

Client Alert

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Shareholder Activist Funds Should Be Aware of BlackRock's Expansion of the Application of Its Director "Overboarding" Policy to Fund Managers

BlackRock, the largest asset manager in the world, issued in December 2020 its new proxy voting guidelines for U.S. securities that expand its director "overboarding" voting policy in a manner that directly impacts shareholder activist funds. BlackRock's overboarding policy generally provides that it will consider voting against committee members and/or individual directors if the number of boards on which the director sits exceeds BlackRock's standard. Prior to the policy change, BlackRock considered a director candidate to be over-committed if he or she served on more than four public boards or two public boards in the case of a public company CEO. BlackRock has expanded the application of the more stringent two-directorship limitation to public company executives and "Fund Managers."

BlackRock defines "Fund Managers" as "individuals whose full-time employment involves responsibility for the investment and oversight of fund vehicles, and those who have employment as professional investors and provide oversight for those holdings."

Shareholder activist funds seeking to nominate directors at companies where BlackRock is a shareholder, which will often be the case in the large to mega-cap space, will need to factor in BlackRock's new overboarding threshold when deciding whether to include a principal of the fund in its slate of nominees.

It remains to be seen how BlackRock will interpret and implement the new policy.

Scope of Definition of Fund Manager – It seems clear that a principal of a fund or a chief investment officer who has ultimate control over the fund's portfolio of securities would fall under the definition of "Fund Manager." It is less clear under what circumstances a high-level executive or key employee of a fund would be deemed to have the requisite

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“responsibility” or “oversight” over the fund’s portfolio to be captured under the definition of “Fund Manager.”

Actual Implementation of Policy – It is important to note that the guidelines “are not intended to limit the analysis of individual issues at specific companies or provide a guide to how BlackRock will vote in every instance.” BlackRock will only “consider” voting against an over-committed director nominee based on “the range of issues” and “facts specific” to each company. That being said, it should be very interesting to see how BlackRock will approach the election of well-known and highly respected fund managers associated with activism, e.g., Jeff Ubben (Inclusive Capital), who currently serves on four public company boards.

While it is important for activist funds to be cognizant of the new overboarding policy when assembling their slates for proxy contests, compliance with the policy should be weighed against BlackRock’s voting record in contested elections. According to data obtained from Proxy Insight, during 2019 and 2020, of the 13 dissident fund managers nominated in contested elections that went to a vote where BlackRock was a shareholder, BlackRock voted in favor of only one fund manager.

Accordingly, activist funds should continue to consider a fund manager’s qualifications, diversity profile and track record for creating shareholder value as the main drivers for determining whether he or she should be included in a slate.

Outside the realm of an activist campaign, a fund manager who already holds more than two directorships will need to consider whether he or she should step off one or more boards prior to being nominated for re-election in order to stay within the threshold or engage in a dialogue with BlackRock in order to see whether it will, based on the facts and circumstances, vote for the nominee despite being overboarded under the new standard.

Please contact the Olshan attorney with whom you regularly work or one of the attorneys below if you would like to discuss further or have questions.

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