

# *Lessons from the 2022 Proxy Season*

*September 19, 2022*

*Marc Treviño  
Melissa Sawyer  
June Hu*

# *Introduction – 10-Year Overview*

- The 2022 proxy season marked the 10th anniversary of S&C's first annual proxy season review.
  - The number of Rule 14a-8 proposals has increased over these 10 years, a trend which has intensified in recent years.
  - The 797 proposals submitted for H1 2022 broke the record set in 2021 (733 in H1 2021 and roughly 550 in H1 2012).
- It is clear that the U.S. market's growing environmental, social and political emphasis has altered proxy season engagement over the course of the last decade.
  - Whereas companies received similar numbers of governance proposals in H1 2012 and H1 2022, they are receiving far more environmental, social and political ("ESP") proposals than ever (503 ESP submitted in H1 2022 compared to 220 in H1 2012 and 408 in H1 2021).
  - ESP proposals now represent 63% of submissions.

# *Introduction – Observations from 2022*

- In this webinar, we will focus on the following developments related to the 2022 U.S. annual meeting proxy season:
  - Impact of Recent SEC Developments
  - Trends in Rule 14a-8 Shareholder Proposals
  - Say-on-Pay and Equity Compensation Plan Voting



# *Impact of Recent SEC Developments*



# SLB 14L

- On November 3, 2021, the staff of the Division of Corporation Finance of the SEC issued new guidance under Staff Legal Bulletin No. 14L (“SLB 14L”), which significantly narrowed the standards for the “ordinary business” and “economic relevance” exclusions.
- Companies had a significantly lower likelihood of obtaining no-action relief on ESP proposals following the SEC’s release of SLB 14L.

	SEC Response Date						
	November 3, 2020 – April 30, 2021			November 3, 2021 – April 30, 2022			
Proposal Category	Considered	Granted	% Granted	Considered	Granted	% Granted	YoY Change in % Granted
Environmental	15	7	47%	18	3	17%	(30%)
Social/Political	67	49	73%	82	21	26%	(48%)
Governance	82	59	72%	58	34	59%	(13%)
Compensation	12	7	58%	8	4	50%	(8%)
<b>Total</b>	<b>177</b>	<b>123</b>	<b>69%</b>	<b>166</b>	<b>62</b>	<b>37%</b>	<b>(32%)</b>

# *SLB 14L—Related Impact*

- Not only were companies less likely to obtain no-action relief, proponents were less incentivized to negotiate settlements with companies.
- As a result, significantly more shareholder proposals made it to a shareholder vote.
  - For the first time, we observed that a majority of ESP submissions reached a vote.
- Shareholder support decreased, with institutional investors expressing concern over the increasingly prescriptive ESP proposals that went to a vote this year.
  - Shareholder support on ESP proposals decreased after steadily rising throughout the last decade, reaching the lowest average percentage of votes cast since 2018.

# *Further SEC Developments*

- We expect the SEC's extensive rulemaking on environmental, social and governance issues, including those on the following topics, to have an even greater impact on submission, voting and engagement trends in future proxy seasons
  - Universal proxy requirements (effective for contested elections after August 31, 2022)
  - Proposed amendments to Rule 14a-8 (proposed in July 2022)
  - Climate-related disclosure requirements (final rules expected in the Fall)
  - Human capital management disclosure requirements (proposed rules expected in the Fall)
  - Board diversity disclosures (proposed rules expected in Spring 2023)



# *Rule 14a-8 Shareholder Proposals*



# Overview of Rule 14a-8 Shareholder Proposals

- Shareholders submitted 797 proposals for meetings in H1 2022, the highest number in recent years, breaking the record set in 2021.
- Social/political proposals remained the largest category of submissions, increasing 17% year-over-year.
- Governance proposals decreased by a further 11% year-over-year, with nearly half of the proposals focusing on amending special meeting thresholds.
- Environmental proposals increased by 38% year-over-year, with proponents focusing on greenhouse gas reduction and other climate-related targets in a third of submissions.
- The number of compensation proposals remained low, with proponents submitting fewer proposals linked to environmental and social performance metrics.

