



SEC Update

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SEC staff suspends substantive responses to most shareholder proposal no-action requests

On November 17, the SEC's Division of Corporation Finance issued a **statement** announcing that it will play a reduced role in the shareholder proposal process under Exchange Act Rule 14a-8 during the 2025-2026 proxy season.

The Division states that, in a departure from its historical practice, it will not respond to no-action requests for, and will not express views on, companies' intended reliance on any procedural or substantive basis under Rule 14a-8 for excluding shareholder proposals from their proxy materials. In the only exception to this policy, the Division will respond substantively to no-action requests under Rule 14a-8(i)(1) seeking exclusion of proposals on the basis that they are not a proper subject for shareholder action under state law.

The Division explains that it adopted this change to its normal process in responding to no-action requests because of the backlog of work requiring the staff's attention following the recent federal government shutdown, and because of the "extensive body" of Commission and staff guidance on the operation of Rule 14a-8 available to both companies and shareholder proponents.

The Statement touches on a number of matters discussed below that companies will have to address in deciding how to respond to shareholder proposals during the current proxy season.

Background

Under the new policy, the SEC will curtail its traditional role as the arbiter of disputes between a company and a shareholder proponent regarding whether the proponent's proposal may be excluded from the company's proxy materials. The Commission performs this function primarily through the issuance of no-action letters by its staff advising both the company and the proponent

whether the staff believes the company has provided a reasonable basis for omitting the proposal.

For some years, the Commission has sought to reduce its involvement in shareholder proposal disputes and allow them to be settled by the parties themselves or by the courts. The Commission's efforts to do so by rulemaking have been rebuffed by both the corporate and the shareholder communities, which have been unwilling to support any alternative to the current process.

The passage of time has not dampened the strong feelings engendered by the debate over the SEC's role in the shareholder proposal process. The Division's decision to suspend substantive review of most exclusion determinations during the current proxy season has attracted strong criticism from various shareholder proponents. They express concern that the new policy is likely to result in the exclusion of some eligible proposals.

Commissioner Caroline Crenshaw conveyed a similar sentiment in remarks critical of the Statement. She maintains that the Division's "purported" neutrality under the new policy "hands companies a hall pass to do whatever they want" and "effectively creates unqualified permission for companies to silence investor voices."

It remains to be seen whether the suspension of the SEC's historical role during this proxy season represents a temporary expedient or a harbinger of a more enduring change.

Impact of Statement on 2025-2026 proxy season

Even though the SEC no-action process is informal and non-binding, companies have relied on the process to provide certainty regarding decisions

to exclude shareholder proposals from their proxy materials based on procedural deficiencies or substantive bases for exclusion under Rule 14a-8. The Statement removes that certainty, other than in the case of no-action requests under Rule 14a-8(i)(1) seeking exclusion of proposals on the basis that they are not a proper subject for shareholder action under state law.

Without the staff's concurrence in their exclusion determinations, companies will need to determine on their own whether there is a "reasonable basis" for concluding that a proposal qualifies for exclusion. In making their exclusion determinations, companies should consult the guidance on Rule 14a-8 from the Commission and the staff highlighted by the Division in its Statement.

The Division reminds companies, however, that prior staff responses to Rule 14a-8 no-action requests are not binding and reflect only informal staff views. The Division underscores that the absence of a prior staff response indicating that the staff agreed that there was some basis to exclude a particular type of proposal does not mean that companies cannot form a reasonable basis to exclude such a proposal. Similarly, the Division notes, a prior staff response indicating that the staff was unable to concur with a company's view that a proposal may be excluded does not mean that companies cannot form a reasonable basis to exclude the same or a similar proposal.

Duration of new policy

The new policy applies to the current proxy season, extending from October 1, 2025 to September 30, 2026, as well as to no-action requests received before October 1, 2025 to which the Division has not yet responded.

It is unclear whether the Division will return to business as usual for the 2026-2027 proxy season. The SEC has placed Rule 14a-8 rulemaking changes on its agenda for 2026.

Process for excluding shareholder proposals under Statement

The Division confirms that, as required by Rule 14a-8(j), companies that intend to exclude shareholder proposals from their proxy materials must still provide notice of their intention to the staff and proponents no later than 80 calendar days before the filing date for their definitive proxy materials.

Under the rule, the notification must include 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. If the basis for exclusion relates to a matter of state or foreign law, the notification also should include a supporting opinion of counsel.

The Statement points out that, in accordance with the Division's long-standing practice, the notification is informational only, there is no requirement that companies seek the staff's views regarding their intended exclusion of a proposal, and no response from the staff is required.

