No. 15-____

IN THE

Supreme Court of the United States

TRINITY WALL STREET,

Petitioner,

v.

WAL-MART STORES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. SEC Rule 14a-8 promulgated under the Securities and Exchange Act of 1934 requires registered corporations to include shareholder proposals in their proxy materials absent limited exceptions. Trinity Wall Street attempted to exercise its shareholder rights by submitting to Wal-Mart Stores, Inc. a proposal concerning board policy oversight of Wal-Mart's sale of products especially hazardous to the community, Wal-Mart's reputation and/or Wal-Mart's brand, such as guns equipped with high capacity magazines. The Third Circuit majority, reversing the District Court which had granted Trinity a permanent injunction relying on SEC interpretative guidance about the meaning of what is called the "ordinary business" exception, held that Wal-Mart could exclude Trinity's proposal under that exception.

Did the Third Circuit err in holding that a corporation may exclude a shareholder proposal because, if adopted, it could affect a retailer's decision about what to sell?

2. A different Third Circuit majority held that Wal-Mart could exclude Trinity's proposal under an exception for proposals that violate the SEC's proxy rules concerning false and misleading statements.

Did the Third Circuit depart from the need for judicial neutrality as to the merit of a shareholder proposal in holding that SEC proxy rules were violated because of what the Court felt was

ambiguity in a proposed board committee charter amendment?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioner in this case is Trinity Wall Street (Plaintiff-Appellee below). The full legal name of Trinity Wall Street is The Rector, Church-Wardens and Vestrymen of Trinity Church in the city of New York. Trinity has no parent corporation and no publicly-held corporation owns 10% or more of its stock. The respondent is Wal-Mart Stores, Inc. (Defendant-Appellant below).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Trinity Wall Street ("Trinity") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Court of Appeals' opinion (Appendix B) is not yet reported and can be found at No. 14-4764, 2015 WL 4069291 (3d Cir. July 6, 2015). The District Court's opinion granting Trinity's injunction is not yet reported but can be found at No. 14-405, 2014 WL 6790928 (D. Del. Nov. 26, 2014).

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 2015. On July 10, 2015, this Court granted an extension of time to and including September 11, 2015, for Trinity to file this petition. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 14(a)(1) of the Securities and Exchange Act of 1934:

> It shall be unlawful for any person, by the use of the mails or by any means or

> instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

SEC Rule 14a-8, 17 CFR § 240.14a-8 (2011):

> Shareholder proposals.
>
> This section addresses when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders. In summary, in order to have your shareholder proposal included on a company's proxy card, and included along with any supporting statement in its proxy statement, you must be eligible and follow certain procedures. Under a few specific circumstances, the company is permitted to exclude your proposal, but only after submitting its reasons to the Commission. We structured this section in a question-and-answer format so that it is easier to

> understand. The references to "you" are to a shareholder seeking to submit the proposal.
> . . . .
>
> (i) Question 9: If I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal?
> . . . .
>
> (3) *Violation of proxy rules:* If the proposal or supporting statement is contrary to any of the Commission's proxy rules, including § 240.14a-9, which prohibits materially false or misleading statements in proxy soliciting materials;
> . . . .
>
> (7) *Management functions*: If the proposal deals with a matter relating to the company's ordinary business operations;

The full text of Rule 14a-8 is set forth at Appendix F.

STATEMENT OF THE CASE

This case presents the important question of whether the regulations of the U.S. Securities and Exchange Commission ("SEC" or the "Commission") concerning shareholder proposals permit a retailer to preclude its shareholders – the corporation's owners – from using the federal shareholder proposal mechanism to ask the board of directors to exercise policy oversight over the sale of products especially hazardous to a retailer's community, reputation, or brand, such as guns equipped with high capacity magazines.[1]

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[1] On August 26, 2015, Wal-Mart announced that due to decreased customer demand Wal-Mart would no longer sell any weapons that accept high-capacity ammunition magazines. This decision received widespread media coverage. In that coverage, Wal-Mart presented the decision as one of ordinary business. "Our merchandising decisions are driven largely by customer demand. In our everyday course of doing business, we are continually reviewing and adjusting our product assortment to meet our customers' needs." Clare O'Connor, *Wal-Mart to Stop Selling Guns Used in Mass Killings*, Forbes (Aug. 26, 2015, 1:10 PM), http://www.forbes.com/sites/clareoconnor/2015/08/26/walmart-to-stop-selling-assault-rifles-other-firearms-used-in-mass-killings. Wal-Mart also said, "There wasn't a whole lot of demand for those products so we replaced them with products we have seen customers coming into purchase it." Phil Wahba, *Wal-Mart to Stop Selling Assault Rifles*, Fortune (Aug. 26, 2015, 1:06 PM), http://fortune.com/2015/08/26/walmart-assault-rifles.

Notwithstanding this very positive development, Trinity has decided to persist in its board oversight proposal which, if the Third Circuit decision is reversed by this Court, it will present without change. Trinity is doing this for several reasons.

As shown below, one reason this question is important is because the Third Circuit's answer

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First, Trinity's proposal is not in any way confined to guns accepting high capacity magazines but concerns board oversight of the sale of all especially hazardous products *such as* high-capacity firearms.

Second, even as to such firearms, the durability of Wal-Mart's decision, depending as it does on customer demand, is unclear. In the past Wal-Mart has gone back and forth on firearms issues. *See* Josh Sanburn, *Walmart's On-Again, Off-Again Relationship with Guns*, Time (Jan. 11, 2013), http://business.time.com/2013/01/11/walmarts-on-again-off-again-relationship-with-guns.

Third, Wal-Mart's stated reason for the decision, which echoes the opening "give your customers what they want" quotation of the main opinion below, is contrary not only to other Wal-Mart merchandising decisions but more importantly to the thesis of Trinity's proposal that corporate social responsibility lies in the intersection of public and long-term corporate interest based on consideration of community impact, reputation, and brand value, as they all impact a company's prosperity and sustainability.

Fourth, the issue is recurring at Wal-Mart suggesting the need for board policy oversight rather than *ad hoc* decision making in the face of public pressure. While Trinity supports Wal-Mart's decision to ban the sale of Confederate flag marked products, to overturn its ban on the sale of the morning-after pill, to ban the sale of handguns and now guns accepting high capacity magazines, and to ban the sale of music with violent or sexually explicit lyrics, these matters are all of sufficient moment to warrant board policy oversight as called for in Trinity's proposal.

Finally, the decision below is hostile to, and a big setback for, shareholder proposals directed to corporate social responsibility, and because, as shown here, it is seriously wrong on the law and creates an important but erroneous precedent contrary to this Court's precedents and in conflict with the decisions of other Circuits, it deserves to be reversed by this Court.

precludes shareholders from using the federal, cost effective mechanism set forth in Rule 14a-8 to make shareholder proposals about important policy issues related to corporate social responsibility. The oversight of these policy issues is beyond question part of the board's responsibility, and Wal-Mart conceded below that this shareholder proposal could properly be brought before the annual meeting under Delaware law.

This question is worthy of the Court's review because the Third Circuit has ignored binding precedent of this Court regarding the proper deference to be given to an agency's interpretation of its own rules, and instead has given undue deference to informal "no-action letters" issued by Commission staff that are devoid of reasoning and in conflict with the Commission's own interpretive guidance. Moreover, it has reached a decision in conflict with decisions of the United States Courts of Appeal for the District of Columbia and the Second Circuit. Finally, it serves little practical purpose for this Court to await the development of law in other Circuits because these issues when litigated, and they are litigated infrequently, are likely to be litigated in the Third Circuit.

The second question presented is also important and worthy of this Court's review. There needs to be a line between the role of shareholders in deciding whether they want to approve the proposal on the merits and the role of agency staff or the judiciary in deciding that a proposal meets legal requirements for inclusion. The decision below strays to the wrong side of that line by faulting

supposed indefiniteness in the drafting when such faults, if they exist, go to the merit of the proposal and not to whether it is false or misleading under the Commission's proxy rules.

A. The Regulatory Framework

Section 14(a) of the 1934 Act, 15 U.S.C. § 78n (2012), empowers the SEC to regulate the solicitation of proxies "as necessary or appropriate in the public interest or for the protection of investors." SEC Rule 14a-8, 17 C.F.R. § 240.14a-8, broadly carries out this mandate by, with "few" exceptions, requiring the inclusion of shareholder proposals in a company's proxy materials. Pet. App. 162a. This right makes it possible for security holders "to have their proposals presented to the issuer's security holders at large and to have proxies with respect to such proposals solicited at little or no expense to the security holder[s]." *See* Proposed Amendments to Rule 14a-8, Exchange Act Release No. 19,135, 1982 WL 600869, at *2 (Oct. 24, 1982) ("1982 Release"). A company must include a proposal from an eligible shareholder in the company's proxy materials, unless the company proves that it is entitled to exclude a proposal under a specific exception. Pet. App. 167a. The scope of two of those exceptions are at issue here.

One exception (17 C.F.R. § 240.14a-8(i)(7)) provides that a proposal may be excluded if it "deals with a matter relating to the company's ordinary business operations." Pet. App. 170a. In its 1998 Adopting Release, the SEC interpreted this exception to apply to those business operations "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." Pet. App. 183a.

The SEC has also made clear in its interpretative guidance that the phrases "related to" and "ordinary business operations" should not be read so broadly as to exclude a proposal if it "focus[es] on sufficiently significant social policy issues . . . , because the proposal[ ] would transcend the day-to-day business matters," and thus be the proper subject of shareholder vote. Pet. App. 183.[2]

The other exception at issue here is Rule 14a-8(i)(3), which allows the exclusion of proposals that violate the SEC's proxy rules. Pet. App. 169a. This exception by its terms allows a proposal to be excluded if it is so vague or indefinite as to be materially false or misleading.

B. Trinity's Shareholder Proposal

Following the December 2012 mass killing at Sandy Hook Elementary School in Newtown, Connecticut, at the time the most recent in a series of mass killings at Columbine High School, Virginia Tech, Fort Hood, Tucson, the Sikh temple in Oak Creek, and Aurora, Trinity reviewed its investment portfolio and discovered that Wal-Mart, whose stock Trinity has long held, was a prominent marketer of

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[2] A proposal may also fall under the ordinary business exception if it "micro-manages" the company. Wal-Mart expressly disavowed this basis for exclusion in the briefing below.

the Bushmaster AR 15, the same model of assault rifle used by the mass killer in Newtown.

After conversations with Wal-Mart's investor relations and legal staff, Trinity decided that it should not put an *ad hoc* proposal before the Wal-Mart Board, but rather put forward a proposal for improved governance over an important corporate social responsibility topic for inclusion in Wal-Mart's proxy materials for its June 2014 annual meeting. Trinity proposed a resolution requesting oversight by the board of the company's policies respecting the sale of products that pose especial danger to the communities in which Wal-Mart operates, to its reputation or to its brand value. In particular, the proposal requested that the mandate or "charter" of the Compensation, Nominating and Governance Committee, or some other committee, be amended to add a new item addressing this topic.[3] The full text

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[3] The Charter of the Compensation, Nominating, and Governance Committee includes similar responsibilities, including that it "[d]evelop and recommend to the Board corporate governance principles applicable to the Company," "[r]eview and assess the quality and clarity of the corporate governance information provided to the Board and its committees by management and direct management as the Committee deems appropriate with respect to such materials," "[r]eview the Company's reputation with external constituencies and recommend to the Board any proposed changes to the Company's policies, procedures, and programs as a result of such review," and "[r]eview and advise management regarding social, community and sustainability initiatives of the Company." The full Committee charter can be found on Wal-Mart's corporate website, *available at* http://stock.walmart.com/investors/corporate-governance/board-

of Trinity's proposal and its statement in support is set forth in Appendix I.

Trinity made a proposal for board oversight over the sale of especially dangerous products first because it felt Wal-Mart would understand the connection between corporate social responsibility and the sale of products posing community, reputation or brand risk. Wal-Mart is not a "let the public be damned" kind of company. Wal-Mart founder Sam Walton decreed from the outset that Wal-Mart would be a family store and not sell "girlie magazines." Wal-Mart also does not sell music with a parental advisory label due to the violent or sexually explicit content of the lyrics. Just recently, Wal-Mart confirmed Trinity's expectation by being the first among major retailers to decide to withdraw from sale products bearing the image of the Confederate flag.

A second reason was Trinity's concern about Wal-Mart's inconsistency in the firearms area, which Trinity felt could be addressed by Board policy oversight. Wal-Mart does not sell handguns except in Alaska. So Trinity wanted to know why did Wal-Mart sell high capacity assault rifles, a weapon ill-suited for hunting and target sports, with which Trinity has no issue, and best suited for killing or injuring the greatest number of people in the shortest span of time. Despite many discussions with Wal-Mart's investor relations and legal staff (requests to speak directly with its management

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of-directors-committee-information/compensation-nominating-and-governance-committee/default.aspx.

have been refused), Trinity was never able to get an answer to that question apart from the entirely non-responsive statement that some customers strongly favored the sale of assault rifles and some strongly opposed it. As noted in footnote 1, Wal-Mart has recently decided to stop selling assault rifles. However, the stated rationale for this decision is decreased customer demand, so at the policy level this conflict remains unresolved.

Finally, while Trinity's concern for corporate social responsibility is rooted in its theological ethic of love of neighbor near and far, an ethic shared by many faiths and by many of no faith, to the best of Trinity's knowledge, many shareholders share Trinity's belief that corporate social responsibility as manifested in concern for community welfare, reputation and brand value serves the best interests of the company by advancing its sustainability, risk profile, and popular support. A company that harms the common good, even if done so legally to make a nice profit, is a damaged and at-risk company.

This principle is particularly important in the case of large multi-national retailers like Wal-Mart. These companies operate in multiple jurisdictions where the quality of the political system and its responsiveness to the general public is uneven and may be marred by corruption or undue control by moneyed interests. Retailers must exercise self-restraint to avoid damage to the public welfare and to protect the company's overall reputation and brand value that is so critical to their business. And the shareholders, as co-owners, must have the opportunity, using the mechanism set forth in Rule

14a-8, to request that the board oversee the formulation and implementation of policies reflecting that self-restraint.

C. The Proceedings Below

On April 1, 2014, Trinity commenced this litigation in the United States District Court of the District of Delaware and moved for a preliminary injunction to require Wal-Mart, a Delaware corporation, to include Trinity's shareholder proposal in its proxy materials for Wal-Mart's June 2014 annual meeting. As confirmed by the Third Circuit, the District Court had jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. § 78aa (2010).

Wal-Mart Is Granted No-Action Relief by the SEC's Division of Corporate Finance. Prior to Trinity's filing suit, Wal-Mart had sought "no-action" assurance from the Division of Corporate Finance (the "Division") of the SEC that if Wal-Mart did not include Trinity's proposal, the Division would not recommend an enforcement action against the company. On March 20, 2014, the Division granted no-action assurance in a two paragraph response (Pet. App. 160a) that found "some basis" to conclude that Wal-Mart was entitled to exclude the proposal under the SEC's regulations governing shareholder proposals.

The granting of no-action relief by the Division is an informal, non-final agency action that is not subject to judicial review under the Administrative Procedure Act. *But see Med. Comm. for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), *cert. granted*, 401 U.S. 973 (1971), *remanded for dismissal*

as moot, 404 U.S. 403 (1972). When notifying the shareholder who has made a proposal that a company's request for no-action relief has been granted, the Division suggests that if that shareholder is dissatisfied, then it should take the company to federal court. It does not encourage the shareholder to file an administrative appeal to the Commission, which in all events would not be formal agency action because the agency is steadfast in its view that the no-action process is entirely informal. *See* Division of Corporate Finance, *Informal Procedures Regarding Shareholder Proposals* (2011), *available at* https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8-informal-procedures.htm ("The receipt by the staff of such information, however, should not be construed as changing the staff's informal procedures and proxy review into a formal or adversarial procedure."). Rather, it advises that "[o]nly a court such as a U.S. District Court can decide whether a company is obligated to include shareholder proposals in its proxy materials." Accordingly, as others have done,[4] Trinity sought a definitive judicial ruling that exclusion of its proposal would be contrary to the SEC's applicable regulations governing shareholder proposals.

Wal-Mart argued in its submission to the Division that Trinity's proposal could be excluded

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[4] *See, e.g.*, *Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.*, 821 F. Supp. 877 (S.D.N.Y. 1993); *N.Y.C. Emps' Ret. Sys. v. Dole Food Co.*, 795 F. Supp. 95 (S.D.N.Y. 1992); *N.Y.C. Emps.' Ret. Sys. v. Am. Brands, Inc.*, 634 F. Supp. 1382 (S.D.N.Y. 1986); *Lovenheim v. Iroquois Brands, Ltd.*, 618 F. Supp. 554 (D.D.C. 1985).

under the ordinary business exception. In response Trinity explained: (1) that the proposal concerned governance over policy at the Board level and that under the Rule as interpreted by the SEC, such a governance proposal was not one related to ordinary business operations; and (2) even if the proposal did relate to ordinary business operations, it fell within the SEC's important policy issue exception to the ordinary business exception that the SEC established in a 1998 interpretative release issued after notice and comment. *See* Pet. App. 179a-185a. The Division's letter notifying Wal-Mart that the Division had granted Wal-Mart's request for no-action relief, attached as Appendix E, did not address either of these contentions.

The District Court Enjoins Wal-Mart from Excluding Trinity's Proposal. Trinity's suit against Wal-Mart to require the inclusion of its proposal was assigned to the Chief Judge of the District Court for the District of Delaware, the Honorable Leonard P. Stark. Trinity moved for a preliminary injunction, which Judge Stark denied. Judge Stark suggested at oral argument on the motion that while he might be unwilling to require Wal-Mart to include Trinity's proposal in proxy materials for the 2014 annual meeting, which had to be printed in less than a week, following full briefing and argument it might be possible to reach a final decision which if favorable to Trinity would be in time for the 2015 annual meeting. Pet. App. 126a-127a, 137a.

The case was briefed and argued on cross motions for summary judgment. The parties, and

the Court, agreed that the case involved only a question of law – the proper interpretation of Rule 14a-8(i)(7) and, because Wal-Mart had raised a new ground for exclusion not presented to the Division, Rule 14a-8(i)(3).

The District Court held that Wal-Mart was not entitled to exclude Trinity's proposal under either Rule 14a-8(i)(7) or Rule 14a-8(i)(3). It granted Trinity's request for declaratory relief and also enjoined Wal-Mart from distributing a proxy statement that did not include Trinity's proposal.

The District Court held that the proposal was "best viewed as dealing with matters that are not related to ordinary business operations." The Court reached this conclusion by following the SEC's guidance on the purpose and interpretation of the ordinary business exception. The Court specifically held that the broad reading of the term "related to" advocated by Wal-Mart was "inconsistent with" interpretative guidance of the SEC. Pet. App. 109a-110a. Under that interpretive guidance the proposal should be viewed as dealing not with a fundamental management task but with Board policy oversight tasks, "which are tasks the Board's Committee, 'subject to direct shareholder oversight,' can and already does perform." Pet. App. 106a.

The Court also held that even if its proposal was related to ordinary business operations, it fell within the exception to the ordinary business exception established under a 1998 SEC interpretative release for proposals that raise significant social or corporate policy issues. Quoting

the SEC's 1998 interpretative release, the Court found that Trinity's proposal "focus[es] on sufficiently significant social policy issues" as to not be excludable, because the Proposal "transcend[s] the day-to-day business matters and raise[s] policy issues so significant that it would be appropriate for a shareholder vote." Pet. App. 107a, 183a. The Court wrote that the significant policy issues on which the proposal focused included the social and community impact of Wal-Mart's sale of weapons with high capacity magazines and the potential impact of such sales on its reputation.

Finally, the District Court rejected Wal-Mart's argument under Rule 14a-8(i)(3)—not raised in its no-action request—that the proposal was impermissibly vague and ambiguous. In the Court's view, should shareholders adopt the Proposal, the Board would have no difficulty implementing it because the proposal was "carefully drafted" to leave policy and implementation details to the Committee, did not dictate any particular outcome and did not seek to micromanage Wal-Mart's day-to-day business. *See* Pet. App. 108a.

The Third Circuit Erroneously Reverses the District Court. Following the District Court decision, Trinity resubmitted its proposal for inclusion in the materials for the 2015 Annual Meeting. Wal-Mart appealed the District Court's grant of declaratory and injunctive relief to the Third Circuit. The case was expedited on consent of all parties. Argument was heard on April 8, 2015 and the Court of Appeals reversed in an order (with opinion to follow) on April 14, shortly before the

deadline by which the proxy materials had to be printed. The Third Circuit's opinion was issued on July 6, 2015.

This litigation drew forth a variety of judicial views in the Third Circuit, but the bottom-line result has been to substantially restrict shareholders' ability to submit social or corporate responsibility proposals. Rather than following the applicable interpretative guidance as set forth in the 1998 Adopting Release from the SEC, two Judges in the Third Circuit, including the author of the "main" opinion, Judge Thomas L. Ambro, and over the dissent of Judge Patty Shwartz, put forth a new, judicially created interpretation of the applicable SEC regulation that adds, at least in the case of retailers, a new hurdle for corporate social responsibility proposals to overcome before they can find their way to a proxy statement for consideration by its shareholders. The main opinion does not quote or discuss the specific guidance in the 1998 Adopting Release – the most recent guidance of the SEC concerning the ordinary business exception – on which Judge Stark had relied.

The new hurdle is this: not only must the proposal raise an issue of corporate or public policy significant enough for a shareholder vote, a requirement in the SEC interpretive guidance that these Judges found to be met by the Trinity proposal, it must also not be entwined with a "core business" function. Pet. App. 61a. The Third Circuit majority held that in the case of a retailer, this new hurdle was not met even by an otherwise proper social-

policy proposal because deciding what to sell is a core business function of a retailer.

These Judges found their line of reasoning to be supported by inference from a series of no-action letters issued by the Division suggesting to the Court a distinction between proposals about what a manufacturer can manufacture, which must be included, and what a retailer can sell, which can be excluded. In doing so, the main opinion acknowledged that by "extrapolating an interpretive rationale from a line of no-action letters," it risked setting a legal precedent based on a rationale that the SEC never in fact advocated. Pet. App. 68a n.14.

Trinity contends that this reliance on staff no-action determinations was error. The distinction between manufacturers and retailers discerned by the Court has never been suggested by the Commission itself, and the no-action letters are informal, discretionary and devoid of any reasoning. The Third Circuit felt that a similarity of result in several letters added weight, but the District Court felt that none of these letters dealt with the kind of board oversight proposal Trinity was making. In all events, as Judge Shwartz concluded, the manufacturer-retailer distinction conflicts with the "plain text" of the Commission's interpretive guidance discussed above. Pet. App. 75a ("In my view . . . [the majority's] reading is inconsistent with the plain text of the 1998 Adopting Release.").

Moreover, the "core business function" test and manufacturer/retailer distinction are unworkable and make no policy sense. Why should

shareholders be limited to policy proposals about peripheral matters? When does a business function become "core"? How is it that a shareholder can ask the other shareholders of a manufacturing company to direct the company to commit *hari-kari* by terminating its manufacture of objectionable goods and go out of business but cannot ask the shareholders of a retailer to request that such retailer exercise modest self-restraint in what it sells for the sake of its long-term interests and the common good?

Two Third Circuit Judges, not including Judge Ambro, also faulted Trinity's proposal for vagueness and ambiguity and would permit its exclusion on that ground. Trinity, however, was proposing an amendment to one of Wal-Mart's corporate governance documents and absent real incomprehensibility, objections to clarity go to the merits of the proposed amendment and not to whether it should be included. In our Constitution there are phrases that are not particularly clear but that was not a reason why the Constitution should not have been submitted to the States for ratification. Absent incomprehensibility, whether the governance language proposed by a proposal is unduly vague is a merits issue for the shareholders to decide.

Finally, Judge Shwartz, was of the opinion that Trinity should have submitted an *ad hoc* proposal limited to Wal-Mart's sale of assault rifles because only that issue, and not corporate reputation or brand value, was a matter of social concern. This was error because, as the other two members of the

Third Circuit panel pointed out, the important policy issues that can be a proper subject for shareholder vote under SEC guidance are not limited to matters of social concern.

Trinity respectfully submits that what the Third Circuit majority has effectively done here is to take over the job of being an SEC Commissioner, indeed the job of being the entire Commission. Indeed, they wrote that if the SEC doesn't like their interpretation, then they can overrule it by issuing new interpretative guidance specifically overruling the Court's interpretation. Pet. App. 68a n.14.

That is not the way it is supposed to work. This Court has made plain that the role of the judiciary in interpreting an agency regulation is to follow the interpretation of the agency that wrote that regulation so long as it is not "plainly erroneous or inconsistent" with the regulation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Key to the result reached by the Third Circuit majority is its view that the subject matter of a proposal is its "ultimate consequence" (Pet. App. 51a) and its broad reading of the phrase "related to" to mean "bears on." Pet. App. 57a. As the District Court observed, this broad reading of the phrase "related to" causes the ordinary business exception to consume the rule because many if not most proposals "bear on" and have ultimate consequences for day-to-day business.

The SEC, which requires the inclusion of proposals that bear on ordinary business, gives this phrase a more narrow reading that looks to the

substance of the proposal and asks whether it concerns ordinary business or an important social or corporate policy question worthy of a shareholder vote. For the same reason, the position that the subject matter of a proposal is its "ultimate consequence" is contrary to the Commission's guidance. The Third Circuit lacked any latitude to depart from the Commission's reasonable, purposive reading of the phrases "subject matter" and "related to" under this Court's decision in *Auer* and *Fed. Express v. Holowecki*, 552 U.S. 389 (2008).

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because a shareholder's ability to submit a proposal for inclusion in a corporation's proxy statement is an important right under federal law that the Third Circuit has severely curtailed. The decision below is in direct conflict with SEC interpretive guidance, and thus with this Court's decision in *Auer* and *Holowecki*, and in conflict with decisions of the Second and D.C. Circuits concerning the weight to be given to staff no-action grants and with decisions of the D.C. Circuit concerning the scope of the ordinary business exception and the right afforded shareholders under federal law to present proposals. Given the rationale of Judge Ambro's opinion, the decision below creates is a nearly absolute bar to corporate social responsibility shareholder proposals involving retailers and, if read broadly, to corporate social responsibility proposals generally. Given the

prominence of Delaware as a state of incorporation, it automatically has nationwide impact.[5]

I. THE QUESTIONS PRESENTED ARE IMPORTANT QUESTIONS OF FEDERAL LAW

Federal law has long served as a foundation for shareholder participation in corporate governance. Section 14(a) of the Securities Exchange Act "stemmed from the congressional belief that '[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange.'" *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964) (quoting H.R. Rep. No. 73-1383, at 13); *see also TSC Indus. v. Northway*, 426 U.S. 438, 444 (1976) (Section 14(a) "was intended to promote 'the free exercise of the voting rights of stockholders' by ensuring that proxies would be solicited with 'explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought'"). As a result of the "increased dispersion" of ownership in public companies, the proxy solicitation process – rather than the annual shareholder

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[5] More than 50% of all publicly traded companies in the United States and 64% of Fortune 500 companies are incorporated in Delaware. *See* Delaware Division of Corporations, *About Agency,* http://corp.delaware.gov/aboutagency.shtml (last visited Sept. 8, 2015). As the court with appellate jurisdiction over the District Court of Delaware, the Third Circuit has disproportionate power to influence the laws that govern a majority of U.S. corporations. This is particularly true since suits to enforce federal proxy rights against Delaware corporations are likely matters of general jurisdiction which can only be brought in Delaware or the corporation's home district.

meeting – soon became the primary method for exercising that suffrage. 1982 Release, 1982 WL 600869, at *2.

Since 1942, the SEC has provided under Rule 14a-8 (and its predecessor rule) that stockholders of public companies have a "right," with certain limited procedural and substantive limitations, "to have their proposals presented to the issuer's security holders at large and to have proxies with respect to such proposals solicited at little or no expense to the security holders." *Id.* Rule 14a-8 thus plays a critical role in balancing the influence of companies and shareholders by establishing the limited exceptions to inclusion of shareholder proposals on proxy statements. If federal law bars a proposal due to its subject matter, then as a practical matter that subject matter is one as to which the corporation may safely ignore the views of its shareholders.

In this area of important federal law, this case presents the important question, with constitutional overtones, of the proper division of responsibility between the judiciary, the Commission, its staff, and the shareholders who would be asked to consider the proposal. The line between the judiciary and the Commission is put in issue by the failure of the Third Circuit to give proper deference to the SEC's 1998 Adopting Release. The line between the judiciary and the Commission on the one hand, and the SEC staff on the other, is put in issue by the Third Circuit's undue deference to what it called a "body" of SEC staff no-action letters. The line between the governmental actors and the shareholders of a company is put in issue by the Third Circuit's

willingness to exclude a proposal because of an issue that went to its merit – the precision of its drafting.

Important Impact on Corporate Social Responsibility. The SEC has issued guidance affording shareholders an increasing role. *See generally* Suneela Jain, Barbara Blackford, Donna Dabney, and James Small III, *What is the Optimal Balance in the Relative Roles of Management, Directors, and Investors in the Governance of Public Corporations?* The Conference Board Governance Center, White Paper (2014) (describing the expanded issues placed in the purview of shareholders, increased disclosure requirements, and enhanced board and management accountability). Since 1976, the SEC has recognized the expanding importance of social policy proposals in light of "experience" and "changing societal views." 1976 Adopting Release, No. 9,344, 1976 WL 160411, at *2 (July 7, 1976).

The result has been an increase in corporate social responsibility shareholder proposals. During the 2015 proxy season, there were 352 shareholder proposals relating to governance and shareholder rights and 324 proposals on environmental and social issues, with the latter category comprising more than 45% of over 1,000 shareholder proposals submitted in 2015. *See* Gibson Dunn Client Alert, *Shareholder Proposal Developments During the 2015 Proxy Season*, at 2 (July 15, 2015), http://www.gibsondunn.com/publications/Documents/Shareholder-Proposal-Developments-During-the-2015-Proxy-Season.pdf; ISS Governance Insights Newsletter (July 31, 2015).

In implicit criticism of social policy shareholder proposals, Judge Ambro's opinion cites what is said to be their uniform lack of success over board opposition, (Pet. App. 35a, citing James Copland, *Getting the Politics Out of Proxy Season*, Wall St. J. (Apr. 23, 2015), at A11). Nonetheless, social policy proposals have been increasingly successful, with seven proposals receiving majority support from investors in 2014, up from three in 2013. *Compare* Sullivan & Cromwell LLP, *2015 Proxy Season Review*, 1 (2015), *with* Sullivan & Cromwell LLP, *2014 Proxy Season Review*, 16 (2014).

Even when unsuccessful, shareholder proposals, and in particular social policy proposals, foster dialogue and motivate corporations to act to protect brand image and identity. Some see this as unfortunate. *See* James Copland, *Special Report: Shareholder Activism by Socially Responsible Investors*, Proxy Monitor (2014) (noting frequency of social policy proposals because "risk-averse corporate managements, sensitive to brand perception, have—despite investor opposition—reacted to such activism by changing practices").[6] On the other hand, one of the most influential consultants to institutional investors in this area is critical of a company that does not give serious and transparent consideration to a proposal that receives substantial shareholder

[6] A testament to the significance of the scope and meaning of the ordinary business exception can be found in the fact that non-parties parties filed seven amicus briefs in support of (four) or in opposition to (three) Wal-Mart's appeal to the Third Circuit.

support.[7] Moreover, Rule 14a-8(i)(12) allows limited resubmission of a proposal made in the last five years receiving more that 3 percent support and unlimited resubmission of a proposal receiving more than 10 percent support. Pet. App. 171a-172a. Thus the SEC recognizes that winning shareholder support can be a multi-year process.

As the statistics show, corporate governance and social responsibility are among the most important subject matters for shareholder influence. Social policy proposals have been used to spur action on important and diverse subjects such as the environment, sustainability, discrimination, and human rights, each of which can impact how a company conducts its day-to-day activities. One such example is the use of shareholder proposals to promote a boycott of doing business in apartheid South Africa, which has been widely credited as resulting in the fall of that regime.[8]

Wal-Mart has been influenced by corporate social responsibility proposals. In 2012, a fire swept through the Tazreen Fashions factory in Dhaka, Bangladesh, killing 112 workers who were making clothes for retailers like Wal-Mart and Sears.

