

Memorandum

SEC Reconsiders No-Action Relief Granted to Whole Foods, Declines to Take Position on Conflicting Proposals

January 22, 2015

On January 16, 2015, Securities and Exchange Commission (“SEC”) Chair Mary Jo White announced that “[d]ue to questions that have arisen regarding the proper scope and application of Rule 14a-8(i)(9),” which permits the exclusion of a shareholder proposal that “directly conflicts” with a management proposal, she has directed her staff to review the rule and report to the SEC on its review.¹ Chair White’s announcement appears to stem from the appeal filed by shareholder proponent James McRitchie with regard to the no-action relief the SEC staff granted to Whole Foods Market, Inc. in connection with McRitchie’s proxy access shareholder proposal, as well as the subsequent influx of no-action requests from companies seeking relief in reliance on Rule 14a-8(i)(9).²

Moreover, the Division of Corporation Finance (the “Division”) announced on the same date that “[i]n light of Chair White’s direction to the staff,” the Division “will express no views on the application of Rule 14a-8(i)(9) during the current proxy season.” Accordingly, the Division has reconsidered its position with regard to Whole Foods, responding to McRitchie’s appeal with a notification that it “express[es] no view concerning whether Whole Foods may exclude the proposal under Rule 14a-8(i)(9).”³

Notably, the Division’s announcement will affect not only companies seeking to exclude proxy access shareholder proposals, but also those seeking to exclude any other shareholder proposals in reliance on Rule 14a-8(i)(9).

¹ Securities and Exchange Commission, “[Statement from Chair White Directing Staff to Review Commission Rule for Excluding Conflicting Proxy Proposals](#)” (Jan. 16, 2015).

² For background on proxy access shareholder proposals and the no-action relief granted to Whole Foods, see Simpson Thacher & Bartlett LLP, “[SEC Allows Exclusion of Proxy Access Shareholder Proposal Due to Conflict with Management Proposal](#)” (Dec. 8, 2014).

³ *Whole Foods Market, Inc. (recon. granted Jan. 16, 2015)*.

If you have any questions or would like additional information, please do not hesitate to contact **Avrohom J. Kess** at (212) 455-2711 or akess@stblaw.com **Yafit Cohn** at (212) 455-3815 or yafit.cohn@stblaw.com, or any other member of the Firm's Public Company Advisory Practice.

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