

SEC Fundamentally Alters the Shareholder Proposal Process for Upcoming Proxy Season

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The SEC's Division of Corporation Finance recently issued a statement (the "Statement") that, for the current proxy season, it will not respond to no-action requests for, and express no views on, companies' exclusion of shareholder proposals under Rule 14a-8. The one exception is that it will respond to requests for exclusion under Rule 14a-8(i)(1), which is the basis for excluding proposals that are improper under state law.

The Division's stated rationales for this process change are current resource and timing considerations following the lengthy government shutdown, the large volume of registration statements and other filings requiring prompt Staff attention, and the extensive body of guidance from the Commission and the Staff available to both companies and proponents. However, the Statement also signals the Commission's skepticism of the value of the no-action letter process, and learnings from this proxy season will inform future reform of the Commission's shareholder proposal regulations. We do not expect the current process to become the status quo. However, the Statement is a harbinger of the shareholder proposal framework to come, with less agency involvement and resources committed to the no-action letter process and increasing deference to issuers on what types of proposals may be included in company proxy statements and under what circumstances.

What procedures must a company now follow if it intends to exclude a shareholder proposal?

As in prior seasons, companies that intend to exclude shareholder proposals from their proxy materials still must notify the Commission and proponents no later than 80 calendar days before filing a definitive proxy statement. Unlike past proxy seasons, however, this requirement is informational only. Rule 14a-8(j) provides that the company must file its reasons and simultaneously provide the proponent with a copy of its submission.

The notification may consist of a brief statement of the basis for exclusion and, at the

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company's option, the new unqualified representation discussed below. [1] Alternatively, the notification may resemble no-action letter requests from prior proxy seasons, which provide more fulsome explanations of the bases for exclusion.

In this uncertain environment, we expect that companies will prepare and provide more fulsome explanations in order to preempt litigation and negative attention that may arise from their decision to exclude shareholder proposals. Whereas in the past, most notifications were drafted for the Staff using technical jargon and a heavy reliance on precedents, we expect companies to be drafting notifications with a broader audience in mind, including their institutional and retail investor bases, as well as proxy advisors and, potentially, the media. Plain English arguments, more cautious use of tenuous and hypothetical bases for exclusion and shorter letters may win the day in these circumstances.

Notices submitted pursuant to Rule 14a-8(j) must continue to be submitted to the Division Staff using the online Shareholder Proposal Form.

Will a company receive a response on its notification from the Division?

Absent a new, unqualified representation by the company, as discussed below, the Division Staff will not respond to a no-action letter request. The Statement clarifies that 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.

However, if a company wishes to receive the Staff's response for any proposal that it intends to exclude pursuant to a basis other than Rule 14a-8(i)(1), the company or its counsel must include, as part of its 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. In those situations, the Staff will respond with a letter indicating 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 reasonability standard appears to be very flexible. In footnote (3) to the Statement, the Staff noted that the absence of a prior 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 that proposal. Likewise, the Division further noted that 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. [2]

In 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, a company's notification should be limited to the information required by Rule 14a-8(j), as well as an unqualified representation that the company has a reasonable basis to exclude the proposal (along with any further explanations that the company desires to communicate to the other constituencies, as

noted above).

What weight will the Division's response carry?

The Statement implies that the Division's "no objection" response will carry the same, or close to the same, weight as past no-action responses, [3] but how much weight would the response carry in litigation? The Division is careful to point out that prior Staff responses to Rule 14a-8 no-action requests are not binding and reflect only informal Staff views.[4] Furthermore, the response is to be issued without an evaluation of the underlying proposal, based solely on the company's unqualified representation that the company has a reasonable basis to exclude the proposal based on the provisions of Rule 14a-8; reasonability is a lower threshold, compared to prior practice. Under these circumstances, it is quite possible that a court may attribute little or no weight to the Division's response, if the exclusion of a proposal were to be litigated.

What recourse will be available to shareholder proponents who disagree with a company's position?

In a scathing response to the Statement, Commissioner Caroline Crenshaw took issue with the Division's issuance of a "no objection" response in every instance, as long as a company is willing to make its unqualified representation. [5]

In the absence of further recourse at the Commission, shareholder proponents may become more willing to negotiate with companies. While companies may have less incentive to negotiate in this environment, they are still likely to be drawn to the table for issues that have broader support across their investor and customer base.

If negotiations fail, the parties will need to weigh their prospects (and their pocketbooks) for challenging the exclusion of a proposal in litigation. As noted in the Statement, the Staff's views are non-binding, and only a court can adjudicate whether a company can exclude a shareholder proposal submitted under Rule 14a-8 from its proxy statement. [6] With the Commission out of the picture, companies will be responsible for determining whether there is a defensible basis for exclusion, increasing the likelihood that disputes will be settled in court.

However, litigation likely will remain unusual, since it may drag on for years with significant legal fees. Furthermore, shareholders have historically had a low rate of success when litigating the exclusion of proposals in court, as cases were often dismissed on procedural grounds. This trend may change as shareholders become more sophisticated at challenging exclusions in court, and a wider variety of proposals are litigated in multiple forums.

Shareholder proponents may increasingly rely on alternative strategies to influence boards of directors, such as the threat of "vote no" campaigns against some or all directors, opposition to say-on-pay resolutions, or proxy contests. Shareholders may also turn to "floor resolutions" made at annual meetings, to present an issue and raise awareness and discussion with management, the board and annual meeting attendees.

Why will the Commission continue to review requests to exclude proposals that are improper under Rule 14a-8(i)(1)?

