

10<sup>th</sup> Anniversary Edition

# 2022 Proxy Season Review: Part 1

## Rule 14a-8 Shareholder Proposals

August 8, 2022

Shareholders submit 797 proposals for meetings in H1 2022, the highest number since 2018; more proposals go to a vote (60% compared to 50% in H1 2021), but average shareholder support decreases

Social/political proposals remain the largest category of submissions, increasing 17% year-over-year:

- No-action success rate decreases by 48%, voted proposals increase by 72% but average support drops to lowest level (26%) since 2018
- Submissions on civil rights, human rights and racial equity impact grow by 81% and 10 pass (compared to 1 in H1 2021)
- Submissions on workforce DEI, the largest subcategory in 2021, drop by 47%, and only 2 pass (compared to 6 in H1 2021)
- Proponents focus on congruency between political spending and company values in 18% of political submissions (38% average support)

Governance proposals decrease by a further 11% year-over-year:

- No-action success rate decreases by 13%, voted proposals decrease by 3% and average support drops to 35% (from 40% in H1 2021)
- Proposals to lower special meeting thresholds triple compared to H1 2021, comprising 38% of submissions and 48% of voted proposals, with 4 passing (compared to 1 in H1 2021)

Environmental proposals increase by 38% year-over-year:

- No-action relief success rate decreases by 30%, voted proposals increase by 76%, while average support drops to 35% (from 41% in H1 2021)
- Proponents focus on greenhouse gas (GHG) reduction and other climate-related targets in a third of submissions

Compensation proposals remain smallest category (6% of total submissions), with 42% more proposals reaching a vote:

- Proponents submit fewer proposals to link ESG with compensation
- Average shareholder support increases to 30% (from 20% in H1 2021), with 3 proposals, all related to executive severance, passing

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## INTRODUCTION

In the tenth edition of our annual proxy season review memo, we summarize significant developments relating to the 2022 U.S. annual meeting proxy season. This year, our review comprises two parts: Rule 14a-8 shareholder proposals and compensation-related matters. This is Part 1, and we expect to issue Part 2 over the next weeks. We will also host our annual webinar in September to discuss 2022 proxy season developments.

The Rule 14a-8 shareholder proposals we discuss are those submitted to and/or voted on at annual meetings of the U.S. members of the S&P Composite 1500, which covers approximately 90% of U.S. market capitalization, at meetings held on or before June 30, 2022. We estimate that around 90% of U.S. public companies held their 2022 annual meetings by that date.

The data on submitted, withdrawn and voted-on shareholder proposals derives, in part, from ISS's voting analytics with respect to 797 known shareholder proposals submitted this year to U.S. members of the S&P Composite 1500.<sup>1</sup> We have supplemented the ISS data with information published by proponents on their websites and other independent research. The number of proposals submitted includes proposals that were not included in a company's proxy statement as a result of the SEC no-action process or withdrawn after being included in a company's proxy statement (usually following engagement with the company). The data on submitted proposals understates the number of proposals actually submitted, as it generally does not include proposals that were submitted and then withdrawn unless either the proponent or the company voluntarily reported the proposal to ISS or on its website.

For a discussion of U.S. proxy contests and other shareholder activist campaigns, see our publication, dated December 20, 2021, entitled "[Review and Analysis of 2021 U.S. Shareholder Activism and Activist Settlement Agreements](#)."

More generally, for a comprehensive discussion of U.S. public company governance, disclosure and compensation, see the [Public Company Deskbook: Complying with Federal Governance and Disclosure Requirements](#) (Practising Law Institute) by our colleagues Bob Buckholz and Marc Trevino, available at 1-800-260-4754 (1-212-824-5700 from outside the United States) or <http://www.pli.edu>.

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<sup>1</sup> Certain proxy advisory firms, including ISS, publish voting policies on an annual basis. Institutional investors, such as Blackrock or Vanguard, also publish voting policies each proxy season. The 2022 voting policies of some of the most prominent players are available at: <https://www.issgovernance.com/policy-gateway/voting-policies/> (ISS); <https://www.glasslewis.com/voting-policies-current/> (Glass Lewis); <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf> (BlackRock); [Investment Stewardship reports and policies \(vanguard.com\)](#) (Vanguard); <https://www.ssga.com/library-content/pdfs/ic/proxy-voting-and-engagement-guidelines-us-canada.pdf> (State Street).

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## PART 1. RULE 14A-8 SHAREHOLDER PROPOSALS

### A. OVERVIEW OF SHAREHOLDER PROPOSALS

In the ten years we have been publishing our annual proxy season review, there has been a generally upward trend in the number of Rule 14a-8 proposals S&P Composite 1500 companies face each proxy season, a trend which has intensified in recent years. Following a record-breaking number of proposals in 2021, there were 797 submissions in H1 2022, compared to 733 in H1 2021 (and roughly 550 in H1 2012).<sup>2</sup> There has been a shift, however, in the focus of shareholder proposals from governance topics to environmental and social/political topics (“ESP”).<sup>3</sup> S&P Composite 1500 companies are now receiving far more ESP proposals (503 submitted in H1 2022 compared to 220 in H1 2012 and 408 in H1 2021), while the number of governance submissions in H1 2022 remained similar to H1 2012 (and declined from 2021). As a result, proposals on ESP now represent a much larger portion of total submissions, surging to 63% of submissions after reaching a majority of submitted proposals for the first time in the 2021 proxy season, driven by a 38% year-over-year (H1 2021 vs. H1 2022) increase in environmental proposals.

It is clear that the growing environmental, social and governance emphasis of proponents and other shareholders has altered proxy season engagement between shareholders and their investors over the course of the last decade. This year the SEC also had a significant impact on submission and voting trends. Notably companies had a significantly lower likelihood of obtaining no-action relief on ESP proposals following the SEC’s release of Staff Legal Bulletin No. 14L (“SLB No. 14L”, further discussed in Section H). For the first time, we observed that a majority of ESP submissions reached a vote. With institutional investors expressing concern over the increasingly prescriptive ESP proposals that went to a vote this year, support on ESP proposals decreased after steadily rising throughout the last decade, reaching the lowest average percentage of votes cast since 2018 (dropping to 28% in H1 2022 after increasing from 18% in H1 2012 to a record high of 32% in H1 2021). We expect the SEC’s extensive rulemaking on environmental, social and governance issues, as well as the efforts of other federal and state regulators and lawmakers on these topics, to have an even greater impact on submission, voting and engagement trends in future proxy seasons, as further discussed below.

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<sup>2</sup> Unless otherwise noted, in the tables throughout this publication, we present H1 2022 and full year 2021 data in tables throughout this publication for completeness, but in the discussion, we generally assess year-over-year changes by comparing H1 2022 and H1 2021 data for consistency.

When we refer to a proposal as “passing,” we mean that it received a majority of votes cast, regardless of whether this is the threshold for shareholder action under state law or the company’s organizational documents. We refer to proposals that have been excluded through the SEC no-action process as “excluded”. Unless stated otherwise, we refer to proposals withdrawn by the proponent, as well as proposals which are not presented by the proponent at the shareholder meeting, as “withdrawn”.

<sup>3</sup> We track proposals on ESP and governance proposals separately in order to distinguish the trends in each category, which have meaningfully diverged over the years as noted above.

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The following table summarizes the Rule 14a-8 shareholder proposals submitted in full-year 2021 and 2022 year-to-date, the number voted on and the rate at which they passed:

<i>Type of Proposal</i>	<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>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>
<b>Social/Political</b>	<b>344</b>	<b>323</b>	<b>196</b>	<b>135</b>	<b>26%<sup>4</sup></b>	<b>30%</b>	<b>21</b>	<b>21</b>
<i>Social Capital Management<sup>5</sup></i>	<b>147</b>	131	<b>109</b>	61	<b>21%</b>	18%	<b>10</b>	1
<i>Human Capital Management</i>	<b>99</b>	119	<b>38</b>	32	<b>33%</b>	39%	<b>6</b>	10
<i>Employee-Related DEI</i>	<b>47</b>	99	<b>13</b>	23	<b>32%</b>	41%	<b>2</b>	7
<i>Other<sup>6</sup></i>	<b>52</b>	20	<b>25</b>	9	<b>33%</b>	32%	<b>4</b>	3
<i>Political Spending/Lobbying</i>	<b>98</b>	73	<b>49</b>	42	<b>32%</b>	41%	<b>5</b>	10
<b>Governance</b>	<b>247</b>	<b>309</b>	<b>193</b>	<b>224</b>	<b>35%<sup>7</sup></b>	<b>40%</b>	<b>23</b>	<b>46</b>
<i>Structural Governance</i>	<b>163</b>	217	<b>140</b>	168	<b>38%</b>	45%	<b>22</b>	42
<i>Special Meetings</i>	<b>105</b>	36	<b>102</b>	30	<b>36%</b>	38%	<b>9</b>	5
<i>Proxy Access</i>	<b>18</b>	33	<b>9</b>	26	<b>29%</b>	32%	<b>1</b>	0
<i>Written Consent</i>	<b>7</b>	77	<b>5</b>	69	<b>36%</b>	41%	<b>1</b>	10
<i>Other Structural<sup>8</sup></i>	<b>33</b>	71	<b>24</b>	43	<b>48%</b>	62%	<b>11</b>	27
<i>Board Composition</i>	<b>60</b>	84	<b>45</b>	54	<b>25%</b>	28%	<b>0</b>	3
<i>Misc. Governance<sup>9</sup></i>	<b>24</b>	8	<b>8</b>	2	<b>30%</b>	41%	<b>1</b>	1
<b>Environmental</b>	<b>159</b>	130	<b>58</b>	39	<b>35%<sup>10</sup></b>	<b>43%</b>	<b>14</b>	<b>14</b>
<b>Compensation</b>	<b>47</b>	51	<b>34</b>	25	<b>30%</b>	<b>22%</b>	<b>3</b>	<b>1</b>
<b>Total</b>	<b>797</b>	<b>813</b>	<b>481</b>	<b>423</b>				

<sup>4</sup> Social/political proposals identifiable as submitted by so-called “anti-ESG” proponents, further discussed in Section B, received an average of 8% of votes cast. Not counting these proposals, shareholder support for social/political proposals averaged 29% of votes cast in H1 2022 (“anti-ESG” social/political proposals rarely reached a vote in 2021 and had no impact on average shareholder support).

<sup>5</sup> Social capital management submissions are proposals related to corporate impact on stakeholders other than employees and shareholders.

<sup>6</sup> The 2022 non-DEI HCM proposals included mandatory arbitration of employee claims, harassment issues, paid sick leave, employee safety and employee involvement in risk oversight.

<sup>7</sup> Governance proposals identifiable as submitted by “anti-ESG” proponents received an average of 18% of votes cast. Not counting these proposals, shareholder support for governance proposals averaged 36% of votes cast in H1 2022 (no “anti-ESG” governance proposals reached a vote in 2021).

<sup>8</sup> The “Other Structural Governance” proposals this year included a request to require nomination of more director nominees than there are open seats at each election at Amazon, as well as requests for companies to consider and assess the effectiveness of the board’s oversight of certain business functions.

