



## SEC Reporting & Compliance and Corporate Governance Series Preparing for the Shareholder Proposal Season

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On November 16, 2017, Skadden held our webinar “Preparing for the Shareholder Proposal Season.” The panelists were Michael Garland, Assistant Comptroller for Corporate Governance and Responsible Investment in the Office of New York City Comptroller Scott M. Stringer; Skadden M&A and corporate governance partner Marc Gerber; and Skadden senior associate Hagen Ganem, who is a former member of the Securities and Exchange Commission’s (SEC) Shareholder Proposal Taskforce.

### Staff Legal Bulletin No. 14I

Following Mr. Gerber’s brief overview of the shareholder proposal landscape, Mr. Ganem provided a summary of the recently published Staff Legal Bulletin No. 14I (SLB 14I) from the SEC’s Division of Corporation Finance, which provides important new guidance for companies and shareholder proponents concerning shareholder proposals for the upcoming proxy season.<sup>1</sup> Mr. Ganem focused the discussion on the “ordinary business” basis for excluding proposals and the new guidance on providing the Staff with a determination by the company’s board of directors that a significant policy issue raised by the proposal lacked a sufficient nexus to the company’s business. Mr. Ganem explained that a board determination will not be necessary where it is well established that a proposal does not raise a significant policy issue and that a board determination will not bind the Staff. Mr. Ganem also explained that there is no particular board process required by the Staff. The panelists agreed that it was too early to know whether SLB 14I will have a significant impact on the no-action letter process.

### Proxy Access Shareholder Proposals

Mr. Gerber next presented observations about proxy access shareholder proposals from the 2017 proxy season. He observed that approximately 60 percent of Standard and Poor’s 500 index companies have a proxy access bylaw, but that the rapid pace of adoption slowed in 2017. Mr. Garland expressed the view that the rate of adoption seen in 2016 was unsustainable and noted that the New York City Comptroller will continue to focus on proxy access.

Mr. Gerber noted that there had been one attempt to use proxy access. In November 2016, GAMCO and Gabelli Funds nominated one person for inclusion in the proxy materials of National Fuel Gas Company. The nomination was ultimately withdrawn

<sup>1</sup> For more information, see our recent client alert on SLB 14I, “[SEC Staff Issues New Shareholder Proposals Guidance](#)” (November 6, 2017).

# Key Takeaways

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following the company's determination that GAMCO and Gabelli Funds could not satisfy a requirement in the bylaw to represent a lack of intent to "change or influence control" of the company. Mr. Garland said the situation illustrated that the safeguards intended to prevent the use of proxy access to change or influence control of the company could work as intended.

Mr. Gerber provided an overview of key terms of proxy access bylaws, which typically permit a group of up to 20 shareholders owning 3 percent of a company's shares for at least three years to nominate up to 20 percent of the board seats (often with a minimum of two board seats), referred to as 3-3-20-20 proxy access. Mr. Garland acknowledged that 3-3-20-20 proxy access bylaws have become the market standard but noted that the New York City Comptroller remains uncomfortable with an aggregation limit of 20 holders.

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 often require a minimum level of shareholder support for a candidate to be eligible for renomination the following year. Mr. Gerber said that in order to avoid so-called 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. On this item, Mr. Garland expressed a preference for a cooling-off period for the nominating shareholders rather than a provision that impacts the ability of other shareholders to utilize proxy access. Finally, Mr. Gerber described that companies 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, Mr. Garland expressed a preference for a mechanism that limits the number of access candidates but allows both contests to proceed, which would have been permitted under the SEC's version of proxy access. Mr. Garland observed that excluding the proxy access nominees in this scenario might ensure that the long-term shareholders deprived of the ability to use proxy access will support one or more dissident nominees and vote on the dissident proxy card to the detriment of the board's nominees.

