

# 2020 Proxy Season Review: Part 1

## Rule 14a-8 Shareholder Proposals

July 15, 2020

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### Environmental, social and political (ESP) proposals:

- Total ESP submissions decline, but percentage voted and number of passing proposals increase
- Environmental proposals predominate ESP submissions, as demand for climate change and other ESP reporting increases and proposals for adoption of Sustainability Accounting Standards Board and Task Force on Climate-Related Financial Disclosures standards typically receive over 60% support
- Political and lobbying proposals decrease in number but are voted at a record rate (over 80%), with five passing (most since 2014)
- Human capital management and social capital management proposals rise, in part due to increase in workplace diversity proposals; nearly half reach a vote but average support remains low

### Governance proposals:

- Although overall number of governance proposals continues a five-year decline, structural governance proposals make comeback due to resurgence in written consent and special meeting proposals (increasing 61% and 33.3%, respectively); significantly fewer structural governance proposals pass due to decline in submission of high-pass rate proposals (e.g., elimination of supermajority voting thresholds)
- Independent chair proposals decrease (by 30%) but receive higher average support

### Compensation Proposals:

- Requests to tie ESP performance to compensation targets increase as a percentage of compensation proposals

## INTRODUCTION

Our annual proxy season review memo summarizes significant developments relating to the 2020 U.S. annual meeting proxy season. This year, our review comprises three parts: Rule 14a-8 shareholder proposals; compensation-related matters; and takeaways for 2021. This is Part 1, and we expect to issue Parts 2 and 3 over the next weeks. We will also host our annual webinar to discuss 2020 proxy season developments in September.

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 over 90% of U.S. market capitalization, at meetings held on or before June 30, 2020. We estimate that around 90% of U.S. public companies held their 2020 annual meetings by that date.

The data on submitted, withdrawn and voted-on shareholder proposals derives from ISS's voting analytics with respect to about 657 known shareholder proposals submitted this year to U.S. members of the S&P Composite 1500. 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 withdrawn before or after being included in a company's proxy statement (usually following engagement with the company) or excluded from a company's proxy statement through the SEC no-action process. 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 November 6, 2019, entitled "[Review and Analysis of 2019 U.S. Shareholder Activism](#)."

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>.

## Table of Contents

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A.	Overview of Shareholder Proposals .....	1
B.	Who Makes Shareholder Proposals .....	4
C.	Targets of Shareholder Proposals .....	6
D.	Shareholder Proposals on Environmental/Social/Political Matters .....	7
1.	Standardized ESG Reporting .....	9
2.	Environmental .....	10
3.	Political.....	12
4.	Human Capital Management .....	13
5.	Social Capital Management.....	17
E.	Shareholder Proposals on Governance Matters.....	18
1.	Structural Governance .....	19
2.	Independent Chair .....	26
3.	Board Composition .....	27
F.	Compensation-Related Shareholder Proposals .....	32
G.	No-Action Relief .....	34
1.	Response Format and Time .....	35
2.	Bases for Relief.....	37
3.	Response to New Format .....	37
H.	Exempt Solicitations.....	38

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

### A. OVERVIEW OF SHAREHOLDER PROPOSALS

The following summarizes the Rule 14a-8 shareholder proposals submitted in 2019 full-year and 2020 year-to-date, the number voted on and the rate at which they passed.<sup>1</sup> Overall, the total number of shareholder proposals declined, continuing a downward trend that began in 2015. A total of 657 shareholder proposals have been submitted to date in 2020, relative to 678 at this time last year, 722 for 2019 as a whole and 788 for 2018. Year-over-year change for environmental, social and political (“ESP”) proposals and governance-related proposals remained consistent with trends observed during the 2019 proxy season, with the drop in ESP proposals being the more significant (6.2% relative to this time last year, compared to a 12.5% drop in 2019) and governance-related proposals declining by a smaller proportion (1.7% drop, compared to a 6.2% drop in 2019).<sup>2</sup> To a lesser extent, the decline in the number of submitted proposals also reflects a decrease in the number of proposals (13 compared to 26 in 2019) against investing or managing on the basis of ESP factors (so-called anti-ESP proposals), which bolstered the number of ESP and governance-related proposals but failed to attract meaningful shareholder support in 2019.

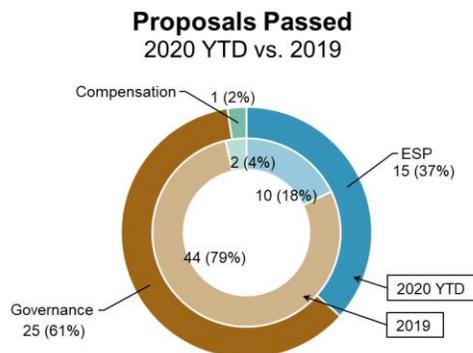
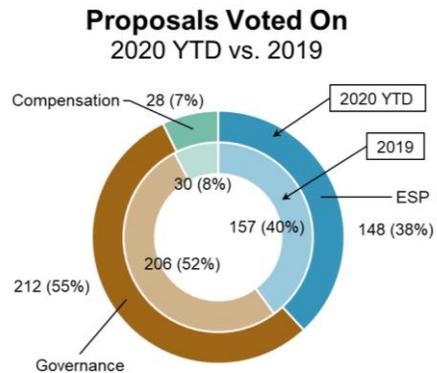
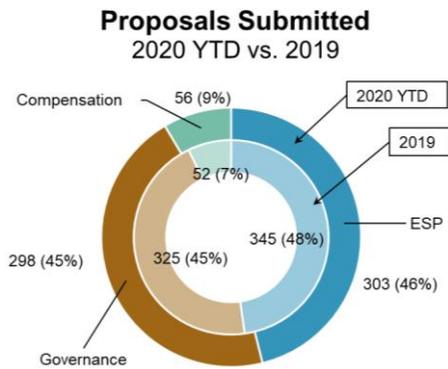
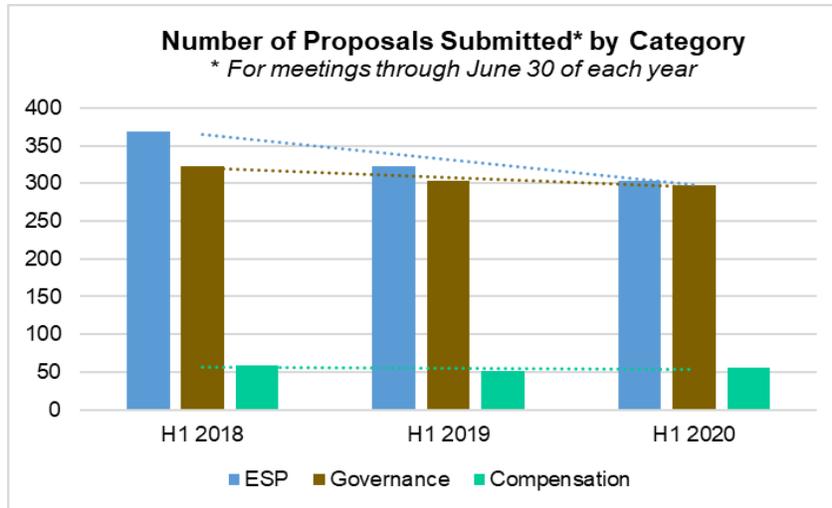
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<sup>1</sup> In this publication, when we refer to a proposal as “passing,” we mean that it received the support of a majority of votes cast, regardless of whether this is the threshold for shareholder action under state law or the company’s bylaws. 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 either before or after the mailing of a company’s proxy materials, as well as proposals which are not presented by the proponent at the shareholder meeting, as “withdrawn” (in cases where a proposal is not included in the proxy or presented, but it is unclear whether the proponent has withdrawn the proposal, we adopt ISS’s catch-all categorization of the proposal as “not in proxy or not presented”).

<sup>2</sup> Although commenters often group governance matters together with environmental and social matters (referred to as ESG), separating governance and ESP matters provides additional insight in the context of discussing shareholder proposals. In a recent speech by SEC Commissioner Elad Roisman, available at <https://www.sec.gov/news/speech/roisman-keynote-society-corporate-governance-national-conference-2020>, the Commissioner also expressed the view that discussing ESP separately from corporate governance helps to alleviate potential confusion about the meaning of the umbrella term “ESG.” The Commissioner stated that he “often wondered how the three concepts of environmental, social, and governance matters got lumped together,” but that, in his opinion, “corporate governance stands by itself and rarely has a direct relationship to environmental or social issues. Best practices in corporate governance are usually the result of many years of private ordering experimentation and experience. Also, governance reform focuses on the company itself and what is best for its optimal operation as well as its shareholders. The same is not necessarily true of ‘E’ or ‘S.’ Those matters tend to be more society, or stakeholder, focused.”

SUMMARY OF 2019–2020 SHAREHOLDER PROPOSALS

Type of Proposal	Shareholder Proposals Submitted		Shareholder Proposals Voted On		Average % of Votes Cast in Favor		Shareholder Proposals Passed	
	2020 YTD	2019	2020 YTD	2019	2020 YTD	2019	2020 YTD	2019
ESP	303	345	148	157	27%	28%	15	10
Governance-related	298	325	212	206	33%	37%	25	44
Compensation-related	56	52	28	30	23%	24%	1	2
<b>Total</b>	<b>657</b>	<b>722</b>	<b>388</b>	<b>393</b>				



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More ESP proposals continue to be submitted than any other type of shareholder proposal. Nearly half of submitted ESP proposals went to a vote in both 2019 and 2020, compared to about one-third of ESP in 2018.

A record 15 ESP proposals passed this year despite the lower overall number of submissions, a significant change from the past three years, when very few ESP proposals passed. However, overall shareholder support for ESP proposals leveled off at an average of 27% this year, on par with 2018 (26%) and 2019 (28%). The gap between ESP and governance-related proposals continued to narrow in terms of average support rate, down to six percentage points from nine percentage points in 2019, 11 percentage points in 2018 and 17 percentage points in 2017. ESP proposals are discussed in more detail in Section D.

The number of governance-related proposals fell further as companies continued proactive adoption of market standard practices (e.g., proxy access) and ongoing engagement with proponents on board issues such as diversity and composition. The overall decline was offset somewhat by a noteworthy resurgence in written consent and special meeting proposals (increasing 61% and 33.3%, respectively) after submissions on these topics declined in 2019. Written consent proposals (61 submitted, the highest since we began tracking submitted proposals) were the most common type of governance-related proposals submitted this year. Written consent proposals reached a vote 91.8% of the time and continued to receive relatively high average support at 35%, although only two passed this year compared to six in 2019.

As a whole, governance-related proposals remained the most likely to reach a vote and did so this year at an even higher rate (71.1%) than in 2019 (63.4%). Governance-related proposals also continued to represent the majority of proposals that passed, although the gap in the passing rate between ESP and governance-related proposals narrowed. While the percentage of passing ESP proposals increased in 2020, the passing rate for governance-related proposals decreased significantly (to 11.8% from 21.4% in 2019). The decrease in the passing rate for governance-related proposals was due primarily to a decrease in the number of elimination of supermajority thresholds proposals, which almost always pass when voted (nine out of 10 in 2020, down from 18 out of 21 in 2019). Governance-related proposals are discussed in more detail in Section E.

The number of compensation-related proposals remained on par with 2019, representing a slightly larger percentage of the overall submissions, but ultimately remaining at a low level. The increases in both the absolute number and relative proportion of compensation proposals compared to 2019 are due to the continued rise in proposals tying ESP performance to compensation targets (41.1% of all compensation-related proposals submitted, compared to 34.6% in 2019). Whereas two compensation-related proposals passed in 2019, only one passed in 2020 (all three were related to clawbacks). Compensation-related proposals are discussed in more detail in Section F.

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## B. WHO MAKES SHAREHOLDER PROPOSALS

The focus of a relatively concentrated group of individuals and entities continues to drive the voting agenda at U.S. public companies. The top 10 proponents account for more than half of shareholder proposals submitted to U.S. S&P Composite 1500 companies, with John Chevedden's submissions alone accounting for 21% of all submitted proposals. Despite some indication last year that the top individual proponents would be shifting their focus to ESP issues (including a public statement from James McRitchie and Myra Young to that effect), the priorities of top individual proponents and the top entity proponents remain divided, with the individuals overwhelmingly focused on governance and the entities primarily focused on ESP.

It is worth noting that data based on the named filer of a shareholder proposal does not reveal the robust activity from investor coalitions (such as the Interfaith Center on Corporate Responsibility), which submit proposals through individuals and member/affiliated organizations. It appears that the concentration of proposals would be even higher if aggregated at the coalition level. In addition, data based on the named filer of a shareholder proposal understates the high level of proactive engagement between companies and shareholders that prefer to effect change through letter-writing campaigns and private engagement, as further discussed below.

The following table shows a breakdown of the types of proposals submitted by the top shareholder proponents in 2020:

	<i>Primary or Secondary Filers<sup>3</sup></i>	<i>Total</i>	<i>% of All Proposals</i>	<i>ESP</i>	<i>Governance</i>	<i>Compensation</i>
1	John Chevedden	132	21%	5	127	0
2	As You Sow Foundation	57	9%	51	4	2
3	NYC Comptroller/NYS Common Retirement Fund	50	8%	23	23	4
4	Kenneth Steiner	45	7%	0	45	0
5	James McRitchie/Myra Young	37	6%	9	28	0
6	Mercy Investment Services	34	5%	25	2	7
7	Trillium Asset Management	33	5%	24	4	5
8	Sisters of St. Francis	13	2%	10	2	1
9	National Center for Public Policy Research	12	2%	8	4	0
10	Arjuna Capital	11	2%	10	1	0
	Harrington Investments	11	2%	11	0	0

- **Individuals.** Three of the five most prolific proponents were the same individual investors who have been active for a number of years: John Chevedden, Kenneth Steiner and James McRitchie/Myra Young. Collectively, these individuals and their family members were responsible for the submission of 214 proposals. These individuals often submit proposals

<sup>3</sup> Based on ISS records of the named sponsors of shareholder proposals, which we have supplemented with information published by proponents on their websites and other independent research.

