

Morgan Lewis

# 2022 ANNUAL MEETING POSTMORTEM

**A RECAP OF TRENDS AND  
CORPORATE GOVERNANCE / ESG CONSIDERATIONS**

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# Overview

- I. Proxy Season Recap – A Post-Mortem of 2022
- II. ESG & Other Trends for 2023
- III. Executive Compensation – Compensation Committee Considerations

# 2022 PROXY SEASON RECAP

# Overview of 2022 Proxy Season

- 2022 Say on Pay Trends
- Continued Focus on ESG Disclosure
- Board Diversity Disclosure

# 2022 SAY ON PAY TRENDS

# 2022 Say on Pay – Overall Trends

- Average vote result of Say on Pay (SoP) proposals is relatively consistent with support experienced in 2021
  - Approximately 90%
- Average SoP levels of support continue to decrease
  - The percentage of companies receiving less than 90% support for their SoP continues to increase
  - The number of large-cap companies that have received votes of 70% or below is on track to be the largest since SoP was implemented in 2011
  - Why?
    - Lack of alignment around pay and performance
    - Rigor of incentive plan metrics
    - Significant adjustments to executive compensation in certain instances
    - Prevalence of special/retention awards
    - Poor disclosure and/or lack of responsiveness
- ISS negative vote recommendation down by 1%
  - ~11% in 2022 v. 12% in 2021

# 2022 Say on Pay – Index Snapshot

	S&P 500	S&P Midcap	S&P Smallcap	Remaining Russell 3000
<b>Average Support</b>	88%	91%	91%	90%
<b>Failure Rate</b>	4%	3%	3%	2%
<b>ISS Negative Vote Recommendation</b>	12%	8%	11%	11%

# Say on Pay – Things to Consider Now

- Recall that in the year following a SoP vote, the proxy advisors scrutinize companies where the SoP approvals fell below certain specified thresholds and will expect companies to address SoP in next year's proxy statement:
  - 70% approval for ISS
  - 80% for Glass Lewis
- Now is the time to think about engaging with institutional investors if SoP approval levels dipped below the above levels, or materially decreased year-over-year
- Consider how the 2023 CD&A will look and what the company will be able to point to in terms of changes made in response to a lower SoP or specific concerns raised by institutional investors



# Roadmap for Outreach/Action Plan on SoP

- Review ISS and Glass Lewis proxy reports to determine the biggest issues raised on SoP
- Review SoP vote itself and determine which shareholders did not support the SoP proposal (proxy solicitor firms can assist with this, as well as outreach)
- Decide with which shareholders the company wants to conduct outreach and the team from the company (i.e., compensation committee chair, general counsel)
- Prepare talking points based on ISS and Glass Lewis reports, any known concerns from shareholders and the prior year's proxy disclosure
  - This may include changes or proposed changes to the compensation program to assuage such concerns
- Caucus following the outreach meetings and coordinate response
  - Report to compensation committee
  - Determine plan of action for disclosure in next year's proxy
  - Consider how 2023 proxy disclosure might look in response to outreach efforts
- Particularly for companies that fell below the ISS and Glass Lewis thresholds for SoP, it will be critical to address:
  - What engagement efforts were made with shareholders
  - Any changes made by the compensation committee in response to iterated concerns
  - A compelling rationale as to the compensation decisions made for 2022

# Upcoming Say on Frequency Vote - 2023

- Say on Frequency votes are required to be held at least once every six years
- Consequently, companies that held their last Say on Frequency vote in 2017 should be prepared to include a Say on Frequency proposal in their 2023 proxy statements
- Selecting a Frequency Preference: Every One, Two, or Three Years
  - Overwhelming majority of companies hold annual SoP votes
  - Why?
    - Fosters shareholder engagement
    - Demands company responsiveness
    - Promotes the annual evaluation and assessment of the need for compensation program changes
    - Enhances transparency
    - Eliminates possibility of shareholder proposals for more frequent SoP votes

# CONTINUED FOCUS ON ESG DISCLOSURE

# 2022 ESG Proxy Disclosure

- Companies continued to focus on providing fulsome ESG disclosure against the backdrop of heightened SEC scrutiny and continued lack of clarity regarding new regulations, guidance, and standards
- Areas of focus:
  - Climate change
  - Supply chain and labor
  - Human capital management
  - Diversity, Equity, & inclusion
  - Social initiatives
  - Community and philanthropic endeavors
  - Risk management of ESG and Board oversight of ESG
  - Executive compensation ESG metrics

# Heightened SEC Scrutiny

- Since early 2021, the SEC has emphasized that ESG-related issues are important to investors and that ESG disclosure would be an enforcement priority
  - March 2021 – SEC announced the formation of an Enforcement Division Task Force focused on climate and ESG issues
  - June 2021 – SEC’s regulatory agenda announced that rulemaking concerning climate-related and ESG related-disclosure would be a top agency priority
  - September 2021 – Staff posted a sample letter with examples of comments it planned to send to issuers inquiring about specific climate-related risk disclosures
  - March 2022 – SEC proposed rules for climate change disclosure requirements for both U.S. public companies and foreign private issuers
  - April 2022 - SEC filed a civil action suit against a Brazilian corporation, alleging the company violated securities laws by making false and misleading disclosures about the safety and stability of its Brumadinho dam

# Shift in Approach in ESG Disclosure

- While companies continue to include ESG disclosures in SEC filings, company websites, press releases, and standalone CSR reports, there has been a shift in the approach in ESG disclosure
  - Previously, when ESG became a “hot topic” companies took the “everything-but-the-kitchen-sink” approach and highlighted everything and anything they could
  - Now, companies must be intentional and cautious in their ESG disclosures
- SEC v. Vale SA demonstrates the SEC’s commitment to identify false and misleading ESG disclosure, requiring companies to bring a heightened level of rigor into their ESG reporting and putting companies on notice that the SEC will not hesitate to prosecute companies that engage in greenwashing

