A TRINITY OF INTERPRETATIONS: FINDING THE CURRENT STATUS OF THE SEC'S SIGNIFICANT SOCIAL POLICY EXCEPTION

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In 2015, the Third Circuit took a rare opportunity to consider the meaning of SEC Rule 14a-8(i)(7), which allows shareholder proposals which address ordinary business matters to be excluded from a proxy statement unless they target matters of sufficiently significant social policy. In doing so, a split panel broke from decades of SEC practice and provoked a response from the Division of Corporate Finance, which is charged with the Rule's application. The Division attempted—and failed—to clarify what it understands the social policy exception to require. This Note analyzes the Division's practice since its confused response to determine whether its interpretation of the significant social policy exception has changed.

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I. INTRODUCTION

A renewed focus on corporations' roles in solving—and creating—our social problems has made strange bedfellows of corporate investors and social activists. Securities Exchange Commission ("SEC") Rule 14a-8 governing shareholder proposals gives activists the power to seek social change through changes in companies' behavior, whether it be to challenge discriminatory hiring practices, reconsider the sale of highly

dangerous products, or dramatically alter environmental practices. But, weary of paralysis from too much intervention, Rule 14a-8 gives companies reciprocal power to decide on which proposals its shareholders will ultimately vote. Generally, when a proposal targets what the company considers to be a matter of ordinary business—as each of the above-mentioned changes can—the company may prevent the proposal from going to a vote. However, mindful of the value of investor confidence and socially beneficial corporate behavior, the SEC created an exception to this rule for proposals which touch on issues of sufficiently significant social policy. Though only recently litigated, this has been an admittedly vague rule for decades. Now, for the first time, a federal circuit court has taken up the question of what must be shown to satisfy this exception. In response to that decision, the SEC division charged with Rule 14a-8's application purported to agree with the concurring judge, but obscured its interpretation of the exception in doing so.

Given the increasing importance of proxy proposals and this exception to social-activist shareholders, this Note seeks to wash away that obscurity by analyzing not what the SEC says, but what it does. Part II describes the proxy process as a mechanism for voting on shareholder proposals and the relevant rules and procedures. Part III identifies exactly where the problem in the current interpretation(s) comes from by analyzing the Third Circuit's decision in *Trinity Wall Street v. Wal-Mart Stores, Inc.*[1] and the Division of Corporate Finance's (the "Division") response in Bulletin 14H. Part IV argues for three propositions with which to test the Division's behavior—in order to reveal its true position on the social policy exception—and applies those tests to the available data. Part V ultimately concludes that the Division's position likely remains unchanged, despite patent ambiguity in Bulletin 14H.

[1] 792 F.3d 323 (3d Cir. 2015).

II. BACKGROUND ON THE SHAREHOLDER PROPOSAL RULES AND SOCIAL POLICY EXCEPTION

Shareholders, whether individuals or legal entities controlled by people, have both private interests as well as personal opinions about what is best for society. A shareholder can use their ownership interest in a company to satisfy their private interests (in maximizing a return on their investment, for example), but they may also use their access to bring about social change they deem desirable. Occasionally, this will require a shareholder to submit a proposed course of action to other shareholders for a vote through the process governed by SEC Rule 14a-8.[2]

A. Process for Submitting a Shareholder Proposal

Rule 14a-8 requires a company to include any shareholder proposal on its proxy card that complies with the rule's procedural requirements and for which there is no substantive basis of exclusion under 14a-8(i).

A shareholder proposal is a "recommendation or requirement that the company and/or its board of directors take action, which [the proponent] intends to present at a meeting of the company's shareholders."[3] Shareholders may vote either in person or by proxy.[4]

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2 17 C.F.R. § 240.14a-8 (2017).

3 17 C.F.R. § 240.14a-8(a) (2017). The Section outlines the shareholder proposal process in a series of questions and answers. *See also* MORRISON & FOERSTER, LLP, FREQUENTLY ASKED QUESTIONS ABOUT SHAREHOLDER PROPOSALS AND PROXY ACCESS 1, https://media2.mofo.com/documents/frequently-asked-questions-about-shareholder-proposals-and-proxy-access.pdf [perma.cc/xw4n-wsup].

4 "A proxy is a written authorization that one person gives to another person to act on the first person's behalf. In the context of corporate elections, when a shareholder votes 'by proxy,' he or she is instructing someone (often members of the company's management) to vote his or her shares in accordance with his or her instructions, as reflected on the proxy card, at the meeting." *Spotlight on Proxy Matters: The Mechanics of Voting*, SEC https://www.sec.gov/spotlight/proxymatters/voting_mechanics.shtml

In order to be eligible to submit a proposal, the shareholder "must have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on at the meeting for at least one year by the date [of submission]."[5] Each shareholder may submit only one proposal per shareholders' meeting.[6] Further, each proposal and accompanying supporting statement may not exceed 500 words.[7] Finally, "the proposal must be received at the company's principal executive offices not less than 120 calendar days" before the date associated with the prior year's proxy statement made in connection with the annual meeting.

If the company hopes to omit the proposal from its materials, "it must file its reasons with the Commission no later than [eighty] calendar days before it files its definitive proxy statement and form of proxy," as well as "[a]n explanation of why the company believes that it may exclude the proposal."[8] Unless noted otherwise, "the burden is on the company to demonstrate that it is entitled to exclude a proposal."[9] This filing almost always takes the form of a request for a no-action letter, which is a generally-available service to entities subject to federal securities law.[10] Based on the reasons a company provides, the no-action letter will "describe the request, analyze the particular facts and circumstances involved, discuss applicable laws and rules, and [if granted, conclude the staff will not recommend enforcement action]."[11]

[perma.cc/ss5s-9qsr]. The proxy card will list the items to be voted on at the meeting, including shareholder proposals made under Rule 14a-8. For an example of a standard proxy card, see *Sample Proxy Card*, SEC, https://www.sec.gov/spotlight/proxymatters/proxy_sample.htm [perma.cc/K75D-QM4K].

5 17 C.F.R. § 240.14a-8(b)(1) (2017).

6 17 C.F.R. § 240.14a-8(c) (2017).

7 17 C.F.R. § 240.14a-8(d) (2017).

8 17 C.F.R. § 240.14a-8(j) (2017).

9 17 C.F.R. § 240.14a-8(g) (2017).

10 *See No-Action Letters*, SEC (Mar. 23, 2017) https://www.sec.gov/fast-answers/answersnoactionhtm.html [perma.cc/GQ5R-UKXU].

11 *Id.*

A company may also exclude a shareholder's proposal from its proxy statement based on the substance of the proposal.[12] These thirteen content-focused rules exclude proposals that relate to issues such as director elections or personal grievances, conflict with state law, or would be impossible to implement.[13] One of those provisions is called the "ordinary business exclusion."[14]

B. Rule 14a-8(i)(7): The Ordinary Business Exclusion and the Implied Social Policy Exception

A company may exclude a shareholder proposal from its proxy materials "[i]f the proposal deals with a matter relating to the company's ordinary business operations."[15] The ordinary business exclusion originated in the Commission's 1954 Adopting Release with language substantially similar to the current text.[16] The Commission hoped to use the new exclusion "to relieve the management of the necessity of including in its proxy material security holder proposals which relate to matters falling within the province of the management."[17]

The term "ordinary business operations" is not defined, and the rule does not articulate a standard for when a proposal sufficiently "relates to" those operations. The lack of definition makes the scope of the rule vague. Consequently, as the Commission has itself acknowledged, the rule has generated significant controversy.[18]

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12 17 C.F.R. § 240.14a-8(i) (2017).

13 *See generally* 17 C.F.R. § 240.14a-8(i) (2017).

14 17 C.F.R. § 240.14a-8(i)(7) (2017).

15 *Id.*

16 *See* SEC, Solicitations of Proxies, Exchange Act Release No. 34-3347, 19 Fed. Reg. 246, 246 (1954) (originally codified in 17 C.F.R. § 240.14a-8(c)(5)) ("If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer.").

17 SEC, Solicitation of Proxies: Notice of Proposed Rule Making, 18 Fed. Reg. 6646, 6647 (1953).

18 SEC, Adoption of Amendments Relating to Proposals by Security Holders, 41 Fed. Reg. 52994, 52998 (Dec. 3, 1976) (codified at 17 C.F.R. pt.

The SEC has used its discretion to interpret the rule to vary the scope over time. These interpretations were formalized and made binding in a series of adopting releases. Twenty-two years after the rule's inception, one of these "interpretations" created the significant social policy exception.

In its 1976 Adopting Release, the SEC first announced that certain proposals pertaining to "substantial policy or other considerations" must be included in a company's proxy statement, even if they might relate to what was previously a matter of ordinary business.[19] In implementing that release, the Staff took a formalist approach to reviewing no-action requests. Specifically, "the staff [had] taken the position that proposals requesting issuers to prepare reports on specific aspects of their business or to form special committees to study a segment of their business would not be excludable" under the exemption.[20] There were no subject-matter limitations, so long as the proposal in form requested a report or committee study on those subjects.

But in 1983, the SEC abruptly changed course. Its new approach considered instead whether the "subject matter" of such a committee study or report "involves a matter of ordinary business."[21] Where the previous approach was overly formal and easy to circumvent, the new approach would look at the true purpose of a proposal regardless of its framing.

240) (recognizing a substantially similar provision had, "in the past year or so, generated a significant amount of controversy").

19 SEC, Adoption of Amendments Relating to Proposals by Security Holders, 41 Fed. Reg. 52994, 52998 (1976) (codified at 17 C.F.R. pt. 240).

20 SEC, Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, 48 Fed. Reg. 38218, 38220–21 (Aug. 23, 1983) (codified at 17 C.F.R. pt. 240). *See also* SEC, Proposed Amendments to Rule 14a-8 under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, 47 C.F.R. 47422–22 (Oct. 26, 1982) (laying out concerns that the staff were elevating form over substance in declining to issue no-action letters for the types of proposals mentioned).

21 SEC, Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, 48 Fed. Reg. 38218, 38220–21 (Aug. 23, 1983) (codified at 17 C.F.R. pt. 240).

In 1992, the SEC continued its trend of expanding the ordinary business exclusion[22] when the staff issued the controversial *Cracker Barrel* No-Action Letter,[23] later affirmed by the Commission.[24] Cracker Barrel shareholders proposed implementing new hiring policies relating to sexual orientation. The letter stated 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 . . . . Rather, determinations with respect to any such proposals are properly governed by the employment-based nature of the proposal."[25] The Division relied entirely on the nature of the business practice being targeted to determine whether the proposal was excludable. This decision effectively eliminated the social policy exception for employment-related proposals, regardless of the content of such proposal or the social issue it implicated.

