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January 26, 2026

Preparing for the Upcoming Form 10-K and Proxy Statement Season

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This alert highlights recent updates to Securities and Exchange Commission (SEC) disclosure obligations effective for the upcoming Form 10-K and proxy statement season as well as other regulatory updates companies should consider. Note that the topics listed below include key SEC updates and do not cover other updates that companies should take into consideration, such as voting guidelines of proxy advisory firms and institutional investors.

Effects of the Government Shutdown

Companies whose business operations and/or financial conditions were materially affected by the government shutdown in late 2025 may be obligated to discuss such material effects in their Management's Discussion and Analysis of Financial Condition and Results of Operations sections of their Form 10-Ks pursuant to Item 303 of Regulation S-K. Companies that were affected by an inability to interact with federal government agencies during the shutdown, for example, should disclose any material impacts on their businesses, financial conditions and results of operations. Similarly, companies whose businesses were or expect to be affected by delays in permitting, licensing or other federal regulatory approval due to the government shutdown should disclose any material effects to their past or upcoming results of operations and/or financial conditions in their Form 10-Ks.

Limited Issuance of "No-Action" Letters Under Rule 14a-8

On Nov. 17, 2025, the SEC's Division of Corporation Finance issued a statement announcing that, with limited exceptions, the SEC will not respond to requests for "no-action" letters that relate to the exclusion of shareholder proposals pursuant to Rule 14a-8 promulgated pursuant to the Securities Exchange Act of 1934 (the Exchange Act) during the 2026 proxy season. The SEC has determined that it will only respond to, or otherwise express views on, "no-action" requests that relate to the exclusion of shareholder proposals pursuant to Rule 14a-8(i)(1). According to the statement, this departure from the SEC's conventional practice of issuing "no-action" letters at the request of a company intending to rely on Rule 14a-8 to exclude a certain shareholder proposal from its proxy statement is due to timing constraints and the considerable backlog of registration statements and other filings following the government shutdown.

Companies should recognize that the SEC's decision to review only "no-action" requests that relate to exclusion under Rule 14a-8(i)(1) came following statements from Chairman Atkins on Oct. 9, 2025 in which he contemplated an interpretation of Rule 14a-8(i)(1) that allows companies to exclude from proxy statements precatory (non-binding) shareholder proposals if such proposals are not permitted by or are otherwise improper under applicable state law. Speaking on Delaware law specifically, Chairman Atkins stated that "if there is no fundamental right under Delaware law for a company's shareholders to vote on precatory proposals . . . then one could make an argument that a precatory shareholder proposal submitted to a Delaware company is excludable under paragraph (i)(1) of Rule 14a-8." For Texas-organized companies, Chairman Atkins stated that companies that have elected to be governed by the new Section 21.373 of the Texas Business Organizations Code, which bars shareholders below a certain ownership threshold or

minimum holding duration from submitting shareholder proposals, would likewise be able to exclude proposals from such shareholders from proxy statements under Rule 14a-8(i)(1).

Companies considering excluding precatory shareholder proposals from proxy statements under Rule 14a-8(i)(1) should still obtain an SEC "no-action" letter. In accordance with established practice, a request for a "no-action" letter concerning Rule 14a-8(i)(1) must include a "supporting opinion of counsel" stating whether the proposal in question is proper under applicable state law. In cases involving Delaware corporations specifically, Chairman Atkins indicated with "high confidence" that the SEC staff will defer to an opinion of counsel or a Delaware court proceeding stating whether a precatory proposal is proper under Delaware law. Because a majority of Rule 14a-8 shareholder proposals are precatory, especially those that relate to environmental, social and governance issues, Chairman Atkins' view would allow companies to exclude a significant percentage of shareholder proposals under Rule 14a-8(i)(1) upon showing that the proposal in question is not proper under applicable state law.

