

SEC Timeout on Proxy Access Issue Has Wider Implications

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On January 16, 2015, the SEC withdrew its December 1, 2014 no-action letter in which it concurred with the view of Whole Foods Market, Inc. that the company was entitled under SEC Rule 14a-8(i)(9) to exclude from its proxy statement a shareholder's proxy access proposal on the basis that the proposal would conflict with the Company's own proposal on proxy access.^[1] Proxy access refers to a corporate bylaw amendment that would permit shareholders to include their own nominees for board membership in the company's proxy materials. But the agency took even broader action when, on January 16, SEC Chair Mary Jo White announced that "due to questions that have arisen about the proper scope and application of Rule 14a-8(i)(9)," she had directed the SEC Staff to review the rule and report on its review, and the SEC's Division of Corporation Finance announced that, in light of Chair White's directive, the Division "will express no views on the application of Rule 14a-8(i)(9) during the current proxy season."^[2] While the withdrawal of its no-action letter creates uncertainty for companies with respect to proxy access proposals under Rule 14a-8(i)(9), the decision not to express a view on the application of Rule 14a-8(i)(9) potentially affects a much wider range of matters involving competing shareholder and company proposals.

Background

SEC Rule 14a-8 permits a shareholder who satisfies the rule's eligibility and procedural requirements to have a proposal included in the company's proxy materials, so long as the proposal does not fall within one of the thirteen substantive bases for exclusion enumerated in the rule. A company wishing to exclude a shareholder proposal for one or more of these bases is required to seek a no-action letter from the SEC's Division of Corporation Finance concurring in the company's proposed exclusion of the proposal. Among the bases of exclusion is Rule 14a-8(i)(9), which allows a company to exclude a shareholder proposal that "directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting." Rule 14a-8(i)(9) reflects the agency's longstanding concern that two inconsistent proposals on a proxy card might result in investor confusion.

The Whole Foods Proposals

Whole Foods invoked Rule 14a-8(i)(9), seeking to exclude a proxy access shareholder proposal.^[3] Under the proposal, shareholders that have collectively held at least 3% of the company's shares continuously for three years would be permitted to nominate candidates for election to the board. In its no-action request, Whole Foods argued that the shareholder's proposal conflicts with its own proxy access proposal that the company intended to submit to its shareholders, even though the terms of the company's proposal differed in significant respects from the shareholder proposal. The company proposal would permit a shareholder (but not a group of shareholders) owning 9% or more of the company's stock for five years to nominate candidates for election to the board. It was the first instance of a company seeking no-action relief concerning a shareholder proxy access proposal on the basis that the proposal was excludable under Rule 14a-8(i)(9) because it conflicted with a company proposal on the same subject.

On December 1, 2015, the SEC's Division of Corporation Finance issued its decision to Whole Foods, stating "there appears to be some basis for your view that Whole Foods Market may exclude the proposal under rule 14a-8(i)(9)." The shareholder proponent responded by requesting an appeal to the full Commission of the Staff's decision and, alternatively, requesting that the Staff "reverse its position and withdraw the no-action letter granted to Whole Foods."^[4] The shareholder's objection to the Staff's decision asserts that it "effectively limits shareholders to consideration of proposals sponsored by the board of directors and eliminates any opportunity for shareholders to present alternative criteria" for proxy access bylaws.

Implications of the SEC's Decision Not to Express Views on Rule 14a-8(i)(9)

Although the Whole Foods no-action request under Rule 14a-8(i)(9) related to a proxy access proposal, the January 15, 2015 announcement by the Division of Corporation Finance that it will express no views on the application of Rule 14a-8(i)(9) during the current proxy season applies broadly to other types of shareholder proposals that a company may seek to exclude because the company plans a proposal on the same subject matter, including with respect to a wide range of corporate governance matters such as, for example, majority voting for directors.

Companies that would rely on Rule 14a-8(i)(9) to exclude a shareholder proposal may, of course, do so in the 2015 proxy season. We recommend that a company continue to comply with Rule 14a-8(j) by filing its reasons for exclusion with the SEC under Rule 14a-8(i)(9). While the Staff will respond that it cannot express any view on that basis for exclusion, Staff responses under Rule 14a-8 are non-binding in all events, and the company may always choose to exclude a proposal if it believes its basis for doing so would survive judicial review, if challenged. Among other things, a company seeking to rely on Rule 14a-8(i)(9) should confirm that its approach is consistent with precedent Rule 14a-8(i)(9) no-action letters. Alternatively, companies may seek declaratory relief in court, or include in their proxy materials both the shareholder proposal and the company proposal. And, of course, companies should exercise special caution in relying on Rule 14a-8(i)(9) to exclude proxy access proposals.

[1] Available at: <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/jamesmcritchiecheveddenrecon011615-14a8.pdf>

[2] Available at: <http://www.sec.gov/news/statement/statement-on-conflicting-proxy-proposals.html#.VM07qdOo60U>

[3] *Whole Foods Market, Inc.* (avail. Dec. 1, 2014).

[4] Available at: <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/jamesmcritchiecheveddenrecon011615-14a8.pdf>

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