

Morgan Lewis

2019 ANNUAL MEETING HOT TOPICS AND WHAT IT MEANS FOR 2020

Erin Randolph-Williams
Patrick Rehfield
Celia Soehner

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Overview

- I. 2019 Annual Meeting Hot Topics
- II. 2019 Litigation-Related Developments
- III. 2019 Shareholder Proposals

2019 ANNUAL MEETING HOT TOPICS

Overview of Hot Topics

- Pay Ratio Disclosure
- Say on Pay and Equity Plan Approval
- Hedging and Pledging Disclosure
- Proposed ISS Updates for 2020
- Human Capital Management Disclosure
- Board Evaluation Disclosure
- Board Diversity

Pay Ratio

- CEO Pay Ratio

- Continue to see median pay ratio levels be highly dependent on industry
 - Consumer services and retailers generally have highest ratios
 - Energy and banking tend to have the lowest
- Remember – no need to re-run median employee calculation for the 2019 fiscal year
 - *Unless* there have been significant changes to compensation structure or employee population
- Among S&P 500 companies, none appear to have changed CEO compensation program and policies as a result of pay ratio (or concerns relating to the same)
- Very few companies address CEO pay ratio within CD&A
- While shareholders and the proxy advisors continue to be agnostic toward pay ratio results, note:
 - Overlap with human capital management and gender pay gaps
 - Requests from unions and pension funds requesting more detail

Say-on-Pay

- Say-on-Pay (“SOP”) vote
 - As in 2018, the vast majority of companies “passed” SOP
 - 99% of S&P 500 companies received majority support for SOP
 - 97% of Russell 3000 companies received majority support for SOP
 - Reasons for failure include:
 - Performance standards that are not sufficiently rigorous
 - Problematic pay practices
 - Lack of responsiveness to shareholder concerns
 - Despite continued overall passage rates, ICR Inc. recently noted that 2019 saw a “marked rise in the percentage of SOP with support rates below 80%”
 - 80% is significant, as this is the level at which shareholders and proxy advisors will scrutinize compensation committee members for their oversight of the compensation program and responsiveness to investor concern
 - ICR attributes this to:
 - Passive investors’ lack of willingness to support one-time retention or discretionary awards
 - Investors increasingly willing to vote against SOP to register concerns over problematic pay practices

Equity Plans

- The vast majority of companies that put up equity plans for shareholder approval saw success in 2019
 - Average level of support approximated 90% among both Russell 3000 and S&P 500 companies
 - Only two companies in the Russell 3000 had equity plan proposals that failed to achieve majority support
- Strategies when faced with a negative ISS recommendation:
 - Shareholder engagement, focusing on largest institutional holders
 - Well-drafted supplemental proxy material can be very effective to rebut ISS's position (particularly if Glass Lewis has expressed support for the plan)

ISS Equity Scorecard

- ISS considers the following three main categories in assessing omnibus equity plans:
 - Plan cost (*i.e.*, dilution and overhang)
 - Plan features (*i.e.*, minimum vesting periods, extent to which vesting can be accelerated on a discretionary basis, liberal share recycling, change in control provisions, dividends paid on unvested awards)
 - Grant practices (*i.e.*, burn rate relative to peer companies)

Hedging and Pledging Disclosure

- The SEC rules that were finalized in December 2018 regarding disclosure of hedging policies (or the lack thereof) will be effective for the 2020 proxy season
 - Emerging growth companies and smaller reporting companies (SRCs) do not have to comply until 2021, although we likely will see early adoption among some SRCs
- As a reminder, new Item 407(i) of Regulation S-K requires companies to disclose whether employees (including officers) or directors or their designees are permitted to purchase financial instruments or otherwise engage in transactions that hedge or offset, or that are designed to hedge or offset, any decrease in the market value of a company's equity securities granted to the employee or director as compensation or held directly or indirectly by the employee or director
- Companies should consider updating their insider trading policies or corporate governance guidelines, as appropriate, prior to filing their 2020 proxy statement to be sure that existing policies capture these concepts

Hedging and Pledging Disclosure (cont.)

- Hedging disclosure may either describe hedging policies or practices in full, or consist of a fair and accurate summary that describes the categories of covered persons and any categories of hedging transactions that are specifically permitted or prohibited
 - Typically will be easiest just to reiterate the full “no-hedging” policy, as these policies tend not to be lengthy
- ISS and Glass Lewis positions:
 - ISS will flag any lack of an anti-hedging policy
 - Glass Lewis supports anti-hedging policies in order to assure alignment between management and shareholders

Hedging and Pledging Disclosure (cont.)

- A note on pledging:
 - Many companies also will provide “voluntary” anti-pledging policy disclosure along with anti-hedging disclosure
 - ISS' view is that any amount of pledged stock is not a responsible use of company equity; pledging by an insider will be noted in ISS report
 - ISS evaluates what is a “significant level” of pledged company stock on a case-by-case basis by measuring the aggregate pledged shares in terms of common shares outstanding or market value or trading volume

2019 Proxy Disclosure and ISS Issues

- Performance metrics
 - ISS is reviewing company performance in part through an Economic Value Added (EVA) framework. The framework applies certain rules-based adjustments to financial statement accounting data in an effort to offer a “uniform” non-GAAP basis for evaluating performance across companies.
 - Starting in 2020, ISS will incorporate EVA metrics in its pay-for-performance screen
- More fulsome director compensation disclosure
- ISS publishes its executive compensation guidance in November or December of each year for the upcoming proxy season

ISS Annual Policy Survey – Key Findings

- In September 2019, ISS published its annual policy survey, which summarizes the findings of the 2019 Global Benchmark Policy Survey of nearly 400 entities, including asset managers, public companies, board members, and advisors to both institutional investors and public companies
- Key findings included:
 - **Board composition and accountability**
 - Majority of respondents agreed that board gender diversity is a key component of effective board governance
 - Investor respondents were more likely than non-investor respondents to indicate that ISS should consider mitigating factors (*i.e.*, adoption of a Rooney rule-type policy) when assessing companies with no female directors
 - Citing poor responsiveness to shareholder concerns as predominant factor showing need for an independent board chair
 - **Compensation**
 - Beginning in 2019, ISS' U.S. research reports started to include additional information on company performance using EVA metrics; ISS plans to incorporate these metrics into its Pay-for-Performance models for 2020
 - A significant majority of respondents indicated that it would be useful for ISS to continue to display in the report the previously-used GAAP financial metrics as a point of comparison
 - **Risk Oversight on Climate Change**
 - Majority of investor respondents indicated that all companies should be assessing and disclosing climate-related risks and taking mitigating actions where possible
 - 35% of such respondents indicated that the right level of disclosure would depend on factors like industry sector

