

August 19, 2021

SHAREHOLDER PROPOSAL DEVELOPMENTS DURING THE 2021 PROXY SEASON

To Our Clients and Friends:

This client alert provides an overview of shareholder proposals submitted to public companies during the 2021 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 2021 PROXY SEASON

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

- ***Shareholder proposal submissions rose significantly.*** After trending downwards since 2016, the number of proposals submitted increased significantly by 11% from 2020 to 802.
- ***The number of social and environmental proposals also significantly increased, collectively overtaking governance proposals as the most common.*** Social and environmental proposals increased notably, up 37% and 13%, respectively, from 2020. In contrast, governance proposals remained steady in 2021 compared to 2020 and represented 36% of proposals submitted in 2021. Executive compensation proposal submissions also declined in 2021, down 13% from the number of such proposals submitted in 2020. The five

¹ **Data on No-Action Requests:** For purposes of reporting statistics regarding no-action requests, references to the 2021 proxy season refer to the period between October 1, 2020 and June 1, 2021. 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Data on Shareholder Proposals: Unless otherwise noted, all data on shareholder proposals submitted, withdrawn, and voted on (including proponent data) is derived from Institutional Shareholder Services (“ISS”) publications and the ISS shareholder proposals and voting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June 1, 2021, for annual meetings of shareholders at Russell 3000 companies held in 2021; however, data for proposals withdrawn and voted on includes information reported in these databases through June 30, 2021. 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 (*).

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most popular proposal topics in 2021, representing 46% of all shareholder proposal submissions, were (i) anti-discrimination and diversity, (ii) climate change, (iii) written consent, (iv) independent chair, and (v) special meetings.

- ***Overall no-action request success rates held steady, but the number of Staff response letters declined significantly.*** The number of no-action requests submitted to the Staff during the 2021 proxy season increased significantly, up 18% from 2020 and 19% from 2019. The overall success rate for no-action requests held steady at 71%, driven primarily by procedural, ordinary business, and substantial implementation arguments. However, the ongoing shift in the Staff’s practice away from providing written response letters to companies, preferring instead to note the Staff’s response to no-action requests in a brief chart format, resulted in significantly fewer written explanations, with the Staff providing response letters only 5% of the time, compared to 18% in 2020.³
- ***Company success rates using a board analysis during this proxy season rose modestly, while inclusion of a board analysis generally remained infrequent.*** Fewer companies included a board analysis during this proxy season (down from 19 and 25 in 2020 and 2019, respectively, to 16 in 2021), representing only 18% of all ordinary business⁴ and economic relevance arguments in 2021. However, those that included a board analysis had greater success in 2021 compared to 2020, with the Staff concurring with the exclusion of five proposals this year where the company provided a board analysis, compared to four proposals in 2020 and just one proposal in 2019.
- ***Withdrawals increased significantly.*** The overall percentage of proposals withdrawn increased significantly to the highest level in recent years. Over 29% of shareholder proposals were withdrawn this season, compared to less than 15% in 2020. This increase is largely attributable to the withdrawal rates of both social and environmental proposals, which rose markedly in 2021 compared to 2020 (increasing to 46% and 62%, respectively).
- ***Overall voting support increased, including average support for social and environmental proposals.*** Average support for all shareholder proposals voted on was 36.2% in 2021, up from the 31.3% average in 2020 and 32.8% average in 2019. In 2021, environmental proposals overtook governance proposals to receive the highest average support at 42.3%, up from 29.2% in 2020. Support for social (non-environmental) proposals also increased significantly to 30.6%, up from 21.5% in 2020—driven primarily by a greater number of diversity-related proposals voted on with increased average levels of support. Governance proposals received 40.2% support in 2021, up from 35.3% in 2020. This year also saw a double-digit increase in the number of shareholder proposals that received majority support (74 in total, up from 50 in 2020), with an increasing number of such proposals focused on issues other than traditional governance topics.
- ***Fewer proponents submitted proposals despite the increase in the number of proposals.*** The number of shareholders submitting proposals declined this year, with approximately 276

³ This statistic includes both initial and reconsideration responses, and excludes withdrawals.

⁴ This statistic excludes micromanagement-only arguments under Rule 14a-8(i)(7).

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proponents submitting proposals (compared to more than 300 in both 2020 and 2019). Approximately 41% of proposals were submitted by individuals and 21% were submitted by the most active socially responsible investor proponents.⁵ As in prior years, John Chevedden and his associates were the most frequent proponents (filing 31% of all proposals in 2021 and accounting for 75% of proposals submitted by individuals). This year also saw the continued downward trend in five or more co-filers submitting proposals—down to 35 in 2021, from 54 in 2020 and 58 in 2019.

- ***Proponents continued to use exempt solicitations.*** Exempt solicitation filings continued to proliferate, with the number of filings reaching a record high again this year and increasing 30% over the last three years.
- ***Amended Rule 14a-8 in Effect.*** With the amendments to Rule 14a-8 now in effect for meetings held after January 1, 2022, companies should revise their procedural reviews and update their deficiency notices accordingly. However, it remains to be seen whether the new rules will lead to a decrease in proponent eligibility or result in an increase in proposals eligible for procedural or substantive exclusion, based on the new ownership and resubmission thresholds. The SEC’s recently announced Reg Flex Agenda indicates that the SEC intends to revisit Rule 14a-8 as a new rulemaking item in the near term, putting into question the future of the September 2020 amendments.

II. SHAREHOLDER PROPOSAL STATISTICS AND VOTING RESULTS

A. Overview of Shareholder Proposals Submitted

Shareholders submitted 802 shareholder proposals during the 2021 proxy season, up 11% from 720 in 2020. The table below shows key year-over-year submission trends across five broad categories⁶ of shareholder proposals in 2021—governance, social, environmental, civic

⁵ This group consists of As You Sow, Mercy Investment Services, Green Century Capital Management, Trillium Asset Management, and The Sisters of St. Francis, Philadelphia, based on the number of proposals submitted during the 2021 proxy season.

⁶ 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 and racial equity audits); (ii) employment, employee compensation or workplace issues (including 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; (vi) societal concerns, such as human rights, employment or workplace policies, animal welfare, and the opioid crisis; and (vii) employment or workplace policies.

Environmental proposals include proposals addressing: (i) climate change (including climate change reporting, climate lobbying, greenhouse gas emissions goals, and climate change risks); (ii) plastics, recycling

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engagement, and executive compensation. Social and environmental proposals combined represented 44% of all proposals submitted and reclaimed their position as the most frequently submitted (as in 2017 through 2019). These were followed by governance proposals (36%), civic engagement proposals (9%), executive compensation proposals (6%), and other proposals (5%).

Overview of Shareholder Proposals Submitted				
Proposal Category	2021	2020	2021 vs 2020 ⁷	Observations
Governance	287	288	–	Written consent proposals continued to be the most common governance proposal, representing 28% of all governance proposals with 80 submitted (up from 23% in 2020). This reflects proponents’ shifting focus since 2017, with the largest subcategory of governance proposals cycling through proxy access (2017), shareholder special meeting rights (2018), independent chair (2019), and written consent (2020).
Social	239	174	↑37%	The largest subcategory, representing 54% of all social proposals, continued to be anti-discrimination and diversity-related proposals, with 128 submitted in 2021 (more than doubled from 53 in 2020).
Environmental	112	99	↑13%	The largest subcategory, representing 75% of these proposals, continued to be climate change proposals, with 83 submitted in 2021 (significantly increased from 54 in 2020, and surpassing the five-year high of 72 in 2018).
Civic engagement	76	76	–	Lobbying spending proposals once again exceeded political contribution proposals, but by a very narrow margin: lobbying spending proposals (the largest subcategory, representing 46%) decreased to 35 in 2021 from 43 in 2020, and political contribution proposals increased to 34 in 2021 from 27 in 2020, after a steep decline from 61 in 2019.

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.

⁷ Data in this column refers to the percentage increase or decrease in shareholder proposals submitted in 2021 as compared to the number of such proposals submitted in 2020.

Executive compensation	49	56	↓13%	Consistent with the last three proxy seasons, the largest subcategory, representing 31% 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 15 submitted in 2021 (compared to 18 in 2020).
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The table below shows that the five most common proposal topics during the 2021 proxy season were the same as those in the 2020 proxy season, with the rankings shuffled somewhat among the top four proposal topics. A sharp increase in the number of anti-discrimination and diversity proposals drove the overall increase in the share of the top five proposal topics, which collectively represented 46% of all shareholder proposals submitted in 2021, up from 37% in 2020.

Top Shareholder Proposals by Percentage of Total Submitted		
	2021	2020
Anti-discrimination & diversity (16%)		Written consent (9%)
Climate change (10%)		Climate change (8%)
Written consent (10%)		Independent chair (7%)
Independent chair (5%)		Anti-discrimination & diversity (7%)
Special meetings (5%)		Special meetings (6%)

B. Overview of Shareholder Proposal Proponents

In terms of who submitted shareholder proposals, there were at least 276 different proponents during the 2021 proxy season, down from 327 in 2020. 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 2021 proxy season—246 proposals (up from 223 in 2020 and 239 in 2019), 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	2021	2020	Primary 2021 Focus Areas
John Chevedden (& associates)	246	223	Governance
As You Sow Foundation	75	63	Environmental, diversity
New York City Comptroller	36	25	Diversity (EEO-1 disclosure ⁸)

⁸ The EEO-1 Component 1 report is a mandatory annual data collection that requires all private sector employers with 100 or more employees, and federal contractors with 50 or more employees meeting certain criteria, to submit demographic workforce data, including data by race/ethnicity, sex, and job categories, to the U.S. Equal Employment Opportunity Commission. *EEO-1 Data Collection*, U.S. Equal Emp. Opportunity Comm’n, available [here](#). Note that shareholder proposals on this topic have been framed to seek disclosure of either (i) the EEO-1 report *itself*, or (ii) the data included in a company’s EEO-1 report. For purposes of this alert, despite this nuance, we have included both types of proposals in the same subcategory (consistent with ISS’s

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New York State Comptroller ⁹	30	18	Environmental, executive compensation, and political contribution reporting
Mercy Investment Services	29	34	Environmental
Green Century Capital Management	22	5	Environmental
Trillium Asset Management	22	34	Diversity, environmental
National Center for Public Policy Research	18	11	Governance, charitable contributions reporting, diversity
The Sisters of St. Francis, Philadelphia	17	22	Social
Calvert Research & Management	17	0	Diversity (EEO-1 disclosure)
Service Employees International Union	15	6	Diversity, lobbying reporting

Decrease in co-filers. While the number of proposals with multiple co-filers over the past several years has been relatively high compared to prior years, that number decreased significantly in 2021. For example, during the 2021 proxy season there were approximately 144 proposals submitted by two or more co-filers (a decrease of 21% from the 182 proposals submitted by two or more co-filers in 2020), 35 of which were submitted by five or more co-filers (a decrease of 25% from the 54 proposals submitted by five or more co-filers in 2020). As a general matter, multiple 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.

C. Overview of Shareholder Proposal Outcomes

As shown in the table below, the 2021 proxy season saw the following significant trends in proposal outcomes: (i) the percentage of proposals voted on declined to the lowest percentage since 2018; (ii) the percentage of proposals excluded through the no-action letter process (the highest since 2017) remained steady in 2021 compared to 2020; and (iii) the percentage of proposals withdrawn increased significantly in 2021.¹⁰ After declines in the rates of withdrawn social and environmental proposals in 2020, both categories saw marked increases in withdrawal rates in 2021, with 46% of social proposals withdrawn (compared to just 16% in 2020) and 62% of environmental proposals withdrawn (compared to 45% in 2020). Higher withdrawal rates in the environmental and social areas may reflect, among other reasons, some companies’

categorization) and refer to them generally as “EEO-1” proposals. These proposals are discussed below in part IV.A.

