

Whole Foods and Other Companies' Own Versions of Proxy Access Proposals

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Although the SEC permitted Whole Foods to exclude a shareholder proposal asking the board to amend its bylaws to allow for proxy access on the basis of a conflicting management proposal that would give such rights only to a single shareholder owning 9% or more shares, as we previously discussed [here](#), the company has filed a preliminary proxy that includes a proposal with a different ownership threshold.

The company intends to ask shareholders to approve amendments to its bylaws to permit any single shareholder or group of funds under common management (but not a group of shareholders) owning 5% or more of the company's common stock for five years to nominate board candidates at annual meetings, limited to the greater of one director or 10% of the board. The company proposal discloses that the company determined the 5% ownership threshold after discussions with many of its shareholders, and also selected the threshold based upon a review of its recent Schedule 13F filings showing that the proposed requirements may render proxy access "immediately usable." The company had been criticized, as noted in yesterday's [New York Times article](#), for seeking no-action letter relief with a share ownership threshold that would make proxy access meaningless, since no shareholder currently owned the requisite amount. Another reason for this selection, according to the company's proxy disclosure, is that many commentators to the SEC's 2009 proxy access rules supported a 5% ownership level.

Whole Foods' proposal expresses frank concern about both activist shareholders who may have short-term agendas, and the "unknown problems" that could arise from proxy access, since it is untested in this country. Those concerns likely led to a unique feature in the bylaws that prohibits the nomination of any person who has compensatory arrangements with a third party, reflecting the recent controversy surrounding compensatory incentives for dissident nominees, concerns that were not prevalent until fairly recently.

According to his [blog](#), Jim McRitchie, the proponent of the Whole Food's proxy access shareholder proposal, has appealed the SEC staff's no-action decision regarding the Whole Foods' shareholder proposal.

About ten other companies have followed Whole Foods in filing no-action letters asking the SEC staff to exclude proxy access shareholder proposals on the basis that they intend to include their own conflicting management proposals. The shareholder proposals ask for proxy access nominations to be made by any shareholder, or group of shareholders, owning 3% or more of company stock for at least 3 years, to nominate up to 25% of the board. Examples of companies' own versions include the following variations:

- Cabot Oil & Gas – one or more shareholders owning at least 5% for 3 years, for up to 20% of the board;
- Arch Coal and Marathon Oil – a single shareholder (not a group), owning at least 5% for 5 years, for up to the greater of one director or 10% of the board;
- eBay – one or more shareholders owning at least 5% for 4 years, for up to the greater of one director or 15% of the board; and
- First Merit – one or more shareholders (but a group may consist of no more than 10) owning at least 5% for 3 years, for up to 20% of the board.

The SEC staff has not yet made a determination on any of the above letters, or the appeal for the Whole Foods' letter.

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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