The Commission quickly reversed its decision in *Cracker Barrel*, seeking "a return to a case-by-case analytical approach" that would avoid categorical exemptions.[26] This was the position first articulated in the 1976 Adopting Release,[27] where the Commission outlined the policy considerations relevant to the social policy exception. Certain tasks are fundamental to managers' ability to run the day-to-day of a company and could not practicably be subject to shareholder control. However, sufficiently significant social policy issues "transcend" the day-to-day such that they would be

22 At the time, codified as 17 C.F.R. § 240.14a-8(c)(7).

23 Cracker Barrel Old County Store, Inc., SEC No-Action Letter, 1992 WL 289095 (Oct. 13, 1992).

24 *See* SEC, Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29106, 29108 n.35 (May 28, 1998) (citing Letter from Jonathan G. Katz, Sec'y to the Comm'n, to Sue Ellen Dodell, Deputy Counsel, Office of Comptroller, City of N.Y. (Jan. 15, 1993)).

25 *See* Cracker Barrel, *supra* note 23, at *2.

26 SEC, Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29106, 29108 (May 28, 1998).

27 *Id.*

appropriate for a shareholder vote.[28] For example, employment decisions such as hiring and firing are clearly essential managerial responsibilities that shareholders could not practically assume for themselves. But, hiring and firing do implicate significant issues of discrimination, so proposals focused on those issues would be appropriate. A proposal to hire Jane Doe would be excludable, but a proposal to create a report on workplace diversity would not.[29]

This was the state of the law prior to the Third Circuit's 2015 decision in *Trinity Wall Street v. Wal-Mart Stores, Inc.*[30] Before *Trinity*, when the SEC received a no-action request, it would look to the content of the proposal, on a case by case basis, to determine whether the proposal related to an ordinary business matter, and if so, whether it related to an issue of sufficiently significant social policy to justify its inclusion. The SEC still failed to define what constituted an ordinary business matter, when a proposal sufficiently related to it, or when a social policy issue was sufficiently significant.

The split court's decision in *Trinity* put forth two approaches, both of which differed from the Division's approach in its Trinity No-Action Letter. The *Trinity* majority created an additional requirement for satisfying the social policy exception, going beyond the standard that the Division had previously applied. The concurring judge rejected the new requirement and applied the old social policy exception but came to a different conclusion than the Division. Part II analyzes the majority and concurring opinions in *Trinity* and the Division's subsequent, non-binding interpretive memo.

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[28] *Id.*

[29] *See, e.g.*, Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc., 821 F. Supp. 877, 890 (1993) (declining to follow *Cracker Barrel* and declaring a proposal requiring Wal-Mart to issue a report on employee relations was not excludable under the ordinary business exclusion).

[30] Trinity Wall Street v. Wal-Mart Stores, Inc., 792 F.3d 323 (3d Cir. 2015) (reversing the District Court's decision in 75 F. Supp. 3d 617, 2014 WL 6790928 (D. Del. 2014)).

III. DIVERGENT COURT AND SEC INTERPRETATIONS OF THE ORDINARY BUSINESS EXCLUSION FOLLOWING *TRINITY*

A. *Trinity*: Two New Interpretations for Rule 14a-8(i)(7) Applications

1. Facts and Procedural Background

On July 6, 2015, the Third Circuit squarely addressed the issue of the proper test to determine whether a proposal can be excluded under the ordinary business exemption.[31] Trinity Wall Street is a major institutional investor and one of the wealthiest religious institutions in the United States.[32] As a religious organization concerned with gun violence and as an investor in Wal-Mart, Trinity objected to the company's sale of automatic weapons equipped with high-capacity magazines.[33] The broadly-worded proposal submitted to the Board requested that Wal-Mart:

> Provide 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 as offensive to the family and community values integral to the Company's promotion of its brand.[34]

The text of the proposal made no mention of firearms with high capacity magazines or social issues related to gun violence, though the accompanying statements in support of the

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[31] *Trinity*, 792 F.3d at 340 ("The principal issue we address is whether Trinity's proposal was excludable because it related to Wal-Mart's ordinary business operations.").

[32] *Id.* at 328 (citing Letter from Wall Street CFO Accompanying Trinity's 2013 Financial Statements (undated)).

[33] *Id.*

[34] *Id.* at 329–30.

proposal made it clear that those issues were of primary concern to Trinity.[35]

Wal-Mart successfully sought a no-action letter from the SEC, which granted the letter because "there appear[ed] 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," and "[p]roposals concerning the sale of particular products and services are generally excludable under [the rule]."[36] Because no-action letters are not binding,[37] Trinity took the unusual step of filing suit in federal court to seek declaratory judgment and an injunction requiring Wal-Mart to include the proposal in its proxy materials.

The District Court ruled in favor of Trinity, finding that Wal-Mart could not use the ordinary business exclusion to omit the proposal from its proxy materials.[38] The lower court relied heavily on the idea that "the proposal wasn't a directive to management but to the Board to 'oversee the development and effectuation of a Wal-Mart policy.'"[39] The lower court alternatively held that the proposal focused on sufficiently significant social issues, which included the communal effects of selling high capacity firearms at the world's largest retailer,

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[35] *Id.* at 330.

[36] *Id.* at 331 (quoting Wal-Mart Stores, Inc., SEC No-Action Letter, 2014 WL 409085, at *1 (Mar. 20, 2014)) (internal quotation marks omitted) (modifications in original).

[37] See *supra* note 10.

[38] *Trinity*, 792 F.3d at 332–33 (citing 75 F. Supp. 3d 617, 630 (D. Del. 2014)).

[39] *Id.* at 333 (quoting 75 F. Supp. 3d 617, 630 (D. Del. 2014)). As the latter part of the Third Circuit's opinion points out, this reasoning echoed the overly formalistic approach that the SEC explicitly rejected in its 1983 amendments. *See* SEC, Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, 48 Fed. Reg. 38218, 38220–21 (Aug. 23, 1983) (codified at 17 C.F.R. pt. 240); *see also* SEC, Proposed Amendments to Rule 14a-8 under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, 1982 WL 600869, at *17 (Oct. 14, 1982) (laying out concerns that the staff were elevating form over substance in declining to issue no-action letters on the basis that proposals were directed at the board or called for a special report).

to warrant an exception.[40] Wal-Mart appealed both of the district court's holdings.

2. The Majority's New Rule

The two-judge majority of the Third Circuit's panel and a concurring judge agreed that Trinity's proposal related to Wal-Mart's ordinary business operations.[41] The court applied a two-part test to determine whether Rule 14a-8(i)(7) applies. "Under the first step, we discern the 'subject matter' of the proposal . . . . Under the second, we ask whether that subject matter relates to Wal-Mart's ordinary business operations."[42] The District Court erred, the panel found, on the first part of the test because it placed "undue weight on the distinction between a directive to management and a request for Board action."[43] In focusing too much on form, the lower court failed to recognize that "[t]he subject matter of the proposal is instead its *ultimate* consequence—here a potential change in the way Wal-Mart decides which products to sell . . . . This view . . . finds support in a well-established line of SEC no-action letters."[44] As the panel recognized, the contrary result would permit easy evasion of the ordinary business exclusion by framing any proposal as a board directive.[45]

That was not the end of the inquiry. Wal-Mart then bore the burden of showing the social policy exception did not

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[40] *Trinity*, 792 F.3d at 333 (quoting Street v. Wal-Mart Stores, Inc., 75 F. Supp. 3d 617, 2014 WL 6790928, at *9 (D. Del. 2014)).

[41] *Id.* at 341, 351 (disagreeing with the District Court's first holding that proposals to the Board are sufficiently removed from the realm of ordinary business).

[42] *Id.* at 341.

[43] *Id.* at 342.

[44] *Id.* at 342–43 (citing *Sempra Energy*, SEC No-Action Letter, 2011 WL 6425347, at *2 (Jan. 12, 2012)).

[45] *Id.* at 344; *see also* SEC, Proposed Amendments to Rule 14a-8 under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, 1982 WL 600869, at *17 (Oct. 14, 1982) (laying out concerns that the staff were elevating form over substance in declining to issue no-action letters for the types of proposals mentioned).

apply. The majority announced a new, two-step test to determine whether that was the case: "The first [step] is whether the proposal focuses on a significant policy (be it social, or as noted below, corporate)," then "[i]f it does, we reach the second step and ask whether the significant policy issue transcends the company's ordinary business operations."[46]

The majority found that the first step was satisfied because "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."[47] They made reference to Trinity's supporting statement of concern regarding high-capacity automatic weapons, as well as *amici curiae* who argued that the social policy implications of selling products that endanger public safety, a company's reputation,[48] and its core values, would be easily on par with employment discrimination, a well-recognized exception to Rule 14a-8(i)(7).[49]

The majority then proceeded to the novel[50] second step. Picking up on language that the Commission used in its 1998 Adopting Release, [51] the majority asked whether the issues of

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[46] *Trinity*, 792 F.3d at 345.

[47] *Id.* at 346. The majority acknowledged that the SEC itself has adopted a "we-know-it-when-we-see-it" approach for when significant social policy issues are implicated and in effect did the same.

[48] Though not the subject of this Note, one issue is the degree to which a company's reputation and its core values are recognized as valid exceptions to Rule 14a-8(i)(7), separate from the issues of broader social concern, like public safety. The majority brushed past this question and recognized that the proposal, on the whole, raised sufficiently significant social policy issues.

[49] *Trinity*, 792 F.3d at 345–46.

[50] *See infra* Section II.B.

[51] *See* SEC, Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29106, 29108 (May 28, 1998). In a section discussing the policy underlying the ordinary business exclusion, the SEC discussed an example proposal that involved management of the workforce (e.g., hiring and promotion). *Id.* The SEC said those managerial tasks themselves "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.*

significant social policy that they identified "transcend" Wal-Mart's ordinary business operations, arguing "the transcendence requirement plays a pivotal role in the social-policy exception calculus."[52] The majority found that the social policy implications of Trinity's proposal did not transcend Wal-Mart's "core business" function of selling varied goods.[53]

The majority based its analysis on the concern that a formalistic approach to this issue would permit intolerable circumvention of the rule.[54] Though the Commission previously avoided formalistic analysis when identifying a proposal's subject matter—instead looking to the "true intent" behind a proposal[55]—it had *not* inquired into whether a proposal whose subject matter concededly touches on significant social issues "truly intends" to address them.

For the majority, the relevant inquiry is whether the proposal's subject matter "is disengaged from the essence of [the company's] business" or "too entwined with the fundamentals of the daily activities of [the company]."[56] The court used this inquiry to distinguish between proposals which relate to

> 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.

Id. (emphasis added).

[52] *Trinity*, 792 F.3d at 347.

[53] *Id.* at 348.

[54] *Id.* (citing Apache Corp. v. New York City Emps.' Ret. Sys., 621 F. Supp. 2d 444, 451 n.7 (S.D. Tex. 2008) (expressing skepticism towards "proposals dealing with ordinary business matters yet cabined in social policy concern")). Though there is generally a dearth of cases in the area, the novelty of this second step is portrayed by the Third Circuit's reaching down to the Southern District of Texas for a supportive precedent (in the form of a footnote).

