SHAREHOLDER PROPOSAL DEVELOPMENTS DURING THE
2017 PROXY SEASON

To Our Clients and Friends:

This client alert provides an overview of shareholder proposals submitted to public companies for 2017 shareholder meetings, including statistics and notable decisions from the staff (the "Staff") of the Securities and Exchange Commission (the "SEC") on no-action requests.[1]

I. Shareholder Proposal Statistics and Voting Results[2]

A. Shareholder Proposals Submitted

1. Overview

For 2017 shareholder meetings, shareholders have submitted approximately 827 proposals, which is significantly less than the 916 proposals submitted for 2016 shareholder meetings and the 943 proposals submitted for 2015 shareholder meetings.

For 2017, across four broad categories of shareholder proposals—governance and shareholder rights; environmental and social issues; executive compensation; and corporate civic engagement[3]—the most frequently submitted were environmental and social proposals (with approximately 345 proposals submitted).

The number of social proposals submitted to companies increased to approximately 201 proposals during the 2017 proxy season (up from 160 in 2016). Thirty-five social proposals submitted in 2017 focused on board diversity (up from 28 in 2016), 34 proposals focused on discrimination or diversity-related issues (up from 16 in 2016), and 19 proposals focused on the gender pay gap (up from 13 in 2016).

Environmental proposals were also popular during the 2017 proxy season, with 144 proposals submitted (up from 139 in 2016). Furthermore, there was an unprecedented level of shareholder support for environmental proposals this proxy season, with three climate change proposals receiving majority support and climate change proposals averaging support of 32.6% of votes cast. This compares to one climate change proposal receiving majority support in 2016 and climate change proposals averaging support of 24.2% of votes cast. As further discussed below, the success of these proposals is at least in part due to the shift in approach towards environmental proposals by certain institutional investors, including BlackRock, Vanguard and Fidelity.
2. **Types of Shareholder Proposals**

The most common types[4] of shareholder proposals in 2017, along with the approximate numbers of proposals submitted, were:

- social (201 proposals);
- environmental (144 proposals, including 69 climate change proposals);
- proxy access (112 proposals); and
- political contributions and lobbying disclosure (87 proposals).

By way of comparison, the most common types of shareholder proposals in 2016 were:

- proxy access (201 proposals);
- social (160 proposals);
- environmental (139 proposals, including 63 climate change proposals); and
- political contributions and lobbying disclosure (91 proposals).

3. **Proponents**

As is typically the case, John Chevedden and shareholders associated with him (including James McRitchie, Kenneth and William Steiner, and Myra Young) submitted by far the highest number of shareholder proposals for 2017 shareholder meetings—approximately 203, which is 24.5% of all shareholder proposals submitted to date in 2017. Other proponents reported to have submitted or co-filed at least 20 proposals each include: As You Sow Foundation (48, largely focused on environmental matters); Trillium Asset Management (42, largely focused on environmental matters); the New York City Comptroller (39, largely focused on governance/shareholder rights and environmental matters); Walden Asset Management (23, largely focused on environmental and political matters); Mercy Investment Services (21, largely focused on environmental and social matters); the New York State Common Retirement Fund (25, largely focused on political matters); and NorthStar Asset Management (20, largely focused on social matters).

**B. Shareholder Proposal No-Action Requests**

1. **Overview**

During the 2017 proxy season, companies submitted 288 no-action requests to the Staff as compared to approximately 245 during the 2016 proxy season. In 2017, the percentage of no-action requests that were granted by the Staff increased to 78%, the highest level in at least four years. The following table summarizes the responses to no-action requests that the Staff issued during the 2017 and 2016 proxy seasons:
2. Reasons for Exclusion in 2017

Based on a review of no-action letters issued during the 2017 proxy season, the Staff concurred that shareholder proposals could be excluded for the following principal reasons:

- 37.6% based on ordinary business arguments;
- 32.8% because the company had substantially implemented the proposal; and
- 17.5% based on procedural arguments, such as timeliness or defects in the proponent's proof of ownership.

Of the shareholder proposals for which no-action relief was denied, 47.2% were challenged as being related to the company's ordinary business operations under Rule 14a-8(i)(7), making ordinary business the most common basis for denial as well as success for a no-action request. Other frequently unsuccessful arguments included that the proposal was vague or false and misleading (45.3% of denials), that the company had substantially implemented the proposal (30.2% of denials), and that there was a procedural defect in the submission of the proposal (17.0% of denials).

Three aspects of the foregoing data are worth noting:

- The success during 2017 of ordinary business arguments, with 37.6% of no-action requests granted on that basis, up from 32.2% in 2016.
- The continued success of substantial implementation arguments. This marks the second straight year in which approximately one-third of all no-action requests were granted because the Staff concurred that the company had substantially implemented the proposal. During the 2017 proxy season, 32.8% of such no-action requests were granted, down slightly from 34.3% in 2016 but up from 21.0% in 2015.
- The continued decrease in exclusions based on procedural arguments, with 17.5% of no-action requests granted on that basis in 2017, down from 23.1% in 2016 and 35.0% in 2015.
a) **Increase in Exclusions Based on Ordinary Business**

