INSIGHTS

The Corporate & Securities Law Advisor

VOLUME 36, NUMBER 9, SEPTEMBER 2022

Wolters Kluwer

www.WoltersKluwerLR.com

INSIGHTS

The Corporate & Securities Law Advisor

Editor-in-Chief
BROC ROMANEK
broc.romanek@gmail.com

EDITORIAL ADVISORY BOARD

EDITORIAL OFFICE
28 Liberty Street,
New York, NY 10005
212-771-0600

Wolters Kluwer
Richard Rubin, Publisher
Jayne Lease, Managing Editor

INSIGHTS (ISSN No. 0894-3524) is published monthly by Wolters Kluwer, 28 Liberty Street, New York, NY 10005. To subscribe, call 1-800-638-8437. customer service, call 1-800-234-1660 or visit www.wolterskluwerlr.com.

For article reprints and reprint quotes contact *Wrights Media* at 1-877-652-5295 or go to *www.wrightsmedia.com.*

SHAREHOLDER PROPOSALS

Shareholder Proposal Developments During the 2022 Proxy Season

By Elizabeth Ising, Thomas J. Kim, Ronald O. Mueller, Lori Zyskowski, and Geoffrey E. Walter

This article provides an overview of shareholder proposals submitted to public companies during the 2022 proxy season,[1] including statistics and notable decisions from the staff (Staff) of the Securities and Exchange Commission (SEC) on no-action requests.[2]

Summary of Top Shareholder Proposal Takeaways from the 2022 Proxy Season

In November 2021, the Staff issued Staff Legal Bulletin No. 14L (Nov. 3, 2021) (SLB 14L).[3] In SLB 14L, the Staff rescinded Staff guidance and reversed no-action decisions published during the tenure of former Division Director Bill Hinman,[4] upending the Staff's recent approach to the application of the economic relevance exclusion in Rule 14a-8(i)(5) and the ordinary business and micromanagement exclusions in Rule 14a-8(i)(7). Moreover, SLB 14L indicated that the Staff would take a more expansive view to whether proposals raised significant policy issues that transcended ordinary business and would be more lenient in interpreting proof of ownership letters.

The change of administration at the SEC and the issuance of SLB 14L appear to have served as an open season call for shareholder proponents: the number of proposals submitted surged, the percentage of proposals that shareholders were willing to withdraw as a result of negotiations dropped, and the number of proposals excluded through the no-action process plummeted. At the same time, recent amendments to Rule 14a-8 had only a very minor impact on shareholder submissions. As a result, shareholders were presented with more proposals on a wider range of topics with which they disagreed, with overall levels of voting support dropping notably. We discuss these trends and developments in further detail below:

- ***Shareholder proposal submissions rose again.*** For the second year in a row, the number of proposals submitted increased. In 2022, the number of proposals increased by 8 percent from 2021 to 868—the highest number of shareholder proposal submissions since 2016.
- ***The number of environmental and civic engagement proposals significantly increased, along with a continued increase in social proposals.*** Environmental and civic engagement proposals increased notably, up 51 percent and 36 percent, respectively, from 2021. And social proposals continued to increase, up 20 percent since 2021 and constituting the largest category of proposals submitted in 2022. In contrast, governance proposals declined 14 percent and executive compensation proposals declined 27 percent, each from the number of such proposals submitted in 2021. The five most popular proposal topics in 2022, representing 49 percent of all shareholder proposal submissions, were (i) climate change, (ii) special meetings, (iii) anti-discrimination and diversity, (iv) independent chair, and (v) lobbying spending and political contributions

Elizabeth Ising, Thomas J. Kim, Ronald O. Mueller, Lori Zyskowski, *and* **Geoffrey E. Walter** *are attorneys of Gibson Dunn & Crutcher LLP.*

(which tied for fifth most common proposal topic).

- ***There was a significant decrease in the number of proposals excluded pursuant to a no-action request.*** The number of no-action requests submitted to the Staff during the 2022 proxy season decreased 10 percent from 2021, but nevertheless was higher compared to prior years, up 5 percent from 2020 and 7 percent from 2019. Most notably, the overall success rate for no-action requests plummeted to 38 percent, a drastic decline from success rates of 71 percent in 2021 and 70 percent in 2020. The 38 percent success rate was significantly below even the previous lowest exclusion rate in recent times, which occurred in the 2012 proxy season when the success rate dipped to 66 percent. Success rates in 2022 declined on every basis for exclusion, with the most drastic decline in success rates for procedural (56 percent in 2022, down from 84 percent in 2021), substantial implementation (13 percent in 2022, compared with 55 percent in 2021), and ordinary business grounds (24 percent in 2022, compared with 65 percent in 2021).
- ***While the number of proposals voted on increased significantly, overall voting support decreased, including average support for social and environmental proposals.*** In 2022, just over 50 percent of all proposals submitted were voted on, compared with 41 percent of submitted proposals that were voted on in 2021. Despite the increase in proposals voted on, average support for all shareholder proposals voted on decreased to 30.4 percent in 2022 from 36.3 percent in 2021. The decrease in average support was primarily driven by decreased support for both social and environmental proposals, with support for social (non-environmental) proposals decreasing to 23.2 percent in 2022 from 32.8 percent in 2021 and environmental proposals decreasing to 33.3 percent in 2022 from 43.5 percent in 2021.

And in line with depressed support overall, the number of shareholder proposals that received majority support in 2022 was 55, down from 74 in 2021. But 2022 did mark the first year that two hot-button social proposals received majority support: (1) multiple proposals requesting reports on gender/racial pay gaps, and (2) requesting racial/civil rights audits received majority support after coming close in recent years.

- ***Written Staff responses to each shareholder proposal no-action request returned mid-season.*** After discontinuing its longstanding practice of issuing a written response to each shareholder proposal no-action request in 2019, the Staff provided response letters to only 5 percent of no-action requests during the 2021 proxy season. In December 2021, the Staff announced that it was reconsidering its approach and would return to its historical practice of issuing a response letter for each no-action request. Following its announcement, the Staff immediately ceased communicating its responses via an online chart and commenced issuing response letters to each and every no-action request.
- ***Recent amendments to Rule 14a-8 appear to have had marginal impact on shareholder submissions.*** The 2022 proxy season was the first in which the September 2020 amendments to Rule 14a-8 took effect. Despite concerns voiced from some shareholder proponents and other stakeholders (including ongoing litigation over the new rules),[5] the new rules do not appear to have had an appreciable effect on proponent eligibility or to have resulted in a significant increase in proposals eligible for procedural or substantive exclusion.

  In fact, as noted above, only 38 percent of no-action requests were successful in excluding shareholder proposals during the 2022 proxy season. The SEC adopted amendments to "update certain substantive bases for exclusion of shareholder proposals" under Rule 14a-8 in July 2022, which is the subject of another article in this issue.

- ***Proponents continued to use exempt solicitations in record numbers.*** Exempt solicitation filings continued to proliferate, with the number of filings reaching a record high again this year and increasing 34 percent over last year and 70 percent since 2020. Consistent with prior years, the vast majority of exempt solicitations filed in 2022 were filed by shareholder proponents on a voluntary basis, that is, outside of the intended scope of the SEC's rules—in order to draw attention and publicity to pending shareholder proposals.

Overview of Shareholder Proposal Outcomes

Overview of Shareholder Proposals Submitted

Shareholders submitted 868 shareholder proposals during the 2022 proxy season, up 8 percent from 802 in 2021. Exhibit 1 shows key year-over-year submission trends across five broad categories[6] of shareholder proposals in 2022—governance, social, environmental, civic engagement, and executive compensation. Social and environmental proposals combined represented 53 percent of all proposals submitted, up from 44 percent in 2021, with social proposals representing 33 percent of all proposals submitted. This was followed by governance proposals (28 percent), environmental proposals (19 percent), civic engagement proposals (12 percent), executive compensation proposals (4 percent), and other proposals (3 percent).

Exhibit 2 shows that four of the five most common proposal topics during the 2022 proxy season were the same as those in the 2021 proxy season, with lobbying spending proposals joining the top five in 2022 and written consent proposals leaving the top five for the first time since 2018. A sharp increase in the number of special meeting proposals drove the overall increase in the share of the top five proposal topics, which collectively represented 49 percent[7] of all shareholder proposals submitted in 2022, up from 46 percent in 2021.

Overview of Shareholder Proposal Outcomes

As shown in Exhibit 3, the 2022 proxy season saw the following significant trends in proposal outcomes: (1) the percentage of proposals voted on increased significantly from 2021, but overall support declined by over six percentage points; (2) the percentage of proposals excluded through the no-action letter process decreased significantly in 2022 compared to 2021; and (3) the percentage of proposals withdrawn edged downward from 2021's record high.

After significant increases in the rates of withdrawn social and environmental proposals in 2021, both categories saw marked decreases in withdrawal rates in 2022, with 30 percent of social proposals withdrawn (compared to 46 percent in 2021) and 51 percent of environmental proposals withdrawn (compared to 62 percent in 2021).

These significant drops in withdrawal rates may reflect, among other reasons, shareholders feeling emboldened by SLB 14L on the viability of no-action requests and demanding more robust commitments from companies in exchange for withdrawal. The percentage of withdrawn governance proposals (9 percent) remained low, although up slightly from 5 percent in 2021, reflecting the fact that individuals, who are the main proponents of many governance proposals, continue to generally not withdraw their proposals even when a company has substantially implemented the request.

Voting Results

Shareholder proposals voted on during the 2022 proxy season averaged support of 30.4 percent, down from 36.3 percent in 2021. Notably, looking at just environmental proposals, average support decreased significantly to 33.3 percent, compared to 43.5 percent support in 2021—driven primarily by an increased number of climate change proposals voted on with significantly lower average levels of support.

As discussed below, the lower support for climate change proposals appears to be driven by the increase in more prescriptive proposals, which certain institutional investors have indicated they will not support. Similarly, support for social (non-environmental)

Exhibit 1—Overview of Shareholder Proposals Submitted

Proposal Category	2022	2021	2022 vs 2021[i]	Observations
Social	287	239	↑20%	The largest subcategory, representing 33% of all social proposals, continued to be anti-discrimination and diversity-related proposals, with 97 submitted in 2022 (down from 128 submitted in 2021, but up significantly from 53 in 2020). Of note, 18 proposals related to pay disparity were submitted in 2022, up from only four such proposals submitted in 2021.
Governance	246	287	↓14%	For the first time since 2018, shareholder special meeting proposals were the most common governance proposal, representing 46% of all governance proposals with 113 submitted (up from 14% in 2021). Notably, in light of the widespread adoption by large companies of shareholder special meeting rights, the proposals submitted in 2022 focused on changes to existing special meeting rights, most often seeking to lower the applicable stock ownership threshold and/or eliminate any minimum holding period for satisfying that threshold.
Environmental	169	112	↑51%	The largest subcategory, representing 76% of these proposals, continued to be climate change proposals, with 129 submitted in 2022 (increasing significantly from 83 in 2021, and exceeding the total number of all environmental proposals submitted in 2021).
Civic engagement	103	76	↑36%	Lobbying spending proposals increased to 45 in 2022 from 35 in 2021, and political contribution proposals increased to 45 in 2022 from 34 in 2021. In addition, charitable contribution proposals increased to 13 in 2022 from seven in 2021.
Executive compensation	36	49	↓27%	For the first time in recent years, the largest subcategory was proposals seeking to submit severance agreements to a shareholder vote, representing 44% of these proposals. Notably, proposals seeking to include social- or environmental-focused performance measures in executive compensation programs (such as sustainability, cybersecurity, data privacy, and risks arising from drug pricing) deceased significantly, with just two submitted in 2022 (compared to 15 in 2021).

[i] Data in this column refers to the percentage increase or decrease in shareholder proposals submitted in 2022 as compared to the number of such proposals submitted in 2021.

Exhibit 2—Top Shareholder Proposals Submitted to Public Companies

2022	2021
Climate change (15%)	Anti-discrimination & diversity (16%)
Special meetings (13%)	Climate change (10%)
Anti-discrimination & diversity (11%)	Written consent (10%)
Independent chair (5%)	Independent chair (5%)
Lobbying spending (5%)	Special meetings (5%)
Political contributions (5%)	

proposals decreased to 23.2 percent in 2022 from 32.8 percent in 2021—driven primarily by an increased number of diversity-related proposals voted on and an overall decrease in the level of support for diversity-related proposals. Average support for governance proposals decreased to 36.7 percent from 38.8 percent in 2021. Notably, 47 of the 438 proposals that were voted on during the 2022 proxy season received less than 5 percent shareholder support, the lowest resubmission threshold under Rule 14a-8(i)(12)—up from 30 proposals that received less than 5 percent support in 2021.