[55] *See* SEC, Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, 48 Fed. Reg. 38218, 38220–21 (Aug. 23, 1983) (codified at 17 C.F.R. pt. 240).

[56] *Trinity*, 792 F.3d at 347.

discriminatory hiring—considered the prototypical exception post-*Cracker Barrel*—from proposals related to the goods retailers sell.[57] While employment questions undoubtedly relate to ordinary business matters,[58] they are not the "core" or "essence" of what any given company does.[59] The majority's interpretation appears to create a bright-line rule stating that any proposal that ultimately may affect a retailer's product matrix will be excludable, regardless of whether it touches on issues of significant social policy. This bright-line approach evokes the SEC's disavowed approach in *Cracker Barrel*.[60] That similarity—a fact that is the focus of Judge Shwartz's concurrence and the basis for her decision to concur only in judgment.[61]

3. The Concurrence's Disagreement

Judge Shwartz rejects the step-two "transcendence" requirement that the majority imposed. First, she argues that "[the majority's] reading is inconsistent with the plain text of the 1998 Adopting Release."[62] In that release—which reversed the categorical approach taken in *Cracker Barrel*—the Commission stated,

> [P]roposals relating to [ordinary business] 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

57 *Id.*

58 *See, e.g.*, SEC, Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, 48 Fed. Reg. 38218, 38220–21 (Aug. 23, 1983) (codified at 17 C.F.R. pt. 240).

59 *Trinity*, 792 F.3d at 347.

60 *See, e.g.,* SEC, Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29106, 29108 (May 28, 1998); *see also* Cracker Barrel, *supra* note 23, at *1.

61 *See generally id.* at 323 (Shwartz, J. concurring).

62 *Id.* at 352 (Shwartz, J. concurring).

> matters and raise policy issues so significant that it would be appropriate for a shareholder vote.[63]

She argues that "this passage makes clear [that] 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."[64] Further, she points to "the 1998 Adopting Release [that] 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' sufficiently significant social policy issues."[65] Indeed, to the extent that the majority believed certain ordinary business matters may never be the subject of a shareholder proposal regardless of the social issues involved, Judge Shwartz casts a skeptical eye on its interpretation.

Nevertheless, Judge Shwartz concurs in the judgment because she believes that Trinity's proposal does not touch on issues of sufficiently significant social policy,[66] which the majority previously argued was the case in its "step one" analysis.[67] Trinity's proposal directs the board to form a committee tasked with creating policies and standards for determining whether Wal-Mart should continue to 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.[68] Judge Shwartz states that the first component

63 SEC, Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29106, 29108 (May 28, 1998).

64 *Trinity*, 792 F.3d at 353 (Shwartz, J. concurring) (quoting SEC, Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29106, 29108 (May 28, 1998)).

65 *Id.*

66 *Id.* at 354 (Shwartz, J. concurring).

67 *Id.* at 345.

68 *Id.* at 354 (Shwartz, J. concurring).

may raise a significant issue of social policy, to the extent it touches on the sale of high capacity firearms, but the other two do not; therefore, the proposal as a whole does not *focus on* such an issue.[69]

The critical implication is that had Trinity Wall-Street cabined its proposal to concerns about public safety, and not mentioned the reputation or values of Wal-Mart, it would be able to avail itself of the significant social policy exception.[70]

Thus, Judge Shwartz takes a fundamentally different view of the social policy exception from that held by the majority. The majority, in a return to *Cracker Barrel*-esque categorical exclusions, permitted exclusion of all product-related proposals put to a retailer by creating a "transcendence" test on top of the significant social policy exception. In their view, touching significant social policy issues does not automatically prove that a proposal goes beyond ordinary business concerns. Judge Shwartz, by contrast, adheres to the 1998 standard the Commission articulated in its rejection of *Cracker Barrel*: When a proposal touches issues of sufficiently significant social policy, it may not be excluded for its relation to ordinary business matters. In her view, there is no additional step requiring "transcendence." The Division appears to agree with Judge Shwartz on this point.

B. Staff Bulletin 14H: Non-binding Response to *Trinity*

On October 22, 2015—only 108 days after the Third Circuit's decision—the staff within the SEC's Division of Corporate Finance issued a Legal Bulletin in response.[71] Though "not a rule, regulation or statement of the [SEC]," Bulletin

69 *Id.*

70 *Id.* at 354 ("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 the proposal as a whole 'focus[es] on' such an issue.").

71 SEC Staff Legal Bulletin No. 14H (Oct. 22, 2015), http://www.sec.gov/interps/legal/cfslb14h.htm [perma.cc /AKR3-4S9X] [hereinafter Bulletin 14H].

14H does "represent the views of the Division," which is charged with making enforcement recommendations under Rule 14a-8.[72] Because proposal omissions based on no-action letters are very rarely challenged in court or elevated for further SEC review, the memo represents the de facto legal standard for applying Rule 14a-8(i)(7).

The Division first agreed that the District Court improperly focused on the form, rather than the underlying subject matter, of the proposal's request when identifying whether the proposal related to Wal-Mart's ordinary business operations.[73]

It then recognized the majority's departure from the Commission's stance on the social policy exception, saying, "The majority opinion employed a *new* two-part test . . . This two-part approach differs from the Commission's statements on the ordinary business exclusion and Division practice."[74] The Division rejected their innovation and endorsed Judge Shwartz's reading of the 1998 Adopting Release, which argued "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 matters."[75] The Division explained that it was "concerned that the new analytical approach introduced by the Third Circuit goes beyond the Commission's prior statements and may lead to unwarranted exclusion of shareholder proposals."[76] More explicitly, the Division believed that "a proposal may transcend a company's ordinary business

72 *Id.*

73 *Id.*

74 *Id.*

75 *See id.* (quoting 792 F.3d 323, 353 (3d Cir. 2015) (Shwartz, J., concurring)) ("The Division intends to continue to apply Rule 14a-8(i)(7) as articulated by the Commission and consistent with the Division's prior application of the exclusion, as endorsed by the concurring judge . . . . ").

76 *Id.*

operations even if the significant policy issue relates to the 'nitty-gritty of its core business."[77]

The memo concluded by saying the Division "intends to continue to apply Rule 14a-8(i)(7) as articulated by the Commission and consistent with the Division's prior application of the exclusion, *as endorsed by the concurring judge . . . .*"[78]

The statement can be seen as contradictory or at least ambiguous because Judge Shwartz did not endorse the position articulated in the no-action letter the Division issued to Wal-Mart. Recall that it found that Wal-Mart had a basis to exclude the proposal under 14a-8(i)(7) because "[p]roposals concerning the sale of particular products and services are generally excludable under [the rule]."[79] Judge Shwartz was unconcerned by the proposal's ultimate effect on Wal-Mart's product matrix, and permitted the proposal's exclusion "because it lack[ed] the focus needed to trigger the 'significant social policy' exception."[80] As discussed in Section II.A.3, she strongly implies that the proposal would *not* be excludable if it only retained its "public safety" component.[81] In effect, she calls for greater focus on firearm products and public safety, which would contradict the Division's position in its no-action letter.

Thus, the Division's statement that it "intends to continue to apply Rule 14a-8(i)(7) . . . as endorsed by the concurring

77 *Id.* Note also the use of the majority's terminology from its "transcendence" test.

78 *Id.* (emphasis added).

79 Wal-Mart Stores, Inc., SEC No-Action Letter, 2014 WL 409085, at *1 (Mar. 20, 2014). That conclusion echoes the *Trinity* majority's reasoning and makes no mention of the significant social policy exception, instead focusing on the parts of ordinary business the proposal touches. *See* Trinity Wall Street v. Wal-Mart Stores, Inc., 792 F.3d 323, 347 (3d Cir. 2015) (asserting proposals should be "divorced from how a company approaches the nitty-gritty of its core business").

80 *Trinity*, 792 F.3d at 354 (Shwartz, J. concurring).

81 *Id.* ("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 the proposal as a whole 'focus[es] on' such an issue.").

judge" appears to contradict its position in the Wal-Mart No-Action Letter.[82]

C. Conflicting Positions: De Jure Precedent and De Facto Control

The three positions discussed above conflict with each other, and none clearly control because the vast majority of exclusion decisions are made by the Division, as opposed to courts within the Third Circuit.

The *Trinity* majority has fashioned a new test designed to exclude proposals that touch on significant social policy issues but attempt to exert control over the company's core business.

Judge Shwartz argues that touching a sufficiently significant issue of social policy is enough to overcome the ordinary business exclusion, regardless of whether the proposal regulates the company's "core business."

The Division occupies a third position, at least to the extent that there is ambiguity in Bulletin 14H. It clearly rejects the *Trinity* majority's new "transcendence" test as inconsistent with the language of the 1998 Adopting Release and the rule's prior application. But it is unclear whether it adopts Judge Shwartz's position in full, which contradicts the Division's position in its Wal-Mart No-Action Letter. Judge Shwartz's reasoning expands the scope of the social policy exception beyond what the Division previously allowed. Thus, the Division may now sit somewhere between the majority and Judge Shwartz, neither expanding nor contracting its pattern of practice.[83]

The *Trinity* majority's position is the only stance that has binding effect in law. It controls courts within the Third Circuit and has the potential to shape an untouched area of law in the other circuits, as evidenced in part by the Third

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[82] Bulletin 14H, *supra* note 71.

[83] Though the Division purports to apply the exclusion on a case-by-case basis, at least one author has recently argued that the exclusion's application has been "rulified" internally and implicitly. *See* Reilly Steel, Note, *The Underground Rulification of the Ordinary Business Exclusion*, 116 COLUM. L. REV. 1547 (2016).

Circuit's reference to a Southern District of Texas decision on the matter.[84] Indeed, its influence was significant enough to warrant an official Legal Bulletin on the matter, of which there have only been eight others.[85]

But litigation under any substantive exception in Rule 14a-8(i) is incredibly rare.[86] While the *Trinity* majority's position may control its lower courts and be persuasive to others, the bulk of determinations are made by the Division when a company seeks a no-action letter.[87] Further, the Commission is reluctant to formally speak on the issue, as evidenced by the almost two decades since the 1998 Adopting Release on 14a-8(i)(7). This gives the Division incredible control over the interpretation and application of Rule 14a-8. Therefore, deciphering Bulletin 14H to identify the Division's position on the rule is critical.

IV. DATA-DRIVEN ANSWERS FOR IDENTIFYING THE STATE OF THE SOCIAL POLICY EXCEPTION

This Note argues that *Trinity* and Bulletin 14H have created a conflict in interpretation of Rule 14a-8(i)(7), or more specifically, two conflicts. First, the Third Circuit's controlling law is now in conflict with the stated position of the Commission and the Division. But more importantly, the Division's present position is potentially in conflict with its pre-*Trinity*

84 *Trinity*, 792 F.3d at 347 (citing Apache Corp. v. New York City Emps.' Ret. Sys., 621 F. Supp. 2d 444, 451 n.7 (S.D. Tex. 2008)).