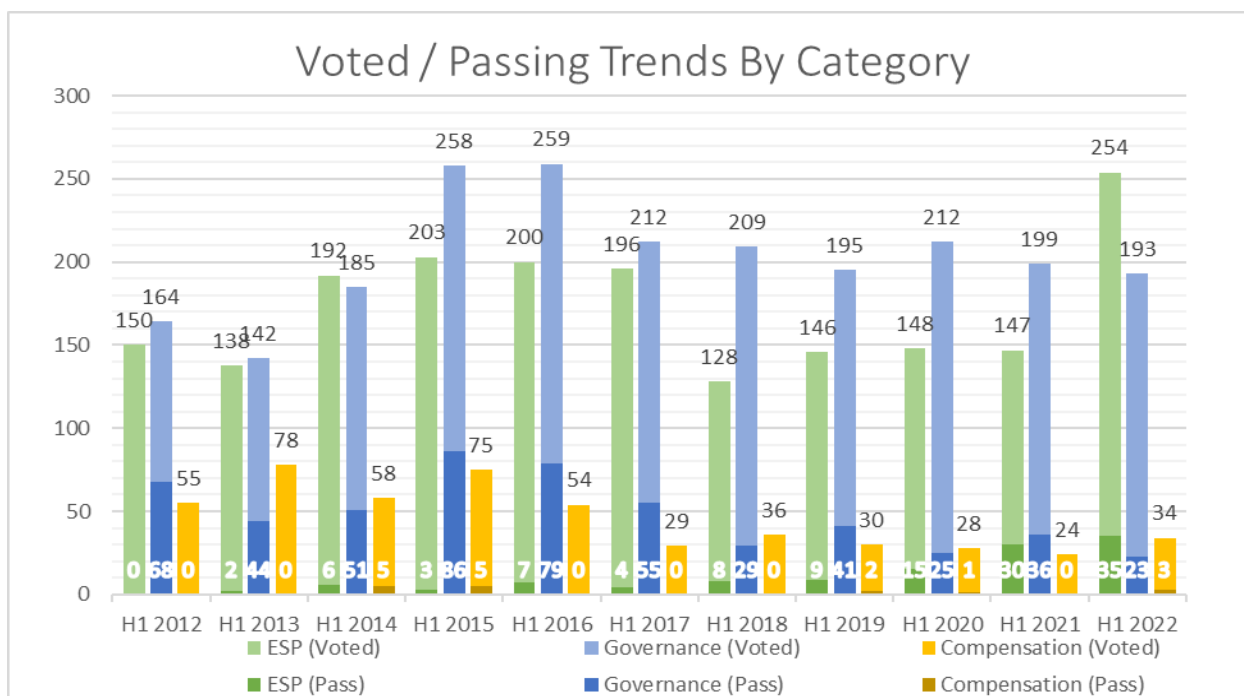
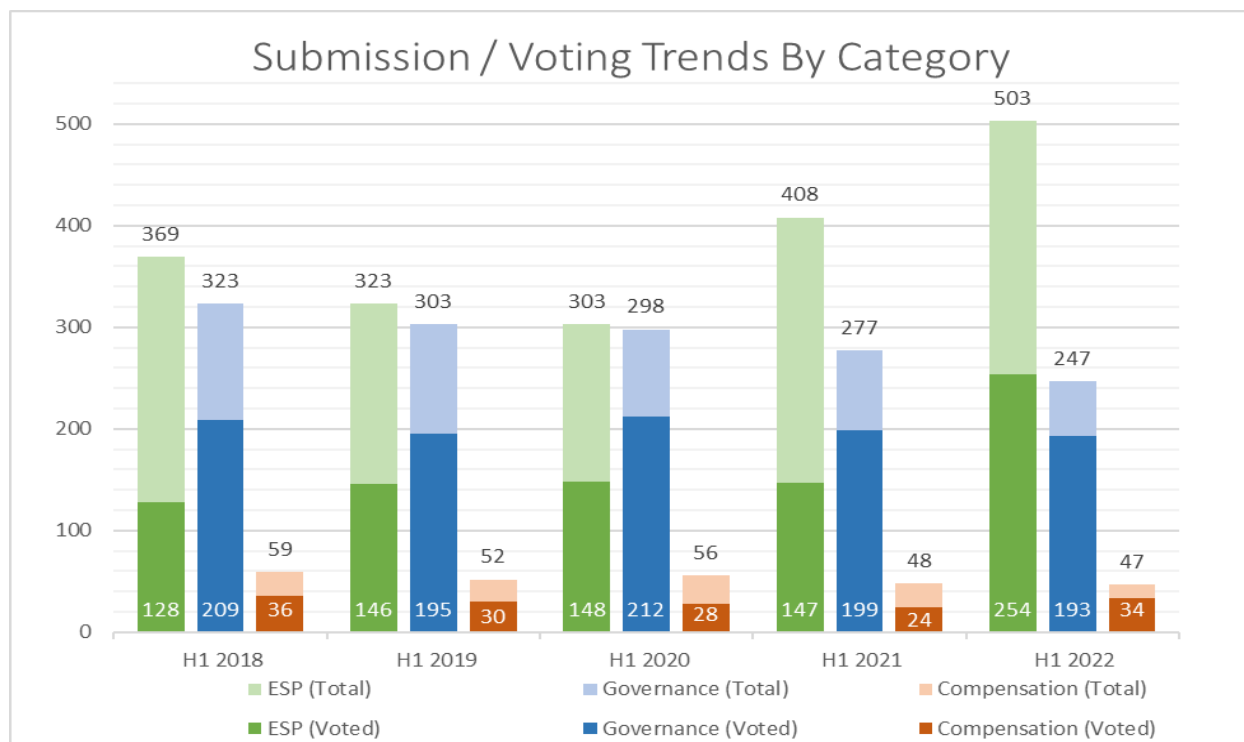
<sup>9</sup> The “Miscellaneous Governance” proposals this year included a request for a virtual shareholder meeting, a proposal asking for dividends to take the form of NFTs (Gamestop), and requests for pharmaceutical companies to monitor or report on anticompetitive pricing behavior (e.g., Pfizer, AbbVie, Eli Lilly and Gilead Sciences).

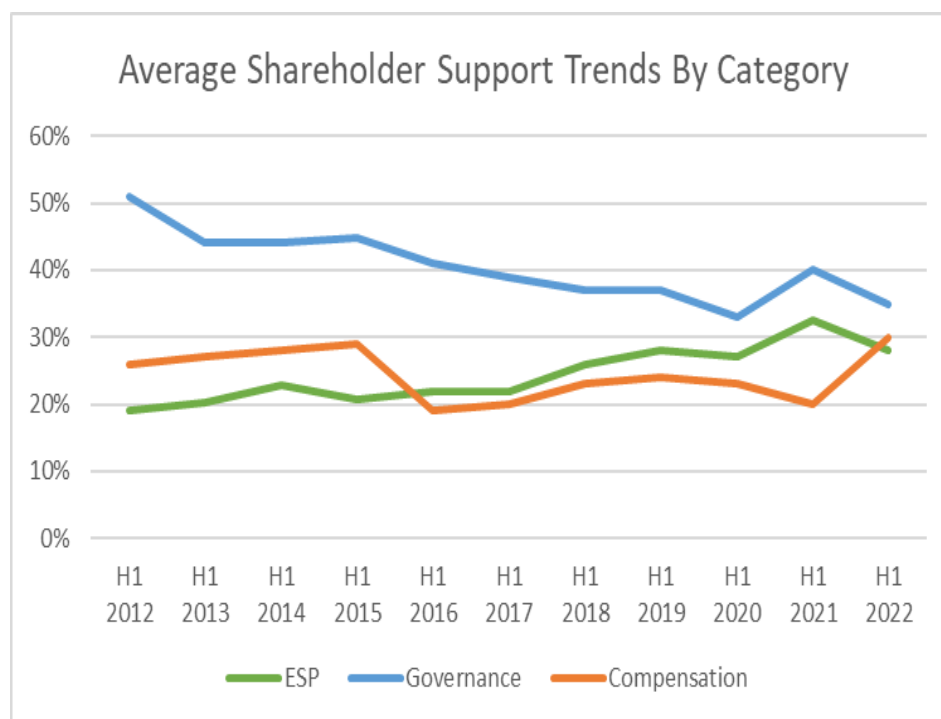
<sup>10</sup> Only one environmental proposal identifiable as submitted by “anti-ESG” proponents reached a vote, receiving 2% of votes cast. This proposal had no impact on average shareholder support for environmental proposals in H1 2022 (without “anti-ESG” proposals, shareholder support for environmental proposals averaged 56% in 2021).



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The following charts illustrate trends in submitted, voted and passing Rule 14a-8 shareholder proposals since we began tracking the relevant data, as well as changes in shareholder support:





On July 13, 2022, the SEC proposed amendments to Rules 14a-8(i)(10), (i)(11) and (i)(12) (“Rule 14a-8 Proposed Amendments”) that would significantly narrow the standards for exclusion of proposals on grounds of substantial implementation, duplication and resubmission exclusions.<sup>11</sup> If adopted as proposed, the Rule 14a-8 Proposed Amendments would not only result in a further increase in voted proposals but also is likely to mean that companies will face a larger number of submissions, more granular proposals, multiple proposals on the same topics at each meeting and similar proposals year after year.<sup>12</sup>

## B. WHO MAKES SHAREHOLDER PROPOSALS

A small group of prolific proponents continued to drive submissions to U.S. S&P Composite 1500 companies. Once again, the top 10 proponents accounted for over 60% of proposals submitted.

<sup>11</sup> For a more detailed discussion of these proposed amendments, see our publication, dated July 21, 2022, entitled “[SEC Proposes to Significantly Narrow Bases for Excluding Shareholder Proposals Under Rule 14a-8.](#)”

<sup>12</sup> Due to stakeholders’ scrutiny on ESP issues in recent years, high profile companies are already receiving a large number of proposals (particularly ESP proposals) each year. For example, Amazon, which faced the largest number of submissions in 2022, received 23 proposals in H1 2022 (with 18 ESP submissions) compared to 20 overall proposals in 2021 (with 16 ESP submissions). Topics that have captured the media attention tend to drive the ESP proposals submitted—for example, a number of ESP proposals at Amazon referenced or otherwise related to recent media coverage of working conditions for frontline workers.

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The following table summarizes the submissions from the top shareholder proponents in 2022:

	<i>Primary or Secondary Filers</i>	<i>Total</i>		<i>Social/Political</i>		<i>Governance</i>		<i>Environmental</i>		<i>Compensation</i>	
		<i>H1 2022</i>	<i>H1 2021</i>	<i>H1 2022</i>	<i>H1 2021</i>	<i>H1 2022</i>	<i>H1 2021</i>	<i>H1 2022</i>	<i>H1 2021</i>	<i>H1 2022</i>	<i>H1 2021</i>
1	John Chevedden	155	168	13	14	130	153	0	0	12	1
2	As You Sow	81	76	32	33	1	0	46	41	2	2
3	James McRitchie/Myra Young	49	50	14	24	15	24	7	1	13	1
	Kenneth Steiner	49	51	1	0	45	51	0	0	3	0
5	Mercy Investment Services	41	26	18	11	5	2	18	11	0	2
6	NYC/NYS Common Retirement Fund	36	58	19	34	4	9	9	7	4	8
7	Green Century Capital Management	30	21	4	1	0	0	26	20	0	0
8	National Legal and Policy Center	25	-	17	-	8	-	0	-	0	-
9	National Center for Public Policy Research	22	18	21	15	1	3	0	0	0	0
10	Trillium Asset Management	20	18	9	11	1	2	10	3	0	2

- Individuals.** During the 2022 proxy season, the most prolific proponents were the same individual investors that have been active for a number of years—John Chevedden, Kenneth Steiner, James McRitchie, and Myra Young. Collectively, these four proponents, individually and as co-filers with other organizations and individuals, submitted 253 proposals, or 32% of all submissions this year. This group has traditionally focused on governance proposals. Although around 75% of their submissions in 2022 were governance-related, around 15% of proposals from this group were social proposals, as was the case in 2021, and these proponents submitted for the first time a meaningful number of proposals on compensation (focusing on CEO pay-ratio) issues.
- Social Investment Entities.** Social investors, including asset management or advisory institutions with a mandate to make “socially responsible” investments or advance social causes, continued to be the main proponents of ESP proposals, submitting 221 ESP proposals, or 44% of all ESP-related proposals. As You Sow and Green Century Capital Management were the most prolific environmental proponents in 2022 and submitted 45% of all environmental proposals. Although the entities that have submitted high numbers of social proposals in recent years (e.g., Trillium Asset Management and Arjuna Capital) remained active in engaging with companies on social topics, their Rule 14a-8 proposals represented a smaller portion of our data this year than As You Sow and Green Century, perhaps because Trillium and Arjuna withdrew more often and before their submissions were included in proxy materials or reported to ISS.
- Public Pension Funds.** Public-sector pension funds and related entities continued to be among the most prolific proponents on social issues, focusing in particular on human capital management and social capital management issues. The New York City and State retirement funds once again submitted the largest number of proposals among public pension funds (although the total number of submissions decreased compared to prior years), focusing on racial equity audits and political contribution disclosures this year. In contrast, California public pension funds such as CalPERS and CalSTRS, which have recently played important roles in ESG-related shareholder activism and urged the SEC to expand its climate-related proposal to require even more disclosures, once again submitted only a handful of proposals, focused on climate-related issues.
- So-Called “Anti-ESG” Proponents.** There was a notable increase in the number of proposals submitted by so-called “anti-ESG” entities (i.e., entities that have self-identified or been identified



by the media as “anti-ESG” for expressing concerns with commonly used ESG investment criteria), as well as individuals with known affiliation to these entities. This year, 54 proposals were identifiable as being submitted by these proponents, compared to 25 in full-year 2021). The National Center for Public Policy Research, which had been focusing on ideological diversity on the board for many years, continued to be one of the most prolific “anti-ESG” proponents, focusing on workplace diversity metrics, training and policies. In addition, another politically conservative group, the National Legal and Policy Center, which in recent years has focused on investigating potential corruption by Democratic politicians and Black Lives Matter leaders, submitted a meaningful number of proposals for the first time, including proposals on ideological board diversity and use of child labor in connection with electric vehicles.<sup>13</sup> In 2022, “anti-ESG” proponents focused on demanding that companies assess the costs and benefits of ESP activities (e.g., climate-related activities, civil rights and racial equity audits), and report on their lobbying payments and policies as well as charitable contributions. In response to some companies’ commitments to abortion access after the Supreme Court’s overturned *Roe v. Wade*, some “anti-ESG” entities have already indicated that they will submit proposals on the topic of abortion.

Out of the 54 proposals identifiable as being submitted by an “anti-ESG” proponent this year, 43 went to a vote and received average shareholder support of 9%. Companies were much more successful in excluding these proposals (including on “ordinary business” grounds), receiving no-action relief in 50% of the instances where relief was requested (compared to a 37% success rate across all proposals). Companies also had a 50% success rate for excluding social/political proposals from “anti-ESG” proponents, compared to 26% across all social/political proposals considered by the SEC. In addition, as further discussed below, this year, in cases where the same company received proposals addressing the same issue (e.g., civil rights audit) from both a social investment entity and an “anti-ESG” proponent, the “anti-ESG” proponent’s proposal received significantly lower support.

- **Religious Organizations.** Religious organizations continued to focus on ESP issues. They submitted a total of 73 proposals this year, representing a 40% increase from the prior year. Many of the active religious organizations were affiliated with the faith-based investor coalition, the Interfaith Center on Corporate Responsibility (ICCR), and they often co-filed proposals. Among the ICCR affiliates, proposals on civil and human rights, human capital management and climate-related issues were the most commonly submitted proposals. In addition to the healthcare, financial services and technology sectors commonly targeted by ICCR affiliates in previous years, the retail and consumer goods industry also received a significant number of proposals from these organizations in 2022. Mercy Investment Services was the most prolific religious organization in terms of submission.

