



DIVISION OF
CORPORATION FINANCE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

March 18, 2024

Scott Lesmes
Morrison & Foerster LLP

Re: Boyd Gaming Corporation (the "Company")
Incoming letter dated December 29, 2023

Dear Scott Lesmes:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by Trinity Health and co-filer for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal requests the board commission and disclose a report on the potential cost savings through the adoption of a smokefree policy for Company properties.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal transcends ordinary business matters and does not seek to micromanage the Company.

Copies of all of the correspondence on which this response is based will be made available on our website at <https://www.sec.gov/corpfin/2023-2024-shareholder-proposals-no-action>.

Sincerely,

Rule 14a-8 Review Team

cc: Catherine M. Rowan
Trinity Health

Writer's Direct Contact
+1 (202) 887-1585
SLesmes@mofocom

December 29, 2023

VIA ONLINE SHAREHOLDER PROPOSAL PORTAL

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: *Boyd Gaming Corporation*
Shareholder Proposal of Trinity Health and the American Nonsmokers' Rights
Foundation
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

We submit this letter on behalf of our client, Boyd Gaming Corporation, a Nevada corporation (the “Company”), which requests confirmation that the staff (the “Staff”) of the Division of Corporation Finance of the U.S. Securities and Exchange Commission (the “Commission”) will not recommend enforcement action to the Commission if, in reliance on Rule 14a-8 under the Securities Exchange Act of 1934 (the “Exchange Act”), the Company omits the enclosed shareholder proposal (the “Proposal”) submitted by Trinity Health and the American Nonsmokers’ Rights Foundation (the “Proponents”) from the Company’s proxy materials for its 2024 Annual Meeting of Shareholders (the “2024 Proxy Materials”).

Pursuant to Rule 14a-8(j) under the Exchange Act, we have:

- submitted this letter to the Staff no later than eighty (80) calendar days before the Company intends to file its definitive 2024 Proxy Materials with the Commission; and
- concurrently sent copies of this correspondence to the Proponents.

Copies of the Proposal, the Proponents’ cover letters submitting the Proposal, and other correspondence relating to the Proposal are attached hereto as Exhibit A.

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Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) (“SLB 14D”) provide that shareholder proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Commission or the Staff. Accordingly, if the Proponents elect to submit additional correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

I. THE PROPOSAL

On November 21, 2023, the Company received letters from the Proponents containing the Proposal for inclusion in the Company’s 2024 Proxy Materials. The Proposal reads as follows:

Resolved: Shareholders request the Board of Directors commission and disclose a report on the potential cost savings through the adoption of a smokefree policy for Boyd Gaming properties. The report, prepared at reasonable cost and omitting confidential and proprietary information, should be published within six months following the 2024 shareholders meeting.

Whereas: The U.S. Surgeon General released a landmark report in 2006 stating that there is no safe level of exposure to secondhand smoke. Tobacco use and secondhand smoke exposure kills nearly 500,000 Americans every year. For the gaming industry, workers on casino floors are largely people of color and women; lack of access to smokefree air can deepen existing disparities in health outcomes.

The COVID-19 pandemic changed long-held business assumptions across many industries. For the gaming industry, customers became much more sensitive to indoor air quality and how such air affects their health.

While our Company may have efforts to address indoor air quality, the American Society of Heating, Refrigerating and Air-Conditioning Engineers states: “There is no currently available or reasonably anticipated ventilation or air cleaning system that can adequately control or significantly reduce the health risks of environmental tobacco smoke to an acceptable level.”

As independent researchers C3 Gaming found in analyzing revenue performance in several competitive casino markets, smokefree casinos, for the first time, generated more revenue: “Data from multiple jurisdictions clearly indicates that banning smoking no longer causes a dramatic drop in gaming revenue. In fact, non-smoking properties appear to be performing better than their counterparts that continue to allow smoking.”

There are potential business risks to allowing indoor smoking in Boyd Gaming properties, from higher employee health insurance premiums (when

compared with casinos that don't permit indoor smoking), greater maintenance costs, and deterring a significant number of potential visitors who won't visit a casino due exposure to tobacco smoke (87% of the American public does not smoke).

Shareholders have no guidance as to the costs our Company is bearing for continuing to allow indoor smoking, nor has the Company disclosed the social and environmental costs and risks imposed on its stakeholders.

Parx Casino's Chief Marketing Officer told the Play Pennsylvania website in February 2023 that since the casino went smokefree, Parx has seen a positive effect on the health and morale of employees and did not increase health insurance premiums: "Frankly, we are starting to see health costs go down.... What's been interesting to me, is a lot of our smoking guests have actually said things like, 'I never realized how smoky and annoying it was. I really don't mind walking 50 feet out to the smoking patio.'"

New customer preferences require an examination of the status quo in which smoking is allowed in gaming properties around the country. We believe our Company could enhance its ESG initiatives by conducting the report that our proposal requests. We urge Boyd Gaming shareholders to vote in favor of this proposal.

II. EXCLUSION OF THE PROPOSAL

a. Basis for Excluding the Proposal

As discussed more fully below, the Company believes it may properly omit the Proposal from its 2024 Proxy Materials in reliance on Rule 14a-8(i)(7) of the Exchange Act ("Rule 14a-8(i)(7)"), as the Proposal deals with matters related to the Company's ordinary business operations.

b. The Proposal May Be Omitted in Reliance on Rule 14a-8(i)(7) Because the Proposal Deals with Matters Relating to the Company's Ordinary Business Operations

Rule 14a-8(i)(7) permits the omission of a shareholder proposal dealing with matters relating to a company's "ordinary business operations." According to the Commission's release accompanying the 1998 amendments to Rule 14a-8, the underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting." Release No. 34-40018 (May 21, 1998) (the "1998 Release").

In the 1998 Release, the Commission identified the two central considerations underlying the general policy for the ordinary business exclusion. The first consideration relates to the subject matter of the proposal. The Commission stated 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.” 1998 Release. The term “ordinary business” is rooted in the fundamental “corporate law concept providing management with flexibility in directing certain core matters involving the company’s business and operations.” *Id.* (citing Release No. 12999 (Nov. 22, 1976)). The second consideration relates to 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.” *Id.*; *see also* Staff Legal Bulletin No. 14L (Nov. 3, 2021) (“SLB 14L”).

As the Commission noted in the 1998 Release, proposals relating to ordinary business matters are distinguishable from those “focusing on sufficiently significant social policy issues,” which generally are not excludable under Rule 14a-8(i)(7) because “the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.” The ordinary business exception therefore “recognize[s] the board’s authority over most day-to-day business matters,” while at the same time “preserving shareholders’ right to bring important issues before other shareholders by means of the company’s proxy statement.” *See* SLB 14L, Part B.2. However, it is well established that a proposal that seeks to micromanage a company’s business operations is excludable under Rule 14a-8(i)(7) regardless of whether the proposal raises a “significant social policy issue.” *See* Staff Legal Bulletin No. 14E (Oct. 27, 2009) (“SLB 14E”), at note 8, citing the 1998 Release for the standard that “a proposal [that raises a significant policy issue] could be excluded under Rule 14a-8(i)(7), however, if it 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.”

Framing a shareholder proposal in the form of a request for a report does not change the nature of the proposal. The Commission has stated that a proposal requesting the dissemination of a report may be excludable under Rule 14a-8(i)(7) if the subject matter of the report is within the ordinary business of the issuer. *See* Exchange Act Release No. 20091 (Aug. 16, 1983) (the “1983 Release”); *see also Johnson Controls, Inc.* (Oct. 26, 1999) (“[Where] the subject matter of the additional disclosure sought in a particular proposal involves a matter of ordinary business... it may be excluded under [R]ule 14a-8(i)(7)”) and *Netflix, Inc.* (Mar. 14, 2016) (concurring with the exclusion of a proposal for a public report describing risks related to offensive and inaccurate portrayals of Native Americans, American Indians and other Indigenous Peoples, noting that the underlying subject matter of the requested report related to “the nature, presentation and content of programming and film production”).

i. The Proposal May Be Omitted Because it Seeks to Micromanage the Company

It is the Company’s view that the Proposal may be properly omitted in reliance on Rule 14a-8(i)(7) because the Staff has repeatedly recognized that a proposal that seeks to micromanage the determinations of a company’s management regarding day-to-day decisions is excludable under Rule 14a-8(i)(7) as a component of “ordinary business.”

