Course Materials: Cooley's "Hot Governance and Engagement Proxy Tips You Need to Know"

Wednesday, December 10, 2025

Corp Fin (Mostly) Gets Out of the Shareholder Proposal Processing Business

Perhaps not too surprising given the recent speech by SEC Chairman Paul Atkins that effectively cast doubt on the viability of precatory shareholder proposals if state law dictates that result and a company obtains a legal opinion to that effect, Corp Fin issued this statement this morning saying that it won't respond to no-action requests – at least until September 30, 2026 – unless a company is seeking relief under Rule 14a-8(i)(1)'s "not a proper subject under federal or state law."

Here's a summary of Corp Fin's statement:

1. **Corp Fin Won't Respond Substantively to Most No-Action Requests:** Due to resource constraints and a backlog from the government shutdown, Corp Fin won't respond to no-action requests to exclude shareholder proposals under Rule 14a-8 except for those relying on Rule 14a-8(i)(1).

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2. **Companies Must Still Notify Both the SEC and Proponents If They Intend to Exclude:** Technically, there is no requirement that a company submit a no-action request – or receive a favorable response from Corp Fin to such a request – before omitting a shareholder proposal from its proxy materials.Rule 14a-8(j), which is typically cited as the basis for Rule 14a-8 no-action requests, only requires that companies "file their reasons" with the SEC.

Nothing has changed in that regard so companies must still notify both the SEC and the proponent at least 80 calendar days before filing the definitive proxy statement if they plan to exclude a proposal – *but* this is an informational filing only and Corp Fin input is not required.

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3. **Corp Fin *Will* Respond to (i)(1) Requests:** Because of evolving legal interpretations and lack of clear guidance, Corp Fin will continue reviewing and issuing views on requests to exclude proposals under Rule 14a-8(i)(1), including recent questions around precatory proposals.

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4. **Corp Fin Willing to Provide Acknowledgment Letters (Even Without Substantive Reviews):** If a company still wants an acknowledgment letter (without substantive review) for exclusions other than (i)(1), it must submit:

- A Rule 14a-8(j) notice, **and**
- An unqualified representation stating the company has a reasonable basis to exclude the proposal under the Rule, prior SEC guidance, or case law.

In such cases, Corp Fin will send a non-objection letter, but it will not assess the merits of the exclusion.

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5. **Scope & Timing of Policy:** Corp Fin's statement covers:

- The 2025–2026 proxy season (October 1, 2025 – September 30, 2026)
- Any pending no-action requests filed before October 1, 2025 that haven't been answered yet

Companies that have already submitted requests (not under (i)(1)) and want a Corp Fin acknowledgment letter must update their submission with the required representation, but the original date still applies for the 80-day rule.

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6. **Use Corp Fin's Online Shareholder Proposal Form:** All Rule 14a-8(j) notices must be submitted using the SEC's online "Shareholder Proposal Form." Questions should be directed to Corp Fin's Office of Chief Counsel at shareholderproposals@sec.gov or 202-551-3500.

Investment companies must use the same process, except they should send Rule 14a-8(j) notices to the Division of Investment Management at IMshareholderproposals@sec.gov.

When deciding whether to exclude a shareholder proposal, companies should continue to analyze the strength of their Rule 14a-8 exclusion arguments as (1) responses by Corp Fin to no-action requests and Rule 14a-8(j) notices are not binding on the Commission or other Divisions and Offices and do not preclude the Commission from taking enforcement action in appropriate circumstances and (2) proponents will still have the option of suing in federal court to force a company to include a shareholder proposal.

In addition, we don't yet know the reactions of investors and proxy advisors to the concept of Corp Fin not issuing no-action responses when companies exclude shareholder proposals, so the risk of adverse reactions by stakeholders should also be considered.

While companies will likely now have significantly greater latitude to exclude proposals, they still will need to have a reasonably plausible argument under Rule 14a-8 given all this, which means there may be some proposals that companies choose to include either because they are concerned with litigation or reputational risk or because there isn't a reasonable basis for exclusion that can be argued.

Microsoft Excludes Chevedden Proposal on Procedural Grounds Without No-Action Relief (Due to Shutdown)

As a byproduct of the government shutdown, Microsoft has decided to exclude a shareholder proposal submitted by John Chevedden on the grounds that it wasn't submitted timely – even though the company hasn't received no-action relief because Corp Fin isn't processing no-action requests due to the shutdown, as noted in this Bloomberg article. Here's a letter to Corp Fin informing it of the company's decision to exclude.