Proposed ISS Policies for 2020

- On October 7th, ISS released proposed new policies for public comment, which include three proposed changes for U.S. voting guidelines:
 - **First**, identifying factors that could lead to ISS support of an independent board chair proposal:
 - Weak or poorly defined lead independent director role
 - Structural concerns (non-independent chair in addition to the CEO, a recent recombining of the CEO/chair roles, and/or move away from an independent chair structure)
 - Failure by board to oversee and address material risks facing the company or to intervene when management's interests are contrary to those of shareholders
 - Material governance failure, particularly when coupled with failure to respond to shareholder concerns
 - **Second**, the proposed codification of ISS' position on the appropriate use of share repurchase program and specific identification of "abusive" practices, such as using buybacks to inappropriately manipulate incentive compensation metrics
 - **Third**, adding a policy regarding newly-public companies' adoption of a multi-class capital structure without a reasonable sunset provision

Human Capital

- Increased focus on human capital issues, including issues such as #MeToo, have raised issues as to the board's role in overseeing human capital.
- Should the compensation committee have specific responsibility with respect to human capital? If so, what reports should be provided to the compensation committee and what should the scope of its review be?
- The SEC's Investor-as-Owner Subcommittee recommended to the SEC in March 2019 that it recognize the significance of human capital management (HCM)
- The Subcommittee noted that companies have become increasingly dependent on their workforces as a source of value creation, and for many of the most dynamic companies, human capital is their primary source of value

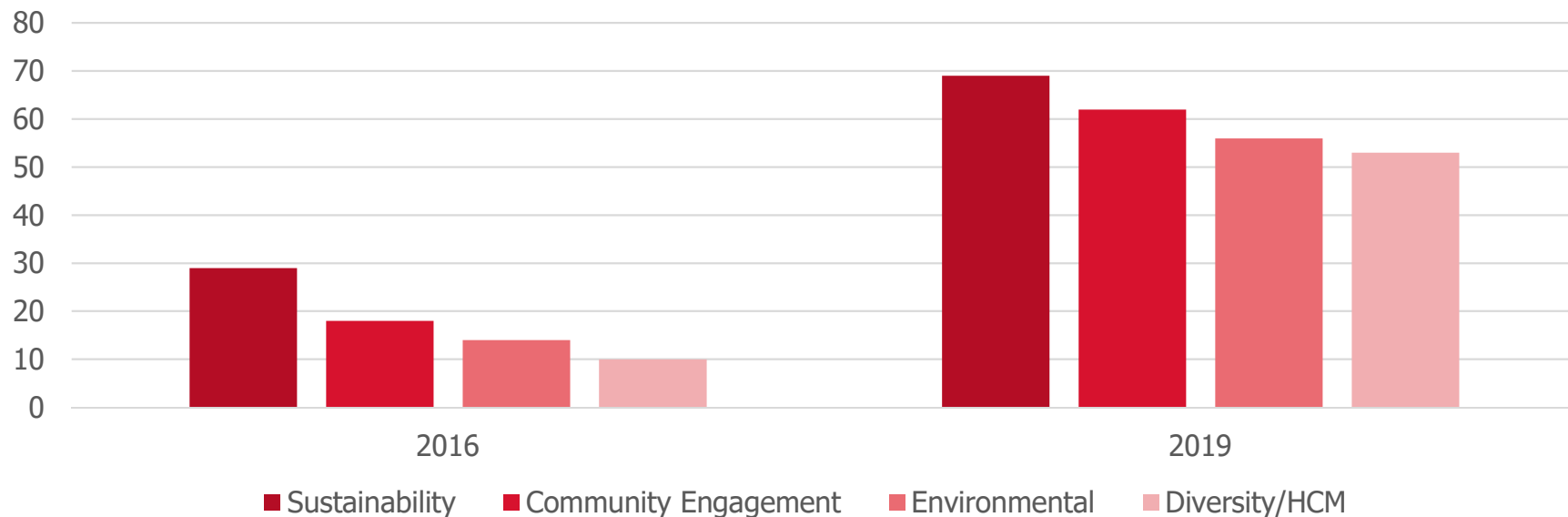
Human Capital (cont.)

- In August 2019, the SEC issued a release proposing to modernize certain required disclosures under the proxy rules
 - Would require companies to disclose a description of the company's human capital resources, including human capital measures or objectives that management focuses on when managing the business
 - Disclosure is required only if it would be material to an understanding of the company's business

Corporate Sustainability and Citizenship

Proxy Disclosure Topics Among Fortune 100 Companies

Source: EY



Corporate Sustainability and Citizenship (cont.)

- Background –
 - In 2019, BlackRock CEO Larry Fink issued a letter encouraging public companies to address social issues (*i.e.*, protecting the environment and gender/racial inequality)
 - In August 2019, 181 CEOs signed the Business Roundtable's Statement on Purpose of a Corporation, committing to:
 - Delivering value
 - Investing in employees
 - Dealing fairly and ethically with suppliers
 - Supporting the communities in which the company works
 - Generating long-term value for shareholders
- More and more companies are using the proxy to message (and tout) their approach to sustainability and “good corporate citizen” initiatives over the prior year, including:
 - Overall commitment to sustainability
 - Environmental matters
 - Community engagement/social impact
 - Diversity and inclusion

Board Evaluation Disclosure

- We believe that fulsome disclosure of how the board and committees conduct evaluations, as well as action items resulting from such evaluations, will continue to be a disclosure trend in 2020
- EY recently published a survey of Fortune 100 companies, which concluded:
 - The vast majority (93%) of companies provided some disclosure about their board evaluation process.
 - Most (73%) disclosed that the Nom/Gov Committee did this process either alone or with the independent lead director or chair
 - Slightly more companies used an independent facilitator at least periodically (i.e., every two or three years) in 2019 vs. 2018
 - Approximately 40% of companies (up from 25% last year) disclosed that they included individual director self-evaluations along with board and committee evaluations
 - Approximately 50% of companies (up from 40% last year) disclosed the general topics covered by the evaluation
 - About 25% of companies (up from 20% in 2018) disclosed actions taken as a result of their board evaluation

Board Evaluation Disclosure (cont.)

