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Know Who is Coming to the Party and How They Will Behave

The Evolving and Increasingly Complicated Annual Meeting Vote

US – February 2022

As 2022 annual meetings are approaching for many public companies, the composition of their stockholder base has become increasingly important for companies to evaluate ahead of their stockholder vote.

In the 2020 proxy season based on a survey of over 3,500 public companies, institutional investors accounted for 71% of total share ownership and voted 92% of the shares that they own, while retail investors accounted for 29% of total share ownership and only voted 28% of the shares they own.[1] How institutional investors make voting decisions and the lack of participation by retail investors can dramatically affect the outcome of director elections and proposals acted upon at stockholder meetings. Accordingly, to provide a greater understanding as to what results to expect at stockholder meetings, senior executives of public companies should routinely track the composition of their stockholder base, as well as historical voting results in order to be in a position to identify areas where additional efforts can be made to increase participation at stockholder meetings and proactively address issues well before they occur.

Institutional Investors

Institutional investors are generally the most influential group of stockholders in a publicly-traded company. This power and influence of institutional investors has steadily increased over the last several decades as a result of their increasing proportional ownership of public company's voting securities and their consistent exercise of those voting rights on matters that are presented for stockholder approval. Further, institutional investors are increasingly developing their own policies to guide their voting decisions for stockholder proposals, and for evaluating individual director candidates. Institutional investors' internal standards often set higher standards than the leading independent proxy advisory firms, Institutional Shareholder Services ("ISS") and Glass Lewis. However, unlike ISS and Glass Lewis, institutional investors do not typically provide written reports outlining their vote determination for a particular public company, therefore, it is up to the public company to actively monitor both the composition of its stockholder base, as well as stockholders' specific voting criteria (or voting trends if such criteria is not known) in each instance, in order to mitigate unexpected results occurring when submitting matters to a stockholder vote.

Two of the institutional investor policies that have become more prevalent over the last few years that can affect the approval of individual directors (i.e., institutional investors voting against or withholding votes from a particular director) relate to (1) board diversity and (2) director "overboarding". These institutional investor policies are continuing to evolve and should continue to be monitored by public companies, particularly to the extent any institutional investor represents a substantial proportion of a company's vote. At times, institutional investors, including those that have their own policies, follow the recommendations of ISS and/or Glass Lewis. Annex A provides a summary of the board diversity and overboarding policies of ISS, Glass Lewis and several leading institutional investors that have disclosed their voting criteria.

Board diversity not meeting the applicable standards of institutional investors (see Annex A) typically leads to votes against, or votes withheld from, the chair of a public company's nominating committee and sometimes also extends to the other directors serving on that committee. A director who serves on too many public company boards, which is referred to as being "overboarded," generally results in a vote against him or her or a withheld vote. Overall, there have been modest declines in stockholder support for election of public company directors, which was down to 95.5% of the directors of S&P 500 companies in 2021 from 96.3% in 2020.[2] In comparing the votes by BlackRock, Vanguard and State Street at S&P 500 companies, BlackRock had the largest increase in opposing director elections (opposing 2.7% of directors in 2021, up from 1.0% in 2020) and State Street continued to oppose the greatest number of directors (voting against 6.5% of directors in 2021).[3]

For many public companies, and particularly for companies that utilize a plurality vote standard for director elections, institutional investors voting against or withholding votes from a specific director will likely not affect the outcome of director elections. However, public companies are required to publicly report detailed vote results for individual directors and, therefore, low support for a director will become public information and, in addition to potential embarrassment or reputational harm, could result in a nominating committee, as a matter of good corporate governance, giving consideration for future nominations of a director candidate that receives comparatively low stockholder support.

1 See Broadridge, 2020 Proxy Season Review, available at https://www.broadridge.com/resource/2020-proxy-season-review?gclid=Cj0KCQiAjc2QBhDgARIsAMc3SqTmCMSGZ_p1NnbbSUp-C-EtXQpqgzowgfjM41w6Yd_cLvC-z1-tavkaAqNAEALw_wcB.

2 See Georgeson, 2021 Annual Corporate Governance Review, available at https://www.georgeson.com/us/news-insights/annual-corporate-governance-review#contact.

3 *Id.*

General counsels and other members of the executive management team at publicly-traded companies, particularly those that have large blocks of shares held by institutional investors, will want to actively monitor these evolving standards and know where the company "stacks up" in relation to such standards. Doing so will help them identify any deviation from relevant institutional investors' policies that may result in unusually low support for a particular director or proposal and allow them to proactively address any areas for possible improvement.

