

District Court Rules Wal-Mart Should Not Have Relied on an SEC Staff Decision and Excluded a Shareholder Proposal in Its 2014 Proxy Materials

December 5, 2014 | Client Update | 3-minute read

The U.S. District Court for the District of Delaware determined that Wal-Mart should not have excluded a shareholder proposal from its 2014 proxy statement, even after it received a favorable SEC no-action letter.

Trinity, an Episcopal parish headquartered in New York City, submitted a proposal for Wal-Mart's 2014 annual meeting requesting that the Compensation, Nominating and Governance Committee charter be amended to add oversight of implementation of policies that would evaluate whether the company should sell a product that endangers public safety, has the substantial potential to impair the company's reputation or would be considered offensive to the values that are integral to the company's brand. Trinity wanted the committee to consider whether or not the company should sell guns equipped with magazines holding more than 10 rounds of ammunition.

In March 2014, the SEC staff agreed with the company that it could exclude the proposal under Rule 14a-8(i)(7), as relating to its ordinary business operations. This is consistent with prior SEC staff views about shareholder proposals focused on company decisions to sell controversial products. In April, the Court denied Trinity's request for a preliminary injunction to prevent Wal-Mart from printing proxy materials without this proposal, on the basis that Trinity had not shown a likelihood of success on the merits. The Court specifically deferred to the SEC's no-action decision.

But in an opinion issued recently on summary judgment motions, the Court held that Trinity's 2014 shareholder proposal does not deal with matters that relate to Wal-Mart's ordinary business operations because it seeks to have Wal-Mart's board oversee the development and effectuation of a policy. The Court found that while the policy could, and likely would, influence what products are sold by the company, the proposal itself does not. Moreover, the proposal relates to social policy issues that transcends ordinary business matters, including the social and community effects of sales of these types of firearms at the retailer and the impact that could have on the company's reputation.

Although the Court acknowledged that it had previously accorded significant weight to the SEC staff's no-action letter determination during the preliminary injunction hearing, the Court noted that the final determination of the application of the ordinary business exception is for the Court alone to make. The SEC itself has acknowledged the same in its 14a-8 guidance.

The Court also decided that Trinity's request for declaratory relief regarding Wal-Mart's 2014 proxy materials for a meeting that already occurred is not moot because it falls into an exceptional category of disputes in which the challenged action was of too short a duration to be fully litigated, given that the Court had little time to make a decision before Wal-Mart's printing deadline for its 2014 annual meeting and therefore could not have resolved the parties' disputes by then. In addition, there was a reasonable expectation that the claim is capable of repetition since Trinity intends to submit another proposal for the next meeting.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Ning Chiu

+1 212 450 4908

ning.chiu@davispolk.com

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