	<i>Shareholder Proposals Submitted</i>		<i>Shareholder Proposals Voted On</i>		<i>Average % of Votes Cast in Favor</i>		<i>Shareholder Proposals Passed</i>	
<i>Type of Proposal</i>	<i>2022 YTD</i>	<i>2021</i>	<i>2022 YTD</i>	<i>2021</i>	<i>2022 YTD</i>	<i>2021</i>	<i>2022 YTD</i>	<i>2021</i>
Social/Political	344	323	196	135	26%	30%	21	21
Governance	247	309	193	224	35%	40%	23	46
Environmental	159	130	58	39	35%	43%	14	14
Compensation	47	51	34	25	30%	22%	3	1
<i>Total</i>	<i>797</i>	<i>813</i>	<i>481</i>	<i>423</i>				

# Social/Political Proposals

- In H1 2022, not only did social/political proposals remain the largest category of submissions, the total number increased by a further 17% compared to H1 2021.
  - Main driver was an 81% growth in the number of submissions on civil rights, human rights and racial equity impact.
- Notwithstanding an increase in voted proposals, the total number of passing proposals did not increase, although more civil rights, human rights and social justice proposals passed.

	Shareholder Proposals Submitted		Shareholder Proposals Voted On		Average% of Votes Cast in Favor		Shareholder Proposals Passed	
	2022 YTD	2021	2022 YTD	2021	2022 YTD	2021	2022 YTD	2021
Social Capital Management	147	131	109	61	21%	18%	10	1
Human Capital Management	99	119	38	32	33%	32%	6	10
Political Spending/Lobbying	98	73	49	42	32%	42%	5	10

# *Social/Political Proposals—Racial Equity / Civil Rights Audits*

- Racial equity audit proposals:
  - Asked companies to commission audits on their impacts on racial equity.
  - In 2021, proposals received meaningful shareholder support, and were withdrawn at several companies after they agreed to conduct racial equity audits.
  - In H1 2022, 30 companies received racial equity audit proposals, including banks, institutional investor issuers and companies in the retail/consumer goods and technology sectors.
  - The SEC rejected all no-action requests on these proposals in 2022.
  - Although 16 of these proposals were withdrawn after companies agreed to some form of the audit, 14 proposals made it to a vote.
  - Shareholder support ranged from a low of 18% to a high of 64%, with three proposals passing.
- Civil rights audit proposals:
  - Asked companies to report on racial equity and other issues (including gender equality, pay equity and human rights impacts).
  - The SEC also rejected all no-action requests on these proposals.
  - Four proposals passed, with the highest support being 62%.

# *Social/Political Proposals—Human Capital Management*

- Perhaps in anticipation of new SEC requirements that could mandate workforce DEI disclosures, proponents in 2022 submitted fewer proposals on employee-related DEI topics and instead focused on issues such as harassment, inadequate paid sick leave and employee health and safety issues.
- Harassment-related proposals:
  - In 2022, 10 out of 15 harassment-related proposals focused on the use of concealment clauses, including non-disclosure or non-disparagement agreements with employees.
  - Eight concealment proposals reached a vote, receiving an average support of 48%, passing at three companies (at between 65% and 98% of votes cast).
- Employee health & reproductive rights proposals:
  - These included six proposals on the adoption of a paid sick leave policy for employees, which, when voted, received between 26% and 34% of votes cast.
  - This year, a handful of companies received proposals asking them to report on the employment-related risks and costs associated with state-level restrictions on access to reproductive healthcare.



# *Social/Political Proposals—Political Spending*

- This year, although most political proposals still focused on general political spending/lobbying reporting, there were 20 proposals that specifically linked political expenditures to companies' ESP-related priorities or values.
- This new type of proposal asks companies to assess the congruency or alignment between their stated company values and priorities and their political spending/lobbying activities.
- Companies settled many of these proposals with the proponent, but the 10 that went to a vote received relatively high votes (between 30% and 50% of votes cast).

