Harvard Law School Forum on Corporate Governance

BlackRock's Recent Move Could Benefit Shareholder Activists in Election Contests

Posted by Andrew M. Freedman and Ron S. Berenblat, Olshan Frome Wolosky LLP, on Sunday, November 7, 2021

Editor's note: Andrew M. Freedman and Ron S. Berenblat are partners at Olshan Frome Wolosky LLP. This post is based on their Olshan memorandum. Related research from the Program on Corporate Governance includes The Agency Problems of Institutional Investors by Lucian Bebchuk, Alma Cohen, and Scott Hirst (discussed on the Forum here); Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy by Lucian Bebchuk and Scott Hirst (discussed on the forum here); and The Specter of the Giant Three by Lucian Bebchuk and Scott Hirst (discussed on the Forum here).

On October 7, 2021, BlackRock, the world's largest asset management firm, announced that it has launched an initiative to provide its institutional clients, such as pensions and endowments, the opportunity to make their own voting decisions on proxy matters tied to their investments. Beginning in 2022, these voting options will first be made available to institutional clients invested in its index strategies holdings within institutional separate accounts globally and certain pooled funds in the U.S. and UK that are managed by BlackRock. According to BlackRock, approximately 40% of the $4.8 trillion in index equities it manages will be eligible for these new voting options, including the ability to vote directly on proposals at annual meetings of portfolio companies. Given BlackRock's penchant for supporting management in election contests, this transfer of voting power could lessen BlackRock's vast influence in proxy contests by opening up opportunities for shareholder activists to solicit such votes from the ultimate investor.

Eligible BlackRock investors will have the following voting options:

- Voting proxies according to their own internal policies using their own voting infrastructure;
- Choosing from a menu of third-party proxy voting policies and votes will be cast according to the selected policy using BlackRock's voting infrastructure;
- Voting directly on selected resolutions or companies of their choice using BlackRock's voting infrastructure (only available to institutional separate accounts); or
- Continuing to allow BlackRock's independent investment stewardship group, BlackRock Investment Stewardship (BIS), to vote on their behalf using BlackRock's voting infrastructure.

On its website, BlackRock described this initiative as consistent with "embracing the responsibility" that comes with investing on behalf of its clients, stating:

Much like asset allocation and portfolio construction, where some clients take an active role while others outsource these decisions to us, more of our clients are interested in having a say in how their index holdings are voted. We want to provide choice to these clients while continuing to support those who have selected BlackRock's industry-leading investment stewardship team to vote on their behalf.

We commend BlackRock for taking these steps to empower investors to make their own decisions at shareholder meetings regarding the election of directors, executive compensation, ESG proposals and other important matters. BlackRock should also be recognized for developing new technology that will enable it to offer this dynamic suite of voting options to its clients. As BlackRock stated, this initiative "reflects broader industry dynamics, such as the impact of advancing technology on investing—and with it, the opportunity for more customized approaches to [clients'] investments and how [clients] manage them."

We believe this could be a positive development for shareholder activists and potentially lead to a higher overall success rate in contested elections. In prior years, BlackRock has been particularly unsympathetic to activists in contested elections. According to Insightia, during the 2020/21 proxy season BlackRock supported at least one dissident nominee in only two of 14 election contests (including withdrawn and settled contests), or 14.3% of the time (down from 25% of the time in the 2019/20 season). Allowing BlackRock's institutional clients to depart from the firm's historical tendency to vote in favor of management by giving these clients the ability to vote on their own could tilt voting results in favor of activists at shareholder meetings of companies where BlackRock is a significant shareholder. BlackRock also stated that it will explore extending these expanded voting choice capabilities to other clients in its ETF, index mutual funds and other products. This could give an even greater boost to the success rate of activists in election contests at companies where BlackRock is a shareholder.

Although the actual impact this initiative will have on voting results in contested elections is difficult to predict, it will likely influence strategic and capital deployment decisions both companies and activists will make when BlackRock is a shareholder. We envision companies and activists will widen their solicitation outreach to target not only the BlackRock Investment Stewardship team, but also individual institutional clients who could potentially take control of their proxy voting under the new voting framework. Proxy solicitation firms typically hired by both the company and activist in these campaigns will be tasked with ferreting out the identities of BlackRock clients as part of their solicitation efforts.