# ESG Disclosure Takeaways and Best Practices

- Consistency and accuracy of disclosure and omissions are paramount
  - Ensure that every assertion and statement can be backed up
  - Confirm that disclosure is uniform and consistent across all media and filings
  - Include all proper caveats
- Third-party verification or audit is now the gold standard
  - At a minimum, conduct internal audits of ESG-related disclosures
- Consider what frameworks are currently used for reporting, and what frameworks may be used in the future – and prepare accordingly
- Include fulsome disclosure on ESG risk management, including Board oversight of ESG

# ESG Disclosure Takeaways and Best Practices (continued)

- Watch out for “commitment” language (i.e., statements that the company will achieve a specific goal threshold by a certain date)
  - Know the difference between disclosing commitments/targets and stating aspirational goals
- Use forward-looking statements where appropriate
- Be careful of inadvertent incorporation by reference
  - Carefully consider the benefits of referencing CRS/sustainability reports in SEC filings
- Remember SEC review and scrutiny extends beyond ESG disclosure in SEC filings
  - Company websites, press releases, marketing materials, blogs, and CSR/sustainability reports are fair game



# BOARD DIVERSITY DISCLOSURE

# 2022 Board Diversity Disclosure

- Disclosure of gender diversity of directors is overwhelming practice
  - 94% of S&P 500 boards disclosed the gender diversity of directors
- Disclosure of director race/ethnicity continued to surge in 2022
  - Nearly all S&P 500 boards (93%) disclosed their racial/ethnic composition (up from 60% in 2021)
    - 41% of boards identified racial and ethnic diversity on an individual director basis (up from 28% in 2021)
- Disclosure of director sexual orientation began to increase in 2022
  - 103 S&P 500 boards included sexual orientation diversity disclosure (up from 32 boards in 2021)
    - 74 boards included a general statement about their LGBTQ+ representation
    - 29 boards identified LGBTQ+ directors on an individual basis

# 2022 Board Diversity Disclosure (continued)

- Disclosure of military or veteran status increased slightly but continues to be uncommon
  - 22 S&P 500 boards disclosed veteran representation (up from 3 boards in 2021)
    - 10 boards included a general statement about veteran representation
    - 12 boards identified veteran directors on an individual basis
- Consistent with 2021, disclosure of directors with disabilities is very rare
  - 1 S&P 500 board disclosed having a director with disabilities (consistent with 2021)

# What is Driving the Increase in Board Diversity Disclosure? – Investor Demands

- Investor demands call for increased diversity and greater transparency
  - In recent years, a number of large institutional investors have expressed strong support for board diversity and have adopted voting policies and other guidelines that penalize companies lacking diversity and/or diversity disclosure
- Examples of voting policies/guidelines on diversity disclosure:
  - BlackRock: Expects boards to disclose their approach, actions, and progress toward achieving diverse representation, including the demographic profile of the incumbent board, including, but not limited to, gender, ethnicity, race, age, and geographic location, in addition to measurable milestones to achieve a boardroom reflective of multi-faceted racial, ethnic, and gender representation.
  - State Street Global Advisors: If a company in the S&P 500 does not disclose, at minimum, the gender, racial and ethnic composition of its board, State Street will vote against the chair of the nominating committee.
  - NYS Comptroller: Vote against all incumbent nominating committee nominees at companies that do not disclose the self-identified individual racial/ethnic diversity of their board members. Also encourages its portfolio companies to disclose whether directors identify themselves as LGBTQ+ or a person with a disability.

# What is Driving the Increase in Board Diversity Disclosure? – Proxy Advisor Firms

- While ISS currently does not have explicit guidelines on director diversity disclosure, it has asked companies for disclosure of the race/ethnicity of each director and named executive officer, both on an aggregate and self-identified basis
  - Indicated that this outreach is an effort to ensure the accuracy of data in research and proxy reports
- Glass Lewis updated its guidelines to address its approach to the recent disclosure rule adopted by Nasdaq and revised its discussion on disclosure of director diversity in proxy statements
  - Beginning in 2022, for companies in the S&P 500 index with particularly poor disclosure (i.e., those failing to provide any disclosure in each of the tracked categories), GL may recommend voting against the chair of the nominating and/or governance committee
  - Beginning in 2023, when companies in the S&P 500 index have not provided any disclosure of individual or aggregate racial/ethnic minority demographic information, GL will generally recommend voting against the chair of the governance committee

# What is Driving the Increase in Board Diversity Disclosure? – Regulatory Requirements

- In 2019, the SEC's Division of Corporation Finance issued guidance regarding diversity characteristics of directors and board diversity policy disclosures:
  - if a board or nominating committee considered diversity characteristics of a candidate and the candidate consents to the disclosure of such self-identified diversity characteristics in the proxy statement, the SEC expects to see disclosure addressing such diversity characteristics and how they were considered
  - The SEC staff expects that any description of diversity policies include a discussion of how the company considers the diversity attributes of nominees and what qualifications the diversity policy takes into consideration
- Beyond this, the only board demographic information that all U.S. public companies are currently required to disclose is the age of each director

# What is Driving the Increase in Board Diversity Disclosure? – Listing Exchange Requirements

- Perhaps the biggest driver in the uptick in board diversity disclosure is the recently approved Nasdaq Diversity Rules
- In addition to requiring listed companies to “comply or explain” with certain board diversity requirements by the applicable transition dates, the Nasdaq Diversity Rules include diversity disclosure requirements
  - Nasdaq-listed companies are required to disclose annually their directors’ self-identified diversity data in the prescribed matrix format
- While the Nasdaq Diversity Matrix requirement technically is not in effect until next year (2023 proxy statements), if a Nasdaq-listed company did not include the matrix in its 2022 proxy statement, it needs to provide the matrix on its website by August 8, 2022
- While it is currently unlikely that NYSE will follow suit, many NYSE-listed companies are voluntarily including similar diversity disclosure