⁹ This includes proposals submitted by the New York State Common Retirement Fund, which is controlled by the New York State Comptroller.

¹⁰ Notably, 31 of the 38 (82%) proposals requesting the company annually disclose its workforce diversity metrics as reported on the company’s annual EEO-1 report were withdrawn by the proponents. However, even if those withdrawn EEO-1 proposals are excluded, over 25% of proposals were withdrawn during the 2021 proxy season.

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preference to negotiate with proponents with respect to proposals on highly charged topics such as workforce diversity and climate change, and in light of proxy advisory firm and institutional investor voting policies in these areas. The percentage of withdrawn governance proposals (4.9%) remained low, consistent with 2020 and 2019, reflecting the fact that individuals, who are the proponents of many governance proposals, tend not to withdraw their proposals even when a company has substantially implemented the request.

Shareholder Proposal Outcomes¹¹			
	2021¹²	2020¹³	2019¹⁴
Total number of proposals submitted	802	720	792
Excluded pursuant to a no-action request	18% (144)	18% (130)	15% (119)
Withdrawn by the proponent	29% (234)	15% (105)	28% (220)
Voted on	50% (404)	58% (420)	52% (411)

Voting Results. Shareholder proposals voted on during the 2021 proxy season averaged support of 36.2%, up from 31.3% in 2020 and 32.8% in 2019. Notably, looking at just environmental proposals, average support increased to 42.3%, compared to 29.2% support in 2020—driven primarily by an increased number of climate change proposals voted on with increased average levels of support. Similarly, support for social (non-environmental) proposals increased to 30.6% in 2021 from 21.5% in 2020—driven primarily by an increased number of diversity-related proposals voted on with increased average levels of support. Average support for governance proposals also increased to 40.2% from 35.3% in 2020. The broad increase in shareholder support across almost all categories of shareholder proposals suggests that, contrary to the concerns of some commentators, the SEC’s increased resubmission thresholds are unlikely to result in the exclusion of a significant number of shareholder proposals. Notably, only 30 of the 404 proposals that were voted on during the 2021 proxy season received less than 5% shareholder support. The table below shows those proposals voted on at least three times that received the highest average support.

¹¹ 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%.

¹² As of June 30, 2021, ISS reported that 15 proposals (representing 2% of the proposals submitted during the 2021 proxy season) remained pending.

¹³ As of June 30, 2020, ISS reported that 11 proposals (representing 2% of the proposals submitted during the 2020 proxy season) remained pending.

¹⁴ As of June 30, 2019, ISS reported that 23 proposals (representing 3% of the proposals submitted during the 2019 proxy season) remained pending.

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Top Proposals by Voting Results¹⁵

Proposal	2021	2020	2019
Board declassification	89.0% (5)	81.2% (6)	75.6% (4)
Eliminate/reduce supermajority voting	87.2% (17)	68.0% (12)	63.7% (22)
Board diversity	82.4% (3)	37.2% (14)	51.9% (5)
Annual EEO-1 disclosure	70.3% (3)	42.6% (1)	39.8% (1)
Employment diversity	58.2% (8)	32.1% (9)	38.6% (7)
Majority voting in director elections	51.6% (12)	37.9% (16)	43.6% (21)
Climate change	49.9% (23)	32.1% (16)	27.2% (12)
Political contributions	46.2% (15)	41.1% (24)	36.3% (36)
Shareholder action by written consent	40.3% (70)	35.6% (58)	39.6% (36)
Lobbying spending	37.5% (23)	33.2% (31)	30.8% (23)
Shareholder special meeting rights ¹⁶	34.5% (32)	41.8% (39)	44.2% (23)
Amend proxy access	32.9% (25)	30.3% (12)	29.0% (24)
Independent board chair	30.6% (34)	34.9% (44)	29.2% (55)

Majority-supported proposals. Overall, 74, or 18%, of shareholder proposals voted on during the 2021 proxy season received majority support, up from 50, or 12%, of proposals in 2020. Governance proposals continued to account for the lion’s share of majority-supported proposals, representing 54% of proposals that received majority support in 2021 (compared to 58% in 2020). Environmental and social proposals accounted for an increasing share of majority supported proposals in 2021 (34% in 2021, up from 26% in 2020), with climate change and diversity-related proposals largely driving the increase. In addition, while the proportion of civic engagement proposals receiving majority support in 2021 versus in 2020 remained relatively flat at just over 12% in each of those years, the increase in the number of political contributions and lobbying spending proposals receiving majority support in 2021 may reflect the green shoots of a trend going forward in this space, which should be kept in mind going into the next proxy season.¹⁷ The table below shows the proposals that received majority support.

Proposals that Received Majority Support

Proposal	2021	2020	2019
Eliminate/reduce supermajority voting	17	9	17
Climate change	11	4	0
Permit shareholder action by written consent	7	3	7

¹⁵ The numbers in the parentheticals indicate the number of times these proposals were voted on.

¹⁶ Support for proposals related to shareholder special meeting rights declined to its lowest level since the 2016 shareholder proposal season, likely because an increasing number of companies have in recent years adopted shareholder special meeting rights and have lowered the applicable thresholds.

¹⁷ Notably, in December 2020, BlackRock stated that with respect to disclosure of political spending or lobbying activities, where BlackRock “notes material inconsistencies with stated public policy priorities, [BlackRock] may support a shareholder proposal requesting additional disclosure or explanation for such inconsistency.” BlackRock added that, in making its assessment, it will “review information disclosed by the company, as well as third-party research for industry peer comparison.” See *BlackRock Investment Stewardship’s Perspective on Corporate Political Activities* (Dec. 2020), available [here](#).

Political contributions	6	4	3
Board declassification	5	6	4
Majority voting in director elections	5	3	8
Shareholder special meeting rights	4	5	4
Board diversity	3	2	3
Report on diversity, equity and inclusion efforts	3	0	0
Lobbying spending	3	1	1
Annual EEO-1 disclosure	2	0	0
Report on employment-related arbitration	2	1	0
Report on management diversity	1	2	0
Adopt proxy access	1	0	4
Reduce ownership threshold for shareholder action by written consent	1	0	0
Report on plastic pollution	1	0	0
Report on efforts to eliminate deforestation in supply chain	1	0	0
Report on human rights risks in operations and supply chain	1	0	0

III. SHAREHOLDER PROPOSAL NO-ACTION REQUESTS

A. Overview of No-Action Requests

Submission and withdrawal rates. The number of shareholder proposals challenged in no-action requests submitted to the Staff during the 2021 proxy season increased significantly, up 18% from 2020 and 19% from 2019, and was roughly on par with the number of submissions in 2018 and 2017.¹⁸

No-Action Request Statistics

	2021	2020	2019
No-action requests submitted	272	232	228
Submission rate ¹⁹	34%	32%	29%
No-action requests withdrawn	64 (24%)	42 (18%)	43 (19%)
Pending no-action requests (as of June 1)	4	4	5
Staff responses ²⁰	204	186	180
Exclusions granted	144 (71%)	130 (70%)	119 (66%)
Exclusions denied	60 (29%)	55 (30%)	61 (34%)

¹⁸ 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.

¹⁹ 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.

²⁰ Percentages of exclusions granted and denied are calculated by dividing the number of exclusions granted and the number denied, each by the number of Staff responses. In 2020, the Staff also took no view in one instance.

Most common arguments. The below table, reflecting the number of no-action requests that contained each type of argument, reveals a change in the most-argued grounds for exclusion from ordinary business in 2020 to substantial implementation in 2021.

Most Common Arguments for Exclusion

	2021	2020	2019
Substantial Implementation	114 (42%)	90 (39%)	86 (38%)
Ordinary Business	96 (35%)	105 (45%)	110 (48%)
Procedural	86 (32%)	61 (26%)	50 (22%)
False/Misleading	38 (14%)	41 (18%)	56 (25%)

Success rates. Notwithstanding proponent concerns that no-action requests would be granted in greater numbers under the Clayton Commission, we generally saw a decline in no-action request grants during that time. This year the Staff granted 71% of no-action requests, on par with the 70% success rate in 2020 and slightly up from the 66% granted in 2019, but still notably down from the 78% granted in 2017, which predated the Staff’s recent series of guidance on the ordinary business exclusion.

The Staff most often granted no-action requests based on procedural grounds (representing 37% of successful requests), ordinary business (28%), and substantial implementation (25%). Success rate trends by exclusionary basis were mixed when comparing 2021 to 2020. For example, the success rates for economic relevance and procedural arguments generally held steady, while the success rate for substantial implementation, ordinary business, and duplicate proposal arguments dropped significantly. Notably, the success rate for substantial implementation arguments for environmental (29%), executive compensation (0%), and social (44%) proposals declined significantly year-over-year (success rates in 2020 were 80%, 50% and 63%, respectively). Meanwhile, the success rate of vague and/or false/misleading arguments rose significantly (due to the fact that four letters were excludable under this basis in 2021 compared to just one in 2020). Finally, while there was an increase in the number of violation of law arguments made (to 11 in 2021 from six in 2020), the success rate for violation of law arguments continued to decline.

Success Rates by Exclusion Ground²¹

Exclusion Ground	2021	2020	2019
Procedural	84%	80%	70%
Ordinary business	65%	54%	54%
Substantial implementation	55%	69%	67%
Economic relevance	50%	50%	20%
Violation of law	50%	60%	75%
Duplicate proposals	38%	80%	66%
Vague or false/misleading	18%	5%	5%

²¹ 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.

B. Key Developments

There were a number of noteworthy procedural and substantive developments in no-action decisions this year.

Staff treatment of climate change proposals. The 2021 proxy season saw a marked change in the treatment of proposals related to climate change as compared to 2020. The number of no-action requests relating to climate change proposals declined overall (to 8% in 2021 from 14% of requests in 2020), and the success rate of climate change proposal no-action requests decreased significantly (to 46% in 2021 from 72% in 2020). Of those requests where the Staff concurred with exclusion, five out of six were on procedural grounds or based on duplicate proposals,²² and just one proposal was excluded on a substantive basis (substantial implementation).²³ In contrast, 16 climate change proposals were excluded in 2020: 11 proposals were excluded on substantive grounds,²⁴ and five were excluded on procedural grounds or based on duplicate proposals.²⁵

Notably this season, no climate change proposals were excluded based on micromanagement, compared to four in 2020.²⁶ Although three requests relating to climate change proposals sought relief based on micromanagement—with each proposal requesting a reduction of greenhouse gas emissions with time-bound goals or metrics—all three were denied. In the Staff’s only written response letter of the season on this topic, denying relief to *ConocoPhillips*, the Staff indicated its view that the proposal did not micromanage the company because “[a]lthough the Commission has stated that a proposal seeking to impose specific time-frames or specific methods for implementing complex policies may be excludable because it seeks to micromanage a company (Exchange Act Release No. 34-40018 (May 21, 1998)), the [p]roposal only asks the [c]ompany to set emission reduction targets; it does not impose a specific method for doing so.”²⁷ The foregoing is inconsistent with the Staff’s position in recent proxy seasons, where the Staff concurred with the exclusion of similarly worded proposals based on micromanagement,²⁸

²² See, e.g., *Chevron Corp. (Benta B.V.)* (avail. Mar. 30, 2021)*; *Union Pacific Corp.* (avail. Mar. 22, 2021)*; *Union Pacific Corp.* (avail. Mar. 19, 2021)*; *Sempra Energy* (avail. Jan. 15, 2021)*.