Several new types of shareholder proposals were excluded based on ordinary business arguments during the 2017 proxy season, including proposals relating to (i) requests for reports on human lead exposure; (ii) a new version of minimum wage reform proposals; (iii) a new type of pharmaceutical pricing proposals; and (iv) a report on certain religious freedom principles. In addition, the Staff agreed that certain environmental and social proposals were excludable on ordinary business grounds because the proposals sought to "micromanage" the company, as further described below.

i. **Requests for Reports on Human Lead Exposure**

During the 2017 proxy season, at least two companies received what appears to be a new type of environmental proposal. Specifically, The Home Depot, Inc. and Lowe's Companies, Inc. each received a shareholder proposal asking them to "issue a report, at reasonable expense and excluding proprietary and privileged information, on the risks and opportunities that the issue of human lead exposures poses to the company, its employees, contractors, and customers." The supporting statement mentioned that companies should consider improving their lead safety practices through "consumer education on lead-safe practices, free or discounted lead testing products, and dedicated lead safety personnel."

While proposals that focus on the adverse effects on the environment and/or public health are typically not excludable, both companies submitted no-action requests to the Staff arguing that this particular proposal was excludable because (1) the supporting statements made it clear that it related to ordinary business matters, namely, the products and services that these companies offer to their customers, and (2) the proposal did not otherwise focus on a significant policy issue.[7]

Ultimately, the proposal submitted to The Home Depot, Inc. was withdrawn, and the Staff granted the no-action request submitted by Lowe's Companies, Inc. While the Staff did not provide any additional insight into its decision, the Lowe's decision confirms the well-established principle that proposals relating to both ordinary business matters and social policy issues may be excludable.

ii. **Minimum Wage Shareholder Proposals**

This proposal, which asks companies to adopt principles for minimum wage reform, is similar to the proposals submitted by Trillium Asset Management and several religious orders in 2016, with one important distinction described below.

Specifically, last year, five of the six submitted proposals were successfully challenged under Rule 14a-8(i)(7) as relating to the companies' ordinary business operations (specifically, general compensation matters).[8] Seeking to avoid exclusion on ordinary business grounds this year, the proponents (Trillium Asset Management and Zevin Asset Management) revised the proposal to include a specific disclaimer regarding general compensation matters by stating that the proposal did not "seek to address the company's internal approach to compensation, general employee compensation matters, or implementation of its principles for minimum wage reform" and giving the board discretion to determine the appropriate timing for publishing the principles.
Five companies that received the proposal this year (including The TJX Companies, Inc. and Chipotle Mexican Grill, Inc., both of which received a minimum wage proposal last year as well) submitted no-action requests to the Staff arguing, among other things, that the proposals were excludable on ordinary business grounds (as relating to general compensation matters) with some letters explicitly noting that the issue of minimum wage is not a significant policy issue and that the Staff has never viewed it as such.[9] The no-action requests also maintained that, in spite of the proponent's disclaimer, the supporting statement still addressed the wage practices (i.e., general compensation matters) of each company that received the proposal.

The Staff agreed that the proposal could be excluded on ordinary business grounds, noting that the proposal "relates to general compensation matters, and does not otherwise transcend day-to-day business matters."[10]

### iii. Pharmaceutical Pricing Proposals

This season saw the return of a shareholder proposal campaign targeting how pharmaceutical companies determine the price of their products. At least ten pharmaceutical companies received proposals requesting that the board "issue a report listing the rates of price increases year-to-year of the company's top ten selling branded prescription drugs between 2010 and 2016, including the rationale and criteria used for these price increases, and an assessment of the legislative, regulatory, reputational and financial risks they represent for the company." The last campaign that similarly focused on the pricing of pharmaceutical products asked companies during the 2015 proxy season to prepare reports "on the risks to [the companies] from rising pressure to contain U.S. specialty drug prices." Those proposals were found to be not excludable under Rule 14a-8(i)(7) by the Staff because they focused on "fundamental business strategy with respect to . . . [companies'] pricing policies for pharmaceutical products."[11]

During the 2017 proxy season, the 10 companies that received this new drug pricing-related proposal sought no-action relief under Rule 14a-8(i)(7), with many arguing that this proposal was different from the 2015 adverse precedents because in those instances, the proposals "focused on the company's fundamental business strategy with respect to its pricing policies for pharmaceutical products rather than on how and why the company makes specific pricing decisions regarding certain of those products." The companies also argued that "[u]nlike the requests in [2015], the primary focus of the [current proposals] . . . is on obtaining explanation and justification for product-specific and time period-specific price increases." Most of the proponents, on the other hand, cited those same 2015 letters and argued that they stood for the proposition that "[i]t is abundantly clear that the pricing of their drugs . . . is a significant policy concern for drug manufacturers." The Staff concurred that the proposals were excludable on ordinary business grounds because they related "to the rationale and criteria for price increases of the company's top ten selling branded prescription drugs in the last six years."[12]


During the 2017 proxy season, the National Center for Public Policy Research and its leaders submitted a new type of proposal to at least eight companies asking them to produce a report (1) detailing risks and costs associated with pressure campaigns to oppose religious freedom laws, public accommodation laws,
freedom of conscience laws and campaigns against candidates from Title IX exempt institutions, (2) detailing risks and costs associated with pressure campaigns supporting discrimination against religious individuals and those with deeply held beliefs, and (3) detailing strategies that they may deploy to defend their employees and their families against discrimination and harassment that is encouraged or enabled by such efforts.

