Cooley

‘We Will Get By, We Will Survive’ – The Future of Shareholder Proposals

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As discussed in more detail in Cooley’s October 10 alert, remarks by Securities and Exchange Commission (SEC) Chairman Paul Atkins suggest that Delaware-incorporated companies may be able to exclude precatory (nonbinding) shareholder proposals under Rule 14a-8(i)(1) of the Securities Exchange Act of 1934 – provided they submit a no-action request to the SEC accompanied by a Delaware law opinion stating that such proposals are not a proper subject for shareholder action under Delaware law, and, in the event of a conflicting opinion, this interpretation is upheld by the Delaware Supreme Court. In addition, as discussed in Cooley’s November 20 alert, the SEC also announced that for the 2026 proxy season, it would only provide substantive no-action letters under Rule 14a-8(i)(1), potentially further encouraging companies to pursue the Delaware opinion approach. In the short term, the SEC’s new approach to Rule 14a-8 no-action letters may cloud the strategic landscape as both proponents and companies wait to see whether it becomes common for companies to exclude proposals (other than for straightforward procedural deficiencies) in the absence of no-action relief.

Should the Delaware opinion approach be upheld by the Delaware Supreme Court this could open the floodgates to precatory proposal exclusions and quickly radically change the shareholder proposal landscape, especially if companies otherwise prove reluctant to exclude proposals in the absence of no-action letters. In the last three years, nearly 3,000 shareholder proposals were submitted to Russell 3000 companies, and fewer than 20 were binding proposals. This raises the question of how shareholder proposal proponents would react if companies were able to exclude precatory proposals under Rule 14a-8(i)(1). It is likely overly optimistic to assume that serial shareholder proposal proponents will pack up their bags and admit defeat – rather, they are likely to explore new avenues to pressure companies.

If precatory proposals are not a guaranteed option, proponents could look to submit binding shareholder proposals under Rule 14a-8 as an alternative, which in practice means binding bylaw proposals that would have direct binding effect on companies. Binding bylaw proposals, which would directly amend a company’s bylaws upon receiving requisite shareholder support, historically have been extremely rare. 2024 was a recent high-water mark, when at least 15 binding bylaw proposals were submitted, including 13 proposals developed by Michael Levin of The Activist Investor and submitted by John Chevedden, which aimed to directly amend company bylaws to require annual binding shareholder votes to approve director compensation. Where these proposals went to a vote, they uniformly received low support. While proponents might hope that shareholders would be more receptive to binding proposals in a world where precatory proposals are no longer an option, simply converting all precatory proposals to binding bylaw proposals is likely not a panacea for proponents.

Even if Delaware 14a-8(i)(1) letters are successful, Rule 14a-8 would not automatically bar proponents from submitting precatory proposals, and companies would retain discretion over whether to seek exclusion. Some companies may continue including certain precatory proposals in their proxy materials on the theory that a nonbinding vote is less disruptive than a binding bylaw proposal, withhold campaign or proxy contest. This decision would be a company-specific judgment considering, among other things, potential proxy advisory firm responses, investor reactions and the risk of more aggressive tactics discussed above.

Limits on environmental, social and governance (ESG) as a subject for binding bylaws

Although Delaware law remains unsettled in this area, environmental and social topics that have constituted approximately two-thirds of recent precatory proposals do not readily translate into binding bylaw provisions. Delaware law draws a distinction between bylaws that regulate the process of corporate governance and those that encroach upon the board’s authority to manage the business and affairs of the corporation. Bylaws that mandate specific operational or strategic actions – such as requiring the publication of sustainability reports, compelling greenhouse gas emissions disclosures or reductions, or dictating supply-chain human rights due

diligence – risk being viewed as impermissible intrusions into the board's managerial prerogatives under Section 141(a) of the Delaware General Corporation Law. While careful drafting may frame some environmental or social-related bylaws as procedural (for example, establishing a board committee or setting meeting procedures), many of the most common requests would direct substantive management action and therefore sit on uncertain footing for validity as binding bylaws.