²³ *Chevron Corp.* (Taggart) (avail. Mar. 30, 2021) (based on a report published on the company’s website)*.

²⁴ See, e.g., *Amazon.com, Inc.* (Sacks) (avail. Mar. 27, 2020)*; *Chevron Corp.* (avail. Mar. 20, 2020)*; *Sempra Energy* (avail. Mar. 6, 2020)*.

²⁵ See, e.g., *Chevron Corp.* (Follow This) (avail. Mar. 6, 2020)* (concurring with the exclusion of a proposal based on procedural grounds); *JPMorgan Chase & Co.* (avail. Feb. 28, 2020).

²⁶ See *Amazon.com, Inc.* (Sacks) (avail. Mar. 27, 2020)*; *Chevron Corp.* (Active Home LLC) (avail. Mar. 6, 2020)*; *Exxon Mobil Corp.* (Active Home LLC) (avail. Mar. 6, 2020); *Exxon Mobil Corp.* (Arjuna Capital) (avail. Mar. 6, 2020).

²⁷ *ConocoPhillips Co.* (avail. Mar. 19, 2021) (Staff unable to concur with exclusion where proposal requested that the company address the risks and opportunities presented by the global transition towards a lower emissions energy system by *setting emission reduction targets covering the greenhouse gas (GHG) emissions of the Company’s operations as well as their energy products (Scope 1, 2, and 3)* (emphasis added)).

²⁸ See, e.g., *Chevron Corp.* (Active Home LLC) (avail. Mar. 6, 2020)*; *Exxon Mobil Corp.* (Active Home LLC) (avail. Mar. 6, 2020); *Exxon Mobil Corp.* (NYSCRF) (avail. Apr. 2, 2019); *MGE Energy, Inc.* (avail. Mar. 13, 2019); *The Goldman Sachs Group, Inc.* (avail. Mar. 12, 2019)*; *Wells Fargo & Co.* (avail. Mar. 5, 2019)*; *Devon Energy Corp.* (avail. Mar. 4, 2019); *J.B. Hunt Transport Services, Inc.* (avail. Feb. 14, 2019); *PayPal*

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including some climate change proposals that were even less prescriptive than the proposal challenged in *ConocoPhillips*.²⁹ The foregoing appears consistent, however, with the change in Presidential administration and (then) Acting Chair Lee’s view that the shareholder proposal process “could also involve reaffirming that proposals cannot be excluded if they concern socially significant issues, such as climate change, just because they may include components that could otherwise be viewed as ‘ordinary business.’”³⁰

The Staff was likewise tough on substantial implementation arguments this year where the proposal related to climate change. The overall success rate for climate change proposal no-action requests based on substantial implementation decreased significantly (to 20% in 2021, from 88% in 2020).

Written Staff responses remain infrequent. Consistent with the practice that began in 2020, the Staff continued to issue no-action request responses via its Shareholder Proposal No-Action Responses chart online,³¹ along with few written response letters. At the time they announced this change, the Staff previewed a decline in written response letters by indicating that it “intends to issue a response letter where it believes doing so would provide value, such as more broadly applicable guidance about complying with Rule 14a-8.”³² Indeed, the written response letters issued by the Staff during the last two proxy seasons are more substantive than those pre-dating the Staff’s chart and provide helpful guidance regarding the Staff’s reasoning in particular instances. Notably, the number of written response letters declined significantly to just 10 in 2021 (5% of responses), down from 33 in 2020 (18% of responses). Of these 10 written responses issued in 2021, six addressed arguments under ordinary business, two addressed procedural arguments, one addressed an argument for exclusion based on substantial implementation, and one addressed an argument for exclusion based on materially false/misleading statements. That said, the continuing decline in written response letters has been challenging for companies and proponents alike, both of whom would welcome more transparency and insight into the Staff’s analysis.

Holdings, Inc. (avail. Mar. 6, 2018); *Verizon Communications Inc.* (avail. Mar. 6, 2018); *EOG Resources, Inc.* (avail. Feb. 26, 2018); *Deere & Co.* (avail. Dec. 27, 2017).

²⁹ See, e.g., *The Goldman Sachs Group, Inc.* (avail. Mar. 12, 2019)* (Staff concurring with exclusion where proposal sought adoption of a policy to reduce the carbon footprint of its loan and investment portfolios in alignment with the 2015 Paris goal of maintaining global warming well below two degrees, and issue annual reports describing targets, plans and progress under this policy); *J.B. Hunt Transport Services, Inc.* (avail. Feb. 14, 2019) (Staff concurring with exclusion where proposal requested adoption of company-wide, quantitative targets to reduce total greenhouse gas emissions, taking into account the goals of the Paris Climate Agreement, and issuance of a report discussing its plans and progress towards achieving these targets).

³⁰ Acting Chair Allison Herren Lee, *A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC*, SEC (Mar. 15, 2021), available [here](#).

³¹ See *Shareholder Proposal No-Action Responses*, SEC, available [here](#).

³² *Division of Corporation Finance Informal Procedures Regarding Shareholder Proposals* (Nov. 21, 2019), available [here](#).

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Procedural exclusions. There were a number of noteworthy wins and losses in 2021 based on various procedural grounds, including related to (i) timeliness, (ii) deficiency notices and burden of delivery, and (iii) failure of the proponent to appear at a prior year’s annual meeting.

Timeliness. In one instance, the Staff concurred with exclusion of a proposal that the company claimed to have received after the deadline where the proponent was unable to demonstrate proof of timely delivery, although the proponent claimed to have hand-delivered the proposal by slipping it under the company’s front office door while the office was closed due to COVID-19.³³ On three occasions,³⁴ however, the Staff was unable to concur with a company’s untimeliness argument. In one such instance, although the proposal was received by the company several days past the submission deadline, the Staff nonetheless denied relief, citing “the significant and well known delivery delays incurred by the United States Postal Service due to the pandemic and surge in holiday deliveries, which were outside the control of the [p]roponent.” The Staff further noted that it was important to its determination that the proponent “used the address that the [c]ompany stated in the proxy statement was the appropriate means of submitting proposals and allowed an amount of time for delivery consistent with the expectations set by the delivery service.”³⁵ While Rule 14a-8(e)(1) makes clear that “shareholders should submit their proposal by means, including electronic means, that permit them to prove the date of delivery,” that did not ultimately persuade the Staff that relief was appropriate in that instance, apparently putting the burden of mail delays on companies, rather than proponents. In the other two instances, the Staff was unable to concur with exclusion of a proposal when it was received via facsimile and email two hours after the company’s published “close of business” deadline.

Deficiency Notices and Burden of Delivery. In one instance, the Staff refused to concur with exclusion of a proposal where the company identified a procedural defect (proponent failed to provide proof of authorization at the time of submission) and the proponent’s response to the company’s timely deficiency notice on this point was received after the 14-day deadline.³⁶ As noted by the Staff, the deficiency notice was delivered only via UPS (and not also to the email address requested by the proponent), and since the proponent’s offices were closed due to the COVID-19 pandemic the proponent was unaware of the delivery of that notice. The Staff further noted that the proponent’s representative “acted reasonably under the circumstances by responding to the [c]ompany within 2 business days after being made aware of the notice.” Based on the foregoing and going forward, it appears that the Staff may not view the company as having met its burden of proving delivery of a notice of deficiency unless it is sent via both mail and email (at least where use of the email address is requested by the proponent); this is slightly

³³ *Digital Realty Trust, Inc.* (avail. Apr. 16, 2021).

³⁴ See *Chevron Corp.* (Rehm) (avail. Mar. 22, 2021)*; *Chevron Corp.* (Turner) (avail. Mar. 22, 2021)*; *PRA Health Sciences, Inc.* (avail. Mar. 17, 2021).

³⁵ The Staff further noted: “To the extent a proponent faces obstacles to timely delivery to a mailing address beyond its control and seeks to submit the proposal by an alternate means not provided for in the proxy statement, the proponent should first contact the company to obtain any approved, alternate means for submitting proposals. The proponent also should request that a company employee confirm that the company received the proposal given the proponent bears the burden of proving the date of delivery.”

³⁶ *Amazon.com, Inc.* (Phyllis Ewen Trust) (avail. Apr. 9, 2021)*.

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at odds with the Staff's position that delivery by email alone, where disputed by the recipient, is an insufficient delivery method since proof of delivery cannot be demonstrated.³⁷

Failure to Attend Prior Year's Annual Meeting. In 2021 there was an uptick in the number of companies that argued for relief based on a shareholder proponent's failure to attend a prior year's annual meeting (from two in 2020 to 8 in 2021).³⁸ Notably, the Staff concurred with the exclusion of two proposals based on a proponent's failure to appear even where the proponents claimed they were unable to travel to attend the annual meeting due to COVID-19.³⁹ In one of these instances, the proponent failed to appear at the company's previous virtual annual meeting, but appeared at virtual meetings for different companies directly before and after the meeting's start and end time. Thus, notwithstanding the Staff's COVID-19 guidance and statement that failure to attend a meeting due to COVID-19 would be considered "good cause" under Rule 14a-8(h)(3),⁴⁰ a proponent's failure to attend a meeting during the pandemic, without some evidence on the part of the proponent that such absence was in fact due to COVID-19, did not itself constitute "good cause."

Vague or false/misleading exclusions. In 2021, the most notable no-action letter decided under this basis involved a proposal requesting adoption of a special meeting right based on a single materially false and misleading statement in the supporting statement about the company's existing special meeting rights.⁴¹ Specifically, the supporting statement asserted that special meetings could be called only by the board, chairman, chief executive officer, or president. But this was demonstrably false because the company's bylaws also permitted shareholders owning at least 25% of the voting power of all shares to call a special meeting. The company argued that the false statement was material because it "convey[ed] the false notion that shareholders have no right to call a special meeting under the [c]ompany's existing [b]ylaws." The Staff concurred with exclusion, noting that "the [c]ompany had demonstrated objectively that the [c]ompany currently provides shareholders with a right to call a special meeting, and the [p]roposal as a whole conveys the impression that it does not."⁴²

³⁷ See, e.g., *Mattel, Inc.* (avail. Mar. 26, 2021; recon denied Apr. 16, 2021)* (concurring with exclusion of a proposal where the company represented it had no record of receiving the proponent's response to the timely deficiency notice before the relevant deadline and noted that the proponent had failed to provide actual evidentiary proof that the letter (and email) was transmitted to the company notwithstanding the proponent's claim (purportedly supported by photographs) that the letter was "delivered to management").

³⁸ See, e.g., *Comcast Corp.* (avail. Mar. 30, 2021) (annual meeting occurred virtually in 2020)*; *The Kraft Heinz Co.* (avail. Feb. 5, 2021) (annual meeting occurred virtually in 2020)*.

³⁹ See, e.g., *The Kraft Heinz Co.* (avail. Feb. 5, 2021)*.

⁴⁰ See *Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns*, SEC (Apr. 7, 2020), available [here](#).

⁴¹ See *NETGEAR, Inc.* (avail. Apr. 9, 2021, recon. denied Apr. 23, 2021).

⁴² *Id.*

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C. Spotlight on the Ordinary Business Exclusion

Companies encountered mixed success making ordinary business arguments this year. Traditional ordinary business arguments fared better this proxy season than during 2020, whereas the success rate for micromanagement arguments decreased this year, as further discussed below.

Traditional ordinary business. Overall, the number of successful ordinary business exclusions (other than on the basis of micromanagement) increased to 35 in 2021 from 19 in 2020, which amounted to overall success rates of 64% and 45%, respectively. During the 2021 proxy season, a number of companies successfully applied the traditional ordinary business analysis, including the company-specific approach to analyzing significance outlined in SLB 14K. Notably, two Staff response letters, in particular, address the topic of significance, as discussed below.

