BRYAN CAVE
A Broader Perspective
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To: Our Clients and Friends January 20, 2015

Chair White Directs Staff to Review Rule 14a-8 Conflicting Proposal Exclusion

Staff to "Express No Views" on 14a-8(i)(9) No-Action Requests

On January 16, 2015, Chair Mary Jo White publicly announced that she has directed the Commission staff to review and report to the Commission "on the proper scope and application" of Rule 14a-8(i)(9), the "conflicts with management proposal" grounds for excluding a shareholder proposal from an issuer's proxy statement. The public statement may be found **here**.

Concurrent with Chair White's statement, the Division of Corporation Finance issued a one sentence public statement that it "will express no views" on the application of Rule 14a-8(i)(9) during the current proxy season.

The Whole Foods Controversy

This action came as a consequence of a no-action letter issued by the SEC staff to Whole Foods Market on December 1, 2014. The no-action letter permitted Whole Foods to exclude from its 2015 annual meeting proxy statement a proxy access proposal from James McRitchie. Whole Foods argued in its request for a no-action letter that the shareholder proposal could be excluded from its proxy statement pursuant to Rule 14a-8(i)(9), because it would conflict with a management proposal on proxy access to be included in the same proxy statement. The no-action letter and incoming request may be found **here**. The Whole Foods proxy access proposal was significantly different from the shareholder proposed version, imposing greater qualifying hurdles for a shareholder to make a director nomination. Subsequently, other issuers filed similar requests for no-action positions on the same topic, also proposing substantially different proxy access terms than those included in the shareholder proposals the issuer sought to exclude. The shareholder proponent sought reconsideration and argued that application of the conflicting company proposal exclusion was inappropriate and unfair.

Certain institutional investors also asked the SEC to revisit the Whole Foods conclusion, as shareholder proponents argued that the decision was allowing issuers to avoid virtually any shareholder proposal by putting forward any version of the proposal that management could construct.

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In concert with the announcements on January 16, the staff issued another letter to Whole Foods, rescinding the staff's prior no-action position in consideration of Chair White's directive to reconsider the scope and application of the exclusion and expressing no views on the request of Whole Foods to exclude the proposal. The staff reversal can be found **here**.

What Can Affected Issuers Do Now?

The position taken by the Division poses a difficult choice for issuers who have pending – or are considering filing – no-action requests on the basis of the "conflicts with management proposal" exclusion, whether on a proposal relating to proxy access or other topics. Without no-action relief from the SEC staff or a declaratory judgment by a court, issuers have typically not excluded shareholder proposals to avoid the risks of a proponent lawsuit or an SEC enforcement action.

For those issuers with affected no-action letters pending, we expect they will receive correspondence from the staff echoing the public statement that the Division of Corporation Finance will express no views on the application of the exclusion to the shareholder proposal.

This leaves these issuers and issuers who were planning a no-action request based on the Rule 14a-8(i)(9) exclusion with poor choices.

Exclusion of a shareholder proposal without a no-action letter is not forbidden by the rules. The rule requires only that the company "file its reasons" for exclusion with the staff no later than 80 calendar days before the definitive proxy statement is filed. Presumably, an issuer could proceed to "file its reasons" for exclusion (including the reason contained in Rule 14a-8(i)(9)) and then proceed to exclude the proposal and include the company's proposal or seek declaratory relief from a court that the shareholder proposal may be excluded if the company proposal is included.

Alternatively, without making a filing with the staff the issuer could (i) include the shareholder proposal and the company proposal; or (ii) include the shareholder proposal and not the company proposal.

We recognize that none of these choices is ideal and each carries its own risks, including litigation risks and related costs. We will continue to monitor this situation and bring you significant updates as they are available to us.

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For further information on this topic contact LaDawn Naegle, Mark Klamer, or Taavi Annus, or any other Bryan Cave Corporate Finance and Securities lawyer. You may also contact us through the direct link to our Website, Bryan Cave Corporate Finance & Securities Practice. Bryan Cave LLP makes available the information and materials in its Website for informational purposes only. The information is general in nature and does not constitute legal advice. Further, the use of this site, and the sending or receipt of any information, does not create any attorney-client relationship between us. Therefore, your communication with us through this Website will not be considered as privileged or confidential.