As in prior years, corporate governance proposals received generally high levels of support. Exhibit 4

Exhibit 3—Shareholder Proposal Outcomes[i]

	2022[ii]	2021[iii]
Total number of proposals submitted	868	802
Excluded pursuant to a no-action request	8% (71)	18% (144)
Withdrawn by the proponent	26% (224)	29% (234)
Voted on	50% (438)	41% (328)

[i] Excludes proposals that, for other reasons, were reported in the ISS database as having been submitted but that were not in the proxy or were not voted on, including, for example, due to a proposal being withdrawn but not publicized as such or the failure of the proponent to present the proposal at the meeting. As a result, in each year, percentages may not add up to 100 percent.
[ii] As of June 1, 2022, ISS reported that 108 proposals (representing 12 percent of the proposals submitted during the 2022 proxy season) remained pending.
[iii] As of June 1, 2021, ISS reported that 91 proposals (representing 11 percent of the proposals submitted during the 2021 proxy season) remained pending.

shows the five shareholder proposals voted on at least three times that received the highest average support.

Majority-Supported Proposals

As of June 1, 2022, 55 proposals, or 6 percent of the 868 proposals submitted, received majority support, as compared with 57 proposals, or 7 percent of the 802 proposals submitted in 2021, that had received majority support as of June 1, 2021. The 2022 proxy season marked the first time that two notable social proposals received majority support. First, after none of the equity civil rights/racial equity audit proposals voted on received majority support in 2021, eight such proposals have received majority support in 2022. Second, after failing to receive majority support in prior seasons despite focused campaigns by a number of shareholders, two proposals requesting a report on gender/racial pay gap received majority support in 2022.

Driven by climate change and diversity-related proposals, environmental and social proposals edged out governance proposals for the first time as the category with the most majority-supported proposals, representing 45 percent of proposals that received majority support in 2022 (compared with 39 percent in 2021). Governance proposals accounted for 38 percent of proposals that received majority support in 2022 (compared with 49 percent in 2021). In addition, civic engagement and executive compensation proposals each represented approximately 7 percent of majority-supported proposals, with all majority-supported executive compensation proposals related to submitting severance agreements to shareholder vote. Exhibit 5 shows the proposals that received majority support.

Shareholder Proposal No-Action Requests

Overview of No-Action Requests

Submission and Withdrawal Rates

The number of shareholder proposals challenged in no-action requests submitted to the Staff during the 2022 proxy season decreased significantly, down 10 percent compared to 2021, but increased slightly from prior years, up 5 percent from 2020 and 7 percent from 2019.[8] (*See* Exhibit 6)

Most Common Arguments

Exhibit 7, reflecting the number of no-action requests that contained each type of argument, reveals a change in the most-argued grounds for exclusion from substantial implementation in 2021 to ordinary business in 2022.

Success Rates

This year, the Staff granted relief to only 38 percent of no-action requests, a drastic decline from the 71 percent success rate in 2021 and the 70 percent success rate in 2020. Although the Staff most often granted relief to no-action requests based on procedural (representing 35 percent of successful requests), ordinary business (30 percent) and substantial implementation grounds (13 percent), success rates declined on every exclusionary basis, with

Exhibit 4—Top Five Shareholder Proposals by Voting Results[i]

Proposal	2022	2021
Board declassification	94.3% (3)	87.8% (3)
Eliminate/reduce supermajority voting	84.1% (6)	87.5% (13)
Submit severance agreement to shareholder vote	46.9% (12)	N/A
Report on civil rights/racial equity audit	45.3% (21)	33.1% (8)
Majority voting for director elections	44.7% (3)	51.6% (12)

[i] The numbers in the parentheticals indicate the number of times these proposals were voted on.

Exhibit 5—Proposals that Received Majority Support

Proposal	2022	2021
Climate change	9	9
Shareholder special meeting rights	9	4
Report on civil rights/racial equity audit	8	0
Eliminate/reduce supermajority voting	6	13
Submit severance agreement to shareholder vote	4	0
Board declassification	3	3
Report on use of concealment clauses	2	0
Political contributions	2	4
Majority voting in director elections	2	2
Lobbying spending	2	3
Report on gender/racial pay gap	2	0
Permit shareholder action by written consent	1	5
Report on plastic pollution	1	1
Report on efforts to eliminate deforestation in supply chain	1	1
Report on third-party human rights impact assessment	1	0
Report on sustainable packaging	1	0
All shareholder meetings to be held in virtual format	1	0

Exhibit 6—No-Action Request Statistics

	2022	2021
No-action requests submitted	244	272
Submission rate[i]	29%	34%
No-action requests withdrawn	56 (23%)	64 (24%)
Pending no-action requests (as of June 1)	3	4
Staff Responses[ii]	185	204
Exclusions granted	71 (38%)	144 (71%)
Exclusions denied	114 (62%)	60 (29%)

[i] Submission rates are calculated by dividing the number of no-action requests submitted to the Staff by the total number of proposals submitted to companies.
[ii] Percentages of exclusions granted and denied are calculated by dividing the number of exclusions granted and the number denied, each by the number of Staff responses.

Exhibit 7—Most Common Arguments for Exclusion

	2022	2021	2020
Ordinary Business	106 (43%)	96 (35%)	105 (45%)
Substantial Implementation	91 (37%)	114 (42%)	90 (39%)
Procedural	64 (26%)	86 (32%)	61 (26%)
False/Misleading	42 (17%)	38 (14%)	41 (18%)

the most drastic change being the decline in success rates for ordinary business arguments.

Notably, the success rate for substantial implementation arguments for environmental (6 percent) and social (3 percent) proposals continued to decline significantly year-over-year (success rates in 2021 were 29 percent and 44 percent, respectively, and in 2020 were 80 percent and 63 percent, respectively). Meanwhile, the high success rate for proposals requesting a specific amount of dividends[9] was due to the fact that there was only one no-action request on each ground. (*See* Exhibit 8)

Top Proposals Challenged

This year, the most common proposals for which companies submitted no-action requests were those requesting a lower threshold for calling special

Exhibit 8—Success Rates by Exclusion Ground[i]

	2022	2021
Specific amount of dividends	100%	N/A
Procedural	56%	84%
Resubmissions	56%	100%
Director elections	33%	N/A
Violation of law	33%	50%
Duplicate proposals	24%	38%
Ordinary business	24%	65%
Personal grievance	20%	N/A
Substantial implementation	13%	67%

[i] Success rates are calculated by dividing the number of no-action requests granted on a particular ground by the total number of no-action requests granted or denied on that ground.

Exhibit 9—Top Types of Proposals Challenged

	Submitted	Denied	Granted	Withdrawn
Special meeting threshold[i]	15	9 (60%)	3 (20%)	2 (13%)
Independent board chair	13	4 (31%)	8 (62%)	1 (8%)
Proxy access	13	4 (31%)	2 (15%)	7 (54%)
GHG emissions	11	4 (36%)	1 (9%)	6 (55%)

[i] As of June 1, 2022, one no-action request involving a special meeting threshold proposal was still pending.

meetings, a policy requiring an independent board chair, an amendment to the company's bylaws to provide or lower the threshold for a proxy access right, and a report on the company's greenhouse gas (GHG) emissions. The no-action requests related to special meeting proposals made the following arguments: procedural (6), vague or false/misleading (5), substantial implementation (4), conflicts with company proposal (2), lack of power/authority (1), and resubmission (1).

Two of the successful requests were granted on procedural grounds, and one was granted on resubmission grounds. The no-action requests related to independent board chair proposals made the following arguments: procedural (9), resubmissions (2), substantial implementation (1), and duplicate proposal (1). The successful requests were granted on the following grounds: procedural (5), resubmissions (1), substantial implementation (1), and duplicate proposal (1). The no-action requests related to proxy access proposals made the following arguments: substantial implementation (7), procedural (6), lack of power/authority (2), and violation of law (1).

The two successful requests were both granted on procedural grounds. The no-action requests related to GHG emissions proposals made the following arguments: substantial implementation (7), ordinary business and/or micromanagement (6), duplicate proposal (3), vague or false/misleading (2), and procedural (1). The successful request was granted on a substantial implementation basis. (*See* Exhibit 9)

Key No-Action Request Developments

There were a number of noteworthy procedural and substantive developments in no-action decisions this year.

Implications of SLB 14L on No-Action Requests

As discussed above, SLB 14L not only rescinded the Prior SLBs, but also fundamentally changes the Staff's approach to the ordinary business exclusion in Rule 14a-8(i)(7), including reframing the evaluation of significant policy issues and micromanagement arguments, and the application of the economic relevance exclusion in Rule 14a-8(i)(5).

SLB 14L rejects a more recent company-specific approach to significance and expresses the Staff's current view that the analytical focus should be on whether the proposal raises issues with a broad societal impact such that they transcend the company's ordinary business and whether the proposal raises issues of broad social or ethical concern related to the company's business when interpreting economic relevance.

According to SLB 14L, the Prior SLBs placed "an undue emphasis … on evaluating the significance of a policy issue to a particular company at the expense of whether the proposal focuses on a significant social policy." This shift was reflected in Staff response letters that, instead of determining whether a proposal raised a significant social policy issue with a nexus to the company, were phrased in terms of whether a proposal "transcended ordinary business." In rejecting a company-specific approach to evaluating significance, SLB 14L also rejected the recent construct of companies using board analyses in their no-action requests under the ordinary business exclusion, which the Staff considered a distraction from the proper application of Rule 14a-8(i)(7) and which the Staff believed "confounded" the application of the substantial implementation standard under Rule 14a-8(i)(10) (in situations where the board analysis involved a "delta" component).

SLB 14L's realigned approach on assessing micromanagement, focusing on the granularity sought by a proposal and the extent to which a proposal limits company or board discretion rather than the prior focus on whether a proposal included requests for specific detail, timeframes or targets, led to an overall decrease in the success rate of these requests.

Of the 868 total shareholder proposals, companies submitted 45 no-action requests, or 5 percent, on micromanagement grounds this year, compared to 44 no-action requests out of 802 total proposals, or 5 percent, in 2021. Only two of these no-action requests were granted on micromanagement grounds in 2022, representing a success rate of 6 percent, while six no-action requests were granted on micromanagement grounds in 2021, representing a success rate of 13 percent.

Despite SLB 14L's changes, challenges to climate change proposals increased slightly in 2022. Of the 129 climate change proposals in 2022, 14 no-action requests, representing 11 percent of proposals, were filed, and of the 80 climate change proposals in 2021, seven no-action requests, representing 9 percent of proposals, were filed. While much of the language in SLB 14L surrounding the Staff's new application of the micromanagement exclusion relates to climate change shareholder proposals, there was an increase in the number of no-action requests that challenged climate change proposals on micromanagement grounds.

In 2022, 10 no-action requests, or 8 percent, were submitted on micromanagement grounds for these proposals. Compare this to 2021, where five of 80, or 6 percent, of climate change proposals were challenged on micromanagement grounds. Challenges to climate change proposals on ordinary business grounds increased slightly year-over-year from 8 percent to 9 percent of proposals submitted, while challenges on substantial implementation grounds remained steady representing 5 percent of proposals submitted. In both years, only one of the challenges to climate change proposals on any of these three grounds were successful, in each instance arguing for substantial implementation.[10]

The 2022 season also saw an overall decline in the number of no-action requests arguing economic relevance under Rule 14a-8(i)(5) and arguing ordinary business grounds under Rule 14a-8(i)(7). Only two no-action requests were submitted under Rule 14a-8(i)(5), neither of which were successful, compared to seven no-action requests submitted in 2021 on the same grounds, one of which was successful. In 2022, 95 no-action requests, or 11 percent of all proposals, challenged proposals on ordinary business grounds (excluding those making only a micromanagement argument), with a success rate of 34 percent.

In 2021, 87 no-action requests, or 11 percent of all proposals, challenged proposals on ordinary business grounds, with a success rate of 49 percent. This drastic change in success rates for ordinary business arguments is likely the result of SLB 14L's treatment of significant social policy issues under Rule 14a-8(i)(7), in which the traditional company-specific approach to significance was rejected in favor of a focus on whether a proposal raises issues with a broad societal impact such that it transcends the company's ordinary business, as well as the Staff's willingness to recognize more topics as transcending ordinary business.

The tangential effects of SLB 14L on the substantial implementation exclusion may also help to explain the sharp decline in the number of no-action requests that were successful on this ground, as well as the drop in total no-action requests submitted on this ground. In 2022, 91 no-action requests argued substantial implementation, representing 11 percent of all proposals, with a 13 percent success rate. Compare this to 2021, where 112 no-action requests argued substantial implementation, representing 14 percent of all proposals, with a 55 percent success rate.

