

CII Challenges Companies' Own Proxy Access Proposals and SEC Staff's Decision on Whole Foods' Shareholder Proposal

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According to the Council of Institutional Investors (CII), the 2015 proxy season is off to an “explosive start” because of proxy access.

CII [announced](#) that it is sending letters to 16 companies that are known to plan to propose their own proxy access proposals that conflict with the shareholder proposals they received, because all of them seek minimum ownership thresholds at between 5 to 8% (either for one shareholder, a group of shareholders with a maximum cap or any group of shareholders). CII and others view these standards to be “unworkable” and an “unattainable requirement,” and contend that this “high bar” is “wildly at odds” with the 3% shareholder ownership for three years threshold that is broadly supported by shareholders (and that was in the SEC rule that was struck down by the D.C. Circuit).

The list of companies and their shareholding requirements as described in their no-action letters are below, derived from the CII posting.

In a [letter](#) CII wrote to Whole Foods Chair John Elstrott, CII urged the board to revise management’s proposed bylaw “to be in line with prevailing U.S. shareowner views for a viable ownership threshold.” The letter notes that the minimum of 5% ownership threshold for five years that the company has included in its preliminary proxy statement is unreasonable, and inconsistent with the thresholds that were adopted by Chesapeake Energy, Western Union and Verizon.

CII is also [asking](#) the SEC to reconsider its recent decision allowing Whole Foods to exclude its shareholder proposal, which we’ve previously discussed [here](#) and [here](#). CII argues that the exclusion based on a management proposal conflicting with a shareholder proposal is appropriate in a narrower set of circumstances than the SEC staff currently allows. It should not be because both proposals cover the same topics, but rather focused on the specific content of the shareholder proposal.

CII argues that in the Whole Foods’ proxy access situation, the different terms of the management proposal and the shareholder proposal suggest that “conflicting decisions and inconsistent results are not a danger.” CII describes the possible interpretations if both proposals are included in Whole Foods’ proxy. For example, a shareholder could vote for or against both proposals, or for one proposal and against the other. In each case, if the management proposal receive sufficient support, because it is binding, it would pass and be adopted. If the management proposal does not pass but the shareholder proposal obtains majority support, then the message to the company would be that shareholders want proxy access, but not on the terms of the management proposal.

CII states that the SEC staff’s decision in Whole Foods is forcing a dilemma for shareholders. Even if shareholders support proxy access but do not like the specific terms in the management proposal, they still do not want to vote against that proposal because they would be concerned that the company would not know whether the opposition is for proxy access generally, or the company’s formulation (“and/or possibly to the gamesmanship many observers perceive Whole Foods as having engaged”).

Company	Proponent	Min. Ownership	Min. Holding Period	Group Size Limit**	Max. number of nominees (% of board)
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Marathon Oil	NYC Funds	5%	5 years	1	10% (Min. of 1 director)
Cabot Oil & Gas	NYC Funds	5%	3 years	none	20%
Arch Coal	NYC Funds	5%	5 years	1	10% (Min. of 1 director)
EBAY	NYC Funds	5%	4 years	Y; # not specified	15% (Min. of 1 director)
Exelon	NYC Funds	5%	5 years	?	10%
Peabody Coal	NYC Funds	7%	5 years	1	10% (Min. of 1 director)
Apache Energy	NYC Funds	5%	3 years	none specified	10% (Min. of 1 director)
Chipotle	NYC Funds	8%	5 years	1	10% (Min. of 1 director)
ConocoPhillips	NYC Funds	5%	3 years	none specified	20%
SBA Communications	NYC Funds	5%	5 years	10	15%
Noble Energy	NYC Funds	5%	5 years	1	10% (Min. of 1 director)
Cloud Peak Energy	NYC Funds	5%	5 years	1	10%
YUM! Brands, Inc.	Marco Consulting Group	5%	4 years	1	10% (Min. of 1 director)
Domino's Pizza, Inc.	Marco Consulting Group	5%	5 years	1	20% (Min. of 1 director)
First Merit	KC Firefighters	5%	3 years	10	20%
Whole Foods	Jim McRitchie	5%*	5 years	1	10% (Min. of 1 director)

* Whole Foods disclosed on 12/29 that it had reduced its proposed bylaw threshold from 9% to 5%.

** Limit of one means a group is ineligible; none specified means that a group is eligible, but there are or may be group size limitations that are not yet set and/or disclosed.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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