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Non-Traditional Activism

USING SHAREHOLDER PROPOSALS TO URGE LGBT NON-DISCRIMINATION PROTECTION

I. INTRODUCTION

Apache Corporation (“Apache”) is an energy company that does business across the world.¹ Until recently, Apache’s non-discrimination policy allowed discrimination on the basis of sexual orientation and gender identity.² In October 2007, several Apache shareholders, all New York City pension funds (“The Funds”),³ sought to correct this blatant disregard for civil rights by submitting a proposal for Apache’s 2008 annual shareholder meeting.⁴ The proposal asked the company to “implement equal employment opportunity policies based on [ten] principles prohibiting discrimination based on sexual orientation and gender identity.”⁵ The principles listed in the proposal are those that several other Fortune 500 corporations have used when implementing their non-discrimination policies.⁶ The Funds argued that if these non-

¹ Apache Corp., Annual Report (Form 10-K), at 1 (Feb. 29, 2008).

² Apache Corp. v. New York City Employees’ Ret. Sys., No. H-08-1064, 2008 WL 1821728, at *6 (S.D. Tex. Apr. 22, 2008).

³ *Id.* at *1. The five funds were the New York City Employees’ Retirement System, New York City Teachers’ Retirement System, New York City Police Pension Fund, New York City Fire Department Pension Fund, and New York City Board of Education Retirement System. *Id.*

⁴ *Id.* The proposal was submitted through the funds’ custodian and trustee. *Id.* The Office of the Comptroller of the City of New York was the trustee and custodian for all of the funds except that the Comptroller is only the custodian of the New York City Board of Education Retirement System. *Id.* at *1 n.1.

⁵ *Id.* at *2.

⁶ *Id.* The proposal stated:

- 1) Discrimination based on sexual orientation and gender identity will be prohibited in the company’s employment policy statement.
- 2) The company’s non-discrimination policy will be distributed to all employees.
- 3) There shall be no discrimination based on any employee’s actual or perceived health condition, status, or disability.
- 4) There shall be no discrimination in the allocation of employee benefits on the basis of sexual orientation or gender identity.
- 5) Sexual orientation and gender identity issues will be included in corporate employee diversity and sensitivity programs.
- 6) There shall be no discrimination in the recognition of employee groups based on sexual orientation or gender identity.
- 7) Corporate advertising policy will avoid the use of negative stereotypes based on sexual orientation or gender identity.
- 8) There shall be no discrimination in corporate advertising and marketing policy based on sexual orientation or gender identity.
- 9) There shall be no discrimination in the sale of goods and services based on sexual orientation or gender identity, and
- 10) There shall be no policy barring on corporate charitable contributions to groups and organizations based on sexual orientation.

Id.

discrimination policies were implemented, Apache shareholders would benefit from the company's improved recruitment and retention of employees, increased employee morale and productivity, lowered litigation costs, and strengthened corporate reputation.⁷

But Apache did not want its shareholders to vote on the proposal and sought to exclude the proposal from its proxy materials.⁸ On January 3, 2008, Apache asked the Securities and Exchange Commission (the "Commission") to issue a no-action letter⁹ on the grounds that the proposal related to the company's ordinary business operations and therefore could be excluded from Apache's proxy materials under Rule 14a-8(i)(7) of the Securities Exchange Act of 1934.¹⁰ The Commission granted Apache's request, stating that the Commission would not pursue enforcement actions against Apache if it excluded the proposal because there was "some basis" for Apache's view that the proposal could be excluded under Rule 14a-8(i)(7).¹¹ Shortly thereafter, Apache mailed its proxy materials to its shareholders without the proposal.¹² On April 8, 2008, Apache sought a declaratory judgment¹³ in the Southern District of Texas that it properly excluded the proposal under Rule 14a-8(i)(7).¹⁴ In *Apache Corp. v. New York City Employees' Retirement System*, the court held that Apache properly excluded the shareholder proposal from its proxy statement because four of the proposal's principles, those relating to advertising, marketing, sale of goods and services, and charitable contributions, did not, in their view, "implicate the social policy underlying the Proposal . . . [and sought to] micromanage the company to an unacceptable degree."¹⁵

The *Apache* case is a recent illustration of shareholders' concern about lesbian, gay, bisexual, and transgender ("LGBT")¹⁶ rights and is an example of the types of non-discrimination proposals that are submitted by shareholders attempting to induce corporations to change their policies to include such protections.

⁷ *Id.*

⁸ See Apache Corp., SEC No-Action Letter, 2008 WL 615894, at *1 (Mar. 5, 2008) [hereinafter Apache No-Action Letter]. For an explanation of how a company can be excused from sending a shareholder proposal to its other shareholders, see *infra* Part II.A.

⁹ For an explanation of no-action letters, see *infra* Part II.A.

¹⁰ 17 C.F.R. 240.14a-8(i)(7); *Apache*, 2008 WL 1821728, at *2.

¹¹ 17 C.F.R. 240.14a-8(i)(7); Apache Letter, *supra* note 8, at *1.

¹² *Apache*, 2008 WL 1821728, at *3.

¹³ It is unclear why Apache filed for declaratory judgment. It may be because the funds filed suit in the Southern District of New York claiming that Apache's exclusion was improper. Apache may have thought that the Fifth Circuit may have been a more receptive forum for their argument. The New York suit was stayed pending the declaratory action in Texas. *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at *6-*8.

¹⁶ "LGBT" is an acronym commonly used to refer to lesbian, gay, bisexual, and transgender individuals. The term "LGBT non-discrimination" will be used throughout this Note to refer to policies or laws that prohibit discrimination on the basis of sexual orientation and gender identity and expression.

It is also an example of an innovative and non-traditional weapon in civil rights activists' arsenal because The Funds seem to have won the war. Shortly after the court's decision in Apache's favor, the company changed its non-discrimination policy to protect against discrimination on the basis of sexual orientation and gender identity.¹⁷ And the same thing has happened at other companies.¹⁸ In 2008, almost forty similar shareholder proposals were filed against companies like Apache, but shareholders only voted on fourteen.¹⁹ This is because companies are "eager to avoid a proxy fight on this issue[.]" choosing instead to negotiate with shareholders in implementing LGBT non-discrimination policies.²⁰

And even when shareholders do vote, LGBT non-discrimination proposals historically receive high votes.²¹ The two highest shareholder votes on all 2008 proposals were LGBT non-discrimination proposals, each receiving over 52% of the shareholder vote.²² In all of these instances, shareholder activists have used a non-traditional mechanism to urge LGBT non-discrimination.

But shareholders cannot count on a company's acquiescence, and companies like Apache often fight the proposals.²³ When that happens, activists' endeavors are hampered by the Commission and some courts. This Note argues that the Commission and the Southern District of Texas responded incorrectly to the proposal and its litigation. Contrary to the Commission and court rulings, shareholder proposals seeking non-discrimination protections based on sexual orientation and gender identity and expression should not fall under Rule 14a-8(i)(7)'s ordinary business exclusion and companies should be required to include them in their proxy materials when requested to do so by shareholders.

Part II of this Note describes the shareholder proposal process and introduces shareholder proposals that seek non-discrimination policies based on sexual orientation and gender identity and expression. Part III then discusses the reasons why these proposals should not fall under Rule 14a-8(i)(7). It concludes that they raise significant social policy issues about which shareholders are able and entitled to make an informed judgment.

¹⁷ See APACHE CORPORATION, EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION POLICY (July 15, 2008), available at http://www.apachecorp.com/content/released/Apache_EEO.pdf (last visited Jan. 29, 2009).

¹⁸ MICHAEL PASSOFF, AS YOU SOW, PROXY SEASON PREVIEW 2009, at 6, 16 (2009), available at <http://www.asyousow.org/csr/proxy-preview-2009.shtml> (follow "Download" hyperlink).

¹⁹ *Id.* at 3.

²⁰ *Id.* at 16.

²¹ See *id.* at 3.

²² *Id.*

²³ See *id.* at 16. For example, in 2009, ExxonMobile is facing its tenth LGBT non-discrimination proposal. *Id.* at 16. In 2008, the proposal drew a 40% shareholder vote. *Id.*

II. BACKGROUND

The extent to which shareholders can control or influence the management of the corporations in which they invest is a prominent issue in corporate law.²⁴ Under statutory default rules, the board of directors controls the company, including hiring managers to run the day-to-day operations.²⁵ Generally, shareholders have no rights to directly control or influence the corporation.²⁶

Despite default statutes, shareholders want—and do have—some ability to influence corporations. This influence is important because all shareholders are concerned about the company’s management since they have a stake in the company.²⁷ Individual investors are often “rationally apathetic” about the management of a corporation—since they only own a small amount of shares, there are few incentives for them to fight for changes in management.²⁸ On the other hand, institutional investors,²⁹ such as The Funds in the *Apache* case, often own a large amount of shares of a single corporation and therefore have a greater incentive to express their opinions and usually have the resources to make their opinions known to management.³⁰ Shareholders are concerned about discrimination issues because of the high costs associated with the corporation being branded “discriminatory,” including lawsuit damages and reputational harm.³¹

²⁴ See, e.g., *Auer v. Dressel*, 118 N.E.2d 590 (N.Y. 1954) (shareholders wanted the president to be reinstated after he was dismissed by the board of directors).

