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Going Beyond Climate: A Closer Look at Environmental Proposals

Posted by J. T. Ho, Orrick, Herrington & Sutcliffe LLP, on Thursday, October 13, 2022

Editor's note: J. T. Ho is partner at Orrick, Herrington & Sutcliffe LLP. This post is based on his recent Orrick memorandum. Related research from the Program on Corporate Governance includes Social Responsibility Resolutions by Scott Hirst.

ESG-related shareholder proposals featured prominently in the most recent proxy season, with nearly 40% of large-cap public companies facing a shareholder vote on ESG topics over the first half of 2022. As introduced in an earlier article, we continue to review ESG-related proposals submitted to companies in the Fortune 250 during this period to identify new trends and to anticipate future proposals.

The first half of 2022 saw a significant increase across the Fortune 250 in proposals seeking supplemental disclosure reports about a range of environmental impact matters. While most environmentally focused proposals were related to climate change governance and disclosures, the first half of 2022 saw a growing number of proposals that covered additional environmental topics. We identified 13 such proposals in the first half of 2022, compared to just four during all of 2021. The majority (53%) requested disclosure reports detailing strategies, use and trend metrics, compliance efforts and similar information about single use plastic and packaging materials. The remainder requested similar disclosure reports about deforestation prevention (6%), pesticide use (6%), water management (6%), financing of fossil fuel supplies (6%), and similar environmental impact expenditures (23%).

Opposition statements by companies primarily acknowledged the risks posed to the business and the environment, expressed shared concern about the issue raised, and pointed to applicable existing disclosures, reports, and strategies as confirmation the company is already reacting. The opposition statements often concluded that preparing more reports would only create additional administrative burdens which would be better devoted to existing or planned operational initiatives in the area.

While the passing rate for such proposals remained low – with just one passing in each of 2021 and the first half of 2022 – companies should take note of the substantial increase in the prevalence of these proposals and the fact that 25% of the proposals that did not pass in the first half of 2022 received 40% or more support, with two of these proposals receiving nearly 50% of the vote. The growing number of extra-climate related environmental proposals is particularly relevant in light of the SEC's recent proposed amendments to the basis for excluding shareholder proposals which, if adopted as proposed, would further restrict a company's ability to exclude proposals a company believes it has already "substantially implemented," among other exclusions.

ESG-focused investing funds and shareholder advocacy groups submitted the majority of these proposals in the Fortune 250, accounting for 75% in 2021 and 62% in the first half of 2022. These ESG-focused investing funds and shareholder advocacy groups generally targeted companies for which an environmental impact item is material to the business and/or supply chain, and for which the company is perceived as having poor disclosures when compared to peers.

For example, in the case of the two proposals that passed, one proposal requested that a multinational home improvement retail corporation report on its efforts to eliminate deforestation and forest degradation in its supply chain, while the other proposal requested that a company, which is a leading producer of transportation and industrial plastic, report on how it is reducing the amount of plastic materials discharged into the environment and effectively managing this risk. In the case of the first proposal, Institutional Shareholder Services (ISS), a leading proxy advisor, recommended for the proposal on the basis that the lack of information on these topics presented potential reputation risks to the company, and also noted that its largest competitor provided such disclosure. Similarly, in the case of the other company, ISS recommended for the proposal on the ground that companies that produce plastic are facing significant risks related to pollution and regulated reduction of demand in their products, and several of their peers had committed to disclosing this information.

This trend suggests companies with a business and/or supply chain materially impacted by plastics, packaging materials, pesticides or similar environmental impact items should expect this type of shareholder proposal over time and potentially support from proxy advisors. Such companies should consider internal programs for monitoring peer group disclosures to keep up with market practices, and should monitor for environmental impact reports or ranking reports from activist groups that identify companies as having deficient disclosures. By adjusting or supplementing related proxy statements and ESG report disclosures in response to such identified deficiencies, companies may be able to avoid receiving shareholder proposals calling for votes that could force increased or unplanned transparency, and may be in a stronger position to prevail over a costly shareholder proposal.