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## SEC Reverses Cracker Barrel No-Action Letter

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# RECENT DEVELOPMENT

## SEC REVERSES CRACKER BARREL NO-ACTION LETTER

### I. INTRODUCTION

Section 14(a) of the Securities Exchange Act of 1934 (the “1934 Act”) delegates the power to regulate the shareholder proxy solicitation process to the Securities and Exchange Commission (the “SEC” or the “Commission”).<sup>1</sup> Pursuant to this broad delegation of authority, the SEC has adopted the 14a series of regulations.<sup>2</sup> Rule 14a-8 regulates the process by which shareholders may submit proposals to management for inclusion in proxy solicitation materials (“proxy materials”) distributed by management.<sup>3</sup> Even if a shareholder complies with the procedural requirements of Rule 14a-8, the corporation may still exclude the proposal if its content falls into one of the nine categories of content-related exceptions provided by the rule.<sup>4</sup> One of these exceptions allows management to exclude the proposal if it relates to the “ordinary business operations” of the corporation (the “ordinary business exception”).<sup>5</sup> Because of its broad wording and potential to thwart many

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1. See Securities Exchange Act of 1934 § 14(a), 15 U.S.C. § 78n(a) (1994), which states:

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, *in contravention of such rules and regulations as the Commission may prescribe* as necessary or appropriate in the public interest or for the protection of investors, to solicit . . . any proxy . . . in respect of any security . . . registered pursuant to section 12 of this title.

*Id.* (emphasis added). The reference to section 12 of the 1934 Act, limits the application of section 14(a) to regulation of proxy solicitations relating to securities registered on a national securities exchange. See Securities Exchange Act of 1934 § 12, 15 U.S.C. § 78l (1994).

2. See generally 17 C.F.R. §§ 240.14a-1 to 14a-15 (1998).

3. Section 240.14a-8. The SEC amended the text of Rule 14a-8 in the same release in which it reversed the Cracker Barrel No-Action Letter. The SEC recast the rule into a “Question & Answer Format,” to make it “easier to understand.” See Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, 63 Fed. Reg. 29,107, 29,119 (1998) (to be codified at 17 C.F.R. § 240.14a-8) (“1998 Release”). The Shareholder Proposal Release indicates that these changes were in form only; no substantive changes to Rule 14a-8 were intended. *Id.* at 19,107. This Recent Development will refer to the text of the new language of Rule 14a-8, unless otherwise specified, and all citations will be to the new rule.

4. 1998 Release, 63 Fed. Reg. at 29,120 (to be codified at 17 C.F.R. § 240.14a-8(i)(1)-(9)).

5. See 1998 Release at 29,120 (to be codified at 17 C.F.R. § 240.14a-8(i)(7)), which states “[I]f I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal? . . . (7) . . . If the proposal deals with a matter relating to the company’s ordinary business operations.”

shareholder proposals, the ordinary business exception remains one of the most controversial rules ever promulgated by the SEC.

In 1992, the SEC issued a No-Action Letter to Cracker Barrel Old Country Stores (“Cracker Barrel”)<sup>6</sup> in which it announced that a company could exclude shareholder proposals dealing with its employment policies under the ordinary business exclusion.<sup>7</sup> The Cracker Barrel No-Action Letter created years of controversy and uncertainty in the area of employment-related shareholder proposals. In July of 1998, the Commission reversed the Cracker Barrel decision and returned to a case by case analysis of employment-related shareholder proposals.<sup>8</sup>

This Recent Development examines the effect of the Cracker Barrel reversal on shareholders’ ability to submit proposals. Part II examines the history of the Commission’s view on the excludability of employment-related shareholder proposals. Part III examines two theories of the SEC’s role in regulating the proxy process. Part IV examines the SEC’s decision to reverse its Cracker Barrel policy and return to a case by case analysis of employment related proposals. Part IV analyzes this reversal under the theory that Congress empowered the SEC to promulgate rules that protect, and possibly even expand, shareholder access to corporate proxies—a right first granted by state corporate law.

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6. Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, [1992-1993 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 76,418 (Oct. 13, 1992) [hereinafter Cracker Barrel No-Action Letter]. Rule 14a-8 requires that a company intending to exclude a shareholder proposal under one of the 13 exclusions, must, among other things, submit to the Commission a copy of the proposal and a statement explaining the company’s belief that the proposal is excludable, including references to the most recent legal authorities. 1998 Release at 29,120 (to be codified as Rule 14a-8(j)). Thus, every decision by a company to exclude a shareholder proposal is reviewed by the SEC. The SEC will then inform the company of whether or not the Commission agrees with its reasoning and whether it will take enforcement action if the company excludes the proposal. Such a response is called a “No-Action Letter.” No-Action Letters constitute a significant source of law interpreting SEC regulations and the securities acts themselves. Although generally considered persuasive, No-Action Letters do not bind the courts. *See Amalgamated Clothing & Textile Workers Union v. SEC*, 15 F.3d 254, 257 (2d Cir. 1994); *New York City Employees’ Retirement System v. SEC*, 843 F. Supp. 858, 868 (S.D.N.Y. 1994), *rev’d*, 45 F.3d 7 (2d Cir. 1995). The Second Circuit has held that courts cannot directly review No-Action Letters; shareholders or corporations must institute private actions against their opponents before seeking to have the position articulated in a No-Action Letter reversed by a court. *See Amalgamated Clothing*, 15 F.3d at 257.