- Questions for a board to consider in connection with the evaluation process (*Source: EY*)
 - Has the most recent evaluation process enabled the board and individual directors to identify actions to optimize board and director performance and board composition?
 - Does the evaluation process provide validation to each director that he or she is the right director at the right time for the right company?
 - Does the board as a whole and each director have a common and clear understanding of the term “effectiveness” as applied to the board as a whole, its committees and each director individually?
 - Has the board formulated clear goals, objectives and standards for itself, its committees and each director that can be referenced during and outside of the evaluation process?
 - If the board has director qualification standards, should they be expanded in more specific ways to include standards and requirements that each director must consistently meet to earn renomination?
 - Does the evaluation process include components that occur on a biannual, quarterly and/or real-time basis? If not, why not?
 - Is the evaluation process appropriately synergized with the board’s annual governance review, orientation and education programs, director nomination process, succession planning and stakeholder engagement programs?

Diversity on Boards

- In early 2019, the SEC's Division of Corporation Finance issued new guidance regarding diversity characteristics of directors and Board diversity policy disclosures
- The guidance specifies that:
 - if a board or nominating committee considered diversity characteristics of a candidate and the candidate consents to the disclosure of such self-identified diversity characteristics in the proxy statement, the SEC expects to see disclosure addressing such diversity characteristics and how they were considered; and
 - The SEC staff expects that any description of diversity policies include a discussion of how the company considers the diversity attributes of nominees and what qualifications the diversity policy takes into consideration

Diversity on Boards (cont.)











▪ Takeaways –

- Ensure that the annual corporate governance review includes a review of any diversity language that is included in corporate governance guidelines and/or director candidate qualifications
- Consider whether the parallel proxy disclosure tracks corporate governance policies and reflects how the board/nominating committee recruits for and assesses director candidates
- More companies are providing detailed diversity information as to board composition (*e.g.*, gender, race, ethnicity) in their proxy statements
- Majority of Fortune 100 companies are using a director skills matrix to demonstrate the diversity of director qualifications

Diversity on Boards – Sample Proxy Disclosure

■ Nike, Inc.'s 2019 Proxy Statement:

INDIVIDUAL BOARD SKILLS MATRIX

EXPERIENCE, EXPERTISE, OR ATTRIBUTES	BENKO	COMSTOCK	CONNORS	COOK	DONAHOE	GRAF	HENRY	KNIGHT	PARKER	PELUSO	ROGERS	THOMPSON
 DIVERSITY Representation of a range of perspectives expands the Board's understanding of the needs and viewpoints of consumers, employees, and other stakeholders worldwide.	✓	✓					✓			✓	✓	✓
 FINANCIAL EXPERTISE Financial expertise assists our Board in overseeing our financial statements, capital structure and internal controls.			✓	✓	✓	✓	✓	✓	✓	✓	✓	
 CEO EXPERIENCE CEO experience brings leadership qualifications and skills that help our Board to capably advise, support, and oversee our management team, including regarding our strategy to drive long-term value.				✓	✓			✓	✓	✓	✓	
 INTERNATIONAL International exposure yields an understanding of diverse business environments, economic conditions, and cultural perspectives that informs our global business and strategy and enhances oversight of our multinational operations.	✓	✓	✓	✓	✓	✓	✓		✓	✓		
 DIGITAL/TECHNOLOGY Technology experience helps our Board oversee cybersecurity and advise our management team as we seek to enhance the consumer experience and further develop our multi-channel strategy.	✓	✓	✓	✓	✓					✓		
 RETAIL INDUSTRY Retail experience brings a deep understanding of factors affecting our industry, operations, business needs, and strategic goals.				✓	✓				✓	✓		
 MEDIA Media experience provides the Board with insight about connecting with consumers and other stakeholders in a timely and impactful manner.		✓						✓				✓
 ACADEMIA Academia provides organizational management experience and knowledge of current issues in academia and thought leadership.							✓					✓
 HR/TALENT MANAGEMENT HR and talent management experience assists our Board in overseeing executive compensation, succession planning, and employee engagement.	✓			✓	✓				✓	✓		✓
 GOVERNANCE Public company board experience provides insight into new and best practices which informs our commitment to excellence in corporate governance.			✓	✓	✓	✓	✓		✓	✓	✓	

Gender Diversity on Boards

- Female presence on boards of directors continues to accelerate –
 - 23% of directorships in 2019 are held by women
 - Most (56%) of S&P 500 boards have at least three female directors

Source: EY

- On October 11, NYC Comptroller Scott Stringer launched the third stage of the Boardroom Accountability Project
 - Calls for 56 S&P 500 companies to adopt the “Rooney rule” in recruiting for directors and CEOs
 - Concept of increasing the number of minority candidates that are considered for these roles includes both gender and racial/ethnic diversity
 - Letter requests that companies commit to including female and minority candidates for every open director seat and for the position of CEO
 - Announcement also indicated that the Comptroller’s Office will “file shareholder proposals at companies with lack of apparent racial diversity at the highest levels”
- NYC Retirement Systems amended its voting policies during 2019 to note that –
 - The Systems will vote against the election of members of a board’s nominating committee if “the board lacks meaningful gender and racial/ethnic diversity, including but not limited to any board on which more than 80% of the directors are the same gender”
 - The Systems may integrate more explicit racial/ethnic diversity expectations in the future, and may increase the minimum expectation for gender diversity

Takeaways for 2020

- Continue to see increased proxy disclosure on:
 - Human capital management and corporate culture
 - Commitment to corporate sustainability initiatives/ESG considerations
 - Hedging and pledging disclosure
 - Board evaluation process
 - Board and gender diversity (and how this translates to the recruitment process)
- Other hot topics for 2020:
 - Director overboarding
 - Combined CEO/chair roles
 - Director accountability for climate change risks
 - Responsiveness to low SOP

2019 LITIGATION-RELATED DEVELOPMENTS

Delaware Standard of Review for Board Decisions on Controlling Shareholder Compensation

- *Tornetta v. Musk et al.* (Case No. 2018-0408)
 - The Board of Directors of Tesla approved a 10-year incentive-based compensation plan for its CEO, allowing the CEO to earn performance-based stock options with a value upwards of \$55.8 billion
 - The CEO is considered a controlling shareholder of Tesla, its CEO and a member of its Board
 - The award was approved by an independent compensation committee of the Board and thereafter ratified by a majority of the minority shareholders.

Delaware Standard of Review for Board Decisions on Controlling Shareholder Compensation (cont.)

