

Whole Foods Activist Shareholder Rings in New Year with a Win

by Jayne E. Juvan and Ilirjan Pipa

Whole Foods Market, Inc. had its own display of fireworks at the beginning of the New Year when it found itself battling against a shareholder, James McRitchie, who sought to include a proxy access proposal in the company's 2015 proxy materials. Mr. McRitchie's pursuit to obtain proxy access is one of many activist campaigns expected this year that attempt to tip the balance of corporate power in their favor.

This shareholder sought proxy statement inclusion for a proposal that would allow a shareholder or group of shareholders owning at least three percent of stock in the company for at least a three-year period to nominate up to twenty percent of the company's board, but not less than two directors if the board reduced its current size. In support, the shareholder indicated that the company's share price substantially underperformed over the past three years and that the company's board is "entrenched and stale, with a majority having served nine years or longer."

Predictably, Whole Foods requested that the Division of Corporate Finance of the Securities and Exchange Commission grant no-action relief and agree that the company may exclude the proposal pursuant to Rule 14a-8(i)(9) under the Securities Exchange Act of 1934. Whole Foods desired to exclude the shareholder's proposal on the basis that the company planned to include its own proposal in the company's 2015 proxy materials that directly conflicted with Mr. McRitchie's proposal. The Whole Foods proposal would allow nomination of the greater of one director or ten percent of the board, rounding down to the nearest whole number, for any single shareholder that held nine percent ownership for a period of five years (later decreased to five percent for five years). Firing back, the activist investor claimed that Whole Foods presented a "phantom proposal" that was "designed for board entrenchment" and "aimed at forestalling any attempt by shareholders to obtain genuine proxy access."

The SEC staff initially sided with Whole Foods and granted the no-action request.

However, on January 16, 2015, after Mr. McRitchie requested reconsideration, Chair Mary Jo White reversed course, issuing a statement indicating that she directed the staff to review the rule and report on its review "[d]ue to questions that have arisen about the proper scope and application of Rule 14a-8(i)(9)." The Division of Corporate Finance concurrently stated that it would not express views on the interpretation of this rule and similarly issued a retraction letter to Mr. McRitchie in which it declined to express a view concerning whether Whole Foods may exclude his proposal. The company has not yet announced whether it will ultimately include or exclude Mr. Ritchie's proposal. If Whole Foods excludes the proposal, however, it will have no assurance that the SEC will refrain from pursuing an enforcement action against the company.

This change in position by the SEC comes on the heels of several recent activist victories that are causing the broader governance community to take note. The most significant one is the ouster of the entire board of directors of Darden Restaurants, Inc. following a proxy fight with activist shareholder Starboard Value LP resulting, in part, because of Darden's



controversial decision to sell Red Lobster. In addition, at Jamba, Inc., two activist shareholders who wanted to have a say over how the company operates negotiated their right to appoint two representatives on the board after agreeing to support Jamba's slate of directors at the company's upcoming meeting. Similarly, at Walgreen Co., activist investor Jana Partners LLC gained two board seats as a result of an agreement reached between the parties following discussions on how to improve stock performance, and, at Hertz Global Holdings, Inc., Hertz invited Carl Icahn to appoint three board members after he became the company's largest shareholder and started pushing for management changes.

Given these victories and the increase in capitalization at activist funds, many are predicting that shareholder activism will grow. Citing data from HFR, a hedge fund tracker, the Wall Street Journal estimates that activist investors controlled about \$115.5 billion in assets as of November 2014, a sizeable increase from the \$93 billion controlled at the beginning of 2014.

In light of the anticipated uptick in activity, boards should make sure they are ready in case a shareholder comes knocking and plan their approach to shareholder engagement in advance. With respect to proxy access in particular, meaningful engagement with shareholders can help a board understand if there is a disconnect over director nominations. A board that actively gathers insights from its shareholder base is more likely to sense if a disagreement is brewing. These actions place the board in a better position to bolster its strategy and communication efforts in attempt to prevent a dispute or resolve a confrontation before it becomes heated.

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