UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

January 16, 2015

James McRitchie

*** FISMA & OMB Memorandum M-07-16 ***

Re: Whole Foods Market, Inc.
Incoming letter dated December 23, 2014

Dear Mr. McRitchie:

This is in response to your letters dated December 23, 2014 and December 30, 2014 concerning the shareholder proposal you submitted to Whole Foods Market. We also have received a letter from Whole Foods Market dated December 29, 2014. On December 1, 2014, we issued a letter expressing our informal view that Whole Foods Market could exclude your proposal from the proxy materials for its upcoming annual meeting based on Exchange Act rule 14a-8(i)(9). You have asked us to reconsider our position or, in the alternative, present the matter for Commission review.

The Division has reconsidered its position. On January 16, 2015, Chair White directed the Division to review the rule 14a-8(i)(9) basis for exclusion. The Division subsequently announced, on January 16, 2015, that in light of this direction, the Division would not express any views under rule 14a-8(i)(9) for the current proxy season. Accordingly, we express no view concerning whether Whole Foods may exclude the proposal under rule 14a-8(i)(9).

Copies of all of the correspondence on which this response is based will be made available on our website at http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8.shtml. For your reference, a brief discussion of the Division's informal procedures regarding shareholder proposals is also available at the same website address.

Sincerely,

David R. Fredrickson
Chief Counsel

cc: A.J. Ericksen
Baker Botts L.L.P.
aj.ericksen@bakerbotts.com

James McRitchie

*** FISMA & OMB Memorandum M-07-16 ***

December 30, 2014

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

#2 Rule 14a-8 Proposal
Request for Reconsideration
Whole Foods Market, Inc. (December 1, 2014) (WFM)
Proxy Access
James McRitchie

Dear Ladies and Gentlemen:

In response to the December 29, 2014 letter from Mr. Eriksen on behalf of Whole Foods, please note the following:

1. The letter does not deny that the mandatory bylaw proposed by Whole Foods was adopted "in response to" the precatory proposal submitted in this case. As a result, this is a stand-alone basis for the inapplicability of subsection (i)(9).

2. The Company indicated in its original submission that its bylaw would extend access rights to "any shareholder (but not a group of shareholders) owning 9% or more of the Company's common stock for five years." The threshold in the shareholder proposal applied to "any shareholder or group of shareholders that collectively hold at least 3% of the Company's shares continuously for three years."[1] Thus, the shareholder proposal allowed groups of shareholders to meet the threshold; the Whole Foods bylaw did not.

    a. A review of the company's proxy statements shows that under the original 9%/5 year threshold, no shareholder met the requirement. Thus, under the Company bylaw, shareholders would have received no right to access. The effect of the proposal would have been to prohibit all existing shareholders from a right to access.

    b. In its most recent discussion (we still have seen no actual language), the board of the Company has determined to lower the ownership threshold to 5% while leaving the five year holding period intact. The discussion further notes that, based upon a review of the Schedule 13F filings, "the Company believes that at

[1] http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2014/jamesmcritchie120114.pdf

least one of its shareholders would currently meet the requirements set forth in the Company's modified proposal for submitting a proxy access."[2]

c. A review of the Company's proxy statements since 2010 reveals that only Baille Gifford has held more than 5% of the shares for five years. Baille Gifford has, however, steadily decreased its percentage of shares of Whole Foods and now has 5.25%.[3] If the pattern continues, the firm will soon be ineligible under the Company bylaw.

d. No other single firm at Whole Foods has held more than 5% for more than a year.[4] As a result, no other shareholder will be eligible under the Whole Floods bylaw for at least four years.[5]

e. The bylaw, therefore, provides access rights over the next five years to at most a single shareholder. The precatory proposal at issue in this case will provide the Company with information to preferred alternatives to this form of shareholder "access."

3. The Letter asserts that a proposal may be excluded to the extent it "could provide inconsistent and ambiguous results." Yet the only explanation of how a precatory proposal can conflict with a mandatory bylaw is to assume facts that are not part of this submission.[6] A precatory proposal merely asks the board to take action. As such, it cannot conflict with a mandatory bylaw.

4. The Letter claims that if the precatory proposal passes, the results will "likely obscure rather than clarify the collective desires of the Company's shareholders." The basis for this conclusion is nowhere explained and in any event wrong. The differences in the two provisions are stark and unambiguous. The outcome will provide Whole Foods with clear insight into the views of shareholders on these types of proposals. The Company may not want to receive this insight but that is not a basis for exclusion under subsection (i)(9).

5. The Company has indicated that it has "no history" of reintroducing its own proposal on governance matters. The Company has not, however, stated on the record that it will not use this approach in the future. Nor does anything in the Staff's current position or in the

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[2] A review of proxy statements suggests that Whole Foods has a single 5% shareholder that has held the shares for the five year period proposed for the Company bylaw.

[3] http://finance.yahoo.com/q/mh?s=WFM+Major+Holders. In 2010, the firm held 6.4% of the shares of Whole Foods. See http://www.sec.gov/Archives/edgar/data/865436/000120677410000109/wholefoods_def14a.htm

[4] The relevant data for the prior five years has been attached as an appendix to this letter.

[5] As of Sept. 30, 2014, Goldman and Vanguard held more than 5%. See http://finance.yahoo.com/q/mh?s=WFM+Major+Holders. Neither, however, held more than 5% the prior year. See http://www.sec.gov/Archives/edgar/data/865436/000120677414000090/wholefoods_def14a.htm#a_0040a

[6] The letter states only that "[i]f the Company's proposal were similarly non-binding as the Proponent's Proposal or if both proposals were binding, there would still be a direct conflict. The binding effect of the Company's proposal does not make the conflict any less of a direct conflict." This assumes facts that do not exist (that applicable standard if both were binding or non-binding) and, in any event, does not explain how a precatory proposal conflicts with a mandatory bylaw.

Company's observation prevent this as a tactic. Indeed, Whole Foods asserts that the possibility of reintroduction was not a basis for excluding the proposal.

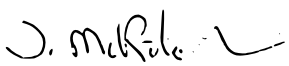
Nothing in the Company's submission establishes the applicability of subsection (i)(9). As a result, the Staff's position should either be reversed or the matter should be submitted to the entire Commission for review.