### C. TARGETS OF SHAREHOLDER PROPOSALS

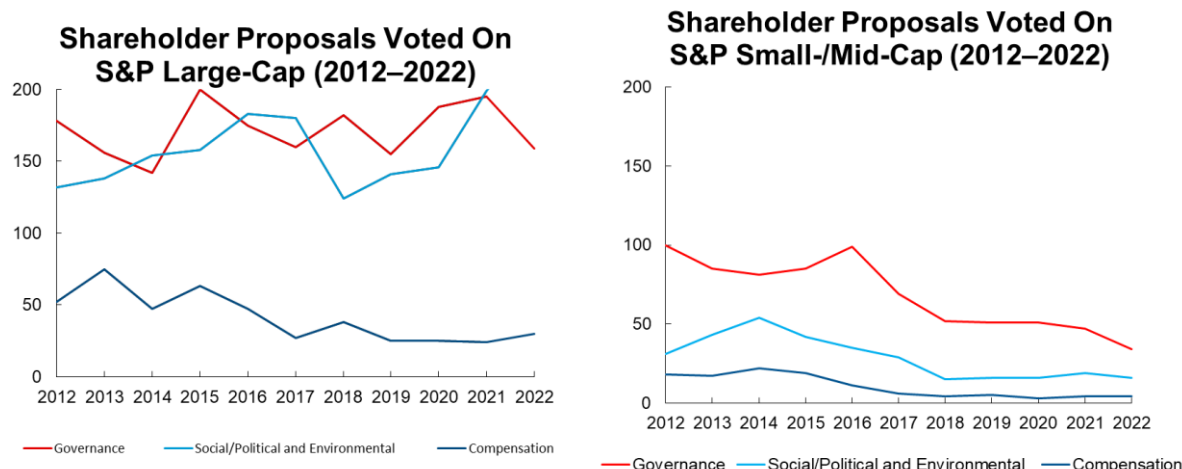
Traditionally, large-cap companies have received the vast majority of shareholder proposals.<sup>14</sup> In 2022 so far, S&P 500 companies received 89% of proposals voted on, on par with 2021 (85%). The following

<sup>13</sup> In the 2022 proxy season, after focusing on board ideological diversity in prior years, the National Center for Public Policy Research (NCCPR) submitted four proposals requesting the publication of employee training materials, and two proposals requesting a report on the risks of omitting viewpoint and ideology from target company’s EEO policies. Even though companies were generally less successful in excluding other social/political proposals on these bases in 2022, the SEC concurred in the exclusion of three of the training material proposals (at American Express, Verizon and John Deere, with the Starbucks proposal being excluded on the basis of substantial implementation) and one of the EEO policy proposals (at BlackRock) on the basis of ordinary business. One of the EEO policy proposals reached a vote (at Comcast) and received only 1.4% support.

<sup>14</sup> In this publication, we use “large-cap” to mean U.S. S&P 500 companies; “mid-cap” to mean the next largest U.S. S&P 400 companies; and “small-cap” to mean the next largest U.S. S&P 600 companies.

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graphs show the frequency of proposals, by category, voted on at large-cap companies compared to small- and mid-cap companies. Large-cap companies received a significantly higher number of proposals even though there are twice as many mid- and small-cap companies.



This year, retail and consumer goods companies, which represent only 7% of the S&P Composite 1500, received 18% of total submissions, outstripping all other industries. Companies in the healthcare/pharmaceutical and utilities and energy sectors, each of which also represent 7% of the S&P Composite 1500, received 15% and 14% of total submissions, respectively. Financial services companies, despite representing over 23% of the S&P Composite 1500, received 14% of total submissions. Companies in the technology and manufacturing sectors, which represent 12% and 10% of the S&P Composite 1500, respectively, each received 13% of total submissions. Proponents tended to focus on social issues in the retail/consumer goods, healthcare/pharmaceuticals and technology sectors, environmental issues in the utilities and energy sector, governance issues in the manufacturing sector and a mixture of governance and ESP issues in the financial services sector.

## D. SHAREHOLDER PROPOSALS ON SOCIAL/POLITICAL MATTERS

### 1. Overview

Over the last decade, S&P Composite 1500 companies have received social and political proposals in increasing numbers. As a result of the steady uptick in the number of human capital management proposals over the last three years, as well as the surge of social capital management proposals in 2021 and 2022, the number of social/political submissions in H1 2022 (344) has more than doubled the number of submissions in H1 2012. Last year, social/political proposals surpassed governance proposals in terms of number of submissions. Not only were social/political proposals the largest category of submissions in H1 2022, the total number increased by a further 17% compared to H1 2021, driven by an 81% growth in the number of submissions on civil rights, human rights and racial equity impact, offset by a 47% decline in submissions on workforce DEI issues. While the prevalence and subject of social

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proposals have changed significantly over the last decade as proponents react to social justice movements, SEC rulemaking and other social, economic, political and legal developments, the number and focus of political proposals have remained relatively constant. Since the Supreme Court's 2010 decision in *Citizens United*, proposals demanding corporate transparency on political expenditures and/or lobbying costs had represented the plurality of social/political proposals for many years. These proposals continue to be submitted in large numbers, but represent a smaller percentage of social/political proposals today due to the growth in social proposals.

Since at least the 2018 proxy season, most social/political proposals have either been settled, omitted or otherwise resolved before going to a shareholder vote. This year, however, the majority of social/political submissions reached a vote, increasing by a staggering 72% compared to the same period last year. The high number of voted social/political proposals appears to be the result of (1) a 48% drop in the no-action success rate in this category following the SEC's implementation of SLB No. 14L, which contributed to only 8% of social/political submissions being excluded through the SEC no-action process (compared to 14% in 2021), and (2) proponents being 1.3 times less likely to withdraw social/political proposals this year (26% of social/political submissions were withdrawn this year, compared to 35% in 2021), likely due to companies and proponents being less willing to reach settlement.

An aggregate comparison between H1 2022 and full-year 2021 of shareholder proposals that passed and of average shareholder support obscures a number of conflicting trends. The total number of passing proposals did not increase, despite a 45% increase in shareholder proposals voted on, but this reflects a sharp increase in passed proposals on civil rights, human rights and social justice proposals (10 in H1 2022 compared to one in full-year 2021) offset by a sharp decline in passing proposals on political spending/lobbying (five in H1 2022 compared to 10 in full-year 2021) and workforce diversity (none in H1 2022 compared to four in full-year 2021).

Likewise, a numerical decline in average shareholder support, from 30% in full-year 2021 to 26% in H1 2022, reflects both the actual support for each proposal and the relative percentage of each proposal in relation to the total of proposals. Among the most impactful changes were a decline in support for workforce diversity proposals (from 45% to 22%) and EEO-1 reporting (from 70% to 46%), offset to some extent by increased—albeit still small—support for charitable contributions (from 1% to 6%) and animal rights (from 10% to 18%) and increased support for wage gap reporting (24% to 38%). The increased number of voted-on social proposals from “anti-ESG” proponents meaningfully contributed to the year-over-year decrease in shareholder support. Not counting the “anti-ESG” proposals, average shareholder support in H1 2022 (29%) was much closer to full-year 2021 levels (30%).

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	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
<b>Social Capital Management</b>	<b>147</b>	131	<b>109</b>	61	<b>21%</b>	18%	<b>10</b>	1
<i>Civil Rights, Human Rights, Racial Justice</i>	<b>78</b>	47	<b>55</b>	23	<b>29%</b>	30%	<b>10</b>	1
<i>Charitable Contributions</i>	<b>14</b>	7	<b>13</b>	1	<b>6%</b>	1%	<b>0</b>	0
<i>Food Supply Chain Animal Rights<sup>15</sup></i>	<b>9</b>	6	<b>10</b>	2	<b>18%</b>	10%	<b>0</b>	0
<i>Access to COVID Products</i>	<b>8</b>	6	<b>5</b>	3	<b>28%</b>	31%	<b>0</b>	0
<i>Corp. Purpose</i>	<b>3</b>	31	<b>3</b>	17	<b>2%</b>	3%	<b>0</b>	0
<i>Other Social Capital Management<sup>16</sup></i>	<b>35</b>	34	<b>23</b>	15	<b>14%</b>	16%	<b>0</b>	0
<b>Human Capital Management</b>	<b>99</b>	119	<b>38</b>	32	<b>33%</b>	39%	<b>6</b>	10
<i>Non-DEI</i>	<b>52</b>	20	<b>25</b>	9	<b>33%</b>	32%	<b>4</b>	3
<i>Harassment</i>	<b>15</b>	7	<b>12</b>	3	<b>46%</b>	50%	<b>4</b>	3
<i>Employee Health and Safety</i>	<b>11</b>	7	<b>4</b>	0	<b>28%</b>	-	<b>0</b>	0
<i>Reproductive Rights</i>	<b>4</b>	2	<b>3</b>	0	<b>25%</b>	-	<b>0</b>	-
<i>Other HCM<sup>17</sup></i>	<b>22</b>	4	<b>6</b>	6	<b>22%</b>	20%	<b>0</b>	0
<i>Employee-Related DEI</i>	<b>47</b>	99	<b>13</b>	23	<b>25%</b>	55%	<b>2</b>	7
<i>Workforce Diversity</i>	<b>29</b>	44	<b>6</b>	12	<b>22%</b>	45%	<b>0</b>	5
<i>Wage Gap</i>	<b>10</b>	10	<b>6</b>	7	<b>38%</b>	24%	<b>2</b>	0
<i>EEO-1 Reporting</i>	<b>8</b>	45	<b>1</b>	3	<b>46%</b>	70%	<b>0</b>	2
<b>Political Spending/Lobbying<sup>18</sup></b>	<b>98</b>	73	<b>49</b>	42	<b>32%</b>	42%	<b>5</b>	10
<b>Total</b>	<b>344</b>	323	<b>196</b>	135				

<sup>15</sup> The 2022 animal rights proposals included proposals on the use of gestation crates in pork supply chains. These were generally brought by the Humane Society, but addressed similar issues as those involved in the high-profile proxy fights Carl Icahn launched against McDonald's and Kroger this year.

<sup>16</sup> The "Other Social Capital Management" proposals this year generally addressed company-specific issues, such as misinformation and customer privacy-related proposal at Meta, Yelp and Alphabet, procurement of down feathers at RH, use of talc in baby powder at Johnson & Johnson, and reporting on operations in Communist China and child labor issues in connection with electric vehicles at a number of companies (from Steven Milloy (who has been affiliated with the "anti-ESG" organization Burn More Coal) and/or the National Legal and Policy Center).

<sup>17</sup> The "Other HCM" proposals this year included the publication of employee training materials proposals submitted by the National Legal and Policy Center, disclosure of the impact of low wages and the use of temporary workers or independent contractors, reporting on business risks related to the increased labor market pressure resulting from the so-called "Great Resignation", and alignment between company practices and codes of conduct/community standards.

<sup>18</sup> The proposals in this category do not include environmental lobbying proposals, which we have categorized as environmental proposals. See Section F.

## 2. Social Capital Management

Social capital management submissions, which relate to corporate impact on stakeholders other than employees and shareholders, increased by 20% from H1 2021 to H1 2022. The year-over-year increase primarily resulted from a substantial increase in civil rights, human rights and racial justice proposals (78 in H1 2022 compared to 47 in full-year 2021), which received relatively robust shareholder support in both H1 2022 and full-year 2021 (averages of 29% and of 30%, respectively). The increase in civil rights, human rights and racial justice proposals, as well as new proposals related to disclosures on the impacts of COVID-19, more than offset a drop in corporate purpose proposals<sup>19</sup> (three in H1 2022 compared to 31 in full-year 2021), which received low support (average of 3%) in 2021.

### a. Racial Equity Audits and Civil Rights Audits

Racial equity audit proposals were submitted in significant numbers for the first time in 2021, with 12 companies receiving such proposals last year. These proposals gained meaningful support, encouraging proponents to submit both more of the racial equity audit proposals and a topically broader variation—civil right audit proposals—in 2022.

After the 2021 proxy season, ISS included recommendations on racial and civil equity audit proposals in its 2022 voting guidelines, noting that it will make recommendations on racial equity and civil rights audit proposals on a case-by-case basis, taking into account, among other factors, the company's established process or framework for addressing racial inequity and discrimination, recent public statement(s) on racial justice efforts, engagement with impacted communities, stakeholders and civil rights experts, track record of racial justice measures and outreach, controversy, litigation or regulatory actions related to racial inequity or discrimination, and alignment with market norms on civil rights and racial or ethnic diversity.<sup>20</sup> In addition, State Street has included racial equity and civil rights audits in its January 2022 Guidance on Diversity Disclosures and Practices. The guidance states that State Street will vote against such proposals at "companies that clearly and publicly articulate (1) the board's process for overseeing risks related to racial equity and/or civil rights (e.g., committee responsible, frequency of discussions, etc.); (2) the specific risks that the board oversees related to the impact of a company's products, practices, and services on underrepresented communities inside and outside the organization; and (3) the company's plan and processes to mitigate these risks," but will support these proposals at companies that do not adequately disclose the board's process for overseeing risks related to racial equity and/or civil rights, have no plan in place to address these risks, and/or cannot identify the relevant risks.<sup>21</sup> Vanguard

<sup>19</sup> These are proposals requesting companies to publicly adopt a "corporate purpose" or become a public benefit corporation.

<sup>20</sup> See ISS's 2022 Voting Guidelines, available at <https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf>, p. 65.

<sup>21</sup> State Street's 2022 guidance is available at <https://www.ssga.com/library-content/pdfs/asset-stewardship/racial-diversity-guidance-article.pdf>.

