No. 14-04764

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WAL-MART STORES INC.,

Defendant-Appellant,

v.

TRINITY WALL STREET,

Plaintiff-Appellee.

Appeal from the United States District Court
for the District of Delaware
No. 1:14-cv-00405-LPS

BRIEF FOR THE AMERICAN PETROLEUM INSTITUTE, BUSINESS ROUNDTABLE & THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

Stacy Linden
Peter Tolsdorf
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, DC 20005
(202) 682-8074

Counsel for Amicus Curiae
The American Petroleum Institute

(*additional counsel listed in the inside cover*)

Robert A. Long
Keir D. Gumbs
David B. H. Martin
Reid Hooper
Ali Mojibi
COVINGTON & BURLING LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000

Counsel for Amici Curiae

January 21 , 2015

Maria Ghazal
BUSINESS ROUNDTABLE
300 New Jersey Avenue, NW
Suite 800
Washington, DC 20001
(202) 872-1260

Counsel for Amicus Curiae
Business Roundtable

Kate Comerford Todd
Steven P. Lehotsky
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae *The Chamber of Commerce of the United States of America*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

ADMINISTRATIVE DECISIONS

OTHER AUTHORITIES

INTERESTS OF *AMICI CURIAE*

The American Petroleum Institute ("API") is a national, non-profit, trade organization representing over 600 companies involved in all aspects of the oil and natural gas industry, including exploration, production, refining, marketing, distribution, and marine activities. Its members include many of the leading public companies in the oil, natural gas, and mining industries.[1]

Business Roundtable ("BRT") is an association of chief executive officers of leading U.S. companies that together have $7.2 trillion in annual revenues and nearly 16 million employees. The BRT's member companies comprise more than a quarter of the total value of the U.S. stock market, pay more than $230 billion in dividends to shareholders, and generate more than $470 billion in sales for small and medium-sized businesses annually.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and

---

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief.

professional organizations of every size, in every industry sector, and from every geographic region of the country.

An important function of the API, BRT, and the Chamber (collectively, "*amici curiae*") is to represent the interests of their members in matters before Congress, the Executive Branch, and the courts. To that end, the *amici curiae* regularly file briefs in cases raising issues of concern to the nation's business community.

This is one such case. The well-established "ordinary business exclusion" permits a public company to exclude from its proxy materials any shareholder proposal that seeks to interfere with the company's ordinary business matters. 17 C.F.R. § 240.14a-8(i)(7). Consistent with its longstanding recognition that a retailer's selection of which products to sell is an ordinary business matter, the staff of the Securities Exchange Commission ("SEC") agreed with Wal-Mart that the proposal of Trinity Wall Street ("Trinity") falls within the scope of this exclusion. The district court, however, ruled that Wal-Mart could not exclude Trinity's proposal from its proxy materials because Trinity's proposal is framed as a request that Wal-Mart's board *review* its selection of products to sell. This decision effectively nullifies the ordinary business exclusion, conflicts with the SEC's longstanding interpretations of that exclusion, and disregards three decades of consistent SEC staff guidance. In particular, the district court's analysis is

diametrically opposed to the SEC's 1983 interpretation of the ordinary business exclusion, which provides that a proposal seeking board or committee review of a matter may be excluded from a company's proxy materials under the ordinary business exclusion if the subject matter of the board or committee review concerns ordinary business matters. If not reversed, the district court's decision could precipitate an avalanche of shareholder proposals and related litigation. As representatives of many corporations subject to the shareholder-proposal process, the *amici curiae* speak on behalf of many of those likely to be most affected by the outcome of this appeal.

SUMMARY OF THE ARGUMENT

1. Trinity's shareholder proposal seeks to influence Wal-Mart's selection of products to sell. The district court acknowledged this when it noted that Trinity's Proposal "could (and almost certainly would) shape what products are sold by Wal-Mart." Op. at 17. That determination should have ended the court's inquiry, because a retailer's selection of products to sell is a quintessential "ordinary business" function falling squarely within the ordinary business exclusion.

