

CONSIDERATIONS FOR PREPARING YOUR 2024 PROXY STATEMENT

Speakers

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Officer Exculpation

Slow and Steady Wins the Race

In August 2022, Section 102(b)(7) of the DGCL was amended to allow limiting monetary liability for certain officers for breaching the duty of care

- Similar (but not identical) in scope to existing director exculpation protections
- Must be implemented via an **amendment to the company's certificate of incorporation** (requires shareholder vote)

Public company adoption was **hampered by uncertainty** as to proxy advisory firm / institutional investor responses

- **ISS** will **support** exculpation amendments on a case-by-case basis
- **Glass Lewis** will generally **recommend against** proposals absent a “compelling” rationale
- Most proposals received **strong investor support**

During the 2023 proxy season, over 200 **Russell 3000** companies sought shareholder approval for exculpation amendments

- If a proposal failed, it was typically due to either:
 - A supermajority standard for charter amendments, and/or
 - Insufficient shareholder participation at the meeting

During the 2023 proxy season, only 26 **S&P 500** companies sought shareholder approval for exculpation amendments

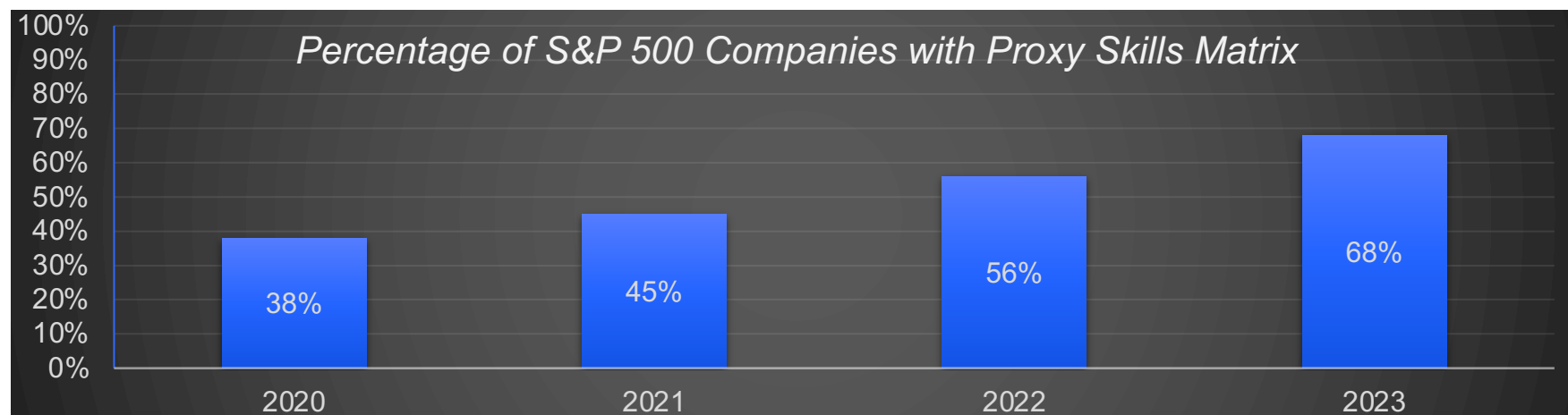
- Approximately 96% (all but one*) of **S&P 500** proposals were approved
- All received at least 60+% support

**Due to failure to meet supermajority vote requirement*

Director Bios & Skills Matrix*

Review and Refresh

- **Scrutiny of board members** continues to rise
 - Median support for director nominees at **R3K** companies continues to decline year over year, dropping **500 bps** over the last 2 years to **97.3% in 2023**
 - Blue-chip company directors continue to face “**vote no**” campaigns
 - Universal proxy rules facilitate **targeting individual directors** with proxy contests
- Companies should **continue to enhance proxy disclosures** focused on **clearly articulating** what each director brings to the board
 - Consider enhancing disclosure on **board refreshment** policies and efforts
 - **Director skills matrices** have quickly become the norm for large cap proxy statements



Don't Forget About Potential Interlock Issues

- Recent **DOJ enforcement actions** show continued focus on “**interlocking directorates**”

***Source:** ISS Governance, *Board Elections and Executive Compensation in the 2023 U.S. Proxy Season* (director support data); Spencer Stuart, *2023 U.S. Spencer Stuart Board Index* (skills matrix data)

