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SHAREHOLDER PROPOSAL DEVELOPMENTS DURING THE 2020 PROXY SEASON

To Our Clients and Friends:

This client alert provides an overview of shareholder proposals submitted to public companies during the 2020 proxy season,¹ including statistics and notable decisions from the staff (the “Staff”) of the Securities and Exchange Commission (the “SEC”) on no-action requests.²

I. TOP SHAREHOLDER PROPOSAL TAKEAWAYS FROM THE 2020 PROXY SEASON

As discussed in further detail below, based on the results of the 2020 proxy season, there are several key takeaways to consider for the coming year:

- Ø *Shareholder proposal submissions continue to decline.* The number of proposals submitted decreased by 9% from the prior year to 720, which was 11% lower than the five-year average of 809.
- Ø *The number of social and environmental proposals significantly decreased, leading to governance proposals being the most common.* Social and environmental proposals declined notably, down 21% and 10%, respectively, from 2019. The number of governance proposals remained steady in 2020 compared to 2019 and represented 40% of proposals

¹ **Data on No-Action Requests:** For purposes of reporting statistics regarding no-action requests, references to the 2020 proxy season refer to the period between October 1, 2019 and June 1, 2020. Data regarding no-action letter requests and responses was derived from the information available on the SEC’s website.

Data on Shareholder Proposals: Unless otherwise noted, all data on shareholder proposals submitted, withdrawn, and voted on is derived from Institutional Shareholder Services (“ISS”) publications and the ISS shareholder proposals and voting analytics databases, and generally includes proposals submitted and reported in these databases for the calendar year from January 1 through June 1, 2020, for annual meetings of shareholders at Russell 3000 companies held in 2020; however, data for proposals withdrawn and voted on includes information reported in these databases through June 30, 2020. References in this alert to proposals “submitted” include shareholder proposals publicly disclosed or evidenced as having been delivered to a company, including those that have been voted on, excluded pursuant to a no-action request, or reported as having been withdrawn by the proponent, and do not include proposals that may have been delivered to a company and subsequently withdrawn without any public disclosure. All shareholder proposal data should be considered approximate. Voting results are reported on a votes cast basis calculated under Rule 14a-8 (votes for or against) and without regard to whether the company’s voting standards take into account the impact of abstentions.

Where statistics are provided for prior years, the data is for a comparable period in those years.

² Gibson, Dunn & Crutcher LLP assisted companies in submitting the shareholder proposal no-action requests discussed in this alert that are marked with an asterisk (*).

submitted, the single largest category during 2020. The five most popular proposal topics, representing 37% of all shareholder proposal submissions, were (i) written consent, (ii) climate change, (iii) anti-discrimination and diversity (although board diversity proposals were down more than 51% from 2019 levels), (iv) independent chair, and (v) lobbying spending.

- Ø ***Overall no-action request success rates held steady, but Staff response letters declined significantly.*** The overall success rate for no-action requests held steady at 70%, driven primarily by substantial implementation, procedural, and ordinary business arguments. However, recent changes in the Staff's practices for responding to no-action requests resulted in significantly fewer written explanations, with the Staff providing response letters only 18% of the time.³ Almost three-fourths of those Staff response letters were issued when the Staff concurred that a proposal was excludable or denied reconsideration.
- Ø ***Company success rates using board analysis during this proxy season show promise.*** Although fewer companies included a board analysis during this proxy season (down 24% from 25 in 2019 to 19 this year), companies that included a board analysis had greater success, with the Staff concurring with the exclusion of four proposals during this year based on the company's use of a board analysis, compared to just one proposal during the 2019 proxy season.
- Ø ***Negotiated withdrawals decreased significantly.*** The overall percentage of proposals withdrawn decreased significantly to its lowest number since 2017. Only 14% of shareholder proposals were withdrawn this season, compared to 20% in 2019, due in part to declining withdrawal rates for social and environmental proposals (dropping to 25% from 38% in 2019).
- Ø ***Overall voting support dipped slightly, including average support for social proposals, although support for environmental proposals continued to gain momentum.*** Average support for all shareholder proposals voted on was 31.3% of votes cast, down slightly from the 32.8% average in 2019 and 32.5% in 2018. In 2020, support for social (non-environmental) proposals was about 21.5%, down from 23.6% in 2019, whereas support for environmental proposals increased to 30.2% from 23.9% in 2019. Governance proposals continued to receive the highest average support at 35.3%. This year also saw a decrease in the number of shareholder proposals that received majority support (50 in total, down from 62 in 2019), with an increasing number of such proposals focused on issues other than traditional governance topics.
- Ø ***Continued proliferation of new proponents and co-filers.*** The number of shareholders using the Rule 14a-8 shareholder proposal process continues to grow, with more than 300 proponents in each of 2020 and 2019 (compared to approximately 200 proponents in 2018). Approximately two-thirds of proposals were submitted by individuals and religious-affiliated organizations. As in prior years, John Chevedden and his associates were the most frequent proponents (filing 31% of all proposals in 2020). This year also saw the continued trend of

³ This statistic includes both initial and reconsideration responses.

multiple co-filers submitting proposals—for example, the number of proposals submitted by at least five co-filers has tripled since 2018.

- Ø ***Proponents continue to use exempt solicitations and litigation.*** Exempt solicitation filings continued to proliferate, with the number of filings reaching a record high again this year and increasing more than 40% over the last three years. This continues to be an area ripe for abuse—for example, nearly 20% of exempt solicitation filings in 2020 failed to comply with Staff guidance. In addition, for the second consecutive year, a proponent turned to the courts to fight the exclusion of an environmental proposal even before the Staff had issued its response to the related no-action request.
- Ø ***Shareholder proposal reform remains pending.*** On November 5, 2019, the SEC proposed amending Rule 14a-8 to address certain eligibility requirements for submitting shareholder proposals and to raise resubmission thresholds. We anticipate that final rules will be adopted in the near term.

II. SHAREHOLDER PROPOSAL STATISTICS AND VOTING RESULTS

A. Overview of Shareholder Proposals Submitted

Shareholders submitted 720 shareholder proposals during the 2020 proxy season, down 9% from 792 in 2019.

Across five broad categories⁴ of shareholder proposals in 2020—governance, social, environmental, civic engagement, and executive compensation—governance proposals represented 40% of all proposals submitted and overtook social and environmental proposals

⁴ Categorizing shareholder proposals can, at times, be a subjective endeavor. We categorize shareholder proposals based on subject matter as follows:

Governance proposals include proposals addressing: (i) shareholder special meeting rights; (ii) proxy access; (iii) majority voting for director elections; (iv) independent board chairman; (v) board declassification; (vi) shareholder written consent; (vii) elimination/reduction of supermajority voting; (viii) director term limits; (ix) stock ownership guidelines; and (x) shareholder approval of bylaw amendments.

Social proposals cover a wide range of issues and include proposals relating to: (i) discrimination and other diversity-related issues (including board diversity); (ii) gender/ethnicity pay gap; (iii) board committees on social and environmental issues; (iv) social and environmental qualifications for director nominees; (v) disclosure of board matrices including director nominees' ideological perspectives; and (vi) reporting on societal concerns, such as human rights, employment or workplace policies, animal welfare, and the opioid crisis.

Environmental proposals include proposals addressing: (i) climate change (including climate change reporting, greenhouse gas emissions goals, and climate change risks); (ii) recycling or sustainable packaging; (iii) renewable energy; (iv) environmental impact reports; and (v) sustainability reporting.

Civic engagement proposals include proposals addressing: (i) political contributions disclosure; and (ii) lobbying policies and practices disclosure.

Executive compensation proposals include proposals addressing: (i) performance metrics, including the incorporation of sustainability-related goals; (ii) compensation clawback policies; (iii) severance and change of control payments; (iv) equity award vesting; (v) executive compensation disclosure; and (vi) limitations on executive compensation.

combined (37%) as the most frequently submitted proposal category for the first time since 2016, followed by civic engagement proposals (11%), executive compensation proposals (8%), and other proposals (5%). Key year-over-year trends in these categories include:

- **Governance proposals.** The number of governance shareholder proposals submitted during the 2020 proxy season held steady at 288, compared to 289 last year. Written consent proposals overtook independent chair proposals as the most common governance proposal this year, representing 23% of all governance proposals with 66 submitted (up from 42 in 2019). This reflects proponents' shifting focus since 2017, with the largest subcategory of governance proposals cycling through proxy access (2017), shareholder special meeting rights (2018), and independent chair (2019).
- **Social proposals.** The number of social shareholder proposals submitted during the 2020 proxy season decreased 21% to 174 (significantly down from 221 in 2019). The largest subcategory, representing 30% of social proposals, continued to be anti-discrimination and diversity-related proposals, with 53 submitted in 2020 (down from 63 in 2019).
- **Environmental proposals.** Environmental shareholder proposals declined by 10% during the 2020 proxy season, with 99 proposals submitted (down from 110 in 2019). The largest subcategory, representing 55% of these proposals, continued to be climate change proposals, with 54 submitted in 2020 (a slight increase from 48 in 2019, but down 25% from the five-year high of 72 in 2018).
- **Civic engagement proposals.** The number of civic engagement shareholder proposals submitted during the 2020 proxy season decreased 22% to 76 (compared to 98 in 2019). Notably, lobbying spending proposals exceeded political contribution proposals: lobbying spending proposals (the largest subcategory, representing 57%) increased from 37 in 2019 to 43 in 2020, and political contribution proposals decreased significantly from 61 in 2019 to 27 in 2020.
- **Executive compensation proposals.** The number of executive compensation shareholder proposals submitted during the 2020 proxy season held steady at 56 (compared to 54 in 2019). Consistent with the last two proxy seasons, the largest subcategory, representing 32% of these proposals, was proposals seeking to include social- or environmental-focused performance measures in executive compensation programs (such as sustainability, cybersecurity, data privacy, and risks arising from drug pricing), with 18 submitted in 2020 (compared to 19 in 2019).