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The Proposal requests that the Company disclose a report on the potential cost savings through the adoption of a smokefree policy for the Company's properties for reasons including the assertion that "[s]hareholders have no guidance as to the costs our Company is bearing for continuing to allow indoor smoking, nor has the Company disclosed the social and environmental costs and risks imposed on its stakeholders." As noted above, the Commission has long held that proposals requesting a report are evaluated by the Staff by considering the underlying subject matter of the proposal when applying Rule 14a-8(i)(7). *See* the 1983 Release; *see also* SLB 14E. The underlying purpose of the report sought in the Proposal is the implementation of a smokefree policy for all of the Company's properties. The fact that the Proposal calls for a report assessing the cost savings does not change the underlying subject matter of the Proposal. A proposal that limits something as core to the Company's business as the management of its place of business and the accommodations that the Company may provide its customers, is by definition micromanagement in areas best left to management in the ordinary course.

Explaining the standard, the Commission noted in the 1998 Release that consideration of complex matters upon which shareholders could not make an informed judgment "may come into play in a number of circumstances, such as where the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies" (footnote omitted). Here, the Proposal intends for shareholders to step into the shoes of management and oversee the environmental, social and financial risks to the Company associated with complex management of its properties as it relates to the Company's smoking policies. It does not merely request that environmental, social and financial concerns be considered when managing the Company's places of business; instead, the underlying subject matter calls for the implementation of a smokefree policy for all of the Company's properties. The Proposal implicates precisely the circumstances contemplated by the Commission in determining when a proposal may be omitted — it involves both "intricate detail" (the complex decisions regarding how best to manage the Company's properties and the accommodations the Company provides to its customers, including whether or not to implement a smokefree policy) and the imposition of "specific ... methods for implementing complex policies" (the adoption of a smokefree policy for all of the Company's properties).

In this case, the Proposal involves exactly the type of day-to-day business operations that the 1998 Release indicated are too impractical and complex to subject to direct shareholder oversight. The smoking policy for each of the Company's properties is impacted by a wide range of business considerations, including the tastes and preferences of customers, local practices and regulations, policies of competitors that are often located nearby the Company's properties, the effectiveness of airflow technology solutions, and considerations of other alternative approaches. Balancing such interests is a complex issue that shareholders as a group lack the business expertise and knowledge of the hospitality and gaming industry upon which to make an informed judgment. Furthermore, the policies that the Company's management puts in place with respect to its properties have a direct impact on the Company's customer base and, by extension, the Company's financial performance. Adopting a Company-wide smokefree policy as contemplated by the Proposal has competitive implications, as customers who wish to smoke while gaming could consider patronizing a competitor. Given the significant number of competitors that permit

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smoking, implementation of the Proposal could adversely impact the Company's gaming revenues and consequently reduce shareholder value.

The Staff's reasoning in concurring with the exclusion of the proposal in *The Kroger Co.* (Apr. 25, 2023), applies to the circumstances here. In *Kroger*, the company received a proposal that would have required the company to give purchase preference within their supply chain to certain suppliers and to suspend purchases from suppliers not complying with the Fair Food code of conduct. Kroger argued that the selection of suppliers and management of supplier relationships was a complex process that shareholders were not in a position to make an informed judgment about and that the proposal sought to substitute shareholders' judgment for management's existing practices and processes. The Staff concurred with the exclusion of the proposal, noting the proposal sought "to micromanage 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." See also *The Wendy's Company* (Mar. 2, 2017) (concurring with the exclusion of a proposal substantially similar to that in *Kroger, supra*, on the same basis); *Deere & Company* (Jan. 3, 2022) (concurring with the exclusion of a proposal for the company to publish employee training materials as probing too deeply into matters of a complex nature given the fact that decisions concerning internal diversity equity and inclusion decisions are multi-faceted); *EOG Resources, Inc.* (Feb. 26, 2018, recon. denied Mar. 12, 2018) (concurring with the exclusion of a proposal as micromanagement where the proposal requested the company adopt company-wide, quantitative, time-bound targets for reducing greenhouse gasses despite the company having already balanced multiple factors in making drilling decisions); *SeaWorld Entertainment, Inc.* (Apr. 20, 2021) (concurring with the exclusion of a proposal seeking a report on specific changes to the company's business to address animal welfare concerns); and *SeaWorld Entertainment, Inc.* (Mar. 30, 2017, recon. denied Apr. 17, 2017) (concurring with the exclusion of a proposal requesting the replacement of live orca exhibits with virtual reality experiences as "seek[ing] to micromanage 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.") As with the letters cited above, the Proposal addresses complex matters upon which shareholders, as a group, are not in a position to make an informed judgment.

Additionally, in applying the micromanagement prong of Rule 14a-8(i)(7), the Staff consistently has concurred that shareholder proposals attempting to micromanage a company by providing a specific method for implementing a proposal as a substitute for the judgment and discretion of management are excludable under Rule 14a-8(i)(7). For example, in *Amazon.com, Inc.* (Apr. 7, 2023, recon. denied Apr. 20, 2023), the Staff concurred with the exclusion of a proposal for the company to measure and disclose scope 3 GHG emissions from its full value chain. In its reply, the Staff stated that the proposal sought to micromanage the company by "imposing a specific method for implementing a complex policy disclosure without affording discretion to management." See also *Amazon.com Inc.* (Apr. 3, 2019) (concurring with the exclusion of a proposal requesting human rights impact assessments for food products sold as micromanagement for "seeking to impose specific methods for implementing complex policies in place of the ongoing judgments of management as overseen by its board of directors") and *JPMorgan Chase & Co.* (Mar. 30, 2018) (concurring with the exclusion of a proposal that

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requested a report on the reputational, financial and climate risks associated with project and corporate lending, underwriting, advising and investing of tar sands projects as micromanagement for “seeking to impose specific methods for implementing complex policies”).

Here, too, while the Proposal purports to raise concerns with health, environmental and financial risks associated with the Company’s smoking policies, at its core, the Proposal seeks to micromanage the Company by requiring compliance with a permanent and specific mandate method of achieving its goal—the adoption of a smokefree policy at all of the Company’s properties. The Company has a robust governance structure with an active board of directors and executive oversight and dedicated management committees and other subject matter experts analyzing the Company’s ongoing management of its properties and ultimately making decisions in a manner that is appropriate for the Company, its customers and its shareholders. Yet, the Proposal does not afford any “discretion to management as to how to achieve such goals.” SLB 14L.

If not excluded from the 2024 Proxy Materials, shareholders would be asked to vote on a proposal that would displace the Company’s judgments on business and operations with a mandate that effectively disregards the complexity of the Company’s management of its properties and decisions regarding the accommodations it provides to its customers. The ultimate sum of the report itself would effectively displace management’s judgment on business and operations. Accordingly, the Proposal should be excluded pursuant to Rule 14a-8(i)(7) as it seeks to micromanage the Company.

ii. The Proposal May be Omitted Because the Proposal Seeks to Direct the Policies Governing the Company’s Properties, which Would Hinder Management’s Fundamental Ability to Run the Company’s Day-to-Day Operations

It is the Company’s view that the Proposal may be properly omitted in reliance on Rule 14a-8(i)(7) because the Staff has repeatedly recognized that proposals concerning management of the place of business, including those relating to controlling the use of tobacco on company premises, are generally excludable as a component of “ordinary business.” The Proposal requests that the Company “commission and disclose a report on the potential cost savings through the adoption of a smokefree policy for Boyd Gaming properties... within six months following the 2024 shareholders meeting.” The underlying subject matter of the report requested in the Proposal (implementation of a smokefree policy) relates directly to the ordinary business of the Company in its ability to manage its properties and make decisions regarding the accommodations it provides to its customers.