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- jointly as co-filers. After excluding overlaps, these individuals submitted 192 distinct proposals in 2020 so far. Overall, they represented 29% of all proposals submitted (slightly down from about 31% in 2019) and the clear majority of governance-related proposals (68%, up from about 62% in 2019). Whereas this group continued to submit ESP proposals this year, the number fell to 13 distinct ESP proposals (or 6.8% of their submissions) in 2020, from 20 (or 9.5% of their submissions) through the same period last year.
- **Public Pension Funds and Entities.** Public-sector pension funds and entities submitted 52 distinct proposals to public companies for 2020 meetings. These entities tend to focus on a mixture of board composition and ESP issues, including political contributions and lobbying, human capital management (including workforce diversity) and environmental matters. The single most frequent proponent in this category was the New York City Comptroller. The number of shareholder proposals submitted fails to reflect the New York City Comptroller's vigorous engagement with companies during the 2020 proxy season. In October 2019, the Comptroller launched his "Boardroom Accountability Project 3.0" initiative on behalf of the New York City Retirement System (NYCRS) by sending letters to 56 companies requesting that they adopt board and CEO search policies requiring the consideration of women and people of color. As further discussed in Section D, the Comptroller announced in June that he submitted shareholder proposals to 17 of these 56 companies for shareholder meetings in 2020, and reached negotiated settlements with 14 (or 82.4%) of those companies (including one with a meeting date after June 30), in each case, after the company agreed to adopt and disclose a compliant board and CEO diversity search policy.
  - **ESP-Focused Social Investment Entities.** The majority of ESP proposals continued to come from asset management or advisory institutions that seek to make "socially responsible" investments. Although the number and size of ESP-focused funds and institutions significantly increased through 2019 and 2020, the roster of social investment entities that submitted the highest number of proposals remained more or less unchanged from prior years—As You Sow Foundation (57 total with 51 ESP), Mercy Investment Services (34 total with 25 ESP), Trillium Asset Management (33 total with 24 ESP) and Arjuna Capital (11 total with 10 ESP). This year, Harrington Investments also submitted a meaningful number of proposals (11 total, all ESP), focusing primarily on corporate purpose and other issues of social capital management. It is worth noting that, this year, some of the top social investment entity proponents have forayed into non-ESP campaigns. For example, in May, Trillium Asset Management issued an open letter urging a split of Conduent Incorporated to maximize shareholder value.
  - **Anti-ESP Entities.** This year, "anti-ESP" entities such as Burn More Coal, a special-interest group supportive of the coal industry, and the Free Enterprise Project, the conservative shareholder activist arm of the National Center for Public Policy Research (NCPFR), continued to submit proposals, mainly on environmental (e.g., the cost of implementing environmental sustainability measures) and diversity (e.g., board representation of diverse political ideology) issues. However, perhaps due to low shareholder support last year, as further discussed in Sections D and E, these entities submitted significantly fewer proposals than they did in 2019—Burn More Coal and NCPFR together submitted 13 proposals to date, compared to 26 in 2019.
  - **Religious Organizations.** This year, religious organizations continued to submit a meaningful number of ESP proposals. The most active proponents were organizations affiliated with the faith-based investor coalition, the Interfaith Center on Corporate Responsibility (ICCR). For the first time since we began tracking submissions, proposals on human capital management and social capital management issues—in particular, human rights and workers' rights—were the most commonly submitted proposals among ICCR affiliates. In addition to the industries targeted by ICCR in previous years (i.e., pharmaceutical, healthcare and financial services sectors), these organizations also submitted human capital management and social capital management proposals at large technology companies. For example, ICCR affiliates submitted at least six of the 20

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proposals at Amazon, including five proposals focused on human rights or protection of consumer interests, and one to link sustainability metrics to executive compensation.

- **Labor Unions.** Labor unions, such as the AFL-CIO and the Teamsters, submitted 30 distinct proposals, on par with the 32 submitted in 2019. While ESP proposals were the most common submissions in 2019, these entities submitted more governance- and compensation-related proposals in 2020.

The ability of shareholders with a small investment in the company (\$2,000 of stock held for one year) to submit Rule 14a-8 proposals has been a subject of controversy and calls for change in recent years. Congressional attempts to increase the investment threshold for submission or to curtail resubmission of proposals have not succeeded, but such amendments are currently one of the SEC's stated near-term priorities. On November 5, 2019, the SEC issued a release proposing amendments to Rule 14a-8, including:

- amending the share ownership requirement to a three-tiered structure: continuous ownership of at least \$2,000 of the company's securities for at least three years, continuous ownership of at least \$15,000 of the company's securities for at least two years, or continuous ownership of at least \$25,000 of the company's securities for at least one year;
- modernizing the current resubmission thresholds of 3%, 6% and 10% for matters voted on once, twice or three or more times in the last five years, respectively, with thresholds of 5%, 15% and 25%, respectively; and
- allowing for the exclusion of a proposal that has been previously voted on three or more times in the last five years, notwithstanding having received at least 25% of the votes cast on its most recent submission, if the proposal (i) received less than 50% of the votes cast and (ii) experienced a decline in shareholder support of 10% or more compared to the immediately preceding vote.

In a recent Keynote Speech at the Society for Corporate Governance National Conference, SEC Commissioner Elad Roisman said that the staff has been focused for the last few months on "digesting the comments received on both proposals and drafting recommendations for the Commission to finalize each of them," and that he hopes the SEC can "move forward in pursuing efforts to improve our 'proxy plumbing' infrastructure."<sup>4</sup> As of the date of this memo, the SEC has not taken action.

### C. TARGETS OF SHAREHOLDER PROPOSALS

Traditionally, large-cap companies have received the vast majority of shareholder proposals.<sup>5</sup> In 2020 so far, S&P 500 companies received nearly 80% of proposals voted on, a slight drop from 2019 (81.6%).

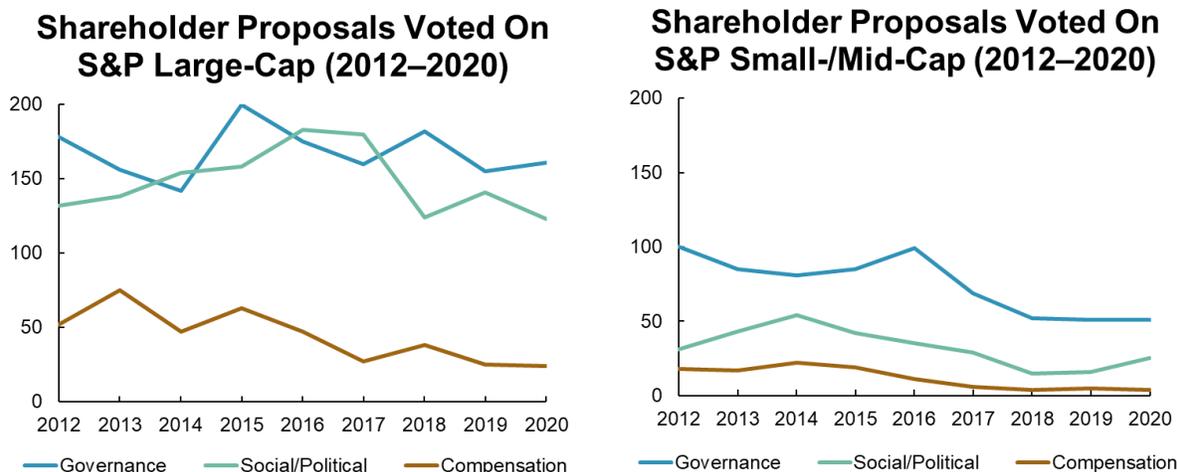
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<sup>4</sup> Elad L. Roisman, Keynote Speech at the Society for Corporate Governance National Conference, Harv. L. Sch. F. on Corp. Governance & Fin. Reg. (July 8, 2020), *available at* <https://corpgov.law.harvard.edu/2020/07/08/keynote-speech-at-the-society-for-corporate-governance-national-conference/>.

<sup>5</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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The following graphs show the frequency of proposals, by category, voted on at large-cap companies compared to small- and mid-cap companies. The higher numbers at large-cap companies are particularly notable given that the small-/mid-cap graph includes twice as many companies.



Proponents submitted Rule 14a-8 proposals at companies in a variety of industries, but seemed to focus particularly on companies in the technology (17% of total submissions), manufacturing (15%), consumer goods/retail (14%), utility and energy (13%), financial services (11%) and healthcare/pharmaceuticals (10%) sectors. Proponents tended to focus on environmental issues in the utility and energy sector, on ESP and ESP-linked compensation in the retail/consumer goods and healthcare/pharmaceutical sectors, and on a mixture of governance and ESP issues in financial services and technology sectors (especially human capital management) and the manufacturing sector (especially social capital management).

### D. SHAREHOLDER PROPOSALS ON ENVIRONMENTAL/SOCIAL/POLITICAL MATTERS

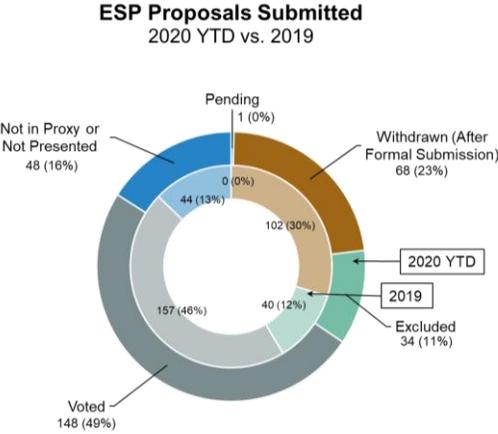
A record 15 proposals have passed in 2020 so far. Despite a slight decline in average support for ESP proposals as a whole (27%) compared to 2019 (28%), the categories of ESP proposals that have emerged in recent years as perennial focal points—political and lobbying and environmental matters—received higher average support than they did in 2019 and represented the categories with the highest levels of support among ESP proposals (36% and 30%, respectively).

	<b>ESP PROPOSALS</b>							
	<b>Shareholder Proposals Submitted</b>		<b>Shareholder Proposals Voted On</b>		<b>Average % of Votes Cast in Favor</b>		<b>Shareholder Proposals Passed</b>	
	<b>2020 YTD</b>	<b>2019</b>	<b>2020 YTD</b>	<b>2019</b>	<b>2020 YTD</b>	<b>2019</b>	<b>2020 YTD</b>	<b>2019</b>
Environmental	<b>82</b>	69	<b>24</b>	22	<b>30%</b>	24%	<b>4</b>	0
Political	<b>67</b>	99	<b>54</b>	63	<b>36%</b>	34%	<b>5</b>	4
Human capital management	<b>65</b>	60	<b>32</b>	33	<b>24%</b>	25%	<b>5</b>	2

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Social capital management	<b>57</b>	55	<b>27</b>	20	<b>18%</b>	22%	<b>0</b>	2
Sustainability report	<b>6</b>	25	<b>0</b>	4	-	30%	-	0
Animal rights	<b>3</b>	8	<b>2</b>	1	<b>6%</b>	7%	<b>0</b>	0
ESP – other	<b>23</b>	29	<b>9</b>	14	<b>25%</b>	30%	<b>1</b>	2

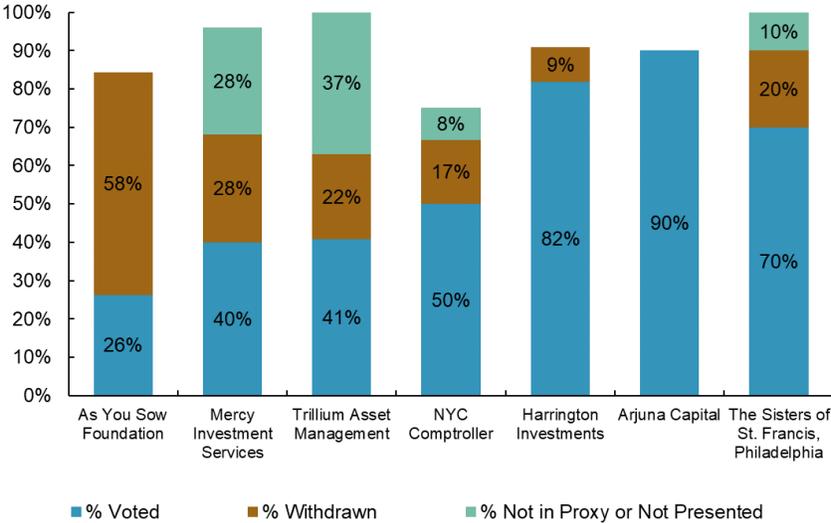
The percentage of ESP proposals voted rose slightly to 48.8% from 45.5% in 2019 (up substantially from 35.9% in 2018). However, the number of ESP proposals voted is lower than for the same period last year, correlating with the 6.2% drop in the number of ESP proposals submitted in the first half of 2020 compared to the same period in 2019 (12.2% drop compared to full-year 2019).<sup>6</sup>



The top shareholder proponents referenced in Section B submitted close to 60% of all ESP proposals received by U.S. S&P Composite 1500 companies. Among these proponents, As You Sow Foundation submitted the greatest number of ESP proposals (51), which related primarily to climate change, other environmental issues and workforce diversity, the majority of which was withdrawn. Mercy Investment Services (25), Trillium Asset Management (24), Harrington Investments (11), Arjuna Capital (10) and Sisters of St. Francis (10) also submitted a meaningful number of ESP proposals, particularly focusing on environmental issues and human capital management issues. Companies resolved about half of the proposals brought by these proponents outside of a shareholder vote, but almost all the proposals brought by Arjuna (primarily related to gender pay gap reporting), Harrington Investments and the Sisters of St. Francis went to a vote. ESP proposals also represented a larger portion of the submissions this year from other types of proponents, such as public pension funds. For example, about one-third of all proposals submitted by the New York City Comptroller this year have been strictly ESP proposals, but if board diversity proposals, discussed further in Section E.2.a. below, are included, the number jumps to around 86%.

