



Proxy Access Proposals: Recent Developments

Jan 6, 2015

Reading Time : **3 min**

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The proposals, submitted pursuant to Rule 14a-8 of the Securities Exchange Act of 1934, ask each board to adopt, and present for shareholder approval, a “proxy access” bylaw. If adopted, the bylaw would require the company to include certain information in its proxy materials with respect to a person nominated for election to the board (the “Nominee”) by a shareholder or group (the “Nominator”). The required information includes (i) the “Disclosure” (defined below) and (ii) if submitted by the Nominator, a statement not exceeding 500 words in support of the nominee (the “Statement”), provided that, in each case, the Nominator has:

- beneficially owned 3 percent or more of the company’s outstanding common stock continuously for at least three years before submitting the nomination
- given the company, within the time period specified in its bylaws, written notice of the information required by the bylaws and any SEC rules about (i) the Nominee, including consent to being named in the proxy materials and to serving as a director if elected, and (ii) the Nominator, including proof it owns the required shares (the “Disclosure”)
- certified that (i) it will assume liability stemming from any legal or regulatory violation arising out of the Nominee’s communications with the company’s shareholders, including the Disclosure and Statement, (ii) it will comply with all applicable laws and regulations if it uses soliciting material other than the company’s proxy materials, and (iii) to the best of its knowledge, the required shares were acquired in the ordinary course of business and not to change or influence control at the company.

As proposed, the number of shareholder-nominated candidates appearing in the proxy materials would not exceed one quarter of the number of directors then serving, and the

board would be required to adopt procedures for promptly resolving disputes over whether notice of a nomination was timely, whether the Disclosure and the Statement satisfy the company's bylaws and applicable federal regulations, and the priority to be given multiple nominations exceeding the one-quarter limit.

Submitted proposals that are not successfully excluded will be voted on at each company's 2015 annual meeting and, if adopted by shareholders at that meeting, would be implemented upon shareholder approval of the related bylaw amendment at the company's 2016 annual meeting. While a company is not required to adopt the bylaw even if a majority votes in favor of it, proponents believe boards will react to strong support from shareholders.

Anecdotal evidence suggests the Project will not be receptive to negotiating a compromise position. While many companies will likely include the proposal in their proxy statements (in many cases with a statement of opposition), some companies may seek to exclude the proposal either for technical deficiencies or in favor of a management proposal with higher shareholder thresholds, especially since the SEC recently granted Whole Foods' no-action request regarding the exclusion of a similar proposal. Whole Foods successfully asserted that it could exclude a shareholder's 3 percent/three-year proposal because it would conflict with a similar but more stringent (9 percent/five-year) management proposal. An appeal of the Whole Foods no-action decision has been filed by the proponent of the original proposal, and, possibly in response, Whole Foods subsequently filed a preliminary proxy statement with a 5 percent/five-year management proposal — less stringent than the proposal set forth in its no-action request. Following the Whole Foods decision, a number of companies have submitted no-action requests on the grounds that shareholder proposals will conflict with the company's own more restrictive proposal, and more issuers are likely to follow suit.

Note, however, that if shareholders approve management's more stringent proposal, the Project or other activists may subsequently re-submit the standard 3 percent/three-year proposal. In that instance, the competing proposal exclusion strategy will not be available to the company, and the SEC has generally been unsympathetic to exclusion requests based on substantial implementation. Thus, the net result of the Whole Foods' exclusion strategy may be to delay rather than defeat the Project's 3 percent/three-year proposal. Companies should take this into account as they assess potential responses to the Project proposal.

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