In *Hilton Hotels Corporation* (Mar. 11, 1998), Hilton received a proposal requesting that the Board of Directors “adopt a policy making all [of the company’s] facilities, including [its] restaurants, smokefree by January 1, 1999...” Hilton noted in its no-action request that the smoking policy at its premises, particularly with respect to its casinos, was a complicated matter better left to company management and that the implementation of such proposal could have a

negative economic effect on its results of financial operations. The Staff concurred in the exclusion of the proposal “as relating to the conduct of the [c]ompany’s ordinary business operations (i.e., management of the place of business).” *See also McDonald’s Corp.* (Mar. 16, 1993) (permitting exclusion of a proposal requesting that the board of directors adopt a policy to make the corporate facilities smoke-free because such proposal related “to the conduct of the [c]ompany’s ordinary business operations (i.e., management of the place of business)”); *Agency Rent-A-Car* (Apr. 8, 1992) (permitting exclusion of a proposal requesting that the company prohibit smoking in all of its vehicles because the proposal related “to the conduct of the ordinary business operations of the [c]ompany (i.e., restrictions on customer conduct and management of the work environment)”); *American Telephone and Telegraph Co.* (Dec. 11, 1991) (permitting exclusion of a proposal requesting that the company publish a total non-smoking policy for the company’s buildings, vehicles and facilities used by employees because the proposal related to “a matter of the [c]ompany’s ordinary business operations (i.e., management of the work environment and employee supervision)”); *The Walt Disney Company* (Dec. 22, 2010) (concurring in the exclusion of a proposal to modify Disney’s smoking policy to not allow children within the designated smoking areas of its theme parks because the proposal related to “the policies and procedures regarding the products and services that a company offer.”)

Further, the decisions that the Company makes in relation to the accommodations it provides to its customers when they visit the Company’s properties is analogous to the decisions behind which products and services other companies offer as the gaming experience is the Company’s key product. The Staff’s reasoning in concurring with the exclusion of the proposal in *Walgreens Boots Alliance, Inc.* (November 7, 2016, *recon. Denied* Nov 22., 2016), applies to the circumstances here. In *Walgreens*, the company received a proposal that would have required the company to issue a report assessing the risks of continued sales of tobacco products in its stores. Walgreens argued that the offering of particular products was a matter properly under the purview of management of the company. *Id.* The Staff concurred with the exclusion of the proposal, noting the proposal related to ordinary business operations. *Id.* The Staff has reached this position consistently, regardless of whether the proposal calls for the adoption of a specific policy or practice regarding the offering of tobacco products or, instead, calls for a report with regard to the offering of tobacco products. *See, e.g., Rite Aid Corp.* (Mar. 24, 2015) (concurring in the exclusion of a proposal requesting additional oversight on the sale of certain products, in particular tobacco products, because the proposal concerned the “products and services offered for sale by the company”); *CVS Caremark Corp.* (Feb. 25, 2010) (concurring in the exclusion of a proposal requesting a report to shareholders on how the company is responding to rising public pressures to discourage sales of tobacco products, because the proposal concerned the “sale of tobacco products” and “CVS is not involved in manufacturing tobacco products”); *Rite Aid Corp.* (Mar. 26, 2009) (concurring in the exclusion of a proposal requesting a report to shareholders on how the company is responding to rising regulatory, competitive and public pressures to halt sales of tobacco products, because the proposal concerned the “sale of a particular product”); and *CVS Caremark Corp.* (Mar. 3, 2009) (same).

Similar to the precedent discussed above, the Proposal seeks to control the management of the Company’s places of business and to directly impose controls on the accommodations that the

Company may provide its customers while those customers are visiting the Company's properties. As discussed above, even though the Proposal requests the Company to disclose a report on the potential cost savings through the adoption of a smokefree policy, the underlying subject matter of the Proposal is the adoption of a smokefree policy, just as previous proposals, such as the proposal in *Hilton*, which sought to prohibit smoking in a company's casinos, hotels and/or other properties. Given the Staff's consistent approach with respect to proposals seeking to influence a company's management of its places of business and the accommodations it provides to its customers, the Company believes the Proposal may be properly excluded under Rule 14a-8(i)(7).

iii. The Proposal Does Not Focus on a Significant Social Policy Issue that Transcends the Company's Ordinary Business Operations.

While the 1998 Release indicated that proposals that "focus on" significant social policy issues may not be excludable under Rule 14a-8(i)(7), in contrast, proposals that touch upon topics that might raise significant social policy issues—but that do not focus on or have only tangential implications for such issues—are not transformed from an otherwise ordinary business proposal into one that transcends ordinary business, and as such, remain excludable under Rule 14a-8(i)(7).

In SLB 14L, the Staff outlined its present approach to evaluating ordinary business proposals, noting a plan to "realign" with the Commission's standard in the 1998 Release, first articulated in 1976, by focusing on "the social policy significance of the issue that is the subject of the shareholder proposal" rather than "the nexus between a policy issue and the company." The explanation provided in SLB 14L confirms the Staff's intent to preserve the Commission's policy objectives behind the ordinary business exclusion, namely "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting." 1998 Release.

The Staff's intent was evidenced in *American Express Company* (Mar. 9, 2023). There, the proposal at issue requested that the company's board of directors conduct an evaluation and issue a report regarding collecting information on the processing of payments for the sale and purchase of firearms. American Express argued that the proposal merely touched on issues related to firearms and mass shootings and that its main request focused primarily on the ordinary business matter of the company's particular products and services. The Staff concurred with the exclusion, noting that the proposal related to, and did not transcend, ordinary business matters. *Id.*

Similarly, in *Amazon.com, Inc.* (Apr. 8, 2022) ("Amazon 2022"), the proposal at issue requested that the company report on the effect of the COVID-19 pandemic on workforce turnover rates and include an assessment of the impact on the company's diversity, equity and inclusion. Amazon argued that passing references to diversity, equity and inclusion did not transcend the primary focus on the ordinary business matter of the company's human capital management practices. The Staff concurred with the exclusion, agreeing that the proposal did "not focus on significant social policy issues." *Id.* See also *Dollar Tree, supra*, (concurring with the exclusion of a proposal requesting a report on risks to the company's business strategy from increasing labor

market pressure, stating the proposal did not transcend ordinary business matters); *Amazon.com, Inc.* (Apr. 7, 2022) (concurring with the exclusion of a proposal requesting a report on the risks to the company related to ensuring adequate staffing of its business and operations on the basis that the proposal related to, and did not transcend, ordinary business matters); TJX (2021), *supra*; *Exxon Mobil Corp.* (Mar. 6, 2012) (concurring with the exclusion of a proposal requesting that the company prepare a report discussing risks to the company posed by the environmental, social and economic challenges associated with oil sands, noting the proposal’s lack of focus on a significant policy issue); and *Dominion Resources, Inc.* (Feb. 3, 2011) (concurring with the exclusion of a proposal requesting the company provide financing to home and small business owners for installation of rooftop solar or renewable wind power generation as the proposal ultimately related to “the products and services offered for sale by the company”). Likewise, in *Walgreens* and *The Walt Disney Company* discussed above, the Staff concurred that a significant social policy issue did not transcend the ordinary business subject matter of the proposal.

The Staff’s no-action determinations under Rule 14a-8(i)(7) and guidance in SLB 14L reconfirm several key principles underlying the ordinary business exclusion. First, as demonstrated in *American Express Company, supra*, the Staff will not recast matters that are inherently operational as social policy issues. Second, as demonstrated in *Amazon 2022, supra*, citing potential social policy implications in a proposal does not equate with “focusing” on such issues.

As discussed above, the underlying subject of the Proposal is focused on the Company’s management of its places of business and the accommodations it provides to its customers, and thus inherently implicates ordinary business matters integral to the Company’s gaming business. While the Proponents frame the Proposal as concerns over health and revenue, the ultimate requested action remains an ordinary business matter. References to the health of customers and employees and speculation about potentially lower costs or higher revenues neither shift the underlying request of the Proposal nor do they transcend the Company’s ordinary business operations.

The Company agrees that the health of its customers and employees and managing costs are important. Indeed, the Company is committed to taking purposeful action to support its employees, communities, and the environment, as outlined in the Company’s proxy materials for its 2023 Annual Meeting of Shareholders, which describes the ways in which the Company is committed to environmental, social and corporate governance. Nevertheless, the Proposal remains squarely focused on the Company’s policies relating to the management of its places of business and accommodations provided to its customers. Such issues are inherently ordinary business matters integral to the Company’s business.

For these reasons, the significant social policy issue exception does not support inclusion of the Proposal in the Company’s 2024 Proxy Materials.

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III. CONCLUSION

For the reasons discussed above, the Company believes that it may properly omit the Proposal from its 2024 Proxy Materials in reliance on Rule 14a-8. As such, we respectfully request that the Staff concur with the Company's view and not recommend enforcement action to the Commission if the Company omits the Proposal from its 2024 Proxy Materials.