Companies have always had the option to exclude shareholder proposals without receiving the "informal" no-action relief that the Rule 14a-8 process provides. But for the most part, companies have sought the comfort of a no-action response. Note that Microsoft had already sent in a no-action request – but the Corp Fin Staff didn't finish processing it before the shutdown.

Given SEC Chairman Paul Atkins' recent speech indicating that he doesn't believe precatory shareholder proposals should be on the ballot if a company obtains a legal opinion that the proposal is "not a proper subject" under state law, I imagine some practitioners may be tempted to go this route if they felt they had a strong argument that exclusion would be granted if Corp Fin was open for business. A procedural grounds exclusion certainly would feel more secure than one based on one of Rule 14a-8's substantive bases.

Note that Chevedden has had a few proposals over the years excluded under a court-mandated process that a company utilized rather than going the traditional Corp Fin no-action request route…

Vanguard Adds $1.4 Trillion in Funds to Its Voting Choice Program

We've been blogging quite a bit about ExxonMobil's retail voting program, including this blog about a recent lawsuit filed against it. It remains to be seen

whether other companies will pursue this type of program even though many are investigating whether they should.

On other side of the coin, Vanguard recently announced that it will add over $1.4 trillion of its funds – including its flagship "Vanguard 500 Index Fund" and more – to its "Investor Choice" voting program. This means that Vanguard's voting choice program spans more than half of its US equity index assets.

What Nom & Gov Committees Are Asking Corporate Secretaries Right Now

Sparked by Cooley's Brad Goldberg's discussion on a panel during the recent "Proxy Disclosure" conference hosted by TheCorporateCounsel.net – the Fall event that I founded many years ago – this blog features a list of the questions that Nom & Gov committees are commonly asking right now. Brad notes this list includes:

1. **Mandatory arbitration bylaws** (here's our most recent blog about this topic):
   – Is the SEC pushing companies to adopt mandatory arbitration bylaws?
   – How will proxy advisors and our largest investors react if we do adopt a mandatory arbitration bylaw?
   – Is mandatory arbitration permitted under state law for the state in which our company is incorporated?
   – Are other companies incorporated in our state adopting these bylaws?
2. **ExxonMobil's retail voting program** (here's our most recent blog about this topic):
   – How much does adopting this type of program cost?
   – Are companies other than ExxonMobil adopting this type of program?
   – Does adopting this type of program for our company make sense given our investor base?
   – What is the status of the lawsuit filed by the City of Hollywood Police Officers' Retirement System against ExxonMobil's program?
3. **Shareholder proposals** (here's our most recent blog about this topic):
   – Should we be more aggressive in seeking to ask Corp Fin to exclude precatory shareholder proposals submitted to us this proxy season?
   – Are other companies taking advantage of SEC Chairman Paul Atkins' speech about his views on Delaware law?
   – What are the risks of being more aggressive? Might we see more "just vote no" campaigns?

4. **Quarterly reporting** (here's our most recent blog about this topic):
   – What's the SEC's timeline to adopt rules making quarterly reporting optional?
   – Do we have reasons to continue to report quarterly even if the SEC makes it optional (eg. investor or proxy advisor pressure, credit agreement or similar obligations, keep our insider trading blackout periods the same as they are now)?
   – Might we consider continuing to report quarterly but on a modified basis?
5. **Reincorporation** (here's our most recent blog about this topic):
   – As a Delaware corporation, does it make sense to be looking at reincorporating to Nevada or Texas?
   – If we did decide to move to Nevada or Texas, what is the process and the expected costs of doing so?
   – How will proxy advisors and our largest investors react if we do attempt to reincorporate?

Will Lack of Shareholder Proposals Mean More 'Vote No' Campaigns? Maybe It Already Has…

I've blogged a few times about how the SEC Chairman Paul Atkins has delivered a speech in which he stated that one of his top priorities is to make being a public company an attractive proposition, with eliminating precatory shareholder proposals being one of the goals. In the speech, Chairman Atkins indicated that there's no firm basis under Delaware law for a shareholder right to submit non-binding proposals and that if a "company obtains an opinion of counsel that the proposal is not a 'proper subject' for shareholder action under Delaware law, this argument should prevail, at least for that company. I have high confidence that the SEC staff will honor this position."

If investors seek to pressure a company about something, how might they go about it without the ability to submit non-binding shareholder proposals? One avenue would be to launch a 'just vote no' campaign against one – or more – directors that are up for election. These campaigns historically pale in number in comparison to the number of shareholder proposals submitted to companies each year.

