**No. 14-4764**

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

**TRINITY WALL STREET,**
*Plaintiff-Appellee*,

v.

**WAL-MART STORES, INC., A DELAWARE CORPORATION,**
*Defendant-Appellant*.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Case No. 14-405-LPS
The Honorable Leonard P. Stark, United States District Judge

# APPELLANT'S REPLY BRIEF

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## INTRODUCTION

Trinity's opposition merely confirms that the District Court's final judgment should be reversed. Trinity does not, and cannot, dispute that the court failed to acknowledge or apply the SEC's guidance from 1976 and 1983 that the underlying subject matter of a shareholder proposal, instead of the form of requested action, is dispositive in determining whether the proposal is excludable under SEC Rule 14a-8(i)(7). Trinity argues that the Proposal's subject matter should be viewed as "improved corporate governance," Appellee's Answering Brief ("Opp.") at 38, but this is precisely the type of form-over-substance interpretation that the SEC expressly rejected.

Trinity also cannot dispute the SEC's clear pronouncement in 1998 that a shareholder proposal must focus on, and not merely "include" or "implicate," a significant policy issue to avoid exclusion under Rule 14a-8(i)(7). Trinity tries to "rewrite the terms of the Proposal" by characterizing it as "aimed at Board oversight of Company policy respecting the sale of especially dangerous products," but the Proposal is not limited to "especially dangerous products" or "guns equipped with high capacity magazines." Opp. at 4, 19. Instead, the Proposal is drafted broadly to encompass any product that could be detrimental to the "business importance of reputation [or] brand identity." *Id.* at 8.

The "terms of the Proposal" thus make clear that it encompasses ordinary business matters. Indeed, a company's reputation and brand are ordinary business concerns. *See FedEx Corp.*, 2014 WL 2358714 (July 11, 2014); *Bank of America Corp.*, 2010 WL 4922465 (Feb. 24, 2010); *Dean Foods Co.*, 2007 WL 754960 (Mar. 9, 2007). Trinity cites no authority to the contrary. Moreover, there is no generalized "public safety" exception to Rule 14a-8(i)(7). *See Johnson & Johnson*, 2010 WL 5388021 (Feb. 22, 2011); *Wal-Mart Stores, Inc.*, 2008 WL 5622715 (Feb. 28, 2008); *Family Dollar Stores, Inc.*, 2007 WL 3317923 (Nov. 6, 2007). Because the Proposal extends to ordinary business matters beyond the "social and community effects of high capacity firearms" (A-21), the District Court erred in holding that exclusion under Rule 14a-8(i)(7) could be avoided.

The District Court's ruling simply cannot be reconciled with the SEC's guidance on Rule 14a-8(i)(7). Because the court's ruling threatens to undo nearly 40 years of SEC guidance and flood public companies with proposals regarding ordinary business matters, multiple *amicus* briefs from the business community have been submitted. *See Amicus* Brief of American Petroleum Institute, Business Roundtable, and U.S. Chamber of Commerce; *Amicus* Brief of Society of Corporate Secretaries and Governance Professionals; *Amicus* Brief of Retail Litigation Center; *Amicus* Brief of National Association of Manufacturers; *Amicus* Brief of Washington Legal Foundation.

The SEC's guidance on Rule 14a-8(i)(7) "must be given controlling weight." *Morrison v. Madison Dearborn*, 463 F.3d 312, 315 (3d Cir. 2006); *Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. E. Assoc. Coal Corp.*, 54 F.3d 141, 147 (3d Cir. 1995) ("We accord greater deference to an administrative agency's interpretation of its own regulations than to its interpretation of a statute."). Because the District Court's ruling contravenes the SEC's guidance on Rule 14a-8(i)(7), it should be reversed.

The District Court's ruling also should be reversed because the Proposal is excludable under SEC Rule 14a-8(i)(3). Trinity does not dispute that the Proposal fails to define key terms; instead, it argues that the Proposal's failure to do so is a "positive point." Opp. at 55. The problem with Trinity's approach is that "shareholders are entitled to know precisely the breadth of the proposal on which they are asked to vote." *N.Y.C. Emps.' Ret. Sys. v. Brunswick Corp.*, 789 F. Supp. 144, 146 (S.D.N.Y. 1992). Where, as here, the ultimate scope and meaning of a proposal is unclear, exclusion under Rule 14a-8(i)(3) is proper. *See*, *e.g.*, *Staples, Inc.,* 2012 WL 748854 (Mar. 5, 2012).

For the reasons set forth herein and in Wal-Mart's Opening Brief, the District Court's final judgment should be reversed.

## ARGUMENT

### I. The Record Contradicts Trinity's Version Of The Facts

Trinity claims the "genesis" of its Proposal is an "*apparent* lack" of Board oversight at Wal-Mart. Opp. at 15-16 (emphasis supplied). Trinity's speculation that there is "no Board committee at Wal-Mart" with oversight of policies regarding the sale of products that could be harmful to the Company's brand or reputation, however, is unfounded. *Id.* at 2. In the ordinary course of its business, Wal-Mart's Board and management evaluate the possible implications of the products it sells on its business and reputation. For example, the "authority and responsibilities" of Wal-Mart's Compensation, Nominating and Governance Committee ("CNGC") include "[r]eview[ing] the Company's reputation with external constituencies and recommend[ing] to the Board any proposed changes to the Company's policies, procedures, and programs as a result of such review." (A-47).[1] Moreover, Wal-Mart has numerous merchandising policies, including a "Safe and Compliant Product Policy," and "Product Safety and Compliance administers programs to identify, mitigate, and monitor risks associated with general merchandise." (A-251-252; A-258, A-260).