85 *See* Staff Legal Bulletins, SEC https://www.sec.gov/interps/legal.shtml [perma.cc/4UBW-4SVF] (listing the nine legal bulletins covering the whole of Rule 14a-8 dating back to 1992).

86 A search in Westlaw of all § 240.14a-8(i) references in federal decisions yields only twenty-two cases, eighteen of which were reported. *See* WESTLAW, http://1.next.westlaw.com (last visited Oct. 18, 2017) (search "240.14a-8(i)" without quotation marks, then filter by "Cases").

87 A search in Westlaw for all no-action letters issued that reference a substantive exception under Rule 14a-8(i) yields almost 7000 results dating back to 1970. *See* WESTLAW, http://1.next.westlaw.com (last visited Oct. 18, 2017) (under "All Content" select "Administrative Decisions & Guidance," then under "Federal" select "Securities & Exchange Commission" then "No-Action Letters" and finally under "All of these terms" search "14a-8(i)").

interpretation of the social policy exception. Part IV proposes a way of resolving the ambiguity in Bulletin 14H—by looking not at the Division's words but its actions—to determine whether the social policy exception has changed to be the more expansive version discussed by Judge Shwartz.

A. Methodological Approach

1. Hypothesis and Propositions

This Note tests the following hypothesis: The Division, in endorsing Judge Shwartz's concurrence, has adopted a broader view of the social policy exception than it previously held. As previously noted, Judge Shwartz's view of the social policy exception can be read as broader than that in the Division's Wal-Mart No-Action Letter, and can be read as significantly broader than that of the *Trinity* majority.[88] If this hypothesis is true, several propositions should follow.

> Proposition 1: The combined effect of *Trinity* and Bulletin 14H should result in a decrease in the rate at which the Division grants no-action requests and an increase in the rate at which the Division denies no-action requests.

There is a negative relationship between the number of no-action requests granted which might implicate 14a-8(i)(7) and the degree to which the Division agrees with Judge Shwartz. Judge Shwartz would not omit the proposal for attempting to influence the sale of particular products, and the Division said that such proposals were excludable under the ordinary business exclusion prior to *Trinity*. Judge Shwartz therefore adopts a more expansive view of the social policy exception than the Division had held prior to issuing Bulletin 14H. If Bulletin 14H represents a change in the Division's interpretation of the exception—and the ambiguity in its endorsement of the concurrence indicates that it might—then there would

88 *See supra* Section II.C.

be an increase in the denial of no-action letters for companies seeking 14a-8(i)(7) exclusion.

> Proposition 2: The negative effect on companies seeking no-action letters from a perceived more expansive interpretation by the Division adopted in Bulletin 14H will outweigh the positive effect on company conduct and result in a decrease in the rate at which they seek no-action letters.

There is a positive relationship between the power that companies believe the majority opinion has and the rate at which these companies seek no-action letters from the Division. Both the Division and Judge Shwartz agree that the *Trinity* majority creates an additional requirement for proposals that touch on issues of significant social policy. This requirement therefore narrows the kinds of proposals that qualify for the exception. Though the effect might be small, companies should feel more confident in their ability to exclude proposals than they would if *Trinity* had not occurred. The decision to seek a no-action letter is in part a function of the company's confidence in a favorable result. Therefore, companies will be more likely to seek no-action letters from the Division when they believe *Trinity* has persuasive force.

There is also a negative relationship between the degree to which companies believe the Division adopts a more expansive view of the social policy exception after Bulletin 14H and the rate at which companies seek no-action letters from the Division. It costs companies money to request a no-action letter from the Division; companies are also required to put forth the basis for their belief that a proposal may be omitted. All else equal, if they are less likely to succeed in excluding a proposal under 14a-8(i)(7), then they would be less likely to seek a no-action letter in the first place.

> Proposition 3: The combined effect of *Trinity* and Bulletin 14H will result in both more social policy-related proposals being brought as well as increase their share of all proposals brought by shareholders.

There is a positive relationship between the number of social-policy-related proposals brought by shareholders and the degree to which shareholders believe the Division agrees with Judge Shwartz's opinion. Shareholders are limited to suggesting one proposal per annual meeting. If a shareholder values two possible proposals equally, the shareholder will prefer to bring the one more likely to succeed. Shareholders now have a basis for believing that the Division has adopted a more expansive interpretation of the social policy exception. They also have a basis for believing that courts will be less likely to find that a proposal qualifies for the social policy exception. But, recognizing that the exception is so rarely litigated, shareholders are more likely post-Bulletin 14H to believe that their social policy-related proposals will be included in a company's proxy statement. This belief will likely result in a shift away from other types of proposals towards social policy-related proposals, as well as an increase in the number of proposals brought by shareholders who would not otherwise submit one.

It may be that changes consistent with the above propositions cannot be identified using currently available information. But it is the author's hope that, by stating the propositions that should follow from the hypothesis and exploring the available data in detail, future studies can better model the actors' behavior. This Note further seeks to provide guidance in a period of increasing activism by at least identifying whether large shifts in position have followed in the wake of an unprecedented circuit decision and agency response.

2. Data Set

In order to analyze the behavior of shareholders, companies, and the Division following *Trinity* and Bulletin 14H, this Note relies on a robust dataset provided by FactSet Research Systems Inc., specifically its SharkRepellent data on proxy proposals.[89] The SharkRepellent database provides some of

[89] The database may be accessed online at SHARKREPELLENT.NET, http://www.sharkrepellent.net [perma.cc/8GRA-44L7] (provided by FactSet Research Systems to subscribers).

the most comprehensive and up-to-date data on proxy proposals, which makes it ideal for statistical and econometric analysis.

The FactSet tool tracks every proposal submitted under Rule 14a-8, whether no-action was sought and granted, the outcome of the proposal, and the breakdown of "For" votes when the proposal was put to a vote. Further, FactSet has a robust categorization scheme for the proposals' subject matter, and details the criteria used to do that categorization. A summary of the search parameters used to pull the dataset and the variables included for each observation—i.e., proposal—is available in the Appendix to this Note.[90]

3. Limitations of the Data

This Note recognizes the data's inherent limitations for the ultimate project of observing the effects of *Trinity* and Bulletin 14H. Specifically, this data has two key limitations. First, SharkRepellent erratically tracks the date that a proxy statement was filed with the SEC, so a before-and-after analysis of *Trinity*/Bulletin 14H's effects must rely on the shareholder meeting date as an imperfect way to separate proposals across time. This effect is somewhat mitigated by the proxy season being largely over by October, when Bulletin 14H was released. However, because proxy proposals must be submitted no later than 120 days before the date the proxy statement is to be released, itself typically filed within one-to-two months of the annual meeting, there may be a lag in the response to Bulletin 14H for proposals voted on in the early 2016 meetings.[91] Because companies can file their objections no more than 80 days ahead of filing the proxy statement, there should be less lag in their behavior.[92]

The second limitation relates to using FactSet's proposal categorization by subject matter to separate the proposals to which *Trinity* might apply from the rest. It is imperfect in that

90 *See* Table A1, Appendix, *infra*.

91 *See* 17 C.F.R. § 240.14a-8 (2017).

92 *Id.*

it does not rely on the content of no-action requests and answers to see if 14a-8(i)(7) was raised or accepted as a basis for exclusion. While that data would not perfectly categorize every proposal, its absence will require reliance on FactSet's categories and an unsophisticated binary answer from the Division—either a grant or denial of the no-action request.

A related, arguably-limiting third issue is that there is only a single year's worth of post-*Trinity*/Bulletin 14H data to work with. While more data is always better, a year is arguably sufficient time for sophisticated parties to alter their behavior and there are a significant number of proposals from the 2015 proxy season to draw inferences from. Despite these limitations, the conclusions drawn from the SharkRepellant proxy data may still prove informative.

4. Sorting the Data

SharkRepellent returned 3471 unique proposals for which results were disclosed using the parameters listed in Table A1 (Appendix A).[93] Using FactSet's provided subcategory criteria and sub-subcategory labels, the author separated the data into two groups: Control and Analysis.[94] The Control group includes only the types of proposals unlikely to implicate the significant social policy exception, whereas the Analysis group contains only proposal types likely to implicate the significant social policy exception.[95] This sorting is critical for an effective

[93] The original dataset included 16,458 proposals. A significant portion of those were duplicates and were removed using Microsoft Excel 2016's "Data > Remove Duplicates function." For details on the function, see *Filter for Unique Values or Remove Duplicate Values*, MICROSOFT, https://support.office.com/en-us/article/Filter-for-unique-values-or-remove-duplicate-values-ccf664b0-81d6-449b-bbe1-8daaec1e83c2 [perma.cc/P665-76WP]. That number was reduced to 3471 unique proposals for which results were disclosed.

[94] *See Proposal Types*, SHARKREPELLENT.NET https://www.sharkrepellent.net/pub/proposal_types.xls (last visited Feb. 23, 2018). All sorting and categorization was done prior to any statistical analysis and with no knowledge of what the results would be.

[95] There may be overlap in the appearance of Categories and Subcategories in both groups. This is due to sorting based on the sub-subcategories

before-and-after analysis, and serves to control for the influence of outside forces on exclusion decisions. Any change in the Analysis group not reflected in the Control group will be much more likely attributable to a change in the Division's position, reflected in Bulletin 14H.

TABLE 1: CONTROL GROUP CATEGORIES AND SUBCATEGORIES

Category	Subcategory
Capitalization	Capital Stock
Corporate Governance	Board Related, Executive Compensation Related, Miscellaneous Corporate Governance, Reincorporate in Another State, Shareholder Rights/Takeover Defense
Proxy Fight Specific	Proxy Fight Specific
Value Maximization	Value Maximization

TABLE 2: ANALYSIS GROUP CATEGORIES AND SUBCATEGORIES

Category	Subcategory
Corporate Governance	Board Related, Executive Compensation Related, Miscellaneous Corporate Governance
Miscellaneous	Miscellaneous
Social/Environmental Issues	Social Issues Related, Environmental Issues Related
Value Maximization	Value Maximization

Sorting based on sub-subcategories for the relevant period yielded a Control group containing 1984 proposals that were

provided by FactSet and a reading of the close-case proposals' actual text. For a complete list of the sub-subcategories used and which group they were sorted into, *see infra* Tables A3 and A4, Appendix.

unlikely to relate to *Trinity*, and an Analysis group containing 1485 proposals that were likely to relate to *Trinity*.[96]

Imperfections in the dataset meant that approximately forty values, spread across three variables, were missing. The blank fields for "Market Cap" and "Pill In Force" were given zero values, and blanks for "State of Incorporation" were treated as "Not Delaware." Given the total number of proposals compared to the few with incomplete data, these small changes are unlikely to affect this Note's conclusions but were necessary for particular analyses.

