SEC NO LONGER A "REFEREE" IN THE SHAREHOLDER PROPOSAL PROCESS

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US Corporate Alert

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On 17 November 2025, the Division of Corporation Finance (the Division) of the US Securities and Exchange Commission (the SEC) issued a statement announcing that it will not respond to or express views on most no-action requests from companies seeking to exclude shareholder proposals from their proxy materials pursuant to Rule 14a-8 of the Securities Exchange Act of 1934. The announcement applies to the current proxy season, which runs from 1 October 2025 through 30 September 2026, as well as outstanding no-action requests received before 1 October 2025 to which the Division has not yet responded.

The Division cited resource and timing considerations along with a large volume of pending registration statements and other time-sensitive filings following the recent government shutdown as the reason for taking this action. The Division also noted there is an extensive body of guidance on shareholder proposal no-action requests that is available to both companies and proponents.

The Division will, however, continue to consider no-action requests under Rule 14a-8(i)(1), which focuses on whether a proposal is improper under applicable state corporate law. This exception under Rule 14a-8(i)(1) is consistent with recent remarks by SEC Chairman Atkins questioning whether precatory (nonbinding) proposals are proper subjects for shareholder action under Delaware law. In light of the limited guidance on this question, the Division will continue to evaluate these specific no-action requests. All other bases for exclusion (ordinary business, personal grievances, procedural deficiencies, false or misleading statements, duplication and resubmissions) will not receive informal Division reviews.

The Division's statement reminds companies that, pursuant to Rule 14a-8(j), they must notify the SEC and proponents of their intent to exclude a shareholder proposal from their proxy materials no later than 80 calendar days before filing a definitive proxy statement. However, the notification will be for information purposes only, and companies are not required to obtain a no-action letter from the Division in order to exclude a shareholder proposal. Companies should submit their notifications through the online shareholder proposal form on the SEC's website.

Under this new process, if a company wishes to receive a response to its notification that it intends to exclude a shareholder proposal pursuant to a basis other than Rule 14a-8(i)(1), the company or its counsel must include in its 14a-8(j) 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 response to the unqualified representation, the Division will issue a letter indicating that, based solely on that representation, the Division will not object if the company omits the shareholder proposal from its proxy statement. The “no objection” letter, however, will not evaluate the adequacy of the company's or

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counsel's representation or express a view on the basis or bases the company intends to rely on in excluding the proposal from its proxy materials.

In light of this significant change to the shareholder proposal process, companies will need to carefully evaluate the merits of any shareholder proposal exclusions and the likely response from the proponent. With the SEC no longer acting as a “referee” in these situations, companies will have additional flexibility in deciding whether to exclude shareholder proposals but at the same time will bear a greater responsibility in making those determinations. As a result, there may be an elevated risk of litigation, as proponents may be more likely to challenge an exclusion in court if they believe the company's exclusion was unjustified. Companies should work closely with legal counsel in analyzing shareholder proposals and document the steps taken in the decision-making process and bases for excluding any shareholder proposal.

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