Morgan Lewis

GLOBAL PUBLIC COMPANY ACADEMY

2021 PROXY SEASON
A RECAP OF 2020 AND TRENDS TO WATCH

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Overview

I. Executive Compensation Hot Topics

II. Dodd-Frank Update

III. Virtual Annual Meetings

IV. ESG and HCM Proxy Disclosure Trends

V. Shareholder Proposals

EXECUTIVE COMPENSATION HOT TOPICS

Overview of Hot Topics

- Say-on-Pay
- Glass Lewis and ISS Compensation Updates
- COVID-19–Related Compensation Disclosures
- COVID-19–Related Perquisites
- Equity Plan Approval

Say-on-Pay

- Say-on-Pay (SOP) vote in 2020 proxy season
  - The vast majority of companies "passed" SOP
    - Approximately 98% of S&P 500 companies and Russell 3000 companies received majority support for SOP
  - Reasons for failure include:
    - Modification of performance targets; targets that are not sufficiently rigorous
    - Lack of quantifiable performance metrics
    - Payment of cash severance on retirement in lieu of forfeited equity
    - Mega-grants covering current and future years without adequate rationale

ISS Compensation Policies

- Starting in 2020, ISS began recommending against board members who are responsible for nonemployee director pay if there is a pattern of excessive pay over two or more years without a compelling rationale
  - Pay outliers will generally be those directors whose pay exceeds the top 2% 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
- Benchmarking and fulsome director compensation disclosure is important
- The following circumstances, if adequately explained, will typically mitigate ISS concern:
  - One-time onboarding grants for new directors
  - Payments related to corporate transactions or special circumstances (such as special committee service)
  - Payments in consideration of specialized scientific expertise

ISS Compensation Policies

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

Glass Lewis Compensation Policies

- Responsiveness to Low Support for Say-on-Pay
  - Low support equates to an opposition of 20% or more
    - Expects "robust disclosure of engagement activities and specific changes made in response to shareholder feedback"
    - Absent such disclosure, "may consider recommending against the upcoming say-on-pay proposal"
    - Appropriate responses to such low shareholder support include:
      - Engaging with large shareholders to identify concerns
      - Where reasonable, implementing changes that directly address those concerns within the company's compensation program

Glass Lewis Compensation Policies

- Contractual Payments
  - In evaluating SOP proposals, generally disfavor contractual agreements that excessively favor an executive, including:
    - Excessive severance payments
    - New or renewed single-trigger change-in-control arrangements
    - Excessive or inadequately explained sign-on arrangements
    - Multiyear guaranteed awards
  - Also disfavor the extension of such entitlements through renewed or revised employment agreements

Glass Lewis Compensation Policies

- Other Compensation Matters – Clarifications in Policy
  - Glass Lewis will review any significant changes or modifications, including post–fiscal year end changes and one-time awards, particularly where the changes touch upon issues that are material to Glass Lewis recommendations
  - If a company has lowered short-term incentive plan performance targets mid-year, Glass Lewis expects the company to provide a robust discussion of why such decision was necessary
  - Excessively broad definitions of "change in control" in employment agreements are potentially problematic, as they may lead to situations in which executives receive additional compensation where no meaningful change in status or duties has occurred

COVID-19–Related Compensation Disclosures

- **ISS position**
  - Last year, ISS indicated that it expected that many boards would materially change the performance metrics, goals, or targets used in short-term compensation plans in response to the current market situation.
  - ISS encourages companies to provide clearly articulated, contemporaneous disclosure of the rationale for adjusting bonuses and performance metrics, as such disclosures will provide shareholders with greater context for the board's rationale and the circumstances in which the changes were made.
  - ISS expects an increasing number of one-time grant-of-retention awards in light of COVID-19 and emphasizes that companies should clearly disclose the rationale for such awards (including magnitude and structure). Boilerplate "retention concerns" language will not be looked at favorably.

COVID-19–Related Compensation Disclosures

- **Glass Lewis position:**
  - Approval of bonus payouts will depend on the company's prospects and current situation. Glass Lewis sets out four scenarios with respect to how compensation arrangements may be affected based on the company's financial situation:
    - Company "on life support": Glass Lewis expects no bonus (or a nominal bonus) in this situation. Forward-looking retention arrangements may be approved.
    - Negatively affected performance: Limit annual bonus payments. Reconsider the vesting terms based on nonfinancial metrics that could result in sizable payouts.
    - Outperformed peers, but objectively negative results: Any upward adjustments to pay for relative outperformance will be scrutinized.
    - Strong performance both absolutely and relatively: For those companies that gained unexpected windfalls due to COVID-19, better to pull back a bonus from stretch or maximum levels.

COVID-19–Related Compensation Disclosures

- Adjustment of performance goals in long-term incentives
  - **ISS position:**
    - ISS does not support changes to long-term compensation plans in the middle of a performance period. ISS will review any such changes on a case-by-case basis. If the compensation committees decide to alter the structures of long-term plans in light of the new economic environment due to COVID-19, ISS will assess such structural changes under its existing policy frameworks.
    - ISS's expected scrutiny means that it is even more important to maintain proper documentation and disclosure.