B. Data Analysis

1. Did the Division Grant No-Action Relief at a Lower Rate After Bulletin 14H?

Analysis Group. A comparison of proposals whose meetings occurred before or on the date the Division issued Bulletin 14H reveals mixed results depending on a proposal's subcategory, but higher rates in granting no-action relief. This result is contrary to the proposition that no-action relief would be less frequent for *Trinity*-related proposals.

[96] Eight proposals for which results were not disclosed were removed after being sorted into one of the two groups.

TABLE 3. NUMBER OF NO-ACTION REQUESTS GRANTED AS PERCENTAGE OF REQUESTS MADE WITHIN CATEGORY AND PERCENTAGE OF NUMBER OF PROPOSALS WITHIN CATEGORY (ANALYSIS)

	Before Bulletin 14H		After Bulletin 14H	
	Of Sought	Of All Proposals	Of Sought	Of All Proposals
Corporate Governance	77.4%	62.7%	81.6%	73.8%
Board Related	57.1%	33.3%	66.7%	66.7%
Executive Compensation Related	35.7%	29.4%	33.3%	33.3%
Miscellaneous Corporate Governance	85.1%	70.8%	87.0%	77.8%
Miscellaneous	82.0%	80.4%	87.5%	87.5%
Miscellaneous	82.0%	80.4%	87.5%	87.5%
Social/Environmental Issues	47.5%	19.2%	46.0%	13.1%
Environmental Issues Related	37.1%	16.7%	34.5%	11.6%
Social Issues Related	52.2%	20.3%	53.3%	13.9%
Value Maximization	100.0%	80.0%	100.0%	100.0%
Value Maximization	100.0%	80.0%	100.0%	100.0%
% of All Categories	57.0%	27.4%	60.3%	23.6%

Overall, no-action relief was more frequently granted after Bulletin 14H for proposals that potentially implicated the social policy exception (~3.5% more frequent across categories). No-action relief was slightly less frequent (~1.5% less frequent) for the individual subcategories of Social Issues and Environmental Issues. The difference in those categories post-Bulletin 14H is greater when looking at no-action relief granted as a proportion of all proposals brought within that category (~6%).

In the aggregate, the overall increase in no-action letters issued would seem to indicate that the Division has not changed its position, contrary to the proposition drawn from the Note's hypothesis.[97] However, independent factors may be working against the proposed negative relationship between

[97] *See supra* Section III.A.1.

no-action requests granted and the degree to which the Division adopts Judge Shwartz's position.

First, the decrease in no-action letters issued for the Social Issues and Environmental Issues subcategories may indicate either a gradual or small change in the Division's position. These are the proposals most likely to implicate the social policy exception out of the entire Analysis group which to some degree relates to *Trinity*. A change in these subcategories may indicate that a gradual shift in position occurred for the proposals most clearly within the scope of 14a-8(i)(7) and the social policy exception.

However, if that were the case, one would expect to see a shift of shareholders bringing more proposals in the Social Issues & Environmental Issues subcategories. This does not appear to be the case.[98] A difference of ~0.4%, or one proposal of the 310 brought after Bulletin 14H, certainly does not indicate a strategic shift towards the subcategories, suggesting that shareholders may not view the Division as adopting a more expansive interpretation of the exception. This assumes that the Social/Environmental Issues category is most likely to be affected by a broader interpretation of the social policy exception out of those within the Analysis group, and that shareholders are responsive to marginal changes in the Division's position.

TABLE 4. DISTRIBUTION OF PROPOSALS BROUGHT BY SUBCATEGORY, BEFORE AND AFTER BULLETIN 14H (ANALYSIS)

Proposal Subcategory	Before 14H	After 14H	Total
Board Related	1.02%	0.97%	1.01%
Environmental Issues	23.49%	27.74%	24.38%
Executive Compensation Related	1.45%	0.97%	1.35%
Miscellaneous	4.34%	2.58%	3.97%
Miscellaneous Corporate Governance	9.62%	11.61%	10.03%
Social Issues Related	59.66%	55.81%	58.86%
Value Maximization	0.43%	0.32%	0.40%

[98] For a more specific breakdown by subcategory, see *infra* Table A5, Appendix.

Table 4 captured the behavior of shareholders by identifying the relative percentages of proposal types that they brought. But there is an intermediary between the shareholder and the Division: the company. Because it is the company that makes the decision of whether to seek a no-action letter, their behavior will influence the types of proposals brought before the Division. Table 5, *infra*, captures companies' behavior across subcategories.

TABLE 5. DISTRIBUTION OF PROPOSALS AMONG SUBCATEGORIES, BEFORE AND AFTER BULLETIN 14H AND BY WHETHER A COMPANY SOUGHT NO ACTION FROM THE DIVISION (ANALYSIS)

Meeting Before or On Bulletin 14H?	Yes		No	
No Action Sought?	Yes	No	Yes	No
Board Related	1.2%	0.8%	2.5%	0.0%
Environmental Issues	22.0%	24.9%	24.0%	30.2%
Executive Compensation	2.5%	0.5%	2.5%	0.0%
Miscellaneous	8.9%	0.2%	6.6%	0.0%
Misc. Corporate Governance	16.6%	3.1%	26.5%	2.1%
Social Issues Related	48.1%	70.3%	37.2%	67.7%
Value Maximization	0.7%	0.2%	0.8%	0.0%

Table 5 shows a notable shift by companies seeking no-action relief away from Social Issues Related proposals (of ~11%). The shift is made up almost entirely by the ~10% increase in share for Miscellaneous Corporate Governance issues and a slight (~2%) uptick in Environmental Issues. The Division's no-action grants laid out in Table 3 show little change in how they treat Social and Environmental Issues.[99] The shareholders' proposal distribution in Table 4 show even smaller movement to the Social and Environmental Issues subcategories.[100] Yet, companies seek no-action less frequently for those issues now as compared to other issues. No-

[99] *See supra* Table 3.

[100] *See supra* Table 4.

action grant rates are about the same for those issues, as is their share of all proposals brought, which might indicate that movements elsewhere in securities law are compelling companies to more aggressively seek no-action relief in other areas.

Second, as will be discussed in detail in Section III.B.2, *infra*, companies sought no-action relief less frequently in the Analysis group, which may indicate a belief that a challenge to those proposals would be less likely to succeed. That would be consistent with the Proposition 1 that the Division has adopted Judge Shwartz's more expansive view of the social policy exception.

Third, there may be a general trend within the Division across all types of proposals to favor companies and issue them no-action letters regardless of a proposal's content. The Control group's results support this idea to some degree.

Control Group. A similar comparison within the Control group shows comparable results, with an increase in no-action letters issued but a decrease in their number as a percentage of all proposals submitted for proxy inclusion.

TABLE 6. NUMBER OF NO-ACTION REQUESTS GRANTED AS PERCENTAGE OF REQUESTS MADE WITHIN CATEGORY AND PERCENTAGE OF NUMBER OF PROPOSALS WITHIN CATEGORY (CONTROL)

	Before Bulletin 14H		After Bulletin 14H	
	Of Sought	Of All Proposals	Of Sought	Of All Proposals
Capitalization	**100.0%**	**100.0%**		
Capital Stock	100.0%	100.0%		
Corporate Governance	**50.5%**	**19.34%**	**62.9%**	**17.9%**
Board Related	47.2%	15.8%	44.4%	5.6%
Executive Compensation Related	48.5%	22.1%	28.6%	9.7%
Miscellaneous Corporate Governance	100.0%	11.1%		
Reincorporate in Another State	50.0%	16.7%		
Shareholder Rights / Takeover Defense	53.6%	20.0%	76.1%	24.6%
Proxy Fight Specific		**0.0%**	**0.0%**	**0.0%**
Proxy Fight Specific		0.0%	0.0%	0.0%
Value Maximization	**88.2%**	**60.0%**	**25.0%**	**13.0%**
Value Maximization	88.2%	60.0%	25.0%	13.0%
% of All Categories	**51.7%**	**20.0%**	**58.2%**	**17.5%**

Overall, there is a more dramatic increase here in the number of no-action letters granted after Bulletin 14H was issued (~6.5% vs. ~3.5% in Analysis). This change occurred despite a similar decline in no-action letters issued as a proportion of all proposals submitted for proxy statement inclusion (~2.5% vs. ~4% in Analysis).

However, the Control group only includes proposals Bulletin 14H should not affect because they do not implicate the social policy exception.[101] If that presumption holds, then the changes observed in the Analysis group—which track the changes shown here in the Control group—might not negate Proposition 1 (though they couldn't be taken to support it, either).

Using regression tools to analyze the same data,[102] the following model ("Proposition 1 Model") also tends to disprove the first proposition.[103]

101 There is some concern that Bulletin 14H's discussion of the Rule 14a-8(i)(9) exclusion for conflict with the company's own proposal may be causing changes in the Control group, which otherwise should remain unchanged by the bulletin. *See* Bulletin 14H, *supra* note 71. The data used are insufficient to isolate those potential effects.

102 A full description of the methodology used to select variables for inclusion, as well as tests reporting goodness of fit, overall significance, and predictive ability is provided in the Appendix, Part B, *infra*.

103 Logistic regression is a means of isolating the effect of independent variables on the likelihood of an event occurring. The model is designed to maximize the likelihood of a correct prediction based on the independent variables chosen to explain some set of data. When the prediction is whether an event will occur, the regression will estimate the effect of the independent variables on the *natural log*-odds of that event occurring. Those estimates can be transformed to provide the change in the odds that the event will occur for each change in the relevant independent variable.

TABLE 7. PROPOSITION 1 MODEL & RESULTS (STATA LOGISTIC OUTPUT)

Logistic Regression Log likelihood = –2011.5598					# of Obs. LR chi2(9) Prob>chi2 Pseudo R2	3469 299.96 .0000 .0694
ProposalExcluded (Dependent)	Odds Ratio	Std. Err.	z	P>|z|	[95% Conf. Interval]	
MeetingBeforeor-OnSECMemoDa	1.271	.1271	2.40	.017	1.04457	1.54599
SubcatEnvironmentalIssues	.1672	.0322	-9.29	.000	.114640	.243860
SubcatSocialIssuesRelated	.1459	.0253	-11.10	.000	.103889	.204993
Subcat-BoardRelated	.0715	.0139	-13.57	.000	.048824	.104601
SubcatExecutiveCompensationR	.1343	.0248	-10.87	.000	.093485	.192856
SubcatReincorporateInAnother	.0676	.0749	-2.43	.015	.007720	.592447
SubcatShareholder-RightsTakeo	.1070	.0188	-12.74	.000	.075848	.150880
SubcatValueMaximization	.2355	.0752	-4.53	.000	.125869	.440474
MarketCapitlizationmil	1.000	.0000	5.20	.000	1.00000	1.00000
_cons	2.305	.4114	4.68	.000	1.62490	3.27049

Proposition 1 Model predicts that a proposal that was brought before or on the date of Bulletin 14H is 1.27x more likely to be excluded than proposals brought after Bulletin 14H. This runs contrary to the proposition that expects proposals are less likely to be excluded after Bulletin 14H, all else held equal. The range of the estimated effect is relatively large, being between 1.04x and 1.55x more likely. More than disconfirm the proposition, the model suggests Bulletin 14H had the opposite effect.