- Plaintiff-shareholder of Tesla brought several claims against the CEO and the Board, including breach of fiduciary duty claims.
- Defendants filed a motion to dismiss the breach claim under the “business judgment rule” (BJR)
- The threshold question for the court was, under which standard of review should the court adjudicate the claim?
 - Generally decisions of a board of directors, such as the approval of executive compensation, receive great judicial deference under BJR
 - However, because the CEO is a controlling shareholder and the potential beneficiary of the award, the court questioned whether the award should trigger heightened judicial scrutiny

Entire Fairness

- Historically, BJR has applied to a board's decisions on executive compensation, entitling the board's decision to "great deference" even where the recipient of the compensation is a controlling shareholder, provided that the compensation decision was made by an independent compensation committee (*See, Friedman v. Dolan*)
- However, in *In re Ezc corp Inc. Consulting Agreement Derivative Litigation*, the court shifted gears and applied the entire fairness framework to a situation where shareholders challenged payments under three advisory agreements between Ezc corp and a company affiliated with Ezc corp's controlling shareholder.
- The *Ezc corp* court provided guidance that BJR may be available if the transaction is conditioned at the outset on the following "dual protections":
 - Being negotiated by an independent special committee; and
 - Subsequent approval by a fully informed vote of the "majority of the minority" of disinterested shareholders

Entire Fairness (cont.)

- In the Tesla case, the Delaware Court of Chancery determined that the “entire fairness” standard of review should apply to breach of fiduciary duty claims
 - The court determined that, for purposes of the motion to dismiss, a majority of Tesla’s compensation committee that approved the award was not independent of the CEO’s influence
 - There lacked a basis on which to conclude that the shareholder vote approving the award would not be subject to inherent coercion.

Entire Fairness (cont.)

- Under the entire fairness standard, the plaintiff-shareholder must demonstrate from well-pled facts that it is reasonably conceivable that the award is unfair as to process and price
- The court dismissed the defendant's motion to dismiss the fiduciary breach claims largely on the size of the award
 - The court accepted the plaintiff's argument that the award's fair value dwarfed the compensation of the "world's most successful technology executives"
 - The defendants argued that the award was fair because it was entirely performance-based and aligned the CEO's interests with Tesla; and, given the extraordinary goals, there was a possibility that the CEO will never realize the full value of the award
- The court stated that it would consider the defendant's arguments at summary judgement or at trial, but held that, while "lodged on the 'very outer margins of adequacy,' it is reasonably conceivable the Award is unfair"

Takeaways

- In the case of board decisions regarding the compensation of a controlling shareholder, companies should consider whether to condition the compensation at the outset on the following “dual protections”:
 - Negotiated by an independent special committee, and
 - Approval by a fully informed vote of the “majority of the minority” of disinterested shareholders
- BJR may not be available when controlling shareholder is heavily involved with both sides of decisions with respect to controlling shareholder compensation

Clawbacks – Advancement of Legal Fees

- Former executives in clawback litigation claiming advancement of fees in the litigation.
- Issue is whether the company's indemnification provisions in the company charter/bylaws require it to advance legal fees for the litigation.

Clawbacks – Advancement of Legal Fees (cont.)

▪ ***The Hertz Corp. v. Frissora* (D.N.J. 2019)**

- Company filed a lawsuit seeking a clawback of approximately \$70 million in incentive compensation to executives, including the CEO, CFO and General Counsel
- Executives responded by filing suit in Delaware seeking advancement of legal expenses
- Company's bylaws provide for advancement of legal fees to former corporate officers for legal claim related to actions taken in their official corporate capacity
- Company's compensation clawback provision was silent on the matter of advancement of fees
- Company argued such advancement would discourage future clawback suits and be contrary to public policy
- Court required Hertz to advance legal fees to the defendants

Clawbacks – Advancement of Legal Fees (cont.)

▪ **Barnes & Noble Clawback Litigation**

- In May 2019 a federal judge ruled that the company could proceed with a counterclaim against former CEO for alleged misconduct and “disloyal” behavior but required that the company advance the CEO’s legal expenses

Clawbacks – Takeaways

- Companies should consider whether their charter/bylaws and other agreements creating indemnification and advancement obligations reflect their intentions, including in clawback litigation
- Clawback policies could address advancement, although consider whether the clawback policy would override charter/bylaws or indemnification agreements

Director Compensation Litigation

- Delaware applies the entire fairness standard in reviewing challenges to discretionary director compensation (*Investors Bancorp* case – December 13, 2017)
 - Under the entire fairness standard, directors have the burden of proving that their self-interested actions were entirely fair to the company (both in amount and process)
 - Entire fairness standard imposes a heavy burden on directors (cannot support a motion to dismiss or likely even a motion for summary judgment)
 - In practice, the company is forced to settle unless it is prepared to engage in expensive, time-consuming, distracting and embarrassing litigation, and a trial on the merits

Director Compensation Litigation (cont.)

- Business Judgment Rule (BJR) standard is the presumption that the Board acted in good faith and in the best interests of shareholders
- Under *Investors Bancorp*, to have the BJR apply to director compensation decisions, director equity awards approved by shareholders must be “specific” as to amounts and terms
- BJR standard for shareholder ratification of director compensation is available only in two circumstances:
 - shareholders approve specific director compensation awards
 - When the plan is self-executing (fixed amounts and fixed criteria/automatic formulaic grants)

Director Compensation Litigation (cont.)

- Plaintiffs lawyers are making fairly frequent claims relating to director compensation. Many cases have settled and required some or all of the following:
 - Mandatory say-on-director pay
 - Proxy disclosure of process for determining director compensation
 - Proxy disclosure of process for identifying peer group members
 - Mandatory director stock ownership guidelines
 - Pay plaintiffs' legal fees

ISS and Director Compensation

- Starting in 2020, ISS will begin recommending against board members responsible for non-employee director pay if there is a pattern of “excessive” pay over two or more years without a compelling rationale
 - Pay outliers will be those directors whose pay exceeds the top 2-3% of all comparable directors (based on index and industry median)
 - If director pay is determined to be an outlier, ISS will perform a qualitative test to analyze factors that may mitigate concerns and disclosure

Director Compensation - Best Practices

- Consider having shareholders approve formulaic grants for directors with limited discretion
- Consider setting a “meaningful” limit on director compensation and denominating compensation in dollars rather than in number of shares
- Establish a robust process for evaluating and approving director compensation, including
 - Benchmarking against an appropriate and carefully constructed peer group
 - Receiving advice from a compensation expert
 - Separating director compensation decisions from executive compensation decisions, including having decisions made at separate meetings
 - Annually reviewing director compensation
 - Seeking frequent shareholder re-approval