Governance topics: What can and cannot be done by bylaw

Many traditional governance reforms raised through precatory proposals also do not map neatly to binding bylaws because they require amendments to the certificate of incorporation. Proposals to eliminate classified boards, remove supermajority voting provisions, allow special meetings of stockholders or action by written consent will typically require charter amendments and cannot be implemented through binding bylaw amendments. On the other hand, several commonly requested governance changes are conventionally addressed in bylaws and are thus plausible targets for binding proposals. These include implementing majority voting for uncontested director elections, creating or amending shareholder special meeting rights where currently established by bylaw, proxy access mechanics and advance notice procedures. Even within these categories, validity and effectiveness will depend on how a particular company's charter and bylaws allocate authority, and whether the proposed bylaw regulates procedures rather than dictating substantive board decisions.

Executive compensation as a potential focus

Executive and director compensation may present another area for binding bylaw experimentation. Delaware law expressly permits the board to set director compensation unless the bylaws provide otherwise, which has encouraged proponents to test bylaw frameworks requiring shareholder approval for director pay. The above-discussed case of proposals seeking annual binding votes on director compensation is an example of this approach. Similar concepts could be adapted to executive compensation in limited respects – for instance, by adopting bylaws that condition certain pay practices on shareholder approval. For example, in the 2025 proxy season, 29 precatory "golden parachute" proposals were submitted requesting that companies adopt a policy for submitting certain severance arrangements to a shareholder vote. When voted on, these precatory proposals performed relatively well, with 28 proposals receiving average support of 34%. Although none passed in 2025, several similar such proposals passed in recent years. Proponents may be tempted to turn this or similar proposals into binding bylaws. Although Delaware law is not clearly established on the point, the validity of any such bylaw would likely turn on whether it regulates the process by which compensation decisions are made rather than dictating specific pay outcomes, and whether it avoids unduly restricting the board's statutory authority to manage compensation arrangements in the ordinary course.

The 'Trojan Horse' dynamic

Binding bylaw proposals could become both ends and means. Given the narrow range of viable binding bylaws, proponents may also use binding bylaw proposals tactically to create leverage for negotiation on other issues, such as environmental and social topics or governance-related charter amendment requests that previously formed the subject matter of most precatory proposals. This would mirror the "Trojan Horse" tactic seen among some anti-ESG proponents, who often submit facially neutral governance proposals with broad investor appeal as a vehicle to engage companies on more politically charged topics. In the binding bylaw context, proposals targeting executive or director compensation policies may be particularly potent given the sensitivity of these subjects and the risk (even if remote) of a binding constraint on pay-setting authority. Proponents could leverage the specter of an unfavorable binding compensation bylaw to prompt discussions and obtain concessions on adjacent priorities, such as board declassification, special meeting thresholds or ESG reporting.

Practical implications

Bylaw defenses

Companies should review and, depending on future developments, revisit the vote standards governing bylaw

amendments. While most shareholder rights advocates endorse a “simple majority” of votes cast bylaw amendment standard, such a threshold would make it materially easier to pass binding bylaw amendments – especially in contested or low-turnout meetings. Companies will have a stronger rationale to retain or adopt higher voting thresholds, such as a majority of the outstanding shares entitled to vote or other supermajority provisions permitted by Delaware law for shareholder-initiated bylaw changes. Any change to these standards should be evaluated holistically in light of the company’s existing charter/bylaw framework, investor expectations and proxy advisor policies.

In his October 9 remarks, 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. If the application of such “shareholder proposal access” bylaws to binding bylaw proposals is permitted under applicable state law, then this approach could also provide significant protection against attempts to include binding (or precatory) proposals in company proxy statements. Undoubtedly, proxy advisors and some institutional investors would pressure companies against adopting overly restrictive access bylaws, and highly motivated proponents could also circumvent such limits by conducting their own solicitation, as done at Warrior Met Coal in 2024 and discussed in this August 2024 Cooley alert.

Inevitability of pressure tactics

Regardless of whether binding bylaws become a staple of the toolkit, activists and gadflies will innovate. If precatory avenues narrow, companies should also expect a mix of alternative pressure tactics, including amplified public campaigns, short-slate contests or full proxy fights, “vote no” or withhold campaigns against directors, and coordinated engagement with large institutions. Companies should be prepared for a more hard-edged engagement environment in which the negotiation leverage once mediated through precatory proposals reappears in other forms.

The potential to end precatory proposals will not end shareholder activism – it will only change its form. Companies should respond by stress-testing their bylaw architecture, sharpening their engagement playbooks, and planning for both the direct risk of binding bylaw initiatives and the indirect leverage they may be used to create.

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