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## Shareholder Proposals

### **In Resolving Wal-Mart-Investors' Gun Sales Fight, Third Circuit Expects Resolution Within the Week**

BY MICHAEL GREENE

**D**uring oral argument in a case about Wal-Mart's high-capacity gun sales, a panel of Third Circuit judges April 8 peppered both sides with questions about the scope of the SEC's "ordinary business" proxy exclusion rule and seemed bothered about where to draw the dividing line (*Trinity Wall Street v. Wal-Mart Stores Inc.*, 3d Cir., No. 14-4764, oral argument held 4/8/15).

The panel raised questions about the SEC's interpretation of Rule 14a-8(i)(7) and whether they should defer to the commission; whether the size and type of business affects the interpretation of the exclusion rule; what effect a D.C. Circuit opinion from 1970—*Medical Committee for Human Rights v. SEC*—may have on this case; and whether the shareholder proposal at issue is impermissibly vague.

Because Wal-Mart Stores Inc. has to print its proxy statement by April 16, the panel said they would try to issue their opinion by April 15.

**Line Drawing.** Wal-Mart is appealing a district court ruling that the megastore couldn't omit a shareholder proposal that sought to provide more oversight and reporting regarding the guns sold at the chain's stores under the SEC's "ordinary business" proxy exclusion rule (13 CARE 549, 3/13/15). The district court concluded that the Securities and Exchange Commission was incorrect in providing Wal-Mart with no-action relief because Trinity Wall Street's proposal related to ordinary business operations (12 CARE 1696, 12/12/14).

During the April 8 oral arguments in Philadelphia, U.S. Court of Appeals for the Third Circuit Court Judge Thomas L. Ambro asked attorneys from both sides where they believed the line for "ordinary business" should be drawn, adding that he wasn't sure where the SEC staff draws this line, citing two decisions where no-action relief had been denied—in cases involving Denny's Corp (5 CARE 407, 4/20/07) and Kroger Co. (4 CARE 481, 5/5/06).

Theodore J. Boutrous Jr., a partner at Gibson, Dunn & Crutcher who represented Bentonville, Ark.-based Wal-Mart, told the panel that his client has a very rigorous process for determining what products it sells. He

argued that there is a distinction between proposals that affect what retailers and manufacturers sell, adding that a policy that dictates what products a retailer should sell is the essence of ordinary business.

Boutrous additionally warned the panel that endorsing this type of proposal will create an outpouring of similar proposals.

Joel E. Friedlander, a partner at Friedlander & Gorris P.A. who represented Trinity, told the panel that according to 1998 SEC staff guidance and *Medical Committee for Human Rights v. SEC*, the proposal is not excludable because it only asks the board to develop a policy in considering what products it sells. He added that exercising oversight is something that shareholders should expect a board to do.

**Floodgates?** The case "goes to the broader question of striking a balance between shareholder suffrage and the prerogative of management," Boutrous told the appeals panel, which also included Judges Thomas I. Vanaskie and Patty Shwartz. A ruling for Trinity would require the retailer to scrutinize hundreds of thousands of potentially controversial products, he said.

However, Friedlander argued that the church's proposal is reasonable considering the specific risks of selling guns. "We're not asking the board to survey each item. Wal-Mart has methods of filtering out which products generate controversy. That leads to the evolution of policy," he said.

**Little Precedent.** Richard Samp, chief counsel at the Washington Legal Foundation, one of the parties that filed an amicus brief in support of Wal-Mart, told Bloomberg BNA that one of the biggest problems the Third Circuit will face in reaching a decision is the relative dearth of precedent on this issue. He added that most of the citations in the parties' briefs came from no-action letters and that the few court decisions that exist come mostly from federal district courts.

According to Samp, if the Third Circuit was to base its decision solely on no-action letters, Wal-Mart will win its appeal.

**Strong Reactions.** Business groups have strongly criticized the district court's ruling (13 CARE 172, 1/23/15), and experts have given diverse predictions on how this case could impact the ongoing proxy season and other similar proposals (13 CARE 234, 1/30/15). Conversely, several groups have filed amicus briefs in support of Trinity's position (13 CARE 381, 2/20/15).

In its appeal, Wal-Mart claimed that "[a]bsent reversal, the District Court's erroneous ruling will leave the Rule 14a-8(i)(7) ordinary business exclusion in tatters" (13 CARE 381, 2/20/15).

Jeffrey Golan, of Philadelphia-based Barrack Rodos & Bacine who represented Robert F. Kennedy Center for Justice and Human Rights, one of the amicus filers, in a statement e-mailed to BBNA said that the group “wholeheartedly endorses Trinity Wall Street’s position because upholding the District Court’s decision is necessary to protect and facilitate the use of the Sustainable Investing investment philosophy as a best practice in the financial evaluation of a company and the role of shareholders.”

**Bases for Reversal.** However, Samp believes that what Trinity is asking for is unprecedented and that it is not realistic for shareholders to play a role in determining what products a retailer sells.

Samp told BBNA that there are two bases for the Third Circuit to overturn the lower courts decision: the

ordinary business exclusion rule and vagueness—and that both are interrelated. He explained that the proposal can’t specifically dictate what products the companies sells, but by not doing so, it becomes vague.

To contact the reporter on this story: Michael Greene in Washington at [mgreene@bna.com](mailto:mgreene@bna.com)

To contact the editor responsible for this story: Ryan Tuck at [rtuck@bna.com](mailto:rtuck@bna.com)

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*Wal-Mart’s brief is available at [http://www.bloomberglaw.com/public/document/Trinity\\_Wall\\_Street\\_v\\_WalMart\\_Stores\\_Inc\\_Docket\\_No\\_1404764\\_3d\\_Cir/8](http://www.bloomberglaw.com/public/document/Trinity_Wall_Street_v_WalMart_Stores_Inc_Docket_No_1404764_3d_Cir/8).*

*Trinity Wall Street’s answering brief is available at [http://www.bloomberglaw.com/public/document/Trinity\\_Wall\\_Street\\_v\\_WalMart\\_Stores\\_Inc\\_Docket\\_No\\_1404764\\_3d\\_Cir/7](http://www.bloomberglaw.com/public/document/Trinity_Wall_Street_v_WalMart_Stores_Inc_Docket_No_1404764_3d_Cir/7).*