

Interview with the New York City Comptroller's Office on Their Advocacy for Proxy Access

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New York City Comptroller Scott Stringer and the New York City Pension Funds launched the Boardroom Accountability Project in the fall of 2014, by submitting shareholders proposals to 75 companies at once, and asking them to give their shareholders the right to nominate directors using the corporate ballot, known as “proxy access.”

By all accounts, this project has led to the tremendous uptick in providing for proxy access rights through private ordering. Almost 400 companies have enacted proxy access bylaws, including more than half of the S&P 500. Below are some thoughts on the topic from Rhonda Brauer, Director of Corporate Engagement in the New York City Comptroller's Office.

Davis Polk: What event led to that Boardroom Accountability Project and how were the targeted companies selected?

Rhonda Brauer: Originally proposed by the Securities and Exchange Commission 60 years ago, proxy access was reinvigorated by the SEC in 2003 in the wake of the board failures at Enron and WorldCom. After the D.C. Court of Appeals vacated the finally-approved SEC rule in July 2011 on procedural grounds, the New York City Pension Funds and other investors began to request proxy access mechanisms (along the lines of the vacated SEC rule) at portfolio companies through shareowner resolutions.

Working with other major institutional investors, the goal has been to ensure that companies are managed for the long term and overseen by boards composed of diverse, independent and accountable directors.

Targeted companies have been selected for one or more of the following reasons: (i) failing to align executive compensation with business performance, (ii) having little or no apparent gender or racial diversity on their boards or (iii) being carbon-intensive energy companies that are among the most vulnerable to the long-term business risks associated with climate change.

Davis Polk: How do Comptroller Stringer and the City Pension Funds think about proxy access as one mechanism in the larger context of board composition and director qualifications?

Rhonda Brauer: Proxy access is one mechanism to promote greater board responsibility and accountability in our financial markets. It is consistent with our commitment to being able to have a meaningful discussion about particular nominees where our portfolio company boards appear to lack the relevant expertise and diversity.

Davis Polk: Can you describe the engagement that has taken place with companies as a result of the Project? What are some of the discussions that the Comptroller's Office has been having over the last two years?

Rhonda Brauer: There was a sea change in the types of engagement that took place after the 2015 proxy season, when 66 of the 75 targeted companies let the proxy access proposals go to a vote, the majority of which passed. In 2016 and 2017, there have been very meaningful and successful discussions and negotiations with targeted companies, such that only 20 proposals have gone (or are expected to go) to votes although we submitted roughly the same number as for 2015.

In addition, we have seen 17 companies targeted for proxy access due to lack of diversity name a woman or minority director in the past two years. Exxon Mobil recently named to its board atmospheric scientist Dr. Susan Avery, who has extensive climate change experience.

Davis Polk: How has the Project changed since it started in 2015? How do Comptroller Stringer and the City Pension Funds determine at the beginning of a proxy season which companies to reach out to?

Rhonda Brauer: We continue to target portfolio companies that fall into one or more of the three baskets, in addition to ones with particular governance concerns.

Davis Polk: As the terms of proxy access bylaws become more standard, what are the key features that the City Pension Funds have been focusing on?

Rhonda Brauer: We continue to focus on the key terms that were in the vacated SEC rule (e.g., 3%, 3 years and 25% of the board) and that support the effectiveness of that rule as envisioned by the SEC.

Davis Polk: Is there a likelihood of a proxy access nomination in the near future? What may be the events that lead to such a nomination and what types of candidates may be nominated by shareholders in this context?

Rhonda Brauer: As in the countries that have regulated proxy access mechanisms, we expect that proxy access will be rarely used, but has had and will continue to have a significant impact on the nature and extent of director-shareowner engagement. It is our expectation that investors would first engage their portfolio companies in quiet diplomacy on specific board candidates where there is a gap in board expertise and diversity. We are committed to being able to have those types of discussions, with an escalation in the use of the tools available to us as needed.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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