But perhaps the number of 'vote no' campaigns will rise going forward as they could touch on the same issues typically raised in shareholder proposals. 'Vote no' campaigns are more personal to directors – and often foretell more activist activity in its aftermath if the campaign is considered a success by the proponent. So the stakes are higher.

And Diligent has reported that this type of campaign is up 40% compared to a year ago already…

Florida City Pension Fund Sues ExxonMobil Over Retail Voting Program

Recently, I blogged about a Cooley Alert detailing some opposition to retail voting programs patterned after the one pioneered by ExxonMobil, including noting how some aspects of the campaign against these voting programs are misleading.

Now the City of Hollywood Police Officers' Retirement System has filed a proposed class action in U.S. District Court of New Jersey on behalf of ExxonMobil shareholders against the company and its board, alleging that they are breaching their fiduciary duties in connection with the company's adoption of its retail voting program. This pension fund has a history of filing lawsuits. Here's the complaint.

A number of companies have been curious about the retail voting program and inquiring about the various pros and cons. One of the cons certainly is the reaction of institutional investors to such a program and the related litigation risk. The disposition of this case might help companies consider this litigation risk…

SEC Chair Atkins Speech Could Spell Death Knell for Non-Binding Shareholder Proposals

In a bombshell speech last night, SEC Chair Paul Atkins stated that one of his top priorities is to make being a public company an attractive proposition – and he noted that these are the three primary obstacles:

1. Simplify and scale the SEC's disclosure requirements to reduce the costs of preparing SEC filings and, at the same time, make them more comprehensible.
2. De-politicize shareholder meetings and return their focus to voting on director elections and significant corporate matters.
3. Reform the litigation landscape for securities lawsuits to eliminate frivolous complaints, while maintaining an avenue for shareholders to continue to bring meritorious claims.

His speech then focused on how the SEC might be able to help overcome the last two of these obstacles. On securities litigation reform, Chair Atkins took issue with recent Delaware amendments prohibiting mandatory arbitration and fee shifting for federal securities law claims. And then the big news was a bevy of comments aimed at Rule 14a-8 as follows:

Are Precatory Shareholder Proposals Proper Under Delaware Law?

In the speech, Chair Atkins indicated that there's no firm basis under Delaware law for a shareholder right to submit non-binding proposals and that if a "company obtains an opinion of counsel that the proposal is not a 'proper subject' for shareholder action under Delaware law, this argument should prevail, at least for that company. I have high confidence that the SEC staff will honor this position."

The Chair pointed to Morris Nichols' Kyle Pinder's upcoming paper — as well as statements from former Chancellor Leo Strine — for the proposition that there's no firm Delaware law basis for a shareholder to submit non-binding proposals.

To get into the nitty gritty of this, the 'proper subject' exclusion basis (ie. Rule 14a-8(i)(1)) permits companies to exclude shareholder proposals from proxy statements "[i]f the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization." When making this argument in a no-action request, companies are required to include supporting opinions from state law counsel as to whether the proposal is not proper under state law.

Rule 14a-8(i)(1) historically hasn't been relied upon much because it has a note that states: "In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise." This note has placed a burden on the company and its supporting opinion that in the past was difficult to overcome.

Based on Chair Atkins' speech, that burden might not be so difficult to be overcome going forward – although this likely will end up being decided ultimately in a Delaware court in the near future as the Chair noted in the speech that the SEC may certify this question to the Delaware Supreme Court for declaratory judgment — since the SEC used this option back in 2008 in the CA v. AFSCME case when Corp Fin was confronted with two conflicting Delaware opinions. The Chair also noted that the Delaware court acted fast when the SEC certified in '08.

Should the SEC Permit State Law to Supersede Rule 14a-8?

Chair Atkins also addressed the legality of the recent Texas legislation that permits Texas companies to opt in to ownership and procedural conditions for submitting a shareholder proposal that are more onerous than the federal Rule 14a-8 standard. The Chair stated that state law provisions should be respected by the SEC under

Rule 14a-8(i)(1), as would any restrictions imposed by a company's governing documents.

The SEC Will Reconsider Rule 14a-8's Fundamental Premise

As reflected in the recent Reg Flex Agenda, Chair Atkins stated that the fundamental premise of the shareholder proposal rule may need to be reconsidered since over 80 years has passed since that rule was first adopted.

What Should Be Seen as the Potential Outcomes of Shareholder Engagement?

Engagement needs to be both a strategic process and a two-way dialogue, because the investors you're engaging with have their own goals for your engagement with them. Does each side have certain expectations as to where the engagement ultimately will go? Maybe. Between the company and the investor, there may well be a lack of alignment on the question of "Should this engagement have a particular outcome?"

