WILMERHALE

SEC's Division of Corporation Finance Staff to Express "No View" on Conflicting Shareholder Proposals This Proxy Season

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On Friday, January 16, the Securities and Exchange Commission (SEC) issued a statement from Chair Mary Jo White directing the SEC staff to review the application of Exchange Act Rule 14a-8(i)(9), the rule that allows a company to exclude a shareholder proposal on the basis that it conflicts with a management proposal. Concurrently with the Chair's statement, the SEC's Division of Corporation Finance announced that it will "express no views on the application of Rule 14a-8(i)(9) during the current proxy season," which means that the staff will not be providing no-action relief for the many pending no-action requests relating to proxy access proposals or on any other pending no-action requests relying on Rule 14a-8(i)(9).

Rule 14a-8(i)(9) permits exclusion of shareholder proposals that "directly conflict[] with one of the company's own proposals to be submitted to shareholders at the same meeting." As historically interpreted, a shareholder and management proposal need not be identical in scope or focus for the exclusion to be available. Rather, the staff has interpreted the rule to permit the exclusion of any shareholder proposal if the inclusion of the management proposal and the shareholder proposal in the same proxy statement could "present alternative and conflicting decisions for shareholders" or if "submitting both proposals to a vote could provide inconsistent and ambiguous results." This has been interpreted to be the case even where a shareholder proposal and a management proposal take completely opposing approaches to a topic.

This proxy season, Rule 14a-8(i)(9) has been subject to an unusual level of attention as a number of companies have sought to rely on the exclusion to omit proxy access shareholder proposals. The term "proxy access" generally refers to procedures that require a company to include shareholder-nominated directors on the company's proxy card alongside the company's nominees. In a letter dated December 1, 2014, Whole Foods received no-action relief from the staff to exclude a shareholder proposal to allow proxy access for a group of shareholders owning 3% of the company's shares for three years on the basis that it would conflict with the company's proposal to provide proxy access for a single shareholder owning 9% of the company's shares for five years. This letter generated a great deal of discussion about the application of Rule 14a-8(i)(9), and resulted in requests from both the proponent and others, including the Council of Institutional Investors, for Commission review of the staff's position. While the SEC's statement does not

mention Whole Foods or the many other pending proxy access no-action letters directly, the statement notes that Chair White is requesting the review "[d]ue to questions that have arisen about the proper scope and application" of the rule.

In addition to announcing the staff review of, and suspension of no-action relief under, Rule 14a-8(i)(9), the staff also posted on Friday its grant of the request for reconsideration of the Whole Foods letter. In granting the request for reconsideration, the Division noted it was doing so consistent with its announcement that "the Division would not express any views under rule 14a-8(i)(9) for the current proxy season."

The staff's decision not to provide no-action relief for conflicting shareholder proposals this season will impact the treatment not only of proxy access proposals, but also the treatment of any other proposal topics that may conflict with a management proposal (e.g., proposals relating to shareholders' ability to call a special meeting). This may leave many companies scrambling to revise their plans for how to respond to a shareholder proposal that they previously planned to omit in reliance on Rule 14a-8(i)(9). A possible approach that a company could consider would be to include its proposal and omit the conflicting shareholder proposal, either with or without seeking declaratory relief from a court that the proposal may be omitted. While companies are not required to seek or obtain no-action relief from the staff to exclude shareholder proposals under Rule 14a-8- the rule requires only that a company that plans to exclude a proposal "file its reasons" for excluding the proposal with the SEC-historically the vast majority of companies exclude shareholder proposals only after requesting and receiving no-action relief from the staff. Other possible approaches are to include both proposals with an explanation for shareholders (e.g., that the company's proposal would be binding if passed); include the shareholder proposal with a recommendation that it not be approved by shareholders; or negotiate with the proponent.

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