Debevoise & Plimpton

Debevoise In Depth

2024 Proxy Season in Review

August 20, 2024

The 2024 proxy season was characterized by a high volume of shareholder proposals submitted to companies, including proposals relating to topical issues such as artificial intelligence ("AI") and political lobbying and spending. In addition, the number of no-action requests submitted to the Securities and Exchange Commission (the "SEC") increased compared to 2023. Based on our experience and data compiled by FactSet and Diligent, this Debevoise In Depth identifies key takeaways from the 2024 proxy season.

Investor Activism Continues to Increase

2024 was the second full proxy season following the effectiveness of Rule 14a-19 under the Securities Exchange Act of 1934, which requires management and dissident shareholders to use universal proxy cards in contested elections. The universal proxy card lists all nominees—both management and insurgent—for director seats. Many commentators predicted that the universal proxy card would increase the number of proxy contests launched and that the universal proxy card would benefit activists by making it easier to support one or more non-management candidates on an individual basis without committing to the activist's entire slate. The number of board seat contests increased in 2024, including high-profile contests such as at Walt Disney, which ranked among the most contentious and expensive ever. However, the universal proxy rules do not appear to have tipped the scale markedly in favor of activists: of the 455 board seats sought by activists as of June 30, 2024, approximately 10% were obtained by activists, either through a vote or settlement, as compared to 349 seats sought in the comparable period in 2023, of which 12.5% were won by activists. In 2022, prior to the universal proxy rules, activists sought 583 board seats and obtained 14.9% of them.

The number of settlements with activists remained steady in 2024. According to Diligent, as of June 30 in each of 2024 and 2023, 86% of seats gained by activists on the boards of U.S.-headquartered companies were obtained through settlement, rather than by vote. This is an increase from 2022, in which 80.5% of seats gained by activists were obtained via settlement. Although the data does not paint a clear picture of what has driven the increase in settlements since 2022, one possible reason is that the universal proxy rules have created a perception that contested elections are less predictable for company nominees because of the ability of shareholders to "mix and match" company nominees and dissident nominees, making companies more willing to reach settlements with activists for an agreed number of board seats. Unrelated to the universal proxy rules, the uncertain macroeconomic environment during 2024 may have made settlements more appealing for both companies and activists.

Shareholder Proposals

Over 730 Rule 14a-8 shareholder proposals had been submitted to companies as of June 30, 2024, slightly more than the 723 and 688 proposals submitted in the comparable period in 2023 and 2022, respectively. Approximately half of the companies receiving shareholder proposals were large-cap companies, including Walt Disney, Norfolk Southern and Phillips 66.

ESG

As of June 30, 2024, shareholders have voted on 582 ESG-related proposals, including proposals critical of a company's stance on "traditional" ESG policies (sometimes referred to as "anti-ESG" proposals), a decrease from 623 ESG-related proposals voted on in 2023.

Governance-related proposals were the most common type of ESG-related proposal submitted to companies—225 governance proposals were voted on, down from 274 in 2023. Support for governance-related proposals increased as compared to 2023, with 20% of proposals having passed as of June 30, 2024, a significant increase from 9.8% as of June 30, 2023. Proposals seeking to replace supermajority provisions in bylaws or charters with simple majority provisions represented more than half of the successful governance-related proposals. Other common governance-related proposals included those related to the appointment of independent board chairs, the adoption of policies regarding director resignation upon a director nominee's failure to receive the majority of votes cast, and severance pay.

Of the 93 environmental-related proposals put to a shareholder vote, only three were successful. The most common proposal of this type related to greenhouse gas reduction. Of the 264 social-related proposals voted on, only one was successful. The successful proposal, which requested regular reporting on political spending, was submitted to DexCom, Inc. by Arjuna Capital and passed with 51.9% of the vote. Reflecting investor focus on the current election cycle, the most common social proposal sought transparency regarding political lobbying and spending. Such proposals generally requested a report from the company disclosing its policies on political lobbying, the amount of its political expenditures or a description of the board's oversight over political lobbying and spending.

Consistent with the trend in recent years, the number of ESG proposals that were critical of traditional ESG policies increased in 2024 compared to 2023. Proponents of such proposals typically challenged corporate initiatives they viewed as inappropriately involved in environmental, social or political agendas. According to the Sustainable Investments Institute, 82 such proposals have been voted on as of June 30, 2024. Despite the increasing number of such proposals, shareholder support remained low, with support averaging approximately 2.8% and no proposal receiving majority support. The most common proposal of this type focused on alleged risks associated with racial and gender equality efforts and viewpoint discrimination. The National Center for Public Policy Research submitted the greatest number of such proposals, accounting for almost half of the proposals submitted in 2024.

AI Governance

Investor focus on AI increased in 2024, commensurate with increased disclosures by companies regarding their use of or plans to use AI in their business operations. Twelve proposals relating to AI were submitted as of June 30, 2024, as compared to four in 2023. Generally, AI-related proposals received low shareholder support and none of the proposals passed. The American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO") submitted five of the AI-related proposals and Arjuna Capital and New York City Retirement Systems each submitted two AI-related proposals.

