

Shareholder Proposal Developments During the 2023 Proxy Season

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This client alert provides an overview of shareholder proposals submitted to public companies during the 2023 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 2023 Proxy Season** As discussed in further detail below, based on the results of the 2023 proxy season, there are several key takeaways to consider for the coming year:

- **Shareholder proposal submissions rose yet again.** For the third year in a row, the number of proposals submitted increased. In 2023, the number of proposals increased by 2% to 889—the highest number of shareholder proposal submissions since 2016.
- **The number of executive compensation proposals significantly increased, along with a continued increase in environmental and social proposals.** Executive compensation proposals increased notably, up 108% from 2022, with the increase largely attributable to proposals seeking shareholder approval of certain executive severance agreements. The number of both environmental and social proposals also increased, up 11% and 3% respectively, compared to 2022 and 68% and 24% respectively, compared to 2021. In contrast, governance proposals declined 14%, and civic engagement proposals declined 6%. The five most popular proposal topics in 2023, representing 43% of all shareholder proposal submissions, were (i) climate change, (ii) independent chair, (iii) nondiscrimination and diversity-related, (iv) shareholder approval of certain severance agreements, and (v) special meetings. Of the five most popular topics in 2023, all but one (shareholder approval of certain severance agreements replacing lobbying spending and political contributions) were also in the top five in 2022.
- **While the number of no-action requests dropped significantly, the percentage of proposals excluded pursuant to a no-action request rebounded from 2022’s historic low.** Only 175 no-action requests were submitted to the Staff in 2023, representing a submission rate of 20%, down from a submission rate of 29% in 2022 and 34% in 2021. The overall success rate for no-action requests, after plummeting to only 38% in 2022, rebounded to 58% in 2023, but was still well below the 71% success rate in 2021, and marked the second lowest success rate since 2012. Success rates in 2023 improved for duplicate proposals (100% in 2023, up from 31% in 2022), procedural (80% in 2023, up from 68% in 2022), ordinary business (50% in 2023, up from 26% in 2022), and substantial implementation grounds (26% in 2023, up from 15% in 2022), while success rates declined for resubmissions (43% in 2023, compared with 56% in 2022) and violation of law (33% in 2023, compared with 40% in 2022).
- **The number of proposals voted on increased yet again, but overall voting support decreased significantly, and less than 3% of proposals submitted received majority support.** In 2023, over 54% of all proposals submitted were voted on, compared with 50% of submitted proposals voted on in 2022. Despite this increase, average support for all shareholder proposals plummeted to 23.3% in 2023, down from 30.4% in 2022. 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 17.2% in 2023

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from 23.2% in 2022 and support for environmental proposals decreasing to 21.3% in 2023 from 33.8% in 2022. And in line with lower support overall, only 25 shareholder proposals received majority support in 2023, down from 55 in 2022.

- **More change is in store for the shareholder proposal process, as the SEC considers further amendments to Rule 14a-8, Congress homes in on reform of Rule 14a-8, and stakeholders challenge the SEC's role in the process.** In July 2022, the SEC proposed amendments to Rule 14a-8 that, if adopted, would make it significantly more challenging for companies to exclude shareholder proposals on substantial implementation, duplication, and resubmission grounds. The SEC targeted approval of these amendments by October 2023, which means the 2024 proxy season could see further changes in how companies approach no-action requests. Additionally, the Financial Services ESG Committee of the U.S. House of Representatives recently formed a Republican ESG Working Group, which has identified reforming the Rule 14a-8 no-action request process as a key priority of the Working Group's focus on reforming the proxy voting system for retail investors. And, as discussed below, legal action by two stakeholder groups, the National Center for Public Policy Research and the National Association of Manufacturers, could disrupt the shareholder proposal process altogether.
- **Proponents' use of exempt solicitations grows again, and now others are joining the game.** Exempt solicitation filings continued to proliferate, with the number of filings reaching a record high again this year and increasing almost 22% over last year and 64% compared to 2021. As in prior years, the vast majority of exempt solicitations filed in 2023 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. Interestingly, third parties have begun intervening in the shareholder proposal process by using exempt solicitation filings to provide their views on shareholder proposals submitted by unaffiliated shareholder proponents.

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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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