Retail Holders and Brokerage Firms

Although retail holders and brokerage firms generally hold a smaller proportion of voting power at publicly traded companies, they can still control a substantial portion of a public company's stockholder vote and their participation, or lack thereof, can impact the outcome of the vote on stockholder proposals and director elections.

Retail brokers have the right, but not the obligation, to use discretionary voting on behalf of investors that have not provided specific instructions on routine matters, pursuant to NYSE Rule 452. In the past few years, certain retail brokers, including Charles Schwab/TD Ameritrade, have instituted policies not to utilize their discretionary voting authority. TD Ameritrade (TD) is one of the country's largest brokerage firms, providing investing and trading services to 11 million client accounts that total more than US$1 trillion in assets, and custodial services for more than 6,000 independent registered investment advisors.[4]

When retail brokers do not utilize their discretionary voting authority, this leads to more limited voter turnout, particularly as the underlying retail holders tend to own smaller amounts of stock and are less inclined to be actively engaged and vote their shares. Low voter turnout can result in a public company not meeting quorum requirements (generally a majority of outstanding stock) or not receiving the requisite votes for certain proposals, particularly those with higher approval thresholds (i.e., majority of outstanding stock as opposed to majority of present in person or by proxy). This, in turn, can result in the need to adjourn an entire meeting or adjourn a meeting as to a specific proposal. Small cap companies, which often have fewer institutional investors, are more likely to face these issues.

To address these issues, a company should closely monitor vote totals leading up to its stockholder meeting. Typically, public companies will receive voting reports daily when the stockholder meeting is two weeks away, unless more frequent updates and reporting is requested. Increasingly, however, public companies are asking their vote tabulation companies to provide such reports earlier in the process. When faced with voter turnout issues and in an effort to increase the retail investor response, companies may want to consider engaging a proxy solicitor or exploring other expanded solicitation efforts. If any quorum or proposal approval issues arise, the most valuable tool in a solicitation effort is time. Therefore, general counsels and other members of the executive management team of publicly traded companies should analyze whether any issues are anticipated based on prior stockholder turnout at meetings and closely monitor results as votes are incoming in order to initiate any additional solicitation efforts.

4 See TD Ameritrade, About Us, available at https://www.tdameritrade.com/about-us.html.

Annex A

	Gender Diversity	Racial/Ethnic Diversity	Overboarding
ISS[5]	Russell 3000 and S&P 1500: Generally vote against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) if there are no women on a company's board. Other companies: The above standard will apply to all companies for meetings on or after February 1, 2023.	Russell 3000 and S&P 1500: Generally vote against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) if the board has no apparent racially or ethnically diverse members.	Generally vote against or withhold from individual directors who (1) sit on more than five public company boards (total including the company under review) or (2) are CEOs of a public company who sit on the board of more than two public companies besides their own (to withhold only at outside boards).
Glass-Lewis[6]	Russell 3000: Generally vote against (1) the chair of the nominating committee if the board has fewer than two gender diverse directors and (2) the entire nominating committee of a board with no gender diverse directors. In 2023, Glass-Lewis will expect boards to have at least 30% gender diversity. Other companies (including Russell 3000 companies with less than six directors): Will generally vote against certain directors if there is not a minimum of one gender diverse director.	Generally vote against the chair of the nominating committee if the board does not comply with state laws on underrepresented community diversity (or gender diversity). Further, may vote against chair of the nominating committee if there is particularly poor disclosure regarding diversity. In 2023, Glass Lewis will particularly look for disclosure of individual or aggregate racial/ethnic minority demographics.	Generally vote against a director who (1) serves as an executive officer of any public company and sits on more than two public company boards, (2) sits on more than five public company boards or (3) is a member of the audit committee and sits on more than three public company audit committees (with certain exceptions), each reflecting a total including the company under review.
BlackRock, Inc.[7]	May vote against members of the nominating/governance committee if there are not at least two directors who identify as female on the board.	May vote against members of the nominating/governance committee if there is not at least one member of an underrepresented group on the board, including, *inter alia*, racial/ethnic groups, LGBTQ+ individuals, individuals with disabilities and veterans.	May vote against directors who (1) sit on the board of more than three public companies (in addition to the company under review) or (2) are public company executives and sit on the board of more than one public company (in addition to the one under review).
The Vanguard Group[8]	Generally vote against the nominating and/or governance committee chair (or other director if needed) if the board is making insufficient progress in its diversity composition.		Generally vote against any director who (1) is a named executive officer and sits on more than two public boards or (2) sits on four or more public company boards, each reflecting a total including the company under review. A fund will generally not vote against the director at the director's home company.

5 See Institutional Shareholder Services, United States Proxy Voting Guidelines, published December 13, 2021, available at: https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf.