7. Cracker Barrel No-Action Letter, *supra* note 6, at 77, 287.

8. *See* 1998 Release at 29,107-29,108.

## II. HISTORY OF SEC POSITIONS ON MANAGEMENT'S POWER TO EXCLUDE SHAREHOLDER PROPOSALS RELATED TO EMPLOYMENT ISSUES

### A. *Pre-Cracker Barrel Rulings*

In section 14(a) of the 1934 Act, Congress delegated to the SEC the authority to regulate the solicitation of corporate proxies.<sup>9</sup> This delegation of regulatory power is both broad and undefined. Section 14(a) does not explicitly state Congress's purpose. However, most commentators agree that Congress was responding to a perceived abuse of power by management during the 1920s and 1930s that prevented shareholder access to proxy materials.<sup>10</sup> Thus, section 14(a) generally represents an attempt to strengthen corporate democracy.<sup>11</sup> However, almost sixty-five years later, debate continues to surround both the means Congress empowered the SEC to use to achieve this goal and the ultimate form of the relationship between shareholders and management.<sup>12</sup>

The SEC did not adopt a rule governing shareholder proposals until 1942.<sup>13</sup> The ordinary business exception was not created until 1954.<sup>14</sup> The original language of the ordinary business exception allowed management to exclude a properly submitted shareholder proposal if the proposal was "a recommendation or request with respect to the conduct of the ordinary business operations of the issuer."<sup>15</sup> This exception was added to incorporate into the federal proxy rules the state law presumption that shareholder-elected managers should maintain

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9. See *supra* note 1 and accompanying text.

10. See Kevin W. Waite, Note, *The Ordinary Business Operations Exception to the Shareholder Proposal Rule: A Return to Predictability*, 64 *FORDHAM L. REV.* 1253, 1259 (1995); Eric A. Welter, Note, *The Shareholder Proposal Rule: A Change to Certainty*, 60 *GEO. WASH. L. REV.* 1980, 1990 (1992).

11. See, e.g., Waite, *supra* note 10, at 1260; Welter, *supra* note 10, at 1990. But see Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 *VAND. L. REV.* 1129, 1174 (1993) (stating that the legislative history and language of the 1934 Act are ambiguous as to the ultimate goal of the SEC's regulatory power).

12. See *infra* Part II.A.

13. Solicitation of Proxies Under the Act, Exchange Act Release No. 3347, 7 Fed. Reg. 10,655, 10,656 (1942). This Recent Development focuses on the ordinary business exclusion and its application to employment related proposals. For a history of the shareholder proposal rule in general, see generally Fisch, *supra* note 11.

The original shareholder proposal rule was found at Rule 14a-7. See Welter, *supra* note 10, at 1980-82.

14. Adoption of Amendments to Proxy Rules, Exchange Act Release No. 4979, [1952-1956 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,267 (Jan. 6, 1954) [hereinafter 1952 Release].

15. *Id.* at 79,247.

complete control over day-to-day business decisions.<sup>16</sup>

In 1976 the SEC made minor changes to the language of the ordinary business exception and adopted a two-part test to be used in applying the exception.<sup>17</sup> The language of the ordinary business exception that was adopted in 1976 is the language that exists today. It states that management may exclude a shareholder proposal from its proxy materials if the proposal “deals with a matter relating to the conduct of the ordinary business operations of the issuer.”<sup>18</sup>

While the language of the ordinary business exception changed only slightly, the SEC’s decision to alter its interpretation of that language was significant. Henceforth, it would use a two-part test in applying the ordinary business exception.<sup>19</sup> The two-part test allowed management to exclude shareholder proposals from management’s proxy materials if the proposal (1) involved “business matters that are mundane in nature” and (2) did not involve “any substantial policy or other considerations.”<sup>20</sup> This test governed management’s

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16. See 1952 Release, *supra* note 14. The SEC added this exclusion even though another exclusion served the same purpose. Rule 14a-7, originally promulgated in 1942 as part of the original shareholder proposal rule, allows management to exclude shareholder proposals that are not a “proper subject” for action by shareholders under applicable state law. See Waite, *supra* note 10, at 1260 (*citing* Exchange Act Release No. 3347, 7 Fed. Reg. 10,655, 10,656 (1942)). However, the SEC, as well as shareholder proponents, have long recognized that this exclusion may be defanged by phrasing proposals in precatory language. *Id.* at 1262. Most proposals cast in precatory language could not be considered improper under state corporate law. See 1998 Release at 29,120 (to be codified as Rule 14a-8(i)(1)). The SEC felt it was closing this loophole when it adopted the ordinary business exclusion, which covered all proposals whether or not framed in precatory language. See Waite, *supra* note 10, at 1262, n.58.

17. Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, 41 Fed. Reg. 52,994, 52,998 (1976) [hereinafter 1976 Release]. In 1976 the SEC initially proposed to amend the ordinary business exception to allow management to omit a shareholder proposal if the proposal dealt with “a routine, day-to-day matter relating to the conduct of the ordinary business operations of the issuer.” *Id.* at 52,997. The SEC decided not to adopt such a change after it received strongly negative comments on the proposed amendment. Opponents of the proposed amendment felt that this would force management to include shareholder proposals that dealt with “ordinary business matters of a complex nature that shareholders, as a group, would not be qualified to make an informed judgment on, due to their lack of business expertise and their lack of intimate knowledge of the issuer’s business.” *Id.* The SEC capitulated to this opposition. The Commission conceded that “there does not appear to be any reasonable means for distinguishing between routine and important business matters . . . . The potential lack of consistency of the proposed standard is a fatal drawback, in the Commission’s view.” *Id.* at 52,998.

18. *Id.* This is substantially the same wording as had existed prior to the 1976 Release. See Waite, *supra* note 10, at 1264.

19. 1976 Release, *supra* note 17, at 52,998.

20. *Id.* The SEC used the example of a shareholder proposal that the company not construct a nuclear power plant. The SEC stated that in the past, such a proposal would be excludable, but, under the new two-part test, it would not be: “In retrospect . . . it seems apparent that the economic and safety considerations attendant to nuclear power plants are of such magnitude that a determination whether to construct one is not an ‘ordinary’ business matter.” *Id.*

ability to exclude employment-related proposals from its proxy materials for the next sixteen years, until the Cracker Barrel decision. During this period, the SEC applied this two-part test in a manner that was, according to many commentators, neither consistent nor appropriate.<sup>21</sup>

In a 1991 no-action letter to Dayton Hudson Corporation, the SEC refused to allow that corporation to exclude from its proxy materials a shareholder proposal that sought to require the corporation to: (1) report to its shareholders the corporation's efforts in the areas of equal employment opportunity and its progress in purchasing from minority owned vendors, and (2) "publicize" to its vendors its own equal employment practices.<sup>22</sup>

The shareholder proponent, a labor union,<sup>23</sup> supported its proposal on the grounds that to remain competitive, the corporation needed policies to effectively deal with an increasingly diverse workforce.<sup>24</sup> The company sought to exclude the proposal under Rule 14a-8(c)(7), claiming that employment related issues, including equal employment opportunity policies, were "basic, routine and ongoing concerns directly related to the conduct of its ordinary business operations."<sup>25</sup> The labor union proponent argued that equal

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21. See generally Fisch, *supra* note 11, at 1157-62; Daniel E. Lazaroff, *Promoting Corporate Democracy and Social Responsibility: The Need to Reform the Federal Proxy Rules on Shareholder Proposals*, 50 RUTGERS L. REV. 33 (1997); Waite, *supra* note 10; Welter, *supra* note 10.

22. Dayton Hudson Corporation, SEC No-Action Letter, 1991 WL 178560 (Mar. 8, 1991). The proposal requested that the corporation:

1. Make a progress report available to shareholders on the corporation's efforts in the areas of equal employment opportunity and affirmative action. This report should summarize the data in the corporation's EEO-1 report and be printed in its next Annual Report.
2. Make a progress report available to shareholders on the corporation's efforts to purchase goods and services from minority and female owned business enterprises.
3. Publicize the corporation's policies in the areas of equal employment opportunity and affirmative action to its merchandise suppliers and service providers in a manner in which they will become familiar with the corporation's standards of conduct.

*Id.* at \*4-\*5.

23. This proposal was submitted to Dayton Hudson management by the Amalgamated Clothing and Textile Workers Union. *Id.* at \*1. Such shareholder proposals are a common tool for labor unions seeking to put pressure on the management of corporations with whom they are engaged in negotiations, or whose policies they are seeking to influence.

24. *Id.* at \*5. The proposal stated that:

Recent studies indicate that equal employment practices are quickly becoming a necessity for corporations such as Dayton Hudson. By the beginning of the next century, the overwhelming majority of new entrants to our nation's work-force will be women and/or members of a minority group. We believe passage of these resolutions will give Dayton Hudson's current minority and female employees confidence in the corporation's commitment to their advancement and will attract new employees from these groups.

