

A Look At The 2016 Proxy Season's Hot Topics

By **Chelsea Naso**

Law360, New York (January 28, 2016, 1:51 PM ET) -- Proxy season is primed for another busy year as investors are set to rally for proxy access, push for broader corporate disclosures in a variety of areas and launch challenges concerning the performance of top executives, experts say.

With more than 70 proposals for proxy access already aimed at companies for the upcoming proxy season, it's clear this is shareholders' top corporate governance issue.

But it won't be the only issue. Institutional investors are expected to push for increased executive compensation disclosure, while activists are looking to tear down underperforming chief executives, according to Andrew Freedman, an Olshan Frome Wolosky LLP partner and co-head of the firm's activist and equity investment group.

"We will continue to see proxy access proposals, and we will see them trickle down to mainstream midcap companies. We'll see executive compensation issues, and we'll see governance issues, but shareholder activism is again going to play a pivotal role in the 2016 proxy season," Freedman said.

Here, Law360 outlines the trends on deck for the 2016 proxy season.

Proxy Access Push Intensifies

Proxy access is going to continue to be a hot corporate governance issue in the coming proxy season, after the shareholder push for the right caught fire in 2015, according to Sanjay Shirodkar, of counsel at DLA Piper and former special counsel in the Division of Corporation Finance's Office of Chief Counsel at the U.S. Securities and Exchange Commission.

"Proxy access will be the biggest thing that will happen this year," Shirodkar said.

New York City Comptroller Scott Stringer helped draw attention to proxy access with the launch of the Boardroom Accountability Project in 2015. The campaign saw the New York City Pension Funds file 72 shareholder resolutions calling for proxy access bylaws last year, with another 73 filed already in 2016.

The basic outline for the proxy access bylaws, which allow larger shareholders to nominate board members on the same proxy card as the company, has become more defined over time, noted Latham & Watkins LLP's Tiffany Campion, a senior attorney in the firm's takeover defense and shareholder activism practice.

"Last year, the question was how long do you have to hold and how many shares, or what percent, to gain proxy access," Campion said. "Now people are looking more at the details, how many shareholders can accumulate in a group and how many seats on the board are available through proxy access."

Generally speaking, proxy access proposals have called for investors to hold a 3 percent stake for at least three years, although some have called for a 5 percent stake.

Companies that don't end up with a shareholder proposal for proxy access may opt to preempt the push with their own set of bylaws. But if an alternate shareholder proposal arises, those companies will be hard-pressed to block the proposal after the SEC's Staff Legal Bulletin No. 14H narrowed companies' ability to exclude shareholder proposals from their proxy cards.

Shareholders Hunt for More Disclosures

The coming proxy season is primed for a number of shareholder proposals calling for additional disclosures in areas such as environmental concerns, conflict minerals and political contributions.

But a hot-button issue for shareholders this year is expected to be the compensation packages doled out at the executive level, particularly at underperforming companies, said Eleazer Klein, a Schulte Roth & Zabel LLP partner.

"There seems to be more frustration that shareholders have with compensation packages at the executive level that don't match up with the metrics of the company, and there's a continuing focus on whether executive compensation truly reflects the contributions they are making," Klein said.

"They are more focused on making sure there is a true tie in on the executive performance and the contributions," he added.

And with the SEC's final rule on CEO pay ratio disclosure requirements under the Dodd-Frank Act taking hold in 2018, some companies may test the waters with some additional pay ratio disclosures this year, Klein noted.

Many shareholders are also concerned with issues surrounding cybersecurity, and may push for more information on how companies are protected from potential cyberthreats, explained Steven Stokdyk, a Latham partner and global chair of the firm's public company representation practice.

Additional information on companies' audit committees and their relationship with auditors will also be a common theme of the coming proxy season, he noted.

"I think there's always been a push for more disclosure by companies in different areas, particularly cybersecurity," Stokdyk said. "There's also additional disclosure being requested for audit committees and how they interact with auditors."

Activists Zero in on CEO Performance

While shareholder activists are ready to put forward a number of plans they believe will drive value creation in the coming year, one major area of focus will be on the performance of corporations' chief executives, Freedman said.

Activists can float a nonbinding proposal as a sign that they aren't the only shareholders that have lost faith in the CEO, or if that executive also sits on the board, they can try to oust the CEO from the boardroom, a clear signal that it's time for change, he explained.

"We'll see proxy contests in situations where investors have lost confidence in senior management due to prolonged underperformance and where the campaign serves as a referendum on the need for new senior leadership," Freedman said.

Recent court rulings have also firmed up shareholders' ability to remove board members, including a December ruling out of the Delaware Chancery Court that found a provision in Vaalco Energy Inc.'s charter that makes it harder to remove board members was invalid and didn't comport with First State corporate law.

"There have been a couple of Delaware cases dealing with provisions in companies, certificates of incorporation about what the approved standard is for removing directors, whether with cause or without," said Mayer Brown LLP partner Mike Hermsen.

And, even though activists' war chests are larger than ever, they are likely to find partners in either other activists or private equity firms desperate to put capital to work, noted Kai Liekefett, a Vinson & Elkins LLP partner and head of the firm's shareholder activism response team.

"Private equity firms, they have billions of dollars, and public M&A transactions which used to be their bread and butter have become more and more difficult," Liekefett said. "They are looking for other ways to deploy their money. They are also more and more looking at what activists are doing."

--Editing by Katherine Rautenberg and Edrienne Su.