<sup>6</sup> We note that the submission and withdrawal data generally excludes shareholder engagement prior to the receipt of a formal proposal, which may obscure trends in shareholder engagement with respect to at least some categories of proposals.

**2020 YTD Withdrawal Rates for ESP Proposals  
(By Top ESP Proponents)**



**1. Standardized ESG Reporting**

Over the last several years, U.S. public companies have faced increasing pressure from investors and other stakeholders to disclose material ESG risks, practices and impacts. Although the SEC has not adopted an ESG disclosure framework outside its general principles-based approach, investors are increasingly demanding standardized, quantitative disclosures from companies that conform to standards promulgated by the Sustainability Accounting Standards Board (SASB)<sup>7</sup> or the Task Force on Climate-Related Financial Disclosures (TCFD).<sup>8</sup> For a more complete discussion of this topic, see our publication, dated June 6, 2020, entitled [“The Rise of Standardized ESG Disclosure Frameworks in the United States.”](#)

In the past year, large institutions such as BlackRock, State Street and Vanguard have publicly indicated that they are in support of companies making ESG disclosures aligned with both the SASB and TCFD frameworks. Meanwhile, proponents—mostly social investment entities—have submitted proposals across a range of different ESP categories, demanding reporting (either generally or on specific issues)

<sup>7</sup> The SASB framework provides sector-specific guidance on a broad range of ESG topics, covering issues such as greenhouse gas emissions, energy and water management, data security and employee health and safety, while providing sector-specific guidelines emphasizing topics SASB believes are material for issuers in those sectors.

<sup>8</sup> Unlike the SASB framework, the TCFD framework provides both general and sector-specific guidance, but only on climate-related topics, such as physical risks of the effects of climate change and climate-related opportunities, including those related to resource efficiencies and alternative energy sources. The TCFD framework has been endorsed and incorporated into mandatory reporting regimes by regulators in the EU, United Kingdom and Hong Kong.

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that align with SASB and TCFD criteria. For example, As You Sow made SASB-aligned disclosures a priority this proxy season, submitting at least seven proposals that endorsed the SASB standards. As You Sow withdrew three such proposals, in two instances (at Ulta Beauty and Advance Auto Parts) following a commitment from the company to provide SASB-aligned disclosure. In addition, As You Sow’s proposal at Sanderson Farms reached a vote and received only 11% support; however, Sanderson Farms subsequently committed to providing complete SASB-aligned disclosures following engagement with BlackRock on the topic (BlackRock later disclosed in a voting bulletin that it voted against the proposal due to its engagement with the company).

Given the attention of both the SEC and institutional investors on these standardized disclosure frameworks, companies should consider whether it is appropriate to enhance certain aspects of their public disclosures to address key ESG issues highlighted under these frameworks (such as greenhouse gas emissions, energy and water management, data security and employee health and safety). In a June 23 interview with FCLT Global,<sup>9</sup> SEC Chairman Jay Clayton reiterated challenges to imposing standardized ESG reporting requirements (e.g., many environmental and social issues are (1) not easily quantifiable and (2) forward-looking and implicate assumptions that may be subject to greater flux than those involved in traditional financial analysis), but indicated that it might be helpful for companies to look at the SASB and TCFD disclosure frameworks as a “heat map” for the areas that investors may consider important to a particular industry.

**2. Environmental**

	<b>ENVIRONMENTAL</b>							
	<b>Shareholder Proposals Submitted</b>		<b>Shareholder Proposals Voted On</b>		<b>Average % of Votes Cast in Favor</b>		<b>Shareholder Proposals Passed</b>	
	<b>2020 YTD</b>	<b>2019</b>	<b>2020 YTD</b>	<b>2019</b>	<b>2020 YTD</b>	<b>2019</b>	<b>2020 YTD</b>	<b>2019</b>
Climate-Related	<b>62</b>	52	<b>18</b>	13	<b>31%</b>	24%	<b>4</b>	0
Other Sustainability Impact	<b>20</b>	17	<b>6</b>	5	<b>27%</b>	22%	<b>0</b>	0

There was a meaningful increase in the number of environmental proposals submitted (82 in 2020, compared to 69 in 2019), bringing this category back to the top spot among ESP submissions (as was the case in both 2017 and 2018). In addition, a larger percentage of environmental proposals went to a vote (29.3% in 2020, compared to 26.1% in 2019), and four passed this year (compared to none in 2019). The four proposals that passed this year all related to climate change risks (Dollar Tree reporting on greenhouse gas emissions; J.B. Hunt Transport Services reporting on climate change initiatives; Phillips 66 reporting on risks of Gulf Coast petrochemical investments; and Chevron reporting on climate lobbying). ISS recommended in favor of each of these four shareholder proposals.

<sup>9</sup> Webinar: A Conversation with SEC Chairman Jay Clayton, FCLT Global (June 23, 2020), available at <https://www.youtube.com/watch?v=HXNgyETPr78>.

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Both the prevalence and pass rate of environmental proposals this year are more consistent with the trends in 2017 and 2018—when shareholders proposed that companies voluntarily adopt Paris Agreement and specific greenhouse gas emissions reporting after President Trump announced the U.S.’s withdrawal from the Agreement in June 2017—than in 2019, when these proposals began to wane. This year, the climate-rated disclosure proposals related to the Paris Agreement and GHG emissions continued to represent a substantial portion of environmental proposals submitted to U.S. S&P Composite 1500 companies. The total number of environmental proposals was boosted by submissions relating to industry-specific climate risks, such as water-related risks at food and energy companies and stranded carbon assets at energy companies, as well as proposals to assess or report on the impact of particular sustainability initiatives implemented by the company. The only proposals calling for the establishment of board committees on environmental issues were once again submitted at Chevron and Exxon Mobil, but these proposals were either excluded on the basis of ordinary business (in the case of Exxon Mobil) or received below 10% support (in the case of Chevron); substantially similar proposals at both companies received below 10% support in 2019.

On aggregate, average shareholder support for environmental proposals increased from 24% in 2019 to 30%, with ISS supporting 63% of environmental proposals this year compared to 64% in 2019. Excluding the two anti-ESP environmental proposals that reached a vote, however, the 2020 average shareholder support was only slightly higher than in 2019 (around 34.5% compared to 31.5% in 2019). ISS recommended against the voted anti-ESP proposals, both submitted by Steven Milloy, one of the leaders of Burn More Coal, requesting that Exxon Mobil and Xcel Energy report on the cost of taking voluntary environmental actions (these proposals received 4.1% and 3.3% of votes cast, respectively).

In addition to recommending against the anti-ESP proposals, ISS recommended against seven other environmental proposals this year, contributing to substantially different results: excluding the two anti-ESP proposals, proposals without ISS support received only 14.3% of votes cast compared with an average 40.8% support when ISS recommended in favor of the proposal. For the most part, ISS recommended against environmental proposals demanding companies report on specific issues, such as water resource risks, coal combustion and petrochemical operations in flood-prone areas. It is worth noting, however, that the ISS recommendation data we examine for this publication is based on ISS’s general U.S. Proxy Voting Policy and does not account for voting recommendations based on ISS’s new Climate Voting Policy, which it launched on March 6, 2020 (for a summary of the material differences between the general and climate-focused 2020 ISS voting policies for U.S. companies, see our publication, dated March 19, 2020, entitled “[ISS Publishes New Climate Proxy Voting Guidelines](#)”). If use of ISS’s Climate Voting Policy becomes more prevalent among investors and the differences between the general and the climate-focused policies become more pronounced, the correlation between voting results and the ISS recommendation data that we examine may become weaker.

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3. Political

POLITICAL							
Shareholder Proposals Submitted		Shareholder Proposals Voted On		Average % of Votes Cast in Favor		Shareholder Proposals Passed	
2020 YTD	2019	2020 YTD	2019	2020 YTD	2019	2020 YTD	2019
67	99	54	63	36%	34%	5	4

Political proposals continued to represent a large portion (22.1%) of ESP proposals (although the number of submissions declined sharply from 2019). There was a significant increase in the percentage of proposals that went to a vote (80.6% in 2020, up from 63.6% in 2019), and five political proposals garnered majority support (compared to four in 2019). All but two of the political proposals submitted this year were requests for companies to disclose their political spending (expenses and/or policies), including contributions to candidates, lobbying expenditures and related policies. The two other proposals requested that the companies in question—Coca Cola and PayPal—either report on, or rebuke the board for failing to ensure, alignment between company values and political expenditures; both proposals were withdrawn before reaching a vote.

Consistent with prior years, many of the companies that received a political proposal this year were high-profile American brands (such as Coca-Cola, Disney, Ford and UPS) or companies in sectors that attract public attention (such as the healthcare, pharmaceutical, technology, banking and energy sectors that have received similar or identical proposals in previous years). Last year, Intel received a proposal to allow annual advisory votes on political contributions, but this request was not the focus of any proposal this year, perhaps due to the low support for this proposal in 2019 (only 6% of votes cast).

For the political proposals that reached a vote, the average shareholder support remained relatively high (at 36%, compared to 34% in 2019), with ISS supporting almost all these proposals (94% in 2020, compared to 95% in 2019). In addition to the five proposals that passed (at Alaska Air, Centene, J.B. Hunt Transport Services, Western Union and Activision Blizzard), which garnered between 51.4% and 58.6% of votes casts, eight other proposals received over 45% support (almost 50% at Illumina, 48.6% at Vertex, 48.2% at Chemed, 47.9% at Motorola, 47% at Verizon, 46.2% at Honeywell and 46% and 45.9% at Delta Airlines for a general disclosure proposal and a climate-related lobbying proposal, respectively).

In the supporting statements for the five proposals that passed, the proponents emphasized the importance of transparent disclosure to shareholders on a company’s direct and indirect political expenditures, non-monetary contributions and affiliation with political nonprofits, citing the Supreme Court’s *Citizens United* decision for the proposition that “disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.” Each supporting statement also notes each company’s contributions based on publicly available information. Each supporting statement also notes that publicly available information does not provide a full picture of the company’s political activities, as it does not account for payments to trade associations or other third-party organizations that make political expenditures.

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Each proposal that passed was opposed by the company's board. In their response statements, each board expressed the concern that the disclosure of indirect political activities, including membership in various trade organizations, may misrepresent their respective companies' actual political activities, since these organizations take independent action with which the board may disagree and their primary purpose, by law, may not be political.

### 4. Human Capital Management<sup>10</sup>

	HUMAN CAPITAL							
	Shareholder Proposals Submitted		Shareholder Proposals Voted On		Average % of Votes Cast in Favor		Shareholder Proposals Passed	
	2020 YTD	2019	2020 YTD	2019	2020 YTD	2019	2020 YTD	2019
Workplace diversity	<b>31</b>	12	<b>11</b>	8	<b>34%</b>	37%	<b>3</b>	2
Gender/racial/other pay gap	<b>13</b>	34	<b>12</b>	18	<b>13%</b>	22%	<b>0</b>	0
Employee arbitration policies	<b>10</b>	7	<b>2</b>	1	<b>34%</b>	13%	<b>1</b>	0
Sexual harassment	<b>4</b>	7	<b>4</b>	6	<b>19%</b>	20%	<b>0</b>	0
Human capital – other	<b>7</b>	0	<b>3</b>	0	<b>28%</b>	14%	<b>1</b>	0

Shareholders began to submit a meaningful number of proposals related to management of human capital for the first time in 2018, driven in part by the momentum of the #MeToo, #TimesUp and similar movements. In contrast to 2018, when only 22% of these proposals went to a vote, approximately half of human capital management proposals reached the voting stage in both 2019 and 2020.

As shareholders, proxy advisors and the public continue to focus on topics such as gender/racial pay equity and workplace diversity, and racial discrimination and social and economic justice more generally, in the wake of the COVID-19 pandemic and the #BlackLivesMatter movement, these proposals may become more prevalent, and shareholder support may well increase. More companies are likely to adopt or expand public disclosure on human capital management in response to growing pressure from investors and regulators. The SEC released proposed amendments to Regulation S-K in August 2019 that would require disclosure of a company's human capital recourses, including any human capital measures or objectives that management focuses on in managing the business that are material to an investor's understanding of the company's business.<sup>11</sup> As discussed in Section D.1, the recent endorsement from prominent institutional investors (BlackRock, Vanguard and State Street (implicitly through its SASB-based R-factor Score)) of the ESG disclosure framework developed by SASB, which covers human capital management issues, also may intensify the pressure on companies to disclose these issues.

<sup>10</sup> We categorize ESP proposals addressing employee-related interests under "human capital management," and those addressing non-employee and non-shareholder stakeholder interests under "social capital management."

<sup>11</sup> Release Nos. 33-10668; 34-86614; File No. S7-11-19, available at <https://www.sec.gov/rules/proposed/2019/33-10668.pdf>.

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### a. Workplace Diversity

The number of workplace diversity proposals this year increased substantially compared to 2019. As was the case in 2019, these proposals were predominantly sponsored by Trillium Asset Management. This year, only 35.5% of these proposals reached a vote, representing a significant decrease from 2019, when two-thirds reached a vote, likely due to engagement. Similar to 2019, the vast majority of workplace diversity proposals requested companies to implement or refine diversity reports and/or policies at the general workplace level. Only two proposals were specifically directed at management-level diversity (from Trillium Asset Management at IPG Photonics and Tractor Supply Company). This year, a new subcategory of workplace diversity proposals was a request to amend existing anti-discrimination policies to prohibit discrimination based on sexual orientation and gender identity; there were six of these proposals this year, all submitted by Trillium Asset Management.

Shareholder support for workplace diversity proposals remained relatively high (at 34%, compared to 37% in 2019). Excluding the three voted proposals from the anti-ESP proponent NCPPR, average shareholder support for workplace diversity proposals was 45.7%, up from 36.6% support in 2019. This year, of the six workplace diversity proposals submitted by NCPPR (which focused on the potential risks of omitting political viewpoint and ideology from workplace diversity policies), three were excluded on the basis of ordinary business, while the other three (at Netflix, Starbucks and Twitter) reached a vote, receiving 0.7%, 1.5% and 1.6% of votes cast, respectively.