Effects of 14a-8 Amendments on No-Action Requests

In September 2020, the SEC adopted amendments (Amended Rules) to key aspects of the SEC's shareholder proposal rule. Because the Amended Rules apply only to shareholder proposals submitted for annual or special meetings held on or after January 1, 2022, the 2022 proxy season was the first time that the effects of the Amended Rules were seen on no-action requests. The Staff relied on three notable provisions of the Amended Rules as the basis for concurring with the exclusion of proposals in 2022:

1. *Increased resubmission thresholds.* The Amended Rules increase the resubmission thresholds of Rule 14a-8(i)(12), which permit exclusion of a proposal if a similar proposal was last included in the proxy materials within the preceding three years and if the last time it was included it received: less than 5 percent support, if proposed once within the last five years (increased from 3 percent); less than 15 percent support, if proposed twice within the last five years (increased from 6 percent); or less than 25 percent support, if proposed three or more times within the last five years (up from 10 percent).

   During the 2022 proxy season, only five proposals (representing significantly less than 1 percent of the 868 proposals submitted) were successfully excluded under Rule 14a-8(i)(12) for failure to receive a sufficient level of support,[11] up from only one such successful exclusion in 2021. Only one of the five proposals excluded under Rule 14a-8(i)(12) in 2022 would have been excluded under the lower resubmission thresholds of the prior rules.
2. *Failure to provide engagement availability.* The Amended Rules require each proponent to affirmatively state that he or is she is available to meet with the company, either in person or via teleconference, between 10 and 30 calendar days after the submission of the shareholder proposal, and each proponent must provide the company with contact information, as well as specific business days and times that the proponent is available to meet with the company to discuss the proposal.

   In three instances this season, the Staff concurred with the exclusion of proposals where proponents did not provide such a statement of engagement availability, noting that the proponents "did not comply with Rule 14a-8(b)(1)(iii)," and "failed to adequately correct" the deficiency after being notified by the companies of the problem.[12]
3. *Multiple proposals.* The Amended Rules apply the one proposal limitation of Rule 14a–8(c) to "each person" rather than "each shareholder" and clarify that the Rule applies to proposals submitted "directly or indirectly" by such person. In one instance this season, the Staff concurred with the exclusion of two proposals where the company argued that the proponent had exceeded the one-proposal limitation of Rule 14a-8(c) by both submitting a proposal in the proponent's own name and simultaneously serving as a representative to submit a different shareholder proposal on another shareholder's behalf.[13]

   The company initially received the first proposal from the proponent and then, one day later, received a second proposal from a different shareholder accompanied by a proxy authorization letter granting the first proponent full

proxy authority. The first proponent then submitted a revised version of the second proposal to the company, without including the other shareholder on communications with the company. The Staff concurred with the exclusion of both proposals, noting that by subsequently submitting a revised proposal on the second proponent's behalf, the first proponent "effectively withdrew . . . [the] original proposal . . . and substituted it with the revised proposal that he, himself, submitted."

As a result, the Staff concluded that the first proponent had submitted both a proposal in his own name and on the second shareholder's behalf, thereby exceeding the one-proposal limitation of Rule 14a-8(c) by submitting "one proposal in his or her own name and simultaneously serv[ing] as a representative to submit a different proposal on another shareholder's behalf for consideration at the same meeting." Notably, however, in other contexts the Staff adopted a narrow and impractical approach to the "directly or indirectly" standard under Rule 14a-8(c), viewing the provision as not applicable when a single person acted as both a proponent and a representative of another shareholder who had transmitted a proposal to the company.[14]

Staff Abandoning Precedents

This season saw the Staff abandoning numerous precedents, with many of the reversals likely related to the Staff's new approach to certain substantive arguments as described in SLB 14L.[15] Notable reversals include:

- *Reports on reproductive healthcare.* During the 2021 season, consistent with a long line of precedent treating reproductive health care as ordinary business, the Staff concurred with the exclusion of a proposal requesting a report detailing known and potential risks and costs to the company caused by enacted or proposed state policies severely restricting reproductive health care, where the company applied a traditional Rule 14a-8(i)(7) ordinary business analysis, arguing that the topics of the proposal related to managing the company's ordinary business activities.[16]

  In three instances this season, companies challenged proposals with resolved clauses almost identical to the precedent no-action request from the 2021 season. In all instances, the companies argued that the proposals were excludable pursuant to Rule 14a-8(i)(7) because the proposals dealt with matters relating to the companies' ordinary business operations, implicating the companies' assessment of the impact of government regulation and the companies' management of their workforces, and did not focus on a significant social policy issue.

  Notably, all three companies cited to the precedent no-action request from the 2021 season. Despite this precedent decision from the immediately prior season, the Staff denied exclusion, noting that the proposals "transcend[ed] ordinary business matters."
- *Proposals related to litigation strategy.* The Staff also appeared to be reluctant to grant no-action requests based on the ordinary business exception in Rule 14a-8(i)(7) when the proposal implicates the company's litigation strategy.

  For example, the Staff denied exclusion of a proposal requesting a third-party audit analyzing the adverse impact of the company's policies and practices on the civil rights of company stakeholders, despite both historical and recent precedent granting exclusion to similar proposals on the same basis. The company argued that the proposal was excludable pursuant to Rule 14a-8(i)(7) because the subject matter of the proposal related to the company's litigation strategy and the conduct of ongoing litigation to which the company was a party. In support of its argument, the company cited numerous no-action letters where

the Staff had previously concurred with exclusion on similar grounds.

For example, one year earlier the Staff concurred with the exclusion of a similar proposal requesting a "third-party report…analyzing how [the company's] policies, practices, and the impacts of its business, perpetuate racial injustice and inflict harm on communities of color in the United States," while the company was involved in numerous pending lawsuits seeking to hold the company liable for its alleged role in climate change and the alleged resulting injuries, including the alleged harmful impacts of climate change on communities of color.[17] This season the Staff similarly denied no-action relief for a proposal requesting that the company report on the size of its gender and racial pay gap and policies, where the company also argued that the proposal related to the company's litigation strategy and the conduct of ongoing litigation to which the company was a party.[18]

- *Tax reporting as ordinary business matter*. In one instance, a company argued that a proposal requesting a tax transparency report prepared in consideration of the indicators and guidelines set forth in the Global Reporting Initiatives (GRI) Tax Standard was excludable pursuant to Rule 14a-8(i)(7) because the proposal related to the company's ordinary business operations, implicating the company's management of its tax expense, and did not focus on a significant social policy issue that transcended the company's ordinary business operations.[19]

Despite numerous precedent treating tax reporting as a core aspect of management's day-to-day running of a company,[20] the Staff did not concur with the exclusion of the proposal, noting that the proposal "transcend[ed] ordinary business matters."

- *Paid sick leave as ordinary business matter.* In one instance, foreshadowed by SLB 14L, the Staff did not concur with the exclusion of a proposal under Rule 14a-8(i)(7) that requested a paid sick leave policy, where the company argued the proposal was excludable under 14a-8(i)(7) because the proposal related to the company's ordinary business operations, implicating the Company's management of its workforce, and attempted to micromanage the company's business.[21] The Staff noted that "[i]n our view, the [p]roposal transcends ordinary business matters because it raises human capital management issues with a broad societal impact, see Staff Legal Bulletin No. 14L (Nov. 3, 2021), and does not seek to micromanage the [c]ompany."
- *Alternative arguments no longer evaluated in isolation.* The Staff also suggested this season that they may view alternative arguments as affecting the validity of other arguments in no-action requests. In one instance, the company, which had received a proposal requesting its board report on how the majority of its clients and shareholders were affected by company asset management policies related to social and environmental issues and whether its clients or shareholders would be better served by the adoption of different policies, argued that the proposal was excludable under (a) Rule 14a-8(i)(2) and Rule 14a-8(i)(6); (b) Rule 14a-8(i)(3); (c) Rule 14a-8(i)(7); and (d) Rule 14a-8(i)(10).[22] In a lengthy response, the Staff did not concur with the exclusion of the proposal on any basis.

Notably, the Staff highlighted that they were "unable to conclude that the [p]roposal, if implemented, would cause the [c]ompany to violate federal or state law," and noted that the company argued "that it ha[d] already substantially implemented the [p]roposal, which suggests that, in the [c]ompany's view, the [p]roposal can be implemented in a manner that would not violate federal or state law." Similarly, the Staff also noted that they were unable to conclude that the company had "demonstrated objectively that the [p]

roposal [was] materially false or misleading," and that the proposal "taken as a whole, [wa]s so vague or indefinite that it [wa]s rendered materially misleading." The Staff concluded by noting that the company's argument of substantial implementation "suggests that, in the [c]ompany's view, the [p]roposal was not so vague or indefinite that 'neither the shareholders voting on it, nor the Company in implementing the [p]roposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the [p]roposal requires.'"

At a minimum, this decision demonstrates that when positing alternative arguments companies must be mindful of how they advance each argument and demonstrate to the Staff how each argument works in practice, particularly when including an argument that the proposal is vague or indefinite.

Key Shareholder Proposal Topics During the 2022 Proxy Season

Human Capital

Proposals focused on diversity constituted the largest subcategory of social proposals submitted in 2022 (representing 33.8 percent of social proposals). These proposals were largely focused on racial equity and civil rights, diversity and inclusion efforts, and gender and racial pay equity. While many human capital management proposals in 2022 were tied to race and equality issues, a new campaign centered on the use of "concealment clauses" emerged.

Racial Equity/Civil Rights Audit Proposals

In 2022, there were 51 shareholder proposals that addressed issues of racial equity and civil rights, including workplace discrimination, audits of workplace practices and policies and related topics, compared to 38 similar proposals submitted in 2021 and only seven in 2020.

The most frequent were 38 proposals calling for a racial equity or civil rights audit analyzing each company's impacts on the "civil rights of company stakeholders" or "civil rights, diversity, equity, and inclusion." Similar to last year, these proposals often included the required or optional use of a third party to conduct the audit, with solicited input from employees, customers, civil rights organizations, and other stakeholders.

These proposals were primarily submitted by the New York State Comptroller (on behalf of the New York State Common Retirement Fund), the Service Employees International Union, Trillium Asset Management, and the International Brotherhood of Teamsters. Twenty-one of these proposals went to a vote, with ISS generally recommending votes "for" the proposal and average support of 45.3 percent, up from 16 such proposals that went to a vote in 2021 with average support of 23.9 percent. Three companies unsuccessfully sought to exclude a racial equity/civil rights audit proposal, arguing for exclusion on ordinary business, duplication, violation of law, vagueness or false/misleading, or absence of power/authority grounds.

The remaining 13 proposals related to civil rights and workplace nondiscrimination, requesting that each company commission a non-discrimination audit analyzing the impacts of the company's employee training on "civil rights and non-discrimination in the workplace." Some of these proposals gave the company the alternative option to publish the content of employee training materials.

Each of these proposals was submitted by the National Center for Public Policy Research, and all but three went to a vote, garnering an average of 2.1 percent support. Six companies sought to exclude the nondiscrimination proposal, but only three were successful, one on substantial implementation grounds and two on micromanagement grounds because the proposal sought "disclosure of intricate details regarding the [c]ompany's employment and training practices."[23]

Reports on the Use of Concealment Clauses

A new focus area for the 2022 proxy season involved 10 shareholder proposals requesting that

the company's board of directors review the risks associated with the use of so-called "concealment clauses," which the proposals generally defined as arbitration, non-disclosure and non-disparagement provisions that restrict disclosure of harassment, discrimination and other unlawful actions. In support of their proposals, shareholder proponents expressed concern that the use of concealment clauses has been linked to serious age, racial, and sex discrimination and sexual harassment allegations.

Three companies sought exclusion of a concealment clause proposal, each arguing that the company had substantially implemented the proposal. Two of the no-action requests were unsuccessful, while the third no-action request was withdrawn after the target company published the requested report and the proponent withdrew the proposal. Of the six concealment clause proposals voted on in 2022, ISS recommended votes "for" four of the proposals, but recommended votes "against" concealment clause proposals at two companies.

Of the two companies where ISS recommended votes against the concealment clause proposals, the first company prepared the requested report and the second company disclosed in its proxy statement that its employment agreements do not include concealment clauses. Average support for the concealment clause proposals was 39.9 percent, and two of these six proposals received majority support. Given the comparatively high success rate of proposals targeting the use of concealment clauses, it appears likely that proponents may continue to focus on this topic in the coming proxy seasons.

Diversity, Equity, and Inclusion Efforts and Metrics

The number of proposals requesting disclosure of diversity, equity, and inclusion (DEI) data or metrics or reporting on the effectiveness of DEI efforts or programs increased, with 34 such proposals submitted in 2022, up from 21 comparable proposals submitted in 2021. Of these, 22 proposals were withdrawn and five went to a vote with average support of 34.9 percent. Three companies sought exclusion of DEI proposals via no-action request, two of which were unsuccessful and one of which was withdrawn.

As in 2021, As You Sow was the main driver behind these proposals, submitting 20 diversity data proposals, 14 of which were withdrawn. Other filers included the New York State Comptroller on behalf of the New York State Common Retirement Fund (submitting five proposals, two of which were withdrawn), Trillium Asset Management (submitting two proposals, one of which was withdrawn), and The Nathan Cummings Foundation (submitting one proposal that went to a vote). One notable proposal requested that the company set targets to increase minority representation in the workforce, which was submitted by Trillium Asset Management and was withdrawn by the proponent.