For example, the Staff concurred with the exclusion of six proposals that requested a report on the feasibility of including paid sick leave as a standard employee benefit, notwithstanding that the proponents submitted correspondence asserting the general social significance of the issue.⁴³ In one of its few written response letters, the Staff emphasized that it “does not recognize particular issues or categories of issues as universally ‘significant.’ Indeed, proposals related to paid sick leave *may* raise a significant policy issue . . . [but this] [p]roposal does not demonstrate how offering paid sick leave as a standard employee benefit is sufficiently significant to *[this] [c]ompany*, such that it transcends the [c]ompany’s ordinary business operations” (emphasis added).⁴⁴ This is in line with the Staff’s guidance, as expressed in SLB 14K, rejecting the universal significance of any particular issue and discouraging “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.”⁴⁵

Consistent with this guidance, the Staff’s company-specific approach to analyzing significance led to different results even where similar (sometimes identical) proposals were at issue. For example, two companies (one in the pharmacy and drug store industry and the other in the food and beverage industry) received nearly identical proposals requesting a report on external public health costs created by the company’s food business. Only the pharmacy and drug store company was able to exclude the proposal under ordinary business. In a written response letter denying the proponent’s request for reconsideration at the pharmacy and drug store company, the Staff noted that “the [p]roposal does not demonstrate how external public health costs created by the [c]ompany’s retail food business are sufficiently significant to the [c]ompany.”⁴⁶

⁴³ See, e.g., *Walmart Inc.* (avail. Mar. 12, 2021)*; *McDonald’s Corp.* (avail. Feb. 19, 2021)*.

⁴⁴ *Kohl’s Corp.* (avail. Feb. 19, 2021).

⁴⁵ Staff Legal Bulletin No. 14K SEC (avail. Oct. 16, 2019), available [here](#).

⁴⁶ *CVS Health Corp.* (avail. Mar. 22, 2021; *recon. denied* Mar. 30, 2021). Compare *The TJX Companies, Inc.* (NorthStar Asset Management) (avail. Apr. 9, 2021) (concurring with exclusion of a proposal requesting a report evaluating whether the company supports systemic racism through undetected supply chain prison labor, with the Staff noting that “although the [p]roposal refers to systemic racism through undetected supply chain prison labor, the [p]roposal acknowledges that the [c]ompany already prohibits prison labor and does not

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Successful use of board analysis remains infrequent. A series of Staff Legal Bulletins issued by the Division under the Clayton Commission expressed 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 the Staff in evaluating a company’s no-action request under the economic relevance and ordinary business exclusions. Similar to the prior two proxy seasons, companies providing a board analysis in 2021 found only moderate success.

Although fewer companies included a board analysis this year (16 in 2021, down from 19 and 25 in 2020 and 2019, respectively), the Staff concurred with the exclusion of five proposals this season (compared to four in 2020 and one in 2019) in reliance on the company’s use of a board analysis: four under the ordinary business exclusion and one under the economic relevance exception.⁴⁷ Of the four ordinary business arguments, three included a board analysis focused on the “delta” between the company’s existing policies and the change the proposal requested.⁴⁸ Since the Staff had already granted no-action requests using similar “delta” arguments during the 2020 proxy season, the success of these board analyses was not surprising.

The remaining win under ordinary business involved a proposal relating to senior executive compensation, where the company argued, consistent with the analytical framework outlined in SLB 14J,⁴⁹ that the executive compensation practice in question was not limited to executives and broadly applied to the general workforce, which was one of the factors considered by the board in its analysis of the significance of the compensation issues raised.⁵⁰ The foregoing marks the first time the Staff has concurred with exclusion of an executive compensation proposal where the company used a board analysis to satisfy the two-prong test outlined in SLB 14J.

Micromanagement. During the 2021 proxy season, the number of micromanagement arguments decreased significantly (to 44 in 2021 from 78 in 2020), while the success rate for micromanagement arguments decreased as well (40% success rate in 2021 down from a 44%

otherwise explain how its compliance program raises a significant issue for the [c]ompany”)* with *The Home Depot, Inc.* (NorthStar Asset Management) (avail. Mar. 19, 2021) (unable to concur with the exclusion of a proposal requesting a report evaluating opportunities to address the company’s role in systemic racism by enhancing its policies applicable to any suppliers utilizing incarcerated workers)*.

⁴⁷ For ordinary business exclusion, see *State Street Corp.* (avail. Mar. 26, 2021); *Verizon Communications Inc.* (avail. Mar. 2, 2021); *American Express Co.* (avail. Feb. 26, 2021); *Walgreens Boots Alliance, Inc.* (avail. Nov. 25, 2020, recon. denied Dec. 10, 2020)*.

For economic relevance exclusion, see *Chubb Ltd.* (avail. Mar. 26, 2021).

⁴⁸ See *State Street Corp.* (avail. Mar. 26, 2021); *American Express Co.* (avail. Feb. 26, 2021); *Walgreens Boots Alliance, Inc.* (avail. Nov. 25, 2020, recon. denied Dec. 10, 2020)*.

⁴⁹ In SLB 14J, the Staff stated its view that “a proposal that addresses senior executive and/or director compensation may be excludable under Rule 14a-8(i)(7) if [(1)] a primary aspect of the targeted compensation is broadly available or applicable to a company’s general workforce and [(2)] the company demonstrates that the executives’ or directors’ eligibility to receive the compensation does not implicate significant compensation matters.”

⁵⁰ *Verizon Communications Inc.* (avail. Mar. 2, 2021).

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success rate in 2020).⁵¹ The foregoing is partly attributable to proponents drafting less prescriptive (and therefore more challenging to exclude given SLB 14K) proposals, particularly with respect to climate change proposals. Additionally, only 7% of micromanagement arguments this year related to corporate governance proposals, compared to 15% in 2020 when the Staff denied several micromanagement arguments involving corporate governance proposals.⁵²

D. No-Action Letter Practice Pointers

Consider timing of no-action requests. Staff response times for no-action requests tended to be longer this season, potentially driven by a number of factors: (i) the change in administration mid-season; (ii) Staff work-from-home protocol and pandemic impacts; and (iii) an increase in the number of no-action requests. Longer response times proved particularly problematic to several companies this year, since companies submit no-action requests 80 days prior to proxy *filing* dates, although proxy *printing* and proxy card *sign-off* dates tend to be earlier, putting companies in the awkward position of potentially not receiving Staff responses prior to those earlier deadlines, or receiving reconsideration requests in between the sign-off/printing and filing deadlines. While the Staff generally tries to meet companies' schedules, including print deadlines, their ability to do so is not guaranteed.⁵³

In order to minimize last-minute surprises, companies may wish to (i) consider submitting no-action requests earlier in the season, and possibly 80 days in advance of their anticipated *printing* deadlines (rather than their *filing* deadlines; even though such an earlier submission is not required by Rule 14a-8); (ii) inform the Staff of the relevant proxy card sign-off and proxy printing deadlines as soon as practicable; and (iii) coordinate early with the financial printer to be clear on key dates.

Provide proponents with clear instructions for email submission. Companies are encouraged to expect and facilitate email communication from proponents. Email communication became even more important during the 2021 proxy season due to pandemic-related work-from-home scenarios that created obstacles for the timely receipt and delivery of physical mail. To this end, companies should consider including an email address in addition to a mailing address in the shareholder proposal submission instructions in the proxy statement, thereby reducing the risk of submissions being directed to the wrong recipient, to the mailroom only, or getting lost entirely.⁵⁴

⁵¹ Notably, from 2018 to 2019, there was a 91% increase in the number of no-action requests granted based on micromanagement arguments (21 and 11 exclusions based on micromanagement in 2019 and 2018, respectively). Thereafter, the Staff published SLB 14K, in which it 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.

⁵² See, e.g., *Johnson & Johnson* (avail. Jan. 29, 2020) (in denying no-action relief for an independent chair proposal where the company argued for exclusion based on micromanagement, the Staff said "the [p]roposal does not encompass an ordinary business matter").

⁵³ We note that in at least one instance the Staff denied a proponent's reconsideration request as untimely where it was submitted three days in advance of the company's proxy filing. See *The Goldman Sachs Group, Inc.* (avail. Mar. 19, 2021)*.

⁵⁴ See *PRA Health Sciences, Inc.* (avail. Mar. 17, 2021).

IV. KEY SHAREHOLDER PROPOSAL TOPICS DURING THE 2021 PROXY SEASON

A. *Anti-discrimination, Diversity-Related and Other Human Capital*

Against a backdrop of public focus on issues related to race and equality, proposals focused on anti-discrimination and diversity constituted the largest subcategory of social proposals submitted in 2021 (representing 54% of social proposals), and also represented the top category of all shareholder proposals submitted during the season (representing 16% of all proposals submitted). These proposals were largely focused on workforce diversity, racial equity, and gender and racial pay equity. Institutional investor focus on human capital management was also at an all-time high this season, and while many human capital management proposals in 2021 were tied to race and equality issues, other topics reflected a focus on paid sick leave (in light of COVID-19) and waning interest in both sexual harassment and mandatory arbitration.

Key Social Proposal Statistics							
	2021			2020			YoY ⁵⁵ Proposal Trend
	Submitted	Voted on	Avg Support	Submitted	Voted on	Avg Support	
Anti-discrimination and diversity-related							
Workforce diversity and EEO-1	81	11	61.56%	26	9	32.1%	↑
Racial equity proposals	38	16	23.9%	7	5	13.4%	↑
Gender and racial pay equity	7	4	24.0%	13	12	12.9%	↓
Other human capital							
Paid sick leave	7	0	–	0	0	–	↓
Employment-related mandatory arbitration	3	2	53.8%	11	2	33.6%	↓
Sexual harassment proposals	2	1	22.0%	4	4	19.5%	↓

Workforce diversity and EEO-1 proposals. The number of proposals submitted related to workforce diversity increased significantly to 81 in 2021 (compared to 26 in 2020). Of the workforce diversity proposals submitted in 2021, 38 requested the company annually disclose its workforce diversity data as reported in the company’s annual EEO-1 report (up from two such proposals in 2020); 14 proposals generally requested a report on the company’s employment diversity and related diversity policies; and eight proposals requested the adoption of a diverse candidate search policy for newly hired employees comparable to the “Rooney Rule” policies requested for new board members.⁵⁶ In addition, As You Sow submitted 21 proposals that requested an annual report assessing the company’s diversity and inclusion efforts, of which six

⁵⁵ “YoY” refers to Year over Year.

⁵⁶ Board diversity proposals are discussed in part IV.C below.

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were voted on by shareholders (with two receiving majority support),⁵⁷ seven were withdrawn following negotiations with the company, and seven were excluded through the no-action process. Notably, six of the proposals were excluded because the proponents failed to provide proof of the requisite stock ownership. The remaining two workforce diversity proposals were submitted by the National Center for Public Policy Research (“NCPPr”), 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.

