal Bulletin 14L also appeared to play a role in resolving a shareholder employment-related issue at the other end of the ideological spectrum.[204] In its proposal, the National Center for Public Policy Research (NCPPR) asked The Walt Disney Company's board of directors to

> commission a workplace non-discrimination audit analyzing Disney's impacts, including the impacts arising from Disney-sponsored or -promoted employee training, on civil rights and non-discrimination in the workplace, and the impacts of those issues on Disney's business. . . . [A] report on the audit, prepared at reasonable cost and omitting confidential or proprietary information, should be publicly disclosed on Disney's website.[205]

Relying on the 1998 Release, Disney argued that "at heart, the Proposal is focused on the indisputably ordinary business topic of employee training and, in particular, the Proponent's objection to the content of the Company's

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197 *Id.* at 6-7. The company also objected to the proposal on grounds of vagueness, asserting that the differing interpretations such that actions by the company might differ materially from those expected by shareholders. *Id.* at 7. The SEC rejected this position. *Id.* at 1.

198 SEC Staff Legal Bulletin No. 14L (Nov. 3, 2021).

199 Tractor Supply Co., *supra* note 188, at 1.

200 *See id.* (citing SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021)).

201 *See* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) ("[S]taff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal. In making this determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.").

202 *See* SEC Staff Legal Bulletin No. 14J (CF) (Oct. 23, 2018) ("Determinations as to whether we agree that a proposal may be excluded 'will be made on a case-by-case basis, taking into account factors such as the nature of the proposal and the circumstances of the company to which it is directed.'").

203 *See* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) ("[S]taff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal.").

204 *See* The Walt Disney Co., 2021 WL 5052838, at 38–40 (Jan. 19, 2022) [hereinafter Disney/NCPPR].

205 *Id.* at 33.

training materials."[206] NCPPR's supporting statement left little doubt that it did indeed object to the training materials, which NCPPR contended treated employees unequally and shamed white employees with "intergenerational, ineradicable guilt."[207] What remains unsettled is what social policy circumstances are weighty enough to take the matter beyond ordinary business matters.[208] Again relying on the 1998 Release, Disney portrayed the proposal as directly implicating the content of employee training manuals and, therefore, failing to reach the required social policy weight.[209] The SEC concluded that the proposal "transcends ordinary business matters and does not seek to micromanage the Company."[210]

While Disney raised the issue concerning micromanagement, it did not develop any separate argument as to why the proposal micromanaged Disney.[211] Instead, it concentrated on the ordinary business nature and failure to raise significant social policy issues.[212] The SEC rejected these arguments.[213] A proposal that raises social policy concerns that would otherwise be required to be submitted to shareholders may be excluded when it seeks to micromanage the company.[214] The SEC's test for micromanagement includes proposals that "seek intricate detail, or seek to impose timeframes or methods for implementing complex policies. . . ."[215] Importantly, "micromanagement addresses the manner in which a proposal raises an issue, and not whether a proposal's subject matter itself is proper for a shareholder proposal under Rule 14a-8."[216] Therefore, the level of detail in a proposal may determine whether it will appear.[217] In general, elaborate details and specific timelines reduce the likelihood the issuer must submit the proposal to shareholders.[218]

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206 *Id.* at 4.

207 *Id.* at 35.

208 *See* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) (asserting, without further explanation, that "[S]taff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company").

209 Disney/NCPPR, *supra* note 204, at 6.

210 *Id.* at 1.

211 *See id.* at 2-8.

212 *See id.* 6-7.

213 *Id.* at 1 ("In our view, the Proposal transcends ordinary business matters and does not seek to micromanage the Company.").

214 *Cf.* SEC Staff Legal Bulletin No. 14J (CF) (Oct. 23, 2018) ("Proposals that focus on significant executive and/or director compensation matters and do not micromanage will continue not to be excludable under Rule 14a-8(i)(7).").

215 *Id.* (superseded for unrelated reasons).

216 *Id.*

217 *See id.*

218 *See id.* ("For example, a proposal detailing the eligible expenses covered under a company's relocation expense policy such as the type and duration of temporary living assistance, as well as the scope of eligible participants and amounts covered, could well be excludable on the basis of micromanagement.").

Staff Legal Bulletin 14L played a role in denying Moderna, Inc.'s no-action letter request concerning a shareholder proposal directing Moderna to study whether it should promptly transfer (possibly on less-than-favorable terms) intellectual property and technical knowledge to facilitate the production of COVID-19 vaccines by additional qualified manufacturers in low- and middle-income countries, as defined by the World Bank.[219] Moderna argued that the proposal should be excluded as ordinary business and that the proposal would micromanage the company.[220] Moderna's request conceded that Staff Legal Bulletin 14L withdraws SEC consideration of company-specific circumstances in evaluating a social policy issue.[221] This change meant the SEC had greater latitude to focus on issues it considers to involve social policy without the complications of understanding how they fit into the context of a particular issue.[222] Moderna argued that decisions to dispose of intellectual property fall within the ordinary business operations exception because the decisions relate to the selling of products and services.[223] Moderna cited prior no-action letters in Wal-Mart (gun sales) and Wells Fargo (social impact of direct deposit accounts).[224] It also argued that company protection of intellectual property is part of ordinary business and that the proponents requested not just disclosures but transfers of intellectual property.[225] This would be a classic case of an "overly prescriptive" proposal.[226] Moderna acknowledged that "COVID-19 is an issue of global magnitude and importance."[227] Despite the importance of the issue, Moderna argued that the proposal amounted to micromanagement because "determinations about how to use and protect . . . intellectual property require a deep understanding of the Company's business, strategy, risk profile and operating environment. . . ."[228]

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219 *See* Moderna, Inc., 2021 WL 6063317, at 1–24 (Feb. 8, 2022) [hereinafter Moderna].

220 *Id.* at 3-10.

221 *Id.* at 3.

222 *See id.; see also* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) ("[S]taff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal. In making this determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.").

223 Moderna, *supra* note 219, at 4.

224 *Id.* at 5.

225 *Id.* at 7.

226 *See* VANGUARD, *supra* note 15 (reporting that the 2021 revised SEC guidance contributed to a significant increase in overly prescriptive shareholder proposals through which shareholders sought "more disclosure of board oversight practices, lobbying expenditures, and trade association memberships").

227 Moderna, *supra* note 219, at 9.

228 *Id.* at 10.

The SEC denied Moderna's request without explanation.[229] The proposal appeared in Moderna's 2022 Proxy Statement, and shareholders rejected the proposal by a margin of 76% to 24%.[230] Oxfam International, one of the proponents, publicly praised the high percentage of votes secured by this proposal in a losing cause, which it also proposed to Pfizer, another manufacturer of COVID-19 vaccines, with similar results.[231] This decision is meaningful on two levels. First, Moderna could not persuade the SEC to issue a no-action letter even when the proposal went beyond disclosure to contemplating the transfer of material intellectual property.[232] Second, the shareholder reaction sent messages the board and management could not ignore.[233] When proposals that fall short garner significant support (as here), proponents may command the attention of proxy advisors, the board, and management.[234]

The Moderna decision leaves issuers and proponents to ponder whether proposals may properly include specific steps that are highly prescriptive and ordinarily considered beyond the competence of shareholders.[235] Because Moderna involved a complex decision with material consequences, one would have placed it within the realm of ordinary business or otherwise shielded from shareholder scrutiny by the prohibition on micromanagement.[236] The SEC's unexplained rejection of Moderna's no-action letter request leads to questions of how the subject matter of an otherwise ordinary business matter colors the SEC's views.[237] One may infer the SEC is balancing the weight of the social policy against consequences for the issuer. Besides questions about the legitimacy of this methodology, the

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[229] *See id.* at 1 (stating merely that "the Proposal transcends ordinary business matters and does not seek to micromanage the Company").

[230] *Global Access to COVID-19 Vaccines*, MODERNA (Apr. 28, 2022), https://investors.modernatx.com/Statements--Perspectives/Statements--Perspectives-Details/2022/Global-Access-to-COVID-19-Vaccines/default.aspx.

[231] *See Significant number of Moderna and Pfizer shareholders support vaccine technology transfer*, OXFAM INT'L (Apr. 28, 2022), https://www.oxfam.org/en/press-releases/significant-number-moderna-and-pfizer-shareholders-support-vaccine-technology.

[232] *See* Moderna, *supra* note 219, at 15.

[233] *See Global Access to COVID-19 Vaccines*, MODERNA (Apr. 28, 2022), https://investors.modernatx.com/Statements--Perspectives/Statements--Perspectives-Details/2022/Global-Access-to-COVID-19-Vaccines/default.aspx; *see also Significant number of Moderna and Pfizer shareholders support vaccine technology transfer*, OXFAM INT'L (Apr. 28, 2022), https://www.oxfam.org/en/press-releases/significant-number-moderna-and-pfizer-shareholders-support-vaccine-technology.

[234] *See Significant number of Moderna and Pfizer shareholders support vaccine technology transfer*, OXFAM INT'L (Apr. 28, 2022), https://www.oxfam.org/en/press-releases/significant-number-moderna-and-pfizer-shareholders-support-vaccine-technology.

[235] *See* Moderna, *supra* note 219, at 1, 10.

[236] *See* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) (explaining that the ordinary business exclusion "is designed to preserve management's discretion on ordinary business matters but not prevent shareholders from providing high-level direction on large strategic corporate matters").

[237] *See* Moderna, *supra* note 219, at 1.

SEC is ill-equipped to calculate this balance and has few, if any, legal and empirical guideposts to consult. This means the SEC must necessarily step outside its traditional role as regulator of securities markets.

In public statements after the vote, Moderna and some of its large shareholders challenged whether the proposal would attain its stated goal.[238] They pointed to an ample global supply of COVID-19 vaccines and attributed any failure to reach populations to both defects in the supply chain (which Moderna does not control) and the reluctance of local populations to accept the vaccine.[239] Therefore, attaining the proponent's goal would require a properly functioning supply chain and education of the populace.[240] In short, the proponent offered no real solution, and local populations would not benefit from their proposal.[241] If the Moderna pre-proposal conversations between the proponent and Moderna had taken the typical course, Moderna would have explained its viewpoint to the proponent.[242] If so, this means the proponent disbelieved Moderna's assessment and substituted its own judgment.[243] While disbelieving is anyone's prerogative, this raises the question: Who is in the best position to evaluate and decide?

The SEC also denied no-action relief to The Walt Disney Company, which faced a proposal from Arjuna Capital concerning pay gaps across race and gender.[244] The proposal provided:

> **Resolved,** Shareholders request Disney report on both *median and adjusted* pay gaps across race and gender, including associated policy, reputational, competitive, and operational risks, and risks related to recruiting and training diverse talent. The report should be prepared at reasonable cost, omitting proprietary information, litigation strategy and legal compliance information.
>
> Racial/gender pay gaps are defined as the difference between non-minority and minority/male and female median earnings expressed as a percentage of non-minority/male earnings (Wikipedia/OECD, respectively).[245]

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238 *See Moderna investors reject proposal to transfer vaccine tech*, FIN. TIMES (Apr. 27, 2022), https://www.ft.com/content/731ae6a6-fa0d-4781-a6e3-0725e68ce060.

239 *Id.*

240 *See id.*

241 *See id.*

242 *See Global Access to COVID-19 Vaccines*, MODERNA (Apr. 28, 2022), https://investors.modernatx.com/Statements--Perspectives/Statements--Perspectives-Details/2022/Global-Access-to-COVID-19-Vaccines/default.aspx ("[W]e will continue to address issues related to vaccine access and communicate with shareholders and others on this topic.").

243 *See, e.g.*, Moderna, *supra* note 219, at 10. ("Proposal seeks to substitute the Proponents' assessment of the most effective way to address a complicated issue for that of the Company's board and management, who have been laser-focused on combating the pandemic for nearly two years.").

244 *See* The Walt Disney Co., 2021 WL 5052834, at 1 (Jan. 19, 2022).

245 *Id.* at 14 (emphasis in original).