The table below shows that the five most common proposal topics during the 2020 proxy season were the same as those in the 2019 proxy season, except that proposals relating to lobbying spending overtook political contributions proposals and the rankings shifted. The top five shareholder proposal topics collectively represented 37% of all shareholder proposals submitted in 2020, up slightly from 35% in 2019.

Top Shareholder Proposals by Percentage of Total Submitted	
2020	2019
Written consent (9%)	Independent chair (8%)

Climate change (8%)	Anti-discrimination & diversity (8%)
Independent chair (7%)	Political contributions (8%)
Anti-discrimination & diversity (7%)	Climate change (6%)
Lobbying spending (6%)	Written consent (5%)

B. Overview of Shareholder Proposal Proponents

In terms of who submitted shareholder proposals, there were at least 327 different proponents during the 2020 proxy season, holding steady compared to the 324 in 2019. Individuals (41%) and religious-affiliated organizations (23%) submitted a substantial majority of proposals during the 2020 proxy season. As in prior years, John Chevedden and shareholders associated with him (including James McRitchie, Kenneth Steiner, and Myra Young) submitted or co-filed the most shareholder proposals during the 2020 proxy season—223 proposals (down from 239 in 2019, but up from 187 in 2018), or 31% of all proposals. The table below shows the proponents who submitted (or co-filed) at least 15 proposals this year.

Top Proponents by Number of Proposals Submitted			
Proponent	2020	2019	Primary 2020 focus areas
John Chevedden (& associates)	223	239	Governance
As You Sow Foundation	63	56	Environmental & diversity
Mercy Investment Services	34	42	Political, environmental & executive compensation
Trillium Asset Management	34	30	Environmental & diversity
New York City Comptroller ⁵	25	48	Diversity & social
Friends Fiduciary Corporation	22	23	Political, environmental & executive compensation
New York State Comptroller ⁶	18	30	Political, diversity & environmental
Boston Trust Walden Company	15	22 ⁷	Political, diversity & environmental

Co-filers remain popular. Over the past several years, the number of proposals with multiple co-filers has remained relatively high. For example, during the 2020 proxy season there were approximately 182 proposals submitted by two or more co-filers (down from 217 in 2019, but up from 141 in 2018), 54 of which were submitted by five or more co-filers (down from 58 in 2019, but up from 18 in 2018). Increases in the number of co-filers create greater burdens on companies to vet the co-filers' eligibility and rule compliance. In addition, to the extent a lead proponent is not identified by the submissions, the existence of multiple co-filers can impede productive negotiations to implement and withdraw a proposal.

⁵ The following organizations are included in the data for the New York City Comptroller because they are managed by the Comptroller's office: New York City Police Dept. Pension Fund, New York City Employees' Retirement System, New York City Fire Dept. Pension Fund, New York City Teachers' Retirement Fund, and New York City Employees' Retirement System.

⁶ This includes proposals submitted by the New York State Common Retirement Fund, which is controlled by the New York State Comptroller.

⁷ The 2019 proposals were submitted under the name of Walden Asset Management.

C. Overview of Shareholder Proposal Outcomes

With respect to shareholder proposal outcomes, as shown in the table below, the 2020 proxy season saw two significant trends: (1) the percentage of proposals excluded through the no-action letter process increased slightly to the highest percentage since 2017; and (2) the percentage of proposals withdrawn decreased significantly. The withdrawal rates for social and environmental proposals declined along with the number submitted (as discussed above), with just 25% of such proposals being withdrawn, compared to 38% in 2019. The percentage of withdrawn governance proposals remained low, consistent with 2019, reflecting the fact that individual proponents of governance proposals tend not to withdraw their proposals even when a company has substantially implemented the request.

Shareholder Proposal Outcomes⁸			
	2020⁹	2019¹⁰	2018¹¹
Total number of proposals submitted	720	792	788
Excluded pursuant to a no-action request	18% (130)	15% (119)	16% (125)
Withdrawn by the proponent	14% (102)	20% (160)	16% (128)
Voted on	58% (420)	52% (410)	53% (418)

Support levels. Shareholder proposals voted on during the 2020 proxy season averaged support of 31.3% of votes cast, down slightly from 32.8% in 2019 and 32.5% in 2018. Continuing 2019's trend, average support for governance proposals declined to 35.3% from 39.1% in 2019, and average support for social and environmental proposals remained roughly the same at 23.5% compared with 23.7% in 2019. Notably, looking at just environmental proposals, average support increased to 30.2%, compared to 23.9% support in 2019. By contrast, support for social (non-environmental) proposals decreased to 21.5% in 2020 from 23.6% in 2019. The table below shows those proposals voted on at least three times that received the highest average support, including two categories of proposals that averaged majority support.

⁸ Excludes proposals that, for other reasons, were reported in the ISS database as having been submitted but that were not in the proxy or were not voted on, including, for example, due to a proposal being withdrawn but not publicized as such or failure of the proponent to present the proposal at the meeting. As a result, in each year, percentages may not add up to 100%.

⁹ As of June 30, 2020, 11 proposals (representing 2% of the proposals submitted during the 2020 proxy season) remained pending.

¹⁰ As of June 30, 2019, 23 proposals (representing 3% of the proposals submitted during the 2019 proxy season) remained pending.

¹¹ As of June 30, 2018, 21 proposals (representing 3% of the proposals submitted during the 2018 proxy season) remained pending.

Top Proposals by Voting Results¹²			
Proposal	2020	2019	2018
Board declassification	81.2% (6)	75.6% (4)	84.3% (5)
Eliminate/reduce supermajority voting	68.0% (12)	63.7% (22)	63.7% (13)
Shareholder special meeting rights	41.8% (39)	44.2% (23)	41.1% (59)
Political contributions	41.1% (24)	36.3% (36)	32.7% (21)
Majority voting in director elections	37.9% (16)	43.6% (21)	77.7% (6)
Shareholder action by written consent	35.6% (58)	39.6% (36)	42.2% (38)
Independent board chair	34.9% (44)	29.2% (55)	31.2% (45)
Lobbying spending	33.2% (31)	30.8% (23)	25.8% (28)
Employment diversity	32.1% (9)	38.6% (7)	38.8% (7)
Climate change	32.1% (16)	27.2% (12)	32.0% (23)
Amend proxy access	30.3% (12)	29.0% (24)	27.8% (27)
Board diversity	20.7% (8)	22.6% (12)	18.4% (5)

Majority-supported proposals. Overall, 50, or 12%, of shareholder proposals voted on during the 2020 proxy season received majority support, down from 15% of proposals in 2019. The table below shows the proposals that received majority support.

Proposals that Received Majority Support			
Proposal	2020	2019	2018
Eliminate/reduce supermajority voting	9	17	10
Board declassification	6	4	5
Shareholder special meeting rights	5	4	7
Climate change	4	0	4
Political contributions	4	3	0
Shareholder action by written consent	3	7	6
Majority voting in director elections	3	8	5
Board diversity	2	3	0
Employment diversity	2	2	0
Report on material human capital risks	2	0	0
Independent board chair	2	0	0
Amend compensation clawback policy	1	0	0
Lobbying spending	1	1	0
Permit removal of directors	1	0	0
Repeal certain bylaw amendments	1	1	1
Report on employment-related arbitration	1	0	0
Report on ESG performance	1	0	0
Report on opioids	1	2	1
Report on risks of expanding petrochemical investments	1	0	0

¹² The numbers in the parentheses indicate the number of times these proposals were voted on.

III. SHAREHOLDER PROPOSAL NO-ACTION REQUESTS

A. Overview of No-Action Requests

Submission and withdrawal rates. As shown in the table below, the number of no-action requests submitted to the Staff during the 2020 proxy season held steady, with submissions up slightly from 2019, but on par with 2018.¹³ The extent of no-action letter withdrawals has slowly decreased, consistent with the general decrease in total number of proposals withdrawn.

No-Action Request Statistics			
	2020	2019	2018
Total no-action requests submitted	232	228	256
Submission rate ¹⁴	32%	29%	33%
No-action requests withdrawn	42 (18%)	43 (19%)	52 (20%)
Pending no-action requests (as of June 1)	4	5	10
Staff responses ¹⁵	186	180	194
Exclusions granted	130 (70%)	119 (66%)	125 (64%)
Exclusions denied	55 (30%)	61 (34%)	69 (36%)

Most common arguments. One hundred five no-action requests included an ordinary business argument, while 90 included a substantial implementation argument, and 39 included a false/misleading argument. These numbers were generally consistent with the 2019 proxy season, although false/misleading arguments declined 28%, likely due to the low success rate for exclusions on this basis in recent years.

Success rates. This year, the Staff granted 70% of no-action requests, an increase compared to both 2019 and 2018, but still notably down from the 78% granted in 2017, which predated the Staff's recent series of guidance on the ordinary business exclusion. Similar to 2019, the Staff most often granted no-action requests based on substantial implementation (representing 36% of successful requests), procedural grounds (28%), and ordinary business arguments (27%). Success rate trends per exclusionary basis were mixed but generally were consistent with what we saw in 2019. For example, although the success rate for economic relevance arguments jumped significantly, the success rate for ordinary business arguments continued to decline, while the success rates for procedural and duplicate proposal arguments continued to increase. Substantial implementation arguments maintained a steady, relatively high success rate.

¹³ Gibson Dunn remains a market leader during proxy season, having filed over 20% of all shareholder proposal no-action requests each proxy season for several years.

¹⁴ Submission rates are calculated by dividing the number of no-action requests submitted to the Staff by the total number of proposals submitted to companies.

¹⁵ Includes one Staff no-view response due to pending litigation in each of 2019 and 2020, as discussed in part V.A. below. Percentages of exclusions granted and denied are calculated by dividing the number of exclusions granted (or denied) by the number of Staff responses.

Success Rates by Exclusion Ground ¹⁶			
Exclusion Ground	2020	2019	2018
Procedural	80%	70%	68%
Duplicate proposals	80%	66%	75%
Substantial implementation	69%	67%	66%
Ordinary business	54%	54%	58%
Economic relevance	50%	20%	14%
Vague or false/misleading	5%	5%	0%

B. Key Developments

There were a number of noteworthy procedural and substantive developments in no-action determinations this year, along with notable changes in the Staff’s process.