The Statement directs companies to submit notices under Rule 14a-8(j) using the Division's online **Shareholder Proposal Form**.

Receipt of non-substantive "no objection" letter from the staff

Under the new policy, companies may ask for a staff response to their exclusion notification under Rule 14a-8(j), but the response will not address the substance of the exclusion determination, unless the determination is based on Rule 14a-8(i)(1).

As noted above, companies are not required in their notifications to seek the staff's views regarding their intended exclusion of a proposal. The Division, however, indicates that a company wishing to receive some form of staff response to its notification may obtain a response by including in the notification "an unqualified representation that the company has a reasonable basis to exclude the proposal based on the provisions of Rule 14a-8, prior published guidance, and/or judicial decisions."

The staff will not respond substantively to such a submission, but instead will issue a letter stating that, based solely on the company's or counsel's representation, the Division will not object if the company omits the proposal from its proxy materials. The Statement emphasizes that "[i]n providing its response, the Division will not evaluate the adequacy of the representation or express a view on the basis or bases the company intends to rely on in excluding the proposal."

Accordingly, based on the foregoing direction in the Statement, a company's Rule 14a-8(j) notification should be limited to the information required under the rule, as summarized above, and, if the company seeks a "no objection" response from the staff, an unqualified representation regarding the company's

exclusion determination in the form specified in the Statement.

The SEC staff has informally advised that it will make available on its website all Rule 14a-8(j) notifications submitted to the Division, whether or not seeking a “no objection” letter from the staff.

Potential consequences of excluding a proposal without staff concurrence

Exclusion determinations without the staff’s concurrence will raise the stakes for companies in evaluating the eligibility of shareholder proposals. In these circumstances, companies should carefully consider the potential negative consequences of excluding a proposal, particularly where the existing precedent provides reasonable arguments both for and against exclusion.

Proponents who disagree with a company’s decision to exclude their proposal may seek remedies in federal court, such as an order compelling inclusion of the proposal or enjoining the shareholder meeting, which could affect mailing and meeting timelines and increase costs. Although historically shareholder lawsuits have been infrequent, companies could be targeted with such lawsuits if proponents believe they have omitted an eligible proposal.

Past practice provides a guide to other ways in which market participants might respond when they believe a company has improperly excluded a proposal. Such an exclusion could provoke, among other adverse actions, negative public comment from shareholder advocates, proxy advisory firms, or institutional shareholders, disruption of the annual meeting, and “withhold” vote campaigns. In a recent example of such a campaign, a proponent filed a notice of exempt solicitation under the proxy rules urging shareholders to vote against election of a company’s governance and nominating committee chair after the company unilaterally excluded a shareholder proposal during the recent federal government shutdown.

Exclusion of a proposal without a reasonable basis also may create an SEC enforcement risk, however remote in the current circumstances. The Statement includes the usual caution that staff “responses to no-action requests and Rule 14a-8(j) notifications are not binding on the Commission or other Divisions and Offices and do not preclude the Commission from taking enforcement action in appropriate circumstances.”

Applicability to exclusions under Rule 14a-8(i)(1)

The Statement specifies that the traditional no-action request process will continue to apply to exclusions of proposals pursuant to Rule 14a-8(i)(1) on the basis they are not a “proper subject” for shareholder action because they are not permissible under state law.

The exception for proposals excluded on this basis follows a **recent speech** by SEC Chair Paul Atkins advancing a position that “precatory” shareholder proposals may not be a proper subject for shareholder action under Delaware law. The SEC’s Chair’s remarks indicate that the Commission and its staff are reconsidering the long-held presumption that most proposals that are cast as recommendations or requests that a company’s board of directors take specified action are proper under state law. The Division says that it will continue to review and express its views on no-action requests under Rule 14a-8(i)(1) until it concludes there is sufficient guidance for use by companies and shareholder proponents in determining the applicability of this substantive basis for excluding a proposal.

This SEC Update is a summary for guidance only and should not be relied on as legal advice in relation to a particular transaction or situation. If you have any questions or would like any additional information regarding this matter, please contact your relationship partner at Hogan Lovells or any of the lawyers listed in this update.