Disney objected to the proposal and, in its request for a no-action letter, argued that this proposal should be excluded on the grounds that it related to ordinary business operations.[246] At the core of Disney's objection was its contention that the proposal would compromise the company's position in pending employment lawsuits.[247] Disney took this position notwithstanding the express litigation carve-out contained in the proposal, with Disney contending that the litigation includes the "same subject matter as the Proposal."[248] The SEC disagreed and was not persuaded that the proposal would compromise Disney's litigation strategy.[249]

The specific category of social policy issue is relevant to the SEC's no-action process, but the SEC does not explain its methodology.[250] In a no-action decision that precedes Disney and Tractor Supply by two years, the SEC issued a no-action letter to Alphabet Inc. concerning a shareholder proposal related to viewpoint-based employment discrimination.[251] In the Alphabet no-action matter, the NCPPR proposal cloned and slightly modified a shareholder proposal made to CorVel Corporation that read as follows:

> RESOLVED, Shareholders request that CorVel Corporation ("CorVel") issue a public report detailing the potential risks associated with omitting "sexual orientation" and "gender identity" from its written equal employment opportunity (EEO) policy. The report should be available within a reasonable timeframe, prepared at a reasonable expense and omitting proprietary information.[252]

NCPPR's proposal was identical to the one submitted in CorVel, except the proposal replaced references to "sexual orientation" and "gender identity" with references to "viewpoint" and "ideology."[253] The SEC denied a no-action letter to CorVel, so NCPPR took the position it should deny one to Alphabet Inc., given the apparent identity of the proposals.[254]

On April 9, 2020, the SEC issued, without reasoning or explanation, the no-action letter requested by Alphabet.[255] NCPPR submitted a request for

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246 *Id.* at 6.

247 *Id.* at 5-6.

248 *Id.* at 3.

249 *See id.* at 1 ("In our view, the Proposal does not deal with the Company's litigation strategy or the conduct of litigation to which the Company is a party.").

250 *See* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021). Instead, the SEC seems to only indicate that it would "consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company." *Id.*

251 *See* Alphabet Inc., 2020 WL 605360, at 1 (Apr. 9, 2020).

252 *Id.* (quoting CorVel Corp. 2019 WL 1640021, at 3 (June 5, 2019)).

253 *Id.* at 4.

254 *Id.*

255 *Id.* at 1.

reconsideration to the SEC.[256] In it, NCPPR argued that viewpoint discrimination was very much like sexual orientation discrimination in that both receive varying degrees of protection under state law.[257] This would reach the significant social policy threshold that would transcend the ordinary business exception.[258] The NCPPR pointed out that neither Alphabet Inc. nor the SEC had even discussed CorVel in their submissions, which, in NCPPR's view, was highly persuasive or even controlling.[259] The NCPPR then attacked the SEC's reliance on two pre-CorVel Staff Legal Bulletins.[260] These furnished the authority for the proposition that a proposal excludable for one issuer may not be excludable for another.[261]

This raises the question: What are the discernable characteristics of an issuer that would trigger a different outcome in similar circumstances? Given Staff Legal Bulletin 14L's mandate to disregard issuer differences, the decision rested upon the difference between sexual orientation and viewpoint discrimination.[262] The NCPPR attributed this to the SEC's then-recognized approach as using Rule 14a-8 "under the guise of determining the substantiality of the issue raised by the proposal—as a multi-factor test that allows the Staff to aggregate grounds, none of which themselves justify exclusion, into a 'lump-sum' exclusion decision."[263] The NCPPR's contention that the SEC had migrated to a multi-factor test largely derived from now-superseded 2017 and 2018 Staff Legal Bulletins with a particular focus on how they invite boards of directors to involve themselves in determining social policy concerns that take a matter beyond ordinary business.[264] Under the now-superseded Staff Legal Bulletin 14J, the SEC furnished guidance to boards of directors to address this question in multi-part factors that focused on the importance of the matter from the perspective of the issuer and its board, including materiality, whether actions had already been taken in relation to the subject matter and shareholder engagement.[265]

Recently, the SEC has either eliminated or deemphasized particular corporate circumstances as a factor, shifting its approach to favor uniformity

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256 *Id.*
257 Alphabet, Inc., 2020 WL 2466907, at 1 (Apr. 15, 2020).
258 *See* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021).
259 Alphabet, Inc., 2020 WL 2466907, at 2 (Apr. 15, 2020).
260 *Id.* at 4-5, 30 (citing SEC Staff Legal Bulletin No. 14I (CF) (Nov. 1, 2017) & SEC Staff Legal Bulletin No. 14J (CF) (Oct. 23, 2018)).
261 *Id.* at 5.
262 *See id.* at 1-2 (explaining that it is impossible to eliminate the supposition that the SEC based their decision on distinguishing between similarly situated proposals, where the only difference was that the proposal in this case, unlike the proposal in *CorVel* that dealt with sexual orientation discrimination, involved viewpoint discrimination).
263 *Id.* at 2.
264 *Id.* at 4-5.
265 SEC Staff Legal Bulletin No. 14J (CF) (Oct. 23, 2018).

without regard to issuer circumstances.[266] If the NCPPR correctly stated the SEC's position and methodology that existed at the time, then proponents would benefit from an explanation from the SEC of how the SEC applied the multi-factor test.[267] What were the factors, and how did each weigh in the ultimate decision? But the SEC has furnished no guidance.[268] With no reasons or explanations, neither issuers nor proponents could understand with any confidence what was required.[269] In the NCPPR's view, this would further lead not just to the appearance of bias, but would also open the door to political bias by the Staff.[270] This fosters bad public policy, and the SEC acted "in contravention of its own published guidance."[271] This problem was not lost on the Staff.[272] As noted, Staff legal bulletins now make increasingly difficult differences in issuer circumstances as a factor in whether a proposal must appear.[273] But this just means the social policy issue takes center stage when no one knows its contours.[274] This issue has insurmountable problems of understanding and interpretation.[275] Now, an outcome would be governed solely by the social policy matter in the proposal and not the identity or

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266 *See* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) ("[S]taff will no longer focus on determining the nexus between a policy issue and the company.").

267 *See* Alphabet, Inc., 2020 WL 2466907, at 2 (Apr. 15, 2020) ("Multi-factor tests are often used in the law, but where they are used, they are carefully explained. These explanations allow parties to understand how the various factors have been weighed, and what contrary considerations have been taken into account and why they have been found wanting, so that parties know how to fashion their behavior in the future.").

268 *Id.* ("But this change in the treatment of Rule 14a-8(i)(7) has come exactly as the Staff has shifted to providing no explanation of any kind for many of its decisions. It provided no explanation in this proceeding.").

269 *Id.* at 6 ("When such very case-specific decisions are made, but no explanations are provided, parties are left with no idea at all what factors were decisive and which were less or not relevant, and how all of the various factors fit together. This leaves parties with no information about how to proceed in future cases.").

270 *Id.* at 8 ("[F]acts that on their own would be insufficient to trigger any other ground to permit exclusion can be amalgamated together to somehow result in exclusion under the ordinary-business exception – and the staff will, at its sole determination, refuse to explain just how that alchemy occurred. This will leave room for the inference that the staff is merely excluding proposals with which it disagrees on the basis of substantive policy, even though such subject-matter considerations are, by regulation, supposed to play no part in its analysis.").

271 *Id.* at 9.

272 *See* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021).

273 *See id.* ("Under this realigned approach, proposals that the staff previously viewed as excludable because they did not appear to raise a policy issue of significance for the company may no longer be viewed as excludable under Rule 14a-8(i)(7).").

274 *See id.* ("[S]taff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal.").

275 *See id.* After all, the SEC did not provide much guidance for determining when a proposal raises issues with broad societal impact to where "they transcend the ordinary business of the company." *Id.*

circumstances of the issuer.[276] What policies attain favor is not communicated by the SEC.[277]

Examining Staff refusals to issue no-action letters furnishes a useful, albeit somewhat limited, basis for analysis. It is also useful to examine proposals submitted to shareholders, and this analysis chooses one where social policy and critical business interests align.[278] Despite alignment in principle, there remained debate over proper measures to address the problem of child sexual exploitation affecting Meta Platforms Inc., which operates (among other things) Facebook, Instagram, and WhatsApp.[279] In 2022, a collection of shareholders introduced the following resolution, which was submitted to a shareholder vote:

> RESOLVED: Shareholders request that the Board of Directors issue a report by February 2023 assessing the risk of increased sexual exploitation of children as the Company develops and offers additional privacy tools such as end-to-end encryption. The report should address potential adverse impacts to children (18 years and younger) and to the company's reputation or social license, assess the impact of limits to detection technologies and strategies, and be prepared at reasonable expense and excluding proprietary/confidential information.[280]

The crux of the proponents' demand was to end Meta's proposed implementation of end-to-end encryption of all its messaging platforms.[281]

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[276] *See id.* ("[S]taff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal.").

[277] *See* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021).

[278] *See* Adrien K. Anderson, *The Policy of Determining Significant Policy Under Rule 14a-8(i)(7)*, 93 DENV. L. REV. ONLINE 183, 196 (2016) (explaining that shareholder proposals implicating "ordinary business" should be weighed against social policy implications because shareholders submitting proposals regarding a company's business typically select topics that raise some public concern).

[279] *See, e.g.*, Antigone Davis, *Preventing Child Exploitation on Our Apps*, META NEWS (Feb. 23, 2021), https://about.fb.com/news/2021/02/preventing-child-exploitation-on-our-apps/ (explaining Meta's targeted solutions for combating child exploitation).

[280] *Meta, Proposal #11—Child Sexual Exploitation Online*, PROXY IMPACT (May 25, 2022), https://www.sec.gov/Archives/edgar/data/1326801/000121465922006855/j513224px14a6g.htm; *see also* META, 2022 NOTICE OF ANNUAL MEETING & PROXY STATEMENT 81 (2022), https://materials.proxyvote.com/Approved/30303M/20220401/NPS_504647/?page=81. The Child Sexual Exploitation Online shareholder resolution was filed by Proxy Impact (on behalf of Lisette Cooper), Adrian Dominican Sisters, CommonSpirit Health, Congregation of St. Joseph, Dana Investment Advisors, Maryknoll Sisters, Providence St. Joseph Health, Sisters of the Presentation of the Blessed Virgin Mary, and Ms. Linda Wisnewski. *Meta, Proposal #11—Child Sexual Exploitation Online*, PROXY IMPACT (May 25, 2022), https://www.sec.gov/Archives/edgar/data/1326801/000121465922006855/j513224px14a6g.htm.

[281] *See Meta, Proposal #11—Child Sexual Exploitation Online*, PROXY IMPACT (May 25, 2022), https://www.sec.gov/Archives/edgar/data/1326801/000121465922006855/j513224px14a6g.htm ("Shareholders are not opposed to encryption, but we believe that Meta should apply new privacy

According to the proponents, this form of encryption would "cloak the actions of child predators, make children more vulnerable," and cause incidents of sexual abuse to go ignored.[282] The proponents were sophisticated enough to know the proposal would need to take on the form of a demand for a report and not an overly prescriptive set of demands.[283]

In contrast to Moderna, the Meta proposal illustrates how social policy and business interests might align.[284] Meta's mere compliance with the law would not suffice on an issue of family personal safety.[285] The questions remained whether the proponents' charges were valid and whether Meta's management was doing all it could to address a problem.[286] Here, awareness in the shareholder community might exert a largely constructive influence on Meta's board and management.[287] However, the question remains: What is the proper solution? Assuredly, all this entails ordinary business operations, but shareholder involvement, whether in the form of pressure or mere awareness, might, in averting a disaster, be healthy for Meta's long-term business prospects.[288]

The Meta proposal may appear to illustrate how well-meaning shareholder proposals affect responsibilities ordinarily reserved for the board.[289] Boards have affirmative fiduciary duties of care and loyalty to

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technologies in a way that will not pose additional threats to children, like sexual grooming (i.e., the luring or enticement of children for sexual purposes) or exploitation itself. Enhanced internet privacy is important, but it should not come at the expense of unleashing a torrent of virtually undetectable child sexual abuse materials on Meta.").

[282] *Id.*

[283] *See id.*

[284] *See id.*; *see also* Moderna, *supra* note 219, at 15.

