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Securities Regulation & Corporate Governance Update

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Delaware Becomes First State to Respond to Proposed Rescission of Rule 14a-8: Corporation Law Council Releases White Paper and Discussion Draft on Stockholder Proposals

On November 9, 2026, the Council of the Corporation Law Section of the Delaware State Bar Association released a white paper and draft legislation for discussion that would establish a state corporate law regime to address stockholder proposals if the SEC rescinds Rule 14a-8. The Council has provided for a 60-day public comment period on the Discussion Draft, which the White Paper explains as recognizing that the amendments "may have effects wider in scope than most of our other recommended legislation."

On November 9, 2026, the Council of the Corporation Law Section (the Council) of the Delaware State Bar Association (the DSBA) released a white paper (the White Paper) and a discussion draft of legislation (the Discussion Draft)[1] that would establish a state corporate law regime to address stockholder proposals if the U.S. Securities and Exchange Commission (the SEC) rescinds Rule 14a-8 under the Securities Exchange Act of 1934 (Rule 14a-8).[2] The Discussion Draft sets forth draft text for a new Section 214 (Section 214) of the Delaware General Corporation Law (the DGCL) that would for the first time provide stockholders of Delaware companies a carefully prescribed state law statutory right to submit precatory (non-binding) proposals at annual meetings and have those proposals included in the company's proxy materials. The amendments would take effect when rescission of Rule 14a-8 becomes effective.

The Council has provided for a 60-day public comment period on the Discussion Draft, which the White Paper explains as recognizing that the amendments "may have effects wider in scope than most of our other recommended legislation." After the comment period, the Council intends to prepare a revised draft for approval by the Corporation Law Section and the Executive Committee of the DSBA and (if so approved) for submission to the Delaware General Assembly during its 2027 session,[3] so that the new framework is in place before preparation for the 2028 proxy season begins in mid-2027.

Why Delaware Is Acting

The SEC's proposal to rescind Rule 14a-8 would end the federal regime under which stockholder proposals have been submitted and included in company proxy statements.[4] As we observed in our June 2026 article, *Considerations for Shareholder Proposals in a Post-Rule 14a-8 World*,[5] while it is "unsettled whether precatory proposals are 'proper' subject matters under Delaware corporate law," rescission of Rule 14a-8 "will almost certainly not eliminate the efforts of that relatively small number of shareholders" who have used the stockholder proposal process created by the rule. The Council agrees that Delaware law does not directly address whether stockholders have a right to present precatory proposals or how far a charter or bylaw may regulate them, and it notes that the DGCL currently gives stockholders no ability to require a company to include a proposal in its proxy materials.

The Council chose to fill that gap with a prescriptive statute that can "immediately replace Rule 14a-8," rather than with enabling legislation that would leave companies and stockholders to negotiate, and litigate, bylaws from a blank slate. That choice is consistent with our own caution in June that "[p]rivate ordering for [p]roposal [a]ccess" (that is, charter or bylaw provisions or corporate policies giving stockholders the ability to include their proposals in a company's proxy materials) "has many potential downsides." At the same time, the Council declined to replicate Rule 14a-8's more problematic provisions, such as the ordinary business exclusion, because a new body of subjective claims "entirely foreign to current Delaware law" would be unfair to both sides and would tax the Delaware courts.

Key Aspects of Draft Section 214 Regarding Precatory Proposals

Section 214 would prescribe the exclusive conditions under which stockholders meeting certain ownership requirements would be able to submit and include in a covered company's proxy statement a limited number of precatory proposals. In place of Rule 14a-8's subject-matter exclusions, the Discussion Draft provides for a capped number of precatory proposals per annual meeting, subject to primarily objective eligibility requirements. The principal terms are summarized in the Annex below.

Treatment of Binding Proposals

The Discussion Draft does not address binding stockholder proposals. The White Paper states that the binding actions available to stockholders are those expressly permitted by the DGCL, namely the election and removal of directors and the adoption and amendment of bylaws. It also notes that an "existing safeguard against misuse" already applies because Delaware case law

holds that a bylaw may not interfere with the board's power to manage the company's business and affairs under Section 141(a) of the DGCL. Under the Discussion Draft, binding proposals therefore would not be subject to Section 214's numerical limitation, ownership requirements or bases for exclusion. Stockholders could continue to present any binding stockholder proposal, provided that it addresses a proper subject matter under Delaware law, and to solicit proxies for them, subject to reasonable advance notice bylaws, although the company would not be required to include them in its proxy materials unless federal law so requires.