Contributors



Alan Dye (co-editor)
Partner, Washington, D.C.
T +1 202 637 5737
alan.dye@hoganlovells.com



Richard Parrino (co-editor)
Partner, Washington, D.C.
T +1 202 637 5530
richard.parrino@hoganlovells.com



Andrew S. Zahn
Partner, Washington, D.C.
T +1 202 637 3658
andrew.zahn@hoganlovells.com



Val Delp
Counsel, Philadelphia
T +1 267 675 4649
val.delp@hoganlovells.com



Weston Gaines
Counsel, Washington, D.C.
T +1 202 637 5846
weston.gaines@hoganlovells.com



Brendan Oldham
Senior Associate, Washington, D.C.
T +1 202 637 7814
brendan.oldham@hoganlovells.com



Leia Scott
Senior Associate, Washington, D.C.
T +1 202 804 7852
leia.scott@hoganlovells.com



Rosalie Gambrah
Associate, Washington, D.C.
T +1 202 957 9266
rosalie.gambrah@hoganlovells.com



Eryn Lin
Associate, Washington, D.C.
T +1 202 804 7804
eryn.lin@hoganlovells.com

Additional contacts

Steven J. Abrams

Partner, Philadelphia
T +1 267 675 4671
steve.abrams@hoganlovells.com

Elizabeth (Liz) L. Banks

Partner, Washington, D.C.
T +1 202 637 2523
elizabeth.banks@hoganlovells.com

David W. Bonser

Partner, Washington, D.C.
T +1 202 637 5868
david.bonser@hoganlovells.com

John P. Duke

Partner, Philadelphia, New York
T +1 267 675 4616 (Philadelphia)
T +1 212 918 5616 (New York)
john.duke@hoganlovells.com

Paul Hilton

Senior Counsel, Denver, New York
T +1 303 454 2414 (Denver)
T +1 212 918 3514 (New York)
paul.hilton@hoganlovells.com

William I. Intner

Partner, Baltimore
T +1 410 659 2778
william.intner@hoganlovells.com

Paul D. Manca

Partner, Washington, D.C.
T +1 202 637 5821
paul.manca@hoganlovells.com

Brian C. O'Fahey

Partner, Washington, D.C.
T +1 202 637 6541
brian.ofahey@hoganlovells.com

Michael J. Silver

Senior Counsel, New York, Baltimore
T +1 212 918 8235 (New York)
T +1 410 659 2741 (Baltimore)
michael.silver@hoganlovells.com

Richard Aftanas

Partner, New York
T +1 212 918 3267
richard.aftanas@hoganlovells.com

John B. Beckman

Partner, Washington, D.C.
T +1 202 637 5464
john.beckman@hoganlovells.com

Rupa Briggs

Partner, New York
T +1 212 918 3024
rupa.briggs@hoganlovells.com

Kevin K. Greenslade

Partner, Northern Virginia
T +1 703 610 6189
kevin.greenslade@hoganlovells.com

J. Nicholas Hoover

Partner, Baltimore
T +1 410 659 2790
nick.hoover@hoganlovells.com

Bob Juelke

Partner, Philadelphia
T +1 267 675 4615
bob.juelke@hoganlovells.com

Michael E. McTiernan

Partner, Washington, D.C.
T +1 202 637 5684
michael.mctiernan@hoganlovells.com

Leslie (Les) B. Reese, III

Partner, Washington, D.C.
T +1 202 637 5542
leslie.reese@hoganlovells.com

Meredith Hines

Counsel, New York
T +1 212 918 3729
meredith.hines@hoganlovells.com

Tifarah Roberts Allen

Partner, Washington, D.C.
T +1 202 637 5427
tifarah.allen@hoganlovells.com

Jessica A. Bisignano

Partner, Philadelphia
T +1 267 675 4643
jessica.bisignano@hoganlovells.com

Glenn C. Campbell

Partner, Baltimore, Washington, D.C.
T +1 410 659 2709 (Baltimore)
T +1 202 637 5622 (Washington, D.C.)
glenn.campbell@hoganlovells.com

Allen Hicks

Partner, Washington, D.C.
T +1 202 637 6420
allen.hicks@hoganlovells.com

Eve N. Howard

Senior Counsel, Washington, D.C.
T +1 202 637 5627
eve.howard@hoganlovells.com

Jonathan Lewis

Partner, São Paulo
T +55 11 3074 3619
jonathan.lewis@hoganlovells.com

Stephen M. Nicolai

Partner, Philadelphia
T +1 267 675 4642
stephen.nicolai@hoganlovells.com

Richard Schaberg

Partner, Washington, D.C., New York
T +1 202 637 5671 (Washington, D.C.)
T +1 212 918 3000 (New York)
richard.schaberg@hoganlovells.com

Catalina Parkinson

Counsel, Washington, D.C.
T +1 202 637 5767
catalina.parkinson@hoganlovells.com

Alicante
Amsterdam
Baltimore
Beijing
Berlin**
Birmingham
Boston
Brussels
Budapest*
Colorado Springs
Denver
Dubai
Dublin
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
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Warsaw
Washington, D.C.

*Our associated offices

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