

Early SEC Staff No-Action Decisions Resolves New Types of Exclusion Requests on Shareholder Proposals

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The SEC Office of Chief Counsel has [determined](#) that Whole Foods can exclude a shareholder proposal asking the board to adopt a proxy access bylaw to allow one or more shareholders owning at least 3% of the company's shares continuously for three years to nominate candidates, for up to 20% of the board, which we previously discussed [here](#). The SEC staff agreed that the company's own proxy access proposal that it will be asking shareholders to vote on at the 2015 annual meeting, which would permit proxy access for one shareholder owning 9% for five years to nominate one director or 10% of the board, presents alternative and conflicting decisions for shareholders.

While this is the first SEC staff decision made on the basis of Rule 14a-8(i)(9) for a proxy access proposal, consistent with past precedents related to shareholder rights to call special meetings, the basis for the exclusion is that it would create inconsistent results if both the shareholder and the management proposals pass, as the board would not know what action to take.

The staff has also [agreed](#) that Franklin Resources can exclude a shareholder proposal that asks the board to initiate a review of the company's proxy voting policy and practices, taking into account Franklin Resources' corporate responsibility and environmental positions, which we previously discussed [here](#). The proposal targeted Franklin Resources' voting decisions on ESG shareholder proposals that it makes as an investor of public companies. The SEC staff granted the exclusion because the proposal relates to the company's ordinary business operations.

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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