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Shareholder Proposal Developments During the 2021 Proxy Season

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This client alert provides an overview of shareholder proposals submitted to public companies during the 2021 proxy season, including statistics and notable decisions from the staff (the "Staff") of the Securities and Exchange Commission (the "SEC") on no-action requests.

I. Top Shareholder Proposal Takeaways from the 2021 Proxy Season

As discussed in further detail below, based on the results of the 2021 proxy season, there are several key takeaways to consider for the coming year:

- ***Shareholder proposal submissions rose significantly.*** After trending downwards since 2016, the number of proposals submitted increased significantly by 11% from 2020 to 802.
- ***The number of social and environmental proposals also significantly increased, collectively overtaking governance proposals as the most common.*** Social and environmental proposals increased notably, up 37% and 13%, respectively, from 2020. In contrast, governance proposals remained steady in 2021 compared to 2020 and represented 36% of proposals submitted in 2021. Executive compensation proposal submissions also declined in 2021, down 13% from the number of such proposals submitted in 2020. The five most popular proposal topics in 2021, representing 46% of all shareholder proposal submissions, were (i) anti-discrimination and diversity, (ii) climate change, (iii) written consent, (iv) independent chair, and (v) special meetings.
- ***Overall no-action request success rates held steady, but the number of Staff response letters declined significantly.*** The number of no-action requests submitted to the Staff during the 2021 proxy season increased significantly, up 18% from 2020 and 19% from 2019. The overall success rate for no-action requests held steady at 71%, driven primarily by procedural, ordinary business, and substantial implementation arguments. However, the ongoing shift in the Staff's practice away from providing written response letters to companies, preferring instead to note the Staff's response to no-action requests in a brief chart format, resulted in significantly fewer written explanations, with the Staff providing response letters only 5% of the time, compared to 18% in 2020.
- ***Company success rates using a board analysis during this proxy season rose modestly, while inclusion of a board analysis generally remained infrequent.*** Fewer companies included a board analysis during this proxy season (down from 19 and 25 in 2020 and 2019, respectively, to 16 in 2021), representing only 18% of all ordinary business and economic relevance arguments in 2021. However, those that included a board analysis had greater success in 2021 compared to 2020, with the Staff concurring with the exclusion of five proposals this year where the company provided a board analysis, compared to four proposals in 2020 and just one proposal in 2019.
- ***Withdrawals increased significantly.*** The overall percentage of proposals

withdrawn increased significantly to the highest level in recent years. Over 29% of shareholder proposals were withdrawn this season, compared to less than 15% in 2020. This increase is largely attributable to the withdrawal rates of both social and environmental proposals, which rose markedly in 2021 compared to 2020 (increasing to 46% and 62%, respectively).

- ***Overall voting support increased, including average support for social and environmental proposals.*** Average support for all shareholder proposals voted on was 36.2% in 2021, up from the 31.3% average in 2020 and 32.8% average in 2019. In 2021, environmental proposals overtook governance proposals to receive the highest average support at 42.3%, up from 29.2% in 2020. Support for social (non-environmental) proposals also increased significantly to 30.6%, up from 21.5% in 2020—driven primarily by a greater number of diversity-related proposals voted on with increased average levels of support. Governance proposals received 40.2% support in 2021, up from 35.3% in 2020. This year also saw a double-digit increase in the number of shareholder proposals that received majority support (74 in total, up from 50 in 2020), with an increasing number of such proposals focused on issues other than traditional governance topics.
- ***Fewer proponents submitted proposals despite the increase in the number of proposals.*** The number of shareholders submitting proposals declined this year, with approximately 276 proponents submitting proposals (compared to more than 300 in both 2020 and 2019). Approximately 41% of proposals were submitted by individuals and 21% were submitted by the most active socially responsible investor proponents. As in prior years, John Chevedden and his associates were the most frequent proponents (filing 31% of all proposals in 2021 and accounting for 75% of proposals submitted by individuals). This year also saw the continued downward trend in five or more co-filers submitting proposals—down to 35 in 2021, from 54 in 2020 and 58 in 2019.
- ***Proponents continued to use exempt solicitations.*** Exempt solicitation filings continued to proliferate, with the number of filings reaching a record high again this year and increasing 30% over the last three years.
- ***Amended Rule 14a-8 in Effect*. **With the amendments to Rule 14a-8 now in effect for meetings held after January 1, 2022, companies should revise their procedural reviews and update their deficiency notices accordingly. However, it remains to be seen whether the new rules will lead to a decrease in proponent eligibility or result in an increase in proposals eligible for procedural or substantive exclusion, based on the new ownership and resubmission thresholds. The SEC's recently announced Reg Flex Agenda indicates that the SEC intends to revisit Rule 14a-8 as a new rulemaking item in the near term, putting into question the future of the September 2020 amendments.

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Gibson Dunn's lawyers are available to assist with any questions you may have regarding 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:

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