



## Corporate Governance Series Preparing for the Shareholder Proposal Season

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On November 16, 2016, Skadden hosted a webinar titled “Preparing for the Shareholder Proposal Season.” The panelists were Amy Borrus, deputy director of the Council of Institutional Investors (CII); Skadden M&A and corporate governance partner Marc S. Gerber; and Skadden senior associate Hagen J. Ganem, who is a former member of the U.S. Securities and Exchange Commission’s (SEC) Shareholder Proposal Taskforce.

### Proxy Access Shareholder Proposals

#### Overview of the 2016 Season

Mr. Gerber began the discussion with some observations about proxy access shareholder proposals during the 2016 proxy season. Shareholders submitted approximately 200 “adopt” proxy access proposals, of which over half were withdrawn after the company engaged with the proponents or omitted pursuant to the SEC’s no-action letter process as being substantially implemented by the company. He noted that most of the proposals at companies that had not already adopted a 3 percent proxy access bylaw received the support of a majority of votes cast at annual meetings and that there may be a potential benefit to adopting a bylaw without having the shareholder proposal go to a vote.

#### Key Terms of Proxy Access Bylaws

Mr. Gerber provided an overview of key terms — proxy access bylaws permit shareholders with 3 percent ownership for at least three years to nominate up to 20 percent of the board seats, with a 20-person aggregation limit for ownership (3-3-20-20). Ms. Borrus observed that there appears to be a general consensus among institutional shareholders that the 3-3-20-20 approach is acceptable. However, she pointed to CII’s “best practices” on proxy access, which oppose aggregation limits, noting that a 20-person aggregation limit can be an impediment to satisfying the 3 percent ownership requirement.

Mr. Gerber also explained other typical proxy access terms. For example, to address the concern that shareholders could harass a company by renominating the same unsuccessful candidate year after year, companies may require a minimum level of shareholder support for a candidate to be eligible for renomination the following year. However, Ms. Borrus explained that CII opposes such restrictions since they do not also apply to the board’s candidates, noting that such renomination eligibility thresholds were not in the SEC’s vacated rule. Mr. Gerber said that in order to avoid so-called

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proxy access “creep” — proxy access nominees being elected in successive years while previously elected access nominees are renominated by the board — companies may require elected access candidates renominated by the board to count against the proxy access “basket” for some period of time. Companies also address the risk of concurrent proxy access and traditional proxy contests — which Mr. Gerber referred to as a “two front war” — by cutting off the access nomination in the event of an advance notice nomination for the same annual meeting. In response, Ms. Borrus pointed out that shareholders are not monolithic and may prefer the access candidate to the advance notice candidate and should have the opportunity to vote accordingly.

Mr. Gerber continued, noting a trend of shareholder proposals to amend existing proxy access bylaws and that most no-action requests arguing that the company’s proxy access bylaw substantially implemented the amendment shareholder proposal have been denied by the SEC staff, meaning that many of these proposals will be voted on by shareholders this coming proxy season.

### Outlook for 2017

Mr. Gerber noted that over 300 companies currently have proxy access bylaws, compared to two years ago, when the number was less than 10. In the coming months, he expects to see this number grow to over 450, perhaps even reach 500. He further discussed the first ever proxy access nomination, which was submitted by Mario Gabelli’s GAMCO Investors, Inc. (GAMCO), for a seat on the board of National Fuel Gas Company (NFG) on November 10, 2016. This nomination may seem surprising because it was submitted by a traditional activist investor. However, Mr. Gerber observed some unique circumstances in this nomination. For example, GAMCO had been reporting at least 5 percent beneficial ownership in NFG for a number of years and advocating for several years that NFG consider a spin-off of certain of its operations. Although this nomination may cause some companies to pause to see the impact of proxy access in the longer term, Mr. Gerber did not expect this recent occurrence to change the overall landscape. Ms. Borrus hoped that companies would not hold off adopting proxy access bylaws due to potential concerns with nominations by activist hedge funds. She pointed to traditional pension funds as the likely users, noting that most activist hedge funds are not likely to use proxy access due to the three-year ownership threshold and other restrictive provisions.