Of particular note, the significant increase in EEO-1-related proposals was driven primarily by the launch in December 2020 of the New York City Comptroller’s campaign calling on companies to publicly disclose the composition of their workforces by race, ethnicity, and gender.⁵⁸ In the campaign’s announcement, the New York City Comptroller explained that the first 24 EEO-1-related proposals were submitted to S&P 100 companies that did not respond to the Comptroller’s July 2020 letter to 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.⁵⁹ In May 2021, the Comptroller issued a press release announcing that 62 S&P 100 companies committed to disclose their EEO-1 data as a result of the launch of the Comptroller’s campaign.⁶⁰

Overall, both the number of workforce diversity proposals voted on and shareholder support increased significantly year-over-year, with the 11 proposals voted on in 2021 averaging 61.5% support (compared to six proposals voted on in 2019 averaging 47.5%), and six proposals (two requesting disclosure of EEO-1 data and four requesting reports assessing the company’s workforce diversity) receiving majority support. Both proposals from NCPPr related to ideological diversity were excluded under the ordinary business exclusion.⁶¹

As in 2020, a significant portion of workforce diversity proposals were withdrawn after negotiations with the proponent. Notably, five of the eight diverse candidate search policy proposals submitted in 2021 were withdrawn by the AFL-CIO and its co-filers after the companies disclosed existing search policies or committed to adopt such policies in the future;⁶² six of the 14 employment diversity and related diversity policies were withdrawn; and, as noted above, seven of As You Sow’s 21 diversity and inclusion efforts proposals were withdrawn. Similarly, the vast majority of the EEO-1 proposals were withdrawn by the proponent following

⁵⁷ One proposal remains pending.

⁵⁸ See *Comptroller Stringer, NYC Funds Escalate Campaign Calling on Major Companies to Publicly Disclose Workforce Demographics*, New York City Comptroller (Dec. 10, 2020), available [here](#).

⁵⁹ See *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](#).

⁶⁰ See *Comptroller Stringer and NYC Funds’ Proposals Win Majority Vote for Workforce Demographic Disclosures at DuPont and Union Pacific*, New York City Comptroller (May 17, 2021), available [here](#).

⁶¹ See, e.g., *Walgreens Boots Alliance, Inc.* (avail. Nov. 25, 2020, recon. denied Dec. 10, 2020)*.

⁶² The diverse candidate search policy proposals were withdrawn at Bank of America Corp., Citigroup Inc., JPMorgan Chase & Co., U.S. Bancorp, and Wells Fargo & Co.

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negotiations, which, as noted above, typically resulted in the company committing to disclose its EEO-1 data.⁶³

EEO-1 Proposal Submissions and Withdrawals			
	2021	2020	2021 vs 2020
Submitted	38	2	↑
Proposals Withdrawn As Percentage of Submitted	82%	0	--

Racial equity. Echoing the nationwide activism for racial equality that followed George Floyd’s death in May 2020, almost 40 shareholder proposals addressed racial equity issues.

Twelve proposals requested a racial equity audit or report analyzing each company’s impacts broadly on “nonwhite stakeholders and communities of color,” “civil rights, equity, diversity and inclusion,” or racial injustice. These proposals often included the required or optional use of a third party to conduct the audit, with solicited input from employees, customers, and civil rights organizations, mirroring the methodologies used by Starbucks⁶⁴ and Facebook⁶⁵ for their own recently published racial equity or civil rights audits. In three instances, these proposals were withdrawn after the companies agreed to conduct the audit. Eight racial equity audit proposals went to a vote, and proponents filed additional soliciting materials in support of all but one proposal (largely criticizing the companies for committing funds broadly to address racial disparities without a clear plan for the effective use of such funds). Notably, six of these companies were banks/financial services companies. These proposals received an average of 33.1% support, with just one receiving an ISS recommendation “for” the proposal (and garnering close to majority support (44.2%)). Five companies sought to exclude the racial equity audit proposal, but only two were successful: one on procedural grounds and the other under ordinary

⁶³ Only two companies sought no-action relief to exclude an EEO-1-related proposal. Walmart Inc. withdrew its no-action request after the New York City Comptroller withdrew its proposal. *See Walmart Inc.* (avail. Feb. 26, 2021)*. In the second no-action request, Moody’s Corp. argued that Calvert Research and Management’s proposal could be excluded under Rule 14a-8(i)(7) on the grounds that the proposal related to how Moody’s manages its workforce. Notably, Moody’s argued that disclosure of its EEO-1 report would not provide an accurate view of the company’s workforce composition or diversity and inclusion efforts because the company’s EEO-1 report covers only its U.S.-based workforce, which accounts for only one-third of Moody’s employees. *See Moody’s Corp.* (avail. Feb. 23, 2021)*.

⁶⁴ *Starbucks Civil Rights Assessments*, Starbucks (last accessed July 12, 2021), available [here](#) (noting that “since 2019, Starbucks has commissioned an objective assessment of [its] work on civil rights,” conducted by a third-party law firm and led by former U.S. Attorney General Eric Holder, Jr., to address the company’s “progress over time and provide[] recommendations for how [it] can better advance inclusion, diversity and equity...”); *A Report to Starbucks: An Examination of Starbucks’ Commitment to Civil Rights, Equity, Diversity, and Inclusion*, Covington (Jan. 23, 2019), available [here](#) (describing listening sessions of Mr. Holder with Store Managers and the company’s engagement with members of the civil rights community).

⁶⁵ *Facebook’s Civil Rights Audit – Final Report*, Relman Colfax et al. (July 8, 2020), available [here](#) (describing the audit, led by “a civil rights and civil liberties leader” and “a team from [a] civil rights law firm,” that included interviews of “over 100 civil rights and social justice organizations, hundreds of advocates and several members of Congress”).

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business because the company’s completion of the requested report would interfere with its litigation strategy in multiple pending lawsuits.⁶⁶

In addition, As You Sow submitted four proposals requesting a report on companies’ plans to “promote racial justice.” Two of these proposals were withdrawn, one was excluded on procedural grounds, and the fourth was voted on (receiving an ISS recommendation “for” the proposal and 38.9% support).

Eight other racial equity proposals focused on addressing racial and other equity issues at the board level. Five of these proposals, all of which were withdrawn, requested that the board strengthen, or discuss how it could strengthen, the board’s oversight of “workforce equity issues” to include employment discrimination, racial and gender pay equity, and diversity and inclusion, among other topics. The other three proposals requested that the board or its nominating committee include in the next election at least one independent candidate with a “high level of human and/or civil rights expertise.” These proposals received an average of 9.6% support, with ISS recommending votes “for” the proposal at Alphabet Inc.

The remaining 13 proposals targeted specific aspects of company operations for their impacts on racial equality, including compensation and lobbying practices, suppliers, advertising policies, corporate culture, products sold, and relationships with police departments. Four of these proposals were voted on and averaged 12.3% support. ISS recommended a vote “for” only one of these proposals, which requested a report on the alignment of a company’s starting pay for employees and its racial justice goals and commitments.

Gender and racial pay equity proposals. The number of shareholder proposals calling for a report on the size of a company’s gender and racial pay gap and policies and goals to reduce that gap decreased during the 2021 proxy season. In 2021, shareholders submitted seven proposals, including five resubmissions to companies subject to pay gap proposals in prior years, targeting primarily technology, pharmaceutical, and financial service companies (down from 13 in 2020), with Arjuna Capital or Proxy Impact responsible for at least five of them. Average support for these proposals increased in 2021 as compared to 2020: the four proposals voted on in 2021 received average support of 24.0% (up from 12.9% for the 12 proposals voted on in 2020), potentially reflecting the increase in investor focus on issues of gender and racial equality more generally. As in 2020, the 2021 proposals primarily targeted unadjusted pay gaps rather than requesting wage gap information for comparable jobs (*i.e.*, what women and ethnic minorities are paid compared to their most directly comparable male and nonminority peers, adjusted for seniority, geography, and other factors).⁶⁷ Following a multiyear trend of proposals increasingly focusing on both gender and racial pay gaps, all 2021 proposals requested information on both gender and racial pay gaps, rather than gender pay gaps alone.

As in 2020, ISS’s voting guidelines call for a case-by-case approach to pay gap proposals. ISS did not support most of these proposals in 2021, generally because it viewed companies as

⁶⁶ See, e.g., *Chevron Corp. (Sisters of St. Francis)* (avail. Mar. 30, 2021)*.

⁶⁷ 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.

already providing sufficient data to assess the effectiveness of diversity and inclusion policies. It is notable, however, that of 51 companies rated by Arjuna Capital and Proxy Impact (the primary proponents of these proposals) in their “Racial and Gender Pay Scorecard,” only Pfizer, Citigroup, Mastercard, and Starbucks (the latter two of which publicly agreed to implement shareholder proposals seeking pay gap disclosures in 2020) were found to disclose both adjusted and unadjusted median global pay gap numbers, with Bank of New York Mellon agreeing to do so in 2021.⁶⁸ As a result of these and other pay gap practices, Arjuna Capital and Proxy Impact give “F” scores to more than half of the companies rated. In light of these ratings and ongoing focus on racial and gender diversity and pay equality, we anticipate that similar proposals will continue to be submitted next season. In particular, concerns with the impact of the COVID-19 pandemic on gender pay gaps⁶⁹ could heighten investor focus on this topic and increase drives for issuer transparency.

Other human capital management proposals. In the wake of the COVID-19 pandemic, seven companies received a proposal requesting that the company consider the feasibility of adopting as a standard benefit any paid sick leave benefits it had already implemented in response to the pandemic. Six of these proposals were excluded under the ordinary business exclusion, and one was withdrawn. Proposals requesting a review of the company’s sexual harassment policies or risks dropped to just two in 2021 (from four in 2020 and 10 in 2019), only one of which was voted on (garnering 22% support, with ISS recommending votes “against” it). Notably, however, ISS, in response to increasing shareholder support for sexual harassment proposals and client demand in prior proxy seasons, did update its 2021 U.S. proxy voting guidelines to specifically address sexual harassment.⁷⁰ Finally, the number of proposals requesting reports on the use of mandatory arbitration for employment-related claims dropped to just three in 2021 (compared to 11 in 2020 and two in 2019). One proposal was excluded on procedural grounds, and the other two proposals were voted on, were supported by ISS and received high votes (one receiving a majority vote and the other proposal receiving 49% support⁷¹). Despite the decline in the number of proposals concerning mandatory arbitration in 2021, the significant shareholder support for these proposals is noteworthy for companies that continue to include mandatory arbitration provisions.

⁶⁸ See *Racial and Gender Pay Scorecard 2021*, Arjuna Capital and Proxy Impact, available [here](#).

⁶⁹ See, e.g., Stephen Miller, *Pandemic Could Widen Gender Pay Gap*, SHRM (Mar. 24, 2021), available [here](#).

⁷⁰ When reviewing a request for a report on company actions to strengthen policies and oversight to prevent workplace sexual harassment or related risks, ISS will take into account the following factors: (i) the company’s current policies, practices, and oversight mechanisms related to preventing workplace sexual harassment; (ii) whether the company has been the subject of recent controversy, litigation, or regulatory actions related to workplace sexual harassment issues; and (iii) the company’s disclosure regarding workplace sexual harassment policies or initiatives compared to its industry peers. *United States Proxy Voting Guidelines, Benchmark Policy Recommendations*, ISS (Nov. 19, 2020), available [here](#).

⁷¹ After the proposal at Goldman Sachs fell just shy of majority support, the company subsequently announced that, in light of the recent shareholder vote and other feedback, it was planning to undertake a review to assess the issue. See *Goldman Sachs Issues Statement on Arbitration Policy Review*, Goldman Sachs (June 4, 2021), available [here](#).

B. Climate Change And Other Environmental

Climate change related proposals, were the largest group of environmental shareholder proposals in 2021 by a large margin, representing 75% of all environmental proposals (and 10% of all proposals) submitted during the season. Other popular environmental proposals sought reports on plastic packaging or pollution, and the costs and benefits of environmental expenditures.

Climate change proposals.

