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Lessons from the 2023 Proxy Season

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Roadmap

- In this webinar, we will focus on the following topics:

  1. Backdrop for 2023 U.S. Annual Meeting Proxy Season
     - *Evolution of ESG Landscape*
     - *Regulatory and Congressional Developments*
     - *Investor and Proxy Advisor Developments*
     - *SEC No-Action Trends*
  2. Trends in Rule 14a-8 Shareholder Proposals
     - *Proponents and Recipients of Proposals*
     - *Trends by Topic: Environmental, Social/Political, Governance and Compensation*
  3. Compensation-Related Matters
     - *Say-on-Pay*
     - *Say-on-Frequency*
     - *Equity Compensation Plan Voting*
  4. Considerations for 2024 Proxy Season
     - *Advance Notice Bylaws*
     - *Officer Exculpation*
     - *Meeting Procedure*

1 Backdrop for 2023 U.S. Annual Meeting Proxy Season

Evolution of ESG Landscape

Robust Investor Engagement

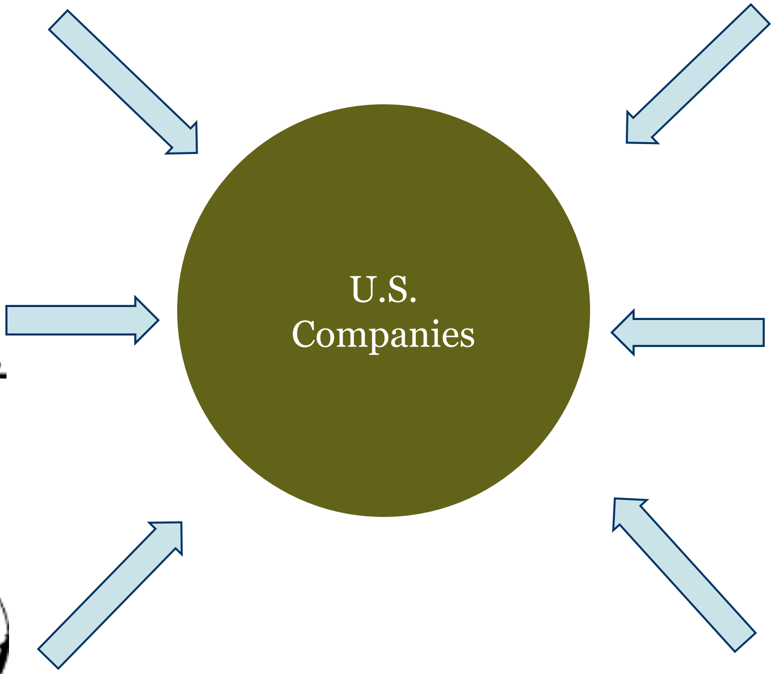
Leading up to the 2023 proxy season, companies saw robust engagement from investors, including both “pro-ESG” and “anti-ESG” shareholders; this engagement took the form of public and private letter-writing campaigns, criticism via traditional and social media, shareholder proposals and lawsuits

Federal Regulatory Focus

Under the Biden Administration, the SEC and other U.S. federal regulators have remained focused on ESG topics despite significant headwinds from the legislative and judicial branches

Emerging International Requirements

Mandatory EU requirements (e.g., CSRD) and widely endorsed voluntary frameworks (e.g., ISSB’s standards) were finalized, impacting the expectations of large and international institutional investors



State-Level Polarization

Political actors in both red and blue states scrutinized companies’ ESG policies, intensifying lawmaking and other efforts that affect company initiatives, as well as engaging in letter-writing campaigns and investigations

Stakeholder Protests

Employees, customers and other public stakeholders, who often have diverging interests and priorities, voiced strong reactions to corporate ESG activities; social media has amplified the impact of protests, strikes and similar responses from these stakeholders

Judicial Headwinds

Recent (e.g., *Dobbs*) or then-pending (e.g., *Harvard*) Supreme Court decisions influenced the engagement focus of shareholders, political actors and other stakeholders; high-profile lawsuits delved into, among other ESG-related topics, D&O decision-making processes on ESG initiatives and the legality of various ESG programs and ESG disclosures

Regulatory Developments

SEC Rulemaking

- Last year, the SEC adopted universal proxy rules mandating the use of one proxy card that lists both the issuer's and the dissident's nominees in non-exempt, contested director elections held on or after September 1, 2022
- This was also the first proxy season after the new pay versus performance rules became effective, and companies were required to provide additional disclosures in their proxy statements that highlight the alignment (or misalignment) between company performance and executive compensation
- In March 2022, the SEC proposed comprehensive climate-related disclosure requirements:
    - Final rules have been repeatedly delayed (latest Regulation Flex agenda sets forth an October 2023 timeline, but Chair Gensler noted that this deadline is not "hard and fast")
    - The proposed requirements are detailed and, in some cases, without reference to a traditional "materiality" (e.g., Scope 1 and Scope 2 GHG emissions, as well as Scope 3 emissions, if material or if the registrant has set a target covering Scope 3, disclosure in financial statements of certain climate-related financial statement metrics (triggered if the impacted amount is 1% or more of a related line item)
- The SEC has agendized the proposal of human capital management and board diversity disclosure rules for Fall 2023