While the proposals were framed as asking for a "[r]eport on certain non-discrimination principles," eight companies sought no-action relief on ordinary business grounds as relating to management of workforce and/or public relations. The Staff concurred in the exclusion of five of these proposals under Rule 14a-8(i)(7), as relating to companies' ordinary business operations.[13] These no-action letters demonstrate that merely labeling a proposal as implicating discrimination issues is not sufficient to avoid evaluation of whether a proposal seeks to address ordinary business operations.

v. Micromanagement Exclusions

During the 2017 proxy season, some companies were also able to exclude proposals on ordinary business grounds because they impermissibly sought to "micromanage" the company. These letters are notable because the Staff has rarely concurred with no-action requests based on the micromanagement prong of the ordinary business exception. For example, Deere & Co. and another company were able to exclude on ordinary business grounds a proposal requesting that the company "generate a feasible plan for the company to reach a net-zero GHG emissions status by the year 2030 . . . and report the plan to shareholders" because, according to the Staff, the proposal sought to "micromanage the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment."[14]

b) Continued Success in Exclusions Based on Substantial Implementation

While substantial implementation continued to be a popular basis for exclusion during the 2017 proxy season, 54.8% of the no-action requests granted on this basis concerned "amend proxy access" proposals, as further discussed below. Overall, approximately 34 companies were able to exclude "amend proxy access" proposals based on arguments that the existing terms of their proxy access bylaws substantially implemented the proposal.[15] As further discussed below, an additional 13 companies were able to exclude "adopt proxy access" proposals on the basis of substantial implementation arguments because of their adoption of a proxy access bylaw prior to their annual meetings.

c) Decrease in Exclusions Based on Procedural Arguments

As noted above, the number of exclusions based on procedural arguments continued to decrease in 2017, with 17.5%[16] of no-action requests (or 33 of 189) granted on that basis in 2017, down from 23.2% in 2016 (or 33 of 142) and 35.0% in 2015 (or 46 of 133). The most common procedural argument that failed to obtain no-action relief in 2017 was based on the one-proposal limitation. Under Rule 14a-8(c), each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting. All seven no-action requests asserting that a submission violated the one-proposal rule did not prevail on this argument.
C. Shareholder Proposal Voting Results[17]

Based on the 331 shareholder proposals for which ISS provided voting results in 2017, proposals averaged support of 29.0% of votes cast, slightly down from average support of 29.8% of votes cast in 2016. The proposal topics that received high shareholder support, including four categories of proposals that averaged majority support, were:

- **Board Declassification**: Three proposals voted on averaged support of 70.2% of votes cast in 2017, compared to three proposals with average support of 64.5% in 2016;

- **Elimination of Supermajority Voting Requirements**: Seven proposals voted on averaged support of 64.3% of votes cast, compared to 13 proposals with average support of 59.6% in 2016;

- **Adopt Proxy Access**: Eighteen adopt proxy access proposals voted on averaged support of 62.1% of votes cast. In 2016, average support for proxy access proposals where the company had not previously adopted some form of proxy access was 56.0%.

- **Majority Voting in Uncontested Director Elections**: Seven proposals voted on averaged support of 62.3% of votes cast, compared to 10 proposals with average support of 74.2% in 2016;

- **Written Consent**: Twelve proposals voted on averaged support of 45.6% of votes cast, compared to 13 proposals with average support of 43.4% in 2016;

- **Shareholder Ability to Call Special Meetings**: Fifteen proposals voted on averaged support of 42.9% of votes cast, compared to 16 proposals with average support of 39.6% in 2016; and

- **Climate Change**: Twenty-eight proposals voted on averaged support of 32.6% of votes cast, compared to 37 proposals with average support of 24.2% in 2016.

Overall, approximately 10.9% of shareholder proposals that were voted on at 2017 shareholder meetings received support from a majority of votes cast, compared to 14.5% of proposals in 2016. The table below shows the principal topics addressed in proposals that received majority support:

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<tr>
<th>Proposal</th>
<th>2017 Majority Votes</th>
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<td>13</td>
<td>27</td>
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<td>Elimination of supermajority vote requirements</td>
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<td>Majority voting in uncontested director elections</td>
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<td>Climate change</td>
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II. Key Shareholder Proposal Topics and Trends During the 2017 Proxy Season

A. Environmental Proposals

The total number of environmental proposals increased in 2017, with shareholders submitting approximately 144 environmental proposals for 2017 meetings compared to 139 in 2016. Overall, the 55 environmental proposals voted on received average support of 28.9% of the votes cast, compared to 71 that received average support of 25.1% of votes cast in 2016.

The largest group of environmental proposals related to climate change, with 69 such proposals submitted in 2017 compared to 63 in 2016. The 28 climate change proposals voted on in 2017 averaged support of 32.6% of votes cast. Three climate change proposals received a majority of the votes cast, as further discussed below. Climate change proposals were submitted not just to oil and gas companies, but also to companies in the financial services and technology industries. ISS recommended that shareholders vote "for" 23 of the 28 proposals (or 82.1%) voted on in 2017 and "for" 27 of the 37 proposals (or 73.0%) of the proposals voted on in 2016.