[285] *See Meta, Proposal #11—Child Sexual Exploitation Online*, PROXY IMPACT (May 25, 2022), https://www.sec.gov/Archives/edgar/data/1326801/000121465922006855/j513224px14a6g.htm ("Despite its new policies, the number of CSAM reports from Meta to NCMEC has escalated dramatically year over year.").

[286] *See id.* ("Meta has little to say about its failed age enforcement verification policies that are likely a major contributor to sexual grooming, sextortion and sex trafficking.").

[287] *But see id.* ("Meta's lack of response to shareholders should also be noted . . . . Meta has only offered one call with shareholders in response to our repeated requests beginning 30 months ago. By comparison, shareholders have had productive dialogues and withdrawn resolutions, or not filed resolutions, at Apple, Alphabet, ATT and Verizon and others, as those companies have engaged shareholders on this issue.").

[288] *See* Amendments To Rules On Shareholders Proposals, 41 Fed. Reg. 52994, 52998 (Dec. 3, 1976) (to be codified at 17 C.F.R. pt. 240) (describing ordinary business exclusions to apply to proposals "involving business matters that are mundane in nature and . . . do not involve any substantial policy or other considerations"). Meta would not be an example of management of systemic risk posited by Professor Coffee. *See* Coffee, *supra* note 192, at 47-52. The concern is issuer-specific (not systemic) and focuses on Meta's bottom line, not an unidentified array of other industry actors. *See Meta, Proposal #11—Child Sexual Exploitation Online*, PROXY IMPACT (May 25, 2022), https://www.sec.gov/Archives/edgar/data/1326801/000121465922006855/j513224px14a6g.htm.

[289] *See Meta, Proposal #11—Child Sexual Exploitation Online*, PROXY IMPACT (May 25, 2022), https://www.sec.gov/Archives/edgar/data/1326801/000121465922006855/j513224px14a6g.htm.

monitor and address compliance matters.[290] No matter whether encryption is required by law, the board has a duty to determine if encryption creates a danger to a large and vulnerable segment of Meta's customer base.[291] Having a legal duty to do this presents a plausible case for circumstances like Meta to be reserved for the board. Setting aside the very real questions of whether shareholders know the facts and have the competency to address the question, to fulfill its duties, the board must inquire and obtain answers to whether a specific method of encryption presents a credible threat and, if so, how to address it. Meta now has a history of legal violations related to customer data, including class action settlements for violating state biometric data laws[292] and for improper sharing of customer data with third parties.[293] While these may signal failings by the board, the question remains whether these problems are for the board or shareholders to solve.

D. Caselaw Does Not Address SEC Problems

In the leading case deciding a social policy issue, *Trinity Wall Street v. Wal-Mart Stores, Inc.*,[294] a shareholder submitted a proposal asking Wal-Mart's board of directors to consider whether to continue selling high-capacity firearms in light of dangers to the public and reputational risk.[295] The United States Court of Appeals for the Third Circuit was tasked with reviewing a district court ruling that held Wal-Mart could not exclude the proposal.[296] The district court ruled that the proposal did not involve ordinary business because it concerned the board of directors, not management.[297] The Third Circuit reversed the district court and rejected strict limitation to board

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290 In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996) (approving settlement: "It is important that the board exercise a good faith judgment that the corporation's information and reporting system is in concept and design adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations, so that it may satisfy its responsibility."); *see also* Paramount Commc'ns, Inc. v. QVC Network Inc., 637 A.2d 34, 43–44 (Del. 1993) (quoting Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1280 (Del. 1989)); Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).

291 *See* META, 2022 NOTICE OF ANNUAL MEETING & PROXY STATEMENT 82 (2022), available at https://materials.proxyvote.com/Approved/30303M/20220401/NPS_504647/?page=1 ("Our goal is to provide the highest levels of private, secure communication while keeping people safe on our platforms.").

292 *See* Parris v. Meta Platforms, Inc. No. 20023 LA 000672 Ill. Cir. Ct. Nov. 21, 2023, INSTAGRAM PRIV. SETTLEMENT, https://instagrambipasettlement.com (last visited Jan. 30, 2024).

293 *See In re: Facebook, Inc. Consumer Privacy User Profile Litigation, No. 3:18-md-02843-VC N.D. Cal. Sept. 7, 2023*, FACEBOOK CONSUMER PRIV. USER PROFILE LITIG., https://www.facebookuserprivacysettlement.com/#submit-claim (last visited Jan. 30, 2023).

294 Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323 (3d Cir. 2015), *cert. dismissed*, 577 U.S. 982 (2015).

295 *Id.* at 327.

296 *See id.* at 327-38.

297 *Id.*

involvement as a standard for the ordinary business exclusion.[298] Instead, the court concluded the subject of the proposal is its ultimate consequence (whether a matter for the board or management), in this case, a potential change in the way Wal-Mart decides what products to sell.[299] The court viewed the proposal, ultimately, as directed toward the products Wal-Mart would or would not sell.[300] Understood in that manner, the proposal fell within the ordinary business exclusion.[301] However, the purpose of the social policy provision was to put ordinary business matters that are transcended by social policy considerations to a shareholder vote.[302] This the court did not do.[303] To illustrate this, the court contrasted a proposal to consider banning the sale of sugary drinks against matters of employment discrimination.[304] The first, like the case at hand, involves ordinary business, while the latter can be found to trigger social policy issues that transcend ordinary business.[305] This view would vary the social policy exception based on the type of conduct involved rather than the generalized impact on society with a special (and perhaps unjustified) carve out for business line decisions.[306] The sale of guns and drinks constitutes ordinary business, yet for some, they raise social policy concerns.[307]

Trinity Wall Street declined to recognize social policy when the matter involves the decision to be in a particular business line.[308] The case ignored social policy in matters involving business line proposals, which otherwise is intended to permit the proposal even when involving ordinary business, so long as it does not micromanage the business.[309] Both the social policy and micromanagement tests that appear in SEC releases have been subjected to notice and comment rulemaking.[310] To handle this, the court resorted to its own judicially created exception to an exception contained within an

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298 *Id.* at 342.

299 *Id.* at 342.

300 Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 342 (3d Cir. 2015), *cert. dismissed*, 577 U.S. 982 (2015).

301 *See id.* at 351(“[W]e hold here that Trinity’s proposal is excludable from Wal-Mart’s proxy materials under Rule 14a-8(i)(7).”).

302 *Id.* at 346-47.

303 *See id.* at 347.

304 *Id.*

305 *Id.* (establishing a test that involved inquiring whether the challenged activity was “disengaged from the essence of a . . . business.”).

306 *See* Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 347 (3d Cir. 2015), *cert. dismissed*, 577 U.S. 982 (2015).

307 *See, e.g.*, *id.* at 348 (explaining Trinity’s view that Walmart’s merchandising decisions regarding dangerous products directly raise social policy concerns).

308 *See id.* at 351 (“For a policy issue here to transcend Wal-Mart’s business operations, it must target something more than the choosing of one among tens of thousands of products it sells.”).

309 *See id.* at 349-50.

310 *See, e.g.*, SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) (providing tests for determining when a shareholder proposal triggers the significant social policy exception and when it micromanages a company).

exclusion.[311] *Trinity Wall Street* establishes no broad proposition upon which analysis can be built but (in the author's view) was correct to classify business line decisions as ordinary business.

More than two decades before *Trinity Wall Street,* the United States Court of Appeals for the District of Columbia ruled that the ordinary business exclusion permits an issuer to resist a shareholder proposal requesting the board of directors of a chemical company expedite plans to phase out production of chlorofluorocarbons and halon.[312] In *Roosevelt v. E. I. Du Pont de Nemours & Co.,*[313] the issuer sought and obtained a no-action letter approving exclusion on the grounds of ordinary business operations.[314] When the proponent challenged the issuer's denial, the court had to decide two issues: (1) whether the proponent enjoyed a private right of action to challenge the decision in court and (2) whether the ordinary business exclusion applied.[315]

In an opinion by then-judge Ruth Bader Ginsburg, the court ruled a private right of action exists but that the proposal was properly excluded as ordinary business operations.[316] Because *Roosevelt* did not involve employment matters, Cracker Barrel was not in play.[317] Instead, the outcome turned on the lack of disagreement between the issuer and proponent about the need to phase out the products in question.[318] The proponent merely sought to expedite the timeline,[319] resulting in a potential difference of one year in the timing of the implementation—a relatively short time span.[320] While the court did not use the term "micromanagement," the narrowness and specificity of the disagreement would support classification as micromanagement.[321] *Roosevelt* furnishes support for the requirement that proposals of social policy weight must avoid micromanagement.[322] However, the court did not articulate its ruling in these terms.[323]

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311 *See Trinity*, 792 F.3d at 347 (establishing a test that involved inquiring whether the challenged activity was "disengaged from the essence of a . . . business.").

312 *See* Roosevelt v. E. I. Du Pont de Nemours & Co., 958 F.2d 416, 417 (D.C. Cir. 1992).

313 *Id.*

314 *Id.* at 418.

315 *See id.*

316 *Id.* at 429.

317 *See id.* at 417-18; *see also* Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,418 (Oct. 13, 1992).

318 *See* Roosevelt v. E. I. Du Pont de Nemours & Co., 958 F.2d 416, 425 (D.C. Cir. 1992) ("[W]e emphasize that Roosevelt's disagreement with Du Pont's current policy is not about whether to eliminate CFC production or even whether to do so at once.").

319 *Id.* at 427.

320 *See id.* at 428 ("The gap between [Roosevelt's] proposal and the company's schedule is now one year, not five.").

321 *See id.* at 427-28; *see also* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) (explaining when a proposal micromanages a company).

322 *See id.*

323 *See id.* at 428.

Importantly, the court did not accord dispositive weight to "the President's headline-attracting decision to accelerate the [phase-out] schedule initially set by Congress."[324] This momentous event did not create any substantial policy question, which the court instead required to be encapsulated in the content of the proposal (and which it found to be lacking).[325] One might view this decision as one of deference to the issuer's scientific and operational experts.[326] Another way to view it is there was nothing of importance for the shareholders.[327] The proponent got its way, cutting the interval down to one year.[328]

A United States District Court ruling followed *Trinity Wall Street* to exclude a shareholder proposal to phase out a public utility's fossil fuel plant and replace it with renewable energy within an identified time period.[329] In *Tosdal v. NorthWestern Corporation*,[330] the court (like the *Trinity Wall Street* court) examined whether the proposal was "too entwined with the fundamentals of the daily activities of a public utility running its business."[331] The court concluded the proposal was too entwined for submission to a shareholder vote because it proposed a myriad of scientific and operational considerations inappropriate for involvement at the shareholder level.[332] This allowed the court to reject Tosdal's argument that the proposal was no different than the nuclear power plant example, deemed fair game for a proposal in the 1976 Release.[333] Like *Roosevelt, Tosdal* was about micromanagement.[334] While the opinion cited *Trinity Wall Street, Tosdal* reached its results differently.[335] Examining whether the activity goes to questions of product mix would not reach the *Tosdal* result.[336] In *Tosdal,* the

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[324] Roosevelt v. E. I. Du Pont de Nemours & Co., 958 F.2d 416, 428 (D.C. Cir. 1992).

[325] *See id.* ("Rule 14a-8I(7) requires us to home in on Roosevelt's proposal, to determine whether her request dominantly implicates ordinary business matters."). Unresolved is whether "significant policy" means the same as "social policy," the term now used. *See id.*

[326] *See id.* (affirming the district court's finding that the steps for accomplishing the phase out are complex to where day-to-day business and technical skills are necessary).

[327] *See id.* (affirming the district court's finding that the steps for accomplishing the phase-out are complex enough to where they are not meant for shareholder participation and debate).

[328] *See id.* ("Du Pont has undertaken to eliminate the products in question by year-end 1995, and has pledged to do so sooner if 'possible.'").

[329] *See* Tosdal v. NorthWestern Corp., 440 F. Supp. 3d 1186, 1188–89 (D. Mont. 2020).

[330] *Id.*; *cf.* New York City Emps.' Ret. Sys. v. Dole Food Co., 795 F. Supp. 95, 100-01 (S.D.N.Y. 1992), *appeal dismissed,* 969 F.2d 1430 (2d Cir. 1992) (rejecting issuer's request to exclude shareholder proposal related to employee healthcare program because the proposal "primarily relates to Dole's policy making on an issue of social significance. . . .").