Finally, I note that the letter specifically requests that, in the event of a disagreement with any conclusion, the Company would "appreciate an opportunity to confer with the Staff or the Commission before issuance of any response." To the extent that this is a request for an *ex parte* meeting between Whole Foods or its representatives and the Staff or the Commission, I specifically ask that such a request be denied. Alternatively, the Staff or the Commission should provide adequate notice of any such "opportunity to confer" so that I and/or my representatives may likewise participate.

If you have any questions or would like any additional information, please do not hesitate to contact me at *** FISMA & OMB Memorandum M-07-16 ***

Thank you for your consideration.

Respectfully submitted,



James McRitchie

*** FISMA & OMB Memorandum M-07-16 ***

Attachment

cc: Hon. Mary Jo White, Chair
Hon. Luis A. Aguilar, Commissioner
Hon. Daniel M. Gallagher, Commissioner
Hon. Kara M. Stein, Commissioner
Hon. Michael S. Piwowar, Commissioner
Mr. Keith F. Higgins, Director, Division of Corporation Finance
Mr. A.J. Eriksen, Baker Botts, L.L.P.
Mr. John Chevedden

Appendix: Major Holders

Sept. 30, 2014:[7]

Top Institutional Holders

Holder	Shares	% Out	Value*	Reported
Baillie Gifford and Company	18,876,706	5.25	719,391,265	Sep 30, 2014
Goldman Sachs Group, Inc.	18,803,545	5.23	716,603,099	Sep 30, 2014
Vanguard Group, Inc. (The)	18,682,751	5.19	711,999,640	Sep 30, 2014

2014 Proxy Statement[8]

Baillie Gifford & Co. (1)	22,220,252	5.97%
Prudential Financial, Inc. (2)	20,081,472	5.40%
T. Rowe Price Associates, Inc. (3)	19,391,184	5.21%

2013 Proxy Statement[9]

Baillie Gifford and Co. Ltd.(1)	11,342,465	6.12%
BlackRock, Inc.(2)	10,268,428	5.54%
Prudential Financial, Inc.(3)	9,866,020	5.32%
FMR LLC, Edward C. Johnson III (4)	9,511,268	5.13%

2012 Proxy Statement[10]

Green Equity Investors V, L.P., Green Equity Investors Side V, L.P. and Thyme Coinvest, LLC (1)	13,910,997	7.7%
Baillie Gifford and Co. Ltd. (2)	11,297,143	6.3%
Jennison Associates LLC (3)	10,143,681	5.6%
Fidelity Management and Research Co. (4)	9,568,798	5.3%
T. Rowe Price Associates, Inc. (5)	9,341,494	5.2%

[7] http://finance.yahoo.com/q/mh?s=WFM+Major+Holders
[8] http://www.sec.gov/Archives/edgar/data/865436/000120677414000090/wholefoods_def14a.htm#a_0040a
[9] http://www.sec.gov/Archives/edgar/data/865436/000120677413000351/0001206774-13-000351-index.htm
[10] http://www.sec.gov/Archives/edgar/data/865436/000120677412000189/wholefoods_def14a.htm

2011 Proxy Statement[11]

Green Equity Investors V, L.P., Green Equity Investors Side V, L.P. and Thyme Coinvest, LLC (1)	19,186,141	11.1%
Baillie Gifford and Co. Ltd. (2)	11,463,602	6.6
Jennison Associates LLC (3)	11,428,944	6.6

2010 Proxy Statement[12]

Green Equity Investors V, L.P., Green Equity Investors Side V, L.P. and Thyme Coinvest, LLC (1)	29,668,574	17.4%
T. Rowe Price Assoc. (2)	12,252,000	7.2%
Baillie Gifford and Co. Ltd. (3)	10,909,367	6.4%

[11] http://www.sec.gov/Archives/edgar/data/865436/000120677411000059/wholefoods_def14a.htm
[12] http://www.sec.gov/Archives/edgar/data/865436/000120677410000109/wholefoods_def14a.htm

BAKER BOTTS L.L.P.

ONE SHELL PLAZA
910 LOUISIANA
HOUSTON, TEXAS
77002-4995

TEL +1 713.229.1234
FAX +1 713.229.1522
BakerBotts.com

ABU DHABI
AUSTIN
BEIJING
BRUSSELS
DALLAS
DUBAI
HONG KONG
HOUSTON
LONDON
MOSCOW
NEW YORK
PALO ALTO
RIO DE JANEIRO
RIYADH
WASHINGTON

December 29, 2014

A.J. Ericksen
TEL: 713.229.1393
aj.ericksen@bakerbotts.com

VIA E-MAIL (shareholderproposals@sec.gov)

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Whole Foods Market, Inc.
Request for Reconsideration of James McRitchie of the Staff's No-Action Letter dated December 1, 2014 Regarding Proxy Access for Shareholders

Ladies and Gentlemen:

We are writing on behalf of our client, Whole Foods Market, Inc., a Texas corporation (the "Company"), in response to the letter dated December 23, 2014 (the "Appeal Letter") submitted by James McRitchie (the "Proponent"). The Proponent has requested an appeal to the Securities and Exchange Commission (the "Commission") of the no-action response of the Staff (the "Staff") of the Division of Corporation Finance (the "Division") dated December 1, 2014 (the "No-Action Letter") in which the Staff concurred with the Company's view, expressed in our letter dated October 23, 2014 (the "Company Request"), that the Company may exclude the Proponent's proposal (the "Proponent's Proposal") from its 2015 proxy material pursuant to Rule 14a-8(i)(9). The Company respectfully submits that it believes, and we concur, that the request does not involve issues that are "novel or highly complex," the standard set forth under Paragraph 202.1(d) of Section 17 of the Code of Federal Regulations for presentation by the Division of a request for Commission review of a Division no-action response. The Company also hereby responds to certain matters stated in the Appeal Letter.