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[1] Trinity's *amicus* also incorrectly asserts that there is no Board oversight of "Sustainable Investing factors" or "economic, social, and governance factors." *Amicus* Brief of Robert F. Kennedy Center for Justice, at 5. The CNGC's responsibilities include "[r]eview[ing] and advis[ing] management regarding social, community and sustainability initiatives." (A-48). Furthermore, there is no generalized exception to Rule 14a-8(i)(7) for "Sustainable Investing" or "ESG." *See Franklin Res., Inc.*, 2014 WL 5336764, at *1, *6-7 (Dec. 1, 2014).

The speculation of Trinity's Rector, Reverend James H. Cooper, that "Wal-Mart does not *appear* to have any policies" relating to the sale of firearms, Opp. at 15 (emphasis supplied), is unfounded. *See Maldonado v. Ramirez*, 757 F.2d 48, 51 (3d Cir. 1985) (rejecting statements in affidavit that were not based on personal knowledge). "[I]n 2008, Walmart became a charter member in Mayor Bloomberg's coalition against illegal guns and . . . adopted the majority of the 10-point code established by the Responsible Firearms Retailer Partnership."[2] (A-255-256). In addition, Wal-Mart "utilize[s] the NICS (National Instant Criminal Service) system" to conduct customer background checks (*id.*), and has an "ATF Compliance team" that oversees a "Firearms Sales Authorization process to ensure all associates who sell firearms receive appropriate training."[3] The Board's Audit Committee oversees the Company's performance on "compliance objectives" and makes recommendations to the CNGC about possible "compliance-related reductions" to executive compensation.[4]

Trinity also erroneously asserts that "Wal-Mart could not explain why it . . . is willing to sell rifles equipped with . . . high capacity magazines." Opp. at 15.

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[2] Wal-Mart did not adopt two points in the 10-point code because its "own processes and systems go above and beyond" those two points. (A-256).

[3] http://cdn.corporate.walmart.com/db/e1/b551a9db42fd99ea24141f76065f/2014-global-responsibility-report.pdf, at 45.

[4] http://corporate.walmart.com/global-responsibility/global-compliance-program-report-on-fiscal-year-2014.

On August 9, 2013, Wal-Mart explained to Trinity precisely why rifles with high capacity magazines are sold at certain of its stores:

> There are many viewpoints on this topic and many in our country remain engaged in the conversations about the sale and regulation of certain firearms. In areas of the country where we sell firearms, we have a long standing commitment to do so safely and responsibly. Over the years, we've been very purposeful about finding the right balance between serving hunters and sportsmen and ensuring that we sell firearms responsibly. Walmart's merchandising decisions are based on customer demand and we recognize that most hunters and sportsmen use firearms responsibly and wish to continue to do so.
>
> Our stores do not sell any handguns in the continental U.S. We don't sell high capacity magazines as an accessory. We currently limit sales of modern sporting rifles to less than one-third of our stores, primarily where there are concentrations of hunters and sportsmen. . . .
>
> While there are some like you, Rev. Cooper who ask us to stop selling firearms, there are many customers who ask us to continue to sell these products in our stores.

(A-255).

That Trinity disagrees with Wal-Mart's decision to limit the sale of rifles to stores in locations where there are "concentrations of hunters and sportsmen" does not mean that (i) there is a "gap in the Company's governance," Opp. at 2; (ii) there has been a "systematic failure of the board to exercise oversight," *Amicus* Brief of Corporate and Securities Law Professors ("CSLP Br."), at 11; or (iii) Wal-Mart has not given "serious thought" to the issue. *Amicus* Brief of Barden, *et al.*, at 6. Instead, it shows that "[t]here are many viewpoints on this topic." (A-255).

## II. Trinity's Legal Arguments Are Meritless

Trinity's legal arguments are also meritless. Contrary to Trinity's claim that it has a "right" to have its Proposal in Wal-Mart's proxy materials, Opp. at 3, "Rule 14a-8 is a compromise that allows for the presentation of *some* shareholder proposals" in company proxy materials. *Jana Master Fund, Ltd. v. CNET Networks*, 954 A.2d 335, 341-42 (Del. Ch. 2008) (emphasis supplied). When a shareholder demands that its proposal be included in a company's proxy materials at the company's expense, "management may exclude a shareholder proposal for any of thirteen reasons enumerated in the Rule." *Id.*[5]

Because the Proposal is properly excludable under either Rule 14a-8(i)(7) or Rule 14a-8(i)(3), the District Court's final judgment should be reversed.

### A. Trinity Cannot Reconcile The District Court's Ruling With The SEC's Longstanding Guidance On Rule 14a-8(i)(7)

Trinity does not, and cannot, dispute that the SEC's guidance on Rule 14a-8(i)(7) "must be given controlling weight." *Morrison*, 463 F.3d at 315. Instead, Trinity tries in vain to rationalize the District Court's ruling. Because the court's ruling contravenes the SEC's guidance, it should be reversed.

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[5] When a shareholder "independently" finances its own proxy materials, "the federal securities laws do not require the shareholder to seek management's approval" under Rule 14a-8. *Jana*, 954 A.2d at 341-42. Thus, in assessing whether Trinity's Proposal is excludable under Rule 14a-8(i)(7) or Rule 14a-8(i)(3), it is irrelevant that Trinity "could have presented its Proposal" by "mailing its own proxy materials" at its own expense. Opp. at 3.