Other Regulators

- Federal banking regulators have proposed principles for climate-related financial risk management for large financial institutions, and are expected to issue final interagency guidance on climate-related risk management this year
- The DoD, General Services Administration and NASA have proposed to require certain federal contractors to disclose GHG emissions and climate-related financial risk, as well as set science-based targets to reduce GHG emissions

Congressional Developments

- Following the mid-term elections, the chairman of the House Financial Services Committee issued statements related to the following areas:
  - Materiality: noting that environmental and social risks are part of an agenda, and are not financial risks
  - Proxy Voting: stating that advisory firms are biased toward progressive agendas and the influence of such firms should be limited
  - Antitrust: suggesting that the Big 3 (BlackRock, Vanguard and State Street) collaborating on climate policies is limiting consumer options
  - Fossil Fuels: suggesting that ESG investors' desire to cut off the energy industry's access to capital is a national security risk

- Members of the U.S. Congress have also sought to block a number of the Biden Administration's regulatory efforts:
  - For example, both chambers of Congress passed a resolution under the Congressional Review Act that would have overturned the Department of Labor's retirement plan fiduciary rule, but President Biden vetoed the resolution

- These topics informed the House Financial Services Committee's "ESG Month" in July 2023, during which the Committee heard testimony on 18 bills intended to limit the SEC's rulemaking efforts or otherwise restrict consideration of ESG by pension funds and other institutions

Investor and Proxy Advisor Developments

- In August 2022, asset managers such as BlackRock received a letter from 19 state attorneys general on their ESG-related commitments and engagement on ESG topics with portfolio companies
- In January 2023, ISS and Glass Lewis received letters from 21 state attorneys general alleging violations of legal duty in connection with their ESG-related policies
- This proxy season, institutional investors have continued to expand their "pass through" voting programs, and are deemphasizing ESG as a standalone priority, instead emphasizing risk stewardship and the link between "values" and value-creation
- ISS and Glass Lewis have each released a "governance-only" thematic voting policy, which generally follows management's recommendations on environmental and social issues

Track changed State Street 2023 voting policy updates:

Issuer Engagement:

We recognize that debt holders have limited leverage with companies on a day-to- day basis. ~~However, we believe that given the size of our holdings in corporate debt, we can meaningfully influence ESG practices of companies through issuer engagement.~~ Our guidelines for engagement with fixed income issuers broadly follow the engagement guidelines for our equity holdings as described above.

Track changed BlackRock 2023 voting policy updates:

These Principles cover seven key themes:

- Boards and directors
- Auditors and audit-related issues
- Capital structure, mergers, asset sales, and other special transactions
- Compensation and benefits
- ~~Environmental and social issues~~Material sustainability-related risks and opportunities

No-Action Trends

- Decreased likelihood of no-action success in 2022:
  - After the release of Staff Legal Bulletin No. 14L ("SLB 14L") in advance of the 2022 season (which raised the standard for excluding proposals on the basis of "ordinary business"), the SEC staff granted relief for 38% of no-action requests that they considered in the 2022 proxy season, compared to 70% for the same period one year prior
- The impact of SLB 14L, together with the SEC's 2022 proposal to narrow the "substantial implementation", "duplication" and "resubmission" exclusionary bases, deterred many companies from submitting no-action requests on substantive exclusionary bases:
  - For H1 2023 proposals, companies submitted 40% fewer no-action requests on substantive bases than they did for H1 2022 proposals
  - Requests based on "ordinary business", "substantial implementation" and "duplication", which were all frequently cited exclusionary bases during the 2022 proxy season, dropped by 32%, 56% and 70%, respectively
  - Companies were even more likely to submit no-action requests based on a procedural defect
- The SEC granted more no-action requests for H1 2023 proposals:
  - The SEC granted relief on 54% of the no-action requests they considered, up from 38% last year but significantly lower than the success rate in the 2020 and 2021 proxy seasons
  - The SEC was less likely to grant relief in connection with environmental and social/political ("ESP") proposals than governance and compensation proposals, adding to the pressure on companies to engage directly with shareholders on ESP proposals