²⁵ See, e.g., N.Y. BUS. CORP. LAW § 701 (McKinney 2009).

²⁶ *Id.* Default rules can be changed in an individual corporation by adding specific shareholder rights in the company’s certificate of incorporation. *Id.*

²⁷ See Patricia Uhlenbrock, Note, *Roll Out the Barrel: The SEC Reverses Its Stance on Employment-Related Shareholder Proposals under Rule 14a-8—Again*, 25 DEL. J. CORP. L. 277, 279 (2000).

²⁸ Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 417 (2006).

Because each individual shareholder owns only a very small percentage of the outstanding shares of a corporation, she does not have a stake sufficient to make monitoring worthwhile. After all, becoming informed is costly; it is also futile, because one shareholder’s meager vote is unlikely to affect the outcome. Thus, shareholders tend to be rationally apathetic and support the incumbent board on the theory that the directors are experts and have access to greater information.

Id.

²⁹ Examples of institutional investors include pension funds, hedge funds, private equity funds, and foreign governments. Uhlenbrock, *supra* note 27, at 278 n.10.

The stock market has had a long history of shareholder passivity, but this is likely a thing of the past. The rise of the institutional investor and the increased knowledge of stockholders as a whole is forcing an increased accountability to shareholders for many boards of directors. As a result, the demands of the Teamsters in its case against Fleming is something courts may encounter with increasing frequency in the years to come.

Int’l Bhd. of Teamsters Gen. Fund v. Fleming Cos., 975 P.2d 907, 909 (Okla. 1999).

³⁰ Velasco, *supra* note 28, at 425-26.

³¹ See Uhlenbrock, *supra* note 27, at 278.

A. *Introduction to Shareholder Proposals*

One way in which shareholders can exercise influence over a corporation is through shareholder proposals. A shareholder proposal is a shareholder's "recommendation or requirement that the company and/or its board of directors take action" that the shareholder intends to present at the company's annual shareholder meeting.³² These proposals allow shareholders a platform for voicing their concerns or suggestions about the company to fellow shareholders.³³

Shareholders have the right to submit proposals independently, by sending their proposals to other shareholders themselves.³⁴ Since the cost of sending their own proposals is often prohibitively high, shareholders rarely choose this option.³⁵

Instead, shareholders prefer to use Rule 14a-8 of the Securities Exchange Act of 1934³⁶ to submit their proposals without incurring any mailing expenses.³⁷ Rule 14a-8 requires a company to "include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders."³⁸ Proxy materials are sent out by management before a shareholder meeting. The materials include items that will be voted on at the meeting and also provide a mechanism for shareholders to vote by proxy, that is, to make sure that their vote is counted even if they are unable to attend the meeting. If a shareholder's proposal must be included in management's proxy materials, management can choose to state the reasons why it thinks that the other shareholders should vote against the proposal.³⁹ In any case, if the proposal is included in management's proxy, the cost of sending the proposal to the other shareholders is borne by the corporation.⁴⁰

To take advantage of the benefits of Rule 14a-8 submission, shareholders must comply with a host of procedural requirements.⁴¹ First, a proposal should state the shareholder's recommendation or requirement

³² 17 C.F.R. § 240.14a-8(a) (2006). Rule 14a-8 of the Securities Exchange Act of 1934 governs shareholder proposals and was re-organized into a "Plain-English Question & Answer Format" in 1998 to "make the rule easier for shareholders and companies to understand and follow." Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 40,018, Investment Company Act Release No. 23,200, 63 Fed. Reg. 29,106, 29,106-07 (May 28, 1998) [hereinafter 1998 Adopted Changes Release].

³³ See Notice of Proposed Rule Making, Exchange Act, Release Number 4950, 18 Fed. Reg. 6646, 6647 (Oct. 9, 1953) [hereinafter 1953 Proposed Changes Release].

³⁴ See, e.g., *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 654 (Del. Ch. 1988).

³⁵ See Leslie Wayne, *Shareholders Who Answer to a Higher C.E.O.*, N.Y. TIMES, Feb. 19, 2005, at C1.

³⁶ 17 C.F.R. § 240.14a-8.

³⁷ Obviously, shareholders must still incur the cost of writing the proposal.

³⁸ 17 C.F.R. § 240.14a-8.

³⁹ *Id.* § 240.14a-8(m).

⁴⁰ Uhlenbrock, *supra* note 27, at 281.

⁴¹ See, e.g., *id.* § 240.14a-8(c); *id.* § 240.14a-8(d); *id.* § 240.14a-8(e).

“as clearly as possible.”⁴² Second, the shareholder must prove that they have held a certain amount of the company’s securities for at least one year before the submission date and certify in writing that they intend to continue to hold them through the shareholder meeting.⁴³ Third, shareholders may submit only one proposal per shareholder meeting.⁴⁴ Fourth, proposals and supporting materials must be less than 500 words.⁴⁵ Finally, the company must receive the proposal before the deadline provided in the statute.⁴⁶

Generally, any eligible shareholder’s proposal must be included in the corporation’s proxy materials if the shareholder meets all of the procedural requirements.⁴⁷ But shareholder proposals may be omitted on substantive grounds.⁴⁸ If a corporation wishes to exclude a proposal on substantive grounds, it must request a no-action letter from the Commission before the corporation files its proxy statement and form of proxy with the Commission.⁴⁹ A no-action letter requests that the Commission’s staff review whether the corporation’s exclusion of the specific proposal would violate federal securities laws.⁵⁰ While these letters are merely the informal views of the Commission’s staff, they are important because they are the interpretations of those who administer the federal securities laws and are often the only statements about the more obscure areas of these laws.⁵¹

⁴² *Id.* § 240.14a-8(a).

⁴³ *Id.* § 240.14a-8(b)(1)-(2). The amount required is “at least \$2,000 in market value, or 1% of the company’s securities entitled to be voted on the proposal at the meeting.” *Id.* A registered shareholder, one whose name is listed in the company’s records, is not required to demonstrate eligibility because ownership can be verified by the company. *Id.* § 240.14a-8(b)(2). A non-registered shareholder can demonstrate eligibility by obtaining and submitting a written statement verifying continuous ownership from the record holder of the securities (i.e., from the broker or the bank in whose name the security is held in trust). *Id.* § 240.14a-8(b)(2)(i).

⁴⁴ *Id.* § 240.14a-8(c).

⁴⁵ *Id.* § 240.14a-8(d).

⁴⁶ *See id.* § 240.14a-8(e)(1).

⁴⁷ *Id.* § 240.14a-8. When this Note refers to excluding or omitting and including proposals, it means excluding or omitting the proposal from the company’s proxy statement.

⁴⁸ *Id.* § 240.14a-8(i).

⁴⁹ *Id.* § 240.14a-8(j)(1). The company must request the no-action letter at least 80 calendar days before it files its proxy statement, but if a company can show “good cause,” the company may direct its no action letter request later than 80 days before filing its proxy statement and form of proxy. *Id.*

⁵⁰ SEC, NO ACTION LETTERS, <http://www.sec.gov/answers/noaction.htm> (last visited Mar. 27, 2009).

An individual or entity who is not certain whether a particular product, service, or action would constitute a violation of the federal securities law may request a “no-action” letter from the SEC staff. Most no-action letters describe the request, analyze the particular facts and circumstances involved, discuss applicable laws and rules, and, if the staff grants the request for no action, concludes that the SEC staff would not recommend that the Commission take enforcement action against the requester based on the facts and representations described in the individual’s or entity’s original letter.

Id.

⁵¹ *See* Thomas P. Lemke, *The SEC No-Action Letter Process*, 42 BUS. LAW. 1019, 1019 (1987).

After a company requests a no-action letter, the Commission's staff will respond either favorably, adversely, or will refuse to respond on the merits.⁵² In a favorable response, the staff will usually state that they "will not recommend any enforcement action to the Commission under a specific provision of law" if, in this case, a shareholder proposal is omitted from the company's proxy materials.⁵³ A no-response on the merits answer will occur if "the staff has indicated that legal, policy, or practical considerations may make it appropriate for it to respond on the merits of a no-action request."⁵⁴ Finally, an adverse response is one in which the staff cannot say that it will not recommend enforcement against to the Commission if the proposal is omitted.⁵⁵ No-action letter requests involving omission of shareholder proposals are directed to the Division of Corporate Finance—the division that deals with the proxy aspects of the 1934 Act.⁵⁶

Most importantly, the no-action letter must be premised on one of Rule 14a-8(i)'s enumerated exceptions.⁵⁷ The Commission first introduced the enumerated exceptions in 1948 to curb the submission of proposals that "are not necessarily in the common interest of the [company's] security holders generally."⁵⁸ The exceptions are meant to achieve this goal without "unduly restricting" shareholders' rights to submit shareholder proposals.⁵⁹ Since the 1948 release, in which three exceptions were created,⁶⁰ ten other exceptions have been introduced.⁶¹ This Note focuses on the ordinary business operations exclusion.⁶²

⁵² *Id.* at 1031.