The other variables yield interesting information as well. A proposal that falls into either the Environmental or Social Issues subcategory is significantly less likely to be excluded than are other proposals (~84% and ~86% less likely,

respectively),[104] independent of whether the proposal occurred before or after Bulletin 14H and the other factors listed. Though that fact is not useful for determining whether the Division's position on the exception itself has changed, Proposition Model 1 does suggest that the significant social policy exception has some bite.

Overall, the data do not support Proposition 1. If the Division had adopted a more expansive view of the social policy exception when it issued Bulletin 14H, there ought to have been a decrease in the rate at which it granted no-action relief to companies on social policy-related issues. Based on the data, the opposite occurred. Because there were similar changes in both the Control and Analysis groups—after an event (Bulletin 14H), which in theory should only influence one—it is possible that external forces not captured by these variables worked against the hypothesized effect. Nevertheless, there is insufficient evidence on the issue to conclude that the Division changed its interpretation post-*Trinity*. The regression results, at a minimum, confirm this conclusion.

2. Did Companies Seek Fewer No-Action Letters for *Trinity*-related Proposals?

Proposition 2 theorized that the negative effect on companies seeking no-action letters from a perceived more-expansive interpretation by the Division adopted in Bulletin 14H would outweigh the positive effect of the *Trinity* majority's view and result in a decrease in the rate at which they seek no-action letters.

Analysis Group. There is an observable decrease in the rate at which companies sought a no-action letter. Post-Bulletin 14H, for proposals in the Analysis group, companies only sought no-action relief 39% of the time. In contrast, prior to Bulletin 14H, companies requested no-action from the Division ~48% of the time. The previous discussion touched on the

104 Alternatively, this can be written as: All proposals except for those that touch on Environmental or Social Policy Issues are collectively 5.98x or 6.85x more likely to be excluded, respectively.

differences, namely, a large drop in Social/Environmental Issues, made up only in part by an increase in the Corporate Governance category.

TABLE 8. PERCENTAGE AND COUNT WITHIN CATEGORY WHERE NO-ACTION SOUGHT, BY BEFORE/ON OR AFTER BULLETIN 14H (ANALYSIS)

	Before 14H		After 14H	
	% within Category for which No-Action Sought	#	% within Category for which No-Action Sought	#
Corporate Governance	**81.0%**	**115**	**90.5%**	**38**
Board Related	58.3%	7	100.0%	3
Executive Compensation	82.4%	14	100.0%	3
Misc. Corp. Governance	83.2%	94	88.9%	32
Miscellaneous	**98.0%**	**50**	**100.0%**	**8**
Miscellaneous	98.0%	50	100.0%	8
Social/ Environmental Issues	**40.5%**	**396**	**28.6%**	**74**
Environmental Issues	44.9%	124	33.7%	29
Social Issues	38.8%	272	26.0%	45
Value Maximization	**80.0%**	**4**	**100.0%**	**1**
Value Maximization	80.0%	4	100.0%	1
Total of All Categories	**48.1%**	**565**	**39.0%**	**121**

However, amongst the Analysis group categories, there has been an observable drop in the rate at which companies seek no-action relief, consistent with Proposition 2. That consistency is further bolstered by the sizable shift away from Social/Environmental issues.

Control Group. The Control group experienced a similar decline post-Bulletin 14H in the rate at which companies sought no-action letters across categories. Much of the foregoing discussion on the Control group and the external forces acting on it may apply here. The decline is similar (~8.5% vs. ~9% in Analysis), but here there is stronger evidence that external forces unrelated to *Trinity* account for the similar effects in both groups. The Analysis group's dramatic drop for Social/Environmental issues indicates a responsiveness to *Trinity*, consistent with expectations. The Control group's similarly dramatic drop came from the Board Related

subcategory, so it is less likely that Bulletin 14H is having an effect.[105]

TABLE 9. PERCENTAGE AND COUNT WITHIN CATEGORY WHERE NO-ACTION SOUGHT, BY BEFORE/ON OR AFTER BULLETIN 14H (CONTROL)

	Before 14H		After 14H	
	% within Category for which No-Action Sought	#	% within Category for which No-Action Sought	#
Capitalization	**100.0%**	**2**		
Capital Stock	100.0%	2		
Corporate Governance	**38.4%**	**608**	**28.5%**	**97**
Board Related	33.5%	144	12.7%	9
Executive Compensation	45.6%	196	33.9%	21
Misc. Corp. Governance	11.1%	1		
Reincorporate in Other State	33.3%	2		
Shareholder Rights/ Takeover Defense	37.3%	265	32.4%	67
Proxy Fight Specific	**0.00%**	**0**	**50.0%**	**1**
Proxy Fight Specific	0.00%	0	50.0%	1
Value Maximization	**68.0%**	**17**	**52.2%**	**12**
Value Maximization	68.0%	17	52.2%	12
Total of All Categories	**38.7%**	**627**	**30.1%**	**110**

Proposition 2 Model tends to affirm the proposition. The model predicts that a proposal is 1.53x more likely to be challenged before Bulletin 14H than after. Indirectly, this supports the idea that Bulletin 14H made successful challenges less likely (and therefore of reduced value) due to a more expansive interpretation of the social policy exception.

Concededly, the available data do not provide a great means of evaluating the effect of Bulletin 14H on the number of no-action letters sought. It is an inherently difficult thing to measure, as it includes both the SEC's actual position and

105 Note that the Board Related subcategory appears in both the Analysis and Control groups. This Note separated proposals using sub-subcategory sorting to ensure only those likely to be relevant to *Trinity* are put in the Analysis group. That should bolster the claim that external forces are causing comparable Control group effects, as extra care has been taken to isolate proposals in the Board Related subcategory from *Trinity*'s influence. *See also infra* Table A3, Appendix.

companies' response to their perception of that position, as well as the proposals written by shareholders observing the same.

TABLE 10. PROPOSITION 2 MODEL & RESULTS
(STATA LOGISTIC OUTPUT)

Logistic Regression Log likelihood = –2166.1833					# of obs LR chi2(11) Prob>chi2 Pseudo R2	3469 364.19 .0000 .0775
NoActionSought (Dependent)	Odds Ratio	Std. Err.	z	P>|z|	[95% Conf. Interval]	
MeetingBeforeor-OnSECMemoDa	1.532	.1470	4.44	.000	1.26915	1.84874
SubcatEnvironmen-talIssues	.0121	.0123	-4.35	.000	.001653	.088267
SubcatSocialIs-suesRelated	.0088	.0089	-4.68	.000	.001211	.063856
Subcat-BoardRelated	.0077	.0078	-4.80	.000	.001059	.056282
SubcatExecu-tiveComepnsationR	.0133	.0134	-4.27	.000	.001822	.096618
SubcatMiscellane-ousCorporate	.0645	.0664	-2.66	.008	.008585	.485066
SubcatProxyFight-Specific	.0024	.0035	-4.12	.000	.000136	.042319
SubcatReincorpo-rateInAnother	.0096	.0128	-3.49	.000	.000709	.130163
SubcatShareholder-RightsTakeo	.0102	.0103	-4.54	.000	.001404	.073944
SubcatValueMaxi-mization	.0301	.0316	-3.34	.001	.003847	.235397
MarketCapitaliza-tionmil	1.000	.0000	9.05	.000	1.00000	1.00000
_cons	33.41	33.82	3.47	.001	4.59426	242.965

Overall, there is stronger evidence to support Proposition 2 than there is for Proposition 1. A decline in seeking no-action, particularly in the most relevant of the proposal categories, is consistent with companies holding a more pessimistic view of their chances for success in excluding proposals which may qualify for the social policy exception to Rule 14a-8(i)(7). This is dampened by a similarly strong effect in the Control group, but the subcategory distribution indicates that external forces, not Bulletin 14H, are responsible. The regression analysis is consistent with that conclusion. It is clear that

companies seek no-action relief at a lower rate than before Bulletin 14H, and there's evidence which arguably attributes that change to the Bulletin itself.

3. Are There More Proposals both in Number and Proportional Share Which Relate to the Social Policy Exception?

Raw counts of proposals are not very reliable in identifying causation. Nevertheless, the one-proposal rule does amplify the significance of any shift between categories year-to-year.

When weighted for the length of the period, there appears to have been a small increase in the number of Analysis group proposals brought. This is consistent with the proposition that there would be an increase in the absolute number of social policy-related proposals post-Bulletin 14H due to the one-proposal limit[106] and the increased chance of success stemming from ambiguity in the Division's position.

TABLE 11. COUNT OF PROPOSALS BROUGHT WITHIN ANALYSIS GROUP, BROKEN OUT BY SUBCATEGORY (ANALYSIS)

	Before 14H (1390 Days)	Per Day	After 14H (385 Days)	Per Day	Δ Per Day
Corporate Governance	**142**	**.102**	**42**	**.109**	**-0.007**
Board Related	12	.009	3	.008	0.001
Executive Compensation	17	.012	3	.008	0.004
Misc. Corp. Governance	113	.081	36	.094	-0.012
Miscellaneous	**51**	**.037**	**8**	**.021**	**0.016**
Miscellaneous	51	.037	8	.021	0.016
Social/ Environmental Issues	**977**	**.703**	**259**	**.673**	**0.030**
Environmental Issues	276	.199	86	.223	-0.025
Social Issues Related	701	.504	173	.449	0.055
Value Maximization	**5**	**.004**	**1**	**.003**	**0.001**
Value Maximization	5	.004	1	.003	0.001
Total	**1175**	**.845**	**310**	**.805**	**0.040**

106 *See* 17 C.F.R. § 240.14a-8.

The data in Table 12, *infra*, are also consistent with Proposition 3, in that they show that proposals in the Analysis group occupy a greater share (~4% greater) of all proposals brought post-Bulletin 14H than they did prior. This fact suggests that shareholders may have both perceived and responded to a change within Bulletin 14H by bringing more social policy-related proposals. The small change in the absolute number of proposals brought within the category likely indicates that the increased share is due to a combination of a decrease in Control group proposals and a slight increase in Analysis group proposals.