# *Social/Political Proposals—“Anti-ESG” Proponents*

- There was a notable increase in the number of proposals—in particular social proposals—submitted by so-called “anti-ESG” entities.
  - This year, 54 proposals were identifiable as being submitted by these proponents (compared to 25 in full-year 2021).
  - These included nine proposals on civil rights audits, and 14 proposals (mainly at financial services and retail companies) to report on their charitable contributions.
- The increased number of social proposals from “anti-ESG” proponents meaningfully contributed to the year-over-year decrease in shareholder support.
  - Social proposals submitted by these proponents received average shareholder support of 9%, compared to 29% support without counting these proposals.
- The voting results this year on civil rights audit, charitable contribution and political congruency proposals submitted by these proponents illustrate the significance of a proponent’s stated policy agenda on voting outcomes, which is a significant development this season.

# Governance Proposals

- Governance proposals continue to decline, as both structural governance and board composition proposals declined in 2022.
- Around three-quarters of submitted governance proposals went to a vote, with SLB 14L seeming to have a smaller impact on this category.

	GOVERNANCE							
	Shareholder Proposals Submitted		Shareholder Proposals Voted On		Average % of Votes Cast in Favor		Shareholder Proposals Passed	
	2022 YTD	2021	2022 YTD	2021	2022 YTD	2021	2022 YTD	2021
Structural Governance	163	217	140	168	38%	45%	22	42
Special Meetings	105	36	102	30	36%	38%	9	5
Proxy Access	18	33	9	26	29%	32%	1	0
Written Consent	7	77	5	69	36%	41%	1	10
Board Composition	60	84	45	54	25%	28%	0	3

# *Governance Proposals—Special Meeting Thresholds*

- The single most prevalent governance proposal this proxy season was a request to lower the ownership threshold in existing special meeting provisions, which accounted for 58% of all structural governance submissions and 35% of all governance submissions.
  - Around 90% of these proposals were “amend” proposals rather than requests to adopt a new right.
  - The majority of the “amend” special meeting proposals went to a vote and received an average of 36% of votes cast, increasing from 33% in 2021 but still mostly failing to pass (four passed compared to one in 2021).
- ISS’s recommendations were important to voting outcomes.
  - In the four cases where ISS recommended against the proposal, ISS cited the presence of a large shareholder that could unilaterally call a special meeting at the proposed threshold.
  - The proposals ISS recommended against each received a much lower percentage of votes cast compared to proposals with ISS support.



# Environmental Proposals

In 2022, shareholder proposals on environmental issues were more granular, focusing on:



**1**  
GHG Reduction  
Targets



**2**  
IEA-Aligned  
Financing  
Policies



**3**  
Climate Transition  
Plans



**4**  
Paris Agreement-  
Aligned Lobbying

- In 2022, shareholders submitted more environmental proposals than ever.
- These proposals were more granular, and received lower overall support (35% compared to 41% in H1 2021).
  - Institutional investors voiced concern that proponents may be taking a one-size-fits-all approach without fully considering the context in which companies are operating their businesses.
- Voted proposals increased by 76%.

# *Environmental Proposals—Climate-Related Targets*

- In 2021, with limited exceptions, proposals on climate-related targets and goals focused on (generally long-term) alignment with the Paris Agreement.
  - A quarter of these proposals went to a vote.
  - All but one passed.
- In 2022, proponents submitted a much higher number of climate target/goal proposals (53 in H1 2022 compared to 30 in full-year 2021).
  - Around 40% of the target/goal proposals requested the adoption of some combination of short-, medium- and/or long-term science-based targets for Scope 3 emissions.
  - None of these more prescriptive proposals passed.
- Target-related proposals were less likely to be withdrawn by the proponent than they were in 2021.