In addition to climate change proposals, environmental proposals submitted in 2017 included:

- 28 proposals related to environmental impacts on the community or supply chains, including impacts of deforestation and pesticides (with 11 such proposals voted on averaging 23.6% support);
- 24 proposals calling for reports on sustainability (with nine such proposals voted on averaging 30.0% support);
- 12 proposals focusing on renewable energy (with four such proposals voted on averaging 18.3% support); and
- Nine proposals focusing on recycling (with three such proposals voted on averaging 24.3% support).

1. Three Climate Change Proposals Receive Majority Support and Pass in 2017

As mentioned above, three climate change proposals received majority support. Various factors may have contributed to the success of these proposals. Most notably, in March, BlackRock announced in its 2017-2018 engagement priorities that it expects boards to have "demonstrable fluency in how climate risk affects the business and management's approach to adapting and mitigating the risk," and that where
it has concerns that a board is not "dealing with a material risk appropriately," it may signal that concern through its vote.[20] Vanguard also updated its proxy voting guidelines in 2017 to state that it would evaluate each environmental proposal on the merits and may support those with a demonstrable link to long term shareholder value.[21]

The three climate change proposals that passed specifically called for a report on the impact of climate change policies, including an analysis of the impacts of commitments to limit global temperature change to two degrees Celsius. The three companies where this proposal passed were the following:

- Occidental Petroleum Corp. received the proposal from Wespath Investment Management, the Nathan Cummings Foundation and other investors, including the California Public Employees' Retirement System ("CalPERS"), and it received support of 67.3% of votes cast by the company's shareholders, including BlackRock, a 7.8% owner. In an unprecedented move, BlackRock issued a press release announcing that it had supported the shareholder proposal.[22]

- PPL Corp., a utility holding company, received the proposal from the New York State Common Retirement Fund, and it received support of 56.8% of votes cast by the company's shareholders, including CalPERS and other pension funds.

- Exxon Mobil received the proposal from the New York State Common Retirement Fund, and it received support from about 62.1% of votes cast by the company's shareholders.

These votes reflect the new willingness of institutional investors to support environmental proposals and the effect of increased pressure from their clients to influence companies on environmental issues. In addition, the same proposal was submitted to 18 other companies and voted on at ten companies, where it averaged 45.6% of votes cast.

B. Board Diversity Proposals

Board diversity continues to remain at the forefront of corporate governance discussions as investors and shareholder activists are increasingly pushing for gender diversity on the boards of U.S. public companies. Most recently, BlackRock and State Street Global Advisors announced plans to drive greater gender diversity on boards through active dialogue with companies. These institutional investors have indicated that, if progress is not made within a reasonable time frame, they plan to use their proxy voting power to influence change by voting against certain directors, such as members of nominating and governance committees.[23]

As such, perhaps unsurprisingly, in 2017 the number of board diversity proposals reached an all-time high. Thirty-five proposals calling for the adoption of a policy on board diversity or a report on steps to increase board diversity were submitted in 2017 as compared to 28 proposals submitted in 2016. As in 2016, a substantial number of board diversity proposals were withdrawn, likely due to commitments made by companies to the proponents of these proposals, such as adopting board recruitment policies inclusive of race and/or gender.[24]
Of the 35 proposals submitted in 2017, eight proposals have been voted on and received, on average, 28.3% of votes cast, as compared to six proposals in 2016, which received, on average, 19.1% of votes cast. ISS recommended that shareholders vote "for" all but two of the proposals voted on in 2017 and "for" all but one of the proposals voted on in 2016.

Two board diversity proposals submitted in 2017 received majority support, as compared to one in 2016. One of the successful proposals was submitted by the City of Philadelphia Public Employees Retirement System to Cognex Corp. requesting that the company's board adopt a policy for "improving board diversity [by] requiring that the initial list of candidates from which new management-supported director nominees are chosen . . . by the Nominating and Corporate Governance Committee should include (but need not be limited to) qualified women and minority candidates." Cognex Corp. had no women on its board of directors. The proposal received 62.8% of votes cast. The second proposal asked a different company to prepare a report (at a reasonable expense and omitting proprietary information) on steps the company is taking to foster greater diversity on its board. The proposal received the support of 84.8% of votes cast.

These results, along with the continued investor focus on board composition and board diversity, mean that board diversity will continue to be raised in shareholder engagements, and that shareholder proponents likely will continue to use the Rule 14a-8 shareholder proposals process as a way to push for greater board diversity.

C. Other Diversity-Related Proposals

Approximately 34 proposals submitted to companies in 2017 related to discrimination and diversity concerns, compared to 16 such proposals in 2016. These proposals included 20 proposals calling for the preparation of a diversity report, eight proposals calling for policy amendments to prohibit discrimination based on sexual orientation and gender, and six proposals calling for a report on company non-discrimination policies. On average, the eight proposals related to discrimination and diversity concerns that were voted on in 2017 received support from 24.2% of the votes cast. ISS recommended that shareholders vote "for" all but three of these proposals voted on in 2017 and "for" all but two of these proposals voted on in 2016.

