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Shareholder Proposals

Third Circuit Reversal in Wal-Mart Gun Case Provides ‘Relief for the Corporate Community’

By MICHAEL GREENE

Wal-Mart may exclude a shareholder proposal seeking to provide more board oversight on its high-capacity gun sales, according to an April 14 U.S. Court of Appeals for the Third Circuit ruling (*Trinity Wall Street v. Wal-Mart Stores Inc.*, 3d Cir., No. 14-4764, order issued 4/14/15).

In a dispositive order, the Third Circuit summarily reversed a district court decision that the Securities and Exchange Commission staff was incorrect in permitting Wal-Mart to exclude the shareholder proposal from its proxy materials. The agency had granted no-action relief under SEC Rule 14a-8(i)(7), finding that the proposal dealt “with matters relating to the company’s ordinary business.”

A week earlier, a panel of Third Circuit judges 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 (13 CARE 764, 4/10/15).

While the Third Circuit’s order did not include the grounds for its decision, it stated that the court will issue an opinion at a later time. Trinity Wall Street, the Episcopal church in Manhattan and Wal-Mart shareholder that filed the proposal, can still seek both a panel and an *en banc* rehearing.

Because Wal-Mart Stores Inc. has to print its proxy statement by April 16, the panel said during oral argument that they would try to issue a decision by April 15.

Controversial Ruling . Last November, U.S. District Court for the District of Delaware Judge Leonard P. Stark held that Wal-Mart failed to comply with federal securities laws when it refused to include in its proxy materials a shareholder proposal seeking to provide more oversight and reporting regarding the guns sold at the chain’s stores (12 CARE 1696, 12/12/14).

The decision came after the SEC staff granted Wal-Mart no-action relief.

As result of the district court’s decision, Wal-Mart filed an appeal with the Third Circuit claiming 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).

Business groups have strongly criticized the district court’s ruling, 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, Trinity and supporting amici—including 38 corporate and securities law professors, and parents of children who were killed in the December 2012 mass shooting at Sandy Hook Elementary School in Connecticut—argued in recent filings that the district court’s ruling should be affirmed, asserting that Trinity’s proposal did not try to dictate to Wal-Mart’s board how the store should be operated or what products the company should sell (13 CARE 381, 2/20/15).

Myriad Reactions. Wal-Mart spokesman Randy Hargrove told Bloomberg BNA that “the Third Circuit reached the right decision in reversing the district court’s ruling. We appreciate the court’s quick consideration of the issues.”

Phillip A. Jackson, a vicar of Trinity Church, said in an e-mailed statement to BBNA that Trinity is “disappointed with the ruling, but pleased that we have been able to draw attention to an important issue of corporate governance and social responsibility.”

“The Court has not yet issued an opinion explaining its reasoning, and we will consider our options when it is issued,” he added.

Meanwhile, practitioners and amicus filers also were divided on the decision.

“While corporate practitioners had confidence that the SEC’s view was correct, the Third Circuit’s holding is a relief for the corporate community, as it removes much of the uncertainty created by the lower court’s decision,” Yafit Cohn, an associate at Simpson Thacher & Bartlett LLP, said in an e-mailed statement to BBNA. “The Third Circuit’s ruling confirms that a shareholder proposal that, at its core, relates to an ordinary business matter, such as the sale of a company’s products, is not required to be included in the company’s proxy statement.”

“The Third Circuit’s decision provides a resounding victory for the business community, but also for common sense. It will provide much needed certainty to all publicly traded companies,” Cory L. Andrews, senior litigation counsel for the Washington Legal Foundation, who filed an amicus brief in support of Wal-Mart, said in an e-mailed statement to BBNA. “The district court’s decision below was clearly erroneous and upset long-settled understandings of the SEC’s proxy exclusions. Left to stand, it would only have increased the uncertainty that surrounds the proxy ballot process, thereby substantially raising proxy voting costs for all public companies.”

On the other side, Jeffrey Golan, of Philadelphia-based Barrack Rodos & Bacine who represented the Robert F. Kennedy Center for Justice and Human

Rights, one of the amicus filers in support of Trinity, told BBNA in an e-mailed statement that “we are disappointed with the ruling. Shareholders should have a formal means to present their views to the board and require the board to consider this highly significant issue and develop a policy that would take into account the reputational and social aspects of WalMart’s sales of highly dangerous products.”

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