⁵³ *Id.* at 1032. Note that sometimes the staff will go further and explain its positions or note which arguments the staff found persuasive. It may also qualify its opinion. *Id.*

⁵⁴ *Id.* at 1033. For example, "the staff will not respond to requests involving issues or parties that are the subject of an ongoing enforcement investigation or proceeding." *Id.* at 1034.

⁵⁵ *Id.* at 1035. In an adverse response, the staff is more likely to provide the reasoning behind its position. *Id.*

⁵⁶ *Id.* at 1024 n.22.

The . . . Division of Market Regulation is primarily responsible for processing those no-action requests under the 1934 Act dealing with the regulation of all aspects of the securities exchanges and related facilities, while the . . . Division of Corporation Finance is responsible for requests dealing with the proxy and other nonexchange aspects of the 1934 Act.

Id.

⁵⁷ See 17 C.F.R. § 240.14a-8(i) (2006).

⁵⁸ Solicitation of Proxies, Exchange Act Release No. 4185, 13 Fed. Reg. 6678, 6679 (Nov. 13, 1948) [hereinafter 1948 Adopted Changes Release].

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 17 C.F.R. § 240.14-8(i).

⁶² See *id.* § 240.14a-8(i)(7).

B. The “Ordinary Business Operations” Exclusion

One of the most common exceptions used by corporations is Rule 14a-8(i)(7)’s “ordinary business operations” exclusion.⁶³ Created in 1954, there have been a number of important changes to the exclusion over time. First, the Commission has changed the exclusion’s language over the years in order to clarify the situations in which it should be used.⁶⁴ In addition, the Commission introduced an exception to the exclusion for proposals that raise significant social policy issues.⁶⁵ Finally, the Commission developed a set of considerations that it uses to determine whether a proposal relates to the company’s ordinary business operations.⁶⁶

1. The Exclusion’s Language

The Commission created the ordinary business operations exclusion in a 1954 release⁶⁷ to alleviate corporations from having to include proposals when the subject matter of the proposal was “within the province of the management.”⁶⁸ The ordinary business operations exclusion expressly clarifies that the board of directors controls matters relating to a company’s ordinary business operations about which shareholders should have no say, even through a shareholder proposal.⁶⁹ Since its introduction, the Commission has attempted to change the wording of the exclusion in order to clarify and provide guidance on the

⁶³ See Proposals by Security Holders Notice of Proposed Amendments to Rule, Exchange Act Release No. 12,598, Investment Company Act Release No. 9345, 41 Fed. Reg. 29,982, 29,984 (July 20, 1976) [hereinafter 1976 Proposed Changes Release]; Uhlenbrock, *supra* note 27, at 279.

⁶⁴ See 1998 Adopted Changes Release, *supra* note 32, at 29,107; Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, Investment Company Act Release No. 9539, 41 Fed. Reg. 52,994, 52,998 (Dec. 3, 1976) [hereinafter 1976 Adopted Changes Release]; Solicitation of Proxies, Exchange Act Release No. 34-4979, 19 Fed. Reg. 246, 246 (Jan. 14, 1954) [hereinafter 1954 Adopted Changes Rule].

⁶⁵ See 1976 Adopted Changes Release, *supra* note 64, at 52,998; see *infra* Part II.B.2.

⁶⁶ See 1998 Adopted Changes Release, *supra* note 32, at 29,108; 1976 Adopted Changes Release, *supra* note 64, at 52,998; see *infra* Part II.B.3.

⁶⁷ 1954 Adopted Changes Rule, *supra* note 64, at 246.

⁶⁸ 1953 Proposed Changes Release, *supra* note 33, at 6647.

⁶⁹ See Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 34-19,135, 47 Fed. Reg. 47,420, 47,428-29 n.46 (Oct. 26, 1982) [hereinafter 1982 Proposed Changes Release]. In creating the new exclusion, the release notes that the new exclusion is a corollary of another exclusion, the exclusion of proposals that are not proper subjects for action by shareholders under state law. See 1954 Adopted Changes Release, *supra* note 64, at 246.

Prior to 1954, many of the proposals included in proxy statements related to ordinary business operations, despite the presence of state laws which generally provided that the business and affairs of corporations shall be managed by their board of directors. In an effort to provide more guidance in this area, the Commission amended the security holder proposal rule to permit the exclusion of proposals relating to ordinary business.

1982 Proposed Changes release, *supra*, at 47,428-29 n.46.

exclusion's proper use. A brief overview of its evolution provides insight into what the Commission considers the proper use to be.

The original language adopted in 1954 allowed a shareholder proposal to be omitted if it was "a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer."⁷⁰ Since its introduction, the Commission has never drastically changed the language. Under the current regulations, a proposal may be excluded if it "deals with a matter relating to the company's ordinary business operations."⁷¹

In 1976, the Commission suggested, but ultimately did not adopt, a change that would have allowed a proposal to be omitted only if it dealt with a "routine, day-to-day matter relating to the conduct of the ordinary business operations of the issuer."⁷² This new language, the Commission asserted, would preserve a shareholder's right to submit a proposal that dealt with an important issue even if it involved the ordinary business of the company.⁷³ In 1998, the Commission suggested removing the term "ordinary business" altogether because it was a "legal term of art that provid[ed] little indication of the types of matters to which it refers."⁷⁴ The proposed language allowed a shareholder proposal to be omitted "if the proposal relate[d] to specific business decisions normally left to the discretion of management" and included a non-exclusive list of examples of excludable proposals.⁷⁵ Even though these changes were never

⁷⁰ 1954 Adopted Changes Release, *supra* note 64, at 247.

⁷¹ 17 C.F.R. § 240.14a-8(i)(7) (2006).

⁷² 1976 Proposed Changes Release, *supra* note 63, at 29,984 (internal quotation marks omitted). In order for companies to differentiate between important and routine issues, the Commission proposed adding language that allowed companies to omit proposals dealing "mundane" matters—matters that the board of directors ordinarily delegated to management—but not proposals dealing with matters that require board action. *Id.*

⁷³ *Id.*

⁷⁴ Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 39,093, Investment Company Act Release No. 22,828, 62 Fed. Reg. 50,682, 50,685 (Sept. 26, 1997) [hereinafter 1997 Proposed Changes Release].

⁷⁵ 1998 Adopted Changes Release, *supra* note 32, at 29,107. The non-exclusive list of examples would be included in a note following the revised text of the exclusion in the statute:

Note to paragraph (i)(7): Examples of such matters include the way a newspaper formats its stock tables, whether a company charges an annual fee for use of its credit card, the wages a company pays its non-executive employees, and the way a company operates its dividend reinvestment plan. For an investment company, such matters include the decision whether to invest in the securities of a specific company.

1997 Proposed Changes Release, *supra* note 74, at 50,704. The Commission suggested that the exclusion could even be clarified by merely adding additional guidance to the current language:

An example of this approach would be to revise [the] current paragraph . . . to permit omission of a proposal "if it deals with a matter relating to the conduct of the company's ordinary business operations (matters that should be left to the discretion of the company's managers because of their complexity, impracticability of shareholder participation, or relative insignificance)."

Id. at 50,685.

adopted, they provide insight into how the Commission views this exclusion.

2. The “Significant Social Policy” Exception to the Exclusion

In order to further clarify the proper use of the ordinary business exclusion, the Commission created the “significant social policy” exception to allow shareholder proposals that raise important issues⁷⁶ to be included in management’s proxy materials even when those issues concern the company’s ordinary business.⁷⁷ This section describes the creation and evolution of the significant social policy exception, explains its use, and explores the first attempt to use the significant social policy to advance an LGBT non-discrimination shareholder proposal.

a. Basics of the Exception

In December 1976, the Commission introduced the “significant social policy” exception to prevent the exclusion of shareholder proposals that raise issues of “considerable importance” to the shareholders⁷⁸ by applying the ordinary business operations exclusion in a “somewhat more flexible manner” than before.⁷⁹ Under this more flexible approach, proposals that have “significant policy, economic, or other implications inherent in them” or those with other “major implications” would not be excludable under the ordinary business operations exclusion even if they raised ordinary business issues.⁸⁰ The Commission stated that the ordinary business operations exclusion should only be applied to exclude proposals dealing with “mundane” business matters and proposals without “any substantial policy or other considerations.”⁸¹

Shareholder proposals that raise a significant social policy issue can be either corporate governance proposals or social policy proposals. Corporate governance proposals are those that relate to the governance of the corporation.⁸² For example, a proposal requesting that a corporation publish the names of shareholder-nominated candidates for director positions next to any candidates nominated by the corporation’s board of directors⁸³ or a proposal seeking a bylaw amendment that would require a

⁷⁶ The term “important issue” may seem nebulous, and it is. For a further discussion of which issues are considered important, see *infra* Part II.B.2.c.

⁷⁷ See 1976 Adopted Changes Release, *supra* note 64, at 52,998.

⁷⁸ See 1976 Proposed Changes Release, *supra* note 63, at 29,984.

⁷⁹ 1976 Adopted Changes Release, *supra* note 64, at 52,997-98.

⁸⁰ See *id.* at 52,998.

⁸¹ *Id.* at 52,998.

⁸² PASSOFF, *supra* note 18, at 1.