D. Gender Pay Gap

Approximately 19 proposals submitted in 2017 concerned the gender pay gap, compared to approximately 13 such proposals submitted for 2016 meetings. Among the 19 proposals were 17 proposals requesting reports on the gender pay gap (two of which also requested a report on any race or ethnicity pay gaps), one proposal requesting evidence that no gender pay gap exists, and one proposal requesting disclosure of the number of women at each compensation percentile. The proposals calling for a report on the gender pay gap include seven proposals submitted to financial institutions and credit card companies requesting a report on whether the company has a "gender pay gap," the size of the gap, and its policies and goals to reduce the gap. On average, the eight gender pay gap proposals that were voted on received support from 18.8% of the votes cast. ISS recommended that shareholders vote "against" all eight of these proposals in 2017 but "for" three out of the five proposals voted on in 2016.
E. Pay Disparity

Approximately 14 proposals regarding pay disparity were submitted in 2017, as compared with nine in 2016. Among these proposals were two general types: proposals related to employee wages (eight proposals) and proposals requesting a report on the ratio between compensation paid to senior management and the median employee (six proposals). On average, the three pay disparity proposals that were voted on in 2017 received the support of only 5.3% of the votes cast. ISS recommended that shareholders vote "against" all three of these proposals voted on in 2017 and "against" both of these proposals voted on in 2016.

Among the proposals related to employee wages were six proposals requesting that companies adopt principles for minimum wage and/or guaranteeing a living wage (five of which were submitted by either, or both of, Trillium Asset Management and Zevin Asset Management) and two proposals requesting a report on incentive risks for low-paid employees.

Although the six pay ratio proposals represent a three-fold increase over the two pay ratio proposals submitted for 2016 meetings, the number remained well below the 15 pay ratio proposals submitted in 2015. Pay ratio is likely to become a focus in upcoming months for companies and the investors eager to obtain this information, as under current SEC regulations, the pay ratio rule will generally require companies to disclose a pay ratio in their 2018 proxy statements. Assuming no change in current regulations, the impact of this 2018 pay ratio disclosure on shareholder proposals may become apparent during the subsequent proxy season (i.e., in 2019).

F. Virtual Annual Meeting-Related Proposals

In recent years, an increasing number of companies have opted to hold exclusively virtual annual shareholder meetings. These annual meetings are commonly referred to as "virtual-only annual meetings."[25]

After not submitting shareholder proposals on this topic during the 2015 and 2016 proxy seasons, some proponents submitted proposals in 2017 requesting that companies that previously held virtual-only annual meetings adopt a corporate governance policy to initiate or restore in-person annual meetings.[26] Notably, none of these proposals have gone to a vote.

Instead, in a decision critical for companies that currently hold or are contemplating switching to virtual-only annual meetings, the Staff issued a no-action letter for the 2017 proxy season permitting HP Inc. to exclude a shareholder proposal submitted by John Chevedden and Bart Naylor that objected to virtual-only annual meetings. The Staff concurred that the proposal could be excluded under Rule 14a-8(i)(7) on the grounds that the "determination of whether to hold annual meetings in person" is related to the company's ordinary business operations.[27]

Since then, investors (including the New York City Comptroller, Walden Asset Management, the Interfaith Center on Corporate Responsibility, CalPERS, and the Council of Institutional Investors ("CII")) have continued to advocate against virtual-only meetings through their own policy pronouncements and direct communications with companies holding virtual-only meetings. For
instance, in the spring of 2017, the New York City Comptroller sent letters to more than a dozen S&P 500 companies that held virtual-only meetings in the prior year (or had announced that they would do so in the future) urging them to host in-person annual meetings instead, but noting that it welcomed and encouraged the use of new technologies to expand shareholder participation (i.e., in the context of "hybrid" annual meetings that allow both live and on-line participation). Furthermore, under its updated proxy voting guidelines, the New York City Comptroller, on behalf of four New York City pension funds,[28] has indicated that the pension funds "may oppose all incumbent directors of a nominating committee subject to election at a 'virtual-only' annual meeting."[29]

G. Proxy Access Proposals

Although proxy access was the second most common shareholder proposal topic in 2017, the spotlight has waned on this issue as proxy access has become the majority practice in the S&P 500 (over 60% have adopted as of the end of the 2017 proxy season). Proxy access refers to the right of shareholders under a company's bylaws to nominate candidates for election to the board and have the shareholder nominees included in a company's proxy materials.

After two years of growing pains, proxy access has become the latest widely-accepted governance change among large-cap companies, following in the footsteps of previous shareholder-advocated governance changes, such as the replacement of plurality with majority voting in uncontested director elections and the declassification of boards. Likewise, the core provisions in proxy access bylaws are now settled (i.e., ownership of 3% of a company's shares for at least three years, and the right to nominate up to 20% of the board by a shareholder or group of up to 20 shareholders).

Approximately 112 proxy access proposals were submitted for 2017 meetings, representing significantly fewer than the 201 proposals submitted for 2016 meetings and only slightly more than the 108 proposals submitted for 2015 meetings. Of the 112 proxy access proposals, 59 proposals requested the adoption of a proxy access bylaw ("adopt proxy access proposals") and 53 proposals requested amendments to an existing proxy access bylaw ("amend proxy access proposals"). Thirty-four of the adopt proxy access proposals and nearly all of the amend proxy access proposals were submitted by John Chevedden (in his own capacity and on behalf of others), while an additional 18 adopt proxy access proposals were submitted by the New York City Comptroller.