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has also stated that it takes a case-by-case approach when evaluating third-party racial equity audit proposals, looking closely at “the facts and circumstances at each company that receives a civil rights or racial equity audit proposal.”<sup>22</sup>

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 Service Employees International Union submitted eight of these proposals, followed by New York State Common Retirement Fund (four submissions) and Trillium’s ESG Global Equity Fund (two submissions). The SEC rejected all no-action requests on these proposals. Although 16 of these proposals were withdrawn after engagement between companies and proponents, 14 proposals made it to a vote and shareholder support ranged from a low of 18% (at Comcast) to a high of 64% (at Maximus), with three proposals passing (at Johnson & Johnson (63%) and Home Depot (63%), in addition to Maximus).

In addition to racial equity proposals, proponents submitted civil rights audit proposals in H1 2022 at companies across the industry spectrum. These proposals addressed issues beyond racial equity (including gender equality, pay equity and human rights impacts), although proponents have generally remained vague on the contours of the requested analysis. For example, at Apple, the Service Employees International Union broadly requested that the company analyze “policies and practices on the civil rights of company stakeholders, above and beyond legal and regulatory matters,” and “provide recommendations for improving the company’s civil rights impact” and noted that “[i]nput from civil rights organizations, employees, and customers should be considered in determining the specific matters to be analyzed.”<sup>23</sup> Similar to racial equity audit proposals, the SEC rejected all no-action requests (generally based on ordinary business or substantial implementation) with respect to civil rights audit proposals.

Civil rights audit proposals illustrate the significance of a proponent’s stated policy agenda on voting outcomes, which is a significant development this season. Of the 17 civil rights audit proposals submitted in H1 2022, nine were brought by “anti-ESG” proponent NCPPR. NCPPR’s civil rights audit proposals, which were similar to other civil rights audit proposals but specifically urged companies to “not compound error with bias by relying only on left-leaning organizations” in conducting the audit, received very low shareholder support, ranging from 0.3% of votes cast at Meta to 4% at AT&T. In contrast, shareholder support for the pro-ESP proponents’ civil rights audit proposals ranged from 17% (at Intel) to 62% (at Altria), with four proposals passing (at Stericycle (61%), McDonald’s (56%) and Apple (54%), in addition

<sup>22</sup> Allie Rutherford, *Engaging with Vanguard*, Harvard Law School Forum on Corporate Governance (May 13, 2022), available at <https://corpgov.law.harvard.edu/2022/05/13/engaging-with-vanguard-2/>. See also, Vanguard, (May 2021), available at [https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/perspectives-and-commentary/INVDEIS\\_052021.pdf](https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/perspectives-and-commentary/INVDEIS_052021.pdf) (stating that Vanguard “first look[s] for whether the proposal addresses a gap in the company’s existing practices or disclosures for financially material risks, then assess whether closing that gap is best addressed by an audit” and “[w]here a gap in addressing and disclosing financially material risks exists, either additional disclosure or a shareholder request for third-party involvement may be warranted”).

<sup>23</sup> See Apple Inc. Proxy Statement (Form 14A), at 88 (January 6, 2022).



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to Altria).<sup>24</sup> Notably, although shareholders at Johnson & Johnson supported the racial equity audit proposal from Mercy Investment Services with 63% of votes cast, the civil rights audit proposal from NCPPR on the same ballot received only 2.7% of votes cast notwithstanding its similar content and the similar content of management's recommendation. For next season, to the extent a proponent's identity and policy goals are not reflected in the text of the proposal itself, management should consider whether it would be appropriate to include that information—which may be influential to voting outcomes—in their recommendations.

### **b. Human Rights Due Diligence**

Eight companies received proposals to report on human rights due diligence processes in H1 2022, down from 17 in H1 2021. Religious organizations submitted all but one of these proposals this year, with shareholder support ranging from 21% (at Kroger) to 69% (at Sturm, Ruger & Company), with the second highest level of support at Amazon (45%). The other proposal was submitted by the National Legal and Policy Center, an “anti-ESG” proponent, at Disney in connection with the release of Disney's live-action *Mulan* film in certain regions of China.<sup>25</sup> The National Legal and Policy Center's proposal received relatively high support (37%).

In March 2022, the European Commission released a draft regulation on human rights due diligence as a part of its sustainable corporate governance initiative. The draft regulation requires large EU companies and non-European companies with significant business in Europe to assess human rights impacts throughout their own operations and across their supply chains, as well as to take action to prevent, mitigate and remedy identified human rights issues.<sup>26</sup> In December 2021, President Biden signed the Uyghur Forced Labor Prevention Act into law, which is intended to prevent American entities from funding forced labor among ethnic minorities in China's Xinjiang Uyghur Autonomous Region. In response to these and other similar requirements being adopted or considered around the world and across various U.S. states (e.g., New York and California), shareholders may be more likely to demand transparency on supply chain human rights due diligence in the future.

### **c. Charitable Contributions**

This year, “anti-ESG” proponents—including NCPPR, the National Legal and Policy Center and

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<sup>24</sup> See Meta Platform, Inc.'s Proxy Statement (Form 14A), at 84 (April 8, 2022).

<sup>25</sup> See The Walt Disney Company Proxy Statement (Form 14A), at 79 (January 19, 2022). As noted above in Note 16, the National Legal and Policy Center also submitted other proposals this year that more broadly requested disclosure of operations in China.

<sup>26</sup> For a more detailed discussion of these proposed amendments, see our publication, dated July 21, 2022, entitled [ESG Update: EU Business and Human Rights Developments](#).

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Thomas Strobhar<sup>27</sup>—submitted 14 proposals (mainly at financial services and retail companies) to report on their charitable contributions. These proposals were generally phrased in a neutral manner to request disclosure of all monetary and non-monetary charitable contribution above a low threshold (e.g., \$999), as well as corporate policies and procedures for charitable contributions. However, based on the stated policy goals of these proponents, part of the goal in transparency relates to corporate contributions to charities that advance reproductive rights. The 2022 corporate contribution proposals failed to attract shareholder support, with all but one proposal (at Wells Fargo, with 26% of votes cast) receiving below 10% of votes cast.

### **d. Public Access to COVID-19 Products**

Proponents (mainly Oxfam and religious organizations) continued to submit proposals related to COVID-19 vaccine access. Whereas the 2021 proposals focused on equitable vaccine access, this year, proponents asked manufacturers of COVID-19 vaccines and other COVID-19 products to share (or report on the feasibility of sharing) their intellectual property. Pfizer, Moderna, and Johnson & Johnson, the manufacturers of the three most widely used COVID-19 vaccines in the United States, received seven of the eight proposals on this topic (the other proposal was at Merck). These companies tried to exclude six of the eight proposals, but failed to receive no-action relief. Five of these proposals reached a vote, receiving 28% of votes cast on average.

### **3. Human Capital Management**

Human capital management was a key issue for companies in 2021, in light of employee retention issues and other employee-related challenges in the aftermath of the COVID-19 pandemic. The Department of Labor found that a record 4.3 million U.S. workers quit their jobs in August 2021 alone,<sup>28</sup> with the number of resignations remaining unchanged in May 2022.<sup>29</sup> Against the backdrop of this “Great Resignation,” regulators, investors, employees and other stakeholders have heightened their scrutiny of employers’ human capital management practices and policies.

According to the SEC’s Fall 2022 agenda, the Commission is expecting to release its proposal for new human capital management disclosure requirements in October 2022. In June 2021, SEC Chair Gary Gensler stated that the new rules could require companies to disclose metrics such as workforce

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<sup>27</sup> According to his profile on [Catholic.com](https://www.catholic.com), Thomas Strobhar, is the chairman of Life Decisions, an organization that advocates against corporate donations to Planned Parenthood, and “is the author of over 70 shareholder resolutions concerning pornography, religious bigotry, fetal tissue research, abortifacient drugs, corporate donations to Planned Parenthood and other charities whose policies undermine marriage.”

<sup>28</sup> New York Times, U.S. Workers Quitting Their Jobs Hit a Record in August (Oct. 12, 2021), <https://www.nytimes.com/2021/10/12/business/economy/workers-quitting-august.html>.

<sup>29</sup> U.S. Bureau of Labor Statistics, Job Openings and Labor Turnover Summary (July 6, 2022), available at <https://www.bls.gov/news.release/jolts.nr0.htm>.

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turnover, skills and development training, compensation, benefits and workforce demographics including diversity, and health and safety.<sup>30</sup> SEC Commissioner Allison Herren Lee, who recently resigned, also suggested that the SEC could require companies to publicly disclose gender and diversity workforce data they provide in confidentially filed EEO-1 reports<sup>31</sup> and that the SEC “should be working with the [EEOC] to learn how the SEC might leverage the information companies send to the EEOC.”<sup>32</sup>

Perhaps in anticipation of new SEC requirements that would mandate workforce diversity, equity and inclusion (“DEI”) disclosures, proponents in 2022 submitted fewer proposals on employee-related DEI topics and instead focused on non-DEI factors that have been reported to contribute to the “Great Resignation”, such as harassment, inadequate paid sick leave and employee health and safety issues (further discussed below). In particular, proponents submitted fewer proposals requesting that companies voluntarily publish their EEO-1 reports<sup>33</sup> (8 in H1 2022 compared to 42 in H1 2021),<sup>34</sup> which is likely attributable to many larger issuers already having such disclosures available. This year all but one of the recipients of EEO-1 reporting proposals agreed to publish EEO-1 disclosures rather than allowing the proposal to go to a vote. Moreover, although the total number of workforce diversity proposals (29 in H1 2022 compared to 32 in H1 2021) remained similar to last year, a larger number of “anti-ESG” proposals that focused on the consideration of ideological diversity in a company’s employment practices were submitted in H1 2022 compared to 2021, which garnered low support and decreased the average shareholder support across this subcategory. Proponents did not submit any management diversity proposals (compared to 7 in H1 2021).

### a. Harassment

Between 2019 and 2021, proponents concerned with #MeToo issues focused on eliminating mandatory arbitration of employment-related claims. In February 2022, Congress passed the Ending Forced

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<sup>30</sup> Chair Gary Gensler, Prepared remarks at London City Week (June 23, 2021), *available at* <https://www.sec.gov/news/speech/gensler-speech-london-city-week-062321>.

<sup>31</sup> Bloomberg, SEC’s Lee Eyes Release of Workforce Diversity Data Sent to EEOC (June 22, 2021), *at* <https://news.bloomberglaw.com/securities-law/secs-lee-eyes-release-of-workforce-diversity-data-sent-to-eeoc>.

<sup>32</sup> In June 2022, the Working Group on Human Capital Accounting Disclosure, a group of former SEC Commissioners and academics, requested that the SEC require (1) disclosure in Management’s Discussion & Analysis (MD&A) on what portion of labor costs they view as an investment and why, (2) disclosure of a standardized matrix showing compensation along enumerated categories (e.g., salary, bonus, pension, stock awards, training, healthcare), and (3) disaggregation of the income statement to provide more detail on workforce costs. See the petition for rulemaking submitted by the Working Group on Human Capital Accounting Disclosure, *available at* <https://www.sec.gov/rules/petitions/2022/petn4-787.pdf>.

<sup>33</sup> The EEO-1 Component 1 report is a mandatory annual data collection that requires all U.S. private sector employers with 100 or more employees to submit demographic workforce data, including data by race/ethnicity, sex and job categories, to the U.S. Equal Employment Opportunity Commission (“EEOC”). While EEO data is collected on an individual company basis, it is only available to the public on an aggregated basis.

<sup>34</sup> Although proponents submitted a similar number of workforce diversity proposals (29 in H1 2022 compared to 32 in H1 2021), more of these proposals were from “anti-ESG” proponents who focused on whether a company considered ideological diversity in its employment practices.

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Arbitration of Sexual Assault and Sexual Harassment Act, which amended the Federal Arbitration Act to make pre-dispute arbitration agreements covering sexual assault and sexual harassment claims unenforceable. In 2022, proponents have turned their attention to the use of concealment clauses, including non-disclosure or non-disparagements agreements with employees, with 10 of the 15 harassment-related proposals addressing this topic. Eight concealment proposals reached a vote, receiving an average support of 48%, passing at SunRun (98%), Twitter (69%) and IBM (65%), and receiving 50% of the votes cast at Apple. Unsurprisingly, concealment proposals and more general sexual harassment proposals tend to achieve the highest votes at companies that have recently faced #MeToo controversies.<sup>35</sup>

### b. Employee Health and Safety

Citing challenges related to the COVID-19 pandemic, proponents submitted 11 proposals regarding employee health and safety. Six of these proposals demanded the adoption of a paid sick leave policy for employees, four of which were withdrawn following settlement, and two of which went to a vote (at CVS with 26% of votes cast and TJX Companies with 34% of votes cast). The remainder of the employee health and safety proposals consisted of a COVID-19 protocol at Disney (excluded due to procedural deficiencies) and four proposals at Amazon relating to the working conditions of frontline workers (a working condition audit proposal receiving 40% of votes cast, a proposal to report on worker health and safety disparities receiving 13% of votes cast and two particularly granular proposals excluded on the bases of duplication and ordinary business).

Employee health and safety may be a continuing area of focus for shareholders, employees and regulators in the coming years, with companies facing more pressure to adopt policies and commitments on worker safety. Before adopting and announcing new policies and commitments, however, companies should carefully review their existing practices. Many of the recent ESG lawsuits have focused on inconsistencies between disclosures—including aspirational statements in SEC filings, codes of conduct and website/social media posts—and actual working conditions and employee safety practices.<sup>36</sup>

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<sup>35</sup> For example, both SunRun, which received the highest vote on a concealment proposal, and Activision Blizzard, which received the only passing harassment proposal not related to concealment clauses, have recently been sued in connection with alleged sexual harassment. See, e.g., CNN Business, *California Sues Activision Blizzard, Alleging Culture of Sexual Harassment*, (Aug. 16, 2021), available at <https://www.cnn.com/2021/07/22/tech/activision-blizzard-sexual-harassment/index.html>; NJ.com, *Solar company promoted workers who 'engaged in sexualized conduct,' suit says* (Aug. 22, 2017), [https://www.nj.com/monmouth/2017/08/solar\\_company\\_employees\\_who\\_engaged\\_in\\_sexual\\_beha.html](https://www.nj.com/monmouth/2017/08/solar_company_employees_who_engaged_in_sexual_beha.html).