# Nasdaq Diversity Matrix

Board Diversity Matrix (As of March 14, 2022)				
Board Size:				
Total Number of Directors	9			
	Female	Male	Non-Binary	Did not Disclose Gender
Gender:				
Directors	3	6	0	0
Number of Directors who identify in Any of the Categories Below:				
African American or Black	0	0	0	0
Alaskan Native or Native American	0	0	0	0
<i>Asian (other than South Asian)</i>	0	1	0	0
<i>South Asian</i>	1	0	0	0
Hispanic or Latinx	0	1	0	0
Native Hawaiian or Pacific Islander	0	0	0	0
White	2	3	0	0
Two or More Races or Ethnicities	0	0	0	0
LGBTQ+	2			
<i>Persons with Disabilities</i>	1			



# Director Diversity Self-Identification Considerations

- Current disclosure is largely based on self-identification
  - Note the potential for liability under the securities laws for opportunistic or unproved identifications
- D&O questionnaires
  - Include questions requesting that directors provide self-identification information regarding their gender, race/ethnicity, LGBTQ+, veteran status, and disabilities
  - Also often provide directors with the option to “prefer not to disclose”
  - Include a question on consent that explicitly gives permission for the information to be shared in SEC filings
- This framework creates the possibility of having a diverse board, but not being able to disclose or highlight such diversity
  - (i.e., if a diverse director opts not to self-identify or does self-identify but does not consent to disclosure)

# Director Diversity - Skills, Qualifications, and Experience Disclosure

- Board diversity with respect to skills, qualifications, and experience continues to be an area of focus
  - Accordingly, in addition to the uptick in gender/racial/ethnic diversity disclosure, there has been a steady increase in the number of companies disclosing tabular skills matrices identifying director skills at an individual level
- While business strategy remains the most cited experience, there has been an increase in skills related to business operations, finance, and technology
  - Additional skills that have become increasingly more important include:
    - Cybersecurity
    - Sustainability
    - Human capital management

# Director Diversity - Skills, Qualifications, and Experience Disclosure Considerations

- In addition to including qualifications in directors' bios, consider including a skills matrix
  - Investors tend to favor a tabular skills matrix over other skills disclosure as it allows them to quickly see a complete composition of skills on the board
- The skills, qualifications, and experiences included in a matrix should be relevant, specific, and tailored to the company and its industry
- Confirm completeness and accuracy of skills matrix disclosure
  - Include a question on skills, qualifications, and experiences in D&O questionnaires
  - Circulate a draft of the skills matrix to the board asking them to review and confirm

# 2023 PROXIES & BEYOND

# Universal Proxy Card

# Universal Proxy Card Rules – Effective August 2022

- In November 2021, the SEC approved “universal proxy” rules
  - Apply to meetings commencing September 1, 2022
- After the rules become effective, proxy cards distributed by both public companies and activist stockholders in a contested director election will have to include both sides’ director nominees
- This means that in a contested election, the Company would need to include both “its slate” of directors, plus the nominees put forth by a nominating stockholder
- This contrasts with the current system in which stockholders generally have a binary choice of either casting their vote for –
  - The company’s slate in the company’s proxy card, or
  - The activist’s slate in the activist’s proxy card

# Universal Proxy Cards – What Does it Mean?

- Under the new rules, a dissident stockholder:
  - **Does not** need to comply with share ownership thresholds or holding period requirements
  - **Does** have to file their own definitive proxy statement and follow other procedures
- Likely to lead to an increase in threatened proxy contests
  - Stockholders will be more inclined to support a dissident nominee when they can do it on a universal proxy card
  - Therefore, the use of universal proxies should make it easier for activists to win at least one board seat
- Costs of proxy contests will be reduced for dissidents significantly due to the reduced mailings associated with a universal proxy card

# Current Timeline for Advance Notice Director Nominee

Stockholder submits a director nominee prior to advance notice deadline

Negotiations may ensue with the nominating stockholder (e.g., standstill agreement)

If negotiations fail, the nominating stockholder must prepare and file proxy materials (at own expense) relating to the stockholder nominee

Nominating stockholder must conduct multiple mailings of own proxy card.

Only the last executed proxy card counts, so the Company can make numerous filings that the dissident then must "match."



# Timeline for Advance Notice Director Nominee (Meetings After September 1, 2022)

Stockholder submits a director nominee prior to advance notice deadline

Negotiations may ensue with the nominating stockholder (e.g., standstill agreement)

If negotiations fail, the nominating stockholder must prepare and file proxy materials (at own expense) relating to the stockholder nominee

Nominating stockholder relies on the Company's mailing of a universal proxy card (no multiple mailings needed)

# Final Rules – Form of Proxy and Proxy Statement

- As adopted, the final rules also:
  - Require proxy cards to include an “against” voting option in director elections, when there is a legal effect to a vote against a director nominee;
  - Require that the proxy card provide shareholders with the ability to “abstain” in a director election where a majority voting standard applies; and
  - Require proxy statement disclosure about the effect of a “withhold” vote in an election of directors.
- Notes from the adopting release:
  - The SEC noted that including an “against” voting option on a proxy card where there is no legal effect to such vote is unnecessarily confusing for shareholders; the SEC therefore amended Rule 14a-4(b) to prohibit such a voting option on the proxy card
  - The SEC retained the phrase “the method by which votes will be counted” from Item 21(b) of Schedule 14A to avoid any ambiguity regarding the need for clear disclosures in the proxy statement regarding the effect of each voting option presented to shareholders

# Takeaway: Clarity on Voting Standards

- We recommend including clear, tabular disclosure that sets forth:
  - The voting options for the particular proposal
  - The applicable voting standard
  - Voting options (and the Board’s recommendation)
  - The effects of broker non-votes and abstentions/withheld votes, as applicable

