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Rescission of Rule 14a-8: Anticipating the Potential Evolution of Shareholder Engagement Strategies

As anticipated, the U.S. Securities and Exchange Commission (the “SEC”) has proposed to rescind Rule 14a-8 under the Securities Exchange Act of 1934. The SEC has also proposed to close the Rule 14a-4(c) “loophole,” which has inadvertently allowed shareholders who file their own proxy materials to add multiple shareholder proposals to a company’s proxy card. The rescission of Rule 14a-8 and the closure of the Rule 14a-4(c) loophole would mean that shareholders would need to turn to a company’s governing documents to propose business at an annual meeting. With the exception of Texas, which last year adopted ownership and solicitation requirements for shareholder proposals, no other state has enacted legislation governing shareholder proposals.

Rule 14a-8 will likely remain effective for most if not all of the 2026-27 proxy season, and the proposed rescission could be challenged in the courts. However, the SEC has already discontinued responding to all no-action requests related to Rule 14a-8, although companies are still required to notify the SEC of their decision and basis for excluding a shareholder proposal. With the SEC no longer substantively adjudicating shareholder proposal exclusions for the second year running, companies will need to continue making an independent judgment as to whether there is a reasonable basis to exclude a proposal. Last year, shareholder proponents filed six lawsuits contesting the exclusion of their proposals. Those lawsuits resulted in three settlements that led to the inclusion of the proposal in the company’s proxy statement and one successful preliminary injunction.

The rescission of Rule 14a-8 will likely influence how shareholder proponents engage with companies in the coming proxy seasons. We outline below some practical considerations for companies:

Litigation relating to shareholder proposals is unlikely to become widespread. The cost and compressed timeline for litigating the exclusion of shareholder proposals are likely to create a meaningful hurdle for many shareholders, particularly where a company has provided a reasonable basis for exclusion. Some shareholders, however, may use the threat of litigation as leverage to secure engagement from companies. Consequently, companies facing, or seeking to mitigate, litigation risk may find a de-escalation pathway through engagement.

Vote-no campaigns may become more frequent, although their impact will likely be limited. Shareholder proponents have already signaled that they may deploy vote-no campaigns to hold directors accountable in the absence of Rule 14a-8. Vote-no campaigns have historically had limited impact on director vote support, and it is unlikely that a vote-no campaign will gain traction on issues that do not resonate with the broader shareholder base. Further, as a blunt-force tool, the use of vote-no campaigns may not appeal to many institutional investors looking for a more surgical approach to addressing their concerns. Moreover, the SEC Staff's July CFI opposing the use of voluntary exempt solicitations is likely to hinder the effectiveness of vote-no campaigns by shareholder proponents.

It remains to be seen whether state legislatures, including Delaware and Nevada, will fill the Rule 14a-8 void. While SEC Chair Paul Atkins has stated that "[c]ompanies and their shareholders should look to the state's legislature . . . for the framework governing shareholder proposals, and resolve disputes in the state's courts or other permitted forums," neither Delaware nor Nevada has signaled an intent to enact laws governing shareholder proposals. To the extent such legislation is proposed, the current reincorporation environment suggests that it would likely seek to address issuers' principal concerns with Rule 14a-8, particularly the ownership threshold for submitting shareholder proposals.

Shareholders may increasingly turn to a company's governing documents to submit shareholder proposals. Many companies' bylaws already permit shareholders to submit business for consideration at an annual meeting independent of Rule 14a-8, subject to advance notice and other procedural and disclosure requirements. These provisions have rarely been invoked because Rule 14a-8 offered a simpler and less costly path to include a shareholder proposal in the proxy materials. With the rescission of Rule 14a-8, more shareholders may look to propose business under a company's bylaws. Accordingly, companies may consider reviewing their advance notice provisions to ensure that appropriate procedural and disclosure requirements are in place to address a potential increase in shareholder proposals.

Shareholders may seek more direct engagement with the board. Shareholder proponents may seek to elevate their concerns to directors through direct communications to the board. Some proponents may also pursue books-and-records requests to scrutinize the scope and quality of board oversight. Consequently, companies may need to assess which communications and issues warrant board attention and ensure that board records appropriately reflect oversight of matters material to the company.

Shareholder proponents could, on occasion, seek to leverage hedge fund activist campaigns to advance their objectives. In the absence of Rule 14a-8, some proponents may attempt to capitalize on the heightened attention surrounding activist campaigns to draw focus to governance and other concerns that have historically been advanced through shareholder proposals. Although such strategies are likely to remain the exception rather than the rule, they may provide an alternative avenue for proponents seeking visibility and engagement.

In addition to the proposed changes to Rule 14a-8 and Rule 14a-4(c), the SEC has proposed several other proxy solicitation modernizations, including eliminating the requirement that companies deliver an annual report to security holders, eliminating the delivery deadline when documents are incorporated by reference into a proxy statement, eliminating the requirement and ability to submit Notices of Exempt Solicitation and shortening the minimum broker search period from 20 business days to five business days.

The SEC has allotted a 60-day comment period for both proposals once they are published in the *Federal Register*.

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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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