### 1. The District Court Did Not Acknowledge Or Apply The SEC's Guidance That The Underlying Subject Matter Of A Proposal Is Dispositive In Determining Whether It Relates To An Area Of Company's Ordinary Business Operations

The District Court's ruling cannot be reconciled with the SEC's guidance from 1976 and 1983 for the simple reason that the court did not even acknowledge, much less apply, the SEC's guidance from 1976 or 1983.

Nearly 40 years ago, the SEC expressly rejected a standard under which proposals involving "matters that would be handled by management personnel without referral to the board of directors generally would be excludable," but proposals involving "matters that would require action by the board would not be." SEC Release No. 34-12598, 1976 WL 160410, at *8 (July 7, 1976); SEC Release No. 34-12999, 1976 WL 160347, at *11 (Nov. 22, 1976) ("1976 Release"). The District Court thus erred when it concluded that Trinity's Proposal falls outside of Rule 14a-8(i)(7) because it does not "dictate to management specific products that Wal-Mart could or could not sell," but instead "seeks to have Wal-Mart's ***Board*** oversee the development and effectuation of a Wal-Mart policy." (A-19-20).

More than 30 years ago, the SEC made clear that the underlying "subject matter" of a shareholder proposal, not the form of the proposal, is dispositive in determining whether a proposal deals with a matter relating to a company's ordinary business operations. SEC Release No. 34-19135, 1982 WL 600869, at *17 n.49 (Oct. 14, 1982) ("1982 Release"); SEC Release No. 34-20091, 1983 WL

33272, at *7 (Aug. 16, 1983) ("1983 Release"). Here, the Proposal relates to an ordinary business matter because it seeks to have a board committee address policies that "could (and almost certainly would) shape what products are sold by Wal-Mart." (A-19). The District Court thus erred by ignoring the SEC's guidance from 1983 and concluding that the Proposal is "best viewed as dealing with matters that are not related to Wal-Mart's ordinary business operations." (*Id.*).

Trinity similarly ignores the SEC's guidance when it contends that the relevant question is "what the board or committee is called on to do." Opp. at 39 n.19. As the SEC explained in 1983, "this interpretation raises form over substance and renders the provisions of [Rule 14a-8(i)(7)'s predecessor] largely a nullity." 1983 WL 33272, at *7. The relevant question is whether the underlying "subject matter" of a committee's review "involves a matter of ordinary business." *Id.* "[W]here it does, the proposal will be excludable." *Id.* Trinity belittles this as a "reductionist view," Opp. at 38, but it is the express view of the SEC, which must be given "controlling weight." *Morrison*, 463 F.3d at 315.[6]

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[6] Empirical data refutes Trinity's policy argument that the ordinary business exclusion would "swallow" Rule 14a-8 if the underlying subject matter of requested board action controlled. Opp. at 38. Since 1983, the SEC staff has denied approximately 620 requests for its concurrence that a proposal requesting board action was excludable under Rule 14a-8(i)(7). *See Amicus* Brief of Society of Corporate Secretaries and Governance Professionals, at 21 n.4. There is thus no policy basis for upending the SEC's guidance that the underlying subject matter of a proposal's requested action is dispositive.

The SEC staff underscored the SEC's view when it explained in 2009 that although "the board's role in the oversight of a company's management of risk is a significant policy matter," the "fact that a proposal would require an evaluation of risk will not be dispositive of whether the proposal may be excluded under Rule 14a-8(i)(7)." SEC Staff Legal Bulletin No. 14E, 2009 WL 4363205, at *2 (Oct. 27, 2009) ("SLB 14E"). Rather, it is the "underlying subject matter of the risk evaluation" that controls. *Id.*

Because "the evaluation of risk should not be viewed as an end in itself," *id.*, Trinity's assertion that "the Proposal's subject matter is improved corporate governance" is misguided. Opp. at 38. If the underlying subject matter of Trinity's Proposal were viewed as "improved corporate governance," Rule 14a-8(i)(7)'s ordinary business exclusion could always be evaded by simply styling a proposal as requesting board oversight.[7] As both the SEC and SEC staff have long made clear, however, there is no board action exception to Rule 14a-8(i)(7). *See* 1976 Release, 1976 WL 160347, at *11; 1983 Release, 1983 WL 33272, at *7; SLB 14E, 2009 WL 4363205, at *2.

[7] Trinity's *amicus* mistakenly asserts that "all shareholder proposals are addressed to a company's board of directors, rather than to its executives." CPSL Br. at 12. Rule 14a-8 proposals are routinely addressed to management. *See Wal-Mart Stores, Inc.*, 2015 WL 456530 (Jan. 30, 2015); *JPMorgan Chase*, 2015 WL 186752 (Jan. 12, 2015); *Target Corp.*, 2013 WL 1452863 (Mar. 26, 2013); *Apache Corp.*, 2008 WL 615894 (Mar. 5, 2008).

The SEC staff's no-action letter in *Sempra Energy*, 2012 SEC No-Act. LEXIS 31 (Jan. 12, 2012) is directly on point and refutes Trinity's assertion that the SEC staff's no-action letters "do not address any proposal identical or similar to Trinity's Proposal." Opp. at 6. There, as here, the shareholder argued that "the Proposal focuses on the Board of Directors' role in the oversight of the Company's management of risk concerning a significant policy issue" that "can have huge consequences for both the Company and shareholders" – *i.e.*, the "risks posed by corporate operations in countries posing an elevated risk of corrupt practices." 2012 SEC No-Act. LEXIS 31, at *2-3, 6. There, as here, the shareholder argued that "[t]he role of corporate directors in the oversight of a company's management of these risks is of critical importance to shareholders and therefore clearly a proper subject for shareholder consideration." *Id.* at *13. There, as here, the shareholder argued that its proposal was unlike others that had been deemed excludable because its proposal did not dictate any particular outcome: "Our Proposal, by contrast, does not request the Company to develop a code of ethics or any other policy dealing with labor relations." *Id.* at *23.

