SEC Backs Off Proxy Access Proposal Exclusion; Will Review Application of Rule 14a-8(i)(9)

After initially granting Whole Foods Market’s no-action request to omit a shareholder proposal on proxy access—on the grounds that the shareholder proposal conflicted with one to be offered by the company—the Securities and Exchange Commission (SEC) reversed course in January 2015. The SEC now takes no position on whether exclusion of the shareholder proposal is permitted for Whole Foods, or for the more than 20 other companies that had submitted similar proposals to the SEC following the December 1, 2014 grant of no action relief to Whole Foods.

SEC Chair Mary Jo White released a statement on January 16, 2015 that she had directed SEC staff to review “the proper scope and application” of Exchange Act Rule 14a-8(i)(9), which allows a company to exclude a shareholder proposal that “directly conflicts” with a management proposal. The SEC Division of Corporate Finance simultaneously announced that it would not offer no-action guidance on Rule 14a-8(i)(9) questions during the 2015 proxy season.

The underlying facts are as follows: A Whole Foods’ shareholder had submitted a proposal seeking inclusion in the company’s proxy statement of an advisory shareholder proposal that would permit any shareholder or group of shareholders that owned at least 3% of the Company’s stock for at least three years to nominate up to 20% of the Board (but not less than two directors). Whole Foods based its exclusion request on its plans to propose a 9%/5-year ownership threshold for proxy access (later amended to a 5%/5-year threshold), for a smaller number of nominees. After the SEC staff’s grant of the no-action request, the shareholder proponent requested reversal of the staff’s decision. Here is a link to the SEC no-action letter and prior correspondence.

“The traditional thinking has been that companies don’t exclude a shareholder proposal unless they get no-action relief from the Corp Fin Staff. But there have been cracks in that thinking in recent years as a smattering of companies have sought declaratory relief from a court instead of following the Staff process – or even going as far as excluding a proposal without seeking court relief either – so there is precedent for going forward without no-action relief. Note that Rule 14a-8 doesn’t require that a company obtain a favorable no-action response. And then there’s the recent matter of Trinity v. Wal-Mart, where the Staff granted no-action relief to the company – but the proponent then won in court to compel inclusion. In other words, the court overturned Corp Fin’s decision – so the value of obtaining a no-action response perhaps has become somewhat tainted.”


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