Recent changes in Staff process. On September 6, 2019, the Staff announced two significant procedural changes for responding to no-action requests, stating that it may not issue a Staff response letter to all no-action requests—a considerable change to prior practice—and in some cases it may decline to state a view at all on whether a proposal is excludable under Rule 14a-8.¹⁷ Subsequently, in November 2019, the Staff provided additional clarity on this process by unveiling a new shareholder proposal no-action request response chart in which all Staff responses are disclosed publicly in real time.¹⁸ Consistent with the first change, during the 2020 proxy season the Staff issued dramatically fewer written response letters, responding in writing only 18% of the time, or 34 times (including requests for reconsideration) out of 194 decisions. However, the Staff declined to state a view only once and did so in connection with pending litigation, consistent with its long-standing practice.¹⁹

Written Staff responses addressed a wide cross-section of the rules, from procedural matters to substantive bases. The Staff’s written responses most commonly addressed the Rule 14a-8(i)(7) ordinary business exclusion, with the Staff issuing written explanations seven times when it concurred with a proposal’s exclusion and four times when it did not. Overall, almost three-fourths of Staff response letters were issued when the Staff concurred that a proposal was excludable or denied reconsideration of a prior exclusion determination.

Successful use of board analysis. Staff Legal Bulletin No. 14K (“SLB 14K”)²⁰ reiterates the Staff’s position that a well-developed discussion of the board’s analysis on whether the particular policy issue raised by a proposal is sufficiently significant in relation to the company can assist

¹⁶ Success rates are calculated by dividing the number of no-action requests granted on a particular ground by the total number of no-action requests granted or denied on that ground.

¹⁷ *Announcement Regarding Rule 14a-8 No-Action Requests*, SEC (Sept. 6, 2019), available [here](#).

¹⁸ *Shareholder Proposal No-Action Responses Issued Under Exchange Act Rule 14a-8*, SEC, available [here](#); *2019-2020 Shareholder Proposal No-Action Responses*, SEC, available [here](#).

¹⁹ See *NorthWestern Corp.* (avail. Jan. 9, 2020).

²⁰ See Staff Legal Bulletin No. 14K (Oct. 16, 2019), available [here](#).

the Staff in evaluating a company’s no-action request under Rules 14a-8(i)(5) and 14a-8(i)(7), and specifically addresses two of the non-exhaustive substantive factors identified in Staff Legal Bulletin No. 14J (“SLB 14J”)²¹ in 2018 (the “delta” and prior voting results).²² In general, companies that included a board analysis this season had greater success than in 2019, when only one proposal was excludable based on the company’s use of a board analysis.²³

Although fewer companies included a board analysis (down 24% from 25 in 2019 to 19 in 2020), the Staff concurred with the exclusion of four proposals this season in reliance on the company’s use of a board analysis: three times under the ordinary business exclusion and once under the economic relevance exception.²⁴ Specifically, three companies with identical proposals requesting a report on risks associated with omitting “viewpoint” and “ideology” from the company’s written equal employment opportunity policy included a board analysis focused on the “delta” between the company’s existing policies and the change the proposal requested and were successful in excluding the proposals under ordinary business.²⁵ The Staff cited the company’s delta analysis in one instance as useful to its evaluation of whether the proposal presented a significant policy issue for the company.²⁶ An additional letter successfully employed a board analysis to exclude a proposal on Rule 14a-8(i)(5) economic relevance grounds, where the proposal sought to prohibit the use of wild animal displays at company hotels.²⁷

Ordinary business exclusions. Companies encountered mixed success making ordinary business arguments this year. Traditional ordinary business arguments fared better this proxy season than during 2019 (due in part to the increased success rate for companies that included a board analysis, as discussed above), whereas the success rate for micromanagement arguments decreased this year, as further discussed below.

Ordinary business. Overall, the number of successful ordinary business exclusions (other than on the basis of micromanagement) increased from 16 in 2019 to 19 in 2020, with success rates of 38% and 45%, respectively. During the 2020 proxy season, a number of companies successfully

²¹ See Staff Legal Bulletin No. 14J (Oct. 23, 2018), available [here](#).

²² During the 2020 proxy season, we did not see companies seek to distinguish the significance of prior voting results.

²³ See *Reliance Steel & Aluminum Co.* (avail. Apr. 2, 2019) (permitting exclusion of a proposal in reliance on Rule 14a-8(i)(5)).

²⁴ Ordinary business: See, e.g., *Alphabet Inc.* (avail. Apr. 9, 2020; recon. denied Apr. 22, 2020); *salesforce.com, inc.* (avail. Apr. 9, 2020; recon. denied Apr. 22, 2020)*.

Economic relevance: *Marriott International, Inc.* (avail. Mar. 13, 2020)*.

²⁵ See, e.g., *Alphabet Inc.* (avail. Apr. 9, 2020); *salesforce.com, inc.* (avail. Apr. 9, 2020; recon. denied Apr. 22, 2020)*.

²⁶ In a response letter dated December 20, 2019, the Staff noted that it “considered the board’s Nominating and Corporate Governance Committee’s analysis and conclusion that the Proposal did not present a significant policy issue for the Company. That analysis discusses the difference – or delta – between the Proposal and the Company’s current policies and practices.”

²⁷ *Marriott International, Inc.* (avail. Mar. 13, 2020)*.

applied the traditional Rule 14a-8(i)(7) ordinary business analysis, including the company-specific approach to analyzing significance outlined in SLB 14K. For example, during the 2020 proxy season, five companies were permitted to exclude a similar proposal that requested a report on the use of contractual provisions requiring employees to arbitrate employment-related claims, notwithstanding many of the proposals asserting the general social significance of the issue. In one of the responses, the Staff noted that the proposal related to the overall use of arbitration and did not focus on any particular policy implication of such use at the specific company.²⁸ The Staff’s response directly quoted SLB 14K to reiterate that the Staff discourages “proponents and companies [from focusing] on the overall significance of the policy issue raised by the proposal, instead of whether the proposal raises a policy issue that transcends the particular company’s ordinary business operations.”²⁹

Micromanagement. In SLB 14K, the Staff elaborated on the existing framework for the “micromanagement” prong of the ordinary business exclusion, underscoring that the analysis focuses on evaluating the manner in which a proposal seeks to address the subject matter raised. SLB 14K followed a 91% increase over the prior year in the number of no-action requests granted based on micromanagement arguments.³⁰ During the most recent proxy season, the number of micromanagement arguments increased (from 66 in 2019 to 77 in 2020), but the number of successful micromanagement exclusions and the success rate for micromanagement arguments decreased (from 21 proposals excluded based on micromanagement in 2019 with a 54% success rate, to 16 proposals excluded this year with a 44% success rate), as some companies sought to apply the Staff’s guidance on micromanagement in the context of corporate governance proposals (45% of the unsuccessful micromanagement arguments in 2020 related to corporate governance proposals). In that context, notwithstanding the Staff’s guidance in SLB 14K that the micromanagement inquiry is not focused on subject matter, in one of its responses denying a micromanagement argument, the Staff nonetheless noted only that it was because “the [p]roposal does not encompass an ordinary business matter.”³¹

That said, building on the guidance in SLB 14K that a micromanagement analysis should address how a proposal may unduly limit the ability of management and the board to manage complex matters, two Staff response letters concurring with exclusion on micromanagement grounds specifically referenced the companies’ arguments that the proposals would unduly limit the discretion and flexibility required by the board to properly exercise its business judgment.³²

²⁸ *Dollar General Corp.* (avail. Mar. 6, 2020) (“In our view, notwithstanding some references in the supporting statement to potentially important social issues, the [p]roposal as a whole deals with a matter relating to the [c]ompany’s ordinary business operations – the overall ‘use’ of arbitration – and does not focus on any particular policy implication of that use at this particular company.”). *See also CVS Health Corp.* (avail. Mar. 6, 2020); *Dollar Tree, Inc.* (avail. Mar. 6, 2020)*; *Walmart Inc.* (avail. Mar. 6, 2020)*; *Yum! Brands, Inc.* (avail. Mar. 6, 2020).

²⁹ *Dollar General Corp.* (avail. Mar. 6, 2020).

³⁰ There were 21 exclusions based on micromanagement in 2019 and 11 in 2018.

³¹ *Johnson & Johnson* (avail. Jan. 29, 2020).

³² *Exxon Mobil Corp.* (avail. Mar. 6, 2020) (“In our view. . . the Proposal unduly limits the board’s flexibility and discretion in determining how the board should oversee climate risk.”); *Johnson & Johnson* (avail. Feb. 12, 2020) (“Despite the fact that the supporting statement says that the Committee could develop the methodology

Additionally, micromanagement wins related to compensation proposals doubled (from five in 2019 to 10 in 2020), likely building on the successful exclusion of similar proposals in the prior year based on guidance in SLB 14J.³³

Vague or false/misleading exclusions. Companies continued to find little success with vagueness arguments, with the Staff concurring with the exclusion of only one proposal (relating to improving guiding principles of executive compensation) on this basis in 2020. That said, the Staff provided useful insight during the season by noting in a response letter that a proposal that lacks sufficient description about the changes, actions, or ideas for the company and its shareholders to consider is more likely to be viewed as vague and indefinite than a proposal that describes the nature of the improvements that the company could consider, provided the proposal is not overly prescriptive.³⁴

Procedural exclusions. Two notable issues came up in procedural arguments this proxy season. First, three Staff decisions demonstrated that while email is a permissible means of communication between a company and proponent, the Staff's position appears to be that email alone is insufficient to establish receipt *when receipt is disputed*.³⁵ Second, four companies challenged seemingly generic authorization letters presented by a shareholder proponent representative that did not refer to the specific proposal being submitted, despite the Staff's express expectation, as set forth in Staff Legal Bulletin 14I ("SLB 14I"), that an authorization letter should do so.³⁶ In three instances, the authorization letter was accompanied by the proposal, and the Staff did not concur with exclusion.³⁷ In contrast, the Staff concurred with the

for determining the length of the deferral period and adjusting the remainder of the bonus over the deferral period, in reaching this position, we note your statement that 'the Proposal's request to categorically prohibit immediate full payment of short-term bonus awards to senior executives would strip the Compensation & Benefits Committee of the discretion and flexibility it requires to properly exercise its business judgment.'").

