



Preparing for the Shareholder Proposal Season

Posted by Marc Gerber, Skadden, Arps, Slate, Meagher & Flom LLP, on Friday, January 14, 2022

Editor's note: Marc Gerber is partner at Skadden, Arps, Slate, Meagher & Flom LLP. This post is based on his Skadden memorandum.

On November 16, 2021, Skadden held a webinar titled “Preparing for the Shareholder Proposal Season.” The panelists were Gianna McCarthy, Director of Corporate Governance for the Office of the New York State Comptroller (New York State Comptroller); Jessica McDougall, Director, BlackRock Investment Stewardship (BlackRock); and Skadden M&A and corporate governance partner Marc Gerber. The key takeaways from the presentation are summarized below.

Overview of 2021 Proxy Season

Mr. Gerber provided a brief overview of the 2021 shareholder proposal season, in particular noting the increase in support this year for environmental and social (E&S) proposals. Ms. McDougall noted that BlackRock had revised its approach to shareholder proposals starting in 2021 and will more likely support proposals if it believes that management could better manage, disclose or otherwise accelerate its progress in addressing a material issue. Ms. McCarthy then noted that the New York State Comptroller’s support for shareholder proposals and for directors in 2021 remained fairly constant with the prior year, although she believes that investors will be more likely to vote against directors in the upcoming proxy season when there are diversity or environmental concerns.

SEC Guidance and Rule Amendments

Mr. Gerber summarized the amendments to Rule 14a-8 of the Securities Exchange Act of 1934, as amended, which were adopted by the Securities and Exchange Commission (SEC) in September 2020, noting that they will be effective for annual meetings held in 2022.

He also described recent guidance by the staff of the SEC (staff) in Staff Legal Bulletin No. 14L that rescinds certain shareholder proposal-related staff guidance issued in 2017, 2018 and 2019. Among other things, Mr. Gerber explained, the staff is no longer seeking board analyses and will now take a more measured approach to micromanagement arguments.

Board Diversity and Other Board Composition Matters

Turning to board diversity, Mr. Gerber provided an overview of matters investors typically consider regarding board composition. Ms. McCarthy noted that the New York State Comptroller’s recent engagements with companies regarding director diversity have been productive, with many companies adding diverse directors. She also noted that the New York

State Comptroller is focused on company disclosure regarding LGBTQ diversity and whether companies have disclosed adoption of a Rooney Rule policy.

Mr. Gerber noted that the vast majority of board diversity proposals were withdrawn during the 2021 proxy season, but such proposals that went to a vote at noncontrolled companies received average support of 82.4% of votes cast. He also briefly summarized ISS, Glass Lewis and other policies on board diversity.

Next, Ms. McDougall described BlackRock's approach to board diversity. As noted in its 2021 proxy voting policy, in addition to other elements of diversity, BlackRock encourages companies to have at least two women directors on their boards. Ms. McDougall also observed that, despite the often slow pace of change regarding corporate governance matters, there has been significant progress regarding gender diversity. As of June 2021, all the companies in the S&P 500 had at least one woman director. Ms. McCarthy noted that the New York State Comptroller looks for at least two women directors on company boards and that it is considering expanding that policy to encompass a broader set of characteristics. Mr. Gerber provided an overview of Nasdaq's recently adopted director diversity rules.

Director Tenure and Overboarding

Mr. Gerber then moved the conversation to director tenure. Ms. McCarthy stated that the New York State Comptroller focuses on director tenure at underperforming companies but is not in favor of a mandatory retirement age, and that if a company is performing well it may not be advantageous to make changes to the board. Regarding BlackRock's voting guidelines, Ms. McDougall stated that BlackRock prefers for companies to have a mix of director tenures. She also noted, however, that some sectors have been struggling with slow director turnover, which is often combined with low director diversity, and that BlackRock continues to engage with companies that are not progressing on these matters.