The Company routinely engages with many of its shareholders to discuss their views on various matters, including corporate governance. The Company wishes to note that following such discussions and upon further consideration of proxy access occurring prior to receipt of the Appeal Letter, the Company's board of directors determined last week to modify the management proposal outlined in the Company Request. Specifically, the board of directors determined to propose to shareholders in the Company's 2015 proxy materials amendments to the Company's bylaws that would permit a shareholder holding 5% or more of the Company's outstanding common stock (as opposed to the 9% threshold described in the Company Request) to nominate director candidate(s) and have such candidate(s) included in the Company's proxy materials along with the board's nominees. Based on a review of the most recent Schedule 13F filings, the Company believes that at least one of its shareholders would currently meet the

requirements set forth in the Company's modified proposal for submitting a proxy access nominee.

Pursuant to Staff Legal Bulletin No. 14D ("SLB 14D"), we are submitting this correspondence by use of the Commission email address, shareholderproposals@sec.gov (in lieu of providing six additional copies of this letter pursuant to Rule 14a-8(j)), and the undersigned has included his name and telephone number both in this letter and the cover email accompanying this letter. We are simultaneously forwarding a copy of this letter to the Proponent via email.

The Issues Are Not Novel or Highly Complex

The issues presented in the No-Action Letter are not novel or highly complex. The No-Action Letter is merely the application of well-established and simple analysis to a proxy access proposal. Precedent applying Rule 14a-8(i)(9) and its predecessor Rule 14a-8(c)(9) abounds. The Staff has consistently taken the position in various contexts that when a shareholder proposal and a company-sponsored proposal present alternative and conflicting decisions for shareholders, and submitting both proposals to a vote could provide inconsistent and ambiguous results, the shareholder proposal may be excluded. In addition to the no-action letters cited in the Company Request, see, for example, *Lowe's Cos., Inc.* (Mar. 22, 2010) (concurring in excluding a proposal requesting the board amend the company's bylaws and other governing documents to give holders of 10% of the company's outstanding stock to call a special meeting when the company planned to submit a proposal to approve an amendment to permit the holders of 25% of the company's outstanding stock to call a special meeting), *Herley Industries Inc.* (Nov. 20, 2007) (concurring in excluding a proposal requesting majority voting for directors when the company planned to submit a proposal to retain plurality voting, but requiring a director nominee to receive more "for" votes than "withheld" votes); *H.J. Heinz Company* (Apr. 23, 2007) (concurring in excluding a proposal requesting that the company adopt simple majority voting when the company indicated that it planned to submit a proposal to amend its bylaws and articles of incorporation to reduce supermajority provisions from 80% to 60%); and *AT&T* (Feb. 23, 2007) (concurring in excluding a proposal seeking to amend the company's bylaws to require shareholder ratification of any existing or future severance agreement with a senior executive as conflicting with a company proposal for a bylaw amendment limited to shareholder ratification of future severance agreements).

A general theme running through such no-action letters and no-action letters applying Rule 14a-8(c)(9) establishes that management may omit a shareholder proposal from its proxy if there is "some basis" that an affirmative vote on both the registrant's proposal and the shareholder's proposal would lead to an inconsistent and inconclusive mandate from the shareholders or provide inconsistent and inconclusive results. In fact, the Division has permitted exclusion even if the proposal could be characterized as an alternative to, rather than opposite of, the registrant's proposal. *See, e.g., Charles Allmon Trust, Inc.* (Jun. 10, 1994) (concurring in excluding a proposal requesting that the company's contract with its investment advisor be

renegotiated to provide different pricing that conflicted with a company proposal to approve a management contract with a new independent investment advisor).

The Proponent's Proposal Directly Conflicts with the Company's Proposal in a Manner That Would Result in Inconsistent and Ambiguous Results

The Proponent posits that inclusion of both proposals "does not generate confusion or concern over ambiguity." This is incorrect. If both the Company's proposal and the Proponent's Proposal were approved, there would be an inconsistent and inconclusive mandate as to (i) the number of shareholders able to nominate a candidate, (ii) the required share ownership percentages and holding period and (iii) the maximum number of candidates that can be nominated using proxy access. The Company's proposal and the Proponent's Proposal directly conflict on these issues.

Moreover, contrary to the Proponent's assertion, these differing alternatives are not comparable to the frequency on say-on-pay vote required by Rule 14a-21(b). That vote allows each shareholder to select from one of three alternatives (one year, two years or three years) or to abstain. These alternatives are presented as a single proposal and each shareholder can only select one option. As a result, the shareholders collectively are able to express their preference and management can respond to the shareholder vote.

By contrast, if both the Company's proposal and the Proponent's Proposal were included and approved, necessarily some of the Company's shareholders would have voted in favor of each proposal. The board of directors would have no means to divine the intent of a shareholder who voted for both proposals and would be left in a very uncomfortable position. On one hand, proxy access in the form approved pursuant to the Company's proposal would be implemented. On the other hand, the board of directors would be subject to potential withhold recommendations from key proxy advisory firms at the next annual meeting either (1) if it does not take action to further amend the Company's bylaws to implement the form of proxy access set forth in the Proponent's Proposal (arguably a failure to be sufficiently responsive to the majority who voted for the Proponent's Proposal) or (2) if it implements the Proponent's Proposal (arguably a failure to be sufficiently responsive to the majority who voted for the Company's proposal).[1] Such an inconsistent and ambiguous result is precisely the scenario that Rule 14a-8(i)(9) is intended to avoid.

[1] For example, proxy advisory firm Institutional Shareholder Services has a policy to consider recommending against or withhold votes for individual directors where "[t]he board failed to act on a shareholder proposal that received the support of a majority of the shares cast in the previous year." Institutional Shareholder Services, *United States Summary Proxy Voting Guidelines, 2015 Benchmark Policy Recommendations*, http://www.issgovernance.com/file/policy/2015ussummaryvotingguidelines.pdf at pg. 13 (last accessed Dec. 29, 2014).

The Precatory Nature of the Proponent's Proposal Is Irrelevant

The Proponent attempts to argue that there is no conflict because the Proponent's Proposal is precatory. This is a distinction without a difference. If the Company's proposal were similarly non-binding as the Proponent's Proposal or if both proposals were binding, there would still be a direct conflict. The binding effect of the Company's proposal does not make the conflict any less of a direct conflict. Contrary to the Proponent's assertion, a vote on the Proponent's Proposal has limited benefit to the board, if any. As discussed above, because approval of both proposals would have ambiguous or inconsistent results, information gleaned from the vote on the Proponent's Proposal is likely to obscure rather than clarify the collective desires of the Company's shareholders.