Board Diversity*

Diversity Disclosures Increase Despite DEI Uncertainty

- Increased **scrutiny on workplace affirmative action** programs and **heightened litigation risk** following Supreme Court's college and university admissions decision
 - Many companies are reviewing their DEI-related programs and disclosures
 - Expect tension with **SEC human capital disclosure rules** now expected to be proposed in 2024, **Nasdaq** "comply or explain" rule to have **2 diverse directors** by August 2025 and **board diversity disclosure rules** SEC expects to propose in October 2024
- **Proxy advisory firms** continue to hone their approaches on diversity issues:
 - **Glass Lewis** expanded its definition of "underrepresented community director" to include someone who self-identifies as "a member of the LGBTQIA+ community" rather than someone who self-identifies as "gay, lesbian, bisexual, or transgender"
 - **ISS E&S QualityScore** updates in 2023 added **gender disclosure** and **gender pay gap** factors to its tracking of workforce diversity and equality factors
- Companies continue to expand **diversity-related disclosures**
 - **56%** of **S&P 500** companies disclose a **Rooney Rule-type commitment** to include diverse candidates in searches, versus **50%** in 2022
 - Disclosure of **board composition** varies by category



Proxy Advisor / Institutional Investor Concerns

Proxy Advisor Policy Updates

- ISS announced several policy updates, including:
 - **ISS E&S QualityScore** updates in 2023 enhanced its approaches on topics including **labor relations, gender equity, human rights and natural resources / climate-related issues**
 - **ISS Governance QualityScore** updates in 2023 enhanced its approaches on topics including **board structure, compensation and shareholder rights**
 - Limited benchmark voting policy updates for international markets (no U.S. updates)
- Glass Lewis announced several policy updates, including:
 - New policies on **material weaknesses** and **executive ownership guidelines**
 - Revised policies on **clawback policies, cyber risk oversight, board oversight of E&S issues, director accountability for climate-related issues, and net operating loss poison pills**
- Companies should review last year's ISS and Glass Lewis reports to identify areas for improvement, either during the engagement process or when enhancing proxy statement disclosures

Don't Forget About Overboarding

- Proxy advisors and institutional advisors continue to refine **board overboarding limits**

Potential Issues to Avoid to Ease Annual Meeting Planning

DGCL 219

Stockholder Lists

- **ELIMINATED** previous requirement that the list of stockholders entitled to vote at a meeting be **made available at a virtual meeting**
- **CLARIFIED** timing for providing the stockholder list, which must be made available for a 10-day period ending **on the day before** the meeting date

DGCL 242

Voting Standards*

- **REDUCED** default threshold to approve COI amendments for reverse stock splits (and a corresponding decrease in authorized shares) to the **affirmative vote of a majority of votes cast**
- **ELIMINATED** need for a shareholder meeting or vote to implement a forward stock split (and a corresponding increase in authorized shares) for companies with one class of stock

**These voting standards will apply as the default procedures going forward, absent conflicting provisions in a company's charter.*

Litigation

Recent Developments

- Increasing books and records demands and litigation around voting standard disclosures
- Critical to double-check governing docs and state law to confirm (and accurately disclose) applicable voting standard for each proposal
- Includes broker-non-vote disclosures; consider revisiting these given interplay of SEC disclosure requirements and NYSE determination dynamics

SEC Comment Letters

SEC Expected to Continue to Drill Down on Leadership and Risk Oversight Disclosures

- SEC expected to review 2024 proxy statements more closely for topics covered in late 2022 comment letter sweeps
 - **Board leadership structure** comment letters focused on:
 - Whether company may combine CEO and board chair roles and whether shareholders would receive advance notice / input opportunities
 - How lead independent director's experience fits into risk oversight
 - Lead independent director's role, including specific responsibilities
 - **Risk oversight** comment letters focused on:
 - Risk evaluation timeframes
 - Application of oversight standards based on the risk's immediacy
 - Whether board consults with outside advisors to anticipate future trends
 - How often board reassesses risk environment
 - Interaction with management around emerging risks
 - Whether company has a CCO and CCO's reporting line
 - How board's risk oversight processes align with disclosure controls
 - How the lead independent director's experience fits into risk oversight

~5%

of, or 26, S&P 500 companies received board leadership comments

~9%

of, or 46, S&P 500 companies received risk oversight comments

Comp- Related Rule Changes

Pay vs. Performance Trends and Considerations

- In November 2023, SEC **issued 8** and **revised 2 C&DIs** further clarifying disclosure requirements, following prior C&DIs issued in February and September 2023
 - PVP disclosures will be required to look back **4 years** in 2024 (FYs 2020, 2021, 2022 and 2023)—will eventually cover information for a 5-year period
- Disclosure **may be taken into account** by proxy advisory firms
 - **ISS**: will not consider the disclosure in its quantitative pay-for-performance assessment, but may do so in its qualitative evaluation
 - **Glass Lewis**: disclosure “may be used” in the supplemental quantitative assessments that support the firm’s pay-for-performance grade of reviewed companies
- While disclosure practices varied, **2023 trends** included using:
 - **Graphs** to compare compensation actually paid (“CAP”) to other metrics
 - A **non-GAAP measure** as the company-selected measure
 - **3 to 5 metrics** for the required tabular list of most important performance measures
 - **Consultants** to assist with calculating CAP

