

Alert

SEC Disclosure and Corporate Governance

Heads Up for 2015 Proxy Season: SEC Staff Empowers Companies in Proxy Access Battle

In a much anticipated decision, the Staff of the SEC's Division of Corporation Finance granted no-action relief to Whole Foods Market, Inc. to allow the exclusion from its proxy statement of a shareholder proposal on proxy access. The Staff agreed with the company that the shareholder proposal was excludable because it "directly conflicts" with the company's own proposal.

The proposal, submitted by James McRitchie, requested that Whole Foods amend its governing documents to allow inclusion in the company's proxy materials of director nominees of any party of one or more shareholders that has collectively held at least 3% of the company's voting securities continuously for three years. The number of nominees would be limited to up to 20% of the size of the board (or no less than two nominees if the board size is reduced). This 3%/3-year formulation mirrors the shareholder proposals calling for proxy access being submitted by the New York City Comptroller to 75 identified companies, as well as the formulation set forth in the SEC's invalidated proxy access rule, except that the number of candidates is capped at 25% of the board under the Comptroller and SEC formulations.

In its no-action request, Whole Foods argued that Mr. McRitchie's proposal is excludable under Exchange Act Rule 14a-8(i)(9), because it "directly conflicts" with the company's proposal to be submitted at its 2015 annual meeting. The Whole Foods proposal will provide that shareholders approve a bylaw amendment to allow proxy access for any single shareholder (but not a group) owning 9% or more of the company's stock continuously for five years, capped at the greater of one director or 10% of the board. Whole Foods claimed that presenting both proposals in its proxy statement "would present alternative and conflicting decisions for the Company's shareholders" and "would likely result in inconsistent and ambiguous results."

The Staff's decision to grant no-action relief is consistent with relief granted in other analogous situations of proposals that "directly conflict" with one another, most notably in relation to proposals calling for the rights of shareholders to call special meetings where

the ownership threshold proposed by the company differs to that proposed by a shareholder. Companies will now have the ability to exclude a proxy access shareholder proposal by putting forth their own formulation with a higher threshold for even a single shareholder. As a result, the 3%/3-year formulation that received increasing levels of support during the 2014 proxy season may become less prevalent.

It is notable that the 9%/5-year proposal is highly unlikely to be met by a *single* shareholder of Whole Foods. Therefore, what remains to be seen is how shareholders and institutional investors will react to a company proposal with a high threshold for a single shareholder and whether counterproposals will be submitted in future years. In addition, it is possible that Institutional Shareholders Services (ISS) or Glass Lewis, who currently review proxy access proposals holistically on a case-by-case basis, could develop voting recommendations with specifically acceptable proxy access parameters such that company proposals at high thresholds would fail to meet their standards. It is also conceivable that voting support by investors or proxy advisory firm recommendations with respect to directors or governance committee members that adopt a proxy access bylaw at a threshold that is viewed as unreasonably high could be impacted. Finally, it is unclear whether the Staff could find a company proposed threshold so burdensome that it would not grant no-action relief in the future.

Companies should continue to engage with shareholders and make decisions based on the company's particular circumstances. The no-action letter is available [here](#).

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If you have any questions on these matters, please do not hesitate to speak to your regular contact at Weil, Gotshal & Manges LLP or to any member of Weil's Public Company Advisory Group:

Howard B. Dicker	Bio Page	howard.dicker@weil.com	+1 212 310 8858
Catherine T. Dixon	Bio Page	cathy.dixon@weil.com	+1 202 682 7147
P.J. Himelfarb	Bio Page	pj.himelfarb@weil.com	+1 214 746 7811
Ellen J. Odoner	Bio Page	ellen.odoner@weil.com	+1 212 310 8438
Lyuba Goltser	Bio Page	lyuba.goltser@weil.com	+1 212 310 8048
Rebecca Grapsas	Bio Page	rebecca.grapsas@weil.com	+1 212 310 8668
Adé K. Heyliger	Bio Page	ade.heylicher@weil.com	+1 202 682 7095
Joanna Jia	Bio Page	joanna.jia@weil.com	+1 212 310 8089
Reid Powell	Bio Page	reid.powell@weil.com	+1 212 310 8831

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