TABLE 12. COUNT OF PROPOSALS BROUGHT BY CONTROL OR ANALYSIS GROUP

	Control	Analysis	**Analysis as % of Total Brought**
Before 14H	1619	1175	**42.05%**
After 14H	365	310	**45.93%**
Both	**1984**	**1485**	**42.81%**

V. CONCLUSION

Just as the language in Bulletin 14H ambiguously conveyed the Division's interpretation of Rule 14a-8(i)(7), the behaviors of shareholders, companies, and the Division itself send ambiguous signals one year later. The goal of this Note was to analyze the actors' behaviors and look to the Division's application of the rule to find a possible *de facto* change in the law. Taken together, the before-and-after analyses do not conclusively suggest that a change in interpretation occurred. At a minimum, though the *Trinity* decision was unprecedented and yielded a similarly uncommon response from the Division, it appears that no radical change in the law occurred.

If the Division's position changed to become more expansive post-*Trinity*, three propositions—subject to constraints and assumptions—should have held true. The Division should have granted a smaller share of no-action requests across Analysis categories than were granted before the decision. Companies should have sought fewer no-action letters for

Analysis group proposals. And finally, shareholders should have altered their behavior and brought more Analysis-category proposals.

The data discussed in Part IV contradict Proposition 1 regarding the Division's behavior. There was an increase in the relative number of no-action letters granted after Bulletin 14H for Analysis proposals. There was a comparable change in the Control group, meaning that at best, there is not yet evidence to support Proposition 1. There is some evidence to support the second and third hypotheses. Companies sought no-action relief for Analysis group proposals at lower rates than they had before Bulletin 14H. While Control group proposals saw similar declines, the subcategory distribution provides support for the proposition that Bulletin 14H was responsible. The shift away from seeking no-action for Social/Environmental issues was significant—it differed from trends in other categories and indicated of a reading of Bulletin 14H where the Division now holds a broader view of the social policy exception. Similarly, some evidence exists to support Proposition 3. More Analysis group proposals are being brought, both in absolute number and as a share of all proposals brought, which is consistent with the theory that shareholders read Bulletin 14H to indicate adoption of a broader social policy exception.

Thus, there is evidence that two of the three actors in this system—shareholders and companies—believe that the Division has shifted the law on Rule 14a-8(i)(7). But the Division's behavior is what truly counts for defining the law, given its *de facto* control through no-action recommendations.

Given the importance of the Proposition 1 relative to the other two propositions, it ultimately appears that the Division has *not* endorsed Judge Shwartz's position and has not adopted a broader view of the social policy exception. As social activism through control over corporate governance grows and institutional investors begin to act with an eye towards changing securities law through litigation, the views of the *Trinity* majority and Judge Shwartz may return with persuasive force. For now, however, the Division's position on the social policy exception appears unchanged.

APPENDIX

A. Tables

TABLE A1. SHARKREPELLENT.NET PROXY SEARCH PARAMETERS

Meeting Date	1/1/2012–11/10/2016
Meeting Type	Annual, Special, Written Consent
Non US Companies	Excluded
Index (Current)	All
Rule 14a-8?	Yes (Only)
No-Action Letter Sought?	All
No-Action Letter Granted?	All
Proposals Not In The Proxy?	Include
Proxy Proposal Result?	Fail, Not Voted On, Pass, Pending/Results Never Disclosed
Proposal Categories[107]	Capitalization Fund Related Miscellaneous Social/Environmental Issues Corporate Governance M&A/Reorganization Proxy Fight Specific Value Maximization

TABLE A2. SHARKREPELLENT.NET OBSERVATION VARIABLES

State of Incorporation	Proposal to Amend Bylaws
FactSet Industry	Proposal Text
Market Capitalization ($ mil)	No-Action Letter Sought
Pill in Force - Time of Meeting	No-Action Letter Granted
Meeting Date	Proposal Not in Proxy
Proxy Statement Filing Date	Proposal Result
Proposal	For as % Yes / No
Proposal Category	For as % Shares Out
Proposal Subcategory[108]	For as % Votes Cast

107 For an explanation of how FactSet defines these categories, see *Proposal Types, supra* note 94.

108 For an explanation of how FactSet defines these subcategories, see *id.*

TABLE A3. CONTROL GROUP SUB-SUBCATEGORIES

Adopt Director Nominee Qualifications
Advisory Vote on Compensation ("say on pay")
Allow Cumulative Voting
Allow for or Decrease Requirement to Act by Written Consent
Allow for or Decrease Requirement to Call Special Meetings
Board Ability to Amend Bylaws Related (Reduce Defense)
Breakup Company, Divest Assets/Divisions
Cap/Restrict Executive Compensation
Change Vote Requirement to Elect Directors to Majority from Plurality
Declassify Board
Eliminate Dual Class Structure (Unequal Voting)
Eliminate Supermajority Requirements
Hire Adviser to Evaluate Alternatives/Seek Sale or Liquidation of Company
Link Pay/Equity Grants and Vesting to Performance ("payforperformance")
Opt out of State Takeover Statute
Other Executive Compensation Issues
Recoup Bonuses/Incentive Pay if Restatement/Discredited ("clawback")
Redeem or Require Shareholder Vote on Poison Pill
Remove Director(s)
Repeal Bylaw Amendments Adopted by Company During Proxy Fight
Require Equity be Retained by Executives/Dirs. for Specified Period
Return Capital to Shareholders (Dividends, Buybacks)
Separate Chairman and CEO Positions/Independent Chairman
Shareholder Nominee in Company Proxy (Proxy Access)
Vote on/Limit Severance Agreements ("golden parachutes")

TABLE A4. ANALYSIS GROUP SUB-SUBCATEGORIES

Add Minorities/Women to Board (board diversity)
Animal Rights
Environmental Issues
Health Issues
Human Rights
Increase Compensation Related Disclosure/Prepare Special Report
Labor Issues
Miscellaneous
Other Board Committee Related
Other Corporate Governance Issues
Other Maximize Shareholder Value Related
Other Social Issues Related
Political Issues
Sustainability Report

TABLE A5. DISTRIBUTION OF PROPOSALS ACROSS SUBCATEGORIES, BEFORE AND AFTER BULLETIN 14H (ANALYSIS)

Proposal Subcategory	Before 14H	After 14H	Total
Board Related	1.02%	0.97%	1.01%
Environmental Issues	23.49%	27.74%	24.38%
Executive Compensation	1.45%	0.97%	1.35%
Miscellaneous	4.34%	2.58%	3.97%
Misc. Corporate Governance	9.62%	11.61%	10.03%
Social Issues Related	59.66%	55.81%	58.86%
Value Maximization	0.43%	0.32%	0.40%

TABLE A6. AVERAGE SIZE OF SUPPORT FOR PROPOSALS VOTED ON, RELATIVE TO SEC, BY TYPE OF VOTE METRIC (CONTROL)

	Average of For as % Yes / No	Average of For as % Shares Out	Average of For as % Votes Cast
Before Bulletin 14H			
Fail	29.95%	22.38%	29.61%
Pass	72.37%	56.05%	71.30%
After Bulletin 14H			
Fail	26.07%	20.27%	25.78%
Pass	73.81%	56.61%	72.13%

TABLE A7. AVERAGE SIZE OF SUPPORT FOR PROPOSALS VOTED ON, RELATIVE TO SEC, BY TYPE OF VOTE METRIC (ANALYSIS)

	Average of For as % Yes / No	Average of For as % Shares Out	Average of For as % Votes Cast
Before Bulletin 14H			
Fail	20.39%	13.52%	18.00%
Pass	68.57%	42.40%	57.30%
After Bulletin 14H			
Fail	19.90%	13.47%	17.70%
Pass	69.58%	53.94%	63.32%

B. Regression Methodology

All statistical testing was run using the Stata 15 statistics package.[109] Unless otherwise indicated, regressions were run using the *logistic* command and all coefficients are output as transformed odds-ratios. This transformation has no effect on the significance of the coefficients or model.

1. Proposition 1 Model Selection & Fit

Here, logistic regression is a useful means of testing Proposition 1. Whether a proposal is excluded from a company's proxy materials because the SEC granted no-action relief is a binary event: The company can either include or exclude the proposal. An independent variable that tracks whether a proposal was made before or after Bulletin 14H can be created. The logistic regression will determine whether that event had a statistically significant effect on whether a proposal would be excluded from a company's proxy statement.

In order for the final model to be useful, it must be a significantly better predictor of whether a proposal would be excluded than the no-variable model, meaning that it must be more accurate than simply picking whichever category has the majority of proposals.

TABLE A2-1. MODEL 1: THE NO-VARIABLE MODEL

Logistic Regression Log likelihood = –2161.542					# of Obs LR chi2(0) Prob>chi2 Pseudo R2	3469 .00 . .0000
ProposalExcluded	Odds Ratio	Std. Err.	z	P>|z|	[95% Conf. Interval]	
_cons	.460017	.01681	-21.25	.000	.428217	.494179

Proposition 1 suggests an effect on proposal exclusion caused by the release of Bulletin 14H. The most relevant parameter then is whether the proposal occurred before or after

109 *See Features*, STATA, https://www.stata.com/features/ [perma.cc/B5BC-EWG3].

the Bulletin came out. Model 2 creates a single-variable model based on that parameter.

TABLE A2-2. MODEL 2: THE SINGLE-VARIABLE MODEL

Logistic Regression Log likelihood = –2159.8696					# of Obs LR chi2(0) Prob>chi2 Pseudo R2	3469 3.34 .0674 .0008
ProposalExcluded (Dependent)	Odds Ratio	Std. Err.	z	P>|z|	[95% Conf. Interval]	
MeetingBeforeor-OnSECMemoDa	1.18673	.11193	1.82	.069	.986443	1.42769
_cons	.400415	.03411	-10.74	.000	.338846	.473171

Model 2 shows the estimated effect of a single independent variable, *MeetingBeforeorOnSECMemoDa*, on whether a proposal was excluded, *ProposalExcluded*.[110] As can be guessed from the name, the independent variable indicates whether a proposal occurred on or before the date of Bulletin 14H.[111] The model predicts that proposals occurring on or before Bulletin 14H are 1.187x more likely to be excluded than those occurring after.

The Single-Variable Model is probably insufficient to test the proposition. The p-value of .069 indicates the variable is only significant at the 90% confidence level, and the standard level variables must usually reach is 95%.[112] The *LR chi2(1)* and *Prob >chi2* values also support this conclusion. *Prob > chi2* indicates whether the model is significantly different from the no-variable model based on a comparison of the log

110 Excluded proposals are coded as "1" and all other proposals are coded as "0". Because of the near-perfect overlap between whether no-action was granted and whether a proposal was excluded from the proxy statement (only 1 in 3469 differed between them), *ProposalExcluded* is used to test no-action relief.

111 Proposals dated on or before Oct. 22, 2015, are coded as "1" and proposals dated after are coded as "0".

112 Unless otherwise indicated, all variables are tested as two-tailed, requiring a p-value equal to or lesser than the critical value of .05 to be significant at the 95% confidence level.

likelihoods of the base and current model.[113] It too is greater than the critical value 0.05, meaning the model is not significantly different from the no-variable model at the 95% confidence level.