Three workplace diversity proposals passed this year, one submitted by Nia Impact Capital and two by As You Sow. The Nia Impact Capital proposal received 70% shareholder support at Fortinet. In its supporting statement, Nia Impact Capital highlighted the results of external studies linking gender and racial diversity with financial outperformance as well as Fortinet's own November 2019 report entitled "Why Gender Diversity in Cybersecurity Matters to the Business: Filling the Skills Gap by Closing the Gender Gap." The As You Sow proposals included a repeat proposal at Fastenal to adopt an EEO diversity report that received 61.1% of votes cast, and a proposal at Genuine Parts to adopt an EEO policy that aligns with SASB-aligned human capital management criteria, which received 79.1% of votes cast.<sup>12</sup> In its supporting statement for the proposal at Fastenal, As You Sow highlighted the poor rankings of the firm in a Massachusetts Institute of Technology Sloan Management Review/Glassdoor Culture 500 report,<sup>13</sup> and in its supporting statement at Genuine Parts, it emphasized the financially material nature of the disclosure it was seeking.

Some proposals combine director and executive team diversity and they are not reflected in this section. We categorized these combined proposals as board diversity proposals to avoid redundancy and to

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<sup>12</sup> As You Sow also submitted a proposal at O'Reilly Automotive to report on human capital risks in a way that aligns with SASB criteria, which received 66% support.

<sup>13</sup> Measuring Culture In Leading Companies (June 24, 2019), available at <https://sloanreview.mit.edu/projects/measuring-culture-in-leading-companies/>.

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discuss them in Section E.3.a. For example, although the New York City comptroller formally submitted only one proposal that focuses on workplace diversity (a proposal at Charles Schwab to adopt an annual workplace diversity reporting policy), based on the published results of the Comptroller's "Boardroom Accountability Project 3.0" initiative, his office submitted 17 proposals that address gender/racial diversity recruitment policies at both the board and CEO levels, after engaging with 56 companies on this topic through a letter-writing campaign in October 2019. Fourteen of these 17 companies adopted compliant policies in response to engagement from the Comptroller; the Comptroller's proposal went to a vote at the other three companies,<sup>14</sup> including at Arthur J. Gallagher, which adopted a diversity policy for director, but not CEOs, searches.

### b. Gender/Racial Pay Gap

This year, proposals on pay-gap disclosures dropped to less than half of the number in 2019 (13 in 2020, compared to 34 in 2019), when pay gap (in particular gender pay gap) ranked as the most prevalent human capital management proposal topic. The average votes in favor also declined sharply, and once again none passed. However, this year, all but one of the proposals reached a vote (compared to 55% in 2019). As in 2019, recipients of these proposals were predominately in the financial services and technology sectors. Two proponents that focused on this issue in 2019, Arjuna Capital and Proxy Impact, submitted all such proposals this year. The New York City Comptroller submitted 10 such proposals in 2019, but did not continue to pursue these proposals in 2020. Although three of Arjuna Capital's proposals received support above 30% of votes cast in 2019, only one received a similar level of support this year (38.1% at Pfizer, which had a similar Arjuna proposal withdrawn in 2019). Repeat proposals at Adobe, Amazon, Facebook and JPMorgan Chase all received lower support than in 2019 (at an average year-over-year decrease of 13.7%).

Arjuna Capital and Proxy Impact have continued to request that companies disclose the unadjusted global median pay-gap figures, in addition to reporting pay-gap figures on a statistically adjusted equal pay basis.<sup>15</sup> Following a 2019 proposal by Arjuna Capital to disclose its unadjusted pay gap, Citigroup became the first U.S. company to disclose a global median gender pay gap that was not adjusted for job function, level or geography; this year, Starbucks and Mastercard joined Citigroup in reporting unadjusted gender pay gap. Arjuna Capital identifies these three companies as the only ones to disclose unadjusted

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<sup>14</sup> The Comptroller's proposals received 53% of votes cast at Expeditors International of Washington, 24% of votes cast at Arthur J. Gallagher and 12% of votes cast at Berkshire Hathaway. In a June 2020 announcement, the Comptroller suggested that a positive outcome of his engagement with Berkshire Hathaway was the "innovative" move by Warren Buffett, who "took significant time at the Berkshire annual meeting to introduce the NYCRS shareholder proposal," "stressed the 'serious and important' nature of the subject," and "issued an invitation to the Comptroller's Office to present and participate in a more fulsome discussion at next year's annual meeting."

<sup>15</sup> Whereas Arjuna Capital and Proxy Impact focused on gender pay gap disclosures in 2019, their proposals this year demanded reporting on global median pay gap both in terms of gender and race.

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gender pay data (and these are the only three companies that received an “A” in Arjuna Capital and Proxy Impact’s joint annual Gender Pay Scorecard).

We note, in this regard, legislative efforts towards closing the gender pay gap, which the Global World Economic Forum and other sources report as substantial and only slowly declining. Presumed Democratic Presidential Candidate Joe Biden has endorsed legislation and policies intended to close the national gender wage gap and has been vocal on the topic during 2020. House Speaker Nancy Pelosi and other Democratic Congressional leaders reintroduced the Paycheck Fairness Act, a bill first proposed in 1997 with the goal of increasing pay-equity protections for women by, among other things, requiring employers that compensate employees differently for performing the same job to justify the discrepancy. The bill passed the House in March 2019, but has not progressed in the Senate. At the state level, 49 states and Puerto Rico have enacted equal pay laws. In 2019, 11 states passed enhanced equal pay laws; no significant changes have been passed so far in 2020.

### c. Arbitration of Employee Claims

Shareholder proponents and other stakeholders have expressed concerns with the potentially coercive nature of mandatory arbitration clauses in employee agreements in part in connection with the #MeToo movement. In 2019, seven proposals were submitted by CtW Investment Group and the New York City Comptroller that require companies to adopt policies against mandatory arbitration as a condition of employment. Although two such proposals were excluded through the SEC’s no-action process and others were withdrawn, one did come to a vote at Alphabet, but received only 13% support. This year, several proponents, including CtW Investment Group and the New York City Comptroller, submitted 10 proposals requesting reporting on the topic. Five were excluded through the no-action process on the basis of ordinary business, and two were withdrawn.<sup>16</sup> Of the two that came to a vote, the proposal at Chipotle passed with 51% of votes cast, but the proposal at Alphabet received only 16.1% support.

In December 2019, the EEOC rescinded its Policy Statement against Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (originally enacted July 10, 1997) (1997 Policy Statement). In doing so, the EEOC cited Supreme Court cases since 1997 that conflicted with the 1997 Policy Statement and found arbitration agreements in the employment context are enforceable in accordance with the Federal Arbitration Act. The EEOC noted that the rescission should not be interpreted as either barring employees from filing charges *and* having cases investigated by the EEOC or the EEOC from pursuing victim-specific relief on behalf of an employee who files a timely charge of discrimination.<sup>17</sup> The EEOC also noted that nothing in the recession should be interpreted as

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<sup>16</sup> One additional proposal was categorized by ISS as “not in proxy” at Nordstrom.

<sup>17</sup> See U.S. Equal Employment Opportunity Commission, Recission of Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (Dec. 16, 2019), citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *EEOC v. Waffle House, Inc.*, 534 U.S. 279

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barring a challenge to a specific arbitration agreement. In light of the EEOC’s rescission of the 1997 Policy Statement, companies should expect shareholder proponents interested in this issue to continue to submit proposals on the topic but also should evaluate whether they may be able to obtain no-action relief with respect to such proposals, as several companies have done this season.

**5. Social Capital Management**

	<b>HUMAN CAPITAL</b>							
	<b>Shareholder Proposals Submitted</b>		<b>Shareholder Proposals Voted On</b>		<b>Average % of Votes Cast in Favor</b>		<b>Shareholder Proposals Passed</b>	
	<b>2020 YTD</b>	<b>2019</b>	<b>2020 YTD</b>	<b>2019</b>	<b>2020 YTD</b>	<b>2019</b>	<b>2020 YTD</b>	<b>2019</b>
Human Rights	<b>33</b>	43	<b>15</b>	15	<b>25%</b>	27%	<b>0</b>	2
Health and Safety	<b>9</b>	12	<b>5</b>	5	<b>14%</b>	5%	<b>0</b>	0
Corporate Purpose	<b>5</b>	0	<b>4</b>	0	<b>7%</b>	-	<b>0</b>	-
Social Capital – Other	<b>10</b>	0	<b>3</b>	0	<b>4%</b>	-	<b>0</b>	-

Social capital management has become an ESP focus over the last several months, in particular following the release of the Business Round Table’s August 2019 “Statement on the Purpose of a Corporation,”<sup>18</sup> in which 181 CEOs expressed their commitment to deliver value to all stakeholders, including customers, employees, suppliers and communities. Proposals relating to the human rights impact of supply chain composition or operations in certain communities (e.g., Indigenous People’s rights), as well as those relating to the health and safety ramifications of certain products and corporate practices, increased in 2020. In addition, this year, Citigroup, Bank of America, Goldman Sachs, BlackRock and JPMorgan, each of which was a signatory to the Business Round Table Statement, received proposals from Harrington Investments or James McRitchie to review the Statement and/or report on recommended changes to governance documents in light of the Statement. Although these proposals received low support (between 3.9% and 9.3% of votes cast) when voted,<sup>19</sup> many U.S. companies undertook the proactive exercise of reviewing their corporate governance guidelines, committee charters and/or other governance documents or policies in light of the growing focus on stakeholder interests. In light of COVID-19 and other recent developments, companies may face growing pressure to review their policies and practices with respect to customers and other stakeholders, as well as to provide greater transparency to investors on ways in which their social capital management risks can impact financial and operational performance in the near- and long-term future.

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(2002), available at <https://www.eeoc.gov/wysk/recission-mandatory-binding-arbitration-employment-discrimination-disputes-condition>.

<sup>18</sup> Available at <https://opportunity.businessroundtable.org/wp-content/uploads/2019/08/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf>.

<sup>19</sup> The only corporate purpose proposals that did not reach a vote was at JPMorgan, where the SEC permitted exclusion on the basis of substantial implementation.

### E. SHAREHOLDER PROPOSALS ON GOVERNANCE MATTERS

Although the number of submitted proposals on governance matters (board-related and anti-takeover concerns) continued to fall (298 compared to 303 and 323 during the same period in 2019 and 2018, respectively), the number that came to a vote in 2020 represented a somewhat larger portion (71.1%) of governance-related submissions than in 2019 (63.4%) and 2018 (69.9%). Support for governance-related proposals in 2020 averaged 33% overall, continuing an overall downward trend from 44% support in 2015.

In 2020, structural governance proposals resumed center stage in a departure from 2019, when independent chair and board composition proposals each represented a larger percentage of governance-related submissions. This year, proposals on written consent rights were the most prevalent governance-related submissions (representing 20.4% of all governance-related submissions and a 61% increase year-over-year). Proposals on special meeting rights (submissions on which increased by nearly one-third year-over-year), particularly proposals seeking to lower the ownership share required in order to call such meetings, also increased the high overall number of structural governance proposals, as did a new proposal, submitted by John Chevedden at 17 companies,<sup>20</sup> requesting shareholder approval of bylaw amendments made unilaterally by a board of directors.<sup>21</sup>

Notwithstanding the higher number of written consent proposals, which once again went to a vote around 90% of the time, the average shareholder support for this proposal fell (to 35% from 39% in 2019), and only two passed (compared to six in 2019). The average support for special meeting proposals was relatively stable (42% compared to 44% in 2019) and the number passing held constant (with five passing in both 2019 and 2020). In contrast, average support for independent chair and board composition proposals increased year-over-year (by 5% and 1%, respectively), and two independent chair proposals and one board composition proposal passed (whereas none had passed in the previous five years).

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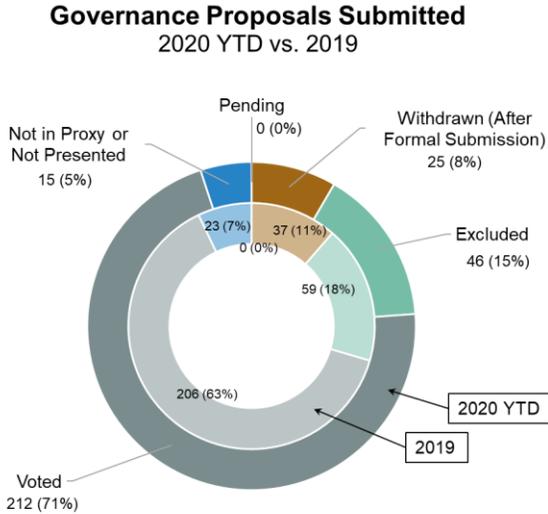
<sup>20</sup> All but one of these proposals went to a vote: five SEC no-action requests on the topic were denied and the only proposal that did not come to a vote (at Dana Incorporated) was due to failure to be presented.

<sup>21</sup> Although these proposals represented a meaningful portion of governance-related submissions this year, they failed to gain meaningful traction, winning only 4% of votes cast on average and failing to pass at any company.