[331] Tosdal v. NorthWestern Corp., 440 F. Supp. 3d 1186, 1198 (D. Mont. 2020).

[332] *See id.* at 1199-1200 (finding that Tosdal "is not well-positioned to opine on the basic planning choices made by NorthWestern's management").

[333] *Id.*

[334] *See id.; see also* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) (explaining when a proposal micromanages a company).

[335] *See Tosdal*, 440 F. Supp. 3d at 1198–1200.

[336] *See id.*

core business was the sale of energy, and the proposal, while impactful on the business, said nothing about the sale of the product.[337] While *Tosdal* did not use the term "micromanagement," the court saw the proposal (which was not grounded in technical proficiency with nuclear energy) as presenting potential interference with day-to-day business management, which is the prerogative of management and the board.[338]

IV. EXPLAINING THE INCONSISTENCIES AND DEFICIENCIES IN GUIDANCE

This Part attempts to explain the inconsistencies in SEC approaches by pinpointing some of their origins and explains how deficiencies in guidance result in uncertainty for proponents and issuers alike, especially when social policy issues exist.

A. Commission and Staff

The SEC's occasionally inconsistent handling of no-action requests creates a blind alley for proponents and issuers alike.[339] Part IV. A. attempts to analyze the SEC's methodologies in the issuance of no-action letters related to shareholder proposals involving the ordinary business operations exclusion. To start, one must understand the difference between the "Commission" and the SEC Staff (the "Staff"). In furtherance of its mission "to maintain fair, orderly and efficient markets and facilitate capital formation,"[340] the Commission "promulgates rules and regulations, which generally have the force and effect of law, and enforces compliance with its rules and regulations."[341] In contrast, the Staff makes its views known about SEC rules and regulations and may issue guidance to parties about how they apply.[342] No-action letters are included in this guidance and issued by the Staff.[343] Importantly, the "Commission's longstanding position is that all Staff statements are nonbinding and create no enforceable legal rights or obligations of the Commission or other parties."[344] When evaluating

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337 *See id.*

338 *See id.*

339 *See, e.g.*, Anderson, *supra* note 278, at 183 (noting that the SEC's Staff has applied the public policy exception "in the absence of meaningful and objective standards, resulting in ambiguous and inconsistent interpretations").

340 Jay Clayton, Chairman, Statement Regarding SEC Staff Views, U.S. SEC. & EXCH. COMM'N (Sept. 13, 2018), https://www.sec.gov/news/public-statement/statement-clayton-091318#_ftnref1.

341 *Id.*

342 *Id.*

343 *Id.* ("Staff of the SEC frequently make their views known through a variety of communications, including written statements, compliance guides, letters, speeches, responses to frequently asked questions and responses to specific requests for assistance.").

344 *Id.*

prospects for judicial review, one must understand if the Commission or the Staff has taken SEC action.[345] Because Staff-prepared no-action letters predominate decision making related to shareholder proposals, Staff responses have come to be viewed as de facto, legally-consequential adjudications, despite the Staff's insistence that there are no legal consequences to the issuance of no-action letters.[346]

Because no-action letters comprise mere Staff guidance, courts have no jurisdiction to review no-action letters or compel their issuance.[347] In *Amalgamated Clothing and Textile Workers Union v. SEC*,[348] a pension fund brought a shareholder-proposal-related challenge against the SEC under Section 25(a)(1) of the Securities Exchange Act of 1934.[349] The pension fund sought judicial review of the SEC's no-action decision pertaining to the fund's proposal that would require the issuer to evaluate then-current healthcare reform proposals.[350] The United States Court of Appeals for the Second Circuit ruled that because the no-action letter binds no one, the court lacked jurisdiction to hear the case.[351] Under this ruling, a shareholder may only judicially challenge pronouncements of the Commission that have the force of law.[352]

Likewise, courts are not bound to observe Staff Legal Bulletins, although, like a no-action letter, they may find them persuasive or helpful in understanding an issue.[353] Staff Legal Bulletins, which may have immense substantive impact on registrants and proponents alike, are not part of the SEC's rulemaking function and are not legally binding.[354] For example, this Article has discussed how Staff Legal Bulletins have differed over time on the question of whether to recognize differences in issuer circumstances.[355]

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345 *See id.* ("Statements issued by SEC staff frequently include a disclaimer underscoring the important distinction between the Commission's rules and regulations, on the one hand, and staff views on the other.").

346 Steel, *supra* note 33, at 1554 n.52.

347 *See, e.g.*, Amalgamated Clothing & Textile Workers Union v. SEC, 15 F.3d 254, 257–58 (2d Cir. 1994).

348 *Id.*

349 *Id.* at 255.

350 *Id.*

351 *See id.* at 257 ("Administrative orders, such as those issued by the SEC, are not reviewable 'unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.'").

352 *See id.*

353 *See, e.g.*, Argentinian Recovery Co. v. Bd. of Dirs. of Multicanal S.A., 331 B.R. 537, 550 (S.D.N.Y. 2005) (explaining that a staff bulletin may provide "guidance based on expertise, which should be considered.").

354 *Staff Legal Bulletins*, SEC, https://www.sec.gov/regulation/staff-interpretations/legal-bulletins#:~:text=Staff%20Legal%20Bulletins%20summarize%20the,Management%20on%20any%20given%20matter (last visited Jan. 30, 2024).

355 *See, e.g.*, Laura Carrier, *Raising the Floor from the Back Door: Shareholder Proposals as a Mechanism for Raising Minimum Wage*, 80 WASH. & LEE L. REV. 1239, 1255–56 (2023)

All were accomplished without public comment, administrative procedure, or judicial review.[356] These safeguards do not apply because these matters are considered internal to the agency, even though they have immense public impact.[357]

On the other hand, final agency action under SEC rulemaking, such as in releases under the various federal securities laws, will be available for judicial scrutiny, albeit entitled to certain quantities of judicial deference to the agency.[358] In *Natural Resources Defense Council, Inc. v. SEC*,[359] an environmental activist group challenged the SEC's failure to require issuer reporting of data arising under the National Environmental Protection Act (NEPA) and reporting of employment-related information relevant under Title VII of the Civil Rights Act of 1964.[360] The case was about what disclosures the SEC should require of issuers, and the shareholder activists sought more rigorous disclosures.[361] The United States District Court for the District of Columbia held that the SEC Release under review arose pursuant to rulemaking under the Administrative Procedure Act (APA)[362] and constituted judicially reviewable final agency action.[363] The court then concluded that a reasonable investor would want the information sought by the activists, and therefore, "the SEC has not entered into an informed and reasoned consideration of the changes which it should effect in its disclosure rules and regulations as a result of NEPA's passage."[364] The court made it clear that it had both a duty and a prerogative to determine whether the action of the Commission adhered to the statute: "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."[365] Interestingly, the court ruled in

(explaining that SEC Staff Legal Bulletin 14L, issued in November 2021, rejected the approach of accounting for a particular company's circumstance to determine a policy issue's significance).

356 *See Staff Legal Bulletins*, SEC, https://www.sec.gov/regulation/staff-interpretations/legal-bulletins#:~:text=Staff%20Legal%20Bulletins%20summarize%20the,Management%20on%20any%20given%20matter (last visited Jan. 30, 2024).

357 *See id.*; *see also* Christina M. Thomas et al., *Responding to Rule Changes When the Rule Has Not Actually Changed: How Companies Should Approach Shareholder Proposals This Proxy Season*, KIRKLAND & ELLIS (Nov. 17, 2022), https://www.kirkland.com/publications/kirkland-alert/2022/11/shareholder-proposals-this-proxy-season (explaining that under SEC Staff Legal Bulletin No. 14L, "years of staff guidance and no-action precedent could no longer be relied upon, which resulted in increased costs for companies to evaluate and prepare no-action requests, only to have them denied.").

358 *See* 5 U.S.C. § 704 (2023) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

359 Nat. Res. Def. Council, Inc. v. SEC, 389 F. Supp. 689 (D. D.C. 1974).

360 *Id.* at 692.

361 *Id.* at 692, 694.

362 5 U.S.C. §§ 551–559 (2023).

363 *Nat. Res. Def. Council, Inc.,* 389 F. Supp. at 696.

364 *Id.* at 699.

365 *Id.* (quoting NLRB v. Brown, 380 U.S. 278, 291–92 (1965)).

this manner without citation to the actual statutory text that made the exclusion of the contested issues so troubling and merited overriding the agency's will.[366]

A decade after *Natural Resources Defense Council,* the United States Supreme Court issued its transformational ruling in *Chevron v. NRDC*.[367] *Chevron* clarified standards for judicial deference to agency rulemaking.[368] Under *Chevron,* a court should defer to an agency's interpretation of an ambiguous term in a statute.[369] More precisely, "[l]egislative regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute."[370] This contrasts with the less deferential *Natural Resources Defense Council* standard, where the reviewing court is free to adopt its own interpretation of the ambiguous statute without required deference to the agency.[371] Through their breadth and ambiguity, securities laws—which delegate to the SEC authority "to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in [securities] transactions"[372]—afford latitude to the SEC under *Chevron.*[373] Today, one would be hard-pressed to find a case where a court substituted its judgment for the SEC on core disclosure issues of the type reviewed in *Natural Resources Defense Council.*[374]

Whether *Natural Resources Defense Council* retains its vitality in light of *Chevron,* the case furnishes an opportunity to explain when judicial review might be available to affected parties. This depends in large measure on whether and how the APA applies.[375] Under the APA, the court may review "agency action," which "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[376] Relevant to our purpose would be the agency action that comprises a rule. A rule is:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe

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366 *See id.*
367 Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).
368 *See id.* at 864–65.
369 *Id.*
370 Gryl ex. rel. Shire Pharms. Grp. PLC v. Shire Pharms. Grp. PLC, 298 F.3d 136, 145 n.8 (2d Cir. 2002), *cert. denied,* 537 U.S. 1191 (2003) (citing Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844 (1984)).
371 Nat. Res. Def. Council, Inc. v. SEC, 389 F. Supp. 689, 698-99 (D. D.C.1974).
372 15 U.S.C. § 78b (2018).
373 *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844 (1984).
374 See *id.*; *Nat. Res. Def. Defense Council, Inc.*, 389 F. Supp. at 689.
375 Administrative Procedure Act, 5 U.S.C. §§ 551-559.
376 *Id.* at § 551(13).