2 Trends in Rule 14a-8 Shareholder Proposals

Overview of Rule 14a-8 Shareholder Proposals

- The number of Rule 14a-8 proposals submitted to S&P Composite 1500 companies reached over 800 for the first time in the core proxy season, while average support and pass rates dropped to record lows:
  - Social/political proposals remained the largest category of submissions, increasing by a further 5% year over year, with 44% of submissions focused on social capital management issues
  - Environmental proposals—which saw 38% growth in H1 2022—increased by a further 8% year over year, with 78% of submissions focused on specific climate-related issues
  - Governance proposals declined by a further 13% year over year, reflecting a 40% decrease in structural governance proposals offset by a 52% increase in board composition proposals
  - Compensation proposals increased by 60% year over year driven by surge in severance proposals
- In 2023, voted shareholder proposals increased by 13% (543 vs. 481 H1 2022) reflecting recent changes in SEC's stance on no-action relief and a decrease in settlement rate:
  - Notably, the number of voted environmental proposals increased 57% year over year

	Shareholder Proposals Submitted		***Shareholder Proposals Voted On***		***Average % of Votes Cast in Favor***		***Shareholder Proposals Passed***	
Type of Proposal	***H1 2023***	***2022***	***H1 2023***	***2022***	***H1 2023***	***2022***	***H1 2023***	***2022***
Social/Political	***360***	374	***213***	215	***18%***	25%	***5***	21
Governance	***215***	263	***178***	207	***29%***	35%	***14***	25
Environmental	**171**	173	**91**	64	**21%**	37%	**2**	15
Compensation	***75***	52	***61***	39	***22%***	30%	***4***	3
Total	***821***	***862***	***543***	***525***	***23%***	***31%***	***25***	64

Who Made Shareholder Proposals

- Proposals from 10 proponents once again accounted for approximately two-thirds of all H1 2023 submissions:
  - Historically, proposals by the top 10 proponents have focused on governance, but this year, for the first time, social/political proposals submitted by the top 10 proponents outnumbered governance proposals
  - Notably, this year, some companies received criticism for not including the names of proponents in proxy statements and making it more difficult for other investors to engage with or understand the proponent's main policy objectives

	Top 10 Proponents					
	Primary or Secondary Filers	**Total**	**Social/Political**	**Governance**	**Environmental**	**Compensation**
1	**John Chevedden**	**146**	13	94	7	32
2	**As You Sow**	**89**	41	0	44	4
3	**Kenneth Steiner**	**54**	0	39	0	15
4	**James McRitchie/ Myra Young**	**49**	21	27	0	1
5	**National Center for Public Policy Research**	**44**	34	5	5	0
6	**Mercy Investment Services**	**34**	16	0	16	2
7	**NYC/NYS Retirement Fund**	**31**	20	4	3	4
8	**Green Century Capital**	**27**	3	0	24	0
9	**National Legal and Policy Center**	**26**	18	8	0	0
10	**CommonSpirit Health**	**19**	16	0	3	0
	Missionary Oblates of Mary Immaculate	**19**	14	1	4	0

"Anti-ESG" Proponents

- The main change in proponent profiles this year was an increase in proposals from "anti-ESG" proponents:
  - For the first time, an "anti-ESG" proponent is represented in the top 5 proponents and proposals from "anti-ESG" proponents accounted for over 10% of overall submissions
  - The National Center for Public Policy Research ("NCPPR"), which has been a frequent proponent for many years, and the National Legal and Policy Center ("NLPC"), which became a frequent proponent in 2022, continued to lead in submissions among this category of proponent
  - A number of new proponents were represented in the broader proponent population, including groups such as Consumer's Research and investment entities such as the American Conservative Values ETF

- "Anti-ESG" proponents remained focused on social/political proposals (73% of submissions from this group); most of the remaining proposals were independent chair proposals submitted with the stated goal of checking the decision-making of a "rogue CEO" who is motivated by "flawed, personal human opinions"

- Proposals from "anti-ESG" proponents in H1 2023 diverged in terms of approach:
  - In some cases, these proponents followed the same approach as in 2022, submitting proposals—such as civil rights audit proposals—that were facially similar to "pro-ESG" proposals
  - In other cases, these proponents highlighted their viewpoints in their resolutions and supporting statements, demanding disclosure on the costs and risks of ESG initiatives as well as the rescission of recently adopted ESG measures
  - Many of these proposals use similar language and focus on similar themes as the House Financial Services Committee's Republican ESG Working Group, which was formed in February 2023 "to combat the threat posed to our free markets by far-left environmental, social, and governance proposals"

“Anti-ESG” Proponents

(Continued)

- Companies were more likely to seek no-action relief on proposals from “anti-ESG” proponents, submitting no-action requests in connection with 36% of proposals from “anti-ESG” proponents, compared to 18% in connection with other proposals:
  - 21% of proposals from such proponents were excluded through the SEC’s no-action process (no-action success rate for these proposals was 76%, meaningfully higher than the 49% success rate for other proposals)
  - More than half of the requests to exclude these proposals were on the basis of “ordinary business”; in 12 instances, the SEC granted no-action relief on the basis of “ordinary business”
- Settlements between companies and “anti-ESG” proponents rarely occurred this year, with 71% of proposals from “anti-ESG” proponents going to a vote; shareholder support averaged 5% overall and 2% for ESP proposals

