

SEC Grants No-Action Relief to Whole Foods to Exclude Proxy Access Shareholder Proposal

On December 1, 2014, the staff of the Securities and Exchange Commission granted no-action relief to Whole Foods Market regarding its request to omit a shareholder proposal from its proxy materials pursuant to Rule 14a-8(i)(9) under the Securities Exchange Act of 1934. Rule 14a-8(i)(9) states that a company may exclude a shareholder proposal if such proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting.

A shareholder had submitted a proposal calling for Whole Foods to include in its proxy statement a non-binding shareholder resolution requesting that the company's Board of Directors amend the company's governing documents to implement proxy access for director nominations. Specifically, the shareholder proposal provided that any shareholder or group of shareholders that collectively holds at least 3% of the company's common stock continuously for at least three years would have the right to nominate candidates for election to the Board and have such nominees included in the company's proxy statement. Shareholders nominating candidates pursuant to the provisions outlined in the shareholder proposal would be able to nominate up to 20% of the Board, but in any event no less than two directors.

In its request for no-action relief, Whole Foods notified the SEC that it intended to submit its own proposal to shareholders at its 2015 annual meeting regarding proxy access with respect to director nominations by shareholders. The company proposal provided for an amendment to the company's bylaws to permit any shareholder (but not a group of shareholders) owning 9% or more of the company's common stock continuously for at least five years to nominate candidates for election to the Board and to have such nominees included with the Board's nominees in the company's proxy statement. Under the Whole Foods proposal, shareholder nominations would be limited to 10% of the Board or one director if the Board consists of fewer than 10 members. Whole Foods argued that it is authorized to omit the shareholder proposal from its proxy statement pursuant to Rule 14a-8(i)(9) because of the conflicting provisions of the two proposals relating to the number of shareholders able to nominate a candidate, the required share ownership percentage and holding period and the number of directors that can be nominated.

The SEC's response to Whole Foods indicates that the SEC is willing to give some leeway to companies to craft and propose a competing proposal with more stringent terms, which will give companies additional flexibility in determining how to respond to shareholder proposals for both proxy access and other governance proposals. The limits of the SEC's deference in this regard are not clear. In its letter granting no-action relief, the SEC staff did not comment on whether it would view a more stringent company proposal (e.g., a 20%/ten-year proposal) as a conflicting proposal. While the reaction of shareholders and proxy advisory firms, and their impact on issuers, remains to be seen, the Whole Foods approach provides companies with another method for handling proxy access shareholder proposals this proxy season. Nevertheless, a no-action letter should not be viewed as the final word with respect to a shareholder proposal, as demonstrated by *Trinity Wall Street vs. Wal-Mart Stores*, where the U.S. District Court for the District of Delaware recently determined that Wal-Mart did not have the authority to exclude a shareholder proposal, even though the SEC had previously granted no-action relief.