ESG Daily, VITAL BRIEFING—If there is one thing to know about the current proxy season, it is this…, (Dec 1, 2025)

By Mark S. Nelson, J.D.

Despite one prominent official's observation about precatory shareholder proposals and state law, companies may still seek the comfort of a no-action letter.

SEC Chair Paul S. Atkins, in remarks delivered in Delaware, told an audience at the John L. Weinberg Center for Corporate Governance's 25th Anniversary Gala that, in his view, Delaware law bars shareholders from submitting precatory proposals. That conclusion may find mixed support under Delaware law and legal scholarship, and current federal proxy regulations permit such proposals so long as they are couched as recommendations or suggestions. But the remarks by the SEC's current chair have touched off a renewed debate about the role that precatory shareholder proposals play within the field of corporate governance.

The effort to bar precatory shareholder proposals is largely directed at providing companies a means to avoid having to address environmental, social, and governance (ESG) topics at their annual general meetings of shareholders. Efforts to curb ESG proposals once sough to limit proposals asking companies to report on their plans to address climate change, workplace diversity, and certain traditional governance topics but, as Atkins noted in his remarks in Delaware, precatory ESG proposals now come from all quarters and can be pro- or anti-ESG.

Layered on top of this debate, the SEC's Division of Corporation Finance (CorpFin) responded to Atkins's remarks by issuing guidance indicating that division staff generally will not respond to or provide views on shareholder proposals during the current proxy season. However, the guidance provides one significant exception—a shareholder proposal for which a company seeks exclusion because it would not be a proper subject under state law.

This Vital Briefing collects the key statements and guidance on this one topic you should know about heading into the heart of proxy season.

Federal proxy regulations. While applicable state laws may be subject to debate, Exchange Act Rule 14a-8(i)(1) remains comparatively clear regarding federal law. As a result, Question 9 provides that shareholder proposals that are unfit subject matter for shareholder action under the law of the company's state of organization may be excluded. That means certain proposals that would be binding on the company may not be proper subject matter for shareholder action.

However, a note to Exchange Act Rule 14a-8(i)(1) provides that precatory proposals may not be excludable per se. Thus, the rule states: "In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise."

However, as Atkins emphasized in his Delaware remarks, companies can rebut that presumption.

Delaware trap door? A forthcoming academic paper authored by Kyle A. Pinder, a partner at Morris, Nichols, Arsht & Tunnell LLP, argued that Delaware law does not allow shareholders to submit precatory proposals to public companies incorporated in Delaware. A key assumption of the paper is that while Delaware law neither expressly allows nor expressly prohibits shareholders from submitting precatory proposals, Pinder would err on the side of "doctrinal clarity" by requiring an express right to do so rather than find an implied or inherent right to submit precatory proposals.

Pinder's overarching theory is that Delaware law emphasizes three shareholder rights: to sell, to sue, or to vote. Voting, Pinder argued, is limited to electing directors, voting on matters accorded to shareholders by law or by

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corporate governance documents, and to voting on matters for which a company's board seeks a shareholder vote. Pinder said the submission of precatory shareholder proposals does not fit within any of these definitions of shareholder voting rights.

However, something that perhaps gets lost in the debate over Pinder's paper is the degree to which he acknowledged some uncertainty about how Delaware law might ultimately be interpreted while also offering a potential solution based on private ordering. Here, Pinder posits that companies incorporated in Delaware might adopt precatory proposal bylaws that would permit such proposals, but mostly on companies' terms. Pinder suggested that precatory proposal bylaws might be drafted to address issues of substance, procedure, and eligibility. He also suggested that precatory proposal bylaws could be scaled to fit a company's business and shareholder base. But Pinder acknowledged that federal preemption via Exchange Act Rule 14a-8 may be a factor in whether such bylaws are valid. Another factor could be a decision by Delaware lawmakers to enact a clarifying amendment to the DGCL to reinforce companies' ability to use private ordering to grant shareholders the ability to submit precatory proposals.

Chair Aktins statement. In his remarks at the Weinberg Center, Atkins noted that some prominent Delaware jurists and practitioners, such as former Delaware Chancellor (at the time Vice Chancellor) Leo Strine, have previously asserted that Delaware companies only address serious corporate actions. The import would be that Delaware corporate law may bar consideration of shareholders' precatory proposals. Atkins then suggested that it was federal law that changed things for precatory proposals and cited Strine's reply to a fellow panelist in a different setting suggesting the same. Said Strine, as quoted by Atkins: "[the SEC] made…up [precatory proposals and Delaware is] fine with it."

With respect to the Note to Exchange Act Rule 14a-8(i)(1) regarding precatory shareholder proposals, Atkins made the following argument:

"The note reflects a codification of the Commission staff's views that there is a presumption that precatory proposals are a 'proper subject' under state law. However, the notion that Rule 14a-8 gives shareholders the right to present precatory proposals—when state law does not—is supported neither by the text of the note nor its history. In fact, the note expressly states that a company can overcome the presumption. Furthermore, when the Commission amended the note in 1983, the purpose was to 'make it clear that whether the nature of the proposal, mandatory or precatory, affects its includability is solely a matter of state law, and to dispel any mistaken impression that the Commission's application of paragraph [(i)](1) is based on the form of the proposal.'"