AVERAGE VOTES CAST IN FAVOR OF PROPOSALS						
Proponent Type	Environmental		Social		Governance	
	H1 2023	H1 2022	H1 2023	H1 2022	H1 2023	H1 2022
All	21%	35%	18%	26%	29%	35%
Anti-ESG	2%	2%	3%	8%	15%	18%
All Other	23%	35%	22%	29%	30%	36%

- Despite these low voting results, several “anti-ESG” proponents have signaled that they will continue to submit proposals in the coming years

Targets of Shareholder Proposals

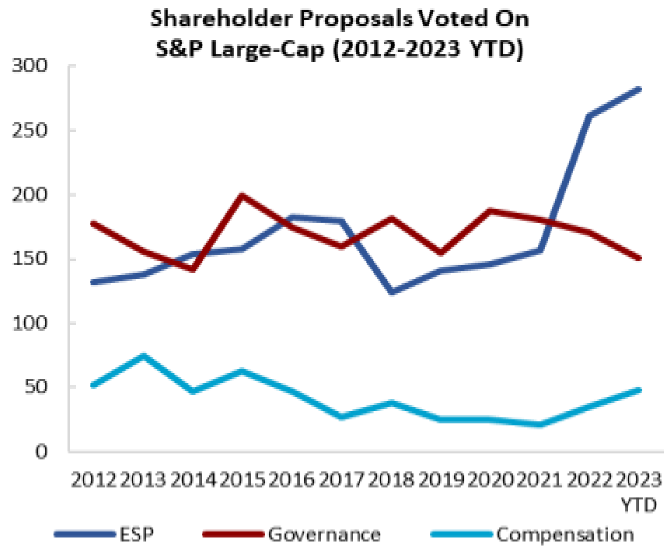
- This year, shareholders were asked to vote on Rule 14a-8 proposals at 263 individual companies (vs. 233 companies in H1 2022):
  - At least one ESP proposals went to a vote at 145 companies, 26% more than the number of companies in H1 2022
  - Many companies had to contend with multiple Rule 14a-8 submissions, with 44 companies receiving five or more proposals (vs. 46 companies in H1 2022) and 10 companies receiving 10 or more proposals (vs. nine companies in H1 2022)
- Consumer goods/retail companies received by far the largest number of proposals overall, followed by tech and financial services companies:

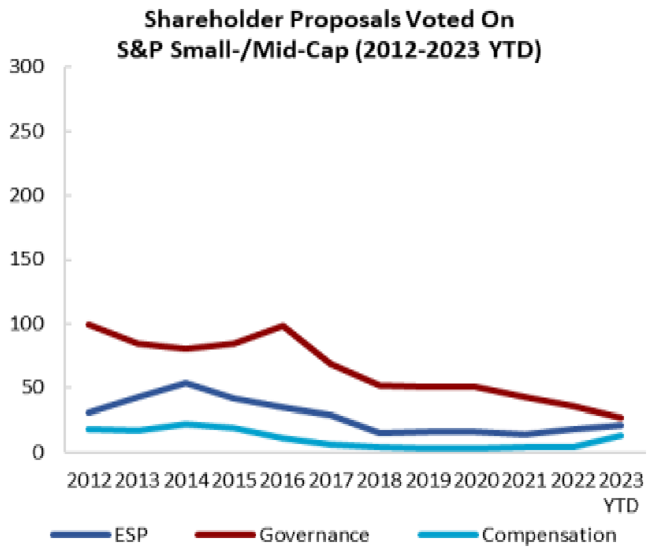
	Rule 14a-8 Proposals By Industry				
Industry (% of S&P Composite 1500)	**Total**	**Social/Political**	**Governance**	**Environmental**	**Compensation**
Consumer/Retail (19%)	**206 (25%)**	113 (31%)	46 (21%)	35 (20%)	12 (16%)
Industrials (16%)	**111 (14%)**	36 (10%)	34 (16%)	26 (15%)	15 (20%)
Financials (16%)	**126 (15%)**	59 (16%)	30 (14%)	30 (18%)	7 (9%)
Technology (15%)	**129 (16%)**	66 (18%)	37 (17%)	10 (6%)	16 (21%)
Healthcare (12%)	**118 (14%)**	68 (19%)	34 (16%)	2 (1%)	14 (19%)
Energy/Utilities (8%)	**94 (11%)**	12 (3%)	20 (9%)	55 (32%)	7 (9%)
Real Estate (7%)	**10 (1%)**	5 (1%)	1 (0%)	2 (1%)	2 (3%)
Materials (6%)	**27 (3%)**	1 (0%)	13 (6%)	11 (6%)	2 (3%)