Gender/Racial Pay Gap

The number of shareholder proposals calling for a report on the size of a company's gender and racial pay gap and policies and goals to reduce that gap increased during the 2022 proxy season. In 2022, shareholders submitted nine proposals, including two resubmissions to companies that received pay gap proposals last year, targeting primarily technology and retail companies (up from seven proposals submitted in 2021). Six gender/racial pay gap proposals were submitted by Arjuna Capital, two were submitted by Proxy Impact, and one was submitted jointly by both Arjuna Capital and Proxy Impact.

Average support for these proposals increased in 2022 as compared to 2021: the five proposals voted on in 2022 received average support of 42.6 percent (with two receiving majority support of 58.0 percent and 59.6 percent), a significant increase over average support of 24.0 percent for the four proposals voted on in 2021. One gender/racial pay gap proposal was unsuccessfully challenged via a no-action request making an ordinary business argument, and the remaining three proposals were withdrawn.

As in prior years, proposals primarily targeted unadjusted pay gaps rather than requesting wage

gap information for comparable jobs (that is, what women and ethnic minorities are paid compared to their most directly comparable male and nonminority peers, adjusted for seniority, geography, and other factors). Only one of these proposals requested a report on gender pay gaps alone, with the rest focusing on both gender and racial pay gaps.

Other

The Staff also suggested this season that the traditional ordinary business argument can still win on employee management, but that the Staff has narrowed the scope of topics that fall within that basis for exclusion. In one instance, a company, which had received a proposal requesting its board report on risks to the company's business strategy in the face of increasing labor market pressure, argued that the proposal was excludable under Rule 14a-8(i)(7) because it related to the company's ordinary business operations.[24] The Staff concurred with the exclusion of the proposal, noting that the proposal "relates to, and does not transcend, ordinary business matters."

However, the Staff denied relief in two instances this season where companies received proposals requesting reports on the financial, reputational, and human rights risks resulting from the companies' supply chain and distribution networks of companies that misclassify employees as independent contractors, where the companies argued that the proposals were excludable under Rule 14a-8(i)(7), because the proposals related to the companies' ordinary business operations.[25] In both instances, the Staff noted that the proposals "transcend[ed] ordinary business matters."

Continued Focus on Climate Change and Environmental Proposals

Climate change-related proposals were the largest group of environmental shareholder proposals in 2022 by a large margin, representing 77 percent of all environmental proposals (and 15 percent of all proposals) submitted. This represented a 55 percent increase in climate change-related proposals over a year ago, with 130 climate change-related proposals submitted in 2022, up from 83 proposals submitted in 2021. Only five of the environmental and climate change proposals submitted were excluded via no-action request: four were excluded on procedural grounds (relating to share ownership and submission deadline) and one was excluded on substantial implementation grounds.

During the 2021 season, seven of the environmental and climate change proposals submitted were excluded via no-action request: three were excluded on procedural grounds (relating to proof of ownership), two were excluded on substantial implementation grounds and two were excluded on substantial duplication grounds.

Climate change proposals took various forms, including requesting adoption of GHG emissions reduction targets, alignment with net zero scenarios, disclosures regarding climate-related lobbying, changes to investments in and underwriting policies relating to fossil fuel production, and disclosures of risks related to climate change. Of these, the most common were proposals focusing on GHG emissions reductions and alignment with net zero scenarios. Other popular climate change proposals included 19 proposals related to climate lobbying aligned with the Paris Agreement and others that sought reports on methane emissions disclosures, climate strategy, and climate-related risks.

While the number of climate change proposals submitted and voted on increased significantly in 2022 compared to prior years, the average support for these proposals and the number receiving majority support

Exhibit 10—Climate Change Proposal Statistics: 2022 vs. 2021

	2022	2021	2022 vs. 2021
Submitted	130	83	↑57%
Voted On	41	23	↑78%
Average Support	33.4%	49.9%	↓33%
Majority Support	9	11	↓18%
Proposals Withdrawn As Percentage of Submitted	52%	61%	↓9%

declined significantly compared to 2021, aligning more closely with the support outcomes in 2020. This dramatic shift is likely largely due to the low success rate of no-action requests challenging climate-related proposals (leading to more aggressive proposals seeking to change business models going to a vote).

In addition, BlackRock and Vanguard have both expressed that they will not support proposals that are overly prescriptive and emphasized that their voting will reflect their overall concern for long-term value. Similarly, ISS support for climate change proposals in 2022 decreased significantly, with ISS recommending votes "for" 61 percent of climate change proposals, down from 83 percent in 2021. The withdrawal rates of climate change proposals also dropped in 2022, returning to a level similar to that in 2020, likely due to proponents' unwillingness to negotiate following successes in 2021. (*See* Exhibit 10)

Focus on Net Zero

There were 22 shareholder proposals submitted that relate to net zero emissions targets, the majority of which requested that the company adopt policies that align with the International Energy Agency's Net Zero Emissions by 2050 scenario. Most of these proposals were submitted to financial services and energy companies, including nine banks (generally requesting that banks align their financing policies with IEA's Net Zero scenario), two insurance companies and seven energy companies.

As You Sow, the Sierra Club Foundation, and Mercy Investment Services collectively submitted 10 of these proposals. Five companies unsuccessfully challenged the net zero proposal via no-action request, eight proposals were withdrawn, and 12 proposals went to a vote, receiving average support of 25.3 percent. Two proposals received majority support, including one (91.4 percent support) where the board recommended votes in favor of the proposal.

Continued Focus on GHG Emissions

There were 55 proposals submitted that related to GHG emissions, generally focusing on the adoption of GHG reduction targets, typically in alignment with the Paris Agreement and often time-bound and covering all three scopes of emissions. The only climate change proposal that was excluded via no-action request on non-procedural grounds requested disclosure of GHG targets and progress made in achieving them. The company argued it had substantially implemented the proposal by having already disclosed its short-, medium-, and long-term GHG emissions targets in its ESG Report and had reported on its progress on meeting those targets in a separate emissions report.[26]

Over half of the emissions-focused proposals (33) were withdrawn or otherwise not included in the company's proxy statement, while 16 proposals were voted on, receiving average support of 42.9 percent. Four proposals received majority support, and one proposal requesting that a company adopt short-, medium-, and long-term science-based greenhouse gas emissions reduction targets in order to achieve net-zero emissions by 2050 or sooner received 88.5 percent of votes cast in its favor.

Other Environmental Proposals

Other popular environmental proposals (not related to climate change) predominantly focused on plastic pollution and sustainable packaging (totaling 15 of the 40 non-climate environmental proposals submitted in 2022) and other sustainability practices. Only one non-climate environmental proposal was excluded via no-action request. The proposal was excluded on procedural grounds since the proposal was submitted after the filing deadline.[27]

Of the remaining proposals, 19 were withdrawn and 13 were voted on (and averaged 32.9 percent support). Of the 13 proposals voted on: six related to plastic use, plastic pollution, or sustainable packaging materials; two related to water-related risks; two related to environmental costs; one related to deforestation; one related to environmental and social due diligence; and one related to the value of distributed solar in the company's electric service territory. Only three of the proposals received majority support—a proposal requesting a report on

sustainable packaging that received 95.4 percent of votes cast (where the proposal was not supported by the board); a proposal requesting a report on efforts to eliminate deforestation in the company's supply chain that received 64.7 percent of votes cast; and a proposal requesting a report on reducing plastic pollution that received 50.4 percent of votes cast.

The Return of Special Meeting Proposals

Although submissions focusing on governance were generally down this season, there was a significant increase in the number of proposals related to the ability of shareholders to call special meetings—the most frequent corporate governance proposal topic in 2022. These proposals focused on allowing shareholders to call special meetings as well as revising existing special meeting provisions to expand shareholder rights to call special meetings.

There were 113 special meeting proposals submitted this season, up from 39 proposals in 2021. As of June 2022, 48 percent of Russell 3000 companies and 68 percent of S&P 500 companies provided shareholders the ability to call special meetings of shareholders, subject to certain procedural and minimum ownership requirements. In light of the widespread adoption of special meeting rights, the majority of special meeting proposals sought to amend existing special meeting rights to lower the stock ownership threshold and/or eliminate minimum holding requirements required by companies to exercise the right to call a special meeting.

Of the 113 special meeting proposals submitted, at least 102 were submitted by John Chevedden and/or his associates, including Kenneth Steiner, James McRitchie and Myra Young. Two proposals were excluded on procedural grounds via no-action requests,[28] and three no-action requests were withdrawn after submission.[29] The vast majority of special meeting proposals (92) were voted on at company annual meetings, compared with only 28 proposals voted on in 2021. Special meeting proposals received average shareholder support of 36.2 percent in 2022, in line with what we saw in 2021. In total, nine special meeting proposals received majority shareholder support, with five of these proposals requesting that companies adopt special meeting shareholder rights and four requesting that companies amend existing special meeting shareholder rights to reduce ownership thresholds for shareholders to call special meetings.

Proponents Refocus Executive Compensation Proposals on Shareholder Approval of Severance Agreements

Overall, the number of executive compensation shareholder proposals received by companies continued to decline this season. In 2022, 36 proposals focused on executive compensation were submitted, down from 49 proposals in 2021. Despite this overall decline, 2022 saw a marked increase in proposals seeking shareholder approval of severance agreements, the most common executive compensation proposal received by companies. Notably, these proposals saw strong support from shareholders when brought to a vote.

Sixteen proposals seeking shareholder approval of severance agreements were submitted in 2022, up markedly from two such proposals in 2021. The majority of these proposals requested that boards seek shareholder approval of any senior manager's new or renewed pay package that provides for severance or termination payments with an estimated value exceeding a certain percentage of the executive's base salary and bonus.

At least 10 of these 16 proposals were submitted by John Chevedden and/or his associates. Two companies sought to exclude these proposals via no-action requests. One company withdrew its request,[30] and the second company was denied relief.[31] As of June 1, 2022, shareholder proposals seeking shareholder approval of severance agreements have received average shareholder support of 46.9 percent, with four proposals receiving majority shareholder support.

Increase in Proposals Focused on Civic Engagement with Reports on Charitable Contributions Fueling Increase

This season saw a marked increase in proposals focusing on civic engagement, with proposals addressing lobbying policies and practices disclosure, political

contributions disclosure, and charitable contributions disclosure. An increase in proposals requesting companies publicly disclose and itemize charitable contributions was the main driver of this increase.

Overall, civic engagement proposals received average shareholder support of 26.3 percent in 2022. However, when excluding charitable contribution proposals (which received average shareholder support of just 4.3 percent), the remaining civic engagement proposals received average support of 32.9 percent. Forty-five proposals focused on lobbying were submitted in 2022, compared with 35 proposals in 2021, and received average shareholder support of 34.3 percent. Forty-five proposals focused on political spending were submitted in 2022, compared with 34 proposals submitted in 2021. Of these political spending proposals, 17 proposals were voted on by shareholders with average shareholder support of 30.9 percent.

Notably, only two lobbying spending and two political contributions proposals received majority support in 2022. Proposals focused on charitable contributions saw the biggest increase in 2022, with 13 proposals submitted, compared with one such proposal submitted in 2021. All 13 charitable contribution proposals were voted on by shareholders; however, as noted above, they received average shareholder support of 4.3 percent, with only three proposals receiving more than 5 percent support.

Two proponents, the National Legal and Policy Center, a conservative non-profit group, and the National Center for Public Policy Research (NCPPR), a conservative think tank, were the driving force behind the significant increase in proposals requesting reports on charitable contributions. During the 2021 season, NCPPR was a similar driving force behind a campaign focused on proposals requesting reports on the reputational risks of charitable contributions, with six proposals excluded via no-action requests for targeting charitable contributions made to specific types of organizations. Unlike the charitable contribution proposals submitted in 2021, which targeted specific organizations, proposals submitted in 2022 were facially neutral and, thus, were not subject to the same argument for exclusion as proposals received in 2021.

Three companies that received charitable contribution proposals sought exclusion via no-action requests, in each case on substantial implementation grounds, and in one case also on the alternative basis that the proposal was impermissibly vague and misleading, but—reflecting the Staff's stricter substantial implementation standards— all were denied relief.[32]

Other Important Takeaways from the 2022 Proxy Season

Staff Legal Bulletin No. 14L Introduced New Procedural Hurdles for Companies and Fundamentally Altered the Landscape for Social and Environmental Proposals

On November 3, 2021, the Staff published SLB 14L, which rescinded three prior Staff Legal Bulletins, unwound years of Staff precedent, and raised the threshold for companies seeking to exclude social and environmental proposals. Among other changes, SLB 14L: (1) reversed the Prior SLBs' company-specific approach to evaluating the significance of a policy issue that is the subject of a shareholder proposal for purposes of the traditional ordinary business argument under Rule 14a-8(i)(7) and signaled a broader willingness to find that proposals transcended ordinary business; (2) reversed the Prior SLBs' approach on micromanagement arguments for purposes of the ordinary business exclusion in Rule 14a-8(i)(7); and (3) outlined the Staff's view regarding application of the economic relevance exclusion in Rule 14a-8(i)(5), which reversed the Prior SLBs' approach that proposals raising social concerns could be excludable where not economically or otherwise significant to the company.[33]

As SLB 14L was issued in the middle of the 2022 proxy season, and was not previewed or discussed in advance at the traditional annual "stakeholders" meeting with proponents and companies because the Staff did not host such a meeting in 2021, it is unclear how much SLB 14L contributed to the

increased number of social and environmental proposals submitted in 2022.

