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WHITE PAPER

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Preparing for an Evolving Shareholder Proposal Landscape

This *White Paper* examines how recent commentary from U.S. Securities and Exchange Commission Chairman Paul Atkins signals a greater role for state law in defining shareholders' ability to place proposals on company proxy statements. Chairman Atkins has articulated his views about how state law and Rule 14a-8 under the Exchange Act intersect Rule 14a-8(i)(1), which permits a company to exclude a shareholder proposal if it is not a "proper subject" for shareholder action under state law.

We outline the potential implications for companies and boards, including a possible heightened use of advance notice bylaws and how private ordering might ultimately result in companies adopting objective procedural guardrails such as ownership thresholds.

BACKGROUND

Over the past decade, activist shareholders have increasingly wielded a powerful tool—the Rule 14a-8 shareholder proposal—in their efforts to exert pressure on corporate America to endorse social and political objectives. Indeed, in some sense, shareholder proposals have served as a microcosm of the rise of ESG and anti-ESG initiatives, turning the proxy statement into a special interest battleground.

Rule 14a-8 has historically permitted holders of very small amounts of stock to require that companies include a proposal on the company's proxy statement. These proposals are often framed as non-binding, but are nevertheless intended to put pressure on boards to undertake a requested action. If a company wants to exclude a Rule 14a-8 proposal from its proxy statement, the company typically asks the SEC staff to confirm that the SEC will not take action if the company excludes the proposal pursuant to an applicable procedural or substantive basis prescribed in Rule 14a-8.

While the scope and application of Rule 14a-8 has ebbed and flowed with the political winds, it has largely been assumed by companies and activists alike that shareholders have the right under state and federal law to submit these non-binding proposals. The SEC's current Chairman, Paul Atkins, however, has posed a fundamental challenge to that assumption.

THE INTERSECTION OF STATE LAW AND RULE 14A-8

On October 9, 2025, Chairman Atkins gave the keynote address at the Weinberg Center for Corporate Governance in Delaware in which he articulated his views about how state law and Rule 14a-8 intersect, focusing particularly on Rule 14a-8(i)(1), which permits a company to exclude a shareholder proposal if it is not a "proper subject" for shareholder action under state law.[1]

Chairman Atkins asserted that if neither state law nor a company's governing documents provide an inherent shareholder right to submit a non-binding proposal on a company's proxy statement, then a non-binding shareholder proposal is not a "proper subject" for shareholder action under Rule 14a-8. In other words, there would be no affirmative right for a shareholder to use Rule 14a-8, and therefore any non-binding proposal could be properly excluded.

Chairman Atkins also provided a road map for companies to use this argument in the upcoming proxy season, stating that a company could request no action relief under Rule 14a-8(i)(1) and accompany its request with a legal opinion stating that a proposal is not a "proper subject" for shareholder action under state law. Chairman Atkins proffered that it could then ask the Delaware Supreme Court to certify the interpretation expeditiously.

The idea that state law has a meaningful role to play in governing shareholder proposals is not new. In fact, nearly two decades ago, Chairman Atkins himself advocated for private ordering of proposals under state law, stating that "to the extent a company adopts a proper bylaw under state law that limits or prohibits the consideration of a non-binding proposal at a shareholder meeting, those types of proposals may be excluded from the company's proxy statement [under Rule 14a-8(i)(1)]."[2]

Notably, Chairman Atkins's speech suggests that a company may not need to explicitly prohibit non-binding proposals if there is no right to submit non-binding proposals under state law in the first place, as was recently argued by a Delaware practitioner.[3] Consequently, if a company were to successfully use Chairman Atkins's roadmap, it would effectively render Rule 14a-8 unusable for non-binding proposals.

ADVANCE NOTICE BYLAWS

If Rule 14a-8 is no longer a viable tool for shareholder activists, companies should be prepared for shareholders to increasingly submit proposals through companies' advance notice bylaws. Advance notice bylaws do not typically include procedural guardrails such as ownership thresholds or limitations on the number of proposals similar to Rule 14a-8. Without such guardrails, a holder of one share could theoretically submit an unlimited number of proposals. This is not a purely hypothetical risk. In 2024, the AFL-CIO submitted five proposals to Warrior Met Coal

pursuant to the company's advance notice bylaw, reportedly spending just $15,000 in proxy solicitation costs.

