

What We Can Expect from the Review of the SEC Rule 14a-8 Conflicting Proposal Framework

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As companies that received proxy access shareholder proposals for this proxy season are determining their the best course of action, which we recently [discussed here](#), others are waiting and watching to see how the developments may impact future proposals. One open question is whether the conflicting proposal provision under Rule 14a-8(i)(9), that Whole Foods originally relied on to put forth its own management proposal instead of the shareholder proponent's version, could be available again as a basis to exclude proxy access shareholder proposals, and under what terms.

In a [recent speech](#), Chair White discussed her direction to the staff to examine the application of the rule, noting that there has been “some not insignificant consternation” over her decision. She stated that her request was driven by the fact that she was not comfortable and had concerns that the rule, as the staff had interpreted it in this context, could result in “unintended consequences and potential misuse” of the SEC no-action letter process.

By way of example, she highlighted a number of possible issues that the SEC staff may be reviewing, consistent with remarks by Keith Higgins, the Director of the Division of Corporation Finance, which we previously [discussed here](#), including:

- Is it a conflicting proposal if a management proposal is made in response to a shareholder proposal on the same subject matter?
- Is it still a conflicting proposal if the subject matters are the same, but the terms are different?
- What if management’s proposal “purports” to provide shareholders with a right, but in fact, no shareholder meets the criteria to do so? This is clearly a reference to the outcry that ensued when it was noted that no single shareholder owned 9% of Whole Food’s shares, which was the threshold provided in the company’s proposal that allowed it to exclude the shareholder proposal in the SEC no-action letter.
- If a company is able to exclude a shareholder proposal under Rule 14a-8(i)(9), should the company be required to disclose that it originally had a shareholder proposal?
- Should a company be required to disclose that it offered a competing management proposal only in response to the shareholder proposal?

Chair White also emphasized that while the SEC staff strives for “consistency and correctness” in administering the no-action letter process, their responses are not “precedent” nor “binding on the Commission or a court.”

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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