Clawback Policy Requirements Now Live

- NYSE and Nasdaq companies by now should have adopted **clawback policies** in accordance with SEC and listing exchange rules
- **Glass Lewis** expects policies to not only **comply with the exchange rules**, but to also meet enhanced standards by further **accounting for problematic behavior**
- Remember to update **CD&A** disclosure to cover **clawback policy** (if not in 10-K)

Proxy Disclosure Effectiveness

Making the Most of Your Proxy

- Annual meetings are becoming **increasingly challenging** (broker non-votes, brokers refusing to exercise discretionary vote, increasing influence of proxy advisors, proxy voting choice programs at large asset managers)
- The proxy statement a key **shareholder engagement tool** (not just a compliance doc)
- Important to **effectively articulate** your story, otherwise no one will listen



AUDIENCE

- Does the proxy statement address important information for **each of the key parties** that will be tuned in?



CLARITY

- Is the proxy dominated by **large blocks** of dense text and/or “legalese”?
- Could it be updated with more **headlines, plain language and graphics**?



ORGANIZATION

- Does the proxy statement structure **prioritize the topics of most interest to readers**?
- Are routine or **repeated yearly disclosures** near the end of relevant sections?



DESIGN

- Is the design of each section **easy to follow**?
- Is the proxy **easy to read**, and are graphics clear?
- Can readers **easily find** information of interest?

Technical Rule Change Reminders

Additional Reminders for Your 2024 Proxy

Confirm proxy statement's cover page incorporates most recent updates to Schedule 14a-101

Confirm Section 16 disclosures reflect recent rulemakings, and reconfirm related controls in light of recent SEC enforcement sweeps

Remember "glossy" annual report (Form ARS) filing obligations

Update deadlines for universal proxy nominee submissions under Rule 14a-19 / bylaw amendments

Shareholder Proposals*

Looking Back at 2023

- In 2023, the number of proposals increased by 2% from 2022 to 889—exceeding last year’s record for the highest number of shareholder proposal submissions since 2016
- Executive compensation proposals were up 108% from 2022, and environmental and social proposals continued to increase, up 11% and 3%, respectively, since 2022
- While only 175 no-action requests were submitted in 2023, overall success rates rebounded to 58% from 2022’s historic low of 38%
 - Success rates improved for duplicate proposals, procedural, ordinary business and substantial implementation, but declined for resubmissions and violations of law
- Over 54% of proposals submitted were voted on, following an increase to 50% in 2022
 - Average support plummeted to 23.3% in 2023, following a decrease to 30.4% in 2022—and only 25 proposals passed, down from 55 in 2022

Looking Ahead to 2024

- Be thorough and thoughtful in procedural reviews
- First time or relatively new proponents continue to emerge
- In keeping with last year, there is continued growth in narrowly focused single-issue social proposals on topics such as animal welfare and plastics
- Expect a continued trend in E&S-skeptical proposals (e.g., challenging assumptions about the benefits of renewable energy transitions)
- Proponents likely to continue using exempt solicitations in support of proposals in proxies

**Source: Derived from Gibson Dunn's internal data and Institutional Shareholder Services (“ISS”) publications and the ISS shareholder proposals and voting analytics databases, with only limited additional research and supplementation from additional sources*

Management Proposal Reminders

In Addition to the Usual Suspects...

- Director Elections
- Say on Pay
- Auditor Ratification (important for quorum)

...Do You Need a Say on Frequency Vote?

- Every 6 years

...How Are Your Share Counts?

- Now is the right time to **check both your equity plan and authorized share reserves** to assess if you have enough shares
- Often need **cross-functional input**
- **Certificate amendment to increase authorized shares** requires **preliminary proxy** filing
- Be sure to confirm **voting thresholds**

...Don't Forget a Preliminary Proxy (if applicable)

- **Charter and bylaw amendments** put to a shareholder vote require a preliminary proxy filing at least **10 days prior** to definitive proxy filing, but consider if there is enough time to push filing of definitive proxy if SEC provides comments

Changes for 2025 to Start Thinking About Now

Timing of Equity Awards vs. Release of MNPI

- New Item 402(x) of Regulation S-K will require award timing disclosure, in either the fiscal year 2024 Form 10-K or the 2025 proxy statement
 - **2024 grants will be the first to be reported on under the new requirement**
- **Narrative** disclosure to cover:
 - **Policies and practices** on the timing of stock options in relation to MNPI disclosure
 - Includes how the board **determines when to grant** such awards
 - Whether / how the board **takes MNPI into account** for award timing
 - Whether the company **has timed the disclosure** to affect the award's value
- **Tabular** disclosure, as shown below, to cover awards made near in time to filing / furnishing documents containing **MNPI**
 - Only required for **NEO** awards
 - Required for awards **4 business days before**, or **1 business day after** such filing