**Don't forget to  
check state  
law, charter  
and bylaws!**

Proposal	Voting Standard	Voting Options	Board Recommendation	Effect of Abstentions	Effect of Broker Non-Votes
Election of Directors	Majority of shares present and entitled to vote	For, against, or abstain	FOR	Against	None

# What's New with ESG?

# Quick Update on Climate Change Rules

- On March 21, 2022, the SEC proposed long-awaited rules that would require public companies to provide climate-related disclosure in registration statements and periodic reports
- The SEC has signaled to public companies and stakeholders its position that climate-related information is material disclosure necessary to make an informed investment decision for some time
- Comment period for public input on the proposed rules was open through June 17<sup>th</sup> (having been extended)
- The proposing release included phase-in periods for the rules based on filer status and provided sample compliance dates based on an effective date of December 2022
- Legal challenges to the rules, if adopted as proposed, are expected

# Key Aspects of the Proposed Rules

- Separately captioned “Climate-Related Disclosure” section in registration statements and reports
- Discussion of climate-related targets, goals and transition plans
- Oversight and governance of climate-related risks
- Process for identifying, assessing and managing climate-related risks and their impact
- Location of properties, processes or operations subject to physical climate-related risks
- Disaggregated climate-related impacts on existing financial statement line items and related disclosure

# Key Aspects of the Proposed Rules (cont'd)

- Disclosure of Scopes 1, 2 and 3 greenhouse gas (GHG) emission data
  - All public companies will be required to disclose Scope 1 and Scope 2
  - Certain public companies will be required to disclose Scope 3 to the extent material or otherwise subject to an emissions reduction target or goal
- Accelerated and large accelerated filers must also obtain an attestation report from an independent attestation service provider covering Scope 1 and Scope 2 GHG emissions disclosure

# So...How Will Climate Change Disclosures Play a Role in Next Year's Proxy?

- Increased prevalence of ESG/CSR reports and “carryover” disclosure to proxy
- As climate change continues to crystallize as the big E in ESG, prepare for expanded – but smarter – climate-related proxy disclosures
- Continued trend of emissions/climate goals as executive compensation performance target:
  - Ex: Citing to achievement of GHG “emissions” target as a performance modifier or qualitative performance goal



# Sample Climate Proxy Summary Disclosures

- References to sustainability reporting:

1. *We recognize that sustainability reporting is an area of interest for our stakeholders. Starting in 2020, [the company] partnered with outside experts to begin a new initiative to define and measure its carbon emissions footprint, to set long-term greenhouse gas (GHG) emissions goals, and to prepare a formal climate disclosure report. In developing our sustainability disclosures, we took into account shareholder input and in 2021 the Company published an enhanced Corporate Sustainability Report which (i) described our long-term corporate strategy development process relative to climate change; (ii) summarized the specific tasks performed by the Board and management in the course of this strategy development; and (iii) described our long-term goals for greenhouse gas reduction.*

- Setting of climate-related and other ESG goals:

1. *GHG Emission Reduction Goal Setting—In 2021, we launched an internal initiative led by senior management to evaluate the establishment of a company-wide GHG emissions intensity reduction goal. We expect to publish the Company's GHG emission reduction goal in the Company's 2021 Sustainability Report.*
2. *We match 100% of the electricity we use at our offices and data centers globally with clean, renewable sources. In fiscal 2021, we achieved net-zero carbon emissions across our offices, data centers, and business travel. We achieved this milestone through a combination of operational efficiency, procurement of renewable electricity equal to 100% of our consumption, and investing in high-quality carbon offset projects. As of the end of fiscal 2022, we mitigated our carbon legacy through the purchase of high-quality, third-party-verified emission reductions, or carbon offsets, effectively reducing [our] lifetime net carbon footprint to zero. In 2020, we committed to science-based emissions reduction targets - across the entire value chain - that are consistent with keeping global warming to 1.5°C above pre-industrial levels. In early 2022, our ambitious science-based targets were approved by the Science Based Targets initiative. With this commitment, we are taking our next steps toward minimizing our impact on the planet and helping our world transition to a net-zero future by 2050. We are committed to:*
  - *continue annually sourcing 100% renewable electricity through fiscal 2030;*
  - *reducing absolute scope 3 business travel GHG emissions by 25% by fiscal 2026 from a fiscal 2020 base year; and*
  - *70% of our suppliers by spend covering purchased goods & services and capital goods having science-based targets by fiscal 2026.*

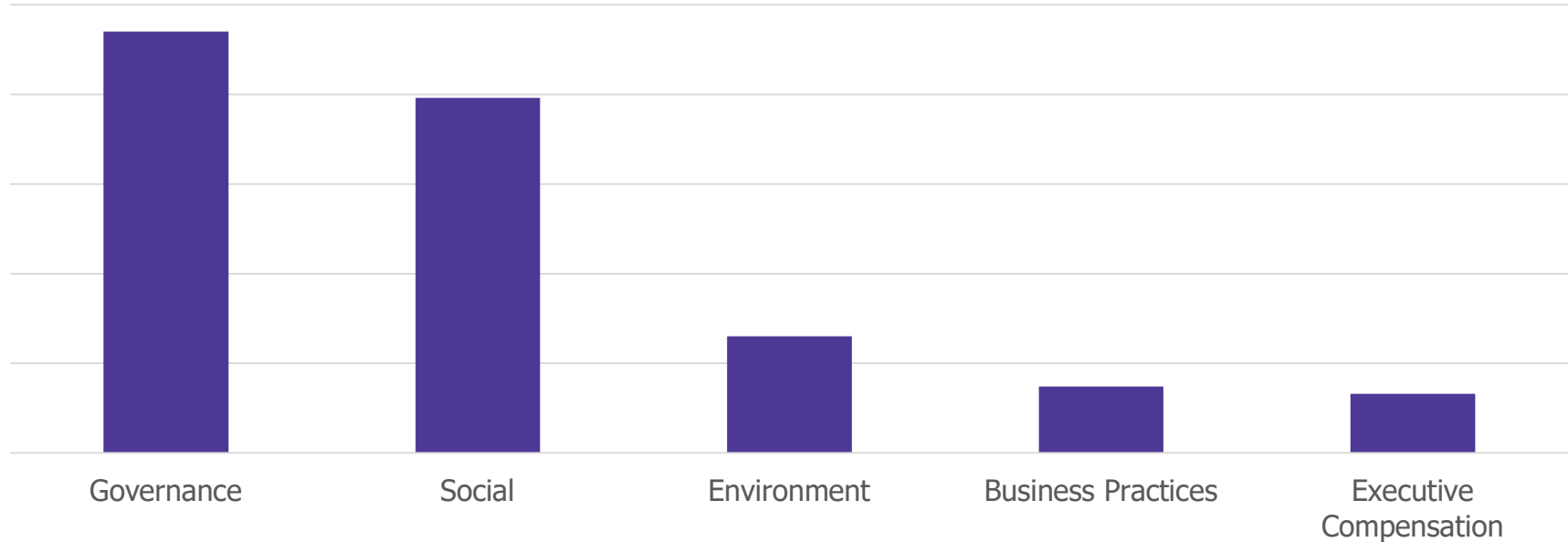
# Anticipated Shareholder Proposal Trends