- “Anti-ESG” proponents also primarily focused their efforts on consumer goods/retail (28% of “anti-ESG” proponents’ submissions), financial services companies (25%) and technology companies (19%)

Large-Caps vs. Mid- and Small-Caps

- Large-cap companies continued to receive the vast majority of shareholder proposals and accounted for almost all Rule 14a-8 proposals that shareholders voted on
- Large-cap companies received a significantly higher number of proposals even though there are twice as many mid- and small-cap companies:
  - Almost 90% of the proposals that reached a vote were at S&P 500 companies, consistent with 2022
  - A lower percentage (62%) of shareholder proposals went to a vote at small- and mid-cap than at large-cap companies (67%), but the voted proposals at small- and mid-cap companies received higher support on average (27% of votes cast) than at large-cap companies (22% of votes cast)





Environmental Proposals

- Environmental proposals increased by 8%, and 57% more proposals went to a vote; average support declined dramatically (21% vs. 35% in H1 2022) and only 2 proposals passed (vs. 14 in H1 2022)
- 75% of submissions focused on specific climate-related issues, including setting Scope 3 or science-based greenhouse gas emission reduction targets and adopting climate transition plans (which tripled compared to H1 2022)

	ENVIRONMENTAL							
	Shareholder Proposals Submitted		Shareholder Proposals Voted On		Average % of Votes Cast in Favor		Shareholder Proposals Passed	
	H1 2023	2022	H1 2023	2022	H1 2023	2022	H1 2023	2022
Specific Climate	***128***	109	***71***	42	***23%***	37%	***2***	10
Target/Goal	***42***	54	***28***	20	***23%***	45%	***0***	6
Transition Plan	***31***	14	***8***	4	***24%***	34%	***0***	1
Financial Activity	***17***	15	***16***	10	***15%***	19%	***0***	1
Lobbying	***16***	18	***10***	5	***35%***	32%	***1***	0
Methane	***9***	2	***3***	1	***51%***	98%	***1***	1
Specific Sustainability Issues	***26***	34	***10***	15	***20%***	45%	***0***	4
Plastics/Packaging	***11***	17	***7***	10	***25%***	52%	***0***	3

Social/Political Proposals

- Social/political proposals once again represented the largest category of submissions in H1 2023:
  - After more than doubling from 2021 to 2022, the number of H1 2023 social/political proposals increased by a further 5% year over year to 360 (vs. 344 in H1 2022)
- Proposals in this category remain wide-ranging and vary year to year depending on current "hot topics":
  - This year, proposals not only covered topics that were prevalent in prior years (such as political spending transparency and racial equity and civil rights audits), but also focused on issues that have more recently seized the public spotlight (such as labor rights and abortion)
- This year, consistent with 2022, proponents were less willing to settle and the majority of social/political submissions reached a vote (9% more proposals reached a vote than in H1 2022)
- Average support decreased by 31% year over year to 18%, a record low; only five social/political proposals passed (vs. 21 in H1 2022), representing a 76% decrease year over year

	SOCIAL/POLITICAL							
	Shareholder Proposals Submitted		Shareholder Proposals Voted On		Average % of Votes Cast in Favor		Shareholder Proposals Passed	
	H1 2023	2022	H1 2023	2022	H1 2023	2022	H1 2023	2022
Social Capital Management	**158**	158	**108**	117	**13%**	20%	**0**	10
Human Capital Management	**89**	109	**41**	41	**28%**	32%	**5**	7
Political Spending/Lobbying	**89**	103	**52**	54	**24%**	31%	**0**	4
Reproductive Rights	**24**	4	**12**	3	**11%**	25%	**0**	0

Social/Political Proposals—Racial Equity/Civil Rights Audits

- Consistent with 2022, social capital management ("SCM") proposals constituted the largest subcategory of social/political proposals, representing 44% of submissions in this category:
  - Nearly half of these proposals were demands for independent audits or additional disclosure on a company's social impact—in particular, with respect to racial equity, gender equality, pay equity and human rights.
- Racial equity/civil rights audit proposals:
  - In H1 2023, companies received at least 37 racial equity/civil rights audit proposals, including 11 targeting consumer goods/retail companies and eight targeting financial services companies
  - Both the total submissions and shareholder support for these proposals decreased compared to last year, as many companies have either already adopted audits or increased their diversity, equity and inclusion ("DEI") disclosures
  - Not including proposals from "anti-ESG" proponents (which achieved only 2% in average support), shareholder support for these proposals dropped to an average of 19% and ranged from 10% to 40% of votes cast (vs. 17% to 64% in H1 2022)
  - While seven proposals passed in H1 2022, no proposals passed this year