⁸³ See *Am. Fed’n of State, County & Mun. Employees v. Am. Int’l Group, Inc.*, 462 F.3d 121, 123 (2d Cir. 2006).

shareholder vote on the implementation of poison pills⁸⁴ are both examples of corporate governance proposals. Social policy shareholder proposals are those whose subjects address social issues.⁸⁵ Both types of proposals have the potential to fall under the significant social policy exception.

In addition, shareholders submit proposals relating to employment decisions, particularly those dealing with employment discrimination.⁸⁶ It is relatively easy to understand why proposals concerning simple employment decisions can and should be excluded under the ordinary business operations exclusion. For example, it is appropriate to allow a company to exclude proposals about employee salaries because they go to the heart of the ordinary business exclusion.⁸⁷ Management must constantly assess and adjust salary levels to attract and retain employees.⁸⁸ In addition, management is in a better position than shareholders to make the decisions because shareholders, as a class, do not have knowledge of all of the circumstances and facts informing the decision and it would be impractical to seek a shareholder vote to set each employee's compensation.⁸⁹

b. Cracker Barrel: The First LGBT Rights Shareholder Proposal

The first time that a shareholder used a proposal to urge LGBT non-discrimination protection occurred in 1992 against Cracker Barrel,⁹⁰ a restaurant chain based in Tennessee.⁹¹ In a 1991 company memo, Cracker Barrel vice president for human resources William A. Bridges

⁸⁴ See *Int'l Bhd. of Teamsters Gen. Fund v. Fleming Cos., Inc.*, 975 P.2d 907, 909 (Okla. 1999). Poison pills are mechanisms by which corporate boards attempt to protect their company from a hostile take-over. 19 AM. JUR. 2D *Corporations* § 2186 (2008). Most poison pills are provisions that state that shareholders have the right to purchase new shares of common stock, triggered when a shareholder buys or attempts to buy a certain amount of the corporation's stock. *Id.* Since the triggering shareholder is not given the same right to purchase, that shareholder's stake is diluted. *Id.*

⁸⁵ PASSOFF, *supra* note 18, at 1; see, e.g., *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 662 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972) (shareholder proposal requesting that Dow stop selling napalm); *Amalgamated Clothing and Textile Workers v. Wal-Mart Stores*, 821 F. Supp. 877, 879 (S.D.N.Y. 1993).

⁸⁶ See e.g., *Amalgamated Clothing*, 821 F. Supp. at 879 (shareholder proposal requesting that Wal-Mart distribute reports about equal employment and affirmative action).

⁸⁷ See e.g., *Union Bankshares Co.*, SEC No-Action Letter, 2006 WL 851097, at *3 (Mar. 24, 2006) (proposal excludable under the ordinary business exclusion where it seeks to reduce the increase in employee salaries and benefits over the next five years); *Hydron Technologies, Inc.*, SEC No-Action Letter, 1997 WL 232587, at *2-*3 (May 8, 1997) (part of the proposal excludable under the ordinary business exclusion where it seeks to cap annual employee salaries for all employees at \$100,000).

⁸⁸ See, e.g., *Union Bankshares Co.*, SEC No-Action Letter, 2006 WL 851097, at *3 (Mar. 24, 2006).

⁸⁹ See, e.g., *id.*

⁹⁰ See PASSOFF, *supra* note 18, at 6.

⁹¹ Gustav Niebuhr, *Cracker Barrel Chain Angers Gay Groups with Written Policy—Firm Briefly Adopted Rule Permitting the Dismissal of Homosexual Workers*, WALL ST. J., Feb. 28, 1991, at C11.

announced that homosexuality was against the values upon which Cracker Barrel was founded and to which its customers adhered.⁹² According to the National Gay and Lesbian Task Force, Cracker Barrel subsequently fired twelve gay and lesbian employees.⁹³ After a public backlash,⁹⁴ Mr. Bridges released another memo rescinding the policy,⁹⁵ although the fired employees were not rehired.⁹⁶ In response, the New York City Employees' Retirement System ("NYCERS"),⁹⁷ a Cracker Barrel shareholder, requested that Cracker Barrel clarify its position on the hiring of gay and lesbian employees.⁹⁸ NYCERS was concerned "about the potential negative impact on the company's sales and earnings, which could result from adverse public reaction, such as organized boycotts and picketing of restaurants."⁹⁹ After receiving no response from Cracker Barrel, NYCERS submitted a shareholder proposal requesting that Cracker Barrel add "sexual orientation" as a protected class to its non-discrimination policy.¹⁰⁰

Cracker Barrel sought to exclude the proposal from its proxy statement under the ordinary business operations exclusion by requesting a no-action letter.¹⁰¹ In its no-action letter response, the Commission not only agreed that the proposal could be excluded, but also outlined a new far-reaching standard under which future no-action letter requests regarding employment matters would be decided.¹⁰² The so-called "*Cracker Barrel Standard*"¹⁰³ stated that employment-based proposals¹⁰⁴ would be treated as ordinary business decisions even if they raised significant social policy issues and would therefore always be excludable by corporations.¹⁰⁵

⁹² *Id.*

⁹³ *Id.*

⁹⁴ The public backlash included protests, sit-ins, and boycotts at Cracker Barrel restaurants in several states. See Peter T. Kilborn, *Gay Rights Groups Take Aim at Restaurant Chain That's Hot on Wall Street*, N.Y. TIMES, Apr. 9, 1992, at A12.

⁹⁵ See Niebuhr, *supra* note 91.

⁹⁶ William Bunch, *City Pension Fund Puts Gay Filings on Chain's Menu*, NEWSDAY, Mar. 20, 1991, at 21.

⁹⁷ NYCERS is an "institutional investor[] that routinely submit[s] employment-related proposals to companies in which [it] owns stock." *New York City Employees' Ret. Sys. v. SEC*, 843 F. Supp. 858, 863 (S.D.N.Y. 1994) (*NYCERS I*), *rev'd*, 45 F.3d 7 (2d Cir. 1995).

⁹⁸ *Company Is Asked About Bias in Hiring*, N.Y. TIMES, Mar. 20, 1991, at B4.

⁹⁹ *Id.*

¹⁰⁰ *Cracker Barrel's Policy on Gays Faces Action by New York Fund*, WALL ST. J., Oct. 31, 1991.

¹⁰¹ See 17 C.F.R. § 240.14a-8(j) (2006); see also note 49 and accompanying text. For a discussion of the steps a corporation must follow in order to exclude a shareholder proposal for one of the substantive reasons provided in Rule 14a-8(i), see *supra* notes 57-62.

¹⁰² *Cracker Barrel Old Country Store, Inc., SEC No-Action Letter*, 1992 WL 289095, at *1-*2 (Oct. 13, 1992) [hereinafter 1992 Cracker Barrel Letter].

¹⁰³ See Uhlenbrock, *supra* note 27, at 280.

¹⁰⁴ The bright-line rule did not exclude proposals that related to executive compensation. *Id.* at *1.

¹⁰⁵ *Id.* The letter specifically stated that:

NYCERS challenged the no-action letter, first by unsuccessfully seeking reversal from the Commission,¹⁰⁶ and then by suing the Commission in the Southern District of New York.¹⁰⁷ NYCERS' suit argued that the *Cracker Barrel* Standard was unenforceable because the Commission did not subject it to the "notice and comment" period required by the Administrative Procedure Act ("APA") and because the Commission's interpretation was "arbitrary and capricious."¹⁰⁸

Under the APA, agencies such as the Commission must subject new or amended rules to a public "notice and comment" period unless, among other things, the rule is merely interpretive.¹⁰⁹ In addition, courts can reverse "arbitrary [and] capricious" rules¹¹⁰ unless "the plaintiffs have an adequate alternative legal remedy against someone else—a remedy that offers the same relief the plaintiffs seek from the agency."¹¹¹

NYCERS prevailed when the district court held the *Cracker Barrel* Standard invalid because it required a "notice and comment" period under the APA.¹¹² On appeal, however, the Second Circuit reversed the lower court, holding that the *Cracker Barrel* Standard did not have to determine whether the standard was "arbitrary and capricious" because it concluded that plaintiffs had "an effective alternative" of suing Cracker Barrel, and could raise its arbitrary and capricious argument in that suit.¹¹³ With its decision, the Second Circuit solidified the *Cracker Barrel* Standard's applicability to all shareholder proposals dealing with employment matters—at least for a while.

[T]he fact that a shareholder proposal concerning a company's employment policies and practices for the general workforce is tied to a social issue will no longer be viewed as removing the proposal from the realm of ordinary business operations of the registrant. Rather, determinations with respect to any such proposals are properly governed by the employment-based nature of the proposal.

Id.

¹⁰⁶ *Cracker Barrel Old Country Store, Inc., SEC No-Action Letter*, 1993 WL 11016, at *1 (Jan. 15, 1993).

¹⁰⁷ *New York City Employees' Ret. Sys. v. Sec. and Exch. Comm'n (NYCERS I)*, 843 F. Supp. 858, 863 (S.D.N.Y. 1994), *rev'd*, 45 F.3d 7 (2d Cir. 1995).