Pursuant to the guidance provided in Section F of Staff Legal Bulletin 14F (Oct. 18, 2011), we ask that the Staff provide its response to this request to Scott Lesmes, on behalf of the Company, via email at SLesmes@mofo.com, and to the Proponents via email at rowancm@trinity-health.org and Cynthia.Hallett@no-smoke.org. If we can be of further assistance in this matter, please do not hesitate to contact me at (202) 887-1585.

Sincerely,



Scott Lesmes

Attachments

cc: Catherine M. Rowan, Director, Socially Responsible Investments
Trinity Health
Cynthia Hallett, President and CEO
American Nonsmokers' Rights Foundation
Uri Clinton, Executive Vice President, General Counsel and Corporate Secretary
Boyd Gaming Corporation

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Exhibit A

Correspondence

(see attached)



Catherine M. Rowan
Director, Socially Responsible Investments
766 Brady Avenue, Apt. 635
Bronx, NY 10462
Phone: (718) 822-0820
Fax: (718) 504-4787
E-Mail Address: rowancm@trinity-health.org

November 21, 2023

Boyd Gaming Corporation
ATTN: Corporate Secretary
6465 South Rainbow Blvd.
Las Vegas, NV 89118

Via overnight mail

Re: Shareholder proposal for 2024 Annual Shareholder Meeting

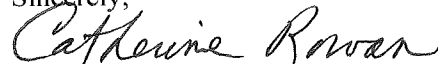
Dear Corporate Secretary,

Trinity Health is submitting the attached proposal (the "Proposal") pursuant to the Securities and Exchange Commission's Rule 14a-8 to be included in the proxy statement of Boyd Gaming Corporation (the "Company") for its 2024 annual meeting of shareholders. Trinity Health is the lead filer for the Proposal and will be joined by other shareholders as co-filers.

Trinity Health has continuously beneficially owned, for at least three years as of the date hereof, at least \$2,000 worth of the Company's common stock. Verification of this ownership will follow in a separate mailing. Trinity Health intends to continue to hold such shares through the date of the Company's 2024 annual meeting of shareholders.

I am available to meet with the Company via teleconference on December 13, 2023, December 18, 2023, or December 19, 2023 between the hours of 9:30 a.m. and 5:00 p.m. PST. Any co-filers have authorized Trinity Health to conduct the initial engagement meeting, but may participate subject to their availability.

Please feel free to contact me by phone (718) 822-0820 or by email at <rowancm@trinity-health.org> to schedule a meeting, or with any questions. I appreciate the response David Strow, VP of Corporate Communications gave to my September 15, 2023 query letter, and hope that the request in our proposal can lead to productive dialogue and mutual agreement.

Sincerely,


Catherine Rowan

enc

Boyd Gaming Corporation

RESOLVED: Shareholders request the Board of Directors commission and disclose a report on the potential cost savings through the adoption of a smokefree policy for Boyd Gaming properties. The report, prepared at reasonable cost and omitting confidential and proprietary information, should be published within six months following the 2024 shareholders meeting.

WHEREAS:

The U.S. Surgeon General released a landmark report in 2006 stating that there is no safe level of exposure to secondhand smoke. Tobacco use and secondhand smoke exposure kills nearly 500,000 Americans every year.¹ For the gaming industry, workers on casino floors are largely people of color and women; lack of access to smokefree air can deepen existing disparities in health outcomes.

The COVID-19 pandemic changed long-held business assumptions across many industries. For the gaming industry, customers became much more sensitive to indoor air quality and how such air affects their health.

While our Company may have efforts to address indoor air quality, the American Society of Heating, Refrigerating and Air-Conditioning Engineers states: "There is no currently available or reasonably anticipated ventilation or air cleaning system that can adequately control or significantly reduce the health risks of environmental tobacco smoke to an acceptable level."²

As independent researchers C3 Gaming found in analyzing revenue performance in several competitive casino markets, smokefree casinos, for the first time, generated more revenue: "Data from multiple jurisdictions clearly indicates that banning smoking no longer causes a dramatic drop in gaming revenue. In fact, non-smoking properties appear to be performing better than their counterparts that continue to allow smoking."³

There are potential business risks to allowing indoor smoking in Boyd Gaming properties, from higher employee health insurance premiums (when compared with casinos that don't permit indoor smoking), greater maintenance costs, and deterring a significant number of potential visitors who won't visit a casino due exposure to tobacco smoke (87% of the American public does not smoke).⁴

Shareholders have no guidance as to the costs our Company is bearing for continuing to allow indoor smoking, nor has the Company disclosed the social and environmental costs and risks imposed on its stakeholders.

Parx Casino's Chief Marketing Officer told the *Play Pennsylvania* website in February 2023 that since the casino went smokefree, Parx has seen a positive effect on the health and morale of employees, and did not increase health insurance premiums: "Frankly, we are starting to see health costs go down....What's

¹ https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/index.htm

² https://www.ashrae.org/file%20library/about/position%20documents/pd_environmental-tobacco-smoke-2020-07-1.pdf

³ https://8b3e0552-f01a-40e0-b077-ea4813c4af0b.usrfiles.com/ugd/8b3e05_348baee6d05949ad9b4adae2b7a77105.pdf

⁴ https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm

been interesting to me, is a lot of our smoking guests have actually said things like, 'I never realized how smoky and annoying it was. I really don't mind walking 50 feet out to the smoking patio.'⁵

New customer preferences require an examination of the status quo in which smoking is allowed in gaming properties around the country. We believe our Company could enhance its ESG initiatives by conducting the report that our proposal requests. We urge Boyd Gaming shareholders to vote in favor of this proposal.

⁵ <https://www.playpennsylvania.com/g2e-panel-discussion-parx-casino-smoking/>

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Executive Assistant

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Development

Lyan Joy Pernal, MPA
Associate Director, Strategic
Partnerships

Heidi Wohlwend, MFA
Donor Relations &
Communications Specialist

Holly Callahan
Gift Processing & Office Manager

Cara Scully Development &
Administrative Assistant

November 21, 2023

Via overnight mail

Boyd Gaming Corporation
ATTN: Corporate Secretary
6465 South Rainbow Blvd.
Las Vegas, NV 89118

Re: Shareholder proposal for 2024 Annual Shareholder Meeting

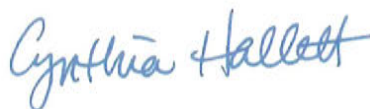
Dear Corporate Secretary,

Americans for Nonsmokers' Rights Foundation ("ANRF") is submitting the attached proposal (the "Proposal") pursuant to the Securities and Exchange Commission's Rule 14a-8 to be included in the proxy statement of Boyd Gaming Corporation (the "Company") for its 2024 annual meeting of shareholders. ANRF is co-filing the Proposal with lead filer Trinity Health. In its submission letter, Trinity Health will provide dates and times of ability to meet. We designate the lead filer to meet initially with the Company but may join the meeting subject to my availability. The primary contact is Catherine Rowan rowancm@trinity-health.org.

American Nonsmokers' Rights Foundation has continuously beneficially owned, for at least three years as of the date hereof, at least \$2,000 worth of the Company's common stock. Verification of this ownership will be sent under separate cover. We intend to continue to hold such shares through the date of the Company's 2024 annual meeting of shareholders.

If you have any questions or need additional information, I can be contacted by phone (510-841-3035) or by email at Cynthia.Hallett@no-smoke.org.

Sincerely,



Cynthia Hallett, MPH

enc.

Boyd Gaming Corporation

RESOLVED: Shareholders request the Board of Directors commission and disclose a report on the potential cost savings through the adoption of a smokefree policy for Boyd Gaming properties. The report, prepared at reasonable cost and omitting confidential and proprietary information, should be published within six months following the 2024 shareholders meeting.

WHEREAS:

The U.S. Surgeon General released a landmark report in 2006 stating that there is no safe level of exposure to secondhand smoke. Tobacco use and secondhand smoke exposure kills nearly 500,000 Americans every year.¹ For the gaming industry, workers on casino floors are largely people of color and women; lack of access to smokefree air can deepen existing disparities in health outcomes.

The COVID-19 pandemic changed long-held business assumptions across many industries. For the gaming industry, customers became much more sensitive to indoor air quality and how such air affects their health.