Director Compensation - Takeaways

- Proxy disclosure
 - Include a thorough description of the process for determining director compensation, including compensation rationale, components and benchmarking

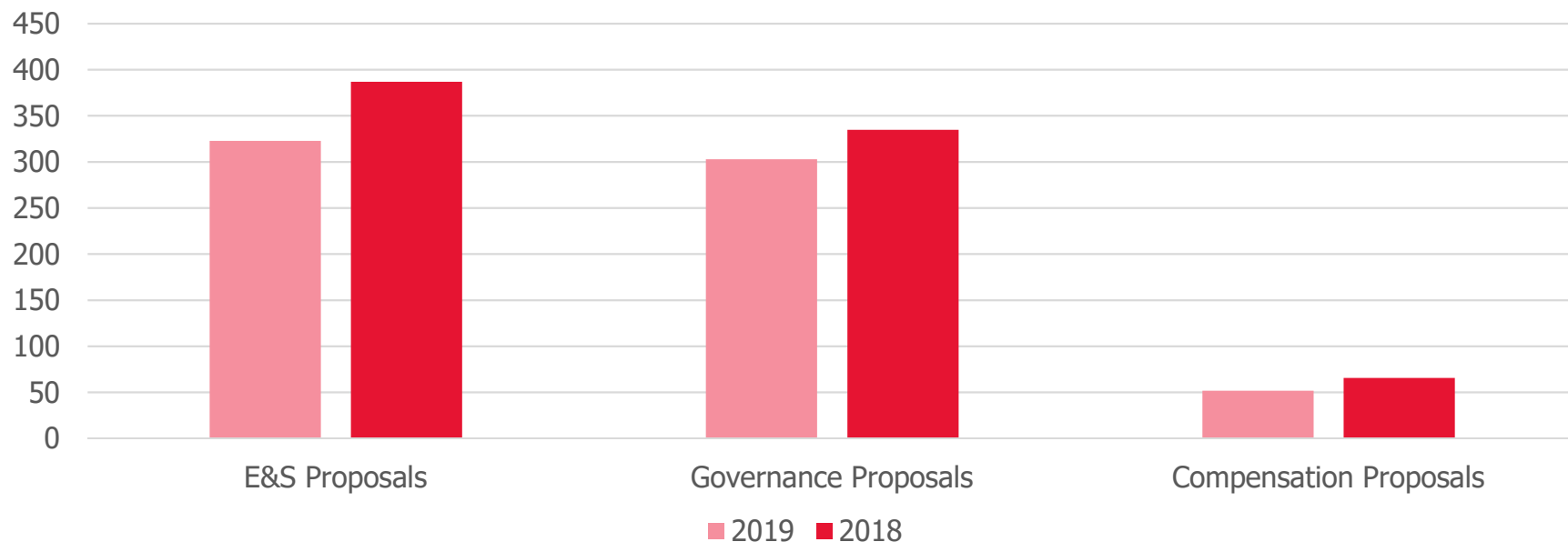
2019 SHAREHOLDER PROPOSALS

2019 Shareholder Proposal Trends

- We saw a reduction in total number of proposals submitted in 2019 as compared to 2018, as well as a general reduction in the number of proposals that went to a vote
 - Exception – slightly more E&S proposals went to shareholder vote in 2019 than 2018
 - E&S shareholder proposals continued to gain momentum in 2019, receiving average support of 28% and with nine proposals passing
 - A record number of E&S proposals also were withdrawn, indicating that companies are more willing to engage with proponents on these topics
- Additionally, more shareholder proposals ultimately passed (*i.e.*, received a majority of votes cast) in 2019 than 2018, which included proposals relating to:
 - Adoption of majority vote standard; and
 - Elimination of supermajority voting thresholds

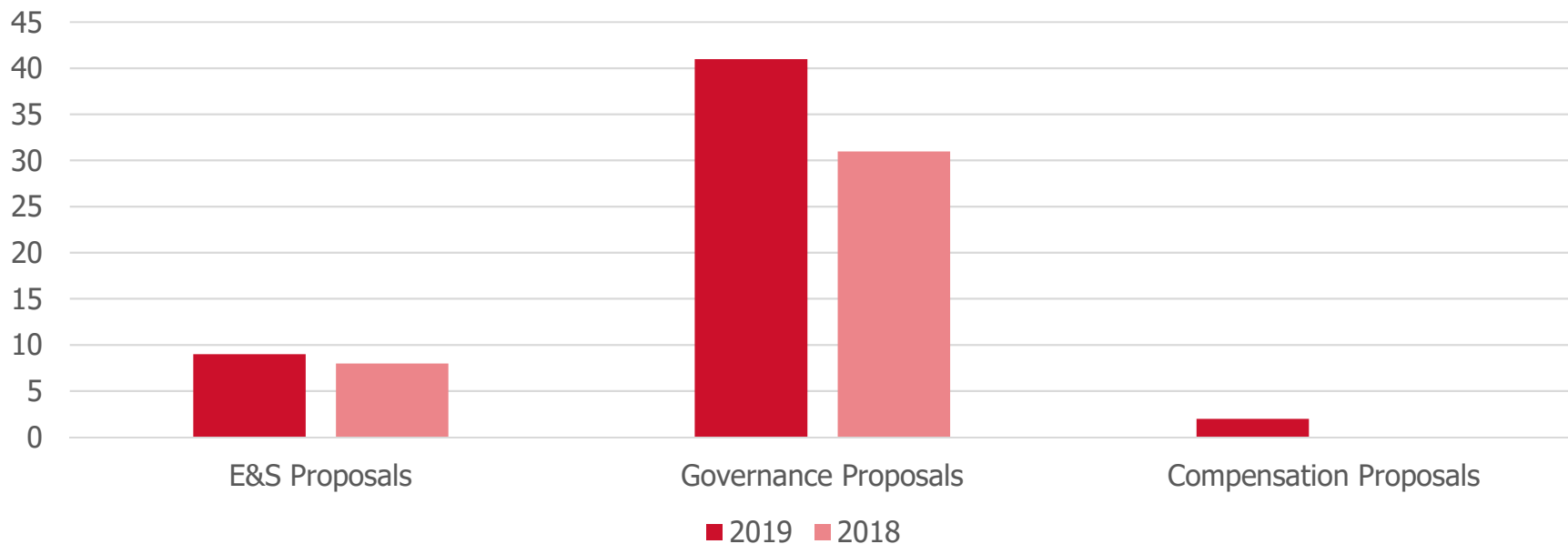
2019 Shareholder Proposal Trends (cont.)

