



SEC Reporting & Compliance and Corporate Governance Series

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Preparing for the Shareholder Proposal Season

On November 19, 2020, Skadden held a webinar titled “Preparing for the Shareholder Proposal Season.” The panelists were **Gianna McCarthy**, Director of Corporate Governance for the New York State Common Retirement Fund (NYS Fund), and Skadden M&A and corporate governance partner **Marc Gerber** and counsel **Hagen Ganem**, who is a former member of the Securities and Exchange Commission’s (SEC) Shareholder Proposal Taskforce. The key takeaways from the presentation are summarized below.

Board Diversity and Other Board Composition Matters

After providing a brief overview of the 2020 shareholder proposal season, Mr. Gerber started the conversation with an overview of board composition matters, including director skills and experiences, diversity, tenure and overboarding.

On board diversity, Mr. Gerber explained that heading into the 2020 proxy season, much of the focus was on gender diversity but with an emerging focus on racial and ethnic diversity. Mr. Gerber cited as an example the New York City Comptroller’s campaign asking companies to adopt a “Rooney Rule” policy mandating that the initial list of candidates considered to fill board seats or to hire a new CEO include qualified female and racially/ethnically diverse candidates, even when the board currently comprises diverse directors.

Discussing the NYS Fund’s voting policies for either all-male boards or boards with only one woman director, Ms. McCarthy noted that the NYS Fund has advocated for board diversity for over a decade and now uses its voting power in director elections to move this effort forward. She stated her expectation that more public pension funds will follow this path.

Mr. Gerber observed that heading into the 2021 shareholder proposal season, there are a number of investor letter-writing campaigns relating to racial and ethnic diversity of boards of directors, management teams and companies’ overall workforces. The NYS Fund, for example, sent letters to portfolio companies soliciting disclosures regarding their current status and future plans on board diversity. Ms. McCarthy identified a lack of diversity data on board members as one significant challenge associated with investors’ advocacy for racial and ethnic diversity. Ms. McCarthy noted that the NYS Fund will closely monitor companies that did not respond with robust disclosures or failed to respond at all.

Key Takeaways

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Mr. Gerber referenced other, similar investor efforts relating to racial and ethnic board diversity, including letters from State Street Global Advisors, Legal & General Investment Management, Trillium Asset Management and an investor coalition known as the Russell 3000 Board Diversity Disclosure Initiative. He further noted that ISS will be flagging boards that appear to lack racial or ethnic diversity and, beginning in 2022, will recommend against nominating committee chairs of those companies continuing to lack racially or ethnically diverse directors.

Mr. Gerber then discussed the recently adopted California law requiring public companies headquartered in California to have at least one director from an “underrepresented community” by the end of 2021, questioning the necessity of such law given that investors already are moving companies in that direction. Ms. McCarthy opined that the law is a positive development because it sets a concrete deadline for companies to take action.

On board tenure, Mr. Gerber observed some investors’ concern that long board tenure could be a roadblock to diversifying the board and described ISS’ policy update, which shifted from recommending against term limit shareholder proposals to considering them on a case-by-case basis. Ms. McCarthy agreed that board tenure is a difficult issue as there can be various considerations but also noted that the NYS Fund does look closely at director tenure if a company experiences poor performance.

Shifting to director overboarding, Mr. Gerber noted that, according to Glass Lewis, 69% of directors at Russell 3000 companies sit on a single public company board and only 3% serve on four or more boards. He then observed that the new focus may become the number of boards on which board leaders serve. For example, State Street adopted a new policy at the beginning of the 2020 proxy season that set a different overboarding standard for directors who serve as board chairs or lead independent directors. Ms. McCarthy echoed a similar focus at the NYS Fund, which votes against CEOs that serve on more than one outside board or independent directors that are overcommitted by virtue of number of boards or leadership roles on those boards.

Workforce and Other Environmental & Social Proposals

Mr. Gerber moved the conversation to board oversight of environmental, social and corporate governance (ESG), observing that the COVID-19 pandemic and calls for racial justice have sharpened corporations’ focus on stakeholders such as their employees, customers and communities. Noting that one year had passed since the Business Roundtable’s Statement on the Purpose of a Corporation, which reflected a commitment to deliver value to all of the corporations’ stakeholders, Ms.

McCarthy noted that for long-term investors there was no tension between a corporation’s consideration of all stakeholders versus considering only investors’ interests.

Mr. Ganem then discussed environmental and social (E&S) proposals, which for 2020 again represented a majority of all shareholder proposals submitted. He noted that a record 21 E&S proposals received majority support to date in 2020, including two proposals seeking a report on material human capital risks and opportunities utilizing metrics and guidelines of the applicable Sustainability Accounting Standards Board (SASB) provisions, two proposals seeking a report on diversity and inclusion efforts, and a proposal seeking a report on the use of contractual provisions requiring employees to arbitrate employment-related claims. On the last proposal, which was submitted by the NYS Fund, Ms. McCarthy expressed the view that companies should be required to disclose employment-related claims because the information can be important to investors.

