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Media Contact: Cory Andrews | 202-588-0302

WLF Asks Third Circuit to Reject Activist Shareholder Proposal

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

“The decision below upsets long-settled understandings of the proxy exclusions at issue here and increases the uncertainty that surrounds the proxy ballot process, thereby substantially raising proxy voting costs for all public companies ... and, therefore, ... every other shareholder.”

—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation (WLF) asked the U.S. Court of Appeals for the Third Circuit, based in Philadelphia, to overturn a district court decision yesterday that threatens to allow the inclusion of frivolous and inappropriate shareholder proposals in proxy statements at the company’s expense—and, therefore, at the expense of every other shareholder.

The lawsuit centers on the proper scope of Rule 14a-8, which constitutes a narrowly-defined exception to the general rule that shareholders must prepare and distribute their own proxy materials, rather than utilize 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 a brief filed in *Trinity Wall Street v. Wal-Mart*, WLF argues that, on its face, the subject matter of the proposal concerns the products the company sells and focuses improperly on the company’s evaluation of specific risks and benefits, and is therefore excludable under SEC Rule 14a-8(i)(7)’s “ordinary business” exception. Not only does the proposal concern Wal-Mart’s ordinary business matters, but the proposal’s language is also so deliberately vague and indefinite that neither the shareholders voting on the proposal, nor the company in implementing it (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal would require.

Upon filing its brief, WLF issued the following statement by Senior Litigation Counsel Cory Andrews: “The decision below upsets long-settled understandings of the proxy exclusions at issue here and increases the uncertainty that surrounds the proxy ballot process, thereby substantially raising proxy voting costs for all public companies. WLF opposes the inclusion of frivolous and inappropriate Rule 14a-8 shareholder proposals in proxy statements at the company’s expense—and, therefore, at the expense of every other shareholder.”

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.