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[7] ISS, *2015 U.S. Summary Proxy Voting Guidelines: 2015 Benchmark Policy Recommendations*, at 11 (Mar. 4, 2014), https://www.issgovernance.com/file/policy/1_2015-us-summary-voting-guidelines-updated.pdf.

[8] Adam M. Kanzer, *Putting Human Rights on the Agenda: The Use of Shareholder Proposals to Address Corporate Human Rights Performance*, at 8 (2009), https://www.domini.com/sites/default/files/Finance_for_a_Better_World_Kanzer.pdf.

Encouraged by a shareholder proposal that ultimately was not approved, Wal-Mart implemented a global approach to safety as well as heightened precautions concerning fire-related risks in Bangladesh.[9]

Trinity too engaged in dialogue with Wal-Mart both before and after making its proposal and would have been pleased to reach a resolution that would have obviated the need for its proposal. However without the ability to make a proposal should those discussions fail, those discussions have little hope of causing a change in management's thinking.

Important Impact on Separation of Judicial, Administrative and Shareholder Roles. The scope and latitude given for corporate social responsibility proposals is of course fair game for policy debate that might cause the SEC to change the wording of Rule 14a-8 and/or its interpretation of that wording. The Commission has made changes in the past.

Whether to make such a change, however, is a decision for the SEC and not for the judiciary unless the Commission has failed to comply with its statutory obligations. Here, the only suggestion of such failure to comply has been made by Judge Shwartz against the majority opinion and not against the Commission. She would have held not only that the majority's interpretation of Rule 14a-

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[9] Wal-Mart Stores Inc., *Responsible Sourcing in Bangladesh*, http://corporate.walmart.com/global-responsibility/ethical-sourcing/promoting-responsible-sourcing-in-bangladesh (last visited Sept. 8, 2015).

8(i)(7) was in conflict with the "plain text" of the 1998 Adopting Release but that it was also inconsistent with the purpose of the Exchange Act to ensure "fair corporate suffrage." Pet. App. 75a, 77a. Trinity agrees.

The importance of this case is not however limited to its serious curtailment of corporate social responsibility proposals. As already explained, this case presents important separation of duties issues as between the three governmental actors involved (the judiciary, the Commission and Commission staff) as well as between those governmental actors and the shareholders who are the co-owners of the corporation. These issues have Separation of Powers, and in the case of the line between government regulation and shareholder speech, First Amendment overtones. They are also of great practical importance because they determine legal advice about the chances of overturning an agency's interpretation of its own regulations or of challenging agency staff determinations that are neither rule making nor adjudication.

Accordingly, the importance of the Third Circuit's decision here is multifold and great and there can be no real issue that this case meets the importance prong of this Court's criteria for granting a writ of certiorari. *See* Sup. Ct. R. 10.

II. THE IMPORTANT FEDERAL QUESTIONS PRESENTED ARE QUESTIONS THIS COURT OUGHT TO DECIDE

A. The petition squarely presents the question of *Auer*'s continuing validity

As Judge Shwartz found, the majority in the decision below conflicts with the "plain text" of the 1998 Adopting Release. The majority made no effort to refute this conclusion, and it is impossible to do so. Thus, the decision below squarely presents the question of the deference to be given to any agency's interpretation of its own regulations and the continuing validity of *Auer v. Robbins*, 519 U.S. 452, 461 (1997), which has publicly been called into question by three Justices. In *Auer*, the Court held that courts must defer to an agency's interpretation of its own regulations, unless such interpretation is "plainly erroneous" or "inconsistent with the regulation."

Judge Shwartz was correct in concluding that the decision below is in direct conflict with the SEC 's 1998 Adopting Release, its most recent and authoritative statement on the meaning of the ordinary business exception adopted after notice and comment. Notwithstanding the SEC's explanation that the exception is concerned with those routine, day-to-day matters that shareholders could not practically weigh in on – such as production quality and quantity or retention of suppliers – the Court of Appeals interpreted the exception to apply to any proposal whose "ultimate consequence" "bears on"

the company's core day-to day business. Pet. App. 51a, 57a. Whereas the 1998 Adopting Release makes clear that a proposal focusing on significant policy issues appropriate for a shareholder vote transcends ordinary business even if it might impact that business, the majority adds a novel requirement that the ordinary business impacted not be "core" ordinary business and on that basis establishes the rule that proposals having a potential impact on what to manufacture are not excludable but those having a potential impact on what to sell are.

This is not a case where there has been a misapplication of a correctly stated rule of law which under Supreme Court Rule 10 is generally not a case appropriate for certiorari review. While in a footnote the majority cites its obligation under this Court's decision in *Holowecki*, 522 U.S. at 397 (Pet. App. 39a n.9) to defer to reasonable agency interpretations of their rules, and to give them more deference than statutory interpretations, the majority opinion fails to adopt this Court's further guidance in *Holowecki* that "[u]nder *Auer*, we accept the agency's position unless it is 'plainly erroneous or inconsistent with the regulation.'" Rather the majority opinion takes the position that it is a "core business" of the judiciary to interpret agency regulations. Most importantly, the opinion does not address Judge Shwartz's view that the majority's interpretation is inconsistent with the "plain text" of the 1998 Adopting Release. While the majority considers it "good news" that it doesn't have to do so because Judge Shwartz comes to the exclusion result on

different grounds (Pet. App. 61a), as we have shown above the majority could not have done so.

Also the outcomes advocated in the opinions of Judges Ambro and Shwartz are as a practical matter very different. Trinity could have submitted a new proposal meeting all of Judge Shwartz objections. Judge Ambro's opinion creates a total bar. The majority's failure to address Judge Shwartz's views is telling.

This case is thus a sound vehicle for addressing the question raised by several Justices of *Auer*'s continuing validity. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210-11, 1213, 1225 (2015) (opinions of Alito, J., concurring, Thomas, J., concurring, Scalia, J., concurring); *Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338-39 (2013) (opinion of Roberts, J., with whom Justice Alito joins, concurring and Scalia, J, concurring in part and dissenting in part). Trinity recognizes that it is germane to consider in that regard the chances that the *Auer* issue will have to be reached. With regard to the issue of supposed lack of precision in the proposal's drafting that two Third Circuit Judges felt provided grounds for exclusion, it is relevant that Wal-Mart did not have enough confidence in this position to present it in its no-action request to Division staff. Also it seems a real stretch to think the drafting weakness identified by the Third Circuit involving common words like "many", "offensive" and "values" could render a proposal false and misleading.

There is also the question of whether the *Auer* issue would not have to be reached because the case could be decided based on *Chevron* deference. *Chevron* deference requires silence or ambiguity in the statutory text, operating somewhat like a parol evidence rule, whereas *Auer* creates a strong, nearly dispositive, presumption in favor of the agency interpretation. While Trinity believes it could prevail under *Chevron* deference, it is not completely certain that the regulation here would be viewed by all as sufficiently ambiguous or silent to warrant *Chevron* deference. More importantly, in the nature of things, it is unlikely that there will ever be a clear case where an agency interpretation could be sustained under *Auer* but not under *Chevron*. If the this Court, contrary to Trinity's view, desires lower courts to go through the *Chevron* analysis rather than take the *Auer* shortcut, it should just use this case to overrule *Auer*.

B. The Third Circuit decision below conflicts with decisions of the Second and D.C. Circuits regarding the weight to be given to staff no-action letters

While this Court's precedents have established for the time being the proper deference to be afforded an agency's interpretation of its own regulations, the Court has yet to address the level of deference afforded to the outcomes of no-action letters of the SEC's Division of Corporate Finance. Each year the Division staff is tasked with responding to hundreds of requests for no-action relief, which comes in the form of brief letters stating whether the Division will

recommend enforcement action if the proposal is omitted. These letters reflect the Division's "informal views regarding the application of Rule 14a-8," and its "determinations do not and cannot adjudicate the merits of a company's position with respect to a proposal." Staff Legal Bulletin No. 14 (CF), 2001 WL 34886112, at *5 (July 13, 2001). When granting no-action relief, they typically conclude no more than that there is "some basis" for the requester's view and reach conflicting results depending on the quality of argument in the requesting letter. Pet. App. 199a-200a.

The Second and D.C. Circuits have adopted the position that "SEC no-action letters constitute neither agency rule-making nor adjudication and thus are entitled to no deference beyond whatever persuasive value they might have." *Gryl ex rel. Shire Pharms. Grp. PLC v. Shire Pharms. Grp. PLC*, 298 F.3d 136, 145 (2d Cir. 2002); *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 427 n.19 (D.C. Cir. 2002)(Ginsberg, J.). Departing from this logical approach, the Third Circuit majority opinion concluded that while the no-action letter received by Wal-Mart had no persuasive value, it would give the "body" of staff no-action letters "careful consideration." Pet. App. 52a n.11. The Court went on to rely on 24 separate no-action letters in holding that Trinity's proposal may be excluded because it bore on what should be sold rather than on what should be manufactured. The Court noted it was extrapolating an interpretive rationale from letters that admittedly provide only a cursory explanation.

Trinity's position is that these letters do not address the differences between Trinity's proposal and the marketing proposals addressed by these letters and that in any event even a large number of staff determinations of no intent to seek enforcement due to "some basis" for the company's exclusion decision are not entitled to any deference because they are not decisions on the merits and do not grapple with the issues at hand.

The Court's clarification of the deference to no-action letters would provide certainty to corporations, shareholders, and the corporate bar by resolving the conflict presented by the disparate standards crafted by the Second and D.C. Circuits, on the one hand, and the Third Circuit, on the other.

C. The Third Circuit decision below conflicts with decisions of the Court of Appeals for the District of Columbia

The Third Circuit decision is also in conflict with decisions of the District of Columbia Circuit concerning social shareholder policy proposals and the extent to which they may be excluded as matters of "ordinary business."

In 1970, the D.C. Circuit decided *Medical Committee for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), which involved a shareholder proposal requesting that the board of directors of Dow Chemical Company consider whether to amend the company's charter to state that the company would not sell napalm without reasonable assurance that it would not be used on or against human beings. *Id.* at 662. The question presented to the

Court of Appeals included whether the SEC's approval of the issuance of a no-action letter in connection with Dow's exclusion of the proposal was reviewable by the Court of Appeals under the Administrative Procedures Act. The court answered in the affirmative, saying that the grant of no-action relief was "extremely dubious" and remanding to the SEC to afford the agency an opportunity to reconsider and provide the reasoning for whatever decision it might reach. This Court granted certiorari but did not decide the case on the merits because Dow elected to include the proposal at issue in its proxy materials.

Medical Committee was cited by Judge Shwartz in her dissent based on the opinion's conclusion that the social policy proposal fit squarely within the spirit of shareholder democracy promoted by Section 14(a). 432 F.2d at 681. As Judge Tamm of the D.C. Circuit explained, the court was aware of no justification for management to prevent shareholders "who wish to present to their co-owners . . . the question of whether they wish to have their assets used in a manner which they believe to be more socially responsible" from doing so. *Id.*

The Third Circuit's decision creates such an obstacle because it creates a new hurdle for social policy proposals. Judge Shwartz correctly noted that the majority opinion had practically speaking given companies "carte blanche" to exclude social policy proposals relating to "core business operations."

These decisions also conflict for another reason. The D.C Circuit respected the role of the

SEC by remanding for its views whereas the Third Circuit majority proceeded unilaterally and in conflict with the 1998 Adopting Release without even requesting the views of the SEC.

The Third Circuit decision also conflicts with *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416 (D.C. Cir. 1992) (Ginsburg, J.), which involved among other things a proposal to fix a target date for the elimination of ozone depleting CFC's from products marketed and distributed by Du Pont. Du Pont did not contest the need to eliminate CFC's as soon as possible. The court considered the fixing of a specific target date to be ordinary business but also held that "requests for special reports or committee studies . . . are not inevitably excludable" as long as they "implicate[ ] significant social policy issues." *Id.* at 429. The Third Circuit by contrast adds an additional blocking requirement that the social policy issues not implicate "core" business and would bar a report or study on marketing policies issues because they implicate core business functions.

D. Unless decided now, these questions will likely evade review by this Court.

Federal questions relating to shareholder proposals rarely reach this Court, because a shareholder with limited resources is unlikely to face off against a large corporation by challenging a company's decision to exclude its proposal in the first place. *See* Sidley Austin Corporate Governance Update, *No-Action Relief Regarding Conflicting Proposals to Be Unavailable During 2015 Proxy Season*, at 3 (Jan. 21, 2015),

http://www.sidley.com/~/media/Files/NewsInsights/News/2015/01/NoAction%20Relief%20Regarding%20Conflicting%20Proposals%20__/Files/View%20Update%20in%20PDF%20Format/FileAttachment/20150121%20Corpprate%20Governance%20Update.

Even if a shareholder is up to the task of bringing a challenge, there is a narrow time frame in which the shareholder and the courts may act. Since SEC no-action relief deters many shareholders from pursuing their proposals, a company will often seek no-action relief from the SEC to avoid litigation. The company may further use Rule 14a-8(j), Pet. App. 172a-173a, which requires a company to file its request for no-action relief only 80 days prior to filing its proxy, to its advantage by putting off its request to the Division until the last possible moment thus limiting shareholders' ability to respond. Here, Wal-Mart submitted its no-action request to the Division on January 30, 2014—just 83 days prior to the filing of its proxy materials on April 23, 2014. Pet. App. 23a, 91a. Not wanting to expend scarce resources or burden the courts with potentially unnecessary litigation, a rational shareholder will wait to see whether the SEC grants no-action relief before seeking a judgment from a federal court as to whether its proposal may be excluded.

Even after the company files its request for no-action relief, the shareholder may still be subject to further delay from the high volume of requests the SEC receives from likeminded companies that purposefully wait until the last minute to seek relief from inclusion of a shareholder proposal. Indeed, SEC staff must review hundreds of no-action

requests during the few-months-long rush of proxy season. During the 2015 proxy season alone, companies submitted 318 no-action requests. *See* Gibson Dunn Client Alert, *Shareholder Proposal Developments During the 2015 Proxy Season*, at 2 (July 15, 2015), http://www.gibsondunn.com/publications/Documents/Shareholder-Proposal-Developments-During-the-2015-Proxy-Season.pdf. As a result, shareholders will often receive notification of the SEC's decision mere weeks before the filing deadline.

In practice, the actual time in which a district court has to consider and adjudicate a challenge to no-action relief is far less than 80 days—the shareholder has only from the issuance of the SEC's no-action letter to the proxy filing deadline to seek preliminary injunctive relief from the judiciary. While, as here, the action may be finally resolved after the proxy statement has been mailed without the proposal, failure to file suit between the grant of no-action relief by the SEC and the mailing deadline could be prejudicial to invoking doctrines that keep a proceeding timely commenced alive against claims of mootness. Here, the SEC issued its no-action letter on March 20, 2014, less than a month before the printing deadline for Wal-Mart's proxy, and Trinity filed suit before the Delaware District Court soon after on April 1, 2014. The District Court recognized that "the short duration of the proxy season makes full litigation on the merits of a shareholder proposal before an annual meeting close to impossible." Pet. App. 94a.

The Third Circuit decision below is also likely to have a chilling effect on shareholder corporate social responsibility proposals for Delaware Corporations. For example, in this case personal jurisdiction over Wal-Mart is likely a matter of general rather than specific jurisdiction requiring suit to be brought in either the Western District of Arkansas or the District of Delaware, and for Trinity and many other shareholders the Western District of Arkansas is not a particularly convenient choice of forum. Thus as a practical matter Delaware companies will have under the Third Circuit's judicially created test what Judge Shwartz called "carte blanche" to eliminate corporate social responsibility shareholder proposals that bear on or may ultimately impact core business decisions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 11, 2015

APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 14-4764

TRINITY WALL STREET

v.

WAL-MART STORES, INC.,
Appellant

Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 1-14-cv-00405)
District Judge: Honorable Leonard P. Stark

Present: AMBRO, VANASKIE, and SHWARTZ, Circuit Judges

ORDER

Appellant Wal-Mart Stores, Inc. filed a notice of appeal on December 16, 2014 from both the District Court's December 8, 2014 order (1) granting Appellee Trinity Wall Street's motion for summary judgment with respect to Count I of the Verified Amended Complaint and (2) entering a permanent injunction

against Wal-Mart from excluding Trinity's Proposal from its 2015 proxy materials.

It is hereby ORDERED that:

The District Court order entered on December 8, 2014 granting Appellee's motion for summary judgment with respect to Count I of the Verified Amended Complaint is reversed and the permanent injunction it entered is vacated.[1]

Consequently, Wal-Mart may exclude Trinity's Proposal from its 2015 proxy materials. The Court will issue an Opinion in this matter at a later time. The mandate will issue forthwith.

By the Court,

s/ Thomas L. Ambro,
Circuit Judge

Dated: April 14, 2015

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[1] Because the District Court's entry of judgment against Trinity on Count II of the Verified Amended Complaint is not before us, we do not address the Court's disposition of that Count

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APPENDIX B

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-4764

TRINITY WALL STREET

v.

WAL-MART STORES, INC.,
Appellant

Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 1-14-cv-00405)
District Chief Judge: Honorable Leonard P. Stark

Argued April 8, 2015

Before: AMBRO, VANASKIE,
and SHWARTZ, Circuit Judges

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OPINION OF THE COURT

AMBRO, Circuit Judge

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I. INTRODUCTION

"[T]he secret of successful retailing is to give your customers what they want." Sam Walton, SAM WALTON: MADE IN AMERICA 173 (1993). This case involves one shareholder's attempt to affect how Wal-Mart goes about doing that.

Appellant Wal-Mart Stores, Inc., the world's largest retailer, and one of its shareholders, Appellee Trinity Wall Street—an Episcopal parish headquartered in New York City that owns Wal-Mart stock—are locked in a heated dispute. It stems from Wal-Mart's rejection of Trinity's request to include its shareholder proposal in Wal-Mart's proxy materials for shareholder consideration.

Trinity's proposal, while linked to Wal-Mart's sale of high-capacity firearms (guns that can accept more than ten rounds of ammunition) at about one-third of its 3,000 stores, is nonetheless broad. It asks Wal-Mart's Board of Directors to develop and implement standards for management to use in deciding whether to sell a product that (1) "especially endangers public safety"; (2) "has the substantial potential to impair the reputation of Wal-Mart"; and/or (3) "would reasonably be considered by many offensive to the family and community values integral to the Company's promotion of its brand." Standing in Trinity's way, among other things, is a rule of the Securities and Exchange Commission ("SEC" or "Commission"), known as the "ordinary business" exclusion. 17 C.F.R. § 240.14a-8(i)(7) ("Rule 14a-8(i)(7)"). As its name suggests, the rule lets a company omit a shareholder proposal from its

proxy materials if the proposal relates to its ordinary business operations.

Wal-Mart obtained what is known as a "no-action letter" from the staff of the SEC's Division of Corporate Finance (the "Corp. Fin. staff" or "staff"), thus signaling that there would be no recommendation of an enforcement action against the company if it omitted the proposal from its proxy materials. *See Wal-Mart Stores, Inc.*, SEC No-Action Letter, 2014 WL 409085, at *1 (Mar. 20, 2014). Trinity thereafter filed suit in federal court, seeking to enjoin Wal-Mart's exclusion of the proposal. *See Trinity Wall Street v. Wal-Mart Stores, Inc.*, --- F. Supp. 3d ----, No. 14-405-LPS, 2014 WL 6790928 (D. Del. Nov. 26, 2014). The core of the dispute is whether the proposal was excludable under the ordinary business exclusion. Although the District Court initially denied Trinity's request, it handed the church a victory on the merits some seven months later by holding that, because the proposal concerned the company's Board (rather than its management) and focused principally on governance (rather than how Wal-Mart decides what to sell), it was outside Wal-Mart's ordinary business operations. Wal-Mart appeals, seeking a ruling that it could exclude Trinity's proposal from its 2015 proxy materials and did not err in excluding the proposal from its 2014 proxy materials.

Stripped to its essence, Trinity's proposal—although styled as promoting improved governance—goes to the heart of Wal-Mart's business: what it sells on its shelves. For the reasons that follow, we

hold that it is excludable under Rule 14a-8(i)(7) and reverse the ruling of the District Court.[1]

II. FACTS & PROCEDURAL HISTORY

Public companies publish and circulate a proxy statement in advance of their annual shareholders' meeting. The statement "includes information about items or initiatives on which the shareholders are asked to vote[.]" *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723, 727 (S.D. Tex. 2010) (citation omitted). It can also include shareholder proposals—a device that allows shareholders to ask for a vote on company matters. Predictably, companies don't easily surrender control of their proxy statement and often lean on an SEC rule to justify excluding a given shareholder proposal. But doing so can trigger a protracted legal battle that escalates from an exchange of views before the SEC to a federal lawsuit. This is one such case.

A. Trinity Objects to Wal-Mart's Sale of Assault Rifles.

Trinity's roots extend back centuries. Its St. Paul's Chapel is the oldest public building in continuous use in New York City and is where George Washington worshipped after his first inauguration. In 1705, the church was the beneficiary of the lower Manhattan farm of Queen Anne of England, instantly making it very wealthy.

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[1] Because of the time-sensitive nature of this appeal, we were unable to give a full rationale for a ruling on the date we entered judgment in favor of Wal-Mart. This opinion does so.

The story isn't much different today. Trinity continues to be one of the wealthiest religious institutions in the United States, with a balance sheet of over $800 million in assets and real estate valued at approximately $3 billion. See Letter from Trinity Wall Street CFO Accompanying Trinity's 2013 Financial Statements (undated), available at https:www.trinitywallstreet.org/sites/default/files.miscellaneous/LetterfromtheCFOaccompanyingthe2013FinancialStatements.pdf. Its strong financial footing, according to Trinity, empowers it to "pursue a mission of good works beyond the reach of other religious institutions." Trinity Br. 16. Part of that mission is to reduce violence in society.

Alarmed by the spate of mass murders in America, in particular the shooting at Sandy Hook Elementary School in December 2012, Trinity resolved to use its investment portfolio to address the ease of access to rifles equipped with high-capacity magazines (the weapon of choice of the Sandy Hook shooter and other mass murderers). Its principal focus was Wal-Mart.

During its review of Wal-Mart's merchandising practices, Trinity discovered what it perceived as a major inconsistency. Despite the retailer's stated mission to "make a difference on the big issues that matter to us all," Trinity Br. 11, it continued in some states to sell the Bushmaster AR-15 (a model of assault rifle). Trinity also perceived Wal-Mart as taking an unprincipled approach in deciding which products to sell. For example, despite its position on the AR-15, Wal-Mart

does not sell adult-rated movie titles (*i.e.*, those rated NC-17) or similarly rated video or computer games. Nor does it sell to children under 17 "'R' rated movies or 'Mature' rated video games." Trinity Br. 12. Wal-Mart also doesn't sell "music bearing a 'Parental Advisory Label'" because of concerns about the music containing "strong language or depictions of violence, sex, or substance abuse." *Id.* And apparently due to safety concerns, it has stopped selling (1) handguns in the United States; (2) high-capacity magazines separate from a gun; and (3) guns through its website. Trinity Br. 13. Trinity attributes these perceived inconsistencies to the "lack of written policies and Board oversight concerning its approach to products that could have momentous consequences for both society and corporate reputation and brand value [.]" Trinity Br. 16.[2]

B. Trinity's Shareholder Proposal.

Trinity pressed Wal-Mart to explain its continued sale of the Bushmaster AR-15. Wal-Mart's response was as follows:

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[2] In its brief and again at oral argument, Wal-Mart answered Trinity's characterization of its sales practices and referred us to its "Safe and Compliant Product Policy" and its "Product Safety and Compliance" division, which "administers programs to identify, mitigate, and monitor risks associated with general merchandise." Reply Br. 4. Wal-Mart also noted that a Board Committee is already tasked with "reviewing the Company's reputation with external constituencies and recommending to the Board any proposed changes to the Company's policies, procedures, and programs as a result of such review." *Id.* (citing J.A. 47) (alterations omitted)

> There are many viewpoints on this topic and many in our country remain engaged in the conversations about the sale and regulation of certain firearms. In areas of the country where we sell firearms, we have a long standing commitment to do so safely and responsibly. Over the years, we've been very purposeful about finding the right balance between serving hunters and sportsmen and ensuring that we sell firearms responsibly. Wal-Mart's merchandising decisions are based on customer demand and we recognize that most hunters and sportsmen use firearms responsibly and wish to continue to do so . . . .
>
> While there are some like you, Rev. Cooper, who ask us to stop selling firearms, there are many customers who ask us to continue to sell these products in our stores.

J.A. 255–56.

Unmoved, Trinity drafted a shareholder proposal aimed at filling the governance gap it perceived. The proposal, which is the subject of this appeal, provides:

> Resolved:
>
> > Stockholders request that the Board amend the Compensation,

> Nominating and Governance Committee charter . . . as follows:
>
> "27. Providing oversight concerning [and the public reporting of] the formulation and implementation of . . . policies and standards that determine whether or not the Company should sell a product that:
>
> 1) especially endangers public safety and well-being;
>
> 2) has the substantial potential to impair the reputation of the Company; and/or
>
> 3) would reasonably be considered by many offensive to the family and community values integral to the Company's promotion of its brand."

J.A. 268.

The narrative part of the proposal makes clear it is intended to cover Wal-Mart's sale of certain firearms. It provides that the

> oversight and reporting is intended to cover policies and standards that would be applicable to determining whether or not the company should sell guns equipped with magazines holding more than ten rounds of ammunition ("high capacity magazines") and to balancing

> the benefits of selling such guns against the risks that these sales pose to the public and to the Company's reputation and brand value.

Id.

The proposal also included a supporting statement asserting in relevant part that

> [t]he company respects family and community interests by choosing not to sell certain products such as music that depicts violence or sex and high capacity magazines separately from a gun, but lacks policies and standards to ensure transparent and consistent merchandizing decisions across product categories. This results in the company's sale of products, such as guns equipped with high capacity magazines, that facilitate mass killings, even as it prohibits sales of passive products such as music that merely depict such violent rampages.
>
> . . . .
>
> While guns equipped with high capacity magazines are just one example of a product whose sale poses significant risks to the public and to the company's reputation and brand, their sale illustrates a lack of reasonable consistency that this proposal seeks to address through Board level oversight.

> This responsibility seems appropriate for the Compensation, Nominating and Governance Committee, which is charged with related responsibilities.

J.A. 268–69.[3]

The purpose of the proposal, as explained by the Reverend James H. Cooper, Trinity's Rector, is to allow[] the company to make a transparent choice considering both the business and ethical (community impact) aspects of the matter. Anti-violence concerns can be broadly considered, including for example the sale of video games glorifying violence, as well as other merchandising decisions that are inconsistent with the well-being of the community and/or Wal-Mart's brand value and desired reputation.

Trinity Br. 18–19 (citation omitted).

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[3] In this context, the proposal is similar to that of a shareholder proposal submitted to Wal-Mart in December 2000 to halt its sale of "handguns and their accompanying ammunition, in any way (e.g.[,] by special order)." *Wal-Mart Stores, Inc.*, SEC No-Action Letter, 2001 WL 253625, at *1 (Mar. 9, 2001). Like Trinity, the submitting shareholder maintained that it was "inappropriate for a 'family store' to sell handguns in any way." *Id.* at *4. As here, the Corp. Fin. staff issued a no-action letter allowing Wal-Mart to exclude the proposal from its proxy materials because it related to its "ordinary business operations (i.e., the sale of a particular product)." *Id.* at *6.

C. Wal-Mart Seeks a No-Action Letter from the SEC.[4]

On January 30, 2014, Wal-Mart notified Trinity and the Corp. Fin. staff of its belief that it could exclude the proposal from its 2014 proxy materials under Rule 14a-8(i)(7). Trinity predictably disagreed, stating that its proposal didn't "meddl[e] in ordinary course decision-making" but focused on "big picture oversight and supervision that is the responsibility of the Board." J.A. 280. In support of that assertion, Trinity offered three reasons why its proposal was not excludable:

> 1. [it] addresses corporate governance through Board oversight of important merchandising policies and is substantially removed from particularized decision-making in the ordinary course of business;
>
> 2. [it] concerns the Company's standards for avoiding community harm while fostering public safety and corporate ethics and does not relate exclusively to any individual product; and

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[4] In the words of the SEC, a "no-action letter is one in which an authorized staff official indicates that the staff will not recommend any enforcement action to the Commission if the proposed transaction described in the incoming correspondence is consummated." Procedures Utilized by the Division of Corporate Finance for Rendering Informal Advice, Release No. 6,253, 1980 WL 25632, at *1 n.2 (Oct. 28, 1980).

> 3. [it] raises substantial issues of public policy, namely a concern for the safety and welfare of the communities served by the Company's stores.

J.A. 280. Trinity also touted the proposal as: not dictating "the specifics of how that Board oversight will operate or how best to report publically on the policies being followed by the Company and their implementation," J.A. 281; not seeking to "determine what products should or should not be sold by the Company," *id.*; allowing policy development "not by shareholders, but by management, using its knowledge and discretion," *id.*; and addressing "the ethical responsibility of the Company to take account of public safety and well-being, and the related risks of damage to the Company's reputation and brand," J.A. 283.

On March 20, 2014, the Commission's Corp. Fin. staff issued a "no-action" letter siding with Wal-Mart. It noted that "there appears to be some basis for [Wal-Mart's] view that [it] may exclude the proposal under rule 14a-8(i)(7), as relating to [its] ordinary business operations[,]" because "[p]roposals concerning the sale of particular products and services are generally excludable under [the rule]." *Wal-Mart Stores, Inc.*, SEC No-Action Letter, 2014 WL 409085, at *1 (Mar. 20, 2014). Consequently, the staff would "not recommend enforcement action to the Commission if Walmart [*sic*] omits the proposal from its proxy materials in reliance on rule 14a-8(i)(7)." *Id.*

Because no-action letters are not binding—they reflect only informal views of the staff and are not decisions on the merits—Trinity's proposal still had life.

D. Trinity Takes its Fight to Federal Court: Round One.

On April 1, 2014, and just 17 days before Wal-Mart's proxy materials were due at the printer, Trinity filed a declaratory judgment action against Wal-Mart in the District of Delaware. It sought a declaration that "Wal-Mart's decision to omit the proposal from [its] 2014 Proxy Materials violates Section 14(a) of the 1934 Act and Rule 14a-8." *Trinity*, 2014 WL 6790928, at *2 (internal citation omitted). The relief it requested was twofold:

> 1. A permanent injunction to prevent Wal-Mart from excluding its proposal from its 2015 proxy materials; and
>
> 2. A preliminary injunction to prevent it from printing, issuing, filing, mailing or otherwise transmitting proxy materials in connection with its 2014 Annual Meeting that do not contain the shareholder proposal submitted by Trinity.

Id.

Because of the April 17 deadline, the District Court held an emergency hearing on Trinity's preliminary injunction request. At the hearing the

Court described Trinity's burden as "heavy," the remedy it was seeking as "extraordinary," and the time frame within which it had to rule as "highly expedited." *Id.* It didn't help Trinity's cause that the SEC had already sided with Wal-Mart.

> It's very clear that the SEC has had hundreds of opportunities to consider questions like this. I have not. While the SEC may only have a few hours or whatever to put into each of these, I have roughly the same amount of time. You come to what you know is an extremely busy court. We have given this expedited attention. It comes to us with a no action conclusion from the SEC staff . . . You come to me, you have the burden [of] asking for extraordinary relief, and I need to find that it's likely that at the end of the trial, whenever we get there, I'm going to disagree with the SEC staff.

Id. at *3 (brackets omitted).

Viewing the proposal as one dealing "with guns on the shelves and not guns in society," the Court, in a ruling from the bench, held that the proposal related to an "ordinary business matter" and was thus excludable under Rule 14a-8(i)(7). *Id.* It explained that

> [t]he proposal [] expressly and . . . importantly states that the requested "oversight and/or reporting is intended to cover policies and standards that

> would be applicable [to] determining whether or not the company should sell guns equipped with magazines holding more than 10 rounds of ammunitions, high capacity magazines." And I tried to emphasize it's my added emphasis on "sell."
>
> . . . .
>
> While the specific proposal is crafted as one directed solely to policy and oversight and therefore arguably arises in the difficult and seemingly novel perhaps intersection between ordinary business . . . on the [one] hand [and corporate governance] on the other hand, ultimately I'm not persuaded that I'm likely to conclude at the end of the day on the merits that it therefore does not fall within the exception given the rule for ordinary business.

