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On Procedural Grounds, the 5th Circuit Rules In SEC's Favor On A Shareholder Proposal; Looking Ahead to Shareholder Proposals Under the Incoming Republican Administration

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Last month, the 5th U.S. Court of Appeals ruled in the SEC's favor in a lawsuit brought by the National Center for Public Policy Research (the "Center"). The Center had submitted a shareholder proposal to The Kroger Company seeking to address what the Center described as "blatant leftwing actions" and seeking a report on the risks of not including "viewpoint" and "ideology" from its EEO policy. Kroger sought SEC no-action concurrence that it could exclude the proposal from its proxy materials based on the "ordinary business" exclusion under Rule 14a-8, and the staff concurred that the proposal could be excluded. The Center filed suit against the SEC challenging its no-action position as "arbitrary and capricious." The court dismissed the lawsuit for lack of jurisdiction, on grounds that it was moot (Kroger included the proposal in its proxy materials) and on grounds that a no-action position is not a final agency order reviewable by the court, at least absent completion of an appeal to the Commission.

What seems most interesting about this case is not the court's holding, but the claim by the plaintiff and by an organization that submitted an *amicus* brief that the SEC staff had disproportionately expressed no-action positions unfavorably to religious and conservative shareholder proposals. In particular, in applying the "significant social policy" exception to the "ordinary business" exclusion, the *amicus* brief argues that "allowing government officials to assess the 'significance' of speech is a recipe for viewpoint discrimination and actions that skew the marketplace of ideas."

This would not be the first time that the SEC and its staff are criticized for their positions in administering the shareholder proposal rule. Other than the observation that the rule and the types of proposals it covers are constantly evolving, and that some proposals are hotly debated issues of the day, it is hard to predict what the future holds for Rule 14a-8. The SEC staff has regularly published “staff legal bulletins” on Rule 14a-8 interpretations and procedures, but it has been 25 years since the rule has been formally amended by the Commission. More generally, the current nominee for SEC Chairman has criticized the agency’s recent administration of Rule 14a-8 and some have speculated that, if confirmed, he will seek to amend to rule to curtail the scope of proposals that companies are required to include in their proxy materials.

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