Year-Over-Year Comparison in Number of Proposals Submitted



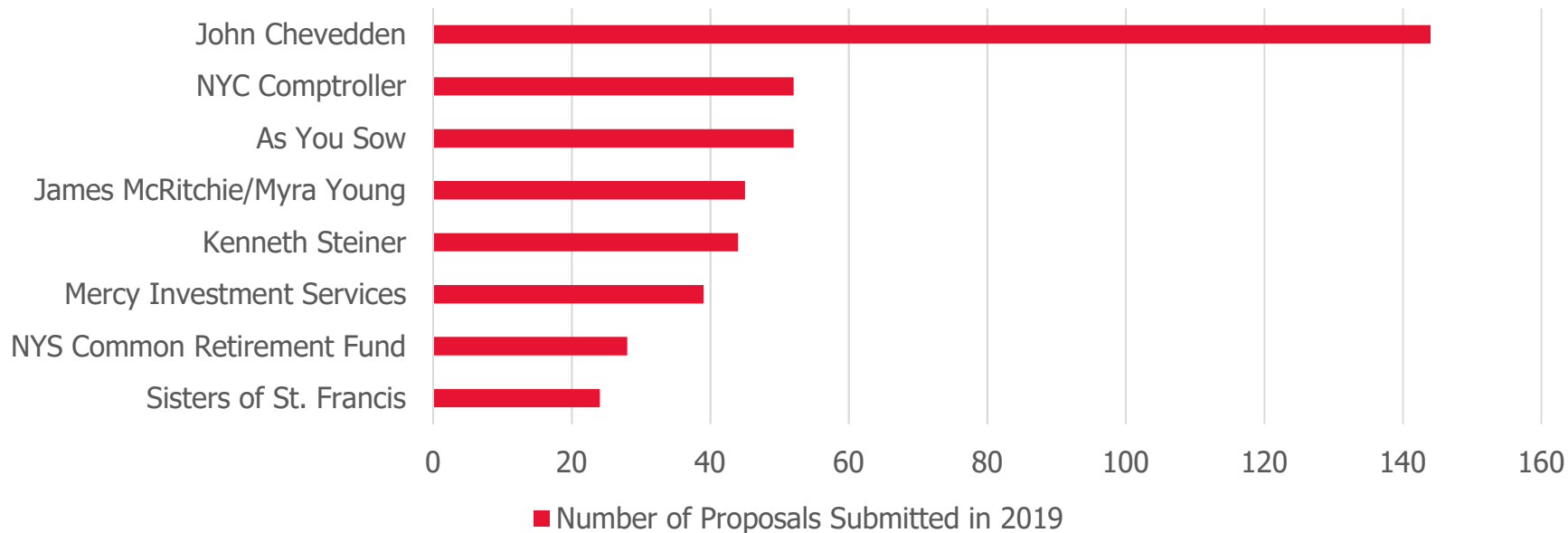
2019 Shareholder Proposal Trends (cont.)