# *Environmental Proposals—Financing Activity*

- In 2021, five banks received As You Sow proposals requesting that they disclose plans to reduce their financed GHG emissions.
  - All of the financing activity proposals were withdrawn in 2021.
- In 2022, six banks (including the original five) and three insurance companies received a total of 15 proposals related to their lending activities.
  - Twelve of the 15 proposals asked that the financial institution adopt lending and/or underwriting policies that align with the GHG reduction path outlined in IEA’s “Net Zero Emissions by 2050 Scenario,” which is intended to be consistent with limiting the global temperature rise to 1.5°C without a temperature overshoot.
  - Specifically, the proponents asked that the financial institutions limit or end financing of new fossil fuel supplies.
  - All of the IEA-related proposals went to a vote, but none received more than 20% of votes cast.

# *Environmental Proposals—Political Spending*

- For the last two years, investors have requested disclosures on the alignment between companies' lobbying activities and the Paris Agreement goals.
- In H1 2022, companies received 16 of these environmental congruency proposals, compared to 14 in all of 2021.
  - Last year, half of these proposals went to a vote and only one failed.
- Perhaps due to the success of these proposals in 2021, companies were more willing to settle in 2022.
  - Only three went to a vote.
  - None of the H1 2022 environmental lobbying proposals passed.



# Compensation Proposals

- Compensation proposals remain the smallest category.
- More proposals reached a vote in 2022.
- Voted proposals received a decade-high average support of 30% and three passed.
  - The passing proposals all requested the board seek shareholder approval for large executive severance or termination payments, suggesting that, even in a competitive market, shareholders remain wary of potentially excessive or unreasonable severance payments.

	Shareholder Proposals Submitted		Shareholder Proposals Voted On		Average % of Votes Cast in Favor		Shareholder Proposals Passed	
	2022 YTD	2021	2022 YTD	2021	2022 YTD	2021	2022 YTD	2021
Severance	13	2	13	2	44%	48%	3	1
Compensation – Social	12	13	4	8	10%	9%	0	0
Clawbacks	5	3	5	3	28%	34%	0	0
Compensation – Environmental	4	9	3	3	10%	11%	0	0
Stock Retention	2	3	2	0	26%	–	0	0



# *Say-on-Pay and Equity Compensation Plan Voting*

# *Overview of Say-on-Pay Votes and Equity Compensation Plan Approval*

- **Say-on-pay:**
  - Although public companies continued to perform strongly, with overall support levels averaging 88% among the S&P 500 and 90% among the Russell 3000, more companies fail compared to prior years.
  - Continued turnover in failed votes, with 57% of companies that failed last year achieving over 70% support this year.
  - Four S&P 500 companies failed in each of 2021 and 2022, all of which were criticized by ISS for limited or inadequate responsiveness to shareholders' concerns.
  - ISS negative recommendations highlighted the continuing importance of the pay-for-performance assessment, with the most important factor remaining alignment of CEO pay with relative total shareholder return.
  - The most significant qualitative factors are limited, opaque, or undisclosed performance goals and use of above-target payouts.
- **Equity compensation plans:**
  - Only two Russell 3000 companies failed to obtain shareholder approval for an equity compensation plan.
  - Support levels at Russell 3000 and S&P 500 companies averaged 91%.

# Drivers of 2021 Say-on-Pay Results

	Russell 3000		S&P 500	
	2022	2021	2022	2021
Percentage passed (majority support)	97%	97%	96%	96%
Percentage with >70% support	91%	93%	90%	91%
Percentage with ISS “Against” recommendations	13%	12%	12%	11%
Average support with ISS “For” recommendations	94%	94%	92%	92%
Average support with ISS “Against” recommendations	63%	65%	54%	56%

