

Third Circuit Lets Wal-Mart Exclude Firearms Proposal Under the “Ordinary Business Operations” Exception

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On April 14, 2015, the U.S. Court of Appeals for the Third Circuit summarily reversed a troubling decision of the Federal District Court in Delaware that required Wal-Mart to include in its 2015 proxy materials a shareholder proposal intended to cause Wal-Mart to restrict retail firearm sales.

On December 8, 2014, Judge Leonard Stark had granted summary judgment to the shareholder proponent and enjoined Wal-Mart from excluding the proposal to amend the company’s certificate of incorporation and take other steps designed to require the board of directors to implement policies and standards to determine if the retailer should sell products that endanger public safety or could reasonably be considered offensive to the Company’s brand.

Wal-Mart contended that the proposal could be excluded as a proposal that would “interfere with the ordinary business operations of the issuer” under Rule 14a-8(i)(7). Wal Mart’s position was consistent with that of the SEC taken in a “no-action” letter that allowed Wal-Mart to exclude the proposal from its proxy materials for its 2014 annual meeting of stockholders. The proponent disagreed and initiated suit in the District Court. The Third Circuit’s order indicated its opinion will be forthcoming.

The proponent held \$300,000 of Wal-Mart stock out of a total market capitalization in excess of \$250,000,000,000. This miniscule economic participation provides support for SEC Commissioner Gallagher’s suggestion that the SEC reexamine Rule 14a-8, the SEC regulation that allows proposals by stockholders to be included in proxy statements.

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