Id. (emphases omitted). The Court also gave weight to the SEC's "expertise" and "lengthy experience" involving proxy contests. *Id.*[5]

Although the favorable ruling allowed Wal-Mart to exclude Trinity's proposal from its 2014 proxy materials, it had not yet prevailed on the merits.

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[5] To be sure, the Court did not suggest that staff no-action letters get automatic deference; just that "*under the circumstances*, . . . some deference [was] merited." J.A. 110 (emphasis added).

E. Round Two.

Wal-Mart thereafter moved to dismiss both counts of Trinity's amended complaint. It contended that Trinity's challenge to Wal-Mart's exclusion of the proposal from the retailer's 2014 proxy materials (count 1) was moot, *see id.* at *4, and the challenge to Wal-Mart's "*reasonably anticipated* 2015 violation of Section 14(a) and Rule 14a-8" (count 2) wasn't ripe, *id.* at *5 (emphasis added). The District Court granted Wal-Mart's motion only in part. It disagreed on mootness, but agreed on ripeness. Most notably, however, and in direct tension with its earlier decision, the Court on summary judgment held that the proposal was *not* excludable under Rule 14a-8(i)(7).

With more time to deliberate, the Court concluded that, although the proposal "could (and almost certainly would) shape what products are sold by Wal-Mart," it is "best viewed as dealing with matters that are *not* related to Wal-Mart's ordinary business operations." *Id.* at *8 (emphasis added). Thus Rule 14(a)-8 could not block its inclusion in Wal-Mart's proxy materials. The Court fastened its holding to the view that the proposal wasn't a directive to management but to the Board to "oversee the development and effectuation of a Wal-Mart policy." Id. at *9. In this way, "[a]ny direct impact of adoption of Trinity's proposal would be felt at the Board level; it would then be for [it] to determine what, if any, policy should be formulated and implemented." *Id.* Stated differently, the day-to-day

responsibility for implementing whatever policies the Board develops was outside the scope of the proposal.

In the alternative, the Court held that even if the proposal does tread on the core of Wal-Mart's business—the products it sells—it "nonetheless 'focuses on sufficiently significant social policy issues'" that "transcend[] the day-to-day business matters" of the company, making the proposal "appropriate for a shareholder vote." *Id.* at *9 (brackets & emphasis omitted). Among the policy issues the District Court noted are "the social and community effects of sales of high capacity firearms at the world's largest retailer and the impact this could have on Wal-Mart's reputation, particularly if such a product sold at Wal-Mart is misused and people are injured or killed as a result." *Id.*

The Court also found helpful how "Trinity [] carefully drafted its proposal . . . to not dictate what products should be sold or how the policies regarding sales of certain types of products should be formulated or implemented." *Id.* at *10. It stressed the difference between Trinity's proposal and the generally excludable proposals that ask a company to report on its "policies and reporting obligations regarding possible toxic and hazardous products offered for sale." *See id.* ("Each of these proposals requested policies or information—such as information on the companies' efforts to minimize exposure to toxic substances, attempts by the companies to secure supply chains, options for alternative safer products, and encouraging suppliers to reduce or eliminate harmful

substances—which directly impacted the ordinary business operations of the companies involved far more than Trinity's proposal would directly impact Wal-Mart.").[6]

Finally, the District Court addressed Wal-Mart's secondary argument that Trinity's proposal is excludable under Rule 14a-8(i)(3) for being "so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable

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[6] As to Wal-Mart's reliance on the Corp. Fin. staff's grant of its no-action request, "a factor to which the Court [] accorded significant weight at the preliminary injunction stage," it declined to accord the staff's action any weight because "[i]t is undisputed that the final determination as to the applicability of the ordinary business exception is for the Court alone to make." *Id.* (citation omitted). It also explained the shift from its earlier ruling:

> At that earlier time Trinity was seeking "extraordinary relief" and the Court's analysis was . . . rushed as well as truncated. In fact, a mere ten days passed between the filing of the motion and the oral argument and the Court's ruling on it. Under the tight time constraints, the Court did not even permit full briefing on the preliminary injunction motion. As . . . noted at that time, "one hopes that if the case proceeds, I'll at least have more time to reflect further on the argument." Having now had the benefit of that time for reflection, as well as the invaluable assistance of additional briefing and oral argument, the Court sees the issues in the way it has explained here.

Id. At *11.

certainty exactly what actions or measures the proposal requires." *Id.* at *11 (quoting SEC Staff Legal Bulletin No. 14B, 2004 WL 3711971, at *4 (Sept. 15, 2004)). It acknowledged that "Wal-Mart is undoubtedly correct that the 'broad variety of products offered by [it] and the numerous customers, employees and communities around the world with whom [it] works' mean that 'there is no *single* set of 'family and community values' that would be readily identifiable as being 'integral to the company's promotion of its brand.'" *Id.* (emphasis in original, bold omitted). But it doesn't "follow from this that shareholders voting on the proposal, or the Committee in implementing it (if approved), would be unable to determine with reasonable certainty what the Committee needs to do." *Id.* "Instead, it merely illustrates . . . that the [p]roposal properly leaves the details of any policy formulation and implementation to the discretion of the Committee, showing once more that [it] does not dictate any particular outcome or micro-manage Wal-Mart's day-to-day business." *Id.*

Wal-Mart appeals from both of the Court's holdings on the merits.

The District Court had jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. § 78aa. We have jurisdiction under 28 U.S.C. § 1291. Trinity's request to enjoin Wal-Mart from excluding the proposal from its 2015 proxy materials is ripe, as Trinity resubmitted its proposal for inclusion in Wal-Mart's 2015 proxy materials and Wal-Mart again rebuffed its request. We review the District

Court's order granting Trinity's motion for summary judgment *de novo*. As it did below, Wal-Mart bears the burden of establishing as a matter of law that it properly excluded the proposal under anexception to Rule 14a-8. *See AFSCME v. Am. Int'l Grp., Inc.*, 462 F.3d 121, 125 (2d Cir. 2006).

III. REGULATORY BACKGROUND

A. The Proxy Statement

A shareholder that is unable to attend a company's annual meeting isn't disenfranchised. It can vote its shares by proxy by empowering an attending shareholder to do so on its behalf. Vote by proxy has "become an indispensable part of corporate governance because the 'realities of modern corporate life have all but gutted the myth that shareholders in large publicly held companies personally attend annual meetings.'" *Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.*, 821 F. Supp. 877, 881 (S.D.N.Y. 1993) (brackets omitted) (quoting *Stroud v. Grace*, 606 A.2d 75, 86 (Del. 1992)); *see also* Proposed Amendments to Rule 14a-8, Exchange Act Release No. 19,135, 1982 WL 600869, at *2 (Oct. 14, 1982) ("1982 Proposing Release") (noting that "with the increased dispersion of security holdings in public companies, the proxy solicitation process rather than the shareholder's meeting itself [] [became] the forum for shareholder suffrage").

As discussed above, a public company that solicits proxies must distribute a proxy statement to each of its shareholders in advance of the annual

shareholder meeting. The statement is an informational package that tells shareholders "about items or initiatives on which [they] are asked to vote, such as proposed bylaw amendments, compensation or pension plans, or the issuance of new securities." *Apache Corp.*, 696 F. Supp. at 727 (citation omitted). "The proxy card, on which the shareholder may submit its proxy, and the proxy statement together are the 'proxy materials.'" *Id.* (citing 17 C.F.R. § 2401.14a-8(j)).

B. Proxy Solicitation

Through its proxy materials, a company solicits proxies—hence the term "proxy solicitation." Congress, under the Securities Exchange Act of 1934, gave the SEC oversight of the proxy context. *See* 3 Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 10.1[1] (6th ed. 2009) (describing the 1934 Act as a congressional response to the uptick of "great corporate frauds [that] had been perpetrated through management solicitation of proxies that did not indicate to the shareholders the nature of any matters to be voted upon"). "Section [] 14(a) of the [1934 Act] renders unlawful the solicitation of proxies in violation of the SEC's rules and regulations, which are codified at 17 C.F.R. § 240.14a-1 *et seq*." *Amalgamated Clothing & Textile Workers Union*, 821 F. Supp. at 881; *see also J.I. Case v. Borak Co.*, 377 U.S. 426, 431 (1964) ("The purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation.").

The SEC's "proxy rules are concerned with assuring full disclosure to investors of matters likely to be considered at shareholder meetings." Hazen at § 10.2[1]. To that end, the SEC adopted "Rule 14a-9, which prohibits 'false or misleading' statements made in any proxy statement, form of proxy, notice of meeting or other communication." *Amalgamated Clothing & Textile Workers Union*, 821 F. Supp. at 882 (citing 17 C.F.R. § 240.14a-9(a)). It has interpreted the rule to "require companies to provide shareholders with the opportunity to submit proposals to management for inclusion in the corporation's proxy materials." *Id.*

To complement Rule 14a-9, the Commission promulgated Rule 14a-8 "to catalyze what many hoped would be a functional 'corporate democracy.'" Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 Ala. L. Rev. 879, 879 (1994). The rule mandates subsidized shareholder access to a company's proxy materials, requiring "reporting companies . . . to print and mail with management's proxy statement, and to place on management's proxy ballot, any 'proper' proposal submitted by a qualifying shareholder." *Id.* at 886; *cf. Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 421 (D.C. Cir. 1992) (R.B. Ginsburg, J.) (maintaining that Rule 14a-8's "right to be informed" is complementary to but distinct from Rule 14a-9's "ban on misleading statements in proxy solicitations"). The idea was to provide shareholders a way to "bring before their fellow stockholders matters of [shareholder concern]" that are "proper subjects for stockholders' action under the laws of

the state under which [the Company] was organized," 1982 Proposing Release, 1982 WL 600869, at *3, and to "have proxies with respect to such proposals solicited at little or no expense to the security holder," *id.* at *2.

C. Shareholder Proposals

A primary means to urge corporate reform is the shareholder proposal, which "communicate[s] not only [shareholders'] interest[] in a company's financial performance, but also their interests and preferences concerning a wide range of issues, such as the board's structure and oversight of important policies, sustainability, and ethical performance." Brief of *amici curiae* Corporate and Securities Law Professors 2. The hard part, however, is soliciting votes to pass a proposal—especially where the motivation is to raise awareness of a policy issue. *See* James R. Copeland, *Getting the Politics Out of Proxy Season*, Wall St. J., A11 (Apr. 23, 2015) ("Not one of the 1,150 shareholder proposals concerning social or policy issues since 2006 got the support of a majority of voting shareholders over board opposition.").

A shareholder can garner support in one of two ways. It can "pay to issue a separate proxy statement, which must satisfy all the disclosure requirements applicable to management's proxy statement." *Apache Corp.*, 696 F. Supp. 2d at 727 (citation omitted). Or the shareholder can go the Rule 14a-8 route and have the company include its proposal (and a supporting statement) in the proxy materials at the company's expense. *See id.* at 728.

D. Exclusion of Shareholder Proposals

Though the Rule 14a-8 option is financially advantageous, it does not "create an open forum for shareholder communication." Palmiter at 886. Rule 14a-8 restricts the company-subsidy to "shareholders who offer 'proper' proposals." *Id.* at 879; *see also* 17 C.F.R. § 240.14a8 ("This section addresses when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders."). A "proper" proposal is one that doesn't fit within one of Rule 14a-8's exclusionary grounds—which are both substantive and procedural.

The procedural exclusions of the rule "protect the solicitation process without regard to a proposal's content[.]" Palmiter at 886. For example, the proponent "must have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date [it] submit[s] the proposal." 17 C.F.R. § 240.14a-8(b)(1). It can "submit no more than one proposal to a company for a particular shareholders' meeting." *Id.* at § 240.14a-8(b)(2)(i). And the "proposal, including any accompanying supporting statement, may not exceed 500 words." *Id.* at § 240.14a-8(d).

The rule's substantive exclusions, by contrast, are "the most frequently used (and most litigated)." Palmiter at 890. They include (1) the "proper subjects" exclusion, which exists "[i]f the proposal is

not a proper subject for action by shareholders under the law of the jurisdiction of the company's organization," 17 C.F.R. § 240.14a-8(i)(1); (2) the "false or misleading" exclusion, which allows companies to bar proposals that are too vague, *id.* at § 240.14a-8(i)(3); (3) the "substantially related" exclusion, which says that a proposal is excludable if it "relates to operations which account for less than 5 percent of the company's total assets [and net earnings and gross sales] at the end of its most recent fiscal year . . . , and is not otherwise significantly related to the company's business," *id.* at § 240.14a-8(i)(5); and, most relevant for purposes of this opinion, (4) the "ordinary business" exclusion, which disallows a proposal that "deals with a matter relating to the company's ordinary business operations," *id.* at § 240.14a-8(i)(7). *See* Palmiter 890.

If a company wants to invoke one of these grounds to exclude a proposal, the process is as follows. First, it must notify the shareholder in writing of the problem with the proposal within 14 days of receiving it and inform the shareholder that it has 14 days to respond. *Id.* at § 240.14a-8(f)(1). If the company finds the shareholder's response unpersuasive and still wants to exclude the proposal, it then must file with the Corp. Fin. staff the reasons why it believes the proposal is excludable no later than 80 days before the company files its proxy materials with the SEC. Id. at § 240.14a-8(j)(1). In this letter, the company may also ask the staff for a no-action letter to support the exclusion of a proposal. *See* Donna M. Nagy, *Judicial Reliance on*

Regulatory Interpretation in S.E.C. No-Action Letters: Current Problems and a Proposed Framework, 83 Cornell L. Rev. 921, 939 (1998) ("Although Rule 14a-8 merely prescribes notification and filing requirements, virtually all companies that decide to omit a shareholder proposal seek a no-action letter in support of their decision."). If the shareholder wants to respond, it can file a submission noting why exclusion would be improper. 17 C.F.R. § 240.14a-8(k).

The staff will respond in one of two ways: (1) with a no-action letter, specifying that the company may omit the shareholder proposal under the exclusion(s) it relied on; or (2) that it is "unable to concur" with the company.[7] A shareholder dissatisfied with the staff's response can, as Trinity did here, pursue its rights against the company in federal court.[8]

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[7] "[B]efore the SEC staff makes a decision on Rule 14a 8 no action requests, there are at least three levels of attorney review by a 'task force' dedicated to reviewing Rule 14a 8 no action requests[.]" *See* Wal Mart Br. 37–38 (outlining layers of review); *see also Apache Corp. v. New York City Emps.' Ret. Sys.*, 621 F. Supp. 2d 444, 448 n.3 (S.D. Tex. 2008) (describing no action review process) (citing Thomas P. Lenke, *The SEC No Action Letter Process*, 42 Bus. Law. 1019, 1027–28 (1987)).

[8] Although rare, the Commission itself may choose to review a no action letter. Even then, its determination would become a final order only if it "impose[d] an obligation, den[ied] a right or fix[ed] some legal relationship as a consummation of the administrative process." *Amalgamated Clothing & Textile Workers Union v. S.E.C.*, 15 F.3d 254, 257 (2d Cir. 1994) (citations & internal quotation marks omitted); *see also* Hazen, *supra* at §10.8[1][A][2] (noting that Commission review is

E. SEC Interpretive Releases on the "Ordinary Business" Exclusion

The ordinary business exclusion has been called the "most perplexing" of all the 14a-8 bars. *See* Daniel E. Lazaroff, *Promoting Corporate Democracy and Social Responsibility: The Need to Reform the Federal Proxy Rules on Shareholder Proposals*, 50 Rutgers L. Rev. 33, 94 (1997). This stems from the opaque term "ordinary business," which is neither self-defining nor consistent in its meaning across different corporate contexts. Neither the courts nor Congress have offered a corrective. Rather, and "[f]rom the beginning, Rule 14a-8 jurisprudence—both in quality and quantity—has rested almost exclusively with the [SEC] . . . ." Palmiter at 880. In both its role as umpire and rule-maker, the SEC has provided various iterations of formal interpretive guidance. [9] Because they inform our analysis, we discuss each in turn.

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appropriate only where it involves "matters of substantial importance and where the issues are novel or highly complex").

[9] Each of the SEC's interpretive releases was adopted after notice and comment and thus merits our deference. As the Supreme Court has explained, "[j]ust as we defer to an agency's reasonable interpretation of the statute when it issues regulations in the first instance, . . . the agency is entitled to further deference when it adopts a reasonable interpretation of the regulations it has put in force." *Fed. Express v. Holowecki*, 552 U.S. 389, 397 (2008); *see also Dep't of Labor v. E. Associated Coal Corp.*, 54 F.3d 141, 147 (3d Cir. 1995) ("We accord greater deference to an administrative agency's interpretation of its own regulations than to its interpretation of a statute.") (citations omitted).

1. The 1976 Proposing Release

The Commission's initial frustration with the ordinary business exclusion was management's reliance on it to omit proposals "that involve matters of considerable importance to the issuer [*i.e.*, the company] and its security holders." Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 9,343, 1976 WL 160410, at *7 (July 7, 1976) ("1976 Proposing Release"). It proposed two modifications to address this concern. The first was a textual alteration to clarify that a proposal is excludable "only if it deals with a 'routine, day-to-day matter relating to the conduct of the ordinary business operations of the issuer.'" *Id.* at *8. (The rule's then-extant language provided that a proposal was excludable if it consisted of a "recommendation or request that [] management take action on a matter relating to the conduct of the ordinary business operations of the issuer." *Id.* at *7 (internal quotation marks omitted).) The second was a new standard to distinguish "routine" (excludable) from "important" matters (not excludable). *See id.* at *8. In the SEC's view, management teams generally handle "mundane matters" while boards of directors are responsible for high level decision-making. It thus proposed the following standard: "Will it be necessary for the board of directors . . . to act on the matter involved in the proposal?" *Id.* If the answer was no, the proposal dealt with a routine business matter and was thus excludable. *See id.*

2. The 1976 Adopting Release

Commenters attacked the textual modification and new standard as unworkable. As to the new language, the criticism was that many routine, day-to-day business matters "would necessarily deal with ordinary business matters of a complex nature that shareholders, as a group, would not be qualified to make an informed judgment on, due to their lack of business expertise and their lack of intimate knowledge of the issuer's business." Adoption of Amendments Relating to Proposals by Security Holders, Release No. 12, 999, 1976 WL 160347, at *10 (Nov. 22, 1976) ("1976 Adopting Release"). It also "would be difficult to administer because of the subjective judgments that necessarily would be required in interpreting it." *Id.* Regarding the new standard, the Commission relented to the criticism that "board practices relating to the delegation of authority to management personnel vary greatly, and there would, therefore, be no consistency in applying such a standard." *Id.* at *11; *see also id.* ("The potential lack of consistency of the proposed standard is a fatal drawback, in the Commission's view. And, since no other reasonable standard for making the requisite distinctions is readily apparent, the Commission believes that the provision would be difficult, if not impossible, to administer on a satisfactory basis."). It thus opted for a tweak of the text of the exclusion and offered fresh interpretive guidance.

For the former, it deleted any reference to management; the exclusion thus read, much like it

does now, that a proposal is excludable if it "deals with a matter relating to the conduct of the ordinary business operations of the issuer." *Id.* Regarding the new guidance, the SEC maintained that the exclusion should be "interpreted somewhat more flexibly than in the past" and reaffirmed that the term "ordinary business operations" has been wrongly interpreted to "include certain matters which have significant policy, economic or other implications inherent in them. For instance, a proposal that a utility company not construct a nuclear power plant has in the past been [wrongly] considered" to be excludable. *Id.* Therefore, "proposals of that nature, as well as others that have major implications, will in the future be considered beyond the realm of an issuer's ordinary business operations." *Id.*

3. The 1982 Proposing Release

The SEC took a fresh look at the ordinary business exclusion in 1982 in reviewing the staff's then-prevailing view on proposals that ask a company to (1) prepare a report to shareholders or (2) recommend that a special committee be formed to examine a particular area of its business. *See* 1982 Proposing Release, 1982 WL 600869, at *17. The staff asserted that, as a category, such proposals were not excludable even if the subject matter of the report or examination involved an ordinary business matter because, in its view, a company doesn't disseminate reports to shareholders or establish special committees as part of its ordinary business operations. *See id.*

The SEC agreed to address the objection launched by commenters that the staff's "interpretation rais[es] form over substance." *Id.* It thus proposed for consideration "whether it would be more appropriate to consider in each instance whether the type of information sought by the proposal involves the ordinary business operations of the issuer and to disregard whether a proposal requests the preparation and distribution of a report or the formation of a special committee." *Id.*

4. The 1983 Adopting Release

After notice and comment, the Commission formalized its adoption of the proposed "significant change in the staff's interpretation" of the exclusion. Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 20,091, 1983 WL 33272, at *7 (Aug. 16, 1983) ("1983 Adopting Release") ("Because [the staff's] interpretation raises form over substance and renders the provisions of [the ordinary business exclusion] largely a nullity, the Commission has determined to adopt the interpretive change set forth in the Proposing Release."). It thus directed the staff to "consider whether the subject matter of a special report or the committee involves a matter of ordinary business; where it does, the proposal will be excludable." *Id.*

5. The 1997 Proposing Release

The SEC revisited the ordinary business exclusion in the late 1990s to tackle proposals "relating simultaneously to both an 'ordinary business' matter and a significant social policy

issue." Amendments to Rules on Shareholder Proposals, Release No. 39,093, 1997 WL 578696, at *12 (Sept. 18, 1997) (the "1997 Proposing Release"). The interpretive snag was that the "fairly straightforward mission" of the rule was ill-suited to address contemporary social issues and "provided no guidance" on how to treat proposals raising such issues. *Id.* This difficulty showed itself when the staff allowed a company (Cracker Barrel Old Country Stores) to exclude a proposal that asked it to "prohibit discrimination on the basis of sexual orientation." *New York City Emps.' Ret. Sys. v. S.E.C.*, 45 F.3d 7, 9 (2d Cir. 1995). In handling the proposal, the staff espoused the view, which the Commissioners of the SEC deemed untenable, that employment-related proposals—regardless whether they raise a social issue—are categorically excludable. *See Cracker Barrel Old Country Store, Inc.*, SEC No-Action Letter, 1992 WL 289095, at *1 (Oct. 13, 1992) ("[T]he Division has determined that 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 nolonger be viewed as removing the proposal from the realm of ordinary business operations of the registrant. Rather, determinations with respect to any such proposals are governed by the employment-based nature of the proposal."). To end this practice, the SEC declared that "employment-related proposals focusing on significant social policy issues could not automatically be excluded under the 'ordinary business' exclusion." 1997 Proposing Release, 1997

WL 578686, at *13. And going forward, "the 'bright line' approach for employment-related proposals established by the Cracker Barrel position would be replaced by a case-by-case analysis that prevailed previously." *Id.*

In a final note of guidance, the Commission summarized the two considerations that guide how to apply the ordinary business exclusion. "The first relates to the subject matter of the proposal. Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." *Id.* at *14. According to the SEC, examples of this "include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers." *Id.* Yet "proposals relating to such matters but focusing on significant social policy issues generally would not be considered to be excludable, because such issues typically fall outside the scope of management's prerogative." *Id.* "The second consideration relates to the degree to which the proposal seeks to 'micro manage' the company by probing too deeply into 'matters of a complex nature that shareholders, as a group, would not be qualified to make an informed judgment on, due to their lack of business expertise and lack of intimate knowledge of the (company's) business.'" *Id.* It comes into play where "the proposal seeks intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies." *Id.*

6. The 1998 Adopting Release

Yet again the SEC declined to modify the language of the rule, perhaps afraid to unleash unintended consequences. Although "the legal term-of-art 'ordinary business' might be confusing to some shareholders and companies," it posited, the risk that practitioners "might misconstrue [a] revision[] as signaling an interpretive change" was too great to ignore. Amendments to Rules on Shareholder Proposals, Release No. 23, 200, 1998 WL 254809, at *2 (May 21, 1998) ("1998 Adopting Release"); *see also id.* ("Indeed, since the meaning of the phrase 'ordinary business' has been developed by the courts over the years through costly litigation and essentially has become a term-of-art in the proxy area, we recognize the possibility that the adoption of a new term could inject needless costs and other inefficiencies into the shareholder proposal process."). It elected simply to reverse the staff's 1992 *Cracker Barrel* no-action letter, thus "return[ing] to a case-by-case analytical approach," *id.* at *4, and commented that

> [w]hile we acknowledge that there is no bright-line test to determine when employment-related shareholder proposals raising social issues fall within the scope of the "ordinary business" exclusion, the staff will make reasoned distinctions in deciding whether to furnish "no-action" relief. Although a few of the distinctions made in those cases may be somewhat

> tenuous, we believe that on the whole the benefit to shareholders and companies in providing guidance and informal resolutions will outweigh the problematic aspects of the few decisions in the middle ground.

Id. It also reaffirmed that the 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." *Id.* at *2 (emphasis added).

With that background, we move to the merits of Wal-Mart's appeal.

IV. ANALYSIS

The principal issue we address is whether Trinity's proposal was excludable because it related to Wal-Mart's ordinary business operations. In doing so, we evaluate the District Court's primary and alternative holdings. To repeat, it held that Trinity's proposal doesn't meddle in the nuts-and-bolts of Wal-Mart's business because it was a directive to the Board (rather than management) to set standards to guide certain merchandising decisions. And in the alternative the proposal is not excludable because it implicates a significant social policy—the sale of high-capacity firearms by the world's largest retailer—that transcends Wal-Mart's ordinary business. In this case (and we agree with the Commission that our determination counsels a case-by-case inquiry)

we conclude that the proposal is excludable under the ordinary business proviso and that the significant social policy intended by the proposal is here no exception to that exclusion.[10]

A. Trinity's Proposal Relates to Wal-Mart's Ordinary Business Operations.

We employ a two-part analysis to determine whether Trinity's proposal "deals with a matter relating to the company's ordinary business operations[.]" 17 C.F.R. § 240.14a-8(i)(7). Under the first step, we discern the "subject matter" of the proposal. *See* 1983 Adopting Release, 1983 WL 33272, at *7. Under the second, we ask whether that subject matter relates to Wal-Mart's ordinary business operations. *Id.* If the answer to the second question is yes, Wal-Mart must still convince us that Trinity's proposal does not raise a significant policy issue that transcends the nuts and bolts of the retailer's business.

1. What is the subject matter of Trinity's proposal?

Beginning with the first step, we are mindful of the Commission's consistent nod to substance over form and its distaste for clever drafting. As it

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[10] A majority of the members of this panel (Judges Shwartz and Vanaskie) also hold that the proposal (which Trinity declined to divide into separate parts) is excludable for being unduly vague under Rule 14a 8(i)(3). I decline to join that holding. Wal Mart's vagueness objection was first raised in the District Court and not before the SEC in seeking a no action letter. And before us it devoted little attention to the argument. I thus think it not prudent to reach the vagueness question in this instance.

reaffirmed in the 1982 and 1983 Releases, it matters little how a shareholder styles its proposal; the emphasis should always be on its substance. To illustrate its point, the SEC invoked the staff's disparate treatment of two proposals where the Commission thought the outcome should have been the same:

> [T]he staff, in a letter to Castle & Cooke . . . *agreed* with the company that a proposal requesting that it alter its food production methods in underdeveloped countries could be excluded under [the ordinary business exclusion] since [it] specified the steps management should take to implement the action requested . . . . [Years later], however, the proponent instead asked the company *to appoint a committee to review* foreign agricultural operations with emphasis on the balance between labor and capital intensive production. The staff *refused* to apply the rule to this provision because the appointment of a special committee to study the company's foreign agricultural operations is a matter of policy.

1982 Proposing Release, 1982 WL 600869, at *17 n.49 (emphases added). In the SEC's view, a directive to Castle & Cooke to alter its food production methods in underdeveloped countries was the functional equivalent of a request for committee review of those methods. *See id.* Because the staff

concurred that the former was excludable, it should have reached the same result as to the latter. Thus, even though Trinity's proposal asks for the development of a specific merchandising policy—and not a review, report or examination—we still ask whether the *subject matter* of the action it calls for is a matter of ordinary business.

Applying that principle, we part ways with the District Court. We perceive it put undue weight on the distinction between a directive to management and a request for Board action. In the District Court's view, if the proposal had directed management to arrange its product assortment in a certain way, it would have been excludable. But because it merely asked the "***Board*** [to] oversee the development and effectuation of a Wal-Mart policy," it was not. *Trinity*, 2014 WL 6790928, at *9 (emphasis and bold in original); *see also id.* ("Any direct impact of adoption of Trinity's proposal would be felt at the Board level; it would then be for the Board to determine what, if any, policy should be formulated and implemented."). The concern with this line of reasoning is that the SEC in its 1976 Adopting Release rejected the proposed bright line whereby shareholder proposals involving "matters that would be handled by management personnel without referral to the board . . . generally would be excludable," but those involving "matters that would require action by the board would not be." 1976 Proposing Release, 1976 WL 160410, at *8. Thus, though the District Court's rationale and holding are not implausible, we do not adopt them.

Distancing itself from the District Court's formal approach, Trinity argues that the subject matter of its proposal is the improvement of "corporate governance over strategic matters of community responsibility, reputation for good corporate citizenship, and brand reputation, none of which can be considered ordinary business," Trinity Br. 39, and the focus is on the "shortcomings in Wal-Mart's corporate governance and oversight over policy matters," *id.* at 33. We cannot agree. As the National Association of Manufacturers points out, Trinity's contention, like the District Court's analysis, relies "on how [the proposal] is framed and to whom, rather than [its] substance." Brief of *amicus curiae* Nat'l Assoc. of Mfrs. 15. Contrary to what Trinity would have us believe, the immediate consequence of the adoption of a proposal—here the improvement of corporate governance through the formulation and implementation of a merchandising policy—is not its subject matter. If it were, then, analogizing to the review context, the subject matter of a review would be the review itself rather than the information sought by it. *See* 1982 Proposing Release, 1982 WL 600869, at *17. For example, under Trinity's position, the subject matter of a proposal that calls for a report on how a restaurant chain's menu promotes sound dietary habits would be corporate governance as opposed to important matters involving the promotion of public health. Yet that is the analysis the SEC disavowed in adopting the suggestions made in the 1982 Proposing Release. The subject matter of the proposal is instead its *ultimate* consequence—here a potential

change in the way Wal-Mart decides which products to sell. Indeed, as even the District Court acknowledged, if the company were to adopt Trinity's proposal, then, whatever the nature of the forthcoming policy, it "could (and almost certainly would) shape what products are sold by Wal-Mart[.]" *Trinity*, 2014 WL 6790928, at *9.

This view of the subject matter of Trinity's proposal finds support in a well-established line of SEC no-action letters.[11] The most instructive is the no-action letter issued to Sempra Energy in January 2012. The proposal there urged the Board "to conduct an independent oversight review each year of the Company's management of political, legal, and financial risks posed by [its] operations in any country that may pose an elevated risk of corrupt practices." *Sempra Energy*, SEC No-Action Letter,

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[11] Wal Mart argues that although no actions letters are generally not entitled to deference, the staff's no action letter here *is* because it is "consistent with both the SEC's guidance on Rule 14a-8(i)(7) and the SEC staff's prior no action letters." Reply Br.13. Although we disagree with the view that the letter holds any persuasive value, we do give the staff's body of no action letters "careful consideration as 'representing the views of persons who are continuously working with the provisions of the statute [the regulation in our case] involved." *Donaghue v. Accenture Ltd.*, No. 03-8329, 2004 WL 1823448, at *3 (S.D.N.Y. Aug. 16, 2004) (brackets, citation & quotation marks omitted); *see also* Nagy *supra* at 1002 (maintaining that whether "the staff has consistently maintained a particular regulatory interpretation in no action letters over a long period of time is relevant" to whether the interpretation should merit some deference, as "consistent, longstanding staff positions may signal Commission approval of these positions").