No Interference with Shareholder Franchise

The Proponent posits that under the interpretation of Rule 14a-8(i)(9) in the No-Action Letter, "[s]hareholders are limited to the version proposed by management and cannot propose and vote on competing proposals with different numerical thresholds. … to the extent that shareholders express opposition to a management bylaw and the bylaw does not pass, management can presumably resubmit the proposal the following year and again use subsection (i)(9) to block any meaningful role of shareholders in determining the applicable standards." This is contrary to experience with the Company, which has no history of resubmitting slightly modified management proposals on governance matters (to the preclusion of shareholder proposals or otherwise).

Moreover, the theoretical possibility of management reintroducing its own proposal with new thresholds was present in the long line of no-action letters related to the threshold required to call a special meeting, and that theoretical possibility did not preclude excluding such shareholder proposals pursuant to Rule 14a-8(i)(9). *See e.g., United Natural Foods, Inc.* (September 10, 2014); *Stericycle, Inc.* (Mar. 7, 2014); *Yahoo! Inc.* (Mar. 6, 2014); *Verisign, Inc.* (Feb. 24, 2014); *Quest Diagnostics Incorporated* (Feb. 19, 2014); *Kansas City Southern* (Jan. 22, 2014); *The Walt Disney Company* (Nov. 6, 2013); *Advance Auto Parts, Inc.* (Feb. 8, 2013); and *American Tower Corporation* (Jan. 30, 2013).

Conclusion

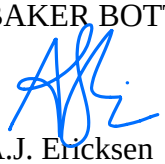
Based upon the foregoing analysis, we respectfully request that the Proponent's request for appeal be denied or, in the alternative, that the Commission affirm the prior determination of the Staff set forth in the No-Action Letter.

In the event the Staff or the Commission disagree with any conclusion expressed herein, or should any information in support or explanation of the Company's position be required, we will appreciate an opportunity to confer with the Staff or the Commission before issuance of any response. If you have any questions regarding this request or require additional information, please contact the undersigned at 713.229.1393 or Felix Phillips at 713.229.1228.

We appreciate your attention to this matter.

Very truly yours,

BAKER BOTTS L.L.P.



A.J. Ericksen

cc: James McRitchie (via email: *** FISMA & OMB Memorandum M-07-16 ***)
John Chevedden (via email: *** FISMA & OMB Memorandum M-07-16 ***)
Albert Percival (Whole Foods Market, Inc.)

James McRitchie

*** FISMA & OMB Memorandum M-07-16 ***

December 23, 2014

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

#1 Rule 14a-8 Proposal
Request for Reconsideration
Whole Foods Market, Inc. (December 1, 2014) (WFM)
Proxy Access
James McRitchie

Ladies and Gentlemen:

I am hereby requesting an appeal to the full Commission of the staff's decision to grant Whole Foods Market, Inc. (Whole Foods) a no action letter permitting the omission of a shareholder access proposal that I submitted on the basis of the exemption in subsection (i)(9) of Rule 14a-8. Alternatively, I request that the staff reverse its position and withdraw the no action letter granted to Whole Foods. The issues in this case are novel or highly unique and are therefore appropriate for review by the Commission. *See* 17 CFR 202.1(d).

The staff's position effectively denies shareholders the right to vote on competing proposals involving similar or related topics solely because the proposals contain different terms or thresholds. The interpretation effectively limits shareholders to consideration of proposals sponsored by the board of directors and eliminates any opportunity for shareholders to present alternative criteria. The interpretation is 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 subsection (i)(9).

I. Analysis

A. 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). 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." Exchange Act Release No. 40018 (May 21, 1998) (adopting release). In providing examples of the "long-standing interpretation" the Proposing Release 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 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 be confronted 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 would have mandated that management negotiate a more equitable merger agreement, specifically the payment of alternative consideration. To the extent that both passed, neither could be implemented. *See Id.* ("An affirmative shareholder vote on both the Board's proposal and the Proponents' proposal would present the Board with an inconsistent mandate. The Board could not both enter into the merger agreement and negotiate a different agreement."). As a result, the staff permitted the exclusion of the proposal.

These 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 in very narrow circumstances and only where adoption of competing proposals could be harmful to shareholders. As *General Electric* and *Northern States* demonstrated, proposals could be excluded where adoption resulted in confusion or uncertainty in actual implementation or where, as a result of incompatibility, implementation of both proposals was impossible.[1]

The 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.[2] Finally, the staff only allowed for the exclusion of proposals that raised actual and immediate concerns. The proposals at issue in *General Electric* and *Northern States* were both mandatory and not precatory and, as a result, they raised clear and unavoidable issues with respect to implementation.

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[1] This is consistent with other no action letters during the relevant period. *See Chevron Corporation* (Feb. 27, 1991) ("if both the Chevron Proposal and the Subscription Proposal were approved by Stockholders at the 1991 Annual Meeting, it would be impossible for Chevron to implement both proposals.").

[2] *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.").

B. The Whole Foods Analysis

Whole Foods contends that the adoption of management's bylaw and the shareholder proposal would result in "inconsistent and ambiguous" results. In making this assertion, the Company has pointed to three differences in the two proposals: "(i) the number of shareholders able to nominate a candidate, (ii) the required share ownership percentage and holding period and (iii) the number of directors that can be nominated." These differences in the two proposals do not raise the types of concerns that subsection (i)(9) was intended to address.

i. Ambiguity

The two proposals are, apparently, identical except for numerical thresholds "set at different levels."[3] These thresholds are clear and unambiguous. As a result, the shareholder proposal does not generate confusion or concern over ambiguity.

Indeed, any confusion arises directly from the decision to omit the proposal. Rather than providing shareholders with meaningful and unambiguous alternatives, the staff decision puts shareholders in the confusing situation of having to decide whether to oppose or favor a bylaw that provides for access but makes its use "unlikely." To the extent that shareholders had more than one proposal with different thresholds, they could avoid the potential for a Hobson's choice and vote for the proposal that was the most consistent with their actual position on access.