COVID-19–Related Compensation Disclosures

- Adjustment of performance goals in long-term incentives
  - **Glass Lewis position:**
    - What is reasonable will vary by company-specific circumstances.
    - Glass Lewis will take a pragmatic approach to voting recommendations.
    - Glass Lewis would be receptive to modifying the performance range between threshold and stretch or reducing the variability of pay (if proper justification is provided).

SEC Guidance on COVID-19–Related Perquisites

- In September 2020, the SEC Staff issued a new CDI on how to analyze COVID-19–related benefits for purposes of determining whether such benefits should be treated as perquisites
- The two-step analysis articulated in Release 33-8732A continues to apply:
  - An item is not a perquisite or personal benefit if it is ***integrally and directly related*** to the performance of the executive's duties
  - Otherwise, an item that confers a direct or indirect benefit and that has a personal aspect, without regard to whether it may be provided for some business reason or for the convenience of the company, is a perquisite or personal benefit unless it is generally available on a nondiscriminatory basis to all employees

SEC Guidance on COVID-19–Related Perquisites

- The SEC guidance indicates that an item that may have been considered a perquisite or personal benefit in the past may not be considered as such in the context of COVID-19
- The SEC staff provided, as an example, that enhanced technology needed to make an executive officer's home his or her primary workplace upon imposition of local stay-at-home orders would generally not be a perquisite or personal benefit
- Conversely, things such as "new health-related or personal transportation benefits" to the executive, if they are not integrally and directly related to the performance of the executive's duties, may be perquisites or personal benefits, unless they are generally available to all employees

Equity Plans

- The vast majority of companies that put equity plans up for shareholder approval saw success in 2020
- For 2021, the passing score for the S&P 500 Equity Plan Score Card model will increase from 55 points to 57 points, and the passing score for the Russell 3000 model will increase from 53 points to 55 points
  - This may reduce the number of shares that will be approved through the ISS scorecard

ISS Equity Plan Scorecard

- ISS considers the following three main categories in assessing omnibus equity plans:
  - Plan cost (i.e., dilution and overhang)
  - Plan features (i.e., quality of disclosure around vesting upon a change in control, liberal share recycling, lack of minimum vesting period for grants, or dividends payable prior to award vesting)
  - Grant practices (i.e., burn rate relative to peer companies, or sufficiency of a clawback policy)
- For plan provisions such as an evergreen (automatic share replenishment) feature, option repricing, or buyout without shareholder approval, a liberal change-in-control definition will be an automatic "overriding" factor, resulting in an ISS recommendation against the equity plan

ISS Plan Equity Scorecard

- 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)

DODD-FRANK UPDATE

Proposed Rulemaking

- **Clawbacks** (Rule Proposed in July 2015)
  - Proposed rule requires public companies to adopt, disclose, and comply with a written policy to recoup incentive-based compensation in the event of an accounting restatement due to material noncompliance with any financial reporting requirement
  - Applies to any compensation granted, earned, or vested, based in whole or in part on any financial reporting measure
  - Covers any current or former executive officer who received erroneously awarded incentive-based compensation
  - On June 30, 2020 the Office of Information and Regulatory Affairs published the new Spring Regulatory Flexibility Act Agenda; the second item on the SEC's short-term agenda was finalization of the clawback requirements

Proposed Rulemaking

- **Pay-for-Performance** (Rule Proposed in April 2015)
  - Proposed rules require public companies to disclose information in their proxy statements showing the relationship between executive compensation actually paid and the companies' financial performance (based on total shareholder return of the companies and total shareholder return for the companies' peer groups)

Proposed Rulemaking

- **Incentive Compensation for Financial Institutions** (Rule Proposed in April 2016)
- Proposed rules impose significant, detailed new requirements on incentive compensation provided by financial institutions
  - Most stringent requirements for senior executive officers and "significant risk-takers"
  - Subject incentive compensation to deferral, forfeiture, downward adjustment, and clawback requirements
  - Periods vary based on an individual's role and the size of the financial institution, but under the proposed rules senior executive officers of the largest financial institutions will be required to have 60% of their incentive pay at risk for up to 11 years

VIRTUAL ANNUAL MEETINGS

Surge in Virtual Annual Meetings in 2020

- The number of public companies holding virtual annual meetings skyrocketed due to the COVID-19 pandemic
  - Broadridge alone hosted nearly 1,500 virtual annual meetings in 2020, as compared to approximately 250 virtual meetings in 2019
- 193 of the virtual annual meetings held included shareholder proposals; these virtual meetings had higher shareholder participation and engagement
  - Higher attendance and voting rates
  - Shareholders asked more questions
  - Lasted nearly twice as long

Virtual Annual Meetings and Shareholder Proposals

	VSMs with shareholder proposals	VSMs without shareholder proposals
Number of VSMs	193	1,301
Average number of attendees	146	37
Average number of shareholders that voted on proxy items at each meeting (versus voting in advance)	14	2
Average number of shareholder questions	19	2
Number of meetings where questions were submitted in advance	25% (48 meetings)	8% (106 meetings)
Average meeting duration	34 minutes	18 minutes

Source: *Data applies to meetings hosted on Broadridge's platform.* Broadridge and PwC, *ProxyPulse: 2020 Proxy Season Review*, October 2020.

