The 2026 Shareholder Proposal Exclusion Experience and Takeaways for the 2027 Season

Skadden

July 7, 2026

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Marc S. Gerber
Partner / Washington, D.C.
202.371.7233
marc.gerber@skadden.com

Jeongu Gim
Counsel / Washington, D.C.
202.371.7223
jeongu.gim@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West
New York, NY 10001
212.735.3000

1440 New York Ave., NW
Washington, DC 20005
202.371.7000

Executive Summary

- **What's new:** Under the SEC Staff's hands-off approach to company exclusions of shareholder proposals, companies excluding shareholder proposals in 2026 experienced litigation, the threat of proposal submissions under advance notice bylaws and the risk of lower voting support for directors.
- **Why it matters:** The SEC Staff's hands-off approach is expected to continue for the 2027 proxy season. Company experiences from this proxy season will inform the approach companies take for the upcoming proxy season.
- **What to do next:** Companies will want to review the bases for exclusion, assess the risks in light of 2026 experiences and, where exclusion is chosen, clearly explain the bases for exclusion to minimize the risks of adverse reactions.

In November 2025, the Staff of the Securities and Exchange Commission (SEC) announced that, for the 2026 proxy season, with one narrow exception, the Staff would not respond to, or express views on, company no-action requests to exclude shareholder proposals submitted under Rule 14a-8. As a result, companies receiving shareholder proposals for inclusion in their 2026 proxy statements often engaged in a different analysis and risk assessment than in prior years. Many commentators and practitioners currently speculate that the Staff will take a similar hands-off approach for the 2027 proxy season. Accordingly, company approaches and investor reactions in the 2026 proxy season — including litigation, threatened use of advance notice bylaws to propose annual meeting business, and voting results on nominating and governance committee chairs — provide important inputs as companies determine how to assess the shareholder proposals they receive for the next proxy season.

SEC Matters

In an October 2025 speech, SEC Chair Paul Atkins stated his belief that "a fundamental reassessment of Rule 14a-8 is in order," and questioned whether the SEC's "original rationale for adopting Rule 14a-8 in 1942 still applie[d] today." In that speech, Chair Atkins also questioned whether precatory (nonbinding) proposals were a proper subject for shareholder action under Delaware law and invited companies to submit no-action letters to exclude proposals on that basis.

As noted above, in November 2025, the SEC Staff published a statement (the Staff Statement) regarding the Staff's planned limited role for the 2026 proxy season (described as October 1, 2025 through September 30, 2026). As described in the Staff Statement, companies intending to exclude a shareholder proposal submitted under Rule 14a-8 were still required by Rule 14a-8(j) to provide a notice to the Staff and the proponent reporting the basis for exclusion. The Staff Statement announced that if a company included in the notice "an unqualified representation" that it had a "reasonable basis to exclude the proposal based on the provisions of Rule 14a-8, prior published guidance, and/or judicial decisions," the Staff would respond with a letter indicating that, based solely on the company's representation, the Staff will not object to the omission of the proposal from the company's proxy materials (without expressing a view on the merits of the company's basis or bases for exclusion).

© Skadden, Arps, Slate, Meagher & Flom LLP. All rights reserved.

The 2026 Shareholder Proposal Exclusion Experience and Takeaways for the 2027 Season

The SEC's regulatory agenda includes "Shareholder Proposal Modernization," but the SEC is unlikely to propose rules, subject them to public notice and comment, and adopt updates in time for the 2027 proxy season. Many practitioners therefore believe the Staff will extend its current approach, as set out in the Staff Statement, for at least another proxy season.

How Companies' Analysis of Shareholder Proposals Changed Under the Staff Statement

Generally, prior to the Staff Statement, a company's inquiry focused on whether there was a credible basis to argue for exclusion of the proposal under any of the procedural or substantive bases for exclusion contained in Rule 14a-8. Although companies or proponents did not always agree with the Staff's nonbinding decisions, the proxy/annual meeting ecosystem of companies, investors and proxy advisory firms all accepted the outcome of the Staff's no-action process — meaning that even if investors would have liked an opportunity to vote on the shareholder proposal in question, there would be no reputational damage or other adverse impact on the company from investors or proxy advisory firms if a no-action letter to exclude the proposal had been obtained. In addition, while either a company or a proponent occasionally brought litigation relating to a shareholder proposal, those instances were relatively uncommon because litigation was viewed as too costly and inefficient a forum for timely resolution of disputes given the short window of time between proposal submission and the printing of a company's proxy materials.

Although some investors were initially concerned that companies would use the Staff's hands-off approach to exclude the vast majority of shareholder proposals, that was not the case. In addition to considering the merits of the arguments for exclusion under Rule 14a-8, companies considered, among other things:

- The risk of litigation brought by proponents, including the cost of litigation and the potential to impact the timing of the company's proxy statement and/or annual meeting.
- The risk that proponents could submit proposals under a company's advance notice bylaw and thereby run a contested proxy solicitation.
- The risk of reputational damage and negative investor relations and public relations reactions, including the potential for "vote no" campaigns against, or negative voting recommendations on, nominating and governance committee chairs and lower levels of voting support for these board members.