*Id.*

25. *Id.* at \*2.

employment practices, and a corporation's policies toward race and sex discrimination, have historically been viewed as "significant policy issues."<sup>26</sup> The Commission concurred with the proponent's view, and required Dayton Hudson to include the proposal in its proxy materials. In doing so the Commission stated that, in its view, "questions with respect to equal employment opportunity and affirmative action involve policy decisions beyond those personnel matters that constitute the Company's ordinary business."<sup>27</sup>

Under the two-part test, not only did the Commission require management to include proposals that merely called for reporting to shareholders, such as the one at issue in Dayton Hudson, but the Commission also required management to include proposals that called for substantive changes to a company's employment policies. Prior to the Dayton Hudson ruling, the Commission, in a no-action letter to American Telephone & Telegraph ("AT&T"), stated that Rule 14a-8(c)(7) did not allow management to exclude from its proxy materials a shareholder proposal requesting that a corporation completely dismantle its equal employment policies.<sup>28</sup> The shareholder proponent in the AT&T situation was a group called the "National Alliance," a white supremacist group, which, according to AT&T, had on the 100th anniversary of Adolf Hitler's birth published a newsletter declaring him to be the "greatest man of our era."<sup>29</sup> Seeking refuge in Rule 14a-8(c)(7), AT&T argued that its affirmative action program was necessary to ensure compliance with current laws.<sup>30</sup> AT&T also made compelling pleas to the Commission's common sense. The company stated that allowing a group of "neo-Nazis" with a total stock ownership of one hundred shares to force management to include a proposal requiring the dismantling of affirmative action programs clearly constituted an abuse of the proxy process. Furthermore, AT&T noted that implementation of the proposal would result in a substantial financial loss to the company due to the fact that its affirmative action programs were a requirement for its continued status as a

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26. *Id.* at \*6.

27. *Id.* at \*9. *See also* Boeing Company, SEC No-Action Letter, 1989 WL 245652 (Feb. 8, 1989) (declining to permit management to exclude from its proxy materials a proposal that Boeing report on the extent to which its suppliers in Northern Ireland were required to adhere to Boeing's non-discrimination policies).

28. American Telephone & Telegraph Co., SEC No-Action Letter, 1990 WL 2285776 (Jan. 5, 1990) [hereinafter AT&T No-Action Letter]. The Commission, in its typically opaque style, stated, "It is the Division's view that the proposal, which relates to those aspects of the Company's affirmative action program designed to assure equal employment opportunities for minority group members, involves policy issues that preclude its exclusion under that provision." *Id.* at \*14.

29. *Id.* at \*2.

30. *Id.* at \*4.

contractor with federal and state governments.<sup>31</sup>

The Commission was unmoved by AT&T's pleas for common sense. It required inclusion of the proposal, under the view that "the proposal, which relate[d] to those aspects of the company's affirmative action program designed to assure equal employment opportunities for minority group members, involve[d] policy issues that preclude its exclusion under that provision."<sup>32</sup> As late as 1990, therefore, the SEC still viewed a proposal that called for drastic restructuring of the "aspects of [a] [c]ompany's affirmative action program designed to assure equal employment opportunities" as involving significant policy issues.<sup>33</sup> These proposals thus failed (or passed, depending on whose perspective is used) the second part of the two-part test, and the company could not exclude them under Rule 14a-8(c)(7).<sup>34</sup>

However, the SEC's rulings under this two-part test were hardly consistent during the pre-Cracker Barrel period. In 1991, the Commission allowed the management of Wal-Mart Stores to exclude a shareholder proposal that cannot logically be distinguished from the Dayton Hudson proposal. The Wal-Mart proposal sought to require the company to prepare a report for shareholders regarding the racial and gender composition of its workforce, a description of its existing affirmative action program, and a plan for increasing minority presence in its workforce.<sup>35</sup> The Commission responded that the company could properly

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31. *Id.* This was the second request for the Commission's concurrence with AT&T's view. AT&T noted that it was unusual to ask for such concurrence a second time, but felt the SEC's position that the proposal must be included "[flew] in the face of economic reality." *Id.*

32. *Id.* at \*14. The author does not mean to suggest that there should be an ideological requirement in the shareholder proposal rule. Instead, the AT&T ruling should be treated critically because the view expressed, that proposals related to affirmative action should absolutely be included, completely disappeared only two years later when the Cracker Barrel decision was made. *See* Cracker Barrel No-Action Letter, *supra* note 6, at 77,287. In short, in the space of two years, the SEC went from a position that all employment related proposals implicating social concerns must be included, no matter how ill-intentioned, to the exact opposite view that *no* such proposals should be included, no matter how well-intentioned.