³³ See, e.g., *JPMorgan Chase & Co.* (avail. Mar. 22, 2019); *General Electric Co.* (avail. Mar. 5, 2019)*; *Abbott Laboratories* (avail. Feb. 28, 2019); *AbbVie Inc.* (avail. Feb. 15, 2019).

³⁴ The Staff concurred with the exclusion of a proposal seeking to "improve the guiding principles of executive compensation" as vague and indefinite under Rule 14a-8(i)(3), noting that the proposal "lack[ed] sufficient description about the changes, actions or ideas for the [c]ompany and its shareholders to consider that would potentially improve the guiding principles." Compare with *AT&T Inc.* (avail. Jan. 31, 2020) (unable to concur with the exclusion of a proposal seeking to "improve guiding principles of executive compensation" as vague and indefinite under Rule 14a-8(i)(3), where the "supporting statement provide[d] clarity as to what is meant by improving the guiding principles of executive compensation" such that "the [p]roposal, taken as a whole, is [not] so vague or indefinite that it is rendered materially misleading").

³⁵ *Abbott Laboratories* (avail. Feb. 12, 2020); *Genuine Parts Co.* (avail. Dec. 20, 2019); *Wheeler Real Estate Investment Trust* (avail. Dec. 3, 2019). In all three letters, the company both mailed and emailed a deficiency notice to the proponent and began counting the 14-day cure period on the date of email. In *Abbott* and *Wheeler*, the proponents responded that the cure period did not begin either until the email was actually received during normal business hours or until the hard copy was received via mail, respectively. The Staff appears to have accepted this argument even where an "out-of-office" email reply indicated the *Genuine Parts*' email was received in the proponent's inbox.

³⁶ See Staff Legal Bulletin No. 14I (Nov. 1, 2017), available [here](#) (noting the letter should "identify the specific proposal to be submitted").

³⁷ *The Bank of New York Mellon Corp.* (avail. Jan. 24, 2020); *Southwestern Energy Co.* (avail. Jan. 24, 2020); *International Business Machines Corp.* (avail. Dec. 20, 2019, recon. denied Jan. 17, 2020) (in denying the

exclusion of one proposal for insufficient authorization where the proponent’s representative submitted a simple majority voting proposal, then another on voting rights, without a clear indication that the proponent had authorized the second proposal.³⁸ The foregoing is consistent with the Staff’s recent trend in disfavoring what it perceives to be “overly technical” arguments by companies for exclusion on procedural bases.

IV. KEY SHAREHOLDER PROPOSAL TOPICS DURING THE 2020 PROXY SEASON

A. Environmental

Although environmental shareholder proposals continued to be popular during the 2020 proxy season, the number of such proposals submitted decreased slightly, from 109 in 2019 to 99 in 2020. However, average support for these proposals increased from 23.9% in 2019 (29 proposals voted on) to 30.2% in 2020 (30 proposals voted on), and six of the proposals received majority support.

Climate change proposals. As in 2019, the largest group of environmental shareholder proposals related to climate change, with 54 submitted in 2020 (a slight increase from the 48 submitted in 2019). Sixteen climate change proposals were voted on in 2020, a significant increase from the 12 climate change proposals voted on in 2019. Fourteen of the climate change proposals voted on in 2020 included requests for reports: six on climate change and/or greenhouse gas (“GHG”) emission targets and goals; three on climate change lobbying practices; two on the costs and benefits of climate-related expenditures; and one each on proxy voting policies, stranded carbon assets, and reputational risks from oil and gas activities. Of the two other proposals, one was board-focused, requesting the establishment of a climate-risk board committee, while the other requested the company adopt quantitative company-wide GHG goals.

The 2020 climate change proposals received an average of 32.1% support, an increase from 27.2% in 2019. Notably, four climate change proposals received majority support (compared to zero in 2019, but in line with three in 2018): (1) a proposal at Dollar Tree, Inc., seeking a report on how the company is aligning its long-term business strategy with the projected long-term constraints posed by climate change (73.5%); (2) a proposal at Ovintiv Inc., seeking a report on climate-related targets aligned with the Paris Agreement (56.4%); (3) a proposal at J.B. Hunt Transport Services, Inc., seeking a report describing if, and how, the company plans to reduce its total contribution to climate change and align its operations with the Paris Agreement’s goal of maintaining global temperature increases well below two degrees Celsius (54.3%); and (4) a proposal at Chevron Corp., seeking a report on if, and how, the company’s lobbying activities align with the Paris Agreement’s goal (53.5%). Additionally, one proposal fell just short of majority support: a proposal at JPMorgan Chase & Co., requesting a report on if, and how, the

company’s reconsideration request, the Staff noted that “SLB 14I addresses situations where there may be ambiguities about the actual proponent and their role with respect to the proposal” and that it did not believe there was any ambiguity here).

³⁸ *Fitbit Inc.* (avail. Mar. 20, 2020) (in concurring with exclusion, the Staff noted the second proposal came with a “deficient authorization letter that failed to specify the subject matter of the proposal,” recognizing that the company had already sent the representative a deficiency notice with respect to the original submission for the same deficiency).

company intends to reduce the GHG emissions associated with its lending activities in alignment with the Paris Agreement’s goal, received 49.6% support. Interestingly, ISS supported only 63% of climate change proposals in 2020 compared to 83% in 2019, which appears to demonstrate that ISS took a more company-specific approach in applying its newly implemented Climate Voting Policy for 2020.³⁹

This year’s voting results reflect the continuing trend of increased support for climate change proposals by large asset managers. For example, in January 2020, BlackRock’s annual letter to S&P 500 CEOs advocated for standardized and more widespread sustainability disclosures and endorsed both the industry-specific standards developed by the Sustainability Accounting Standards Board (“SASB”) and the climate-specific framework developed by the Task Force on Climate-related Financial Disclosures (“TCFD”) as the benchmark frameworks.⁴⁰ BlackRock further indicated that disclosure should include plans for operating under a scenario where the Paris Agreement’s goal is fully realized, and warned that it will vote against management and directors when it views companies as not making sufficient progress on these disclosures.⁴¹ Additionally, several of BlackRock’s “vote bulletins” provide detailed explanations for its votes for or against a specific climate change proposal.⁴²

B. Human Capital Management

Against a backdrop of increasing investor attention on human capital management,⁴³ shareholder proposals focused on the topic continued to be popular during the 2020 proxy season, with

³⁹ In March 2020, ISS announced its launch of a new specialty Climate Voting Policy, which evaluates a company’s climate-related performance under five primary categories: (i) norms violations; (ii) disclosure indicators aligned with the TCFD recommendations; (iii) current performance indicators, including greenhouse gas emissions data; (iv) future performance indicators drawing from ISS’s Carbon Risk Ratings; and (v) sector-specific materiality using ISS’s Carbon Risk Classification. Among other things, the policy provides that ISS will or may recommend votes against individual directors, board committees or the entire board for perceived climate risk oversight shortfalls. *See Policy Supports Investors Choosing to Integrate Climate Performance & Disclosure into their Proxy Voting*, ISS (Mar. 9, 2020), available [here](#).

⁴⁰ BlackRock asked companies, if they had not already done so, to: (1) publish either disclosure in line with industry-specific SASB guidelines by year end or disclose a similar set of data in a way that is relevant to the company’s business; and (2) disclose climate-related risks in line with the TCFD’s recommendations. *See Letter from Larry Fink, Chairman and Chief Executive Officer of BlackRock, to CEOs* (Jan. 14, 2020), available [here](#).

⁴¹ *See BlackRock: Our Approach to Sustainability* (July 2020), available [here](#). BlackRock indicated that it identified 244 companies in 2020 that are making insufficient progress integrating climate risk into their business models or disclosures, and that it took voting action against 53 of these companies. BlackRock further indicated that it has put the remaining 191 companies “on watch,” and those that do not make significant progress risk voting action against management in 2021.

⁴² *See Investment Stewardship—Engagement and Voting History—Vote Bulletins*, BlackRock (last visited June 26, 2020), available [here](#).

⁴³ *See, e.g., BlackRock Investment Stewardship—Engagement Priorities for 2020*, BlackRock (Mar. 2020), available [here](#) (listing human capital as one of BlackRock’s five engagement priorities for 2020); *Institutional Investor Survey 2020*, Morrow Sodali (Mar. 10, 2020), available [here](#) (noting that 64% of investors surveyed consider human capital management an engagement priority); *Investment Stewardship: 2019 Annual Report*, Vanguard (Aug. 29, 2019) (stating that human capital management is of “utmost importance” for many companies), available [here](#).

shareholders submitting 66 proposals (consistent with the 66 in 2019). These proposals focused mainly on gender and racial pay equity, employment diversity, employment practices and policies (and on mandatory arbitration policies in particular), sexual harassment, and human capital risks. Average support for these proposals was consistent with the prior year at 24.9% (30 proposals) in 2020, compared to 25.2% in 2019 (29 proposals), and five proposals received majority support in 2020. The decreased overall support levels reflect the fact that ISS supported just under half of these proposals, marking a significant shift from its support of all but two such proposals in 2019. ISS's shift can largely be attributed to its determination not to support gender and racial pay equity proposals in 2020 due to a technical concern with how the proposals were structured, as well as its determination not to support "ideological diversity" proposals, discussed in more detail below. ISS generally remained supportive of other employment diversity proposals.

Gender and racial pay equity proposals. The number of shareholder proposals calling for a report on the size of a company's gender pay gap and policies and goals to reduce that gap decreased during the 2020 proxy season. Shareholders submitted 13 proposals targeting primarily technology and financial service companies (down from 28 in 2019), with Arjuna Capital responsible for at least eight of them. Twelve of these proposals were voted on in 2020, receiving average support of 12.9% (down from 24.5% for the 13 proposals voted on in 2019). As in 2019, the proposals primarily targeted unadjusted pay gaps rather than requesting wage gap information for comparable jobs (*i.e.*, what women are paid compared to their most directly comparable male peers, adjusted for seniority, geography, and other factors). An adjusted pay gap often refers to "equal pay for equal work," whereas an unadjusted pay gap reflects raw numbers that proponents argue can indicate whether women and ethnic minorities hold relatively high-paying positions. The notable trend this year, however, was Arjuna's shift to requesting information on both gender and racial pay gaps, rather than gender pay gaps alone.