The Division has determined that there is not a sufficient body of applicable guidance for companies and proponents to rely on for no-action requests related to Rule 14a-8(i)(1), which permits exclusions of proposals that are improper under state law. Categories of proposals that have been excluded on this basis include:

- Proposals that purport to be binding on the board when state law gives the board exclusive authority. Examples include the board's ability to declare dividends, hire or fire specific executives, enter or exit specific lines of business, approve or reject an M&A transaction, or redeem poison pills or implement takeover defenses.
- Proposals that conflict with the company's charter or state corporate statutes.
- Proposals that are improper subjects under state law because they are *ultra vires*. These would include proposals asking the company to undertake actions outside its business purpose, as defined in its charter, or proposals mandating illegal conduct.

In an October 9, 2025 [keynote speech](#) at the John L. Weinberg Center for Corporate Governance, Commission Chairman Paul Atkins questioned whether shareholders have a fundamental right to bring precatory proposals under Delaware law. He encouraged Delaware to clarify this issue, and he stated that the Commission would honor the state's position. [7]

By making an exception for no-action requests based on the proposal's propriety under state law, the Division is signaling its interest in receiving no-action requests that challenge the legality of precatory proposals under Delaware law. In fact, Chairman Atkins indicated in his speech that, if a company were to obtain an opinion of counsel that precatory proposals are not a proper subject for shareholder action under Delaware state law, then he would have "high confidence that the SEC Staff will honor that position," potentially setting up a showdown in Delaware Chancery Court.

Will we see companies relying on novel or historically less successful bases for exclusion?

Despite the flexibility offered by the Division, we expect companies to remain cognizant of existing precedent in preparing their notifications of exclusion under Rule 14a-8(j), especially if the proposal otherwise would receive broad support among the company's investors, and if the notification were to include the unqualified representation.

On the other hand, it is possible that this could be the season of the novel shareholder proposal, when proponents lean into companies' discomfort with excluding a proposal with little or no precedent, and thus (arguably) no reasonable basis for exclusion, especially when there is no Commission process for addressing novel proposals.

Will no-action correspondence continue to be publicly available?

Yes, the Division expects to make all correspondence available promptly on the

Commission's website.

For what period of time is the Statement effective?

The Statement applies to the current proxy season (October 1, 2025 through September 30, 2026) as well as no-action requests received before October 1, 2025 to which the Division has not yet responded. Companies that have already submitted a request relying on a basis for exclusion other than Rule 14a-8(i)(1) and that wish to receive a response from the Division should submit a notice that includes the representation described above. In those cases, the time of the initial submission will apply for purposes of the 80-day requirement in Rule 14a-8(j).

Does the Statement establish a new status quo?

We do not expect the current process to become the status quo. However, the Statement is a harbinger of the shareholder proposal framework to come, with less agency involvement and resources committed to the no-action letter process and increasing deference to issuers on what types of proposals may be included in company proxy statements and under what circumstances. Shareholder proposal modernization originally was included in the Commission's Spring 2025 Unified Agenda for potential rulemaking, with an anticipated timing of as early as April 2026, though new rules would not likely take effect until the 2027 proxy season. That timeline is likely to be delayed in light of the government shutdown and Staffing shortages at the Commission.

[1] In a November 25, 2025 virtual meeting with members of the Society for Governance (the "Society Meeting"), Division Chief Counsel Michael Seaman stated that the Staff would accept notices of any length, so long as they complied with Rule 14a(8)(j).

[2] In the Society Meeting, Division Chief Counsel Michael Seaman explained that the Staff used the term "reasonable" for situations that are "close to the line". He explained that, where excludability is a close call (*i.e.*, both parties can make reasonable arguments), in his view, the company should still be able to make the representation. Last year, the Staff responded favorably in 55% of no-action requests, but, he noted that does not mean that the other companies could not have made the reasonability representation. And, he further noted that, in the case of proposals involving new or emerging subject matters, where there may not be any relevant guidance, in his view, companies may still be able to reach a conclusion that there is a reasonable basis for exclusion.

[3] In the Society Meeting, Division Director Jim Moloney discussed how, in his view, the Division's responses are "one step shy" of a true no-action letter.

[4] In footnotes (3) and (4) to the Statement, the Division is careful to point out that prior Staff responses to Rule 14a-8 no-action requests are not binding and reflect only informal Staff views. Furthermore, 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.

[5] Per Commissioner Crenshaw: “It is one thing to announce that the Division is not in the business of issuing no-action letters due to resource constraints. It is another thing entirely to pronounce—tell us what you want us to say and we’ll bless it. Indeed, the Division will “not object” even if it *would have disagreed* with the company’s analysis had it substantively reviewed the submission. And, the Division will apparently “not object” even if the representations are unreasonable on their face or contain misrepresentations or omissions. Why should the Division “not object” when a submission is clearly objectionable? Today’s missive will give the false impression that the Division is “not objecting” to a company’s position because it agrees with the grounds of the submission; when in fact the Division is “not objecting” because Staff have been ordered to rubber stamp those submissions irrespective of their content.”

[6] See Statement of Informal Procedures for The Rendering of Staff Advice With Respect to Shareholder Proposals, Release No. 34-12599 (July 7, 1976) [41 FR 29989 (July 20, 1976)].

[7] From Chairman Atkins’ speech: “Pulling all of this together, if there is no fundamental right under Delaware law for a company’s shareholders to vote on precatory proposals—and the company has not created that right through its governing documents—then one could make an argument that a precatory shareholder proposal submitted to a Delaware company is excludable under paragraph (i)(1) of Rule 14a-8. If a company makes this argument and seeks the SEC Staff’s views, and the company obtains an opinion of counsel that the proposal is not a “proper subject” for shareholder action under Delaware law, this argument should prevail, at least for that company. I have high confidence that the SEC Staff will honor this position.”