Indeed, shareholders have on other occasions confronted multiple proposals on identical topics that differed only on numerical thresholds with little confusion. The proxy rules require companies to ask shareholders about the frequency of the advisory vote on executive compensation. *See* Rule 14a-21(b), 17 CFR 240.14a-21(b). Shareholders must decide whether the vote should be every year, two years or three years. In adopting the requirement, investor confusion was not raised as a concern over the requirement. *See* Exchange Act Release No. 63768 (Jan. 25, 2011).

ii. Inconsistency

There is no conflict between the two proposals. Unlike *Northern States* and *General Electric*, the proposal at issue in this case is precatory, merely "ask[ing]" the board to adopt an access proposal with 3%/3 year periods.[4] Thus, to the extent both the management bylaw and shareholder proposal are adopted, there will be no actual conflict.[5]

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[3] Letter from A.J. Ericksen, Baker Botts, Oct. 23, 2014, *available at* http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2014/jamesmcritchie120114.pdf

[4] As Whole Foods has acknowledged, the proposal is "a non-binding shareholder resolution". *See also The Next Wave of Proxy Access Proposals: What Issuers Should Know and How They Can Prepare, WSGR Alert, Nov. 13, 2014* ("Approval of such a [precatory] proposal by shareholders *does not* implement proxy access at a company. If the Comptroller's proposal passes, a company's board is entitled, in the exercise of its business judgment, to decline to adopt a proxy access bylaw.").

[5] Moreover, had both proposals been mandatory, their adoption would not have presented the type of conflict that subsection (i)(9) was attended to address. The higher thresholds set out in the management bylaw did not preclude or prohibit a proposal with lower thresholds. As a result, adoption of the two sets of requirements would not have prevented their implementation.

Indeed, a vote on the shareholder proposal submitted in this case benefits the board. The results will provide directors with additional information about the views of shareholders. Because bylaws can be amended unilaterally by directors, including bylaws adopted by shareholders, the level of support for the bylaw submitted in this case will provide directors with information on shareholder views that may lead to modifications of the bylaw.

Nor is the authority cited by Whole Foods to the contrary. The Company acknowledged that there was no authority directly on point.[6] Instead, the Company relied on nine "analogous" no action letters involving proposals relating to special meetings. Although the shareholders proposals were precatory, the letters did not address the impact of precatory proposals on any purported conflict that could arise with management proposals. As a result, the staff did not have the issue before it when considering the requested no action letters.[7]

iii. Prepared "In Response To" the Shareholder Proposal

Exclusion also cannot occur where the bylaw has been adopted "in response to" a shareholder proposal. The circumstances surrounding the bylaw proposed by Whole Foods suggests that it was adopted "in response to" the proposal submitted in this case.

First, the timing suggests that the bylaw was a reaction to the shareholder proposal. Whole Foods made no mention of an access bylaw until after receiving the shareholder proposal at issue in this case. For example, see attached letter from Whole Foods objecting to my appointment of John Chevedden to act as my agent, indicating the "Company does not currently plan to include the Proposal in its proxy statement for the 2015 Annual Meeting," and specifying action I might take to cure that objection but making no mention of their intent to submit an access bylaw.[8]

Second, the terms indicate that the bylaw was a reaction to the shareholder proposal at issue in this case. The Company did not provide any text of its proposed bylaw. Nonetheless, in pointing to differences in the two proposals, the Company made no objection to most of the language contained in the shareholder proposal aside from the numerical thresholds. This suggests that the Company worked off the shareholder version and was, therefore, responding to the shareholder proposal.[9]

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[6] Letter from A.J. Ericksen, Baker Botts, Oct. 23, 2014, *available at* http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2014/jamesmcritchie120114.pdf ("We are unaware of instances where a company has sought no-action relief under Rule 14a-8(i)(9) with respect a shareholder-sponsored proxy access proposal that conflicts with a company-sponsored proxy access proposal.").

[7] There are other reasons why a number of the letters cited by Whole Foods are inapplicable. Many of the cases involved proposals by management to amend the articles of incorporation or other "foundational documents." Amendments require approval by both the board and shareholders. As a result, the board could not unilaterally alter an amendment to the articles that was adopted by shareholders to reflect the substance of a precatory proposal passed at the same time. In this case, however, the board has proposed an access bylaw, not an amendment to the articles. As a result, the board has the authority to amend the bylaw to reflect the substance of the precatory proposal. *See supra* note 4.

[8] Letter from Albert Percival, Senior Securities, Finance and Governance Counsel, Whole Foods, Sept. 22, 2014, attached.

[9] Thus for example the Company did not object to the portions of the shareholder proposal that included the requirement that directors be listed alphabetically, that board members or officers be excluded from any group

Third, the bylaw proposed by the Company apparently makes exercise of the right to access "unlikely."[10] The bylaw, therefore, can be seen as a response to, and an effort to negate, a proposal designed to provide shareholders with a meaningful right of access.

Finally, the board could have adopted the access bylaw without submission to shareholders. Unlike an amendment to the articles of incorporation, shareholder approval is not a precondition for the adoption of a bylaw. While the decision to submit the matter was not necessary under state law, it did provide for a basis for exclusion of the proposal. This suggests that the bylaw and the terms of approval were determined as a "response to" the proposal at issue in this case.

iv. Interference with the Shareholder Franchise

The interpretation of subsection (i)(9) by the staff directly interferes with the shareholder franchise and effectively denies shareholders rights that exist under state law. Under state law, shareholders have the right to propose bylaws.[11] Moreover, in at least some jurisdictions, they have the express right to propose bylaws that provide for shareholder access.[12] Without the ability to include a proposal in the proxy statement, shareholders are effectively denied the right to adopt bylaws.[13]

The staff's approach also interferes with private ordering with respect to shareholder access.[14] Shareholders are limited to the version proposed by management and cannot propose and vote on competing proposals with different numerical thresholds. This is true even where the management bylaw actually makes the exercise of the rights at issue "unlikely." Moreover, to the extent that shareholders express opposition to a management bylaw and the bylaw does not pass, management can presumably resubmit the proposal the following year and again use subsection (i)(9) to block any meaningful role of shareholders in determining the applicable standards.

II. Conclusion

Whole Foods has not carried the burden of demonstrating how the shareholder proposal at issue in this case will result in actual confusion in implementation or result in an incompatibility that

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submitting proposals, that shareholders have the right to provide a 500 word statement, and that proxy statements include instructions for submitting nominations.