Challenges of Virtual Meetings in 2020

- Technology Issues:
  - Impacted shareholder participation
  - Problems with joining and authentication
  - Login difficulties
- Question Submission and Selection Practices:
  - Some companies limited questions to those submitted in advance of the meetings
  - Certain investors questioned whether companies were selectively answering questions or limiting the ability to ask questions live
- Limitation on Shareholder Proposal Presentations:
  - In some cases, limitations were placed on the process for shareholders to present their proposals

Virtual Annual Meetings in 2021

- With the uncertainty of COVID-19, virtual annual meetings are most likely here to stay for 2021
- However, unlike in 2020, companies have more time to plan, prepare, and iron out the logistics for their 2021 virtual annual meetings
  - This will enable companies to reevaluate and implement additional preferences that were not possible given the timing of the requisite transition to a virtual-meeting platform in 2020

State Corporate Law and Governing Documents

- Switching to a virtual annual meeting begins by considering the laws of the state in which a company is incorporated and reviewing the company's governance documents
  – The majority of states, including Delaware, permit companies to hold virtual-only meetings
- In 2020, many of the states that otherwise would have required an in-person meeting or at least an in-person component (i.e., a hybrid meeting) issued executive orders and/or amended the governing statutes to provide relief by permitting virtual meetings
- However, the status of this relief for 2021 annual meetings is uncertain
  – New York corporations are permitted to hold virtual meetings only for as long as the current state of emergency remains in place
  – New Jersey corporations are allowed to host virtual-only shareholder meetings only when the governor has declared a state of emergency

SEC Staff Guidance

- The staff of the SEC's Division of Corporation Finance (Staff) issued guidance early in the 2020 proxy season:
  - "disclose clear directions as to the logistical details of the [meeting], including how shareholders can remotely access, participate in, and vote at such meeting"
- Additionally, the guidance addressed how to disclose changes to the date, time, or location of a meeting (i.e., from in-person to virtual meeting)
- The staff urged companies to provide proponents of shareholder proposals or their representatives "with the ability to present their proposals through alternative means, such as by phone, during the 2020 proxy season"

Proxy Advisory Firm and Investor Group Perspectives

- During the 2020 proxy season, both ISS and Glass Lewis issued guidance in support of virtual meetings during the COVID-19 pandemic
- Glass Lewis, however, stated that for virtual meetings in future years it expects companies to provide "robust" proxy disclosures regarding shareholders' ability to participate in the meetings
- In its 2021 proxy voting guidelines, ISS adopted a new policy of generally recommending voting in favor of management proposals to allow virtual meetings, provided that the proposals do not preclude in-person meetings

Virtual Meeting Service Providers and Logistics

- Companies should secure meeting dates early with virtual-meeting service providers
- Discuss optionality and use of platform, specifically with respect to how to handle Q&A sessions
  - Consider whether to permit questions submitted in advance
  - Consider how questions will be submitted
  - Consider if there will be any limitations on shareholder questions

Virtual Meeting Service Providers and Logistics

- Audio vs. Video:
  - While the overwhelming majority of 2020 virtual meetings were audio-only (as opposed to video), some companies received pushback from shareholders who wanted to be able to see the board and management during the meeting
- Plan to Disclose Fulsome Details (including how Q&A sessions will be handled) in the Proxy Statement
  - Prominent and clear instructions on how to attend, vote, and ask questions
  - Have the service provider review and sign off on the disclosure
  - Rationale for hosting a virtual meeting
- Technical Support
  - Have a help line or online chat feature to assist shareholders as needed at each step of the login process and meeting participation

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TR2020S

ESG AND HCM PROXY DISCLOSURE TRENDS

Environmental, Social and Governance (ESG) Proxy Disclosure

- "Environmental, Social and Goverance" (ESG) includes disclosure about environmental, sustainability, community engagement, diversity/human capital, and other corporate governance issues
- While disclosure is not necessarily required, many US public companies currently highlight their ESG oversight frameworks or recent ESG achievements in their proxy statements, including ESG expertise represented on the board or executive team
- In 2020, ESG disclosure in proxy statements continued to increase
- Nearly 80% of Fortune 100 companies voluntarily highlighted environmental sustainability initiatives and commitments in 2020
- More and more companies are using the proxy to message (and tout) their approaches to sustainability and "good corporate citizen" initiatives over the prior year
- Proxy disclosure may include a list of environmental, sustainability, and community engagement highlights
  - e.g.: recycling initiatives, participation in climate-change information request surveys, initiatives to reduce carbon emissions, investment in local communities through charitable giving and volunteer efforts, and continuing education opportunities for rank-and-file employees

Elements of ESG Proxy Disclosure

- ESG risks and opportunities and the company's area of focus
- The governance and operations structures from a management perspective
  - Whether a committee or a specific person is responsible for developing and executing the company's ESG strategy and frequency of reporting to the board
- The role of stakeholders
  - How and how often the topic is discussed with various stakeholders
- Goal setting and progress against implementation goals
  - The company's current state, periodic milestone goals, and other long-term goals
- Links to the company's other ESG information
  - Reports or materials on the company's website