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	<i>Governance Proposals</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>2020 YTD</i>	<i>2019</i>	<i>2020 YTD</i>	<i>2019</i>	<i>2020 YTD</i>	<i>2019</i>	<i>2020 YTD</i>	<i>2019</i>
Act by Written Consent	<b>61</b>	38	<b>56</b>	33	<b>35%</b>	39%	<b>2</b>	6
Independent Chair	<b>47</b>	67	<b>41</b>	58	<b>34%</b>	29%	<b>2</b>	0
Board Composition	<b>44</b>	41	<b>17</b>	9	<b>9%</b>	8%	<b>1</b>	0
Special Meeting	<b>40</b>	30	<b>37</b>	25	<b>42%</b>	44%	<b>5</b>	5
Eliminate Supermajority Thresholds	<b>18</b>	39	<b>10</b>	21	<b>79%</b>	69%	<b>9</b>	18
Shareholder Approval of Bylaw Amendments	<b>17</b>	0	<b>16</b>	0	<b>4%</b>	-	<b>0</b>	-
Proxy Access	<b>17</b>	34	<b>13</b>	27	<b>29%</b>	33%	<b>0</b>	3
Declassify Board	<b>12</b>	7	<b>5</b>	4	<b>78%</b>	76%	<b>5</b>	4
Majority Voting in Uncontested Elections	<b>10</b>	13	<b>4</b>	7	<b>22%</b>	58%	<b>0</b>	4
Dual Class Voting	<b>7</b>	7	<b>6</b>	6	<b>28%</b>	27%	<b>0</b>	0

As has been the case for some years, when governance proposals failed to reach the shareholder vote stage, it was most often due to exclusion through the SEC no-action process, as the following chart illustrates:



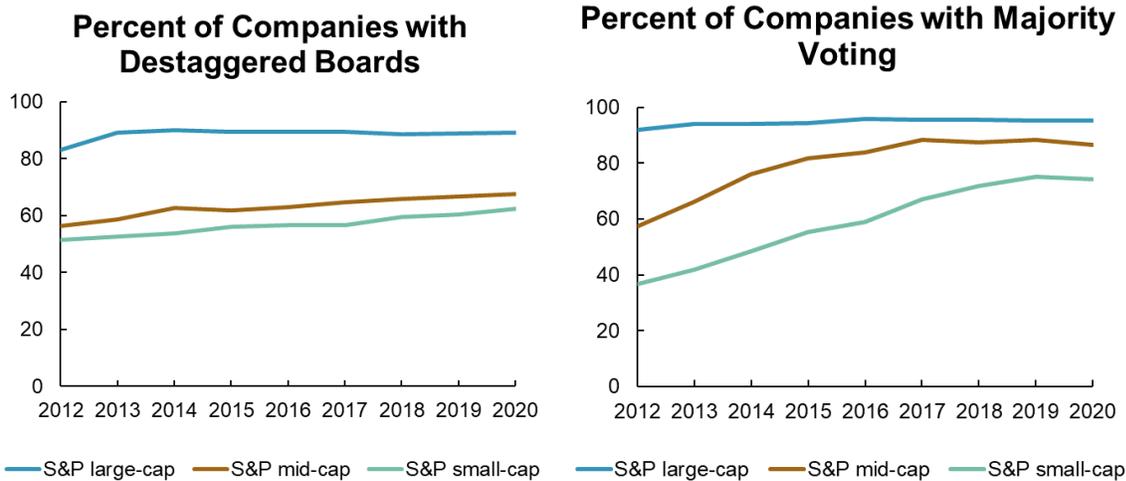
**1. Structural Governance**

The shareholder proposals that have passed on a consistent basis over the last few years have been the three governance proposals that have been widely adopted at large companies—elimination of supermajority voting thresholds to effect certain corporate actions (such as charter or bylaw changes or

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the removal of directors), majority voting in uncontested director elections (rather than plurality voting), and declassification of boards. Accordingly, governance proponents who propose structural changes that increase shareholder rights have increasingly focused their efforts on areas that are less well-settled, such as the adoption of written consent rights and the lowering of shareholding thresholds to call special meetings, as further discussed in Sections E.1.a and b below.

Most large-cap companies have already adopted destaggered boards, majority election of directors, special meeting rights, simple majority vote thresholds and, more recently, proxy access, and the large-cap companies that have not are often unappealing targets (because of structural hurdles, such as dual class voting or large insider holdings, that limit the efficacy of shareholder proposals). Many small- and mid-cap companies also have adopted these structural measures at this point, often as part of a broader response to shareholder pressure relating to say-on-pay or stock-price performance.



This year, although there was an uptick in proposals to declassify the board (increasing to 12 from seven in 2019), a sharp decline in submissions on elimination of supermajority voting thresholds (18 compared to 39 in 2019)<sup>22</sup> and a smaller decline in submissions on majority voting in uncontested director elections (10 compared to 13 in 2019) produced an overall decrease in the total number of these proposals compared to 2019 and continued a steep downward trend. Over a third of these proposals have been at non-S&P 500 companies.

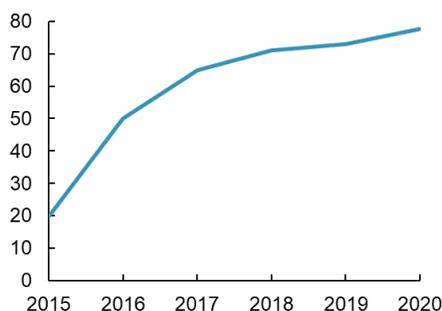
Proxy access has similarly become widely adopted at U.S. companies despite being a newer structural governance topic compared to the three mentioned above, only becoming a focal point since November 2014, when the New York City Comptroller sponsored many of these proposals (mostly at large-cap companies) as a part of his “Boardroom Accountability Project 1.0” during the 2015 to 2017 proxy

<sup>22</sup> It is worth noting that 90% of the proposals on the elimination of supermajority voting thresholds that reached a vote this year passed (compared to 84.2% in 2019), and average support increased from 68% to 79% year-over-year.

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seasons. At this point, 535 companies in the S&P Composite 1500 have adopted proxy access provisions, including 78% of the S&P 500.

**Percent of S&P Large-Cap Companies with Proxy Access**



As more large-cap companies have elected to proactively adopt a market standard proxy access provision rather than face a shareholder vote,<sup>23</sup> the number of proxy access proposals submitted (17 compared to 34 in 2019 and 47 in 2018) and voted on (13 compared to 27 in 2019 and 35 in 2018) continue to decline dramatically. These decreases include significant drops in both proposals to adopt a new right and proposals to amend existing provisions.<sup>24</sup> Average support for new right proposals dropped from 53% to 19% year-over-year and, for the first time since 2012, no such proposal passed (compared to three in 2019 and a record of 53 in 2015). Average support for proposals to amend existing provisions, which were almost all submitted by John Chevedden, remained relatively steady at 30% compared to 29% in 2019; no such proposal has gained majority shareholder support since two passed in 2016.

### a. Shareholder Right to Act by Written Consent

<b>ACT BY WRITTEN CONSENT</b>							
<b>Shareholder Proposals Submitted</b>		<b>Shareholder Proposals Voted On</b>		<b>Average % of Votes Cast in Favor</b>		<b>Shareholder Proposals Passed</b>	
<b>2020 YTD</b>	<b>2019</b>	<b>2020 YTD</b>	<b>2019</b>	<b>2020 YTD</b>	<b>2019</b>	<b>2020 YTD</b>	<b>2019</b>
<b>61</b>	38	<b>56</b>	33	<b>35%</b>	39%	<b>2</b>	6

<sup>23</sup> There has been convergence in the terms of proxy access provisions adopted by companies, with the current market standard being a so-called 3/3/20/20 bylaw—a threshold of 3% ownership for 3 years, a director cap of 20% of the board but no less than two, and a group limit of 20 shareholders. Continuing a trend that began in 2017, most companies receiving a proposal to adopt proxy access opted to adopt the market-standard bylaw before a vote, resulting in the near complete elimination of such proposals that reached a shareholder meeting in 2020 (one total, compared to five in 2019, 10 in 2018 and 28 in 2017).

<sup>24</sup> Proposals to amend existing 3/3/20/20 proxy access provisions generally seek to remove limits on the size of shareholder groups, and/or to remove various other limitations on the use of proxy access, like the percentage vote required to qualify a shareholder proxy access director candidate.

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The corporate laws of most states provide that shareholders may act by written consent in lieu of a meeting unless the company's certificate of incorporation provides otherwise. However, many companies have expressed the concern that giving shareholders the right to act by written consent in lieu of a meeting can frustrate the orderly and transparent debate on the merits that would occur if the proposed action were raised at a shareholder meeting, which would further reduce the role that small shareholders have in corporate decision-making. Therefore, public companies commonly provide in their charters that shareholders may not act by written consent, or that they may act by written consent only if the consent is unanimous. Presently, only approximately 31% of S&P 500 companies allow for shareholders to act by written consent. When companies do implement a written consent right today, the right is often subject to a number of the same terms contained in market standard special meeting provisions, such as defined waiting periods, disclosure requirements (including disclosures to shareholders who are not solicited), holding requirements, and black-outs.

Proposals requesting the adoption of written consent rights have been a staple of governance-related submissions since 2018, when proponents submitted 41 such proposals after average support for the 15 voted proposals on this topic in 2017 reached 46% (highest since 2012). Although both the number of submissions and average support for these proposals declined between 2018 and 2019, proponents submitted a record number of written consent proposals this year, up approximately 61% from 2019, perhaps spurred by the meaningful portion of passing proposals in 2019 (18.2% of voted proposals passed). However, despite ISS recommending in favor of 77% of submitted proposals that went to a vote, average shareholder support continued to drop this year, and only two—Stanley Black & Decker (at 51% of votes cast) and OGE Energy (at 79.8% of votes cast)<sup>25</sup>—or less than 4% of voted proposals, passed. The relatively low success rate of written consent proposals since 2018 seems to reflect continuing agreement by a majority of shareholders that special meeting rights adequately address this concern and render written consent rights unnecessary.

### b. Shareholder Right to Call Special Meetings

	<i>RIGHT TO CALL SPECIAL MEETINGS</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>2020 YTD</i>	<i>2019</i>	<i>2020 YTD</i>	<i>2019</i>	<i>2020 YTD</i>	<i>2019</i>	<i>2020 YTD</i>	<i>2019</i>
Adopt New Right	<b>3</b>	2	<b>3</b>	2	<b>62%</b>	50%	<b>2</b>	1
Lower % on Existing Rights	<b>37</b>	28	<b>32</b>	22	<b>40%</b>	44%	<b>3</b>	4

Proxy advisory firms and many shareholders support the right of shareholders to call a special meeting because it enables shareholders to act on matters that arise between annual meetings (such as the replacement of one or more directors, including in circumstances intended to permit an acquisition offer to

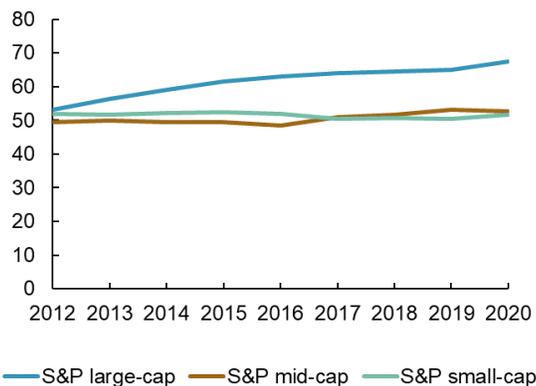
<sup>25</sup> A written consent proposal at HP nearly passed at 50% of votes cast.

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proceed, or the amendment of bylaws). The right to call special meetings should be viewed in conjunction with the strong movement away from classified boards and the right, in Delaware, of shareholders to remove the directors of a non-classified board without cause. Thus, given the trend of declassifying boards, the ability to act outside the annual meeting to remove directors without cause and elect their replacements can be viewed as the dismantling of an effective mechanism to provide directors with additional time to respond to shareholder activism or consider hostile takeover proposals.

Over two-thirds of S&P 500 companies now provide shareholders with some right to call a special meeting, a development driven largely by shareholder proposals and shareholder support for the concept over the past decade. As the following chart illustrates, the number of S&P 500 companies that have adopted special meeting rights has increased slightly this year, continuing the overall upward trend despite a temporary leveling-off between 2017 and 2019. The level of adoption among mid- and small-cap companies (around 50% among each of the S&P 400 and S&P 600) is also significant albeit relatively flat over the last few years.

**Percent of Companies that Allow Shareholders to Call Special Meetings**



Due to the high level of adoption, the number of proposals to adopt a new special meeting right has been insignificant for the past several years. This year, only three companies received a shareholder proposal to add a new special meeting right—Sonoco (passing with 70.2% of votes cast), FleetCor (passing with 78.9% of votes cast) and Dow (which was excluded through the SEC no-action process because the proposal was filed too late for consideration).

Instead, since 2016, the overwhelming majority of special meeting proposals has targeted the amendment of existing special meeting rights, in particular, lowering shareholding thresholds for calling a special meeting. This year, perhaps due to the record-setting average support level for these proposals in 2019, the number of submissions in this subcategory increased by 32.1% from 2019, almost exclusively driving the 33.3% year-over-year increase in the overall number of special meeting proposals submitted.

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Over three-quarters of these proposals were at companies in the S&P 500. As was the case in 2019, most of these proposals were submitted by John Chevedden or Kenneth Steiner. Average support remained high at 40% (although down from 44% in 2019), suggesting that some governance-focused shareholders continue to be dissatisfied with the 25% ownership threshold for calling a special meeting that has been adopted by a plurality of S&P 500 companies (presently, of the S&P 500 companies that provide a special meeting right, over 60% set the ownership threshold *at or above* 25%, including 41% which set the threshold *at* 25%). However, passage rate decreased (dropping from 18.2% of voted proposals in 2019 to 9.3%). Three proposals passed this year: a proposal at Cadence Design Systems to lower the ownership threshold from 25% (on an individual basis) to 10% or the lowest percentage under state law (on an aggregated basis) passed with 53.7% of votes cast, a proposal at Verizon to lower the ownership threshold from 25% (on an aggregated basis) or 10% (on an individual basis) to 10% on an aggregated basis passed with 51.8% of votes cast, and a proposal at Laboratory Corporation of America Holdings to lower the ownership threshold from 25% to 10% (in each case, on an aggregated basis) passed with 53.2% of votes cast.<sup>26</sup>

Companies putting forth a new special meeting right or evaluating an existing right, either preemptively or in response to a proposal, may wish to consider the following terms:

- **Threshold.** Though practice varies, for a number of years 25% has been the most common threshold for special meeting rights at public companies, as reflected in the following chart showing the threshold for special meeting rights at Delaware companies among the S&P 500.<sup>27</sup> BlackRock's current policies indicate that it generally believes a threshold between 15–25% is reasonable “in order to avoid the waste of corporate resources in addressing narrowly supported interests.”<sup>28</sup> They also believe that a right to act by written consent is “not a sufficient alternative to the right to call a special meeting.”