> law or policy or describing the organization, procedure or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.[377]

Inter alia, a reviewing court shall hold unlawful and set aside agency action (which includes the making of a rule) that is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[378] An agency's interpretative rules, general statements of policy, rules of agency organization, procedure, or practice (such as the activities of the Staff) are not part of rulemaking[379] and, therefore, not subject to judicial review applicable to an agency rule.[380] No-action letters fall within this category of unreviewable agency procedure or practice even though, in practice, they express rules and have great influence not just on whether a proposal appears but on investor and issuer behavior generally.[381]

B. Interpretive Rule Versus Legislative Rule

The conventional view is Staff Legal Bulletins, which are informal opinions of the Staff are (like no-action letters) not judicially reviewable.[382] On the other hand, Exchange Act Releases are subject to judicial review, and the outcome may depend on whether they comprise legislative or mere interpretive rules.[383] A legislative rule is subject to judicial review under an arbitrary and capricious/abuse of discretion standard.[384] An interpretive rule is subject to judicial review under a more relaxed standard.[385] An interpretive rule will be upheld unless "'plainly erroneous or inconsistent with the regulation.'"[386] The distinction applies no matter how significant the outcome

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377 *Id.* at § 551(4).
378 *Id.* at § 706(2) (A-C).
379 *Id.* at § 553(b)(A).
380 *Id.*
381 *See* 5 U.S.C. §704.
382 *See* Steel, *supra* note 33, at 1557 n.78.
383 *See* W. Va. Health Care Cost Rev. Auth. v. Boone Mem'l Hosp., 472 S.E.2d 411, 422 (W. Va. 1996); Auer v. Robbins, 519 U.S. 452, 461 (1997).
384 *W. Va. Health Care Cost Rev. Auth.*, 472 S.E.2d at 422. ("A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious.").
385 *See Auer*, 519 U.S. at 461.
386 *Id.* (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

of the decision is.[387] An interpretive rule that extracts meaning from an ambiguity can be as weighty in its effects as a legislative rule.[388]

In *Clarry v. United States*, the court decided whether the Federal Office of Personnel Management could enforce a rule barring the re-hiring of air traffic controllers who had been fired during the 1982 strike by the Federal Aviation Administration.[389] The controllers contended the decision violated the APA because it comprised a legislative rule that required notice and comment rulemaking.[390] The United States Court of Appeals for the Second Circuit disagreed, holding that because interpretive rules such as the one under review do not create rights but merely clarify an existing statute or rule, they do not require notice and comment rulemaking under the APA.[391] Pivotal to the decision was the fact that the policy did not create new laws, rights, or duties and did not confer a right to employment to the aggrieved controllers.[392]

The decision is analytically unsatisfactory because it relies on an unusual distinction between the conferment of new rights (which would require rulemaking) and the curtailment of rights (which would not). The ordinary business operations exclusion, discussed in this Article, is a case in point for this problematic dichotomy. Nothing in the actual text of Rule 14a-8 addresses social policy questions that would cause the ordinary business operations exclusion not to apply.[393] Likewise, the Rule has nothing to say about micromanagement, another material determinant of whether a shareholder proposal is heard.[394] This means that even when expressed in SEC Releases, these critical determinants are reviewed as interpretive rules, examined under the lenient "plainly erroneous or inconsistent with the regulation" standard.[395] Whether these are not legislative rules is open to question.[396] Even if viewed as legislative rules, it is unclear if the standard would be invalidated as arbitrary or capricious.[397] When these material determinants arise in no-action letters and Staff guidance, they are not subject to any judicial review under the APA.[398] In the context of shareholder proposals, there is no case that holds any no-action letter or Staff Bulletin to

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[387] *See generally id.*
[388] *See id.* at 463 (finding that an agency has the power to resolve ambiguities in its own regulations).
[389] Clarry v. U.S., 85 F. 3d 1041, 1045 (2d Cir. 1996).
[390] *Id.* at 1048.
[391] *Id.*
[392] *Id.* at 1048-49.
[393] *See* 17 C.F.R. § 240.14a-8 (2013).
[394] *See id.*
[395] *See* Auer v. Robbins, 519 U.S. 452, 461 (1997).
[396] *See generally* White v. Shalala, 7 F.3d 296, 303 (2d Cir. 1993) (defining a legislative rule as one that "grants rights, imposes obligations, or produces other significant effects on private interests.").
[397] *See generally* W. Va. Health Care Cost Rev. Auth. v. Boone Mem'l Hosp., 472 S.E.2d 411, 422 (W. Va. 1996).
[398] *See* Administrative Procedure Act, 5 U.S.C. §704.

involve an interpretive rule.[399] Instead, these fall outside rulemaking altogether and are generally not judicially reviewable under any standard.[400]

C. Internal Procedure Versus Rule

Another way of resolving the important question of whether agency action or policy comprises a rule is whether it involves internal agency procedure.[401] Staff activities will largely be deemed internal to the agency, no matter the public consequences.[402] There is, however, authority to challenge this view when internal agency procedure impacts the public.[403] In *Military Order of Purple Heart of USA v. Secretary of Veteran's Affairs*, veterans' organizations challenged a change to a Veteran's Administration policy that potentially reduced veterans' awards without notice to affected veterans.[404] The veterans challenged the policy as a rule that required notice and comment rulemaking under the APA.[405] The Veterans' Administration contended that the policy amounted to a mere internal procedure and not a rule.[406] The Federal Circuit held that a procedure that redetermines awards without the knowledge of the affected veteran violates regulations and requires notice and comment under the APA.[407]

Military Order of Purple Heart illustrates that even bulletins prepared by the Staff could require rulemaking if the procedures outlined in the bulletins affect the public and violate a rule, as was the case with the Cracker Barrel no-action letter.[408] In general, the Staff Bulletins discussed in this Article are addressed to the public and have no relationship to internal procedures.[409] Therefore, under *Military Order of Purple Heart*, the SEC

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399 *See* Gryl ex rel. Shire Pharms. Group Plc v. Shire Pharms. Group Plc, 298 F.3d 136, 145 (2d Cir. 2002); Argentinian Recovery Co., LLC v. Bd. Dirs. Multicanal S.A., 331 B.R. 537, 550 (S.D.N.Y. 2005) ("Even if courts are not obligated to give full *Chevron* deference to this staff bulletin, . . . the bulletin provides guidance based on expertise, which should be considered.").

400 *See Gryl ex rel. Shire Pharms Group Plc*, 298 F.3d at 145 ("[S]EC no-action letters constitute neither agency rule-making nor adjudication and thus are entitled to no deference beyond whatever persuasive value they might have . . .").

401 *See* 5 U.S.C. § 553(b)(A).

402 *See* James v. Hurson Ass'n v. Glickman, 229 F.3d 277, 280 (D.C. Cir. 2000) (holding that the procedural exception applies to "agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.").

403 *See* Mil. Ord. Purple Heart v. Sec'y of Veterans Affs., 580 F.3d 1293 (Fed. Cir. 2009).

404 *Id.* at 1294.

405 *Id.*

406 *Id.* at 1296.

407 *Id.*

408 *See id.* at 1293; Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, [1992-1993 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 76, 418 (Oct. 13, 1992).

409 *See generally* 17 CFR § 240.14a-8 (2023); Mil. Ord. Purple Heart v. Sec'y of Veterans Affs., 580 F.3d 1293, 1296 (Fed. Cir. 2009).

could not judicially defend these materials as mere internal procedures.[410] The author has found no meaningful attempts to challenge Staff decisions under a theory that they affect the rights of the public. Additionally, the Staff position would be that in any case, in contrast to *Military Order of Purple Heart*, its activities violate no rules.[411] The author has found no case involving securities regulation that follows *Military Order of Purple Heart.*[412]

V. RECOMMENDATIONS

Part V presents this Article's recommendations. It begins in Section A by explaining the forces and conditions that have created the disarray surrounding shareholder proposals involving ordinary business operations. Section B will address problems in the ordinary business exclusion and, to correct these problems, recommends the Commission do away with the social policy exception.

A. Forces and Conditions

What forces and conditions have led to the current state of affairs? First, judicial review is not a realistic option. Issuers may face jurisdictional objections over no-action decisions that have no formal legal effect.[413] And what issuer would relish the chance to bring litigation against its principal federal regulator? Issuers must, therefore, necessarily abide by no-action letter decisions.[414] When the SEC denies a no-action request, in the majority of cases, the issuer submits the proposal without further review of the merits under Rule 14a-8.[415] Proponents may have marginally better access to courts

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[410] *See Mil. Ord. Purple Heart*, 580 F.3d at 1296.

[411] *See generally* James v. Hurson Ass'n v. Glickman, 229 F.3d 277, 280 (D.C. Cir. 2000); *see also id.* at 1296.

[412] *See generally Mil. Ord. Purple Heart*, 580 F.3d at 1296 (no superseding case law found through Shepherd's). One unresolved issue is whether an agency principally charged with the dispensation of benefits, such as the Veterans' Administration, should be treated differently from a regulatory agency such as the SEC. *Cf.* Military-Veterans Advoc. v. Sec'y Veterans Affs., 7 F.4th 1110, 1138 (Fed. Cir. 2021) (considering that a statute awarding attorneys' fees is devoid of any indication that a supplemental claim should be treated differently from other types of administrative review, yet no other form of review is subject to the same restrictions on attorneys' fees under the Department of Veterans Affairs' regulation.).

[413] *See e.g.,* Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc., 821 F. Supp. 877, 885 (S.D.N.Y. 1993) ("[A]n SEC no-action letter regarding shareholder proposals . . . does not 'rank[ ] as an agency adjudication or rulemaking.'").

[414] *See* Clarke v. CFTC, 74 F.4th 627, 634 (5th Cir 2023) ("Only the division that issued the no-action letter is bound by it and only the Beneficiary may rely upon the no-action letter.").

[415] *See* KBR Inc. v. Chevedden, 776 F. Supp.2d 415, 432 n.8 (S.D. Tex. 2011) (listing a number of cases in which the SEC staff rejected no-action requests from companies); *see also* 17 CFR § 240.14a-8 (2023).

but may lack the resources necessary to bring litigation against well-represented issuers.[416] Proposals are also very time-sensitive, and once deadlines pass, rights diminish, and goals must be pursued by other means.[417]

The 1976 Release introduced major social policy considerations, which were not defined and seldom illustrated in a consistent, intelligible manner.[418] As Cracker Barrel taught, these were honored in the breach.[419] In Cracker Barrel, the Staff upended these with respect to employment matters without resorting to notice and comment rulemaking.[420] The 1998 Release reinstated social policy without subject matter restrictions but did nothing to shape the contours of social policy issues eligible for proposal.[421] Instead, the SEC left the no-action letter process to a string of either inconsistent or indecipherable no-action decisions.[422] Concomitantly, the SEC has vacillated over time.[423] While these vacillations are normal and sometimes healthy, there is no mechanism to limit the agency.[424] In the domain of shareholder proposals, the agency largely escapes judicial review and even notice and comment rulemaking.[425] The SEC was right to supersede Staff Legal Bulletins from 2017 and 2018 that concentrated on issuer circumstances that reduced no-action determinations to a near-total mystery.[426] But what replaced them did not resolve the problem of understanding when a proposal could be embraced or rejected and why.[427] Treating all issuers the same introduces its own set of problems, most notably failure to understand the impact of problems and the ability to handle them for the benefit of the enterprise. These vary by industry and the resources available to the issuer.

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416 *See KBR Inc*., 776 F. Supp.2d at 432 n.8.

417 *See* 17 CFR §240.14a-8(e) (2023) (stating the deadline for submitting shareholder proposals).

418 Notice of Proposed Amendments to Proxy Rule 14a-8 Relating to Shareholder Proposals, 9 SEC Docket No. 19; *see also Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)*, U.S. SEC. & EXCH. COMM'N (Nov. 3, 2021), https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals?# (stating that the 1976 Release "provided an exception for certain proposals that raise significant social policy issues, and which the Commission subsequently reaffirmed in the 1998 Release.").

419 *See* N.Y.C. Emp.'s. Ret. Sys. v. SEC, 45 F.3d 7 (2d Cir. 1995).

420 *Id.* at 10.

421 *See Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)*, U.S. SEC. & EXCH. COMM'N (Nov. 3, 2021), https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals?# ("[S]taff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.").

422 Cohen & Schleyer, *supra* note 64, at 121-22 ("The lack of consistency over time is not an indication of inadequate analysis by the SEC staff—the SEC's 1998 release expressly contemplated that the same proposal might be treated differently at different times, depending on the level of public debate on the topic."); *see also* Ayotte, *supra* note 163, at 532-38.

423 *See, e.g., id.* at 530 ("[I]n a no-action letter, [the Commission] reversed its own interpretation of [Rule 14a-8] without much explanation or procedure.").

424 *See, e.g.,* Amalgamated Clothing & Textile Workers Union v. SEC, 15 F.3d 254 (2d Cir. 1994).

425 *See, e.g., id.*

426 *See* Alphabet, Inc., 2020 WL 2466907, at 4–5, 30 (Apr. 15, 2020) (citing SEC Staff Legal Bulletin No. 14I (CF) (Nov. 1, 2017) & SEC Staff Legal Bulletin No. 14J (CF) (Oct. 23, 2018)).

427 *See* Steel, *supra* note 33, at 1552-53.

B. Options/Recommendations

What follows will discuss three possible ways to correct problems with the social-policy exception. Each is aimed to address the principal issues with the present system, which lacks reliable, binding legal precedents, lacks clear agency guidance, and sometimes creates the appearance of Staff bias. The possible approaches include (1) withdrawing altogether from the issuance of no-action letters for matters concerning ordinary business operations, (2) enumerating what comprises social policy through formal rulemaking, or (3) abolishing the social policy exception. Upon comparative analysis, this Article concludes the Commission should abolish the social policy exception and make clear that business-line decisions involve ordinary business operations. Business-line decisions expressly characterized as ordinary business would codify the holding of *Trinity Wall Street,* albeit in a more straightforward manner.