2. Although the district court acknowledged that the subject matter of Trinity's proposal concerns the selection of a particular type of product to sell, it nevertheless determined that Trinity's proposal could not be excluded because it is

framed as a request for the board to review Wal-Mart's policies regarding its selection of products to sell. That analysis, however, eviscerates the ordinary business exclusion because a shareholder can simply draft a proposal concerning a company's ordinary business matters as a request for board review in order to avoid exclusion. That is why, more than three decades ago, the SEC formally announced that shareholder proposals seeking board or special committee review are excludable under the ordinary business exclusion so long as their underlying subject matter relates to an issuer's ordinary business functions.

3. The district court also erred in finding that Trinity's proposal "focuses on sufficiently significant social policy issues." Op. at 18. The significant social policy exception is a narrow exception to the ordinary business exclusion that applies only if a proposal raises a significant social policy issue *that has a sufficiently strong nexus to the company's business*. As decades of SEC no-action letters demonstrate, the SEC has generally recognized that a proposal relating to the sale of a particular product raises significant social policy considerations that transcend ordinary business only if those considerations have a strong nexus to the company's operations, which is not the case here. The district court did not address this nexus requirement and thus its determination that Trinity's proposal concerns significant policy issues does not support its ultimate conclusion that the

proposal may not be excluded under the ordinary business exclusion. Nothing justifies breaking new ground as the district court has done here.

4. The district court's decision effectively nullifies the ordinary business exclusion. Under the district court's decision, the ordinary business rule can easily be circumvented simply by drafting a proposal in the form of a request for a board or special committee review. If upheld, the district court's decision could result in the submission of hundreds of shareholder proposals that were previously excludable as relating to ordinary business matters. The resulting increase in the number and complexity of shareholder proposals will come at significant cost to public companies. Moreover, the district court's decision undermines the reliability of the SEC staff's no-action letters. The SEC staff's consistent application of the ordinary business exclusion is an invaluable source of guidance for shareholders and issuers alike. In brushing aside more than three decades of no-action precedent, the district court's decision threatens to dramatically increase the number and complexity of shareholder proposals and encourage litigation—and *all* shareholders will have to bear the cost.

ARGUMENT

I. Shareholder Proposals Seeking Review of a Retailer's Selection of Products to Sell Involve a Quintessential "Ordinary Business" Function

Initially adopted in 1954, Rule 14a-8(i)(7) (the "ordinary business exclusion") permits the exclusion of a shareholder proposal that "deals with a

matter relating to the company's ordinary business operations." 17 C.F.R. § 240.14a-8(i)(7). The ordinary business exclusion is intended "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." Securities Exchange Act Release No. 4950, 1953 SEC LEXIS 146, at *4 (Oct. 9, 1953).

The ordinary business exclusion and Rule 14a-8 more broadly are based on the SEC's recognition that, in certain circumstances, common practice under state corporate law allows shareholders to propose matters from the floor of a shareholder meeting. *See* Randall Thomas & Catherine Dixon, Aranow & Einhorn on Proxy Contests for Corporate Control (3d ed. 1998), § 16.01[A]. Traditionally, however, that practice has been subject to limitations. State law reserves for the board of directors the power to oversee the operations of a corporation. *See, e.g.*, Section 141 of the Delaware General Corporation Law ("DGCL") ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors."); *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 232 (Del. 2008) ("[I]t is well-established that stockholders of a corporation subject to the DGCL may not directly manage the business and affairs of the corporation . . . .").

Consistent with this state law principle, the SEC and federal courts historically have interpreted the ordinary business exclusion to permit the exclusion of shareholder proposals that seek to interfere in the management of the company's ordinary business operations. *Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.*, 821 F. Supp. 877, 882-83 (S.D.N.Y. 1993) ("A shareholder proposal pertaining to 'ordinary business operations' would be improper if raised at an annual meeting, because the law of most states (including Delaware) leaves the conduct of ordinary business operations to corporate directors and officers rather than the shareholders.").