In addition, companies weighed these risks against the low levels of support that many of the shareholder proposals, particularly proposals relating to environmental and social topics, were expected to receive. In many cases, "the juice was not worth the squeeze" and, absent a straightforward, noncontroversial basis to exclude, companies opted to include shareholder proposals in their proxy materials even if the companies had reasonable arguments for exclusion.

Rule 14a-8(j) Notices

As noted above, where a company planned to exclude a shareholder proposal, the company was required to notify the Staff and the proponent under Rule 14a-8(j). As of early-July 2026, approximately 135 companies had excluded a total of approximately 165 shareholder proposals. Some observations and statistics from a review of these notices include:

- Approximately 95% of the Rule 14a-8(j) notices contained "an unqualified representation" along the lines outlined in the Staff Statement, generating "no objection" letters from the Staff, and approximately 5% of notices did not contain that representation.
- Approximately 50% of the excluded proposals related to corporate governance topics, 33% related to social topics, 10% related to environmental topics and 5% related to executive compensation topics.
- The vast majority of notices looked similar to, although perhaps shorter than, typical no-action requests prior to the Staff Statement. And a handful of very short notices may have been viewed as somewhat conclusory.
- More than 80% of the Rule 14a-8(j) notices referenced a single basis for exclusion, more than 10% referenced two bases for exclusion and less than 5% of notices referenced three or more bases for exclusion, in contrast to no-action requests prior to the Staff Statement, which tended to include as many arguments as possible.
- Approximately 45% of the excluded proposals were submitted by John Chevedden. A few other proponents each had five or six proposals excluded, and most other proponents had just one or two proposals excluded.
- The most common bases for exclusion referenced in the notices were:
  - Ordinary business/micromanagement.
  - Failure to provide adequate proof of ownership or other procedural defects.
  - Substantial implementation.

- A materially false and misleading proposal and/or supporting statement in violation of the proxy rules.

Litigation

Six different proponents brought lawsuits against six companies that had excluded shareholder proposals:

– The New York City pension funds' proposal requesting disclosure of EEO-1 workforce data was excluded on ordinary business grounds.

– A proposal from an individual associated with PETA addressing treatment of animals in the company's supply chain was excluded on procedural grounds.

– The Nathan Cummings Foundation's proposal seeking disclosure of political contributions was excluded on micromanagement grounds.

– As You Sow's proposal requesting a report on the potential use of subrogation claims for climate-related losses was excluded on ordinary business grounds.

– A proposal from Fonds des Missions seeking a report on the healthcare consequences of the company's acquisitions over the prior decade was excluded on ordinary business grounds.

– The New York State Common Retirement Fund's proposal addressing reporting on deforestation risks associated with company's private label brands was excluded on ordinary business grounds.

In three instances, the companies and proponents promptly settled, with two companies agreeing to include the proposals (on EEO-1 disclosures and treatment of animals) in their proxy statements for their 2026 annual meetings and one company agreeing to make the political contributions disclosure sought by the proposal for the next five years.

In the other three instances, all relating to proposals excluded on ordinary business grounds, litigation moved forward. In one case, the proponent's motion for preliminary injunction was denied and the company's motion to dismiss the complaint also was denied, the complaint was amended and the litigation remains ongoing, with a motion to dismiss the amended complaint currently pending. In another case, the proponent's motion for injunctive relief was denied, after which the proponent voluntarily dropped the litigation. In the third case, the New York State Common Retirement Fund obtained a preliminary injunction and the company included the proposal in its proxy materials for the 2026 annual meeting, although the proposal was ultimately withdrawn prior to the company's annual meeting.

This 2026 experience confirms that litigating over shareholder proposals comes with expense and risk. Courts will assess the details of the shareholder proposal and the arguments for exclusion, and may generate differing results based on small differences in the facts or proposal language.

Use of Advance Notice Bylaws

In at least one instance made public by a proponent, a company had provided a notice that the company would exclude the proponent's greenhouse gas (GHG) emissions proposal on the basis of micromanagement, following which the proponent and the company engaged in further discussions. According to the proponent, it informed the company that if the company continued toward omission, the proponent would submit shareholder proposals under the company's bylaws relating to GHG emissions as well as additional corporate governance topics and solicit proxies in support of those items. After further engagement, the proponent and the company reached an agreement to include the GHG emissions shareholder proposal in the company's 2026 proxy materials. Ultimately, the proponent withdrew the proposal prior to the company's annual meeting.

In another instance, the Communications Workers of America (CWA) filed additional soliciting materials disclosing that it had notified the company of CWA's intent to solicit shareholders in support of five corporate governance proposals at the company's upcoming annual meeting of shareholders. This occurred in the context of the company's unrelated pending acquisition and presumably was part of the labor union's efforts at the company rather than in connection with a Rule 14a-8 shareholder proposal. There was no further soliciting activity, and the CWA corporate governance proposals did not appear in the company's proxy materials.