The 18 adopt proxy access proposals voted on received average support of 63.1% of votes cast, while the 20 amend proxy access proposals voted on received average support of 28.5% of votes cast. A total of 13 proxy access proposals (all adopt proxy access proposals) received a majority of votes cast. ISS recommended that shareholders vote "for" all of the proxy access proposals voted on in 2017 and "for" all but one of the proxy access proposals voted on in 2016.

The main proxy access development in 2017 related to proposals seeking to amend an existing proxy access bylaw to increase the number of shareholders permitted to constitute a nominating group. The Staff generally agreed with companies that they could exclude these proposals as substantially implemented, provided that the no-action request demonstrated how the existing aggregation limit achieved the proposal's goal of providing a meaningful proxy access right.[30]
As in 2016, a number of companies also obtained no-action letters concurring that a proposal seeking adoption of proxy access had been substantially implemented when the companies responded to the receipt of an adopt proxy access proposal by adopting a proxy access bylaw prior to their annual meetings, even though the companies' bylaws varied in certain respects from the proxy access terms requested in the proposals.\[31\]

III. Potential Reform of Shareholder Proposal Rule

There have been growing calls over the last decade to amend Rule 14a-8, the SEC's shareholder proposal rule, to update various thresholds in the rule and to address some of the ways in which the rule has been abused. For example, in 2014, the U.S. Chamber of Commerce, along with eight other business organizations, petitioned the SEC to raise the existing threshold for the excludability from company proxy materials of shareholder proposals previously submitted to shareholders that did not elicit meaningful shareholder support. The petition requested that the SEC reconsider its resubmission rule by conducting a thorough cost-benefit analysis of the current rule and creating new threshold percentages based on the conclusions gleaned from its cost-benefit analysis.\[32\]

More recently, the House Republicans' proposal for financial regulation reform, the CHOICE Act, tackled the issue. The legislation, which passed the House by a 233-186 vote in early June, would amend the shareholder proposal rule to (1) increase the holding period for the shareholder proponent from one year to three years; (2) require that a shareholder hold 1% of a company's outstanding stock (and eliminate the option to satisfy this requirement by holding $2,000 in stock) for the holding period; (3) prohibit the submission of proposals other than by the shareholder (so-called "proposals by proxy"); and (4) increase the percentage of support that a proposal must have received the last time it was voted on in order to be resubmitted. The proposed resubmission thresholds would exclude proposals that previously were voted on in the past five years and most recently received less than 6% (currently 3%) if voted on once, 15% (currently 6%) if voted on twice, and 30% (currently 10%) if voted on three times.\[33\]

The CHOICE Act has faced strong opposition from institutional investors, including CII, which sent a letter to House members urging them to oppose the bill.\[34\] While the legislation's prospects in the U.S. Senate are uncertain, the SEC may consider Rule 14a-8 amendments (although that is more likely to occur once the two vacancies on the Commission are filled).

IV. Top Take-Aways for 2017 Season

Based on the results of the 2017 proxy season, there are several key take-aways to consider:

- **First, 2017 was the year for both environmental and social proposals to take center stage, and the spotlight on these issues is likely to continue to shine brightly in 2018.**
  - Over 40% of shareholder proposals submitted in 2017 dealt with environmental and social issues, making this the largest category of shareholder proposals for the first time since 2014.
The key environmental proposals in 2017 were climate change proposals (69 in 2017, with those voted on averaging 33.8% support); environmental impacts on communities or supply chains (28 in 2017, with those voted on averaging 23.6% support), and reports on sustainability (24 in 2017, with those voted on averaging 30.0% support). The key social proposals to watch are board diversity proposals (35 in 2017, with those voted on averaging 28.3% support); diversity-related proposals (34 in 2017, with those voted on averaging 24.2% support); and gender pay gap proposals (19 in 2017, with those voted on averaging 18.8% support).

With the Administration's decision to withdraw from the Paris Climate Accord and decrease federal support for environmental initiatives, the focus on private sector environmental initiatives has increased, including through the submission of shareholder proposals. In this context, engagement on climate-related matters has become more important, as several institutional investors have indicated that company engagement and responsiveness on these issues can sway their votes.

With several institutional investors increasingly willing to support environmental proposals, companies should consider whether to take additional actions with respect to their sustainability practices and how these efforts are communicated to investors.

- **Second, in the area of virtual-only annual meetings, the stage is set for increased debate over this hot-button issue.**
  - Companies now have solid no-action request precedent to exclude these shareholder proposals. That being said, certain investors are very vocal about their opposition to virtual-only meetings. Their activism (both leading up to and during the meeting) may discourage some companies from making a move to virtual-only meetings.
  - Companies that are currently holding virtual-only annual meetings may face increasing pressure to either hold hybrid annual meetings or to enhance virtual-only meetings to make them as interactive as possible (i.e., as close to a physical annual meeting as possible). This would include live audio and/or video participation for all shareholder participants, which is something most companies that hold virtual-only annual meetings currently do not accommodate.

- **Third, although the spotlight on proxy access has waned, this has become the latest standard governance practice.**
  - Companies that have not yet adopted proxy access are likely to continue to face shareholder proposals on this topic in the coming years, and these proposals are likely to continue to receive significant support—in 2017, adopt proxy access proposals voted on received average support of 63.2% of votes cast.
  - Accordingly, companies that have not yet adopted proxy access may consider whether to do so—and this may arise either in response to a shareholder proposal or due to the desire
to align with majority practice among S&P 500 companies. Likewise, companies that previously adopted proxy access, particularly those that were early adopters of proxy access, may want to revisit their bylaws and consider whether their provisions align with the terms adopted by the majority of adopters.