However, companies with a 25% threshold should monitor and consider developments at peer companies on special meeting proposals and practices. In addition to proposals related to the purely numerical ownership threshold, proponents are focused on special meeting rights that allow aggregation of shares owned by multiple shareholders to meet those thresholds.

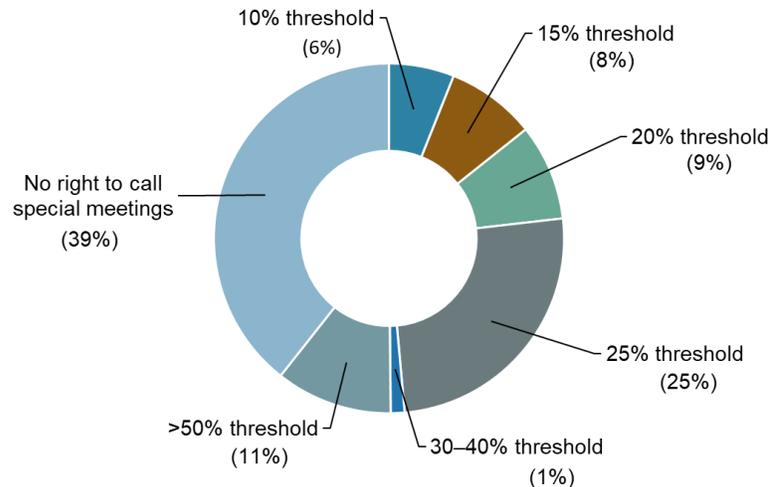
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<sup>26</sup> A proposal to lower the special meeting threshold from 25% to 10% (in each case, on an aggregated basis) at Anthem nearly passed at 48.6% of votes cast.

<sup>27</sup> Based on data from FactSet. We have limited this analysis to Delaware companies, because certain other states provide a statutory default special meeting right at 10%.

<sup>28</sup> See BlackRock, Corporate governance and proxy voting guidelines for U.S. securities (Jan. 2020), available at <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf>.

### Thresholds to Call Special Meetings at Delaware S&P 500 Companies\*



\* Percentage of S&P 500 companies with relevant threshold shown in parentheses.

- Definition of ownership.** Many companies require “record” ownership of shares (as opposed to “beneficial” ownership), essentially requiring street name holders to work through their securities intermediaries to become a record holder. This eliminates uncertainty as to proof of ownership, but introduces an additional administrative step for shareholders seeking to use the right. In addition, a number of companies have introduced a “net long ownership” concept into their special meeting provision—essentially reducing the shareholders’ actual ownership level by any short positions or other hedging of economic exposure to the shares. Companies that do not include a “net long” concept should nevertheless provide that the information required from the requesting shareholders must include details of any hedging transactions, so that the company and other shareholders can have a full picture of the requesting shareholders’ economic stake in the company.
- Pre- and post-meeting blackout periods.** In order to avoid duplicative or unnecessary meetings, many companies provide that no meeting request will be valid if it is received during a specified period (usually 90 days) before the annual meeting, or during a specified period (usually 90 or 120 days) after a meeting at which a similar matter was on the agenda.
- Limitations of matters covered.** Special meeting provisions typically provide that the special meeting request must specify the matter to be voted on, and that no meeting will be called if, among other things, the matter is not a proper subject for shareholder action. Generally, the only items that may be raised at the special meeting will be the items specified in the meeting request and any other matters that the board determines to include.
- Timing of meeting.** Companies typically provide that the board must set the meeting for a date within 90 days from the receipt of a valid request by the requisite percentage of shareholders. Often, the special meeting provisions provide that, in lieu of calling a special meeting, the company may include the specified item in a meeting called by the company within that same time period.
- Holding period.** A few companies require the requesting shareholders to have held the requisite number of shares for a specified period of time prior to the request.

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- ***Inclusion in charter versus bylaws.*** Companies should consider whether to include the special meeting provisions in the charter, the bylaws or a combination. In some cases, companies include the critical provisions (such as ownership threshold) in the charter so that shareholders cannot unilaterally amend them, but provide the details and mechanics in the bylaws, so that they can be adjusted by the board without a shareholder vote.

### 2. Independent Chair

<b>INDEPENDENT CHAIR</b>							
<b>Shareholder Proposals Submitted</b>		<b>Shareholder Proposals Voted On</b>		<b>Average % of Votes Cast in Favor</b>		<b>Shareholder Proposals Passed</b>	
<b>2020 YTD</b>	<b>2019</b>	<b>2020 YTD</b>	<b>2019</b>	<b>2020 YTD</b>	<b>2019</b>	<b>2020 YTD</b>	<b>2019</b>
<b>47</b>	67	<b>41</b>	58	<b>34%</b>	29%	<b>2</b>	0

Proponents continue to focus on requiring companies to mandate the presence of an independent chair by splitting currently combined CEO/chair roles and/or adopting a policy on this issue on a forward-looking basis. The proponents not only included governance-focused proponents (such as John Chevedden and Kenneth Steiner, who submitted just under half of this year's independent chair proposals in the aggregate), but also ESP-focused proponents, who seem to believe that independent chairs will improve board risk oversight in industries that they deem to be higher-risk from an ESP perspective. For example, nine utility and energy companies received independent chair proposals, with the proponents citing concerns relating to climate change risks. Similarly, religious organizations, faith-based coalitions, and their affiliates, including members of ICCR and IOA, have continued to submit independent chair proposals at healthcare and pharmaceutical companies in connection with the opioid crisis. A number of high-profile technology companies were also targeted this year as they were in 2019, with Amazon, AT&T, Facebook, IBM and others receiving repeat proposals this year.

Overall, the number of proposals requiring the chair be an independent director decreased by 30% from 2019. These proposals, however, tend to receive meaningful shareholder support (generally between 25% and 45%), with the average increasing to 34% from 29% in 2019, and ISS recommended in favor of 56% of these proposals this year (up from about 39% in 2019). Although these proposals still rarely win majority shareholder approval, two such proposals narrowly passed this year (whereas none did in 2019). The passing proposals were at Baxter International (with 55% of votes cast) and Boeing (with 52.9% of votes cast), both of which were facing company-specific circumstances that may have influenced the outcome of the vote this year.

In its 2020 proxy voting guidelines for U.S. companies, ISS provides that it will generally vote in favor of a proposal for a company to adopt an independent chair requirement, and provides a list of factors that will increase the likelihood of a "for" recommendation, including a majority non-independent board, a weak or poorly defined lead independent director, an executive or non-independent chair in addition to the CEO or recent recombination of the chair/CEO roles, failure to oversee and address material risks, governance failures (particularly diminishment of shareholder rights or failure to respond to shareholder concerns) and evidence of the board's failure to intervene when management's interests are contrary to those of

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shareholders. Although 2020 results reiterate the importance of robust independent board leadership to proxy advisors and institutional investors, they also indicate that stakeholders are not necessarily supportive of mandating an independent chair where a company can ensure strong independent leadership in other ways. We note that each of BlackRock, State Street and Vanguard itself has a combined CEO/chair in 2020, and each takes the view that a lead independent director is generally sufficient.<sup>29</sup>

### 3. Board Composition

	BOARD COMPOSITION							
	Shareholder Proposals Submitted		Shareholder Proposals Voted On		Average % of Votes Cast in Favor		Shareholder Proposals Passed	
	2020 YTD	2019	2020 YTD	2019	2020 YTD	2019	2020 YTD	2019
Board Diversity	<b>30</b>	34	<b>7</b>	9	<b>15%</b>	8%	<b>1</b>	0
Director Qualifications	<b>4</b>	7	<b>2</b>	0	<b>6%</b>	-	<b>0</b>	-
Employee Representation	<b>10</b>	0	<b>8</b>	0	<b>4%</b>	-	<b>0</b>	-

#### a. Board Diversity

Board diversity continues to be an issue for shareholder proponents, as has been the case in the past several years. Whereas proponents' efforts in prior years have centered on gender representation, this year saw an intensified focus on racial/ethnic diversity as well. Of the 30 board diversity proposals (down from 34 in 2019) submitted by proponents for meetings through June 30, 2020, 16<sup>30</sup> were from the New York City Comptroller as part of his "Boardroom Accountability Project 3.0" initiative and covered both gender *and* racial diversity recruitment policies at the board level, as well as in CEO searches. Three of the Comptroller's diversity search policy proposals went to a vote (including the passing proposal at Expedito International).<sup>31</sup>

<sup>29</sup> See Vanguard Funds, Summary of the proxy voting policy for U.S. portfolio companies; State Street Global Advisors, Summary of Material Changes to State Street Global Advisors' 2020 Proxy Voting and Engagement Guidelines; BlackRock, Proxy voting guidelines for U.S. securities.

<sup>30</sup> One of the 17 proposals submitted by the New York City Comptroller as part of the initiative (but withdrawn after the company announced it was adopting the Comptroller's proposal) was for Lamb Weston's 2020 annual meeting to be held in the fall.

In addition to the diversity search policy proposals submitted as part of his "Boardroom Accountability Project 3.0" initiative, the Comptroller also submitted a proposal at PACCAR to disclose board diversity and director qualifications, which the SEC permitted PACCAR to exclude on the basis of substantial implementation.

<sup>31</sup> The other board diversity proposals that reached the voting stage were four of the six "true board diversity" proposals—or proposals seeking to shift companies' board diversity efforts away from diversity based on race, gender, and other self-identified demographic characteristics towards a nominee's ideological perspectives—submitted by anti-ESP proponents such as NCPPR (down from seven voted proposals out of eight submissions in 2019). The true board diversity proposals once again received low support when they reached a vote (proposals at Johnson & Johnson and AT&T were excluded on the basis of substantial implementation), ranging from around 1% at each of

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Looking outside of shareholder proposals, although lawmakers and regulators have primarily focused on gender representation in recent years, their attention on racial/ethnic representation has been increasing over the past year and is likely to continue as the #BlackLivesMatter and related efforts toward racial equity dominate headlines:

- On February 6, 2019, the same day that the SEC released its C&DIs clarifying that U.S. public companies should disclose how director candidates' race, gender, and other self-identified characteristics are considered by a company's nominating committee (to the extent they were considered),<sup>32</sup> Representative Gregory Meeks (D-N.Y.) and other co-sponsors introduced the "Improving Corporate Governance Through Diversity Act" in both houses of Congress. The bill is focused on disclosure and not quotas, requiring U.S. public companies to disclose information regarding their boards', director nominees' and executive officers' gender, racial, and ethnic makeup based on self-identification,<sup>33</sup> as well as policies or procedures to promote the gender, racial, and ethnic diversity of the board and executive team. In July 2019, the bill passed the U.S. House Financial Services Committee with bipartisan support. The bill would also require the SEC to establish an advisory committee that will report on ways to promote racial, gender and ethnic diversity at public companies, and to issue an annual report on the public disclosures made by companies on these topics. The House passed the bill<sup>34</sup> in November 2019. As of the date of this publication, the bill has been referred to the Committee on Banking, Housing, and Urban Affairs in the U.S. Senate.
- After California passed Senate Bill 826 in 2018,<sup>35</sup> which requires publicly held corporations with their principal place of business in California to have at least two (for companies with five directors) or three female directors (for companies with six or more directors) by December 31, 2021, lawmakers in other states took similar legislative steps. On March 27, 2020, Washington State enacted Senate Bill 6037, which mandates that each public company with its principal executive offices in the state must have a board comprised of at least 25% individuals who self-identify as women by January 1, 2022.<sup>36</sup> On August 27, 2019, Illinois enacted House Bill 3394 modeled after California's law that requires each public company with its principal executive office in the state to report the number of individuals who self-identify as women and/or minorities serving on their boards, as well as established processes for identifying diverse candidates for their board and executive officers.<sup>37</sup> On May 13, 2019, Maryland enacted Senate Bill 911, which requires qualifying domestic stock

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Costco, Deere & Co. and Eli Lilly, to 13.2% at Boeing (bringing the average support to an even lower level than 8% in 2019).

<sup>32</sup> U.S. Securities and Exchange Commission, Regulation S-K (Feb. 6, 2019), *available at* <https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm>.

<sup>33</sup> The proposed federal legislation would also require public companies to disclose the veteran status of directors or executives officers.

<sup>34</sup> H.R. 5084, *available at* <https://www.congress.gov/bill/116th-congress/house-bill/5084/text>.

<sup>35</sup> Ca. S.B. 826, *available at* [https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill\\_id=201720180SB826](https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180SB826). Less than half of companies affected by this regulation were in compliance according to the state's March 2020 Women on Board report, *available at* <https://bpd.cdn.sos.ca.gov/women-on-boards/WOB-Report-04.pdf>.

<sup>36</sup> Wa. S.B. 6037, *available at* <https://app.leg.wa.gov/bills/summary?BillNumber=6037&Initiative=false&Year=2019>.

<sup>37</sup> Il. Public Act 101-0589, *available at* <https://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=101-0589>.