Notwithstanding the shareholder's arguments, the SEC staff concurred that the *Sempra* proposal was excludable because "although the proposal requests the board to conduct an independent oversight review of Sempra's management of particular risks, the underlying subject matter of these risks appears to involve

ordinary business matters." *Id.* at *1; *accord The Western Union Co.*, 2011 WL 916163, at *1 (Mar. 14, 2011) (concurring in exclusion even though "the proposal requests the establishment of a risk committee" because the "underlying subject matter" of the risks "involve[s] ordinary business matters").[8]

The same analysis applies here: Trinity's Proposal is excludable under Rule 14a-8(i)(7) because the "underlying subject matter of the risk evaluation" that it requests is the products that the Company sells, which has been repeatedly recognized as an area of a retailer's ordinary business operations. *See Wal-Mart Stores, Inc.*, 2010 WL 369420 (Mar. 30, 2010); *Wal-Mart Stores, Inc.*, 2010 WL 1371654 (Mar. 26, 2010)*; The Home Depot, Inc.*, 2008 WL 257307 (Jan. 25, 2008); *Family Dollar Stores, Inc.*, 2007 WL 3317923 (Nov. 6, 2007); *Walgreen Co.*, 2006 WL 5381376 (Oct. 13, 2006).

Because the Proposal requests board oversight of "risks posed by the sale of products that are especially dangerous to a community as well as a company," Opp. at 7, and because it is the "underlying subject matter of the risk evaluation"

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[8] Instead of applying the 1976 Release, the 1983 Release, SLB 14E, *Sempra* or *Western Union*, Trinity's *amicus* relies on "state corporation law." CSLP Br. at 9-11. But Wal-Mart has not invoked Rule 14a-8(i)(1), which provides for exclusion if a proposal is "not a proper subject for action by shareholders" under state law. 17 C.F.R. § 240.14a-8(i)(1). Moreover, as Trinity's counsel has acknowledged, Rule 14a-8(i)(7) is a "creature of federal law," and the "meaning of 'ordinary business'" for Rule 14a-8(i)(7) is not a "question of state law." (A-79: 14 – A-81: 19); *see also* 1982 Release, 1982 WL 600869, at *16 (state law does not define the scope of "ordinary business" for Rule 14a-8).

that controls, the SEC staff did not "mischaracterize[] the Proposal as 'concerning the sale of particular products and services.'" *Id.* at 49. Instead, the SEC staff's "expert decision" regarding Trinity's Proposal (A-8) is "persuasive" authority because it properly characterizes the Proposal as "relat[ing] to the products and services offered for sale by the company" (A-288), consistent with both the SEC's guidance on Rule 14a-8(i)(7) and the SEC staff's prior no-action letters. *See S&D Trading Academy, LLC v. AAFIS Inc.*, 336 F. App'x 443, 449 (5th Cir. 2009) (unpublished); *Donoghue v. Accenture Ltd.*, No. 03 Civ. 8329, 2004 WL 1823448, at *3 (S.D.N.Y. Aug. 16, 2004).

Contrary to Trinity's speculation that the SEC staff's review was "cursory," Opp. at 6, 32, the Director of the SEC's Division of Corporation Finance recently reiterated that no-action requests "receive very careful staff attention and multiple reviews by lawyers within the Division with substantial experience." Keith F. Higgins, Rule 14a-8: Conflicting Proposals, Conflicting Views (Feb. 10, 2015), http://www.sec.gov/news/speech/rule-14a-8-conflicting-proposals-conflicting-views-.html. He also confirmed that the SEC staff has had no second thoughts about its analysis of Trinity's Proposal by highlighting the District Court's error:

> I would like to share one observation about the most recent court decision on Rule 14a-8 [in] *Trinity Wall Street v. Wal-Mart Stores*. . . .
>
> One ground upon which the court reached [its] conclusion was its view that because the proposal merely sought board oversight of the development and implementation of a company policy, leaving the

> day-to-day aspects of implementation of this policy to the company's officers and employees, the proposal itself did not have the consequence of dictating what products Wal-Mart could sell. In the court's view, a board committee's formulation and implementation of a policy is not a "task[] . . . so fundamental to management's ability to run a company on a day-to-day basis that [it] could not, as a practical matter, be subject to direct shareholder oversight," which is the standard for the ordinary business exclusion. ***By contrast, the Commission has stated that, in analyzing whether a proposal requesting the formation of a special committee is excludable under the ordinary business exception, the key is to consider whether the underlying subject matter of the committee involves an ordinary business matter.***

*Id.* at 2 (emphasis supplied).[9]

Unable to dispute the express guidance of both the SEC and the SEC staff that the underlying subject matter of a proposal's requested action is dispositive, Trinity resorts to a "construction of 'ordinary business'" based on the dictionary definition of "ordinary." Opp. at 33-34. As the SEC explained in 1998, however, "ordinary business" is a "term-of-art in the proxy area" and "refers to matters that are not necessarily 'ordinary' in the common meaning of the word." SEC Release No. 34-40018, 1998 WL 254809, at *2 (May 21, 1998) ("1998 Release"). The "underlying policy" of Rule 14a-8(i)(7) is to "confine the resolution of ordinary business problems to management *and the board of directors*." *Id.* at *4 (emphasis supplied). Through Trinity's Proposal, shareholders would direct an existing board

[9] The argument by Trinity's *amicus* that "the Proposal does not seek to micro-manage Wal-Mart," CPSL Br. at 6-9, is irrelevant. Wal-Mart argued that the Proposal is excludable because its underlying subject matter is the products that the Company sells, not because it micro-manages the Company, and the SEC staff granted no-action relief on this basis. *See* Opening Br. at 21-22 & n.4.

committee to act on ordinary business matters. That is contrary to the distinction between the "spheres of authority for the board of directors on one hand, and the company's shareholders on the other" underlying the Rule 14a-8(i)(7) exclusion. SEC Release No. 34-39093, 1997 WL 578696, at *4 (Sept. 18, 1997).

