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SEC Grants Companies Unprecedented Discretion to Exclude Shareholder Proposals

The SEC's Division of Corporation Finance has [announced](#) a policy change that grants companies significant discretion to determine whether shareholder proposals may be excluded from proxy materials. Specifically, the staff will no longer provide substantive responses to no-action requests that do not concern whether the proposal is proper under state law, giving proponents little or no recourse to reverse a company's decision to exclude a proposal.

The new policy applies to the current proxy season (October 1, 2025 to September 30, 2026) and to pending no-action requests received before October 1, 2025. The announcement reflects the SEC's ongoing focus on reining in shareholder proposals, including last month's [speech](#) by SEC Chair Paul Atkins questioning whether precatory shareholder proposals are permissible under state law and therefore Rule 14a-8, and anticipated further changes to Rule 14a-8 expected in the first half of 2026.

Companies will still need to notify the SEC and proponents no later than 80 calendar days before filing a definitive proxy statement that excludes a Rule 14a-8 shareholder proposal. Companies wishing to receive a response from the staff for proposals excluded on bases other than validity under state law will need to provide an unqualified representation that the company has a reasonable basis to exclude the proposal under Rule 14a-8, judicial decisions and/or prior published SEC guidance (though the latest announcement specifically notes that lack of prior staff guidance does not mean companies cannot form a reasonable basis to exclude a proposal). In these situations, the staff will respond with a letter indicating that, based solely on the company's or counsel's representation, it will not object if the company omits the proposal from its proxy materials.

While the staff is halting its review of no-action requests, institutional investor and proxy advisor policies on the treatment of shareholder proposals remain in place. Specifically, institutional investors may still seek to understand the substantive bases upon which the company has decided to exclude a shareholder proposal. Both ISS and Glass Lewis may also, in egregious situations, recommend against directors of a company that has excluded a shareholder proposal without first obtaining no-action or judicial relief.¹ While less likely, proponents may also challenge a company's decision to exclude a shareholder proposal in federal court.

Going forward, companies would be well advised to ensure that there remains some reasonable basis under Rule 14a-8 to exclude a shareholder proposal and be prepared for shareholder questions related to such decisions. Rule 14a-8 currently provides several bases for excluding shareholder proposals, including with respect to proposals relating to a company's ordinary business and proposals that violate law or the proxy rules. While a company may likely find some reasonable basis to

¹ While current ISS and Glass Lewis policy contemplates the potential to recommend against election of directors of companies that have excluded shareholder proposals without obtaining no-action or judicial relief, it is hard to see these policies remaining in place following the SEC's decision to eliminate substantive no-action relief for most shareholder proposals.

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exclude shareholder proposals relating to environmental and social matters under Rule 14a-8, companies may find it more difficult to justify the exclusion of validly submitted core governance proposals related to key shareholder rights.

As the Rule 14a-8 shareholder proposal pathway continues to narrow, shareholder proponents may look to other avenues to push for change at companies. These avenues may include increased use of exempt solicitation notices, the use of withhold or “vote-no” campaigns against directors, as well as, in certain circumstances, use of Rule 14a-4, which allows shareholders filing and mailing their own proxy materials to submit and solicit support for an unlimited number of shareholder proposals.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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