Social/Political Proposals—Human Capital Management

- Although DEI topics constituted the largest subcategory of HCM proposals, labor and employment issues attracted greater scrutiny this year due to macro trends:
  - Average support for DEI proposals declined (to 25% from 31% in H1 2022), while average support for non-DEI labor and employment proposals remained unchanged (33%)
  - Three non-DEI proposals and two workforce DEI proposals passed
- Workplace DEI initiatives:
  - This year, a campaign by As you Sow demanded more disclosure on DEI topics and accounted for more than half of the workforce DEI proposals (As You Sow submitted at least 25 of such proposals)
- Union activity was the most prevalent non-DEI topic in H1 2023:
  - At least six companies received proposals to adopt a policy to support "freedom of association and collective bargaining" and at least five additional companies received proposals to conduct an independent third-party worker rights assessment
  - Most collective bargaining proposals went to a vote and obtained fairly high support (36% on average) and one passed

Social/Political Proposals—Reproductive Rights

- In response to the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, (which overturned *Roe v. Wade*) and recent state legislative efforts, companies received six times the number of shareholder proposals they did last year on reproductive health-related issues:
  - This includes 13 "report impact" proposals, which requested corporate reporting on the impact of state laws criminalizing abortion
- In addition to the more general "report impact" proposals, proponents also sought to address post-*Dobbs* developments in more granular ways:
  - These proposals focused on "reproductive and maternal health" and the consumer data privacy implications of a company's compliance with potential information demands under new laws criminalizing abortion
- The SEC denied all no-action requests on reproductive rights proposals and half of the proposals went to a vote:
  - Voted proposals received between 2% and 16% support and none passed
  - Only one proposal related to reproductive rights was from an "anti-ESG" proponent

Governance Proposals

- Governance proposals declined by 13% year over year (247 in H1 2022 to 215 in H1 2023); average support dropped to 29% (vs. 35% in H1 2022) and pass rate declined by 39%
- There was a 40% decrease in structural governance proposals (which have high average support), offset by 52% increase in board composition (predominately independent chair) proposals
- Special meetings, the most prevalent governance proposal in 2022, dropped by 63% this year, likely due to (1) declining support for these proposals in recent years and (2) John Chevedden and other traditional governance proponents shifting their attention to other topics

	GOVERNANCE							
	Shareholder Proposals Submitted		Shareholder Proposals Voted On		Average % of Votes Cast in Favor		Shareholder Proposals Passed	
	H1 2023	2022	H1 2023	2022	H1 2023	2022	H1 2023	2022
Structural Governance	**97**	170	**76**	145	**32%**	38%	**13**	24
Special Meetings	**40**	108	**36**	105	**32%**	36%	**5**	9
Fair Elections	**21**	0	**11**	-	**14%**	-	**0**	-
Supermajority	**14**	11	**12**	9	**54%**	72%	**7**	9
Board Composition	**91**	66	**84**	52	**30%**	26%	**0**	0
Independent Chair	**84**	48	**79**	39	**30%**	31%	**0**	0
Misc. Governance	**27**	27	**18**	10	**15%**	29%	**1**	1

Compensation Proposals

- Compensation-related proposals have consistently represented the smallest category of proposals, with minor year-over-year fluctuations
- This year, however, the number of compensation proposals increased by 60%, largely as a result of 40 Chevedden-sponsored severance proposals (resulting in 44 severance proposals in H1 2023 compared to 15 in 2022)
- Average support dropped to 22% (compared to 30% in H1 2022) while four proposals passed (compared to 3 in H1 2022)
- Shareholder proposals on ESG-linked compensation declined, but private engagement remained robust

	COMPENSATION							
	Shareholder Proposals Submitted		Shareholder Proposals Voted On		Average % of Votes Cast in Favor		Shareholder Proposals Passed	
	H1 2023	2022	*H1 2023*	2022	*H1 2023*	2022	*H1 2023*	2022
Severance	*44*	15	*38*	15	*25%*	44%	*4*	3
Compensation – Social	*7*	12	*5*	4	*8%*	10%	*0*	0
Clawbacks	*3*	5	*2*	5	*42%*	28%	*0*	0
Compensation – Environmental	*5*	6	*5*	5	*11%*	10%	*0*	0
Stock Retention	*9*	2	*8*	2	*19%*	26%	*0*	0
Compensation – Other	*7*	12	*3*	8	*19%*	30%	*0*	0