The one-variable model is simply too limited. While the relationship between whether no-action relief is granted and Bulletin 14H is the entire proposition, the former is a function of numerous other forces. For instance, the type of proposal is extremely relevant. Bulletin 14H related to social policy proposals, so any change in the other proposal categories may not be explained by *MeetingBeforeorOnSECMemoDa.* In the single-variable model, any significance of Bulletin 14H must be protected from the effects of outside forces which may be influencing other proposal types. More variables are required to control for those outside effects and isolate, as best as possible, Bulletin 14H's influence.

[113] The likelihood-ratio test determines whether the coefficients are jointly significant. The likelihood chi-square statistic can be manually calculated as –2 times the difference between the base and current log likelihood of the models. The null hypothesis is that all coefficients are equal to zero—i.e., that they jointly have no effect on the dependent variable. The Prob > chi2 gives the probability that the null hypothesis is true. If that value is less than or equal to the critical value of .05, then the null hypothesis that the variables are jointly insignificant can be rejected. In other words, if (Prob > chi2) is less than .05, at least one of the variables in the model significantly improves the model's ability to predict the effect on the dependent variable.

TABLE A2-3. MODEL 3: THE MULTIVARIATE MODEL

Logistic Regression Log likelihood = –2008.8969					# of Obs LR chi2(0) Prob>chi2 Pseudo R2	3469 305.29 .0000 .0706
ProposalExcluded (Dependent)	Odds Ratio	Std. Err.	z	P>|z|	[95% Conf. Interval]	
MeetingBefореor-OnSECMemoDa	1.26871	.12693	2.38	.017	1.04280	1.54356
SubcatEnvrion-mentalIssues	.111979	.03740	-6.56	.000	.058192	.215478
SubcatSocialIs-suesRelated	.097585	.03154	-7.20	.000	.051798	.183847
Subcat-BoardRelated	.048036	.01607	-9.07	.000	.024930	.092556
SubcatExecu-tiveCompensa-tionR	.090171	.02965	-7.32	.000	.047332	.171785
SubcatMiscellane-ousCorporate	.590624	.21532	-1.44	.149	.289069	1.20676
SubcatReincorpo-rateInAnother	.023360	.05243	-2.70	.007	.004906	.430152
SubcatShare-holder-RightsTakeo	.072279	.02336	-8.13	.000	.038364	.136179
SubcatValueMaxi-mization	.158705	.06670	-4.38	.000	.069637	.361689
DelawareIn-croporated	1.02826	.08168	0.35	.726	.880007	1.20148
MarketCapitaliza-tionmil	1.00000	.00000	5.21	000	1.00000	1.00000
PillinForce	.487462	.19490	-1.80	.072	.222646	1.06725
_cons	3.39923	1.1265	3.69	.000	1.77536	6.50841

Model 3 includes a series of dummy variables to control for the type of proposal,[114] as well as whether the company is incorporated in Delaware, its market capitalization (in millions of U.S. dollars), and whether the company had a poison pill in force at the time of the meeting.[115]

114 The subcategory for "Miscellaneous" proposals is omitted as the base case of the dummies created for the subcategories of proposals.

115 The subcategories for proposals related to Capital Stock and Proxy-fight Specific proposals are excluded because they perfectly predicted whether no-action would be granted. Because this only included 11 proposals of the 3480 in the sample, the effect should not meaningfully alter the results.

The multivariate model solved the problems of the one-variable model. It significantly improves its estimation over the no-variable model with a p-value below well below .05. It further identifies a number of significant variables, including *MeetingBeforeorOnSECDa*. It is not perfect, and necessarily is limited by the data available. But the type of proposal in theory should go a long way in capturing outside effects on no-action grant rates and isolating the relevant ones.

Before analyzing the model in depth, it can be reduced by the same likelihood-ratio test to correct for the risk that too many variables are included. By dropping variables one by one and comparing the likelihood ratios of the resulting "nested" model to the "full" model, variables made significant only due to their interaction with others can be eliminated.

Table A2-4 shows the Chi2(df) and p-value produced from the likelihood-ratio chi2 test on the nested (i.e., one-variable-less model) and the full model. It indicates that *PillInForce, DelawareIncorporated,* and *SubcatMiscellaeousCorporate* can be dropped without significantly affecting the model's estimation.

TABLE A2–4. LIKELIHOOD-RATIO COMPARISONS (*LRTEST*) FOR MODELS WITHOUT THE OMITTED VARIABLE, NESTED OF MODEL 3.

Variable Omitted	**Chi2(1) Value**	**Prob > chi2**
PillInForce	3.58	.0583
MarketCapitalizationmil	26.79	.0000
DelawareIncorporated	.12	.7256
SubcatValueMaximization	21.18	.0000
SubcatShareholderRightsTakeo	90.63	.0000
SubcatRecinorprateInAnother	10.46	.0012
SubcatMiscellaneousCorporate	2.19	.1389
SubcatExecutiveCompensationR	71.57	.0000
SubcatBoardRelated	112.20	.0000
SubcatSocialIssuesRelated	70.17	.0000
SubcatEnvironmentalIssuesRelated	55.88	.0000
MeetingBeforeorOnSECMemoDa	5.77	.0163

Model 4 reruns the logistic regression including only the *lrtest* significant variables ($p < .05$). Re-running the *lrtest* on Model 4, nested of Model 3, confirms that the difference between the models is insignificant when those variables are included.

TABLE A2-5. MODEL 4: PROPOSITION 1 MODEL & RESULTS. (STATA LOGISTIC OUTPUT)

Logistic Regression Log likelihood = –2011.5598					# of Obs. LR chi2(9) Prob>chi2 Pseudo R2	3469 299.96 .0000 .0694
ProposalExcluded (Dependent)	Odds Ratio	Std. Err.	z	P>|z|	[95% Conf. Interval]	
MeetingBeforeorOnSECMemoDa	1.271	.1271	2.40	.017	1.04457	1.54599
SubcatEnvironmentalIssues	.1672	.0322	-9.29	.000	.114640	.243860
SubcatSocialIssuesRelated	.1459	.0253	-11.10	.000	.103889	.204993
SubcatBoardRelated	.0715	.0139	-13.57	.000	.048824	.104601
SubcatExecutiveCompensationR	.1343	.0248	-10.87	.000	.093485	.192856
SubcatReincorporateInAnother	.0676	.0749	-2.43	.015	.007720	.592447
SubcatShareholderRightsTakeo	.1070	.0188	-12.74	.000	.075848	.150880
SubcatValueMaximization	.2355	.0752	-4.53	.000	.125869	.440474
MarketCapitlizationmil	1.000	.0000	5.20	.000	1.00000	1.00000
_cons	2.305	.4114	4.68	.000	1.62490	3.27049

TABLE A2-6. LIKELIHOOD-RATIO TEST (*LRTEST*) COMPARING MODEL 4 & MODEL 3.

Likelihood-ratio test	LR chi2(3) = 5.33
(Assumption: . nested in full)	Prob > chi2 = 0.1494

One method for measuring goodness-of-fit, or how well the variables explain the data, is the Hosmer-Lemeshow test.[116] Running the test on Model 4 produced the following table.[117] It suggests that the model does not fit the data well ($p < .05$). No firm conclusion can be drawn from the result of the H-L test; nevertheless, it is reported here for completeness.

TABLE A2-7. LOGISTIC MODEL FOR *PROPOSALEXCLUDED*, GOODNESS-OF-FIT TEST

Number of observations =	3469
Number of groups =	10
Hosmer-Lemeshow chi2(8) =	25.26
Prob > chi2 =	0.0014

How well the model captures the influences on the dependent variable can be measured by its success or failure in classifying the observations and comparing its predictions to these observations.[118] The following table provides that comparison and shows that there still exists a significant portion of unaccounted-for behavior. Model 4 only correctly classified 71.87% of the 3469 observations.

116 *See* Kellie J. Archer & Stanley Lemeshow, *Goodness-of-fit Test for a Logistic Regression Model Fitted Using Survey Sample Data*, 6 STATA J. 97, 97–98 (2006), http://www.stata-journal.com/sjpdf.html?articlenum=st0099 [perma.cc/AK4B-49EN].

117 The Hosmer-Lemeshow test was run using Stata 15's *estat gof, group(10)* function.

118 Classification was done through Stata 15's *estat classification* function.

TABLE A2-8. CLASSIFICATION FOR LOGISTIC MODEL FOR *PROPOSALEXCLUDED*

Classified	**D (True)**	**~D (True)**	**Total**
+	188	71	**259**
-	905	2305	**3210**
Total	**1093**	**2376**	**3469**
Classified + if predicted PR(D) >= 0.5 True D defined as ProposalExcluded != 0			
Sensitivity		Pr(+ | D)	**17.20%**
Specificity		Pr(– |~D)	**97.01%**
Positive Predictive Value		Pr(D | +)	**72.59%**
Negative Predictive Value		Pr(~D | –)	**71.81%**
False + rate for true ~D		Pr(+ | ~D)	**2.99%**
False – rate for true D		Pr(– | D)	**82.80%**
False + rate for classified +		Pr(~D| +)	**27.41%**
False – rate for classified -		Pr (D| –)	**28.19%**
Correctly classified			**71.87%**

2. Proposition 2 Model Selection & Fit

The same procedures were followed to develop the Proposition 2 Model as were used to develop the Proposition 1 model, which yielded the model shown in Section III.B.2

The Hosmer-Lemeshow test suggests that the model does not fit the data well ($p < .05$), reflecting the theoretical and practical difficulties surrounding the data. No firm conclusion can be drawn from the result of the H-L test; nevertheless, it is reported here for completeness.

TABLE A2-9. LOGISTIC MODEL FOR *NOACTIONSOUGHT*, GOODNESS-OF-FIT TEST

Number of observations =	3469
Number of groups =	10
Hosmer-Lemeshow chi2(8) =	17.05
Prob > chi2 =	0.0296

Finally, to further highlight the difficulties inherent in modelling Proposition 2, the following table shows its relatively poor ability to correctly classify the observations.

TABLE A2-10. CLASSIFICATION FOR LOGISTIC MODEL FOR *NOACTIONSOUGHT*

Classified	D (True)	~D (True)	Total
+	408	188	**596**
-	1013	1858	**2871**
Total	**1421**	**2046**	**3467**
Classified + if predicted PR(D) >= 0.5 True D defined as ProposalExcluded != 0			
Sensitivity		Pr(+ | D)	**28.71%**
Specificity		Pr(– |~D)	**90.81%**
Positive Predictive Value		Pr(D | +)	**68.46%**
Negative Predictive Value		Pr(~D | –)	**64.72%**
False + rate for true ~D		Pr(+ | ~D)	**9.19%**
False – rate for true D		Pr(– | D)	**71.29%**
False + rate for classified +		Pr(~D | +)	**31.54%**
False – rate for classified -		Pr (D | –)	**35.28%**
Correctly classified			**65.36%**