Activist shareholders have proven that access to the company's proxy statement is not necessarily important if they are willing to file their own Rule 14a-compliant proxy statement. And because such proxy statements need not include dissident director nominees or extensive disclosures required in the company's proxy statement on topics like compensation, board structure, and the like, expense is not prohibitively high.

We expect this tactic to grow in prominence. At a minimum, companies should review their advance notice bylaw to understand how it could be used by shareholders to submit proposals. Some companies may consider clarifying, to the extent they do not already, that advance notice proposals must relate to a proper subject for shareholder action under applicable law. Other companies may also want to explore the feasibility and advisability of adding procedural guardrails such as ownership thresholds and limitations on the number of proposals submitted pursuant to an advance notice bylaw.

PRIVATE ORDERING FOR RULE 14A-8 PROPOSALS

Chairman Atkins also offered his view that private ordering through corporate bylaws is permissible, citing Commissioner Mark Uyeda's view that Rule 14a-8 should be treated as "default standards that apply only if companies decline to establish their own standards in their governing documents." He also posited that imposing heightened submission standards via state law, as Texas recently did in setting an "opt in" $1 million ownership threshold, should be no different. He reasoned that Rule 14a-8 cannot protect a right if it does not first exist under state law.

Many companies may be unwilling to use Chairman Atkins's Rule 14a-8(i)(1) roadmap outlined above unless a company has the support of large shareholders or structural features such as dual class voting stock that would make them less susceptible to criticism by the proxy advisors and shareholder activists. Furthermore, companies may face pressure from shareholders and proxy advisors to explicitly provide a bylaw right to submit Rule 14a-8 proposals. In anticipation of such pressures, companies should consider the feasibility of, and appetite for, adopting objective procedural bylaw amendments that supplement the current guardrails in Rule 14a-8.

For example, a simple yet effective amendment could be to add a minimum ownership threshold that is different or higher than Rule 14a-8. Options might include setting a $1 million ownership requirement similar to Texas's or looking to Europe for inspiration where, for example, Germany, has a €500,000 ownership requirement and the United Kingdom allows a proposal if it is submitted by 100 individuals who jointly own £10,000 in shares.

It is far from clear what practices will become standard or how long it will take for clarity to emerge. Companies and boards should exercise patience and flexibility, as it will take time for companies, shareholders, proxy advisors, and states to settle on market-accepted practices.

KEY TAKEAWAYS

1. Chairman Atkins's speech forecasts an evolving shareholder proposal landscape in which state law will play a more prominent role in governing shareholder proposals.
2. Legal departments and governance committees should review their advance notice bylaws and consider the feasibility and appetite for imposing additional requirements applicable to both advance notice proposals and Rule 14a-8 proposals.

LAWYER CONTACTS

Marjorie P. Duffy
Columbus
+1.614.281.3655
mpduffy@jonesday.com

Ferrell M. Keel
Dallas
+1.214.969.4851
fkeel@jonesday.com

Randi C. Lesnick
New York
+1.212.326.3452
rclesnick@jonesday.com

Joel T. May
Atlanta
+1.404.581.8967
jtmay@jonesday.com

Braden McCurrach
New York
+1.212.326.3486
bmccurrach@jonesday.com

Kimberly J. Pustulka
Cleveland
+1.216.586.7002
kjpustulka@jonesday.com

ENDNOTES

1 Paul S. Atkins, U.S. Sec. & Exch. Comm'r, Keynote Address at the John L. Weinberg Center for Corporate Governance's 25th Anniversary Gala (October 9, 2025).

2 Paul S. Atkins, U.S. Sec. & Exch. Comm'r, *Shareholder Rights, the 2008 Proxy Season, and the Impact of Shareholder Activism*, Speech Before the U.S. Chamber of Commerce (July 22, 2008).

Commissioner Mark Uyeda made similar arguments in 2023, asserting that federal law was not intended to supplant state law, but rather to reinforce state law rights. He argued that a company should have the right to adopt, in its governing documents, requirements for shareholder proposals that differ from those set forth in Rule 14a-8. *See* Mark T. Uyeda, U.S. Sec. & Exch. Comm'r, Remarks at the Society for Corporate Governance 2023 National Conference (June 21, 2023).

3 Kyle Pinder, *The Non-Binding Bind: Reframing Precatory Stockholder Proposals under Delaware Law*, 15 Mich. Bus. & Entrepreneurial L. Rev. (forthcoming 2026).