### 2. The District Court Turned The SEC's Guidance On Its Head By Holding Trinity Could Avoid Exclusion Under Rule 14a-8(i)(7) Because The Proposal "Includes" Or "Implicates" A Purported Significant Policy Issue

Because the underlying subject matter of the board action requested by the Proposal is indisputably an area of Wal-Mart's ordinary business operations, Trinity argues as a fallback that the Proposal "addresses" a "transcendent policy issue." Opp. at 44. Trinity relies on *N.Y.C. Emps. Ret. Sys. v. Dole Food Co.*, 795 F. Supp. 95 (S.D.N.Y. 1992) and *Grimes v. Centerior Energy Corp.*, 909 F.2d 529 (D.C. Cir. 1990) to argue that a shareholder proposal may avoid exclusion merely because it "concerns" a significant policy issue. Opp. at 42. In 1998, however, the SEC made clear that a proposal may only avoid exclusion under Rule 14a-8(i)(7) if it "focus[es] on" a significant policy issue. 1998 Release, 1998 WL 254809, at *4; SEC Staff Legal Bulletin No. 14C, 2005 WL 3805843, at *4-5 (June 28, 2005).

Following the SEC's guidance in 1998, both courts and the SEC staff have recognized that a proposal that implicates, but does not focus on, a significant policy issue is excludable. *See Apache Corp. v. N.Y.C. Emps.' Ret. Sys.*, 621 F. Supp. 2d 444, 451-53 (S.D. Tex. 2008); *Mattel, Inc.*, 2012 WL 483197, at *1 (Feb.

10, 2012); *JPMorgan Chase & Co.*, 2010 WL 147293, at *1 (Mar. 12, 2010); *CVS Caremark Corp.*, 2008 WL 308201, at *1 (Jan. 31, 2008); *Capital One Fin. Corp.*, 2005 WL 293305, at *1 (Feb. 3, 2005). Trinity does not, and cannot, cite any post-1998 authority to the contrary. *See also Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 502 (3d Cir. 2008) (explaining that Supreme Court "left no doubt that if a court of appeals interprets an ambiguous statute one way, and the agency charged with administering that statute subsequently interprets it another way, even that same court of appeals may not then ignore the agency's more recent interpretation" and holding that principle "applies equally" to interpretation of SEC rule) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)).

Trinity thus errs as a matter of law when it asserts that a shareholder proposal is not excludable merely because it "addresses" or "concerns" a significant policy issue. Opp. at 42. The District Court made the same mistake when it held that the Proposal was not excludable because it "includes" or "implicates" the "social and community effects of sales of high capacity firearms at the world's largest retailer and the impact this could have on Wal-Mart's reputation." (A-21). Indeed, "[t]o read the [SEC's] guidance as directing proper exclusion of shareholder proposals only when those proposals do not implicate a significant social policy would make much of the [SEC's] statement [in the 1998 Release] superfluous." *Apache*, 621 F. Supp. 2d at 451 & n.7.

The decision in *Apache* is instructive. There, the proposal requested that the company "implement equal employment opportunity policies" based on ten principles "prohibiting discrimination based on sexual orientation and gender identity." 621 F. Supp. 2d at 447. Although six of the ten principles were "directed at discrimination in employment," four of the principles were "aim[ed] at discrimination in [the company's] business conduct as it relates to advertising, marketing, sales, and charitable contributions." *Id.* at 452. In a no-action letter, the SEC staff concurred that the proposal could be excluded under Rule 14a-8(i)(7) because "some of the principles relate to Apache's ordinary business operations." *Apache*, 2008 WL 615894, at *1.

When the *Apache* matter went to litigation, the shareholder argued that the "dispositive inquiry" should be "whether a proposal implicates significant social policy" because "all proposals could be viewed as effecting at least some aspect of ordinary business operations." 621 F. Supp. 2d at 451 & n.7. The court rejected the shareholder's argument because it would render the SEC's guidance in the 1998 Release "superfluous" and improperly "promote submission of proposals dealing with ordinary business matters yet cabined in social policy concern." *Id.* Because "advertising and marketing, sales of goods and services, and charitable contributions are ordinary business matters," and "because the Proposal must be

read with all of its parts," the court concluded, like the SEC staff, that "the Proposal is properly excludable under Rule 14a-8(i)(7)." *Id.* at 452.[10]

Trinity admits that its Proposal is "not directed solely to Wal-Mart's sale of guns." (District Ct. Dkt. 38 at 17). Instead, the Proposal is drafted broadly to encompass any product that "especially endangers public safety and well-being," "would reasonably be considered by many offensive to the family and community values integral to the Company's promotion of its brand," or "has the substantial potential to impair the reputation of the Company." (A-268).