The rationale for this approach is straightforward: Certain matters 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." Securities Exchange Act Release No. 40018, 1998 SEC LEXIS 1001, at *20 (May 21, 1998). As the D.C. Circuit has explained in considering the ordinary business exclusion, "management cannot exercise its specialized talents effectively if corporate investors assert the power to dictate the minutiae of daily business decisions." *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 679 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

This concern is particularly relevant to shareholder proposals that seek to interfere with myriad choices that companies, especially retailers, must make

concerning the sale of products, such as pricing, advertisement, packaging, design, and product content. Thus, in more than 150 no-action letters, the SEC staff has consistently protected retailers from shareholder proposals that seek to influence the retailer's selection of products and services to sell.[2] Indeed, nearly 15 years ago the SEC staff took this very position with respect to another proposal relating to sale of handguns and ammunition that had previously been submitted to Wal-Mart. *See* Wal-Mart Stores, Inc., 2001 SEC No-Act. LEXIS 330 (Mar. 9, 2001).

These no-action letters reflect the SEC staff's recognition that companies cannot run their businesses effectively if shareholders are permitted to dictate—directly or indirectly—the myriad choices companies must make each day regarding the sale of particular products. That is why Trinity's proposal, and

---

[2] *See, e.g.,* Dominion Resources, Inc., 2014 SEC No-Act. LEXIS 163 (Feb. 19, 2014) (sale of renewable energy products and services); DENTSPLY International Inc., 2013 SEC No-Act. LEXIS 321 (Mar. 21, 2013) (phasing out mercury from products); JPMorgan Chase & Co., 2013 SEC No-Act. LEXIS 202 (Mar. 7, 2013) (preventing financial flows to terrorist organizations and countries or entities operating against U.S. national security interests); General Electric Company, 2011 SEC No-Act. LEXIS 125 (Feb. 7, 2011) (use of human embryos and fetuses in research); CVS Caremark Corp., 2009 SEC No-Act. LEXIS 242 (Mar. 3, 2009) (sale of tobacco products); Marriott International, Inc., 2004 SEC No-Act. LEXIS 315 (Feb. 13, 2004) (sales of sexually explicit materials); and Tootsie Roll Industries, Inc., 2002 SEC No-Act. LEXIS 80 (Jan. 31, 2002) (use of imagery offensive to the American Indian community in product marketing, advertising, endorsements, sponsorships, and promotions).

proposals like it, have been deemed excludable under the ordinary business exclusion.

II. The District Court's Decision Violates the SEC's Long-Standing Interpretive Guidance and the SEC Staff's Consistently Held View Regarding the Shareholder Proposal Rule

At the core of the district court's decision is an improper distinction between proposals that directly seek to influence a company's selection of goods to sell and those that seek to achieve the same end indirectly by requiring action at the board level, such as the formation of special committees and preparation of reports. The district court acknowledged that Trinity's proposal "could (and almost certainly would) shape what products are sold by Wal-Mart," Op. at 17, and that Trinity, under the SEC's rule, could not "dictate to management specific products that Wal-Mart could or could not sell," Op. at 18. But, the district court nevertheless held that Trinity's proposal could not be excluded because the "direct impact of adoption of Trinity's Proposal would be felt at the Board level." *Id.* at 18. That approach is diametrically opposed to the SEC's interpretation of its own regulation and more than three decades of SEC staff no-action decisions.

Prior to 1983, the SEC staff refused no-action relief under the ordinary business exclusion if the shareholder proposal sought preparation of reports or review by board (or a special committee) of a particular aspect of the issuer's business. According to the SEC, this approach was criticized for being unduly

formalistic and failing to control the increasing number of proposals that companies were receiving from shareholders. Securities Exchange Act of 1934 Release No. 19135, 1982 SEC LEXIS 691, at *12 (Oct. 14, 1982).