Mr. Gerber next noted a trend of shareholder proposals seeking amendments to existing proxy access bylaws, with a recent focus on eliminating (rather than increasing) shareholder aggregation limits. In July 2017, the SEC staff denied no-action relief to a

company that argued that a 20-person aggregation limit substantially implemented a proposal seeking elimination of the aggregation limit. In the 2017 proxy season, no proposal to amend an existing proxy bylaw has received majority shareholder support. Mr. Garland stated that the New York City Comptroller would typically support shareholder proposals that brought proxy access terms closer to the SEC's vacated proxy access rule but generally does not submit proposals to amend existing proxy access bylaws with 3 percent ownership requirements and other provisions consistent with current market practice.

### Independent Chair, Special Meeting and Written Consent Proposals

Mr. Ganem discussed other common shareholder proposals, starting with those requesting an independent board chair, which is the most common governance-related shareholder proposal after proxy access. Mr. Ganem said none of these proposals received majority support in 2016 or 2017. Mr. Ganem then discussed proposals for shareholders to have the right to call special meetings or act by written consent, noting that proposals to lower an existing special meeting right with a 25 percent ownership threshold to 15 percent or 10 percent generally do not achieve majority support. Mr. Garland noted that the New York City Comptroller is supportive of written consent proposals even where a reasonable right to call a special meeting exists but would not typically submit a written consent proposal in those circumstances.

### Climate Change Proposals

Mr. Ganem noted that climate change shareholder proposals saw a marked increase in shareholder support in the 2017 proxy season, with average support for proposals calling for reports assessing the impact of 2-degree Celsius policies increasing to 44.4 percent of votes cast and proposals achieving majority shareholder support at three companies. One reason for the recent success of these proposals is that several large asset managers have been more willing to support these proposals, at least under certain circumstances. Mr. Garland referred to a "tipping point" on this topic, noting the substantial increase in year-over-year shareholder support, and indicated that disclosure concerning the impact of climate change would remain a focus of the New York City Comptroller.

### Other Noteworthy Shareholder Proposal Topics

Mr. Ganem covered other noteworthy shareholder proposal topics that have continued to receive strong support from shareholders, such as proposals to eliminate supermajority

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voting requirements, proposals to declassify boards of directors and proposals to implement majority voting in uncontested elections. 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 activities. With respect to gender diversity and pay equity proposals, Mr. Ganem observed that many companies have been able to convince proponents to withdraw the proposal.

### Board Composition

Regarding board composition, Mr. Gerber noted an increasing focus on boardroom gender diversity from several large asset managers. Mr. Gerber then described the New York City Comptroller's Boardroom Accountability Project 2.0 (Boardroom 2.0) campaign to make boards "more diverse, independent and climate competent." The New York City Comptroller sent letters to 151 companies that had adopted proxy access or had a majority-supported proxy access proposal in 2017, requesting that the companies publicly disclose the skills, race and gender of board members, discuss the board refreshment processes with the New York City Comptroller and use a standardized matrix to disclose certain experiences and demographic qualities of each director. Mr. Garland noted the view that many companies already utilize a version of a director skills matrix in their board succession

planning and that the Boardroom 2.0 matrix was intended to be illustrative and not prescriptive. Mr. Garland said the New York City Comptroller viewed disclosure of race/ethnicity and gender as extremely important. Finally, Mr. Garland noted that initial responses to Boardroom 2.0 have been positive and that there is no current plan for a shareholder proposal campaign comparable to the New York City Comptroller's proxy access shareholder proposal campaign.

### Other Matters

On the question of "virtual" annual shareholder meetings, Mr. Garland supported using technology to expand shareholder meeting participation but observed that "virtual only" meetings are problematic, as the New York City Comptroller believes shareholders should have the opportunity to meet boards face to face at in-person meetings.

Mr. Gerber concluded the discussion by reviewing recent proposals to reform the shareholder proposal process, including the Financial CHOICE Act, which was passed by the House of Representatives in June 2017 and would substantially increase the eligibility requirements for submission of proposals. Mr. Garland expressed concern that some aspects of the reform proposals would make it virtually impossible for many investors to file shareholder proposals.