There is no generalized "public safety" exception to the Rule 14a-8(i)(7) exclusion. *See Johnson & Johnson*, 2010 WL 5388021, at *1 (concurring in exclusion of proposal requesting that company develop warning labels for certain drug tablets and injection solutions); *Wal-Mart*, 2008 WL 5622715, at *1 (concurring in exclusion of proposal regarding "the company's policies on product safety"); *Family Dollar*, 2007 WL 3317923, at *1 (concurring in exclusion of proposal regarding "the company's policies and procedures for minimizing customers' exposure to toxic substances and hazardous components in its marketed products"); *AMR Corp.*, 1987 WL 107896, at *1 (Apr. 2, 1987) (concurring in

[10] *Grimes* underscores this point. There, the D.C. Circuit held that the shareholder proposal at issue was excludable under Rule 14a-8(i)(7) because it was "*not limited in reach* to those capital expenditure decisions involving substantial policy considerations . . . but *potentially extends* to capital expenditures of any kind." 909 F.2d at 532 (emphasis supplied).

exclusion of proposal requesting board review of "the safety of the Company's airline operations").

Nor is there any basis for Trinity's contention that "in the context of the sale of products especially dangerous to the corporate reputation or brand value, the Board's effective oversight and concern is itself a matter of public concern" that trumps Rule 14a-8(i)(7)'s exclusion. Opp. at 45. Indeed, the SEC staff has made clear that board oversight of matters concerning a company's reputation or brand properly falls within Rule 14a-8(i)(7)'s exclusion as relating to ordinary business matters. *See FedEx*, 2014 WL 2358714, at *1 (concurring in exclusion of proposal requesting report on board's oversight of management in responding to "reputational damage" from company's association with allegedly racist NFL team name); *Equity Lifestyle Props., Inc.*, 2012 WL 6723114, at *1 (Feb. 6, 2013) (concurring in exclusion of proposal requesting board report on the "reputational risks" from company policies); *Bank of America*, 2010 WL 4922465, at *1 (concurring in exclusion of proposal requesting board report on efficacy of a company policy "in protecting Bank of America's reputation" because it "relat[ed] to Bank of America's ordinary business operations"); *Dean Foods*, 2007 WL 754960, at *1 (concurring in exclusion of proposal requesting board committee's review of policies for organic dairy products to "protect the company's brands and

reputation" because it "relat[ed] to Dean Foods' ordinary business operations (*i.e.*, customer relations and decisions relating to supplier relationships)").

Far from focusing on the "social and community effects of sales of high capacity firearms" (A-21), Trinity's Proposal extends to ordinary business concerns about the impact that sales of other products may have on the public generally or on Wal-Mart's reputation and brand.[11] Where a proposal "includes" or "implicates" a purported significant policy issue, but also extends to ordinary business matters, a shareholder cannot avoid exclusion under Rule 14a-8(i)(7). *See Apache*, 621 F. Supp. 2d at 451-52 & n.7; *JPMorgan*, 2010 WL 147293, at *1 (concurring in exclusion because "part of the proposal addresses matters beyond the environmental impact of JPMorgan Chase's project finance decisions, such as JPMorgan Chase's decision to extend credit or provide other financial services to particular types of customers"); *Wal-Mart Stores, Inc.*, 1999 WL 152447, at *1 (Mar. 15, 1999) (concurring in exclusion of proposal addressing a significant policy issue because "although the proposal appears to address matters outside the

[11] By contrast, the proposals in the no-action letters cited by Trinity all focused on a significant policy issue and did not extend to ordinary business concerns. *Wal-Mart Stores, Inc.*, 2010 WL 369421 (Mar. 31, 2010) (animal cruelty); *Denny's Corp.*, 2009 WL 772857 (Mar. 17, 2009) (battery-caged hens); *Nordstrom, Inc.*, 2000 WL 430825 (Mar. 31, 2000) (labor sweatshops); *Sears, Roebuck & Co.*, 1999 WL 80276 (Feb. 16, 1999) (same).

scope of ordinary business, paragraph 3 of the description of matters to be included in the report . . . relates to ordinary business operations").[12]

Because the Proposal extends to ordinary business matters beyond the "social and community effects of sales of high capacity firearms" (A-21), Trinity tries to "cabin" the ordinary business matters in a policy concern, *Apache*, 621 F. Supp. 2d at 451-52 & n.7, by arguing that "the Proposal addresses the transcendent policy issue of under what policies and standards and with what Board oversight Wal-Mart handles [its] merchandising . . . decisions" for products that are "especially dangerous to reputation, brand value, or the community." Opp. at 44.

Trinity cites no authority in which such a broad and nebulous concept of "significant policy issue" has been recognized. Instead, Trinity contends that there

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[12] Contrary to the District Court's suggestion that "***anything*** a company like Wal-Mart does at least somewhat 'deals with' a matter 'relating to' the company's business operations" (A-22), the SEC staff has repeatedly denied no-action relief under Rule 14a-8(i)(7) where it determined a proposal focused on a significant policy issue. *See Wal-Mart Stores, Inc.*, 2011 WL 304198 (Mar. 29, 2011); *Wal-Mart Stores, Inc.*, 2011 WL 304197 (Mar. 28, 2011); *Wal-Mart Stores, Inc.*, 2010 WL 369421 (Mar. 31, 2010).