33. AT&T No-Action Letter, *supra* note 28, at \*14.

34. *Cf.*, CBS, Inc., SEC No-Action Letter, 1985 WL 53812 (Jan. 24, 1985) (allowing management to exclude a proposal submitted by a shareholder, who was also a terminated manager, calling for broad changes to the company's entire employee management system); Transamerica Corp., SEC No-Action Letter, 1986 WL 66511 (Jan. 22, 1986) (allowing management to exclude a shareholder proposal calling for the development of a broad "code of corporate conduct" that would define rules and policies for equal employment opportunities because it would affect many areas of the company's daily business operations); Capital Cities/ABC Inc., SEC No-Action Letter, 1987 WL 107813 (Mar. 23, 1987) (allowing management to exclude a proposal that sought sweeping changes to the content of the company's television programming, even though it also sought to establish criteria for the increased employment of racial minorities as performers and crew members for these television shows).

35. Wal-Mart Stores, Inc., SEC No-Action Letter, 1991 WL 178759 (Apr. 10, 1991). The Wal-Mart no-action letter involved two proposals. The proposal discussed in this text was submitted by the



exclude the proposal under Rule 14a-8(c)(7) because it “involves a request for detailed information on the composition of the Company's work force, employment practices and policies, and also on the Company's practices and policies for selecting suppliers of goods and services.”<sup>36</sup> The only possible distinction between this decision and the Dayton Hudson decision appears to be the request for detailed information about the company's workforce.<sup>37</sup> Both proposals sought reports on a company's affirmative action policies, policies for dealing with minority-owned vendors, and the disclosure of the company's own affirmative action policies to its vendors and suppliers.<sup>38</sup> The fact that the Wal-Mart proposal required a report on the company's employee demographics is not a principled distinction. In the prior year, the Commission told AT&T that

Amalgamated Clothing and Textile Workers Union. The proposal stated as follows:

Resolved: That the shareholders recommend the Board of Directors establish the following program concerning equal employment opportunity and affirmative action:

1. Make a progress report available to shareholders on the corporation's efforts in the areas of equal employment opportunity and affirmative action. This report should summarize the data in the corporation's EEO-1 report and be printed in its next Annual Report.

2. Make a progress report available to shareholders on the corporation's efforts to purchase goods and services from minority and female owned business enterprises.

3. Publicize the corporation's policies in the areas of equal employment opportunity and affirmative action to its merchandise suppliers and service providers in a manner in which they will become familiar with the corporation's standards of conduct.

*Id.* at \*9.

36. *Id.* at \*13. The Commission reached the same conclusion in April of 1992, when it allowed Wal-Mart to exclude a similar proposal from its proxy materials for that year's stockholders' meeting. Wal-Mart Stores Inc., SEC No-Action Letter, 1992 WL 78127 (Apr. 10, 1992). The proposal at issue in the 1992 letter required Wal-Mart to prepare a report for its shareholders which would have included the following information:

1. A chart of Wal-Mart's employees according to their sex and race in each of the nine major E.E.O.C. defined job categories for 1989, 1990 and 1991, by number of employees or percentages.

2. A summary description of Affirmative Action Programs to improve performance especially in job categories where women and minorities are under-utilized and a description of major problems in meeting the company's goals and objectives in this area.

3. A description of steps taken to increase the number of managers who are qualified females and ethnic minorities.

4. A description of ways in which Wal-Mart publicizes our company's policies to merchandise suppliers and service providers to encourage forward action on their part as well.

5. A description of Wal-Mart's efforts to purchase goods and services from minority and female owned business enterprises.

*Id.* at \*5. *See also* Capital Cities/ABC Inc., SEC No-Action Letter, 1987 WL 107813 (Mar. 23, 1987) (allowing exclusion of proposal calling for corporation to prepare detailed report to shareholders).

37. *See supra* notes 22-27 and accompanying text. The SEC used the same justification for its 1992 Wal-Mart decision as well. *See supra* note 35.

38. *See* Dayton Hudson Corp., SEC No-Action letter, 1991 WL 178560 (Mar. 8, 1991); Wal-Mart Stores, Inc., SEC NO-Action letter, 1991 WL 178759 (Apr. 10, 1991); Wal-Mart Stores, Inc., SEC No-Action Letter, 1992 WL 78127 (Apr. 10, 1992).

proposals related to affirmative action invoked such strong policy considerations that a company could not even exclude proposals submitted by neo-Nazi hate groups to completely dismantle an affirmative action program.<sup>39</sup> However, in the Wal-Mart decision, the Commission allowed the company to exclude proposals that merely called for reports on the grounds that the reports called for too much detail.