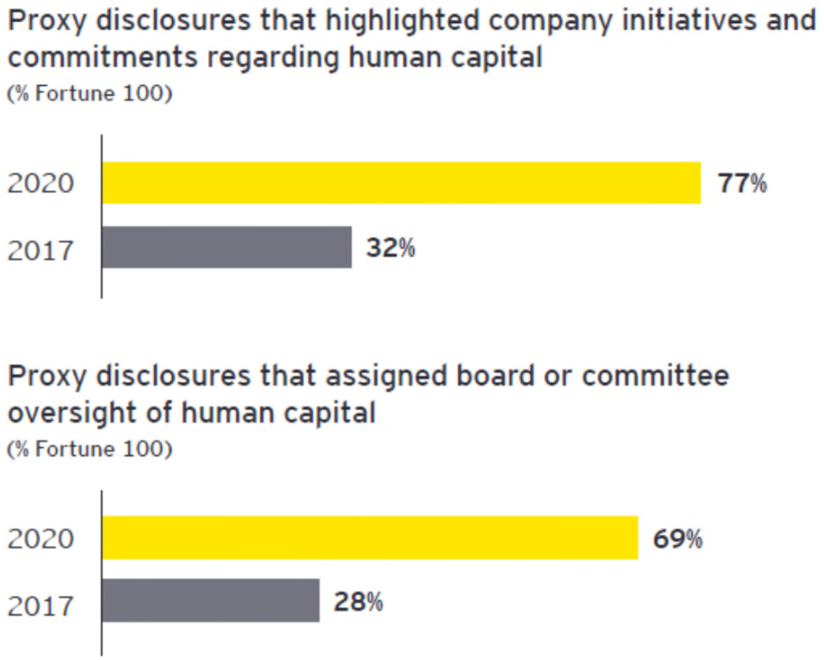
Human Capital Management (HCM)

Human Capital Resources Disclosure Now Required in Form 10-K

- Under Item 101 ("Description of Business"):
  - Description of the "registrant's human capital resources, including the number of persons employed by the registrant, and any human capital measures or objectives that the registrant focuses on in managing the business" to the extent material to an understanding of the registrant's business taken as a whole
- This disclosure requirement is largely principles-based
  - Meaning there is not a lot of guidance from the SEC
  - The adopting release did not define the term "human capital"
  - The SEC says that companies should consider disclosing "measures or objectives that address the development, attraction and retention of personnel"

HCM

- Item 101 Amendment: What does this mean for proxy disclosure?
  - The Regulation S-K amendment follows the trend of more companies voluntarily including ESG and HCM disclosures in their proxy statements and annual reports
    - Over the last three years, the percentage of Fortune 100 companies that highlighted human capital initiatives and commitments in their proxy statements more than doubled, rising from 32% in 2017 to 77% in 2020
  - While the new rule targets annual reports, we expect that this will cause many companies to add and/or expand human capital disclosures into their proxy statements



Source: Harvard Law School Forum on Corporate Governance, "Four ESG Highlights from the 2020 Proxy Season"

Top 5 HCM Topics

- Diversity:
  - Included by 63% of Fortune 100 companies
- Health, Wellness, and Safety:
  - Included by 33% of Fortune 100 companies
- Compensation:
  - Included by 37% of Fortune 100 companies
- Culture Initiatives:
  - Included by 36% of Fortune 100 companies
- Development, Skills, and Capabilities:
  - Included by 33% of Fortune 100 companies

Source: Harvard Law School Forum on Corporate Governance, "Four ESG Highlights from the 2020 Proxy Season"

SHAREHOLDER PROPOSALS: RULE CHANGES AND TRENDS

Modernization of Shareholder Proposal Rules

- On September 23, 2020, the SEC adopted a final rule amending Rule 14a-8 by:
  - Imposing heightened eligibility requirements for submitting (or resubmitting) a shareholder proposal
  - Restricting a person to only one proposal per meeting
  - Generally updating procedural requirements
- The pro-company amendments are expected to reduce the time and money spent by companies responding to shareholder proposals from low-stakes investors with targeted motives

Amendments to Rule 14a-8(b)

- The amendments to Rule 14a-8(b) update the prior requirement that a shareholder-proponent hold at least $2,000 or 1% of a company's securities for at least one year to be eligible to submit a proposal
- The amendments:
  - Eliminate the 1% threshold
  - Provide three alternative thresholds, any one of which a shareholder could satisfy to be eligible to submit a proposal:
    - Continuous ownership of at least $2,000 of the company's securities for at least three years;
    - Continuous ownership of at least $15,000 of the company's securities for at least two years; or
    - Continuous ownership of at least $25,000 of the company's securities for at least one year
- The amendments also no longer allow two or more shareholders to aggregate their securities to meet the applicable minimum ownership thresholds to submit a Rule 14a-8 proposal
  - However, shareholders continue to be permitted to co-file or co-sponsor a proposal as a group if each shareholder-proponent in the group meets an eligibility requirement

Amendments to Rule 14a-8(c)

- Previously, the rule provided that "each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting"
- As amended, the rule applies the "one-proposal" rule to "each person" rather than "each shareholder" who submits a proposal
  - That is, a shareholder-proponent is not permitted to submit one proposal in his or her own name and simultaneously serve as a representative to submit a different proposal on another shareholder's behalf for consideration at the same meeting
  - Similarly, a representative is not permitted to submit more than one proposal to be considered at the same meeting, even if the representative were to submit each proposal on behalf of a different shareholder