While our Company may have efforts to address indoor air quality, the American Society of Heating, Refrigerating and Air-Conditioning Engineers states: "There is no currently available or reasonably anticipated ventilation or air cleaning system that can adequately control or significantly reduce the health risks of environmental tobacco smoke to an acceptable level."²

As independent researchers C3 Gaming found in analyzing revenue performance in several competitive casino markets, smokefree casinos, for the first time, generated more revenue: "Data from multiple jurisdictions clearly indicates that banning smoking no longer causes a dramatic drop in gaming revenue. In fact, non-smoking properties appear to be performing better than their counterparts that continue to allow smoking."³

There are potential business risks to allowing indoor smoking in Boyd Gaming properties, from higher employee health insurance premiums (when compared with casinos that don't permit indoor smoking), greater maintenance costs, and deterring a significant number of potential visitors who won't visit a casino due exposure to tobacco smoke (87% of the American public does not smoke).⁴

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¹ https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/index.htm

² https://www.ashrae.org/file%20library/about/position%20documents/pd_environmental-tobacco-smoke-2020-07-1.pdf

³ [https://8b3e0552-f01a-40e0-b077-
ea4813c4af0b.usrfiles.com/ugd/8b3e05_348baee6d05949ad9b4adae2b7a77105.pdf](https://8b3e0552-f01a-40e0-b077-
ea4813c4af0b.usrfiles.com/ugd/8b3e05_348baee6d05949ad9b4adae2b7a77105.pdf)

⁴ https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm

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⁵ <https://www.playpennsylvania.com/g2e-panel-discussion-parx-casino-smoking/>

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Cara Scully Development &
Administrative Assistant

November 30, 2023

Boyd Gaming Corporation
ATTN: Corporate Secretary
6465 South Rainbow Blvd.
Las Vegas, NV 89118

Via certified mail

Re: Shareholder proposal for 2024 Annual Shareholder Meeting

Dear Corporate Secretary,

Attached please find a letter from Charles Schwab, which verifies that as of November 21, 2023, the American Nonsmokers' Rights Foundation has continuously held at least \$2,000 worth of Boyd Corporation shares for at least three years. The letter is intended to accompany the November 21, 2023 filing of a shareholder proposal by the American Nonsmokers' Rights Foundation, which is attached for reference and was sent to the company via UPS overnight mail on November 21, 2023.

If you have any questions or need additional information, please contact me at (510) 841-3045 or by email at Cynthia.Hallett@no-smoke.org. Alternatively, you may also contact Mr. Len Casey at (510) 841-3032, x 311 or Len.Casey@no-smoke.org.

Sincerely,



Cynthia Hallett, MPH
President and CEO



November 30, 2023

Len Michael Casey
PII

Important information about your recent request.

Dear Len Michael Casey,

I am writing to confirm registration and share ownership information for the account listed below:

Account Number: PII
Account Registration: American Non Smokers Rights Foundation
Account Type: Corporate
Agents: Len Michael Casey, Kirk Kleinschmidt, Cynthia Hallett, and Bruce Kevin Hetrick

From May 5, 2020 to November 29, 2023 this account has continuously held 100.00 shares of Boyd Gaming Corp (BYD) plus applicable reinvested dividends, with a fluctuating market value.

This letter is for informational purposes only and is not an official record of your account. Please refer to your statements and trade confirmations as they are the official record of your transactions.

Thank you for investing with Schwab. We appreciate your business and look forward to serving you in the future. If you have any questions or if we can help in any other way, please call me or any Client Service Specialist at +1 877-561-1918 x715486, Monday through Friday, from 9:00 a.m. to 7:00 p.m. ET.

Sincerely,

Ann Nesbit

Ann Nesbit
Sr Specialist, Escalation Support
Ann.Nesbit@schwab.com
[+1 877-561-1918 x715486](tel:+18775611918x715486)
9800 Schwab Way

Lone Tree, CO 80124



Catherine M. Rowan
Director, Socially Responsible Investments
766 Brady Avenue, Apt. 635
Bronx, NY 10462
Phone: (718) 822-0820
Fax: (718) 504-4787
E-Mail Address: rowancm@trinity-health.org

January 24, 2024

Via Shareholder Proposal Portal

Securities and Exchange Commission
Office of the Chief Counsel
Division of Corporation Finance
100 F Street, NE
Washington, DC 20549

Re: Request by Boyd Gaming Corporation to omit proposal submitted by Trinity Health and American Nonsmokers' Rights Foundation

Ladies and Gentlemen,

Pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, Trinity Health and the American Nonsmokers' Rights Foundation (together, the "Proponents") submitted a shareholder proposal (the "Proposal") to Boyd Gaming Corporation ("Boyd Gaming" or the "Company"). The Proposal asks Boyd Gaming to report on the potential cost savings resulting from the adoption of a smokefree policy for its gaming properties.

In a letter to the Division dated December 29, 2023 (the "No-Action Request"), Boyd Gaming stated that it intends to omit the Proposal from its proxy materials to be distributed to shareholders in connection with the Company's 2024 annual meeting of shareholders. Boyd Gaming argues that it is entitled to exclude the Proposal in reliance on Rule 14a-8(i)(7), on the ground that the Proposal deals with the Company's ordinary business operations. As discussed more fully below, the Proposal would not micromanage Boyd Gaming because it does not seek to dictate policy, request disclosure of intricate detail, or prescribe any specific methods for preparing the requested report. Moreover, the Proposal addresses allowing smoking in casinos, which is a consistent topic of widespread public debate and has broad societal impact. Accordingly, Boyd Gaming has not met its burden of proving its entitlement to exclude the Proposal, and the Proponent respectfully requests that the Company's request for relief be denied.

The Proposal

The Proposal states:

Resolved: Shareholders request the Board of Directors commission and disclose a report on the potential cost savings through the adoption of a smokefree policy for Boyd Gaming properties. The report, prepared at reasonable cost and omitting confidential and proprietary information, should be published within six months following the 2024 shareholders meeting.

Background

According to the Centers for Disease Control and Prevention, “there is no safe level of exposure to secondhand smoke.”¹ Secondhand smoke is known to cause numerous health problems, including “coronary heart disease, stroke, and lung cancer, as well as adverse reproductive health effects in women, including low birth weight.” Nonsmokers suffer nearly 34,000 premature deaths per year from heart disease as a result of secondhand smoke exposure.² Lung cancer risk for nonsmokers exposed to secondhand smoke is increased by 25-30%.³ The American Heart Association⁴ and American Lung Association⁵ support banning smoking in all public places and workplaces.

Although many states have banned smoking indoors, a significant number allow it in bars and casinos. According to CNN, “13 of the 22 states and territories that allow casino gambling permit smoking in at least part of their facilities.”⁶ The casino industry has grown tremendously in recent years; the American Gaming Association pegged 2022 casino slots and table gaming revenue at nearly \$48 billion.⁷

Smoking in casinos poses serious health risks for customers and especially workers, who are exposed more regularly and for longer periods of time. A study found that “50% of the casinos sampled had air pollution levels known to cause cardiovascular disease after only 2 hours of exposure.”⁸ According to the American Cancer Society, casino customers were “found to have significantly elevated levels of a tobacco-specific lung carcinogen after a four-hour visit to a casino that allowed smoking.”⁹ Research has found that separating smoking and nonsmoking areas in a casino is ineffective: A 2023 study found that secondhand smoke levels were “5.4 times higher in gaming areas [of casinos that allow smoking] when compared with a

¹ <https://www.cdc.gov/tobacco/secondhand-smoke/health.html>

² <https://www.cdc.gov/tobacco/secondhand-smoke/health.html>

³ <https://www.cdc.gov/tobacco/secondhand-smoke/health.html>

⁴ <https://www.heart.org/-/media/Files/About-Us/Policy-Research/Policy-Positions/Tobacco-Endgame/Clean-Indoor-Air-Laws-and-Cardiovascular-Disease-2009.pdf>

⁵ <https://www.lung.org/policy-advocacy/tobacco/smokefree-environments/smokefree-air-laws>

⁶ <https://www.cnn.com/2024/01/09/health/indoor-smoking-casinos-kff-health-news-partner/index.html>

⁷ https://www.americangaming.org/wp-content/uploads/2023/02/CGRT_CY_2022_Report.pdf, at 2.