¹⁰⁸ *Id.*

¹⁰⁹ 5 U.S.C. § 553(b)-(c) (2006); *NYCERS I*, 843 F. Supp. at 872. The two other instances in which a rule is not required to undergo notice and comment are if the rule is "a statement of policy, or a rule regarding agency organization, procedure, or practice." *NYCERS I*, 843 F. Supp. at 872; *see also* 5 U.S.C. § 553(b)(3)(A).

¹¹⁰ 5 U.S.C. § 706(2)(A).

¹¹¹ *New York City Employee's Ret. Sys. v. SEC (NYCERS II)*, 45 F.3d 7, 14 (2d Cir. 1995).

¹¹² *NYCERS I*, 843 F. Supp. at 881. "The APA requires agencies to provide an opportunity for notice and comment prior to adoption or amendment of a rule, unless the rule is interpretive, a statement of policy, or a rule regarding agency organization, procedure or practice." *Id.* at 872 (citing 5 U.S.C. § 553(b)).

¹¹³ *NYCERS II*, 45 F.3d at 14.

3. The Ordinary Business Operations Test

In 1998, only six years after first announcing the *Cracker Barrel* Standard, the Commission killed it, returning instead to analyzing each no-action letter on a case-by-case basis.¹¹⁴ According to the Commission, “the relative importance of certain social issues relating to employment matters has reemerged as a consistent topic of widespread public debate.”¹¹⁵ The Commission also noted that many shareholders were interested in expressing their opinions to the corporations in which they invest regarding employment issues that raise social policy issues.¹¹⁶ Since 1998, the Commission no longer automatically restricts shareholders from submitting important employment-related proposals designed to protect minority employees.¹¹⁷ The Commission’s change in policy paved the way for the use of shareholder proposals’ as a non-traditional way to champion LGBT rights.

Even though proposals about LGBT non-discrimination are no longer automatically excludable, they are far from automatically includable. In order to determine whether a particular proposal will be excludable, the Commission released the two “principal considerations” under which the staff determines whether a proposal may be properly omitted from a company’s proxy statement.¹¹⁸ Both considerations involve subjective analysis.¹¹⁹

The first consideration involves the proposal’s subject matter, recognizing that “[c]ertain tasks are so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight.”¹²⁰ “Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers.”¹²¹

Importantly, the first consideration is also subject to the aforementioned exception for proposals that raise “significant social policy issues.”¹²² Therefore, even if a proposal concerned a subject matter fundamental management decision-making, it would not be excludable if it raised a significant social policy issue because it “transcend[s] the day-

¹¹⁴ See 1998 Adopted Changes Release, *supra* note 32, at 29,107-08.

¹¹⁵ *Id.* at 29,108.

¹¹⁶ See *id.*

¹¹⁷ See *id.* “Nearly all commenters from the shareholder community who addressed the matter supported the reversal of this position. Most commenters from the corporate community did not favor the proposal to reverse *Cracker Barrel* . . .” *Id.* (citations omitted).

¹¹⁸ *Id.* at 29,108.

¹¹⁹ Uhlenbrock, *supra* note 27, at 298.

¹²⁰ 1998 Adopted Changes Release, *supra* note 32, at 29,108.

¹²¹ *Id.*

¹²² *Id.*

to-day business matters and raise[s] policy issues so significant that it would be appropriate for a shareholder vote.”¹²³

The second consideration focuses on “the degree to which the proposal seeks to ‘micro-manage’ the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.”¹²⁴ The Commission suggested that a proposal would be properly omitted from proxy materials if it “involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies” but that the Commission’s determinations will be made on a “case-by-case basis” considering “factors such as the nature of the proposal and the circumstances of the company to which it is directed.”¹²⁵

Apache was decided under this two-part test.¹²⁶ Recall that the shareholder proposal submitted by The Funds listed ten principles to which it wanted Apache to adhere in its employment practices.¹²⁷ Judge Gray Miller recognized that the proposal *as a whole* sought to affect employment discrimination but found that three of its principles did not implicate employment discrimination.¹²⁸ Therefore, relying on the rule that “the [p]roposal must be read with all of its parts,” Judge Miller concluded that the proposal *as a whole* did not implicate a social policy issue.¹²⁹

Even though he already determined the case’s outcome—if the proposal does not raise a significant social policy issue, it is excludable under the ordinary business operations exclusion—the Judge addressed the second consideration.¹³⁰ He found that the proposal sought to “micromanage the company to an unacceptable degree” because shareholders would not be able to grasp the intricate workings of the company.¹³¹

¹²³ *Id.* The Commission’s example of a matter that raises a “sufficiently significant social policy issue[]” is “significant discrimination matters.” *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 29,108-09. For example, timing might raise a significant social policy issue where there is a great difference at issue or timing is of great importance. *See id.* at 29,109. The Commission also clarified that not “all proposals seeking detail, or seeking to promote time-frames or methods, necessarily amount[ed] to ‘ordinary business.’” *Id.*

¹²⁶ *Apache Corp. v. New York City Employees’ Ret. Sys.*, No. H-08-1064, 2008 WL 1821728, *4-*5 (S.D. Tex. Apr. 22, 2008).

¹²⁷ *Id.* at *1-*2; *see supra* notes 4-8 and accompanying text.

¹²⁸ *See Apache*, 2008 WL 1821728, at *6. Interestingly, Judge Miller seemed to recognize that the proposal—seeking LGBT non-discrimination in employment only—raised a significant social policy issue when he said that “[the last four] principles do not implicate the social policy underlying the Proposal.” *See id.*

¹²⁹ *Id.*

¹³⁰ *See id.*

¹³¹ *Id.*

III. SHAREHOLDER PROPOSALS SEEKING LGBT NON-DISCRIMINATION PROTECTIONS ARE SIGNIFICANT SOCIAL POLICY ISSUES

As discussed above, when a company seeks to omit a shareholder proposal under the ordinary business exclusion, the Commission's staff will use the two-part test outlined in the 1998 Release to determine whether the exclusion will apply.¹³² In contrast to the Commission's and Judge Miller's rulings in *Apache*, shareholder proposals seeking non-discrimination protections based on sexual orientation and gender identity and expression should not fall under Rule 14a-8(i)(7)'s ordinary business exclusion because they raise significant social policy issues upon which shareholders are able to make an informed judgment.

A. *LGBT Discrimination Is a Significant Social Policy Issue*

This section argues that workplace discrimination based on sexual orientation and gender identity and expression is a significant social policy issue that transcends day-to-day business matters and an issue to which the ordinary business exclusion should not apply.¹³³ First, this section discusses that the Commission recognizes that whether a particular issue raises a significant social policy changes with the changing social climate.¹³⁴ As a result, the Commission will reconsider its earlier determinations and rule that issues it once found were not indicative of significant social policy now rise to that category.¹³⁵ Consequently, the Commission's decisions on proposals for LGBT non-discrimination policies can similarly be reexamined.¹³⁶ It argues, second, that in light of the current social climate, LGBT non-discrimination protections should be regarded as a significant social policy issue.¹³⁷ Finally, this section argues that LGBT workplace discrimination can take many different forms, and therefore shareholder proposals seeking non-discrimination in areas that affect workplace treatment should also be exempted from the ordinary business exclusion.¹³⁸

¹³² See *infra* Part II.B.3.

¹³³ See *supra* note 123.

¹³⁴ See Statement of Informal Procedures for the Rendering of Staff Advice with Respect to Shareholder Proposals, Exchange Act Release No. 12,599, Investment Company Act Release No. 9344, 41 Fed. Reg. 29,989, 29,991 (July 7, 1976) [hereinafter July 1976 Release]. For a more detailed discussion, see *infra* Part III.A.1.

¹³⁵ 1998 Adopted Changes Release, *supra* note 32, at 29,108. For a more detailed discussion, see *infra* Part III.A.1.

¹³⁶ See *infra* note 141.

¹³⁷ See *infra* Part III.A.2.

¹³⁸ See *infra* Part III.A.2.

1. Significant Social Policies Emerge from Changing Social Attitudes

What is considered a significant social policy issue changes with time. The Commission stated that its “views on certain issues may change from time-to-time, in light of re-examination, new considerations, or changing conditions which indicate that its earlier views are no longer in keeping with the objectives of Rule 14a-8.”¹³⁹ Specifically, the Commission’s staff changes its positions to “reflect[] changing societal views . . . with respect to ‘social policy’ proposals involving ordinary business.”¹⁴⁰ This means that the fact that LGBT non-discrimination is not currently a significant social policy issue in the eyes of the Commission does not foreclose the possibility that the Commission will later make such a determination.

Historically, several shareholder proposal issues that were formerly excludable as ordinary business matters are now seen by the Commission as non-excludable significant social policy issues.¹⁴¹ The common thread through each example is that the issue raises a widespread public debate.

For example, the Commission reconsidered and now holds as non-excludable the issue whether to close or relocate a company facility.¹⁴² Such reconsideration was prompted when a shareholder submitted a proposal requesting that the Pacific Telesis Group study the effects of closing company facilities on the communities in which those facilities were located and to develop alternatives to alleviate the harm to those communities.¹⁴³ Pacific Telesis sought to exclude the proposal under the ordinary business operations exclusion because the Commission had consistently recognized that proposals dealing with closing company facilities were ordinary business matters.¹⁴⁴

¹³⁹ July 1976 Release, *supra* note 134, at 86, 605.