This result is nonsensical. Application of the two-part test to the Wal-Mart proposals yields a finding that they dealt with a company's "ordinary business," its employment practices and the ethnic composition of its workforce. In addition, the proposals involved a substantial policy consideration: the company's affirmative action program. Therefore, the proposals did meet both prongs of the test and could not be excluded under Rule 14a-8(c)(7).<sup>40</sup>

### *B. Cracker Barrel*

The SEC, realizing that its application of the two-part test produced anomalous results, abruptly changed course in 1992 in a notorious no-action letter to Cracker Barrel Old Country Stores.<sup>41</sup> Cracker Barrel, based in Lebanon, Tennessee, operated a chain of country stores located in rural and suburban areas in several states.<sup>42</sup> In January 1991, Cracker Barrel publicly announced that it would no longer hire or employ gay or lesbian workers.<sup>43</sup> The company proceeded to fire several employees that it determined were gay or lesbian.<sup>44</sup> One month later, the company issued a vague statement that it had "revisited" its policy concerning homosexual workers, but did not specifically apologize, rescind the policy or rehire the terminated employees.<sup>45</sup> Several months later, after public protests and the termination of several more gay employees, the New York City Employee's Retirement System ("NYCERS") submitted a proposal for inclusion in Cracker Barrel's proxy materials for its

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39. See *supra* notes 32-34 and accompanying text.

40. See *supra* notes 21-22 and accompanying text.

41. Cracker Barrel No-Action Letter, *supra* note 6, at ¶ 76,418. The Commission in this letter specifically stated that the distinctions it had come to rely on in applying the two-part test were viewed by commentators as "tenuous, without substance and effectively nullifying the application of the ordinary business exclusion to employment related proposals." *Id.* at 77,287.

42. Cracker Barrel Homepage (last visited Sept. 8, 1999) <Error! Bookmark not defined.>

43. Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, 1992 WL 289095, at \*5 (Oct. 13, 1992) [hereinafter Cracker Barrel No-Action Letter (Westlaw)].

44. *Id.*

45. *Id.* at \*6.

next annual meeting.<sup>46</sup> The NYCERS proposal called for the board of Cracker Barrel to implement non-discrimination policies with respect to sexual orientation and to specifically amend its written employment policies to reflect this.<sup>47</sup>

Cracker Barrel argued that under Wal-Mart and similar rulings, it could exclude the proposal under the ordinary business exception.<sup>48</sup> NYCERS argued that the proposal at issue in Wal-Mart was distinguishable because the Wal-Mart proposal required the company to prepare detailed reports of its employment practices.<sup>49</sup> NYCERS also argued that under the AT&T ruling, its proposal clearly involved substantial policy concerns, and thus could not be excluded.<sup>50</sup> The SEC rendered both arguments irrelevant by overruling its prior decisions regarding the excludability of employment related proposals under Rule 14a-8(c)(7).<sup>51</sup> The Commission stated that it viewed proposals directed at a company's non-executive employment policies and practices as uniquely related to the company's ordinary business, and thus excludable.<sup>52</sup> Despite this general rule, the Commission claimed to have made exceptions in the past for employment related proposals that involved "social policy" concerns.<sup>53</sup> Henceforth, proposals relating to a company's employment practices could be excluded under Rule 14a-8(c)(7) even if they involved a "social issue."<sup>54</sup> In

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46. *Id.* In June of 1991, Cracker Barrel had fired three more gay employees. *Id.* During this time, gay and lesbian organizations had organized pickets of Cracker Barrel stores and called for boycotts by consumers. *Id.*

47. *Id.* at \*4. The full text of the NYCERS proposal read as follows:

Whereas, in February, 1991 the management of Cracker Barrel Old Country Stores restaurants announced a policy of discrimination in employment against gay men and lesbians; and,

Whereas, although Cracker Barrel management asserts that this discrimination policy has been rescinded, the company has refused to rehire fired workers and media reports have indicated that gay and lesbian workers continue to be dismissed on the basis of their sexual orientation . . . .

RESOLVED, Shareholders request the Board of Directors to implement non-discriminatory policies relating to sexual orientation and to add explicit prohibitions against such discrimination to their corporate employment policy statement.

*Id.* at \*4.

48. Cracker Barrel No-Action Letter, *supra* note 6, at 77,285.

49. Cracker Barrel No-Action Letter (Westlaw), *supra* note 43, at \*10. As noted above, this distinction should, theoretically, have been irrelevant under the two-part test. *See supra* note 41 and accompanying text.

50. *Id.* at \*8.

51. Cracker Barrel No-Action Letter, *supra* note 6, at 77,287.

52. *Id.*

53. *Id.* This mischaracterized the two-part test as a narrow exception to a broad single criteria for excludability. *See supra* Part II.A. In doing so, the SEC created an inaccurate picture of its pre-Cracker Barrel treatment of affirmative action proposals.

54. *Id.*

short, employment related proposals would no longer be evaluated under the two-part test.