Amendments to Rule 14a-8(i)(12)

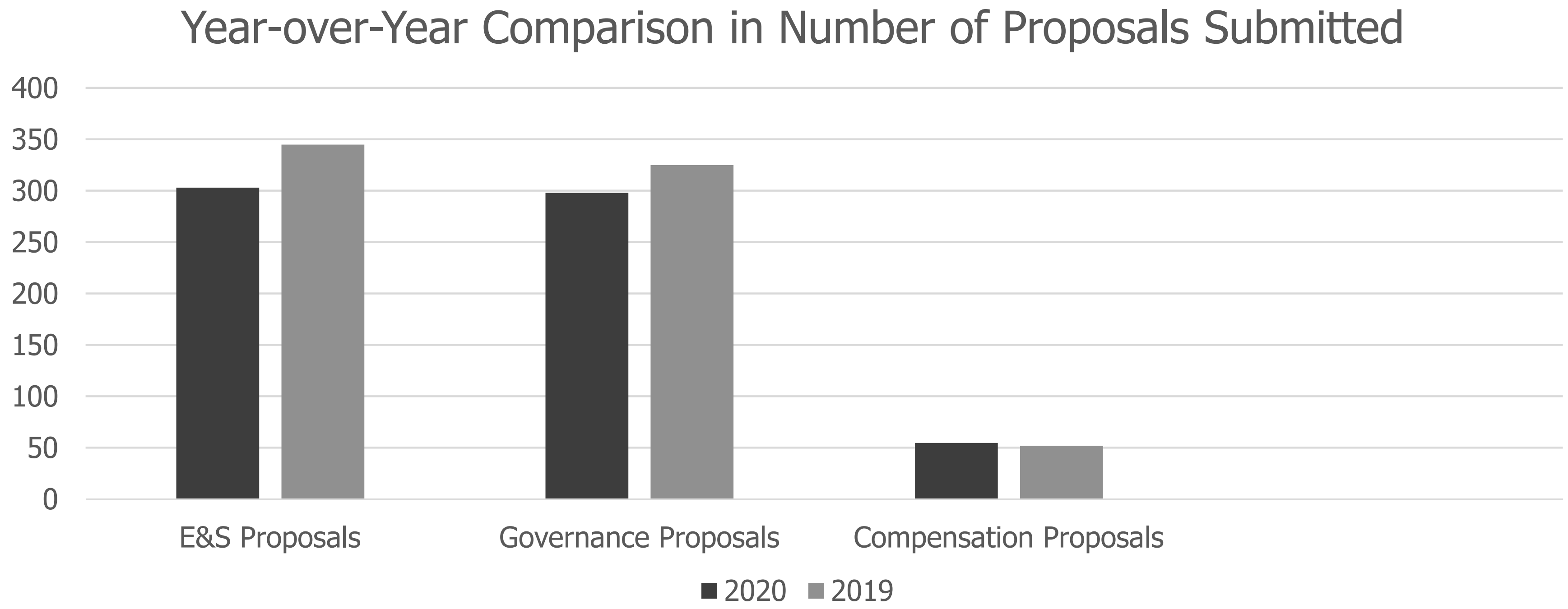
- Rule 14a-8(i)(12) provides companies with an exclusion mechanism to the extent that a proposal deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials within the preceding five years

Prior Threshold for Exclusion	New Threshold for Exclusion
Proposal received less than 3% of votes and was proposed once within the preceding five calendar years	Proposal received less than 5% of votes and was proposed once within the preceding five calendar years
Proposal received less than 6% of votes and was proposed twice within the preceding five calendar years	Proposal received less than 15% of votes and was proposed twice within the preceding five calendar years
Proposal received less than 10% of votes and was proposed three or more times within the preceding five calendar years	Proposal received less than 25% of votes and was proposed three or more times within the preceding five calendar years