¹⁴⁰ 1998 Adopted Changes Release, *supra* note 32, at 29,108.

¹⁴¹ See, e.g., Reebok Int’l Ltd., SEC No-Action Letter, 1992 WL 55815, at *1 (Mar. 16, 1992) [hereinafter Reebok Letter]; Transamerica Corp., SEC No-Action Letter, 1990 WL 285806, at *1 (Jan. 10, 1990) [hereinafter Transamerica Letter]; Pac. Telesis Group, SEC No-Action Letter, 1989 WL 245523, at *1 (Feb. 2, 1989) [hereinafter Pacific Telesis Letter].

¹⁴² See Pacific Telesis Letter, *supra* note 141, at *1.

¹⁴³ *Id.*

¹⁴⁴ *Id.* (citing Gen. Elec. Co., SEC No-Action Letter, 1998 WL 43005 (Jan. 29, 1988)). The company also argued that even though the proposal sought a study, it still related to ordinary business operations. *Id.* (citing Exchange Act Release No. 20,091, 48 Fed. Reg. 38,218, 38,221, (1983)).

[The SEC staff’s former position was] that proposals requesting issuers to prepare reports on specific aspects of their business or to form special committees to study a segment of their business would not be excludable under [the ordinary business exclusion]. Because this interpretation raises form over substance and renders the provisions of [the ordinary business exclusion] largely a nullity, the Commission has determined to adopt the interpretative change set forth in the Proposing Release. Henceforth, the staff will consider whether the subject matter of the special report or the committee involves a

In its response, the Commission reconsidered its past treatment of this issue and concluded that proposals about closing company facilities could not be excluded if the proposals dealt “with the broad social and economic impact” of the closings.¹⁴⁵ The Commission held that these proposals now raise significant social policy issues because of the “heightened state and federal interest in the social and economic implications” of closing corporate facilities.¹⁴⁶

Another example of a reconsidered issue, which the Commission reexamined in two decisions, is executive compensation.¹⁴⁷ First, the Commission recognized “golden parachute” payments¹⁴⁸ as a significant social policy issue¹⁴⁹ when a shareholder submitted a proposal to Transamerica Corp. requesting that the corporation disallow such payments.¹⁵⁰ While the Commission had previously held that golden parachutes were ordinary business matters,¹⁵¹ it found these payments rose to matters of significant social policy because Internal Revenue Code interpretations had recently clarified the difference between golden parachute payments and ordinary compensation and because there was a current “public debate” about the implications of golden parachute contracts.¹⁵² After recognizing that golden parachute payments were a significant social policy issue, the Commission eventually concluded that all executive compensation was a significant social policy issue¹⁵³ because of the “widespread public debate” about the issue.¹⁵⁴

matter of ordinary business; where it does, the proposal will be excludable under [the ordinary business exclusion].

Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 20,091, 48 Fed. Reg. 38,218, 38,220-21 (Aug. 23, 1983) [hereinafter 1983 Adopted Changes Release]. Note that Rule 14a-8(c)(7) is the precursor to Rule 14a-8(i)(7). See 1998 Adopted Changes, *supra* note 32, at 29,120.

¹⁴⁵ Pacific Telesis Letter, *supra* note 141. The Commission’s staff noted that proposals dealing with the closing of specific corporate facilities would still be omitted as relating to ordinary business operations. See *id.*

¹⁴⁶ *Id.*

¹⁴⁷ See Reebok Letter, *supra* note 141, at *1; Transamerica Letter, *supra* note 141, at *1.

¹⁴⁸ Golden parachutes are payments that a corporate executive would receive if he or she were to lose his or her job and usually apply when there is a change in company ownership (as would be the case in a take-over). 19 AM. JUR. 2D *Corporations* § 2181 (2008).

¹⁴⁹ See Transamerica Letter, *supra* note 141, at *1.

¹⁵⁰ See *id.*

¹⁵¹ See *id.* The company also argued that the proposal could be excluded because it would violate state law (then Rule 14a-8(c)(2); now Rule 14a-8(i)(2)) and because it is contrary to the Commission’s Proxy Rules and Regulations (then Rule 14a-8(c)(3); now Rule 14a-8(i)(3)). *Id.* at *4-*5.

¹⁵² *Id.* at *1. The Commission’s staff noted that proposals about ordinary executive compensation would still be excludable as relating to ordinary business operations. *Id.*

¹⁵³ Reebok Letter, *supra* note 141, at *1.

¹⁵⁴ *Id.* at *1. In 1992, a Reebok shareholder submitted a proposal requesting that Reebok establish a “Compensation Committee” composed entirely of independent directors to “evaluate and establish executive compensation.” *Id.* Reebok sought to omit the proposal on the grounds that executive compensation was an ordinary business matter. See *id.* at *3-*4. The Commission reconsidered its position regarding executive and director compensation and determined that it was a significant social policy issue. *Id.* at *1.

2. “Changing Societal Views” and “Widespread Public Debate”

Issues relating to LGBT non-discrimination are currently some of the most-discussed social issues. Across the country, issues relating to sexual orientation and gender identity and expression have been part of the public debate for the last several years. The public debate centers on rights afforded (or taken away) from the LGBT community, including marriage rights (including the debate about the differences between civil unions, domestic partnerships, and marriage), rights incident to marriage (including hospital visitation, survivorship rights, etc.), legal non-discrimination protection (Civil Rights Act Protections), adoption rights, and hate-crime legislation. Not only are all of these issues matters of greater social policy debate, they are all matters of corporate policy, and thus are proper issues for shareholders to raise in proposals.

Changing societal values can be seen in the increased acceptance of LGBT individuals and non-discrimination protections¹⁵⁵ and in the increased visibility of the LGBT community in mainstream media and entertainment.¹⁵⁶ *Newsweek*'s public opinion polls show that support for every area of LGBT equity has increased through the years.¹⁵⁷ In addition, public polls also show a changing societal view of the LGBT community because support for every area of LGBT equality has increased through the years.¹⁵⁸ In 2008, 39% of Americans supported full same-sex marriage equality, up 6% from 2004.¹⁵⁹ But in 2008, 55% supported some type of alternative legal union, up 15% from 2004.¹⁶⁰ Support for same-sex couples' rights to adopt children also increased 8% to 53%.¹⁶¹ Finally, a whopping 73% of Americans support extending health insurance and other employee benefits to gays and lesbians, up 13% from 2004.¹⁶²

Increased acceptance of the LGBT community into mainstream media and entertainment also evidences the change in societal values.¹⁶³ Many of today's most popular television shows and movies feature LGBT characters that have developed characters that are not dissimilar in complexity from the show's heterosexual characters. Entertainment has

¹⁵⁵ See Jay Michaelson, *On Listening to the Kulturkampf, or, How America Overruled Bowers v. Hardwick, even though Romer v. Evans Didn't*, 49 DUKE L.J. 1559, 1600 (2000) (arguing “[c]hanges in social attitudes have already yielded important gains in gay civil rights generally”).

¹⁵⁶ See *id.*

¹⁵⁷ Arian Campo-Flores, *A Gay Marriage Surge*, NEWSWEEK WEB EXCLUSIVE, Dec. 5, 2008, available at <http://www.newsweek.com/id/172399> (last visited Jan. 29, 2009).

¹⁵⁸ See *id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See Michaelson, *supra* note 155 at 1600 (arguing that portrayal of LGBT characters in the media “suggest[s] a sea change in the way gay families function and are depicted in American cultural life”).

come a long way from the first gay on-screen kiss to having transgender characters.¹⁶⁴

Even though “[c]hanges in societal attitudes have already yielded important gains in [LGBT] civil rights generally,” there is still a very widespread public debate about the validity of LGBT non-discrimination protections.¹⁶⁵ Justice Antonin Scalia recognized this widespread public debate when he penned his dissent in *Romer v. Evans*,¹⁶⁶ referring to the debate as a “Kulturkampf” or culture war.¹⁶⁷ And as Professor Jay Michaelson put it, “it takes two to *kulturkampf*.”¹⁶⁸ The continued fight over non-discrimination protections show that the widespread public debate is ongoing.¹⁶⁹

No contemporary issue more clearly evidences the widespread public debate about LGBT rights than the issue of same-sex marriage equality. Same sex couples can get married in only four states to date, Massachusetts,¹⁷⁰ Connecticut,¹⁷¹ Iowa,¹⁷² and Vermont.¹⁷³ A few other states offer another form of recognition for same-sex couples such as civil unions or domestic partnerships,¹⁷⁴ but many gay-marriage advocates claim that these unions are merely separate and unequal alternatives to marriage.¹⁷⁵ Furthermore, same-sex couples are denied the 1,049 federal benefits that heterosexual married couples enjoy because federal law does not recognize same-sex marriages or unions.¹⁷⁶ In

¹⁶⁴ The first same-sex kiss on primetime television was between Kerr Smith and Adam Kauffman on “Dawson’s Creek” in 2000. Don Chareunsky, *EXTRA: The TV History of Gay Liplocks*, EXTRA, May 24, 2000, available at http://www.hollywood.com/news/EXTRA_The_TV_History_of_Gay_Liplocks/312388. The first transgender character was on the soap-opera “All My Children” in 2006. Dan J. Kroll, *AMC introduces daytime’s first transgender character*, Soapcentral.com, Nov. 29, 2006, available at <http://www.soapcentral.com/amc/news/2006/1127-transgender.php?printonly=yes>.

