

**Morgan Lewis**

# 2021 ANNUAL MEETING POSTMORTEM

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

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# Overview

- I. Proxy Season Recap – A Post-Mortem of 2021
- II. Executive Compensation – Compensation Committee Considerations
- III. Shareholder Proposals – What Happened in 2021, and What's to Come

# **2021 PROXY SEASON RECAP – A POST-MORTEM OF 2021**

# Overview of 2021 Proxy Season




- The VSM Experience – Here to Stay
- Say on Pay in 2021
- COVID-Related Proxy Statement Disclosures
- Focus on ESG

# Virtual Shareholder Meetings are Here to Stay

- Prior to the onset of COVID-19, the VSM format represented less than 10% of shareholder meetings, and most commonly was utilized by small cap companies
- Where we are now –
  - Substantial majority of companies utilized VSM in 2020 and 2021
  - State legislatures are facing decisions on whether to relax historic restrictions on VSM format
    - In August, the New Jersey Business Corporation Act was amended to permit New Jersey corporations to hold any shareholder meeting remotely, eliminating the prior requirement that generally required a state of emergency in order to hold a VSM
    - In Massachusetts, the executive order that permitted Massachusetts-incorporated companies to hold VSMs expired last month, reverting to the prohibition on public companies incorporated in Massachusetts from holding annual or special shareholder meetings solely by means of remote communication

# VSM: Best Practices

- A working group comprising The Society for Corporate Governance, Council of Institutional Investors and Rutgers Center for Corporate Law and Governance has developed the following best practices:

	<ul style="list-style-type: none"><li>• Provide shareholders with detailed, prominent disclosure on how to attend the meeting and vote prior to and at the meeting</li><li>• Explain the different procedures for shareholders of record and beneficial holders, if applicable</li><li>• Disclosure if a shareholder must provide additional information in advance of the meeting and how to do so</li></ul>
	<ul style="list-style-type: none"><li>• Explain in the proxy how and when shareholders will be able to ask questions</li><li>• Clarify that a shareholder must attend as a verified shareholder to be able to ask questions</li><li>• Disclose any limits or requirements on asking questions</li><li>• Explain how the company will handle questions not answered at the annual meeting (i.e., due to timing constraints)</li></ul>
	<ul style="list-style-type: none"><li>• Coordinate with shareholder-proponents in advance of the meeting</li><li>• Communicate with proposants regarding how they will present their proposals</li></ul>

# The VSM: Best Practices (cont.)

- Prominent, “plain English” instructions in the proxy for how to attend, vote, and ask questions
- Provide option to ask questions in advance of the meeting
- Ease of accessibility and advance notice of any requisite separate control number, legal proxy, or other information a shareholder might need to enter the meeting
- Hold the meeting at a reasonable time of day across continental U.S. time zones
- Provide instructions for technical support on every page the shareholder has to go through to get into the meeting and on the main meeting page
- Post the annual report, proxy statement, rules of conduct, and agenda on the main meeting page
- Have a prominent link to the registered shareholder list
- Real-time video of board and management participants
- Real-time closed captioning
- Keep the polls open until the end of the Q&A
- Obtain contact information for shareholders asking questions
- Allow shareholder proponents to present their proposal remotely or send a pre-recorded message
- Grant shareholder proponents a minimum of three minutes “airtime”
- Give a preliminary voting report at the end of the meeting, and post the final report on the company’s website
- Announce how many shareholders attended the meeting
- Allow shareholders to ask questions live on-air
- Answer all appropriate questions that are submitted
- Post all appropriate questions on the company’s website

*Source: Harvard Law School Forum on Corporate Governance*

# Say on Pay

- As in 2020 and 2019, the vast majority of companies' Say on Pay (SoP) proposals passed.
- However, more companies failed SoP in 2021
- Average SoP levels of support also decreased year over year
  - In 2021, there was a 28% increase in the number of Russell 3000 companies that received below 50% shareholder support for SoP (55 companies in 2021 compared to 43 in 2020)
  - "Against" recommendations from ISS increased slightly
- Why?
  - Significant adjustments to executive compensation in certain instances
  - Prevalence of special/retention awards
  - Adjustments to in-flight long-term awards
  - Delaying decisions until later in the fiscal year to determine how to measure and pay out annual cash incentive compensation
  - "Make whole" adjustments to executive compensation