2011 WL 6425347, at *2 (Jan. 12, 2012). As Trinity does here, the proposing shareholder framed the subject matter of its proposal as targeting the company's governance of a certain type of risk: "the political, legal, and financial risks" inherent in the company's operations in countries "posing an elevated risk of corrupt practices," *id.*, which could ultimately trigger a Foreign Corrupt Practices Act prosecution. *Cf.* Trinity Br. 40 (maintaining that its proposal addresses the governance of the "risks to society and Wal-Mart should a product, after it is sold, cause harm to [its] customers or its brand and reputation") (quotation marks omitted). But, as here, the staff granted no-action relief because, "although the proposal requests the board to conduct an independent oversight review of Sempra's management of particular risks, the underlying subject matter of these risks appears to involve ordinary business matters." *Sempra Energy*, 2011 WL 6425347, at *1; *see also The Home Depot, Inc.*, SEC No-Action Letter, 2008 WL 257307, at *1, *2 (Jan. 25, 2008) (granting no-action relief where the proposal asked Home Depot's Board to publish a report outlining the company's product safety policies and describing what management is doing to address recent product safety concerns because it related to "Home Depot's ordinary business operations (i.e., the sale of particular products)"); *Family Dollar Stores, Inc.*, SEC No-Action Letter, 2007 WL 3317923, at *1 (Nov. 6, 2007) (same where proposal asked for a report "evaluating Company policies and procedures for systematically minimizing customers' exposure to toxic substances

and hazardous components in its marketed products" because it relates to Family Dollar's "ordinary business operations (i.e., sale of particular products)"); *Walgreen Co.*, SEC No-Action Letter, 2006 WL 5381376, at *1 (Oct. 13, 2006) (same for proposal asking for a report "characterizing the extent to which the company's private label cosmetics and personal care products lines contain carcinogens, mutagens, reproductive toxicants, and chemicals that affect the endocrine system and describing options for using safer alternatives," because the subject matter of the proposal related to Walgreen's "ordinary business operations (i.e., the sale of particular products)").[12]

The staff's consistent focus on the underlying subject matter of a proposal is instructive. So too is Trinity's failure to cite any authority for its view of the subject matter of its proposal. *See* Trinity Br. 37–42. For us, the subject matter of Trinity's proposal is how Wal-Mart approaches merchandising decisions involving products that (1) especially endanger public-safety and well-being, (2) have the potential to impair the reputation of the Company, and/or (3) would reasonably be considered by many offensive to the family and community values

[12] In keeping with its emphasis on the subject matter of a proposal, the staff often denies no action relief where the proposal merely calls for the Board to establish a committee to oversee risk generally. *See, e.g., PepsiCo, Inc.*, SEC No-Action Letter, 2012 WL 542708, at *1 (Feb. 16, 2012) (denying no action relief where the proposal merely asked the company to establish "a Risk Oversight Committee of the Board of Directors").

integral to the company's promotion of the brand. A contrary holding—that the proposal's subject matter is "improved corporate governance"—would allow drafters to evade Rule 14a-8(i)(7)'s reach by styling their proposals as requesting board oversight or review. *See* Reply Br. 10. We decline to go in that direction.

2. Does Wal-Mart's approach to whether it sells particular products relate to its ordinary business operations?

Reaching the second step of the analysis, we ask whether the subject matter of Trinity's proposal relates to day-to-day matters of Wal-Mart's business. Wal-Mart says the answer is yes because, even though the proposal doesn't demand any specific changes to the make-up of its product offerings—a point on which Trinity hangs its hat, *see* Trinity Br. 38 ("[The proposal] is not a 'stop selling' proposal. Nor does it require intricate reports on Wal-Mart's products.") —it "seeks to have a [B]oard committee address policies that could (and almost certainly would) shape what products are sold by Wal-Mart." Reply Br. 9 (internal quotation marks omitted). That is, Trinity's proposal is just a sidestep from "a shareholder referendum on how [Wal-Mart] selects its inventory." Brief of *amicus curiae* the Nat'l Assoc. of Mfrs. at 11. And thus its subject matter strikes at the core of Wal-Mart's business.

We agree. A retailer's approach to its product offerings is the bread and butter of its business. As *amicus* the National Association of Manufacturers notes, "Product selection is a complicated task

influenced by economic trends, data analytics, demographics, customer preferences, supply chain flexibility, shipping costs and lead-times, and a host of other factors best left to companies' management and boards of directors." *Id.* at 12; *see also* Brief of *amicus curiae* Retail Litig. Ctr., Inc. 11 ("The understanding of consumer behavior and careful tailoring of product mix is central to the success or failure of a given retailer."). Though a retailer's merchandising approach is not beyond shareholder comprehension, the particulars of that approach involve operational judgments that are ordinary-course matters.

Moreover, that the proposal doesn't direct management to stop selling a particular product or prescribe a matrix to follow is, we think, a straw man. *See* Trinity Br. 38; *Trinity*, 2014 WL 6790928, at *10 ("Trinity has carefully drafted its Proposal. . . . not [to] dictate which products should be sold or how the policies regarding sales of certain types of products should be formulated or implemented."). A proposal need only *relate* to a company's ordinary business to be excludable. *Cf.* 17 C.F.R. § 240.14a-8(i)(7) (exclusion is proper where a proposal deals with a matter "*relating* to the company's ordinary business operations") (emphasis added). It need not dictate any particular outcome. To make the point even clearer, suppose that Trinity's proposal had merely asked Wal-Mart's Board to *reconsider* whether to continue selling a given product. Though the request doesn't dictate a particular outcome, we have no doubt it would be excludable under the SEC's 1983 Adopting Release,

as the action sought relates to Wal-Mart's ordinary business operations. This is so even though it doesn't suggest any changes. The same is true here. In short, so long as the subject matter of the proposal *relates*—that is, bears on—a company's ordinary business operations, the proposal is excludable unless some other exception to the exclusion applies.

Failing all of this, Trinity retreats to friendlier territory. It contends that, even if the subject matter of its proposal concerns Wal-Mart's ordinary business operations, it focuses on a significant and transcendent social policy issue: Wal-Mart's approach to the risk that the sale of a product can cause "harm to [its] customers or its brand and reputation." Trinity Br. 40; *see also id.* at 44 ("There are various products especially dangerous to reputation, brand value, or the community that a family retailer such as Wal-Mart should carefully consider whether or not to sell, and the proposal addresses the transcendent policy issue of under what policies and standards and with what Board oversight Wal-Mart handles these merchandising decisions."). We address that issue next.

B. Trinity's Proposal Does Not Focus on a Significant Policy Issue that Transcends Wal-Mart's Day-to-Day Business Operations.

As discussed above, there is a significant social policy exception to the default rule of excludability for proposals that relate to a company's ordinary business operations. For the SEC staff this means that when "a proposal's underlying subject

matter transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote, the proposal generally will not be excludable under Rule 14a-8(i)(7)." SEC Staff Legal Bulletin No. 14E, 2009 WL 4363205, at *2 (Oct. 27, 2009).

The difficulty in this case is divining the line between proposals that focus on sufficiently significant social policy issues that transcend a company's ordinary business (not excludable) from those that don't (excludable). Even the Commission admits that the social-policy exception "raise[s] difficult interpretive questions." 1997 Proposing Release, 1997 WL 578696, at *13. No doubt that is because the calculus is complex. Yet we cannot sidestep what some may deem an unreckonable area. Thus we wade in.

We think the inquiry is again best split into two steps. The first is whether the proposal focuses on a significant policy (be it social or, as noted below, corporate). If it doesn't, the proposal fails to fit within the social-policy exception to Rule 14a-8(i)(7)'s exclusion. If it does, we reach the second step and ask whether the significant policy issue transcends the company's ordinary business operations.

1. Does Trinity's proposal raise a significant social policy issue?

We first turn to whether Trinity's proposal focuses on a "sufficiently significant" policy issue like "significant [employment] discrimination." 1998 Adopting Release, 1998 WL 254809, at *4. The District Court said yes because the proposal at its

core dealt with "the social and community effects of sales of high capacity firearms at the world's largest retailer." *Trinity*, 2014 WL 6790928, at *9. However, even Trinity concedes its proposal "is not directed solely to Wal-Mart's sale of guns." Trinity Mot. for Summ. J. 17 (ECF No. 38, filed Jun. 18, 2014). Rather it asks Wal-Mart's Board to oversee merchandising decisions for *all* "products especially dangerous to reputation, brand value, or the community that a family retailer such as Wal-Mart should carefully consider whether or not to sell." Trinity Br. 44. *See also* Brief of *amici curiae* Corporate and Securities Law Professors 14–15 (arguing that the "ethical and social policy implications" of "[s]elling products that endanger public safety, Wal-Mart's reputation, and [its] core values," are "easily on par with employment discrimination, which the SEC's 1998 Release deemed a sufficiently significant policy issue to warrant inclusion of shareholder proposals relating to it").

Wal-Mart, on the other hand, contends that neither the Commission nor its staff has ever countenanced "such a broad and nebulous concept of significant policy issue." Reply Br. 21. We disagree. True enough, the Commission has adopted what can only be described as a "we-know-it-when-we-see-it" approach, *see* Palmiter at 910 (describing the Commission's "shifting approach to social/political proposals" as the "most dramatic and prominent example of SEC inconstancy" under Rule 14a-8). Yet it is hard to counter that Trinity's proposal doesn't touch the bases of what are significant concerns in

our society and corporations in that society. Thus we deem that its proposal raises a matter of sufficiently significant policy.

Our concurring colleague, Judge Shwartz, would allow Wal-Mart to exclude Trinity's proposal because it doesn't focus on the retailer's sale of guns with high-capacity magazines. As she points out, it instead focuses on the broader issue of the company's commitment to public safety through the sale of products that can be especially dangerous to the community. Concurring Op. at 6–7 ("The 'public safety' component of the proposal could cover many products, especially in light of the amount of products Wal-Mart offers, and thus might require [it] to develop policies and standards for thousands of goods."). And because this policy issue has the potential to bring "thousands" of products under its umbrella—not just guns with high-capacity magazines—it does not "as a whole 'focus'" on a significant policy issue. *Id.* at 7 (alterations omitted).

Our colleague also believes that the second and third parts of Trinity's proposal do not raise issues of significant import. She claims that Wal-Mart's management of risk to its brand value (the proposal's second part) and its reputation as a family retailer (the third part) relate to matters that, "while certainly important to shareholders seeking a return on their investment," are "not of broad societal concern." Concurring Op. at 7. Thus, she posits, these parts of the proposal relate to policy issues the exception doesn't deem significant. The

trouble is the social-policy exception—despite its name—is not so limited.

The good news is we come to the ultimate conclusion of Judge Shwartz—that Trinity's proposal is excludable under the ordinary business bar—but take a different path. We are more persuaded by the view that, because the proposal relates to a policy issue that targets the retailer-consumer interaction, it doesn't raise an issue that *transcends* in this instance Wal-Mart's ordinary business operations, as product selection is the foundation of retail management.

2. Even if Trinity's proposal raises a significant policy issue, does that issue transcend Wal-Mart's ordinary business operations?

To repeat, where "a proposal's underlying subject matter transcends the day-to-day business matters of the company *and* raises policy issues so significant that it would be appropriate for a shareholder vote, the proposal generally will not be excludable under Rule 14a-8(i)(7)." SEC Staff Legal Bulletin No. 14E, 2009 WL 4363205, at *2 (Oct. 27, 2009) (emphasis added). What this means is that, to shield its proposal from the ordinary business exclusion, a shareholder must do more than focus its proposal on a significant policy issue; the subject matter of its proposal must "transcend" the company's ordinary business. *See* 1998 Adopting Release, 1998 WL 254809, at *4. The Commission used the latter term, we believe, to refer to a policy issue that is divorced from how a company approaches the nitty-gritty of its core business. *See*

SEC Staff Legal Bulletin No. 14E, 2009 WL 4363205, at *3 (maintaining that CEO succession-planning "raises a significant policy issue regarding the governance of the corporation that transcends the day-to-day business matter of managing the workforce"). Thus, and contrary to the position of our concurring colleague, we think the transcendence requirement plays a pivotal role in the social-policy exception calculus. Without it shareholders would be free to submit "proposals dealing with ordinary business matters yet cabined in social policy concern." *Apache Corp. v. New York City Emps.' Ret. Sys.*, 621 F. Supp. 2d 444, 451 n.7 (S.D. Tex. 2008) (rejecting the argument that "whether a proposal implicates significant social policy is the dispositive inquiry").

For major retailers of myriad products, a policy issue is rarely transcendent if it treads on the meat of management's responsibility: crafting a product mix that satisfies consumer demand. This explains why the Commission's staff, almost as a matter of course, allows retailers to exclude proposals that "concern[] the sale of particular products and services." *Rite Aid Corp.*, SEC No-Action Letter, 2015 WL 364996, at *1 (Mar. 24, 2015). On the other hand, if a significant policy issue disengages from the core of a retailer's business (deciding whether to sell certain goods that customers want), it is more likely to transcend its daily business dealings.

To illustrate the distinction, a proposal that asks a supermarket chain to evaluate its sale of

sugary sodas because of the effect on childhood obesity should be excludable because, although the proposal raises a significant social policy issue, the request is too entwined with the fundamentals of the daily activities of a supermarket running its business: deciding which food products will occupy its shelves. So too would a proposal that, out of concern for animal welfare, aims to limit which food items a grocer sells. *Cf., e.g.*, *Amazon.com, Inc.*, SEC No-Action Letter, 2015 WL 470145, at *1 (Mar. 27, 2015) (allowing Amazon to exclude proposal that asked it to "disclose to shareholders any reputational and financial risks that it may face as a result of negative public opinion pertaining to the treatment of animals used to produce products it sells" because the "proposal relates to the products and services offered for sale by the company"); *Papa John's Int'l, Inc.*, SEC No-Action Letter, 2014 WL 7406254, at *1 (Feb. 13, 2015) (same for proposal that encouraged the pizza franchise to "expand its menu offerings to include vegan cheeses and vegan meats in order to advance animal welfare, reduce its ecological footprint, expand its healthier options and meet growing demand for plant-based foods").

By contrast, a proposal raising the impropriety of a supermarket's discriminatory hiring or compensation practices generally is not excludable because, even though human resources management is a core business function, it is disengaged from the essence of a supermarket's business. *See Wal-Mart Stores, Inc.*, SEC No-Action Letter, 2004 WL 326494, at *1 (Feb. 17, 2004) (denying no-action relief where proposal asked for a report documenting "the

distribution of [] equity compensation by the recipient's race and gender and discuss[ing] recent trends in equity compensation granted to women and employees of color"). The same goes for proposals asking for information on the environmental effect of constructing stores near environmentally sensitive sites. *See, e.g.*, Jenny Staletovich, *Developer Defends Walmart in Rare Forest*, The Miami Herald (Sept. 12, 2014), *available at* http://www.miamiherald.com/news/local/environment/article 2092364.html.[13]

With those principles in mind, we turn to Trinity's proposal. Trinity says it focuses on "*both* corporate policy and social policy"—specifically, the "transcendent policy issue of under what policies and standards and with what Board oversight Wal-Mart handles [] merchandising decisions" for products that are "especially dangerous to [the company's] reputation, brand value, or the community." Trinity Br. 44 (emphasis in original). "In an age of mass shootings, increased violence, and concerns about product safety," Trinity argues, "the [p]roposal goes to the heart of Wal-Mart's impact on and approach to

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[13] Our concurring colleague says our suggested test is untenable for deciding whether a proposal fits within the social policy exception because she believes our test requires that a proposal be "completely" divorced from a company's ordinary business. Concurring Op. at 3. Nowhere do we suggest that to come within the exception a proposal must raise a policy issue that is completely unrelated to a day-to-day business matter. If that were so, then a proposal relating to a retailer's discriminatory hiring practices would be excludable, as hiring is a fundamental business decision. We agree with the Commission that such a proposal is not excludable.

social welfare as well as the risks such impact and approach may have to Wal-Mart's reputation and brand image and its community." *Id.* at 43.

But is how a retailer weighs safety in deciding which products to sell too enmeshed with its day-to-day business? We think it is in this instance. As we noted before, the essence of a retailer's business is deciding what products to put on its shelves—decisions made daily that involve a careful balancing of financial, marketing, reputational, competitive and other factors. The emphasis management places on safety to the consumer or the community is fundamental to its role in managing the company in the best interests of its shareholders and cannot, "as a practical matter, be subject to direct shareholder oversight." 1998 Adopting Release, 1998 WL 254809, at *4. Although shareholders perform a valuable service by creating awareness of social issues, they are not well-positioned to opine on basic business choices made by management.

It is thus not surprising that the Corp. Fin. staff consistently allows retailers to omit proposals that address their product menu. For example, it has indicated that a proposal trying to stop a retailer from selling or promoting products that connote negative stereotypes is excludable. *See, e.g.*, *Federated Dep't Stores, Inc.*, SEC No-Action Letter, 2002 WL 975596, at *13 (Mar. 27, 2002) (allowing the retailer to omit a proposal asking for a report on its "efforts to identify and disassociate from any offensive imagery to the American Indian community

in products, adverting [*sic*], endorsements, sponsorships and promotions"). It has done the same for proposals aiming to restrict a retailer's promotion of products that pose a threat to public health, *see e.g.*, *Wal-Mart Stores, Inc.*, SEC No-Action Letter, 2002 WL 833445, at *1 (Apr. 1, 2002) (agreeing with Wal-Mart that it could exclude a proposal asking it to explain "its rationale for not adopting in developing nations the same policies restricting the promotion and marketing of tobacco products as in the United States"); *Walgreen Co.*, SEC No-Action Letter, 2006 WL 5381376, at *1–2 (Oct. 13, 2006) (same for proposal asking for a report regarding "the extent to which the company's private label cosmetics and personal care product lines contain carcinogens, mutagens, reproductive toxicants, and chemicals that affect the endocrine system"), as well as those proposals targeting a retailer's approach to product safety. *See, e.g.*, *Wal-Mart Stores, Inc.*, SEC No-Action Letter, 2008 WL 670182, at *1 (Mar. 11, 2008) (Wal-Mart may exclude a proposal requesting a "report on the company's policies on nanomaterial product safety"); *The Home Depot, Inc.*, SEC No-Action Letter, 2008 WL 257300, at *2 (allowing company to exclude a proposal encouraging it "to end its sale of glue traps because they are cruel and inhumane to the target animals and pose a danger to companion animals and wildlife"); *The Home Depot, Inc.*, SEC No-Action Letter, 2008 WL 257307, at *7 (same for proposal asking for an "evaluation of company policies and practices relating to product safety").

For further support of the view that a policy issue does not transcend a company's ordinary business operations where it targets day-to-day decision-making, we look to the difference in treatment of stop-selling proposals sent to retailers and those sent to pure-play manufacturers. A policy matter relating to a product is far more likely to transcend a company's ordinary business operations when the product is that of a manufacturer with a narrow line. Here the staff often will decline a no-action request. *See, e.g.*, *Phillip Morris Companies, Inc.*, SEC No-Action Letter, 1990 WL 286063, at *1 (Feb. 22, 1990) (denying no-action relief as to proposal that requests the Board to amend the company's charter to provide that it "shall not conduct any business in tobacco or tobacco products"); *Sturm, Ruger & Co., Inc.*, SEC No-Action Letter, 2001 WL 258493, at *1 (Mar. 5, 2001) (same where proposal asks the Board to provide a report on company policies and procedures focused on reducing gun violence in the United States).

But the outcome changes where those same policy proposals are directed at retailers who sell thousands of products. *See Wal-Mart Stores, Inc.*, SEC No-Action Letter, 2001 WL 253625, at *6 (Mar. 9, 2001) (allowing Wal-Mart to exclude a proposal aimed at stopping its sale of handguns and accompanying ammunition[] in any way (e.g. by special order)" because it relates to "Wal-Mart's ordinary business operations (i.e., the sale of a particular product)"); *see also Rite Aid Corp.*, SEC No-Action Letter, 2009 WL 829472, at *1 (Mar. 26, 2009) (same for proposal asking for a report on the

company's response "to rising regulatory, competitive and public pressures to halt sales of tobacco products"); *Walgreen Co.*, SEC No-Action Letter, 1997 WL 599903, at *1 (Sept. 29, 1997) (same for proposal requesting that Walgreen stop the sale of tobacco in its stores, as it "is directed at matters relating to the conduct of the Company's ordinary business operations (i.e., the sale of a particular product)").

The reason for the difference, in our view, is that a manufacturer with a very narrow product focus—like a tobacco or gun manufacturer—exists principally to sell the product it manufactures. Its daily business deliberations do not involve whether to continue to sell the product to which it owes its reason for being. As such, a stop-selling proposal generally isn't excludable because it relates to the seller's very existence. Quite the contrary for retailers. They typically deal with thousands of products amid many options for each, precisely the sort of business decisions a retailer makes many times daily. Thus, and in contrast to the manufacturing context, a stop-selling proposal implicates a retailer's ordinary business operations and is in turn excludable. Although Trinity's proposal is not strictly a stop-selling proposal, it still targets the same basic business decision: how to weigh safety risks in the merchandising calculus.[14]

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[14] We recognize that in "extrapolat[ing] an interpretive rationale from a [line of] [] no action letter[s], [we] risk[] setting a legal precedent based on a rationale that the SEC never in fact advocated." Nagy at 1006. Fortunately, our word is not the

Trinity's claim that its proposal raises a "significant" and "transcendent" *corporate* policy is likewise insufficient to fit that proposal within the social-policy exception to exclusion. *See* Trinity Br. 47. The relevant question to us is whether Wal-Mart's consideration of the risk that certain products pose to its "economic success" and "reputation for good corporate citizenship" is enmeshed with the way it runs its business and the retailer-consumer interaction. We think the answer is yes. Decisions relating to what products Wal-Mart sells in its rural locations versus its urban sites will vary considerably, and these are quintessentially calls made by management. Wal-Mart serves different Americas with different values. Its customers in rural America want different products than its customers in cities, and that management decides how to deal with these differing desires is not an issue typical for its Board of Directors. Indeed, catering to "small-town America" is how Wal-Mart built its business. *See* Sam Walton, SAM WALTON: MADE IN AMERICA 50 (1993) ("It turned out that the first big lesson we learned was that there was much, much more business out there in small-town

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last. If our interpretation is flawed, the Commission can issue new (binding) interpretative guidance to correct us. *Cf. Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 502 (3d Cir. 2008) (explaining that a court of appeals is not free to ignore the SEC's interpretation of one of its ambiguous rules even where the court of appeals had previously interpreted the rule and its interpretation is at odds with that of the Commission) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 976 (2005)).

America than anybody, including me, had ever dreamed of."). And whether to put emphasis on brand integrity and brand protection, or none at all, is naturally a decision shareholders as well as directors entrust management to make in the exercise of their experience and business judgment.

We also agree with Wal-Mart's contention (and seemingly the position of the Corp. Fin. staff) that a company can omit a shareholder proposal concerning its reputation or brand when what the proposal seeks is woven with the way the company conducts its business. *Cf. FedEx Corp.*, SEC No-Action Letter, 2014 WL 2358714, at *1 (July 11, 2014) (allowing FedEx to omit a proposal that asked for a report addressing how the company "can better respond to reputational damage from its association with the Washington D.C. NFL franchise team name controversy" because it "relates to the manner in which FedEx advertises its products and services"); *see also Equity Lifestyle Props., Inc.*, SEC No-Action Letter, 2012 WL 6723114, at *1 (Feb. 6, 2013) (same for proposal asking the Board to prepare a report on, among other things, "the reputational risks associated with the setting of unfair, inequitable and excessive rent increases that cause undue hardship to older homeowners on fixed incomes," as "the setting of prices for products and services is fundamental to management's ability to run a company on a day-to-day basis"); *Bank of America Corp.*, SEC No-Action Letter, 2010 WL 4922465, at *1 (Feb. 24, 2010) (same for proposal asking Bank of America's Board to publish a report describing the bank's policy regarding the "funding of companies

engaged predominantly in mountain top removal coal mining and an assessment of the policy's efficacy in reducing [greenhouse gas] emissions and in protecting [its] reputation," as it "addresses matters beyond the environmental impact of [its] project finance decisions, such as [its] decisions to extend credit or provide other financial services to particular types of customers"); *Dean Foods Co.*, SEC No-Action Letter, 2007 WL 754960, at *1 (Mar. 9, 2007) (same for proposal requesting that an independent committee of the Board "review the company's policies and procedures for its organic dairy products and report to shareholders on the adequacy of the policies and procedures to protect the company's brands and reputation and address consumer and media criticism," because this concerns the company's "ordinary business operations (i.e., customer relations and decisions relating to supplier relationships)").

We thus hold that, even if Trinity's proposal raises sufficiently significant social and corporate policy issues, those policies do not transcend the ordinary business operations of Wal-Mart. 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. Trinity's proposal fails that test and is properly excludable under Rule 14a-8(i)(7).

V. CONCLUSION

Although a core business of courts is to interpret statutes and rules, our job is made difficult where agencies, after notice and comment, have

hard-to-define exclusions to their rules and exceptions to those exclusions. For those who labor with the ordinary business exclusion and a social-policy exception that requires not only significance but "transcendence," we empathize. 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, and we have no hint that any change from it or Congress is forthcoming. As one former SEC commissioner has opined, "it is neither fair nor reasonable to expect securities experts [like the Commission and its staff] to deduce the prevailing wind on public policy issues that have yet to be addressed by Congress in any decisive fashion." *Commissioner Criticizes Subjectivity, Inconsistency in SEC Review of Proposals*, BNA Corp. Couns. Wkly., 2-3 (Mar. 31, 1993) (quoting remarks of Comm. Richard Y. Roberts). That remains true today.

We have no doubt that the Commission is equipped to collect "relevant data and views regarding the best direction for its regulatory policy." Nagy at 993. We thus suggest that it consider revising its regulation of proxy contests and issue fresh interpretive guidance. In the meantime, we hold here that Trinity's proposal is excludable from Wal-Mart's proxy materials under Rule 14a-8(i)(7).

SHWARTZ, Circuit Judge, with whom Judge VANASKIE joins as to Part III, concurring in the judgment.

I agree with the Majority that Wal-Mart may omit Trinity's proposal from the company's proxy materials. I write separately, however, for two reasons. First, while I agree with my colleagues that the proposal is excludable based on the ordinary business exclusion, I believe that the test that it has fashioned for determining when an exception to this exclusion applies may remove many company actions over which shareholders should have a say from shareholder oversight. Second, I write to explain that both the ordinary business and the vagueness exclusions support exclusion of the entire proposal.[1]

I

SEC Rule 14a-8 requires a public company to include a shareholder proposal "in its proxy statement . . . when [the company] holds an annual or special meeting of shareholders," 17 C.F.R. § 240.14a-8, in recognition of the fact that, "with the increased dispersion of security holdings in public companies, the proxy solicitation process rather than the shareholder's meeting itself ha[s] become the forum for shareholder suffrage," Proposed Amendments to Rule 14a-8, Exchange Act Release No. 19135, 1982 WL 600869, at *2 (Oct. 14, 1982)

[1] Trinity declined to omit any component of the proposal, Tr. of Oral Arg. at 39 40, and thus sought approval of the proposal in its entirety. Accordingly, each component of the proposal must be nonexcludable for it to comply with SEC Rule 14a-8.

(the "1982 Proposing Release"). The rule thus "affords shareholders access to management proxy solicitations," both "to sound out management views and to communicate with other shareholders on matters of major import." *Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.*, 821 F. Supp. 877, 882 (S.D.N.Y. 1993) (internal quotation marks, citation, and alteration omitted). Such access, however, is not unfettered. In addition to eligibility and procedural requirements, SEC Rule 14a-8 is "limited by thirteen content-based exceptions," *id.*, two of which Wal-Mart argues apply here: Rule 14a-8(i)(7) and Rule 14a-8(i)(3).

Rule 14a-8(i)(7) allows a company to exclude proposals that "deal[] with a matter relating to the company's ordinary business operations." 17 C.F.R. § 240.14a-8(i)(7). The SEC has explained that the determination of whether a particular shareholder proposal implicates a company's ordinary business operations "rests on two central considerations": (1) whether the "subject matter" of the proposal involves "tasks . . . fundamental to management's ability to run a company on a day-to-day basis"; and (2) "the degree to which the proposal seeks to 'micro-manage' the company by probing too deeply into matters of a complex nature upon which shareholders . . . would not be in a position to make an informed judgment." Amendments to Rules on Shareholder Proposals, Release No. 23200, 1998 WL 254809, at *4-5 (May 21, 1998) ("1998 Adopting Release").

There is an exception to this exclusion. Specifically, proposals "relating to" ordinary business operations "but focusing on sufficiently significant social policy issues . . . generally would not be considered excludable," notwithstanding their relationship to ordinary business, "because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote." *Id.* at *4. The Majority would limit proposals invoking the "significant social policy exception" to only those concerning matters that are "disengaged from the essence of" a company's business, Maj. Op. at 52, and reads the 1998 Adopting Release to require a proposal that focuses on a significant social policy issue to be completely "divorced from how a company approaches the nitty-gritty of its core business," Maj. Op. at 50; *see also id.* ("[T]o shield its proposal from the ordinary business exclusion, a shareholder must do more than focus its proposal on a significant policy issue; the subject matter of its proposal must 'transcend' the company's ordinary business."). In my view, this reading is inconsistent with the plain text of the 1998 Adopting Release.

The 1998 Adopting Release provides that, to avoid running afoul of the ordinary business exclusion, a proposal "relating to" a company's ordinary business must "focus[] on" a "sufficiently significant social policy issue." 1998 Adopting Release, 1998 WL 254809, at *4. If it does, "it generally would not be considered excludable, because the proposal[] would transcend . . . day-to-day business matters." *Id.* As this passage

makes clear, whether a proposal focuses on an issue of social policy that is sufficiently significant is not separate and distinct from whether the proposal transcends a company's ordinary business. Rather, a proposal is sufficiently significant "because" it transcends day-to-day business matters. *Id.* Thus, the SEC treats the significance and transcendence concepts as interrelated, rather than independent.

The 1998 Adopting Release also does not require that a proposal be "disengaged from the essence of" a company's business, Maj. Op. at 52, such that a company is insulated from any submission relating to the "crafting [of] a product mix that satisfies consumer demand," Maj. Op. at 51. Indeed, the 1998 Adopting Release expressly permits a shareholder to submit a proposal that relates directly to ordinary business matters, including "decisions on production quality and quantity, and the retention of suppliers," so long as it "focus[es] on" an issue of "sufficiently significant social policy." 1998 Adopting Release, 1998 WL 254809, at *4 (acknowledging that "[c]ertain tasks," including those related to production and suppliers, "are so fundamental to management's ability to run a company on a day-to-day basis" that they are not "subject to direct shareholder oversight," but recognizing that "proposals relating to such matters but focusing on sufficiently significant social policy issues" generally are not excludable). Thus, to "transcend" ordinary business, as that term is used in the 1998 Adopting Release, a proposal need not be divorced from ordinary business, as the Majority proposes, but instead must focus on a policy issue

that in some "transcend[ent]" way trumps ordinary business in importance. *See id.*; *see also* Adoption of Amendments Relating to Proposals by Security Holders, Release No. 12999, 1976 WL 160347, at *11 (Nov. 22, 1976) (noting that proposals including "certain matters which have significant policy, economic, or other implications," like "the economic and safety considerations attendant to nu[cl]ear power plants," are "of such magnitude" that they should be "considered beyond the realm of an issuer's ordinary business operations," despite their relationship to such operations).

In addition to conflicting with SEC guidance, the Majority's test for the "significant social policy exception" to the ordinary business exclusion is inconsistent with the purpose of § 14 of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (the "Exchange Act"), and Rule 14a-8. When Congress enacted the Exchange Act, it sought to ensure "fair corporate suffrage." *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964). One way such suffrage is protected is through accurate proxy solicitations. *Id.* Congress authorized the SEC to generate rules that would advance this goal. *See* 15 U.S.C. § 78n. To this end, it promulgated Rule 14 to provide guidelines for shareholder proposals, including those that raise social issues. As the Commission noted in the 1998 Adopting Release, "shareholder proposals on social issues may improve investor confidence in the securities markets by providing investors with a sense that as shareholders they have a means to express their views to the management of the

companies in which they invest." 1998 Adopting Release, 1998 WL 254809, at *19.

