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Mr. Keith F. Higgins
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
Via E-Mail: i9review@sec.gov

June 8, 2015

Dear Mr. Higgins:

Subject: Proxy Access Proposal Rulings 14a-8(i)(9)

Thank you for the opportunity to offer comments relative to the interpretation of Rule 14a-8(i)(9), allowing exclusion of shareholder proposals that directly conflict with management proposes.

The initial no-action letter issued to Whole Foods Market (Whole Foods) last year sanctioning the exclusion of my proxy access proposal (later rescinded) was based on a gradual reinterpretation of Rule 14a-8(i)(9), without going through the rulemaking process. It was an unnecessary limitation on the shareholder franchise, effectively depriving shareholders of rights that exist under state law, and is inconsistent with the Commission's intent in adopting subdivision (i)(9).

The Requirements of Rule 14a-8(i)(9)

Rule 14a-8(i)(9) allows for the exclusion of proposals that "conflict with one of the company's own proposals. . . " 17 CFR 240.14a-8(i)(9). The provision was never intended to bar shareholders from considering alternative proposals on a similar topic, even when the competing proposals contained different terms.

The current iteration of subsection (i)(9) was added in 1998. *See* Exchange Act Release No. 40018 (May 21, 1998) (adopting release at http://www.sec.gov/rules/final/34-40018.htm). In proposing the language, the Commission noted that the provision was consistent with the "long-standing interpretation" that permitted "omission of a shareholder proposal if the company demonstrates that its subject matter directly conflicts with all or part of one of management's proposals." In providing examples of the "long-standing interpretation" the Proposing Release No. 39093, http://www.sec.gov/rules/proposed/34-39093.htm) cited two no action letters: *General Electric Corporation* (Jan. 28, 1997) and *Northern States Power Co*. (July 25, 1995).

In *General Electric*, the "conflict" arose out of two binding proposals that affected stock option plans. The shareholder proposal called for the mandatory indexing

of the exercise price. In contrast, the Company proposal assigned to the board the discretion to determine the exercise price so long as the exercise price was not less than the market price. If adopted, therefore, the company would face a "direct conflict" in law, with pricing formulas that were inconsistent. As a result, the staff agreed that the proposal could be excluded.

In *Northern States Power Co.* (July 25, 1995), the company intended to submit a merger agreement to shareholders. The shareholder proposal at issue sought to circumvent the normal proxy solicitation process, requesting that management negotiate a more equitable merger agreement, specifically the payment of alternative consideration. As pointed out in the June 10, 2015 letter from Gibson Dunn, et al., the original intent of the provision appears to have been "to prevent shareholders from using Rule 14a-8 to mount proxy contests without complying with the rules relating to proxy contests."

These no-action letters illustrate that, at the time of the adoption of the current version of subsection (i)(9) by the full Commission, proposals could be excluded only under very narrow circumstances. Staff also made clear that subsection (i)(9) could not be used as a tactical weapon in order to exclude shareholder proposals. To the extent company proposals were developed "in response to" a proposal submitted by shareholders, the subsection was unavailable.[1]

Suspension of Rule 14a-8(i)(9) Interpretations by Staff

The suspension of Staff comment on applicability of the rule during the 2015 season provided a real-world experiment in how companies could reconcile shareholder and management proposals within the same proxy. The sky did not fall. Several companies included "conflicting proposals" from the board and shareholders, allowing shareholders to vote in favor of either or both. The outcomes were not confusing, but rather provided additional information regarding the preferences of shareholders.

In addition, more than a dozen companies that filed no action requests asserting that they intended to publish their own proxy access proposals, with which shareholder proposals "conflicted," failed to follow through and instead argued against the entire concept of proxy access in any form. See the letter from Michael Garland at http://www.sec.gov/comments/i9review/i9review-7.pdf. It

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[1] *See Cypress Semiconductor Corporation* (March 11, 1998) ("The Division is unable to concur in your view that the proposal may be excluded under rule 14a-8(c)(9). Among other factors that the staff considered in reaching this result, the staff notes that it appears that the Company prepared its proposal on the same subject matter significant part in response to the Mercy Health Services proposal."); *see also Genzyme Corporation* (March 20, 2007) ("We are unable to concur in your view that Genzyme may exclude the proposal under rule 14a-8(i)(9). Among other factors that we considered in reaching this result, we note your representation that you decided to submit the company proposal on the same subject matter to shareholders, in part, in response to your receipt of the AFL-CIO Reserve Fund proposal.").

appears they were gaming the system with the purpose denying shareholders a voice.

Conclusion

Staff should issue a Staff Legal Bulletin clarifying the circumstances when Rule 14a-8(i)(9) can be properly invoked:

- A "direct conflict" can be found if both proposals, the company's and the shareholder's, are binding and there is a direct conflict between the terms. Such a legal conflict is a clear and coherent interpretation of the rule.

- A "direct conflict" could also be found in the rare instance where, as was intended under the origins of the rule, a shareholder is abusing the Rule 14a-8 process to conduct a proxy solicitation on a merger or acquisition issue previously scheduled and announced by the board.

- Companies should be required to provide the text of the proposal they allege directly conflicts with a shareholder's proposal in conjunction with their no action requests.

- Company proposals announced subsequent to a shareholder proposal should be presumed to be counterproposals, for which the rule is inapplicable.

- In the event that a binding shareholder proposal is found to conflict with a management proposal, the shareholder should be allowed to revise the proposal to make it advisory.

I urge Staff to carefully consider the above outlined approach to Rule 14a-8(i)(9) and would welcome the opportunity to discuss any of the above further at your convenience.

Sincerely,

James McRitchie, Publisher & Shareholder