For the 2017 proxy season, Ms. Borrus also expects another influx of shareholder proposals for proxy access with continued focus on large-cap companies. In addition, some institutional investors may expand their focus to smaller and midcap companies as well, to further the notion that proxy access should not

vary based on the size of the company. Generally, she also does not expect institutional investors to push for amendments to existing proxy access bylaws unless they are out of sync with the mainstream approach (*e.g.*, 3-3-20-20).

### Independent Chair Proposals

Mr. Ganem discussed other common shareholder proposals, starting with those requesting an independent board chair, which continues to rank high among governance-related shareholder proposals. He noted Institutional Shareholder Services’ (ISS) shift in approach, which has resulted in ISS’ increased support of such proposals. However, despite such ISS support, Mr. Ganem noted that these proposals often receive low levels of support absent other governance issues at the company.

### Majority Voting in the Election of Directors

Mr. Ganem also discussed shareholder proposals calling for majority voting standards in director elections, noting the distinction between a plurality voting standard and a plurality-plus standard. He observed that almost 90 percent of S&P 500 companies have adopted a majority voting standard. Ms. Borrus provided some updates on expanding the focus from larger to smaller companies, especially with recent letter campaigns by CII and certain public pension funds targeting companies in the Russell 2000 index. She also commented on CII’s concerns with plurality-plus “policies” as distinguished from majority voting bylaws.

### Special Meeting and Written Consent Proposals

Mr. Ganem discussed proposals for shareholders to have the right to call special meetings or act by written consent, noting that as a general matter, proposals to lower an existing special meeting right with a 25 percent ownership threshold to 15 percent or 10 percent have not received majority shareholder support. He concluded that as long as a reasonable right to call a special meeting exists, proposals to reduce the percentage necessary to call a special meeting and/or adopt the right to act by written consent likely will fail to receive majority support.

### Other Noteworthy Shareholder Proposal Topics

Mr. Ganem covered other noteworthy trends, such as proposals to eliminate supermajority voting requirements, which have decreased in frequency but continue to receive strong support from shareholders. He also noted that shareholder proposals on climate change and greenhouse gas emissions are difficult to exclude from proxy statements. Another popular topic is increased transparency of corporate political activity, including reports or disclosures on a company’s policies and procedures for either making political contributions or engaging in lobbying

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activities. With respect to proposals seeking a report on a company's policies and goals to reduce any gender pay gap, Mr. Ganem observed that a number of companies have been able to convince the proponents to withdraw the proposal. Lastly, Mr. Ganem discussed proposals asking companies to adopt and issue a general payout policy that gives preference to shareholder repurchases (rather than to cash dividends) as a way to return capital to shareholders. Although the SEC staff has rejected the argument that these proposals could be excluded from proxy statements, these proposals, on average, received less than 2 percent support.

### Board Composition

Regarding board composition, Mr. Gerber noted an increasing focus on director skills, expertise and industry representation. Ms. Borrus discussed CII's best practices with respect to disclosures, noting a strong focus on quality of directors, skills, diversity and tenure issues.

Mr. Gerber also provided an overview of the SEC's recently proposed universal proxy rules.<sup>1</sup> The proposed rules would require both the company and the dissident shareholder to list all director nominees — whether nominated by the board or by

the dissident shareholder — on their proxy cards so that shareholders can vote on any combination of board and dissident nominees. Ms. Borrus said CII has been a champion of universal proxy and plans to submit comments on the proposed rules.

Mr. Gerber concluded the discussion with observations on the Business Roundtable's recent proposals to update and modernize the shareholder proposal process. Ms. Borrus expressed some concerns with the proposals. For example, the Business Roundtable proposal to change the current ownership threshold from \$2,000 worth of stock to a sliding scale ranging from 1 percent at smaller companies to 0.15 percent at larger companies would mean that a shareholder of a mega-cap company would need to own hundreds of millions of dollars' worth of stock to submit a proposal. It remains to be seen if these proposals, which could significantly reduce the number of shareholder proposals voted on at annual meetings, will have any traction in the new Congress or the SEC under a new chair.

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<sup>1</sup> A copy of our recent client alert on the proposed rules, "SEC Proposes Rule Amendments to Require Universal Proxy Cards" (October 27, 2016), is available [here](#).