[Blogs]
June 11, 2021
Public Chatter

12 Surprising Developments This Proxy Season

This proxy season did not disappoint in the surprising department. Here are a dozen notable things to be aware of:

1. **High Profile Proxy Fight**

- - A **small activist fund**– with merely a 0.02% ownership stake – won three director seats in a proxy fight at ExxonMobil.
  - BlackRock and Vanguard each supported at least two of Engine No. 1's four director nominees.
  - Although this is only one company and one proxy fight, it appears to be part of a larger trend toward activism by funds focused on sustainability.

2. **Support for Climate Shareholder Proposals Way Up**

- - Results so far show that support for climate proposals is way up this season.
  - For example, one shareholder proposal at a company seeking an annual report on plastic waste garnered increased support to the tune of 6% to 81% from 2019 to this year.
  - Climate lobbying proposals – regarding whether a company's lobbying activities are aligned with the Paris Agreement – are averaging 61% of votes cast this season, up 17% from last season where it averaged 44%, according to Proxy Analytics. Last year, these proposals averaged 44% support.

3. **Summary ESG Report - ESG Disclosures During Proxy Season**

- - Prudential Financial posted an **ESG Summary Report** on their website on the same day that Pru filed its proxy statement.
  - Some of the information in the 18-page summary is also contained in **Pru's proxy**. The summary report was not filed with the SEC.
  - This enabled Prudential to have a host of ESG metrics available to shareholders to consider during proxy season because Pru, like many companies, doesn't issue its full-blown ESG report until after its annual meeting.

4. **Human Capital Quantitative Metrics Not Typically Found in 10-Ks**

- - The SEC's new business section requirements, which became effective only in November 2020, included human capital management as a potential topic for disclosure.
  - For companies preparing Form 10-Ks, time was relatively short to prepare an entirely new disclosure topic, but many engaged in significant efforts with their human resources teams and considered how HCM was already addressed – in reports to the board or in sustainability or other ESG reporting – to prepare robust disclosures on HCM topics the company focuses on in managing its business.
  - Unsurprisingly, early surveys are showing significant increases in HCM disclosures:
    - This **Equilar study** found that the median character count was up 9x.
    - **PwC's survey** found that 89% of SEC filings included both qualitative and quantitative metrics.

        - But **Intelligize's survey** says quantitative disclosures are fairly rare in those filings.
    - We are likely to see more change next year as companies have more time to prepare and consider if there are key metrics that are material to the company and can be provided from year to year on a consistent basis.
    - In addition, SEC Chair Gary Gensler reportedly said in a recent speech that the SEC plans to propose additional HCM disclosure requirements.

5. **Corp Fin Reconsidering Proxy Advisor Rule Amendments and Guidance**

- - The SEC's Division of Corporation Finance **announced** that it will not recommend enforcement action against proxy advisers based on rule amendments adopted by the SEC in 2020 (which we have **summarized before**) and interpretive advice issued in 2019.
  - The 2020 rule amendments are currently in a transition period, and proxy advisers were not required to comply until December 1, 2021. Once effective, the rules would require, among other things, that proxy advisers provide all companies, without charge, a copy of the advisor's report relating to annual shareholder meetings at or prior to the time it is initially provided to the proxy adviser's clients.
  - Corp Fin is considering whether to recommend revisions to the rule amendments and related interpretive guidance.
  - A key issue is the SEC's previously espoused view, codified in the rule amendments, that proxy solicitations include the type of proxy voting advice furnished by proxy advisory firms. The 2020 rule amendments were already subject to litigation challenging this view.

6. **"Say-on-Climate" Management Proposals Earn Wide Support**

- - At least two U.S. companies included management-sponsored "Say-on-Climate Plan" proposals on their annual meeting ballot.
  - The companies had received shareholder proposals seeking "Say-on-Climate" disclosures and votes.
  - Both companies that included the management proposals were already making robust SASB and TCFD-aligned disclosures, including Scope 1, Scope 2 and Scope 3 GHG The proposal won broad support at both companies, passing with the approval of over 93% and over 99% of the required vote, respectively.
  - A small number of companies in Europe have say-on-climate on their ballots this year. Climate Action 100+ is pushing companies to do this – that investor coalition represents $52 trillion in assets, with over 500 investors as members.