[10] Pamela Park, *SEC grants Whole Foods no-action relief for proxy access proposal*, Westlaw Corporate Governance Daily Briefing, 2014 WL 6779097 ("The ownership thresholds in Whole Foods' proposal are so high that it is unlikely any shareholder will meet the standards required to include director nominees in the company's proxy materials.").

[11] *See* Texas Bus. Organ. Code Sec. 21.058.

[12] *See* DGCL 112.

[13] The Honorable Henry duPont Ridgely, Justice, Supreme Court of Delaware, *The Emerging Role of Bylaws in Corporate Governance*, at 7 ("For public companies, a shareholder vote to approve a bylaw requires proxy access."), *available at* http://www.delawarelitigation.com/files/2014/11/The_Emerging_Role_of_Bylaws_in_Corporate_Governance-copy.pdf

[14] *See* Troy A. Paredes, *Statement at Open Meeting to Propose Amendments Regarding Facilitating Shareholder Director Nominations*, SEC, Washington DC, May 20, 2009, *available at* http://www.sec.gov/news/speech/2009/spch052009tap.htm

makes implementation of either proposal impossible. As a result, the Company has not established the availability of subsection (i)(9).

If you have any questions or would like any additional information, please do not hesitate to contact me at *** FISMA & OMB Memorandum M-07-16 ***

Thank you for your consideration.

Respectfully submitted,

James McRitchie

*** FISMA & OMB Memorandum M-07-16 ***

Attachment

cc: Hon. Mary Jo White, Chair
Hon. Luis A. Aguilar, Commissioner
Hon. Daniel M. Gallagher, Commissioner
Hon. Kara M. Stein, Commissioner
Hon. Michael S. Piwowar, Commissioner
Mr. Keith F. Higgins, Director, Division of Corporation Finance
Mr. A.J. Eriksen, Baker Botts, L.L.P.
Mr. John Chevedden

WHOLE FOODS MARKET
550 BOWIE STREET, AUSTIN, TEXAS 78703
WWW.WHOLEFOODSMARKET.COM
WHOLE FOODS. WHOLE PEOPLE. WHOLE PLANET.

September 22, 2014

James McRitchie

*** FISMA & OMB Memorandum M-07-16 ***

Re: Whole Foods Market, Inc. Shareholder Proposal

Dear Mr. McRitchie,

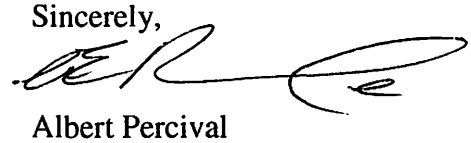
On September 10, 2014, Whole Foods Market, Inc. (the "Company") received a fax from John Chevedden purportedly submitting a shareholder proposal (the "Proposal") for consideration at the Company's 2015 Annual Meeting of Shareholders (the "2015 Annual Meeting"), which appears to contain your signature. The Proposal requests that all communications regarding the Proposal be directed to Mr. Chevedden and purports to delegate to Mr. Chevedden or his designee the power to "forward this Rule 14a-8 proposal to the company and to act as [your] agent regarding this Rule 14a-8 proposal, negotiations and/or modification, and presentation of it for the forthcoming shareholder meeting."

As you know, Rule 14a-8 allows shareholders of a company to submit proposals for inclusion in a company's proxy statement. Under certain circumstances, explained in Rule 14a-8(h), a shareholder may designate a representative to present a proposal on the shareholder's behalf at the company's shareholders' meeting. However, there is no other provision of Rule 14a-8 that allows a shareholder to designate a representative to act on the shareholder's behalf for the purposes of submitting, negotiating or modifying a proposal. Because Rule 14a-8 does not allow for the delegation of the power to submit shareholder proposals, and the Proposal was submitted by John Chevedden as your delegate, the Proposal was not properly submitted prior to the September 12, 2014 deadline as set forth in the Company's 2014 proxy statement. Therefore, the Company does not currently plan to include the Proposal in its proxy statement for the 2015 Annual Meeting.

Additionally, although the Proposal stated that Harrington Investments, Inc. was the co-filer of the Proposal, Harrington Investments, Inc. did not sign the letter or provide any evidence that it intended to be a filer or co-filer of the Proposal. Therefore, we do not intend to communicate with Harrington Investments, Inc. regarding this matter.

Should your defective submission be determined to be curable, to comply with Rule 14a-8(f), you must notify us of your intent to take full control of the shareholder proposal via response to this notice, which must be postmarked or transmitted within 14 calendar days of receiving this notice. A copy of Rule 14a-8 is enclosed with this notice for your information.

Sincerely,



Albert Percival
Senior Securities, Finance and
Governance Counsel

Enclosure

Rule 14a-8. Shareholder Proposals.*

This section addresses when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders. In summary, in order to have your shareholder proposal included on a company's proxy card, and included along with any supporting statement in its proxy statement, you must be eligible and follow certain procedures. Under a few specific circumstances, the company is permitted to exclude your proposal, but only after submitting its reasons to the Commission. We structured this section in a question-and-answer format so that it is easier to understand. The references to "you" are to a shareholder seeking to submit the proposal.

(a) **Question 1: What is a proposal?**

A shareholder proposal is your recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company's shareholders. Your proposal should state as clearly as possible the course of action that you believe the company should follow. If your proposal is placed on the company's proxy card, the company must also provide in the form of proxy means for shareholders to specify by boxes a choice between approval or disapproval, or abstention. Unless otherwise indicated, the word "proposal" as used in this section refers both to your proposal, and to your corresponding statement in support of your proposal (if any).

(b) **Question 2: Who is eligible to submit a proposal, and how do I demonstrate to the company that I am eligible?**

(1) In order to be eligible to submit a proposal, you must have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date you submit the proposal. You must continue to hold those securities through the date of the meeting.