By effectively creating a board action exception to Rule 14a-8(i)(7) and dramatically expanding the significant policy issue exception, the District Court's ruling threatens to gut the Rule 14a-8(i)(7) exclusion and upset the SEC's careful balancing of interests. The additional costs and burdens to public companies from shareholder proposals relating to ordinary business matters would be significant. *See Amicus* Brief of American Petroleum Institute, Business Roundtable, and U.S. Chamber of Commerce, at 17-21; *Amicus* Brief of Society of Corporate Secretaries and Governance Professionals, at 23-26.

is a "corporate policy" exception to Rule 14a-8(i)(7). *Id.* at 42-43. However, as Wal-Mart pointed out in the District Court proceedings (*see* District Ct. Dkt. 57 at 7), the phrase "significant corporate policy matter" nowhere appears in SLB 14E. Trinity has (again) erroneously attributed it as a direct quote from SLB 14E. *See* Opp. at 43 (same mistake as in District Court Dkt. 55 at 8). Moreover, SLB 14E makes clear that, although "the board's role in the oversight of a company's management of risk is a significant policy matter," the "fact that a proposal would require an evaluation of risk will not be dispositive of whether the proposal may be excluded under Rule 14a-8(i)(7)." 2009 WL 4363205, at *2. Rather, it is the "underlying subject matter of the risk evaluation" that controls. *Id.* As discussed in Section II.A. above, the "underlying subject matter of the risk evaluation" sought by the Proposal is the products that the Company sells, which is an area of Wal-Mart's ordinary business operations.

Instead of focusing on the "social and community effects of sales of high capacity firearms" (A-21), the Proposal encompasses ordinary business matters. For this reason alone, it is excludable under Rule 14a-8(i)(7).

### 3. The District Court Did Not Evaluate Whether The Purported Significant Policy Issue That The Proposal "Implicates" Has A Sufficient Nexus To The Company

Even if the broad scope of Trinity's Proposal were somehow construed as "focusing" on the "social and community effects of sales of high capacity

firearms" (A-21), it would still be excludable because Wal-Mart, as a retailer, does not have a "sufficient nexus" to the firearms that the Proposal references. SLB 14E, 2009 WL 4363205, at *2. Trinity does not dispute the nexus requirement; instead, it argues that "[t]he Proposal has a direct nexus to Wal-Mart's long-term shareholder value." Opp. at 47. But neither the SEC, the SEC staff, nor any court has ever recognized a "sufficient nexus" based on a retailer's sale of a product, and Trinity's "direct nexus" argument makes even less sense here considering that Wal-Mart sells hundreds of thousands of different products (A-250), and limits the sales of rifles with high capacity magazines to stores in locations where there are "concentrations of hunters and sportsmen." (A-255).

While a "sufficient nexus" has been found or suggested with proposals that relate to the *manufacture* of products, the SEC staff has repeatedly determined that proposals relating to *retail sales* of the same products are excludable.[13] *Compare* 1998 Release, 1998 WL 254809, at *3 & n.35 (noting denial of no-action relief for a proposal concerning the "manufacture of tobacco products") (citing *Philip Morris Cos. Inc.*, 1990 WL 286063, at *1 (Feb. 22, 1990)), *with Walgreen Co.*, 1997 WL 599903, at *1 (Sept. 29, 1997) (concurring in exclusion of proposal to

[13] Trinity's reliance on cases not involving retailers is thus misplaced. *See*, *e.g.*, *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 661 (D.C. Cir. 1970) (shareholder expressed concern about Dow Chemical's "manufacture of the chemical substance napalm"), *vacated as moot*, 404 U.S. 403 (1972); *Wyeth*, 2005 WL 326905 (Feb. 8, 2005) (drug manufacturer).

prohibit the retail sale of tobacco products); *compare Sturm, Ruger & Co.*, 2001 WL 258493, at *1 (Mar. 5, 2001) (declining to concur in exclusion of gun violence proposal directed to gun manufacturer), *with Wal-Mart Stores, Inc.*, 2001 WL 253625, at *1 (Mar. 9, 2001) (concurring in exclusion of proposal to end retail sale of "handguns and their accompanying ammunition"); *compare Denny's*, 2009 WL 772875, at *1 (declining to concur in exclusion of cage-free egg proposal directed to restaurant), *with Wal-Mart Stores, Inc.*, 2008 WL 809042, at *1 (Mar. 24, 2008) (concurring in exclusion proposal directed to retail sales of cage-free eggs).

Trinity asserts that, where no-action relief was granted in these matters, it was because the proposals were "naked 'stop selling' proposals, not because the relevant company was a retailer rather than a manufacturer." Opp. at 47 n.24. The no-action letters belie Trinity's assertion. For example, the *Philip Morris* proposal asked that the company's articles of incorporation be amended to prohibit the company from "conduct[ing] any business in tobacco or tobacco products." 1990 WL 286063, at *1. Under Trinity's view that no-action relief was granted for "naked 'stop selling' proposals," the SEC staff should have concurred in the exclusion of the proposal. The SEC staff denied no-action relief, however, because of the "significance of the social and public policy issues attendant to operations involving the *manufacture* of tobacco related products." *Id.* at *1 (emphasis supplied). By sharp contrast, in *Walgreen*, the SEC staff granted no-action relief

where the proposal asked that a *retailer* "stop the sale of tobacco in its stores." 1997 WL 599903, at *1, 4. Thus, this distinction has not been "created out of whole cloth," Opp. at 47, but is firmly rooted in SEC staff precedent. *See also Amicus* Brief of American Petroleum Institute, Business Roundtable, and U.S. Chamber of Commerce at 13-17.

* * *

Consistent with the SEC's longstanding guidance on Rule 14a-8(i)(7), Trinity's Proposal is excludable because the underlying subject matter of the requested board action is an area of Wal-Mart's ordinary business operations, and the Proposal does not focus on a significant policy issue, let alone one that has a sufficient nexus to a retailer like Wal-Mart. Accordingly, the District Court's final judgment should be reversed.

### B. Trinity's Proposal Is Vague And Indefinite And Thus Also Excludable Under SEC Rule 14a-8(i)(3)

The District Court's final judgment should also be reversed because the Proposal is excludable under Rule 14a-8(i)(3), which renders a proposal excludable if it is "vague" or "indefinite," 1982 Release, 1982 WL 600869, at *13; SEC Staff Legal Bulletin No. 14B, 2004 WL 3711971, at *4 (Sept. 15, 2004), or otherwise "lacks the clarity required of a proper shareholder proposal." *Brunswick*, 789 F. Supp. at 146.