- **Lastly, the momentum to amend Rule 14a-8 is growing, albeit slowly.**

  o There is increasing support for amendments to the shareholder proposal rule to update various thresholds in the rule and address some of the ways in which the rule has been abused. Rule 14a-8 was last amended in 2010 to no longer permit the exclusion of proxy access shareholder proposals. However, there have been calls for some time to address other aspects of the rule. Top items on the reform list for Rule 14a-8 include increasing the holding period and ownership requirements for shareholder proponents and increasing the resubmission thresholds for proposals that were voted on in prior years.

  o The CHOICE Act takes a comprehensive approach to amending the rule and aims to address these "top items" on the reform list as well as to prohibit submission of so-called "proposal by proxy" (i.e., ability of a proponent to act as a designee for an actual shareholder with respect to a proposal). Given the scope of the reforms in the CHOICE Act, and with a new Administration and growing support for deregulation, changes to Rule 14a-8 may finally happen. Even without Congressional action, the SEC could take action on its own to amend Rule 14a-8 with its rulemaking authority.

[1] Gibson, Dunn & Crutcher LLP assisted companies in submitting the shareholder proposal no-action requests discussed in this alert that are marked with an asterisk (*).

[2] For the purposes of reporting in this alert statistics regarding no-action requests, references to the "2017 proxy season" refer to the period between October 1, 2016 and June 1, 2017. Data regarding no-action letter requests as well as no-action letters was derived from the information available on the SEC's website. Unless otherwise noted, all data in this alert on shareholder proposals submitted, withdrawn, and voted on is derived from the Institutional Shareholder Services ("ISS") publications and the ISS shareholder proposals and voting analytics databases, and includes proposals submitted and reported on in these ISS databases at any time prior to June 1, 2017 for annual meetings of shareholders at Russell 3000 companies held at any time in 2017 ("2017 meetings"). References in this alert to proposals "submitted" include those shareholder proposals voted on or that were withdrawn by the proponent. Voting results are reported on a votes cast basis (votes for or against) and do not address the impact of abstentions. Where statistics are provided for prior years, the data is for a comparable period in those years.

[3] Corporate civic engagement includes proposals regarding support for political, lobbying, or charitable organizations.

[4] Shareholder proposals are categorized based on the subject matter of various proposals.
Social proposals cover a wide range of issues and include proposals relating to (i) board diversity; (ii) discrimination and other diversity-related issues; (iii) the gender pay gap; (iv) establishing a board committee on human rights; (v) requiring a director nominee with social and environmental qualifications; and (vi) providing a report on drug pricing increases.

Environmental proposals include proposals addressing (i) a report on climate change; (ii) a report on or the adoption of greenhouse gas emissions goals; (iii) actions to address risks in light of climate change; (iv) reviewing public policy advocacy on climate change; (v) recycling; (vi) renewable energy; (vii) hydraulic fracturing; and (viii) a report on sustainability.

Climate change proposals include proposals addressing (i) a report on climate change; (ii) a report on or the adoption of greenhouse gas emissions goals; (iii) actions to address risks in light of climate change; and (iv) reviewing public policy advocacy on climate change.

Proxy access proposals are proposals calling on a company to adopt a proxy access right or to revise an existing proxy access bylaw.

Political contributions disclosure proposals call on a company to provide information regarding political contributions, while lobbying disclosure proposals request information on a company's lobbying policies and practices.

[5] Includes Staff-issued responses either granting or denying exclusion of a proposal, or following withdrawal of a no-action request, usually in response to a proponent’s withdrawal of a proposal.

[6] All percentages are based on the number of no-action requests for which relief was granted.

[7] Lowe's Companies, Inc. also argued that the proposal was excludable because it had already been substantially implemented (Rule 14a-8(i)(10)) and because it related to operations that did not meet the five percent threshold and were not otherwise significantly related to the company's business (Rule 14a-8(i)(5)). The Staff did not address these arguments. See Lowe's Companies, Inc. (avail. Mar. 8, 2017).

[8] See, e.g., The TJX Companies, Inc. (avail. Mar. 8, 2016)*. One proposal was withdrawn (Panera Bread Co.).


[13] See, e.g., Johnson & Johnson (avail. Feb. 23, 2017)*. The proposal was excluded on procedural grounds at two companies and was withdrawn at a third company.

[14] See Deere & Co. (avail. Dec. 5, 2016). Deere argued that the proposal sought to micromanage the company by replacing the judgment of management with specific quantitative measures and timelines provided by shareholders, who, as a group, would not be in a position to make an informed judgment. The Staff also concurred that SeaWorld Entertainment, Inc. could exclude a shareholder proposal for the same reason (the proposal "seeks to micromanage the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment"). See SeaWorld Entertainment, Inc. (avail. Mar. 30, 2017).

[15] As further discussed below, the Staff generally agreed with companies that they could exclude as substantially implemented "amend proxy access" proposals that only requested an increase in the number of shareholders permitted to constitute a nominating group, provided that the no-action requests included specified share ownership information demonstrating that the aggregation limit in the company's bylaw compared favorably to the limit in the shareholder proposal. See, e.g., Amazon.com, Inc. (avail. Mar. 7, 2017)*; Anthem, Inc. (avail. Mar. 2, 2017)*; and General Dynamics Corp. (avail. Feb. 10, 2017).