Notwithstanding the foregoing, companies that intend to exclude shareholder proposals from their proxy materials pursuant to any other basis under Rule 14a-8 must still comply with Rule 14a- 8(j), which requires a submission of the proposal and an explanation for the exclusion of the proposal to the SEC with a copy to the shareholder proponent. While it will not provide a substantive no-action letter under any topic other than Rule 14a-8(i)(1), the SEC has stated that it will provide a response to a company's Rule 14a-8(j) notice, provided that the company or its counsel includes an unqualified representation that the company has a reasonable basis to exclude the proposal and requests an SEC response. In accordance with the Nov. 17 announcement, the SEC staff will not substantiate the adequacy of the company's representations, but will respond via letter that, based solely on the company's representations contained within the Rule 14a-8(j) notice, it will not object to the exclusion of the shareholder proposal from its proxy materials. For example, a company that seeks to exclude a shareholder proposal under Rule 14a-8(i)(9) because it conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting must still submit to the SEC and the shareholder a 14a-8(j) notice. If the company unqualifiedly represents that it has a reasonable basis to exclude such conflicting proposal under Rule 14a-8(i)(9) and requests that the SEC issue a response letter, the SEC should respond that it will not object if the company excludes the proposal from its proxy materials.

ExxonMobil's Retail Voting Program

In an effort to increase voting participation at shareholder meetings by retail investors, ExxonMobil obtained on Sept. 15, 2025 a "no-action" letter from the SEC regarding Rules 14a-4(d)(2) and (3) promulgated pursuant to the Exchange Act and regarding ExxonMobil's retail shareholder voting program. Under the program, retail shareholders that opt in are authorizing a standing voting instruction that directs ExxonMobil to vote the shareholder's shares at each future shareholder meeting in accordance with the voting recommendations of the ExxonMobil's board on either (1) all matters or (2) all matters except contested director elections or any acquisition, merger or divestiture transaction that, under applicable state law or stock exchange rules, requires approval of ExxonMobil's shareholders. The voluntary program is available to all retail shareholders at no cost, allows shareholders to opt out of the program or override their instruction with respect to any proposal at any future meeting and does not apply to written consents of shareholders. The SEC's "no-action" letter highlighted, among other things, ExxonMobil's intent to submit to participating shareholders an annual reminder of their opt in status and ability to opt out, cancel or override their standing

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voting instruction with respect to subsequent shareholder meetings and the full disclosure by ExxonMobil of the program on its website and in its proxy statements.

Companies that have faced difficulties reaching quorum or approving proposals at shareholder meetings due to low voting turnout by retail investors may wish to implement a voting program consistent with the SEC's outline in the ExxonMobil letter. Companies seeking to implement voting programs that substantively differ from the ExxonMobil program should submit to the SEC their own "no-action" request regarding Rules 14a-4(d)(2) and (3) before proceeding.

Updated Guidance Regarding Smaller Reporting Company Filer Status

On Aug. 27, 2025, the SEC issued Compliance and Disclosure Interpretation (C&DI) Question 130.05, which clarifies the filing status of a company that previously qualified as a "smaller reporting company" (SRC) under the revenue test of paragraphs (2) or (3)(iii)(B) of the SRC definition in Section 12b-2 of the Exchange Act, but subsequently determines it no longer qualifies as an SRC. SRCs must make an annual re-determination regarding their status at the end of their second fiscal quarter of each year. If a company assesses on its re-determination date that it is no longer eligible for SRC status, scaled SRC disclosure requirements continue to apply through the end of the fiscal year in which SRC status is lost (including the Form 10-K for that year) and cease to apply beginning with the company's first Form 10-Q of the next fiscal year.

It has been less clear whether and/or when the company should make a determination regarding "accelerated filer" or "large accelerated filer" status and to which filings such status applies. The new C&DI 130.05 clarifies that companies that lose SRC status under the revenue test will continue to be classified as "non-accelerated filers" through the end of both the current fiscal year and the year following the determination that SRC status is lost. Because the "non-accelerated filer" designation extends through the current and the next fiscal year, companies that lose SRC status receive an additional year before they may be required to comply with Section 404(b) auditor attestation obligations under the Sarbanes-Oxley Act. C&DI 130.05's clarification of post-SRC classification applies only to former SRCs that qualified under the revenue test. SRCs that qualified solely under the public float test of paragraphs (1) or (3)(iii)(A) of the definition and subsequently lose SRC status are not eligible for the relief described therein.