Trinity does not dispute that the Proposal fails to define key terms; instead, it embraces the Proposal's failure to do so, arguing that it is a "positive point." Opp. at 55. But "shareholders are entitled to know precisely the breadth of the proposal on which they are asked to vote." *Brunswick*, 789 F. Supp. at 146.; *accord Staples*, 2012 WL 748854, at *1-3 (concurring in exclusion, notwithstanding shareholder argument that "issues of interpretation" were "best decided by the Board of Directors," because "neither shareholders nor the company would be able to determine with any reasonable certainty what actions or measures the proposal requires").

Rather than providing Wal-Mart's Board with "flexibility and discretion" in implementing the Proposal, Opp. at 54, the Proposal's failure to define key terms creates ambiguities regarding the ultimate scope and meaning of the Proposal. For example, Trinity does not dispute that no single set of "family and community values" would be readily identifiable as being "integral to the Company's promotion of its brand."[14] Worse yet, the Proposal fails to identify even one example of "values" that should be considered, or of a "family or community" whose values should be considered, in determining whether a product is

[14] Trinity misses the point when it argues that "Wal-Mart's Board should know what values are integral to its brand." Opp. at 55. Because of the broad variety of products offered by Wal-Mart and the numerous customers, employees, and communities with whom Wal-Mart works, there is no single set of "family and community values" that would be readily identifiable as being integral to the Company's brand.

"offensive." It would hardly be clear to either Wal-Mart's shareholders or its Board which of the hundreds of thousands of products that Wal-Mart sells (A-250) should be addressed by the Proposal. *Cf. McCauley v. Univ. of Virgin Islands*, 618 F.3d 232, 248 (3d Cir. 2010) ("Paragraph R's use of 'offensive' is, 'on its face, sufficiently broad and subjective that [it] could conceivably be applied to cover any speech . . . th[at] offends someone.'") (citation omitted).

By contrast, in the no-action requests that Trinity cites, the subject of each proposal was defined. *See NetApp, Inc.*, 2014 WL 1878421, at *13 (June 27, 2014) (subject was "policies and practice that relate to public policy," and proposal provided seven examples of "public policy" covered by the proposal); *iRobot Corp.*, 2013 WL 267335, at *7 (Mar. 26, 2013) (subject was proposed amendments to company's governing documents, and proposal identified four amendments); *The Western Union Co.*, 2013 WL 368364, at * 1-3 (Mar. 14, 2013) (subject was company's "electioneering contribution decisions," and proposal defined "expenditures for electioneering communications"); *Walt Disney Co.*, 2012 WL 5267955, at *1 (Dec. 13, 2012) (subject was a proposed "proxy access bylaw with the procedures and criteria set forth in the proposal"); *Intel Corp.*, 2012 WL 160565, at *10-11 (Feb. 23, 2012) (subject was proxy statement "proposal on political contributions," and proposal provided details to be disclosed, including "the total amount of such anticipated expenditures" and "congruency" with

"INTCPAC's policies on electioneering and political contributions"); *Yahoo! Inc.*, 2007 WL 1175903, at *8-9 (Apr. 16, 2007) (subject was "human rights," and proposal defined "human rights" with reference to "the US Bill of Rights and the Universal Declaration of Human Rights"); *Avaya Inc.*, 2006 WL 3007364, at *1-2 (Oct. 18, 2004) (subject was a "pay-for-superior-performance standard," and proposal set forth three principles to be incorporated into the standard).

Where a proposal's failure to define key terms leaves the ultimate scope and meaning of the proposal unclear, the SEC staff has repeatedly concurred in the proposal's exclusion under Rule 14a-8(i)(3). *See Staples*, 2012 WL 748854, at *1, 3; *The Boeing Co. (Recon.)*, 2011 WL 757455, at *1 (Mar. 2, 2011) (concurring in exclusion because "the proposal does not sufficiently explain the meaning of 'executive pay rights'"); *Puget Energy, Inc.*, 2002 WL 532241, at *1 (Mar. 7, 2002) (concurring in exclusion of proposal requesting "improved corporate governance" as vague and indefinite); *Fuqua Indus., Inc.*, 1991 WL 178684, at *1 (Mar. 12, 1991) (concurring in proposal's exclusion where "the meaning and application of terms and conditions . . . in the proposal would have to be made without guidance from the proposal and would be subject to differing interpretations"); *Amicus* Brief of Washington Legal Foundation, at 15-25.

Because the ultimate scope and meaning of Trinity's Proposal is unclear, Trinity's Proposal is also excludable under Rule 14a-8(i)(3).

## CONCLUSION

For all these reasons, the District Court's final judgment should be reversed.

Dated: February 13, 2015

Respectfully submitted,

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**CERTIFICATE OF BAR MEMBERSHIP**

I hereby certify that I am a member in good standing of the U.S. Court of Appeals for the Third Circuit.

Dated: February 13, 2015

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The foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it contains 6997 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(b)(iii).

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I, Theodore J. Boutrous Jr., hereby certify that, on February 13, 2015, Appellant's Reply Brief was electronically filed with the Clerk of the United States Court of Appeals for the Third Circuit using CM-ECF which will send notification to the registered participants including:

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I further certify that I caused the required number of copies of Appellant's Reply Brief to be filed with the Clerk's Office of the U.S. Court of Appeals for the Third Circuit, via Federal Express.

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