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and non-stock corporations to report the number of women on their boards in state tax filings beginning on October 1, 2019.<sup>38</sup>

In addition to lawmakers and regulators, companies are also facing pressure from proxy advisors, institutional investors and other market participants to improve board diversity:

- As the one-year grace period for ISS's U.S. gender diversity policy has lapsed, ISS now recommends against the chair of the nominating committee if the board has no female directors.<sup>39</sup> In addition, ISS has put out more stringent limitations on the mitigating factors it will consider. For example, a company's firm commitment to appoint at least one woman to the board will only be deemed a mitigating factor until February 1, 2021.
- Glass Lewis's 2020 U.S. proxy voting guidelines state that it will generally recommend against the nominating committee chair of boards with no female members.<sup>40</sup>
- BlackRock has continued to emphasize that board diversity is a key component in their investment stewardship considerations. While BlackRock's 2020 proxy voting guidelines focus on gender representation (encouraging companies to have at least two women on their boards),<sup>41</sup> in January 2020, BlackRock released commentary specifically recommending boards to consider "gender, ethnicity, and age, as well as professional characteristics, such as a director's industry, area of expertise, and geographic location" when identifying board candidates, explaining that board diversity was an investment issue for them as diversity in a group leads to better decision-making.<sup>42</sup>
- In its 2020 voting guidelines, State Street Global Advisors has indicated that it will vote against the entire slate of incumbent board members on the nominating committee if a company does not have at least one woman on its board *and* has not engaged in successful dialogue on State Street's board gender diversity program for four consecutive years.<sup>43</sup>
- In September 2019, Vanguard released guidance on its stewardship approach to board gender diversity, calling for companies to disclose, at least on an aggregate basis, their directors' gender, age, race, ethnicity and national origin and encouraged boards to broaden their searches for diverse candidates, noting that Vanguard expects companies to make significant progress on the issue of board diversity in the coming years.<sup>44</sup>

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<sup>38</sup> Md. S.B. 911, *available at* <https://legiscan.com/MD/text/SB911/2019>.

<sup>39</sup> See ISS's America's Proxy Voting Guidelines Updates for 2020, *available at* <https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf>.

<sup>40</sup> Glass Lewis 2020 Proxy Paper, Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice, *available at* [https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines\\_US.pdf](https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines_US.pdf).

<sup>41</sup> See BlackRock, *Proxy voting guidelines for U.S. securities* (Jan. 2020), *available at* <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf>.

<sup>42</sup> BlackRock, Investment Stewardship's approach to engagement on board diversity (Jan. 2020), *available at* <https://www.blackrock.com/corporate/literature/publication/blk-commentary-engaging-on-diversity.pdf>.

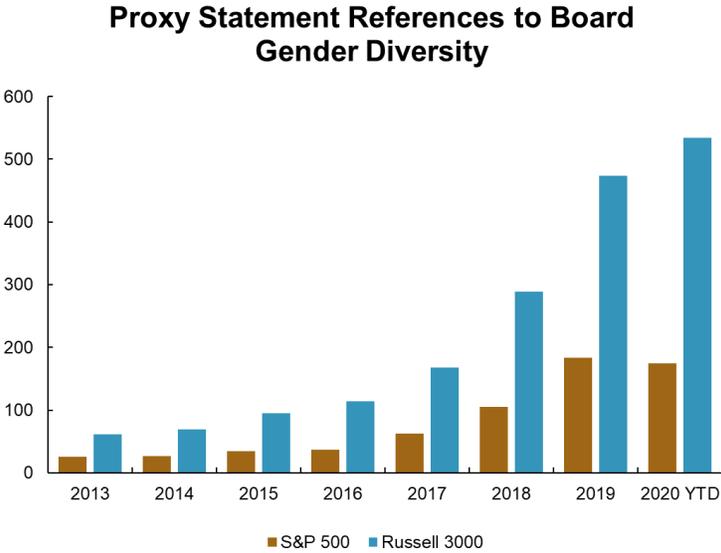
<sup>43</sup> State Street Global Advisors, Summary of Material Changes to State Street Global Advisors' 2020 Proxy Voting and Engagement Guidelines, *available at* <https://www.ssga.com/library-content/pdfs/global/proxy-voting-and-engagement-guidelines.pdf>.

<sup>44</sup> Vanguard, Vanguard Investment Stewardship Perspectives: Board Diversity, *available at* [https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/persp\\_board\\_diversity.pdf](https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/persp_board_diversity.pdf).

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- In January 2020, Goldman Sachs committed that it would not take U.S. or European companies public without at least one diverse board candidate, with an emphasis on female directors.

Female representation on boards has been increasing in recent years, particularly at larger companies. A record 22% of board seats of Russell 3000 companies were held by women as of Q1 2020.<sup>45</sup> In addition, it has become increasingly common for both large- and small-cap companies to address the topic of board gender diversity in their proxy statements. The following chart, which presents the number of proxy statements that include the phrases “women on the board,” “gender diversity” or “female directors,” presents a partial picture of trends in proxy disclosures with respect to board gender diversity:



So far, disclosures on racial/ethnic diversity have not become nearly as prevalent. A search of proxy statements that include similar key words with respect to racial/ethnic diversity as those used in our search on gender diversity disclosures yielded only 40 references in 2019 and 41 to date in 2020 among S&P 500 companies, and 94 in 2019 and 106 to date in 2020 among the Russell 3000. In light of the current focus on both gender and racial/ethnic diversity, companies should be prepared to engage with investors on these issues and, in particular, to articulate the principles by which the board considers gender, race, ethnicity and other types of diversity in choosing a slate, the steps taken to ensure a diverse pool of potential nominees is considered, and how the board is considering this issue for the upcoming meeting.

<sup>45</sup> See Equilar, Q1 2020 Gender Diversity Index (May 28, 2020), available at <https://www.equilar.com/reports/74-q1-2020-equilar-gender-diversity-index.html>.

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### b. Director Qualifications

In response to demands in prior years from high-profile proponents such as the New York City Comptroller and endorsement from prominent institutional investors, many companies have started to include annual disclosure on board qualifications and diversity in a matrix form. For purposes of this publication, we categorize proposals requesting disclosure of *both* board diversity and director qualifications as board diversity proposals and not director qualification proposals. Whereas these mixed-topic proposals comprised the majority of director diversity proposals in 2019, when the New York City Comptroller focused on such disclosures as part of his previous “Boardroom Accountability Project 2.0,” the number of these proposals fell significantly in 2020, with the Comptroller submitting only one such proposal (at PACCAR).

In addition to proposals requiring disclosure on both diversity and qualifications, there were four proposals that primarily focused on the topic of director qualifications this year, each of which related to the incorporation of ESP expertise into director qualification considerations. Proposals at three of the companies—Alphabet (receiving 9% of votes cast), Facebook (receiving 3.7% of votes cast) and CoreCivic, a private prison operator (which was withdrawn prior to inclusion in proxy)<sup>46</sup>—specified that human and/or civil rights experience should be considered as a director qualification, while a proposal at Pfizer from NCPPR (which was excluded through the SEC no-action process) demanded that the board exclude expertise on environmental and social issues from the consideration of director qualifications.

### c. Employee Representation on Boards

Consistent with this proxy season’s overall focus on stakeholder interests, there were 10 proposals submitted on the topic of employee representation on boards, which has not been the primary focus of any shareholder proposal submitted in previous years. In most cases, these proposals requested a board seat for an employee, but some also requested observer or non-voting representative positions. Of the 10 proposals submitted, eight came to a vote. While average support for these proposals was only 4%, the increased focus on employee-related issues could lead to greater traction in coming years. Companies should continue to monitor legislative developments on this topic and consider whether and in what circumstances it may be appropriate to engage with employee stakeholders, particularly in light of the COVID-19 pandemic.

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<sup>46</sup> Notably, CoreCivic’s 2020 proxy included discussions of the human rights experiences of several of its board members, as well as highlighting the board’s general consideration of human rights expertise in choosing the director slate.

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## F. COMPENSATION-RELATED SHAREHOLDER PROPOSALS

	COMPENSATION-RELATED PROPOSALS							
	Shareholder Proposals Submitted		Shareholder Proposals Voted On		Average % of Votes Cast in Favor		Shareholder Proposals Passed	
	2020 YTD	2019	2020 YTD	2019	2020 YTD	2019	2020 YTD	2019
Social Compensation Issues	<b>23</b>	18	<b>11</b>	9	<b>16%</b>	24%	<b>0</b>	0
Stock Retention	<b>5</b>	2	<b>5</b>	1	<b>22%</b>	25%	<b>0</b>	0
Clawbacks	<b>2</b>	8	<b>2</b>	5	<b>45%</b>	45%	<b>1</b>	2
Limit Golden Parachutes	<b>0</b>	1	<b>0</b>	0	–	–	–	0
Compensation – Other	<b>26</b>	23	<b>10</b>	15	<b>28%</b>	18%	<b>0</b>	0

There was a steep decline in the number of compensation-related proposals between 2012 and 2017, in large part a result of mandatory say-on-pay votes becoming the primary mechanism by which shareholders express concerns over executive compensation. The number of compensation-related proposals leveled out in 2018, and this trend has continued through 2020. Compensation-related proposals tend to receive relatively low support (averaging 23%), and only one passed this year (compared to two in 2019).

As was the case in both 2018 and 2019, the most common type of compensation-related proposal in 2020 were proposals to link executive compensation to social issues, such as sustainability or social or environmental impact. There were more ESP compensation-related proposals in 2020 than in 2019, contributing to the slight growth in the overall number of compensation-related proposals this year. Similar to 2018 and 2019, only half of these proposals reached a vote in 2020 (11 total, including two<sup>47</sup> proposals relating to the integration of drug pricing risks into compensation plans at pharmaceutical companies, three<sup>48</sup> proposals relating to the integration of sustainability as a metric for executive compensation and one<sup>49</sup> to integrate community impacts into compensation plans at an oil company). Five of the compensation proposals relating to social issues that did not go to a vote were excluded (three<sup>50</sup> of which sought to reduce the pay disparity between top executives and other employees), while the other eight (six<sup>51</sup> of which involving the integration of drug pricing risks into compensation plans at pharmaceutical companies) were withdrawn or otherwise not presented in the company's proxy.

Despite public expressions of support for ESP-linked compensation from company executives and investors in recent years, as well as the adoption of these compensation plans by high-profile companies

<sup>47</sup> These included AbbVie (which received a similar proposal last year) and Eli Lilly and Company.

<sup>48</sup> These included Apple, Alphabet and XPO Logistics.

<sup>49</sup> This proposal was voted at Marathon Petroleum Corporation.

<sup>50</sup> These included Comcast, Amazon and Juniper Networks.

<sup>51</sup> These included Johnson & Johnson, Merck, Pfizer, and Vertex, which received similar proposals last year, as well as Amgen and Biogen.

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such as Shell, Clorox, Intel, PepsiCo, Walmart and Unilever, most companies do not currently have executive compensation plans that explicitly factor in ESP metrics. In 2019, a spot survey of 135 North American companies found that only 30% of respondents incorporated ESG metrics into their incentive plans, although another 21% said they were considering taking similar steps in the future.<sup>52</sup> In addition to implementation challenges, the relatively low adoption rate of these plans at U.S. public companies may also be linked to low shareholder support when proposals on this topic go to a vote. These proposals received even lower shareholder support this year (16%) than they did in 2019 (24%), and once again none passed. Moreover, in a notable contrast to 2019, when ISS supported 89% of these proposals, this year only 45% of ESP-linked compensation proposals received ISS support. Notwithstanding current support levels, in light of the COVID-19 pandemic, shareholder proposals linking compensation to ESP issues are likely to remain in focus going forward, and may begin to gain more traction.

ISS supported 79% of the compensation-related proposals voted on so far in 2020 (up from 70% last year), and shareholder support averaged 27% for proposals where ISS recommended in favor, as compared to 10% for proposals where ISS recommended against. ISS recommended in favor of all clawback-related proposals this year as it did in 2018 and 2019, and the average support for this proposal remained high in 2020. The one clawback-related proposal that passed this year was at a waste disposal company, Stericycle.

Proposals to limit golden parachutes (*i.e.*, acceleration of performance awards upon a change in control) and to enhance executive stock retention requirements saw temporary increases in frequency and support levels in 2014 and 2015, but have slowed since and no golden parachute proposals were submitted this year, for the first time since 2015.

This year, one proposal relating to the feasibility of incorporating data privacy as a performance metric for senior executive compensation went to a vote. ISS supported the repeat proposal submitted by Trillium Asset Management to Verizon, which won 31% shareholder support this year after gaining only 12.5% support in 2019. Given the relatively high support for the proposal this year and the remote working needs arising from the COVID-19 pandemic, shareholders may be more likely to submit this type of proposal next year. Additionally, the evolving challenges from an increasingly complex patchwork of data privacy regulations across jurisdictions will further emphasize the importance of these safeguards in industry sectors with exposure to data privacy risks. If shareholders have particular concerns about a company's or its industry's cybersecurity and/or data privacy risk profile or risk management practices, proposals to explicitly link cybersecurity and/or data privacy performance to executive pay may gain more traction going forward. In response to increasing focus on these topics from investors and the SEC, it has become

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<sup>52</sup> Mercer North America Executive Rewards—Environmental, Social and Governance (ESG) Incentive Plan Metrics: Spot Survey, Mercer (US) Inc., available at <https://www.mercer.us/content/dam/mercer/attachments/north-america/us/us-2019-environmental-social-and-governance-esg-incentive-plan-metrics-spot-survey.pdf>.

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common practice for both large- and small-cap companies to address the topics of cybersecurity and data privacy in their proxy statements, but companies should also be prepared for heightened scrutiny of their cybersecurity infrastructure and data use policies in the future, especially since COVID-19 has further highlighted the importance of these issues.

### G. NO-ACTION RELIEF

The most significant developments with respect to the no-action process for the 2020 proxy season related to the SEC staff process. The substance of the responses were consistent with the 2019 proxy season.

On September 6, 2019, the SEC announced that it would change its process for responding to Rule 14a-8 no-action requests.<sup>53</sup> In order to “most efficiently and effectively provide guidance where appropriate,” starting with the 2020 proxy season, the SEC staff has begun to respond orally in some cases to no-action requests. Instead of responding in writing in all cases to inform the proponent and the company of the staff’s position (which may be that the staff concurs, disagrees or declines to state a view because the request is moot or the matter is in litigation, with respect to the company’s asserted basis for exclusion), the SEC stated that it intended to issue a written response only when doing so would “provide value, such as giving guidance on compliance with Rule 14a-8.”