In response to these criticisms, the SEC announced in October 1982 that it intended to reverse the interpretation that its staff had been following. The SEC acknowledged criticism regarding the increasing number of shareholder proposals, their complexity, and "the susceptibility of [the pre-1983 approach] to abuse by a few proponents and issuers." *Id*. The SEC provided the following example to highlight the hyper-technical nature of the staff's pre-1983 interpretation:

> For example, the staff, in a letter to Castle & Cooke, dated December 12, 1978, agreed with the company that a proposal requesting that it alter its food production methods in underdeveloped countries could be excluded under Rule 14a–8(c)(7) since the proposal specified the steps management should take to implement the action requested by the proposal. In 1980, however, the proponent instead asked the company to appoint a committee to review foreign agricultural operations with emphasis on the balance between labor and capital intensive production. The staff refused to apply the rule to this provision because the appointment of a special committee to study the company's foreign agricultural operations is a matter of policy.

Id. at *54 n.49. The SEC explained that this approach was "more restrictive than is necessary to achieve the purposes of the rule and . . . contributed to the abuse of its provisions." *Id.* at *12. Accordingly, after providing an opportunity for notice and comment the SEC reversed the staff's interpretive position in August 1983. The

SEC explained that the change was necessary because the pre-1983 approach "raises form over substance and renders the provisions of paragraph (c)(7) largely a nullity." Securities Exchange Act of 1934 Release No. 20091, 1983 SEC LEXIS 1011, at *19 (Aug. 16, 1983). Since 1983, therefore, a company may exclude from its proxy materials any shareholder proposal that seeks action by its board (such as preparing a report or forming a special committee) so long as "the subject matter of the special report or the committee involves a matter of ordinary business." *Id.*

The SEC staff has consistently followed the SEC's 1983 interpretive guidance. Thus, in deciding whether to grant no-action relief, the staff has looked to the substance of the shareholder proposal—not whether the proposal seeks board or board committee review. Specifically, the SEC staff has consistently held that proposals that seek board (or board committee) review of a company's selection of goods to sell fall within the ordinary business exclusion.[3]

---

[3] *See, e.g.,* Walgreen Co., 2006 SEC No-Act. LEXIS 638 (Oct. 13, 2006) (proposal requesting that the board publish a report characterizing the extent to which the company's private label cosmetics and personal care products lines contain carcinogens, mutagens, reproductive toxicants, and chemicals that affect the endocrine system, excludable as relating to "the sale of particular products"); Wal-Mart Stores, Inc., 2006 SEC No-Act. LEXIS 392 (Mar. 24, 2006) (proposal requesting that the board publish a report evaluating the company's policies and procedures for minimizing customers' exposure to toxic substances in products excludable as relating to the "sale of particular products"); Rite Aid Corp., 1997 SEC No-Act. LEXIS 409 (Mar. 5, 1997) (proposal requesting that the board adopt a policy to stop selling cigarettes unless management can demonstrate that its (continued…)

The district court's analysis stands in direct opposition to the SEC's 1983 interpretive position, which rejected a distinction between proposals that "specified the steps management should take to implement the action requested" from those that sought "the appointment of a special committee to study the company's . . . operations . . . ." Release No. 19135, 1982 SEC LEXIS 691 at *54 n.49. The district court's failure to defer to the SEC's 1983 well-reasoned interpretation is reversible error. *See Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008) ("Just as we defer to an agency's reasonable interpretations of the statute when it issues regulations in the first instance, *see Chevron*, . . . the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force."); *Facchiano Constr. Co. v. U.S. Dep't of Labor*, 987 F.2d 206, 213 (3d Cir. 1993).