However, as discussed above, it appears likely that the significant decrease in the success rates of no-action requests in 2022 was due, at least, in part to the application of the Staff's "realigned" approach under SLB 14L to traditional ordinary business and micromanagement arguments.

It also appears likely that the Staff's "realigned" approach under SLB 14L, and the related collapse in success rates for no-action requests in 2022, will continue to embolden shareholders to submit an increasing number of social and environmental proposals in the years to come. And, given the current Staff's apparent increasing willingness to view proposals raising a wide range of environmental and social issues as transcending ordinary business, the number of proposals voted on in coming proxy seasons seems unlikely to abate.

The 2020 Rule 14a-8 Amendments Remain Unchanged—at Least for Now—but More Change Is Coming

The 2022 proxy season marked the first season under the Amended Rules. The Amended Rules: (1) increased the stock ownership threshold for shareholders who have not held the company's stock for at least three years, subject to a transition period for all annual or special meetings held prior to January 1, 2023; (2) imposed additional procedural requirements for proponents, including limiting the use of representatives to submit a proposal (proposal by proxy) and requiring notice of availability to meet with the company; and (3) increased the levels of shareholder support a proposal must receive in order to be eligible for resubmission at future meetings (commonly referred to as the resubmissions thresholds).

Since their adoption in September 2020, the Amended Rules have been subject to considerable scrutiny and criticism, including from Senate leaders,[34] shareholder proponents and activists,[35] and even SEC Commissioners.[36] Opponents of the Amended Rules have expressed concern that the increased stock ownership thresholds, additional procedural requirements, and higher resubmission thresholds could have a chilling effect on shareholders' ability "to use the shareholder proposal process to hold corporate boards and executives accountable on corporate governance and risk management."[37]

Despite these concerns, the results of the 2022 proxy season suggest that the Amended Rules appear to have had only a marginal impact on shareholders' continued ability to use the Rule 14a-8 process. During the 2022 proxy season, no shareholder proposals were excluded because a proponent was unable to comply with the Amended Rules' increased stock ownership requirements.[38] And, as noted above, the Amended Rules resulted in only a slight uptick in proposals excluded for failing to meet the higher resubmission thresholds. In addition, the Staff has demonstrated that it may concur with exclusion where proponents fail to comply with the procedural requirements under the Amended Rules, including the updated multiple proposal rule and the requirement that proponents provide companies with their availability to meet to discuss their proposals.

Finally, we note that the SEC is scheduled to consider proposing amendments to "update certain substantive bases for exclusion of shareholder proposals" under Rule 14a-8 at a meeting to be held on July 13, 2022.[39] The proposed rules are expected to once again rewrite the ordinary business exception set forth in Rule 14a-8(i)(7)[40] and may also unwind the changes to the resubmission thresholds in Rule 14a-8(i)(11) set forth in the Amended Rules.

The Return to Written Responses Provided Additional Clarity Regarding Staff Rationale

After discontinuing its longstanding practice of issuing a written response to each shareholder proposal no-action request in 2019, the Staff provided response letters to only 5 percent of no-action requests during the 2021 proxy season. At the time of

its announcement in 2019, the Staff indicated it was focused on how the Staff "could most efficiently and effectively provide guidance where appropriate," and accordingly the Staff would issue a written response only where "doing so would provide value, such as more broadly applicable guidance about complying with Rule 14a-8."[41]

In lieu of written responses, the Staff communicated its decisions through a chart that tallied the Staff's written and oral responses to no-action requests. While the chart indicated the regulatory bases asserted by the company and the Staff's response, the chart provided no insight regarding the Staff's analysis of the company's argument. And in some instances, particularly where a company advanced multiple arguments for exclusion on the basis of ordinary business, the chart did not indicate which argument the Staff relied on in making its decision. This lack of visibility into how and why the Staff made certain decisions presented challenges to both companies and shareholders when evaluating the precedential value of prior no-action requests.

In December 2021,[42] the Staff, now under the leadership of Division Director Renee Jones, announced that it had reconsidered its approach and would immediately return to its historical practice of issuing a response letter for each no-action request. The Staff indicated that it had determined written responses would give shareholders and companies more transparency and certainty regarding the Staff's decisions. Following its announcement, the Staff ceased communicating its responses via the online chart and commenced issuing responses to each no-action request.

As anticipated, the Staff's resumption of issuing written responses improved clarity regarding the Staff's decision-making process and how the Staff analyzed arguments advanced by companies in support of no-action requests. That additional transparency proved particularly helpful during the 2022 proxy season in light of the significant changes wrought by SLB 14L and the Staff's analysis thereunder.

We note, however, that Staff response times for no-action requests slowed significantly during the 2022 proxy season, which may have been driven by significant changes in Staff interpretations and fewer staff on the shareholder proposal task force due to the SEC's extensive rulemaking agenda. Companies should continue to be mindful of the possibility for continued longer response times when determining when to submit no-action requests.

Shareholder Use of Exempt Solicitations Continues to Grow

Following a rapid proliferation in the 2021 proxy season, the use of exempt solicitation filings by shareholder proponents continued to grow unabated in 2022, including as part of efforts to generate greater publicity for their proposals in advance of shareholders' meetings or to address other topics. Under Rule 14a-6(g) under the Exchange Act, shareholders owning more than $5 million of a company's securities generally must file a Notice of Exempt Solicitation (an Exempt Notice) on EDGAR when soliciting other shareholders on a topic without seeking to act as a proxy.

The rule is one of several exempting certain solicitations from the proxy filing requirements, and it was designed to address concerns that institutional investors and other large shareholders would conduct "secret" solicitations. However, in recent years, these filings have primarily been used by smaller shareholders to publicize their views on various proposals, as EDGAR does not restrict their use of these filings. In this regard, consistent with the prior proxy season, approximately 80 percent of Exempt Notices filed in 2022 were identified as voluntary filings by shareholders who did not own more than $5 million in company stock. As a result, it seems that shareholders are using these filings outside of Rule 14a-6(g)'s intended scope, resulting in some compliance issues and potential confusion for other shareholders when evaluating the items to be voted on.

As of June 1, 2022, there was a record-high 284 Exempt Notices filed since the beginning of the calendar year, up from 211 as of the same date in

2021. Frequent filers included John Chevedden with 30 filings (up from 24 in 2022), As You Sow with 26 filings (up from 20 in 2021), Majority Action, LLC, with 26 filings (up from 21 in 2021), and The Shareholder Commons with 16 filings (up from 11 in 2021). All of the Exempt Notices filed by Mr. Chevedden, As You Sow, Majority Action, and The Shareholder Commons were voluntary. Despite the continued use of exempt solicitations, the Staff has yet to address the continued potential for abuse. We continue to recommend that companies both actively monitor their EDGAR feed for these filings and inform the Staff to the extent they believe an exempt solicitation filing contains materially false or misleading information or may not have been filed by a shareholder.

Notes

1. **Data on No-Action Requests:** For purposes of reporting statistics regarding no-action requests, references to the 2022 proxy season refer to the period between October 1, 2021 and June 1, 2022. Data regarding no-action letter requests and responses was derived from the information available on the SEC's website.

   Data on Shareholder Proposals: Unless otherwise noted, all data on shareholder proposals submitted, withdrawn, and voted on (including proponent data) is derived from Institutional Shareholder Services (ISS) publications and the ISS shareholder proposals and voting analytics databases, with only limited additional research and supplementation from additional sources, and generally includes proposals submitted and reported in these databases for the calendar year from January 1 through June 1, 2022, for annual meetings of shareholders at Russell 3000 companies held in 2022. Unlike in prior years, the data for proposals withdrawn and voted on includes information reported in these databases also through June 1, 2022. References in this article to proposals "submitted" include shareholder proposals publicly disclosed or evidenced as having been delivered to a company, including those that have been voted on, excluded pursuant to a no-action request, or reported as having been withdrawn by the proponent, and do not include proposals that may have been delivered to a company and subsequently withdrawn without any public disclosure. All shareholder proposal data should be considered approximate. Voting results are reported on a votes-cast basis calculated under Rule 14a-8 (votes for or against) and without regard to whether the company's voting standards take into account the impact of abstentions.

   Where statistics are provided for 2021, the data is for a comparable period in 2021.
2. Gibson, Dunn & Crutcher LLP assisted companies in submitting the shareholder proposal no-action requests discussed in this article that are marked with an asterisk (*).
3. Available at *https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals*.
4. SLB 14L rescinds each of Staff Legal Bulletin No. 14I (Nov. 1, 2017), Staff Legal Bulletin No. 14J (Oct. 23, 2018), and Staff Legal Bulletin No. 14K (Oct. 16, 2019) (collectively, the Prior SLBs).
5. *See infra* ns.43-45.
6. We categorize shareholder proposals based on subject matter as follows:

   Governance proposals include proposals addressing: (i) shareholder special meeting rights; (ii) proxy access; (iii) majority voting for director elections; (iv) independent board chairman; (v) board declassification; (vi) shareholder written consent; (vii) elimination/reduction of supermajority voting; (viii) director term limits; (ix) stock ownership guidelines; and (x) shareholder approval of bylaw amendments.

   Social proposals cover a wide range of issues and include proposals relating to: (i) discrimination and other diversity-related issues (including board diversity and racial equity audits); (ii) employment, employee compensation or workplace issues (including gender/ethnicity pay gap); (iii) board committees on social and environmental issues; (iv) social and environmental qualifications for director nominees; (v) disclosure of board matrices including director nominees' ideological perspectives; (vi) societal concerns, such as human rights, animal welfare, and the opioid crisis; and (vii) employment or workplace policies, including the use of concealment clauses, mandatory arbitration, and other employment-related contractual obligations.

Environmental proposals include proposals addressing: (i) climate change (including climate change reporting, climate lobbying, greenhouse gas emissions goals, and climate change risks); (ii) plastics, recycling, or sustainable packaging; (iii) renewable energy; (iv) environmental impact reports; and (v) sustainability reporting.

Civic engagement proposals include proposals addressing: (i) political contributions disclosure; (ii) lobbying policies and practices disclosure; and (iii) charitable contributions disclosure.

Executive compensation proposals include proposals addressing: (i) performance metrics, including the incorporation of sustainability-related goals; (ii) compensation clawback policies; (iii) severance and change of control payments; (iv) equity award vesting; (v) executive compensation disclosure; (vi) limitations on executive compensation; and (vii) CEO compensation determinations.