⁸ <https://www.cdc.gov/statesystem/factsheets/gaming/Gaming.html>

⁹ fightcancer.org/sites/default/files/The%20risk%20of%20secondhand%20smoke%20in%20casinos%202018.pdf

smoke-free casino”; even non-smoking areas of casinos that allowed smoking had twice the level of secondhand smoke as the nonsmoking casino.¹⁰

Ordinary Business

Rule 14a-8(i)(7) allows exclusion of proposals related to a company’s ordinary business operations. Boyd Gaming argues that the Proposal relates to the Company’s ordinary business operations because it would micromanage the Company and its subject involves the management of the Company’s properties and the accommodations it provides to its customers. Neither claim withstands scrutiny.

The Proposal Would Not Micromanage Boyd Gaming Because it Does Not Direct the Company to Take Specific Actions, Request Disclosure of Intricate Detail, or Dictate the Report’s Specific Content or Format

The Proposal would not micromanage Boyd Gaming. In November 2021, Staff Legal Bulletin (“SLB”) 14L clarified the Staff’s approach to micromanagement claims. It states that “the staff will take a measured approach to evaluating companies’ micromanagement arguments – recognizing that proposals seeking detail or seeking to promote timeframes or methods do not per se constitute micromanagement.” Instead, the Staff will analyze “the level of granularity sought in the proposal and to what extent it inappropriately limits the discretion of the board or management.”¹¹

Boyd Gaming repeatedly tries to muddy the waters by conflating the Proposal’s request for a report on an action the Company might take with a demand that the Company take that action. “[A]t its core,” the No-Action Request states, the Proposal seeks “the adoption of a smokefree policy at all of the Company’s properties.”¹² Similarly, the No-Action Request urges that the Proposal “calls for the implementation of a smokefree policy for all of the Company’s properties.”¹³

Boyd Gaming’s efforts to connect its arguments to the language of the Commission’s 1998 release and SLB 14L’s language all assume that the Proposal aims to impose a smokefree policy. For example, the Company claims that the Proposal “involves both ‘intricate detail’ (the complex decisions regarding how best to manage the Company’s properties and the accommodations the Company provides to its customers, including whether or not to implement a smokefree policy) and the imposition of ‘specific . . . methods for implementing complex policies’ (the adoption of a smokefree policy for all of the Company’s properties).”¹⁴ Boyd Gaming emphasizes the “wide range of business considerations” that must be balanced in determining whether to allow smoking at its properties, factors on which shareholders lack expertise.

¹⁰ Michael A. Tynan et al., “What happens in Vegas, stays in your lungs: an assessment of fine particulate matter in casinos that prohibit and allow smoking in Las Vegas, Nevada, USA,” *Tobacco Control*, Feb. 2023 (online preprint at <https://pubmed.ncbi.nlm.nih.gov/36822833/>); *see also* <https://www.cdc.gov/statesystem/factsheets/gaming/Gaming.html>

¹¹ Staff Legal Bulletin 14L (Nov. 3, 2021).

¹² No-Action Request, at 7

¹³ No-Action Request, at 5.

¹⁴ No-Action Request, at 5.

Boyd Gaming’s characterization finds no support in the Proposal’s language. The Proposal leads with a resolved clause that clearly asks for a report. The supporting statement focuses on disclosure, arguing that “[s]hareholders have no guidance as to the costs our Company is bearing for continuing to allow indoor smoking, nor has the Company disclosed the social and environmental costs and risks imposed on its stakeholders.” The supporting statement ends by asserting that “[w]e believe our Company could enhance its ESG initiatives by conducting the report that our proposal requests.” No reasonable reader of the Proposal, then, could conclude that it asks Boyd Gaming to adopt a smokefree policy.

Perhaps due to these repeated mischaracterizations, Boyd Gaming does not identify the aspects of the report actually requested by the Proposal that would micromanage the Company. The Proposal does not specify any details around implementation, such as the methodology for estimating the costs associated with allowing smoking. Nor does it request “intricate detail” about the costs. Rather, it gives Boyd Gaming discretion to determine how it defines “cost savings,” the assumptions and methods used to estimate those savings, and the content and format of the report.

The determinations Boyd Gaming cites on page 6 of the No-Action Request involved proposals that were far more detailed and prescriptive than the Proposal. Several proposals asked the companies to take specific actions related to their businesses, which is more intrusive than a request for a report. One proposal, submitted to SeaWorld,¹⁵ not only urged the company to retire its resident orcas; it also suggested where they should go—seaside sanctuaries—and what type of exhibit should replace them. The Kroger¹⁶ proposal highlighted by Boyd Gaming identified a specific program—the Fair Food Program (“FFP”)—Kroger should join; that program mandated that participating buyers pay a price premium, give preference to suppliers that adhered to the FFP’s code of conduct, and stop doing business with suppliers that did not comply with that code. The Proposal does not ask Boyd Gaming to change any of its practices, much less do so with the specificity seen in these proposals.

The disclosure proposals in the determinations Boyd Gaming cites sought much more detailed and extensive information than the Proposal’s one-time report. For example, the proposal submitted to Deere¹⁷ asked the company to disclose, each year, all employee-training materials offered to any subset of employees, including material conveyed orally, which would be voluminous and, in the case of oral training materials, burdensome to produce. The Staff concurred with the company that the proposal micromanaged, stating that it sought disclosure of “intricate details” regarding employment and training practices.

The Staff recently rejected arguments very similar to Boyd Gaming’s. Last season, Travelers¹⁸ argued that a proposal seeking a report on the company’s intentions to measure, disclose and reduce the greenhouse gas emissions associated with its underwriting activities was excludable on micromanagement grounds. Travelers urged that the proposal would require it to reduce emissions by changing its business activities and that those kinds of decisions involved “myriad and complex considerations,” including “extensive statutory and regulatory constraints” and “advanced industry and regulatory knowledge, mathematics, modeling and more.” In other words, Travelers—like Boyd

¹⁵ SeaWorld Entertainment Inc. (Mar. 30, 2017, recon. denied Apr. 17, 2017)

¹⁶ The Kroger Co. (Domini Impact Equity Fund) (Apr. 25, 2023)

¹⁷ Deere & Company (Jan. 3, 2022).

¹⁸ The Travelers Companies, Inc.(Meyer Memorial Trust) (Mar. 30, 2023)

Gaming--claimed that the subject of the proposal was too technical and difficult for shareholders and thus would micromanage the company. The Staff declined to grant relief. Similar arguments were unavailing in Merck,¹⁹ Eli Lilly,²⁰ and Chubb.²¹

The Proposal's Subject Matter is a Significant Social Policy Issue

Boyd Gaming contends that reporting on a policy regarding the use of tobacco on company premises is analogous to dictating how a company manages its properties or the details of the products and services it sells. It is true that the Division's Staff has allowed exclusion of proposals in both of those categories, as illustrated by the determinations Boyd Gaming cites on pages 7-8 of the No-Action Request. The proposals at issue in those determinations, however, were deemed not to address a significant social policy issue transcending ordinary business, which defeats application of the ordinary business exclusion.²²

Two changes in the Staff's analytical approach to identifying significant social policy issues and the renewed debate over exposure of workers to secondhand smoke in the workplace favor a different outcome here.

The first shift involves the "Cracker Barrel" doctrine. In 1992, the SEC Staff allowed Cracker Barrel Old Country Stores to exclude a proposal on employment discrimination. Since 1976, the Commission had interpreted the ordinary business exclusion to allow omission of a proposal if it addressed "business matters that are mundane in nature" and implicated no "substantial policy or other considerations,"²³ but the Cracker Barrel determination read the second prong out of the test altogether for workforce-related proposals. In Cracker Barrel,²⁴ the Staff not only concurred with the company that the proposal was excludable on ordinary business grounds but also announced a new rule:

[T]he line between includable and excludable employment-related proposals based on social policy considerations has become increasingly difficult to draw. . . . As a result, the Division has determined that the 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.

The Cracker Barrel interpretation remained in effect until mid-1998, when the Commission returned to the two-part test for employment-related proposals.²⁵

¹⁹ Merck & Co., Inc. (Province of St. Joseph of the Capuchin Order) (Mar. 28, 2023)

²⁰ Eli Lilly & Company (Trinity Health) (Mar. 28, 2023)

²¹ Chubb Limited (Domini Impact Equity Fund) (Mar. 27, 2023)

²² In Exchange Act Rel. No. 40018 (May 21, 1998), the Commission stated that a proposal whose subject matter focuses on "sufficiently significant social policy issues" is not excludable on ordinary business grounds.

