

Viewpoint: Trump's SEC pick points to reduced proxy power for shareholders

By Jonathan Gardner and Lauren A. Ormsbee, Labaton Keller Sucharow LLP | 20 December 2024

The SEC prioritised ESG goals when Gary Gensler was chair, but many of his initiatives are expected to be rolled back under Trump, note lawyers at Labaton Keller Sucharow LLP

In the six weeks since the 2024 US election, president-elect Donald Trump has rapidly announced a slate of cabinet and other administrative agency leadership nominations to take effect during his second term in the White House. One of his most recent selections was the [nomination of Paul Atkins to serve as chair of the US Securities and Exchange Commission \(SEC\)](#). Atkins, an SEC veteran who served as an SEC commissioner from 2002 to 2008, is considered to be a pro-business conservative who will apply a “lighter regulatory approach” than the current chair, Gary Gensler, who assumed the role in 2021 and announced his resignation shortly after Trump’s victory.

Trump’s pick for SEC chair signals a marked shift away from certain policies and priorities launched under Gensler.

With Gensler at the helm, the SEC prioritised ESG goals, and [proposed rules that, for example, require public companies to disclose environmental risks](#). These initiatives prompted fierce public backlash from conservatives and from Atkins himself, who complained in a letter to the SEC that such measures are only “nominally framed as an investor protection initiative” and in reality “represent a roundabout way of regulating greenhouse gas emissions themselves, by handing a weapon to climate advocates”.

Many of Gensler’s initiatives are expected to be reversed during Trump’s second administration. A significant initiative likely to be axed under Trump’s SEC is non-binding guidance ([Staff Legal Bulletin No. 14L](#)) on the SEC’s interpretation and application of “Rule 14a-8.” In this rule, the SEC provided a

way for shareholders to present proposals for consideration in the company’s proxy statement. The Rule 14a-8 process has become “a cornerstone of shareholder engagement on important matters” because it allows stockholders to submit proposals to be considered at annual meetings.

However, the rule does allow for several bases for exclusion if a proposal “deals with a matter relating to the company’s ordinary business operations”. If a company’s management wishes to exclude a shareholder proposal from a proxy, it may request safe harbour assurance from the SEC in the form of a so-called no-action letter. If granted, the no-action letter articulates the SEC’s formal recommendation not to take enforcement action against the company for excluding a certain proposal from its proxy statement.

Prior to 2021, companies relied on the ‘ordinary business exception’ to [exclude what they considered superfluous proposals related to ESG initiatives](#). Legal Bulletin 14L evidenced Gensler’s SEC’s intent to “realign its approach for determining whether a proposal relates to ‘ordinary business’” by considering whether the proposal “raises issues with a broad societal impact”.



“If appointed SEC chair, Atkins (or someone with similar views) can readily rescind Legal Bulletin 14L and other pro-ESG and pro-shareholder guidance implemented by Gensler”

In effect, Legal Bulletin 14L promoted shareholder rights by making it easier to place important social and environmental issues on management's desks and into discussion at annual meetings. For example, a recently passed proposal requested that an industrial plastic production company report on how it reduces the amount of plastic material discharged into the environment and disclose the mechanisms it utilizes to manage that risk.

Another successful proposal asked a home improvement corporation to report its efforts to eliminate deforestation. Since Legal Bulletin 14L's enactment in 2021, shareholder proposals on ESG issues have surged 33% and have accounted for 62% of the total number of proposals considered at annual meetings in 2024.

The [recent proliferation of ESG-related proposals](#) has received substantial pushback from certain conservative politicians and lobbyists. Jay Clayton, who served as Trump's SEC chair during his first term and has been nominated by the president-elect to be the US Attorney for the Southern District of New York, expects that Atkins is likely to reform the proxy-voting process that made it possible for shareholders to present these ESG proposals in the first place.

Certain lawmakers have already taken steps to remove ESG initiatives from shareholder votes through legislative action. For example, in 2023, Rep. Ralph Norman (SC-5) [introduced H.R. 4655—the Businesses Over Activists Act](#) — a bill that would rescind the SEC's power to compel inclusion of ESG and policy-related shareholder proposals, with Rep. Norman calling ESG “an evil pollutant that must be eradicated from corporations and businesses”.

While the Businesses Over Activists Act may be merely a bellwether of economic reforms targeting ESG and shareholder rights to be expected in the next administration, the SEC need not rely on the lengthy, unpredictable process that accompanies lawmaking.

With president-elect Trump's inauguration fast approaching, shareholders must brace for diminished proxy powers and seek alternative avenues to drive corporate change.

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