The Cracker Barrel decision sparked controversy from the start. NYCERS immediately filed suit against the SEC, claiming that the SEC's decision in Cracker Barrel to overrule its prior no-action letters violated the Administrative Procedure Act.<sup>55</sup> The Federal District Court for the Southern District of New York found for NYCERS, holding that the SEC violated the Administrative Procedure Act.<sup>56</sup> For several years the SEC refused to issue no-action letters under Rule 14a-8(c)(7), pending the outcome of its appeal.<sup>57</sup> Finally, in late 1994, the Second Circuit held in favor of the Commission, finding that no-action letters were not subject to the requirements of the Administrative Procedure Act.<sup>58</sup> Thus, for the first two years of its life, Cracker Barrel was on life support. Thereafter, corporate management and shareholder activists fought continuously over the proper scope of Rule 14a-8(c)(7).

Corporate America immediately sought to expand Rule 14a-8(c)(7) to cover issues other than employment. One corporation argued that no sound reason existed as to why employment related proposals should be exempt from the two-part test while other proposals were not.<sup>59</sup>

Predictably, shareholder activists sought a reversal of the Cracker Barrel decision.<sup>60</sup> Some commissioners within the SEC sympathized with these groups from the start,<sup>61</sup> and, as early as 1996, the SEC was surveying the securities community to gauge opinion on the Cracker Barrel decision as a preliminary step to considering its reversal.<sup>62</sup> That reversal came in the summer of 1998.<sup>63</sup>

### III. THE REVERSAL

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55. *New York City Employees' Retirement System v. SEC*, 843 F. Supp. 858, 863 (S.D.N.Y. 1994), *rev'd*, 45 F.3d 7 (2d Cir. 1995).

56. *Id.* at 881.

57. *Group Petitions SEC for Change on Proxy Resolutions About Employment*, 27 SEC. REG. L. REP. (BNA) 1366, 1367 (Aug. 18, 1995).

58. *New York City Employees' Retirement System v. SEC*, 45 F.3d 7 (2d Cir. 1995).

59. *See* *RJR Nabisco Holdings Corp.*, SEC No-Action Letter, 1995 WL 749658, at \*2 (Dec. 15, 1995) (rejecting company's argument that the decision in Cracker Barrel should be extended to exempt tobacco-related proposals from the two-part test).

60. *See* *Group Petitions for Change*, *supra* note 57.

61. *See* *Proxies: SEC Should Reexamine Position on Shareholder Proposals*, *Wallman Says*, 28 SEC. REG. L. REP. (BNA) 1134 (Sept. 20, 1996).

62. *See id.* at 1135.

63. *See* Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, 63 Fed. Reg. 29,106, 29,119-121 (1998) (to be codified at 17 C.F.R. § 240.14a-8) [hereinafter 1998 Release].

The reversal of the Cracker Barrel decision is easily summarized. The SEC has returned to a case by case analysis using the old two-part test to determine whether a corporation may exclude employment-related shareholder proposals under the ordinary business exclusion.<sup>64</sup>

The stated rationale for the Commission's reversal is that since the Cracker Barrel decision, "the relative importance of certain social issues relating to employment matters has re-emerged as a consistent topic of widespread public debate."<sup>65</sup> The Commission also stated that the intense public debate over the Cracker Barrel decision helped it to "gain[] a better understanding" of the importance of employment related issues to many shareholders.<sup>66</sup>

The Commission also elaborated on what it felt to be the underlying policy behind the ordinary business exclusion.<sup>67</sup> The exclusion is primarily designed to further the policy behind state corporate laws that grant the board of directors sole power over the corporation's ordinary business operations.<sup>68</sup> This basic policy invokes two concerns with respect to shareholder proposals. First, a proposal's content may involve ordinary business matters that are properly subject to the discretion of the board of directors.<sup>69</sup> Such proposals are excludable unless they relate to "sufficiently significant social policy issues."<sup>70</sup>

Second, the action sought by a proposal may seek to "micro-manage" the company by "probing too deeply" into complex affairs about which shareholders "would not be in a position to make an informed judgment."<sup>71</sup> The Commission only vaguely stated the importance of this second consideration. On the one hand, the degree to which a proposal seeks to micro-manage a company is clearly a factor in its excludability under Rule 14a-8(c)(7).<sup>72</sup> On the other hand, the Commission refused to put forth any bright line test and stated only that this determination will be made on a case by case basis.<sup>73</sup>

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64. *See id.* at 29,108. The effective date of the reversal is May 21, 1998. *Id.* at 29,108 n.33.

65. *Id.* at 29,108. As support for this proposition, the Commission cited two recent cases of corporations, Texaco and Shoney's, which had garnered media attention for problems with employment discrimination. *Id.* at 29,108 n.39.