¹⁶⁵ Michaelson, *supra* note 155 at 1600-03; *id.* at 1602 (“Gay men and lesbians are still the object of intense social hostility . . .”).

¹⁶⁶ 517 U.S. 620 (1996).

¹⁶⁷ *Id.* at 636 (Scalia, J., dissenting).

¹⁶⁸ Michaelson, *supra* note 155 at 1601.

¹⁶⁹ See generally Suzanne B. Goldberg, *Intuition, Morals, and the Legal Conversation About Gay Rights*, 32 NOVA L. REV. 523 (2008).

¹⁷⁰ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (holding that Massachusetts could not deny marriage to same-sex couples).

¹⁷¹ *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (holding that marriage could not be withheld from same-sex couples).

¹⁷² *Varnum v. Brien*, No. 07-1499, slip op. at 1 (Iowa Apr. 3, 2009) (holding an Iowa statute limiting marriage to one man and woman unconstitutional).

¹⁷³ Abby Goodnough & Anahad O’Connor, *Vermont Legislature Legalizes Same-Sex Marriage*, N.Y. TIMES, Apr. 8, 2009.

¹⁷⁴ Human Rights Campaign, *Relationship Recognition in the U.S.*, http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf (last visited Apr. 7, 2009).

¹⁷⁵ See generally Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont’s Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 VT. L. REV. 113 (2000) (arguing that civil unions will never be equal to marriage unless and until they are recognized by all other states and the federal government).

¹⁷⁶ Letter from Barry R. Bedrick, Assoc. Gen. Counsel, to Henry J. Hyde, Chairman, Comm. on the Judiciary, House of Representatives (Jan. 31, 1997), available at <http://www.gao.gov/archive/1997/og97016.pdf>.

addition, same-sex unions performed in states that provide for them do not have to be recognized by other states,¹⁷⁷ and currently New York State is the only state that does not recognize same-sex marriage that will recognize a same-sex marriage performed out-of-state.¹⁷⁸

Marriage equality has taken a main stage in elections in the last fifteen years.¹⁷⁹ Public referendums amending state constitutions to define marriage as between one man and one woman have swept the country; to date, forty-two states' constitutions or laws define marriage in such way.¹⁸⁰ Each of these elections involved frequent public debate concerning the rights of LGBT citizens, and the 2008 fight over California's Proposition 8, a ballot measure that amended California's constitution to prohibit same-sex marriage, is a perfect example. The campaign for Proposition 8 was heated, with spending on each side totaling more than \$75 million, making it "one of the most expensive ballot measures ever waged."¹⁸¹ Even after the measure passed, the social debate continued. New activists emerged to mobilize supporters to repeal the ban¹⁸² and supporters of LGBT rights turned out in massive numbers to protest its passage in cities across the country.¹⁸³ In California, business owners complained about losing a substantial amount of same-sex marriage business in the midst of a recession,¹⁸⁴ while same-sex marriage related business in Massachusetts was projected in 2008 to result in 330 additional jobs and a \$111 million economic boost for the state over the next three years.¹⁸⁵ Finally, Reverend Rick Warren, the

¹⁷⁷ See 28 U.S.C. § 1738C (2006).

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Id.

¹⁷⁸ *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 742 (N.Y. App. Div. 2008). The Washington D.C. Council preliminarily voted to also recognize same-sex marriages performed elsewhere, but the D.C. Council's decision is subject to approval by Congress. Nikita Stewart & Tim Craig, *D.C. Council Votes to Recognize Gay Nuptials Elsewhere*, WASH. POST, Apr. 8, 2009, at A1.

¹⁷⁹ See, e.g., Adam Nagourney, "Moral Values" Carried Bush, Rove Says, N.Y. TIMES, Nov. 10, 2004, at A20.

¹⁸⁰ Jesse McKinley & Laurie Goodstein, *Bans in 3 States On Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1; Human Rights Campaign, *Statewide Marriage Prohibitions*, http://www.hrc.org/documents/marriage_prohibitions_2009.pdf (last visited Apr. 7, 2009).

¹⁸¹ McKinley & Goodstein, *supra* note 180.

¹⁸² Jesse McKinley, *Marriage Ban Inspires New Wave of Gay Rights Activists*, N.Y. TIMES, Dec. 10, 2008, at A23.

¹⁸³ Jesse McKinley, *Across U.S., Big Rallies for Same-Sex Marriage*, N.Y. TIMES, Nov. 16, 2008, at A25. Over 4000 people protested in New York, 9000 in Los Angeles, 900 in Washington D.C., 1000 in Las Vegas, and 200 in Little Rock. *Id.*

¹⁸⁴ Jesse McKinley, *Demise of Same-Sex Weddings Disheartens Businesses*, N.Y. TIMES, Nov. 7, 2008, at A20.

¹⁸⁵ Jason Szep, *Two U.S. States See Boost from Gay Weddings*, REUTERS, Nov. 28, 2008.

pastor chosen to deliver the invocation at President Obama's inauguration, was harshly criticized for his support of Proposition 8.¹⁸⁶

The debate over gay adoption also evidences the public debate surrounding LGBT rights. For example, in 2008, Arkansas voters approved a ballot measure to limit adoptions to only married couples who live together.¹⁸⁷ This measure was created with the intent of prohibiting gay and lesbian adoption.¹⁸⁸ On the other side of the debate, a Florida Circuit Court held that Florida's explicit ban on gay and lesbian adoption was unconstitutional.¹⁸⁹

The debate over employment discrimination also is indicative of the public debate about LGBT rights. There is currently no federal law banning discrimination on the basis of sexual orientation or gender identity. Only twelve states provide such protection.¹⁹⁰ That means that in a whopping eighteen states anyone can lose their job simply because they are lesbian, gay, bisexual, or transgendered.¹⁹¹ Corporate America, however, has taken the lead in addressing the issue of LGBT non-discrimination. Of the Fortune 500 companies, 88% provide protection against discrimination based on sexual orientation and 25% provide it based on gender identity.¹⁹²

3. All LGBT Non-Discrimination Proposals Raise Significant Social Policy Issues

Since the Commission analyzes no-action letter requests from companies seeking to exclude proposals from their proxy statements on a case-by-case basis, past no-action letters are not binding on future Commission determinations.¹⁹³ But since they are interpretations of the Commission's staff, they are still an important indication of what the staff is thinking.¹⁹⁴ In addition, proposals such as the one in *Apache*¹⁹⁵

¹⁸⁶ See Jeff Zeleny & David D. Kirkpatrick, *Obama's Choice of Pastor Creates Furor*, N.Y. TIMES, Dec. 20, 2008, at A19.

¹⁸⁷ Robbie Brown, *Antipathy Toward Obama Seen as Helping Arkansas Limit Adoption*, N.Y. TIMES, Nov. 9, 2008, at A26.

¹⁸⁸ *Id.*

¹⁸⁹ *In re Adoption of Doe*, 2008 WL 5006172, at *29 (Fla. Cir. Ct. Nov. 25, 2008).

¹⁹⁰ Human Rights Campaign, *Statewide Employment Law & Policies*, http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf (last visited Aug. 21, 2008). Twenty additional states prohibit discrimination based solely on sexual orientation, not gender identity. *Id.*

¹⁹¹ See *id.*

¹⁹² HUMAN RIGHTS CAMPAIGN, *STATE OF THE WORKPLACE 22 (2006-2007)*, available at http://www.hrc.org/documents/State_of_the_Workplace.pdf.

¹⁹³ "It should be recognized that no-action . . . responses by the staff are subject to reconsideration and should not be regarded as precedents binding on the Commission." Procedures Regarding Public Availability of Request for No-Action and Interpretive Letters and Responses, Securities Act Release No. 5095, Exchange Act Release No. 9006, Investment Company Act Release No. 6220, 35 Fed. Reg. 17,779, 17,779 (Nov. 19, 1970).

¹⁹⁴ See *supra* note 51 and accompanying text.

¹⁹⁵ No. H-08-1064, 2008 WL 1821728 (S.D. Tex. Apr. 22, 2008).

sometimes request that non-discrimination extend to all areas of the business, including charitable contributions, advertising, marketing, and sale or purchase of goods and services.¹⁹⁶ Since all of these specific non-discrimination proposals raise significant social policy issues, all proposals that request LGBT non-discrimination protections are significant social policy issues and corporations should be required to include them in the corporate proxy materials.

Proposals that deal with charitable contributions, a classic matter of ordinary business operations, have been recognized by the Commission's staff as raising significant social policy issues.¹⁹⁷ In 2008, a Ford shareholder submitted a proposal requesting that Ford "list the recipients of charitable contributions of \$5000 or more on [its] website."¹⁹⁸ Ford sought to exclude the proposal under the ordinary business exclusion because the proposal was about "marketing and public relations as they relate to charitable donations."¹⁹⁹ The Commission, however, did not agree with Ford's argument²⁰⁰ and the proposal was subsequently included in Ford's proxy materials.

