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Board Oversight of ESG: Preparing for the 2022 Proxy Season and Beyond

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Last year's proxy season saw investor support for an unprecedented number of ESG proposals, on issues ranging from climate change to human capital management to diversity, equity and inclusion. Proxy advisory firms increasingly recommended that shareholders vote for such proposals. We also saw the emergence of ESG-driven withhold campaigns targeting individual directors. This upcoming 2022 proxy season will likely remain hotly contested as investors, proxy advisors and other stakeholders further scrutinize companies' ESG credentials. The Securities and Exchange Commission's recent guidance limiting exclusion of Rule 14a-8 proposals and proposed new rules on climate-related disclosures, and the new ISS and Glass Lewis proxy voting guidelines on climate, board and workforce diversity and "responsiveness" will continue to lend support to ESG-related shareholder proposals. As a result, companies and major institutional investors will need to continue to focus on the relevance, impact and risks of a proposal on an individual company.

Boards now face heightened expectations for how they oversee ESG, with some investors prepared to hold directors, particularly committee chairs, directly accountable (through director specific withhold/against votes and targeted public commentary) for a company's perceived ESG underperformance, shortfalls versus peers or failures of oversight.

We set forth below some key considerations for companies and directors as they continue to prepare for the upcoming proxy season and beyond:

1.The board is a core part of a company's ESG narrative. Over the past year, we have seen the growing integration of ESG into corporate communications and disclosures, whether it be discussion of ESG in earnings calls, transaction announcements, 10-Ks, proxy statements or press releases. Companies are also increasingly taking a fresh look at how the business of the board is allocated, organized and prioritized across the full board and individual board committees, especially as it relates to ESG matters. The proxy season has become another opportunity for companies to convey their ESG positioning and progress to investors, including especially the board's involvement with those items. Investors want to understand with which ESG issues the board engages, what efforts have been made to identify ESG risks and opportunities that are significant to the company, whether and how often the board is getting updates from management on ESG matters, and whether ESG considerations have been woven into key strategic decision-making. Investors are looking for boards that comprehend and are transparent with their company's progress, targets and aspirations on ESG. Directors and management teams that are able to tell their company's ESG story can demonstrate the scope of their ESG oversight and confirm that the board is equipped to oversee and address material ESG issues.

2.Understand what is material and why. Materiality as it applies to ESG continues to be debated, with the EU and certain ESG disclosure frameworks used by investors calling on companies to consider material impacts on stakeholders alongside the financially material impact of ESG items on the company, while the SEC (and U.S. securities law) continues to view...

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