

Whole Foods Asks SEC Staff to Exclude Proxy Access Shareholder Proposal by Offering Up Its Own Alternative, Conflicting Proposal

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In a novel request, Whole Foods has submitted a [no-action letter](#) to the SEC seeking to exclude a proxy access shareholder proposal under Rule 14a-8(i)(9), because the company's board has decided to seek shareholder approval to amend its bylaws for its own proposal that the company argues conflicts with the shareholder proposal.

The shareholder proposal from Jim McRitchie asks Whole Foods to allow any shareholder or group of shareholders that collectively own at least 3% of the company's shares continuously for three years to nominate candidates onto the company's ballot, for up to 20% of the board. The company's proposal would permit any shareholder (but not a group of shareholders) owning 9% or more of the company's stock for five years to make proxy access nominations, limited to the greater of (a) one director or (b) 10% of the board.

The company states in the letter that several elements of its proposal conflict with the shareholder proposal, including: (a) the number of shareholders able to nominate a candidate, since the company prohibits a nomination from a group of shareholders; (b) the required shareholder ownership percentage (9% vs. 3%); (c) the holding period (five years vs. three years) and the number of directors that can be nominated (one director or 10% of the board vs. 20% of the board).

A similar request to the SEC staff several years ago by Western Union, who had proposed a management proposal with a 3% ownership threshold when faced with a shareholder proposal seeking 1%, was withdrawn, making this the first time the SEC staff needs to decide whether a proxy access shareholder proposal can be excluded on the basis of a company presenting its own alternative proposal. As the letter argues, the SEC staff has frequently permitted companies to exclude shareholder proposals asking companies to provide shareholders with the right to call special meetings on the basis of Rule 14a-8(i)(9), when companies agree to ask shareholders to vote on management proposals at a different ownership threshold level than those sought in the shareholder proposals.

This proposal could be novel in yet another way, as possibly representing a change from the form of proxy access rights that retail shareholders have previously used. In 2014, retail shareholders submitted several proxy access proposals to allow shareholders owning 1%, or 25 holders with \$2,000 each together owning 1%, for at least a year, to nominate proxy access candidates. Those proposals, which the proxy advisory firms recommended against, received low levels of support, compared to the ones submitted by pension funds and other larger investors at the 3%/3-year ownership threshold, which received majority support at four companies in 2014.

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.

Ning Chiu

+1 212 450 4908

ning.chiu@davispolk.com

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