Mr. Ganem turned the discussion to current initiatives seeking workforce diversity disclosure, noting that the New York City Comptroller had asked 67 S&P 100 companies that had issued statements in support of racial equality and/or affirmed support for diversity and inclusion to disclose their EEO-1 reports (which are filed with the Equal Employment Opportunity Commission and provide certain diversity statistics regarding the company’s workforce) and reported that 34 of the 67 companies had committed to doing so. Mr. Ganem observed that the NYS Fund is among the investors calling for disclosure of workforce diversity data, and Ms. McCarthy noted that the NYS Fund seeks this disclosure for three reasons: (i) companies already compile this data to submit the EEO-1 reports, (ii) investors believe they can rely on the data as it is filed with the government, and (iii) the data is comparable across industries and companies. She indicated that the NYS Fund seeks disclosure of the last three EEO-1 reports and expressed her belief that there will be a significant increase in shareholder proposals seeking disclosure of EEO-1 data and investor support for those proposals.

Mr. Ganem then turned to climate change and environmental shareholder proposals. He noted that investors, including BlackRock and Vanguard, are expecting more robust disclosures on climate risk using standardized frameworks such as SASB and Task Force on Climate-related Financial Disclosures (TCFD). Mr. Ganem added that various stakeholders and other bodies are recognizing the risks to companies presented by climate change, such as the Business Roundtable and the U.K.’s Joint Government-Regulator TCFD Taskforce. Ms. McCarthy described the NYS Fund’s focus on whether directors are adequately addressing climate risk.

Key Takeaways

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Mr. Ganem then discussed political spending and lobbying proposals as well as other noteworthy E&S proposal topics. Ms. McCarthy observed that some companies may receive proposals requesting board oversight of workforce equity issues, including matters such as employment discrimination, gender pay gap and senior executive pay ratio, rather than proposals addressing individual topics within this larger category.

Governance Proposals

Mr. Gerber provided a brief update on governance proposals. He reported that independent chair proposals typically receive majority support only where there are other investor concerns at a company. On special meeting rights proposals, Mr. Gerber noted that most proposals were to reduce the ownership threshold for an existing right to call a special meeting. Mr. Gerber turned to written consent proposals and described new proposals in 2020 seeking to reduce the ownership level required to request that the board set a record date for shareholders to act by written consent. Ms. McCarthy commented that the NYS Fund supports both special meeting and written consent rights.

SEC Update

Mr. Ganem described recent developments in board analyses submitted to SEC staff as part of no-action requests seeking exclusion of shareholder proposals on ordinary business and relevance grounds. He explained that for the 2018 and 2019 proxy seasons, no-action requests containing a board analysis generally were unsuccessful, with just one exclusion each year on relevance grounds and none relating to ordinary business. Mr. Ganem reported that the 2020 season saw the first successful use of a board analysis under ordinary business (at three companies seeking to exclude the same proposal), two more successful uses of a board analysis under the relevance basis for exclusion and a successful substantial implementation argument using a board analysis.

Next, Mr. Ganem summarized recent amendments to Rule 14a-8, the shareholder proposal rule.¹ He noted that the amendments apply to shareholder proposals submitted for annual or special

meetings to be held on or after January 1, 2022. Mr. Ganem then reviewed rule amendments relating to proxy advisory firms that also would not be in effect for the upcoming proxy season.²

Practical Points

Mr. Ganem discussed key practical points relating to the shareholder proposal process, such as the need for companies to ensure incoming shareholder proposals are forwarded to the appropriate personnel, retain envelopes and shipping labels to document the date of proposal submission, and ensure the timely review of proposals for procedural deficiencies. He also reminded companies of their obligation to send opposition statements to proponents no later than 30 days prior to filing definitive proxy statement.

Mr. Gerber commented that, unlike in 2020 where companies had only a few weeks to shift to virtual shareholder meetings, companies should plan ahead for virtual shareholder meetings in 2021. This entails engaging with investors, incorporating feedback and working with service providers. Ms. McCarthy described the NYS Fund's acceptance of virtual-only meetings during the pandemic and expectation that companies will conduct in-person or hybrid meetings once the pandemic subsides. She further noted that investors need more transparency in virtual meetings, such as the ability to see questions coming in from other shareholders and the degree to which investors can observe the participants in the meeting.

Additional ISS Updates

Mr. Gerber concluded the webinar by describing recent updates on ISS voting policies. Among others, he noted that ISS will recommend in favor of federal forum selection provisions for Securities Act claims so long as the provision is for federal courts generally and not any particular federal district court. Ms. McCarthy described the NYS Fund's policy to vote against bylaw amendments that would limit shareholders' forum selection or choice between litigation and arbitration.

¹ See our client alert "[SEC Adopts Amendments to Shareholder Proposal Rules](#)" (September 25, 2020).

² See our client alert "[SEC Adopts Proxy Rule Amendments Relating to Proxy Voting Advice Businesses](#)" (July 27, 2020).