6 See Glass-Lewis, United States 2022 Policy Guidelines, published in 2022, available at: https://www.glasslewis.com/wp-content/uploads/2021/11/US-Voting-Guidelines-US-GL-2022.pdf?hsCtaTracking=257fcf1c-f11e-4835-81a3-d13fbc7b1f4c%7C1dad2378-213f-45f6-8509-788274627609.

7 See BlackRock Inc., Investment Stewardship: Proxy Voting Guidelines for U.S. Securities, effective as of January 2022, available at: https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf.

8 See The Vanguard Group, Proxy Voting Policy for U.S. Portfolio Companies, effective as of March 1, 2022, available at: https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/policies-and-reports/US_Proxy_Voting.pdf.

	Gender Diversity	Racial/Ethnic Diversity	Overboarding
Fidelity (FMR LLC)[9]	Will oppose the election of certain or all directors (1) if there are no women on the board or (2) if a board of ten or more members has fewer than two female directors. However, Fidelity generally expects at least 30% female board representation at companies in developed markets and will take board size, industry and corporate structure into account for companies falling below this standard.	Consider voting against the election of accountable directors where there are serious concerns relating to racial or ethnic underrepresentation on the board, or the number is inadequate, based on factors including the board size, industry and market.	Generally will oppose the election of a director if the director is a public company CEO and sits on more than two unaffiliated public company boards.
State Street[10]	In 2022, expect companies in all markets and indices to have at least one woman on their boards. In 2023, expect Russell 3000, TSX, FTSE 350, STOXX 600 and ASX 300 indices to have boards comprised of at least 30% women directors. If such standards are not met, State Street may vote against the chair of the nominating committee or the board leader. If the board fails for three consecutive years, State Street may vote against all incumbent members of the nominating committee or those deemed responsible for the nomination process.	S&P 500 and FTSE 100 companies: Will vote against the chair of the nominating committee if a board does not have at least one director from an underrepresented racial or ethnic community and if the company does not disclose racial and ethnic composition.	Generally vote against any director who (1) is a NEO of a public company and serves on more than two public boards, (2) Board chairs/ lead independent directors who sit on more than three public company boards, or (3) sits on four or more public company boards, each reflecting a total including the company under review.
Dimensional Fund Advisors LP[11]	Generally does not vote against directors for lack of board diversity alone, but does consider a lack of gender, racial or ethnic diversity on a board as a reason to apply further scrutiny of the board assessment and refreshment processes.		No relevant provision.
JPMorgan Chase[12]	Generally vote against the chair of the nominating committee when the issuer lacks any gender diversity or racial/ethnic diversity unless there are mitigating factors, including, *inter alia*, recent retirement of relevant directors, a relatively new public company, and an ongoing search for a director.		Generally will withhold votes from directors who (1) are CEOs of publicly-traded companies who serve on more than two public boards (besides his or her own board) or (2) serve on more than four public company boards (reflecting a total including the company under review).

9 See Fidelity Investments, Proxy Voting Guidelines, published February 2022, available at: https://www.fidelity.com/bin-public/060_www_fidelity_com/documents/Full-Proxy-Voting-Guidelines-for-Fidelity-Funds-Advised-by-FMRCo-and-SelectCo.pdf; and Fidelity International, Sustainable investing voting principles and guidelines, July 2021, available at: https://eumultisiteprod-live-b03cec4375574452b61bdc4e94e331e7-16cd684.s3-eu-west-1.amazonaws.com/filer_public/85/bf/85bf98f6-27b6-4ff8-8e73-52a6838f575b/fidelity_voting_policy_2021_v17.pdf.

10 See State Street, CEO's Letter on Our 2022 Proxy Voting Agenda, published January 12, 2022, available at: https://www.ssga.com/us/en/intermediary/ic/insights/ceo-letter-2022-proxy-voting-agenda; State Street, Guidance on Diversity Disclosures and Practices, January 2022, available at: https://www.ssga.com/library-content/pdfs/asset-stewardship/guidance-on-diversity-disclosures-practices.pdf; and State Street, Proxy Voting and Engagement Guidelines, March 2021, available at: https://www.ssga.com/library-content/pdfs/ic/proxy-voting-and-engagement-guidelines-us-canada.pdf.

11 See Dimensional Fund Advisors LP, 2021 Annual Stewardship Report, published in 2022, available at: https://us.dimensional.com/about-us/investment-stewardship.

12 See JPMorgan Chase, Global Proxy Voting Procedures and Guidelines, published April 1, 2021, available at: https://am.jpmorgan.com/content/dam/jpm-am-aem/global/en/institutional/communications/lux-communication/corporate-governance-principles-and-voting-guidelines.pdf.

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