The district court also declined to defer to the SEC staff's no-action letters, reasoning that they reflect only the agency's informal views. Op. at 21. Yet, as the district court acknowledged during the preliminary hearing stage, the SEC staff

---

stores are able to fully implement FDA regulations restricting youth access to tobacco excludable as relating to the sale of a particular product); Kmart Corp., 1993 SEC No-Act. LEXIS 307 (Feb. 23, 1993) (proposal requesting that the board stop the promotion, display and sale of literature and other media that is largely devoted to the description of sexual encounters or that has a graphic depiction of exploitative sex or gratuitous violence excludable as relating to the sale of a particular category of products).

no-action letters are entitled to persuasive weight. Op. at 21; *see also Allaire Corp. v. Okumus*, 433 F.3d 248, 254 (2d Cir. 2006) ("The SEC no-action letter does not bind us, but we find it persuasive."). Further and importantly, the district court dismissed not just one no-action letter, but *three decades* of SEC staff no-action letters. The district court should have been more deferential. *See Fed. Express Corp.*, 552 U.S. at 399–401 (2008) (deferring to an informal agency interpretation because it was consistent with the agency's responsibilities and had bound staff members for over five years); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due.").

III. The District Court Also Erred in Finding That Trinity's Proposal "Focuses on Sufficiently Significant Social Policy Issues"

The district court also erred in finding that Trinity's proposal could not be excluded because it "focuses on sufficiently significant social policy issues." Op. at 18. The SEC adopted a limited exception to the ordinary business rule in 1976 for proposals that raise significant policy issues that are intertwined with the nature of the company's business. *See* Securities Exchange Act of 1934 Release No. 12999, 1976 SEC LEXIS 326, at *31 (Nov. 22, 1976) (providing the example of "a proposal that a utility company not construct a proposed nuclear power plant"). Since then, the SEC staff has taken the position that a proposal relating to the sale of a particular product raises significant social policy considerations that transcend

ordinary business only if "a sufficient nexus exists between the nature of the proposal and the company." Staff Legal Bulletin 14E, 2009 SEC No-Act. LEXIS 825, at *5 (Oct. 27, 2009).

The SEC staff's application of the significant social policy exception to certain proposals regarding tobacco products highlights the importance of this principle. For over two decades, the SEC staff has found that certain tobacco-related proposals submitted to the tobacco manufacturers raised significant policy issues and thus refused to grant no-action relief.[4] In contrast, the SEC staff has consistently granted no-action relief under the ordinary business exclusion where a tobacco-related proposal was submitted to retailers that sell tobacco products

[4] *See, e.g.,* Philip Morris Companies Inc., 1990 SEC No-Act. LEXIS 713 (Mar. 14, 1990) (proposal seeking an amendment to the company's charter to prohibit the company from engaging in the tobacco business); R.J. Reynolds Tobacco Holdings, Inc., 2002 SEC No-Act. LEXIS 308 (Mar. 7, 2002) (proposal regarding packaging of tobacco); UST Inc., 2002 SEC No-Act. LEXIS 256 (Feb. 27, 2002) (same); H.B. Fuller Company, 1997 SEC No-Act. LEXIS 164 (January 28, 1997) (proposal requesting board report to shareholders regarding the Company's sales of adhesives to the tobacco industry); American Brands, Inc., 1991 SEC No-Act. LEXIS 402 (Feb. 28, 1991) (proposal requesting report on consumer perceptions of the company's cigarette advertisements and on what policies and practices the company might adopt to ensure adherence to the voluntary code of cigarette advertising); Loews Corporation, 1990 SEC No-Act. LEXIS 321 (Feb. 22, 1990) (proposal requesting that the company amend its articles to provide that the company would not conduct any business in tobacco or tobacco products); Kimberly-Clark Corp., 1990 SEC No-Act. LEXIS 330 (Feb. 22, 1990) (same).

among many other items[5] or to advertising companies that run tobacco-related ads among many other types of content.[6] These no-action decisions reflect that the