Although neither of these two episodes resulted in a contested solicitation, they are reminders of the potential for proponents to submit proposals under a company's advance notice bylaw (which does not have a one-proposal limit like Rule 14a-8 does). Although the risk of a proponent conducting its own solicitation for business submitted under an advance notice bylaw is not a new risk, the SEC's universal proxy card rules adopted in 2021 that allow a proponent in this instance to list the company's nominees for election on the proponent's proxy card — sometimes referred to as the "universal proxy loophole" — make this tactic potentially more effective and, therefore, more likely to be employed by a proponent that has the resources to prepare and distribute its own proxy materials.

The 2026 Shareholder Proposal Exclusion Experience and Takeaways for the 2027 Season

Investor/Proxy Advisory Firm Reactions and Voting Support for Governance Committee Chairs

Although some criticism surfaced of companies excluding shareholder proposals under the system set forth in the Staff Statement, critique has been fairly muted and appears to have had limited (if any) impact on voting support for governance committee chairs.

As an example of investor criticism, the Interfaith Center on Corporate Responsibility (ICCR), a coalition of faith-based and socially responsible institutional investors, published on its website a list of approximately 20 companies that ICCR members believe "are behaving opportunistically by offering weak or meritless arguments to support their announcements that they intend to exclude proposals." With perhaps one exception (described below), this criticism did not appear to translate into lower voting support for governance committee chairs.

In terms of proxy advisory firms, ISS expressed its expectation that companies clearly explain the basis for excluding a shareholder proposal and indicated that, while a failure to present a clear explanation for exclusion could be viewed as a governance failure, only "in rare cases based on case-specific facts and circumstances" would ISS recommend against any directors based on exclusion of a shareholder proposal.

Voting Results

Of the approximately 100 nominating and governance committee chairs standing for reelection by early July (the difference between the number of companies excluding proposals and the number of governance committee chairs largely being a function of classified boards and, in some cases, director retirements), almost one-half received the lowest level of voting support at their company relative to the other directors standing for reelection and another one-third of the committee chairs were in the bottom three directors in terms of voting support at their company. Nevertheless, the vast majority of these directors received greater than 90% of votes cast, and only a dozen governance committee chairs received less than 85% voting support. Further, in most of these instances, the lower voting support typically appears due to other governance concerns, such as having a classified board or a multi-class capital structure, rather than having excluded a shareholder proposal.

In almost every instance, ISS and Glass Lewis noted in their annual meeting voting recommendations the existence of an excluded proposal, but the exclusion had no impact on their voting recommendations. In at least one instance, Glass Lewis's report quoted from the ICCR website criticizing the company's exclusion of the proposal, but still recommended in favor of the governance committee chair's election. In another instance, ISS recommended against a governance committee chair based on the absence of a clear explanation of the basis for exclusion, but then reversed its negative recommendation when the company filed additional soliciting material providing further context and rationale for excluding the proposal.

What Does This Mean for the 2027 Proxy Season?

Some companies have begun to receive shareholder proposals for their 2027 annual meetings, although most proposals likely will be submitted in the typical time frame of the fourth quarter of 2026 and beginning of 2027. As of early-July 2026, 28 corporate governance-related shareholder proposals and one executive compensation-related shareholder proposal have received a majority of votes cast, and no environmental or social proposals have obtained majority support. This likely does not foretell the end of environmental and social proposals, but traditional corporate governance topics may continue to constitute the bulk of shareholder proposals submitted for next proxy season.

As noted above, companies considered the merits of their arguments for exclusion and the expected level of support a proposal was likely to garner against the risks of potential litigation, submissions under advance notice bylaws, reputational damage and related low voting support for directors. The experience of 2026 indicates that:

- The litigation risk is real and may deter overly aggressive exclusions, but may only come into play with institutional proponents and not individual proponents, as institutions generally have the resources to litigate and the incentive of being repeat proponents.
- Submitting proposals under a company's advance notice bylaw and undertaking the related expense of soliciting proxies remains at least a theoretical risk and cannot be dismissed, although only well-funded proponents would likely pursue this option.
- Excluding a proposal did not appear to result in any real reputational damage or impact on director voting. Because in a couple of instances an arguably aggressive exclusion or an exclusion without sufficient explanation may have had a voting impact, companies cannot completely rule out this risk in more extreme situations, but those instances were exceptions to companies' experiences in the 2026 proxy season.

The 2026 Shareholder Proposal Exclusion Experience and Takeaways for the 2027 Season

Accordingly, the experience of 2026, where the majority of excluded proposals were submitted by individual investors, is likely to continue for the 2027 proxy season and may be exacerbated if companies view the litigation risk as greater than previously considered. However, the starting point for companies remains a review of the merits of the arguments for exclusion and then, where exclusion is the chosen path, explaining clearly for all audiences the basis or bases for exclusion in order to minimize any adverse investor reaction.