The Majority's test, insofar as it practically gives companies carte blanche to exclude any proposal raising social policy issues that are directly related to core business operations, undermines the principle of fair corporate suffrage animating Rule 14a-8: shareholders' "ability to exercise their right—some would say their duty—to control the important decisions which affect them in their capacity as . . . owners of [a] corporation." *Med. Comm. for Human Rights v. SEC*, 432 F.3d 659, 681-82 (D.C. Cir. 1970) (footnote omitted). Section 14(a) of the Exchange Act ensures that "[a] corporation is run for the benefit of its stockholders and not for that of its managers," *SEC v. Transamerica Corp.*, 163 F.2d 511, 517 (3d Cir. 1947), and "Congress intended by its enactment of [§] 14 . . . to give true vitality to the concept of corporate democracy," *Med. Comm. for Human Rights*, 432 F.3d at 676. Permitting shareholders to vote on important social issues, including those that may be closely related to a company's ordinary business, is consistent with these principles, and I would not interpret the ordinary business exclusion to prohibit it.

II

All that said, Trinity's proposal as written is excludable under the ordinary business exclusion because it lacks the focus needed to trigger the "significant social policy" exception. To qualify for this exception, Trinity's proposal must focus on a significant policy issue. Trinity's proposal asks the

Board to amend the Committee charter to require that it create policies and standards for determining whether Wal-Mart should sell a product that: (1) "especially endangers public safety and well-being"; (2) "has the substantial potential to impair" Wal-Mart's reputation; and/or (3) "would reasonably be considered by many to be offensive to the family and community values integral to" Wal-Mart's brand. J.A. 268. Although the proposal states that it is for "determining whether or not [Wal-Mart] should sell guns equipped with magazines holding more than ten rounds of ammunition . . . and [for] balancing the benefits of selling such guns against the risk that these sales pose to the public and to [Wal-Mart's] reputation and brand value," J.A. 268, the full text shows that it is not directed solely to Wal-Mart's sale of guns.

The proposal has three separate components. The "public safety" component of the proposal could cover many products, especially in light of the amount of products Wal-Mart offers, and thus might require Wal-Mart to develop policies and standards for thousands of goods. While Wal-Mart's sale of guns with high-capacity magazines may raise a significant social policy issue concerning public safety, not all products that may fall within the proposal do so. Thus, while the first component of Trinity's proposal may raise a significant issue of social policy, insofar as it touches on the sale of guns equipped with high capacity magazines, we cannot say that the proposal as a whole "focus[es] on" such an issue. 1998 Adopting Release, 1998 WL 254809, at *4. Accordingly, Trinity may not avail itself of the

"significant social policy exception" to the ordinary business exclusion.

Similarly, the second and third components of the proposal could cover many products. They are also problematic for other reasons. The second component seeks standards for determining whether Wal-Mart should sell a product that may impair the company's reputation. How Wal-Mart would like others to view it is a unique company interest, and while certainly important to shareholders seeking a return on their investment, it is not of broad societal concern. The third component, which asks the Board to consider whether the sale of a product would impact its brand, also focuses on matters of interest to the company but not society at large. Thus, these components cover matters relating to Wal-Mart's ordinary business operations, do not present a social policy issue, and render the entire proposal excludable.

III

There is an additional problem with the third component of the proposal: it is vague and thus excludable under Rule 14a-8(i)(3). Rule 14a-8(i)(3) permits a company to exclude shareholder proposals that are "so vague and ambiguous that the issuer and security holders would not be able to determine what action the proposal is contemplating," 1982 Proposing Release, 1982 WL 600869, at *13. The rationale for excluding a shareholder proposal that is "vague and ambiguous" is twofold: (1) shareholders are entitled to know the breadth of the proposal on which they are asked to vote; and (2) the company must be able

to comprehend what actions or measures the proposal requires of it. *See Dyer v. SEC*, 287 F.2d 773, 781 (8th Cir. 1961); *N.Y.C. Emps. Ret. Sys. v. Brunswick*, 789 F. Supp. 144, 146 (S.D.N.Y. 1992).

As previously stated, the third component of the proposal that asks the Committee to formulate policies and standards for the sale of products that "would reasonably be considered by many to be offensive to the family and community values integral to" Wal-Mart's brand. J.A. 268. While Trinity argues that this component simply asks the Committee to consider whether a product may negatively impact its brand, the proposal, as written, measures that impact based upon what "many" view as "offensive" to "family and community values." Trinity attempts to link these terms back to what Wal-Mart has said about its values, including the "Save Money, Live Better" tag line, but these buzz words fail to provide any concrete guidance as to what constitutes "many" or what "family values" should be considered. Thus, this component of the proposal does not inform the shareholders of the breadth of the subject on which they would be asked to vote nor does it make clear what the Company would be required to do if it were adopted. For this reason, the proposal is also excludable under Rule 14a-8(i)(3).

IV

I therefore concur in the judgment.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

TRINITY WALL STREET,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No.
	)	14-405-LPS
	)	
WAL-MART STORES, INC.,	)	
	)	
Defendant.	)	

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Counsel for Defendant

MEMORANDUM OPINION

November 26, 2014
Wilmington, DE

/S/

STARK, U.S. District Judge:

Plaintiff, Trinity Wall Street ("Trinity" or "Plaintiff"), owns shares of common stock of Defendant, Wal-Mart Stores, Inc. ("Wal-Mart" or "Defendant"), which is the world's largest retailer. Trinity seeks declaratory judgments to the effect that Wal-Mart violated federal securities laws when it refused to include in its proxy materials relating to its 2014 annual shareholders meeting a proposal submitted by Trinity that would have added to the obligations of one of Wal-Mart's Board of Directors committees, and that Wal-Mart will again violate these same federal securities laws if and when it refuses to include the same or a similar Trinity proposal in Wal-Mart's proxy materials for its 2015 annual meeting. Trinity also seeks injunctive relief to prevent Wal-Mart from excluding its proposal from the 2015 proxy materials.

Pending before the Court are three motions: Wal-Mart's Motion to Dismiss the Amended Complaint for Lack of Jurisdiction Over the Subject Matter (D.I. 33), Trinity's Motion for Summary Judgment (D.I. 37), and Wal-Mart's Cross-Motion for Summary Judgment. (D.I. 47)[1] All of the motions relate to Trinity's amended complaint, Count I of which challenges the proxy materials Wal-Mart

[1] Defendant filed an earlier motion to dismiss on May 6, 2014. (D.I. 26) In response to that motion, Plaintiff filed an amended complaint. (D.I. 32) The original motion to dismiss was thereby mooted and will be terminated by separate order.

distributed in connection with its June 6, 2014 annual meeting, and Count II of which challenges Wal-Mart's anticipated actions with respect to proxy materials Trinity intends to submit in advance of the 2015 annual meeting. (D.I. 32) For the reasons set forth below, the Court finds it has jurisdiction to hear Trinity's claim with respect to the 2014 proxy materials. This claim is not moot as it presents a type of dispute that would otherwise evade review yet is capable of repetition. However, the Court lacks jurisdiction with respect to the challenge to the 2015 proxy materials, as this dispute is not ripe. Turning to the merits, the Court concludes that Trinity is correct that its proposal should not have been excluded from Wal-Mart's 2014 proxy materials. Thus, the Court will grant Trinity's motion for summary judgment with respect to Count I of the amended complaint and will deny Wal-Mart's motion for summary judgment. Finally, the Court will grant Trinity injunctive relief.

BACKGROUND

The parties' dispute relates to the process by which shareholder proposals are included in proxy materials distributed to shareholders in advance of an annual shareholder meeting. Plaintiff Trinity, an Episcopal parish headquartered in New York City, is a shareholder of Defendant Wal-Mart. (D.I. 32 ¶ 3, 18) Trinity owns, at all relevant times has owned, and intends to continue to own – at least through the date of Wal-Mart's 2015 annual meeting – at least $2,000 of Wal-Mart shares. (*Id.* ¶ 3)

Wal-Mart is a publicly listed Delaware corporation with its corporate headquarters in Bentonville, Arkansas. (*Id.* 1119) "Wal-Mart, the world's largest retailer, runs chains of large department and warehouse stores." (*Id.*)

On December 18, 2013, Trinity submitted a proposal ("the Proposal") for inclusion in Wal-Mart's 2014 proxy materials, seeking a shareholder vote. (D.I. 3-1, Exhs. B, D) The Proposal requests that the charter of Wal-Mart's Board of Directors' Compensation, Nominating and Governance Committee ("Committee") be amended to add the following to the Committee's duties:

> 27. Providing oversight concerning the formulation and implementation of, and the public reporting of the formulation and implementation of, policies and standards that determine whether or not the Company [i.e., Wal-Mart] should sell a product that:
>
> > 1) especially endangers public safety and well-being;
> >
> > 2) has the substantial potential to impair the reputation of the Company; and/or
> >
> > 3) would reasonably be considered by many offensive to the family and community values integral to the Company's promotion of its brand.

(D.I. 3-1, Exh. D) The narrative portion of the Proposal states that the oversight and reporting duties extend to determining "whether or not the company should sell guns equipped with magazines holding more than ten rounds of ammunition ('high capacity magazines') and to balancing the benefits of selling such guns against the risks that these sales pose to the public and to the Company's reputation and brand value." (*Id.*)

On January 30, 2014, as required by SEC Rule 14a-8(j), 17 C.F.R. § 240.14a-8(j), Wal-Mart filed a detailed letter with the Securities and Exchange Commission ("SEC"), notifying the SEC staff and Trinity that Wal-Mart intended to omit the Proposal from its 2014 proxy materials; the letter explained how, in Wal-Mart's view, the Proposal "deals with matters relating to the Company's ordinary business operations." (D.I. 3-1, Exh. E at 2) On February 4, 2014, Trinity submitted its own detailed letter to the SEC staff, providing Trinity's analysis as to why its Proposal was not excludable and requesting, hence, that the SEC staff "deny the Company's request for no-action relief." (D.I. 3-1, Exh. F) On March 20, 2014, the SEC staff advised Wal-Mart that it had reviewed the correspondence and found that "there appears to be some basis for your view that Wal-mart may exclude the proposal under rule 14a-8(i)(7), as relating to Wal-mart's ordinary business operations . . . Accordingly, we will not recommend enforcement action to the Commission if Wal-mart omits the proposal from its proxy materials." (D.I. 3-1, Exh. G)

On April 1, 2014, Trinity filed suit in this Court, seeking a declaratory judgment that "Wal-Mart's decision to omit the Proposal from the 2014 Proxy Materials violates Section 14(a) of the 1934 Act and Rule 14a-8, 17 C.F.R. § 240.14a-8." (D.I. 4 at 12) Trinity also seeks a permanent injunction to prevent Wal-Mart from excluding its Proposal from Wal-Mart's 2015 proxy materials. (*Id.*) Also on April 1, Trinity filed a motion for a preliminary injunction to prevent Wal-Mart from "printing, issuing, filing, mailing, or otherwise transmitting proxy materials in connection with its 2014 Annual Meeting that do not contain the shareholder proposal submitted by Plaintiff." (D.I. 1 at 1)

Ten days later, on April 11, 2014, the Court heard argument on the preliminary injunction motion. As of that date, only six days remained until Wal-Mart's scheduled deadline for printing its proxy materials. (D.I. 23 at 12) ("April 17th is a hard date in order to have a resolution without anybody incurring additional costs.") As is always the case, Plaintiff confronted a heavy burden to demonstrate that the extraordinary remedy of a preliminary injunction was warranted. In particular, in seeking to have the Court intercede to frustrate Wal-Mart's printing plans, Trinity was asking the Court to take an extraordinary step – and to do so on a highly expedited basis. As the Court stated during the preliminary injunction hearing:

> It's very clear that the SEC has had hundreds of opportunities to consider

> questions like this. I have not. While the SEC may only have a few hours or whatever to put into each of these, I have roughly the same amount of time. You come to what you know is an extremely busy court. We have given this expedited attention. It comes to us with a no action conclusion [from the SEC staff] . . . You come to me, you have the burden asking for extraordinary relief, and I need to find that it's likely that at the end of the trial, whenever we get there, I'm going to disagree with the SEC [staff].

(*Id.* at 8-9)

The Court denied Trinity's request for a preliminary injunction, primarily on the basis that Trinity had not met its burden to show a likelihood of success on the merits. (*Id.* at 42) The Court found that the Proposal "deals with guns on the shelves and not guns in society" and was properly excluded from Wal-Mart's proxy materials since it dealt with an ordinary business matter. (*Id.* at 46)[2] In ruling from

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[2] As is discussed in the briefing on summary judgment, the Court opened the preliminary injunction hearing with a question posed to Plaintiff's counsel: "So is this proposal dealing with guns on the shelves or guns in society?" Plaintiff's counsel responded, "It's guns on the shelves." (D.I. 23 at 4) This suggested to the Court that it would likely find, on the merits at the conclusion of the case, that the Proposal dealt with Wal Mart's ordinary business, and, therefore, the Proposal was likely properly excludable from the proxy materials. For reasons

the bench at the end of the preliminary injunction hearing, the Court further explained:

> The proposal also expressly and I think importantly states that the requested "oversight and/or reporting is intended to cover policies and standards that would be applicable [to] determining whether or not the company should ***sell*** guns equipped with magazines holding more than 10 round of ammunitions, high capacity magazines." And I tried to emphasize it's my added emphasis on "***sell.***"
>
> …
>
> While the specific proposal is crafted as one directed solely to policy and oversight and therefore arguably arises in the difficult and seemingly novel perhaps intersection between ordinary business . . . on the [one] hand [and corporate governance] on the other hand, ultimately I'm not persuaded that I'm likely to conclude at the end of the day on the merits that it therefore does not fall within the exception given the rule for ordinary business.

(*Id.* at 43, 46) (emphasis added)

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explained throughout this Opinion, the Court has, in fact, concluded otherwise.

The Court found additional support for its conclusion – especially in the context of an expedited preliminary injunction motion – in the SEC staff's expert decision to issue Wal-Mart's requested no-action letter. The Court emphasized that "all of the arguments that were made here have previously been made out in front of the SEC by both sides," adding:

> Materially the same, if not identically the same arguments that were made to this Court in connection with this dispute were made previously to the SEC . . . And with all that, the SEC [staff], with its expertise and its lengthy experience in this area, found that Wal-Mart met its burden to show there appears to be some basis for Wal-Mart's contention that the ordinary business exception applies as "the proposal relates to the products and services offered for sale by that company." With all of that, while I agree that no deference to the SEC is mandated, I believe that under the circumstances it is appropriate for the Court to accord some deference to the SEC given its expertise and again given particularly that all of the arguments that were made here have previously been made out in front of the SEC by both sides. I understand the SEC has limited resources, that its no action letters are simply the opinion of staff, they're

> non-binding. Of course, as we have discussed, the resources of this court are limited as well. We don't have the expertise of the SEC. And under the circumstances, I think some deference is merited.

(*Id.* at 44)

Wal-Mart distributed its proxy materials for the Company's 2014 annual meeting as planned, without Trinity's Proposal, on April 23, 2014. (D.I. 35, Exh. 2) On May 6, 2014, Wal-Mart filed a motion to dismiss Trinity's original complaint for lack of subject matter jurisdiction. (D.I. 26) In response, Trinity filed an amended complaint, seeking declaratory relief as to the 2014 proxy materials as well as prospective relief based on Trinity's alleged intention to submit its Proposal for inclusion in Wal-Mart's 2015 proxy materials. (D.I. 32) Wal-Mart responded by filing a motion to dismiss the amended complaint (D.I. 33), and thereafter both parties sought summary judgment (D.I. 37, 47).

After full briefing, the Court heard oral argument on August 14, 2014. (D.I. 59) ("Hr'g Tr.") Although trial was scheduled to begin on November 17, 2014 (D.I. 31), on October 9, 2014 the Court granted the parties' joint request to cancel trial (D.I. 63, 64), as the Court agrees with the parties that there are no genuine disputes of material fact.

MOTION TO DISMISS

Wal-Mart seeks to have the Court dismiss Trinity's amended complaint for lack of subject

matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1). (D.I. 33) Wal-Mart contends that "Count I of the Amended Complaint is moot because it seeks declaratory relief relating to an act that has already occurred – the exclusion of Trinity's Proposal from Wal-Mart's 2014 proxy materials." (D.I. 34 at 1) Wal-Mart further contends that "Count II of the Amended Complaint for Wal-Mart's 'reasonably anticipated 2015 violation of Section 14(a) and Rule 14a-8' is not ripe for adjudication." (*Id.*) (internal citations omitted)

Article III of the Constitution limits federal jurisdiction to actual "cases" and "controversies." U.S. Const. art. III, § 2. "To satisfy Article III's 'case or controversy' requirement, an action must present '(1) a legal controversy that is real and not hypothetical, (2) a legal controversy that affects an individual in a concrete manner so as to provide the factual predicate for reasoned adjudication, and (3) a legal controversy so as to sharpen the issues for judicial resolution.' *Armstrong World Indus., Inc. by Wolfson v. Adams*, 961 F.2d 405, 410 (3d Cir. 1992) (internal citations omitted). As the Supreme Court has explained,

> The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree. . . Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy,

> between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Maryland Cas. Co v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941).

Courts enforce Article III's case-or-controversy requirement through application of justiciability doctrines, such as mootness, ripeness, and the prohibition on advisory opinions. *See Keitel v. Mazurkiewicz*, 729 F.3d 278 (3d Cir. 2013). "When the issues presented in a case are no longer 'live' or the parties lack a legally cognizable interest in the outcome, the case becomes moot and the court no longer has subject matter jurisdiction." *Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004) (citing *Cnty. of L.A. v. Davis*, 440 U.S. 625, 631 (1979)). A case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S.Ct. 2277, 2287 (2012) (internal quotation marks omitted). For instance, a suit over a shareholder's proposal may become moot if, during the course of litigation over the exclusion of the proposal, the shareholder resubmits its proposal and the corporation includes it in a subsequent proxy statement. *See Sec. & Exch. Comm'n v. Med. Comm. for Human Rights*, 404 U.S. 403, 406 (1972). "[T]he ripeness doctrine attempts to define ***when*** an otherwise proper party may bring an action." *Bell Atl. Corp. v. MFS Commc'ns Co., Inc.*,

901 F. Supp. 835, 842 (D. Del. 1995) (emphasis in original). The ripeness doctrine functions to "prevent federal courts, 'through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Phila. Fed'n of Teachers v. Ridge*, 150 F.3d 319, 323 (3d Cir. 1998) (citing *Abbott Labs v. Gardner*, 387 U.S. 136, 148 (1967)); *see also Peachlum v. City of York, Pa.*, 333 F.3d 429, 433 (3d Cir. 2003) ("The function of the ripeness doctrine is to determine whether a party has brought an action prematurely."). Within the Third Circuit, the ripeness analysis requires inquiry into "the adversity of the interest of the parties, the conclusiveness of the judicial judgment and the practical help, or utility, of that judgment." *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 647 (3d Cir. 1990).

Trinity's request for declaratory relief regarding Wal-Mart's 2014 proxy materials, which have already been distributed, is not moot. As demonstrated by the procedural history of this case, the short duration of the proxy season makes full litigation on the merits of a shareholder proposal before an annual meeting close to impossible (at least for the undersigned Judge, given this Court's current docket). As such, this case falls in the special category of disputes that are "capable of repetition, yet evading review." *See N.J. Turnpike Auth. v. Jersey Cent. Power and Light*, 772 F.2d 25 (3d Cir. 1985).

"[T]he 'capable of repetition, yet evading review' doctrine [i]s limited to the situation where two elements [are] combined: (1) the challenged

action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). Trinity bears the burden of proving that both components of the capable of repetition, yet evading review exception are satisfied.[3] *See City of L.A. v. Lyons*, 461 U.S. 95, 109 (1983) ("[T]he capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality."); *OSHA Data/CIH, Inc. v. U.S. Dept. of Labor*, 220 F.3d 153, 168 (3d Cir. 2000) (noting that party seeking to qualify for capable of repetition but evading review exception has burden to meet both parts of test).

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[3] Trinity asserts that Wal Mart bears the burden to prove that the capable of repetition yet evading review exception does ***not*** apply, relying on *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d. Cir. 2011). (D.I. 43 at 15) The Court disagrees. Diop, a case dealing with pre removal detention in immigration proceedings, presented a situation in which the purported mootness was based on a voluntary discontinuance of an allegedly illegal activity. In that context, the burden was on the defendant to prove that the case was moot because the defendant needed to prove it would not continue the challenged conduct. *See also U.S. v. W. T Grant Co.*, 345 U.S. 629, 633 (1953) ("[A] case may nevertheless be moot if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated."). The situation presented in the instant case is quite different, as Wal-Mart is not seeking to show that it will act differently in the future.

Trinity has shown that the first requirement, that the dispute "evades review" because its duration is too short to permit full merits litigation, is met here. Trinity submitted its proposal for the 2014 proxy materials in a timely manner on December 18, 2013. Wal-Mart rejected the Proposal, also in a timely manner, on January 30, 2014. The SEC staff then acted in a timely manner by issuing its no-action letter on March 20, 2014. Thereafter, Trinity timely filed suit and moved for a preliminary injunction on April 1, 2014.[4]

The problem is that because the window for Wal-Mart to evaluate shareholder proposals is so short (opening in December[5] and closing in late

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[4] Wal-Mart has argued that Trinity could and should have filed suit before April 1, before even hearing the SEC staff's opinion. While the Court agrees that Trinity could have chosen to proceed in this manner, the Court does not agree that Trinity's decision not to do so rendered its suit untimely or in any way undermines the conclusion that the 2014 dispute is not moot. As a practical matter, even giving the Court from December 2013 until April 2014 would have made it very difficult, if not impossible, for full adjudication on the merits to be concluded before Wal-Mart needed to print the proxy materials. Moreover, the Court was substantially assisted by having the SEC staff's no action opinion, as both parties undoubtedly expected would be the case. Finally, had the SEC staff declined Wal-Mart's no action request, it is likely this litigation could have been avoided altogether, as it is likely Wal-Mart would have then included Trinity's 2014 Proposal in its proxy materials.

[5] During the August hearing on the summary judgment motions, Wal-Mart's counsel explained that even if Trinity filed its 2015 Proposal earlier than December, Wal-Mart would not have to – and likely would not, for reasons including that Wal-Mart would prefer to wait and see all shareholder proposals

January), and because the allowable steps relating to a no-action request understandably take several months, even when everyone acts in a timely manner the case only reaches District Court with just weeks remaining before proxy materials must be finalized and printed. Here, the Court responded to Trinity's motion is an extremely expedited fashion, issuing an order on April 1 for truncated briefing that was completed by April 4, and conducting a hearing — and ruling on the motion — on April 11. Despite the parties and the Court having done all of this work, there remained at that point just six more days left until Wal-Mart's printing deadline.[6]

The Court could not have resolved the merits of the parties' dispute before Wal-Mart planned to print its proxy materials for the 2014 annual meeting. Notably, neither party even suggested that the Court could have proceeded to a full trial on the merits (or even full summary judgment briefing) in the short time between the filing of the complaint and the date by which Wal-Mart's proxy materials needed to be printed for the annual meeting to go forward as scheduled. In a different context, the Supreme Court has held that a full year may be too short of a time for a court to be able to litigate a

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before deciding which ones to include in its proxy materials – take a position on whether or not to include that Proposal before December 26, 2014. (Hr'g Tr. at 11-13)

[6] Wal-Mart presented evidence that were it not to meet its April 17 deadline to begin printing, it would incur additional printing and mailing costs "in the millions of dollars." (D.I. 12 at 2)

dispute fully on its merits. *See Turner v. Rogers,* _____U.S.__, 131 S.Ct. 2507, 2515 (2011). While there is no hard-and-fast rule establishing a minimum amount of time a Court must be provided in order to make it reasonable to expect a final decision on the merits, here, plainly, the Court was not given enough time to do so.

The Court has reviewed the cases cited by Wal-Mart in which shareholder proposal suits were found not to evade review, and they do not dictate a different conclusion. In *Lindner v. Am. Express Co.*, 2011 WL 2581745, at *5 (S.D.N.Y. June 27, 2011), the Court concluded that the plaintiff was likely to file a future suit concerning a similar future proposal, so his case would not evade review. However, the plaintiff's original complaint was filed over a year before the District Court reached this conclusion; and the Magistrate Judge, in recommending finding the case moot, did not address how a future action could be fully litigated in the short time frame of any single proxy season. In *NYCERS v. Dole Food Co.*, 969 F.2d 1430, 1435 (2d Cir. 1992), the Second Circuit stated: "As Rule 14a-8 requires shareholders to submit proposals to management at least 120 days before the proxy statement is released, there should be ample time for a full review of the case while it remains a live controversy." Putting aside that the regulations could be read to leave as little as 80 days (or less if time for printing is factored in),[7] the fact remains

[7] If the company intends to exclude a proposal from its proxy materials, it must file its reasons with the Commission no later than 80 calendar days before it files its definitive proxy

that — at least for this judge on this Court at this time — even 120 days is not enough time to allow for: (i) full briefing on the merits of summary judgment, (ii) careful review of the summary judgment motion, possibly including oral argument, (iii) issuance of a decision on such a motion, and (iv) time remaining to allow the losing party to seek an expedited appeal and possibly a stay from the Court of Appeals. Notwithstanding defense counsel's insistence to the contrary, 80-120 days is not a "wealth of time."[8] It is, instead, an amount of time that makes Trinity's

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statement and form of proxy with the Commission." 17 CFR § 240.14a 8(j) (2011).

[8] At the hearing, defense counsel explained that the best case is scenario is that this Court and the Court of Appeals would together have four months to decide the case:

> Now, assuming there is a dispute, assuming no other proposal is raised, that might shed light on or change the dynamic of this proposal, and assuming on December 26th Wal-Mart sends a letter to Trinity and to the SEC saying we intend to exclude this, on December 27th or December 26th, my capable adversary can file his lawsuit, and if it provides comfort for the Court, I believe he could move for summary judgment three days later. So, Your Honor would have in effect four months to decide a summary judgment motion that is at least largely drafted; and after ruling on that summary judgment motion, the Third Circuit, upon a motion for expedited appeal, would certainly have a wealth of time to decide an issue that the parties have agreed is ripe for summary adjudication.

(Hr'g Tr. at 15)

dispute one which will evade review during any single proxy season.

Turning to the second step of the analysis, the Court finds that Trinity has also shown that its claim is capable of repetition. Trinity intends to submit another proposal to Wal-Mart for the 2015 proxy statement. If it were to do so in the absence of a judicial ruling on the merits relating to its 2014 Proposal, there is "more than a 'reasonable' likelihood" that Trinity's Proposal will again be excluded from the proxy materials. *See Turner*, 131 S. Ct. at 2515 (finding no mootness where petitioner would likely fail to pay child support and face contempt hearing, as had happened multiple times before). Hence, not only is the dispute presented by Trinity ***capable*** of repetition, it almost certainly would be repeated, during the 2015 proxy season, if the Court were to dismiss the instant action. Importantly, Trinity seeks not just to have its Proposal included in Wal-Mart's proxy statement but also to have the Court issue a declaratory judgment clarifying its rights under the pertinent SEC rules — yet another aspect of the parties' dispute that is capable of repetition.

Contrary to Wal-Mart's contention *(see* Hr'g Tr. at 6), Trinity's failure to appeal or seek a stay of this Court's preliminary injunction decision does not preclude Trinity from demonstrating that this case is capable of repetition yet evades review. For this proposition, Wal-Mart relies on *Matter of Kulp Foundry, Inc.*, 691 F.2d 1125 (3d Cir. 1982). But in *Kulp Foundry* what the Third Circuit held was that

where an important liberty interest is at stake, and where an appellant "has expeditiously taken all steps necessary to perfect the appeal and to preserve the status quo before the dispute becomes moot," there is "an ***extension*** of the more traditional 'capable of repetition, yet evading review' exception." (*Id.* at 1129) (emphasis added) *Kulp Foundry* does not preclude a party which, like Trinity, satisfies the traditional "capable of repetition, yet evading review" standard, from taking advantage of the mootness exception simply due to a failure to file an appeal.

At bottom, there is, under all the circumstances presented here, a substantial controversy between Trinity and Wal-Mart, as these parties have adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment with respect to Wal-Mart's 2014 proxy materials. A declaratory judgment that Wal-Mart improperly excluded Trinity's Proposal from Wal-Mart's 2014 proxy materials will be effectual relief for it should preclude Wal-Mart from excluding an identical Proposal, if submitted, from its 2015 proxy materials.

While Trinity's claim regarding its Proposal's exclusion from Wal-Mart's 2014 proxy materials is not moot, there is no case or controversy with respect to Trinity's claim regarding a promised Proposal for Wal-Mart's 2015 proxy materials. Instead, Trinity's requests for declaratory and injunctive relief relating to Wal-Mart's 2015 proxy materials are unripe at this time. Trinity's mere ***intent*** to submit "the proposal, or an amended proposal" (D.I. 32 ¶ 40), which it

seems ***likely*** would be excluded by Wal-Mart for the same reasons as the 2014 Proposal, does not (yet) present a live controversy for the Court. That is, a dispute between the parties over a possible 2015 Proposal is a "contingent future event[] that may not occur as anticipated, or indeed may not occur at all." *Texas v. U.S.*, 523 U.S. 296, 300 (1998). Trinity has neither drafted nor submitted its 2015 proposal, and indeed trumpets its flexibility to modify the 2014 Proposal based on any ruling of the Court, preserving its "position to cure any defects the Court may identify." (D.I. 32 ¶ 59) Not only could Trinity's 2015 Proposal differ materially from the 2014 Proposal currently before the Court, but it is also possible that Wal-Mart would take a different approach to a revised proposal. While unlikely, it is possible that Wal-Mart will have adopted a different corporate philosophy or retained different personnel or have new Board members at the point when any 2015 Proposal is submitted. Thus, the "adversity of interest" required for a declaratory judgment action is not present with respect to the promised 2015 Proposal.

Therefore, the Court will deny Wal-Mart's motion to dismiss Trinity's claims with respect to the 2014 Proposal but will grant that motion as it pertains to Trinity's promised 2015 Proposal. Accordingly, Count I of the amended complaint remains in the case for review on cross-motions for summary judgment while Count II is dismissed.

MOTIONS FOR SUMMARY JUDGMENT

Summary judgment should be granted if, upon viewing the facts in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 32223 (1986). Here, both parties agree that their disputes are amenable to resolution on summary judgment and, therefore, asked the Court to cancel the previously scheduled trial. (*See* D.I. 55 at 4) ("The facts underlying the parties' motions for summary judgment are not in dispute.") The Court shares the parties' views.

SEC Rule 14a-8(i)(7) provides that a company may exclude from its proxy materials a shareholder proposal that "***deals with a matter relating to the company's ordinary business operations***." 17 C.F.R. § 240.14a-8(i)(7) (emphasis added). The SEC has provided guidance as to the basis for this "ordinary business" exception, explaining:

> The general underlying policy of this exclusion is . . . to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting. The policy underlying the ordinary business exclusion rests on two central considerations. The first relates to the subject matter of the proposal. Certain tasks are so fundamental to

management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as the hiring, promotion, and terminations of employees, decisions on production quality and quantity, and the retention of suppliers. ***However, proposals relating to such matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.*** The second consideration relates to the degree to which the proposal seeks to "micro-manage" the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment. This consideration may come into play in a number of circumstances such as where the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.

Amendments to Rules on Shareholder Proposals, Release No. 34-40018, 63 Fed. Reg. 29106, 29108 (May 28, 1998) ("the 1998 Release") (emphasis added); *see also Apache Corp. v. NY C. Emps. Ret. Sys.*, 621 F. Supp. 2d 444, 451 (S.D. Tex. 2008) ("A clear reading of the *1998 Release* informs this court's analysis.").

Given this guidance, Trinity's 2014 Proposal is best viewed as dealing with matters that are not related to Wal-Mart's ordinary business operations. Therefore, Trinity's Proposal was not properly excluded from Wal-Mart's 2014 proxy materials under the ordinary business exception of Rule 14a-8(i)(7).