The Bigger Picture

The Discussion Draft represents an important first step toward establishing a rational framework for stockholder proposals in the absence of Rule 14a-8 for the following three reasons:

- **Stockholder engagement will continue.** The Discussion Draft confirms two points we have made since the SEC's proposal was issued: stockholder proposals and stockholder engagement will continue notwithstanding any rescission of Rule 14a-8, and assertions that Rule 14a-8's rescission means the end of stockholder democracy vastly mischaracterize the potential implications. Even some frequent stockholder proponents have acknowledged that the SEC's stockholder proposal rule is not an ideal framework.[6] The Discussion Draft provides an appropriate starting point for developing a stockholder proposal regime that both avoids the burdens that Rule 14a-8 places on companies and stockholders at large and is less prone to abuse by stockholders owning a nominal amount of securities and advocating for special interests. Companies should plan for a continuing proposal process rather than the absence of one.

- **Clear statutory right to submit certain precatory proposals.** The Discussion Draft would give stockholders something that no state corporate law provides today, namely a statutory right to submit precatory proposals and to have those proposals included in a company's proxy statement. The White Paper is clear that the DGCL confers no such express right today and that no Delaware court decision directly addresses the question. Section 214 would create that right by statute, with defined eligibility rules and a defined dispute resolution process.

- **Delaware continues to be responsive to issues in real time.** The deliberate speed and structure of the response are notable. Within two months of the SEC's proposal, Delaware has produced a complete statutory framework, published its reasoning, invited public comment and set a path to enactment ahead of the 2028 proxy season. While there are elements that can be improved (and the comment process exists for that purpose), the Discussion Draft is a clear example of Delaware responding rapidly and proactively to an evolving issue. As we wrote in June, "the time for state legislatures, companies, and stockholders to engage proactively with these questions is now," and Delaware has done exactly that.

What Companies Should Do Now

- **Companies should hold off on "proposal access" provisions.** As we advised in September, companies should not preemptively adopt policies or bylaw provisions on precatory proposals in anticipation of rescission of Rule 14a-8, pending further clarification on how stockholder proposals will be addressed under state corporate laws.

- **Nothing changes for the 2027 proxy season.** Rule 14a-8 remains in effect until rescission becomes effective, and Section 214 would not apply until that date. Companies should continue to administer the 2027 proxy season under Rule 14a-8, mindful that the SEC staff is no longer responding to no-action requests.[7]

- **Companies should watch the other variables.** The SEC's final action on rescission, any federal response to Delaware's proposal and the reactions of other states will all bear on where this lands, and, as we noted in September, a company's state of incorporation may become a more consequential variable in its stockholder proposal exposure than it has been for decades.

Comments can be submitted at https://sos.delaware.gov/give-feedback-on-stockholder-proposals-rules, and the comment period runs for 60 days from the release of the White Paper. The Council has said that it is particularly interested in whether Section 214 "will establish satisfactory limits, clear requirements and a straightforward process." We will continue to monitor the comment process and the Council's revised draft. Please contact any of the authors or any other members of Gibson Dunn's Securities Regulation and Corporate Governance practice group with questions.

ANNEX

Key Aspects of Draft DGCL Section 214

- **Covered companies.** Section 214 would apply only to listed companies with a market capitalization of at least $30 billion, measured as of the tenth day before the notice record date for the prior year's annual meeting. Stockholders of smaller listed companies and of private companies would not be able to submit precatory proposals, and newly public companies would have a five-year grace period before precatory proposals would be permitted.

- **Number of precatory proposals.** Companies would be required to allow stockholders to submit and include in the company's proxy materials (i) up to three precatory proposals in the aggregate at companies with a market capitalization of $100 billion or more, (ii) up to two precatory proposals at companies with a market capitalization of $50 billion or more but less than $100 billion, and (iii) one precatory proposal at companies with a market capitalization of $30 billion or more but less than $50 billion.

- **Eligible proponents.** A proponent would need to beneficially own (i) at least $250,000 in market value of voting stock individually, or (ii) together with up to nine co-filers, at least $1 million in market value of company stock, in each case held continuously for 365 days as of a date 30 days before the submission deadline. A stockholder could be the proponent or co-filer of only one proposal per meeting. Directors, officers and persons acting for them would not be eligible for proponent or co-filer roles for these purposes (meaning their ownership would not count toward the caps). If more than the permissible number of precatory proposals are submitted and not otherwise excluded, the eligible proponents (together with their respective co-filers) owning the greatest number of shares would be allowed, with ties broken by random selection.

- **Timing and content.** Proposals would need to be received at least 180 days before the anniversary of the prior year's annual meeting (subject to adjustment if the meeting date is advanced by more than 30 days), and, consistent with current Rule 14a-8, the proposal and any supporting statement together could not exceed 500 words. Again, similar to the

current Rule 14a-8 process, a proponent would receive a single 14-day opportunity to cure deficiencies in its submission materials or word count.