---

[5] *See, e.g.,* Rite Aid Corporation, 2009 SEC No-Act. LEXIS 286 (Mar. 26, 2009) (proposal requesting that the board issue a report to shareholders on how the company is responding to rising regulatory, competitive and public pressures to halt sales of tobacco products); CVS Caremark Corporation, 2009 SEC No-Act. LEXIS 242 (Mar. 3, 2009) (same); Time Warner, Inc., 2004 SEC No-Act. LEXIS 216 (Feb. 6, 2004) (proposal requesting the formation of a committee to review data linking tobacco use by teens with tobacco use in youth-rated movies); Wal-Mart Stores, Inc., 2002 SEC No-Act. LEXIS 494 (Apr. 1, 2002) (proposal requesting a report on Wal-Mart's rationale for not adopting in developing nations the same policies restricting the promotion and marketing of tobacco products as it adopts in the United States); Albertson's, Inc., 2001 SEC No-Act. LEXIS 440 (Mar. 23, 2001) (proposal requesting that Albertson's discontinue the sale of tobacco and tobacco-related products); Wal-Mart Stores, Inc., 2001 SEC No-Act. LEXIS 413 (Mar. 20, 2001) (same); Albertson's, Inc., 1999 SEC No-Act. LEXIS 336 (Mar. 18, 1999) (same); J.C. Penney Company, Inc., 1998 SEC No-Act. LEXIS 332 (Mar. 2, 1998) (proposal requesting that the board adopt a policy to stop selling cigarettes unless management can demonstrate that its stores are able to fully implement FDA regulations restricting youth access to tobacco); Rite Aid Corporation, 1997 SEC No-Act. LEXIS 409 (Mar. 5, 1997) (same); CVS Corporation, 1998 SEC No-Act. LEXIS 359 (Mar. 2, 1998) (same); Wal-Mart Stores, Inc., 1996 SEC No-Act. LEXIS 340 (Mar. 12, 1996) (same); Walgreen Co., 1997 SEC No-Act. LEXIS 907 (Sept. 29, 1997) (proposal requesting that the company discontinue the sale of tobacco and tobacco-related products); Wal-Mart Stores, Inc., 1997 SEC No-Act. LEXIS 397 (Mar. 3, 1997) (same); J. C. Penney Company, Inc., 1997 SEC No-Act. LEXIS 405 (Mar. 3, 1997) (same); Texaco Inc., 1997 SEC No-Act. LEXIS 306 (Feb. 12, 1997) (same).

[6] *See, e.g.,* Clear Channel Communications, Inc., 1999 SEC No-Act. LEXIS 300 (Mar. 10, 1999) (proposal requesting that the board implement a policy of only accepting tobacco ads that have been submitted to independent testing to ensure that they are not more appealing to children than to adults, excludable as relating to criteria for the sale of advertising space); The Walt Disney Company, 1997 SEC No-Act. LEXIS 1004 (Nov. 10, 1997) (proposal mandating that the board of directors review and report on the way tobacco use is portrayed in its films and programs for television, any potential influence on youth smoking, and whether tobacco companies are paying for product placement, excludable as relating to the nature, presentation and content of programming and film production); (continued…)

significant social policy exception for proposals regarding product sales is conditioned upon the existence of a strong nexus between the particular product and the company's business.

Here, although the district court recited the nexus requirement, it did not evaluate whether Trinity's proposal is sufficiently related to the nature of Wal-Mart's business. Op. at 19 n.9. Because of this failure, the district court's determination that Trinity's proposal raises significant policy considerations does not support the court's ultimate conclusion that the proposal cannot be excluded under the ordinary business exclusion.