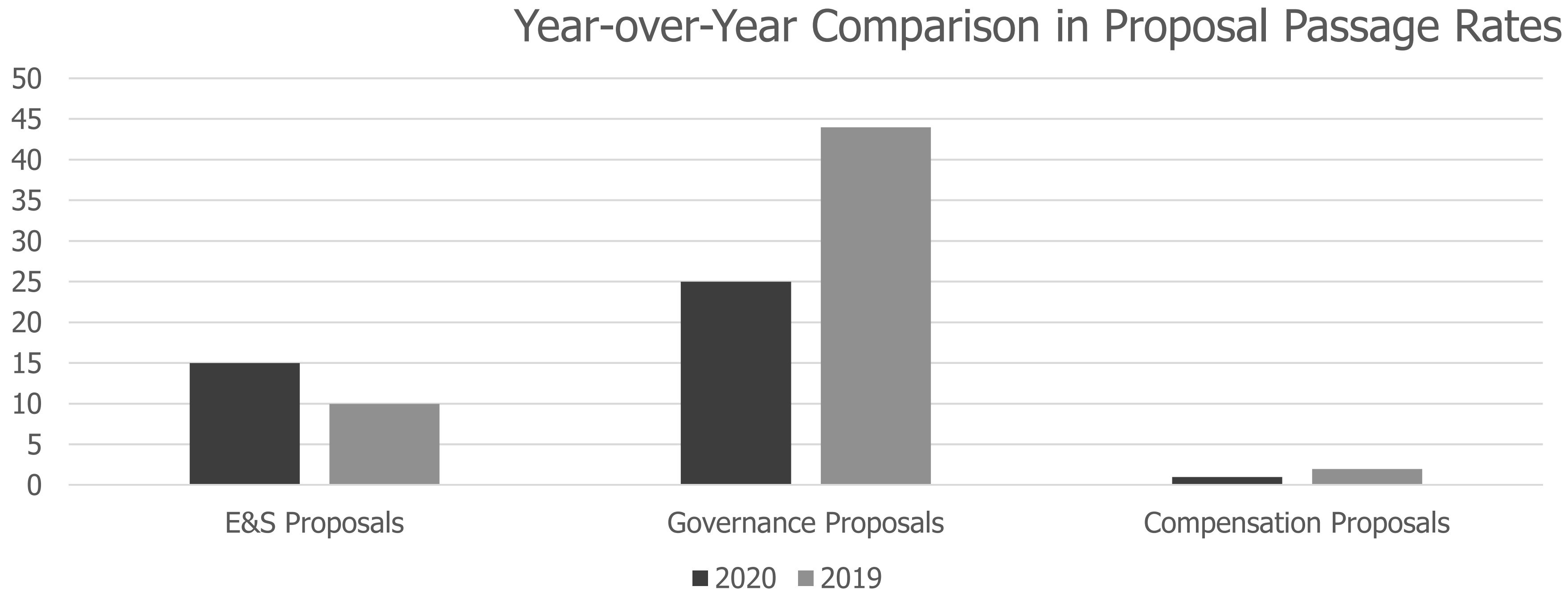
2020 Shareholder Proposal Trends

- For the first time since 2015, there was an increase in the number of shareholder proposals that went to a vote
  - In 2019, shareholders voted on 426 proposals, while in 2020 that number rose to 434
- E&S proposals continue to be the most prevalent type of shareholder proposal
  - Almost half of the submitted E&S proposals went to a vote in both 2019 and 2020, compared to about one-third in 2018
  - A record high of 15 E&S proposals passed in 2020 (despite fewer proposals overall); this marked a shift from prior years, when very few E&S proposals passed
  - However, overall shareholder support for E&S proposals leveled off at an average of 27% in 2020, on par with 2018 (26%) and 2019 (28%)