Schedules 13D and 13G Eligibility

Companies and shareholders who hold more than 5 percent of a company's voting stock are subject to revised guidance from the SEC's Division of Corporation Finance relating to beneficial ownership disclosures on Schedules 13D and 13G. To avail themselves to the shorter-form Schedule 13G, shareholders must certify that the reported securities were not acquired and are not held "for the purpose of or with the effect of changing or influencing the control of the issuer." In February 2025, the SEC revised C&DI Question 103.11 and added C&DI Question 103.12 to specify certain circumstances in which a shareholder that engages with a company's management is disqualified from reporting ownership on Schedule 13G and must instead report on Schedule 13D. The revised guidance states that the subject matter and the context of a shareholder's engagement with a company are highly relevant, but provides that Schedule 13G is not available to a shareholder that:

- Engages with a company's management with the purpose of calling for the sale of the company, a significant amount of the company's assets or the restructuring of the company; or

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- Engages with a company's management to call for the election of director nominees other than those recommended by the board of directors of the company.

C&DI 103.12 also elaborates that Schedule 13G may be unavailable to a shareholder that:

- Conditions, explicitly or implicitly, its support of one or more of the company's director nominees as a means of pressuring the company to accept the shareholder's recommendation to remove its staggered board, switch to a majority voting standard in uncontested director elections, change its executive compensation practices, eliminate its poison pill plan or adopt specific social, environmental or political policies; or

- Discusses with the company's management its expectations on a particular topic and, as a means of pressuring the company, states or implies that it will not support one or more of the company's director nominees at the next director election unless management makes changes to align with the shareholder's expectations.

Notwithstanding the examples listed therein, C&DI 103.12 reiterates that the determination whether a shareholder must file on Schedule 13D is based on all the relevant facts and circumstances and is informed by the meaning of "control" as defined in Exchange Act Rule 12b-2. Shareholders who have been filing on Schedule 13G should consider the SEC's clarifying guidance in C&DIs 103.11 and 103.12 and reassess whether, based on all relevant facts and circumstances, they still qualify to file on Schedule 13G.

Disclosure Considerations for the Upcoming Form 10-K Season

In their upcoming Form 10-Ks, companies should revisit disclosure relating to, among other topics, artificial intelligence (AI), inflation and interest rates, global tariffs and geopolitical conflicts to ensure such disclosure remains accurate and complete. Due to the rapid development of each of these topics in 2025, each may warrant expanded discussion compared to prior periods. For example, companies that discuss their use of AI in their Form 10-Ks should consider an approach that discloses both the current opportunities and the current risks related to AI. Similarly, companies that face risks to their business operations or financial conditions due to global tariffs and/or geopolitical conflict, such as U.S. involvement in Venezuela, should consider whether additional risk factor or business description disclosure is appropriate.

Directors and Officers of Foreign Private Issuers Now Subject to Section 16(a)

Beginning March 18, 2026, directors and officers of Foreign Private Issuers (FPIs) will no longer be exempt from Section 16(a) of the Exchange Act. The Holding Foreign Insiders Accountable Act, signed into law on Dec. 18, 2025, extends application of Section 16(a)'s insider reporting obligations, requiring directors and officers of FPIs to publicly report on Forms 3, 4 and 5 their ownership in, and any transactions involving, the FPI's securities. The new law does not affect FPI directors' and officers' exemptions from Section 16(b)'s short-swing profit liability rules and Section 16(c)'s prohibition on short sales. In addition, the new law does not affect the obligations of FPI shareholders who hold more than 10 percent of an FPI and are not directors or officers of such FPI, leaving such shareholders exempt from Section 16(a).

FPIs should identify the directors and officers who will become subject to Section 16(a) reporting obligations ahead of March 18, 2026, and ensure they have adequate internal procedures for compliance with Section

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16(a), including but not limited to: procedures to obtain EDGAR filing credentials for all directors and officers; procedures to properly educate Section 16 insiders and ensure timely reporting of insider transactions; and procedures for preparing and filing Forms 3, 4 and 5, as applicable.

For further information, please contact a member of the Haynes Boone Capital Markets and Securities Practice Group.

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