# Fast Facts on 2022 Shareholder Proposals

- The publication of Staff Legal Bulletin No. 14L in November 2021 signaled, among other things, that Corp Fin would take a more expansive view on whether proposals raised significant policy issues, thus “transcending” the ordinary business basis for exclusion of the proposal
- Against this backdrop, the number of shareholder proposals submitted to public companies increased during the 2022 proxy season as compared to 2021
- While governance-related proposals continued to dominate, “E&S”-related proposals – including those relating to climate change and DEI matters – rose significantly compared to 2021
- No-action relief from Corp Fin declined compared to 2021
- Average voting support from shareholders also declined compared to 2021

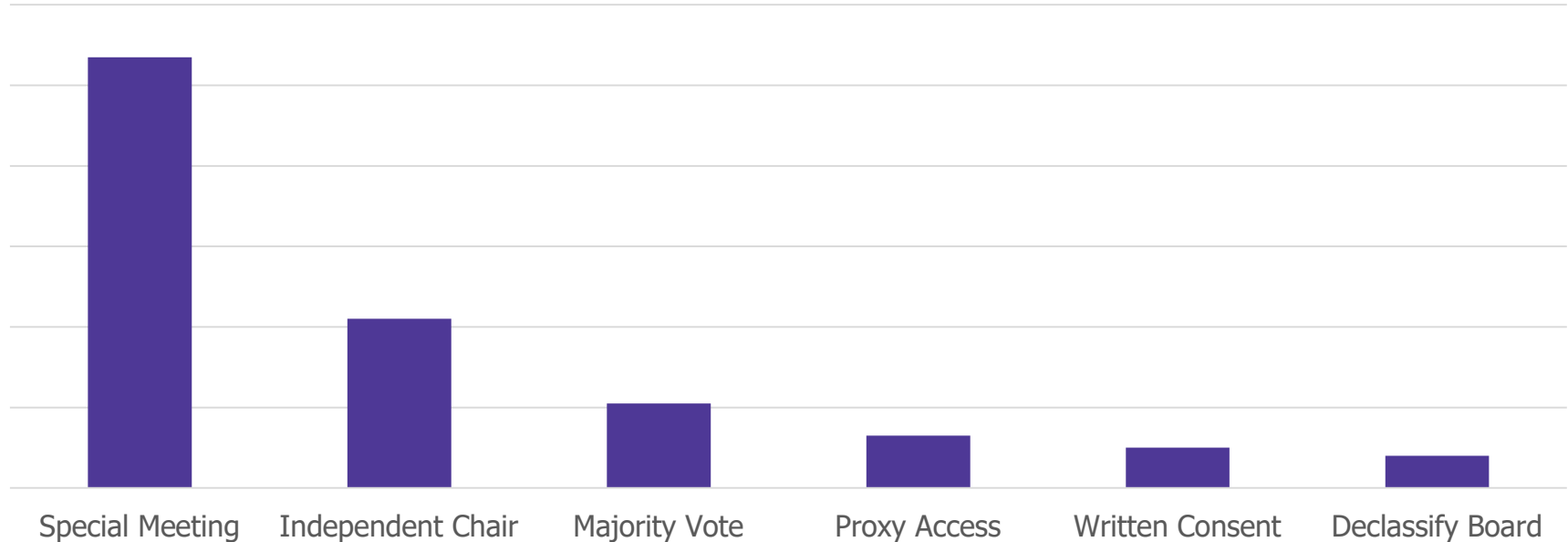
# 2022 Shareholder Proposals

Breakout of Proposals by General Category



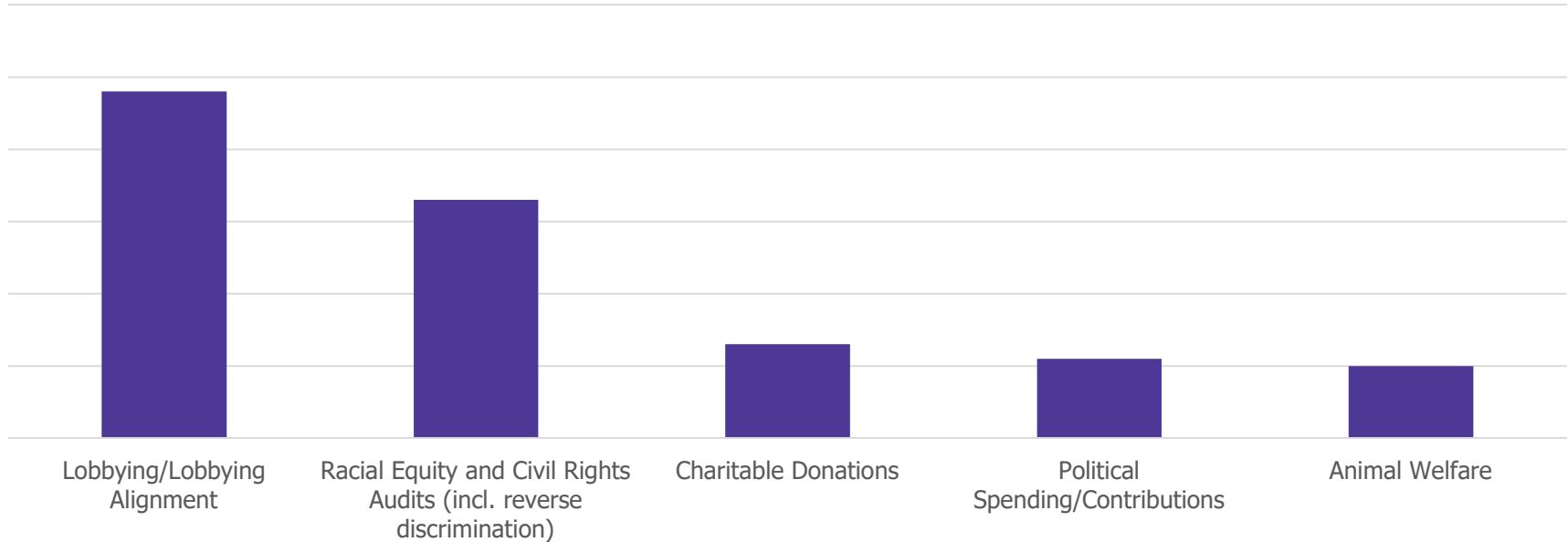
# 2022 Shareholder Proposals (cont.)

## Breakout of Governance-Related Proposals



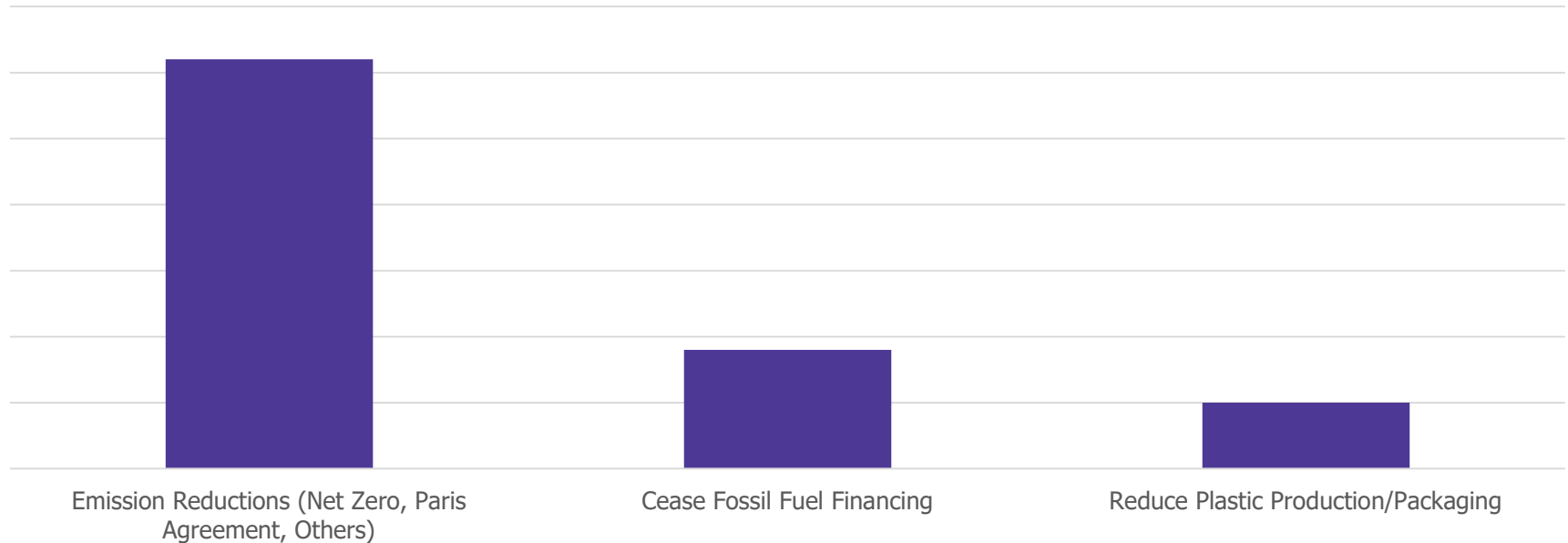
# 2022 Shareholder Proposals (cont.)

## Breakout of Social-Related Proposals



# 2022 Shareholder Proposals (cont.)

## Breakout of Environmental-Related Proposals



# Impact of *Dobbs*

- Both prior to and in the wake of the *Dobbs* Supreme Court decision, various stakeholders are pressing companies to explicitly explain how they will support their workers' access to abortion and reproductive health services
- During the 2022 proxy season, we saw two primary categories of reproductive health-focused shareholder proposals:
  1. Proposals asking for a report describing the risks and costs caused by enacted or proposed state policies severely restricting reproductive rights and detailing any strategies beyond litigation and legal compliance to minimize or mitigate such risks
  2. Proposals asking companies to "report on the congruence of political and electioneering expenditures during the preceding year against publicly stated company values and policies"
    - Aims to address "political spending misalignment," in which companies state that they support women's rights while donating to campaigns and organizations that seek to limit access to abortion and reproductive health care