Trinity's Proposal sought a shareholder vote on amending Wal-Mart's Committee's charter to add an obligation to "provid[e] oversight concerning the formulation and implementation of . . . policies and standards that determine whether or not the Company should sell a product" having certain characteristics, i.e., one that especially endangers public safety, has the substantial potential to impair Wal-Mart's reputation, or would reasonably be considered by many to be offensive to the values integral to Wal-Mart's brand. (D.I. 3-1, Exh. D) At its core, Trinity's Proposal seeks to have Wal-Mart's ***Board*** oversee the development and effectuation of a Wal-Mart policy. While such a policy, if formulated and implemented, could (and almost certainly would) shape what products are sold by Wal-Mart, the Proposal does not itself have this consequence. As Trinity acknowledges, the outcome of the Board's

deliberations regarding dangerous products is beyond the scope of the Proposal. Any direct impact of adoption of Trinity's Proposal would be felt at the Board level; it would then be for the Board to determine what, if any, policy should be formulated and implemented.

The guidance provided by the SEC in its 1998 Release strongly supports the Court's conclusions. Trinity's Proposal does not undermine the "policy underlying the ordinary business exclusion." 1998 Release, 63 Fed. Reg. at 29108. The Proposal does not, for instance, take a "task[] . . . so fundamental to management's ability to run a company on a day-to-day basis" and, impractically, subject it to "direct shareholder oversight." *Id.* That might be the case if the Proposal attempted, through a shareholder vote, to dictate to management specific products that Wal-Mart could or could not sell. (The 1998 Release gives as examples of tasks so fundamental to management's ability to run a company "decisions on production quality and quantity, and the retention of suppliers," none of which are tasks that are the subject of the Proposal.) It is not the case here, however, where the "task" is the formulation and implementation of policy, which are tasks the Board's Committee, "subject to direct shareholder oversight," can and already does perform. Trinity's Proposal leaves development of policy to the Board Committee, which in turn is free to delegate responsibility for the day-to-day aspects of implementation of any such policy to the Company's officers and employees.

Moreover, to the extent the Proposal "relat[es] to such matters" as which products Wal-Mart may sell, the Proposal nonetheless "***focus[es] on sufficiently significant social policy issues***" as to not be excludable, because the Proposal "***transcend[s] the day-to-day business matters and raise[s] policy issues so significant that it would be appropriate for a shareholder vote***." (*Id.*) (emphasis added) The significant social policy issues on which the Proposal focuses include the social and community effects of sales of high capacity firearms at the world's largest retailer and the impact this could have on Wal-Mart's reputation, particularly if such a product sold at Wal-Mart is misused and people are injured or killed as a result. In this way, the Proposal implicates significant policy issues that are appropriate for a shareholder vote.[9] Additionally, again consistent with the 1998 Release, the Proposal is not excludable because it does not

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[9] *See also* SEC Staff Legal Bulletin No. 14E, 2009 WL 4363205, at *2 (Oct. 27, 2009) ("In those cases in which a proposal's underlying subject matter transcends the day to day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote, the proposal generally will not be excludable under Rule 14a 8(i)(7) as long as a sufficient nexus exists between the nature of the proposal and the company... In addition, we note that there is widespread recognition that the board's role in the oversight of a company's management of risk is a significant policy matter regarding the governance of the corporation. In light of this recognition, a proposal that focuses on the board's role in the oversight of a company's management of risk may transcend the day to day business matters of a company and raise policy issues so significant that it would be appropriate for a shareholder vote.").

seek to "micro-manage" Wal-Mart or "prob[e] too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." (*Id.*) The Proposal does not involve "intricate detail" or seek to "impose specific time-frames" or dictate a "method[] for implementing complex policies." (*Id.*)

Trinity has carefully drafted its Proposal. It does not dictate what products should be sold or how the policies regarding sales of certain types of products should be formulated or implemented. Instead, as Trinity has explained in this litigation, "The Proposal intentionally ensures that any day-to-day decision-making concerning the matters raised in the Proposal is reserved to the management of Wal-Mart pursuant to policies created by management with Board oversight." (D.I. 38 at 14) For this reason, the no-action letters cited by Wal-Mart are distinguishable, as they involve circumstances Trinity has avoided by limiting its Proposal to the Board's decision-making process, as opposed to proposals that attempted to direct day-to-day operations. Wal-Mart cites many SEC no-action letters which, in Wal-Mart's view, "repeatedly concurred in the exclusion of shareholder proposals that relate to decisions by retailers concerning the sales of products." (D.I. 48 at 8) None of the letters cited by Wal-Mart involved proposals comparable to Trinity's. For example, *Gen. Elec. Co.*, 2010 WL 5067922 (Jan. 7, 2011), addressed a proposal seeking to reduce the role of GE Financial because "financial services should not be a core business of the General Electric Company." (*Id.* at

*2) Similarly, *Walt Disney Co.*, 2010 WL 4312760 (Dec. 22, 2010), addressed a proposal to modify smoking policies at the company's theme parks. Three other no-action letters dealt with defining policies and reporting obligations regarding possible toxic and hazardous products offered for sale. *See Wal-Mart Stores, Inc.*, 2008 WL 5622715 (Feb. 27, 2008); *Home Depot, Inc.*, 2008 WL 257307 (Jan. 25, 2008); *Family Dollar Stores, Inc.*, 2007 WL 3317923 (Nov. 6, 2007). Each of these proposals requested policies or information – such as information on the companies' efforts to minimize exposure to toxic substances, attempts by the companies to secure supply chains, options for alternative safer products, and encouraging suppliers to reduce or eliminate harmful substances – which directly impacted the ordinary business operations of the companies involved far more than Trinity's Proposal would directly impact Wal-Mart's.

It is true that the ordinary business exception of Rule 14a-8(i)(7) is written broadly, allowing exclusion of a shareholder proposal that "***deals with*** a matter ***relating to*** the company's business operations." 17 C.F.R. § 240.14a-8(i)(7) (emphasis added); *see also* D.I. 51 at 5. However, viewed at a general level, ***anything*** a company like Wal-Mart does at least somewhat "deals with" a matter "relating to" the company's business operations. Such a broad reading is inconsistent with the guidance provided by the SEC itself (for reasons

already explained above)[10] and, if adopted, would improperly permit the "exception to swallow the rule."

Wal-Mart places heavy reliance on the SEC's grant of its no-action request, a factor to which the Court also accorded significant weight at the preliminary injunction stage. (*See, e.g.,* D.I. 48; D.I. 23 at 44) It is unnecessary (because immaterial) for the Court to resolve the parties' factual debates as to precisely how no-action letters are prepared and how thoroughly the SEC staff is able to analyze issues presented in these types of requests. (*Compare* Informal Procedures for the Rendering of Staff Advice with Respect to Shareholder Proposals, Release No. 9344, 1976 WL 160411, at *3 (July 7, 1976) (noting that Commission has limited staff and "cannot do more in each case than make a quick analysis of the material submitted") *with* Cross Decl., D.I. 52 at 3 (outlining three levels of attorney review involved in handling no-action requests)) It is undisputed that the final determination as to the applicability of the ordinary business exception is for the Court alone to make. *See Apache*, 621 F. Supp. 2d at 449. Indeed, the SEC has itself made this point, stating:

> It is important to note that the staff's no-action responses to Rule 14a-8(j)

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[10] *See*, *e.g.*, 1998 Release at 29108 (stating "proposals ***relating*** to such matters [e.g., production decisions, retention of suppliers] but ***focusing on sufficiently significant social policy issues . . . generally would not be considered to be excludable***") (emphasis added).

> submissions reflect only informal views. The determinations reached in these no-action letters do not and cannot adjudicate the merits of a company's position with respect to the proposal. ***Only a court such as a U.S. District Court can decide whether a company is obligated to include shareholder proposals in its proxy materials.*** Accordingly, a discretionary determination not to recommend or take Commission enforcement action does not preclude a proponent, or any shareholder of a company, from pursuing any rights he or she may have against the company in court, should the company's management omit the proposal from the company's proxy materials.

Div. of Corporate Fin., Informal Procedures Regar[d]ing Shar[e]holder Proposals; *www.sec.gov/divisions/corpfin/cf-noactiona 4a-8-informal-procedures.htm (11/21/2011).*

Nor does the fact that the Court denied Trinity's motion for a preliminary injunction preclude the Court from ruling in favor of Trinity on the motions for summary judgment. As Wal-Mart understandably emphasizes, the Court earlier concluded that Trinity was not likely to succeed on the merits of its claims, and no facts have changed since the time the Court reviewed the preliminary injunction motion. (D.I. 48 at 6) However, at that

earlier time Trinity was seeking "extraordinary relief" (D.I. 23 at 42) and the Court's analysis was, necessarily, rushed as well as truncated. In fact, a mere ten days passed between the filing of the motion and the oral argument and the Court's ruling on it. Under the tight time constraints, the Court did not even permit full briefing on the preliminary injunction motion. As the Court noted at that time, "one hopes that if the case proceeds, I'll at least have more time to reflect further on the argument." (D.I. 23 at 45) Having now had the benefit of that time for reflection, as well as the invaluable assistance of additional briefing and oral argument, the Court sees the issues in the way it has explained here.

As a final matter, the Court rejects Wal-Mart's newest contention, that Trinity's Proposal is excludable under Rule 14a-8(i)(3) as vague and indefinite.[11] The SEC has stated that a proposal is excludable under Rule 14a-8(i)(3) if it is "so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires." SEC Staff Legal Bulletin No. 14B, 2004 WL 3711971, at *4 (Sept. 15, 2004). Here, neither stockholders nor Wal-Mart will have any such problem. If Wal-Mart's shareholders approve Trinity's Proposal, the Committee's charter will be

[11] Wal Mart did not raise this argument in connection with the preliminary injunction motion, or before the SEC, but only for the first time in its summary judgment briefing.

amended, and thereafter the Committee will be obligated to "provid[e] oversight concerning the formulation and implementation of . . . policies and standards that determine whether or not" Wal-Mart should sell certain products. Determining the specifics of the policy to be formulated, details about how it is implemented, and assessing what products may be "especially" dangerous or have "substantial potential to impair" Wal-Mart's reputation or "would reasonably be considered by many offensive to the family and community values integral to the Company's promotion of its brand," are all matters properly delegated to the Committee to evaluate in its discretion.

Wal-Mart is undoubtedly correct that the "broad variety of products offered by Wal-Mart and the numerous customers, employees and communities around the world with whom Wal-Mart works" mean that "there is no ***single*** set of 'family and community values' that would be readily identifiable as being 'integral to the company's promotion of its brand.'" (D.I. 48 at 1718) (emphasis added) But from this it does not follow that shareholders voting on the Proposal, or the Committee in implementing it (if approved), would be unable to determine with reasonable certainty what the Committee needs to do. Instead, it merely illustrates, again, that the Proposal properly leaves the details of any policy formulation and implementation to the discretion of the Committee, showing once more that the Proposal does not dictate any particular outcome or micro-manage Wal-Mart's day-to-day business.

The Court's conclusion that Trinity's Proposal is not impermissibly vague and ambiguous is supported by several SEC denials of no-action requests arising under Rule 14a-8(i)(3). For example, the SEC found a proposal seeking the establishment of "a Public Policy Committee to assist the Board of Directors in overseeing the Company's policies and practice that relate to public policy including human rights, corporate social responsibility . . . and other public issues that may affect the Company's operations, performance or reputation, and shareholders' value," not to be vague and indefinite. *NetApp, Inc.,* 2014 WL 1878421 (June 27, 2014). Similarly, in denying a no-action request by Western Union, the SEC found not vague and indefinite a proposal that "the Board of Directors create and implement a policy requiring consistent incorporation of corporate values as defined by Western Union's stated policies (including Our Values, Corporate Citizenship, Corporate Governance, and especially Our Code of Conduct) into Company and WUPAC political and electioneering contribution decisions." *The Western Union Co.,* 2013 WL 368364 (March 14, 2013).

For all of these reasons, the Court will grant Trinity's motion for summary judgment on Count I of the amended complaint, which relates to Trinity's 2014 Proposal. The Court will deny Wal-Mart's cross-motion for summary judgment with respect to Count I.[12]

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[12] The parties' summary judgment motions as they relate to Count II, and a potential 2015 Proposal, will be denied as moot

INJUNCTIVE RELIEF

Trinity seeks as a remedy not just a declaratory judgment, but also "injunctive relief enjoining Wal-Mart from relying on Rule 14a-8(i)(7) to exclude the Proposal from its 2015 Proxy Materials." (D.I. 38 at 1) Traditional rules of equity apply to requests for injunctive relief. *See eBay, Inc. V. MercExchange, L.L.C.,* 547 U.S. 388 (2006). "The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court." *Id.* at 391. The Court "must consider whether: (1) the moving party has shown actual success on the merits; (2) the moving party will be irreparably injured by the denial of injunctive relief; (3) the granting of the permanent injunction will result in even greater harm to the defendant; and (4) the injunction would be in the public interest." *Shields v. Zuccarini,* 254 F.3d 476, 482 (3d Cir. 2001).

Trinity has met its burden. Trinity has shown that its Proposal should not be excluded from Wal-Mart's proxy materials under the "ordinary business exception" of Rule 14a-8, or on any other basis to which Wal-Mart has directed the Court. Trinity will be irreparably harmed if it is again deprived of the opportunity to put its Proposal before Wal-Mart's shareholders for a vote at the next annual meeting. By contrast, granting Trinity's requested injunctive relief does not result in a greater injury to Wal-Mart, as Wal-Mart strives (as it must) to include

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because, as explained in connection with the motion to dismiss, the Court lacks subject matter jurisdiction with respect to this unripe claim.

all compliant shareholder proposals in its proxy materials, and the Court has determined that Trinity's Proposal is precisely such a proposal. *(See* Hr'g Tr. at 74) (Wal-Mart's counsel stating, "I just want to make clear [Wal-Mart] include[s] 14a-8 compliant proposals.") Lastly, granting the injunction serves the public interest by providing Wal-Mart's shareholders the opportunity to vote on Trinity's Proposal and by upholding the SEC's rules. Accordingly, the Court will grant Trinity injunctive relief, in addition to a declaratory judgment.

CONCLUSION

For the reasons stated above, the Court will deny Wal-Mart's motion to dismiss Count I of the amended complaint and grant its motion to dismiss Count II of the amended complaint. The Court will grant Trinity's motion for summary judgment as to Count I and deny Wal-Mart's cross-motion for summary judgment as to that same count. The parties' summary judgment motions will be denied as moot with respect to Count II. The Court will further grant Trinity's requested relief in the form of a declaratory judgment and permanent injunction. An appropriate order follows.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

TRINITY WALL STREET	:	CIVIL ACTION
	:	
Plaintiff,	:	
v	:	
	:	
WAL-MART STORES, INC.,	:	
	:	NO. 14-405-LPS
Defendant.		

— — —

Wilmington, Delaware
Friday, April 11, 2014
Oral Argument Hearing

— — —

BEFORE: HONORABLE **LEONARD P. STARK**, U.S.D.C.J.

APPEARANCES: — — —

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P R O C E E D I N G S

(REPORTER'S NOTE: Oral argument hearing proceedings were held in open court, beginning at 2:31 p.m.)

THE COURT: Good afternoon.

(The attorneys respond, "Good afternoon, Your Honor.")

THE COURT: Let's put your appearances on the record for us.

MR. FISCHER: Yes. On behalf of Wal-Mart, Matt Fischer, Potter Anderson. With me Adam Offenhartz, Gibson Dunn in New York; Aric Wu, Gibson Dunn New York; Elizabeth Ising, Gibson Dunn D.C.; you know Jonathan Choa of Potter Anderson; Matt Satchel of Potter Anderson; and Greg Belliston, Gibson Dunn D.C.

THE COURT: Okay.

MR. MS. FISCHER: With your permission, Mr. Offenhartz will present the argument on behalf of Wal-Mart.

THE COURT: That's fine. Thank you.

Welcome to all of you.

MR. OFFENHARTZ: Thank you.

THE COURT: Good afternoon.

MR. FRIEDLANDER: Good afternoon, Your Honor. Joel Friedlander from Bouchard, Margulies & Friedlander on behalf of the Rector, Church-Wardens and Vestrymen of Trinity Church, otherwise known as Trinity Wall Street; and Jackie Levy from our firm is here as well.

THE COURT: Welcome to both of you.

It's your motion so we'll have you proceed first.

MR. FRIEDLANDER: Thank you, Your Honor.

I'd like to begin by thanking Your Honor for scheduling this hearing so promptly and also for accommodating my schedule which I greatly appreciate.

THE COURT: Thank you all for your flexibility. We have a jury deliberating right behind my back as we speak; and with any luck they won't interfere with us, but we may need some further flexibility. We'll see.

MR. FRIEDLANDER: I hope they take their time.

THE COURT: I hope so as well.

MR. FRIEDLANDER: We're aware of the time constraints, Your Honor.

To start off, the proposal that Trinity Wall Street is seeking to put forward, it's attached as Exhibit D to the Brandom declaration, and it's to have Wal-Mart create an additional responsibility for an existing committee, the Compensation, Nominating and Governance Committee; and in particular, that this committee would provide oversight concerning policies about whether or not the company should sell products that either especially endanger public safety, have the potential to substantially impair the reputation of Wal-Mart, or could reasonably be considered by many to be offensive to the family and community values integral to the company's promotion of its brand.

THE COURT: All right. So is this proposal dealing with guns on the shelves or guns in society?

MR. FRIEDLANDER: It's the guns on the shelves. In particular, the one item that is mentioned that would be included within these parameters would be to provide oversight respecting policies about the sale of guns with high capacity magazines.

THE COURT: So why doesn't that broadly "relate to" the ordinary business of Wal-Mart?

MR. FRIEDLANDER: Well, because, as my opponent pointed out, improperly, it's not a matter of just taking a plain meaning of the language of the rule. 14a-8 has been around for decades, for several decades. And there has been an incretion of authoritative interpretation of what those words mean, therefore, what is included and what is excluded. I think the best source of the words then is to look at the SEC releases that interpret those words. Well, what does relate to and what does not relate to?

THE COURT: Why isn't the best place to start with the no action letter here?

MR. FRIEDLANDER: Because the no action letter is only an informal advice by the staff. Certainly, there can be some weight placed on it but it is not an authoritative source of guidance from the SEC. The SEC is very clear that it's releases, its legal bulletins are authoritative sources by the SEC itself.

The no action letters are written by staff. And according to some data that our friends at Gibson Dunn put together, last year in the proxy season there were 264 no action letters written by the staff mostly in a very narrow time frame.

As the *Amalgamated Clothing* court stated, these SEC no action letters, the SEC staff, because of the time constraints, "necessarily cannot do more in each case than make a quick analysis of materials submitted that perforce lack the kind of in-depth study that would be essential to a definitive

determination. And the DB SEC itself says, on its website, these reflect only the informal views of the staff and do not and cannot adjudicate the merits of any dispute.

THE COURT: So I understand I'm not obligated to accord any deference to the SEC, but I may accord deference; correct?

MR. FRIEDLANDER: I think if you find it helpful. But you see in the no action letter request, there really is no reasoning to it. But I think we can look for guidance, Your Honor. Maybe it would be helpful if I could pass it up. The parties have cited various SEC materials. I realize we didn't provide compendiums, but I brought them with me to court and I thought there were a couple of them that would be of assistance to the Court.

THE COURT: You certainly can pass them up. We'll take two copies, if you have them.

MR. FRIEDLANDER: Thank you.

(Documents passed forward.)

MR. FRIEDLANDER: So, for instance, skipping to the end, Tab 5 is from the SEC website which has that quote which I just told you about. It's only informal views of the staff.

The first four tabs reflect SEC releases, and some of them discuss in some depth what this phraseology means when it talks about ordinary business in Rule 14a-8.

Tab 1 is the 1988 SEC that reflects the current language of the rule. And in that SEC release, the SEC overturned its own prior interpretation in something called the *Cracker Barrel* case. And the SEC explained in Section 3 of that tab how they, the

SEC, over time has gained a better understanding of the depth of interest among shareholders to express their views on employment-related proposals that raise sufficiently significant policy issues. And it goes on and discusses at length about what "ordinary business" means, and there are two central considerations about what can be and should not be excluded:

One is whether this is a task so fundamental to management's ability that it's not appropriate for a shareholder vote or, looking at it the other way, does the proposal relate to matters focusing on sufficiently significant social policy issues? For example, antidiscrimination employment. That even though hiring and firing might be management policy, social policy about that would be an important policy issue that shareholders can reflect on. That is a Consideration No. 1.

Consideration No. 2: Does the proposal seek to micromanage the affairs of the company? Under our proposal, there is no micromanagement. We are not seeking, unlike a lot of the SEC no action letters my friends cite, we're not putting forth a policy that says do not sell high capacity magazines. We're saying have the board adopt policies regarding oversight under the oversight of the board to adopt such policies.

THE COURT: But your client certainly hopes they would adopt a policy and then stop selling, for instance, high capacity magazines.

MR. FRIEDLANDER: I think that as a policy preference, they very well might, but on the other hand what they really do want to see is transparent

board oversights. That attention is being paid at the highest levels of the company to weighing the cost and benefits and overseeing the process of weighing costs and benefits.

THE COURT: Is their policy attention pertinent to the analysis that I need to undertake?

MR. FRIEDLANDER: I don't think so. When I see these cases, it's really based on the language of the proposal on the supporting statement and then applying it to the SEC materials about what the legal standard is.

THE COURT: All right. So the record, I mean it's obvious but it's very clear that the SEC has had hundreds of opportunities to consider questions like this. I have not. While the SEC may only have a few hours or whatever to put into each one of these, I have roughly the same amount of time.

You come to what you know is an extremely busy court. We have given this expedited attention. It comes to us with a no action conclusion. That there appears to be merit to a position on which the SEC required Wal-Mart to meet a burden to show that the exception might apply.

You come to me, you have the burden asking for extraordinary relief, and I need to find that it's likely that at the end of the trial, whenever we get there, I'm going to disagree with the SEC, which, again, as you are proving, has a lot more experience in this area than I do. How do you meet that burden?

MR. FRIEDLANDER: Well, first, I think we is have seen the disposition of some of these cases. A lot of them can be on summary judgment or it really is a paper record. I don't think it is necessarily

duelling fact testimony, that it would come to that. And, ultimately, the burden is actually on the registrant to show that the exclusion applies. So while procedurally we have a burden I suppose in putting forth our motion and seeking relief on our motion, there is a burden of exclusion on the issuer. So that can be weighed.

But I think ultimately it is a legal determination, it is a legal question about how the SEC stated policies as expressed in the language of the rule and in the SEC releases apply to really the words on the page, the proposal on the supporting statement.

THE COURT: Let's talk about irreparable harm. That is another point on which procedurally you have the burden at this point.

As I understand it, there is or at least was an alternative mechanism for you to get your proposal in front of the shareholders. It would have required or still would require, if it is possible, your client to bear some I think significant financial expense.

MR. FRIEDLANDER: Right.

THE COURT: Is there any idea of what that expense would be? And whatever number it is, why doesn't that make whatever harm you have here at least quantifiable and perhaps ultimately reparable?

MR. FRIEDLANDER: I think because the whole structure of 14a-8 is to not require, whether it is my client or any stockholder, to bear that cost upon a showing being made that this is a proposal that is fitting to be included in the proxy statement.

The great innovation of 14a-8 was to create a mechanism so that shareholder proposals could be voted on at annual meetings without shareholders

having to incur the costs if they meet the various procedural requirements of the rule and the substantive requirements of whether it should be included or should be excluded.

So the opportunity to vote at the meeting I think in any kind of voting case and to be able to put forward a resolution is a type of irreparable harm. In the case of Wal-Mart, it's probably about as high as you can quantify the cost to be because of the expense involved. You actually have to duplicate all the items to be voted on and send that out to all the stockholders of the company if you are going to try to circulate it and get the support.

So I don't -- I think we pointed out the other side doesn't have a case where they can say there is no irreparable injury because 14a-8 can just be dispensed with. And the idea only courts can make determinations about 14a-8 it is embedded in the structure of the rule the SEC releases saying that the only determination to be made is by a court.

THE COURT: Do we have anything in the record to give us an idea as to what the cost would be to Trinity if they were to pursue that alternative option?

MR. FRIEDLANDER: I do not believe we have anything in the record, Your Honor.

THE COURT: Do you believe that your client -- let's just play this out: If I deny the preliminary injunction, proxy goes out without your proposal, we have a trial or cross motion for summary judgment and I find that you are right. Is there a way in which you might be able to recover,

either in this case or by some other claim, whatever those costs would have been?

MR. FRIEDLANDER: Yes, I think the way it would work, Your Honor, would be certainly nothing -- if that is the relief, if that is the outcome for this year's meeting, certainly there would be no other practical means to get the proposal before the stockholders.

What other courts have done is to keep jurisdiction over the matter where they could be decided upon, say, for next year's meeting. And I think we cited the *ASCME* decision in the Second Circuit, that was the posture that ultimately got resolved.

THE COURT: That was going to be one of my next questions. If I were able to commit to a schedule whereby it was likely -- I can't guarantee anything -- that we could get a resolution of this very question in time for your proposal or a very similar proposal to get on next year's proxy, assuming I deny the preliminary relief, does that do anything to your argument for irreparable harm?

MR. FRIEDLANDER: I don't think so, Your Honor. Because we are talking about, there are rules to be followed to get on the ballot for this year, so we're seeking to get on the ballot for this year. And there is only -- this year only happens once. There is only one meeting, it's June 6th, and accepting the dates that the other side provided, April 17th is a hard date in order to have a resolution without anybody incurring unnecessary costs.

And this really is the way the structure of the proceedings works. I know the other side made some sounds about whether we could have done things differently, but the no action informal means of dispute resolution is the orderly way to proceed, to see if we have one at the SEC level, there would be no need to come to court. And I know issuers sometimes file suits themselves and seek declarations that they don't have to put some in the proxy, but there always is that recourse to a court for that ultimate determination because the SEC on their own website and their own teaching says they do not provide ultimate determinations. Only a court can do that.

THE COURT: Let me ask one other thing, and then we will save you some time for rebuttal.

MR. FRIEDLANDER: Sure.

THE COURT: It appears that, would you agree that the meaning of "ordinary business" is ultimately really a question of state law and, here, Delaware state law?

MR. FRIEDLANDER: No.

THE COURT: No.

MR. FRIEDLANDER: No. And it's probably best I just leave this with you rather than walk you through the different language, but it's all cited.

THE COURT: I think I saw something.

MR. FRIEDLANDER: Yes, we had snippets.

THE COURT: There was a decision you referenced from the Southern District of New York that in a footnote at least seemed to suggest that ultimately the SEC has been active in the area just by necessity as to how the disputes have come up,

but then in reality what is ordinary business and what is the line between management and directors. Under Delaware law, for a Delaware corporation such as Wal-Mart, it should be determined by state law. Do you disagree with that?

MR. FRIEDLANDER: Yes, because there is no state analog to SEC Rule 14a-8. 14a-8, this remedy to be included on the company's proxy is a creature of federal law, and the language is a federal rule. What you do see in the SEC releases is that animating those words are concepts from state law as that something should be left to the Board and the province of the Board. Other things, stockholders properly should be able to express their views upon an annual meeting.

So there is this notion of, and then the SEC themselves, I mean, grasps with risk compliance, oversight, public policy. These type of issues, proposals that raise those sort of issues should not be excluded. And I don't know -- whether or not it would be properly, under such a resolution would be operative under state law is a different question because we're adopting the language of 14a-8 in light of the interpretation of the SEC.

THE COURT: So if I were to deny the preliminary injunction and this case were to go forward on summary judgment or to trial, would it be something worth entertaining, whether there a question here of state law that might potentially be certified to the Delaware Supreme Court, sort of a chance to get a definition as to what is ordinary business?

MR. FRIEDLANDER: I don't think so, Your Honor. Because as I said, the phrase "ordinary business" dates back at least to 1954, it may be earlier, as a matter of federal law. We have under state law the concept of under the direction -- I'm forgetting my language of 141(a). But that the management affairs of the company are properly under the direction of the Board. So it's different language, and that is what state law is.

This are precatory resolutions. 14a-8 are precatory resolutions. They're non-binding. So, again, that is a creature of federal law as well. So while there are some similarities, we are interpreting federal law here, which is why we are here.

THE COURT: Well, I will have to tell the new Chancellor you can't quote 141(a) off the top of your head.

I will save you some time on rebuttal.

MR. FRIEDLANDER: Thank you, Your Honor.

THE COURT: I'll hear from Wal-Mart.

MR. OFFENHARTZ: I'll see if I can get my papers up here without dropping everything, Your Honor.

THE COURT: How do you I pronounce your name?

MR. OFFENHARTZ: Your Honor, Adam Offenhartz with Gibson Dunn.

THE COURT: Thank you.

MR. OFFENHARTZ: We, too, Wal-Mart thanks you very much for taking the time to squeeze us in on this very important issue. As you can imagine, Wal-Mart is very focused on this issue. The relief

that my friend across the aisle is seeking is the extraordinary relief of a preliminary injunction in which he bears the burden of clearing four high hurdles; and I want to focus on two in my comments right now.

Your Honor, you raised the issue of the alternative source. That isn't this a problem of Trinity's own making? Isn't the fact that Trinity could have taken an alternative approach something that would avoided the very problem they face now, which was SEC review, or the SEC did issue a no action letter. And I will come back on the merits as to why that no action letter should be given great deference because it is a far more involved process than my friend across the aisle would like to suggest.

But it's also important to keep in mind that had they gone through this alternative approach, they would not be subject to the exclusions of 14a-8. And, Your Honor, with your indulgence, I would like to hand up a couple of documents which really highlight this point.

THE COURT: Since I let Mr. Friedlander hand stuff up, I certainly will let you do as well.

MR. OFFENHARTZ: Thank you, Your Honor. (Documents passed forward.)

MR. OFFENHARTZ: Your Honor, the one set of the documents is the Wal-Mart bylaws. Well, it's an 8-K filed on approximately February 14th, 2014 that attaches both Wal-Mart's current bylaws as well as the black-line. The reason I provided those to the Court is that in our briefing of last week, we did not have an opportunity to provide the actual source documents for how someone, how a savvy

sophisticated investor, an investor sitting on $2 billion in assets like Trinity, would go about acting under Wal-Mart's bylaws.

As the 8-K makes clear, they had from a date in February through March 24th of this year to take this alternative approach. And, importantly, even before some of these revisions were made, they still had that opportunity. So when Trinity was pondering what to do, how to approach this issue, how to approach its proposal, they made a conscious decision to proceed under 14a-8.

THE COURT: Now, what roughly would it have cost had they proceeded under the bylaws provision?

MR. OFFENHARTZ: Your Honor, I do not know what it would have cost, but I do know from my travels in this area that there are any number of ways to control the cost of outreach to client. I have been involved in cases where people were soliciting proxies for short slates of directors or even full slates of directors. And when they take this alternative approach under 14a-7, and under the company's bylaws, they are paying for it themselves, but there are a number of steps they can take to limit the costs. They can reach --

THE COURT: You have Mr. Edwards' declaration that you put in which talks about the costs to Wal-Mart were I to provide the relief sought by the plaintiff. He talks about millions of dollars in costs which I understand to be in part necessitated by the reprinting of documents.

Is that a reasonable estimate as to what it would have cost Trinity --

MR. OFFENHARTZ: I think -- I'm sorry, Your Honor.

THE COURT: -- to pursue this alternative mechanism?

MR. OFFENHARTZ: Your Honor, I would suggest that is an absolute ceiling for a number of reasons. What Trinity would be disseminating would be much smaller than what Wal-Mart was disseminating. Wal-Mart, as you might imagine, its proxy statement is literally hundreds of pages. If Trinity were to take that approach, it would be a much smaller document.

THE COURT: But it would be, what, I was going to say first class postage but than probably something cheaper than that, but it would be some basic minimum required postage times each number of record shareholder, I guess?

MR. OFFENHARTZ: I think at some level, it could be that. But, importantly, they can decide to only go after shareholders with more than 1,000 shares or 5,000 shares to bring that cost down. But even more significant than that, this was a conscious decision because in the other document that I handed up, the e-mail, it makes clear that Trinity is well aware of this alternative.

Your Honor, this is an e-mail from October 28th, 2013, from the Reverend Dr. James Cooper to Carol Schumacher. If you look about two-thirds of the way down that first page, it mentions that or even the last paragraph:

"If this request can be accommodated, Trinity Wall Street will refrain from using Rule 14a-7

shareholder proposal process at this time and seek shareholder support for this or similar requests."

The next paragraph says, and I think this is critical. It says, "This situation is different with Cobelli. We do currently plan to solicit proxies from Cobelli's shareholders if certain requests we have made to the company are not granted. We have retained Georgeson to assist in that solicitation."