7. **Beware the "Greenwashed" Climate Shareholder Proposal**

- - Some shareholder proponents are submitting proposals claiming to seek solutions to climate change – but they really are asking the company not to take any climate change action.
  - Companies should consider warning other shareholders about the true nature of this type of proposal – so that it doesn't garner support just because it's labeled as a "climate" proposal.
  - Rule 14a-8 doesn't require companies to identify who a proponent is in their proxies – but doesn't preclude companies from doing so. In this case, it may be a good idea to name the proponent in the proxy statement so that other shareholders can more easily recognize the proposal for what it is.

8. **Support for Diversity Shareholder Proposals Substantially Increases**

- - Proxy Analytics notes that shareholder support for EEO-1 disclosure and board diversity proposals is averaging more than 60% growth this year compared to 33% support levels last year.

    - Over half of these proposals have received majority support, with three board diversity proposals exceeding 90% support.
    - Support for racial equity audit proposals has generally been strong for a first-year proposal, but none have received majority support.

9. **Institutional Investors Appear More Likely to Vote For Certain Shareholder Proposals**

-
    - BlackRock announced in its **2021 Stewardship Priorities** that it sees "voting on shareholder proposals playing an increasingly important role in our stewardship efforts, particularly on sustainability issues."
    - Large institutional investor policies like this appear to have been a factor for some of the big swings in the level of support for many shareholder proposals.

10. **Largest Investors Provide Greater Transparency About How They Voted**

-
    - Many of the largest institutional investors have started providing greater transparency into how and why they are voting on proposals at certain companies. These reports include BlackRock's "**Vote Bulletins**" section of its Investment Stewardship webpage and Vanguard's "**Voting Insights**."
    - In March, then-Acting SEC Chair Allison Herren Lee **discussed in a speech** the potential for the SEC to pursue rulemaking to require funds to disclose more about how they vote, and to have funds make this disclosure closer to when they cast their votes (as compared to the current Form N-PX framework that has a deadline in August of each year).

11. **Say-on-Pay Produces Some Interesting Results**

-
    - Reports tracking say-on-pay votes at S&P 500 and Russell 3000 companies indicate that votes are down, including an increase in the number of failed votes.
    - However, overall support for say-on-pay is roughly flat compared to last year for the Russell 3000 (as noted in this **Semler Brossy report**).
    - Early analyses, including recent reports from **Semler Brossy** and **FW Cook**, note that a substantial portion of the failed votes are due at least in part to Covid-19 related actions.
    - Both of these reports also highlight the apparent correlation between ISS recommendations "against" say-on-pay proposals and failed votes. It is hard to know whether that correlation equates to actual causation.
    - Given all of this, many companies may find executive compensation to be an important area for shareholder engagement in the coming months.

12. **Complaints Over Virtual Annual Meeting Conduct Muted**

-
    - In 2020, companies - and virtual meeting providers - scrambled to pivot to virtual annual meetings in the middle of proxy season. Ahead of the 2021 season, everyone had far more time to plan and prepare.
    - Preparations for virtual meetings included a **working group that provided a solution** to one of the biggest logistical challenges of 2020 - ensuring that street name owners could attend, and vote at, virtual annual meetings regardless of which meeting provider the company used.
    - So far, there has not been a significant amount of new commentary objecting to how companies are conducting their meetings.
    - Certain practices continue to draw criticism from investors, including only taking questions in advance of the meeting or cutting off a shareholder proponent's microphone at precisely the expiration of their allotted speaking time.

- The relative calm in this area may reflect more widespread adoption of certain recommended practices, including proxy statement disclosure regarding company policies on taking questions during the meeting, providing additional transparency regarding company practices with respect to questions, and posting questions and answers after the meeting - including questions that the company did not have time to address during the meeting.

Explore more in

Corporate Law
Blog series

Public Chatter

Public Chatter provides practical guidance—and the latest developments—to those grappling with public company securities law and corporate governance issues, through content developed from an in-house perspective.

View the blog