(2) If you are the registered holder of your securities, which means that your name appears in the company's records as a shareholder, the company can verify your eligibility on its own, although you will still have to provide the company with a written statement that you intend to continue to hold the securities through the date of the meeting of shareholders. However, if like many shareholders you are not a registered holder, the company likely does not know that you are a shareholder, or how many shares you own. In this case, at the time you submit your proposal, you must prove your eligibility to the company in one of two ways:

(i) The first way is to submit to the company a written statement from the "record" holder of your securities (usually a broker or bank) verifying that, at the time you submitted your proposal, you continuously held the securities for at least one year. You must also include your own written statement that you intend to continue to hold the securities through the date of the meeting of shareholders; or

(ii) The second way to prove ownership applies only if you have filed a Schedule 13D, Schedule 13G, Form 3, Form 4 and/or Form 5, or amendments to those documents or updated forms, reflecting your ownership of the shares as of or before the date on which the one-year

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Effective April 4, 2011, Rule 14a-8 was amended by adding *Note to Paragraph (i)(10)* as part of rule amendments implementing the provisions of the Dodd-Frank Act relating to shareholder approval of executive compensation and golden parachute compensation arrangements. See SEC Release Nos. 33-9178; 34-63768; January 25, 2011. *Compliance Date*: April 4, 2011. For other compliance dates related to this release, see SEC Release No. 33-9178.

eligibility period begins. If you have filed one of these documents with the SEC, you may demonstrate your eligibility by submitting to the company:

(A) A copy of the schedule and/or form, and any subsequent amendments reporting a change in your ownership level;

(B) Your written statement that you continuously held the required number of shares for the one-year period as of the date of the statement; and

(C) Your written statement that you intend to continue ownership of the shares through the date of the company's annual or special meeting.

(c) Question 3: How many proposals may I submit?

Each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting.

(d) Question 4: How long can my proposal be?

The proposal, including any accompanying supporting statement, may not exceed 500 words.

(e) Question 5: What is the deadline for submitting a proposal?

(1) If you are submitting your proposal for the company's annual meeting, you can in most cases find the deadline in last year's proxy statement. However, if the company did not hold an annual meeting last year, or has changed the date of its meeting for this year more than 30 days from last year's meeting, you can usually find the deadline in one of the company's quarterly reports on Form 10-Q (§ 249.308a of this chapter), or in shareholder reports of investment companies under § 270.30d-1 of this chapter of the Investment Company Act of 1940. In order to avoid controversy, shareholders should submit their proposals by means, including electronic means, that permit them to prove the date of delivery.

(2) The deadline is calculated in the following manner if the proposal is submitted for a regularly scheduled annual meeting. The proposal must be received at the company's principal executive offices not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting. However, if the company did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting, then the deadline is a reasonable time before the company begins to print and send its proxy materials.

(3) If you are submitting your proposal for a meeting of shareholders other than a regularly scheduled annual meeting, the deadline is a reasonable time before the company begins to print and send its proxy materials.

(f) Question 6: What if I fail to follow one of the eligibility or procedural requirements explained in answers to Questions 1 through 4 of this Rule 14a-8?

(1) The company may exclude your proposal, but only after it has notified you of the problem, and you have failed adequately to correct it. Within 14 calendar days of receiving your proposal, the company must notify you in writing of any procedural or eligibility deficiencies, as well as of the time frame for your response. Your response must be postmarked, or transmitted electronically, no later than 14 days from the date you received the company's notification. A company need not provide you such notice of a deficiency if the deficiency cannot be remedied, such as if you fail to submit a proposal by the company's properly determined deadline. If the company intends to exclude the proposal, it will later have to make a submission under Rule 14a-8 and provide you with a copy under Question 10 below, Rule 14a-8(j).

(2) If you fail in your promise to hold the required number of securities through the date of the meeting of shareholders, then the company will be permitted to exclude all of your proposals from its proxy materials for any meeting held in the following two calendar years.

(g) Question 7: Who has the burden of persuading the Commission or its staff that my proposal can be excluded?

Except as otherwise noted, the burden is on the company to demonstrate that it is entitled to exclude a proposal.

(h) Question 8: Must I appear personally at the shareholders' meeting to present the proposal?

(1) Either you, or your representative who is qualified under state law to present the proposal on your behalf, must attend the meeting to present the proposal. Whether you attend the meeting yourself or send a qualified representative to the meeting in your place, you should make sure that you, or your representative, follow the proper state law procedures for attending the meeting and/or presenting your proposal.

(2) If the company holds its shareholder meeting in whole or in part via electronic media, and the company permits you or your representative to present your proposal via such media, then you may appear through electronic media rather than traveling to the meeting to appear in person.

(3) If you or your qualified representative fail to appear and present the proposal, without good cause, the company will be permitted to exclude all of your proposals from its proxy materials for any meetings held in the following two calendar years.

(i) Question 9: If I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal?

(1) ***Improper Under State Law:*** If the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization;

Note to Paragraph (i)(1): Depending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.

(2) ***Violation of Law:*** If the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject;

Note to Paragraph (i)(2): We will not apply this basis for exclusion to permit exclusion of a proposal on grounds that it would violate foreign law if compliance with the foreign law would result in a violation of any state or federal law.

(3) ***Violation of Proxy Rules:*** If the proposal or supporting statement is contrary to any of the Commission's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials;

(4) ***Personal Grievance; Special Interest:*** If the proposal relates to the redress of a personal claim or grievance against the company or any other person, or if it is designed to result in a benefit to you, or to further a personal interest, which is not shared by the other shareholders at large;

(5) ***Relevance:*** If the proposal relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business;

(6) ***Absence of Power/Authority:*** If the company would lack the power or authority to implement the proposal;

(7) ***Management Functions:*** If the proposal deals with a matter relating to the company's ordinary business operations;

*(8) ***Director Elections***: If the proposal:

(i) Would disqualify a nominee who is standing for election;

(ii) Would remove a director from office before his or her term expired;

(iii) Questions the competence, business judgment, or character of one or more nominees or directors;

(iv) Seeks to include a specific individual in the company's proxy materials for election to the board of directors; or

(v) Otherwise could affect the outcome of the upcoming election of directors.

(9) ***Conflicts with Company's Proposal:*** If the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting;

Note to Paragraph (i)(9): A company's submission to the Commission under this Rule 14a-8 should specify the points of conflict with the company's proposal.

