Client Alert | US Public Company Advisory

Public Companies in Uncharted Territory Following SEC Announcement it will Step Back from Responses on Most Shareholder Proposal No-Action Requests

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In a landmark change, the SEC's Division of Corporation Finance has announced that it will **not** provide substantive responses or express views on most no-action requests for shareholder proposal exclusions "due to current resource and timing considerations following the lengthy government shutdown and the large volume of registration statements and other filings requiring prompt Staff attention, as well as the extensive body of [SEC] guidance" in this area that is available to companies and proponents. Public companies that intend to exclude shareholder proposals from their proxy statements must still notify the SEC and proponents no later than 80 calendar days before filing their definitive proxy statements.[1]

The Staff has provided two notable exceptions to this new guidance:

- First, the Staff will continue to review and express its views on no-action requests related to Rule 14a-8(i)(1), which addresses whether proposals are permissible under applicable state law. This exception follows a recent speech by SEC Chairman Atkins that raised two issues related to Rule 14a-8(i)(1). Chairman Atkins questioned whether precatory (i.e., non-binding) proposals are proper under Delaware law[2] and noted that a company may seek the Staff's views on this by obtaining an opinion of counsel that a proposal is not a "proper subject" for shareholder action and submitting its argument, which the SEC could certify to Delaware's highest court for a declaratory judgment. Chairman Atkins also noted a new provision under the Texas Business Organizations Code which, if opted into by a company, requires a shareholder to own at least $1 million in market value of shares or 3% of the voting shares to submit a shareholder proposal. Since these thresholds are significantly higher than those under the SEC's Rule 14a-8, Chairman Atkins noted that a proposal that does not meet these applicable state requirements should be excludable under Rule 14a-8(i)(1).

1 Rule 14a-8(j) requires the notice to include the company's reason(s) for excluding the proposal, including "an explanation of why the company believes that it may exclude the proposal, which should, if possible, refer to the most recent applicable authority," and a supporting opinion of counsel when such reasons are based on matters of state or foreign law.

2 The SEC staff's view, codified in a note to Rule 14a-8(i)(1), is that a precatory proposal is presumed proper under state law unless the issuer demonstrates otherwise.

- Second, a company may still request a response from the Staff to a no-action request (other than under Rule 14a-8(i)(1)) if the company includes, as part of its notification to the Staff, an "unqualified representation" that the company has a reasonable basis to exclude the proposal under Rule 14a-8, prior published guidance, and/or judicial decisions. In these situations only, the Staff will respond with a letter indicating that, based solely on the company's or counsel's representation, the Staff will "not object" if the company omits the proposal from its proxy materials.[3] In providing this response, the Staff will *not* evaluate the adequacy of the company's representation or express any view on the merits.[4]

The Staff's guidance takes effect immediately and applies to the entire 2025-2026 proxy season running from October 1, 2025 through September 30, 2026. It also applies retroactively to any no-action requests submitted before October 1, 2025 that have not yet received a response.[5]

A New Decision-Making Paradigm for Public Companies

The Staff's new guidance has left public companies with a new set of considerations on shareholder proposals and whether to seek to exclude them or not from proxy statements this year. Prior to this guidance, there was a familiar dance between public companies and the SEC Staff each year during proxy season: public companies would submit a no action request and wait to receive a letter from the Staff either concurring (or not concurring) with the company's argument using the bases for exclusion under Rule 14a-8.

Now, the SEC Staff has signaled that it is bowing out of this dance. Without the Staff's "backing" for their arguments, the onus is placed on public companies to determine whether there is a reasonable basis to exclude a proposal, based on the extensive body of publicly available guidance from the Staff. Notably, the new Staff guidance also acknowledges that the absence of a prior Staff response (as well as a prior Staff denial of a no-action request) does *not* mean that companies cannot form a reasonable basis to exclude a proposal.

Regardless, public companies may resort to excluding proposals only in circumstances where prior Staff guidance is sufficiently clear to support an exclusion and in cases where the company can make its reasoning sufficiently clear for their investors and the proxy advisory firms making voting recommendations. Excluding a proposal without the Staff's "backing" can place a spotlight on a company's rationale for exclusion, and companies should consider how best to make such information publicly available to their investors and prepare to engage with them in order to withstand any legal or investor scrutiny of the company's decision. Companies will also want to carefully weigh whether to seek Staff response letters based solely on their "unqualified" representation and monitor what weight, if any, will be placed on such Staff no-objection letters by their investors and proxy advisory firms.

The new decisional paradigm shift also turns the spotlight back on other avenues of defeating a proposal – for example, either negotiating a withdrawal or, if a withdrawal is not obtained, including the shareholder proposal with a well-crafted opposition statement in the proxy statement. Well-crafted opposition statements included in proxy statements can demonstrate to investors why the shareholder proposal may have no value for investors and why it is inappropriate to implement such a proposal. Given that institutional investors significantly decreased their support for environmental and social proposals during the 2025 proxy season, a company's advocacy of its position through a well-crafted opposition statement and shareholder engagement can in many instances provide an efficient and successful path to defeat such proposals.

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3 A company's Rule 14a-8(j) notification should be limited to the information required by the rule as well as an unqualified representation that the company has a reasonable basis to exclude the proposal.

4 The Staff's guidance also noted that its "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*" (emphasis added).

5 Companies that have already submitted requests relying on exclusion bases other than Rule 14a-8(i)(1) and that wish to receive a response should submit a new notice including the unqualified representation described above. The timing of the initial submission will still apply for purposes of the 80-day requirement. All notices must be submitted through Corp Fin's online Shareholder Proposal Form, and companies with questions should contact the Office of Chief Counsel at shareholderproposals@sec.gov or 202-551-3500.

Public companies should continue to monitor developments in this space, including next steps by the SEC, investors, proxy advisory firms and shareholder proposal proponents. The SEC has put “Shareholder Proposal Modernization” on its near term agenda for proposed rulemaking, which could bring more significant change to this space. It also remains to be seen whether shareholders will respond to decisions to exclude proposals with more aggressive avenues, such as resorting to legal threats or lawsuits to challenge an exclusion, launching “vote no” campaigns against directors using exempt solicitation filings with the SEC, or using more binding shareholder proposals submitted under a company’s bylaws, in lieu of precatory proposals submitted under Rule 14a-8.

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