Georgeson is a highly regarded proxy solicitation firm. Trinity not only knows how to use the alternative but in the case of Cobelli, it had gone so far as to retain a proxy solicitation firm to do that.

And as to the cost, Your Honor, I believe that when you are thinking about cost, there goes your irreparable harm argument. And, Your Honor, the cost to Trinity of perhaps $1 million, perhaps a couple million dollars is de minimis if you remember that they have over $2 billion in assets.

If their concern is to get their message out to shareholders, to get their message in the public and to avoid the very issues we're raising now, the very issues, the very gnarly, difficult -- while we think very easy issues, I am sure they're finding them difficult -- issues of ordinary business under 14a-8. If their mission, if their goal was to make sure that people had this proposal, to make sure that it was available, they could have bypassed this 14a-8 review and gone directly to the shareholders.

THE COURT: So let me play out the hypothetical that I had in my question to the plaintiff's counsel. Is there any opportunity in Wal-Mart's view for the plaintiff to recover those costs if they perhaps are a measure of damages or were it to turn out that I

grant the preliminary injunction and then ultimately conclude that was a mistake and that plaintiff should have gotten the relief it sought?

MR. OFFENHARTZ: I'm sorry, Your Honor. I think I misunderstood your question.

THE COURT: Let me break it down. Let's just stipulate for a moment it would cost a million dollars for plaintiff to pursue that other avenue to get their proposal out to shareholders. Okay?

MR. OFFENHARTZ: Yes.

THE COURT: Have you got that far?

MR. OFFENHARTZ: Yes, Your Honor. Sorry.

THE COURT: Let's further say that I deny the preliminary injunction. Okay?

MR. OFFENHARTZ: Yes, sir.

THE COURT: Then this case goes forward and ultimately the plaintiff prevails. They prove to me that the ordinary business exception does not apply and, therefore, I made a mistake in denying the preliminary injunction.

Does that $1 million measure in any way inform any type of relief that this Court or some other court on some other claim might be able to provide to plaintiff in part as a remedy for the erroneous denial of the preliminary injunction?

MR. OFFENHARTZ: Well, Your Honor, at this juncture, I think it does not because Trinity, with absolute top flight counsel and obviously with Georgeson on retainer, knew that it had until March 24th to take that alternative approach that may well have cost $1 million.

March 24th came and went and significantly the SEC issued its no action letter on March 20th. So

even after the no action letter came down, if Trinity had wanted to avoid the entire fight they're involved in now, they could have taken that alternative approach before March 24th.

I also think, Your Honor, if I understand my friend from across the caption correctly, if I understood him correctly, I think he was saying that this year's proxy materials are this year's proxy materials and that what might happen next year is what would happen next year.

For instance, we think we would have a strong motion -- well, let me focus, let me take a step back on that. One of the sort of hornbook issues of irreparable harm is, is it irreparable? Are there money damages involved? Another key issue is have you created the box you are in? Did you create the problem that you need to seek injunctive relief for? Had Trinity, a savvy, savvy company, $2 billion in assets; Georgeson, a savvy --

THE COURT: I think that is a good distinction. I was trying to ask -- I understand your argument they put themselves in the box they're in, and I take it you agree that now that March 24th has passed, this other avenue through the bylaws is no longer available to them; correct?

MR. OFFENHARTZ: They, through their own decision making, lost that avenue, yes.

THE COURT: That's one, I would agree, component on whether any harm is irreparable. But another component to is whatever harm there is, self-inflicted or not, whether it is remediable by money damages. And that is where I was trying to

focus in my question, my inarticulate question without trying to bring you back there again.

Is it remediable? I understand you are going to say it is their own fault so you are not liable for it. But put that aside just for purposes of the question. Is it remediable by money damages either in this case or some other case or is it not?

MR. OFFENHARTZ: Your Honor, if I understand my adversary's position correctly, they have taken the position that they want their proposal in the materials that are going out April 23rd, where printing is beginning April 17th, full stop.

So if that is the zero sum gain of the relief they're seeking, come April 23rd, we will, or before April 17th when, oops, we would have a decision, one way or the other, if there were other relief they were seeking, if they were to shift gears entirely on their irreparable harm argument and seek some other form of relief, then perhaps then there could be a mechanism where they could be compensated by money damages. But in any event, I don't, we don't see the irreparable harm.

THE COURT: What about next year's meeting versus this year's meeting? Do you think that factors into the irreparable harm analysis? Specifically, if I deny the preliminary injunction and this case plays out and I'm able to get a decision to you in advance of next year's proxy season so they might be able to have this distributed for next year's annual meeting, if they were to prevail, does that sort of thinking factor into the harm analysis, do you think?

MR. OFFENHARTZ: Well, Your Honor, I would -- if that is the way things play out and Your

Honor were to rule this proposal passes muster six months from now, clearly that would provide significant guidance to the parties. I absolutely agree that it would provide guidance. I think I would be remiss if I didn't say that, and perhaps not unlike my adversary, that I don't know that the case rolls over into next year because I think we would have any number of arguments that, and I think my adversary alluded to them, that each year is its own year, and that there would be an approach and a way to deal with it.

Frankly, I in no way want to convey to the Court that Wal-Mart is waiving any of those arguments that it could make that this case, come April 17th, is effectively done unless a court intervenes and orders Wal-Mart to not send out its proxy materials to its many, many shareholders who are expecting them. Of course, that has the potential to dramatically alter the annual meeting currently scheduled for June 6th, which, in turn, as your Honor knows from the affidavit we submitted, affects all kinds of logistics from the 4,000 Wal-Mart associates from many countries.

THE COURT: And I saw all that.

MR. OFFENHARTZ: Yes.

THE COURT: And I intend to make a decision soon.

MR. OFFENHARTZ: No, no. And --

THE COURT: Let me ask you before, because I do want to give you a couple minutes on the merits.

MR. OFFENHARTZ: Thank you, Your Honor.

THE COURT: But one more harm-related question going I guess to the balance of harms.

If I were to decide today or Monday to grant the preliminary injunction, isn't it correct that there is no significant cost, no real harm to Wal-Mart, it's just a matter of adding probably on a word processor somewhere another page to that already lengthy proxy you showed me?

MR. OFFENHARTZ: Your Honor, on the one hand, mechanically you are right. If you were to grant the preliminary injunction that Trinity is seeking, which we think is not supported, Wal-Mart could address it that way.

But Wal-Mart might also take the position, and I think it would be well within its rights to take the position, that the securities laws are at issue. 14a-8 is at issue. The SEC no action letters are clear. We've cited 15 or 16 that are on point. The SEC commission releases that my friend across the aisle refer to, the 1998 one, which if the Court will grant me a few moments, I would welcome the opportunity to say that we agree, that release is very insightful and provides great information, all of which supports our argument that this proposal should be excluded.

So I think it does a disservice to the importance of the securities laws, and I thin, it does a disservice to the shareholders of Wal-Mart to assume or to presume that simply adding a proposal, ah, what is the big deal? Because it is a big document. Everything you add to it has the potential to, I guess, create clutter is the first phrase that comes to mind. I mean that with no disrespect, but every time you make it longer you are perhaps lessening the degree to which shareholders are reading it. Moreover, it has the potential to open the floodgates.

If it is easy, and if 14a-8 is discounted, there could well be next year a mass of shareholder proposals and literally the floodgates could open, and then that very thick document I held up a few moments ago could end up being twice as large, and at some point it defeats the purpose of 14a-8. At some point, shareholders get a document so big they don't look at it at all.

So I do think --

THE COURT: That's a good segue. Let's come to just briefly to the merits of 14a-8.

Why isn't it your interpretation of 14a-8 I guess the opposite of opening the floodgates? If "relates to ordinary business" is so broad as you seem to suggest, doesn't that leave the shareholder proxy mechanism so narrow there is really very little that the shareholder can propose?

MR. OFFENHARTZ: Actually, Your Honor, that is a good question and one of the things we have been thinking about. But, interestingly, I think looking at the way Wal-Mart has handled shareholder proposals itself provides a very good answer to that. If you bear with me for one second.

Your Honor, as we have indicated in our papers, Wal-Mart has provided -- has included in the last five years 24 shareholders proposals. So even with the reading that we are proffering to the Court that we think is well supported by the no action letters, well supported by the SEC commission, well supported by the *Apache* decision, Wal-Mart does publish and include in its proxy materials 14a-8 compliance proposals. In the last five years, 24

shareholders proposals were included by Wal-Mart. And I can give you the details to provide comfort.

THE COURT: Not at this time.

MR. OFFENHARTZ: Okay. But I have a list, Your Honor, and it's detailed, and it will convey that there is no concern about anti-floodgating, that 24 proposals with things from political contributions. I will ...

THE COURT: We'll stop there.

MR. OFFENHARTZ: Yes, Your Honor. I will.

THE COURT: I accept your representation. Let me ask you this, though. The proposal, the one in front of us, seemed pretty carefully crafted to try to relate really just at a level of policy and corporate governance.

In fact, I think the plaintiff somewhere writes, and I think they are right about this, that the proposal, even if adopted ultimately by the shareholders, by the Board could be complied with at a policy or oversight level and is not about -- and there need not be any specific decisions about what is on the shelves at Wal-Mart.

Aren't they right about that? And doesn't that show this isn't relating to ordinary business?

MR. OFFENHARTZ: Your Honor, respectfully, we disagree with that position for several reasons. One of which is during the earlier argument just this afternoon, you asked my friend across the aisle, are we dealing with guns on shelves or are we dealing with guns in society? And Trinity conceded that we're dealing with guns on shelves, not guns in society. So I think Trinity's position is that this

really is not a socially prominent issue that has to be addressed.

And as to the fact that they're simply trying to have management -- or the Board create a general policy that would then be followed by management, I think that that is form over substance. The SEC, both in no action letters but also in the very release that my adversary pointed out, the 1998 release, makes clear you have to look at the subject matter of what the proposal is all about.

I think a careful reading of this proposal indicates that it's got these three parameters that are very, very overbroad and could cover products ranging from, as my adversary conceded, guns, to music videos, to movies, to books, conceivably to fragrances, makeup, lipstick, clothing, shoes, T-shirts, cigarettes, alcohol --

THE COURT: One more question for you.

MR. OFFENHARTZ: Peanut butter.

THE COURT: Peanut butter?

MR. OFFENHARTZ: Your Honor, allergy issues are very significant.

THE COURT: Okay. That wasn't my last question. This is my last question.

So I don't know if I have the same 1988 SEC release as you all have been referring to, but there is a 1988 SEC release that talks about two considerations in connection with the ordinary business exclusion. One being whether decisions are fundamental to management's ability to run a company on a day-to-day basis and another being the degree to which the proposal would micromanage the company.

Regardless of what release that is, are those elements of the test I need to apply? And, if so, how are they applicable here?

MR. OFFENHARTZ: Your Honor, that is an excellent question, and that is what the '98 release I'm looking at says at page 4. Indeed, when you talk about the "relates to the subject matter of the proposal day-to-day basis," I think that language is incredibly instructive for us.

First of all, the *Apache* judge indicated reading this '98 release is very helpful. But when I look at the language, the SEC says: "Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as hiring, promotion, termination of employees; significantly, decisions on production, quality and quantity, and retention of suppliers."

Now, your Honor, I would respectfully suggest that the examples, the SEC felt worth putting in such as decisions on production quality and quantity and the retention of suppliers are very analogous to what a retailer like Wal-Mart does.

What does a retailer like Wal-Mart do? It has literally hundreds of thousands of products in a myriad of stores: Wal-Mart stores, Sam's Clubs, wholesalers, online, and it has to make decisions about do we buy this product? Do we sell this product? Do we buy this product here in this state? Do we sell this product here in this other state?

To me, that is very analogous if not really right in the same category as the SEC specific examples from this '98 release.

THE COURT: I think that is right. But the proposal isn't that, the proposal is have one of your Board committees adopt a policy or consider a policy about these things. So that is not what the SEC was talking about in that release, is it?

MR. OFFENHARTZ: Your Honor, I think that the SEC in other instances has made clear that tacking on a Board role in something that also touches ordinary course business does not free it from the ordinary course, ordinary business mandate, if you will, or the ordinary course exclusion. That is what this proposal seeks.

This proposal seeks to have the shareholders vote and provide guidance and I guess affix or amend a charter of a committee of the Board to undertake these three policies, to then reach out to management and have management make the very decisions about buying and selling that are critical.

And I think, Your Honor, looking at the proposal for a moment really highlights that. As much as they have tried artfully to avoid this, the very first sentence -- well, I mean I guess the second paragraph says: "Providing oversight concerning the formulation and implementation of, and the public reporting of the formulation and implementation of policies and standards," and, Your Honor, here is the kicker, "that determines whether or not the company should sell a product that ..."

This is about what Wal-Mart will buy from its supplier's -- and I harken back to the '98

release -- and what it will sell. And given the breadth of Wal-Mart with stores all over the place, this is not one person deciding one thing. This is a tremendously complex web of decision making that the shareholders are trying to, inconsistent with 14a-8, be involved in.

THE COURT: All right. Thank you very much. I have given you some extra time. And I will certainly give Mr. Friedlander a couple more minutes as well. Thank you very much.

MR. OFFENHARTZ: Thank you, Your Honor.

MR. FRIEDLANDER: Thank you, Your Honor. I think we had the opportunity to really crystallize the issue here very quickly.

We're all talking about the same 1998 release. My friend left off as a certain point of the release. I'd like to read you the next sentence.

"However, proposals relating to such matters" -- suppliers and things like that -- "but focusing on sufficiently significant social policy issues such as significant discrimination matters generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote."

Your Honor talked about how this proposal was drafted. We said it was first impression as far as we know. We haven't heard any contradiction to that.

My friend said you have to look at the subject matter. If you look at Tab 2, Your Honor, the staff legal bolded question 6: Do we base our determinations solely on the subject matter of the proposal?

The answer? No. We consider the specific arguments asserted by the company and the shareholder, the way in which the proposal is drafted and how the arguments in our prior no action responses apply to the specific proposal and company at issue.

So we pay attention to how it is drafted.

The staff legal bolded 14(e) Tab 4 talks about the permissibility of proposals that may -- talk about the company minimizing or eliminating operations that may adversely effect the environment or public health. And ours is very analogous to that, about public safety.

And in that same legal bolding on Tab 4, there is a sentence about the widespread recognition of the role, the oversight of a company's management of risk: "There is a significant policy matter with regard to governance of the corporation ..." and then it continues on: "In light of the recognition of the importance of risk assessment, the Board's role and the proposal of a company's management of risk may transcend the day-to-day business matters of a company and raise policy issues so significant that it would be appropriate for a shareholder vote.

And that is why, Your Honor, I have asked you to focus on the SEC releases as the authoritative guidance. There really is very little, apart from the SEC, that really bears on our specific proposal.

I heard my friend reference the *Apache* decision. If I asked Your Honor to look at one case, I would also say the *Apache* decision. The *Apache* decision is a 2008 decision, so it talks about some of these more recent, so it talks about the 1998 release. And it was

about workplace policies about antidiscrimination as to sexual orientation and as relates to hiring and jobs.

And the flavor of the opinion is, if the proposal had been limited to that, it would have been fine. But the way it was worded, it also dealt with some other issues about charitable contributions and other things not relating to employment, and that was found to be not fitting the proposal language too well, also happens to be micro-managing the affairs of the company, the actual policies it was purporting to ask the company to adopt.

We are not asking the corporation to adopt any particular policies. And they all fit squarely within what we are talking about, the public policy of risk oversight as relates to matters of importance to the reputation of the company, the brand of the company, and it can have a dramatic effect on public safety.

THE COURT: So with the SEC 1998 release and everything else you refer to about the SEC and the *Apache* decision and the others, this case comes before the SEC. They have all of your arguments. All the same arguments you made to me here were made there. And knowing all of this, the SEC, with their expertise, just plain got it wrong? Is that what I should conclude?

MR. FRIEDLANDER: Right. We can look back at the correspondence and see how well the correspondence crystallized it versus the arguments we had heard. But as I said, it's a staff. There are 263 of these responses written each year.

I was interested to see the Gibson Dunn & Crutcher specializes in this area. They posted some of the Harvard corporate governance law a couple months, how they were able to get the SEC to exclude a proposal even though the SEC had required it to be included, the exact same proposal, for a different company in the same proxy season. Identically worded proposals. One gets included, one gets excluded.

I think that tells you something about the SEC is trying to keep up but it's staff work and they're under tremendous time pressure. I know your Honor is under time pressure, but there is not this requirement necessarily to make the ultimate determination. They're trying to fit it into a box.

THE COURT: Finally, what about this alternative mechanism and Georgeson and how sophisticated and wealthy your client is? Wasn't that a reasonable alternative approach that could have pursued?

MR. FRIEDLANDER: It is an approach that theoretically could be avoided. We know who Georgeson is. I think we can talk about the costs associated with it, but let's be clear. My opponents are asking Your Honor to be the first court that we know of to say that being not able to avail yourself of 14a-8 is not irreparable injury.

We cited authority, *Lovenheim v Iroquois Brands*. That is 618 F. Supp. 554 (1985). It talks about the irreparable harm of losing the opportunity to communicate his concern with those shareholders not attending the annual meeting.

And *New York City Employees Retirement System* v *American Brands*, 634 F. Supp. 1382 (1986). Irreparable harm occurs to a shareholder whose proposal is wrongfully excluded from management's proxy solicitation because the shareholders loses the opportunity to communicate his concern with those shareholders not attending the upcoming shareholder meeting.

I think the fact that we're talking about Wal-Mart just magnifies the expense and difficulty. In my other life in the Court of Chancery, I'm dealing with wealthy investors who are deterred by the cost to practice litigation. They are expensive. They are difficult. There is no payoff if you win, even if you get you directors on the board. It's an expensive proposition.

14a-8 was adopted decades ago. People can talk. I mean whether it's floodgates or whether it should be reformed, it get revisited every few years. This is federal law, and it's a federal right.

THE COURT: All right. Thank you. I'm going to take a recess and check on whether my jury has needed me in my absence.

MR. OFFENHARTZ: Your Honor, may I be so bold as to offer just two very, very quick points?

THE COURT: Very quickly.

MR. OFFENHARTZ: I won't even approach the podium.

THE COURT: Okay. Fine.

MR. OFFENHARTZ: First of all, this is one of those rare instances where the letter that my friend referred to where Gibson Dunn was apparently able to reverse something that had never been reversed

before. That letter happened to be written by my colleague Ms. Ising. And she assures me that that is simply not the case.

THE COURT: And my understanding is they're sort of fact specific, and one proposal could be appropriate for one and not for another.

MR. FRIEDLANDER: I would be glad to hand it up.

THE COURT: I don't need to see any more. The other thing I want to make clear for the record, because I may have misspoken, is that it is not a two prong test. It's not subject matter and micromanage. It's sort of one or the other. We don't need to do both.

And just one last point. On the socially important thing that my adversary mentions, I didn't state it, he did read it: "However, proposals relating to such matters, but focusing on sufficiently important matters."

Focusing. Their proposal does not focus on nuclear reactors. Their proposal does not focus on employment discrimination. Their proposal does not focus on a specific significant social policy issue. So I think that that is a bit of a red herring. And,

Finally, and then I promise I will sit down and be quiet. The *Apache* case I think is fascinating because in that case, the Court noted that there actually was a socially important policy issue, the employment discrimination issue, yet it still held that the proposal was excludable because parts of the proposal were ordinary business. It's the "tainting the well" theory that is well settled under SEC jurisprudence, if you will.

THE COURT: Okay.

MR. OFFENHARTZ: I'll stop there.

THE COURT: You caused Mr. Friedlander to rise, and I'm going to give him the last word as it is his motion.

MR. FRIEDLANDER: This is my motion, Your Honor.

If I could pass up the web posting, I would appreciate it. I won't take up any time.

THE COURT: That's fine.

MR. FRIEDLANDER: Thank you.

(Document passed forward.)

THE COURT: If you want to make any last point, I would permit that, too, if you wish.

MR. FRIEDLANDER: Maybe I will read it into the record, the staff's decision.

MR. OFFENHARTZ: Do you have a copy of that?

MR. FRIEDLANDER: Yes. I'm sorry.

(Document passed out.)

MR. FRIEDLANDER: "The staff's decision to grant or give rise no action request is notable because the staff had denied a no action request earlier this year regarding identical shareholder proposal submitted to another company."

THE COURT: Thank you for that.

So as I said, I'm going to take a recess. I might be able to get you a ruling. I need to check on whether my jury needs me and collect my thoughts. So somebody from each side stick around and we'll let you know something shortly.

(Brief recess taken.)

* * *

(Proceedings reconvened after recess.)

THE COURT: Evidently my jury has not needed me, so I have been able to focus my attention in the interim on your case, and I'm in a position to make a ruling on the motion. I'm in this position and really credit in large part all of you. The briefing was excellent the arguments today was extremely helpful.

We expedited the matter. It's rare for us to expedite matters this quickly. We're really not in a position to do it very often but I thought it was warranted given the timing of the whole proxy season and the nature of the parties' dispute.

So we put what time we could into preparing for today. But were I to take the matter under advisement and try to write my thoughts, who knows when you would hear from us, and it's not in anyone's interest I think under the circumstances for you not to know what my ruling is before these materials need to be prepared.

So having said all that and having reviewed the materials submitted before today and including I think much if not all of what was also passed up today, and having listened carefully to the argument, the Court has decided that Trinity's motion for preliminary injunction and/or temporary restraining order is denied. Let me try to explain why.

First, undisputedly, of course, Trinity, the plaintiff, is seeking extraordinary relief. As the Third Circuit has made clear in many cases, a preliminary injunction is an extraordinary remedy and should be granted only in limited circumstances.

The four factors that the Court must consider on which the plaintiff has the burden are well settled

and really all four need to favor relief in order for it to be granted.

Here, I find the plaintiff had not met its burden to show a likelihood of success on the merits. And having made that finding, the decision to deny the motion followed.

The plaintiff claims that the defendant Wal-Mart is violating or will likely be found to have violated Section 14a of the Securities Exchange Act and SEC Rule 14a-8 by refusing to include plaintiff Trinity's proposal in defendant's 2014 proxy materials in advance of Wal-Mart's 2014 annual meeting.

The plaintiff's proposal asks that the Board amend its charter to require, among other things, "oversight concerning the formulation and implementation of policies and standards that determine whether or not the company should sell a product that (1) especially endangers public safety and well-being, (2) has a substantial potential to impair the reputation of the company and/or (3) would reasonably be considered by many offensive to the family and community values integral to the company's promotion of its brand."

The proposal also expressly and I think importantly states that the requested "oversight and/or reporting is intended to cover policies and standards that would be applicable determining whether or not the company should sell guns equipped with magazines holding more than 10 round of ammunitions, high capacity magazines." And I tried to emphasize it's my added emphasis on "sell."

Defendant responded to Trinity's proposal by informing Trinity and informing the SEC that the defendant intended to omit the proposal from its 2014 proxy materials, stating, "The company may exclude the proposal pursuant to Rule 14a-8(i)(7) because it deals with matters relating to the company's ordinary business operations. Specifically, decisions concerning the products offered for sale by the company.

Materially the same, if not identically the same arguments that were made to this Court in connection with this dispute were made previously to the SEC. Plaintiff's memo, D.I. 211, for instance, notes that "the same reasoning given here was given to the SEC."

And with all that, the SEC, with its expertise and its lengthy experience in this area, found that Wal-Mart met its burden to show there appears to be some basis for Wal-Mart's contention that the ordinary business exception applies as "the proposal relates to the products and services offered for sale by the company."

With all of that, while I agree that no deference to the SEC is mandated, I believe under the circumstances it is appropriate for the Court to accord some deference to the SEC given its expertise and again given particularly that all of the arguments that were made here have previously been made out in front of the SEC by both sides.

I understand the SEC has limited resources, that its no action letters are simply the opinion of staff, they're non-binding. Of course, as we have discussed, the resources of this court are limited as

well. We don't have the expertise of the SEC. And under the circumstances, I think some deference is merited.

Let me just note in this regard, we have reviewed the *Apache* decision before today. I had a moment to look it over as well during break, and one of the things I noted is that, there, it was not just a preliminary injunction motion but it was consolidated with a trial on the merits, and that Court appears to have had at least a little bit more time before the proxy had been sent out already, so the issues were not as pressing in terms of timing.

I don't know what lays ahead in this case and, if we get to a trial, whether the record in front of me will be much different than what it is now. But one hopes that if the case proceeds, I'll at least have more time to reflect further on the argument.

In any event, all that said, I'm not just deferring to the SEC. The Court does also agree with Wal-Mart that Trinity has not shown that the SEC staff's no action letter was erroneous.

Because Trinity's proposal deals with the matter relating to the company's ordinary business operations, and that's the language of the exception, "deals with the matter relating to the company's ordinary business operations." Here, it relates to what Wal-Mart sells on its shelves. I recognize I'm somewhat old fashioned to refer "to the shelves" but you know what I mean. The Court believes it is likely that it will reach the same conclusion as the SEC when it reaches the merits ultimately in these proceedings.

As Trinity's counsel acknowledged at the start of the proceeding today, the policy here deals with guns on the shelves and not guns in society.

While the specific proposal is crafted as one directed solely to policy and oversight and therefore arguably arises in the difficult and seemingly novel perhaps intersection between ordinary business on the one hand corp. governance on the other hand, ultimately I'm not persuaded that I'm likely to conclude at the end of the day on the merits that it therefore does not fall within the exception given the rule for ordinary business.

So for all those reasons, I find the plaintiff failed to meet its burden of showing a likelihood of success on the merits.

Given that finding, I need not and am not making any finding on the other three prongs on the preliminary injunction test.

Let me just touch briefly without making findings, since we did have some good discussions about it.

I think there appears to be good arguments on both sides on the irreparable harm analysis. I think it is likely the balance of harm favors the plaintiff.

And then on public interest, there are clearly important public interests on both sides of the scale here, but under the circumstances I need not weigh them and come out to a conclusion, one way or the other.

So I will be entering an order denying, for the reasons stated in court here, the motion for preliminary injunction and TRO. And I will also

solicit in the coming days scheduling proposals for how this matter should proceed hereafter.

Are there any questions about what I have ruled or anything else we should discuss in our time together, Mr. Friedlander?

MR. FRIEDLANDER: None, Your Honor.

THE COURT: All right. And forgive me, I won't butcher your name to end the week.

MR. OFFENHARTZ: Thank you for that, Your Honor. Nothing further.

THE COURT: All right. Thank you all very much. We will be in recess.

(Hearing ends at 3:56 p.m.)

I hereby certify the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.

/s/ Brian P. Gaffigan
Official Court Reporter
U.S. District Court

APPENDIX E

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

March 20, 2014

Erron W. Smith
Wal-Mart Stores, Inc.
erron.smith@walmartlegal.com

Re: Wal-Mart Stores, Inc.
Incoming letter dated January 30, 2014

Dear Mr. Smith:

This is in response to your letter dated January 30, 2014 concerning the shareholder proposal submitted to Walmart by The Rector, Church-Wardens and Vestrymen of Trinity Church in the City of New York. We also have received a letter from the proponent dated February 4, 2014. Copies of all of the correspondence on which this response is based will be made available on our website at http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8.shtml. For your reference, a brief discussion of the Division's informal procedures regarding shareholder proposals is also available at the same website address.

Sincerely,

Matt S. McNair
Special Counsel

Enclosure

cc: The Rev. Dr. James H. Cooper
Trinity Wall Street
jcooper@trinitywallstreet.org

March 20, 2014

Response of the Office of Chief Counsel
Division of Corporation Finance

Re: Wal-Mart Stores, Inc.
Incoming letter dated January 30, 2014

The proposal requests that the board amend the compensation, nominating and governance committee charter to provide for oversight concerning the formulation and implementation of policies and standards that determine whether or not the company should sell a product that especially endangers public safety and well-being, has the substantial potential to impair the reputation of the company and/or would reasonably be considered by many offensive to the family and community values integral to the company's promotion of its brand.

There appears to be some basis for your view that Walmart may exclude the proposal under rule 14a-8(i)(7), as relating to Walmart's ordinary business operations. In this regard, we note that the proposal relates to the products and services offered for sale by the company. Proposals concerning the sale of particular products and services are generally excludable under rule 14a-8(i)(7). Accordingly, we will not recommend enforcement action to the Commission if Walmart omits the proposal from its proxy materials in reliance on rule 14a-8(i)(7).

Sincerely,

Tonya Aldave
Attorney-Adviser

APPENDIX F

17 C.F.R. § 240.14a–8

§ 240.14a–8 Shareholder proposals.

Effective: September 20, 2011

This section addresses when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders. In summary, in order to have your shareholder proposal included on a company's proxy card, and included along with any supporting statement in its proxy statement, you must be eligible and follow certain procedures. Under a few specific circumstances, the company is permitted to exclude your proposal, but only after submitting its reasons to the Commission. We structured this section in a question-and-answer format so that it is easier to understand. The references to "you" are to a shareholder seeking to submit the proposal.

(a) Question 1: What is a proposal? A shareholder proposal is your recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company's shareholders. Your proposal should state as clearly as possible the course of action that you believe the company should follow. If your proposal is placed on the company's

proxy card, the company must also provide in the form of proxy means for shareholders to specify by boxes a choice between approval or disapproval, or abstention. Unless otherwise indicated, the word "proposal" as used in this section refers both to your proposal, and to your corresponding statement in support of your proposal (if any).

(b) Question 2: Who is eligible to submit a proposal, and how do I demonstrate to the company that I am eligible?

(1) In order to be eligible to submit a proposal, you must have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date you submit the proposal. You must continue to hold those securities through the date of the meeting.

(2) If you are the registered holder of your securities, which means that your name appears in the company's records as a shareholder, the company can verify your eligibility on its own, although you will still have to provide the company with a written statement that you intend to continue to hold the securities through the date of the meeting of shareholders. However, if like many shareholders you are not a registered holder, the company likely does not know that you are a shareholder, or how many shares you own. In this case, at the time you submit your proposal, you must prove your eligibility to the company in one of two ways:

(i) The first way is to submit to the company a written statement from the "record" holder of your securities (usually a broker or bank) verifying that, at the time you submitted your proposal, you continuously held the securities for at least one year. You must also include your own written statement that you intend to continue to hold the securities through the date of the meeting of shareholders; or

(ii) The second way to prove ownership applies only if you have filed a Schedule 13D (§ 240.13d–101), Schedule 13G (§ 240.13d–102), Form 3 (§ 249.103 of this chapter), Form 4 (§ 249.104 of this chapter) and/or Form 5 (§ 249.105 of this chapter), or amendments to those documents or updated forms, reflecting your ownership of the shares as of or before the date on which the one-year eligibility period begins. If you have filed one of these documents with the SEC, you may demonstrate your eligibility by submitting to the company:

(A) copy of the schedule and/or form, and any subsequent amendments reporting a change in your ownership level;

(B) Your written statement that you continuously held the required number of shares for the one-year period as of the date of the statement; and

(C) Your written statement that you intend to continue ownership of the shares through

the date of the company's annual or special meeting.

(c) Question 3: How many proposals may I submit? Each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting.

(d) Question 4: How long can my proposal be? The proposal, including any accompanying supporting statement, may not exceed 500 words.

(e) Question 5: What is the deadline for submitting a proposal?

(1) If you are submitting your proposal for the company's annual meeting, you can in most cases find the deadline in last year's proxy statement. However, if the company did not hold an annual meeting last year, or has changed the date of its meeting for this year more than 30 days from last year's meeting, you can usually find the deadline in one of the company's quarterly reports on Form 10–Q (§ 249.308a of this chapter), or in shareholder reports of investment companies under § 270.30d – 1 of this chapter of the Investment Company Act of 1940. In order to avoid controversy, shareholders should submit their proposals by means, including electronic means, that permit them to prove the date of delivery.

(2) The deadline is calculated in the following manner if the proposal is submitted for a

regularly scheduled annual meeting. 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. 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.

(3) If you are submitting your proposal for a meeting of shareholders other than a regularly scheduled annual meeting, the deadline is a reasonable time before the company begins to print and send its proxy materials.

(f) Question 6: What if I fail to follow one of the eligibility or procedural requirements explained in answers to Questions 1 through 4 of this section?