AI-related proposals generally sought transparency regarding the use of AI in business operations. Most commonly, the proposals requested reports on the use of AI by the company and the anticipated impact of the use of AI, and the amendment of the relevant board committee's charter to include AI oversight. A few of the proposals were specifically tailored for the target company's use of AI. For example, the proposal submitted to Alphabet Inc. sought information regarding the use of AI related to Google's targeted advertising policies and practices, and the proposal submitted to Meta Platforms, Inc. sought information regarding the impact of the company's use of generative AI. In contrast, a proposal submitted to Chipotle Mexican Grill, Inc. by the International Brotherhood of Teamsters requested a report on the impact of AI on the company's workforce.

Although most of the proposals were submitted to companies in the technology, media and entertainment industries, as investors' understanding of the wide-ranging and potentially sensitive uses of AI evolves, companies should expect the number of AI-related proposals submitted to increase.

For companies that use or are testing the use of AI, having an effective, risk-based governance program will be important when facing investor scrutiny of AI disclosures, policies and procedures. For further discussion of AI governance considerations, see the Data Blog of our Data, Strategy and Security practice.

Say on Pay

Investor support for say-on-pay proposals continued to be strong, with an average of 97.7% of votes cast in favor of such proposals, a slight increase from 97.4% in 2023. According to Semler Brossy, among the likely causes for shareholders not voting in favor of say-on-pay proposals in 2024 were perceived misalignment with pay vs. performance, lack of rigorous performance goals and problematic pay practices identified by proxy advisory firms.

Exclusion of Shareholder Proposals

In response to the record number of Rule 14a-8 shareholder proposals submitted in 2024, companies increasingly turned to the SEC no-action relief process to seek approval for exclusion. As of June 30, 2024, 224 requests for no-action relief, or approximately one request for every three shareholder proposals, were submitted as compared to 171 requests, or one request for every four shareholder proposals, as of June 30, 2023. The SEC granted relief to 94, or 42%, of these requests, as compared to 77, or 45%, of these requests in 2023. The most successful bases for the exclusion of shareholder proposals in 2024 were that (i) the proponent failed to follow correct procedures in submitting the proposal, including untimely submissions, (ii) the proposal related to the company's ordinary business operations and (iii) the proposal would, if implemented, cause the company to violate the law.

Court Relief Sought by Exxon Mobil

In December 2023, Arjuna Capital and Follow This, an Amsterdam-based nongovernmental organization, submitted a Rule 14a-8 shareholder proposal requesting that Exxon Mobil ("Exxon") accelerate its reduction of greenhouse gas emissions and disclose new plans, targets and timetables for such reduction. Instead of seeking traditional no-action relief from the SEC, Exxon filed suit in the U.S. District Court for the Northern District of Texas, seeking a declaratory judgment to exclude the proposal. Exxon's complaint alleged that the SEC's no-action relief process was flawed, stating that recent guidance by SEC staff was at odds with Rule 14a-8, and sought to exclude the proposal on the basis that the information sought related to ordinary business operations and that its shareholders put forth substantially similar proposals in 2022 and 2023, which received only 27.1% and 10.5% of the vote, respectively.

In February 2024, Arjuna Capital withdrew the proposal and moved to dismiss the suit for lack of subject-matter jurisdiction. The court denied the motion to dismiss, stating that Arjuna Capital's withdrawal of its proposal was not proof that the conduct at issue would not recur. In the same order, the court dismissed Exxon's claim against Follow This due to lack of personal jurisdiction. Following the court's order, in May 2024, Arjuna Capital sent a letter to Exxon stating that they "unconditionally and irrevocably covenant to refrain henceforth from submitting any proposal for consideration by Exxon shareholders relating to GHG or climate change." The court ultimately dismissed the case after determining that Arjuna Capital's letter to Exxon made it "absolutely clear" that the shareholder's conduct would not recur.

In response to Exxon's lawsuit, various organizations, including the NYC Comptroller, CalPERs, eight state treasurers, the AFL-CIO and the United Steelworkers, recommended shareholders vote against electing Exxon's incumbent directors, including its CEO, at Exxon's annual meeting. Many of these organizations stated that Exxon's lawsuit was overly aggressive and threatened shareholder rights. Notwithstanding these recommendations, all 12 of Exxon's director nominees were elected with support ranging from 87% to 98%.

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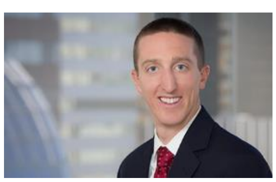
Please do not hesitate to contact us with any questions.



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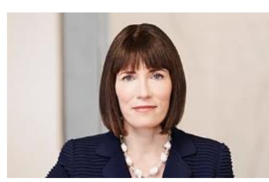

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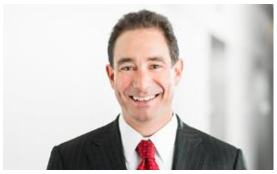

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