ISS updated its 2020 voting guidelines on pay gap proposals to include race and ethnicity. As in prior years, the ISS guidelines call for a case-by-case approach to pay gap proposals. In 2020, of the 12 proposals voted on, ISS recommended votes "for" only one gender pay gap proposal (which received the highest level of support at 38.1%), compared to supporting 12 of the 13 proposals voted on in 2019. ISS did not support most of these proposals in 2020 due to concerns with how the additional request for a racial pay gap ratio would be calculated. As a result, average support for these proposals declined to 10.6% in 2020. Notably, in 2020, as in 2019, only two companies publicly agreed to implement a shareholder proposal on unadjusted pay gender/racial gaps (MasterCard and Starbucks), in contrast to 2018, when at least 10 companies agreed to report their adjusted gender pay gaps.

Employment diversity proposals. The number of employment diversity proposals submitted increased to 26 in 2020 (compared to 15 in 2019). Six of these proposals were submitted by the National Center for Public Policy Research, a conservative think tank, and requested a report on risks associated with omitting "viewpoint" and "ideology" from the company's written equal employment opportunity policy, while the other 20 proposals generally requested a report on the company's employment diversity and related diversity policies. Excluding the six aforementioned proposals related to ideological diversity, shareholder support slightly increased year-over-year, with the six proposals voted on in 2020 averaging 47.5% support (compared to 45.0% in 2019), and two proposals (both requesting reports assessing the company's workforce

diversity) receiving majority support. In addition, a significant portion of these proposals were withdrawn after negotiations with the proponent.⁴⁴ Proposals related to ideological diversity, however, received much lower shareholder support, with the three voted on in 2020 averaging only 1.3% support. ISS recommended votes “against” the three ideological diversity proposals and supported the other six employment proposals. As discussed in part III.B above, the three remaining ideological diversity proposals were excluded based on the ordinary business exclusion.

In addition to the employment diversity proposals discussed above, in 2020 Trillium Asset Management submitted six proposals requesting the adoption of a sexual orientation anti-bias policy, though ultimately all were withdrawn following negotiations. In each instance, the companies agreed to adopt and/or clarify their equal employment opportunity policies to be inclusive of sexual orientation and gender identity.

Employment-related mandatory arbitration proposals. The number of proposals requesting reports on the use of mandatory arbitration for employment-related claims rose to 11 in 2020 (compared to two in 2019), whereas the number of proposals requesting the adoption of a policy waiving mandatory arbitration for employment-related claims fell to one (compared with eight in 2019). Eight of the 11 proposals requested that the company report on its use of contractual provisions requiring employees to arbitrate employment-related claims and included supporting statement language emphasizing concerns regarding claims of workplace sexual harassment (which we discuss in further detail below). Of these eight proposals, five were excluded under the ordinary business exclusion,⁴⁵ while two of the three remaining proposals have been voted on and received ISS support. The results varied: one proposal received 51.0% support while the second proposal received only 16.1% support.

Three other proposals were submitted expressly requesting a report on the risks resulting from a company’s mandatory arbitration policy on claims of workforce sexual harassment. Of these proposals, two were withdrawn and one was omitted from the company’s proxy materials. In addition to the proposals requesting reports on the use of mandatory arbitration, one proposal that requested the company adopt a policy waiving mandatory arbitration for employee claims of sexual harassment unless the board of directors concludes that mandatory arbitration does not deter reports of sexual harassment was excluded under the ordinary business exclusion as micromanaging the company.⁴⁶

Sexual harassment proposals. Sexual harassment reporting emerged as a new proposal topic against the backdrop of the #MeToo movement in 2019, and continued in fewer numbers in 2020. Proposals dealing directly with sexual harassment reporting (*i.e.*, requesting a review of the company’s sexual harassment policies or risks related to failures to prevent sexual harassment in the workplace) decreased from 10 in 2019 to four in 2020. All four proposals

⁴⁴ See, e.g., *Shareholder Proposals—Workplace Diversity*, Trillium Asset Management (last visited June 26, 2020), available [here](#) (listing the outcomes of the workplace diversity proposals it submitted to companies).

⁴⁵ See *Dollar General Corp.* (avail. Mar. 6, 2020). See also *CVS Health Corp.* (avail. Mar. 6, 2020) (no letter issued); *Dollar Tree, Inc.* (avail. Mar. 6, 2020) (same)*; *Walmart Inc.* (avail. Mar. 6, 2020) (same)*; *Yum! Brands, Inc.* (avail. Mar. 6, 2020) (same).

⁴⁶ *CBRE Group, Inc.* (avail. Feb. 14, 2020).

were voted on, averaging 19.5% support, and all but one received ISS support, though none received majority support. As noted above, a number of proposals also addressed sexual harassment in the context of mandatory arbitration provisions.

Human capital risks and opportunities proposals. The 2020 proxy season saw a new type of shareholder proposal addressing human capital broadly. Four of these proposals requested a report on the company’s policies, performance, and improvement targets related to human capital risks and opportunities. A fifth proposal requested disclosure regarding the company’s overall approach to and oversight of human capital management in the context of “emerging workforce-related risks and opportunities.” Of these five proposals, two were voted on with ISS supporting both and both receiving majority support (averaging 72.6%). The other three proposals were withdrawn.

Given growing attention from the SEC⁴⁷ and investors⁴⁸ on addressing and disclosing human capital measures, this could easily become a more popular proposal topic in the upcoming proxy season. BlackRock recently indicated that it plans to assess companies’ responses to the coronavirus (“COVID-19”) pandemic and issues of racial inequality as it addresses human capital management through its investment activities.⁴⁹ Additionally, the New York City Comptroller recently sent a letter to more than 60 companies that issued statements calling for racial justice, requesting that they support those positions by publicly disclosing employment data to allow investors to evaluate the companies’ workforce diversity practices.⁵⁰

C. Board Diversity

2020 trends. Board diversity remained a topic of interest in 2020, although the number of these proposals decreased significantly from 2019. During the 2020 proxy season, shareholders submitted 21 proposals requesting the adoption of a board diversity policy or a report on board diversity (down 55% from 47 proposals in 2019). Excluding “ideological diversity” proposals (a more recent variant of board diversity proposals discussed below), the four proposals voted on in

⁴⁷ See Release Nos. 33-10750, 34-88093, available [here](#).

⁴⁸ See, e.g., *Institutional Investor Survey 2020*, Morrow Sodali (Mar. 10, 2020), available [here](#) (noting that human capital management was the second-most important sustainability topic, after climate change, with 64% of investors surveyed cutting it as a focus); *Investment Stewardship’s Approach To Engagement On Human Capital Management*, BlackRock (Jan. 2020), available [here](#) (“We consider human capital management (HCM) an important investment issue.”); *Aligning Corporate Culture with Long-Term Strategy*, State Street Global Advisors (Jan. 29, 2019), available [here](#); see also *How the Governance of Human Capital and Talent is Shifting*, Ernst & Young (May 19, 2020), available [here](#) (“Recent developments reflect a clear and growing market appetite to understand how companies are managing and measuring human capital.”).

⁴⁹ *Our Actions to Advance Racial Equity and Inclusion*, BlackRock (June 22, 2020), available [here](#) (“This fall, as we assess the impact of companies’ response to COVID-19 and associated issues of racial equality, our stewardship team will be refreshing our expectations for human capital management and how companies pursue sustainable social practices more broadly.”).

⁵⁰ *Comptroller Stringer and Three New York City Retirement Systems Call on 67 S&P 100 Companies Who Issued Supportive Statements on Racial Equality to Publicly Disclose the Composition of their Workforce by Race, Ethnicity and Gender*, New York City Comptroller (July 1, 2020), available [here](#).

2020 averaged support of 37.2% (down from 51.9% for five proposals in 2019), with two receiving majority support (compared to three in 2019), both of which were supported by ISS. Continuing the trend from prior years, a significant number of board diversity proposals (43%) were withdrawn or not included in the proxy. We expect continued momentum on these proposals in light of the increased focus on board diversity by investors,⁵¹ proxy advisors,⁵² and local, state, and federal governments.⁵³ For example, in October 2019, the New York City Comptroller launched a campaign calling on companies to consider both women and people of color for every open board seat (known as “Rooney Rule” proposals).⁵⁴ The Comptroller was not alone in leveraging the Rooney Rule to call for increased board diversity: Trillium Asset Management and As You Sow were among the proponents who also referenced the Rooney Rule in their proposals.

“Ideological board diversity” proposals. The 2020 proxy season saw a slight decrease in the number of proposals submitted by the National Center for Public Policy Research, typically asking for a report on directors’ ideological perspectives rather than characteristics such as gender, race, or ethnicity. Of the seven ideological board diversity proposals submitted in 2020, only four were voted on, averaging 4.2% support, resembling the results in 2019 where seven such proposals were submitted, all of which were voted on, and averaged support of just 1.7%. ISS has recommended votes “against” each of the proposals over the past two years. Notably, three companies were permitted to exclude the proposal based on substantial implementation.

D. Stakeholder Theory

The 2020 proxy season saw shareholders use the shareholder proposal process to question companies’ alignment with the Business Roundtable’s Statement on the Purpose of a Corporation (the “BRT Statement”).⁵⁵

Proposals focused on the BRT Statement. In August 2019, the Business Roundtable issued the BRT Statement, signed by 181 corporate chief executive officers who committed to lead their companies for the benefit of all stakeholders—customers, employees, suppliers, communities, and shareholders—rather than focus on shareholder return and concerns alone under the

⁵¹ See, e.g., *BlackRock Investment Stewardship—Engagement Priorities for 2020*, BlackRock (Mar. 2020), available [here](#) (listing board quality, including board diversity, as one of BlackRock’s five engagement priorities for 2020).

