

## Securities Regulation Daily Wrap Up, PROXIES—3rd Cir.: Wal-Mart returns fire against shareholder proposal on gun sales, (Jan. 15, 2015)

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By Rodney F. Tonkovic, J.D.

Wal-Mart Stores, Inc. has filed a brief with the Third Circuit appealing a decision on the exclusion of a shareholder proposal on gun sales. The proposal concerned the sale of certain guns and the risks that those sales posed to the public and Wal-Mart's reputation. The District Court for the District of Delaware found that the proposal should have been included in Wal-Mart's proxy materials for its 2014 annual shareholders meeting and that the proposal should not be excluded in 2015. Wal-Mart seeks a declaration that the proposal was excludable in 2014 and that an injunction requiring the inclusion of the proposal in 2015 be vacated (*Trinity Wall Street v. Wal-Mart Stores, Inc.*, January 14, 2015).

**Trinity's proposal.** In December 2013, Trinity submitted a proposal for inclusion in Wal-Mart's 2014 proxy materials requesting that the board amend its charters to provide for policies to determine whether Wal-Mart should sell products that: (1) are especially dangerous to the public; (2) pose a substantial risk to the company's reputation; and (3) would be considered offensive to the values integral to Wal-Mart's brand. Trinity said that the proposed oversight and reporting duties include policies applying to whether or not the company should sell firearms equipped with magazines holding more than ten rounds of ammunition. Wal-Mart sought no-action relief, and in March 2014, the Commission concurred with Wal-Mart's view that the proposal could be omitted from its proxy materials as relating to the company's ordinary business operations. (For more background, please see our coverage of the no-action letter in the *Securities Regulation Daily Wrap Up* for April 4, 2014.)

**District court.** In April 2014, the district court denied Trinity's request for a preliminary injunction to prevent Wal-Mart from excluding the proposal from the proxy materials for the shareholder meeting to be held on April 23, 2014. In November 2014, however, the court found that the proposal dealt with matters that were not related to Wal-Mart's ordinary business operations and that it was thus improperly excluded from the 2014 proxy materials. The court also rejected Wal-Mart's argument that the proposal was "vague and indefinite" under Rule 14a-8(i)(3). Finally, the court concluded that an identical proposal should not be excluded in 2015 and granted injunctive relief.

**Wal-Mart fires back.** In its brief, Wal-Mart urges the Third Circuit to vacate the injunction requiring it to include the proposal in its 2015 proxy materials and to declare that the proposal was excludable in 2014. Absent relief from the Third Circuit, Wal-Mart must include Trinity's proposal in its 2015 proxy materials, which will go to the printer in mid-April 2015.

Wal-Mart argues that the proposal was excludable under Rule 14a-8(i)(7) because it deals with a matter relating to ordinary business operations. The district court, Wal-Mart contends, "wholly ignored" or misconstrued longstanding SEC guidance. Without a reversal, Wal-Mart urges, the district court's ruling will leave the ordinary business exclusion "in tatters," having created "what amounts to a board action exception to Rule 14a-8(i)(7)" and an expansion of the significant policy issue exception.

First, Wal-Mart noted that the district court decided that the proposal did not deal with matters related to Wal-Mart's ordinary business operations despite seeking to have a board committee address policies regarding whether or not the company should sell certain products. Wal-Mart states that the SEC explained more than 30 years ago that a shareholder proposal is excludable under if the underlying "subject matter" that it seeks to have a committee review "involves a matter of ordinary business."

Next, Wal-Mart explains that while the district court said that the proposal does not "dictate to management," nearly 40 years ago, the SEC rejected a standard under which shareholder proposals involving "matters that would be handled by management personnel without referral to the board of directors generally would be excludable," but proposals involving "matters that would require action by the board would not be." The district court also determined that the proposal implicates significant policy issues. Wal-Mart argues that a proposal must *focus on*, not merely implicate, a significant policy issue; Trinity's proposal is too broad, Wal-Mart contends. Finally, Wal-Mart asserts that the district court erred in holding that the proposal was not vague and indefinite under Rule 14a-8(i)(3). Key terms of the proposal are "hopelessly vague and indefinite" due in part to the vast array of products offered by the company and the numerous communities with whom it works, Wal-Mart says. The case is No. 14-4764.

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Companies: Trinity Wall Street; Wal-Mart Stores, Inc.

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