3 *Compensation-Related Matters*

Overview of Say-on-Pay Votes

- Public companies continued to perform strongly on say-on-pay, with overall support levels averaging 88% among the S&P 500 (consistent with 2022) and 90% among the Russell 3000 (compared to 89% in 2022)
- Fewer companies failed compared to last year both among the S&P 500 (11 vs. 19 in 2022) and Russell 3000 (44 vs. 72 in 2022)
- Continued turnover in failed votes, with 82% of S&P 500 companies that failed last year achieving majority support, 65% of Russell 3000 companies that failed last year achieving majority support and 53% of Russell 3000 companies that failed last year achieving over 70% support
- Three S&P 500 companies failed in each of 2022 and 2023, all of which were criticized by ISS for having non-rigorous performance standards for compensation, which may be indicative of the significance shareholders attribute to this criteria

	Russell 3000		S&P 500	
	H1 2023	*2022*	*H1 2023*	*2022*
Percentage passed (majority support)	***98%***	*97%*	***98%***	*96%*
Percentage with >70% support	***93%***	*92%*	***93%***	*90%*
Percentage with ISS "Against" recommendations	***12%***	*14%*	***9%***	*12%*
Average support with ISS "For" recommendations	***94%***	*94%*	***92%***	*92%*
Average support with ISS "Against" recommendations	***68%***	*64%*	***60%***	*54%*

Update on ISS Analysis

S&P 500 Companies with Negative ISS Recommendations	H1 2023	H1 2022
Total with negative recommendations	43	50
Number that had "high concern" on:		
Pay-for-Performance	39	40
Compensation Committee Communication and Responsiveness	10	12
Severance/Change-in-Control Arrangements	2	5
Non-Performance-Based Pay Elements	2	3
Peer Group Benchmarking	1	2

- Although pay-for-performance is just one factor in the overall compensation assessment, it remained the main factor correlating to ISS's negative recommendation on say-on-pay, as has been the case in recent years
- ISS continues to place a greater emphasis on its quantitative factors in issuing negative recommendations on say-on-pay
- Performance-based awards with non-rigorous performance goals or outdated performance metrics became the most important qualitative factor underlying ISS negative recommendations this year (the number of companies that ISS criticized on the basis of this qualitative factor doubled year over year to 24 (vs. 12 in 2022))
- ISS has indicated that, while it will not consider the new pay versus performance disclosure in its quantitative screen, it will do so in the qualitative analysis

Equity Compensation Plan Approvals

- ISS recommended against approximately 29% of equity plan proposals in the case of Russell 3000 companies (up from 26% in 2022), but recommended against only 10% in the case of S&P 500 companies (up from 8% in 2022)
- Five Russell 3000 companies failed to obtain shareholder approval for an equity compensation plan (vs. two in 2022)
- Average support level for equity plan proposals at S&P 500 companies was 93% when ISS recommended “for” approval and 70% when ISS recommended “against” (compared to 94% and 73% in 2022)

	RUSSELL 3000		S&P 500	
Adoption or Amendment of Omnibus Stock Plans	H1 2023	2022	H1 2023	2022
Number of proposals voted on	564	*541*	82	*83*
Percentage with ISS “against” recommendations	29%	*26%*	10%	*8%*
Average level of support with ISS “for” recommendations	93%	*93%*	93%	*94%*
Average level of support with ISS “against” recommendations	74%	*79%*	70%	*73%*
Number of failed proposals (<50% support)	5	*2*	0	*0*

4 Considerations for 2024 Proxy Season

Advance Notice Bylaws

- Following the SEC's adoption of the universal proxy rule, over 200 companies in the S&P 500 have amended their advance notice bylaws (1) to reflect Rule 14a-19 requirements and (2) in anticipation of a potential uptick in activism
- Changes in adopted bylaws have focused on the following:

Focus	Related Bylaw Changes
• **Corporate Transparency**: Allowing the company to obtain enough information from all director nominees to provide the board and shareholders with the benefit of a well-considered nomination process	• Specifying additional information requirements in advance notice bylaws (including to conform D&O questionnaires for company nominees) • Requiring nominating shareholder to request and have its nominees complete the company's standard forms of D&O questionnaire, representations and agreement, which must be submitted with the nomination notice
• **Procedural Clarity**: Outlining a clear process for shareholders to make nominations, as well as a clear process for the company to address any deficiencies	• Clarifying deadline for submission of nomination notice (although typically maintaining the 90/120 day window that is the longest ISS/Glass Lewis consider to be reasonable under their current guidelines) • Including a requirement to "bring down" information shortly before the shareholder meeting • Specifying that the nominating shareholder must use a proxy card that is a different color from the company's card • Clarifying the power of the board and meeting chair to address deficiencies in the nomination notice

Advance Notice Bylaws

(Continued)

