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SEC Chair White Directs Staff to Review Position on Excluding Conflicting Proxy Proposals under Rule 14a-8

SEC Chair Mary Jo White has directed the Division of Corporation Finance ("Corporation Finance") to review its position on Rule 14a-8(i)(9), which allows a company to exclude a shareholder proposal from the company's proxy materials if it "conflicts" with the company's own proposal to be submitted to shareholders at the same meeting. As a result of this direction, Corporation Finance will express "no views" on the application of Rule 14a-8(i)(9) this proxy season.

The catalyst for this development was a shareholder proposal submitted by proponent James McRitchie to Whole Foods Market, Inc., requesting that the company adopt "proxy access" procedures generally to allow one or more shareholders owning at least 3% of the company's voting securities for three or more years to nominate up to 20% of the board of directors via the company's proxy materials. Whole Foods countered with its own proposal that included significantly different share ownership and holding period thresholds and director nominee caps, but nevertheless was granted no-action relief by Corporation Finance, allowing it to exclude the McRitchie proposal under Rule 14a-8(i)(9) on the basis that it conflicted with Whole Foods' proposal and the proposals would "present alternative and conflicting decisions for the Company's shareholders that would likely result in inconsistent and ambiguous results". Thereafter, Mr. McRitchie, the Council of Institutional Investors and others have called for the SEC to review its position on these "conflicts", which SEC Chair White has now done. Corporation Finance has since effectively rescinded its no-action relief to Whole Foods and stated that it has no view of Rule 14a-8(i)(9).

In addition to proxy access proposals, Corporation Finance's decision to express no views on Rule 14a-8(i)(9) will broadly impact a number of other recent, popular shareholder proposals (such as proposals to give, or expand, shareholder rights to call special meetings), where the "conflict" argument had frequently been made in no-action requests. Companies faced with possible conflicting proposals could take one of the following approaches, among other options:

- Include the shareholder proposal only, thereby eliminating the "conflict", and support or oppose the shareholder proposal on its face;
- Include both the shareholder proposal and the company proposal, although companies will need to consider implementation strategies and related disclosure, for example, if both proposals are approved by shareholders;

- Seek declaratory judgment from court that the shareholder proposal is excludable under Rule 14a-8(i)(9); or

- Exclude the shareholder proposal without a declaratory judgment, while being cognizant of the litigation risk (particularly in light of the high profile of this issue this proxy season).

The decision as to the optimal strategy will be case specific and should take into account, among other factors, the specific terms of the shareholder and management proposals as well as a weighing of the benefits and risks to the company and its shareholders, the level of shareholder support or opposition to the proposals and the possibility of future repercussions (e.g., a possible no or withhold vote recommendation against the board by proxy advisory firms, although the proxy advisory firms have yet to opine on this specific situation).

For SEC Chair White's statement and the Division of Corporation Finance's response, see http://www.sec.gov/news/statement/statement-on-conflicting-proxy-proposals.html

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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