



SEC Reporting & Compliance and Corporate Governance Series

Preparing for the Shareholder Proposal Season

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On November 14, 2019, Skadden held a webinar titled “Preparing for the Shareholder Proposal Season” with panelists Amy Borrus, Deputy Director of the Council of Institutional Investors (CII); Marc Lindsay, Senior Strategist, Investment Stewardship, The Vanguard Group, Inc. (Vanguard); and Skadden mergers and acquisitions and corporate governance partner **Marc Gerber** and counsel **Hagen Ganem**, formerly a member of the Securities and Exchange Commission’s (SEC) Shareholder Proposal Taskforce. The key takeaways from the presentation are summarized below.

SEC Proposed Rules

Following Mr. Gerber’s brief overview of the 2019 shareholder proposal season and the investor expectation that boards should be responsive to majority-supported proposals, Mr. Ganem described the recently proposed amendments to Rule 14a-8. The proposed amendments include, among other things, a new tiered-ownership requirement for eligibility to submit a proposal and increased voting support requirements for a previously submitted proposal to qualify for resubmission.¹

Ms. Borrus stated that CII is concerned that the proposed Rule 14a-8 amendments, together with the proposed amendments relating to proxy voting advice (described below), would muffle the voice of shareholders. Further, she noted that the proposed amendments were particularly prescriptive and detailed, in contrast to the principles-based approach that the SEC has employed in other rule-making contexts.

Noting that ISS has a lawsuit pending against the SEC relating to the SEC’s August 2019 guidance that proxy voting advice may be a solicitation under the proxy rules, Mr. Ganem then described the SEC’s proposed amendments relating to proxy advisory firm voting recommendations. Among other things, the proposed rules would require that proxy voting recommendations be provided to companies and certain other soliciting persons as many as seven business days in advance of publication to allow for company review and feedback.¹

Ms. Borrus stated CII’s belief that the proposed amendments are a heavy-handed solution to a problem that does not exist. She also expressed concern that the proposed rules would restrict the amount of time investors have to review and consider the proxy voting

¹ See our client alert [“SEC Proposes Amendments to the Proxy Rules Regarding Shareholder Proposals and Proxy Voting Advice”](#) (November 7, 2019).

Key Takeaways

Preparing for the Shareholder Proposal Season

advice and would increase investor costs. She also noted that the 60-day public notice and comment period seems like a short window in light of the substantial number of issues presented in the two sets of rule proposals.

Mr. Lindsay explained that Vanguard conducts its own voting analyses but uses proxy advisory firm reports as a data source. He also expressed concern that the proposed rules could increase costs and impact the timeliness of proxy advisory firm reports.

SEC Staff Announcement on Rule 14a-8 No-Action Requests and Staff Legal Bulletin No. 14K

Mr. Ganem described the September 2019 announcement from the Division of Corporation Finance stating that the Staff may respond orally (instead of in writing) to some no-action requests and, in some cases, may decline to state a view on whether a proposal may be omitted from proxy materials. He explained that the Staff has indicated that it will post to its website a chart summarizing responses to no-action letters. Mr. Ganem noted that Glass Lewis will likely recommend against governance committee members if the Staff declines to state a view on a no-action request and the company nevertheless excludes the proposal.

Mr. Ganem then reviewed Staff Legal Bulletin No. 14K (SLB 14K), in which the Staff reiterated that a board analysis can assist the Staff in analyzing certain no-action requests and provided additional insights into specific factors often included in a board analysis. Also the Staff further clarified its analysis of micromanagement arguments and urged companies to refrain from advancing hyper-technical interpretations of proof-of-ownership letters.²

Independent Chair, Special Meeting, Written Consent and Other Governance Proposals

Mr. Gerber then discussed independent chair proposals. He noted that while such proposals remain common, only one proposal out of 139 received majority support during 2016-2018, and none received majority support during the 2019 season. Mr. Gerber also noted ISS's recent update of its benchmark voting policy relating to independent chair proposals. Ms. Borrus observed that voting support for these proposals tends to increase when problems exist at a company and that some investors are becoming more critical of companies that lack an independent chair. Mr. Lindsay explained that Vanguard looks for meaningful independent board leadership, whether through a lead independent director or through an independent chair. Accordingly, Vanguard will generally vote against these proposals unless

it has concerns, including, for example, when it detects a lack of willingness by the company to engage with shareholders.