- **Bases for exclusion.** The Discussion Draft lists 12 bases for exclusion, most of which are borrowed from Rule 14a-8's procedural or substantive requirements, including (i) late or incomplete submissions, (ii) excess length, (iii) failure to meet the ownership requirements, (iv) a proposal that expressly questions the character of a director nominee, (v) a proposal that primarily seeks to redress a personal grievance, and (vi) a proposal that "no rational person would determine" is relevant to the company. A resubmission bar would apply to a proponent where the same proponent submitted a proposal at either of the two preceding annual meetings at which precatory proposals could be presented and that proposal received less than 15% of the votes cast. The Discussion Draft does not authorize exclusion based on ordinary business, substantial implementation, violation of law or the lack of power to implement, or false and misleading statements.

- **Proxy placement and presentation.** If the company solicits proxies, up to the number of permissible proposals would be required to be included in the company's proxy materials and on the company's form of proxy. The company could include a statement in response or opposition and would be required to state that the proposal and supporting statement are solely the responsibility of the proponent. The White Paper also provides that the company and its directors and officers would not be responsible under Delaware law for the proponent's statements. As under Rule 14a-8, no vote would be taken on a precatory proposal unless the proponent or its proxy holder attends the meeting and requests a vote or the person presiding over the meeting submits the precatory proposal for a vote.

- **Disputes.** Only the proponent, and not a co-filer, could challenge the company's determination that a proponent or proposal fails to satisfy Section 214's requirements.

- **Private ordering.** Charters and bylaws could neither add to nor reduce the statutory requirements. In addition, a stockholder proposal could not request that the company adopt a charter or bylaw provision or policy that would provide for the inclusion of precatory proposals in company proxy materials outside Section 214.

- **Effectiveness.** The amendments would take effect on the date that the SEC's rescission of Rule 14a-8 becomes effective.

[1] *Available at* https://sos.delaware.gov/wp-content/uploads/sites/14/2026/11/White-Paper-on-Stockholder-Proposals.pdf.

[2] As we reported in September, the Council announced on September 18, 2026, that it would consider a statutory response to the SEC's proposed rescission of Rule 14a-8 as part of its annual review of the DGCL. *See* Gibson Dunn Securities Regulation and Corporate Governance Monitor, *States Begin to React: Delaware Corporation Law Council to Consider Statutory Response to Proposed Rescission of Rule 14a-8* (Sept. 22, 2026), *available at* https://themonitor.gibsondunn.com/states-begin-to-react-delaware-corporation-law-council-to-consider-statutory-response-to-proposed-rescission-of-rule-14a-8/.

[3] The next regular session of the Delaware General Assembly is scheduled to convene on January 12, 2027, and end by midnight on June 30, 2027.

[4] Rescission of Rule 14a-8's Federal Regulation of Shareholder Proposals and Amendments to

Rule 14a-4, Release No. 34-106383 (Sept. 16, 2026), *available at* https://www.sec.gov/files/rules/proposed/2026/34-106383.pdf.

[5] Elizabeth Ising, Ronald Mueller, Julia Lapitskaya & Michael Svedman, *Considerations for Shareholder Proposals in a Post-Rule 14a-8 World*, Harv. L. Sch. F. on Corp. Governance (June 15, 2026), *available at* https://corpgov.law.harvard.edu/2026/06/15/considerations-for-shareholder-proposals-in-a-post-rule-14a-8-world/.

[6] *See* Petition Regarding Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934, File No. 4-917 (July 23, 2026) (petition submitted by Ceres, For the Long Term, Interfaith Center on Corporate Responsibility, New York State Comptroller Thomas P. DiNapoli, Shareholder Rights Group and US SIF), *available at* https://www.sec.gov/files/rules/petitions/2026/petn4-917.pdf.

[7] *See* Gibson Dunn Client Alert, *SEC Division of Corporation Finance Withdraws Indefinitely from the Shareholder Proposal Process* (Aug. 17, 2026), *available at* https://www.gibsondunn.com/sec-division-of-corporation-finance-withdraws-indefinitely-from-the-shareholder-proposal-process/.

The following Gibson Dunn lawyers prepared this update: Elizabeth Ising, Julia Lapitskaya, Ronald O. Mueller, Michael Svedman, and Thomas W. Franck.

Please view additional information on Gibson Dunn's Securities Regulation & Corporate Governance Monitor.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding the SEC's proposed rules, or federal securities laws and regulations more generally. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following leaders of the firm's Securities Regulation & Corporate Governance practice group:

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