

# Ex-Commissioner Calls for Overhaul Of SEC Shareholder Proposal Process

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The Securities and Exchange Commission should overhaul its shareholder proposal rule and the process by which the staff decides when issuers may exclude the proposals from their proxy materials, former Commissioner Paul Atkins told BNA April 2.

A lot of time, effort and money are expended by corporations on “things that ultimately are just precatory,” Atkins said in an interview. Many of the issues touched upon by the resolutions are not within the purview of shareholders, he said. “And we have these various special interest groups pushing their pet agendas.”

Atkins cited for example the recent surge in shareholder proposals urging companies to disclose their political spending. He noted that according to figures provided by the Manhattan Institute for Policy Research, such proposals in the 2012 proxy season garnered on average only 18.3 percent of support from shareholders. “Shareholders are overwhelmingly against these resolutions, and yet they are recurring and pushed by a few special-interest shareholders.”

## **No-Action Relief.**

Atkins also argued that the no-action process allows the SEC staff to decide every year the major issues that go on issuers' proxies to be voted upon by their shareholders. The staff action is extremely subjective, he said. “There is little transparency, no accountability, and no real due process to it.”

Atkins, a Republican commissioner from 2002 to 2008, now is chief executive officer of financial services consultant Patomak Global Partners LLC. He told BNA that his firm has been advising clients and trade associations on the political spending disclosure issue.

SEC spokesman John Nester declined to comment on Atkins's remarks. He told BNA April 3 that as a general matter, “the staff's responses are based on making sure the rule requirements are followed by both sides, and do not reflect a judgment by the staff as to the merits of the subject matter of the proposal.”

The SEC's shareholder proposal rule--Rule 14a-8 under the 1934 Securities Exchange Act--sets out the procedures by which eligible investors may have their proposals included in the company's proxy materials. The rule also allows issuers to exclude the proposals under limited circumstances. However, the issuers must explain to the staff at the SEC Division of Corporation Finance their reasons for doing so. If it agrees with the reason, Corp Fin staff can issue no-action relief to the company.

In early 2010, the SEC was in the process of taking a fresh look at the infrastructure, or “plumbing,” of the U.S. proxy voting system. As part of the effort, the SEC July 14, 2010, issued

a concept release soliciting public comment on the accuracy, transparency, and efficiency of the voting process and other issues that have raised regulatory concern for years (42 SRLR 1362, 7/19/10).

A week later, President Obama July 21, 2010, signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (42 SRLR 1401, 7/26/10). The SEC's efforts to implement the financial reform law have pushed much of its proxy plumbing review into the backburner.

### **Shareholder Activism.**

There is support for Atkins's views. According to the Manhattan Institute's Proxy Monitor winter report 2013, Fortune 250 companies listed 303 shareholder resolutions on their proxy ballots in 2012, an increase from the prior year's 294 resolutions. The proposals overwhelmingly were submitted by labor union pension funds, investors focused on socially responsible investing, and a few individual "corporate gadflies"--activist investors who advocate for change through the shareholder proposal process, the report said.

The Manhattan Institute also noted that in 2012, companies received many more proposals than actually showed up on their proxy statements. According to the institute, a significant number of the proposals were either allowed by the SEC to be omitted, or were withdrawn after negotiations between the issuers and the shareholder proponents.

Moreover, the institute found that only 26 of the 303 proposals on the Fortune 250 companies' proxy ballots received the support of a majority of shareholders. The institute further found that resolutions on companies' political spending or lobbying was the most popular kind of proposal in 2012, comprising 18.8 percent of the resolutions submitted in that year.

Groups such as the U.S. Chamber of Commerce and the Society of Corporate Secretaries and Governance Professionals also have faulted the shareholder proposal process. In comment letters responding to the SEC's proxy plumbing concept release, the groups suggested that there is a lack of transparency, and possible conflict of interest, in how proxy advisory firms issue their voting recommendations on such resolutions.

### **Prior Attempts.**

Observers told BNA that suggestions to change the shareholder proposal process have been floated at the SEC quite a few times over the last 30 years. John Olson, a Washington-based partner at Gibson Dunn & Crutcher LLP, noted for example that former Corp Fin director Linda Quinn and former Commissioner Steven Wallman had suggested changes to the system. Olson also observed that during SEC Chairman Richard Breeden's administration (1989 to 1993), a concept release was floated "suggesting a much more pragmatic approach" to the staff's review of the resolutions.

However, "in each case the social issue interest groups, allied with the union and public employee pension funds, strongly opposed any change that would make it harder for them to use corporate proxies to pursue their agendas," Olson said. "Thus, the system has been tweaked but not changed in any helpful way."

Olson added that many at the commission might welcome a system “where they are not called upon to be the 'deciders' of what proposals go into company proxies.”

Meanwhile, shareholder proponents staunchly defended the process, telling BNA that while it is not perfect, it serves as an important channel of communications between corporations and their shareholders. They also noted that with all the mandates faced by the SEC under Dodd-Frank and the Jumpstart Our Business Startups Act, this might not be the best time to initiate a new rulemaking.

### **'Room for Improvement.'**

Jonas Kron, vice president at Trillium Asset Management LLC--a group that has filed many shareholder resolutions in the sustainable and responsible investing (SRI) arena--agreed that there is “certainly room for improvement” in the shareholder proposal system.

The lack of transparency in the staff's no-action reviews also is an issue for proponents, he told BNA. “It's not like we have any special insight as to how the staff will decide.”

Typically, the staff response is a one-paragraph decision that provides a conclusion but does not really explain how that decision was arrived at, Kron said. “There is a fair amount of consensus that it would be useful to have more information.”

However, Kron added that the staff has made efforts over the last few years to provide a “little bit more insight into their reasoning.” Given the commission's resource constraints and the relatively short period for the review process, the staff “can't put out judicial opinions” on these proposals, he said. In any case, the proposal system was always intended to be a “relatively informal user-friendly process” in which ordinary shareholders could engage.

Ultimately, shareholder resolutions are an “incredibly important part of good corporate governance,” and nothing should be done to stifle that process, Kron said.

### **Change Enacted.**

Harvard law professor and corporate governance expert Lucian Bebchuk--who works with institutional investors to submit shareholder resolutions--similarly described shareholder proposals as an “useful and important” governance tool. He added that widely-accepted reforms and arrangements were sparked by such resolutions.

Bebchuk noted for example that disclosure of executive compensation, now widely accepted, originated from shareholder resolutions that, by attracting significant support, led the SEC to adopt rules requiring such disclosures. “Similarly, the diffusion of majority voting standard originated from shareholder proposals urging a move away from plurality voting,” he said.