- In response to companies' adoption of advance notice bylaw updates, several shareholders have brought lawsuits in Delaware, and over 20 companies received Rule 14a-8 proposals demanding shareholder approval of advance notice bylaw updates
- These cases, proposals and related corporate governance commentary suggest that bylaw updates should be:
  - Made without any connection to any ongoing activist campaign (i.e., "on a clear day")
  - Consistent with the view of the Delaware courts that advance notice bylaws should not interfere with or frustrate shareholders' right to nominate or elect directors
  - Appropriate in light of the company's shareholder base, requirements for its own nominees and other relevant circumstances

Officer Exculpation

- Effective August 1, 2022, DGCL §102(b)(7) was amended to allow Delaware corporations to exculpate certain senior officers (in addition to directors) for monetary damages arising out of breaches of their fiduciary duties of care
  - The officers who may be exculpated include:
    - the President, CEO, COO, CFO, CLO, Controller, Treasurer and/or CAO;
    - any "Named Executive Officers" in the company's SEC filings; and
    - anyone who has consented to being an officer for purposes of accepting service of process.
  - Certain actions may not be exculpated, including:
    - breaches of the duty of loyalty;
    - acts/omissions not in good faith or involving intentional misconduct or a knowing violation of law;
    - transactions in which the director or officer derived an improper personal benefit; and
    - solely in the case of officers, claims brought directly by the Delaware corporation or derivative suits brought by its shareholders

Officer Exculpation

(Continued)

- Adopting an officer exculpation provision would require a shareholder vote
- For meetings through H1 2023, 269 U.S. public companies put an officer exculpation proposal to a vote, including 31 companies in the S&P 500
  - 84% met the applicable threshold for charter amendments under the company's organizational documents (typically a majority or supermajority of the company's outstanding shares)
  - Regardless of whether the proposal ultimately reached the charter amendment threshold or whether proxy advisors supported the proposal, officer exculpation proposals received high support among shareholders that voted:

	VOTES CAST IN FAVOR OF OFFICER EXCULPATION PROPOSALS	
	Average	*Median*
Overall	90%	90%
Proposals passing amendment threshold	91%	91%
Proposals failing amendment threshold	84%	93%
Proposals with positive ISS recommendation	90%	90%
Proposals with negative ISS recommendation	90%	93%

  - Determining factor for failed vote was low % of voted shares (high broker non-votes)
  - While Glass Lewis generally recommended against these provisions, ISS recommended against only 19% of them; recommendations did not impact voting results

Director Qualification Considerations

- The universal proxy rules and other recent developments have led to increased scrutiny of director qualifications as investors seek to ensure that boards have the necessary tools to exercise effective oversight in light of rapidly changing market conditions, regulatory requirements and risk profiles
  - Tenure:
    - In ISS's guidance surrounding the universal proxy rule, the proxy advisor indicated that they are willing to replace a "long-tenured, overboarded director who seems disengaged" with "a nominee who brings clearly-relevant skills to the board, or perhaps enhances diversity"
  - Overboarding:
    - Institutional investors continue to adopt stricter overboarding limits (including, for some investors, such as Wellington, double-counting certain board leadership positions)
    - Note, however, that, starting in 2024, State Street will no longer prescribe its own overboarding limits but will instead vote against nom/gov committee chairs at S&P 500 companies that have not adopted their own overboarding policies
  - Director Skills:
    - Institutional investors such as State Street have indicated that they look to director qualifications as an indicia of independent board decision-making, focusing on whether directors have "adequate skills to provide effective oversight of corporate strategy, operations, and risks, including environmental and social issues"
- Perhaps correlated with the greater emphasis on director qualifications in light of the universal proxy rules and recent SEC rulemaking, a larger number of directors failed to receive a majority of votes cast (eight among the S&P 500 vs. five in H1 2022, and 119 among the Russell 3000 vs. 89 in H1 2022), although shareholder support for director nominees remained high in uncontested elections (averaging 95% of votes cast among the S&P 500 vs. 96% in H1 2022, and 94% of votes cast among the Russell 3000 in both H1 2023 and H1 2022)

Meeting Procedure Considerations

- Time between presentation and voting:
    - In H1 2023, proponents criticized companies for leaving too little time between the presentation of the last shareholder proposal and the closing of the polls
    - An ICCR survey of 31 companies showed that the time companies reserved at their 2022 annual meetings for shareholders to cast or change their vote varied significantly, ranging from zero seconds to 20 minutes (median of one minute)
    - In light of these criticisms and increased shareholder scrutiny of meeting procedures following the broad adoption of hybrid annual meetings, for next year's meeting agenda, companies may consider specifying a brief pause after the last shareholder proposal is presented
- Annual meeting protests:
    - This year, a number of companies faced lengthy and disruptive protests at their annual meetings, with protestors breaking into the room or attempting to get onstage at the Walgreens and Shell shareholder meetings
    - Going forward, companies may assess meeting protocols to ensure safety and orderly conduct at annual meetings, especially when there is a highly publicized or divisive shareholder proposal on the ballot

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