<sup>36</sup> For example, in April 2022, the SEC charged Vale, a Brazilian mining company, for misleading investors regarding safety standards prior to a fatal dam collapse which killed 270 people in 2019. See SEC Charges Brazilian Mining Company with Misleading Investors about Safety Prior to Deadly Dam Collapse, SEC (April 28, 2022), available at <https://www.sec.gov/news/press-release/2022-72>. See also, *Charges Filed in Connection with Texas Oilfield Deaths*, U.S. Dep't of Justice (March 8, 2022), available at <https://www.justice.gov/opa/pr/charges-filed-connection-texas-oilfield-deaths>.

**c. Reproductive Rights**

Consistent with prior years, there were a handful of proposals on reproductive health access. This year, TJX Companies, Walmart, Kroger and Lowes received proposals asking them to report on the employment-related risks and costs associated with state-level restrictions on access to reproductive healthcare. Other than the proposal at Kroger, which was withdrawn, companies unsuccessfully sought to exclude all of these proposals (in 2021, companies sought exclusion on the two proposals on this topic and the SEC granted no-action relief to Walmart on the basis of ordinary business). None of the proposals passed, receiving a high of 32% of votes cast at Lowe's and a low of 13% at Walmart.

When the Supreme Court overturned *Roe v. Wade* through its *Dobbs v. Jackson Women's Health Organization* decision on June 24, 2022, the proxy season had mostly concluded. However, within days after the decision, at least four companies and four major banks announced policies providing travel expenses to staff engaging in interstate travel to seek access to an abortion.<sup>37</sup> Companies such as Live Nation, Sony Music, Amazon, Uber, Tesla, Citigroup, Levi Strauss and Starbucks previously had announced similar initiatives.<sup>38</sup> In light of *Dobbs*, we expect to see more proposals focused on reproductive healthcare access next year, including more of the "report impact" proposals that we saw this year, as well as more granular proposals (such as proposals requesting companies to adopt interstate travel policies).<sup>39</sup> Conservative lawmakers and policy groups have also indicated that they will be focusing on companies' reactions to *Dobbs*, and we may see a corresponding increase in abortion-related proposals from certain "anti-ESG" proponents, including the charitable contribution proposals from the National Legal and Policy Center described above. We also expect that proponents on both sides of the abortion debate will make congruency proposals of the type described in the following section, which demand that a company assess and report on the alignment between its stated values and its political contributions.

**4. Political Spending/Lobbying**

Compared to other ESP subcategories, political proposals have had the greatest level of year-over-year consistency—in terms of total numbers, focal issues and target companies—across the last decade. Generally, political proposals have focused on transparent disclosure of political spending and lobbying, following the Supreme Court's 2010 *Citizens United* decision. Targets of these proposal are almost

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<sup>37</sup> Yahoo! Entertainment, Sony Music, Live Nation, Netflix, More Offer Staff Travel Reimbursement for Abortions (June 24, 2022), <https://www.yahoo.com/entertainment/sony-live-nation-netflix-more-193524227.html>.

<sup>38</sup> CNN Business, These Companies Will Help Staff in Red States Bypass Abortion Bans (May 16, 2022), <https://www.cnn.com/2022/05/03/business/amazon-abortion-costs/index.html>.

<sup>39</sup> Some proponents, such as As You Sow, have already indicated that they will be focusing on corporate policies related to reproductive health access. See, e.g., Bloomberg Law, Shareholder Activism Emerging as New Path to Abortion Rights (May 4, 2022), <https://news.bloomberglaw.com/us-law-week/shareholder-activism-emerging-as-path-to-protect-abortion-rights>.

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always high-profile American brands (e.g., Disney, Boeing, Netflix and Amazon in 2022) or companies in sectors that attract public attention (e.g., healthcare, pharmaceutical, technology, banking and energy in 2022).

This year, however, there were 20 new ESP-linked political proposals, asking companies to assess the congruency or alignment between their stated company values and priorities and their political spending/lobbying activities. These proposals typically contrast a company's public statements in support of, for example, reproductive rights, action on climate change, expanded LGBTQIA+ rights and/or voter access, with the company's record on political contributions to candidates who oppose such efforts. Companies settled many of these proposals with the proponent, but the ten that went to a vote received relatively high votes (between 30% and 50% of votes cast). The only exception was an NCPPR proposal at Pfizer, which received 10% of votes cast. Notably, another congruency proposal at Pfizer from Tara Health (which advocates in favor of issues such as reproductive healthcare access) was excluded on the basis of duplication. It is likely that Tara Health's proposal would have received a higher level of support than NCPPR's.

In addition to the traditional proposals on spending transparency and this year's new congruency proposals, proponents also looked at issues such as a company's global political influence and specific political spending policies and controls. After a spike in shareholder support for political disclosure proposals in 2021 (partly in response to the armed insurrection at the United States Capitol in January 2021), average shareholder support returned to pre-2021 levels (32% in 2022, compared to 42% in 2021 and 35% in 2020).<sup>40</sup>

### **E. SHAREHOLDER PROPOSALS ON GOVERNANCE MATTERS**

Over the last decade, governance proposals have represented a declining percentage of total Rule 14a-8 proposals as proponents submit ESP proposals in increasing numbers. This year, the relative decline in governance proposals continued. In addition, average shareholder support for governance proposals has declined over the last decade (35% in H1 2022 compared to 51% in H1 2012; with 23 passing this year compared to 68 in H1 2012) because companies have widely adopted those governance practices consistently favored by institutional shareholders.

The number of board composition proposals—in particular board gender/racial diversity proposals—had increased coincident with the #MeToo and Black Lives Matter movements between 2016 and 2020, but began to decrease in 2021 as boardroom diversity measures improve and pro-diversity policies and commitments become more widely adopted across corporate America. In 2021 and 2022, governance proposals predominately focused on structural governance issues, as they did a decade ago, although proponents generally sought to change existing provisions rather than to adopt new rights. The single

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<sup>40</sup> No "anti-ESG" proposals in this category reached a vote.



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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.

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	2022 YTD	2021	2022 YTD	2021	2022 YTD	2021	2022 YTD	2021
<b>Structural Governance</b>	<b>163</b>	217	<b>140</b>	168	<b>38%</b>	45%	<b>22</b>	42
<i>Special Meetings</i>	<b>105</b>	36	<b>102</b>	30	<b>36%</b>	38%	<b>9</b>	5
<i>Adopt</i>	<b>11</b>	9	<b>10</b>	6	<b>38%</b>	57%	<b>5</b>	4
<i>Amend</i>	<b>94</b>	27	<b>92</b>	24	<b>36%</b>	33%	<b>4</b>	1
<i>Proxy Access</i>	<b>18</b>	33	<b>9</b>	26	<b>29%</b>	32%	<b>1</b>	0
<i>Adopt</i>	<b>3</b>	3	<b>2</b>	2	<b>42%</b>	19%	<b>1</b>	0
<i>Amend</i>	<b>15</b>	30	<b>7</b>	24	<b>26%</b>	33%	<b>0</b>	0
<i>Supermajority</i>	<b>10</b>	29	<b>8</b>	19	<b>75%</b>	81%	<b>8</b>	17
<i>Dual Class</i>	<b>8</b>	11	<b>7</b>	11	<b>31%</b>	34%	<b>0</b>	1
<i>Written Consent</i>	<b>7</b>	77	<b>5</b>	69	<b>36%</b>	41%	<b>1</b>	10
<i>Majority Voting</i>	<b>7</b>	18	<b>5</b>	7	<b>28%</b>	63%	<b>1</b>	5
<i>Declassify Board</i>	<b>5</b>	9	<b>2</b>	4	<b>92%</b>	80%	<b>2</b>	4
<i>Other Structural</i>	<b>3</b>	4	<b>2</b>	2	<b>6%</b>	3%	<b>0</b>	0
<b>Board Composition</b>	<b>60</b>	84	<b>45</b>	54	<b>25%</b>	28%	<b>0</b>	3
<i>Independent Chair</i>	<b>44</b>	43	<b>34</b>	36	<b>30%</b>	33%	<b>0</b>	1
<i>Board Diversity</i>	<b>8</b>	21	<b>4</b>	5	<b>14%</b>	40%	<b>0</b>	2
<i>Emp. Director</i>	<b>6</b>	10	<b>5</b>	9	<b>9%</b>	8%	<b>0</b>	0
<i>Director Qualification</i>	<b>2</b>	10	<b>2</b>	4	<b>10%</b>	9%	<b>0</b>	0
<b>Misc. Governance</b>	<b>24</b>	8	<b>8</b>	2	<b>30%</b>	41%	<b>1</b>	1
<b>Total</b>	<b>247</b>	309	<b>193</b>	224				

Consistent with prior years, around three-quarters of submitted governance proposals went to a vote. SLB No. 14L seems to have had a smaller impact on governance proposals, for which the likelihood of obtaining no-action relief decreased by 13%, compared to ESP proposals, where the decrease was much higher. However, if the Rule 14a-8 Proposed Amendments are adopted as proposed, it is likely that we will see a more dramatic decrease in both the number of no-action requests in connection with governance proposals and the success rate of those requests. As an example of the proposed approach to substantial implementation under Rule 14a-8(i)(10), the SEC noted that it would no longer concur in the exclusion of a proxy access proposal seeking to allow an unlimited number of shareholders who collectively owned 3% of the company to nominate up to 25% of the company's directors where the company had adopted a standard 3/20/20 proxy access bylaw (i.e., a shareholder or group of up to 20 shareholders that collectively own 3% can nominate up to 20% of the board), even though it had

historically granted no-action relief under those circumstances.<sup>41</sup> In addition, in the case of two special meeting proposals, under the proposed amendments, it seems that an insubstantial difference in ownership threshold would require both proposals to be submitted to shareholders.

### 1. Structural Governance

Over the last decade, proponents have consistently demanded that companies adopt structural changes to increase shareholder rights, leading many large-cap and high-profile companies to adopt the governance measures that are widely considered to be “shareholder-friendly” by investors. Currently, over 80% of S&P 500 companies have adopted majority voting in contested elections, declassified their boards, and adopted proxy access rights and special meeting rights, and over 70% have eliminated supermajority voting provisions. Whenever these proposals have come to a vote, they have generally received high shareholder support, driving the broad adoption of these measures across U.S. public companies over the last decade.

John Chevedden has been the most prolific proponent of these structural governance proposals over the course of the decade and continues to submit identical proposals across a large number of companies each year. As was the case in 2021, he and other governance proponents focused on “amend” proposals (typically seeking to lower the special meeting ownership threshold), rather than requesting a new type of right to be added.

#### a. Lowering Special Meeting Voting Threshold

The number of special meeting proposals submitted this year nearly tripled compared to 2021. Around 90% of these proposals were “amend” proposals rather than requests to adopt a new right. John Chevedden and Kenneth Steiner were responsible for at least 90% of the 2022 proposals to lower the ownership thresholds in special meeting provisions. After failing to garner support for his 3% ownership threshold proposals in 2020, John Chevedden generally moved to a 10% special meeting threshold in 2021, and continued to do so this year. Today, most large-cap companies have a special meeting ownership threshold of around 20 to 25%, with 10% being on the low end of what is generally considered market practice.

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). Some companies tried to exclude these proposals through the SEC no-action process, primarily seeking relief under the substantial implementation exclusion. The SEC generally did not concur with these arguments in 2022.

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<sup>41</sup> Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8, SEC Release No. 34-95267 (July 13, 2022), available at <https://www.sec.gov/rules/proposed/2022/34-95267.pdf>, at p. 15.

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A number of the companies that received an “amend” special meeting proposal included a management counterproposal with a higher (but reduced) ownership threshold in their proxy statements to be voted side-by-side with the proponents’ proposal. A few companies (e.g., Baxter, Intercontinental Exchange) defeated the proponent’s 10% proposal using a 20% management counterproposal, with the proponent’s proposal failing to receive majority support and the counterproposal receiving the requisite votes. In some cases, shareholders approved both the proponent’s proposal and the management counterproposal, likely requiring the company to further engage with shareholders to reconcile the voting outcome.<sup>42</sup>

ISS’s recommendations were important to voting outcomes. ISS recommended in favor of all but four “amend” special meeting proposals relating to the ownership threshold. (In the 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.

### **b. Written Consent**

After several years of high submission rates and relatively high average shareholder support (approximately 40% each year), almost no written consent proposals were submitted this year (7 in H1 2022 compared to 72 in H1 2021). Written consent proposals accounted for the highest number of structural governance submissions in 2021 and 2020, but the right to act by written consent remains relatively rare among the S&P 500 today due to the perception that such a right is unnecessary where a company has an otherwise “shareholder-friendly” defensive profile (e.g., where shareholders can call a special meeting) and may operate to limit the voice of smaller shareholders in corporate decision-making. All seven written consent proposals in H1 2022 related to adoption of a new right, whereas a small but meaningful number of written consent proposals in 2021 (15) focused on amending existing rights.