7. Because lobbying spending and political contributions proposals tied for the fifth most common proposal topic, this calculation only includes proposals representing one of these two topics.
8. Gibson Dunn remains a market leader during proxy season, having filed over 20 percent of all shareholder proposal no-action requests each proxy season for several years.
9. Rule 14a-8(i)(13) permits the exclusion of proposals that relate to specific amounts of cash or stock dividends. *See*, *e.g.*, Ruth's Hospitality Group, Inc. (avail. Apr. 8, 2022) (concurring with the exclusion of a proposal requesting that "no further stock buybacks occur until such time as both the previous full amount of the dividend issued in March of 2020 is restored or exceeded for a period of one year, and all corporate debt secured by financing is eliminated" under Rule 14a-8(i)(13) because it "relate[d] to a specific amount of cash dividends").
10. *See* IDACORP, Inc. (avail. Apr. 1, 2022); Chevron Corp. (Taggart) (avail. Mar. 30, 2021)*.
11. Pfizer Inc. (avail. Jan. 20, 2022) (concurring with exclusion under Rule 14a-8(i)(12)(iii) where the similar proposal last received 15.9 percent of the votes cast, less than the 25 percent required); 3M Co. (avail. Feb. 7, 2022) (concurring with exclusion under Rule 14a-8(i)(12)(iii) where the similar proposal last received 11 percent of the votes cast, less than the 25 percent required); Coca-Cola Consolidated, Inc. (avail. Feb. 23, 2022) (concurring with exclusion under Rule 14a-8(i)(12)(iii) where the similar proposal last received 6 percent of the votes cast, less than the 25 percent required); Exxon Mobil Corp. (avail. Mar. 15, 2022) (concurring with exclusion under Rule 14a-8(i)(12)(iii) where the similar proposal last received 20.7 percent of the votes cast, less than the 25 percent required); Amazon.com, Inc. (avail. Apr. 5, 2022)* (concurring with exclusion under Rule 14a-8(i)(12)(iii) where the similar proposal last received 14.9 percent of the votes cast, less than the 25 percent required).
12. PPL Corp. (avail. Mar. 9, 2022); The Allstate Corp. (avail. Feb. 8, 2022); American Tower Corp. (avail. Feb. 8, 2022).
13. Bank of America Corp. (avail. Mar. 1, 2022)*.
14. For example, Baxter International Inc. (avail. Jan 12, 2021).
15. SLB 14L specifically indicated that under its new approach to analysis under Rule 14a-8(i)(7), "proposals that the [S]taff previously viewed as excludable because they did not appear to raise a policy issue of significance for the company may no longer be viewed as excludable."
16. Walmart, Inc. (avail. Apr. 7, 2021)*.
17. Chevron Corp. (Sisters of St. Francis of Philadelphia et al.) (avail. Mar. 30, 2021)*.
18. The Walt Disney Company (avail. Jan. 19, 2022).
19. Amazon.com, Inc. (Missionary Oblates of Mary Immaculate-United States Province) (avail. Apr. 5, 2022)*.
20. Amazon.com, Inc. (avail. Mar. 8, 2012)* (concurring with the exclusion of a proposal requesting that a company prepare a report "disclosing its assessment of the financial, reputational and commercial effects of changes to, and changes in interpretation and enforcement of, US federal, state, and local tax laws and policy that pose risks to shareholder value," under Rule 14a-8(i)(7) because it "relate[d] to decisions concerning the company's tax expenses and sources of financing")*; The Boeing Co. (avail. Feb. 8, 2012) (same); General Electric Co. (avail. Feb. 3, 2012) (same)*; Amazon.com, Inc. (avail. Mar. 21, 2011)* (concurring with the exclusion of a proposal requesting that the company prepare a report regarding the board's assessment of "the risks created by the actions [the company] takes to avoid or minimize US federal, state and local taxes," proposal under Rule 14a-8(i)(7) because it "relate[d] to

decisions concerning the company's tax expenses and sources of financing"); Lazard Ltd. (avail. Feb. 16, 2011) (same).

21. CVS Health Corp. (avail. Mar. 18, 2022).
22. State Street Corp. (avail. Apr. 1, 2022).
23. Verizon Communications Inc. (National Center for Public Policy Research) (avail. Mar. 17, 2022); American Express Co. (avail. Mar. 11, 2022).
24. Dollar Tree, Inc. (avail. May 2, 2022).
25. The TJX Companies, Inc. (avail. Apr. 15, 2022); Lowe's Companies, Inc. (avail. Apr. 7, 2022).
26. IDACORP, Inc. (avail. Apr. 1, 2022).
27. Dow, Inc. (avail. Feb. 15, 2022).
28. Verizon Communications Inc. (avail. Feb. 24, 2022); American Tower Corp. (avail. Feb. 8, 2022).
29. Air Transport Services Group, Inc. (avail. Feb. 22, 2022); Zynga Inc. (avail. Feb. 1, 2022); Teledoc Health, Inc. (avail. Jan. 31, 2022).
30. General Electric Co. (avail. Jan. 6, 2022)*.
31. The AES Corp. (avail. Feb. 16, 2022).
32. *See*, for example, The Boeing Co. (avail. Feb. 10, 2022); Johnson & Johnson (avail. Feb. 9, 2022).
33. For a detailed discussion of the substance of the amendments, *see* The Pendulum Swings (Far): SEC Staff Issues New Guidance on Shareholder Proposals, Gibson Dunn (Nov. 5, 2021) available at *https://www.gibsondunn.com/the-pendulum-swings-far-sec-staff-issues-new-guidance-on-shareholder-proposals/*.
34. On March 25, 2021, Senate Banking Chair Sherrod Brown (D-OH) introduced legislation under the Congressional Review Act (CRA) to repeal those recently adopted amendments. Companion legislation also was introduced in the House. The resolution was not approved before the 60-legislative-day window closed under the CRA, which would have allowed Congress to effectively rescind the rule with a simple majority vote and the President's signature. *See* S.J.Res.16, 117th Cong. (2021), available at *https://www.congress.gov/bill/117th-congress/senate-joint-resolution/16/text*.
35. On June 15, 2021, As You Sow, a California shareholder activist group, James McRitchie, an individual investor, and the Interfaith Center on Corporate Responsibility, which represents religious groups and other institutional investors, collectively sued the SEC over the amendments. *See* Interfaith Ctr. on Corp. Responsibility v. SEC, No. 21-01620 (D.D.C. 2021). In late 2021 the parties filed cross-motions for summary judgment that have not yet been decided. The court currently has a status conference set for August 25, 2022, but could reschedule the conference or decide the motions at any time without hearing oral argument.
36. In a March 2021 speech, then-Acting Chair Allison Herren Lee stated, "I have asked the staff to develop proposals for revising Commission or staff guidance on the no action process, and potentially revising Rule 14a-8 itself. . . . This could involve reversing last year's mistaken decision to bar proponents from working together and restricting their ability to act through experienced agents." *See* Acting Chair Allison Herren Lee, "A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC," SEC (Mar. 15, 2021), available at *https://www.sec.gov/news/speech/lee-climate-change*.
37. *See* "Investors and Consumer Groups Urge Members of Congress to Overturn Trump-Era SEC Rule Changes," *ICCR* (Apr. 22, 2021), available at *https://www.iccr.org/investors-and-consumer-groups-urge-members-congress-overturn-trump-era-sec-rule-changes*.
38. While the transition period for the stock ownership requirements will no longer apply to meetings held on or after January 1, 2023, most proponents who were eligible to submit proposals during the transition period will be able to rely on the three-year/$2,000 ownership standard so long as they continue to hold at least $2,000 in company securities.
39. *See* Sunshine Act Notice (July 6, 2022), available at *https://www.sec.gov/os/sunshine-act-notices/sunshine-act-notice-open-071322*.
40. *See* The Shareholder Proposal Rule: A Cornerstone of Corporate Democracy (Mar. 8, 2022), available at *https://www.sec.gov/news/speech/jones-cii-2022-03-08*.
41. *See* Announcement Regarding Rule 14a-8 No-Action Requests (Sept. 6, 2019), available at *https://www.sec.gov/corpfin/announcement/announcement-rule-14a-8-no-action-requests*.
42. *See* Announcement Regarding Staff Responses to Rule 14a-8 No-Action Requests (Dec. 13, 2021), available at *https://www.sec.gov/corpfin/announcement/announcement-14a-8-no-action-requests-20211213*.

SEC Proposes to Substantially Restrict Grounds for Excluding Shareholder Proposals

By Nicole Brookshire, Ning Chiu, Louis L. Goldberg, Joseph A. Hall, Michael Kaplan, and Richard D. Truesdell, Jr.

On July 13, 2022, the Securities and Exchange Commission (SEC) issued a proposal that would amend three substantive bases for excluding shareholder proposals: (1) the substantial implementation exclusion, (2) the duplication exclusion, and (3) the resubmission exclusion.[1] What may appear fairly benign in terms of the proposed textual changes to Rule 14a-8 underlies a fairly dramatic departure from existing practice.

Consistent with the fallout from recent SEC Staff guidance under SLB 14L and many of the unexpected Staff decisions that occurred during the 2022 proxy season, the proposal will shift the balance fundamentally in favor of what the SEC calls "shareholder suffrage."[2] The proposal would not affect foreign private issuers who are not subject to US proxy rules.

The SEC will be accepting public comments until 30 days after the date of publication in the Federal Register or until September 12, 2022, whichever is later.

Rule 14a-8

Rule 14a-8 under the Securities Exchange Act of 1934 requires public companies to include shareholder proposals in their proxy statements if the proposals meet procedural and substantive requirements. A company may seek no-action relief from the SEC Staff to exclude a proposal on multiple grounds.

Nicole Brookshire, Ning Chiu, Louis L. Goldberg, Joseph A. Hall, Michael Kaplan, *and* **Richard D. Truesdell, Jr.** *are attorneys of Davis Polk & Wardwell LLP.*

The proposal would affect three of the substantive bases that companies use to argue for exclusion, in an effort, according to the SEC, to provide increased consistency and predictability to the process.

A foreshadowing of the proposal was evident in this past proxy season, as the SEC Staff made multiple determinations that appeared to be inconsistent with prior no-action letters and ultimately reversed many long-standing precedents, although under numerous bases and not just those contained in the proposal. The upshot was that companies were able to exclude proposals much less frequently than in prior seasons, resulting in a significant uptick in the number of proposals placed on corporate ballots.

The proposal leaves intact, at least for now, the Rule 14a-8 amendments made in September 2020 that strengthened some of the procedural requirements needed for submission, including more meaningful ownership thresholds. The proposal also does not address the ordinary business exclusion, although this exclusion has already been narrowed by the guidance in SLB 14L.

Substantial Implementation

Current. Rule 14a-8(i)(10) permits a company to exclude a shareholder proposal that the company already has "substantially implemented." In making the determination, the SEC Staff previously considered whether the company's policies, practices and procedures compare favorably with the guidelines of the proposal and whether it addressed the proposal's underlying concerns.

Proposed. The proposal would require that the Staff focus instead on the specific elements of a shareholder proposal to assess whether the company's prior actions taken to implement the substance of the proposal are sufficiently responsive. The degree

of specificity of the shareholder proposal and its stated primary objectives would guide the analysis, and any differences between the proposal and the company's actions would have to be non-essential to the proposal to meet the standard of substantial implementation.

Impact. The examples provided in the proposal include a proxy access proposal that allows for the ability of an unlimited number of shareholders to form a nominating group. A company that adopts any numerical limit on that group when implementing proxy access would not be able to have the proposal excluded.

Most no-action relief requests arguing substantial implementation are responding to proposals calling for reports, where the company had already addressed the subject matter in a prior report. Going forward, proposals will likely not be excluded if the plain language of the proposal explains how the company's existing reports or disclosures are insufficient. In addition, a proposal that requests a report from the board, such as an assessment by the board or an explanation of the board's process, will not be considered substantially implemented if management provides the report instead.

The consequences of the potential adoption of this element of the proposal were already felt this season, as even without any changes in SEC rules, the Staff did not permit the exclusion of proxy access proposals similar to the example noted above, ignoring years of Staff decisions to the contrary. The Staff also did not adhere to precedent standard in disallowing exclusion for other governance proposals, including proposals to eliminate supermajority vote provisions when a company had previously adopted a "majority of votes outstanding" standard if the proposal called for a "majority of votes cast" standard.

The proposal would make it fairly simple for any proponent to claim that its primary objective is not addressed by a company's existing report on any subject. A proponent could also describe the requested elements of a shareholder proposal in a manner that makes it challenging for a company to argue that it has substantially addressed those elements, such as including somewhat detailed or complex elements.

Duplication

Current. Under current Rule 14a-8(i)(11), the duplication exclusion provides that a company may exclude a shareholder proposal that "substantially duplicates" a shareholder proposal that the company has already received, and will be including on its proxy card for the same meeting. The Staff traditionally has considered the second proposal to be duplicative of the first one if the two proposals have the same principal thrust or focus.

Proposed. The SEC believes that it would be appropriate to have multiple competing proposals on the same ballot that address similar issues, and for that reason the proposal would amend the standard so that proposals are duplicative only when they address the same subject matter and seek the same objective by the same means.

Impact. It appears that two proposals must have the same subject, objective and means of implementation for the second one to be excluded. Proposals that cover the same subject but seek different objectives would not be excludable. In the example provided by the proposal, a proposal that asks a company to publish in newspapers a detailed statement of each of its direct or indirect political contributions or attempts to influence legislation and another shareholder proposal requesting a report on the company's process for identifying and prioritizing legislative and regulatory public policy advocacy activities are not duplicative. Although they both address political and lobbying expenditures, they seek different objectives by different means.

In practice, at least with respect to shareholder proposals focused on political activities, the Staff has already decided that proposals that address lobbying activities are different from proposals that address political contributions. This distinction has led to some companies facing multiple proposals on ballots about their public policy and political initiatives. With the proposal, we will likely continue to

see multiple proposals that touch on similar or even the same subject matters, especially a proliferation of environmental and social proposals.

The SEC is aware of this possible consequence, and in its request for comments asks two interesting questions around whether there should be a numerical limit on the number of shareholder proposals that address the same subject matter, or whether priority should be given to proponents who own more shares or have amassed a larger group of co-proponents.

Resubmission

Current. The resubmission exclusion under Rule 14a-8(i)(12) allows a company to exclude a shareholder proposal that addresses "substantially the same subject matter" as a proposal previously included in the company's proxy within the preceding five calendar years if the matter was voted on before and received support below specified vote thresholds.

Proposed. The proposal would change the standard for the resubmission exclusion from "substantially the same subject matter" to "substantially duplicates," using the same analysis outlined above.

