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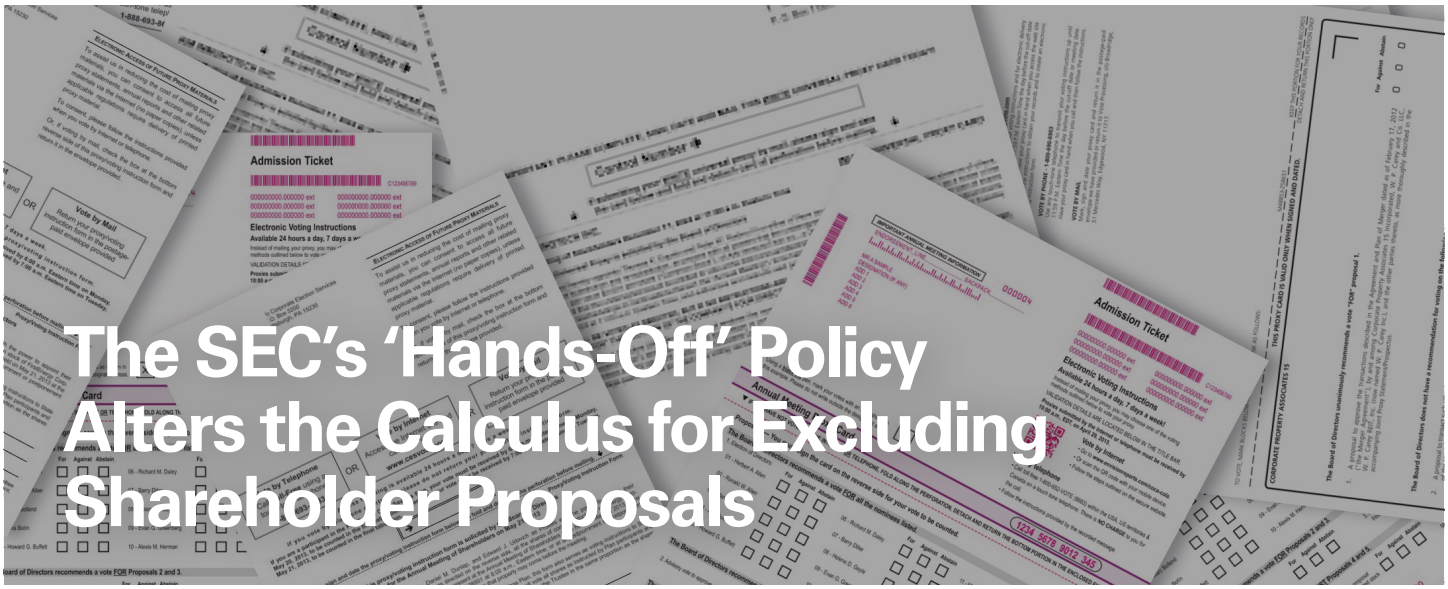
Skadden



The SEC's 'Hands-Off' Policy Alters the Calculus for Excluding Shareholder Proposals

- In the 2026 proxy season, the staff of the Securities and Exchange Commission (SEC) stopped assessing the reasons companies offered for excluding shareholder proposals from their proxy statements.
- While, at first glance, the change seemed to give companies more latitude, in practice this hands-off approach introduced new risks in excluding a proposal, including an increased risk of litigation and investor opposition, plus the possibility that some shareholders may use companies' bylaws instead of SEC rules to put their proposals before other shareholders.
- The SEC staff recently announced that this hands-off policy will continue going forward. As companies gear up for next year's proxy season, they will need to study the track record of exclusions in 2026 before deciding whether to exclude any shareholder proposals.

Ahead of the 2026 proxy season, the SEC staff changed its approach to companies that wish to exclude shareholder proposals from their proxy statements. The staff said that it would no longer evaluate a company's reasons for excluding a proposal, as it had historically.

That would appear to make it easier for companies to exclude shareholder proposals. But in practice the change has forced companies to consider new factors. In the past, the SEC staff's conclusions were generally respected and few exclusions were litigated. Now more cases may end in court. Moreover, the change in the SEC's review could prompt shareholders pressing environmental, social or governance issues to choose an alternative means of putting questions to a vote: using their rights under corporate bylaws. In addition, adverse investor reaction has the potential to result in lower support for directors.