Year-Over-Year Comparison in Proposal Passage Rates



2019 Shareholder Proposal Trends (cont.)

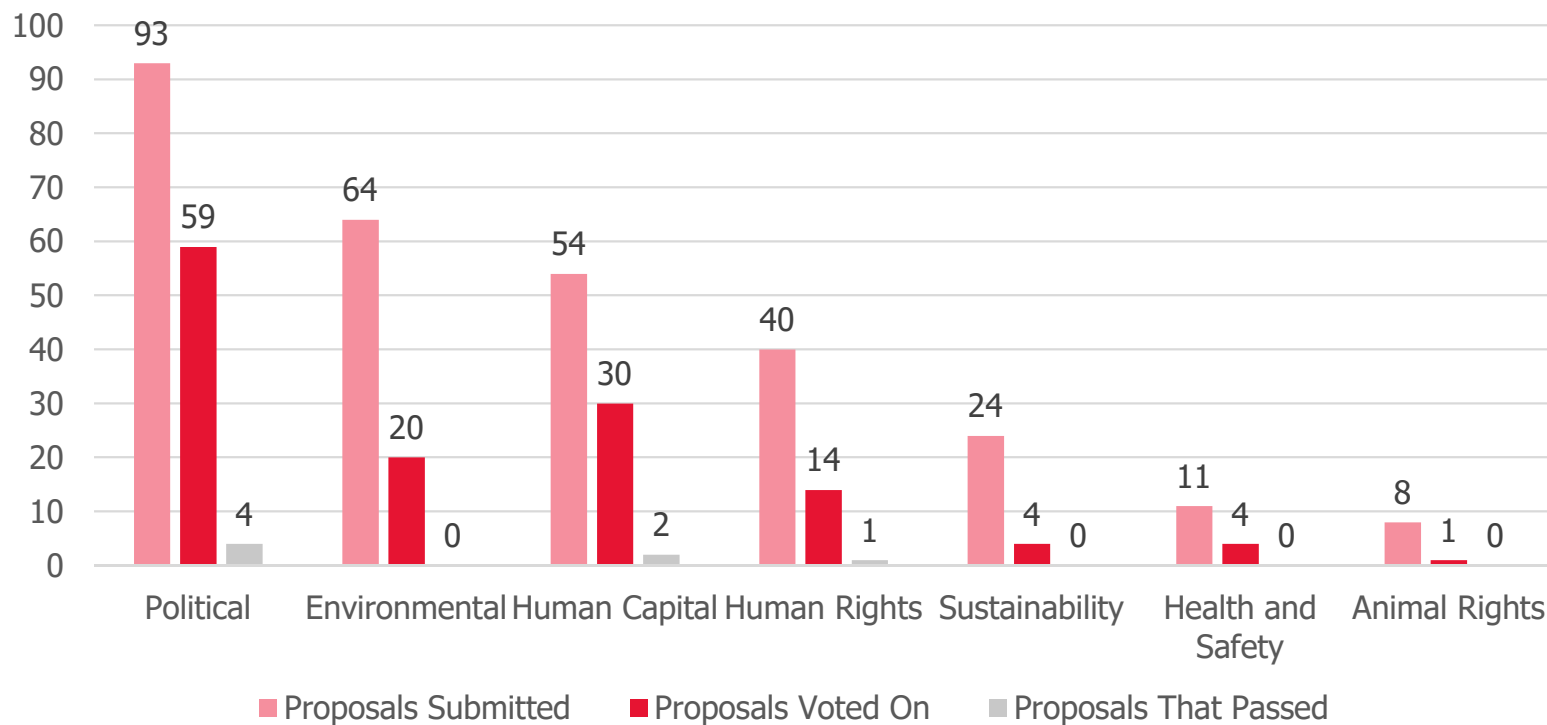
Top Proponents in 2019



Types of E&S Proposals

Proposal Subcategory	Sample Proposal Topics	Companies Receiving Such Proposals
Political	<ul style="list-style-type: none">• Requests to disclose political spending• Allow annual advisory votes on political spending	Intel, Macy's, Disney, Ford, and UPS
Environmental	<ul style="list-style-type: none">• Greenhouse gas emissions/Paris Agreement• Cost of environmental activities• Board oversight of environmental matters	Exelon, Duke Energy
Human Capital	<ul style="list-style-type: none">• Reports on gender pay gap• Reports on workplace diversity and policies• Voluntary reporting re: sexual harassment and policies re: prevention	Bank of America, Wells Fargo, Travelers, Alphabet
Governance	<ul style="list-style-type: none">• Requests that board chair be independent• Increase board diversity• Right to act by written consent• Board declassification• Proxy access	Amazon, Exxon
Compensation	<ul style="list-style-type: none">• Link executive compensation to social issues• Adoption of clawback policies	AbbVie, Johnson & Johnson

E&S Proposals – By the Numbers



Board Diversity Proposals in 2019

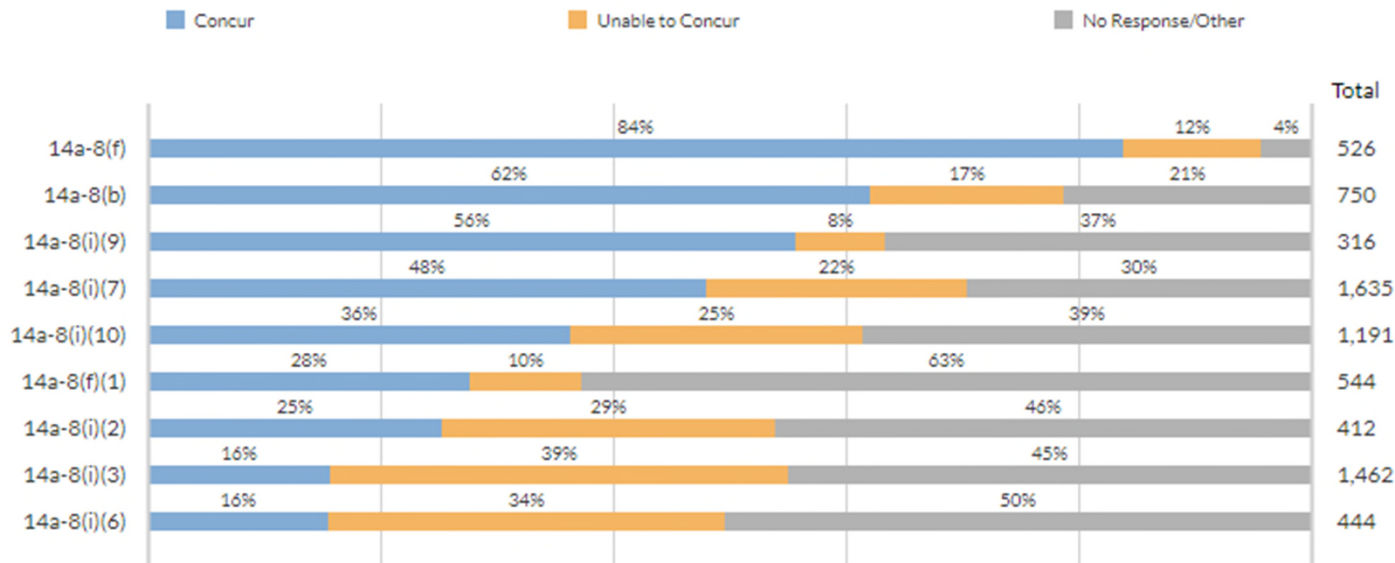
- The Nathan Cummings Foundation (Foundation) resubmitted a proposal to **Discovery, Inc.** requesting that the company apply the “Rooney Rule” concept and adopt a formalized nominating committee procedure for identifying new board candidates
 - Request was that the policy should require that the initial list of director candidates include (but need not be limited to) qualified women and minority candidates, and that any third-party consultant assisting in the identification of potential nominees be asked to include such candidates
 - Similar proposal has gone to a vote every year since 2015, and ultimately did not pass
- The Foundation also submitted a similar proposal to **CBS Corporation**, noting the company’s decision to donate departing CEO Lester Moonves’ \$120 million forfeited severance package to the Time’s Up initiative
 - Proposal ultimately was withdrawn due to the Foundation’s inability to perfect its proof of share ownership

“Anti-E&S” Proposals

- 2019 also saw several “anti-E&S” proposals go to a shareholder vote
 - These proposals advocate against investing on the basis of E&S factors
- The Free Enterprise Project, the conservative shareholder activist arm of the National Center for Public Policy Research (NCPPr), seeks to shift companies’ board diversity efforts away from diversity based on race, gender, and other self-identified demographic characteristics, and towards “true board diversity,” defined as a nominee’s skills, experience, and ideological perspectives

No-Action Requests for 2019 Proxy Season

- Top Exclusionary Rules Requested and Success Rate



Source: Intelligize

No-Action Requests for 2019 Proxy Season (cont.)