## **2. Board Composition**

Proposals for independent board chairs remained the most frequently submitted type of board composition proposal (with 44 proposals in H1 2022 compared to 38 in H1 2021 and 47 in H1 2020). Shareholder support remained at similar levels (30% in 2022 compared to 33% in 2021), and none passed this year (two did in H1 2021). While the number of independent chair proposals remained relatively unchanged compared to prior years, there were sharp declines in all other types of board composition proposals, especially board diversity proposals.

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<sup>42</sup> Shareholders at ConocoPhillips approved both a management proposal setting the special meeting ownership threshold at 20% (with 80% of votes cast) as well as a shareholder proposal with a 10% threshold (with 53% of votes cast). ConocoPhillips has not yet announced any changes to its special meeting provisions.

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### a. Board Diversity

In 2022, only eight board diversity proposals were submitted (compared to 17 in 2021, 30 in H1 2020 and 32 in H1 2019). None were submitted by “anti-ESG” proponents, who have in the past requested that companies consider ideological diversity on their boards. Average support declined from 40% in 2021 to 14%. Once again, no board diversity proposal passed.

The continued decline in the number of board diversity proposals may be due to proponents’ perception that regulators, lawmakers, stock exchanges and companies themselves are already focused on this issue. For example, the SEC approved Nasdaq’s board diversity disclosure requirements last year, which will require all Nasdaq-listed companies to have, or explain why they do not have, at least one self-identified female director and at least one director who self-identifies as an underrepresented minority.<sup>43</sup> Nasdaq-listed companies also will need to disclose board-level diversity statistics on an annual basis on a standardized matrix by August 8, 2022 (unless they file their 2022 annual general meeting proxy statement on a later date). In addition, the Division of Corporation Finance is considering recommending that the SEC propose amendments to enhance disclosures about the diversity of board members and nominees. According to the SEC’s regulatory agenda, the SEC is expecting to issue its board diversity proposal by April 2023.<sup>44</sup>

In addition to disclosure requirements, states like California have also adopted laws setting minimum board diversity thresholds. However, both of California’s board diversity statutes, SB 826 and AB 979, which require a minimum board representation of women and members of underrepresented communities, were both recently declared unconstitutional by the California Superior Court.<sup>45</sup> These judicial actions could motivate proponents to turn their attention back to board representation issues.

### b. Director Qualifications

Submissions of director qualification proposals also decreased this year, with only two being submitted in H1 2022 compared to nine in H1 2021. Regardless of whether proponents submit more proposals on this topic in the future, companies will likely face increasing pressure to disclose director qualifications and expertise as a result of the expectations of larger institutional shareholders. The SEC’s new universal proxy card requirements, which are scheduled to take effect for contested elections after August 31, 2022, also will increase focus on director qualifications.<sup>46</sup> In addition, there may be greater scrutiny on

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<sup>43</sup> For a more detailed discussion of the Nasdaq requirements, see our publication, dated December 14, 2020, entitled “[Nasdaq Proposes Board Diversity Requirements](#).”

<sup>44</sup> Office of Information and Regulatory Affairs, available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=3235-AL91>.

<sup>45</sup> *Robin Crest, et al. v. Alex Padilla* (No. 20-STCV-37513) (“*Padilla I*”), *Robin Crest, et al. v. Alex Padilla* (No. 19-STCV-27561) (Ca Sup. Ct. May 13, 2022) (“*Padilla II*”).

<sup>46</sup> For a more detailed discussion of the universal proxy card requirements, see our publication, dated November 18, 2021, entitled “[SEC Mandates Universal Proxy Cards in Contested Director Elections](#).”

the ESP qualifications of directors if the SEC adopts its proposed cybersecurity and climate-related rules, which would require companies to disclose whether they have cybersecurity and climate-related experts on their boards.<sup>47</sup>

### 3. Virtual Shareholder Meetings

Following the sweeping adoption of virtual meetings in 2020 due to the COVID-19 pandemic, some companies have begun to transition back to shareholder meetings with a physical component.<sup>48</sup> Interestingly, notwithstanding the considerable skepticism many vocal shareholders had regarding the appropriateness of virtual meetings (including concerns that shareholders could not meaningfully participate during virtual meetings), some now prefer at least a virtual meeting option. For example, at companies where John Chevedden has filed shareholder proposals this year, we are aware that he requested a virtual component to physical meetings to allow him to present his proposals (and submitted letters to the SEC staff where he was not accommodated). This year, the Humane Society also submitted a proposal at Jack in the Box to amend its bylaws to permit virtual meetings, which received 69% of votes cast.

## F. SHAREHOLDER PROPOSALS ON ENVIRONMENTAL MATTERS

Overall, investors are both more focused on and more knowledgeable about environmental (particularly, climate-related) issues today than they were in 2012. This has correlated with a gradual increase in submissions year-over-year, as well as a significant increase in the granularity of proponents' requests. In the past, proponents tended to submit more general requests (e.g., publish a sustainability report) across the board, and only make granular demands at a company in response to company-specific issues or controversies. In the last two years, however, companies have been receiving more granular proposals across the board. Proponents have been breaking down their broader prior requests into discrete elements (e.g., instead of requesting broad climate impact policies or commitments, demanding companies limit their investment and lending activities in carbon-intensive sectors), specifying detailed standards (e.g., instead of generally aligning with Paris Agreement goals, setting independently verified science based targets for Scope 1, 2 and 3 GHG emissions reduction) or prescribing a specific means for

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<sup>47</sup> The SEC's climate-related proposal is further discussed in Section F below.

The SEC released its cybersecurity proposal on March 9, 2022. Among other things, the proposal would require companies to provide periodic disclosures about their policies and procedures to identify and manage cybersecurity risks, management's role in implementing cybersecurity policies and procedures, and the board of directors' cybersecurity expertise, if any, and its oversight of cybersecurity risk.

For a more detailed discussion of the Nasdaq requirements, see our publication, dated March 11, 2022, entitled "[SEC Proposes New Cybersecurity Disclosure Rules for Public Companies](#)." None of the 2022 proposals specifically addressed cybersecurity board expertise or risk oversight.

<sup>48</sup> See *'Tis the Season for Shareholder Meetings*, FACTSET (May 5, 2022), available at ['Tis the Season for Shareholder Meetings \(factset.com\)](#).

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achieving the underlying objective (e.g., instead of asking for risk oversight enhancements generally, requiring companies to conduct a climate scenario analysis).

In 2022, environmental proposals became even more granular, raising concerns that proponents may be taking a one-size-fits-all approach without fully considering the context in which companies are operating their businesses. In May 2022, citing proposals this year for companies to (1) stop financing or decommission assets of traditional energy companies, (2) align their business models to the specific 1.5°C scenario outlined by the International Energy Agency (“IEA”), (3) set absolute Scope 3 GHG emissions reduction targets, (4) mandate climate risk reporting or voting under their charters and (5) align climate lobbying activities and spending with the Paris Agreement, BlackRock announced it expected to support proportionally fewer climate-related proposals in 2022 than it did in 2021 because the overly prescriptive proposals are not “consistent with our clients’ long-term financial interests.”<sup>49</sup> Although overall ISS support for environmental proposals generally remained consistent in 2021 and 2022 (with the proxy advisor recommending in favor of 67% of environmental proposals each year), ISS has been recommending against particularly prescriptive climate-related proposals in 2022. This has led to a decrease in ISS support of specific climate-related proposals from 74% to 43% this year. Shareholder support for these proposals also decreased significantly (to 35% in H1 2022 from 63% in 2021).

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<sup>49</sup> See BlackRock Investment Stewardship, 2022 climate-related shareholder proposals more prescriptive than 2021, available at <https://www.blackrock.com/corporate/literature/publication/commentary-bis-approach-shareholder-proposals.pdf>. Recently, BlackRock announced that, in voting on behalf of its clients, it supported 24% of ESP proposals in the 2022 proxy season compared to 43% in 2021, due to the more prescriptive nature of the 2022 proposals and because “many climate-related shareholder proposals sought to dictate the pace of companies’ energy transition plans despite continued consumer demand, with little regard to company financial performance” and “[o]ther proposals failed to recognize that companies had largely already met their ask.” See, BlackRock, 2022 voting spotlight summary (July 26, 2022), available at <https://www.blackrock.com/corporate/literature/publication/2022-investment-stewardship-voting-spotlight-summary.pdf>, pp. 5-6.



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	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
<b>Specific Climate Issues</b>	<b>98</b>	<b>62</b>	<b>39</b>	<b>15</b>	<b>35%</b>	<b>63%</b>	<b>9</b>	<b>12</b>
<i>Target/Goal</i>	<b>53</b>	30	<b>19</b>	7	<b>46%</b>	66%	<b>6</b>	6
<i>Financing Activity</i>	<b>15</b>	5	<b>11</b>	0	<b>16%</b>	-	<b>1</b>	0
<i>Lobbying</i>	<b>16</b>	14	<b>3</b>	6	<b>31%</b>	62%	<b>0</b>	5
<i>Transition Plan</i>	<b>11</b>	12	<b>4</b>	1	<b>34%</b>	63%	<b>1</b>	1
<i>Scenario Analysis</i>	<b>3</b>	1	<b>2</b>	1	<b>45%</b>	48%	<b>1</b>	0
<b>Specific Sustainability Issues</b>	<b>27</b>	<b>21</b>	<b>11</b>	<b>4</b>	<b>41%</b>	<b>43%</b>	<b>3</b>	<b>1</b>
<i>Packaging/ Plastic</i>	<b>15</b>	12	<b>7</b>	3	<b>46%</b>	54%	<b>2</b>	1
<i>Deforestation</i>	<b>5</b>	4	<b>1</b>	0	<b>65%</b>	-	<b>1</b>	0
<i>Pesticide</i>	<b>4</b>	4	<b>1</b>	0	<b>34%</b>	-	<b>0</b>	0
<i>Water</i>	<b>3</b>	1	<b>2</b>	1	<b>11%</b>	11%	<b>0</b>	0
<b>General Reporting</b>	<b>12</b>	<b>18</b>	<b>2</b>	<b>5</b>	<b>22%</b>	<b>31%</b>	<b>0</b>	<b>0</b>
<b>Environmental Justice</b>	<b>5</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>14%</b>	-	<b>0</b>	<b>0</b>
<b>Board Oversight</b>	<b>4</b>	<b>2</b>	<b>1</b>	<b>0</b>	<b>5%</b>	-	<b>0</b>	<b>0</b>
<b>Misc. Environmental<sup>50</sup></b>	<b>13</b>	<b>27</b>	<b>4</b>	<b>12</b>	<b>47%</b>	<b>17%</b>	<b>2</b>	<b>1</b>
<b>Total</b>	<b>159</b>	<b>130</b>	<b>58</b>	<b>36</b>				

### 1. SEC's Proposed Climate-Related Disclosure Rules

On March 21, 2022, the SEC proposed climate-related disclosure rules (the “Proposed Climate-Related Disclosure Rules”) that would require U.S. public companies and foreign private issuers to dramatically expand the climate-related disclosures in their SEC periodic reports and registration statements.<sup>51</sup> Key requirements of the Proposed Climate-Related Disclosure Rules include detailed disclosures (in many cases regardless of materiality) on: (1) Scope 1, 2 and 3 GHG emissions (in the case of Scope 3, disclosure is only required if material or if the company has set targets or goals that include Scope 3 emissions reduction), with third-party attestation for Scope 1 and 2 emissions, (2) GHG reduction or other climate-related targets and goals set by the company, including ongoing requirements to disclose the company's progress towards such targets and goals, (3) transition plans and related progress, (4) any internal carbon price and climate scenario analysis used by the company, (5) climate-related risks over

<sup>50</sup> The “Miscellaneous Environmental” proposals include proposals from “anti-ESG” proponent Steven Milloy to report on the costs and benefits of taking voluntary environmental actions. Six energy sector companies received these proposals in 2021, which received between 1.6% and 5.2% of votes cast. This year, one such proposal was submitted at International Paper Company, which received 1.7% of votes cast and appears to be the only anti-environmental proposal in H1 2022. This category also included company-specific issues (e.g., Arctic operations, flaring reduction) in both years. This year, there was also one proposal on the use of carbon credits, along with proposals on methane emissions and chemical footprint.

Of the four proposals that went to a vote in 2022, two passed, both at energy companies. A proposal on natural gas stranded assets received 80% of votes cast at Dominion, and one on the accuracy of methane emissions disclosures received 98% of votes cast at Chevron after Chevron's management recommended that shareholders vote in favor of the proposal despite disagreeing with some of the proponent's statements. The two failed proposals include the “anti-ESG” proposal described above, as well as a Myra Young proposal on balancing climate measures with financial returns (at UPS), which received below 10% of votes cast.

<sup>51</sup> For a more detailed discussion of the Proposed Climate-Related Disclosure Rules, see our publication, dated March 28, 2022, entitled “[SEC Proposes Expansive Climate-Related Disclosure Rules.](#)”

the short-, medium- and long-term and their impacts on business activities, (6) qualitative and quantitative climate risk and historical impact in the notes to a company's audited financial statements, with information required to be presented on a disaggregated basis if the aggregated impact is 1% or more of the total line item, and (7) governance of climate-related risks and risk management processes. If adopted as proposed by the end of this year,<sup>52</sup> large accelerated filers will need to comply with the reporting requirements under the Proposed Climate-Related Disclosure Rules beginning in 2024 with respect to fiscal year 2023. The Proposed Climate-Related Rules, as well as the SEC's rulemaking authority, are widely expected to face litigation if the proposal is adopted in some form.<sup>53</sup>

Regardless of the outcome of the Proposed Climate-Related Rules, it is likely that the SEC's proposal will encourage proponents to submit more prescriptive proposals in the future. We would expect more proposals demanding voluntary adoption of transition plans, scenario analysis and climate-related targets and goals, which would in turn trigger disclosure requirements under the SEC's proposal. Even if the Proposed Climate-Related Rules are not adopted, they will serve as a roadmap against which pro-disclosure investors will likely request voluntary compliance.<sup>54</sup>

The SEC's changing approach with respect to no-action requests may amplify the trend towards more granular environmental proposals. Notably, the SEC stated in SLB No. 14L that it would no longer concur in the exclusion of proposals that "request companies adopt timeframes or targets to address climate change" for micromanagement reasons.<sup>55</sup> If the Rule 14a-8 Proposed Amendments are adopted as proposed, the SEC also will allow multiple proposals on the same topic (e.g., report on climate-related risks and opportunities) to go to a vote at the same shareholder meeting if the proponents recommend different means of implementation (e.g., as a disclosure on a company's website, a plan to be approved by the board of directors or a report by a third party).

