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Shareholder Proposal Developments During the 2022 Proxy Season

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This client alert provides an overview of shareholder proposals submitted to public companies during the 2022 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. Summary of Top Shareholder Proposal Takeaways from the 2022 Proxy Season

In November 2021, the Staff issued Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("SLB 14L"). In SLB 14L, the Staff rescinded Staff guidance and reversed no-action decisions published during the tenure of former Division Director Bill Hinman, upending the Staff's recent approach to the application of the economic relevance exclusion in Rule 14a-8(i)(5) and the ordinary business and micromanagement exclusions in Rule 14a-8(i)(7). Moreover, SLB 14L indicated that the Staff would take a more expansive view to whether proposals raised significant policy issues that transcended ordinary business and would be more lenient in interpreting proof of ownership letters. The change of administration at the SEC and the issuance of SLB 14L appear to have served as an open season call for shareholder proponents: the number of proposals submitted surged, the percentage of proposals that shareholders were willing to withdraw as a result of negotiations dropped, and the number of proposals excluded through the no-action process plummeted. At the same time, recent amendments to Rule 14a-8 had only a very minor impact on shareholder submissions. As a result, shareholders were presented with more proposals on a wider range of topics with which they disagreed, with overall levels of voting support dropping notably. We discuss these trends and developments in further detail below:

- ***Shareholder proposal submissions rose again.*** For the second year in a row, the number of proposals submitted increased. In 2022, the number of proposals increased by 8% from 2021 to 868—the highest number of shareholder proposal submissions since 2016.
- ***The number of environmental and civic engagement proposals significantly increased, along with a continued increase in social proposals.*** Environmental and civic engagement proposals increased notably, up 51% and 36%, respectively, from 2021. And social proposals continued to increase, up 20% since 2021 and constituting the largest category of proposals submitted in 2022. In contrast, governance proposals declined 14% and executive compensation proposals declined 27%, each from the number of such proposals submitted in 2021. The five most popular proposal topics in 2022, representing 49% of all shareholder proposal submissions, were (i) climate change, (ii) special meetings, (iii) anti-discrimination and diversity, (iv) independent chair, and (v) lobbying spending and political contributions (which tied for fifth most common proposal topic).
- ***There was a significant decrease in the number of proposals excluded pursuant to a no-action request.*** The number of no-action requests submitted to the Staff during the 2022 proxy season decreased 10% from 2021, but nevertheless was higher compared to prior years, up 5% from 2020 and 7% from

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2019. Most notably, the overall success rate for no-action requests plummeted to 38%, a drastic decline from success rates of 71% in 2021 and 70% in 2020. The 38% success rate was significantly below even the previous lowest exclusion rate in recent times, which occurred in the 2012 proxy season when the success rate dipped to 66%. Success rates in 2022 declined on every basis for exclusion, with the most drastic decline in success rates for procedural (56% in 2022, down from 84% in 2021), substantial implementation (13% in 2022, compared with 55% in 2021), and ordinary business grounds (24% in 2022, compared with 65% in 2021).

- ***While the number of proposals voted on increased significantly, overall voting support decreased, including average support for social and environmental proposals.***In 2022, just over 50% of all proposals submitted were voted on, compared with 41% of submitted proposals that were voted on in 2021. Despite the increase in proposals voted on, average support for all shareholder proposals voted on decreased to 30.4% in 2022 from 36.3% in 2021. The decrease in average support was primarily driven by decreased support for both social and environmental proposals, with support for social (non-environmental) proposals decreasing to 23.2% in 2022 from 32.8% in 2021 and environmental proposals decreasing to 33.3% in 2022 from 43.5% in 2021. And in line with depressed support overall, the number of shareholder proposals that received majority support in 2022 was 55, down from 74 in 2021. But 2022 did mark the first year that two hot-button social proposals received majority support—multiple proposals requesting reports on gender/racial pay gaps and requesting racial/civil rights audits received majority support after coming close in recent years.
- ***Written Staff responses to each shareholder proposal no-action request returned mid-season.*** After discontinuing its longstanding practice of issuing a written response to each shareholder proposal no-action request in 2019, the Staff provided response letters to only 5% of no-action requests during the 2021 proxy season. In December 2021, the Staff announced that it was reconsidering its approach and would return to its historical practice of issuing a response letter for each no-action request. Following its announcement, the Staff immediately ceased communicating its responses via an online chart and commenced issuing response letters to each and every no-action request.
- ***Recent amendments to Rule 14a-8 appear to have had marginal impact on shareholder submissions*.** The 2022 proxy season was the first in which the September 2020 amendments to Rule 14a-8 took effect. Despite concerns voiced from some shareholder proponents and other stakeholders (including ongoing litigation over the new rules), the new rules do not appear to have had an appreciable effect on proponent eligibility or to have resulted in a significant increase in proposals eligible for procedural or substantive exclusion. In fact, as noted above, only 38% of no-action requests were successful in excluding shareholder proposals during the 2022 proxy season. The SEC is scheduled to consider proposing amendments to "update certain substantive bases for exclusion of shareholder proposals" under Rule 14a-8 at an open meeting to be held on July 13, 2022.
- ***Proponents continued to use exempt solicitations in record numbers.*** Exempt solicitation filings continued to proliferate, with the number of filings reaching a record high again this year and increasing 34% over last year and 70% since 2020. Consistent with prior years, the vast majority of exempt solicitations filed in 2022 were filed by shareholder proponents on a voluntary basis—*i.e.*, outside of the intended scope of the SEC's rules—in order to draw attention and publicity to pending shareholder proposals.

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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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