In any event, the nexus requirement cannot be satisfied here. The only connection between Trinity's proposal and Wal-Mart's business is the fact that Wal-Mart sells firearms (among thousands of other products). If that were enough of a nexus, then retailers such as Wal-Mart could face thousands of shareholder proposals concerning their products, many of which might be portrayed as raising a

---

Westinghouse Electric Corporation, 1997 SEC No-Act. LEXIS 161 (Jan. 24, 1997) (proposal requesting that the board voluntarily adopt a policy reflecting FDA regulations and pertaining to tobacco advertising on billboards excludable as relating to criteria for the sale of advertising space); Time Warner, Inc., 1996 SEC No-Act. LEXIS 132 (Jan. 18, 1996) (proposal requesting that the board voluntarily implement key elements of the FDA proposal regarding advertising for cigarettes and smokeless tobacco, excludable as relating to the nature, presentation and content of advertising); Minnesota Mining and Manufacturing Company, 1996 SEC No-Act. LEXIS 62 (Jan. 16, 1996) (same).

variety of social policy issues. But that is not the law. As the long line of SEC no-action letters demonstrate, the SEC never intended that result. *See also* Wal-Mart Stores, Inc., 2001 SEC No-Act. LEXIS 330 (Mar. 9, 2001) (proposal requesting that the board adopt a policy which refuses to sell handguns and their accompanying ammunition in any way, excludable as relating to the sale of a particular product).

IV. If Upheld, the District Court's Decision Will Have a Substantial Adverse Effect on the Annual Shareholder Meeting Process

By allowing ordinary business proposals to be framed as matters for board action and expanding the significant social policy exception, the district court's decision vitiates the shareholder proposal rule and removes the SEC as the principal administrator of shareholder proposals in that area. Left in place, the district court ruling likely would result in companies having to include in their proxy materials hundreds of shareholder proposals that were previously excludable as relating to ordinary business matters. The resulting increase in the number and complexity of shareholder proposals will come at significant cost to public companies—and their shareholders and other stakeholders.

First, companies will have to evaluate proposals in light of the district court's decision and decide whether there is a basis for excluding such proposals, and if so, prepare no-action requests relating to such proposals. This evaluation process typically requires the company to incur internal costs, including

management time spent evaluating the proposals, as well as external costs, such as the retention of legal counsel to assist companies in evaluating the proposals and preparing no-action requests. Release No. 40018, 1998 SEC LEXIS 1001, at *60 (May 21, 1998) (reporting that, based on a survey of 80 companies, determining whether to include a proposal in a company's proxy materials cost approximately $37,000 on average).[7]

Whether a company decides to include or exclude a proposal, it will incur more costs. Excluding a proposal is very costly, as it involves seeking no-action relief from the SEC and, as is illustrated by the present litigation, may also involve defending against related lawsuits. But including a proposal is also costly. For each additional proposal that is included in a company's proxy statement, a company must prepare additional proxy disclosures regarding the proposal, including a statement regarding management's support or opposition to the proposal, and to the extent that the company opposes the proposal, a company may engage in additional solicitation efforts, including the preparation of additional soliciting materials and direct engagement with its largest shareholders.[8] *See*

---

[7] Adjusting for inflation, the average cost is likely much higher today.

[8] It bears noting that public companies are not free to ignore shareholder proposals that receive a majority of votes at a shareholder meeting, regardless of how the shareholder phrases the proposal and whether the board believes that the proposal (continued…)

generally Defining Engagement: An Update on the Evolving Relationship Between Shareholders, Directors and Executives, Institutional Shareholder Services (Apr. 10, 2014), http://irrcinstitute.org/pdf/engagement -between-corporations-and-investors-at-all-time-high.pdf; *see also* Release No. 40018, 1998 SEC LEXIS 1001, at *62 (May 21, 1998) (reporting that, based on a survey of 67 companies, printing a shareholder proposal for inclusion in a company's proxy materials costs companies an additional $50,000 on average).