²³ Exchange Act Release No. 12,999 (Nov. 22, 1976)

²⁴ Cracker Barrel Old Country Store, Inc. (Oct. 13, 1992)

²⁵ Exchange Act Release No. 40,018 (May 21, 1998)

Cracker Barrel matters because it was in effect when the Hilton²⁶ and McDonald's²⁷ determinations relied on by Boyd Gaming were issued. Of the determinations Boyd Gaming cites, the proposals at issue in those letters most closely resemble the Proposal, in that both involved smoking policies in a hospitality business.

In Hilton, the company urged that the proposal, which asked the company to make the company's facilities smoke-free by 1999, addressed ordinary business matters for several reasons, including that it dealt with "management of the workplace." In response to the proponent's claim that the proposal implicated a significant social policy issue, given the overwhelming evidence of harm caused by secondhand smoke, the company invoked Cracker Barrel, stating that the existence of a significant policy issue was irrelevant "as long as the Cracker Barrel interpretation is binding on the Commission." McDonald's also characterized the proposal to make all company facilities smoke-free as addressing ordinary business because it concerned management of the workplace. (The proponent did not respond to the request.) Following the return to the pre-Cracker Barrel analytical framework, the Hilton and McDonald's determinations may be considered to have less persuasive power.

The second, and much more recent, interpretive shift was articulated in SLB 14L. There, the Staff emphasized that the focus when deciding whether an otherwise excludable proposal concerns a significant social policy issue should be whether it "raises issues with a broad societal impact" even if the proponent does not demonstrate the issue's significance to the specific company. SLB 14L illustrated the application of the broad societal impact standard by pointing to human capital matters, stating that a "proposal[] squarely raising human capital management issues with a broad societal impact" would not be subject to exclusion. Under this approach, proponents of proposals addressing exposure to secondhand smoke might have been able to defeat no-action requests based on ordinary business, due to the public health impacts involved, even if those proposals also stood to benefit the health of workers.

The Proposal's Subject Has Broad Societal Impact

The health benefits to workers from a smoke-free policy, which could lead to health care savings for Boyd Gaming, support a conclusion that the Proposal deals with a significant social policy issue under SLB 14L's standard. (The Proponents would not characterize the Proposal as solely addressing worker health and safety, since a shift to a smoke-free policy could have other public health benefits.) According to the American Cancer Society, studies show that "smoke-free policies reduce workers' long-term risk of lung cancer and cardiovascular disease."²⁸

Post-SLB 14L determinations on two proposals addressing worker health and safety show that this issue has a broad societal impact. In Amazon,²⁹ the Staff did not concur with the company that a proposal requesting an audit of warehouse workers' working conditions and treatment was excludable on ordinary business grounds. The proponent argued that the proposal's subject was a human capital matter with broad societal impact. Dollar General's³⁰ argument for excluding a

²⁶ Hilton Hotels Corp. (Mar. 11, 1998)

²⁷ McDonald's Corp. (Mar. 16, 1993).

²⁸ fightcancer.org/sites/default/files/The%20risk%20of%20secondhand%20smoke%20in%20casinos%202018.pdf

²⁹ Amazon.com, Inc. (Apr. 6, 2022)

³⁰ Dollar General Corporation (Mar. 31, 2023)

proposal seeking an audit of how the company’s policies affected workers’ safety and well-being focused primarily on whether implementing the proposal would prejudice Dollar General in litigation, but the proponent urged the Staff not to allow the company to evade accountability on the significant social policy issue of workers’ safety and wellbeing. Dollar General’s request for relief was denied.

The Proposal’s Subject is a Consistent Topic of Widespread Public Debate

The Proposal’s subject is a consistent topic of widespread public debate. Although most indoor smoking bans were adopted in the 1990s, there has been a recent surge of interest in extending bans to bars and casinos:

- In September 2023, Pennsylvania House Health Committee Majority Chairman Dan Frankel introduced H.B. 1657, the Protecting Workers From Secondhand Smoke Act. It would close the loophole in the state’s Clean Indoor Air Act allowing bars, clubs and casinos to permit smoking. Rep. Frankel argued that “Pennsylvania’s workers should not have to sacrifice their health for a paycheck, but the data shows that’s exactly what’s happening.”³¹
- Davidson County, Tennessee, in which Nashville is located, enacted a ban on smoking in “most 21+ establishments” in the county in October 2022.³² Supporters of the ban, like an opinion columnist in the Nashville Tennessean, focused on the value of a smoke-free workplace: “As the metro city council continues to debate an ordinance to ensure age-restricted venues are smoke-free, I’m thankful to see a worker’s right to safe working conditions front and center.”³³
- A bill to end smoking in Atlantic City casinos stalled in the New Jersey legislature amid industry opposition in November 2023. Casino workers led the campaign for the ban,³⁴ arguing that secondhand smoke created great health risks for them.³⁵ UAW president Shawn Fain weighed in, urging lawmakers to pass the measure.³⁶ The following month, the workers’ organization, Casino Employees Against Smoking Effects (“CEASE”), announced it was forming a political action committee to support legislators who will back a casino smoking ban.³⁷
- An effort to ban smoking in St. Louis, Missouri county casinos failed in 2023, but a compromise measure mandates that casinos can allow smoking on no more than half of their gaming space.³⁸

³¹ <https://www.pahouse.com/InTheNews/NewsRelease/?id=130684>

³² <https://www.smokefreenashville.com/>

³³ Denis Gilmore, “Historic smoke free ordinance will protect Nashville workers from secondhand smoke,” Nashville Tennessean, Oct. 3, 2022.

³⁴ <https://apnews.com/article/casino-smoking-atlantic-city-cigarettes-dealers-cancer-11534c340a3d8a3443ebae9e7f5bfff01>

³⁵ Scott Fallon, “Smoking ban in Atlantic City casinos to get hearing in Legislature,” Daily Record (Morristown, NJ), Nov. 29, 2023

³⁶ <https://why.org/articles/new-jersey-casino-smoking-ban-auto-union/>

³⁷ <https://smokefreecasinos.org/casino-workers-announce-formation-of-pac-to-bring-accountability-to-new-jersey-legislators/>

³⁸ T.J. McBride, “St. Louis Casino Smoking Ordinance Compromise Reached,” Play Missouri, Aug. 18, 2023

- Two Rhode Island legislators introduced bills to ban smoking in casinos that died in committee in 2023; they plan to reintroduce them in 2024.³⁹ A Rhode Island CEASE chapter was formed in May 2022.⁴⁰
- In 2023, the Kansas Senate passed a bill that, among other things, would have “remove[d] the exemption in the Kansas Indoor Clean Air Act for gaming floors.”⁴¹ Kansas casino workers formed a CEASE chapter last year.⁴²
- A Virginia CEASE chapter was formed in 2023 to advocate for smoke-free casinos in that state.⁴³
- 2023 saw the first panel on casino smoking bans at the Global Gaming Expo.⁴⁴
- In 2020, the American Lung Association pressed Indiana casinos to ban smoking, citing a survey showing that two-thirds of state residents supported doing so.⁴⁵

Advocates for casino smoking bans have faced fierce opposition from the industry, which lobbied against many of the measures listed above. The Casino Association of New Jersey opposed that state’s legislation to make casinos smoke-free, arguing that the bill would have “significant adverse effect on Atlantic City’s economy.”⁴⁶ (The Proposal notes that there is solid evidence that banning smoking would not curtail revenue.) “[P]ushback” from Penn Entertainment helped to defeat St. Louis’s proposed ban.⁴⁷

At the same time, there have been recent efforts to create exemptions to previously-adopted smoking bans. Campbellsville, Kentucky council members sought last year to allow businesses servicing alcohol to create rooms where smoking is permitted.⁴⁸ A West Virginia bill that “would have allowed indoor smoking areas at certain resort areas and gaming facilities at existing historic resort hotels like The Greenbrier” passed the state House but didn’t make it out of committee in the Senate last year.⁴⁹ Shreveport, Louisiana repealed its ban on smoking in casinos last year.⁵⁰

Casinos are taking action even in the absence of legislative mandates. Over 1000 casinos now prohibit smoking in all indoor areas.⁵¹ More than 160 tribal casinos are smoke-free,⁵² including all of those operated by the Navajo Nation and the Eastern Band of Cherokee.⁵³ Some credit the

³⁹ <https://www.playusa.com/smoking-ban-ballys-rhode-island-casinos/>

⁴⁰ <https://www.casino.org/news/rhode-island-senate-casino-smoking-comments-ignite-backlash/>