Climate Change Proposal Statistics: 2021 vs. 2020			
	2021	2020	2021 vs 2020
Submitted	83	54	↑56%
Voted On	23	16	↑44%
Average Support	49.9%	32.1%	↑18%
Majority Support	11	4	↑175%
Proposals Withdrawn As Percentage of Submitted	61%	43%	↑18%

Of the 23 climate change proposals that went to a vote in 2021: seven requested reports on climate change and/or greenhouse gas (“GHG”) emission targets, progress and/or goals; six requested reports on climate change lobbying practices; four requested an annual nonbinding advisory vote on a company’s climate disclosure and strategy (referred to as a “Say on Climate” vote); three requested the company adopt quantitative company-wide GHG goals; two requested reports on analyses of impact of third-party scenarios; and one requested a report on proxy voting policies. Both shareholders and management have submitted Say on Climate proposals at companies that are considered “high impact” as well as at companies that would not be considered “high impact” from a GHG emissions perspective.⁷² Institutional investors and proxy advisor firms have had mixed reactions to these types of proposals. For example, Vanguard stated that it will evaluate Say on Climate proposals on a case by case basis and noted that while “advisory votes can help companies gain insight into investors’ perspectives on a topic, they should not be used to delegate strategic oversight responsibilities to shareholders, nor should they be used in place of meaningful disclosures to and communications with shareholders.”⁷³ In 2021, three Say on Climate shareholder proposals went to a vote and received an average of 24% support. Additionally, two U.S. companies (Moody’s Corp. and S&P Global, Inc.) included in their 2021 proxy statements company-sponsored Say on Climate vote proposals to shareholders, and both of these proposals received over 98% support.

⁷² Climate Action 100+ has identified 167 companies that it views as disproportionately responsible for GHG emissions. For instance, Management of Royal Dutch Shell, one of the companies identified by Climate Action 100+, introduced a Say on Climate Proposal and Booking Holdings, a company that would not be considered “high impact,” received a shareholder proposal. See *Climate Action 100+ Adds to Focus List of Companies*, *Climate Action 100+* (Nov. 18, 2020), available [here](#).

⁷³ See *Vanguard Investment Stewardship Insights: How we evaluate Say on Climate proposals*, Vanguard (May 2021), available [here](#).

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Notably, each of 11 climate change proposals that received majority support received at least 56% of the vote. Additionally, three climate change proposals received between 47% and 49% support. ISS supported 83% of climate change proposals in 2021 compared to 63% in 2020, which indicates that ISS was more likely to support climate change proposals when applying its company-specific approach detailed in its Climate Proxy Voting Guidelines for 2021.⁷⁴ The 18% increase in percentage of climate change proposals that were withdrawn signals a continued trend in companies' willingness to discuss reasonable means to address these proposals, as well as increased pressure on companies to address concerns that investors and other stakeholders have on these issues.

This year's voting results also reflect the continuing trend of increased support for climate change proposals by large asset managers. For example, in January 2021, BlackRock's annual letter to S&P 500 CEOs advocated for companies to expedite their disclosures regarding climate change planning.⁷⁵ In February 2021, BlackRock also indicated that it may vote against directors if a company has not provided "a credible plan to transition its business model to a low-carbon economy" and that BlackRock is open to supporting shareholder proposals that will force a company to address gaps in its approach to climate risk or to accelerate changes surrounding climate risk.⁷⁶ In March 2021, BlackRock published a report laying out its engagement priorities for 2021, stating that it expects companies to have "clear policies and action plans to manage climate risk and realize opportunities presented by the global energy transition."⁷⁷ On May 26, 2021, BlackRock voted for three directors nominated by activist investor Engine No.1 at Exxon Mobil's annual meeting. In BlackRock's voting bulletin, BlackRock cited Exxon Mobil's "limited capital expenditure toward diversification of its portfolio" and the need for the company

⁷⁴ In March 2020, ISS launched its 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. ISS updates the Climate Proxy Voting Guidelines on "an annual basis to consider emerging trends on climate change and other related environmental, social, and governance issues, and on relevant developments in market standards and regulations as well as investor feedback." See *United States Climate Proxy Voting Guidelines, 2021 Policy Recommendations*, ISS (Dec. 27, 2020), available [here](#).

⁷⁵ BlackRock asked companies to: (i) publish a plan for how their business models will be compatible with a net zero economy; and (ii) disclose how the climate plan is incorporated into the company's long-term strategy and reviewed by the board of directors. BlackRock acknowledged that the variety of reporting frameworks can create further complexities for companies and supports moving to a single global disclosure standard aligned with the reporting frameworks developed by the Task Force on Climate related Financial Disclosures and the Sustainability Accounting Standards Board. See Larry Fink, *Larry Fink's 2021 Letter to CEOs*, BlackRock (Jan. 26, 2021), available [here](#).

⁷⁶ See *Climate Risk and the Transition to a Low-Carbon Economy*, BlackRock (Feb. 2021), available [here](#). BlackRock indicated that it expects companies to disclose Scope 1 and Scope 2 emissions and accompanying GHG reduction targets. Additionally, companies in carbon-intensive industries should disclose Scope 3 emissions.

⁷⁷ See *BlackRock Investment Stewardship Engagement Priorities for 2021*, BlackRock (Mar. 2021), available [here](#).

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to assess its strategy and board expertise against the possibility that the demand for fossil fuels may decline rapidly.⁷⁸ Engine No.1 won three board seats at the annual meeting.⁷⁹

Further, the SEC has indicated that it is pursuing disclosure requirements for public companies when it comes to the risks posed by climate change.

Other environmental proposals. Other popular environmental proposals included: 12 proposals requesting reports on the impact of plastic packaging or pollution, with three proposals averaging 54.1% support and six proposals requesting a report on costs and benefits of environmental related expenditures, all of which were voted on and averaged 3.0% support.

C. Board Diversity

2021 trends. Board diversity was a continued topic of interest in 2021, with the number of these proposals holding steady from 2020. During the 2021 proxy season, excluding “ideological diversity” proposals (a more recent variant of board diversity proposals discussed below), shareholders submitted 22 proposals requesting the adoption of a board diversity policy or a report on board diversity (up from 14 proposals in 2020). Excluding “ideological diversity” proposals, the three proposals voted on in 2021 averaged support of 82.4% (up from average support of 37.2% for four proposals voted on in 2020), with all receiving majority support (compared with two receiving majority support in 2020), and all of which were supported by ISS. Of the proposals voted on, focus included gender and racial disclosure and steps and strategies for increasing board diversity. Continuing the trend from prior years, a significant number of board diversity proposals (68.2% in 2021 as compared with 43% in 2020) were withdrawn or not included in the proxy.

Momentum has continued with respect to these proposals in light of voting policies of the largest institutional investors⁸⁰ and proxy advisors⁸¹ calling for increased board diversity, and state and

⁷⁸ See *BlackRock Vote Bulletin: ExxonMobil Corporation*, BlackRock (May 26, 2021), available [here](#).

⁷⁹ See Pippa Stevens, *Activist Firm Engine No.1 Claims Third Exxon Board Seat*, CNBC (June 2, 2021), available [here](#).

⁸⁰ See, e.g., *BlackRock Investment Stewardship, Proxy Voting Guidelines for U.S. Securities*, BlackRock (Jan. 2021), available [here](#) (asking companies to disclose EEO-1 data regarding the diversity of their workforce, as well as actions they are taking to advance diversity, equity, and inclusion); *Vanguard Investment Stewardship Insights, A Continued Call for Boardroom Diversity*, Vanguard (Dec. 2020), available [here](#) (expecting boards to publish their perspectives on board diversity, disclose board diversity measures, and broaden search for director candidates); *Guidance on Enhancing Racial & Ethnic Diversity Disclosures*, State Street (Jan. 2021), available [here](#) (asking companies to articulate role diversity plays in broader human capital management practices, describe what diversity goals exist, provide diversity metrics, articulate goals and strategy related to racial and ethnic representation at the board level, and describe how boards execute oversight role in diversity and inclusion).

⁸¹ See, e.g., *ISS Benchmark Policy Updates, Executive Summary*, ISS (Nov. 12, 2020), available [here](#) (stating that for the 2021 proxy season, the absence of racial/ethnic diversity on a company’s board would not be a factor in ISS’s voting recommendations, but would be highlighted by ISS in its research reports, and also stating for the 2022 proxy season, ISS will generally recommend votes “against” the chair of the nominating committee or other directors on a case-by-case basis where the board has no apparent racially or ethnically diverse members; starting with meetings on or after February 1, 2021 ISS will recommend votes “against” the chair of the

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federal governments entering the arena of legislating board diversity.⁸² In August 2021, the SEC approved Nasdaq’s rule proposal, which takes a “comply or explain” approach to board diversity, and requires most Nasdaq-listed companies to disclose whether they have at least two directors who self-identify as diverse—including one who identifies as female and another as an underrepresented minority (African American or Black, Hispanic or Latinx, Asian, Native American or Alaskan Native, Native Hawaiian or Pacific Islander) or LGBTQ+—or explain of why they do not.⁸³ Diversity on boards has also been on the rise; 97% of the top 200 S&P 500 company boards now have at least one minority director (defined as Black/African American, Hispanic/Latinx, and Asian directors), compared with 93% in 2019, and all S&P 500 boards have at least one female director.⁸⁴

“Ideological board diversity” proposals. The 2021 proxy season saw a decrease in the number of proposals seeking a report on directors’ ideological perspectives rather than characteristics such as gender, race, or ethnicity, which were typically submitted by NCPPR. Of the five ideological board diversity proposals submitted in 2021, only one was voted on, with 0.7% support (compared to seven proposals submitted and voted on in 2020, averaging 4.2% support). ISS has consistently recommended votes “against” these proposals. Notably, two companies were permitted to exclude the proposal based on substantial implementation (three companies excluded the proposal on the same basis in 2020).

D. Stakeholder Theory and Public Benefit Corporations

During the 2021 proxy season, shareholders continued to submit proposals to question companies’ alignment with The Business Roundtable’s Statement on the Purpose of a Corporation (the “BRT Statement”).⁸⁵ Notably, this year some shareholders took the stakeholder theory a step further by asking companies to transition to a public benefit company (a “PBC”).⁸⁶

nominating committee at companies that have no women on their boards); *2021 Proxy Paper Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice (United States)*, Glass Lewis (Nov. 24, 2021), available [here](#) (establishing that beginning with the 2021 proxy season, Glass Lewis began tracking the quality of disclosure regarding a board’s mix of diverse attributes and skills of directors, and also stating that for the 2022 proxy season, Glass Lewis will generally recommend votes “against” the nominating committee chair of a board with fewer than two female directors).

⁸² See, e.g., H.R. 1277, 117th Cong. (2021) (mandating proxy disclosure of voluntarily self-identified race, ethnicity, and gender for directors); Cal. Corp. Code § 301.3 (2021) (requiring public companies headquartered in California to have up to three women on their boards by December 31, 2021); 805 Ill. Comp. Stat. Ann. 5/8.12 (2021) (requiring publicly listed companies with principal executive offices in Illinois to disclose information in their annual report filed with the Illinois Secretary of State about the racial, ethnic, and gender diversity of their boards of directors).

⁸³ See *SEC Approves New Nasdaq Board Diversity Rules*, Gibson Dunn (August 12, 2022), available [here](#).

⁸⁴ See *2020 U.S. Spencer Stuart Board Index*, Spencer Stuart (2020), available [here](#).

⁸⁵ *Statement on the Purpose of a Corporation*, Business Roundtable (Aug. 19, 2019), available [here](#).