The adverse implications of the district court's decision reach far beyond the fiscal cost of processing shareholder proposals. Public companies and their

---

is in the company's best interest. Most large holders of the securities of public companies use the services of "proxy advisory firms," which advise institutional investors regarding their voting decisions. *See generally* Securities Exchange Act Release No. 62495, 75 Fed. Reg. 42982 (July 14, 2010). The largest proxy advisory firm in the United States, Institutional Shareholder Services ("ISS"), will recommend a vote against a board nominee in an election of directors if the company has failed to implement a shareholder proposal that received a majority of votes cast at a prior shareholder meeting. *See generally* Institutional Shareholder Services Inc., 2014 U.S. Proxy Voting Summary Guidelines (Nov. 6, 2014) at 13, http://www.issgovernance.com/file/files/2014ISSUSSummary-Guidelines.pdf. ISS voting recommendations can influence as much of 30% of the shares voted. *See* A Corporate Secretary's Survival Guide to Proxy Advisory Firms (Fall 2014). Thus, the fact that Trinity's proposal is framed as a request for the board to review certain policies does not reduce its potency as a lever for forcing the board to take action. *See generally* Public Company Initiatives in Response to the SEC Staff's Guidance on Proxy Advisory Firms (January 2015), http://www.centerforcapitalmarkets.com/wpcontent/uploads/2013/08/021874Proxy Advisory_final-1.pdf.

shareholders depend on the smooth and efficient scheduling and conduct of annual shareholder meetings. The shareholder meeting process will not operate properly, however, if companies and shareholders are inundated with myriad proposals concerning a variety of ordinary business matters. The district court's decision thus threatens to seriously disrupt the annual shareholder meeting process. Moreover, the increase in the number and complexity of shareholder proposals that could result from the district court's decision threatens to disrupt the efficient operation of public companies. The review and processing of shareholder proposals by public companies require meaningful attention and coordination by senior management and board of directors and thus necessarily detract from the time that senior management can spend managing a company's business. Thus, for every new shareholder proposal that is submitted as a result of the district court's decision, companies will have less time to focus on their core business.

In addition, the district court's decision creates uncertainty for all businesses regarding the application of the ordinary business exclusion. For more than two decades the SEC staff has been consistent in granting no-action relief under the ordinary business exclusion where a proposal concerns a company's selection of products to sell, particularly where the company at issue is a retailer. And for more than three decades, SEC Staff has been consistent in looking at the substance underlying a proposal and not solely at whether the proposal requests a board or

committee review. In unsettling these well-established principles, the district court's decision creates ambiguity, forcing public companies to either invite litigation by excluding such proposals from their proxy materials or to further encumber their already-crowded proxy statements and annual meeting agendas by including an increasing number of proposals in such materials. In either case, *all* shareholders will bear the cost.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Defendant-Appellant's brief, the district court's decision should be reversed.

Respectfully submitted,

Dated: January 21, 2015

/s/ Robert A. Long
Robert A. Long
Keir D. Gumbs
David B. H. Martin
Reid Hooper
Ali Mojibi
COVINGTON & BURLING LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000

Counsel for Amici Curiae

Stacy Linden
Peter Tolsdorf
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, DC 20005
(202) 682-8074

Counsel for Amicus Curiae
The American Petroleum Institute

Maria Ghazal
BUSINESS ROUNDTABLE
300 New Jersey Avenue, NW
Suite 800
Washington, DC 20001
(202) 872-1260

Counsel for Amicus Curiae
Business Roundtable

Kate Comerford Todd
Steven P. Lehotsky
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae *The Chamber of Commerce of the United States of America*

CERTIFICATE OF COMPLIANCE

I CERTIFY, pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7), that the foregoing Brief contains 5,332 words, excluding the parts of the Brief exempted under Federal Rule of Appellate Procedure 32. In accordance with Federal Rule of Appellate Procedure 32(a)(5)-(6), this Brief has been prepared in 14-point Times New Roman font.

Dated: January 21, 2015

/s/ Robert A. Long
Robert A. Long
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also certify that I caused ten (10) copies of the foregoing brief to be sent via overnight mail to the Clerk of the Court for the United States Court of Appeals for the Third Circuit.

Dated: January 21, 2015

/s/ Robert A. Long
Robert A. Long
Counsel for Amicus Curiae