(1) The company may exclude your proposal, but only after it has notified you of the problem, and you have failed adequately to correct it. Within 14 calendar days of receiving your proposal, the company must notify you in writing of any procedural or eligibility deficiencies, as well as of the time frame for your response. Your response must be postmarked, or transmitted electronically, no later than 14 days from the date you received the company's notification. A

company need not provide you such notice of a deficiency if the deficiency cannot be remedied, such as if you fail to submit a proposal by the company's properly determined deadline. If the company intends to exclude the proposal, it will later have to make a submission under § 240.14a–8 and provide you with a copy under Question 10 below, § 240.14a–8(j).

(2) If you fail in your promise to hold the required number of securities through the date of the meeting of shareholders, then the company will be permitted to exclude all of your proposals from its proxy materials for any meeting held in the following two calendar years.

(g) Question 7: Who has the burden of persuading the Commission or its staff that my proposal can be excluded? Except as otherwise noted, the burden is on the company to demonstrate that it is entitled to exclude a proposal.

(h) Question 8: Must I appear personally at the shareholders' meeting to present the proposal?

(1) Either you, or your representative who is qualified under state law to present the proposal on your behalf, must attend the meeting to present the proposal. Whether you attend the meeting yourself or send a qualified representative to the meeting in your place, you should make sure that you, or your representative, follow the proper state law

procedures for attending the meeting and/or presenting your proposal.

(2) If the company holds its shareholder meeting in whole or in part via electronic media, and the company permits you or your representative to present your proposal via such media, then you may appear through electronic media rather than traveling to the meeting to appear in person.

(3) If you or your qualified representative fail to appear and present the proposal, without good cause, the company will be permitted to exclude all of your proposals from its proxy materials for any meetings held in the following two calendar years.

(i) Question 9: If I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal?

(1) Improper under state law: If the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization;

Note to paragraph (i)(1): Depending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state

law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.

(2) Violation of law: If the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject;

Note to paragraph (i)(2): We will not apply this basis for exclusion to permit exclusion of a proposal on grounds that it would violate foreign law if compliance with the foreign law would result in a violation of any state or federal law.

(3) Violation of proxy rules: If the proposal or supporting statement is contrary to any of the Commission's proxy rules, including § 240.14a–9, which prohibits materially false or misleading statements in proxy soliciting materials;

(4) Personal grievance; special interest: If the proposal relates to the redress of a personal claim or grievance against the company or any other person, or if it is designed to result in a benefit to you, or to further a personal interest, which is not shared by the other shareholders at large;

(5) 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;

(6) Absence of power/authority: If the company would lack the power or authority to implement the proposal;

(7) Management functions: If the proposal deals with a matter relating to the company's ordinary business operations;

(8) Director elections: If the proposal:

(i) Would disqualify a nominee who is standing for election;

(ii) Would remove a director from office before his or her term expired;

(iii) Questions the competence, business judgment, or character of one or more nominees or directors;

(iv) Seeks to include a specific individual in the company's proxy materials for election to the board of directors; or

(v) Otherwise could affect the outcome of the upcoming election of directors.

(9) Conflicts with company's proposal: If the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting;

Note to paragraph (i)(9): A company's submission to the Commission under this section should specify the points of conflict with the company's proposal.

(10) Substantially implemented: If the company has already substantially implemented the proposal;

Note to paragraph (i)(10): A company may exclude a shareholder proposal that would provide an advisory vote or seek future advisory votes to approve the compensation of executives as disclosed pursuant to Item 402 of Regulation S–K (§ 229.402 of this chapter) or any successor to Item 402 (a "say-on-pay vote") or that relates to the frequency of say-on-pay votes, provided that in the most recent shareholder vote required by § 240.14a–21(b) of this chapter a single year (i.e., one, two, or three years) received approval of a majority of votes cast on the matter and the company has adopted a policy on the frequency of say-on-pay votes that is consistent with the choice of the majority of votes cast in the most recent shareholder vote required by § 240.14a–21(b) of this chapter.

(11) Duplication: If the proposal substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the company's proxy materials for the same meeting;

(12) Resubmissions: If the proposal deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials within the preceding 5 calendar years, a company may exclude it from its proxy materials for any meeting held within 3 calendar

years of the last time it was included if the proposal received:

(i) Less than 3% of the vote if proposed once within the preceding 5 calendar years;

(ii) Less than 6% of the vote on its last submission to shareholders if proposed twice previously within the preceding 5 calendar years; or

(iii) Less than 10% of the vote on its last submission to shareholders if proposed three times or more previously within the preceding 5 calendar years; and

(13) Specific amount of dividends: If the proposal relates to specific amounts of cash or stock dividends.

(j) Question 10: What procedures must the company follow if it intends to exclude my proposal?

(1) If the company intends to exclude a proposal from its proxy materials, it must file its reasons with the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The company must simultaneously provide you with a copy of its submission. The Commission staff may permit the company to make its submission later than 80 days before the company files its definitive proxy statement and

form of proxy, if the company demonstrates good cause for missing the deadline.

(2) The company must file six paper copies of the following:

(i) The proposal;

(ii) An explanation of why the company believes that it may exclude the proposal, which should, if possible, refer to the most recent applicable authority, such as prior Division letters issued under the rule; and

(iii) A supporting opinion of counsel when such reasons are based on matters of state or foreign law.

(k) Question 11: May I submit my own statement to the Commission responding to the company's arguments?

Yes, you may submit a response, but it is not required. You should try to submit any response to us, with a copy to the company, as soon as possible after the company makes its submission. This way, the Commission staff will have time to consider fully your submission before it issues its response. You should submit six paper copies of your response.

(l) Question 12: If the company includes my shareholder proposal in its proxy materials, what information about me must it include along with the proposal itself?

(1) The company's proxy statement must include your name and address, as well as the number of the company's voting securities that you hold. However, instead of providing that information, the company may instead include a statement that it will provide the information to shareholders promptly upon receiving an oral or written request.

(2) The company is not responsible for the contents of your proposal or supporting statement.

(m) Question 13: What can I do if the company includes in its proxy statement reasons why it believes shareholders should not vote in favor of my proposal, and I disagree with some of its statements?

(1) The company may elect to include in its proxy statement reasons why it believes shareholders should vote against your proposal. The company is allowed to make arguments reflecting its own point of view, just as you may express your own point of view in your proposal's supporting statement.

(2) However, if you believe that the company's opposition to your proposal contains materially false or misleading statements that may violate our anti-fraud rule, § 240.14a – 9, you should promptly send to the Commission staff and the company a letter explaining the reasons for your view, along with a copy of the company's statements opposing your proposal. To the extent

possible, your letter should include specific factual information demonstrating the inaccuracy of the company's claims. Time permitting, you may wish to try to work out your differences with the company by yourself before contacting the Commission staff.

(3) We require the company to send you a copy of its statements opposing your proposal before it sends its proxy materials, so that you may bring to our attention any materially false or misleading statements, under the following timeframes:

(i) If our no-action response requires that you make revisions to your proposal or supporting statement as a condition to requiring the company to include it in its proxy materials, then the company must provide you with a copy of its opposition statements no later than 5 calendar days after the company receives a copy of your revised proposal; or

(ii) In all other cases, the company must provide you with a copy of its opposition statements no later than 30 calendar days before its files definitive copies of its proxy statement and form of proxy under § 240.14a – 6.

APPENDIX G

Release No. 23200 (S.E.C. Release No.), Release No. 40018, Release No. 34-40018, Release No. IC - 23200, 67 S.E.C. Docket 373, 1998 WL 254809

Securities and Exchange Commission (S.E.C.)
Securities Exchange Act of 1934
Investment Company Act of 1940
17 CFR Part 240

RIN 3235-AH20

AMENDMENTS TO RULES ON SHAREHOLDER PROPOSALS

File No. S7-25-97
May 21, 1998

***1 AGENCY: Securities and Exchange Commission**

ACTION: Final Rule

SUMMARY: The Securities and Exchange Commission ("we" or "Commission") is adopting amendments to its rules on shareholder proposals. The amendments recast rule 14a-8 into a Question & Answer format that both shareholders and companies should find easier to follow, and make other modifications to existing interpretations of the rule. We are also amending rule 14a-4 to provide clearer ground rules for companies' exercise of discretionary voting authority, and making related amendments to rule 14a-5.

EFFECTIVE DATE: The amendments are effective [30 days after publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Frank G. Zarb, Jr., or Sanjay M. Shirodkar, Division of Corporation Finance, at (202) 942-2900, or Doretha M. VanSlyke, Division of Investment Management, at (202) 942-0721, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to rules 14a-8[1], 14a-4[2], and 14a-5[3] under the Securities Exchange Act of 1934 (the "Exchange Act").[4]

I. Executive Summary

With modifications, we are adopting some of the amendments to our rules on shareholder proposals that we initially proposed on September 18, 1997.[5] As explained more fully in this release, we modified our original proposals based on our consideration of the more than 2,000 comment letters we received from the public.[6]

Our proposed changes evoked considerable public controversy, as have our earlier efforts to reform these rules. Some of shareholders and companies expressed overall support for our proposals.[7] Certain of our proposals, however, were viewed as especially controversial, and generated strong comments in favor, as well as heavy opposition.[8]

The amendments adopted today:

- recast rule 14a-8 into a Question & Answer format that is easier to read;
- reverse the Cracker Barrel no-action letter on employment-related proposals raising social policy issues;
- adopt other less significant amendments to rule 14a-8; and
- amend rule 14a-4 to provide shareholders and companies with clearer guidance on companies' exercise of discretionary voting authority.

These reforms, in our view, will help to improve the operation of the rules governing shareholder proposals and will address some of the concerns raised by shareholders and companies over the last several years on the operation of the proxy process.

We have decided not to adopt other elements of our original proposals, due in part to strong concerns expressed by commenters. We are not adopting our original proposals to increase the percentage of the vote a proposal needs before it can be resubmitted in future years;[9] to streamline the exclusion for matters considered irrelevant to corporate business;[10] or to modify our administration of the rule that permits companies to exclude proposals that further personal grievances or special interests.[11] We are also not adopting the proposed "override" mechanism that would have permitted 3% of the shareownership to override a company's decision to exclude proposals

under certain of the bases for exclusion set forth under Question 9 of amended rule 14a-8.[12]

***2** Some of the proposals we are not adopting share a common theme: to reduce the Commission's and its staff's role in the process and to provide shareholders and companies with a greater opportunity to decide for themselves which proposals are sufficiently important and relevant to the company's business to justify inclusion in its proxy materials. However, a number of commenters resisted the idea of significantly decreasing the role of the Commission and its staff as informal arbiters through the administration of the no-action letter process. Consistent with these views, commenters were equally unsupportive of fundamental alternatives to the existing rule and process that, in different degrees, would have decreased the Commission's overall participation.

While we have tried to provide the most fair, predictable, and efficient system possible, these rules, even as amended, will continue to require us to make difficult judgments about interpretations of proposals, the motives of those submitting them, and the policies to which they relate. We will continue to explore ways to improve the process as opportunities present themselves.

. . . .

III. <u>The Interpretation Of Rule 14a-8(c)(7): The "Ordinary Business" Exclusion</u>

We proposed to reverse the position announced in the 1992 <u>Cracker Barrel</u> no-action letter concerning

the Division's approach to employment-related shareholder proposals raising social policy issues.[32] In that letter, the Division announced that 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 any such proposals are properly governed by the employment-based nature of the proposal.

We are adopting our proposal to reverse the Cracker Barrel position, which provided that all employment-related shareholder proposals raising social policy issues would be excludable under the "ordinary business" exclusion.[33] The Division will return to its case-by-case approach that prevailed prior to the Cracker Barrel no-action letter.

In applying the "ordinary business" exclusion to proposals that raise social policy issues, the Division seeks to use the most well-reasoned and consistent standards possible, given the inherent complexity of the task. From time to time, in 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,[34] the manufacture of tobacco products,[35] executive compensation,[36] and golden parachutes.[37]

***4** We believe that reversal of the Division's Cracker Barrel no-action letter, which the Commission had subsequently affirmed,[38] is warranted. Since 1992, the relative importance of certain social issues relating to employment matters has reemerged as a consistent topic of widespread public debate.[39] In addition, as a result of the extensive policy discussions that the Cracker Barrel position engendered, and through the rulemaking notice and comment process, we have gained a better understanding of the depth of interest among shareholders in having an opportunity to express their views to company management on employment-related proposals that raise sufficiently significant social policy issues.

Reversal of the Cracker Barrel no-action position will result in a return to a case-by-case analytical approach. In making distinctions in this area, the Division and the Commission will continue to apply the applicable standard for determining when a proposal relates to "ordinary business." The standard, originally articulated in the Commission's 1976 release, provided an exception for certain proposals that raise significant social policy issues.[40]

While we acknowledge that there is no bright-line test to determine when employment-related shareholder proposals raising social issues fall within the scope of the "ordinary business" exclusion, the staff will make reasoned distinctions in deciding whether to furnish "no-action" relief. Although a few of the distinctions made in those cases may be somewhat tenuous, we believe that on the whole the

benefit to shareholders and companies in providing guidance and informal resolutions will outweigh the problematic aspects of the few decisions in the middle ground.

Nearly all commenters from the shareholder community who addressed the matter supported the reversal of this position.[41] Most commenters from the corporate community did not favor the proposal to reverse Cracker Barrel, though many indicated that the change would be acceptable as part of a broader set of reforms.[42]

Going forward, companies and shareholders should bear in mind that the Cracker Barrel position relates only to employment-related proposals raising certain social policy issues. Reversal of the position does not affect the Division's analysis of any other category of proposals under the exclusion, such as proposals on general business operations.

Finally, we believe that it would be useful to summarize the principal considerations in the Division's application, under the Commission's oversight, of the "ordinary business" exclusion. The general underlying policy of this exclusion is consistent with the policy of most state corporate laws: to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.

The policy underlying the ordinary business exclusion rests on two central considerations. The first relates to the subject matter of the proposal.

Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. However, proposals relating to such matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.[43]

***5** The second consideration relates to the degree to which the proposal seeks to "micro-manage" the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.[44] This consideration may come into play in a number of circumstances, such as where the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.

A similar discussion in the Proposing Release of the primary considerations underlying our interpretation of the "ordinary business" exclusion as applied to such proposals raised some questions and concerns among some of the commenters. Because of that concern, we are providing clarification of that position.[45] One aspect of that discussion was the

basis for some commenters' concern that the reversal of Cracker Barrel might be only a partial one. More specifically, in the Proposing Release we explained that one of the considerations in making the ordinary business determination was the degree to which the proposal seeks to micro-manage the company. We cited examples such as where the proposal seeks intricate detail, or seeks to impose specific time-frames or to impose specific methods for implementing complex policies. Some commenters thought that the examples cited seemed to imply that all proposals seeking detail, or seeking to promote time-frames or methods, necessarily amount to "ordinary business."[46] We did not intend such an implication. Timing questions, for instance, could involve significant policy where large differences are at stake, and proposals may seek a reasonable level of detail without running afoul of these considerations.[47]

Further, in a footnote to the same sentence citing examples of "micro-management," we included a citation to Capital Cities/ ABC, Inc., (Apr. 4, 1991) involving a proposal on the company's affirmative action policies and practices.[48] Some commenters were concerned that the citation might imply that proposals similar to the Capital Cities proposal today would automatically be excludable under "ordinary business" on grounds that they seek excessive detail. Such a position, in their view, might offset the impact of reversing the Cracker Barrel position. However, we cited Capital Cities/ABC, Inc. only to support the general proposition that some proposals may intrude unduly on a company's "ordinary

business" operations by virtue of the level of detail that they seek. We did not intend to imply that the proposal addressed in Capital Cities, or similar proposals, would automatically amount to "ordinary business." Those determinations 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.

. . . .

Footnotes

1 17 CFR 240.14a-8.

2 17 CFR 240.14a-4.

3 17 CFR 240.14a-5.

4 15 U.S.C. 78a et seq.

5 See our Proposing Release, Exchange Act Release No. 39093 (Sept. 18, 1997) [62 Fed. Reg. 50682].

6 The comment letters are available for inspection and copying in the Commission's Public Reference Room in file number S7-25-97. Comments that were submitted electronically are available on the Commission's website (www.sec.gov).

7 See, e.g., Comment Letters From Teachers Insurance and Annuity Assoc./ College Retirement Equities Fund, Nov. 19, 1997 ("TIAA-CREF Letter"); California Public Employees' Retirement System, Nov. 10, 1997 ("CALPERS Letter"); American Society of Corporate Secretaries, Dec. 8, 1997 ("ASCS Letter"); The Business Roundtable, Dec. 9, 1997 ("BRT Letter"); Barclays Global Investors, Dec. 4,

1997; Georgeson & Company Inc., Dec. 31, 1997 ("Georgeson Letter").

8 See, e.g., New York City Employees Retirement System, Nov. 5, 1997 ("NYCERS Letter"); Interfaith Center on Corporate Responsibility, Dec. 23, 1997 ("ICCR Letter"); American Bar Ass'n, Dec. 23, 1997 ("ABA Letter"); Labor Policy Ass'n, Nov. 17, 1997 ("LPA Letter").

9 See Paragraph (12) under Question 9, formerly rule 14a-8(c)(12) [17 CFR 240.14a-8(c)(12)].

10 Paragraph (5) under Question 9, former rule 14a-8(c)(5) [17 CFR 240.14a-8(c)(5)].

11 Paragraph (4) under Question 9, former rule 14a-8(c)(4) [17 CFR 240.14a-8(c)(4)].

12 The mechanism had been included in Paragraph 10 of rule 14a-8 as proposed to be amended. See Proposing Release.

. . . .

32 See Cracker Barrel Old Country Stores, Inc. (Oct. 13, 1992).

33 The reversal is effective as of May 21, 1998, and will apply to future Division no-action responses. It will apply to any rule 14a-8 no-action submission that the Division has received before May 21, 1998 if the Division has not issued a corresponding no-action response by the close of business on May 20, 1998.

34 See Pacific Telesis Group (Feb. 2, 1989).

35 See Phillip Morris Companies, Inc. (Feb. 13, 1990).

36 See Reebok Int'l Ltd. (Mar. 16, 1992).

37 See Transamerica Corp. (Jan. 10, 1990).

38 See Letter dated January 15, 1993 from Jonathan G. Katz, Secretary to the Commission, to Sue Ellen Dodell, Deputy Counsel, Office of Comptroller, City of New York.

39 See, e.g., Investors Focus on Diversity at Texaco Annual Meeting: Company Faces 94 Discrimination Filings, The Washington Post, May 14, 1997; Shareholders Press Shoney's on Bias Issue, The New York Times, Dec. 26, 1996.

40 See Exchange Act Release No. 12999 (Nov. 22, 1976) [41 FR 52994].

41 See, e.g., Calvert Group, Nov. 26, 1997 ("Calvert Letter"); Center for Responsible Investing, Rec'd Nov. 3, 1997; Captains Endowment Assoc., Rec'd Nov. 6, 1997; Social Investment Forum, Jan. 2, 1998 ("Social Investment Forum Letter").

42 See, e.g., ASCS Letter; ACCA Letter; BRT Letter; AlliedSignal Inc., Nov. 24, 1997; Ashland Inc., Nov. 21, 1997; LPA Letter; Sullivan & Cromwell, Dec. 29, 1997 ("Sullivan & Cromwell Letter").

43 See, e.g., Reebok Int'l Ltd. (Mar. 16, 1992) (noting that a proposal concerning senior executive compensation could not be excluded pursuant to rule 14a-8(c)(7)).

44 Exchange Act Release No. 12999 (Nov. 22, 1976).

45 The exclusion has been interpreted previously by the Commission. See, e.g., Exchange Act Release No. 20091 (Aug. 16, 1983) [48 FR 38218];Exchange Act Release No. 12999 (Nov. 22, 1976) [41 FR 52994];Exchange Act Release No. 4950 (Oct. 9, 1953) [18 FR 6646]. It has also been interpreted by the courts. See, e.g., Grimes v. Ohio Edison Co., 992 F.2d 455 (2d Cir. 1993); Roosevelt v. E.I. Du Pont De Nemours & Co., 958 F.2d 416 (D.C. Cir. 1992); Medical Committee for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970); New York City Employees' Retirement Sys. v. SEC, 843 F. Supp. 858,rev'd45 F.3d 7 (2d Cir. 1995); Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc., 821 F. Supp. 877, 891 (S.D.N.Y. 1993).

46 See, e.g., ICCR Letter; LongView Letter; Letter from Professor Harvey J. Goldschmid of Columbia University School of Law, and Ira M. Millstein, Senior Partner, Weil, Gotshal & Manages LLP, Dec. 23, 1997 ("Goldschmid and Millstein Letter").Compare Chase Manhattan Letter.

47 See, e.g., Roosevelt v. E.I. Du Pont De Nemours & Co. 958 F.2d at 424-427 (one-year difference in timing of CFC production phase- out does not implicate significant policy, but longer period might implicate significant policy). In Amalgamated Clothing and Textile Workers Union, 821 F. Supp. at 891, the court required Wal-Mart to include a proposal in its proxy materials that sought information on the company's affirmative action policies and practices, although it also required the proponents to make certain revisions designed to

ensure that the proposal did not seek excessive detail.

48 See Proposing Release, Footnote 79.

. . . .

Release No. 23200 (S.E.C. Release No.), Release No. 40018, Release No. 34-40018, Release No. IC - 23200, 67 S.E.C. Docket 373, 1998 WL 254809

APPENDIX H

DIVISION OF CORPORATION FINANCE

INFORMAL PROCEDURES REGARDING SHAREHOLDER PROPOSALS

The Division of Corporation Finance believes that its responsibility with respect to matters arising under Rule 14a-8 [17 CFR 240.14a-8], as with other matters under the proxy rules, is to aid those who must comply with the rule by offering informal advice and suggestions and to determine, initially, whether or not it may be appropriate in a particular matter to recommend enforcement action to the Commission. In connection with a shareholder proposal under Rule 14a-8, the Division's staff considers the information furnished to it by the company in support of its intention to exclude the proposals from the company's proxy materials, as well as any information furnished by the proponent or the proponent's representative.

Although Rule 14a-8(k) does not require any communications from shareholders to the Commission's staff, the staff will always consider information concerning alleged violations of the statutes and rules administered by the Commission, including arguments as to whether or not activities proposed to be taken would violate the statute or rule involved. The receipt by the staff of such information, however, should not be construed as changing the staff's informal procedures and proxy review into a formal or adversarial procedure.

It is important to note that the staff's no-action responses to Rule 14a-8(j) submissions reflect only informal views. The determinations reached in these no-action letters do not and cannot adjudicate the merits of a company's position with respect to the proposal. Only a court such as a U.S. District Court can decide whether a company is obligated to include shareholder proposals in its proxy materials. Accordingly, a discretionary determination not to recommend or take Commission enforcement action does not preclude a proponent, or any shareholder of a company, from pursuing any rights he or she may have against the company in court, should the company's management omit the proposal from the company's proxy materials.

http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8-informal-procedures.htm

APPENDIX I

PROPOSAL FOR ADOPTING POLICIES AND ESTABLISHING BOARD POLICY OVERSIGHT CONCERNING CERTAIN MERCHANDIZING DECISIONS

RESOLVED:

Stockholders request that the Board amends the Compensation, Nominating and Governance Committee charter (or add an equivalent provision to another Board committee charter) as follows:

"27. Providing oversight concerning the formulation and implementation of, and the public reporting of the formulation and implementation of, policies and standards that determine whether or not the Company should sell a product that:

1) especially endangers public safety and well-being;

2) has the substantial potential to impair the reputation of the Company; and/or

3) would reasonably be considered by many offensive to the family and community values integral to the Company's promotion of its brand."

This oversight and reporting is intended to cover policies and standards that would be applicable to determining whether or not the company should sell guns equipped with magazines holding more than

ten rounds of ammunition ("high capacity magazines") and to balancing the benefits of selling such guns against the risks that these sales pose to the public and to the Company's reputation and brand value.

SUPPORTING STATEMENT:

The proposal, advanced by stockholder Trinity Church Wall Street, seeks to ensure appropriate and transparent Board oversight of the sale by the company of products that especially endanger public safety and well-being, risk impairing the company's reputation, or offend the family and community values integral to the company's brand.

The company respects family and community interests by choosing not to sell certain products such as music that depicts violence or sex and high capacity magazines separately from a gun, but lacks policies and standards to ensure transparent and consistent merchandizing decisions across product categories. This results in the company's sale of products, such as guns equipped with high capacity magazines, that facilitate mass killings, even as it prohibits sales of passive products such as music that merely depict such violent rampages.

The example of guns equipped with high capacity magazines, which are on sale at the company's stores, is instructive in other ways. There is a substantial question regarding whether these guns are well suited to hunting or shooting sports; it is beyond doubt that they are well suited to mass killing, and tragically more effective for the latter purpose, than are the handguns equipped to fire ten

or fewer rounds that the company chooses not to sell except in Alaska. The former reduce opportunities for people to flee or overwhelm a shooter during reloading and have enabled many mass killings, including those at Newtown, Oak Creek, Aurora, Tucson, Fort Hood, Virginia Tech and Columbine.

While guns equipped with high capacity magazines are just one example of a product whose sale poses significant risks to the public and to the company's reputation and brand, their sale illustrates a lack of reasonable consistency that this proposal seeks to address through Board-level oversight. This responsibility seems appropriate for the Compensation, Nominating and Governance Committee, which is charged with related responsibilities.

We urge stockholders to vote FOR this proposal.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

TRINITY WALL STREET,	)	
	)	
Plaintiff,	)	
v.	)	C.A. No. 14-405
	)	(LPS)
	)	
WAL-MART STORES, INC.,	)	
	)	
Defendant.	)	

DECLARATION OF MEREDITH B. CROSS

MEREDITH B. CROSS, pursuant to 28 U.S.C. § 1746, hereby declares:

1. I am a partner at the law firm of Wilmer Cutler Pickering Hale and Dorr LLP ("WilmerHale") and have previously served in a number of capacities in the Division of Corporation Finance (the "Division") at the U.S. Securities and Exchange Commission (the "SEC" or the "Commission"). Based on my experience in the Division, I am providing this declaration to describe (i) the Division's review and consideration of no-action requests submitted pursuant to SEC Rule 14a-8; and (ii) the Division's forms of response to Rule 14a-8 no-action requests.

SEC Background

2. From June 2009 through December 2012, I served as the Director of the Division. As Director, I oversaw all of the Division's activities, including the no-action, interpretive, and exemptive positions taken by the Division on a wide range of matters, including proxy solicitation and shareholder proposal rules (I rejoined WilmerHale in early 2013 after I left the SEC at the end of December 2012).

3. I was also at the Division from September 1990 through January 1998. During that time, I served in a number of capacities, including as Deputy Chief Counsel, Chief Counsel, Associate Director, and Deputy Director of the Division (I was at WilmerHale from early 1998 through April 2009).

The Division's Review and Consideration of Rule 14a-8 No-Action

4. SEC Rule 14a-8 states that "[i]f [a] company intends to exclude a [shareholder] proposal from its proxy materials, it must file ... [a]n explanation of why the company believes that it may exclude the proposal." 17 C.P.R. § 240.14a-8(j). This explanation is typically in the form of a no-action request to the Office of Chief Counsel of the Division. The Chief Counsel of the Division ultimately reports to the Director of the Division. As noted above, I have served as both Chief Counsel and Director of the Division.

5. The Rule 14a-8 no-action requests are reviewed upon receipt by the Division's Chief Counsel or by someone he or she designates and then

assigned to SEC staff attorneys for review. The Division will ultimately grant the no-action request if it decides, based on the facts, arguments and representations set forth in the company's request and in any response by the shareholder proponent, not to recommend that the Commission take enforcement action against the company if it excludes the shareholder proposal from its proxy materials.

6. Because the vast majority of Rule 14a-8 no-action requests are submitted to and acted upon by the Division during Proxy Season (generally, from December of each year through mid-Spring of the following year), the Division assembles a team, or "task force," of approximately 15-20 attorneys to review Rule 14a-8 no-action requests during those months. Outside of Proxy Season, Rule 14a-8 no-action requests are researched and acted upon by senior attorneys in the Office of Chief Counsel, one of which is typically the attorney who served as task force leader during the preceding Proxy Season.

7. During Proxy Season, a Rule 14a-8 no-action request generally undergoes at least three levels of attorney review by the Division's "task force":[1]

- First, an "examiner" analyzes the arguments and precedent cited by the parties and also conducts

[1] In some years, the Division has used four levels of review by adding a "reviewer" between the examiner and manager. No-action requests raising issues such as a shareholder's failure to submit a proposal by the applicable deadline may undergo an abbreviated review process.

his or her own independent research of additional precedent, resulting in the examiner preparing a legal memorandum that explains his or her findings and recommendations.[2]

- Second, a "manager" - a mid-level to senior attorney who has particular experience with SEC Rule 14a-8 - reviews the parties' arguments and precedent and the examiner's research and analysis, conducts additional research as needed and recommends whether to grant or deny the request, also stating his or her reasoning for the recommendation.

- Third, the "task force leader" - a senior attorney who has extensive SEC Rule 14a-8 experience - reviews the parties' arguments and precedent and the internal research and analysis, consults with others in the Division as appropriate, and renders a final decision on behalf of the Division. The decision is then communicated to both the company seeking to exclude the shareholder proposal and the proponent of the shareholder proposal in the form of a written letter.

The Division's Forms of Response to Rule 14a-8 No-Action Requests

8. If the Division ultimately agrees with the company requesting no-action relief, thereby

[2] The manager and/or task force leader may ask the examiner to conduct additional research on specific issues as they deem appropriate.

concluding that the company may properly exclude the shareholder proposal from its proxy materials under SEC Rule 14a-8, the Division will concur in a no-action letter.

9. The standard language used by the Division to indicate its concurrence in Rule 14a-8 no-action letters is the following: "There appears to be some basis for your view that [insert company name] may exclude the proposal under rule 14a-8 [insert specific provision] .... Accordingly, we will not recommend enforcement action to the Commission if [insert company name] omits the proposal from its proxy materials in reliance on rule 14a-8 [insert specific provision]."

10. If the Division ultimately disagrees with the company requesting no-action relief, thereby concluding that the company may not exclude the shareholder proposal from its proxy materials under SEC Rule 14a-8, the Division will deny the no-action request.

11. The standard language used by the Division to indicate its denial of a Rule 14a-8 no-action request is the following: "We are unable to concur in your view that [insert company name] may exclude the proposal under rule 14a-8 [insert specific provision] .... Accordingly, we do not believe that [insert company name] may omit the proposal from its proxy materials in reliance on rule 14a-8 [insert specific provision]."

12. In some instances, after conducting its research and analysis, the Division staff will conclude that a proposal is likely excludable but that

the company, which bears the burden of persuasion under Rule 14a-8, failed to satisfy its burden by citing the applicable no-action precedent or otherwise making the "winning" argument in its no-action request.

13. The standard language used by the Division in such instances is the following: "We are unable to conclude that [insert company name] has met its burden of establishing that it may exclude the proposal under rule 14a-8 [insert specific provision] .... Accordingly, we do not believe that [insert company name] may omit the proposal from its proxy materials in reliance on rule 14a-8 [insert specific provision]."

14. The reason for using such "burden" language is to signal to the public that if the Division subsequently grants a no-action request to another company regarding the same type of shareholder proposal (as a result of the other company satisfying its burden of persuasion), the differing decisions are a result of the differing arguments presented to the Division and are not a change of position by the Division.

No Interest In Outcome Of This Litigation

15. I have no interest in the outcome of this litigation. The compensation that I am receiving for this project is not dependent on who prevails in this lawsuit. WilmerHale is billing at its standard hourly rates.

16. Certain of my colleagues at WilmerHale represent Wal-Mart Stores, Inc. in other unrelated

matters. I have not been counsel to Wal-Mart, however, in any matter, and neither I nor any of my colleagues from WilmerHale have discussed or been promised any future engagements based on my submission of this declaration.

I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on July 11, 2014.

/s/ Meredith B. Cross
Meredith B. Cross

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that, on July 11, 2014, the within document was electronically filed with the Clerk of the Court using CM-ECF which will send notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading from CM-ECF.

I further certify that on July 11, 2014, the within document was electronically mailed to the following persons:

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