



Trinity Wall Street v. Wal-Mart Stores, Inc.: Is it About Guns on the Shelves or Guns in the Streets?

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In late November of 2014, a federal district court in Delaware ruled that Wal-Mart must include in its 2015 proxy materials a shareholder proposal seeking heightened board oversight concerning the societal, community, and reputational effects of the company's sale of certain products, including semi-automatic rifles with high capacity magazines. See *Trinity Wall Street v. Wal-Mart Stores, Inc.*, -- F. Supp. 3d -- (D. Del. Nov. 26, 2014).

Trinity Wall Street, a historic Episcopalian parish located in New York City and a Wal-Mart minority shareholder, first submitted its proposal for inclusion in Wal-Mart's 2014 proxy materials, seeking a shareholder vote at the company's 2014 annual meeting. Specifically, Trinity's proposal sought to amend Wal-Mart's Compensation, Nominating and Governance Committee charter to require the board committee to provide oversight concerning the formulation, implementation, and reporting of company policies and standards that determine whether Wal-Mart should sell a product that: (1) "especially endangers public safety and well-being; (2) has the substantial potential to impair the reputation of the company; and/or (3) would reasonably be considered by many offensive to the family and community values integral to the Company's promotion of its brand." The proposal's supporting statement explained that this oversight and reporting encompassed determinations of whether Wal-Mart should sell guns with magazines holding more than ten rounds.

Wal-Mart submitted a letter to the Securities and Exchange Commission stating that it intended to exclude Trinity's proposal from its 2014 proxy materials, as permitted under SEC Rule 14a-8(i)(7), because the proposal related to the company's "ordinary business operations." In April of 2014, two weeks after the SEC issued a "no action" letter agreeing with Wal-Mart that Rule 14a-8's ordinary business exception provided a proper basis for exclusion of Trinity's proposal, the church filed its lawsuit against Wal-Mart.

In *Trinity Wall Street v. Wal-Mart Stores, Inc.*, the district court disagreed with the world's largest retailer and the SEC by concluding that Trinity's proposal was *not* properly omitted under the ordinary business exclusion. Instead, the court found that the proposal does not interfere with Wal-Mart management's ability to run the company's day-to-day business by dictating the specific products that the company should sell as the proposal leaves the development and implementation of such policies to the discretion of Wal-Mart's board of directors. Moreover, the court reasoned that the proposal "focuses on sufficiently significant social policy issues" and "transcend[s] the day-to-day business matters and

raise[s] issues so significant that it would be appropriate for a shareholder vote,” although it did not expand on this issue in much detail. Notably, the court emphasized that no-action letters issued by the SEC’s staff reflect only “informal views,” and “the final determination as to the applicability of the ordinary business exception is for the Court alone to make.” Wal-Mart has appealed the decision, and the Court of Appeals for the Third Circuit is expected to make a swift ruling in light of Wal-Mart’s looming deadline to print and disseminate its 2015 proxy materials to shareholders before the company’s annual shareholder meeting in June.

If the Third Circuit affirms the lower court’s ruling, the practical effects felt by Wal-Mart likely will be slight considering that the proposal requires a majority vote, and the retailer’s founding family owns over fifty percent of the company. On a broader level, however, this case highlights the lack of consistent, bright-line rules in the SEC staff’s determinations and court decisions regarding the proper application of Rule 14a-8’s ordinary business exclusion. Moreover, Trinity’s success in challenging the retail giant’s decision to exclude its proposal could motivate minority shareholders of companies across an immense spectrum of industries to pursue similar action. This could lead to an increase in shareholder proposals aimed at addressing a company’s sale of certain goods that, in that particular shareholder’s views, may threaten societal values or go against a company’s perceived core values. As evidenced by the modern-day David versus Goliath case currently unfolding in the Third Circuit, a dispute concerning a company’s decision to exclude a shareholder proposal under the ordinary business exception can snowball into unanticipated and undesirable litigation even when a company is armed with a favorable SEC “no-action” letter.

Though this case is premised on “social policy issues” surrounding the sale of firearms, the potential precedent could affect any number of industries. Could the same logic apply if shareholders object to the way in which a restaurant chain sources its ingredients or to a retailer’s decision to sell tobacco products? Whether or not a publicly traded company is involved in the manufacture or sale of firearms, this case warrants attention.

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