⁵² See, e.g., *United States Proxy Voting Guidelines: Benchmark Policy Recommendations*, ISS (Nov. 18, 2019), available [here](#) (announcing general policy to vote in favor of requests for reports on a company’s efforts to diversify its board); *2020 Proxy Paper Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice (United States)*, Glass Lewis (Nov. 1, 2019), available [here](#).

⁵³ See, e.g., Joan Helwig, *More States Promote Gender Diversity on Corporate Boards*, Cogency Global (June 20, 2019), available [here](#); Lori Tripoli, *House passes bill requiring disclosure of diversity on corporate boards*, Compliance Week (Nov. 20, 2019), available [here](#).

⁵⁴ See *Comptroller Stringer Launches Boardroom Accountability Project 3.0, a First-in-the-Nation Initiative to Bring Diversity to Board and CEO Recruitment*, New York City Comptroller Scott M. Stringer (Oct. 11, 2019), available [here](#).

⁵⁵ *Statement on the Purpose of a Corporation*, Business Roundtable (Aug. 2019), available [here](#).

traditional views of shareholder primacy. The BRT Statement’s release generated considerable media attention⁵⁶ and debate.⁵⁷ Some observers argued that the BRT Statement did not actually represent a departure from shareholder primacy,⁵⁸ while others, like the Council of Institutional Investors (“CII”), expressed concern that the BRT Statement could undercut management’s accountability to shareholders.⁵⁹

John Harrington and Harrington Investments submitted six proposals related to the BRT Statement to signatory companies.⁶⁰ Although the proposal language varied, each proposal generally requested a board-level review of the BRT Statement and guidance on the extent to which the companies’ existing policies and practices—including, in some instances, its governance and management systems—should be changed in light of the commitments set forth in the BRT Statement. Each company sought to exclude the BRT Statement proposal, arguing that it related to the company’s ordinary business operations, sought to micromanage the company, and/or was impermissibly vague and indefinite. However, the Staff rejected each of these bases for exclusion in all but one instance. Only one company, which conducted a board review that concluded it had substantially implemented the BRT Statement proposal, was successful in obtaining no-action relief.⁶¹ Of the four BRT Statement proposals that were voted on as of June 30, 2020, the proposals received an average 6.5% of votes cast. Notably, ISS recommended shareholders vote “against” each of the BRT Statement proposals.

⁵⁶ See, e.g., David Gelles and David Yaffe-Bellany, *Shareholder Value Is No Longer Everything, Top C.E.O.s Say*, N.Y. Times (Aug. 19, 2019), available [here](#); Alan Murray, *America’s CEOs Seek a New Purpose for the Corporation*, Fortune (Aug. 19, 2019), available [here](#).

⁵⁷ See, e.g., James Copland, *The Business Roundtable’s statement isn’t revolutionary. It’s a truism.*, Wash. Post (Aug. 22, 2019), available [here](#); Alfred Rappaport, *How CEOs Can Forge a New Kind of Shareholder Value*, Bloomberg (Sept. 4, 2019), available [here](#); Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?*, Harv. Bus. Rev. (Aug. 30, 2019), available [here](#).

⁵⁸ See, e.g., Luca Enriques, *The Business Roundtable CEOs’ Statement: Same Old, Same Old*, Promarket (Sept. 9, 2019), available [here](#).

⁵⁹ See, e.g., *Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose*, CII (Aug. 19, 2019), available [here](#).

⁶⁰ See *JPMorgan Chase & Co.* (avail. Feb. 5, 2020); see also *McKesson Corp.* (avail. May 26, 2020) (no letter issued); *BlackRock, Inc.* (avail. Feb. 25, 2020) (same); *Citigroup, Inc.* (avail. Feb. 25, 2020) (same); *The Goldman Sachs Group, Inc.* (avail. Feb. 25, 2020) (same); *Bank of America Corp.* (avail. Feb. 12, 2020) (same). In addition, Harrington submitted a proposal to Wells Fargo & Co. requesting the board to commission an independent study to assess the feasibility of becoming a Delaware public benefit corporation or otherwise implementing measures to protect the interests of critical stakeholders. The company sought to exclude it based on substantial implementation, commissioning and issuing a report reflecting the board’s determination as to the feasibility and advisability of the requested actions, and the proponent withdrew the proposal. *Wells Fargo & Co.* (avail. Feb. 12, 2020).

⁶¹ *JPMorgan Chase & Co.* (avail. Feb. 5, 2020). The Staff concurred that the proposal could be excluded under Rule 14a-8(i)(10) because the company’s actions, which included a board analysis conducted to support an ordinary business argument, compared favorably with the proposal’s request that the board review the BRT Statement and provide oversight and guidance as to how the company’s governance and management systems should be changed in light of the BRT Statement.

E. Shareholder Approval of Bylaw Amendments

A new shareholder proposal category emerged during the 2020 proxy season due to submissions from John Chevedden and his associates that sought to require non-binding shareholder approval of any board-adopted bylaw amendments (and in one case, charter amendments as well). Of the 18 companies that received this proposal, five companies filed no-action requests to exclude it, asserting a variety of procedural and substantive grounds, but only one no-action request was successful, based on procedural defects.⁶² The average vote at the 17 companies where the proposal was properly presented was just 3.6%.

F. Corporate Governance

During the 2020 proxy season, the most common governance proposals were shareholder written consent rights, independent board chairs, special shareholder meeting rights, supermajority voting, and proxy access. As noted below, the focus has shifted away from proxy access and eliminating/reducing supermajority voting given the widespread adoption of these provisions among the S&P 500.

1. Proxy Access

Major Proponents	S&P 500 Adoption Rate	YoY⁶³ Proposal Trend	Proposal Statistics			
• Chevedden & associates	>75% (as of June 2020)	↑	<i>Total # submitted</i>	2020 20	2019 38	2018 48
Key Takeaways			Adopt Proxy Access			
• As proxy access has become majority practice in the S&P 500, proxy access proposals continue to wane			<i># voted on</i>	1	6	11
• “Amend” proposals still do not appear to have gained much traction with investors			<i>Average support</i>	19.0%	54.9%	40.7%
			<i># majority support</i>	0	4	3
			Amend Proxy Access			
			<i># voted on</i>	12	25	27
			<i>Average support</i>	30.3%	29.0%	27.8%
			<i># majority support</i>	0	0	0

⁶² Although The Bank of New York Mellon Corp. was permitted to exclude this proposal based on its successful no-action request on procedural grounds, the proposal was included in the company’s proxy statement and was voted on at its annual meeting. As a result, the voting data is accounted for in the average vote calculation and in the number of companies considered with regard to the resubmission threshold.

⁶³ “YoY” refers to year-over-year.

4. Shareholder Right to Act by Written Consent

<u>Major Proponents</u>	<u>S&P 500 Adoption Rate</u>	<u>YoY Proposal Trend</u>	<u>Proposal Statistics</u>			
<ul style="list-style-type: none"> Chevedden & associates 	<p>~30%</p> <p>(as of June 2020)</p>	<p>↗</p>				
			2020	2019	2018	
			<i>Total # submitted</i>	66	42	42
			Adopt Written Consent Right			
			<i># excluded (i)(10)</i>	2	3	1
			<i># voted on</i>	53	36	38
			<i>Average support</i>	37.4%	39.6%	42.2%
			<i># majority support</i>	3	7	6
			Lower Threshold			
			<i># excluded (i)(10)</i>	0	0	0
			<i># voted on</i>	5	0	0
			<i>Average support</i>	16.7%	N/A	N/A
			<i># majority support</i>	0	N/A	N/A
Key Takeaways						
<ul style="list-style-type: none"> High number of submissions, with shareholder focus returning to written consent after success of other campaigns (e.g., proxy access and eliminating/reducing supermajority voting) While “adopt” proposals comprise the vast majority, proposals requesting to lower the percentage ownership needed to commence the consent process have emerged in 2020 as a new area of interest for proponents While the number of proposals has increased, average support and the number of majority supported proposals have declined 						

5. Independent Board Chair

<u>Major Proponents</u>	<u>S&P 500 Adoption Rate</u>	<u>YoY Proposal Trend</u>	<u>Proposal Statistics</u>			
<ul style="list-style-type: none"> Chevedden & associates NYC Comptroller Daughters of Charity (St. Louis) 	<p>>33%</p> <p>(as of May 2019)⁶⁵</p>	<p>↑</p>				
			<i>Total # submitted</i>	2020	2019	2018
			<i># voted on</i>	49	64	51
			<i>Average support</i>	44	55	45
			<i># majority support</i>	34.9%	29.2%	31.2%
				2	0	0
<u>Key Takeaways</u>						
<ul style="list-style-type: none"> Number of proposals declined in 2020 following a steady increase in the number of proposals over the last few years While two proposals received majority support in 2020, overall support levels have increased only slightly, indicating little movement regarding investor consensus as to “best” leadership structure 						

G. Executive Compensation and Non-GAAP Metrics

The number of executive compensation shareholder proposals submitted during the 2020 proxy season remained steady at 56 (compared to 54 in 2019). Of these, 25 were voted on, receiving 24.7% average support (compared to 31 proposals with 22.6% average support in 2019). Only one such proposal, relating to a clawback policy, received majority support.

The number of proposals relating to the use of non-U.S. Generally Accepted Accounting Principles (“GAAP”) performance metrics in setting executive compensation increased in 2020 to eight from five in 2019, reflecting an area of increased focus for public employee pension funds. As in 2019, four of the proposals requested the adoption of policies prohibiting the adjustment of performance metrics for legal and compliance costs and were successfully excluded on micromanagement grounds. The remaining four proposals requested enhanced disclosure and a reconciliation to GAAP in the proxy statement’s Compensation Discussion and Analysis (“CD&A”) whenever adjusted metrics are used in setting executive compensation, a notable increase from one proposal in 2019. Of those, two of the three were voted on, received average support of 28.5%, and all received ISS support.