As companies look toward the 2027 proxy season, the calculus that goes into excluding a proposal has changed.

What the SEC Did: A Hands-Off Approach to Exclusions

In October 2025, SEC Chair Paul Atkins called for a "fundamental reassessment" of the SEC rule that allows shareholders to submit proposals for inclusion in a company's proxy statement (Rule 14a-8). The next month, the SEC staff announced that for the 2026 proxy season it would no longer review the merits of decisions by companies to exclude shareholder proposals. Companies were still required to notify the SEC staff and the proponent when excluding a proposal, and were given the option to include in the notice an explicit statement that the company had a "reasonable basis" for exclusion in order to receive a "no objection" letter from the staff.

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In August 2026, the SEC staff went further, announcing that its approach of not reviewing the merits of company exclusion decisions would continue but it would no longer issue "no objection" letters (though companies must still provide notice of exclusion to the staff and the proponent).

How the Calculus for Companies Changed

Before 2026, even if a company or proponent disagreed with the staff's no-action decision on whether a company could exclude a shareholder proposal, investors, proxy advisors and companies alike generally accepted the outcome. Litigation was rare because it was too costly and slow given the tight timeline between the submission of a proposal and proxy printing.

This year, with the staff stepping back, companies had to weigh a broader set of risks when deciding whether to exclude a proposal:

- **Litigation risk.** With the staff no longer acting as a neutral arbiter, proponents might be more likely to challenge exclusions in court.
- **Advance notice bylaw risk.** Instead of availing themselves of Rule 14a-8, proponents might use companies' advance notice bylaws to put their proposals on the annual meeting agenda, and then run a proxy solicitation.
- **Reputational and investor relations risk.** Without the validation of the company's position in a no-action letter from the staff, excluding a proposal could draw negative attention from proxy advisors and investors and invite a "vote no" campaign against board members — particularly nominating and governance committee chairs.

This year, many companies weighed these risks against the likelihood that some proposals would not receive significant shareholder support (especially those on environmental and social topics). In many cases, companies concluded that, under the SEC staff's new approach, the risks of exclusion outweighed the benefits and chose to include proposals even when they had reasonable arguments for keeping them out.

How the Exclusion Process Played Out in 2026

As of August 2026, approximately 140 companies had excluded roughly 170 proposals (compared to approximately 195 proposals in 2025).

- **SEC responses.** About 95% of notices included the optional "reasonable basis" representation described in the staff's November 2025 statement, generating "no-objection" letters from the SEC staff.
- **Issues excluded.** Roughly half of excluded proposals related to corporate governance topics, a third to social topics, 10% to environmental topics, and 5% to executive compensation.
- **Fewer reasons.** Most notices this year cited only one basis for exclusion, a shift from prior years when companies typically included

Shareholder proposals that made it to a vote in 2026 U.S. proxy season:

– More than 380

Proposals that won majority support:

– 28 related to governance

– 1 related to compensation

– 0 relating to environmental or social issues

as many arguments as possible. The most commonly cited grounds were that the proposal involved ordinary business/micromanagement; suffered from procedural defects (such as failure to prove share ownership); had already been substantially implemented; or contained materially misleading statements.

– **Prolific proponent.** Approximately 45% of excluded proposals were submitted by a single prolific individual proponent.

Some Exclusions Were Challenged in Court

Six proponents sued six companies over excluded proposals. In three of those cases, the company promptly settled by agreeing to include the proposal in the proxy statement or by making the disclosure requested by the proposal. A company prevailed in one case and a proponent was successful in the other. The sixth case amounted to a split decision: The court refused to issue the injunction the proponent sought but allowed the case to go forward.

Some interpret six lawsuits out of 170 excluded proposals as a small risk. The other way to look at the data is that six institutional investors out of the 32 that had a proposal excluded brought litigation.

The takeaway: Litigation can be unpredictable and companies are not assured of prevailing in litigation if their exclusion decisions are challenged.

