

# Wal-Mart Appeals Ruling Requiring the Company to Include a Shareholder Proposal About Its Products

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Wal-Mart Stores is appealing to the U.S. Court of Appeals for the Third Circuit to vacate a mandatory injunction that requires Wal-Mart to include a shareholder proposal in its 2015 proxy materials, and the declaration that Wal-Mart should not have excluded the proposal in 2014.

As we previously discussed [here](#), the U.S. District Court for the District of Delaware held in late 2014 that a shareholder proposal does not deal with matters that relate to Wal-Mart's ordinary business operations and should not have been left out of the company's 2014 proxy statement. The proposal requested that the Compensation, Nominating and Governance Committee oversee 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, an Episcopal parish headquartered in New York City, wanted the committee to consider whether or not the company should sell certain types of guns.

Wal-Mart had received a no-action letter from the SEC staff during the 2014 proxy season concurring that the company could exclude the proposal. After denying Trinity's request to force Wal-Mart to include the proposal for its 2014 annual meeting, the District Court later reversed itself. Trinity has submitted an identical proposal for Wal-Mart's 2015 proxy statement.

In the appeal, appellants argue that the district court's judgment contradicts Rule 14a-8(i)(7) and contravenes nearly 40 years of SEC guidance on the rule. The SEC guidance should be given considerable deference unless it is plainly erroneous or inconsistent with the regulation.

The district court was influenced by the fact that the board, rather than management, was asked to take action by overseeing the development and implementation of a policy. Appellants contend that it has long been understood that the underlying subject matter of a shareholder proposal, not the form of requested action, governs the determination of whether a proposal is excludable. Otherwise, the district court has in effect created a board action exception to the rule.

As to the court's holding that the proposal implicates a significant public policy, the appellants assert that the proposal must focus on, and not merely implicate, public policy. As written, the proposal could cover many products, since guns equipped with high capacity magazines are listed as just one example. The SEC has previously allowed the exclusion of proposals that relate to a retailer's sale of controversial products, as distinguished from companies manufacturing those products, in evaluating the nexus of the proposal to a company's operations.

The brief also states that the court erred in not deciding that the proposal can be excluded because key terms are vague, in particular the reference to products that would be considered "offensive to the family and community values integral to the company's promotion of its brand." This argument was made, but not decided upon by the SEC staff, in the no-action letter.

Appellants conclude that the district court committed reversible error by ignoring and misconstruing the SEC's interpretation. What the court created could "swallow the rule" and "flood" public companies with proposals regarding ordinary business matters.

As an expedited motion, a decision is expected before Wal-Mart prints its proxy materials in mid-April. The district court ruling has ignited an intense level of interest, as amicus briefs have been filed in support of Wal-Mart's position by, among, others, the Business Roundtable, the Chamber of Commerce, the National Association of Manufacturers and the Society of Corporate Secretaries and Governance Professionals.

**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.**

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