By way of background, instruction 5 to Item 402(b) of Regulation S-K excludes CD&A disclosure of non-GAAP incentive compensation target levels from the reconciliation requirements of Regulation G and Item 10(e) of Regulation S-K; however, in recent years, institutional investors have increasingly advocated for companies to better explain the use of non-GAAP financial measures in setting executive compensation. For example, in April 2019, CII submitted a rulemaking petition to the SEC requesting a requirement that the reconciliation

⁶⁵ See 2019 U.S. Spencer Stuart Board Index, Spencer Stuart (2019), available [here](#).

of all non-GAAP CD&A financial measures be included in the proxy statement or via a hyperlink. The SEC has not signaled any willingness to amend the existing disclosure rules to require increased disclosure in this area.⁶⁶ Investors have also directly pressured companies on their disclosure regarding the use of non-GAAP performance metrics. In January 2020, many large companies received letters from the institutional investor Say on Pay Working Group (which includes union pension funds and other investors with a total of over \$1 trillion in assets under management and advisement) that cite the CII petition and urge these companies to clearly disclose in CD&A any adjustments to GAAP performance metrics. It remains unclear what traction this proposal topic might have heading into the 2021 proxy season.

V. OTHER SHAREHOLDER PROPOSAL DEVELOPMENTS

A. *Proponents' Use of Litigation*

Both companies⁶⁷ and shareholder proponents⁶⁸ have used litigation as a tactic outside the no-action request process to resolve shareholder proposal disputes, including to challenge the Staff's decisions regarding such requests. However, in this proxy season, for the second year in a row, a shareholder proponent sought to enjoin a company from omitting the proponent's proposal *before* the Staff issued its response to a pending no-action request.⁶⁹

Proposal background. In September 2019, Thomas Tosdal, a shareholder of the public utility company NorthWestern Corporation, submitted a shareholder proposal to the company requesting that it plan “to cease coal fired generation of electricity” at one of its coal-fired power plants, “replace that electricity with non-carbon emitting renewable energy and 21st century storage technologies” by 2025, and share that plan with shareholders by the 2021 annual

⁶⁶ In fact, Director Hinman recently noted that although quantitative GAAP reconciliation is not required, the existing rules require showing “how you get to that number if it’s a non-GAAP number.” See Soyoung Ho, *SEC Official Signals No Rulemaking on Non-GAAP Measures for CEO Pay*, Reuters (Dec. 18, 2019), available [here](#).

⁶⁷ See, e.g., *Waste Connections, Inc. v. Chevedden*, No. 4:13-cv-00176 (S.D. Tex. June 3, 2013), *aff'd* 2014 U.S. App. LEXIS 2731 (5th Cir. Feb. 13, 2014); *KBR, Inc. v. Chevedden*, 2011 U.S. Dist. LEXIS 36431 (S.D. Tex. Apr. 4, 2011), *aff'd* 478 F. App'x 213 (5th Cir. June 11, 2012); *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723 (S.D. Tex. 2010).

⁶⁸ See, e.g., *Trinity Wall Street v. Wal-Mart Stores, Inc.*, No. 14-4764 (3d Cir. July 6, 2015)*; Amended Complaint, *Silberstein v. Aetna, Inc.*, No. 1:13-CV-08759 (AJN) (S.D.N.Y. Mar. 3, 2014); Complaint, *The New York City Employees' Retirement System v. TransDigm Group, Inc.*, No. 1:18 CV 11344 (KPF) (S.D.N.Y. Dec. 5, 2018).

⁶⁹ In September 2018, the New York City Comptroller, on behalf of the New York City Employees' Retirement System and other pension funds overseen by the Comptroller, submitted a shareholder proposal to TransDigm Group Inc. requesting that TransDigm adopt a “policy with time-bound, quantitative, company-wide goals for managing [GHG] emissions, taking into account the objectives of the Paris Climate Agreement,” and issue a report on its plans to meet these targets. In November 2018, TransDigm filed a no-action request seeking to exclude the proposal as ordinary business on the theory that the proposal would micromanage the company. In December 2018, while the no-action request was pending, the Comptroller filed a complaint in the Southern District of New York seeking to enjoin TransDigm from soliciting proxies without including their proposal. See Complaint, *TransDigm Group, Inc.*, No. 1:18 CV 11344. TransDigm ultimately withdrew its no-action request and included the proposal in its proxy materials.

meeting. On December 17, 2019, NorthWestern filed a no-action request seeking to exclude the proposal as ordinary business on the theory that the proposal micromanaged the company.⁷⁰

Shareholder takes NorthWestern to court; Staff declines to state a view. Less than a week after the no-action request's submission, Mr. Tosdal filed a complaint in the District of Montana seeking injunctive and declaratory relief to prevent NorthWestern from excluding the proposal in its proxy materials.⁷¹ Mr. Tosdal argued that the proposal was not excludable under the SEC's ordinary business exclusion because it did not micromanage the company and addressed a significant policy issue ("whether to plan for future discontinuation of coal fired generated electricity at [the plant] in favor of renewables") and therefore went beyond "management of the daily affairs of the company" and "normal or usual business operations."⁷² Mr. Tosdal also argued that the Staff's no-action letters and Staff Legal Bulletins should not be considered authoritative or persuasive in interpreting the ordinary business exclusion because the regulation's language is unambiguous.⁷³ On January 9, 2020, in light of the pending litigation, the Staff responded to NorthWestern's no-action request, declining to state its view on whether the proposal was excludable.⁷⁴

District Court's response. The District Court granted summary judgment on February 25, 2020 in favor of NorthWestern.⁷⁵ The District Court concluded that although the proposal raised "sufficiently significant social policy issues," it would have to focus on "something larger than shutting down a specific plant by a specified target date" in order "to transcend the ordinary business operations" of the company.⁷⁶ The District Court described how the proposal's requested phase-out of a facility "would take work day-to-day with experts in a multitude of disciplines," require complex steps to accomplish, and ultimately shape the company's resource planning, which "lies at the core of NorthWestern's ordinary business operations."⁷⁷ Therefore, despite raising a significant policy issue, the District Court concluded that the proposal failed to transcend the company's ordinary business operations and was properly excludable.⁷⁸

⁷⁰ See *NorthWestern Corp.* (avail. Jan. 9, 2020). The company also argued for exclusion due to several allegedly false and misleading statements contained in the proposal.

⁷¹ Specifically, the complaint sought to enjoin NorthWestern from excluding the proposal in its proxy materials and requested the District Court to provide a declaratory judgment that NorthWestern has a legal duty to include the proposal in its next proxy statement.

⁷² See Plaintiff's Brief in Support of Motion for Summary Judgment and for a Preliminary Injunction, *Tosdal v. NorthWestern Corp. et al.*, No. 9:19-CV-205 (DLC), at 9 (D. Mont. Jan. 17, 2020).

⁷³ *Id.* at 9–10, 14–15.

⁷⁴ See *NorthWestern Corp.* (avail. Jan. 9, 2020).

⁷⁵ See Order, *Tosdal v. NorthWestern Corp. et al.*, No. 9:19-CV-205 (DLC) (D. Mont. Feb. 25, 2020).

⁷⁶ *Id.* at 24, 29.

⁷⁷ *Id.* at 26–27.

⁷⁸ The District Court also rejected Mr. Tosdal's argument that no deference should be given to the Staff's interpretation of the ordinary business exclusion because the rule is unambiguous. Instead, the District Court concluded that because "ordinary business" has more than one reasonable interpretation, it is appropriate to consider the Staff's guidance in interpreting the agency's own rule. See *id.* at 11–16.

Takeaways. Notably, this is not the first time a shareholder has taken a company to court in an effort to force inclusion of a climate change proposal in a company’s proxy statement,⁷⁹ nor is it the first time a shareholder proponent has objected to the Staff’s recent application of the ordinary business exclusion (particularly with respect to micromanagement).⁸⁰ Given the recent headwinds faced by proponents seeking to challenge a company’s no-action request relating to a climate change proposal (both under the ordinary business exclusion and based on substantial implementation), we may see more shareholders turning to litigation.

Although the District Court’s decision is likely consistent with how the Staff would have responded to the company’s no-action request had it responded on the merits (consistent with Staff precedent), the District Court’s reasoning does not entirely align with recent Staff guidance (including SLB 14K) as to application of the ordinary business exclusion, including micromanagement. In this regard, while the District Court recognized micromanagement as one of the two central considerations underlying the ordinary business exclusion, the District Court did not explicitly rely on that basis when concluding the proposal was properly excludable.

B. Proponents’ Use of Exempt Solicitation Filings

During the 2020 proxy season, exempt solicitation filings proliferated, including by proponents who continued to use them to try and generate greater publicity for their proposals in advance of shareholders’ meetings or to address other topics, either before or after a shareholders’ meeting.

Background on PX14A6G filings. Under Rule 14a-6(g), shareholders owning more than \$5 million of a company’s securities generally must file a Notice of Exempt Solicitation (an “Exempt Notice”) on EDGAR⁸¹ when soliciting other shareholders on a topic without seeking to act as a proxy. The rule is one of several exempting certain solicitations from the proxy filing requirements, and was designed to address concerns that institutional investors and other large shareholders would conduct “secret” solicitations. However, in recent years, these filings have primarily been used by smaller shareholders to publicize their views on various proposals as EDGAR does not restrict use of the filing codes. In this regard, more than 60% of Exempt Notices filed in 2020 were identified as voluntary filings by shareholders who do not meet the \$5 million ownership threshold. As a result, shareholders are using these filings outside of Rule 14a-6(g)’s intended scope, resulting in compliance issues⁸² and potential confusion for other shareholders when evaluating the items to be voted on.

⁷⁹ See Complaint, *TransDigm Group, Inc.*, No. 1:18 CV 11344; see also *TransDigm Group, Inc.* (avail. Jan. 28, 2019).

⁸⁰ See, e.g., *Devon Energy Corp.* (avail. Mar. 4, 2019, recon. denied Apr. 1, 2019); *TransDigm Group, Inc.* (avail. Jan. 28, 2019).

⁸¹ This Exempt Notice appears on the company’s EDGAR page as a PX14A6G filing and sets forth all written materials used in the solicitation.