66. *Id.* at 29,108.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* The Commission cited "significant discrimination matters" as an example of such a policy concern. *Id.*

71. *Id.* Proposals that seek reports involving intricate details or impose time-frames or methods for implementing complex proposals provide examples of this concern. *See id.*

72. *See id.* at 29,109.

73. *See id.*

## IV. ANALYSIS

The effect of the Cracker Barrel reversal is that, once again, the excludability of all shareholder proposals under Rule 14a-8(c)(7) is determined by the same two-part test. Employment-related proposals are no longer exempt from this analysis. The reversal of the Cracker Barrel decision is an appropriate decision for the SEC. It does nothing, however, to address the underlying problems with the historically inconsistent manner in which the SEC has applied the two-part test.<sup>74</sup>

The decision is appropriate in that nothing intrinsic to employment related proposals suggests that they should be treated differently than other types of proposals. In fact, management groups immediately seized upon this basic observation to argue that the Cracker Barrel rule should be applied broadly to proposals dealing with matters outside of employment issues.<sup>75</sup> These arguments, if accepted, would have essentially gutted the two-part test and excluded all proposals related to ordinary business operations, no matter how great the social policy concerns implicated.<sup>76</sup>

Employment practices are clearly part of a corporation's ordinary business activities. However, employment practices also raise important concerns that go far beyond day-to-day issues. There is an ever increasing number of laws regulating an employer's conduct towards its employees, violation of which can subject a corporation to significant private and public legal action, financial losses, and negative publicity.<sup>77</sup> Even at the time of the Cracker Barrel decision, these factors stood in opposition to the SEC's decision. Six years later, they continue to do so with at least the same force.

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74. See Waite, *supra* note 10, at 1265-70.

75. See *e.g.*, RJR Nabisco Holdings Corp, SEC No-Action Letter, 1995 WL 749658 (Dec. 15, 1995).

76. Perhaps the real problem with the ordinary business exception is that it exists at all. Numerous commentators have called for its elimination on the grounds that the SEC has not found a way to consistently apply the rule and no consistent application seems possible. See *infra* note 81 and accompanying text.

This recent development does not advocate such a view, but accepts, for the sake of argument, the Commission's view that the ordinary business exception serves the valuable function of ensuring governance by the board of directors, a fundamental concept of all state corporation laws. See 1998 Release, *supra* note 63, at 29,108.

77. See, *e.g.*, Peter Fritsch et al., *Texaco to Pay \$176.1 Million in Bias Suit*, WALL ST. J., Nov. 18, 1996, at A3, available in 1996 WL-WSJ 11806548 (detailing the record setting sum Texaco agreed to pay to settle racial discrimination suits filed by ex-employees); Laura Johannes, *Astra USA Fires Bildman From Top Post*, WALL. ST. J., June 27, 1996, at A3, available in 1996 WL-WSJ 3108490 (detailing the turmoil, including the firing of the firm's CEO, that followed the filing of several widely publicized sexual harassment lawsuits).

Critics have faulted the Commission for its constant reversals under the ordinary business exception.<sup>78</sup> The SEC does appear to frequently change its views as to what constitutes a “substantial policy or other consideration.”<sup>79</sup> The Commission justifies these reversals on the basis of its finding that the issue has either become or ceased being the subject of significant press attention, legislative debate, or public concern.<sup>80</sup> Critics have consistently called for the elimination of the ordinary business exclusion on grounds that there are no objective, predictable factors through which the SEC can apply the exception.<sup>81</sup> Thus, the reversal of the Cracker Barrel decision represents yet another such reversal, subject to change whenever the Commission is so inclined. However, there are no proposals currently under consideration by the SEC to eliminate the ordinary business exclusion, and the exclusion is likely to remain part of the securities law landscape for some time. In this light, the reversal of the Cracker Barrel decision marks a moderate victory for shareholder democracy.

## V. CONCLUSION

The SEC’s decision to reverse the Cracker Barrel no-action letter returns the Commission to its prior policy of using a two-part test to determine the excludability of employment related shareholder proposals under the ordinary business exclusion. The proposal may be excluded if it deals with a corporation’s day-to-day operations, and does not involve any substantial policy concerns. While the application of the two-part test has been inconsistent and subject to frequent change, it better protects shareholder democracy than the Cracker Barrel rule.

*Phillip R. Stanton*

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78. See Waite *supra* note 10, at 1265-70.

79. See *id.* at 1265.

80. See *id.*

81. See Lazaroff, *supra* note 21, at 87; Waite, *supra* note 10, at 1276; Welters, *supra* note 10 at 2016 (advocating a statutory presumption of includability that management would have to overcome with clear and convincing evidence). These commentators also criticize the ordinary business exception on the grounds that it blatantly restricts shareholder democracy and that state corporate law typically does not make such an explicit restriction on the content of proposals.