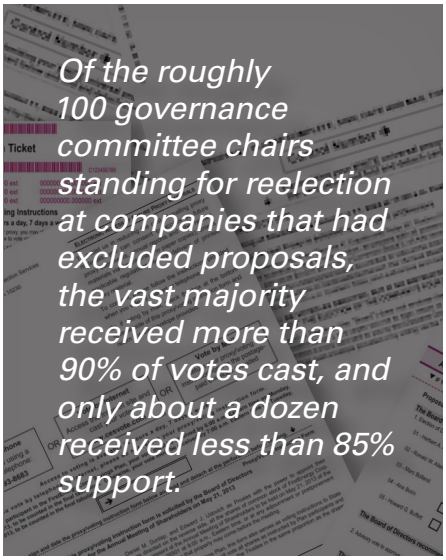
Proponents May Try to Utilize Companies' Advance Notice Bylaws

Rule 14a-8 is not the only means shareholders have to get their proposals before other shareholders: Advance notice bylaws provide an avenue for shareholders who comply to get their measures on the agenda for the annual meeting. They would have to prepare and file their own proxy statement and solicit investors to win support. One advantage for proponents: They are not limited to a single proposal, as they are under Rule 14a-8.

– In one case, after a company provided notice that it would exclude a greenhouse gas emissions proposal submitted under Rule 14a-8, the proponent threatened to submit multiple proposals under the company's bylaws and solicit proxies in support. After further engagement, the company agreed to include the original proposal. The proponent later withdrew it before the annual meeting.

– In another case, a labor union notified a company that had a merger pending that it would solicit shareholder support for five corporate governance proposals at the company's upcoming meeting, though no contested solicitation materialized.

The takeaway: While neither episode resulted in a proxy contest, a well-financed proponent shut out under Rule 14a-8 may try to pursue its



agenda under a company's advance notice bylaw, which would introduce greater unpredictability for a company's annual meeting.

So Far There Has Been Little Pushback from Investors or Proxy Advisors Over Exclusions

Criticism of companies excluding proposals was relatively muted this year and, importantly, did not translate into meaningfully lower voting support for directors. Of the roughly 100 governance committee chairs standing for reelection at companies that had excluded proposals, the vast majority received more than 90% of votes cast, and only about a dozen received less than 85% support. Where support was lower, it typically appeared to stem from other governance concerns — such as a classified board or dual-class capital structure — rather than the exclusion itself.

Institutional Shareholders Services (ISS), the proxy advisor, had said that if a company did not clearly explain the basis for an exclusion, ISS would consider that a governance shortcoming. However, in only one case did it recommend against reelection of a governance committee chair on that ground, and it reversed its position after the company filed supplemental materials elaborating on its rationale for excluding the proposal.

The takeaway: In this first year of the staff's hands-off policy, investors generally were not second-guessing company exclusion decisions. It remains to be seen if they maintain this posture in the future.

Lessons for the 2027 Proxy Season

In the 2026 season, of the more than 380 proposals that made it to a vote, only 28 governance-related proposals and one compensation-related proposal received majority shareholder support, while no environmental or social proposals did.

Companies have already begun receiving shareholder proposals for their 2027 annual meetings, with most expected to arrive in the fourth quarter of 2026 and early 2027. As the 2027 proxy season shapes up, here are questions companies should ask when considering whether to exclude proposals:

- **How likely is litigation?** Institutional proponents are more likely to have the resources to litigate, and if they are repeat proponents, they may have an added incentive to challenge exclusions. Individual proponents may be unwilling to incur the costs of litigation but could seek funding from other groups.
- **Is the possibility that a proposal will be submitted using your advance notice bylaw a serious threat?** Only well-funded proponents are likely to conduct a proxy solicitation.

– **What is the risk of reputational damage or an adverse impact on the voting for directors?** A few instances of aggressive or poorly explained exclusions may have contributed to lower voting support, but these were exceptions. Will that track record continue in 2027?

The best strategy for excluding a proposal remains providing a clear and well-supported explanation, and communicating that to all audiences — the proponent, other shareholders, the larger investment community and proxy advisors.

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