1. Withdraw from No-Action Letter Issuance

As this Article has demonstrated, no-action letters have an immense influence on the question of whether a shareholder proposal must appear. Nearly complete reliance on this process has inhibited both judicial review and agency rulemaking.[428] While extensive litigation and rulemaking in any specific area may not be desirable, erratic judicial review and absent rulemaking result in a lack of guidance, which the public experiences today.[429] The Staff is under no legal obligation to issue a no-action letter.[430] Indeed, it denies requests in many cases but may leave the field open to issuance in circumstances it considers appropriate.[431] This solution would close the entire field to no-action issuance. Under this approach, the Staff would categorically reject no-action requests on ordinary business matters. This would leave the task of sorting out the question of social policy to the courts and the Commission. Investors and issuers could then expect a body of law and regulation to emerge that would, over the long term, place the question of whether a proposal should appear on more solid legal ground.

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[428] *See generally* Gary M. Bridgens, *Demystifying Reliance Interests in Judicial Review of Regulatory Change,* 29 GEO. MASON L. REV. 411, 431 (2021) ("Without a common understanding of reliance interests, it will be difficult for courts and agencies to strike an appropriate balance in the application of reliance-interest considerations.").

[429] *See* Ayotte, *supra* note 163, at 556 ("The only agency that has the power to effectuate a change in policy has remained relatively silent until recently.").

[430] *See generally* KBR Inc. v. Chevedden, 776 F. Supp.2d 415, 432 (S.D. Tex. 2011) ("Since the *Apache* decision, the S.E.C. staff has rejected no-action requests from a number of companies . . .").

[431] *See id.* at 432 n.8 (listing a number of cases in which the SEC staff rejected no-action requests from companies).

In addition to an understandable refusal by the SEC to cede jurisdiction, discarding the no-action letter process would create more problems than it would solve. First, doing so for ordinary business matters would likely impact the twelve other exclusions where the no-action letter process may function productively.[432] Doing so would also change the composition of successful proponents, skewing those to more deep-pocketed investors equipped to bring or credibly threaten litigation or push for new rules.[433] Issuers may become more cavalier in their rejection of colorably valid proposals. Alternatively, some would err on the side of inclusion to avoid costly litigation. A core problem persists, namely, applying neutral principles on the merits. While this approach would develop a body of case law and more refined rules in the long term, the cost of doing so is unjustified when the measure of improvement is uncertain. A withdrawal of the no-action process would harm small investors and heighten uncertainty for issuers. All participants, including the SEC, issuers, and proponents, would suffer.

The SEC stands accused of using the no-action letter process as de facto administrative adjudications without appropriate safeguards for valid administrative adjudication.[434] The time factor is one possible explanation that does not really appear in the literature. Burdensome administrative adjudications do not suit the time-sensitive process of shareholder proposal review.[435] Due to the inherent time limitations on submissions, the SEC must act promptly on no-action letter requests.[436] The author does not have an opinion on this issue but believes it is worthy of discussion. In any case, discarding the no-action letter process altogether is not a good idea.

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[432] *See* 17 CFR §240.14a-8(j); *see also* Steel, *supra* note 33, at 1552 ("These substantive exclusions prohibit a range of proposals, such as proposals containing false or misleading statements, proposals motivated by the proponent's personal grievance, and proposals related to the company's ordinary business operations.").

[433] *See* Jeffrey L. Kochian et al., *How to Handle Shareholder Proposals, Practical Law*, 2013 WL 4864187 (noting that companies rarely initiate litigation due to the "potential expense," "[t]iming concerns," and "potential for negative precedent.").

[434] *See* Steel, *supra* note 33, at 1554.

[435] *See* Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351 ("While insufficient procedures can endanger important interests, excessive procedures can delay time-sensitive agency decisionmaking or even block desirable agency action.").

[436] *See generally 2021-2022 No-Action Responses Issued Under Exchange Act Rule 14a-9*, U.S. SEC. & EXCH. COMM'N (last modified Aug. 24, 2023), https://www.sec.gov/corpfin/2021-2022-shareholder-proposals-no-action? (showing a rough turnaround 30-days of staff response to no-action letter requests).

2. Rulemaking to Flesh Out Social Policy

A problem with the ordinary business exception is the inability of proponents and issuers to ascertain social policy.[437] The Staff contributed to this problem by vacillating over time and showing favoritism for certain social policy issues over others without explanation.[438] One helpful measure would be to require Staff to explain its reasons for rejecting no-action letter requests. This would furnish needed guidance, but a more effective solution would be to require the Commission to enumerate acceptable social policy matters through rulemaking. Rulemaking would then give the specified social policy matters legal force, which would be more difficult for the Staff to evade. However, as Cracker Barrel has shown, this would not prevent Cracker Barrel-style evasions, which may require many years to correct.[439]

By way of example, under this approach, climate change, fundamental business strategy, human rights, political activity, lobbying disclosures, and senior executive compensation[440] might attain social policy status, notwithstanding that shareholders vote separately on some of these (such as executive compensation say on pay proposed by management).[441] An enumeration of social policy might exclude other causes, especially those not fitting the pattern set forth by the enumeration.[442] Ascertaining if a social policy proposal appears then becomes an exercise in statutory interpretation.[443] For example, suppose human rights make the list of social policy concerns, but animal rights and artificial intelligence do not. Also, suppose a shareholder of Coca-Cola wants to propose the company study the effects of its products on levels of obesity and diabetes but finds these causes absent from the list.

There is also the problem of competing social policy interests and goals.[444] One shareholder group wants to end mining, but this will threaten the supply of rare earth minerals needed to build electric vehicles so critical

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437 *See* Cohen & Schleyer, *supra* note 64, at 119 ("[T]he SEC staff [is] in the business of deciding what is, and is not, a substantial policy consideration. The SEC and the staff have struggled valiantly ever since to bring predictability and efficiency to this inherently subjective judgment.").

438 *See id.* at 121-22.

439 *See* N.Y.C. Emp.'s. Ret. Sys. v. SEC, 45 F.3d 7 (2d Cir. 1995).

440 *See* Steel, *supra* note 33, at 1570-71 (analyzing SEC Staff determinations in excluding proposals according to Rule 14a-8 through staff-imposed categories, including climate change, business strategy, human rights, political activities, and more).

441 *See id.*

442 *See generally id.* at 1584 ("Another route would be to simply eliminate the significance requirement and not replace it at all, opening Rule 14a-8 to social policy proposals of all variety.").

443 *See id.* at 1587 (explaining how the SEC staff is currently in the awkward role of a social policy censor, "through which bias and shifting views may cause inconsistency and inaccuracy.").

444 *See generally* Keith F. Higgins, Dir., Div. Corp. Fin., *Rule 14a-8: Conflicting Proposals Conflicting Views*, U.S. SEC. & EXCH. COMM'N, (Feb. 10, 2015) https://www.sec.gov/news/speech/rule-14a-8-conflicting-proposals-conflicting-views ("The Division has thus become an informal arbitrator in the shareholder proposal process . . . .").

to avert climate change. Which social policy should the SEC deem worthy? While a social policy catalog[445] that lists recognized social policies would alleviate some confusion in specific domains, it would leave some constituencies confused and aggrieved. This is one of the main problems with social policy; namely, it plays to grievance-oriented activists with goals often at odds with ordinary investors and (as discussed below) undermines board authority.[446] Additionally, notions of social policy evolve over time, and the Commission would be under no duty to update them.[447] If updated by rulemaking, there would be some protection against arbitrary agency action but little protection against doing nothing.

Also important is the question of whether it is appropriate for the SEC to say what comprises social policy. Enumeration of social policy only partially solves the problem and creates new problems. While notice and comment rulemaking would give all interested parties a voice, it does not assure their wishes will be heard or respected.[448] In the end, a specific enumeration of approved social policy causes could sow discord among those feeling their social policy had gone unrecognized. Then, upon surveying those enumerated social policy issues deemed valid, one would be left to ponder where those left out appear in the corporate governance landscape.

3. Eliminate Social Policy

Since 1976, social policy has formally existed to facilitate the submission of shareholder proposals otherwise excluded as ordinary business operations.[449] After nearly fifty years of living with a Rule the SEC admitted to be experimental,[450] it is time to examine social policy's role in the holistic workings of securities regulation. As shown, the history of social policy is erratic and heated.[451] There is no fixed understanding or public meaning for social policy.[452] Inherent limits on both administrative and judicial review

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445 *See* Steel, *supra* note 33, at 1579.

446 *See generally id.* at 1574 (explaining collection-action and free-rider are problems preventing companies from litigating no-action letters).

447 *See* Cohen & Schleyer, *supra* note 64, at 116-124 (discussing the evolution and history of social policy proposals under Rule 14a-8).

448 *See generally A Guide to the Rulemaking Process*, OFF. FED. REG., https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Nov. 7, 2023).

449 *See* Cohen & Schleyer, *supra* note 64, at 119 (explaining that the SEC expressly narrowed the ordinary business exclusion in shareholder proposals with significant social policy implications in 1976).

450 *See* Adoption of Amendments Relating to Proposals by Security Holders, 41 Fed. Reg. 52994, 52998 (Dec. 3, 1976) (to be codified at 17 C.F.R. pt. 240); *see also* Timothy L. Feagans, *SEC Rule 14a-8: New Restrictions on Corporate Democracy?*, 33 BUFF. L. REV. 225, n. 3 (1984).

451 *See* Cohen & Schleyer, *supra* note 64, at 116-124 (discussing the evolution and history of social policy proposals under Rule 14a-8).

452 *See* Lucida Platt, *What is Social Policy?*, LONDON SCH. ECON. & POL. SCI., https://www.lse.ac.uk/social-policy/about-us/What-is-social-

ensure that social policy will remain in a state of flux.[453] Social policy sometimes places the Staff in untenable situations, interferes with the proper functioning of board duties, threatens healthy board decision-making and continuity, duplicates and frustrates disclosure requirements, and extends undue influence to activists seeking to attain unpopular and idiosyncratic social goals not through law and government but through private ordering of property rights. These realities demonstrate that social policy should be discarded in this context.

Accompanying that decision should be clarification that business-line decisions fall under ordinary business.[454] This would codify the outcome of *Trinity Wall Street,* that line of business decisions involve ordinary business.[455] Additionally, removing the social policy question would eliminate the need to evaluate the question the *Trinity Wall Street* court dodged.[456] Proposals to cease business lines would be deemed lines of business decisions reserved for the management to implement based on the board's instructions.

Congress authorized the SEC to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.[457] Deciding at the Staff level whether to accept or reject a social policy issue is beyond the core competency of the SEC and at the fringes of its authority. The Staff is especially unsuited to evaluate how social policy impacts a particular

policy#:~:text=Social%20policy%20is%20concerned%20with,of%20poverty%2C%20migration %20and%20globalisation (last visited Jan. 30, 2024) ("Social policy is concerned with the ways societies across the world meet human needs for security, education work, health and wellbeing."); Steel, *supra* note 33, at 1587 (explaining how the SEC Staff is currently in the awkward role of a social policy censor, "through which bias and shifting views may cause inconsistency and inaccuracy.").

453 Steel, *supra* note 33, at 1555-64 (demonstrating that social policy remains in a constant state of flux through the legislative and judicial history revolving around Rule 14a-8's social policy standard); *see also* Cohen & Schleyer, *supra* note 64, at 116-124.

454 *See* 17 CFR § 240.14a-8(i)(7) (2023); Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 340 (3d Cir. 2015) ("[T]he term 'ordinary business' continues to 'refer to matters *that are not necessarily 'ordinary' in the common meaning of the word'* and 'is rooted in the corporate law concept providing management with flexibility in directing certain core matters involving the company's business and operations.'"). For example, whether to sell controversial products such as alcohol, tobacco and firearms. *See id.* at 340-341 (considering whether Wal-Mart's sale of high-capacity firearms is related to ordinary business operations).

