

## SEC Staff Rejects Introducing Broker as Appropriate Evidence of Ownership for Shareholder Proposals and Provides Other Technical Guidance

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Yesterday the SEC Staff issued [Staff Legal Bulletin No. 14F \(SLB 14F\)](#), which addresses the mechanics related to proof of eligibility to submit shareholder proposals under Rule 14a-8(b), the acceptance of revisions and procedures for withdrawals of no-action letter requests involving multiple shareholders. The highly specific guidance demonstrates that the rules involving the submission, and acceptance, of shareholder proposals are often a minefield of technical requirements.

To be eligible to submit a shareholder proposal, a shareholder must have continuously held at least \$2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the shareholder meeting for at least one year as of the date the shareholder submits the proposal. The shareholder must also continue to hold the required amount of securities through the date of the meeting and must provide the company with a written statement of intent to do so. Beneficial owners who hold their shares through an intermediary, such as a broker or bank, can prove their eligibility by submitting a written statement from the record holder verifying the beneficial holder's ownership.

### Only DTC Participants Qualify as Record Holders

SLB 14F rejects the SEC Staff's prior position in *Hain Celestial*, and now makes clear that only DTC participants are viewed as record holders of securities that are deposited at DTC. Previously, companies were required to accept proof of ownership letters from introducing brokers who are generally not permitted to maintain custody of customer funds and securities, and are not DTC participants. Those brokers instead engage a clearing broker that is likely a DTC participant to handle such matters. Going forward, shareholders must include proof of ownership from a DTC participant, even when their securities are not held by one. It is important to note, however, that the Staff will grant no-action relief to a company on the failure to meet this requirement only if the company's notice of defect clearly describes the necessary proof.

The Staff reconsidered its position in light of two recent cases involving Apache and KBR in Texas court over the past two years, each of which analyzed the proof of ownership submitted by activist investor John Chevedden in connection with certain shareholder proposals. The prolific proponent of shareholder proposals had a practice of submitting only letters from his introducing broker as proof of his security ownership, which would no longer be acceptable. However, SLB 14F does explicitly reject the argument raised by some companies that only DTC or Cede & Co., as DTC's nominee, should be viewed as the record holder.

### Companies Must Accept Revised Proposals Submitted Before the Deadline

Under SLB 14F, a proponent who submits a revised proposal prior to the deadline for receiving shareholder proposals will be deemed to have effectively withdrawn the initial proposal, and companies cannot argue that the proponent has violated the one-proposal limitation. Any no-action letter requests must be written with respect to the revised proposal. No additional proof of ownership is required when a shareholder submits a revised proposal.

A company is not required to, but may, accept revisions to a proposal submitted after the deadline. If the company elects not to accept the revisions, the revised proposal should be treated as a second proposal. The company should submit a timely notice, as this is a procedural requirement, stating its intent to the shareholder as a basis to exclude the proposal.

## Withdrawal of No-Action Letter Requests May be Documented Through the Lead Filer

Questions have arisen with respect to withdrawals of no-action letter requests when shareholder proposals are submitted by multiple proponents, since documentation demonstrating that the shareholder has withdrawn the proposal is required. SLB 14F indicates that the Staff will process a withdrawal request if the company provides a letter from the lead filer that includes a representation that the lead filer is authorized to withdraw the proposal on behalf of each proponent of the proposal in the company's no-action request.

## Staff Provides "Form Language" on the Holding Period for Shareholders Submitting Proposals

Wading into the disputes over the representation of the one-year holding period that shareholders include in their evidence of ownership, which at times speaks of a date either before or after the date the proposal is submitted and therefore fails to comply with the requirement of continuous holdings for at least one year by the date of submission, SLB 14 suggests some form language that shareholders may have their brokers or bank provide in their verification of ownership.

## No-Action Letter Responses Transmitted Through E-Mails

The Staff encourages both companies and proponents to include email contact information in no-action letter correspondence, in which case their no-action letter requests will be transmitted entirely by email, and only with the Staff responses and not the entire body of correspondence, which can still be found on the SEC website.

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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