Company	Proposal Request	Basis for Exclusion Requested	Disposition
Anadarko Petroleum Corp.	Issue a report describing how the Company plans to reduce its total contribution to climate change and align operations with the Paris Agreement goal	Rule 14a-8(i)(7) (ordinary business)	No-action relief denied; Staff found that the proposal transcends ordinary business matters and does not micromanage
Amazon.com	Issue an annual report on the environmental and social impacts of food waste generated from the Company's operations	Rule 14a-8(i)(5) (not significantly related to company's business); Rule 14a-8(i)(7) (ordinary business)	No-action relief denied; Staff unable to conclude that the information presented, including the discussion of the board's analysis on the topic, indicates that the proposal is not sufficiently significant to the company's business
Exxon Mobil	Board disclosure of each director's/nominee's gender and race/ethnicity, as well as skills, experience and attributes most relevant to the Company, in a matrix form	Rule 14a-8(i)(10) (substantial implementation)	No-action relief denied; Staff found that aggregated matrices did not provide investors with a means to evaluate an individual nominee's attributes
Johnson & Johnson	Annual report by compensation committee on the extent to which risks relating to public concerns over drug pricing programs are integrated into incentive compensation policies for senior executives	Rule 14a-8(i)(7) (ordinary business)	No-action relief denied; Staff found that the proposal transcends ordinary business matters and does not micromanage

SEC No-Action Process Changes

- On September 6th, the SEC's Division of Corporation Finance announced changes to its process for administering the Rule 14a-8 no-action process
- Although SEC staff will continue to weigh in on companies' requests to exclude a proposal, that input may consist of declining to state a view
 - Corp Fin indicated that this should not be interpreted as indicating that the proposal must be included, but only that SEC staff is not taking a position on the merits
 - Should this occur, a company may still have a valid basis to exclude the proposal, despite the staff declining to take a view
- SEC staff also may respond to some no-action requests orally
 - Will continue to issue letters where the SEC still believes such process will "provide value" - e.g., to provide "broadly applicable guidance" on Rule 14a-8 compliance
- The announcement also reinforced the SEC staff's view that companies' inclusion of a board analysis is "often useful" to its review and evaluation of a no-action request

SEC No-Action Process Changes (cont.)

- On September 19th, the Council of Institutional Investors, US SIF, the Shareholder Rights Group, Ceres, and the Interfaith Center on Corporate Responsibility sent a letter to Corp Fin Director, Bill Hinman, requesting that the Division rescind these changes
- The letter identifies a number of adverse consequences anticipated to result from the changes, including reduced transparency, predictability, and accountability; increased burden for investor-proponents, who may need to litigate to enforce the rule; and increased conflict between companies and their investors

Shareholder Proposal Trends for 2020

▪ ***Gun Safety***

- In August 2019, shareholders of **Visa, Inc.** submitted a shareholder proposal asking that Visa's board issue a report on the risks associated with "mounting public scrutiny of the role played by credit card issuers and payment networks in enabling the purchase of firearms...and the steps Visa is taking to mitigate those risks"
- The proposal cites a *New York Times* article noting that two-thirds of the deadliest mass shootings were financed with credit cards, and argues that credit card companies have an opportunity to address this by flagging suspicious purchases for authorities to investigate
- Note that Visa has submitted a request for no-action relief due to proponents' failure to provide evidentiary support for their share ownership per Rule 14a-8(b) and 14a-8(f)(1)

Shareholder Proposal Trends for 2020 (cont.)

▪ *Climate Change and Sustainability*

- Nathan Cummings Foundation has submitted a proposal to **Air Products & Chemicals, Inc.** requesting that the board issue a report on climate change mitigation strategies and evaluate options for reducing greenhouse gas emissions; the company indicated on October 14th that the proposal was withdrawn
- As You Sow has submitted a proposal to **AutoZone, Inc.** requesting that the board issue a sustainability report prepared in accordance with SASB standards, and tailored to the company's industry's material sustainability issues

▪ *Compensation and Social Issues*

- **Visa, Inc.** received a shareholder proposal requesting that Visa's compensation committee reform its executive compensation philosophy to include "social factors"
- The Visa proposal specifically identified Visa's CEO pay ratio (147:1 in 2018) as a social issue
- Visa won no-action relief on the basis of Rule 14a-8(i)(10) (substantial implementation) after noting that its compensation philosophy as disclosed in its CD&A includes tying performance goals to "strategic pillars" such as "a commitment to attract, develop and retain diverse employees"

QUESTIONS?

Erin Randolph-Williams



Of Counsel

Morgan Lewis

erin.randolph-williams@morganlewis.com

+1.215.963.5982

Morgan Lewis

Erin Randolph-Williams is part of a team that helps clients find solutions to their employee benefits–related problems. She counsels clients on employee benefits matters, including design, implementation, and administration of cash or deferred compensation arrangements, nonqualified deferred compensation plans, and executive and equity compensation arrangements. Erin negotiates employment agreements and severance arrangements for senior executives, and advises clients on all employee benefits and compensation-related aspects of mergers, acquisitions, sales and spin-offs.

Erin lectures on executive compensation and equity compensation issues for continuing legal education programs and client seminars. She has experience working with a range of clients from publicly traded Fortune 500 companies to US regional privately held startups.

Patrick Rehfield



Partner

Morgan Lewis

patrick.rehfield@morganlewis.com

+1.202.739.5640

Morgan Lewis

Patrick Rehfield focuses on matters related to executive compensation, payroll tax, and employee fringe benefits. He advises private and public companies on designing and implementing nonqualified retirement plans, equity compensation plans, and executive compensation arrangements. He also counsels publicly traded companies on reporting and compliance matters involving the SEC, with a focus on proxy and disclosure issues, executive compensation, and corporate governance. He advises public and private companies on employee benefit issues in mergers and acquisitions, including executive compensation matters for senior management.

Patrick also advises companies of all sizes on the design and implementation of employment agreements, retention agreements, and change in control agreements. He represents senior management teams in leveraged buyouts, and senior-level executives in compensation package negotiations. He has particular experience in the application of sections 162(m), 280G, and 409A of the Internal Revenue Code.

Patrick also maintains an active payroll tax and fringe benefit practice that focuses on corporate and payroll tax audits, penalty abatements, refund claims, IRS ruling requests, and multistate tax and withholding issues.

Celia A. Soehner



Partner
Morgan Lewis

celia.soehner@morganlewis.com

+1.412.560.7441

Morgan Lewis

Celia Soehner focuses her practice on advising public companies with respect to corporate governance, federal securities laws, stock exchange and executive compensation matters. She also advises clients in connection with mergers and acquisitions and capital market transactions.

Previously, Celia served for more than five years as an attorney-advisor with the US Securities and Exchange Commission (SEC) in the Division of Corporation Finance. While at the SEC, Celia worked on a number of transactional and securities compliance matters specific to large financial institutions, including bank holding companies, investment advisers and alternative investment companies.

Celia has experience with securities disclosure issues affecting initial public offerings, debt and equity offerings and mergers and acquisitions, as well as issuer reporting obligations under the Securities Exchange Act of 1934. Celia received the 2011 Chairman's Award for Excellence.

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