455 *See Trinity,* 792 F.3d at 344 ("A retailer's approach to its product offerings is the bread and butter of its business.").

456 *See id.* at 345 ("Yet we cannot sidestep what some may deem an unreckonable area. Thus we wade in.").

457 *Mission*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/mission (last visited Jan. 30, 2024).

issuer.[458] Instead, the Staff can only consider "broad societal impact."[459] There is no guidance as to how to accomplish this.[460] The Staff is not a social science authority and, therefore, must either proceed largely in the dark or seek studies and advice from parties who may be biased and that work at cross purposes to the SEC's mission.[461] The Staff's repeal of Staff Legal Bulletins that consider specific circumstances[462] admits that the Staff is not set up to evaluate the impact on any given issuer and whether a proposal should matter to its shareholders.[463] If the Staff concedes it is not equipped to understand issuers, then it must instead adhere to agreed, neutral notions of social policy that the public cannot learn and apply through legal research. This leaves open the question of how to foster consideration of emerging social norms that would not necessarily be picked up by mere compliance with the law. Cracker Barrel would be one example where, in 1992, few legal protections existed for gay employees.[464] Presently, concerns of a social policy nature exist with respect to artificial intelligence, but governing law is still emerging.[465] While the ability to spot trends that may take decades to find their way into law is a legitimate cause, the fact remains the SEC is not equipped to announce and regulate emerging social policies.

The shareholder proposals that seek social change (and not corporate reform) by corporate action in lieu of legislation and government action compound the difficulty for the SEC.[466] Even under rulemaking overseen by

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458 *See* Steel, *supra* note 33, at 1587 (explaining how the SEC Staff is currently in the awkward role of a social policy censor, "through which bias and shifting views may cause inconsistency and inaccuracy.").

459 *Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)*, U.S. SEC. & EXCH. COMM'N (Nov. 3, 2021), https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals?#.

460 *See* Steel, *supra* note 33, at 1571 ("[T]he staff may only be relying on 'rules of thumb'—soft rules that provide helpful guidance but may be overridden by external exceptions or the inapplicability of the rules' background justifications.").

461 *See id.* at 1587.

462 *See* Marc S. Gerber & Ryan J. Adams, *Hitting Reset or Flipping the Table? SEC Staff Significantly Increases the Unpredictability of the Shareholder Proposal No-Action Process*, SKADDEN INSIGHTS (June 2022), https://www.skadden.com/insights/publications/2022/06/quarterly-insights/hitting-reset-or-flipping-the-table ("SLB 14L effectively reset the Staff's analytical approach to the 'ordinary business' and 'relevance' exclusions for shareholder proposals to prior to November 2017, rescinding Staff Legal Bulletin Nos. !4I, 14J, and 14K from 2017, 2018, and 2019, respectively.").

463 *See* Steel, *supra* note 33, at 1572 (discussing that the Staff Legal Bulletin emphasizing the importance of a case-by-case inquiry "does not purport to signal any sort of paradigm shift for staff interpretation of [14a-8](i)(7).").

464 *See* N.Y.C. Emp.'s. Ret. Sys. v. SEC, 45 F.3d 7, 9 (2d Cir. 1995).

465 *See* Sunil Johal & Daniel Araya, Commentary, *Work and Social Policy in the Age of Artificial Intelligence*, BROOKINGS (Feb. 28, 2017), https://www.brookings.edu/articles/work-and-social-policy-in-the-age-of-artificial-intelligence/.

466 *Cf.* Steel, *supra* note 33, at 1592 ("Historically, shareholder proposals have played a small, albeit significant, role in effecting valuable social change."); Cohen & Schleyer, *supra* note 64, at 83 ("Advocates of Rule 14a-8 social policy proposals assert that they advance 'shareholder democracy' and are a powerful and valid tool for social change and moral improvement of corporate behavior.").

the Commission, no publicly available deliberative process would foster public confidence in legitimate social policy.[467] As illustrated in the examples discussed in this Article, the social policy exception makes these proposals on matters such as climate change and affirmative action related to race and sex possible.[468] These require no nexus to shareholder economic welfare and indeed may be highly and immediately detrimental when, for example, calling for issuers to place core lines of business at risk to attain a social policy objective. Merely presenting the proposal in terms of "sustainability" suffices to take the proposal away from a generalized societal grievance.[469] For example, a proposal demanding an issuer pay workers above what the law and market requires may appear in the name of "sustainability" or similar diffuse terms.[470] Under this process, the SEC functions not as a regulator of the orderly functioning of securities markets but as an arbiter of social policy messages. When the Staff enforces social policy through the no-action letter process, it sends a tacit message of worthiness or disapproval.

As the Moderna shareholder proposal dramatized, the no-action letter process has the potential to pressure business strategy in directions unimaginable to the board.[471] Whether the Moderna board made the proper decision is not evaluated here. Instead, Moderna is an example where activist shareholders forced a proposal that involved the ordinary business question of what markets to serve and what to do with intellectual property.[472] It is not possible to gain an understanding of the Staff's reasoning in its rejection of Moderna's request for a no-action letter.[473] However, it is possible the Staff concluded the social policy impact of furnishing vaccines to developing countries towered over something as pedestrian as Moderna's property rights.[474]

While Moderna is an apparent Staff failing, what about circumstances such as Meta, where social policy and shareholder economic interests appear to align?[475] There should be no disagreement that Meta should take

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467 *See generally* Negrete-Rodriquez v. Mukasey, 518 F.3d 497, 503 (7th Cir. 2008) ("An agency is not precluded from announcing new principles in an adjudicative proceeding rather than through notice-and-comment rulemaking.").

468 *See* Steel, *supra* note 33, at 1570-71.

469 *See* Coffee, *supra* note 192, at 50-51. In the case of climate change, Professor Coffee's view that systemic risk could be a legitimate portfolio management tool would mean even generalized climate grievances would support social policy acceptable to the SEC. *See id.* at 49.

470 *Cf.* Julie Wokaty, *Worker Justice Rises to the Top of Investors' Agenda at 2023 Annual Meetings*, INTERFAITH CTR ON CORP. RESP. (Apr. 27, 2023), https://www.iccr.org/worker-justice-rises-top-investors-agenda-2023-annual-meetings/.

471 *See* Moderna, Inc., SEC Staff No-Action Letter, 2021 WL 6063317 (Feb. 8, 2022) at *14.

472 *See id.*

473 *See id.*

474 *See id.* at *2-3.

475 *See Meta Platforms Inc, Proposal #11—Child Sexual Exploitation Online*, PROXY IMPACT (May 25, 2022), https://www.sec.gov/Archives/edgar/data/1326801/000121465922006855/j513224px14a6g.htm.

appropriate measures to combat child sex trafficking that may take place through its various messaging networks.[476] Meta shareholder proponents argued that specific decisions by Meta's management would facilitate sex trafficking.[477] This very serious charge involves both the ordinary business question of how to administer messaging and a social policy question.[478] Discarding the social policy exception might mean the meritorious Meta proposal could be suppressed by management or assigned low priority.[479] Cases like Meta might justify upholding the social policy exception to force action by the board.[480] But the larger question is: who decides? Does the social policy contained in the proposal limit the board's good options to address a problem? Or does it prod the board to act?

Eliminating social policy does not mean shareholder concerns like this go unaddressed when the board functions properly.[481] As *Tosdal* illustrates, assigning primacy to shareholder feelings and opinions over scientific and operational considerations is both contrary to corporate law and bad business practice.[482] Meta[483] and other meritorious social-policy-based concerns are ultimately the responsibility of the board.[484] Index funds and other investors take pains to monitor the board's handling of strategy and risk.[485]

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[476] *See id.* ("In 2021 there were nearly 29 million reported cases of online child sexual abuse material (CSAM), nearly 27 million of these (92%) stemmed from Meta platforms including Facebook, WhatsApp, Messenger and Instagram").

[477] *See id.*

[478] *See id.*

[479] *See* Steel, *supra* note 33, at 1582 ("Elimination of the social policy exception would be inconsistent with the official Commission-approved interpretations of the ordinary business operations exclusion set forth in the adopting releases to the 1976 and 1998 amendments to Rule 14a-8, . . .").

[480] *See Meta Platforms Inc, Proposal #11—Child Sexual Exploitation Online*, PROXY IMPACT (May 25, 2022), https://www.sec.gov/Archives/edgar/data/1326801/000121465922006855/j513224px14a6g.htm.

[481] *See generally* Steel, *supra* note 33, at 1584 ("[D]enying shareholders a voice in whether their investments are managed in what they believe to be a socially responsible manner, even if that manner is not the most profitable, would lie in considerable tension with nearly fifty years of jurisprudence and SEC practices, as well as the congressional purpose underlying section 14(a) of the '34 Act.").

[482] *See* Tosdal v. NorthWestern Corp., 440 F. Supp.3d 1186, 1190 (D. Mont. 2020).

[483] While the author does not examine the failings of Meta's board, he notes Meta is subject to majority control by a single individual shareholder, which may cause its practices for the screening of directors to differ from issuers with more dispersed ownership structures. *Meta (Facebook) Organization Structure*, LEXCHART, https://lexchart.com/org-charts/meta-facebook-organization-structure/ (last visited Nov. 24, 2023).

[484] *See generally* Steel, *supra* note 33, at 1588 n. 289 ("[P]rofit-only clauses could present public relations difficulties in light of the reputational pressures on corporations to be perceived as committed to corporate social responsibility.").

[485] *See* Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 881 (1992) ("[W]hat matters in the end is the balance between incentives and disincentives to monitor. In that calculus, index funds have some advantages that may offset their weaker incentives to monitor."); *see also* VANGUARD, *supra* note 15, at 50-77 (listing "company engagements" on, among other things, oversight of strategy and risk).

When pondering the fate of social policy in shareholder resolutions, one question is whether a board intent on preserving and growing shareholder wealth over the long term may, in doing so, harm society and, if so, whether shareholder empowerment to propose resolutions will solve this problem.[486] Even if shareholder empowerment works to solve this problem, at what cost? Does this empowerment undermine the "balance of authority"[487] between the board and shareholders? Messrs. Cohen and Schleyer have encapsulated the concern:

> What is of concern is how the combination of SEC policy, special interest activism, and the concentration of influence in proxy advisory firms have combined to make this a more formulaic and non-deliberative process that can impair the board's deliberation on complex social issues. If a director, or the entire board, gets voted out after the board failed to implement a shareholder proposal, this is not necessarily reflective of the collective view of all of the corporation's shareholders, or in the collective interest of the corporation, its shareholders, and its other stakeholders. The result has likely been affected, perhaps decisively, by the outsize influence and largely unregulated and potentially opaque decisions of a relatively small number of players (e.g., a special interest proponent, the major proxy advisory firms, and those institutional investors who follow these firms' recommendations virtually automatically).[488]

The business and affairs of a corporation are managed by and under the direction of the board of directors.[489] "[D]irectors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders."[490] Directors are not the agents of the corporation, and they do not answer to any specific segment of shareholders.[491] If disenchanted, shareholders can remove and replace directors.[492] When confronted with threats of removal for failure to agree to implement a social policy proposal approved by shareholders, the director's duties collide with the wants and needs of shareholders that may gain power through various means.[493]

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486 *See* Cohen & Schleyer, *supra* note 64, at 114 (discussing the traditional view in corporate law that directors must focus on maximizing shareholder wealth and social policy implications of the company's actions).

487 *Id.* at 125-26.

488 *Id.* at 128-29.

489 DEL. CODE ANN. tit. 8, § 141(a) (2023).

490 Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993) (citations omitted).

491 Cohen & Schleyer, *supra* note 64, at 111 ("State courts have long rejected the view of directors as mere agents of the shareholders. [] Delaware courts have expressly confirmed that directors are not obligated to follow the wishes of even the holders of a majority of shares. In fact, the courts explicitly prohibit the board from delegating its duties to shareholders.").

492 *Id.* at 110.

493 *See id.* at 110-111.