⁸² For example, approximately 17% of PX14A6G filings did not include the required cover page in 2020. We understand from the Staff that they review Exempt Notices, are aware of the compliance issues, and regularly contact non-compliant filers.

2020 filings. As of July 1, 2020, there were a record-high of 182 Exempt Notices filed since the beginning of the calendar year, up from 170 and 140 as of the same dates in 2019 and 2018, respectively.⁸³ Frequent filers included California Public Employees Retirement System (“CalPERS”) with 29 filings this year (up from 22 in 2019), CtW Investment Group with 18 filings (up from five in 2019), As You Sow with 15 filings (same as last year), and John Chevedden with nine filings (down from 16 in 2019). This year, based on the statements contained therein, all of the Exempt Notices filed by As You Sow and Mr. Chevedden were voluntary and submitted at companies where they submitted a shareholder proposal. Further, approximately two-thirds of the CalPERS filings appear to have been voluntary⁸⁴ and at least one-third were filed at companies where CalPERS submitted a shareholder proposal (and 90% of those filings were made voluntarily). Additionally, all of the Exempt Notices filed by CtW were voluntary and at least two appeared to be at companies where CtW submitted a shareholder proposal. Notably, the majority of Mr. Chevedden’s filings included language criticizing companies’ shareholder meeting practices which, in light of the COVID-19 pandemic, reflected changes to in-person meeting practices and increased use of virtual meetings. Specifically, Mr. Chevedden claimed that companies created technological barriers that impaired shareholders’ ability to attend and participate in annual meetings.

Continued potential for abuse. Although the Staff previously issued interpretive guidance (“C&DIs”) on some problematic practices in connection with voluntary filings of Exempt Notices,⁸⁵ there are several ongoing issues that the Staff has not addressed. First, companies and shareholders cannot easily determine the magnitude of a voluntary filer’s ownership position, or whether the filer is in fact a shareholder at all, because Exempt Notices do not require disclosure of the filer’s stock ownership (only an indication of whether or not the filer crosses the \$5 million threshold). Second, although the C&DIs affirmed that Exempt Notices must not be materially false or misleading, there remains no practical and timely recourse for companies when these filings contain materially false or misleading information as the Staff, as a matter of policy, continues to refuse to remove them from EDGAR. Even if the Staff were to contact a filer about false or misleading statements, the remedy of requiring a corrected filing would only draw additional attention to those filings.

As long as the SEC continues to permit shareholders who do not meet the \$5 million ownership threshold to make these filings, we expect their use among proponents to continue to grow in

⁸³ The foregoing numbers reflect both required and voluntary filings, and are not limited to filings by shareholder proponents.

⁸⁴ CalPERS represented to owning more than \$5 million in company securities in just 10 of the 29 filings.

⁸⁵ See *Proxy Rules and Schedules 14A/14C*, SEC (July 31, 2018), at Questions 126.06-07, available [here](#). The first C&DI takes the position that “voluntary” Exempt Notices are permitted to be filed by a shareholder who does not meet the \$5 million threshold, but the filer must specifically state that the Exempt Notice is being provided on a voluntary basis, which the Staff claims will alert investors that the filer does not beneficially own more than \$5 million of the company’s stock. The second C&DI clarifies that all Exempt Notices must include a cover page setting forth the information required under Rule 14a-103 (generally, the name and address of the soliciting party as well as the name of the company to which the filing relates), which must come before any written soliciting materials, and that a failure to do so may be considered materially misleading under Rule 14a-9.

coming years given their broad dissemination and resulting publicity. We recommend companies actively monitor their EDGAR feed for these filings, and, to the extent they believe an exempt solicitation filing contains materially false or misleading information or may not have been filed by a shareholder, they should inform the Staff.

C. COVID-19 Impacts – Shareholder Proposal Presentations

Given the public health and safety concerns related to COVID-19, the Staff provided guidance in April 2020 to companies regarding the conduct of annual meetings, including concerns relating to the presentation of shareholder proposals at annual meetings.

The proxy rules generally require shareholder proponents, or their representatives, to appear and present their proposals at the annual meeting.⁸⁶ Recognizing the possible difficulties for compliance due to COVID-19, the Staff encouraged companies to provide proponents with alternative means of presenting their proposals (*e.g.*, by phone), subject to applicable state law.⁸⁷ The guidance also clarified that if a shareholder proponent is unable to attend the meeting and present the proposal due to an inability to travel or other hardships related to COVID-19, such failure to appear would be considered “good cause” under Rule 14a-8(h). Consequently, a company will not be able to rely on the shareholder proponent’s COVID-related failure to appear and present the proposal at this year’s meeting as a basis to exclude a proposal submitted by the same shareholder for meetings held in 2021 or 2022.

Companies should be mindful of this Staff guidance heading into the next two proxy seasons, although there may be debate or ambiguity over what is a COVID-related failure to appear and what documentation will be necessary to sustain such a claim.

VI. PENDING REFORM OF THE SHAREHOLDER PROPOSAL RULES

On November 5, 2019, the SEC proposed to amend three parts of Rule 14a-8 that allow shareholders to include shareholder proposals in company proxy statements (subject to certain procedural and substantive requirements) (the “Proposed Rules”).⁸⁸ The Proposed Rules would (1) change the eligibility requirements for submitting shareholder proposals, (2) expand the limit of one proposal per shareholder per meeting to apply to representatives acting on behalf of shareholders, and (3) raise, for the first time since 1954, the resubmission thresholds, which are the minimum levels of shareholder support that a repeat shareholder proposal needs in order to be eligible for resubmission at the same company’s future shareholder meetings.

⁸⁶ Exchange Act Rule 14a-8(h) (“If you or your qualified representative fail to appear and present the proposal, without good cause, the company will be permitted to exclude all of your proposals from its proxy materials for any meetings held in the following two calendar years.”).

⁸⁷ See *Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns*, SEC (Apr. 7, 2020), available [here](#).

⁸⁸ See Release No. 34-87458, available [here](#). The Proposed Rules were approved by a 3-2 vote, with Commissioner Allison Herren Lee and former Commissioner Robert J. Jackson, Jr., who resigned in February 2020, forcefully objecting to each of the proposed amendments. In contrast, the Commissioners who supported the proposed amendments lauded the SEC for taking a measured approach to updating outdated rules.

The comment period on the Proposed Rules ended in early February 2020, but, as discussed further below, stakeholders continue to submit comments to the SEC. Any final rules will be subject to a Congressional Review Act⁸⁹ fast track process by which Congress may disapprove the regulatory rules if Congress enacts a joint resolution of disapproval within 60 legislative days after the agency submits the rules to Congress.

With respect to the ownership threshold, a shareholder-proponent currently must hold at least \$2,000 or 1% of a company's securities for at least one year to be eligible to submit a proposal. The Proposed Rules would shift to a tiered approach based on the length of time the shares have been held, requiring continuous ownership of at least (1) \$2,000 of the company's securities for at least three years, (2) \$15,000 of the company's securities for at least two years, or (3) \$25,000 of the company's securities for at least one year. To support engagement and possible resolution of proposals, the proponent also would be required to state his or her availability to meet with the company, either in person or via teleconference, between 10 and 30 calendar days after the proposal's submission.

With respect to the resubmission thresholds, a company currently may exclude a proposal if a substantially similar proposal was included in the proxy materials within the preceding three years and if, the last time it was included, it received (1) less than 3% support, if proposed once within the last five years, (2) less than 6% support, if proposed twice within the last five years, or (3) less than 10% support, if proposed three or more times within the last five years. The Proposed Rules would increase these thresholds to 5%, 15% and 25%, respectively. Additionally, the Proposed Rules would add a new "momentum" requirement that would permit companies to exclude resubmissions that have been voted on three or more times in the last five years, notwithstanding having been supported by at least 25% of the votes cast, if (1) the proposal received less than 50% of the votes cast, and (2) there is a decline in shareholder support of 10% or more from the last vote.

⁸⁹ The Congressional Review Act, 5 U.S.C. §§ 801–08, established a special parliamentary "fast track" mechanism that allows Congress to disapprove a final rule promulgated by a federal agency. The mechanism, which applies to both "major" and "non-major" rules, begins with a notification to Congress from the agency of the adoption of a new regulation. This notification triggers a 60-day period in which the Senate may introduce a "resolution of disapproval" of a rule (the expedited 60-day process applies only to the Senate, but the House of Representatives would likely consider the measure via a special rule). In most respects, introduction and passage of a joint resolution of disapproval is similar to any other bill. Both have to pass the House and Senate with precisely identical text and be presented to the President for a signature or be enacted over a veto, and a joint resolution had the effect of law. If a joint resolution of disapproval complies with these requirements within the specified deadline, then the rule shall not take effect.

Significantly, the 60-day period is not composed of calendar days, but rather is composed of 60 legislative days for the House or 60 session days for the Senate. Additionally, if there are fewer than 60 legislative days between passage of the final rule and when the session of Congress ends, then Congress gets what is in effect a "reset" and the 60-day period starts over again at the beginning of the next legislative session.

Any rule that is finally disapproved through the Congressional Review Act mechanism would be immediately discontinued, and application of the rule would end immediately.

The proposed amendments to Rule 14a-8 have been highly contentious, and hundreds of comment letters were submitted to the SEC.⁹⁰ The vast majority of these comment letters were submitted by individuals, and many of those letters voiced concerns that the new eligibility requirements will stifle shareholder voices. Similarly, numerous advocacy groups, including CII, are campaigning against the proposed amendments. For example, CII submitted a report to the SEC on May 19, 2020, based on internally conducted analysis, arguing that the proposed higher resubmission thresholds for resubmitting shareholder proposals would have more than doubled the number of excluded proposals in the past decade, and “in particular [would have reduced] the number of shareowner proposals for independent chairs and to improve disclosure on political contributions and lobbying.” In contrast, comment letters in support of the amendments state that these changes reduce costs and help manage a small subset of investors who dominate the shareholder proposal process. Notably, few companies have submitted comment letters to the SEC.

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⁹⁰ See *Comments on Proposed Rule: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*, SEC (last modified June 11, 2020), available [here](#).