(10) ***Substantially Implemented:*** If the company has already substantially implemented the proposal;

***Note to Paragraph (i)(10):* A company may exclude a shareholder proposal that would provide an advisory vote or seek future advisory votes to approve the compensation of executives as disclosed pursuant to Item 402 of Regulation S-K (§ 229.402 of this chapter) or any successor to Item 402 (a "say-on-pay vote") or that relates to the frequency of say-on-pay votes, provided that in the most recent shareholder vote required by § 240.14a-21(b) of this chapter a single year (*i.e.*, one, two, or three years) received approval of a majority of votes cast on the matter and the company has adopted a policy on the frequency of say-on-pay votes that is consistent with the choice of the majority of votes cast in the most recent shareholder vote required by § 240.14a-21(b) of this chapter.

(11) ***Duplication:*** If the proposal substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the company's proxy materials for the same meeting;

(12) ***Resubmissions:*** If the proposal deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials within the preceding 5 calendar years, a company may exclude it from its proxy materials for any meeting held within 3 calendar years of the last time it was included if the proposal received:

(i) Less than 3% of the vote if proposed once within the preceding 5 calendar years;

(ii) Less than 6% of the vote on its last submission to shareholders if proposed twice previously within the preceding 5 calendar years; or

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**Effective April 4, 2011, Rule 14a-8 was amended by adding *Note to Paragraph (i)(10)* as part of rule amendments implementing the provisions of the Dodd-Frank Act relating to shareholder approval of executive compensation and golden parachute compensation arrangements. See SEC Release Nos. 33-9178; 34-63768; January 25, 2011. *Compliance Date*: April 4, 2011. For other compliance dates related to this release, see SEC Release No. 33-9178.

(iii) Less than 10% of the vote on its last submission to shareholders if proposed three times or more previously within the preceding 5 calendar years; and

(13) ***Specific Amount of Dividends:*** If the proposal relates to specific amounts of cash or stock dividends.

(j) Question 10: What procedures must the company follow if it intends to exclude my proposal?

(1) If the company intends to exclude a proposal from its proxy materials, it must file its reasons with the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The company must simultaneously provide you with a copy of its submission. The Commission staff may permit the company to make its submission later than 80 days before the company files its definitive proxy statement and form of proxy, if the company demonstrates good cause for missing the deadline.

(2) The company must file six paper copies of the following:

(i) The proposal;

(ii) An explanation of why the company believes that it may exclude the proposal, which should, if possible, refer to the most recent applicable authority, such as prior Division letters issued under the rule; and

(iii) A supporting opinion of counsel when such reasons are based on matters of state or foreign law.

(k) Question 11: May I submit my own statement to the Commission responding to the company's arguments?

Yes, you may submit a response, but it is not required. You should try to submit any response to us, with a copy to the company, as soon as possible after the company makes its submission. This way, the Commission staff will have time to consider fully your submission before it issues its response. You should submit six paper copies of your response.

(l) Question 12: If the company includes my shareholder proposal in its proxy materials, what information about me must it include along with the proposal itself?

(1) The company's proxy statement must include your name and address, as well as the number of the company's voting securities that you hold. However, instead of providing that information, the company may instead include a statement that it will provide the information to shareholders promptly upon receiving an oral or written request.

(2) The company is not responsible for the contents of your proposal or supporting statement.

(m) Question 13: What can I do if the company includes in its proxy statement reasons why it believes shareholders should not vote in favor of my proposal, and I disagree with some of its statements?

(1) The company may elect to include in its proxy statement reasons why it believes shareholders should vote against your proposal. The company is allowed to make arguments reflecting its own point of view, just as you may express your own point of view in your proposal's supporting statement.

(2) However, if you believe that the company's opposition to your proposal contains materially false or misleading statements that may violate our anti-fraud rule, Rule 14a-9, you should promptly send to the Commission staff and the company a letter explaining the reasons for your view, along with a copy of the company's statements opposing your proposal. To the extent possible, your letter should include specific factual information demonstrating the inaccuracy of the company's claims. Time permitting, you may wish to try to work out your differences with the company by yourself before contacting the Commission staff.

(3) We require the company to send you a copy of its statements opposing your proposal before it sends its proxy materials, so that you may bring to our attention any materially false or misleading statements, under the following timeframes:

(i) If our no-action response requires that you make revisions to your proposal or supporting statement as a condition to requiring the company to include it in its proxy materials, then the company must provide you with a copy of its opposition statements no later than 5 calendar days after the company receives a copy of your revised proposal; or

(ii) In all other cases, the company must provide you with a copy of its opposition statements no later than 30 calendar days before it files definitive copies of its proxy statement and form of proxy under Rule 14a-6.

Rule 14a-9. False or Misleading Statements.*

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

**(c) No nominee, nominating shareholder or nominating shareholder group, or any member thereof, shall cause to be included in a registrant's proxy materials, either pursuant to the Federal proxy rules, an applicable state or foreign law provision, or a registrant's governing documents as they relate to including shareholder nominees for director in a registrant's proxy materials, include in a notice on Schedule 14N (§ 240.14n-101), or include in any other related communication, any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to a solicitation for the same meeting or subject matter which has become false or misleading.

Note. The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this section:

***a. Predictions as to specific future market values.

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*Effective September 20, 2011, Rule 14a-9 was amended by adding paragraph (c) and redesignating Notes (a), (b), (c), and (d) as a., b., c., and d., respectively, as part of the amendments facilitating shareholder director nominations. See SEC Release Nos. 33-9259; 34-65343; IC-29788; September 15, 2011. See also SEC Release Nos. 33-9136; 34-62764; IC-29384 (Aug. 25, 2010); SEC Release Nos. 33-9149; 34-63031; IC-29456 (Oct. 4, 2010); SEC Release Nos. 33-9151; 34-63109; IC-29462 (Oct. 14, 2010).

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***Effective September 20, 2011, Rule 14a-9 was amended by redesignating Notes (a), (b), (c), and (d) as a., b., c., and d., respectively, as part of the amendments facilitating shareholder director nominations. See SEC Release Nos. 33-9259; 34-65343; IC-29788; September 15, 2011. See also SEC Release Nos. 33-9136; 34-62764; IC-29384 (Aug. 25, 2010); SEC Release Nos. 33-9149; 34-63031; IC-29456 (Oct. 4, 2010); SEC Release Nos. 33-9151; 34-63109; IC-29462 (Oct. 14, 2010).