Social policy appears in now-mandated issuer disclosures, raising the question of whether social policy disclosures handle problems that would be included in social policy shareholder proposals.[494] Examples include (inter alia) mine safety[495] and, as proposed by the Commission, climate change-related disclosures.[496] This raises the additional question of whether social policy shareholder proposals undermine, conflict with, or feed off disclosures. Periodic disclosures include, among other things, risks to the business, such as competition, supply chain, labor, regulation, financing, and litigation.[497] A soon-to-appear empirical test will be SEC-proposed climate disclosure requirements.[498] This means using shareholder proposals to prod issuers to work for a social policy, such as zero carbon emissions by a target date, may motivate the Commission. When issuers begin reporting, one can envisage rating agencies and other metric keepers developing measures, such as CO2 per unit of sales, CO2 per unit of earnings, and CO2 per unit of capital, all to be compared to industry peers. When climate activist shareholders confront the board with lagging metrics in order to keep their positions, the board must answer.

One plausible answer would be adaptation to climate change is a long-term problem and the board is engaged in vigilant, watchful waiting to determine appropriate steps. However, at present, the board is doing nothing more than observing. Outlays deferred generally benefit the enterprise, and the board and management await technological improvements that will lessen and defer the cost to the enterprise.[499] Metrics in any given year (such as those illustrated here) should be assigned lesser weight. In many respects, this is a conversation much like issuer-specific shareholder activism motivated by return.[500] The hedge fund wants sales of unprofitable business

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[494] *See* John H. Matheson & Vilena Nicolet, *Shareholder Democracy and Special Interest Governance*, 103 MINN. L. REV. 1649, 1666 (2019) (discussing companies disclosing information regarding social policies).

[495] Mine operators are required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), and rules promulgated by the SEC implementing that section of the Dodd-Frank Act, to provide certain information concerning mine safety violations and other regulatory matters concerning the operation of mines. *See* 15 U.S.C. § 78m-2; *see also* Cohen & Schleyer, *supra* note 64, at 107-08.

[496] U.S. Securities on Exchange Comm'n, Proposed Rule, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Rel. Nos. 33-11117, 34-96005, IA-6162, 7C-34724, 07FR63016 (Oct. 7, 2022).

[497] *See* Matheson & Nicolet, *supra* note 494, at 1666.

[498] U.S. Securities on Exchange Comm'n, Proposed Rule, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Rel. Nos. 33-11117, 34-96005, IA-6162, 7C-34724, 07FR63016 (Oct. 7, 2022).

[499] *See* Elisabeth A. Gilmore & Travis St. Clair, *Budgeting for Climate Change: Obstacles and Opportunities at the US State Leve*l, 18 CLIMATE POL'Y 729 (2018) ("Between FY 2008 and FY 2013, direct federal funding to address global climate change totaled $77 billion, approximately 0.4% of federal outlays over the time period. More than 75% has funded technology development and deployment, primarily through the Department of Energy.").

[500] *See* Cohen & Schleyer, *supra* note 64, at 114.

units followed by stock buybacks,[501] and the board disagrees. But with climate change, the Commission now assumes some role in launching these conflicts, which may have implications for board independence, authority, and efficacy. Social-policy-oriented shareholder proposals will fuel the conflagration.

Social policy also places shareholders at odds with each other in ways not seen before.[502] Some market and governance observers note that investors seeking to attain social policy goals do so as a portfolio management tool over systemic risk.[503] Under this view, large, diversified portfolio managers will sacrifice returns in an issuer engaged in a disapproved activity (such as CO2 emissions), which substandard returns (or losses) will be offset by returns in issuers that benefit from the phase-out or curtailment of the disapproved activity.[504] Besides unjustified disruption to boards, such an approach pits large diversified shareholders (such as index funds) against less diversified or concentrated investors who seek returns at the issuer level and with lesser (or no) regard for systemic risk as an investment decision-making metric.[505] Professor Coffee has brought this phenomenon to light in a case study involving Exxon Mobil and notes, "small activist firms do not hold sufficiently large or diversified portfolios to enable them to . . . profit from a systemic risk campaign."[506] Professor Coffee's study involved a climate change-related proxy contest and not a shareholder proposal; however, the principle of enmity between those with fully diversified index funds who may embrace a systemic risk approach and concentrated, issuer-focused investors remains applicable to shareholder proposals.[507] Social policy considerations threaten to worsen an irreconcilable divide between issuer-focused investors and those who subscribe to systemic risk management. This may explain why shrill voices make themselves heard in these matters.

In 1976, when the social policy carve-out assumed full force, it served as a tool for shareholder messaging.[508] Social media and internet-based communications now make it possible for shareholders of like mind to gather and discuss issues of concern.[509] This is now common knowledge, and social science research finds online discussion boards and shareholder messaging

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501 *See* Coffee, *supra* note 192, at 52-53.

502 *See id.* at 49-50.

503 *See id.* at 49.

504 *See id.*

505 *See id.* 45-48.

506 *Id.* at 59.

507 *See* Coffee, *supra* note 192, at 59-63.

508 *See* Steel, *supra* note 33, at 1559-60.

509 *See* Seth C. Oranburg, *A Little Birdie Said: How Twitter is Disrupting Shareholder Activism*, 20 FORDHAM J. CORP. & FIN. L. 695, 696 (2015) ("Tweets are a cheap and easy way for shareholders to engage with each other and build consensus and support for collective action.").

apps commonplace.[510] There is institutional support and infrastructure for these methods.[511] Both the SEC and securities exchanges require methods for shareholder communications with independent directors.[512] If shareholders can communicate with each other with relative ease, collective action becomes more feasible.[513] This includes a wide range of actions, such as engagement with the board or heads of board committees.[514] Proponents are already doing this by teaming up in the submission of shareholder proposals, and the same can be done with other levels of engagement, such as communications with directors and committee leaders.[515] The most dramatic example of shareholder messaging occurred in a proxy contest.[516] There, shareholders collaborated to seat three climate-friendly directors on the board of directors of Exxon Mobil, even though the proxy contest challenger held only 0.02% of Exxon Mobil's shares.[517] Sophistication and the availability of communication means shareholders will not be without meaningful tools in the event of social policy's demise.

VI. CONCLUSION

Social policy plays a major role in whether shareholder proposals concerning an issuer's ordinary business operations must appear for a vote.[518] Despite its influence over whether a proposal appears, the SEC has not defined social policy and offers little guidance.[519] Most of the guidance takes the form of no-action letter responses, which are nonbinding, informal

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510 *See* Tim Bowley et al., *Shareholder Engagement Inside and Outside the Shareholder Meeting* 5 (Eur. Corp. Governance Inst. L., Working Paper No. 709, 2023) ("Developments in computing, information technology and electronic communications assist shareholders to gather and analyse [sic] information regarding the performance of a company and to communicate instantly and cheaply with potential allies and supports among a company's shareholder base.").

511 *See, e.g., id.* at 9 (Eur. Corp. Governance Inst. L., Working Paper No. 709, 2023) ("Research has also found that it is common for corporate managers to engage with proposal proponents ahead of the shareholder vote and that such engagement frequently leads to proponents withdrawing their proposals, revealing the potential for precatory proposals to catalyse [sic] shareholder-company engagement.").

512 *See* Cohen &. Schleyer, *supra* note 64, at 108.

513 *See* Oranburg, *supra* note 509, at 696.

514 *See* Elizabeth Richards, *Why Company Directors Should Use Social Media,* CONF. BD. (Sept. 8, 2020), https://www.conference-board.org/brief/environmental-social-governance/company-directors-social-media.

515 *See generally id.*

516 Coffee, *supra* note 192, at 60-61 (discussing ways to minimize the costs of a proxy contest).

517 *See id.* at 54.

518 *See* Cohen & Schleyer, *supra* note 64, at 124-32.

519 *See* Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 351 (3d Cir. 2015) ("Despite the substantial uptick in proposals attempting to raise social policy issues that bat down the business operations bar, the SEC's last word on the subject came in the 1990s . . .").

opinions of the Staff.[520] Whether the Staff issues or declines to issue a no-action letter, it is under no obligation to share its reasoning, and quite often, decisions arise without explanation.[521] In general, no-action letters are not judicially reviewable, and agency oversight by the Commission is absent.[522] There is no meaningful process for judicial review of shareholder proposal disputes, and the scant case law that exists does not help form a useful pattern for guidance. The Commission could elect to clarify social policy under administrative rulemaking but has not done so.[523] Beyond the no-action letter, the public can look only to Staff Legal Bulletins, but these are also nonbinding and of limited influence over federal courts.[524]

Social policy is very meaningful to the shareholder proposal process.[525] Each year, shareholders submit large numbers of proposals concerning social policies such as climate change, environmental welfare, human rights and diversity, equity, and inclusion. What sometimes differentiates these social policy-based proposals from others is the absence of apparent benefit to the issuer and even the imposition of unnecessary burdens.[526] Index funds that hold shares comprising an entire defined market may do this in order to reduce systemic risk where a harm to one portfolio company may be offset by a benefit to others in the portfolio.[527] Others may pursue social policy with idiosyncratic motivations unrelated to returns (or highly attenuated), seeking to change society by means outside of the law and government.[528] Shareholders who use these approaches must be taken seriously, and their methods have a number of adverse effects.[529] These efforts threaten the proper working of the board of directors, who may have sensed a given problem but chosen to approach it differently.[530] This means boards may not have the luxury to do what's right by their lights. Boards that disregard shareholder proposals that are approved or garner substantial support may lose their positions on account of "withhold approval" recommendations

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520 *See* Apache Corp. v. NYC Emps. Ret. Sys., 621 F. Supp.2d 444, 449 (S.D. Tex. 2008) (concluding that no-action letters are nonbinding, persuasive authority).

521 *See* Steel, *supra* note 33, at 1549 ("[N]o-action letters typically contain minimal explanation of the staff's reasoning, and appellate review is difficult to obtain.").

522 *See generally id.*

523 *See id.* at 1564-1572.

524 *See id.* at 1555-1558.

525 *See* Cohen & Schleyer, *supra* note 64, at 124-25.

526 *See generally* Steel, *supra* note 33, at 1592.

527 *See* Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 881 (1992).

528 *See* Steel, *supra* note 33, at 1592.

529 *See id.*

530 *See* Cohen & Schleyer, *supra* note 64, at 125-29 (discussing the practical impact of Rule 14a-8 on directors).

made by proxy advisors.[531] The sizable influence[532] of proxy advisors' recommendations magnifies this risk. Thus, boards may unnecessarily lose experienced talent to be replaced by less experienced activist nominees.[533]

Likewise, social policy divides shareholders into multiple camps with competing goals and visions.[534] Index funds and social activist investors that seek to either reduce systemic risk or change society will have goals at odds with investors that make issuer-specific investment decisions seeking to maximize economic return on each asset held.[535] These competing goals cannot be reconciled and by favoring systemic risk and social activist investors, social policy widens this divide without measurable offsetting benefit.

The SEC makes this state of affairs possible based on its longstanding embrace of social policy and refusal to clarify or change. The agency is, therefore, a contributor to a problem in need of correction. The SEC is not equipped to assess social policy, nor is the type of social policy this Article discusses within the purview of the SEC's role to facilitate the orderly workings of securities markets. No-action letters function as de facto administrative adjudications without the safeguards normally afforded.[536] Judicial review is largely unavailable, and administrative rulemaking takes a distant back seat to informal, opaque, extra-administrative pronouncements by the Staff. Wholesale reform of an intractable agency structure is unrealistic. Still, a practical way to mitigate these flaws is to do away with social policy as a determinant of whether a proposal involving ordinary business operations should appear.

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531 *See id.* at 105-06.

532 Andrew F. Tuch, *Proxy Advisor Influence in a Comparative Light*, 99 BOSTON U. L. REV. 1459, 1461 (2019).

533 *See generally* Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 300 (2016) ("Here, activist shareholders tee up social policy reforms at low cost to other shareholders.").

534 *See* Maya Mueler, Comment, *The Shareholder Proposal Rule: Cracker Barrel, Institutional Investors, and the 1998 Amendments*, 28 STETSON L. REV. 451, 498 (1998) (explaining how the SEC's 1998 Amendments to Rule 14a-8 attempted to balance the competing interests between shareholders).

535 *See* Black, *supra* note 527, at 881.

536 *See* Steel, *supra* note 33, at 1575.