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Securities Regulation & Corporate Governance Update

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SEC Chairman Atkins Comments on Rule 14a-8 Challenges to Non-Binding Shareholder Proposals, as well as Delaware and Texas Corporate Laws

Gibson Dunn's lawyers are available to discuss with companies key considerations related to asserting Rule 14a-8(i)(1) as a basis for excluding a shareholder proposal.

In a significant dinner speech on October 9, at the John L. Weinberg Center for Corporate Governance, SEC Chairman Atkins signaled the SEC's willingness to take a step that could significantly alter the landscape for shareholder proposals submitted under Exchange Act Rule 14a-8, by allowing companies (at least, Delaware companies) to exclude precatory/non-binding shareholder proposals. In practice, the vast majority of Rule 14a-8 shareholder proposals are precatory. The speech is available here: SEC.gov | Keynote Address at the John L. Weinberg Center for Corporate Governance's 25th Anniversary Gala.

Specifically, Chairman Atkins indicated that the SEC Staff is likely to defer to a Delaware law legal opinion or a Delaware court proceeding to decide whether precatory proposals are proper under Delaware law (that is, whether shareholders have a right to introduce precatory proposals). If the determination is that they are not proper subjects under state corporate law, the proposals would be excludable from companies' proxy statements under Rule 14a-8(i)(1). In essence, he has invited a Delaware incorporated company to initiate a challenge on this issue. We expect the

speech to garner a lot of attention in the legal, financial, and governance press. We would be happy to discuss with companies key considerations related to asserting Rule 14a-8(i)(1) as a basis for excluding a shareholder proposal.

Additional background.

1. Rule 14a-8(i)(1) allows a company to exclude a shareholder proposal from its proxy statement "[i]f the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization." To assert this provision, a company's no-action request must include "a supporting opinion of counsel" *(i.e.,* a legal opinion) that the proposal is not proper under state law.

2. However, a note to Rule 14a-8(i)(1) 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."

3. The Delaware courts have not directly addressed the issue of whether shareholders have *a right* to introduce precatory proposals under Delaware law. However, in a forthcoming law review article, a prominent Delaware lawyer has set forth a well-articulated argument that there is no such right under Delaware law: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5418534.

4. Chairman Atkins essentially invites a Delaware company to make this argument in a no-action request submitted to the Division of Corporation Finance and supported by a Delaware law opinion (presumably by a respected Delaware law firm). Chairman Atkins expressed "high confidence" that the SEC staff will "honor" the legal opinion.

5. However, if a company were to assert Delaware corporate law as a basis for excluding a precatory shareholder proposal, it's likely that shareholder proposal advocates will rally around the issue and submit a competing Delaware law opinion. Whether or not they do so, the SEC Staff does not have to decide the issue on its own and instead may follow a procedure allowed under the Delaware constitution, in which the SEC can certify a Delaware corporate law question directly to the Delaware Supreme Court. If it did so and the Delaware Supreme Court accepts the case, the company that submitted the no-action request and the proponent would be expected to brief and argue the issue before the Delaware Supreme Court, although there likely would be many parties on both sides of the issue that would seek to intervene or submit amicus briefs on the issue.

6. This process has only been implemented by the SEC Staff once before (under the direction and supervision of our partner Tom Kim, who was the Chief Counsel and Associate Director of the SEC's Division of Corporation Finance at the time), in 2008 with a case captioned *CA, Inc. v. AFSCME Employees Pension Plan*. See the decision here and commentary by law firms that were involved: https://www.rlf.com/ca-inc-v-afscme-employees-pension-plan/ and https://corpgov.law.harvard.edu/2008/07/21/ca-inc-v-afscme-employees-pension-plan/.

7. If the Delaware Supreme Court were to determine that Delaware law does bestow a right on shareholders to submit precatory proposals, then Rule 14a-8 proposals would continue as they have in the past. But if the Delaware Supreme Court were to determine that there is no such right, then all other Delaware companies might be able to easily obtain legal opinions that precatory proposals are improper, allowing them to be excluded from companies' proxy statements under Rule 14a-8(i)(1). However, the breadth of relief available could be affected to the extent that the Delaware Supreme Court limits its

decision to precatory proposals dealing with particular topics or to the topic presented in the case before it.

8. Chairman Atkins' speech also states that Texas corporations opting into the recent state law provision placing ownership and procedural conditions on the ability to introduce a shareholder proposal should also be respected by the SEC as allowing exclusion of shareholder proposals under Rule 14a-8(i)(1), as would restrictions imposed under a company's governing documents. (See our client alert, More Significant Changes to the Texas Business Organizations Code: SB 1057 and SB 2411 – Gibson Dunn.) While this is a position that both Chairman Atkins and Commissioner Uyeda have previously supported, the law in this context is not settled, and it's worth noting that (as the SEC Staff always states) only a court can resolve the scope of the Rule 14a-8 exclusions.
9. Consistent with the SEC's recent Reg Flex Agenda (addressed in our client alert, A New Day at the SEC: The SEC's Spring 2025 Reg Flex Agenda – Gibson Dunn), Chairman Atkins also stated his view that the Commission should re-evaluate Rule 14a-8's fundamental premise that shareholders should be able to force companies to solicit for their proposals—to the extent that a shareholder proposal is a proper subject for shareholder action under state law—at little or no expense to the shareholder.
10. Finally, Chairman Atkins expresses disappointment with recent Delaware amendments prohibiting mandatory arbitration and fee shifting for federal securities law claims, describing them as "steps backwards" in Delaware's efforts to stem the potential exodus of Delaware companies reincorporating to another state.

The following Gibson Dunn lawyers prepared this update: Ronald Mueller, Elizabeth Ising, Thomas Kim, and Brian Lane.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding the SEC's announcement, or federal securities laws and regulations more generally. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following leaders and members of the firm's Securities Regulation & Corporate Governance practice group:

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