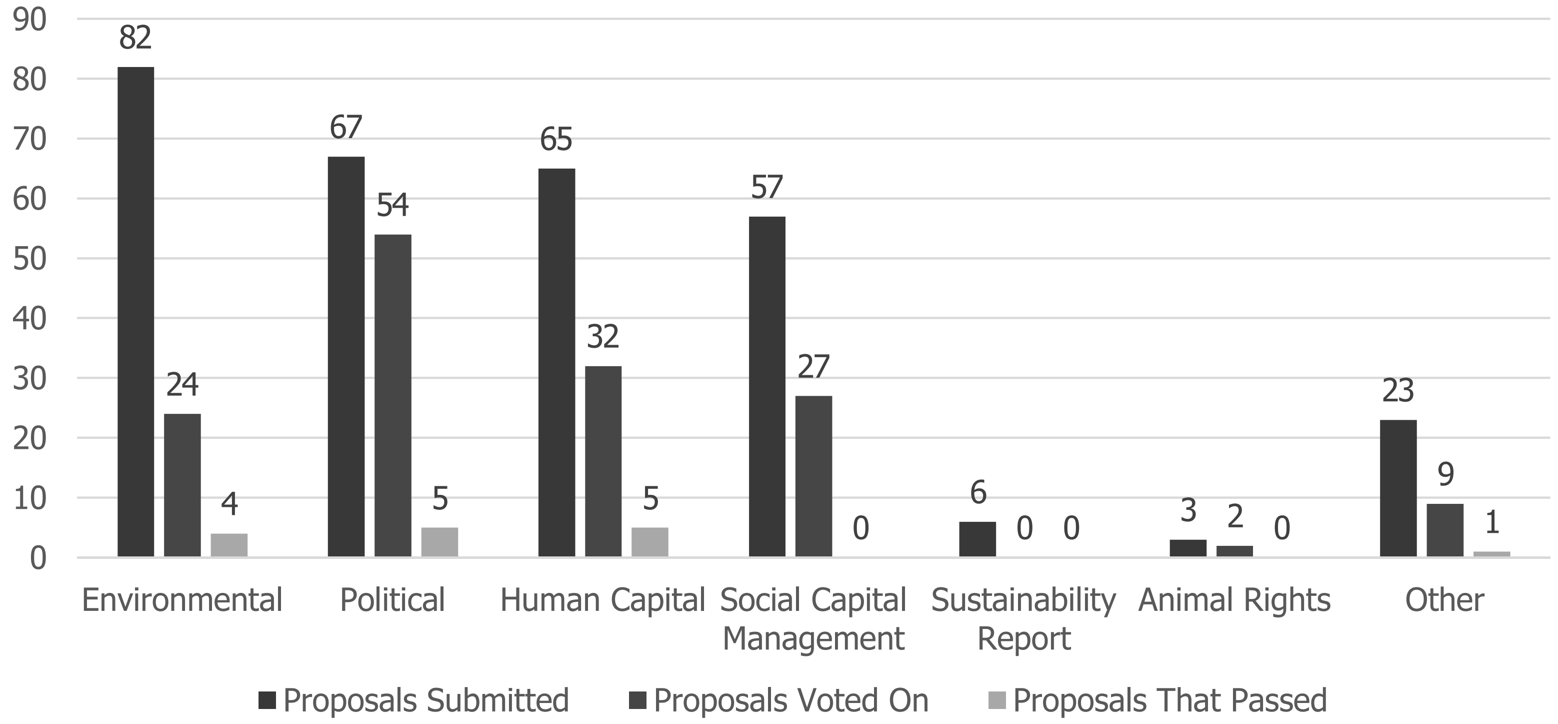
2020 Shareholder Proposal Trends



2020 Shareholder Proposal Trends



E&S Proposals – By the Numbers



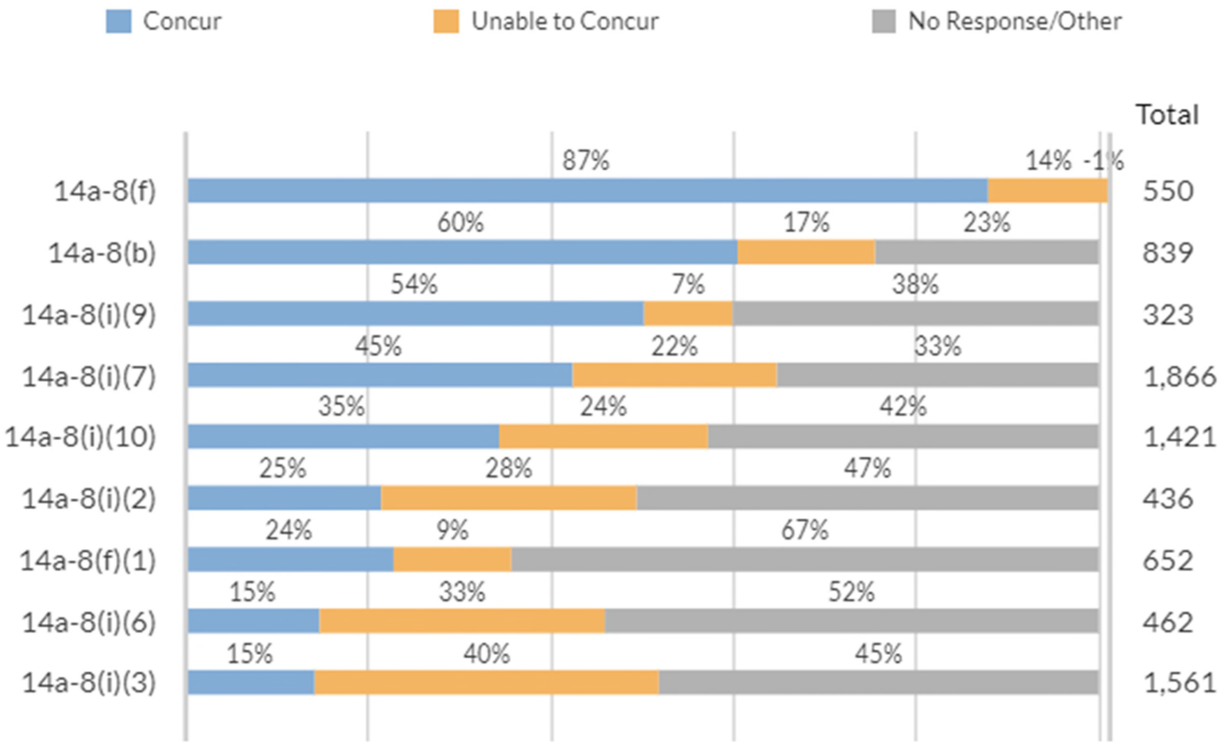
2020 Shareholder Proposal Trends

	Proposal Category/Subcategory	Last 12 Months Count	Last 12 Months % of Total	12 Months Prior Count	12 Months Prior % of Total	Change
1	Social/Discrimination and Diversity	46	11.3%	21	7.1%	100.0% ▲
2	Environmental/Climate Change	44	10.8%	29	9.3%	46.7% ▲
3	Governance/Internal Controls	32	7.9%	2	0.6%	1,500.0% ▲
4	Governance/Vote Requirements	31	7.6%	34	10.9%	-11.4% ▼
5	Governance/Compensation	31	7.4%	25	9.9%	-6.2% ▼
6	Social/Human Rights	27	6.6%	27	8.4%	0.0%
7	Social/Political and Charitable Contributions	21	5.2%	15	4.7%	40.0% ▲
8	Governance/Written Consent	20	4.9%	8	2.5%	150.0% ▲
9	Governance/Classified Boards	19	4.7%	12	3.7%	58.3% ▲
10	Governance/Proxy Access	13	3.2%	7	2.2%	85.7% ▲

Source: Intelligize

No-Action Requests for 2020 Proxy Season

Top Exclusionary Rules Requested and Success Rates



Source: Intelligize

QUESTIONS?