# Impact of *Dobbs* (cont.)

- The proposals requesting a report on the risks and costs associated with state-level restrictions on reproductive rights cited the then-anticipated overturning of *Roe*, noting the following –
  - Challenges with employees' ability to access abortion care and other sexual and reproductive health care
  - Increased costs to employers resulting from restricted access to reproductive health care, including by women potentially leaving the workforce
  - The potential impact on companies' ability to achieve D&I goals
- None of these proposals passed in 2022
- ISS supported these proposals, while Glass Lewis recommended that shareholders vote against, stating that the proposal language failed to argue why access to reproductive health services is a unique business risk and that the issue was one out of the subject companies' control
- Glass Lewis also noted that companies could face consequences by acting on "controversial political issues that are somewhat removed from their own operations"

## Impact of *Dobbs* (cont.)

- Proxy disclosure from companies that have announced plans to support employees impacted by restrictive state laws on abortion access
- Enhanced shareholder/stakeholder pressure from investors and others who view access to abortion as a human capital risk
- Potential pushback for “hypocrisy” to the extent that companies have made political contributions to organizations or politicians that support anti-abortion measures
- The potential for a greater number of shareholder proposals during the 2023 proxy season in light of shifting policy from Corp Fin on social issues

# Takeaways for 2023

- All climate-related proxy disclosures – specifically those citing goals and targets – must be carefully reviewed and fully vetted
- ESG-focused shareholder proposals will continue to play an outsized role during the 2023 proxy season
- Consider impact of *Dobbs* both with respect to shareholder proposals and proxy disclosure

# EXECUTIVE COMPENSATION – COMPENSATION COMMITTEE CONSIDERATIONS

# Equity Plans: Refresher on the ISS Equity Plan Scorecard

- For the 2022 proxy season
  - ISS did not make any changes to the threshold passing score of 57 points for its S&P 500 model and 55 points for its Russell 3000 model
  - ISS also did not make any changes to the pillars or weightings in assessing omnibus equity plans, with the three “pillars” as follows:
    - 45 Points: Plan cost (i.e., dilution and overhang)
    - 38 Points: Grant practices (i.e., burn rate relative to peer companies, CEO vesting terms)
    - 17 Points: Plan features (e.g., minimum vesting periods, extent to which vesting can be accelerated on a discretionary basis, liberal share recycling, change-in-control provisions, dividends paid on unvested awards)

# Equity Plans: Refresher on the ISS Equity Plan Scorecard

- Features that may result in a vote against an equity plan proposal, irrespective of EPSC score
  - Liberal change in control definition that could result in vesting of awards other than full double trigger
  - Plan permits repricing or cash buyout of underwater options without shareholder approval
  - Plan is a vehicle for problematic pay practices or a pay-for-performance misalignment
  - Plan is estimated to be excessively dilutive to shareholders
  - Plan contains an evergreen feature
  - Other plan features or company practices are deemed as detrimental to shareholders

# Equity Plans: Refresher on the ISS Equity Plan Scorecard

- ISS introduced the concept of “Value Adjusted Burn Rate”
  - Is intended to use more accurate measures for the value of equity-based awards
  - Will be displayed for informational purposes only for 2022 meeting
  - Expected to replace the current burn rate factor beginning with meetings on or after February 1, 2023

# Equity Plans: Negative Equity Plan Vote

- Strategies when faced with a negative ISS/Glass Lewis recommendation:
  - Shareholder engagement, focusing on largest institutional holders
  - Well-drafted supplemental proxy material can be very effective to rebut ISS's position (particularly if Glass Lewis has expressed support for the plan)
  - Confirm information that is basis of determination is correct



# Equity Plans: What's Next?

- Anticipated increase in equity plan proposals
  - Plan cost is the most heavily weighted pillar
    - If stock prices have decreased in an industry or for individual companies, companies may need to include more restrictive plan features to gain more points for that pillar to offset a high plan cost
  - Equity clawback policies can help companies earn points in the grant practices pillar without reducing equity grants
  - For plan provisions such as an evergreen feature, option repricing, or buyout without shareholder approval, a liberal change-in-control definition will be an automatic “overriding” factor, resulting in an ISS recommendation against the equity plan

# ISS Compensation Policies: Severance

- ISS expects fulsome disclosure of payments made to terminating executives, stating that severance pay is not appropriate for executives who voluntarily resign or retire
  - Clear and direct disclosure about the nature of an executive's termination
    - Identify the type of termination (termination of employment without cause/resignation for good reason) and the applicable agreement provision under which severance payments were made
    - Disclosure as to how the board of directors determined to pay severance to the executive, including whether there were any discretionary enhancements

# COVID-19 Pay Actions

- ISS Position
  - 2022 is the third proxy season/second year of executive pay proxy disclosure during the pandemic
  - Belief that 2021 boards should have returned to pre-pandemic annual incentive plan structures such that they expect for plans to use objective and transparent metrics using predetermined goals.
    - Mid-year changes to metrics and targets, and discretionary/subjective programs, viewed negatively.
  - If adjustments warranted, companies encouraged to provide clearly anticipated, contemporaneous disclosure of the rationale for adjusting bonuses and performance metrics, including specific pandemic-related challenges and how the challenges resulted in the original program becoming obsolete or unattainable.
    - Include disclosure that changes are not reflective of management performance
  - Consistent with pre-pandemic policy, the rationale for any one-time awards should be adequately disclosed.

# Incentive Compensation Trends – Looking Ahead

- Equity plan approvals
- Retention awards
- Adjustments to performance measurements
- Performance metrics based on non-financial ESG factors
- Underwater grants/option repricing
- Tax law changes

# Alexandra Good



Ali counsels public companies and their boards of directors on matters relating to corporate governance and securities regulation. She specializes in advising clients on annual meeting and proxy-related issues, periodic reporting and disclosure requirements, Nasdaq and NYSE compliance, shareholder engagement, environmental, social, and governance (ESG), and executive compensation matters. Ali also has experience with public capital raising transactions and business combinations, including providing counsel to special purpose acquisition companies (SPACs) and target companies in “de-SPAC” transactions.