Mr. Gerber then turned to special meeting proposals, reporting that most seek to reduce the ownership threshold needed to request a special meeting. He noted that proposals seeking a 15% threshold were more likely to receive majority support than those seeking a 10% threshold. Mr. Lindsay outlined that Vanguard prefers a 25% threshold for requesting a special meeting, but may support proposals with lower thresholds when a company does not already provide shareholders with the right to call a special meeting.

Next, Mr. Gerber discussed written consent proposals, noting that Vanguard, Glass Lewis and ISS each have different standards to determine when they will vote against a written consent shareholder proposal.

Mr. Gerber then provided a brief update on other corporate governance topics, including proxy access, board declassification, the elimination of supermajority voting requirements and majority voting in uncontested director elections.

Board Composition

On the topic of board composition, including directors' skills, diversity and tenure, Mr. Gerber noted that many proposals relating to director diversity or disclosure of a director skills matrix were withdrawn. Mr. Lindsay highlighted the importance for companies to explain how a particular skill relates to the company, rather than simply noting the skills of the company's directors.

Ms. Borrus observed that the focus on diversity has broadened beyond gender. Ms. Borrus and Mr. Lindsay agreed that the pace of adding diverse directors to boards has been too slow. Mr. Lindsay noted that there has not been enough progress on the placement of women in leadership roles on boards. Mr. Lindsay elaborated on Vanguard's position regarding board diversity, stating that it creates positive outcomes for companies, and that there should also be a focus on other forms of diversity, such as race/ethnicity, age and nationality.

Next Mr. Gerber discussed the New York City Comptroller's Board Accountability Project 3.0, which asks companies to adopt a "Rooney Rule" policy mandating that the initial list of candidates considered to fill board seats or to identify a new CEO include qualified female and racially/ethnically diverse candidates.

Turning to board tenure, Mr. Lindsay agreed that investors may find it useful to look at average director tenure, the percentage of

² See our client alert "[SEC Staff Issues Additional Shareholder Proposal Guidance](#)" (October 18, 2019).

Key Takeaways

Preparing for the Shareholder Proposal Season

board members with lengthy tenure and the lapse in time since the addition of new directors to a company's board.

Mr. Lindsay then explained Vanguard's adoption in April 2019 of a director overboarding policy. Under that policy, Vanguard generally will vote against public company "named executive officers" who sit on more than one outside public company board and against other persons sitting on more than four public company boards. Mr. Lindsay noted that while the policy seems like a bright-line rule, Vanguard is willing to discuss specific circumstances with companies.

Environmental and Social Proposals and Related Developments

Mr. Gerber noted that the Business Roundtable (BRT) released a statement in August 2019 on the role of the corporation and the desire to create value for all stakeholders, not only for shareholders. He noted that CII publicly expressed concerns about the BRT statement and that the BRT had released certain clarifications. Ms. Borrus acknowledged that companies already consider a wide range of interests in making decisions and noted that the BRT statement left unanswered questions of accountability and how to manage competing views of different stakeholder groups. Mr. Lindsay reported that Vanguard's CEO had signed the BRT statement. He explained that Vanguard does not believe that long-term shareholder value is one-dimensional and that the interests of various stakeholders likely converge in the long term.

Mr. Ganem then addressed environmental and social (E&S) proposals. He observed that of the proposal topics receiving majority support in 2019, only one overlapped with the proposal topics receiving majority support the previous year. Mr. Ganem further discussed proposals relating to political spending and lobbying and those regarding climate change and other environmental matters. Mr. Lindsay described Vanguard's focus on climate change disclosure, as well as disclosure regarding the board's involvement in overseeing a company's approach to climate change. Lastly Mr. Ganem described proposals relating to various aspects of human capital management and proposals on gender pay gap reporting.

Practical Points

Mr. Ganem concluded the webinar by discussing key practical points relating to the shareholder proposal process, such as the need for companies to have procedures for forwarding incoming shareholder proposals to the appropriate personnel, to retain envelopes and shipping labels to document the date of proposal submission and to ensure the timely review of proposals for procedural deficiencies. Finally, he reminded companies of their obligation to send opposition statements to proponents and of the related deadline.