

Memorandum

Proxy Access Update: Whole Foods Delays Annual Meeting, While Several Other Companies Adopt Proxy Access Bylaws

February 18, 2015

Many public companies continue to consider their options in responding to proxy access shareholder proposals following the Division of Corporate Finance's unusual announcement that it will not opine on "the application of Rule 14a-8(i)(9) during the current proxy season."¹ But over the last few days, several companies have made notable decisions. Whole Foods Market, Inc., which had led the charge earlier this proxy season by obtaining no-action relief from the Securities and Exchange Commission ("SEC") on the ground that it was planning to submit a conflicting management proposal to shareholders, announced on February 13 that it has decided to postpone its annual meeting, originally scheduled for March 10.² Whole Foods explained that given the SEC's subsequent reversal of its no-action determination, "the postponement of the Annual Meeting is necessary to ensure the Company can meet applicable deadlines and allow the Board adequate time to review and evaluate the Company's alternatives." The company stated that it would announce a new meeting date "after a final decision has been made."

At least three companies – General Electric Co., CF Industries Holdings, Inc. and HCP, Inc. – took more decisive action, amending their respective bylaws to adopt proxy access.

- General Electric's bylaw amendments permit "a shareowner, or a group of up to 20 shareowners, owning 3% or more of the Company's outstanding common stock continuously for at least three years to nominate and include in the Company's proxy materials directors constituting up to 20% of the board," rounding

¹ For background on proxy access shareholder proposals and related developments this proxy season, see Simpson Thacher & Bartlett LLP, "[SEC Allows Exclusion of Proxy Access Shareholder Proposal Due to Conflict with Management Proposal](#)" (Dec. 8, 2014); Simpson Thacher & Bartlett LLP, "[SEC Reconsiders No-Action Relief Granted to Whole Foods, Declines to Take Position on Conflicting Proposals](#)" (Jan. 22, 2015).

² See [Form 8-K of Whole Foods Market, Inc.](#) (Feb. 13, 2015).

down to the nearest whole number.³

- CF Industries' bylaw amendments allow “any stockholder or group of up to 20 stockholders who have maintained continuous qualifying ownership of 5% or more of the Company's outstanding common stock for at least the previous three years” to nominate in the company's proxy materials up to “20% of the directors in office at the time of nomination,” rounding down to the nearest whole number.⁴
- HCP's amended bylaws “permit any stockholder or group of up to ten stockholders who have maintained continuous qualifying ownership of 5% or more of the Company's outstanding common stock for at least the previous three years” to nominate up to 20% of the board, rounding down to the nearest whole number.⁵

Interestingly, among other details, all three companies disclosed that under their amended bylaws, shareholder nominees “who are included in the Company's proxy materials but subsequently withdraw from or become ineligible for election at the meeting or do not receive at least 25% of the votes cast in the election would be ineligible for nomination under the proxy access provisions of the Bylaws for the next two years.”⁶

Implications of the Decision of General Electric, CF Industries and HCP

Most public companies will likely be unwilling to exclude proxy access shareholder proposals from their proxy materials this year due to a combination of factors – most notably, the inability to obtain no-action relief from the SEC and the concern that proxy advisory firms may then recommend against one or more of their directors. Assuming that a company will not exclude the shareholder proposal it received, it faces several options. It can:

- include only the shareholder proposal in its proxy materials, perhaps accompanied by an opposition statement from the board;
- include both the shareholder proposal and a conflicting management proposal in its proxy materials; or
- unilaterally adopt a bylaw providing for proxy access under terms perceived to be more favorable to the company and urge shareholders to vote against the shareholder proposal.

General Electric, CF Industries and HCP have opted for voluntary adoption of proxy access. It is possible

³ [Form 8-K of General Electric Co.](#) (Feb. 11, 2015).

⁴ [Form 8-K of CF Industries Holdings, Inc.](#) (Feb. 10, 2015).

⁵ [Form 8-K of HCP, Inc.](#) (Feb. 11, 2015).

⁶ *Id.*; see also Form 8-K of CF Industries Holdings, Inc., *supra* note 4 (same); Exhibit 3(ii) to Form 8-K of General Electric Co., *supra* note 3 (“Any Shareholder Nominee who is included in the Company's proxy materials for a particular meeting of shareholders but either (i) withdraws from or becomes ineligible or unavailable for election at the meeting, or (ii) does not receive at least 25% of the votes cast in favor of the Shareholder Nominee's election, shall be ineligible to be a Shareholder Nominee pursuant to this Article VII Section F for the next two annual meetings of shareholders following the meeting for which the Shareholder Nominee has been nominated for election.”).

that other corporations may follow suit and amend their bylaws to adopt proxy access on their terms. It is too early in the proxy season, however, to draw any conclusions from the decision of these three companies or to infer any trends regarding which strategies will be pursued by most companies grappling with proxy access shareholder proposals.

If you have any questions or would like additional information, please do not hesitate to contact **Yafit Cohn** at +1-212-455-3815 or yafit.cohn@stblaw.com, or any other member of the Firm's Public Company Advisory Practice.

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