

Via Email

March 25, 2015

Keith F. Higgins
Director
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Review of Scope and Application of Rule 14a-8(i)(9)

Dear Mr. Higgins:

The Council of Institutional Investors (“CII”) wrote on January 9, 2015, to urge the Division to revisit its position on what constitutes a “direct conflict” between a shareowner proposal and management proposal on the same topic, following the Staff’s determination in Whole Foods Market (Dec. 1, 2014) that a non-binding shareowner proposal on proxy access could be excluded in reliance on Rule 14a-8(i)(9)(the “counter proposals” exclusion). In Whole Foods, the Staff concurred with the company that the shareowner proposal directly conflicted with a management proposal the company planned to submit for shareowner approval at its next annual meeting, despite very substantial differences between the two proxy access rights.

On January 16, 2015, the Commission announced that Chair Mary Jo White had instructed the Division to review its approach to the counter proposals exclusion. As a result, the Division stated that it would not express its views regarding application of the counter proposals exclusion for the remainder of the 2015 proxy season and issued a determination reversing the one it issued to Whole Foods.

CII submits this letter in response to the Division’s solicitation of views on the proper scope and application of the counter proposals exclusion. Before addressing specific points, CII wishes to emphasize the importance of arriving at a workable resolution within the relatively short period between now and late fall/early winter, when the bulk of shareowner proposals will be submitted for the 2016 proxy season. At that time, companies and shareowners will need guidance regarding the counter proposals exclusion, as the process of negotiating settlements, formulating potential management proposals (and obtaining board approval for them) and seeking no-action relief will begin anew. We therefore urge the Division to move with alacrity to formulate an interpretive approach to the current counter proposals exclusion language, which the Division has the power to do without rulemaking.

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We believe a rulemaking process would be unnecessary and impose substantial delay, preventing the Staff from issuing determinations involving the counter proposals exclusion for the 2016 proxy season and perhaps beyond. Although companies are not required to obtain the Staff's concurrence in order to omit a proposal, CII believes that prolonging the time during which the Staff will not express its views on the application of the counter proposals exclusion would significantly disrupt the shareowner proposal process for both companies and proponents.

We offer the following additional comments, consistent with our January 9 letter, for your consideration when developing interpretative guidance on this important matter:

As you are aware, we argued in our January 9 letter that a direct conflict would clearly exist if shareowners were asked to vote on two binding proposals on the same topic, regardless of either proposal's specific terms, and opined that a direct conflict would not exist if the shareowner proposal was non-binding, unless the proposals sought reforms that would take the company in opposite directions (e.g., a management proposal to require the chairman to be the CEO and a shareowner proposal to require an independent chair). We continue to support this binding/nonbinding distinction for determining what constitutes a direct conflict.

Although it is true that many shareowner proposals are nonbinding, rendering the counter proposals exclusion quite narrow under a binding/nonbinding distinction, we believe a narrow interpretation is proper. For well over a half century, the proxy rules have provided shareowners with an essential tool for expressing their views to management, directors and other shareowners on major policy decisions and other matters that are important to them. A narrow counter proposals exclusion is consistent with that history and, importantly, would limit the gamesmanship to which Chair White recently commented "has no place in the process."

In addition, although non-binding proposals have predominated in more recent seasons, the pendulum may swing in the other direction potentially increasing the use of a narrow counter proposals exclusion. In the 2012 proxy season, for example, nine of the 23 proxy access proposals submitted were binding. Thus, distinguishing between binding and non-binding proposals is appropriate when considering what constitutes a direct conflict.

We also believe that voting results would not be confusing under a binding/nonbinding distinction even if, for example, shareowners approve both a management proposal to adopt a particular reform—say, to give holders of 25 percent of shares the right to call a special meeting—and a shareowner proposal urging the same reform but with a lower threshold, like 10 percent. In our view, majority votes for both proposals would show support for the special meeting right, even one with a relatively high 25 percent threshold.

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Moreover, if the shareowner proposal received a higher vote than the management proposal, the board would infer that shareowners preferred the lower threshold and might decide at some future time to lower the threshold. Alternatively, if the management proposal received a higher vote than the shareowner proposal, the board would conclude that the lower threshold enjoyed less support, confirming that the 25 percent threshold was the right choice.

Indeed, these unambiguous messages are made possible by the presence of both proposals on the proxy, which allow shareowners independently to express a view on the desirability of the reform with the 25% threshold proposed by the company and to signal whether the 10% threshold would be preferable. (In this way, inclusion of both proposals would allow shareowners as a group to express aggregate preferences even though no individual shareowner could rank the proposals due to limitations in the proxy card's format).

As an aside, we note that since the Commission's January 16 announcement, a number of companies, including Chipotle, Cloud Peak Energy, Exelon, and The AES Corporation, have all voluntarily chosen to include both management and shareowner proposals on proxy access in their 2015 definitive or preliminary proxy statements. Those companies apparently agree with CII that the voting results of so-called "dueling proposals" are unlikely to be confusing.

Finally, we note that although the counter proposals exclusion can be relied upon to omit proposals on many topics, CII has particular concerns about an overly broad interpretation of its scope as applied to proxy access proposals. As you are aware, the Commission's own uniform proxy access rule was invalidated by the U.S. Court of Appeals for the D.C. Circuit in 2011, and Chair White has indicated the Commission has no plans to re-propose a new access rule.

Many opponents of the Commission's rule touted the benefits of private ordering, and shareowners have begun to take up that challenge in earnest by filing shareowner proposals. The Division's current approach to the counter proposals exclusion threatens to undermine private ordering just as it has gotten under way.

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Please contact me with any questions. I would welcome the opportunity to meet to discuss CII's views on the counter proposals exclusion and related matters.

Sincerely,

A handwritten signature in blue ink that reads "Ann Yerger". The signature is written in a cursive, flowing style.

Ann Yerger
Executive Director