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SEC Chairman Suggests Path to Eliminating Most Shareholder Proposals

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In remarks delivered on October 9 at the John L. Weinberg Center for Corporate Governance's 25th Anniversary Gala, US Securities and Exchange Commission (SEC) Chairman Paul Atkins suggested the SEC may be open to eliminating the ability of shareholders to submit precatory shareholder proposals to companies incorporated in Delaware. This speech follows the **recent publication of an article** by Kyle Pinder of Delaware law firm Morris, Nichols, Arsht & Tunnell arguing that shareholders do not have a fundamental right to bring nonbinding shareholder proposals, such as those requesting that companies prepare reports on environmental or social topics or change governance practices, under Delaware law.

If submitting a precatory proposal is not a right shareholders have under Delaware law, then, according to Chairman Atkins, such proposals should be excludable under paragraph (i)(1) of Rule 14a-8 of the Securities Exchange Act of 1934. Atkins stated that if a company submitted a no-action letter with a Delaware opinion indicating that the proposal is "'not a proper subject' for shareholder action under Delaware law, ... I have high confidence that the SEC staff will honor this position." Although a shareholder proponent may submit a competing Delaware law opinion, Atkins specifically referenced the right of the SEC under Delaware law to certify questions to the Delaware Supreme Court for (potentially quick) declaratory judgment.

Although the SEC's Reg Flex Agenda **contemplates amendments to Rule 14a-8** to "reduce compliance burdens for registrants and account for developments since the rule was last amended," the path laid out in Atkins' remarks has the potential to radically reshape the shareholder proposal landscape as early as the upcoming proxy season. Should a Delaware company submit a no-action letter under this theory and receive support from Delaware courts, this would likely eliminate nearly all shareholder proposals as currently understood, forcing shareholder proponents to either submit binding proposals or find other avenues for pressuring companies to implement desired governance changes or adopt environmental and social policies or practices. While Atkins' speech focused on Delaware companies, there is no reason to believe the SEC would not take the same position for companies incorporated in other states.

In addition to this precatory proposal argument, Atkins also suggested that companies could adopt bylaws that impose procedural requirements for Rule 14a-8 shareholder proposals, such as heightened ownership or holding period thresholds, in excess of Rule 14a-8. Atkins stated his agreement with a view previously articulated by SEC Commissioner Mark Uyeda: that Rule 14a-8 provides only a default standard and companies may supplement these standards with their own governing documents. If this view is adopted by the SEC and validated in court, then companies could introduce significantly more stringent requirements on Rule 14a-8 shareholder proposals, similar to current proxy access bylaws for director nominations, thereby allowing for the exclusion of Rule 14a-8 proposals if these requirements are not met.

In his remarks, Atkins also indicated he believes the SEC should reevaluate the fundamental premises of Rule 14a-8 and whether shareholders should have the right to submit proposals in a company's proxy statement at all. Accordingly, the state law exclusion strategies signaled by Atkins may be the first step on the path to an SEC proposal to eliminate Rule 14a-8 entirely.

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