Key Takeaways

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Preparing for the 2023 Shareholder Proposal Season

On November 15, 2022, Skadden held a webinar titled "Preparing for the 2023 Shareholder Proposal Season." The panelists were Gianna McCarthy, Director of Corporate Governance for the New York State Common Retirement Fund (NYS CRF); Jessica McDougall, Director of BlackRock Investment Stewardship (BlackRock); and Skadden partner Marc Gerber and counsel Ryan Adams. The key takeaways from the presentation are summarized below.

Overview of 2022 Proxy Season

Mr. Gerber provided a brief overview of the 2022 shareholder proposal season, noting that fewer environmental and social (E&S) proposals garnered majority support compared to the 2021 season despite a meaningful increase in the number of proposals going to a vote. Mr. Gerber also observed that while the overall number of proposals increased, average voting support had declined from the prior year.

SEC Matters

Mr. Adams discussed the impact of recent SEC actions on the 2022 shareholder proposal season. In particular, recent amendments to Rule 14a-8 of the Securities Exchange Act of 1934, as amended (the Exchange Act), took effect for the 2022 proxy season, but did not have a significant impact on no-action letter results. Mr. Adams also summarized proposed amendments to Rule 14a-8, which he said, if adopted, could increase the number of shareholder proposals received by companies and make it more difficult to exclude future shareholder proposals.

Next, Mr. Adams described how the SEC staff's guidance in Staff Legal Bulletin No. 14L (SLB 14L) affected the 2022 proxy season. He explained that that SLB 14L rescinded previous shareholder proposal-related staff guidance and resulted in fewer shareholder proposals being excluded. Notably, Mr. Adams observed that in the 2022 proxy season, the staff granted no-action relief in only about 41% of cases compared to 70% in the prior year and that the staff overturned both recent and long-standing no-action letter precedent.

Board Diversity and Other Board Composition Matters

Turning to board diversity, Mr. Gerber provided an overview of matters investors typically consider regarding board composition, including a focus on gender and racial/ethnic diversity. He noted that among S&P 500 companies providing disclosure regarding director racial/ethnic diversity, approximately 40% did so on a director-by-director basis, and approximately 60% disclosed that information on an aggregated basis. Ms. McCarthy noted that NYS CRF has a strong preference for director-by-director diversity disclosure. In contrast, Ms. McDougall stated that BlackRock has accepted director diversity disclosure on an aggregated basis.

Mr. Gerber noted that most shareholder proposals relating to disclosure of a director skills matrix, including self-identified director gender and race/ethnicity, were withdrawn during the 2022 proxy season, and that a number of proposals that tied board diversity goals to U.S. population demographics received average support in the teens. Ms. McCarthy stated that having board demographics in line with broader population demographics remained a long-term goal. Ms. McDougall described BlackRock's approach to board diversity, which is that boards should aim for at least 30% diversity of membership, including at least two female directors and at least one director from an underrepresented group. Ms. McDougall noted that BlackRock believes that diverse directors in leadership positions is important to promoting broader diversity on boards. Ms. McCarthy noted that the NYS CRF's policy is to vote against incumbent board nominees when there are no women or members of underrepresented groups on the board, and against incumbent nominating and corporate governance committee members when there is only one woman or only one member of an underrepresented group on the board. Ms. McCarthy observed that data regarding diverse board leadership is somewhat unclear and that the NYS CRF is awaiting better data before considering voting policies based on diversity in board leadership roles.

Mr. Gerber next provided an overview of the SEC's recently adopted rule on universal proxy cards, observing that companies should consider how to most effectively convey the skills and value that each director brings to the boardroom. Both Ms. McCarthy and Ms. McDougall indicated that the new rule would not likely impact their respective approaches to analyzing contested director elections.

Mr. Gerber turned to the SEC's pending rule proposals relating to climate change and cybersecurity, including the requirement that companies identify any directors with climate change or cybersecurity expertise. Ms. McCarthy noted that the NYS CRF believes that the disclosure of climate change or cybersecurity expertise would provide useful information to investors when evaluating a company's board. Ms. McDougall stated that while BlackRock believes the disclosure of cybersecurity and climate change skillsets may be important, BlackRock continues to focus on the most relevant director skillsets at individual companies.

Mr. Gerber briefly touched on director tenure and overboarding, noting that overboarding has become less of an issue at S&P 500 companies. He also highlighted State Street's policy of considering board chairs or lead independent directors overboarded if serving on more than three public company boards.

Environmental and Social Proposals and Developments

Mr. Gerber provided an overview of the environmental, social and governance (ESG) landscape, noting the increasing politicization of the topic and growing backlash against ESG. Mr. Adams discussed specific E&S proposal topics during the 2022 proxy season. He noted that racial equity/civil rights audit proposals continued to be popular in 2022, with both the number of proposals and average support increasing compared to 2021. Mr. Adams also briefly summarized how Institutional Shareholder Services (ISS), Glass Lewis and Vanguard approached these proposals in 2022. Ms. McDougall noted that BlackRock analyzed racial equity/civil rights audit proposals on a case-by-case basis, supporting those proposals that it believed would be beneficial to shareholders, and not supporting others.

Mr. Adams also described common workforce-related proposals, including those requesting a report on the use of concealment clauses — arbitration, non-disclosure and non-disparagement agreements that potentially limit an employee's ability to discuss workplace harassment and discrimination. He noted that these proposals received significant investor support in 2022. Ms. McCarthy stated that the NYS CRF supported those proposals and was a proponent for several of them. Ms. McDougall noted that human capital management has been one of BlackRock's engagement priorities for a number of years.

Mr. Adams then turned to climate change proposals. Ms. McDougall described BlackRock's priorities regarding climate change, stating that BlackRock is looking for companies to explain how they are considering climate risks and opportunities and the transition to a low-carbon economy. 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. Ms. McCarthy observed that the NYS CRF tends to vote in favor of many climate-related proposals and expects robust board oversight of climate change matters.

Corporate Governance and Other Matters

Mr. Gerber presented an overview regarding corporate governance-focused shareholder proposals. He noted that special meeting rights were the most common governance proposal topic in 2022, and that written consent proposals, which were the most common governance proposal topic in 2021, fell dramatically in 2022. He observed that proposals requesting an independent board chair remained the second-most common governance proposal topic in 2022, but rarely receive majority support.

Mr. Gerber next discussed executive compensation-related proposals. He noted that the most common proposal requested adoption of a policy that the board of directors seek shareholder approval of any senior manager's new or renewed pay package that provides for severance or termination payments — including the vesting of equity awards — in excess of 2.99 times the person's salary and bonus. Ms. McCarthy stated that the NYS CRF is generally supportive of these proposals. On the other hand, Ms. McDougall observed that BlackRock generally did not support these proposals and had particular concerns with the approach to vesting of equity awards reflected in these proposals.

Turning to proxy advisory firm updates, Mr. Gerber noted that in response to recent Delaware law amendments permitting companies to include officer exculpation provisions in their certificates of incorporation, ISS had proposed a policy that would generally support such provisions (following the date of the webinar, ISS adopted a policy to consider these amendments on a case-by-case basis). Ms. McCarthy stated that the NYS CRF generally does not support these provisions. Ms. McDougall indicated that BlackRock has not formulated a formal voting policy on this topic.

Lastly, Mr. Gerber noted recent developments regarding BlackRock's Voting Choice program, including that eligible BlackRock clients would be able to select from one of seven Glass Lewis proxy voting policies in addition to the seven ISS voting policies already available to them. Ms. McDougall explained that BlackRock is committed to expanding how its clients can express their votes as the ultimate owners of the shares underlying their investments.