[16] Based on the number of no-action requests for which relief was granted.

[17] Voting results are reported on a votes cast basis (votes for or against) and do not address the impact of abstentions.

[18] The information in this alert regarding the three climate change proposals that received majority support includes the Exxon Mobil Corp. shareholder vote on May 31, 2017, which ISS voting results data did not yet report as of June 1, 2017. Apart from this information, the data in this alert regarding climate change proposals is based on ISS data as of June 1, 2017, and, therefore, excludes this proposal.

[19] Climate change proposals submitted in 2017 included 35 proposals calling for a report on climate change (including the three that received majority support); 29 proposals calling for a report on, or adoption of, greenhouse gas emissions goals; three proposals requesting the company to take action to address risks in light of climate change; and two proposals related to the review of public policy advocacy on climate change.


[21] Vanguard, Vanguard's Proxy Voting Guidelines, available at: https://about.vanguard.com/investment-stewardship/voting-guidelines/. Furthermore, Fidelity updated its proxy voting guidelines to state that "[i]n certain cases…Fidelity may support shareholder proposals that request additional disclosures from companies regarding environmental or social issues, where it believes that the proposed disclosures could provide meaningful information to the investment management process without unduly burdening the company." See Fidelity, Fidelity Funds' Proxy

[22] See BlackRock Press Release, available at: https://www.blackrock.com/corporate/en-us/literature/publication/blk-vote-bulletin-occidental-may-2017.pdf (specifically noting that "when we do not see progress despite ongoing engagement, or companies are insufficiently responsive to our efforts to protect the long-term economic interests of our clients, we will not hesitate to exercise our right to vote against management recommendations. Climate-related risks and opportunities are issues we have become increasingly focused on at BlackRock as our understanding of the related investment implications evolves").


[25] According to Broadridge, in 2016, 187 companies held virtual annual meetings (including virtual-only meetings and hybrid meetings that are both virtual and physical). Of those, 83% (155) were virtual-only meetings, as compared to 67% in 2015. In addition, of these 155 virtual-only meetings, six were conducted with live video, while the vast majority (149) used only live audio. Moreover, of the 44 companies that held a hybrid annual meeting in 2015, 12 of them switched to virtual-only meetings in 2016.

[26] ISS data includes information about three such proposals. Two of these proposals were excluded after receiving no-action relief as described further below, and one proposal was excluded based on procedural grounds.

[27] See HP Inc. (avail. Dec. 28, 2016)*. In permitting HP to exclude the proposal, the Staff reaffirmed its position on this subject from more than 14 years ago.

[28] These four funds are the New York City Employees' Retirement System, the New York City Police Pension Fund, the New York City Fire Department Pension Fund and the Board of Education Retirement System of the City of New York. The guidelines for these four funds indicate that a fifth New York City pension fund, the New York City Teachers' Retirement System, has the same policy. See The Office of the New York City Comptroller, Corporate Governance Principles and Proxy Voting Guidelines (last amended Apr. 2017), available at: https://comptroller.nyc.gov/wp-content/uploads/documents/NYCRS-Corporate-Governance-Principles-and-Proxy-Voting-Guidelines_April-2016-Revised-April-2017.pdf.
[29] The revised policy applies to S&P 500 companies starting in 2017 and will expand to cover all U.S. portfolio companies in 2018. Nominating committee members can avoid negative votes during 2017 if their companies agree to hold in-person or hybrid annual meetings beginning in 2018.


[33] This would raise the thresholds to the same percentages that were proposed but not adopted by the SEC in 1998. See Release No. 40018, available at: https://www.sec.gov/rules/final/34-40018.htm. ("We had proposed to raise the percentage thresholds respectively to 6%, 15%, and 30%. Many commenters from the shareholder community expressed serious concerns about this proposal. We have decided not to adopt the proposal, and to leave the thresholds at their current levels.").


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The following Gibson Dunn lawyers assisted in the preparation of this client update: Ronald O. Mueller, Elizabeth Ising, Lori Zyskowski, Gillian McPhee, Maia Gez, Julia Lapitskaya, Lauren Assaf, Kevin Hill, Victor Twu, and Geoffrey Walter.

Gibson, Dunn & Crutcher’s lawyers are available to assist in addressing any questions you may have about these developments. To learn more about these issues, please contact the Gibson Dunn lawyer.
with whom you usually work, or any of the following lawyers in the firm’s Securities Regulation and Corporate Governance practice group:

Ronald O. Mueller - Washington, D.C. (+1 202-955-8671, rmueller@gibsondunn.com)
Elizabeth Ising - Washington, D.C. (+1 202-955-8287, eising@gibsondunn.com)
Lori Zyskowski - New York (+1 212-351-2309, lzyskowski@gibsondunn.com)
Gillian McPhee - Washington, D.C. (+1 202-955-8201, gmcphee@gibsondunn.com)
Maia Gez - New York (+1 212-351-2612, mgez@gibsondunn.com)
Michael Titera - Orange County, CA (+1 949-451-4365, mmittera@gibsondunn.com)
Julia Lapitskaya - New York (+1 212-351-2354, jlapitskaya@gibsondunn.com)