- Overall, U.S. companies had similar say-on-pay results in 2021 and 2020.
- Of the 14 S&P 500 companies that failed say-on-pay votes in 2021 and have had their 2022 votes thus far, 10 have achieved majority support in 2022 (compared to seven out of 10 in 2021)
  - Of the 43 companies in the Russell 3000 that failed their say-on-pay votes in 2021 and have had their 2022 votes thus far, 33 achieved majority support in 2022, and 24 had support levels over 70%.
  - This turnover suggests that companies (particularly those in the S&P 500) having losing say-on-pay votes in one year are generally succeeding in implementing program changes that result in better say-on-pay outcomes in the subsequent year.
- Four of the 18 S&P 500 companies that failed say-on-pay in 2022 to date failed their vote in the prior year, although three additional companies that failed in 2022 had support levels below 70% in the prior year (compared to three and four out of 16 in 2021, respectively).
  - All four companies in the S&P 500 which failed say-on-pay in both 2021 and 2022 were criticized by ISS for limited or inadequate responsiveness to shareholders’ concerns, which is indicative of the significance ISS attributes to this criteria.



# ISS Pay-for-Performance Analysis

- Relative alignment of CEO pay and total shareholder return over three years
- Relative alignment of CEO pay to peer group median over one year
- Absolute alignment of CEO pay and TSR over five years
- Relative alignment of CEO pay and financial performance over three years

<i>S&amp;P 500 Companies with Negative ISS Recommendations</i>	<b>2022</b>	<b>2021</b>
Total with negative recommendations	50	45
Number that had “high concern” on:		
Pay-for-Performance	40	36
Compensation Committee Communication and Responsiveness	12	12
Severance/Change-in-Control Arrangements	5	8
Peer Group Benchmarking	2	0
Non-Performance-Based Pay Elements	3	4

# *ISS Qualitative Pay-for-Performance Analysis*

- Under ISS's policies, the qualitative review takes into account a range of factors, including:
  - the ratio of performance-based equity awards to time-based equity awards;
  - the overall ratio of performance-based compensation to total compensation;
  - the completeness of disclosure and rigor of performance goals;
  - application of compensation committee discretion;
  - peer group benchmarking practices;
  - financial and operational performance (both absolute and relative to peers);
  - realizable pay compared to grant pay; and
  - any special circumstances, such as a new CEO or anomalous equity grant practices.
- Notably, despite the uncertainty created by COVID-19, the exercise of discretion by compensation committees can be viewed negatively by ISS. For example, ISS FAQs on compensation policies and the COVID-19 pandemic indicate that changes to in-progress long-term incentive awards will generally be viewed negatively, especially with respect to companies having a pay-for-performance misalignment.

# Equity Compensation Plan Approvals

- Since 2015, ISS has applied an “equity scorecard” approach to assessing equity plans. The scorecard method considers factors under three main categories: plan cost, plan features, and grant practices.
- ISS recommended against approximately 27% of equity plan proposals in the case of Russell 3000 companies (down from 33% in 2021), but recommended against only 8% in the case of S&P 500 companies (up from 6% in 2021).

Adoption or Amendment of Omnibus Stock Plans	RUSSELL 3000		S&P 500	
	2022 YTD	2021	2022 YTD	2021
Number of proposals voted on	455	678	73	109
Percentage with ISS “against” recommendations	27%	33%	8%	6%
Average level of support with ISS “for” recommendations	94%	94%	94%	94%
Average level of support with ISS “against” recommendations	79%	82%	75%	77%
Number of failed proposals (<50% support)	2	4	0	0



**Marc Treviño**

Partner, New York

T: +1-212-558-4239

E: trevinom@sullcrom.com



**Melissa Sawyer**

Partner, New York

T: +1-212-558-4243

E: sawyerm@sullcrom.com



**June Hu**

Associate, New York

T: +1-212-558-4356

E: huju@sullcrom.com

The background is a soft-focus, abstract composition. On the left side, there is a vertical grid of small, glowing orange and yellow dots. To the right of this grid, several vertical, elongated, orange-colored shapes resembling stylized fingers or light trails are visible. The rest of the background is filled with out-of-focus, circular bokeh lights in various colors including yellow, orange, blue, and green, creating a dreamy, ethereal atmosphere.

SULLIVAN & CROMWELL