Skadden

SEC Reporting & Compliance and Corporate Governance Series

Preparing for the Shareholder Proposal Season

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On November 13, 2018, Skadden held our webinar "Preparing for the Shareholder Proposal Season." The panelists were Peter da Silva Vint, Vice President of BlackRock's Americas Investment Stewardship Group; 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 counsel Hagen Ganem, who is a former member of the Securities and Exchange Commission's (SEC) Shareholder Proposal Taskforce.

Staff Legal Bulletins No. 14I and No. 14J

Following Mr. Gerber's brief overview of the shareholder proposal landscape, Mr. Ganem summarized last year's Staff Legal Bulletin No. 14I (SLB 14I) from the Division of Corporation Finance (Staff) of the SEC. In SLB 14I, the Staff invited companies, in the context of "ordinary business" and "relevance" no-action requests, to include a discussion that reflects the board's analysis of the proposal's significance and nexus to a company's business. Mr. Ganem observed that no companies including a discussion of the board's analysis in their no-action request were successful in obtaining no-action relief under ordinary business grounds and only one of those companies obtained no-action relief under relevance grounds. Mr. Ganem also explained that despite SLB 14I requesting details of specific board processes, the Staff subsequently has indicated that companies should include a description of the board's substantive analysis.

Mr. Ganem then described the recently published Staff Legal Bulletin No. 14J (SLB 14J), which reiterated that a well-developed discussion of a board's analysis can be helpful in the Staff's analysis of no-action requests and contained a nonexclusive list of substantive factors that the board might consider including in its analysis.[1] He explained that the Staff confirmed that a board analysis is not always required and that the inclusion or absence of a board analysis does not create any presumption for or against no-action relief.

Mr. Ganem observed that SLB 14J also addressed the micromanagement prong of the ordinary business exclusion, which analyzes whether a proposal probes too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgement. Mr. Ganem noted the increase in no-action requests granted on this basis in 2018. Mr. Ganem concluded the discussion on SLB 14J

[1] For more information, see our recent client alert on SLB 14J, "SEC Staff Issues Shareholder Proposal Guidance" (October 24, 2018).

by noting the Staff's guidance on proposals that address senior executive and/or director compensation that also raise ordinary business matters, address aspects of compensation available to the workforce generally or micromanage compensation.

Special Meeting Proposals and Ratification

Mr. Gerber next presented observations about special meeting shareholder proposals from the 2018 proxy season. He noted that special meeting shareholder proposals more than doubled from the prior year and were the most common governance proposal topic in 2018. Mr. Gerber contrasted voting support levels on proposals calling for a new special meeting right versus those that sought changes to an existing special meeting right. Mr. da Silva Vint indicated that BlackRock is supportive of special meeting rights so long as the required ownership threshold is reasonable and not too low. Mr. Garland indicated the New York City Pension Funds' preference for a 10 percent ownership threshold.

Mr. Gerber then stated that some companies had received no-action letters to exclude shareholder proposals seeking to reduce the ownership threshold required to call a special meeting on the basis of the conflict with a company proposal seeking ratification of a company's existing special meeting right. Mr. Gerber observed that while the ratification votes all received majority support, there was a marked increase in negative voting for the governance committee chairs of these companies. Mr. Gerber then highlighted the new Glass Lewis voting policy that if a company excludes a shareholder proposal to amend an existing special meeting right by seeking ratification of an existing right, Glass Lewis will recommend against the members of the company's governance committee. Moreover, Glass Lewis indicated that it would apply the same approach in any instance where it believes a shareholder proposal was excluded to the detriment of shareholders. Mr. Garland indicated that the New York City Pension Funds had adopted a similar policy and that this position was based on a view that companies should act in good faith and not "game the system."

Proxy Access, Independent Chair and Other Governance Shareholder Proposals

Mr. Gerber next presented observations about proxy access shareholder proposals from the 2018 proxy season. He observed that approximately 70 percent of S&P 500 companies have a proxy access bylaw. Mr. Gerber contrasted voting results for proposals to adopt proxy access versus proposals to amend an existing proxy access right. Mr. Garland expressed the view that the New York City Comptroller will continue to focus on proxy access and make it a priority. Mr. da Silva Vint also confirmed that BlackRock is supportive of proxy access.