The Commission has also recognized that a proposal requesting that a corporation purchase from minority and female-owned suppliers could not be excluded under the ordinary business operations exclusion because "questions with respect to equal employment opportunity . . . involve policy decisions beyond those personnel matters that constitute the Company's ordinary business."²⁰¹

Finally, there is also widespread public debate about sexual orientation and advertising. Individuals and organizations on both sides of the issue closely follow which companies advertise to the LGBT community.²⁰² These activists alert their supporters, often resulting in a national debate about certain companies' advertising policies.²⁰³ The

¹⁹⁶ See Apache No-Action Letter, *supra* note 8.

¹⁹⁷ See, e.g., Ford Motor Co., SEC No-Action Letter, 2008 WL 527445 (Feb. 25, 2008) [hereinafter Ford No-Action Letter].

¹⁹⁸ *Id.* Thomas Strobhar, the shareholder who submitted this proposal, *id.*, is an active shareholder. In 2008, he submitted this same proposal to JPMorgan Chase & Co. and American Express Co. See JPMorgan Chase & Co., SEC No-Action Letter, 2008 WL 485460, at *12-*13 (Feb. 20, 2008); American Express Co., SEC No-Action Letter, 2007 WL 4555619 (Dec. 19, 2007). In both of those instances, Mr. Strobhar withdrew his proposal. See JPMorgan Chase & Co., SEC No-Action Letter, 2008 WL 485460, at *1 (Feb. 20, 2008); American Express Co., SEC No-Action Letter, 2007 WL 4555619 (Dec. 19, 2007).

¹⁹⁹ Ford No-Action Letter, *supra* note 197.

²⁰⁰ *Id.*

²⁰¹ Dayton Hudson, SEC No-Action Letter, 1991 WL 178560, at *1 (Mar. 8, 1991).

²⁰² An example of such an organization is the Gay & Lesbian Alliance Against Defamation (GLAAD). See GAY AND LESBIAN ALLIANCE AGAINST DEFAMATION, GLAAD WAS THERE 2007, at 2 (2008), available at <http://www.glaad.org/Document.Doc?id=7>.

²⁰³ See, e.g., Press Release, John Ireland, Project Coordinator, GetToKnowUsFirst.org, Super Bowl Ad Featuring Gay Family Rejected by KNBC (Feb. 2, 2009), available at http://www.glaad.org/media/archive_detail.php?id=4954 (reporting that a public service announcement set to air during the Super Bowl was rejected by an NBC affiliate in California).

national debate is usually expressed when activists instigate company boycotts.²⁰⁴

B. LGBT Non-Discrimination Proposals Do Not Seek to Micromanage Corporations

In addition to raising significant social policy issues, LGBT non-discrimination proposals do not exhibit any characteristics of micromanagement. The second consideration the Commission uses to determine if the ordinary business operations exclusion will apply to a particular proposal is the degree to which a proposal “seeks to micromanage the company.”²⁰⁵ The Commission explicitly stated that proposals will be reviewed on a case-by-case basis, but “some proposals may intrude unduly on a company’s ‘ordinary business’ operations by virtue of the level of detail that they seek.”²⁰⁶

When introducing the test, the Commission cited four examples of shareholder proposals that sought to micromanage a corporation.²⁰⁷ Each of these four proposals differs radically from a proposal that merely seeks protection of LGBT rights, such as those that The Funds proposed that Apache adopt in 2008. Since LGBT non-discrimination proposals do not micromanage in the way that the Commission intended, companies should be required to include these proposals in their proxy materials.

The first proposal that the Commission cited as an example of micromanagement was submitted to Capital Cities/ABC, Inc. (“Capital Cities”).²⁰⁸ There, the shareholders requested that the corporation create a report for shareholders detailing several of the corporation’s affirmative action policies.²⁰⁹ Among other things, the proposal requested “[a] summary of Affirmative Action Programs and timetables to improve performance . . . and a description of major problems in meeting the network’s goals.”²¹⁰ The Commission agreed with Capital Cities that the proposal could be omitted from Capital Cities’ proxy materials under the ordinary business operations exclusion.²¹¹

The Commission’s second example was a proposal submitted to Templeton Dragon Fund, Inc. (“Templeton”).²¹² The proposal requested that Templeton’s board create a corporate policy that required them to “make annual offers to repurchase at least 5%, and up to 25% of its

²⁰⁴ See, e.g., Jeremy W. Peters, *Still Advertising to Gays, Ford Under Boycott Again*, N.Y. TIMES, Mar. 15, 2006, at C5.

²⁰⁵ 1998 Adopted Changes Release, *supra* note 32, at 29,109.

²⁰⁶ *Id.*

²⁰⁷ 1997 Proposed Changes Release, *supra* note 74, at 50,689 n.79.

²⁰⁸ Capital Cities/ABC, Inc., SEC No-Action Letter, 1991 WL 178633, at *1 (Apr. 4, 1991).

²⁰⁹ *Id.*

²¹⁰ *Id.* at *6.

²¹¹ *Id.* at *1.

²¹² Templeton Dragon Fund, Inc., SEC No-Action Letter (June 11, 1997).

outstanding shares at net asset value commencing with an initial repurchase of 25% of its outstanding shares.”²¹³ The Commission agreed with Templeton that it could exclude the proposal under the ordinary business operations because the proposal was too intricate.²¹⁴

Third, the Commission cited a proposal requesting that Burlington Northern Railroad report “what corporate funds have been expended to date on [the development of a new technology] . . . specifically what has been accomplished in the way of hardware and software development, systems testing, added personnel requirements for future maintenance,” the status of the technological development, the corporation’s “intent[ions] to continue the project,” the cost at which it intends to continue the project, and when the corporation expects the project to be completed.²¹⁵ Again, the Commission agreed with Burlington Northern that the proposal could be excluded under the ordinary business operations exclusion.²¹⁶

Finally, the Commission’s last example of micromanagement was a proposal to Du Pont requesting that the corporation “[r]apidly accelerate plans to phase out [chlorofluorocarbon (“CFC”)] and halon production . . . [and] . . . report to shareholders within six months . . . research and development program expenditures which dramatically increase efforts to find CFC and halon substitutes.”²¹⁷ The Commission agreed with Du Pont that the proposal could be excluded from Du Pont’s proxy materials because the proposal related to the corporation’s ordinary business operations.²¹⁸ In addition, the D.C. Circuit Court clarified, in an opinion written by soon-to-be Supreme Court Justice Ruth Bader Ginsburg, that the problem with the proposal was that it “relates not to *whether* CFC production should be phased out, but *when* the phase out should be completed.”²¹⁹

In contrast to the examples of shareholder micromanagement, proposals such as The Fund’s proposal to Apache merely ask that the corporation include a classification of people to its already existing non-discrimination policy. The proposals above either provide detailed instructions to corporate management or set specific timelines in which management must complete the request. Unlike the Capital Cities proposal, non-discrimination proposals do not ask for the corporation to provide a report to shareholders, especially one that requires summaries, tables, and descriptions. Unlike the Templeton proposal, non-discrimination proposals do not specify percentages, limits, or

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Burlington Northern Santa Fe Corp., SEC No-Action Letter, 1997 WL 33742 (Jan. 22, 1997).

²¹⁶ *Id.*

²¹⁷ *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 417 n.1 (D.C. Cir 1992).

²¹⁸ *Id.* at 418.

²¹⁹ *Id.* at 427.

thresholds, instead they merely request that the corporation not discriminate. Unlike the Burlington Northern proposal, non-discrimination proposals do not ask for information regarding the use of corporate funds, specific statuses of projects, management intentions, or management expectations. Finally, unlike the Du Pont proposal, non-discrimination proposals do not ask for the corporation to complete the proposal within a certain time period or provide corporate expenditure reports.

Unlike the Commission's examples of micromanagement, non-discrimination proposals are not complicated. They do not seek to impose time limitations, nor are they intricate. These proposals are simple and straightforward. Therefore, shareholders should be able and entitled to review and vote on these proposals.

IV. CONCLUSION

Shareholders can use the shareholder proposal process provided in the Securities Exchange Act of 1934 to suggest that the corporations in which they invest add LGBT non-discrimination policies. In response, the corporations can attempt to exclude the proposal from their proxy materials under the ordinary business operations exclusion. Shareholder proposals that seek LGBT non-discrimination protections should never be excludable because they raise significant social policy issues and do not seek to micromanage the corporation.

American society's acceptance of the LGBT community has been increasing and it is clear that societal views towards LGBT rights have been changing, too. These changing societal views have also contributed to the public debate about LGBT rights. Moreover, recent political and legal events also evidence the public debate. Finally, proposals seeking LGBT rights do not seek to micromanage corporations; they are straightforward and simple.

If the Commission expanded the significant social policy exception to LGBT non-discrimination policies, concerned shareholders would be better able to influence corporations to recognize the value of all employees. But even without the significant social policy's help, activist shareholders are still successful. As mentioned above, many corporations faced with these proposals acquiesce and add non-discrimination protection.

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