Since the SEC’s September 2019 announcement, the staff has issued 79% of its no-action responses in an oral format. Despite the format change, however, there does not appear to have been a significant change in the average response time from the staff (46 days between initial no-action request and SEC response for requests submitted between September 2019 and June 2020, compared to approximately 50 days for requests submitted between September 2017 and June 2018).<sup>54</sup>

Although some investors and market participants expressed concern regarding the SEC’s decision to provide oral responses immediately following the September 2019 announcement, the initial concerns have been allayed by measures the staff has taken to ensure transparency despite its transition to oral responses. Primarily, the SEC has published a chart on its website of all the responses (*i.e.*, both written and oral) that it has issued on or after November 21, 2019. The staff updates this chart on a regular basis, and includes on the chart the information that would be included in the staff’s traditional written response letter, such as the bases for exclusion asserted by the company and the staff’s concurrence (or inability to concur) with certain of the bases asserted.

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<sup>53</sup> See <https://www.sec.gov/corpfin/announcement/announcement-rule-14a-8-no-action-requests>.

<sup>54</sup> Data on staff response for no-action requests submitted between September 2018 and June 2019 was not calculated as a reference point because of the federal government shutdown during that period. Data on staff response time for no-action requests between September 2017 and June 2018 was derived from Bloomberg Law. The total number of no-action requests submitted between September 2017 and June 2018 (238) was on par with the total number between September 2019 and June 2020 (244).

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While the format of the SEC’s responses have changed, the staff’s substantive interpretation of the grounds for exclusion seem to have remained unchanged in the 2020 proxy season, following several years of interpretive changes on topics such as the “ordinary business” exclusion under the micromanagement prong of Rule 14a-8(i)(7).<sup>55</sup>

**1. Response Format and Time**

Through June 30, 2020, 164 issuers submitted 244 requests for no-action relief to exclude shareholder proposals from proxy circulars for annual meetings scheduled to be held in 2020. Of the 244 requests submitted, 200 received a response from the SEC. The rest of the requests were withdrawn by the issuer or had yet to receive a response as of June 30.

<b>SUMMARY OF NO-ACTION RELIEF RESPONSES</b>			
	<b># of Responses</b>	<b>Oral</b>	<b>Written</b>
Total	200	158	42
Granted	142	111	31
Denied	57	47	10
Declined	1	0	1

Of the 200 no-action requests which received a response, the SEC granted 71% and denied 29% (the staff declined to state a view in one instance on the basis that there was pending litigation over exclusion of the proposal). In the vast majority (79%) of cases where the SEC responded to a request, it did so orally.

As noted above, the SEC’s new process does not appear to result in different response times compared to 2018. In addition, in terms of the length of time between the date of the initial no-action request and the date of the SEC’s response, there does not seem to have been a meaningful difference between responses issued in writing and those that were oral. The average time to receive a response in any format was 46 days, and there was no meaningful variation based on the SEC’s response format or ultimate decision.

Average <u>oral</u> response time:	46 days
Average <u>written</u> response time:	46 days
Average <u>deny relief</u> response time:	47 days
Average <u>grant relief</u> response time:	46 days

So far, there is insufficient data to draw any conclusion regarding the impact of COVID-19 on SEC response times. The majority of the SEC staff began teleworking on March 10, 2020,<sup>56</sup> but the SEC has only responded to nine requests received since then. Based on this limited dataset, the response time

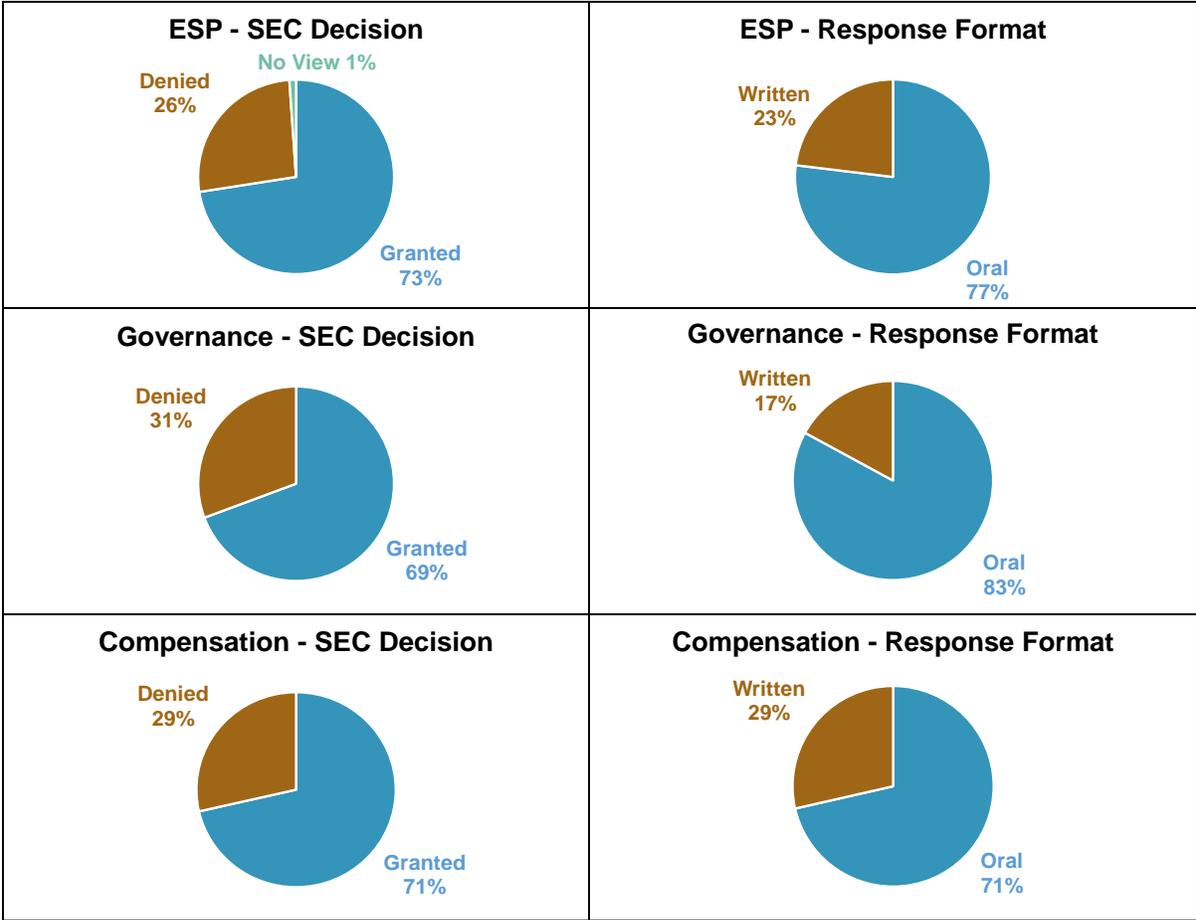
<sup>55</sup> See Staff Legal Bulletin No. 14J, available at <https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals>, which the staff of the SEC’s Division of Corporation Finance issued in October 2018 to provide additional guidance on the excludability of shareholder proposals on the basis that they seek to “micromanage” the company.

<sup>56</sup> See <https://www.sec.gov/sec-coronavirus-covid-19-response>.

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was only 31 days, consistent with previous years of accelerated response times in March, when the overwhelming majority of no-action requests for the proxy season have already been processed.

The SEC’s decision to grant or deny relief did not seem to significantly impact the likelihood of a written response. The SEC responded orally in 78% of all cases where it granted relief, and in 82% of all cases where it denied relief. The nature of the proposal (*i.e.*, whether the proposal addressed ESP, governance or compensation issues) also did not seem to significantly impact the format of the staff’s response or the staff’s ultimate decision.



Instead, the SEC may be more likely to provide an oral response where proponents have submitted a meaningful number of identical (or very similar) proposals to multiple issuers. In those cases, the data from the 2020 proxy season suggests that the SEC may be inclined to issue one written response explaining the rationale for its decision, and then respond to the other requests orally. For example, on March 6, 2020, the SEC granted relief to five separate issuers who sought to exclude substantively identical proposals demanding reports on the use of mandatory arbitration clauses for employment related claims. The SEC provided a written response to Dollar General expressing its concurrence that there was some basis for excluding the proposal under Rule 14a-8(i)(7), referencing the standard set out

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in Staff Legal Bulletin No. 14K stating that the proposal “does not transcend the company’s ordinary business operations.”<sup>57</sup> The staff then provided four other issuers (CVS, Dollar Tree, Walmart and Yum! Brands) with oral responses, noting on its chart that the SEC concurred “that Rule 14a-8(i)(7) provides a basis to exclude (ordinary business).” Similarly, on December 20, 2019, the staff granted no-action relief in a written letter to Apple with respect to a proposal demanding reports on the risks of omitting viewpoint and ideology from equal employment opportunity policies. In its written response to Apple, the staff expressed its concurrence that there was some basis for excluding the proposal under Rule 14a-8(i)(7) since the proposal “does not transcend the Company’s ordinary business operations,” noting further that Apple’s Nominating and Corporate Governance Committee concluded that the proposal did not represent a significant policy issue for Apple and that a related proposal only received 1.7% of shareholder votes last year.<sup>58</sup> When Alphabet and Salesforce.com requested no-action relief with respect to the same proposal in February 2020, the SEC provided them with oral responses, noting on its chart that the SEC concurred “that Rule 14a-8(i)(7) provides a basis to exclude.” Similar to the Apple request, Alphabet and Salesforce.com both included an analysis of the proposal from their governance committees in their no-action requests.

### 2. Bases for Relief

Based on the responses received, the three most common bases on which the SEC granted no-action relief were:

Rule 14a-8(i)(10) – Substantial Implementation	46
Rule 14a-8(i)(7) – Ordinary Business	37
Rule 14a-8(b) and (f) – Failure To Demonstrate Ownership	28

During the 2020 proxy season, the SEC did not announce interpretative changes with respect to the basis on which a Rule 14a-8 proposal may be excluded. However, the SEC did announce on March 13, 2020 that if a proponent is unable to attend an annual meeting and present their proposal in person or by representative due to hardships related to COVID-19, the SEC would consider that to be “good cause” under Rule 14a-8(h).<sup>59</sup> Under Rule 14a-8(h)(3), an issuer may exclude a proposal for any shareholder meetings held in the following two calendar years when a proponent fails to properly present its proposal, unless the proponent had “good cause” for its failure to present.

### 3. Response to New Format

When the SEC first announced its new approach to responding to no-action requests, the Council of Institutional Investors (“CII”) wrote a letter to the SEC requesting that the Commission rescind the

<sup>57</sup> See <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2020/occnycdollar030620-14a8.pdf>.

<sup>58</sup> See <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/ncpprapple122019-14a8.pdf>.

<sup>59</sup> Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns (last updated April 7, 2020), available at <https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns?auHash=zrsDVFen7QmUL6Xou7EIHov4Y6lfrRTjW3KPSVukQs>.

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change.<sup>60</sup> The CII was concerned that the change would result in greater uncertainty due to an increase in the number of cases where the staff “declines to state a view” or that the inability to track oral decision would reduce transparency and predictability for issuers and proponents looking to no-action responses for guidance. Glass Lewis also updated its 2020 policy guidelines in response to the SEC’s change stating it will recommend shareholders to vote against:

“[a] member of the governance committee when a shareholder resolution is excluded from the meeting agenda but the SEC has declined to state a view on whether such resolution should be excluded, or when the SEC has verbally permitted a company to exclude a shareholder proposal but there is no written record provided by the SEC about such determination and the Company has not provided any disclosure concerning this no-action relief.”<sup>61</sup>

These initial concerns seem to have faded over the 2020 proxy season. Although CII was concerned that the SEC’s new approach would result in an increase in the cases where the SEC declined to state a view, that has not been the case. The staff has only declined to state a view with respect to one request and only because the proposal in question was the subject of pending litigation. There also do not appear to have been any instances of Glass Lewis recommending that shareholders vote against the members of an issuer’s governance committee on that basis that the issuer excluded a proposal without providing a written record of the SEC’s determination, perhaps as a result of the level of detail the SEC has provided on its website with respect to oral responses.

Finally, there have been only eight requests this proxy season for the staff to reconsider its no-action decisions, comparable to the six requests for reconsideration made last year. Furthermore, these requests for reconsideration were equally likely to arise from an oral response vis-à-vis a written response (four of the challenged SEC decisions were in a written format, and the other four were oral). All of the reconsideration requests were denied.

### H. EXEMPT SOLICITATIONS

Each year, some institutional shareholders (including public pension funds) file notices of exempt solicitation with the SEC under Rule 14a-6(g) to encourage votes on shareholder proposals, say-on-pay proposals and in “vote no” campaigns. Rule 14a-6(g) requires a person who conducts a solicitation of shareholders that is exempt (because the person does not seek to have proxies granted) and who owns more than \$5 million of the company’s securities to file with the SEC all written materials used in the

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<sup>60</sup> RE: Investor Concerns and Recommendations Regarding the Division’s No-Action Process Announcement of September 6, 2019 (Sept. 19, 2019), *available at* [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2019/Final\\_no\\_action\\_orgs\\_letter.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/Final_no_action_orgs_letter.pdf).

<sup>61</sup> Glass Lewis 2020 Proxy Paper, Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice, *available at* [https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines\\_US.pdf](https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines_US.pdf).

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solicitation. These notices of exempt solicitation appear on the SEC's Edgar internet system as "PX14A6G" filings.

The SEC staff published two C&DIs regarding PX14A6G filings in 2018. C&DI 126.06 clarified that the staff will not object to a voluntary submission of a PX14A6G filing, while requiring the cover notice to clearly state that such filing is being submitted on a voluntary basis. C&DI 126.07 specifies how such information should be presented when making a PX14A6G filing.

Through June 30, 2020, 182 PX14A6G filings were submitted to the SEC, representing a 7% increase from the 170 filings submitted last year at this time. The majority of these filings were made voluntarily by the top proponents described in Section B, including John Chevedden, the California Public Employees Retirement System (CalPERS), social investment entities and religious organizations. Whereas a number of proponents continued to file "tweets" or other social medial posts as they did in 2019, voluntary submissions this year consisted primarily of press releases and email communications.

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