Biography

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Gina advises clients across the spectrum of employee benefits and executive compensation matters. Her practice encompasses designing, implementing, and administering equity, incentive compensation, nonqualified deferred compensation, employment, and severance plans and agreements for public and private companies. When clients undertake mergers, acquisitions, and other corporate transactions, she offers advice on all employee benefits and compensation-related aspects. Gina's recent work has included advising a credit ratings agency on its acquisition of a leading provider of analytical tools and data.

Gina also provided counsel to a British communications and events company in its acquisition of the entire issued and outstanding capital stock of a privately held US trade show organizer.

Biography

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Mims advises on complex executive compensation and employee benefit plan matters, including the design, negotiation, and implementation of executive compensation, equity compensation, and tax–qualified retirement plans and shareholder approval of equity plans. She counsels large publicly and privately owned businesses, including Fortune 500 enterprises, technology companies, and universities on a range of legal issues related to executive compensation governance, and employee benefit plans. Mims also represents executives in the negotiation of employment agreements and equity compensation, including in connection with transactions. She advises on benefits and executive compensation issues that arise during major corporate transactions, including mergers and acquisitions, sales, IPOs, and spinoffs.

Co-leader of the firm's Executive Compensation Task Force, Mims advises corporations and compensation committees with respect to governance issues relating to executive compensation and works with corporations and executives to design and negotiate employment agreements, severance agreements, and change of control agreements for key executives. She advises companies with respect to equity compensation plans, deferred compensation and other executive plans, and change of control agreements in preparation for sales or public offerings.

Biography

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Ali focuses her practice on securities, corporate governance, and general corporate matters focuses on counseling public companies and their boards with respect to corporate governance, federal securities, stock exchange, shareholder engagement, and executive compensation matters. Ali represents clients that include public and private companies, financial institutions, and venture capital and corporate investors and advises clients ranging from Fortune 500 companies to emerging market companies.

Ali has experience with securities disclosure issues that impact public companies' ongoing reporting obligations and proxy-related matters that impact public companies and their officers and directors. She also advises companies in connection with public capital raising transactions, including through IPOs, secondary offerings, and debt offerings.

Our Global Reach

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Latin America
Middle East
North America

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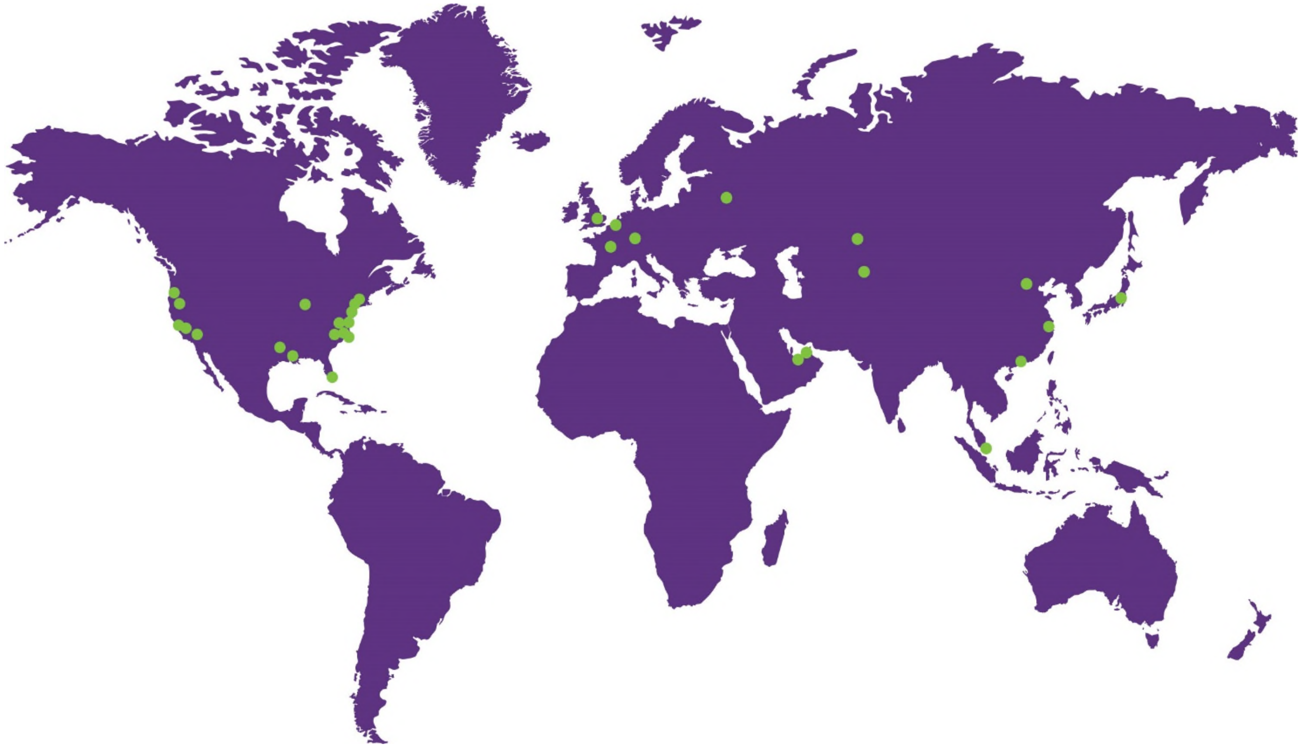

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