Regarding director overboarding, Mr. Gerber noted that fewer directors are serving on multiple boards, and many investor policies limit directors that are not public company executives to no more than four boards, and public company executives to their own board and one other board. Ms. McCarthy noted that the New York State Comptroller's overboarding position is evolving and is increasingly focused on the board roles held by a director (*e.g.*, lead independent director or committee chair) and on private company board service, which can still place significant demands on directors' time.

Environmental and Social Proposals

Mr. Gerber discussed E&S proposals during the 2021 proxy season, noting that a common proposal related to disclosure of companies' Equal Employment Information Report (EEO 1) data and that such proposals received significant investor support. Ms. McDougall noted that BlackRock is generally supportive of such proposals, and Ms. McCarthy stated that the New York State Comptroller is typically in favor of the proposals as a means of providing reliable diversity data. Ms. McCarthy also stated that the New York State Comptroller may vote against directors at companies that do not disclose EEO 1 data.

Next, Mr. Gerber described a new racial equity audit proposal, which requests that companies analyze their effectiveness at combatting systemic racism, and noted that the proposal received significant investor support for a first-time proposal. Ms. McCarthy noted that the New York State Comptroller supports such proposals and filed one that received 44% of votes cast.

Mr. Gerber turned to climate change proposals. Ms. McDougall described BlackRock's priorities regarding climate change, stating that BlackRock seeks for companies to explain how they are considering climate risks and opportunities and the transition to a low-carbon economy, including impacts on the companies' outlooks. She also explained that BlackRock is focused on companies that have the most material climate risk, and in particular how those companies are setting short-, medium- and long-term GHG reduction targets. Regarding "say-on-climate" shareholder proposals, Ms. McDougall noted that some of the proposals received management support and that BlackRock had supported some of them. Ms. McCarthy observed that due to the New York State Comptroller's concerns that say-on-pay voting has not had a sufficient impact on executive compensation levels, the New York State Comptroller has been abstaining from voting on say-on-climate proposals.

Political Spending/Lobbying

Mr. Gerber discussed political spending and lobbying proposals, noting that in light of the January 6, 2021, attack on the U.S. Capitol, there may be an increase this coming proxy season in these types of proposals. Ms. McCarthy explained that the New York State Comptroller recently sent a letter to certain companies that it views as providing insufficient disclosure regarding political contributions and expenditures. The letters requested that the companies provide the types of disclosure sought by the Center for Political Accountability, and Ms. McCarthy noted that the underlying objective of the initiative is for corporate political giving to be aligned with the companies' stated values and business strategies.

Corporate Governance and Other Matters

Mr. Gerber presented an overview regarding corporate governance shareholder proposals. He noted that most special meeting proposals during the 2021 season related to lowering an ownership threshold for an existing special meeting right and that support for the proposals was mixed. He also stated that written consent proposals were the most common governance proposal topic in 2021.

Mr. Gerber discussed key practical points relating to the shareholder proposal process, such as the need for companies to have effective procedures in place for forwarding incoming shareholder proposals to appropriate personnel—especially given the increase in remote working—to ensure the timely review of proposals for procedural deficiencies.

Turning to the increase in virtual annual meetings due to the COVID-19 pandemic, Ms. McCarthy stated that the New York State Comptroller is in favor of companies holding hybrid meetings, in which shareholders have the option of attending the meeting virtually or in person. She also explained that the New York State Comptroller remains focused on whether there is sufficient disclosure in company proxy statements regarding the ability of shareholders to participate in annual meetings, such as how shareholders may ask questions.

Ms. McDougall then provided a summary of a new BlackRock policy to give institutional investors invested in index strategies through separate accounts globally or certain pooled funds in the U.S. and UK more choice in how their shares are voted. Ms. McDougall explained that investors may be able to vote through their own voting infrastructure, direct how BlackRock votes their shares, choose among a slate of third-party voting options or have BlackRock's stewardship team continue to vote their shares.