⁴¹ https://www.kslegislature.org/li/b2023_24/measures/vote_view/je_20230404144953_288367/

⁴² <https://no-smoke.org/kansas-casino-workers/>

⁴³ <https://www.casino.org/news/virginia-casino-workers-join-coalition-to-end-indoor-smoking/>

⁴⁴ <https://www.reviewjournal.com/business/casinos-gaming/is-nevada-facing-pressure-to-ban-smoking-in-casinos-2919865/>

⁴⁵ Dan Carden, “Lung Association poll finds two-thirds of Hoosiers favor smoke free casinos,” *The Times* (Munster, Indiana), Aug. 11, 2020

⁴⁶ <https://whyy.org/articles/new-jersey-casino-smoking-ban-workers/>

⁴⁷ <https://medicalxpress.com/news/2024-01-air-casinos-workers-tobacco.html>

⁴⁸ “MD urges vote to stay smokefree,” *The Central Kentucky News-Journal*, Dec. 14, 2023

⁴⁹ Mike Tony, “Bill that would have allowed indoor smoking facilities at certain resort areas fails in WV Senate,” *Charleston Gazette-Mail*, Mar. 13, 2023

⁵⁰ “Smoke-free Shreveport in danger: Council repeals smoke-free protections for casino workers,” *States News Service*, May 25, 2023

⁵¹ <https://www.gamingdirectory.com/smokefree/properties/>

⁵² <https://no-smoke.org/tribal-casinos-set-revenue-record-smokefree/>

⁵³ <https://www.cnn.com/2022/03/12/opinions/american-indian-casinos-smoking-ban/index.html>

pandemic, which imposed smoking bans on casinos, with accelerating the trend toward smoke-free policies.⁵⁴

The proposals in the determinations Boyd Gaming cites in support of its contention that the Proposal does not address a significant social policy issue are distinguishable from the Proposal, due to the proposal's focus or the proponent's framing of the policy issue; the Staff's reasoning in one determination rested on a basis that was made unavailable by SLB 14L:

- The TJX⁵⁵ determination illustrates well the impact of SLB 14L. There, the Staff concurred with the company that a proposal requesting disclosure of the company's monitoring of suppliers' compliance with its policy prohibiting prison labor was excludable based on the lack of nexus to the company: "[A]lthough the Proposal refers to systemic racism through undetected supply chain prison labor, the Proposal acknowledges that the Company already prohibits prison labor and does not otherwise explain how its compliance program raises a significant issue for the Company." It was exactly this nexus requirement that SLB 14L eliminated.
- The determinations in Walgreens,⁵⁶ Rite Aid,⁵⁷ and CVS Caremark,⁵⁸ all of which pre-dated SLB 14L, involved proposals asking retailers to report on or impose additional restrictions on the sale of tobacco products. The companies' status as retailers was likely important in the Staff's analysis, given that the Staff has often allowed exclusion on ordinary business grounds of proposals on retailers' sale of particular products.⁵⁹
- The Staff allowed exclusion of the proposal to Exxon Mobil⁶⁰ regarding oil extraction from tar sands, reasoning that the proposal addressed the "economic challenges" associated with that process. The proposal's resolved clause specified that it sought information on risks "other than those associated with or attributable to climate change," which was an established significant social policy issue. Likewise, the Dominion Resources⁶¹ proposal, which asked the company to provide financing for rooftop solar installation, focused on the business benefits of doing so and did not mention climate change. The Exxon Mobil and Dominion proposals would be analogous to the Proposal, then, if the latter did not mention public health impacts from secondhand smoke.
- The proposal in American Express⁶² asked the board to evaluate and report on "how the Company intends to reduce the risk associated with tracking, collecting, or sharing information regarding the processing of payments involving its cards and/or electronic payment system services for the sale and purchase of firearms." The supporting statement made clear that the proponent was not concerned about the gun violence epidemic or its

⁵⁴ <https://www.vixio.com/insights/gc-marriage-rocks-smoking-and-casinos-and-you-can-blame-or-thank-covid-19>; <https://www.cbsnews.com/pittsburgh/news/report-smoking-bans-no-longer-a-threat-to-casino-revenue/>

⁵⁵ TJX Companies Inc. (Apr. 9, 2021)

⁵⁶ Walgreens Boots Alliance, Inc. (Nov. 7, 2016, recon. denied Nov. 22, 2016)

⁵⁷ Rite Aid Corp. (Mar. 24, 2015); Rite Aid Corp. (Mar. 26, 2009)

⁵⁸ CVS Caremark Corp. (Feb. 25, 2010); CVS Caremark Corp. (Mar. 3, 2009)

⁵⁹ See Walgreens Boots Alliance Inc. (Nov. 20, 2018) (declining to concur that the "sale of products" basis allowed the company to a proposal on the sale of opioid medications); Amazon.com, Inc. (Apr. 1, 2020) (rejecting argument that proposal seeking human rights risk assessments on at least one high-risk product Amazon sold was excludable on ordinary business grounds)

⁶⁰ Exxon Mobil Corp. (Mar. 6, 2012)

⁶¹ Dominion Resources, Inc. (Feb. 3, 2011)

⁶² American Express Company (Mar. 9, 2023)

public health impacts; rather, it focused exclusively on privacy concerns associated with the use of merchant category codes to track firearms purchases. In opposing the no-action request, the proponent characterized the significant policy issue quite narrowly, as “the critical issue of firearms and the utilization of each respective company’s cards and services to purchase them,” focusing on the debate over adoption of merchant category codes.

- The Amazon (2022; AFL-CIO Reserve Fund)⁶³ proponent, by contrast, did try to connect the proposal to a subject that had been recognized as a significant social policy issue, at least in some contexts—the COVID-19 pandemic. The proposal asked Amazon to report on the company’s workforce turnover rates and the effects of labor market changes that had resulted from the pandemic, but four of the five supporting statement paragraphs discussed Amazon’s high turnover, including prior to the pandemic. In its no-action response, the proponent pointed to several determinations involving proposals submitted to Johnson & Johnson and Pfizer regarding the financing of and access to COVID-19 vaccines and therapies. It is possible that the Staff viewed the public health aspects of COVID-19 as a significant policy issue, but not the employment impacts. That interpretation finds support in the Dollar Tree⁶⁴ and Amazon (2022; UAW Retiree Medical Benefits Trust)⁶⁵ determinations, both of which allowed exclusion of proposals that addressed post-pandemic labor market pressures as they related to the companies’ strategies and employment practices.

Here, by contrast, the Proposal addresses a public health issue with broad societal impact. Although Boyd Gaming characterizes the Proposal’s subject as “inherently operational,” the central focus of the Proposal is on the adverse health impacts of allowing smoking at Boyd Gaming’s facilities. The Johnson and Johnson⁶⁶ and Pfizer⁶⁷ determinations cited by the Amazon proponent involved operational aspects of the companies’ businesses—technology transfer and government financing for vaccines and therapies—that had been deemed ordinary business matters in other contexts. The proposals’ goals, however, like that of the Proposal, were to provide shareholders with information about how the companies’ actions affected public health.

In sum, Boyd Gaming is not entitled to exclude the Proposal on ordinary business grounds because allowing smoking in casinos—the Proposal’s sole subject—is a significant social policy issue transcending ordinary business, as evidenced by the consistent and widespread public debate. Because the Proposal would not dictate company policy, inappropriately limit the discretion of Boyd Gaming’s management or board, or request intricate detail, it would not micromanage Boyd Gaming. Boyd Gaming has thus not met its burden of showing that it is entitled to exclude the Proposal in reliance on Rule 14a-8(i)(7), and the Proponents respectfully ask that its request be denied.

⁶³ Amazon.com Inc. (AFL-CIO Reserve Fund) (Apr. 8, 2022)

⁶⁴ Dollar Tree, Inc. (May 2, 2022)

⁶⁵ Amazon.com Inc. (UAW Retiree Medical Benefits Trust) (Apr. 7, 2022)

⁶⁶ Johnson & Johnson (Feb. 8, 2022); Johnson & Johnson (Feb. 26, 2021)

⁶⁷ Pfizer Inc. (Feb. 26, 2021)

The Proponents appreciate the opportunity to be of assistance in this matter. If you have any questions or need additional information, please contact me at (718)822-0820. Thank you.

Sincerely,

Catherine Rowan

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