Impact. The SEC plainly wants to allow proponents who did not get strong support in one year to be able to adjust their proposals in an effort to gain more support, or allow other shareholders to submit similar proposals that seek to address the same issue by alternate means.

The SEC provides as an example that a proposal requesting the board to adopt a policy prohibiting the vesting of a "government service golden parachute" and a proposal requesting the board to prepare a report to shareholders regarding the vesting of such golden parachutes but asks that eligible senior executives and dollar values of the parachutes be identified are not considered duplicative. Therefore, simply asking for a few pieces of additional information from a prior proposal that received a low vote would avoid the resubmission exclusion.

Notes

1. *https://www.sec.gov/rules/proposed/2022/34-95267.pdf.*
2. *https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals.*

DIVERSITY

Combatting Racial Inequity: A Two-Year Retrospective

By Adam O. Emmerich, David M. Silk, Sabastian V. Niles, Elina Tetelbaum, and Carmen X. W. Lu

The events of the summer of 2020 galvanized the country and drew attention to how systemic racism and injustice continue to burden communities of color. Business leaders throughout the country stepped up to the challenge of combatting racial injustice by pledging funds and taking action to address inequity within their workforces, local communities and society at large. The Business Roundtable launched comprehensive efforts to combat racial inequality in employment, finance, education, health, and housing.

Diversity, equity, and inclusion (DEI) has permeated the governance landscape, as evidenced by corporate and stakeholder focus on board and workforce diversity, the emergence of racial equity and civil rights audits and the heightened number of shareholder proposals targeting the disclosure of DEI metrics. Challenges remain, particularly as macroeconomic headwinds will likely leave many people, families, and communities of color vulnerable.

We review some of the tools and approaches that have helped buttress corporate efforts to address racial inequity and meet the evolving expectations of investors and stakeholders.

Adam O. Emmerich, David M. Silk, Sabastian V. Niles, Elina Tetelbaum, *and* **Carmen X. W. Lu** *are attorneys of Wachtell, Lipton, Rosen & Katz.*

Transparency and Disclosure

As the old adage goes, you cannot manage what you don't measure. DEI is no exception. Over the past 18 months, companies have increasingly moved to provide disclosures on their workforce demographics, notably publishing their EEO-1 reports, in part due to pressure from investors, including the New York City Comptroller, institutional pension funds and large asset managers last year. Some companies have also provided information on gender and racial pay disparities, policies regarding supplier diversity, initiatives to cultivate a pipeline of diverse employees and candidates for management and board roles and DEI targets.

Shareholder proposals submitted in this year's proxy season reflect ongoing pressure for DEI disclosures, with several proposals asking companies to provide disclosures on progress related to DEI initiatives and policies relating to the hiring, training, retention and promotion of diverse employees. Thoughtful DEI disclosures can be a powerful tool to demonstrate progress and credibility, particularly in advance of additional Securities and Exchange Commission rulemaking on human capital expected later this year.

Effective and Impactful DEI

When it comes to board composition, the focus for investors is no longer just a question of numbers but also a question of quality and effectiveness. The expectations of board members have never been higher, as companies face economic headwinds, climate change risks, labor shortages, persistent supply chain challenges, geopolitical tensions and political polarization.

Boards should seek to leverage their full suite of backgrounds, skills and experiences to enhance oversight and impact, setting the right tone at the top, better identifying and addressing emerging risks and opportunities, engaging with stakeholders, improving human capital strategies and developing diverse management pipelines. This includes updating board and committee-level oversight frameworks.

Embedding DEI Into Strategy

DEI is now expected to be integrated into an organization's human capital management, business strategy, brand and reputation management, product management, and supply chain functions. Companies have already begun rolling out supplier diversity programs as both a means to shore up fragile supply chains and to strengthen ties with local communities in which they operate and benefit from the increased competition among suppliers.

DEI also is being integrated into product management as a tool for companies to help align products and services with the needs and demands of their increasingly diverse customer base and identify new commercial opportunities. Effective DEI strategy can also play a key role in strengthening a company's brand and reputation, which in turn, draws diverse talent and customers.

Engagement and Outreach

DEI weaknesses have now become another tool in the activist's arsenal and can be deeply damaging to the credibility of the board and management when deployed. The activist players on DEI issues encompass hedge funds looking to drive a wedge between the company and its shareholders and employees and customers who increasingly expect companies, particularly household brands, to adopt a principled—and public—position on a range of issues.

Boards and management should keep an ear to the ground, and integrate conversations on DEI issues, where appropriate, into engagement with investors and public communications with employees, customers, suppliers and the broader public. Companies deciding when and how to communicate with their disparate stakeholders on polarizing issues need to, more than ever before, stay attuned to the expectations and views of their core stakeholders, engage the input of the board and management and ensure alignment with business purpose.

Looking ahead, calls for greater disclosure, transparency, effort and accountability to address racial inequity will continue to inform investor engagement priorities and impact a business's relationship with all of its stakeholders. Being an active participant in that evolving dialogue, and keeping attuned and informed, will be critical to corporate success and long-term value creation.

Board Diversity: A Path to Board Service from the Wisdom of Black Women Directors

By Keith D. Dorsey

A recent McKinsey and Company study of 1000 global firms across 12 countries found that companies with the least diverse boards (in terms of ethnicity and gender) were 29 percent less likely to achieve above-average profitability than other companies, while companies with the most ethnically and gender diverse boards were 43 percent more likely to experience higher profits.[1] However, despite more than 50 years of equal opportunity policies, women and ethnic minorities still represent a small percentage of board directors at corporations worldwide.

Although the number of women and ethnic minority (that is, Asian, Black/African American, and Hispanic/Latinx) corporate board directors has increased over the past 10 years, most of those gains involved White women and men of color.[2] Although White women now represent 20.85 percent of Fortune 500 board seats, ethnic minority women directorship remains low at only 5.66 percent of the Fortune 500 board seats (despite making up 18 percent of the US population).[3]

The Research

To further investigate how diverse executives secure board seats and what barriers they encounter along the way, I interviewed 12 Black women corporate directors to uncover the human and social capital resources corporate boards seek in directors, the human capital that Black women directors bring to corporate boards, and the barriers and enablers that Black women directors encounter on their corporate board journey.

The 12 directors interviewed actively were serving on 38 corporate boards, including 31 public boards (10 of which were Fortune 500 companies) and 7 private boards. Beyond the 38 active corporate boards, these participants collectively completed their board service on an additional 18 corporate boards.

The 12 participants had 2–23 years of corporate boards service (median = 7 years). Of these participants, 42 percent had served on corporate boards for over 15 years, while the remaining had served for fewer than 10 years. Before serving on corporate boards, all the participants served on numerous nonprofit boards for a median of 29 years. They currently were serving on 19 nonprofit boards in addition to their corporate board service.

Human Capital Needed

Historically, corporate boards had consisted of current and former CEOs and CFOs, and they often reached out to their closed group networks of other CEOs and CFOs to recruit new board members—this means that diverse candidates typically were not on the list of prospective candidates.

In the words of one participant, the CFO experience "opens the door to the boardroom, whether you are White, Black, male, female, or not. If you are a public company, large company CFO, your phone just starts to ring." Nonetheless, over the past few years, boards have started to broaden their search to include those who have no prior board service and who hold roles such as division president, COO, CIO, and other titles that were not

Keith D. Dorsey *is a managing partner and the US Practice Leader of CEO & Board Services at Boyden, a global executive search firm with 75 offices in 45 countries. He is a researcher, author, advisor, and active board member at Vimly Benefit Solutions, Pepperdine University's Graziadio Business School, and the City of La Quinta's Financial Advisory Commission.*

even considered in the past. Other participants emphasized that boards are seeking profit and loss operating experience; consulting experience; and deep functional skill sets such as cybersecurity, technology, human resources, legal, marketing, and sales.

These expanded criteria are a result of shifting concerns and needs within organizations. For example, during the enactment of Sarbanes-Oxley in the early 2000s, Qualified Financial Experts that would appropriately govern and provide oversight were in high demand, prompting Fortune 500 companies to actively recruit CFOs from large public companies to serve on their boards.

Social Capital Needed

Independent directors reportedly find their board seats through networking, recruiters, and a hybrid approach of leveraging both networking and recruiters. In the words of April, an attorney and current board member, "It's who you know, who knows you, and what that person has to say about you that makes a difference."

The women I interviewed explained that an aspiring director's network should include existing board members, CEOs, recruiters, and contacts met through external membership groups, board education, and networking events. The women also stressed that these people need to know that an aspiring director is interested in serving on a board and that they can elevate conversations, as they would need to do in the boardroom. Michele explained how to leverage networking opportunities to demonstrate your strategic thinking:

> If you find yourself at a dinner and you're sitting next to somebody who's on boards, know how to talk to that person. Know how to elevate your conversation in a way where you don't have to say it overtly, but that person will be thinking: Wow, this person gets it. They're a real strategic thinker about their own business or some other business.

The reason these relationships are so important is because board director candidates typically are vetted by recruiters and other board members well before the candidate is contacted. Moreover, the candidate is contacted only if the vetting (based on the candidate's current and past relationships) is successful.

In Ebony's experience, she was offered a board seat with a company that did not do any of her reference checks but that had previously called everyone they knew who might know her. This vetting process reveals the importance of repairing and nurturing past and current relationships.

Barriers and Enablers

A chief challenge facing diverse candidates is the focus on expediency in among recruiters. As a result, search firms tend to focus on former or active Fortune 500 CEOs and CFOs (where little diversity exists).

Moreover, Black women executives with CEO and CFO experience usually are at capacity for corporate board service seats, only intensifying the belief that there is a lack of a pipeline of Black women executives. The women I interviewed shared that when contacted by recruiters, they provide the names of other qualified Black women executives and directors who could serve on the board.

A second challenge to diverse candidates tends to be their career path. Nicole, who has 19 years of corporate board experience, explained, "If you're not a CEO, you've got to have strong experience in an area that boards are seeking. Be intentional about building those." Michele added:

> If you are the head of HR, you're never going to be the financial expert [on the board], and you're not going to be on the radar when people are looking for a financial expert. No matter what you do, even if you take an accounting class, you're just not going to be that person.

To overcome these barriers, the women I interviewed stressed the importance of mentors and sponsors (both Black, Indigenous, and people of color (BIPOC) and allies, both men and women) who helped them make work-related decisions, negotiate new organizations and industries, navigate strategic career moves, and balance work and life.

Sponsors and mentors included both those assigned during formal corporate programs as well as informal contacts the women made—including internal and external colleagues, peers, subordinates, managers, and board members, among others. Career sponsors opened doors to help position the women for and then to propel them into executive and C-suite roles as well as board seats. Scarlet shared, "Some of my mentors and sponsors are on a lot of boards and they're on big boards. They've been really helpful to me in evolving my message."

Other mentors created opportunities for the women to gain board experience. Elaine, a corporate executive in various roles at a Fortune 500 company, spent 13 years attending her company's board meetings up to six times per year. Reflecting on this experience, she shared, "I think really I gained a better understanding of corporate governance and structure and the experience, in terms of how the board looked at my company's risk management and understanding of the business." All the women agreed that board experience—whether gained internally or gained through service on a nonprofit board—was invaluable preparation for corporate board service.

The women in this study also emphasized the importance of starting to plan for board service as early as possible, given that it takes substantial time to build the skills, experiences, and contacts needed to secure and be successful in the board role. Victoria, who has 22 years of corporate board service, explained:

> If board service is something that you are interested in and you're 35 years old, you may have a 10-year window to really package yourself, so you're attractive to a board, and you have all the attributes they are seeking.

Finally, stakeholder pressures (for example, from the investment community) for increased board diversity may have created an opportunistic environment where Black women executives more easily acquire corporate board seats. Within just the past 21 months, the women I interviewed began serving on 27 or 71 percent of their 38 total active corporate boards.

Implications and Recommendations

Corporate board diversity has been a topic of discussion for many years, and it is a complex problem that requires complex solutions. Corporate boards have been responding to board diversity pressures coming from policymakers, institutional investors, and society as a whole. Rather than resort to traditional practices of recruiting CEO and CFO candidates, firms (and the search firms they employ) must recognize they have a problem finding a qualified pool of Black women executives and directors and begin targeting candidates based on the skill sets that meet the board's needs. This, plus accessing new social networks, should help in recruiting diverse candidates.

Diverse candidates also must do their part in solving the problem of limited board diversity. First, they must inventory their own human capital and commit to transforming into someone attractive to corporate boards by acquiring profit and loss experience, improving their internal and external networks, building more trusted relationships, repairing broken professional relationships, creating more mentor relationships around specific skill sets, positioning themselves for different executive roles internally or externally, gaining exposure to their firms' internal boards, joining external board related groups (for example, Executive Leadership Council, National Association of Corporate Directors), becoming students of the profession of corporate governance, ensuring they are seen and known as being interested in and capable of filling a board seat, and recommending other diverse candidates for open board seats when they themselves are at capacity.

