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In WLF Victory, Third Circuit Rejects Activist Shareholder Proposal

(Trinity Wall Street v. Wal-Mart Stores, Inc.)

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—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—The U.S. Court of Appeals for the Third Circuit issued its opinion today in *Trinity Wall Street v. Wal-Mart Stores, Inc.*, explaining its decision earlier this year to overturn a lower court decision that would have required publicly traded companies to include frivolous and inappropriate shareholder proposals in proxy statements at the company’s expense—and, therefore, at the expense of every other shareholder. Today’s full opinion follows the court’s brief April 14, 2015 two-page order vacating the district court’s judgment and permitting Wal-Mart to exclude the proposal.

The lawsuit centered on the scope of Rule 14a-8, which defines a narrow exception to the general rule that shareholders must prepare and distribute their own proxy materials, rather than piggyback on the company’s materials. Even where Rule 14a-8’s procedural requirements have been satisfied, a company may exclude a shareholder proposal if it falls within one of the Rule’s thirteen exclusions. In this case an activist shareholder sought to include a proposal in Wal-Mart’s proxy materials that would have compelled the board’s governance committee to review the company’s policies concerning the sale of potentially dangerous or offensive products.

In its January *amicus curiae* brief, WLF argued that the subject matter of the proposal concerned the products the company sells and focused improperly on the company’s evaluation of specific risks and benefits, making it excludable under SEC Rule 14a-8(i)(7)’s “ordinary business” exception. The Third Circuit’s opinion agreed: “Stripped to its essence, Trinity’s proposal—although styled as promoting improved governance—goes to the heart of Wal-Mart’s business: what it sells on its shelves.”

Not only did the proposal implicate Wal-Mart’s ordinary business, WLF argued, but the proposal’s language was also so deliberately vague and indefinite that neither the shareholders voting on the proposal, nor the company in implementing it (if adopted), would have been able to determine with any reasonable certainty exactly what actions or measures the proposal would have required. Today, the court agreed with WLF on this point too, explaining that the proposal “does not inform the shareholders of the breadth of the subject on which they would be asked to vote nor does it make clear what the Company would be required to do if it were adopted.”

In response to the Third Circuit’s ruling, WLF issued the following statement by Senior Litigation Counsel Cory Andrews: “Today’s opinion is a victory for common sense. The decision below threatened to upset long-settled understandings regarding shareholder voting on corporate policy matters and would have drastically increased the uncertainty that surrounds the proxy ballot process.”

WLF is a national public interest law firm and policy center that regularly litigates to protect investors from activists’ excesses, such as unwarranted proxy proposals that drive up costs for all shareholders.