The company should have a point of view as to why it is doing a particular engagement. Is it just a "check-the-box" exercise? Perhaps the company needs a certain number of engagements to disclose in the proxy so it looks like its engagement program is robust. That's a valid reason, but be aware going in what your goal for a particular engagement is – even if it's as simple as that.

Don't forget the importance of keeping good records and tracking all investor interactions for, among other reasons, purposes of reporting in the proxy statement. If a company doesn't yet have a full IR department, this tracking responsibility would likely fall to the corporate secretary or the general counsel.

Maybe you're trying to build a relationship – or you're repairing one. These also are valid reasons for engaging. Or maybe you genuinely want some input on an issue from a particular investor – or from a broad set of investors – and you're taking the temperature on the response to your perspective on that issue. Agreement among investors inevitably varies on a topic, although positions tend to be more aligned on sustainability and executive pay compared to other topics.

When deciding on an outcome that you will consider to be a "success," you should determine whether it is a multi-year goal or something that you want to achieve this year, like procuring a majority vote on a particular meeting agenda item. When it comes to multiyear goals, the ultimate outcomes sometimes are binary – short-term and long-term objectives that you seek. Many of your issues are likely to be multifaceted and textured and not necessarily an easy fix.

So be mindful about "Here's the message I want to deliver to this particular investor" when you're having an engagement, and don't just go into engagements blindly without being strategic.

For a Shareholder Engagement Meeting, Who Should Attend?

Typically, someone from the general counsel/corporate secretary team is always involved in an engagement. From there, you look at the agenda for the engagement to see what the issues are – and you bring the right people. You don't want people on the call on your side who will have no role. Having a dozen people on the call is overkill and won't feel right to the investor. That's not how this is supposed to work.

You have the specialists on the call. So if the investor has expressed any interest in executive compensation issues, you usually have the head of HR – or the person in HR who leads on executive comp – on the call. Or maybe you have made new commitments this year around diversity, and so you'll have your chief diversity officer join to walk the investor through your overall program. You also might have made commitments on climate, so you would have your sustainability staffers on the call.

For some issues, it's appropriate to have a director on the engagement. Some investors like that. Some don't. So always ask the investor if they want a director on the call rather than presume they would. Of course, you need to be sure any director tabbed can speak about the issues at hand. For example, that the compensation committee chair can adequately speak to the comp programs and the rationale for decisions made about comp. A director who is not prepared – or not able to communicate well – can do much more harm than good.

Often, it will be the head of a board committee – or the lead director – that should be on the call. It will depend on the issues on the agenda. Preparing your director for the call is key. Remind them of the key issues. Remind them to be courteous and curious. Remind them of Reg FD. (Note that the Corp Fin staff has issued Reg FD CDI – Question 101.11 – which clarifies that directors are not prohibited from speaking privately with shareholders. This CDI should give directors comfort that private meetings are not problematic in and of themselves.)

Being "camera ready" isn't perhaps as important as some think when it comes to directors on calls. They should be prepared, but they should be themselves. That's who they are – and they are likely to perform better on the call if they don't have the pressure of being someone they aren't.

How Do You Know Which Issues to Engage On?

The initial obvious answer is to engage on issues that the investors you're meeting want to talk about. That's the primary purpose of engagement – to find out what investors want to know and give them that information.

But you should be proactive if you know there are issues that you should be engaging on. Don't let it always be shareholder driven. Obviously, if you had a low say-on-pay vote, that's an issue you would want to engage on. Maybe the lead director or a board committee chair got a lower level of votes than normal. Find out why. Issues raised in proxy advisor reports often make sense to address proactively during engagements – and be prepared for those topics in your annual meeting's Q&A session.

Most corporate secretaries have the same motto when it comes to voting outcomes at annual meetings: "No surprises." You should view engagement as an opportunity to not be surprised. To uncover any seemingly minor issues that could grow into a real problem by the time the annual meeting rolls around. Be frank and ask your shareholders to be honest and let you know of any issues that could be sticky this upcoming proxy season.

"No surprises" works both ways. You don't want to be surprised. And you don't want to surprise your shareholders – because they might then surprise you in response.

If you know you have something on the ballot that is sticky, sometimes you'll want to do a quick call in-season – if you can get someone on the phone – about "hey, remember we talked about this six months ago. I want to check in and see if you have any questions that have arisen since then for which I can be helpful." That can help to curtail surprises.