Regarding independent chair proposals, Mr. Gerber noted that this proposal was the second most common governance proposal topic in 2018 but that proposals only rarely achieve majority support. Mr. da Silva Vint expressed that BlackRock generally finds having a lead independent director as an acceptable approach, whereas Mr. Garland expressed the view that a lead independent director is not an adequate substitute for an independent chair. Mr. Gerber noted that governance proposal topics such as the elimination of supermajority voting requirements, board declassification and majority voting standards in uncontested director elections continued to receive very high levels of shareholder support.

Board Composition

Mr. Gerber moved the conversation to board composition, where he noted four major issues of investor focus: director diversity, director skills and experience, director tenure and the disclosure around these issues. Mr. Gerber then observed that most shareholder proposals regarding director diversity are withdrawn after the company engages with the proponent.

Mr. Gerber next described California's recently adopted law that requires public companies with principal executive offices in California to have at least one woman board member by December 31, 2019, and at least three women board members by the end of 2021. Mr. da Silva Vint observed that BlackRock's focus on board diversity reflects the research that diversity leads to better decisions, which in turn can drive long-term shareholder value. He also noted BlackRock's policy that boards have at least two women directors to avoid concerns over tokenism. Mr. Garland asserted that the pace of change has been too slow, creating frustration among investors. Mr. Garland indicated that boards putting forward nondiverse slates of nominees when filling board vacancies will be held accountable by their investors.

Mr. Gerber next discussed the New York City Comptroller's Boardroom Accountability Project 2.0 campaign, which seeks to make boards "more diverse, independent and climate competent" and to include disclosure of a board skills matrix. Mr. Garland explained that the New York City Comptroller is looking for the ability to better assess boards, including the diversity and skills of board members. The New York City Comptroller published a status report in June 2018 reflecting that some companies have been responsive to these efforts. Mr. da Silva Vint noted that these topics are often addressed in the context of BlackRock's engagement with portfolio companies. Mr. Garland confirmed that the New York City Comptroller is likely to submit additional shareholder proposals relating to these matters.

Environmental and Social Proposals

Mr. Ganem next observed that environmental and social (E&S) issues represented approximately 54 percent of all shareholder proposals in 2018 and that the median support reached a record high of approximately 23 percent. Mr. Ganem noted that climate change remains the most common E&S topic, with average support of approximately 32 percent. Mr. da Silva Vint commented that long-term shareholders want to know how companies think about climate change and its impact on their business from a regulatory perspective, regardless of whether the company believes in the science behind climate change. Mr. Garland expressed similar views and stated that the New York City Comptroller is focused on both climate change risk and the disclosures companies provide to investors on how they manage the risk.

Mr. Ganem then discussed gender pay proposals, noting many of these proposals are withdrawn following company-proponent engagement. Where the proposal went to a vote, the average support was approximately 17 percent. Mr. Garland noted that the New York City Comptroller has been a proponent of a number of gender pay proposals and that negotiating the withdrawal of these proposals has been particularly rewarding. Mr. da Silva Vint noted BlackRock's continuing focus on many aspects of human capital management.

Mr. Ganem concluded the conversation by addressing other noteworthy E&S shareholder proposal topics, such as corporate political contributions, lobbying expenditures and employment diversity. Mr. Ganem also highlighted proposals relating to the opioid crisis and gun safety measures.

Practical Points and Other Matters

Mr. Ganem next discussed key practical points relating to the shareholder proposal process, such as the need to retain envelopes to establish the date of submission of a proposal and the need to timely review proposals for procedural deficiencies.

Mr. Ganem then observed that approximately 200 companies held virtual-only annual meetings in 2018. Mr. Garland expressed the view that any shareholder, no matter how many shares they own, should be allowed to attend an in-person annual meeting in person and be able to engage directly with directors. Mr. da Silva Vint noted that BlackRock agrees with Glass Lewis's view that shareholders should have the opportunity in a virtual-only annual meeting to exercise the same rights as if they attended an in-person meeting.