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<sup>52</sup> According to the SEC's Fall 2022 agenda, the Commission is expecting to release final climate-related disclosure rules in October 2022, although this timeline will be challenging given the record number of comment letters the SEC has received on the Proposed Climate-Related Disclosure Rules.

<sup>53</sup> See, e.g., the Senate Banking Committee Republicans' letter to Chairman Gensler (July 21, 2022), *available at* [https://www.banking.senate.gov/imo/media/doc/banking\\_republicans\\_to\\_gensler\\_on\\_inadequate\\_response.pdf](https://www.banking.senate.gov/imo/media/doc/banking_republicans_to_gensler_on_inadequate_response.pdf). Criticizing the SEC's lack of transparency regarding the Proposed Climate-Related Disclosure Rules, the senators stated that "[i]n *West Virginia v. EPA*, the Supreme Court ruled that the executive branch and its agencies, including financial regulators, cannot use creative, new interpretations of existing law to pretend they have legal authority to support sweeping policy changes that Congress never intended. Unfortunately, the SEC appears to be trying to act in precisely this way with its climate disclosure rule."

<sup>54</sup> Some U.S. companies could be subject to climate-related disclosure requirements that are being considered in Europe and other jurisdictions. In addition, U.S. states have begun to adopt their own climate-related disclosure requirements. For example, the California Senate passed the "Climate Corporate Accountability Act" in January 2022 that would require all companies doing business in California and generating over \$1 billion in gross annual revenue to disclose annually on their Scope 1, 2 and 3 GHG emissions.

<sup>55</sup> SEC, Shareholder Proposals: Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021), *available at* [https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals#\\_ftnref6](https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals#_ftnref6). For a more detailed discussion of the new guidance, see our publication, dated November 8, 2021, entitled "[New SEC Staff Guidance on Shareholder Proposals](#)."

## 2. Climate-Related Targets and Goals

After then-President Trump announced the U.S.'s withdrawal from the Paris Agreement in June 2017, proponents began to submit a large number of proposals asking companies to report on the alignment between their environmental goals and the goals set out in the Paris Agreement. In 2021, with the exception of a few proposals that had a more narrow focus (e.g., on Scope 3 targets or GHG reduction targets based on specific scientific standards/scenarios), proposals on climate-related targets and goals still focused on (generally long-term) alignment with the Paris Agreement. A quarter of the 2021 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, with a few of these proposals going so far as to request targets for specific categories of Scope 3.<sup>56</sup> None of these proposals passed. The remainder of the 2022 proposals consisted mostly of the broader Paris Agreement alignment proposals (which give companies comparatively more room to define their own targets and goals), as well as a few requests for companies that have already set a net zero target to disclose progress against specific indicators or scenarios. The six target/goal proposals that passed in H1 2022 included five of the former and one of the latter.

Overall, although these proposals continue to be withdrawn at high rates, withdrawal rates decreased in 2022. A higher percentage of proposals reached a vote (36% in H1 2022 compared to 31% in full-year 2021) as companies and proponents failed to reach resolution, likely as a result of the increasing granularity of the proposals. Companies also may have been more cautious about agreeing to adopt a climate target or goal, especially a Scope 3 reduction target, in light of the Proposed Climate-Related Disclosure Rules. Although the SEC's proposed rules would not require companies to set a Scope 3 reduction target, once a company sets such a target, it would need to provide details on the target and the company's progress against the target and disclose its Scope 3 emissions (regardless of whether Scope 3 emissions are material to the company).

## 3. Financing Activity

U.S. federal agencies and regulating financial institutions have indicated that they are increasingly focused on incorporating climate risks into their regulatory and supervisory practices. Recently, a number of these regulators have issued reports or proposed new guidance focused on climate-related financial risks, as well as their impact on financial institutions and the financial stability of the United States. For example, in November 2021, the Financial Stability Oversight Council (FSOC) issued a report

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<sup>56</sup> For example, JPMorgan received a proposal from the Sierra Club Foundation to report on absolute targets for financed emissions in line with the company's net zero commitments. The no-action request was denied but the proposal only received 16% of votes cast.

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recommending that its members accelerate their current climate-related efforts and take additional, coordinated actions to enhance the resiliency of the financial system to climate-related risks.<sup>57</sup>

Investors also seem to be increasingly focused on the role that financial institutions play. In 2021, five banks (Bank of America, Citigroup, Goldman Sachs, Wells Fargo and JPMorgan) received As You Sow proposals requesting that they disclose plans to reduce their financed GHG emissions. The same banks, along with Morgan Stanley and three insurance companies (Chubb, The Hartford and Travelers), received a total of 15 proposals in H1 2022 related to their lending activities. With limited exceptions, these proposals were more prescriptive than the 2021 proposals. 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.<sup>58</sup> Specifically, the proponents asked that the financial institutions limit or end financing of new fossil fuel supplies.

Whereas all of the financing activity proposals were withdrawn in 2021 following engagement between the company and the proponent, none of the IEA-related proposals were withdrawn in 2022.<sup>59</sup> Recently enacted state fair access laws could have contributed to these financial institutions' decision to allow these proposals to go to a vote rather than settle. For example, last summer, after the Office of the Comptroller of the Currency ("OCC") decided not to move forward with its fair access rule, Texas passed a statute that requires state governmental entities to divest publicly traded securities of financial institutions that boycott fossil fuel-based energy companies and prohibits state governmental entities from contracting with such financial institutions.<sup>60</sup> A similar bill passed in West Virginia earlier this year, and the West Virginia state treasurer placed BlackRock, Goldman Sachs, JPMorgan, Morgan Stanley, and Wells Fargo on the state's restricted financial institution list after finding that these institutions "were engaged in boycotts of fossil fuel companies."<sup>61</sup>

All of the IAE-related proposals went to a vote, but none received more than 20% of votes cast. In contrast, the only financing activity proposal that passed in H1 2022 was a request for voluntary reporting

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<sup>57</sup> For a more detailed discussion of these regulatory developments, see our publication, dated April 13, 2022, entitled "[Proposed SEC Climate Disclosure Rules: Implications for Financial Institutions.](#)"

<sup>58</sup> See IEA, Net Zero Emissions by 2050 Scenario (NZE), available at <https://www.iea.org/reports/world-energy-model/net-zero-emissions-by-2050-scenario-nze>.

<sup>59</sup> The only financing activity proposal that was withdrawn in 2022 was a less prescriptive request to disclose alignment between financing activities and the Paris Agreement.

<sup>60</sup> S.B. No. 13, An Act relating to state contracts with and investments in certain companies that boycott energy companies (Sept. 1, 2021), available at <https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00013F.pdf#navpanes=0>.

<sup>61</sup> Bloomberg, BlackRock, JPMorgan Barred from West Virginia Banking Contracts (July 28, 2022), available at <https://news.bloomberglaw.com/banking-law/blackrock-jpmorgan-barred-from-west-virginia-banking-contracts>.

on efforts to measure and reduce underwriting-related GHG emissions, which received 56% of votes cast at Travelers.

#### **4. Social/Political-, Governance- and Compensation-Related Environmental Issues**

As U.S. companies announce efforts to address different categories of environmental, social and governance issues, investors are beginning to request that companies consider whether their various commitments, policies and initiatives align with one another. For the last two years, investors have requested disclosures on the alignment between companies' lobbying activities (including through trade associations and nonprofits) and the Paris Agreement goals, focusing on companies that have announced a commitment to these 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. Only three (19%) went to a vote, at companies that were likely confident about the outcome. None of the H1 2022 environmental lobbying proposals passed.

Proponents also focused on social- and governance-related environmental issues in a small number of proposals in 2022. For example, the New York State Comptroller brought proposals for two companies to issue reports on environmental justice, focusing on any unequal environmental impact of pollution on communities of color and economically impoverished communities. Four proposals focused on board-level oversight of climate change, with two specifically calling for companies to establish an environmental board committee. These proposals were generally withdrawn and received low support when voted. Shareholder interest in these proposals may increase if the Proposed Climate-Related Disclosure Rules are adopted as proposed, which would require disclosure of material physical climate risks by zip code and detailed disclosures on board oversight of climate risks.

This year, compensation proposals (which are discussed in the following section) not only included demands to link environmental metrics with executive compensation but also included two proposals on employee retirement plans from As You Sow. These proposals requested that companies disclose the alignment between a company's climate action goals and its 401(k) plans, citing a lack of sustainable investing options.<sup>62</sup>

#### **G. COMPENSATION-RELATED SHAREHOLDER PROPOSALS**

Over the past ten years, compensation-related proposals have consistently represented the smallest category in terms of both submissions and voted proposals, with minor fluctuations. However, this year,

<sup>62</sup> See As You Sow, *Campbell Soup Co: Report on Aligning Retirement Plan Options with Company Climate Goals* (June 21, 2022), available at <https://www.asyousow.org/resolutions/2022/06/14-microsoft-report-on-aligning-retirement-plan-options-with-company-climate-goals>; As You Sow, *Microsoft Corp: Report on Aligning Retirement Plan Options with Company Climate Goals* (June 14, 2022), available at <https://www.asyousow.org/resolutions/2022/06/14-microsoft-report-on-aligning-retirement-plan-options-with-company-climate-goals>.

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the percentage of voted proposals (72%) reached the highest level since we began tracking in 2018, dramatically higher than 49% in 2021. After reaching 29% average shareholder support in 2015, compensation-related proposals had generally received low shareholder support (averaging 22%) but hit a decade-high average support of 30% this year. ISS supported 68% of compensation proposals, representing an increase from 52% in 2021 and a decrease from 76% in 2020.

	<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>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>
<b>Severance</b>	<b>13</b>	<b>2</b>	<b>13</b>	<b>2</b>	<b>44%</b>	<b>48%</b>	<b>3</b>	<b>1</b>
<b>Compensation – Social</b>	<b>12</b>	<b>13</b>	<b>4</b>	<b>8</b>	<b>10%</b>	<b>9%</b>	<b>0</b>	<b>0</b>
<b>Clawbacks</b>	<b>5</b>	<b>3</b>	<b>5</b>	<b>3</b>	<b>28%</b>	<b>34%</b>	<b>0</b>	<b>0</b>
<b>Compensation – Environmental</b>	<b>4</b>	<b>9</b>	<b>3</b>	<b>3</b>	<b>10%</b>	<b>11%</b>	<b>0</b>	<b>0</b>
<b>Stock Retention</b>	<b>2</b>	<b>3</b>	<b>2</b>	<b>0</b>	<b>26%</b>	<b>-</b>	<b>0</b>	<b>0</b>
<b>Compensation – Other<sup>63</sup></b>	<b>11</b>	<b>21</b>	<b>7</b>	<b>9</b>	<b>27%</b>	<b>31%</b>	<b>0</b>	<b>0</b>
<b>Total</b>	<b>47</b>	<b>51</b>	<b>34</b>	<b>25</b>				

Three compensation proposals passed, whereas none had passed by this time last year and one passed in September 2021. The passing proposals all requested the board seek shareholder approval for large executive severance or termination payments,<sup>64</sup> suggesting that, even in a competitive market, shareholders remain wary of potentially excessive or unreasonable severance payments. The 13 proposals on this topic (compared to two last year) generally received high shareholder support even when they did not pass, averaging 44% of votes cast.

Overall, the compensation proposals topics (e.g., golden parachutes, clawback policies and stock retention requirements for executives) have remained the same through the past decade, with one notable exception. Beginning in 2017, proponents have focused on the link between certain ESP performance measures (e.g., diversity, social, sustainability and environmental impact) and executive compensation. For five years in a row, including this year, these proposals have been the most common type of compensation-related proposals despite consistently receiving low average shareholder support (10% in H1 2022 and 9% in 2021). However, instead of focusing on broader social and environmental issues, 12 out of the 16 ESP-linked compensation proposals submitted this year focused on the pay disparity between management (particularly the CEO) and the workforce, particularly front-line workers in

<sup>63</sup> The “Compensation-Other” proposals in 2022 included proposals to adopt policies accounting for legal or compliance costs in incentive compensation.

<sup>64</sup> The severance-related proposals passed at AbbieVie, Alaska Air Group and Fiserv this year. At Fiserv, for example, the proposal requested shareholder approval for executive severance or termination payments that exceed 2.99 times the sum of the executive’s base salary plus target short-term bonus.



light of the COVID-19 pandemic. Of the 12 pay-disparity proposals submitted, four went to a vote but none passed, with ISS recommending against all four proposals.

