

Client Alert

August 2018

SEC Announces Roundtable on the Proxy Process

On July 30, 2018, Chairman Jay Clayton of the Securities and Exchange Commission (“SEC”) issued a statement announcing that the SEC will host a roundtable this fall regarding the U.S. proxy process. Noting that “shareholder engagement is a hallmark of our public capital markets, and the proxy process is a fundamental component of that engagement,” Chairman Clayton is seeking the perspectives of companies, investors and other market participants on whether various aspects of the proxy rules should be clarified.

Back in 2010, the SEC issued a 151-page “concept release” soliciting public comment on the U.S. proxy system and whether the proxy rules should be amended to promote greater efficiency and transparency. Chairman Clayton stated that in light of changes in the U.S. markets and technology since the 2010 concept release and the significant increase in shareholder engagement (72% of S&P 500 companies reporting engagement with shareholders in 2017, compared to just 6% in 2010), the SEC is seeking to assess whether the existing proxy rules are “achieving their objectives effectively in light of changes in our marketplace.”

The roundtable agenda has not yet been announced. However, Chairman Clayton has asked the SEC Staff to consider and invited others to comment on the following items.

Voting Process – Noting that “accuracy, transparency and efficiency in the proxy system can inspire confidence in the proxy voting process,” attention should be given to the potential for over-voting and under-voting of securities by broker-dealers as well as “empty voting” (i.e., voting shares in which the investor has little or no economic interest). Views should also be expressed on the practical challenges of confirming whether an investor’s shares have actually been voted in accordance with his or her instructions given the number of intermediaries involved in the voting process. Consideration should also be given to the costs of distributing proxy materials to and the practical difficulties of communicating with shareholders who hold their shares in “street name.”

attorneys

Steve Wolosky
swolosky@olshanlaw.com
212.451.2333

Andrew M. Freedman
afreedman@olshanlaw.com
212.451.2250

Ron S. Berenblat
rberenblat@olshanlaw.com
212.451.2296

practice

Shareholder Activism &
Engagement

Retail Shareholder Participation – Noting that during the 2017 proxy season institutional investors voted over 90% of their shares while retail investors voted under 30% of their shares, areas of discussion should include the reasons for the “relatively low retail participation rate” and whether retail participation could be improved through enhancements in communication, technology and investor education. Views should also be expressed on whether individuals who invest through vehicles such as mutual funds should be given the ability to participate in the funds’ voting process with respect to portfolio securities.

Shareholder Proposals – Recognizing that many market participants believe the Rule 14a-8 shareholder proposal process has “enhanced company performance” and the costs of this process could be reduced, while it has also been noted that only a handful of shareholders submit a large percentage of these proposals, attention should be given to the thresholds and other requirements for participating in this process. Specifically, consideration should be given regarding whether the current minimum ownership thresholds for shareholders to submit a proposal (\$2,000 or 1% for one year) and the thresholds that allow companies to omit resubmitted proposals are still appropriate. Input should also be given as to whether retail investors who invest indirectly in companies through mutual funds, ETFs and other products are “appropriately represented in the shareholder proposal process and in the shareholder engagement dynamic more generally.”

Proxy Advisory Firms – Without providing any commentary on the current highly publicized debate surrounding the role of proxy advisory firms and their influence on the proxy voting process, comments are sought on whether investment managers are relying too heavily on proxy advisory firms for voting recommendations and whether such reliance is in the best interests of these investment managers and their clients. Input should also be given on whether companies who are the subject of a proxy advisory firm’s voting recommendation have the ability to raise concerns with a recommendation, including if it is based on “erroneous, materially incomplete, or outdated information.” Attention should also be given as to whether proxy advisory firms provide adequate disclosure of their voting policies and procedures and whether their provision of related consulting services to companies create conflicts of interest.

Technology and Innovation – Recognizing that the “use of technology is implicated in all areas of the proxy process,” views are sought on how technology can improve the process and the potential benefits or consequences that could result from continued reliance on and changes to technology, particularly blockchain.

Universal Proxies – Chairman Clayton briefly addressed the SEC’s 2016 proposal to amend the proxy rules to require the use of universal proxy

attorneys

Steve Wolosky
swolosky@olshanlaw.com
212.451.2333

Andrew M. Freedman
afreedman@olshanlaw.com
212.451.2250

Ron S. Berenblat
rberenblat@olshanlaw.com
212.451.2296

practice

Shareholder Activism &
Engagement

cards in contested elections and how under the current rules and proxy voting mechanics, a shareholder who desires to split votes among management and dissident director candidates must attend the shareholders meeting and vote by ballot. Departing from the more comprehensive discussion of the other potential agenda items, Chairman Clayton did not list any specific issues, questions or concerns regarding universal proxies that could be subject to comment. Interestingly, only a few weeks ago, it was reported that Chairman Clayton shelved the SEC's universal proxy proposal.

The date, agenda and panelists for the roundtable will be announced at a later date. Comments may be submitted electronically through the SEC's website or on paper. All submissions will become part of the public record. For more information on the roundtable and the comment submission process, please contact the Olshan attorney with whom you regularly work or any of the attorneys listed below.

attorneys

Steve Wolosky
swolosky@olshanlaw.com
212.451.2333

Andrew M. Freedman
afreedman@olshanlaw.com
212.451.2250

Ron S. Berenblat
rberenblat@olshanlaw.com
212.451.2296

practice

Shareholder Activism &
Engagement

This publication is issued by Olshan Frome Wolosky LLP for informational purposes only and does not constitute legal advice or establish an attorney-client relationship. In some jurisdictions, this publication may be considered attorney advertising.

Copyright © 2018 Olshan Frome Wolosky LLP. All Rights Reserved.