Ali is committed to keeping companies and their boards of directors up to date on the latest governance and disclosure issues and trends. In addition to regularly writing LawFlashes, she participates in the Morgan Lewis Public Company Academy by presenting on recent developments and hot topics.

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# Celia A. Soehner



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Celia focuses her practice on counseling public companies and their boards with respect to corporate governance, federal securities, stock exchange, shareholder engagement, and executive compensation matters. Drawing on her previous tenure as an attorney-advisor with the US Securities and Exchange Commission (SEC) in the Division of Corporation Finance, Celia has experience with securities disclosure issues that impact public companies' ongoing reporting obligations and proxy-related matters that impact public companies and their officers and directors. She also advises companies in connection with public capital raising transactions, including through IPOs, secondary offerings, and debt offerings. Celia currently serves as the deputy leader of the firm's capital markets and public companies practice and co-chairs the firm's environmental, social, and governance (ESG) and sustainable business team.

In keeping with Morgan Lewis's commitment to serving the public good, Celia serves as chair of the Pittsburgh office pro bono committee. Celia also is actively involved in the local arts community, including through her service on the board of directors of the Pittsburgh Opera.

A central tenet of Celia's practice is ensuring that companies and their boards are abreast of the latest disclosure, governance, and regulatory issues and trends. To this end, Celia often presents at events and webinars on topics relating to SEC initiatives and corporate governance and executive compensation hot topics and helps to lead the Morgan Lewis Public Company Academy.

While at the SEC, Celia received the 2011 Chairman's Award for Excellence, and was a member of the Rule 14a-8 Shareholder Proposal Taskforce.

# David B. Zelikoff



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David represents and counsels clients in a range of matters related to employee benefit plans and executive compensation agreements. He advises on the design and implementation of tax-qualified, nonqualified deferred compensation, equity compensation, and health and welfare plans, and he helps clients draft and negotiate executive employment agreements, severance arrangements, and change-in-control arrangements. David's clients include tax-exempt organizations, and public/private Fortune 500 and emerging growth companies in the technology and life sciences fields.

David also represents benefit plan sponsors in audit and corrective action matters before the IRS, counsels plan sponsors and committees on ERISA fiduciary matters, and advises on matters related to the IRS code (IRC), including Section 409A.

As part of an active pro bono practice, David has helped entities file with the IRS for tax-exempt status under Section 501(c)(3) of the IRC. He is also an adjunct professor at Villanova University, where he teaches executive compensation planning during the summer session.

# Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

**Morgan Lewis**

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at

[www.morganlewis.com/topics/coronavirus-covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19)

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#).



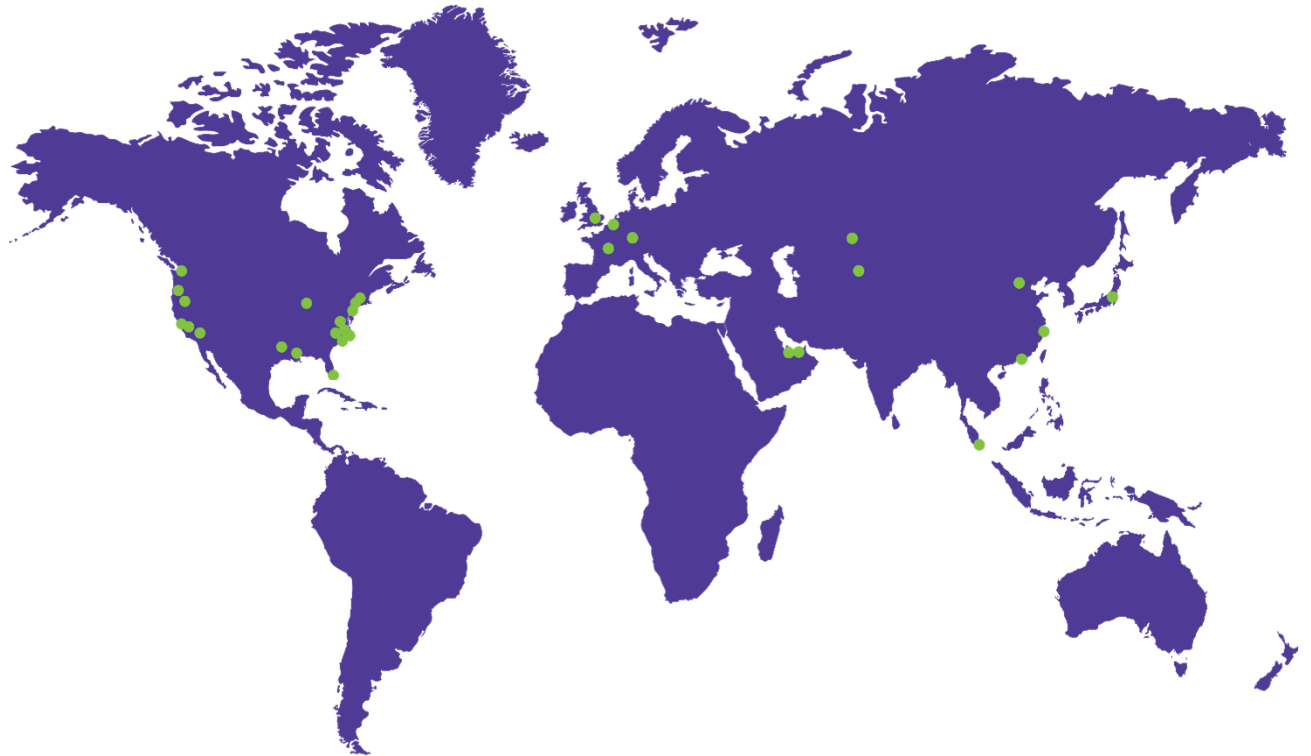


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Europe  
Latin America  
Middle East  
North America

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Almaty  
Beijing\*  
Boston  
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Century City  
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Dallas  
Dubai  
Frankfurt  
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Hong Kong\*  
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