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SEC's Corp. Governance Shift Puts Onus On States, Cos.

By **Sarah Jarvis**

Law360 (May 1, 2026, 1:48 PM EDT) -- Lawyers who work with clients on corporate governance matters had a warm response to a recent pledge from U.S. Securities and Exchange Commission Chairman Paul Atkins to let states handle such issues, saying the shift marks a return to the agency's historical approach and may spur increased activity among state regulators.

Atkins told an audience at a Texas Stock Exchange event in April that as part of the agency's push toward "making [initial public offerings] great again," the SEC is "focused on ensuring that states, and not the SEC, regulate matters of corporate governance."

"Over time, the agency has used its disclosure authority to attempt to indirectly establish governance standards that state corporate law should and can address," Atkins said in prepared remarks. "We must stay in our lane as a disclosure agency and not be a merit regulator."

The corporate governance matters the SEC has handled include various rules related to executive compensation, proxy voting, cyber incident disclosures and when insiders can trade their own company's stock. Attorneys told Law360 it's possible that as the SEC increasingly defers to companies on what to disclose in those areas, states may be inclined to increase their enforcement or come forward with more related laws.

Gary Brown, a partner at Nelson Mullins Riley & Scarborough LLP, said he would "wholeheartedly applaud" Atkins' attempts to roll back what he said is unnecessary information in corporate proxy statements, pointing to the examples of CEO pay ratio and some pay-versus-performance information — which includes disclosures on the relationship between executive compensation and a company's financial performance.

The Securities Act of 1933, which governs the financial information investors receive, was initially focused on disclosure regulation, while state securities laws took a more merit-based approach, Brown said. But both Congress and the SEC have layered on more prescriptive and merit-based requirements over the years leading to modern proxy statements that Brown said are vastly larger than they were in decades past and include unnecessary information.

"What we've got here is a lot of things that have changed gradually over the years, where it's just one little brick here, one little brick there," Brown said. "Now that brick has become a wall, and sometimes that wall just needs to be taken down, and maybe we should start over with some things."

Potential Impact

Atkins' comments could add fuel to the fire for an ongoing pattern Brown described as a "race to the bottom," in which states change their corporate laws to entice more corporate formation, Brown said. Several major companies recently have decided to reincorporate outside their former Delaware home in hopes of doing business in more favorable regulatory environments —including Tesla's and Coinbase's moves to Texas and TripAdvisor's and Dropbox's moves to Nevada.

Brown added that while there is already a patchwork of state corporate governance regulations, he thinks it's speculative to say there will be an increase in state attorneys general going after corporations for allegedly harming residents.

While most corporate governance issues such as voting and shareholder rights are addressed by a state's corporate statute, governance requirements for publicly listed companies are generally addressed at the federal level in the listing standards of the exchanges on which they are traded, Brown said. The New York Stock Exchange and Nasdaq impose independence requirements, certain voting requirements and board committee requirements, for example, and some exchange listing standards are required either by law or SEC regulations.

Governance of publicly listed companies, therefore, will continue to be both a state and federal issue, he said.

Kevin Harnisch, head of white collar defense and investigations for the U.S. at Norton Rose Fulbright, said Atkins' comments reflect a refocus of the SEC's mission and authority under federal securities laws.

"I think this fits within the theme of having the SEC focused really on its bread-and-butter issues as articulated in the federal securities laws, and focusing on investor protection, combating fraud, protecting integrity of the markets — and when it comes to the inner workings of how a company is organizing itself and its internal workings, that that continue to be left as a matter of state law, as it historically has been," Harnisch said.

Harnisch, who is also a former branch chief in the SEC's Division of Enforcement, said state enforcers may step up to the plate by, for example, initiating additional, securities-related enforcement investigations through a state attorney general's office. In the meantime, he is working with clients on making plain-English securities disclosures — a focus he said underpins much of the commentary from Atkins and his colleagues.

The SEC didn't make Atkins available for further comment on his remarks.

Corporate Judgment Calls

Erin Martin, a Morgan Lewis & Bockius LLP partner and former legal branch chief in the SEC's Division of Corporation Finance, said prior administrations were wading much further into corporate issues than the SEC had in the past.

Martin, who left the SEC in late 2021, said Corporation Finance staff would issue comments on a range of topics in the process of reviewing corporate filings, including exclusive forum provisions, waiver of jury trials, fee-shifting provisions and mandatory arbitration. She said it seemed the staff was taking the position that those issues were inherently material to investors, often resulting in challenging reviews that would take up a lot of time and potentially hold up related filings and deals.

Now in private practice, she thinks that whether an issuer has to disclose any of those provisions in their corporate organizing documents hinges on whether they'd be material to investors, unless there is an explicit requirement to disclose.

"I do welcome Chair Atkins' position that seems to be that perhaps those are the kind of judgment calls that should be made by the company and their trusted counsel about whether or not disclosure would be warranted for certain provisions that may impact shareholder rights," Martin said, adding that Atkins coupled that with the position that the SEC's role "should not be aimed to evolve best practices in corporate governance," absent an explicit congressional directive.

Martin pointed to Atkins' review of Regulation S-K, which concerns corporate disclosure obligations, and said she anticipates current requirements for companies to make disclosures on hot topic issues will be removed.

One of those topics would be a Reg S-K requirement that calls for information on how a nominating committee or a board of directors considers diversity in identifying nominees for director, said Morgan Lewis' Celia Soehner, a former attorney-adviser in the SEC's Division of Corporation Finance.

Over the last decade, corporate governance guidelines and nominating committee board charters have evolved to specifically mention how they may consider diversity in composing their boards of directors. But in the last couple of years, there has been a shift away from "that level of explicit callout," Soehner said.

Martin added that Atkins has made it clear over the past year that he is "not a fan" of what he said are instances of the SEC using its disclosure rules to indirectly regulate companies and push them toward preferred policies. Soehner said the combination of the SEC's disclosure framework, private ordering and the influence of proxy advisory firms such as Glass Lewis & Co. LLC and Institutional Shareholder Services Inc. "creates this nudge to have companies go in a particular direction."

"The goal is to perhaps take some of that nudging away from the SEC's rulemaking and role," Soehner said, adding that Atkins' aim is to give a company the bandwidth to determine what is best for it and its stockholders within the framework of the corporate laws of their state of incorporation.

'Huge Activity Going Forward'

At least one former state AG predicted the SEC's shift on corporate governance will encourage states to take further action. Jerry Kilgore, co-chair of the state attorneys general practice at Cozen O'Connor and Virginia attorney general from 2002 to 2005, said he is anticipating an uptick in state activity related to corporate governance across political party lines.

Republican state AGs, he said, continue to be highly skeptical of the influence of proxy advisory firms, litigating against them and sending letters to companies that use their services. And blue states such as New York, California and Illinois may step into the fray to push their companies along "to do things that they want their companies to do" — as he noted they have done historically, pointing to the mortgage crisis and the opioid crisis.

"I think on both sides, you're going to see huge activity going forward," Kilgore said. "Maybe some of the blue states come forth with more enforcement, more laws directed towards corporate governance, while the red states will push back vehemently, and you'll have litigation going back and forth between these states."

Kilgore's advice to issuers is to ensure that the decisions they make are benefiting their shareholders, which

can help them rebuff potential allegations that their choices as a company aren't supporting the company's value.

"As long as you can say, 'We made the decision because it brings value to our company,' I think you are on the road to success," he said.

--Editing by Orlando Lorenzo.