In addition to the focus on the disparity between the CEO and workforce compensation, one possible explanation for the decreased prevalence in other types of ESP-linked proposals is the SEC's reopening of the "pay versus performance" rule comment period.<sup>65</sup> Compared to the SEC's original 2015 "pay versus performance" proposal, which would have required disclosure of executive compensation as it compared to total shareholder return, the SEC has indicated that it may require the disclosure of (1) three new financial performance measures in addition to total shareholder return in a supplemental table with a clear description of the relationship between the measures and (2) a list of the five most important performance measures used by the company to determine compensation actually paid to the executive, potentially in a tabular format. It is possible that proponents are holding back their ESP-linked compensation demands while these disclosure requirements—which would provide greater transparency on whether or not ESP issues are important performance measures considered by a company in making compensation determination—are being finalized. They may also be waiting for the SEC to finalize cybersecurity, board diversity, climate and HCM disclosure rules, which will likely provide proponents with quantitative data that can be more easily translated into performance measures.<sup>66</sup> If the final SEC rules require companies to disclose whether they have cybersecurity or climate experts among the management team, there may also be increased scrutiny on whether the compensation of those "experts" is linked to the issues on which they have purported expertise.

Another possible reason for the decline in ESP-linked proposals may be related to shareholder skepticism regarding proactive commitments that have been adopted by companies.<sup>67</sup> On the one hand, proponents of ESP-linked compensation metrics have queried how meaningful these compensation commitments really are, especially in the absence of consistent and concrete quantitative disclosures that allow investors to track companies' ESP progress. In September 2021, As You Sow reviewed the disclosures made in the proxy statements of 48 large carbon emitters and found (1) that only four companies explicitly linked a percentage of executive pay to achieving a specific emissions reduction and (2) that only two

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<sup>65</sup> See U.S. Securities and Exchange Commission, SEC Reopens Comment Period for Pay Versus Performance (Jan. 27, 2022), *available at* <https://www.sec.gov/news/press-release/2022-11>; and Reopening of Comment Period for Pay Versus Performance, Release No. 34-94074; File No. S7-07-15 (Jan. 27, 2022), *available at* <https://www.sec.gov/rules/proposed/2022/34-94074.pdf>.

<sup>66</sup> For example, at Amazon and Comcast, which have voluntarily set and disclosed climate goals, proponents sought disclosure of how the companies' retirement plan options align with the companies' climate goals, while proposals at Booking Holdings Inc. sought disclosure of how similar climate-related metrics factored executive compensation programs. These proposals reached a vote, but ultimately failed to obtain majority support. The prevalence of these proposals may increase as more companies disclose GHG emissions reduction or other climate goals, targets and metrics as a result of the SEC's final climate-related disclosure rules.

<sup>67</sup> For example, in April 2022, Mastercard announced that it would expand its compensation model, which linked executive bonuses to the company's performance on carbon neutrality, financial inclusion and gender pay parity, to cover all employee bonus calculations. See <https://www.mastercard.com/news/perspectives/2022/esg-goals-and-employee-compensation/>.

linked that reduction target to long-term incentive compensation. Other proxy statements linked compensation to the attainment of generalized goals such as long-term GHG reduction, and a few simply stated the attainment of larger environmental, sustainability, or climate-related goals is one element of executive pay. On the other hand, critics of ESP-linked compensation metrics have questioned how appropriate ESP-linked compensation commitments are, expressing concern that companies may be voluntarily linking compensation to ESP metrics to divert shareholder attention away from financial underperformance.<sup>68</sup>

### H. NO-ACTION RELIEF<sup>69</sup>

#### 1. New SEC Staff Guidance on Shareholder Proposals

On November 3, 2021, the staff of the Division of Corporation Finance of the SEC issued new guidance on shareholder proposals under SLB No. 14L that rescinded prior guidance issued in 2017, 2018 and 2019 on the “ordinary business” and “economic relevance” exclusions under Rules 14a-8(i)(7) and (i)(5), respectively.<sup>70</sup> SLB No. 14L represents a significant shift in the staff’s approach with respect to these exclusions, and has been correlated with a meaningful decrease in the rate at which no-action requests—especially in connection with ESP proposals—have been granted by the SEC staff on the basis of Rule 14a-8(i)(7).

The effect of the new SEC guidance on no-action success rates will likely continue next year. In its proposing release for the Rule 14a-8 Proposed Amendments, the SEC stated that, while it is not proposing for the Rule 14a-8 Proposed Amendments to cover the ordinary business exclusion under Rule 14a-8(i)(7), it reaffirms the standards that it articulated in 1998 (i.e., proposals relating to ordinary business matters but focusing on “sufficiently significant social policy issues” are generally not excludable under Rule 14a-8(i)(7)).<sup>71</sup> As characterized by the SEC, the 1998 standard aligns with the approach to Rule 14a-8(i)(7) under SLB No. 14L. Furthermore, since the Rule 14a-8 Proposed Amendments would significantly narrow the substantial implementation, duplication and resubmission exclusion standards,

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<sup>68</sup> See, e.g., Shivaram Rajgopal, Are Companies Tying CEO Pay To ESG Because It's Not Linked To Performance? (Apr. 29, 2021), available at <https://www.forbes.com/sites/shivaramrajgopal/2021/04/29/are-companies-tying-ceo-pay-to-esg-because-its-not-linked-to-performance/?sh=25084be776cd>.

<sup>69</sup> Our dataset reflects no-action requests submitted by companies in the S&P Composite 1500 with respect to meetings in the first half of 2022 and 2021, consistent with our overall dataset on shareholder proposals. This reflects a change from our 2021 Proxy Season Review memo, which covered all no-action requests that were submitted from September 1, 2020 through June 30, 2021.

<sup>70</sup> For a more detailed discussion of the new guidance, see our publication, dated November 8, 2021, entitled “[New SEC Staff Guidance on Shareholder Proposals](#).”

<sup>71</sup> Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8, SEC Release No. 34-95267 (July 13, 2022), available at <https://www.sec.gov/rules/proposed/2022/34-95267.pdf>, at p. 7.

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the effects we observed this year will likely intensify if the Rule 14a-8 Proposed Amendments are adopted as proposed.<sup>72</sup>

### **a. SLB No. 14L**

Under the new SLB No. 14L, instead of focusing on a particular proposal's significance to the specific company and its operations, the staff will assess "whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company" in determining whether a proposal is excludable under Rule 14a-8(i)(7). Similarly, proposals that relate to operations below the economic thresholds of Rule 14a-8(i)(5) may not be excluded if they raise issues of broad social or ethical concern related to the company's business. In addition, the SEC staff has said that "it will no longer expect a board analysis" when considering no-action requests based on ordinary business or economic relevance.

Further, SLB No. 14L also provided that "proposals seeking detail or seeking to promote timeframes or methods do not per se constitute micromanagement." The SEC staff stated its belief that its new approach under SLB No. 14L to micromanagement "will help to avoid the dilemma many proponents faced when seeking to craft proposals with sufficient specificity and direction to avoid being excluded under Rule 14a-8(i)(10), substantial implementation, while being general enough to avoid exclusion for 'micromanagement.'"

### **b. Impact on Success of No-Action Requests**

Since the release of SLB No. 14L, there has been a marked decrease in the prevalence of requests for which the SEC has granted no-action relief, as shown in the table below. From November 3, 2021 through April 30, 2022, the SEC staff granted relief for 37% of the 166 no-action requests that they considered, compared to 69% for the same period one year prior.<sup>73</sup> While issuers saw a decline in the rate at which no-action requests were granted by the SEC across all categories of proposals, the decline was precipitous for no-action requests relating to ESP proposals.

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<sup>72</sup> Myriad factors (e.g., shareholder expectations, company costs, voting results, final SEC disclosure rules) will influence whether we also continue to see a corresponding increase in the rate at which proposals reach a vote (described above in Sections A and D-G), or if companies will be more likely to settle with proponents in the years to come.

<sup>73</sup> April 30 is the date by which most responses from the SEC to no-action requests for meetings in the first half of the year were provided in 2022 and 2021.

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### No-Action Relief Success by Category

	SEC Response Date						YoY Change in % Granted
	November 3, 2020 – April 30, 2021			November 3, 2021 – April 30, 2022			
Proposal Category	Considered	Granted	% Granted	Considered	Granted	% 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%)
Total	177	123	69%	166	62	37%	(32%)

The SEC granted relief to only 17% of requests related to environmental proposals, 26% of requests related to social proposals, 59% of requests related to governance proposals and 50% of requests related to compensation proposals (compared to 47%, 73%, 72% and 58%, respectively, for the same period in 2021).

From November 3, 2021 through April 30, 2022, the staff concurred with only 24% of requests based on the ordinary business basis under Rule 14a-8(i)(7), compared to 64% during the same period in 2021 prior to the release of SLB No. 14L. The decrease in the rate at which requests under the ordinary business basis have been granted has been most significant for social proposals: the staff have granted only 8 of 44 such requests (18%) compared with 27 of 37 such requests (73%) during the same period last year. Although the substantial implementation basis under Rule 14a-8(i)(10) was not the focus of SLB No. 14L, the success rate of no-action requests on this basis from November 3, 2021 through April 30, 2022 decreased to 16% from 56% for the same period in 2021.

In contrast, procedural bases have become more important this proxy season, representing the majority of the instances where the staff has concurred with a no-action request. Issuers have sought to exclude proposals for noncompliance with various other requirements of the proxy rules. Attempts to exclude under Rule 14a-8(e)(2) (submitted after deadline) and Rules 14a-8(b) and (f) (failed to demonstrate requisite ownership) appear to have been relatively more successful in the aggregate, while no-action requests based on Rule 14a-8(i)(3) (violated proxy rules) have been least likely to be granted.

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## No-Action Relief Success by Basis of Relief<sup>(1)</sup>

	SEC Response Date						YoY Change in % Granted
	November 3, 2020 – April 30, 2021			November 3, 2021 – April 30, 2022			
Basis of Relief	Considered	Granted	% Granted	Considered	Granted	% Granted	
(i)(7) ordinary business	55	35	64%	72	17	24%	(40%)
(i)(10) substantially implemented	62	35	56%	55	9	16%	(40%)
(i)(3) violation of proxy rules	20	4	20%	26	2	8%	(12%)
(b),(f) fail to show sufficient ownership	38	33	87%	17	10	59%	(28%)
(i)(11) duplication	5	1	20%	12	4	33%	13%
(e)(2) submitted after deadline	8	5	63%	9	9	100%	38%
(i)(12) resubmission	1	1	100%	9	5	56%	(44%)
(c) more than one proposal per person	1	0	-	5	1	20%	20%
(i)(2) violation of law	3	1	33%	4	1	25%	(8%)
(i)(6) lack power/authority to implement	1	0	-	3	0	-	-
(i)(4) personal grievance/interest	0	0	n/a	2	1	50%	n/a
(i)(5) economic relevance	2	1	50%	2	0	-	(50%)
(i)(9) conflict with company proposal	0	0	n/a	2	0	-	n/a
(i)(13) specific amount of dividends	0	0	n/a	1	1	100%	n/a
(h)(3) fail to appear & present proposal	2	2	100%	1	1	100%	-
(d),(f) more than 500 words	5	4	80%	1	1	100%	20%
Total	203	122	60%	221	62	28%	(32%)

(1) Number of times a basis for no-action relief was considered is greater than the number of requests considered because many no-action requests cite more than one basis for relief.

### c. Impact on Submission of No-Action Requests

Since the adoption of SLB No. 14L on November 3, 2021, companies in the S&P 1500 submitted 198 requests for SEC no-action relief to exclude shareholder proposals from proxy materials for annual meetings scheduled for the first half of 2022, down from 224 requests submitted for the same period one year prior. This overall decline is consistent with the feedback we have received that companies were deterred from submitting no-action requests as a result of the changes under SLB No. 14L, and the decline may be more pronounced following any adoption of the Rule 14a-8 Proposed Amendments.

The decrease in no-action requests this year was driven by a meaningful decline in requests related to governance proposals, whereas requests to exclude social/political proposals actually increased. No-

action requests on social/political proposals represented 81% of all no-action requests for meetings in H1 2022 submitted prior to the adoption of SLB No. 14L, up from 47% for the same period last year. However, it is likely that no-action requests on social/political proposals will also decrease in the future, especially if the Rule 14a-8 Proposed Amendments are adopted as proposed. This year, in at least one case, an issuer that had already submitted a request under Rule 14a-8(i)(7) based on the SEC staff's prior guidance withdrew its request following the SEC's release of SLB No. 14L.

## **2. SEC Staff's Reversion to Providing Written Responses to No-Action Requests**

On December 13, 2021, the SEC's Division of Corporation Finance announced that the staff would immediately revert to their past practice of responding to each no-action request with a written letter, stating that it believed "written responses will provide greater transparency and certainty to shareholder proponents and companies alike."<sup>74</sup> The SEC had previously announced on September 6, 2019 that for the 2020 proxy season, it would begin to provide verbal only responses unless a written response would provide value. This practice continued in the 2021 proxy season, during which nearly all responses were provided verbally only.<sup>75</sup>

### **a. Impact on the Timing of No Action Decisions**

Consistent with the SEC staff's December 13, 2021 announcement, the SEC staff provided written responses to all requests that it responded to between December 13, 2021 and April 30, 2022. This return to written responses has coincided with an increased average response time for the 2022 proxy season, averaging 70 days for requests from December 13, 2021 through April 30, 2022, compared to 60 days during the same period one year prior.

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<sup>74</sup> SEC Division of Corporation Finance, Announcement Regarding Staff Responses to Rule 14a-8 No-Action Requests (December 13, 2021), *available at* <https://www.sec.gov/corpfin/announcement/announcement-14a-8-no-action-requests-20211213>.

<sup>75</sup> For a more detailed discussion of the SEC staff's practice of verbal only responses, see our "[2021 Proxy Season Review: Part 1 – Rule 14a-8 Shareholder Proposals](#)."



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