⁸⁶ In 2020, one proposal requesting that a company assess the feasibility of converting to a public benefit corporation (a “PBC”) was submitted by proponent Harrington Investments, Inc. The proponent later withdrew the proposal after the company submitted a no-action request seeking exclusion of the proposal on the basis of

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Proposals focused on the BRT Statement. During the 2021 proxy season, shareholders submitted nine proposals related to the BRT Statement to signatory companies (up from six proposals in 2020). Each proposal generally requested a board-level review of the BRT Statement and guidance on the extent to which the company’s 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. All but one company that received a BRT Statement proposal sought and received a no-action letter concurring that the company had substantially implemented the proposal.⁸⁷ The one BRT Statement proposal that was voted on in 2021 received 2.3% support.

Proposals seeking transition to a PBC. A PBC is a corporate form that allows a company to identify its objectives in terms of broader social or environmental responsibility rather than focusing exclusively on financial performance and profit maximization.⁸⁸ Under the Delaware statute, a PBC is a for-profit corporation “that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner” and a PBC needs to identify in its certificate of incorporation specific public benefits that it will seek to promote.⁸⁹

During the 2021 proxy season, 19 companies received shareholder proposals urging them to transition to a PBC, compared to one in 2020. Among these proposals, seven were submitted to financial institutions, five to technology firms, four to industrial companies, and three to companies in other industries. The Shareholder Commons, a nonprofit organization, participated in the submission of a significant number of PBC proposals as part of its “Beta Stewardship for Shareholders” campaign.⁹⁰ Each proposal generally requested that the board approve an amendment to the company’s certificate of incorporation to become a PBC and then submit the proposed amendment to shareholders for approval.

Of the 19 PBC proposals, one was excluded on procedural grounds,⁹¹ three were withdrawn, and 15 were included in companies’ proxy materials. Three companies tried to exclude the proposal on various grounds, including that it was impermissibly vague and indefinite and related to the company’s ordinary business operations, but were unsuccessful. Fifteen PBC proposals were voted on, averaging 3.4%. Notably, ISS recommended that shareholders vote “against” each of the PBC proposals. All but one PBC proposal garnered less than 5% support.

substantial implementation. This year’s proposals seek *actual conversion* to a PBC, not just an assessment of the costs and benefits of doing so.

⁸⁷ See, e.g., *Amazon.com, Inc.* (avail. Apr. 2, 2021)*; *salesforce.com, inc.* (avail. Apr. 20, 2021)*.

⁸⁸ Jill E. Fisch & Steven Davidoff Solomon, *The “Value” Of A Public Benefit Corporation*, in Research Handbook on Corporate Purpose and Personhood (2021), available [here](#).

⁸⁹ See 8 Del. C. § 362(a).

⁹⁰ *Beta Stewardship for Shareholders*, Shareholder Commons (2021), available [here](#).

⁹¹ See *Amazon.com, Inc.* (avail. Feb. 23, 2021)* (concurring that the proposal is excludable since the proponent failed to substantiate his eligibility to submit the proposal under Rule 14a-8).

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In spite of overall low support for the PBC proposals, PBC proposals are likely to proliferate in the coming proxy season. Certain proponents, including The Shareholder Commons, appear committed to the PBC model of governance⁹² and may also be encouraged by a more pragmatic calculation: based on this year’s no-action request precedent, PBC proposals generally cannot be excluded on substantive grounds, which means they are likely to earn the proponents’ airtime at companies’ annual shareholder meetings.

E. Corporate Governance

During the 2021 proxy season, the most common governance proposals concerned written consent, independent chair, special shareholder meeting rights, proxy access, and supermajority voting requirements. As noted below, the focus has shifted away from eliminating supermajority voting given adoption of these provisions among the S&P 500, and also from traditional independent chair proposals (an increasing number of which touch upon environmental and social issues), suggesting an overall shift in proponents’ focus generally to environmental and social proposals.

1. Proxy Access

Major Proponents	S&P 500 Adoption Rate	YoY⁹³ Proposal Trend	Proposal Statistics			
<ul style="list-style-type: none"> Chevedden & associates 	<p>>80% (as of June 2021)</p>	<p>↑</p>				
Key Takeaways						
<ul style="list-style-type: none"> Although proxy access has become majority practice in the S&P 500, such proposals nearly doubled in 2021 compared to 2020 Proposals seeking to amend existing proxy access rights still have not gained much traction with investors in terms of average support for these proposals 						
			<i>Total # submitted</i>	2021 37	2020 20	2019 38
			Adopt Proxy Access			
			<i># voted on</i>	3	1	6
			<i>Average support</i>	40.5%	19.0%	54.9%
			<i># majority support</i>	1	0	4
			Amend Proxy Access			
			<i># voted on</i>	25	12	25
			<i>Average support</i>	32.9%	30.3%	29.0%
			<i># majority support</i>	0	0	0

⁹² See *Beta Stewardship for Shareholders*, The Shareholder Commons (2021), available [here](#); *Our Policy Proposals*, The Shareholder Commons (2021), available [here](#); *The Shareholder Commons Takes Action to Force Companies to Live up to Their Commitments to a Higher Purpose, With Growing Support from Asset Managers and Proxy Advisors*, PR Newswire (May 24, 2021), available [here](#).

⁹³ “YoY” refers to year-over-year and reflects trends with respect to the number of proposals submitted.

2. Shareholder Right to Call a Special Meeting

Major Proponents	S&P 500⁹⁴ Adoption Rate	YoY Proposal Trend	Proposal Statistics			
<ul style="list-style-type: none"> Chevedden & associates 	>65% <small>(as of June 2021)</small>					
Key Takeaways						
<ul style="list-style-type: none"> After a dramatic increase in 2018 (75 proposals submitted), these proposals have become less frequent in the last three years as more companies have adopted a special meeting right or lowered the special meeting threshold Support for both “adopt” and “lower” proposals have decreased 						
				2021	2020	2019
			<i>Total # submitted</i>	39	44	32
			Adopt Special Meeting Right			
			<i># voted on</i>	6	4	1
			<i>Average support</i>	43.9%	57.3%	42.4%
			<i># majority support</i>	3	2	0
			Lower Special Meeting Threshold			
			<i># voted on</i>	26	35	22
			<i>Average support</i>	32.4%	40.0%	44.3%
			<i># majority support</i>	1	3	4

3. Eliminate Supermajority Voting

Major Proponents	S&P 500 Adoption Rate	YoY Proposal Trend	Proposal Statistics			
<ul style="list-style-type: none"> Chevedden & associates 	>50% <small>(as of June 2021)</small>					
Key Takeaways						
<ul style="list-style-type: none"> After a dramatic increase in 2019, these proposals have become less frequent in the last two years as more companies have eliminated supermajority voting provisions Average support levels increased and remain among the highest of all proposals, with 100% of shareholder proposals voted on receiving majority support 						
				2021	2020	2019
			<i>Total # submitted</i>	27	23	42
			<i># excluded as substantially implemented</i>	7	8	13
			<i># voted on</i>	17	12	22
			<i>Average support</i>	87.2%	68.0%	63.7%
			<i># majority support</i>	17	9	17

⁹⁴ Includes all companies that permit shareholders to call a special meeting, regardless of the requisite ownership threshold specified in the governing documents.

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% (as of June 2021)</p>	<p>↑</p>				
<u>Key Takeaways</u>						
<ul style="list-style-type: none"> Proposals almost doubled compared to 2019, with shareholder focus returning to written consent after success of other campaigns (e.g., eliminating supermajority voting and proxy access) Average support and the number of majority votes have all increased since 2020 While “adopt” proposals comprise the vast majority, proposals requesting to lower the percentage ownership needed to commence the consent process continue to gain traction after emerging in 2020 						
				<u>2021</u>	<u>2020</u>	<u>2019</u>
			<i>Total # submitted</i>	80	66	42
			Adopt Written Consent Right			
			<i># excluded as substantially implemented</i>	1	2	3
			<i># voted on</i>	58	53	36
			<i>Average support</i>	39.8%	37.4%	39.6%
			<i># majority support</i>	7	3	7
			Lower Threshold			
			<i># excluded as substantially implemented</i>	0	0	0
			<i># voted on</i>	12	5	0
			<i>Average support</i>	42.8%	16.7%	N/A
			<i># majority support</i>	1	0	N/A

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"> Steiner, Chevedden & associates NYC Comptroller 	<p>>33% (as of May 2020)⁹⁵</p>	<p>↓</p>				
<u>Key Takeaways</u>						
<ul style="list-style-type: none"> Number of proposals continued to decline in 2021 Average support and the number of majority supported proposals also decreased, while an increasing number of proposals touched upon environmental and social matters, suggesting a shift in proponents’ focus towards environmental and social proposals generally 						
				<u>2021</u>	<u>2020</u>	<u>2019</u>
			<i>Total # submitted</i>	41	49	64
			<i># voted on</i>	34	44	55
			<i>Average support</i>	30.6%	34.9%	29.2%
			<i># majority support</i>	0	2	0

F. Executive Compensation and ESG Metrics

The number of executive compensation shareholder proposals submitted during the 2021 proxy season decreased to 49 (compared to 56 in 2020). Of these, 21 were voted on, averaging 21.5% support (compared to 25 proposals with 24.7% average support in 2020). None of these

⁹⁵ See 2020 U.S. Spencer Stuart Board Index, Spencer Stuart (2020), available [here](#).

proposals received majority support, and only two proposals (relating to clawback policies and incentive plan adjustments, respectively) received over 40% support.

In the context of ongoing intense investor and activist focus on ESG matters, linkages between ESG goals and executive compensation has become an increasingly discussed topic. For example, in January 2021 ISS updated its ESG Governance QualityScore rating methodology to include criteria related to the integration of ESG metrics into executive compensation programs.⁹⁶ Similarly, 2021 witnessed a continued trend of submission of executive compensation shareholder proposals requesting reports on linking compensation to ESG-related metrics, although the overall number of proposals related to ESG compensation metrics dropped slightly to 15 in 2021 (down from 18 in 2020). While support for ESG metric proposals decreased to an average of 11.6% in 2021, from 19.1% in 2020, 2021 witnessed an increase in issuers voluntarily including such metrics in their compensation programs, with 29% of respondents in a Pay Governance study reporting the incorporation of such metrics, up from 22% in 2020.⁹⁷ Company agreements to include such metrics in their compensation programs may have also resulted in proposals being withdrawn. For example, the New York State Common Retirement Fund/NY State Comptroller proposal was withdrawn following such an agreement with McDonald's.⁹⁸ As in 2020, all such proposals requested reports on either the feasibility of integrating certain ESG metrics into executive compensation programs or reports on the extent to which the existing programs already integrate such metrics. These proposals included requests related to broadly defined "ESG," "social" or "sustainability" goals, as well as requests tied to specific ESG topics, such as increased diversity or the Paris Agreement's emissions targets. In particular, one proposal requested a reporting on linking executive compensation to risks related to drug pricing (down from eight in 2020).

The number of proposals relating to the use of non-U.S. Generally Accepted Accounting Principles ("GAAP") performance metrics in setting executive compensation decreased to two proposals in 2021, from eight in 2020, although the one proposal voted on, which requested enhanced proxy statement disclosure related to non-GAAP compensation adjustments, received support of 43.8%, up from an average support of 28.5% for the two proposals voted on in 2020 and the highest support of any executive compensation proposal in 2021.

V. PROPONENTS' USE OF EXEMPT SOLICITATION FILINGS

During the 2021 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.

⁹⁶ See ISS ESG Governance QualityScore Methodology Guide, ISS (June 2021), available [here](#).

⁹⁷ See John Ellerman, Mike Kesner & Lane Ringlee, *Inclusion of ESG Metrics in Incentive Plans: Evolution or Revolution?*, Pay Governance (Mar. 16, 2021), available [here](#).