Name	Grant date	Number of securities underlying the award	Exercise price of the award (\$/Sh)	Grant date fair value of the award	Percentage change in the closing market price of the securities underlying the award between the trading day ending immediately prior to the disclosure of material nonpublic information and the trading day beginning immediately following the disclosure of material nonpublic information
[NEO]					



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Before rejoining Gibson Dunn, Mr. Briggs served for five years as Executive Counsel - Corporate, Securities & Finance, at General Electric Company. His in-house experience—which included responsibility for SEC reporting and compliance, board governance, proxy and annual meeting, investor outreach and executive compensation matters, and included driving GE's revamp of its full suite of investor communications (proxy statement, 10-K, earnings releases, and integrated report)—provides a unique insight and practical perspective on the issues that his clients face every day.

In 2023, Mr. Briggs was elected a Fellow of the American College of Governance Counsel, an organization of leading corporate governance lawyers from the US and Canada, and was inducted into the *Governance Intelligence* Hall of Fame. In 2016, *Corporate Secretary Magazine* named Mr. Briggs Governance Professional of the Year. Mr. Briggs' work has also been recognized by Financial Executives International, ReportWatch, Sustainability Investment Leadership Council, and TheCorporateCounsel.net.

Mr. Briggs is a frequent speaker on governance, proxy and securities disclosure panels and serves on the Certified Corporate Governance Professional Oversight Commission for the Society for Corporate Governance.

Mr. Briggs received his Juris Doctorate from the University of Chicago Law School in 2007, where he was a Kosmerl Scholar. He received his Bachelor of Arts with high honors from the University of Notre Dame in 2004.

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Prior to joining Gibson, Dunn & Crutcher, Ms. Lapitskaya was an associate in the New York office of Davis Polk & Wardwell, LLP, where she advised clients on executive compensation, equity-based incentives, deferred compensation, severance plans and other compensatory arrangements, with particular emphasis on disclosure issues and issues arising in initial public offerings and mergers and acquisitions transactions.

Ms. Lapitskaya is a frequent author and speaker on securities law and ESG issues and is a member of the Society for Corporate Governance. She also contributed to a chapter in the "Executive Compensation Disclosure Handbook: A Practical Guide to the SEC's Executive Compensation Disclosure Rules" as well as in the treatise "A Practical Guide to SEC Proxy and Compensation Rules." Most recently, *Expert Guides* has named Ms. Lapitskaya to its Rising Stars 2022 Guide, which recognizes the brightest and most talented practitioners under 40 in the area of business law and related practices, and *Euromoney* named her among its 2022 Rising Stars in the Americas region.

Ms. Lapitskaya earned her Juris Doctor in 2010 from the New York University School of Law, where she served as Developments Editor of the *Journal of International Law and Politics*. Prior to attending law school, Ms. Lapitskaya graduated *summa cum laude* from Fordham University with Bachelor of Arts degrees in Economics and Political Science and was elected to Phi Beta Kappa.

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Based in Gibson Dunn's Orange County office, Lauren Assaf-Holmes advises public companies across industries on a variety of ESG, compliance and related corporate law matters as a member of the firm's Securities Regulation and Corporate Governance Practice Group.

In connection with annual stockholder meetings, she assists clients through planning, drafting and increasing the effectiveness of their proxy statement disclosures, and she recently contributed to the "Proxy Disclosure Effectiveness" chapter in *A Practical Guide to SEC and Proxy Compensation Rules*. Her practice also supports clients in connection with the Rule 14a-8 shareholder proposal process, director and officer questionnaires, transitions to virtual meetings, and compliance with stock exchange and proxy advisory firm policies.

Lauren advises clients throughout the year on financial reporting and compliance matters in connection with Securities and Exchange Act reporting (including Section 16 and Schedule 13G/D reports), as well as beginning or expanding ESG-related reporting. She has contributed to the publication *Legal Risks and ESG Disclosures: What Corporate Secretaries Should Know* and presents on these and related topics.

She graduated from the University of California, Berkeley School of Law in 2016 where she served as the Supervising Editor (Internal) for the *Berkeley Journal of International Law* and as a Research Assistant to Professor Steven Davidoff Solomon. Lauren also served as a judicial extern to the Honorable Jacqueline Scott Corley of the U.S. District Court for the Northern District of California and the Honorable William W. Bedsworth of the California Court of Appeals.

She earned her Bachelor of Arts degree, *magna cum laude*, in English Literature from Knox College in 2010 where she graduated with honors and was elected to Phi Beta Kappa.

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