If organizations, search firms, and diverse candidates implement these recommendations, I believe we can collectively achieve the diversity we need on our boards to improve corporate performance.

Notes

1. Hunt, V., Prince, S., Dixon-Fyle, S., & Yee, L. (2018), Delivering through diversity, McKinsey, available at *https://www.mckinsey.com/~/media/McKinsey/Business Functions/Organization/Our Insights/Delivering through diversity/Delivering-through-diversity_full-report.ashx*
2. Bosworth, W., & Lee, S. (2017), "Mandated or spontaneous board diversity? Does it matter?," *Journal of Business and Behavioral Sciences*, 29(1), 45–56; Castañón Moats, M., DeNicola, P., & Malone, L. (2020), "Insights from PwC's 2020 Annual Corporate Directors Survey," PwC's Governance Insights Center, available at *https://www.pwc.com/us/en/services/governance-insights-center/library/annual-corporate-directors-survey.html*; DeHaas, D., Akutagawa, L., & Spriggs, S. (2019), "Missing pieces report: The 2018 board diversity census of women and minorities on Fortune 500 boards alliance for board diversity," Deloitte, available at *https://www2.deloitte.com/content/dam/Deloitte/us/Documents/ center-for-board-effectiveness/us-cbe-missing-pieces-report-2018-board-diversity-census.pdf.*
3. DeHaas, D. (2021, September 20), Missing pieces report: The board diversity census of women and minorities on Fortune 500 Boards (6th ed.), Deloitte, available at *https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-board-effectiveness/missing-pieces-fortune-500-board-diversity-study-6th-edition-report.pdf.*

PROXY ADVISORS

SEC's Proxy Amendments Enhance Timeliness and Independence of Proxy Voting Advice

By David A. Sakowitz and Sey-Hyo Lee

On July 13, 2022, the Securities and Exchange Commission (SEC) adopted amendments to the 2020 proxy rules governing proxy voting advice applicable to proxy advisory firms, or proxy voting advice businesses (PVABs).[1] PVABs advise shareholders on how to exercise their rights to vote on matters at public company shareholders' meetings, and investors rely on PVABs to stay informed about company and shareholder proposals. Since the adoption of the 2020 rules establishing new requirements for PVABs, investors have expressed strong concerns about their ability to receive independent proxy voting advice in a timely manner due to requirements imposed by the 2020 rules.

These amendments are expected to address those concerns while maintaining investors' access to transparent, accurate, and materially complete information to help them determine how to vote.

The amendments rescind two portions of the 2020 rules:

1. Two conditions to the Rule 14a-2(b)(9) exemptions from the proxy rules' information and filing requirements upon which PVABs often rely and the related safe harbors and exclusions from those conditions; and
2. Note (e) to the Rule 14a-9 liability provisions, which set forth examples of material misstatements or omissions related to proxy voting advice.

David A. Sakowitz *and* **Sey-Hyo Lee** *are partners of Winston & Strawn LLP. Sangil Min, a law clerk in Winston's London office, assisted with this article.*

Removing the Rule 14a-2(b)(9)(ii) Conditions for Exemptions to the Proxy Rules for Proxy Voting Advice

Rule 14a-2(b)(9)(ii) previously required that, in order to qualify for the exemptions from the proxy rules' information and filing requirements, PVABs adopt and publicly disclose written policies and procedures reasonably designed to ensure that (1) their proxy voting advice is made available to corporations that are the subject of the advice no later than when the advice is disseminated to the PVABs' clients; and (2) the PVABs provide their clients with a means of becoming aware of any written responses by the subject corporations, in a timely manner before the relevant shareholder meeting (or if no meeting, before the votes, consents, or authorizations may be used to effect the proposed action).

In light of (1) continued concerns expressed by investors and others that the conditions set forth in Rule 14a-2(b)(9)(ii) have adverse effects on the cost, timeliness, and independence of proxy voting advice and (2) the voluntary adoption by PVABs of practices that advance the goals underlying Rule 14a-2(b)(9)(ii), the SEC concluded that the potential informational benefits to investors of those requirements do not justify their potential effects on the cost, timeliness, and independence of proxy voting advice. As a result, the SEC is rescinding Rule 14a-2(b)(9)(ii) and the related safe harbors and exclusions.

In connection with the removal of Rule 14a-2(b)(9)(ii), the SEC is also rescinding supplemental guidance to investment advisors about their proxy voting obligations issued in connection with the 2020 rules. In connection with the rescission of the supplemental guidance, the SEC noted comments received on the 2021 release proposing the amendments to the

proxy rules and existing obligations and considerations regarding proxy voting under the Investment Advisers Act of 1940.

Removing Note (e) Examples to the Rule 14a-9 Liability Rule for Proxy Advice

The 2020 rules added Note (e) to the Rule 14a-9 liability rules that prohibit false or misleading statements. Note (e) cited the failure to disclose material information regarding proxy voting advice, such as a PVAB's methodology, sources of information, or conflicts of interest, as an example of an omission that can be misleading within the meaning of Rule 14a-9.

The SEC emphasized that the purpose of deleting Note (e) is to address any uncertainty regarding the application of Rule 14a-9 to proxy voting advice and any misperception that Note (e) purported to determine or alter the law governing Rule 14a-9's application and scope, and to avoid any increased litigation risks and impaired independence of proxy voting advice as a result of such uncertainty. The SEC noted that deletion of Note (e) is not intended to, and does not, affect the scope of Rule 14a-9 or its application to proxy voting and that material misstatements remain subject to liability under the rule.

According to the SEC, these amendments do not represent a wholesale reversal of the 2020 rules. Proxy voting advice generally remains a solicitation and, as with any other person engaged in a solicitation, a PVAB can still remain subject to liability under Rule 14a-9 for material misstatements or omissions of fact. Furthermore, PVABs still need to satisfy Rule 14a-2(b)(9)'s conflicts of interest disclosure requirements to qualify for the exemptions from the proxy rules' information and filing requirements.

The amendments will be effective 60 days after publication in the Federal Register.

Note

1. *https://www.sec.gov/rules/final/2022/34-95266.pdf*.

CYBERSECURITY

Cybersecurity Concerns: Board Communications and Oversight

By Matthew Baker and Rachel Ehlers

Why Should Cybersecurity Be a Board-Level Concern?

Cybersecurity has been a board-level concern for some time. There is good reason for this: there has been a steep rise in cyber incidents, including ransomware attacks, that have crippled companies of all sizes across industries. At the same time, companies continue to collect, generate, and store huge amounts of valuable data, which cybercriminals are also actively trying to exploit.

Additionally, there is a patchwork of current cybersecurity laws and growing liability risks from a litigation and enforcement perspective, as well as prospective key regulations on the horizon. For example, the Securities and Exchange Commission (SEC) recently proposed rules related to cybersecurity disclosure (both for incidents and cyber risk). Under the proposed rules, companies will be required to report on the Board's oversight of cyber risk.

Finally, law and regulation aside, Boards should be concerned about the company's cyber hygiene and resiliency simply to ensure continued protection of operation and reputation. One single cyber event could cripple a company's operations for days to weeks, often resulting in negative public disclosures and press.

Matthew Baker *and* **Rachel Ehlers** *are attorneys of Baker Botts LLP.*

Why Isn't Cybersecurity for Board Communications Taken As Seriously As Other Types of Communications?

While most Boards have indicated a desire to proactively address cyber issues, addressing the issue and providing effective oversight are a continuing challenge. Technology, along with the cyber threat landscape, is complex and ever evolving, the issues are more tactical than the Board normally manages, and balancing security requirements and business effectiveness is difficult for nearly all organizations.

Also, compared to some of the other issues that Boards are managing, cyber incidents are often considered "black swan events"—it is difficult to predict the likelihood of a successful attack and the resulting loss. To add to that mentality, many Boards have a sense (often false sense) of security that the company's safeguards and security frameworks will prevent or mitigate a significant incident, or, at minimum, allow them to anticipate or predict such incidents.

How Can a Company Check the Security of Its Board Portal Providers?

Managing third party risk, including with Board vendors, is a critical component of a cybersecurity program. Threat actors are sophisticated, and often target third party vendors that may not have the same security standards and protections in place as the company to access the confidential data of the vendor's client.

Third party management must be a real-time, continuous process that includes security diligence and monitoring throughout the relationship. The company should conduct a comprehensive data mapping exercise to understand how data flows

throughout the organization and through electronic systems, including the Board portals. The cybersecurity posture and controls for any third party managing these systems or accessing sensitive data should be reviewed.

Throughout the onboarding process, and on an on-going basis, the company should review the level of risk posed by the third parties, including the types of data they hold, how each vendor's portal or solution is accessed, and the related safeguards (for example, two-factor authentication, access limitations, audit controls, vulnerability monitoring).

Finally, contract diligence is key to ensure ongoing reliability from the third-party provider, including assurances of routine and/or required audits, assessments, and up-to-date security certifications, and potential indemnification in the event of an event.

What Steps Should a Company Take During a Cyber Incident, and What Is the Board's Role?

The company should proactively plan for cyber incidents with a comprehensive Incident Response Plan. As part of this plan, the company should designate a core group of cross-functional employees to manage the incident. The company may also need to designate external experts. For example, there are significant legal implications of any cyber incident, and the company will likely need to retain outside cybersecurity and privacy counsel, forensic specialists, and potentially crisis communication specialists.

Mobilizing the Incident Response Team is one of the first critical steps in addressing a cyber incident. The company should also check whether losses from a cyberattack are covered under existing insurance policies and notify carriers, as applicable.

From a technical perspective, the first key step will be to secure compromised systems to contain the breach. This could mean isolating or suspending a compromised section of the network. The initial review should consider how and when the compromise was detected and what other systems might have been impacted. After this initial triage, the company should conduct a more thorough investigation as to the cause and impact of the incident.

The company should consider engaging external forensics experts to lead the investigation (both because they can provide an unbiased assessment and because internal resources are usually consumed in the immediate aftermath of the incident). The company will also need to manage public and internal communications during this period, depending on the nature of the incident.

The company will need to address any legal and regulatory obligations. There is a patchwork of laws and regulations related to cybersecurity, including data breach reports in all 50 states in the United States and mandatory reporting in the European Union. There are also industry and sector specific laws related to cybersecurity and incident reporting.

Once the investigation has concluded, the company should also review and update policies and procedures and the Incident Response Plan to respond to lessons learned, as regulators are often as interested in what was done to improve processes going forward.

The Board should review the Incident Response Plan prior to an incident and communicate how and when it wants to be made aware of any incident. As a best practice, the Incident Response Team should alert the Board (or a specific designee of the Board) of any incident involving ransomware or that likely impacts personal information of individuals as soon as practical after the incident is detected.

Finally, given the nature of the compromise to the Board's communications, consider whether the incident is material and whether additional regulators should or must be notified, including the SEC, and whether—given the nature of certain Board communication—any business partners or other organization should be notified.

How Can Directors Best Be Trained to Identify and Address Cybersecurity Concerns?

Boards should have the knowledge and skills necessary to assess cybersecurity risks, challenge security

plans, and evaluate policies and solutions that protect the assets of the company, as a failure to exercise appropriate oversight in the face of known risk constitutes a breach of the duty of loyalty. As such, the Board should receive training in the following areas:

- Company's Incident Response Plan
- Company's cybersecurity program and controls
- Cybersecurity risks specific to the company and industry
- How to recognize social engineering threats (that is, phishing, spoofing)
- Legal and regulatory requirements specific to cybersecurity

Directors should discuss and communicate:

- Which directors and employees are responsible for the oversight of cyber risks?
- How the Board should be informed of cyber risks and cyber incidents.
- How the Board will consider cyber risks within the context of the company's business strategy and how frequently the Board will discuss cyber risks.

At a minimum, Boards should require that either internal or external information security professional provide routine and up-to-date assessments on the company's resiliency, risk, mitigation, and threat response posture to ensure transparency and visibility.

VitalLaw™

Analysis that grounds you. Excellence that elevates you.

When fast, in-depth research is essential, VitalLaw is indispensable. Powered by Wolters Kluwer's world-class analysis, VitalLaw's intuitive research platform gives you the depth you need for the actionable insights you want. With solutions that enrich the entire legal process, VitalLaw enables you to more effectively advise your clients.

Win more cases and clients

Faster answers

- Move further faster with the most comprehensive, leading editorial analysis and data visualization
- Answer hard questions and streamline your success
- Save time without sacrificing accuracy

Better outcomes

- Obtain actionable insights
- Craft legal strategies elevated by excellence
- Enjoy the resources needed to increase profitability

Deeper insights

- Benefit from attorney-written and expert-curated analysis
- Take advantage of over 100 years of editorial excellence
- Read expert content drawn from over 1,200 practitioners and 99 Am Law 100 firms

September/ 10041527-0690