⁹⁸ See NY State Comptroller DiNapoli Statement on McDonald's Agreement to Tie Executive Compensation to Diversity, Workforce Management (February 18, 2021), available [here](#).

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Background on PX14A6G filings. Under Rule 14a-6(g) under the Exchange Act, shareholders owning more than \$5 million of a company’s securities generally must file a Notice of Exempt Solicitation (an “Exempt Notice”) on EDGAR⁹⁹ 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 it 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 their use of these filings. In this regard, more than 80% of Exempt Notices filed in 2021 were identified as voluntary filings by shareholders who do not exceed the \$5 million ownership threshold. As a result, shareholders are using these filings outside of Rule 14a-6(g)’s intended scope, resulting in some compliance issues¹⁰⁰ and potential confusion for other shareholders when evaluating the items to be voted on.

2021 filings. As of July 1, 2021, there were a record-high 221 Exempt Notices filed since the beginning of the calendar year, up from 182 and 170 as of the same dates in 2020 and 2019, respectively.¹⁰¹ Frequent filers included CtW Investment Group with 29 filings this year (up from 18 in 2020), John Chevedden with 24 filings (up from nine in 2020), Majority Action, LLC, with 21 filings (up from eight in 2020), As You Sow with 20 filings (up from 14 in 2020), California Public Employees Retirement System (“CalPERS”) with 14 filings (down from 29 in 2020), and The Shareholder Commons with 11 (compared to none in 2020). All of the Exempt Notices filed by Mr. Chevedden, Majority Action, As You Sow, and The Shareholder Commons were voluntary. Further, over half of the CalPERS filings appear to have been voluntary.¹⁰² Additionally, nearly all of the Exempt Notices filed by CtW were voluntary and many consisted only of screenshots of tweets sent by CtW.

Two significant U.S. events in 2020—the COVID-19 pandemic and the focus on racial justice— influenced many Exempt Notices filed in 2021, including those submitted by John Chevedden, CtW, Majority Action, As You Sow, and CalPERS.

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,¹⁰³ several ongoing issues persist that the Staff has not addressed. First, companies and

⁹⁹ This Exempt Notice appears on the company’s EDGAR page as a PX14A6G filing and sets forth all written materials used in the solicitation.

¹⁰⁰ We understand from the Staff that they review Exempt Notices, are aware of the compliance issues, and regularly contact noncompliant filers.

¹⁰¹ The foregoing numbers reflect both required and voluntary filings, and are not limited to filings by shareholder proponents.

¹⁰² CalPERS represented owning more than \$5 million in company securities in just five of the 12 filings.

¹⁰³ 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

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shareholders cannot 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; the Staff, as a matter of policy, continues to refuse to remove these filings 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 exceed the \$5 million ownership threshold to make these filings, we expect their use among proponents to continue to grow in coming years given their low cost and broad dissemination and resulting publicity. We continue to recommend that companies both actively monitor their EDGAR feed for these filings and inform the Staff to the extent they believe an exempt solicitation filing contains materially false or misleading information or may not have been filed by a shareholder.

VI. PRACTICAL IMPACT OF THE AMENDED SHAREHOLDER PROPOSAL RULES AND REGULATORY UPDATE

On September 30, 2020, the SEC adopted amendments to Rule 14a-8 that apply to any shareholder proposal submitted for shareholder meetings to be held on or after January 1, 2022. The amendments: (i) increased the stock ownership threshold for shareholders who have not held the company’s stock for at least three years, subject to a transition period for all annual or special meetings held prior to January 1, 2023; (ii) imposed additional procedural requirements for proponents, including limiting the use of representatives to submit a proposal (“proposal by proxy”) and requiring notice of availability to meet with the company; and (iii) increased the levels of shareholder support a proposal must receive in order to be eligible for resubmission at future meetings.¹⁰⁴

The Contentious Amendments Stand Despite Efforts to Overturn. On March 25, 2021, Senate Banking Chair Sherrod Brown (D-OH) introduced legislation¹⁰⁵ under the Congressional Review Act (“CRA”) to repeal those recently adopted amendments. Companion legislation also was introduced in the House. The resolution was not approved before the 60-legislative-day window closed under the CRA, which would have allowed Congress to effectively rescind the rule with a simple majority vote and the President’s signature. As with any other rule, the current Congress may still vote to repeal the amendment to Rule 14a-8, but any vote going forward will now need

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.

¹⁰⁴ For a detailed discussion of the substance of the amendments, see *SEC Adopts Amendments to Modernize the SEC’s Shareholder Proposal Rules*, Gibson Dunn (Oct. 1, 2020) available [here](#).

¹⁰⁵ See S.J.Res.16, 117th Cong. (2021), available [here](#).

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60 votes and thus will be subject to a filibuster. Given the current political makeup of Congress, it appears unlikely the resolution will achieve that level of support.

The amendments to Rule 14a-8 have been highly contentious, including among SEC Commissioners. In a March 2021 speech, then-Acting Chair Allison Herren Lee stated, “I have asked the staff to develop proposals for revising Commission or staff guidance on the no-action process, and potentially revising Rule 14a-8 itself. . . . This could involve reversing last year’s mistaken decision to bar proponents from working together and restricting their ability to act through experienced agents.”¹⁰⁶ Additionally, on April 22, 2021, a group of nearly 200 organizations comprising pension funds, asset managers, foundations, labor unions, religious organizations, and consumer groups announced that they sent a letter to all members of Congress urging support for invoking the CRA as a means to overturn the amendments.¹⁰⁷ This letter contends that “the rulemaking process clearly violated the SEC’s own guidelines for economic analysis, with the express purpose of limiting shareholders’ ability to use the shareholder proposal process to hold corporate boards and executives accountable on corporate governance and risk management.” In contrast, supporters of the amendments, such as the National Association of Manufacturers and the U.S. Chamber of Commerce, have spoken out against the effort to overturn the amendments, with the U.S. Chamber of Commerce noting that the amendments were meant to modernize rules that were “antiquated, inefficient and drowned out important issues for consideration.”¹⁰⁸

On June 15, 2021, As You Sow, a California shareholder activist group, James McRitchie, an individual investor, and the Interfaith Center on Corporate Responsibility, which represents religious groups and other institutional investors, collectively sued the SEC over the amendments.¹⁰⁹ In response to the lawsuit, the SEC may take an approach similar to the one it has taken with respect to the lawsuit by ISS over the proxy advisory rules,¹¹⁰ and request that the court suspends the lawsuit as it reconsiders the amendments. If so, during this time, the SEC would not enforce the recent Rule 14a-8 amendments. However, thus far, the SEC has not asked to stay the case but instead stipulated to the schedule, and is expected to file its arguments in response by November 19.

Regulatory Update. On June 11, 2021, the SEC released its Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions (the “Reg Flex Agenda”), offering the first official insight

¹⁰⁶ See Acting Chair Allison Herren Lee, *A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC*, SEC (Mar. 15, 2021), available [here](#).

¹⁰⁷ See *Investors and Consumer Groups Urge Members of Congress to Overturn Trump-Era SEC Rule Changes*, ICCR (Apr. 22, 2021), available [here](#).

¹⁰⁸ See Katanga Johnson, *U.S. Senate Democrats Aim to Undo Trump-era Shareholder Voting Rights Rule*, Reuters (Mar. 26, 2021), available [here](#).

¹⁰⁹ *Interfaith Ctr. on Corp. Responsibility v. SEC*, No. 21-01620 (D.D.C. 2021).

¹¹⁰ See Andrew Ramonas, *SEC, ISS Move to Freeze Proxy Adviser’s Suit on Trump-era Rules*, Bloomberg Law (June 2, 2021), available [here](#).

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into Chair Gensler’s near-term priorities.¹¹¹ Notable proposed rulemaking areas for October 2021 include climate change disclosure, human capital management disclosure, and corporate board diversity, while “[e]nhancing shareholder democracy” and amendments to Rule 14a-8 are on the agenda for April 2022.¹¹² Based on the foregoing, coupled with statements made by Chair Gensler¹¹³ and former Acting Chair Lee¹¹⁴ on these topics, we anticipate possible rollback of the recently amended Rule 14a-8 share ownership and resubmission thresholds (along with other potential changes), and enhanced disclosure requirements related to the risks posed by climate change and human capital to encourage the reporting of specific metrics. Depending on the outcome of the rulemaking process, the SEC’s new agenda is likely to impact the tenor and content of both human capital and climate change proposals in future proxy seasons. Additionally, given (i) recent calls by some members of the proponent community criticizing the Staff’s administration of Rule 14a-8, particularly on social and environmental issues, and urging the new administration to reverse certain Staff guidance (including as expressed in recent Staff Legal Bulletins),¹¹⁵ and (ii) the Staff’s own willingness to reverse itself on well-established precedent during the 2021 proxy season,¹¹⁶ the outlook for companies seeking exclusion of shareholder proposals during the upcoming proxy season, particularly those related to sensitive social and environmental topics, remains uncertain.

Practice Pointers for Amended Rule 14a-8. Notwithstanding the uncertainty surrounding the amendments, public companies should plan to update their shareholder proposal intake and response strategies in advance of the 2022 proxy season to address the revised procedural requirements. Specifically, for proposals that are submitted for a shareholder meeting to be held on or after January 1, 2022:

- *Revise Procedural Review Checklists.* Checklists used to confirm proponents’ satisfaction of procedural eligibility requirements should be updated to address the amended rule, including: the updated ownership requirements; the documentation and information requirements for proposal by proxy; the need for statements of availability for engagement; the one proposal per shareholder limitations; and the increased resubmission thresholds.
- *Update Deficiency Notices.* Deficiency notices that are sent to shareholders to alert them of their submission’s procedural deficiencies should be revised to describe the updated Rule

¹¹¹ *Agency Rule List – Spring 2021 Securities and Exchange Commission*, Office of Information and Regulatory Affairs (2021), available [here](#); *Back to the Future: SEC Chair Announces Spring 2021 Reg Flex Agenda*, Gibson Dunn (June 21, 2021), available [here](#).

¹¹² *SEC Announces Annual Regulatory Agenda*, SEC (June 11, 2021), available [here](#).

¹¹³ See Kellie Mejdrieh, *Gensler Confirmed as Cop Wall Street Cop, Bringing New Era of Tough Scrutiny*, POLITICO (Apr. 14, 2021), available [here](#).

¹¹⁴ See Acting Chair Allison Herren Lee, *A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC* (Mar. 15, 2021), available [here](#).

¹¹⁵ Letter from Mindy Lubber, Lisa Woll, Josh Zinner & Sanford Lewis to Allison Lee, Acting Chair of the SEC (Jan. 26, 2021), available [here](#).

¹¹⁶ See, e.g., *ConocoPhillips Co.* (avail. Mar. 19, 2021).

14a-8 requirements. Attachments to those deficiency notices that reproduce Rule 14a-8 should also be replaced with the current version of the rule.

- *Meeting With Proponents.* Amended Rule 14a-8 requires that proponents include a statement of availability to meet with the company within 10 to 30 calendar days of a proposal's submission. Companies are not required to pursue such meetings, and the rule did not include a clear enforcement mechanism for shareholders who misrepresent their availability or later refuse to meet with the company. The availability range will also overlap with the period for addressing proposal procedural deficiencies and preparing no-action requests. In some cases, companies may already be involved in discussions with the proponents at that time, or alternatively, may need additional time to evaluate relevant company policies and developments before engaging. Thus, companies should consider the benefits and drawbacks of requesting missing engagement windows and/or engaging with the proponent during the Rule 14a-8 window.

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

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