

2025 – 2026 SEC Annual Reporting Workshop: Hot Governance and Engagement Proxy Tips You Need to Know

Key takeaways

Here's just a handful of the many nuggets shared during our December 10 webcast – “Hot Governance and Engagement Proxy Tips You Need to Know” – during which Cooley's Beth Sasfai, Michael Mencher and Broc Romanek, along with Proxy Analytics' Steve Pantina, provided practical guidance on how to tackle so many changes in an uncertain environment, including how your proxy disclosure and shareholder proposal process may be changing and evolving proxy advisory and engagement practices.

1. Future of precatory proposals

In his well-known October speech about how one of his top priorities is to make being a public company an attractive proposition, Securities and Exchange Commission (SEC) Chairman Paul Atkins addressed whether precatory shareholder proposals are proper under Delaware law. Atkins suggested companies could amend their bylaws to adopt enhanced procedural requirements – for example, to add heightened share ownership or holding requirements for nonbinding proposals that are beyond the Rule 14-8 thresholds. Historically, these sorts of bylaw provisions have been viewed as impermissible under SEC rules.

So far, no company has appeared to have taken up Atkins on his invitation to seek to exclude a shareholder proposal under the “proper subject” exclusion basis (i.e., Rule 14a-8(i)(1)) by obtaining a Delaware law opinion – most likely due to the litigation risk posed by being the first to do so. It's a “first mover” issue.

In our view, whoever does this first is probably going to be a company that has a long and difficult history with activism, where it's not just the legal team and the corporate secretary who find shareholder proposals frustrating, but the CEO and the board, because they've done this year after year and had challenging results. It's a pretty small pool of companies, particularly because many of the companies that receive a lot of proposals aren't incorporated in Delaware.

But if this Delaware opinion strategy were to take off and be successful, it would radically change the shareholder landscape as nearly all shareholder proposals are precatory.

2. Glass Lewis and ISS views on shareholder proposals

For these proxy advisors, current voting guidelines treat environmental and social matters on a case-by-case basis. During the 2025 proxy season, ISS recommended against all environmental proposals and all human capital management-related proposals. It's not that its policies have necessarily changed – but how it applies its policies.

This is a little bit of “putting the cart before the horse” kind of thing, catching up to each other. It gives them more wiggle room. But if current trends continue, the expectation is that we'll see far more negative recommendations from ISS on environmental and social issues, much less any support this year.

Glass Lewis made some changes to its policies this year, but they are not very significant changes to shareholder proposal-related policies. However, whereas ISS didn't really give a nod to what's going on at the SEC about how it won't process most no-action letters in the normal course, Glass Lewis did. Glass Lewis specifically said that this is an environment that is changing rapidly. It didn't go so far as to say that shareholder proposals are a fundamental right, but called them important and material.

3. Corp Fin's Rule 14a-8 no-action processing for this proxy season

A few weeks ago, the SEC came out with a new policy and said, because of the government shutdown, it doesn't have sufficient resources and time to review the hundreds of no-action requests it typically gets this time of year. So, unless you submit a no-action letter with the Delaware law opinion, the Corp Fin staff isn't going to render a traditional response to a no-action request under Rule 14a-8.

As most companies are risk averse, we don't expect to see companies take the opportunity to just unilaterally exclude proposals from their proxy. For a long time, companies have relied on the SEC staff to serve as a referee. In the absence of an SEC response, most companies will likely feel there's too much uncertainty this proxy season. Could proponents sue you in federal court to compel you to include the proposal in your proxy? Maybe even potentially try to stay your annual meeting? How will proxy advisors and institutional investors respond?

What the outcome looks like now is that many proposals may very well make their way into the proxy that otherwise could have been excluded with the benefit of no-action relief, meaning that proponents and activists in general have more leverage than they did a year ago in this area.

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