



## Securities Litigation ADVISORY ■

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### Third Circuit Quells Proxy Uncertainty: Vacates Order That Required Wal-Mart to Include Shareholder Proposal in Its 2015 Proxy Statement

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The comfort given to companies from Securities and Exchange Commission (SEC) no-action letters relating to shareholder proposals has been increasingly challenged by shareholders. In a case that has been watched closely this proxy season, on April 14, 2015, the U.S. Court of Appeals for the Third Circuit vacated the injunction that mandated that Wal-Mart, Inc., include a shareholder's proposal in its 2015 annual meeting proxy materials.<sup>1</sup> The circuit court also reversed the district court's summary judgment in favor of the shareholder. As a result, the concern and uncertainty created by the district court's earlier decision, which had declined to follow the SEC no-action letter, is put to rest, at least for this season.

#### **The Shareholder's 2014 Proxy Proposal**

On December 18, 2013, Trinity Wall Street submitted a shareholder proposal to Wal-Mart for inclusion in Wal-Mart's 2014 annual meeting proxy materials pursuant to Rule 14a-8 of the Securities Exchange Act of 1934, as amended (Exchange Act).<sup>2</sup> Trinity's proposal sought a vote to require that Wal-Mart's board of directors amend the charter of the compensation, nominating and governance committee to include oversight and reporting duties over the establishment of policies and standards regarding the sale of products that "especially endanger public safety and well-being, risk impairing the company's reputation, or offend the family and community values integral to the company's brand."

<sup>1</sup> <http://www2.ca3.uscourts.gov/opinarch/144764po.pdf>.

<sup>2</sup> <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2014/trinitychurch032014-14a8.pdf>.

## Wal-Mart Requests and Receives No-Action Relief from the SEC

On January 30, 2014, Wal-Mart requested no-action relief from the staff of the SEC for exclusion of the shareholder proposal. Under Rule 14a-8, a company is required to include a shareholder proposal in its proxy statement unless the proposal fails to comply with one of the Rule's requirements or one of the enumerated bases for exclusion in the Rule applies. If a company intends to exclude a shareholder proxy proposal, the company must notify the SEC, typically in the form of requesting a "no-action" letter, setting forth the basis for exclusion of the shareholder proposal from the proxy statement. Receipt of a no-action letter provides the staff's informal view regarding whether it would recommend enforcement action to the SEC if the company excludes the shareholder proposal.

In its letter to the staff, Wal-Mart stated that Trinity's proposal could be properly excluded pursuant to Rule 14a-8(i)(7) because the proposal related to its "ordinary business" operations. Specifically, Wal-Mart contended that "[b]y calling for policies that would govern the Company's decisions whether to sell particular products, the Proposal seeks to subject these decisions to shareholder oversight ... [and] extends far beyond any significant policy issue raised by gun violence."

The SEC staff concurred with Wal-Mart that Rule 14a-8(i)(7) permitted Wal-Mart to exclude Trinity's proposal from its 2014 annual meeting proxy materials. On March 20, 2014, the staff notified the company that "the proposal relates to the products and services offered for sale by the company... Accordingly, we will not recommend enforcement to the Commission if [Wal-Mart] omits the proposal from its proxy materials."

## The District Court Proceedings

Disputes over whether a shareholder's proxy proposal may be properly excluded under Rule 14a-8 do not typically result in litigation. On April 1, 2014, however, Trinity filed suit in the U.S. District Court for the District of Delaware, seeking a declaratory judgment that Wal-Mart's decision to exclude the proposal violated Section 14(a) of the Exchange Act.<sup>3</sup> On the same day, Trinity also filed a motion to preliminarily enjoin Wal-Mart from distributing its 2014 annual meeting proxy materials without including its proposal.<sup>4</sup> After expedited briefing and a hearing, the district court denied Trinity's request for a preliminary injunction, thus enabling Wal-Mart to distribute its 2014 annual meeting proxy materials without the shareholder proposal. Specifically, the district court held that Trinity "had not met its burden to show a likelihood of success on the merits" because Trinity's proposal "deals with guns on the shelves and not guns in society." In this regard, the district court noted that "[m]aterially the same, if not identically the same arguments that were made to this Court in connection with this dispute were made previously to the SEC." And, while stating that "no deference to the SEC is mandated," the district court noted that some deference was merited given the nature of the requested relief and exigent circumstances under which such relief was being sought.

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<sup>3</sup> *Trinity Wall Street v. Wal-Mart Stores, Inc.*, No. 1-14-cv-00405-LPS (D. Del. Apr. 1, 2014) ECF No. 4.

<sup>4</sup> *Id.* at ECF No. 1.

In a subsequent ruling, however, the district court reversed its preliminary view and granted Trinity summary judgment. The district court held that “[a]t its core, Trinity’s Proposal seeks to have Wal-Mart’s **Board** oversee the development and effectuation of a Wal-Mart policy.”<sup>5</sup> The district court noted that Trinity’s proposal “does not dictate what products should be sold or how the policies regarding sales of certain types of products should be formulated or implemented.” According to the court, it would be for the board to determine what, if any, policy should be formulated and implemented. Although the 2014 proxy had since been delivered to shareholders without inclusion of Trinity’s proposal, the district court ordered Wal-Mart to include the proposal in the 2015 annual meeting proxy materials.

## **Wal-Mart Appeals to the Third Circuit**

Wal-Mart appealed and sought an expedited decision by the Third Circuit to accommodate a mid-April printing deadline for the 2015 proxy statement. The appeal attracted numerous amici curiae briefs on both sides of the issue, which demonstrated the keen interest in the standoff. As expressed by one amicus, the Washington Legal Foundation, the district court’s decision, if left standing, presented “enormous uncertainty” for all publicly held companies. SEC Commissioner Daniel Gallagher spoke publicly on the case, calling the district court’s ruling an “erroneous decision.”

## **Conclusion**

The Third Circuit’s ruling, which allows Wal-Mart to exclude the shareholder proposal from its 2015 proxy statement, is a decisive victory for public companies, and shareholders should be discouraged from initiating litigation to circumvent no-action relief provided by the SEC. The court indicated that a full opinion will be forthcoming, which will be significant, as it will reveal the court’s analysis and rationale for its decision. The level of deference the appellate court gives to the SEC’s interpretation of Rule 14a-8(i)(7) will influence the extent to which shareholders continue with court challenges in future proxy seasons. In the meantime, public companies should take comfort in the SEC’s no-action review process for the ordinary business operations exception provided in Rule 14a-8.

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<sup>5</sup> *Trinity Wall St. v. Wal-Mart Stores, Inc.*, No. 1-14-cv-00405-LPS, 2014 WL 6790928, at \*9 (D. Del. Nov. 26, 2014).

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