Key Takeaways

Proxy Advisory Firm and Institutional Investor Policy Updates and Advice for the 2022 Proxy Season

At the Comp Talks and SEC Reporting Skills Workshop session on January 19, 2022, **Proxy Advisory Firm and Institutional Investor Policy Updates and Advice for the 2022 Proxy Season**, our panelists – Cooley partners Megan Arthur Schilling and Brad Goldberg – discussed an array of topics that should be on everyone's radar for the upcoming proxy season. Here are some of the key takeaways summarized by Cooley lawyer Ariane Andrade:

Not all investors follow the recommendations of proxy advisory firms, and those that do may assign those recommendations varying degrees of importance. The panelists emphasized that companies should pay attention to the specific preferences of their shareholder bases, and evaluate the extent to which the voting recommendations of ISS and Glass Lewis are impactful to their company. Companies should also keep in mind that their significant investors may change, so regular monitoring is advisable.

Proxy advisers and institutional investors are focusing more and more on diversity at the board level. The panelists observed that ISS, Glass Lewis and institutional investors have increased their expectations for gender, racial and ethnic diversity of directors on public company boards. Because changes in board composition don't happen overnight, companies that are working hard behind the scenes to improve recruitment efforts of diverse director candidates and to implement governance policies that encourage board refreshment should ensure that their proxy disclosures and shareholder engagement discussions clearly signal this commitment for investors.

Votes for directors are increasingly at risk. Directors are being held accountable for a broader range of matters that go beyond what might be considered the traditional purview of a board, including human capital management, board and workforce diversity, environmental and social disclosure, and climate risk oversight. Accordingly, more directors are receiving significant opposition from investors, which trend could make service as a director less attractive for qualified candidates and could make a company a more likely target for activist shareholders.

Proxy advisory firms continue to crack down on companies with multi-class stock and other "adverse" governance provisions. Both ISS and Glass Lewis announced expansions of their policies to issue negative vote recommendations for directors not only at newly public companies, but at any company that employs certain multi-class common stock structures. ISS has also suggested that it may in the future similarly expand its current policy of issuing negative vote recommendations for directors at newly public companies that have classified boards or supermajority vote requirements. Accordingly, companies that employ these governance provisions should consider the extent to which such policy changes may impact

future proxy voting for directors and be prepared to discuss these topics in shareholder engagements.

Be prepared to provide more support for any continuing COVID-related compensation changes. Because the “surprise element” of the pandemic is no longer applicable, many investors believe that companies should be largely returning to traditional, pre-pandemic-style incentive compensation programs. The panelists stressed that if companies made any changes or adjustments to their programs in 2021 due to COVID, it will be extremely important to explain clearly and in sufficient detail the facts, circumstances and justifications underlying those adjustments. Certain types of compensation program changes – such as one-time awards – may be more challenging to justify, particularly if those changes were repeated in consecutive years, and clear and expanded disclosure may not be enough to avoid a negative say-on-pay recommendation.

Tying executive pay to ESG metrics is an increasing trend, but companies should structure and disclose these programs thoughtfully. Boards and management teams should think carefully about whether it makes sense from a business perspective for their companies to incorporate ESG metrics into their incentive compensation programs. If ESG metrics are utilized, investors expect the company to clearly disclose in the proxy statement the details of those metrics (including the specific targets, their rigor and payout opportunities), the basis for incorporation of those metrics, and why those particular metrics will help incentivize performance.

Tread carefully in disclosure of executive perquisites. Perks continue to be an area of focus for the Securities and Exchange Commission, with particular attention being paid to aircraft-related perks. The panelists reminded listeners to confirm that their companies’ disclosures regarding perks are accurate and fulsome, and have been vetted by legal counsel. They also cautioned that the SEC may more closely scrutinize year-over-year changes in methodology for reporting perks as compensation.

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