Atkins continued: "Pulling all of this together, if there is no fundamental right under Delaware law for a company's shareholders to vote on precatory proposals—and the company has not created that right through its governing documents—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."

According to Atkins, companies could seek to exclude such proposals. "If a company makes this argument and seeks the SEC staff's views, and the company obtains an opinion of counsel that the proposal is not a 'proper subject' for shareholder action under Delaware law, this argument should prevail, at least for that company," said Atkins. "I have high confidence that the SEC staff will honor this position."

CorpFin to the rescue. According to a statement issued by CorpFin: "…[t]he Division has determined to not respond to no-action requests for, and express no views on, companies' intended reliance on any basis for exclusion of shareholder proposals under Rule 14a-8, other than no-action requests to exclude a proposal under Rule 14a-8(i)(1)."

CorpFin said the reason for continuing to review no-action requests citing Exchange Act Rule 14a-8(i)(1), that is, whether a proposal is proper subject matter under state law, was that there is insufficient guidance available to

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companies and proponents at this time.

CorpFin cited the lengthy government shutdown, a backlog of registration statements and other filings to review, and the existence of ample guidance for companies and proponents as the basis for not responding to other types of shareholder proposal requests from companies. With respect to existing guidance, the most recent guidance addressed ESG engagements between shareholders and companies and how such engagements may require the filing of the more onerous Schedule 13D instead of the short form Schedule 13G (See Staff Legal Bulletin No. 14M and prior coverage in *Securities Regulation Daily*); See also Compliance and Disclosure Interpretations Regarding Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting, Question 103.12)).

Things to keep in mind for this proxy season per CorpFin regarding all types of shareholder proposals that companies may seek to exclude:

- *General guidance*—"Pursuant to Rule 14a-8(j), companies that intend to exclude shareholder proposals from their proxy materials must still notify the Commission and proponents no later than 80 calendar days before filing a definitive proxy statement."

- *Exception*—"[I]f a company wishes to receive a response for any proposal that it intends to exclude pursuant to a basis other than Rule 14a-8(i)(1), the company or its counsel must include, as part of its notification pursuant to Rule 14a-8(j), an unqualified representation that the company has a reasonable basis to exclude the proposal based on the provisions of Rule 14a-8, prior published guidance, and/or judicial decisions. In those situations, the Division will respond with a letter indicating that, based solely on the company's or counsel's representation, the Division will not object if the company omits the proposal from its proxy materials."

- *Scope of CorpFin announcement*—"This announcement applies to the current proxy season (October 1, 2025 – September 30, 2026) as well as no-action requests received before October 1, 2025, to which the Division has not yet responded. Companies that have already submitted a request relying on a basis for exclusion other than Rule 14a-8(i)(1) and that wish to receive a response from the Division should submit a notice that includes the representation described above. In those cases, the time of the initial submission will apply for purposes of the 80-day requirement in Rule 14a-8(j)."

- *Note regarding investment companies*—"The Division of Investment Management is responsible for responding to Rule 14a-8 requests related to investment companies. The staff of the Division of Investment Management will follow a substantially similar process as set forth above."

Looking ahead. The SEC has taken a mostly hands-off approach to company plans to exclude precatory shareholder proposals this proxy season with the notable exception that agency staff may still respond to and provide views on requests to exclude precatory proposals that are asserted to be improper subject matter under state law. Companies likely will continue to document any attempts to exclude precatory shareholder proposals regardless of the asserted basis or bases for exclusion.

A significant open question for activist shareholders is whether the SEC's guidance for the current proxy season seriously impairs their ability to push companies to take actions on various topics. The answer partially depends on guidance already issued in 2025 that may function to curb ESG engagements and, in light of the latest statements from Atkins and CorpFin, just how aggressive companies may be in seeking to exclude precatory shareholder proposals on state law grounds.

Effective shareholder activism also may depend on whether these shareholders begin to shift their overall strategy

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away from precatory proposals to more aggressively rely on the SEC's universal proxy regulation (i.e., for non-exempt director election contests) or to engage in "vote no" campaigns, exempt solicitations, or to call special meetings (to the extent permitted under the company's bylaws) to remove existing directors and appoint their own nominees to fill the vacancies.

Perhaps the most significant mid- to long-term factor would be any major SEC reforms to the proxy process. Atkins, in his remarks on precatory shareholder proposals, said he had asked agency staff to begin a "fundamental reassessment of Rule 14a-8." The SEC during the first Trump Administration increased the shareholder eligibility thresholds significantly, although not as far as a defunct SEC proposal or the then equally defunct GOP-led CHOICE Act would have done. Companies and shareholders will need to be attentive to whether the SEC's next steps to amend Regulation 14A are comparatively minor tweaks or result in major changes to how shareholders interact with companies.

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