# Say on Pay – Things to Consider Now

- Recall that in the year following a SoP vote, the proxy advisors scrutinize companies where the SoP approvals fell below certain specified thresholds and will expect companies to address SoP in next year's proxy statement:
  - 70% approval for ISS
  - 80% for Glass Lewis
- Now is the time to think about engaging with institutional investors if SoP approval levels dipped below the above levels, or materially decreased year-over-year
- Consider how the 2022 CD&A will look and what the company will be able to point to in terms of changes made in response to a lower SoP or specific concerns raised by institutional investors

# Roadmap for Outreach/Action Plan on SoP

- Review ISS and Glass Lewis proxy reports to determine the biggest issues raised on SoP
- Review SOP vote itself and determine which shareholders did not support the SOP proposal (proxy solicitor firms can assist with this, as well as outreach)
- Decide with which shareholders the company wants to conduct outreach and the team from the company (i.e., compensation committee chair, general counsel)
- Prepare talking points based on ISS and Glass Lewis reports, any known concerns from shareholders and the prior year's proxy disclosure
  - This may include changes or proposed changes to the compensation program to assuage such concerns
- Caucus following the outreach meetings and coordinate response
  - Report to compensation committee
  - Determine plan of action for disclosure in next year's proxy
  - Consider how 2022 proxy disclosure might look in response to outreach efforts
- Particularly for companies that fell below the ISS/GL thresholds for SoP, it will be critical to address:
  - What engagement efforts were made with shareholders
  - Any changes made by the compensation committee in response to iterated concerns
  - A compelling rationale as to the compensation decisions made for 2021

# COVID-Related Disclosures: Executive Compensation

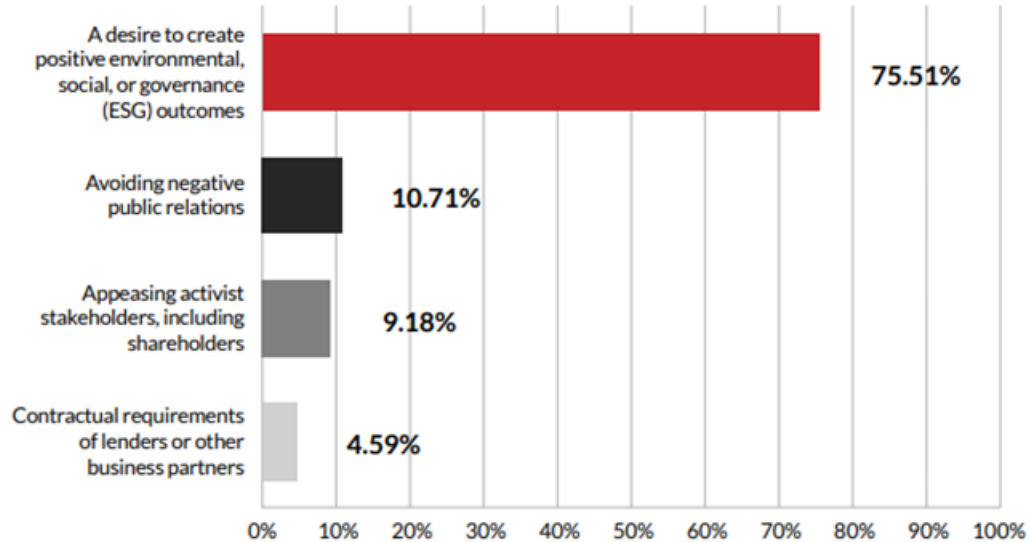
- Callouts for decisions to reduce board and executive compensation
- Changes to performance metrics and incentive programs for 2020
- Changes to compensation program for 2021
- Shifting grant dates
- Inability to set performance goals
- Use of non-GAAP metrics
- How did management respond to challenges posed by COVID
- Retention-related issues in a competitive market
- Whether, and when, companies will revert to pre-COVID compensation programs

# ESG in 2021

- Companies continue to focus efforts on ESG disclosure and reporting against a backdrop of increased scrutiny from the SEC and lack of clarity regarding new regulations and guidance
- Areas of focus –
  - Climate change
  - Human capital management (yes, even in the proxy)
  - Diversity & inclusion
  - Social initiatives
  - Community and philanthropic endeavors
  - Executive compensation ESG metrics

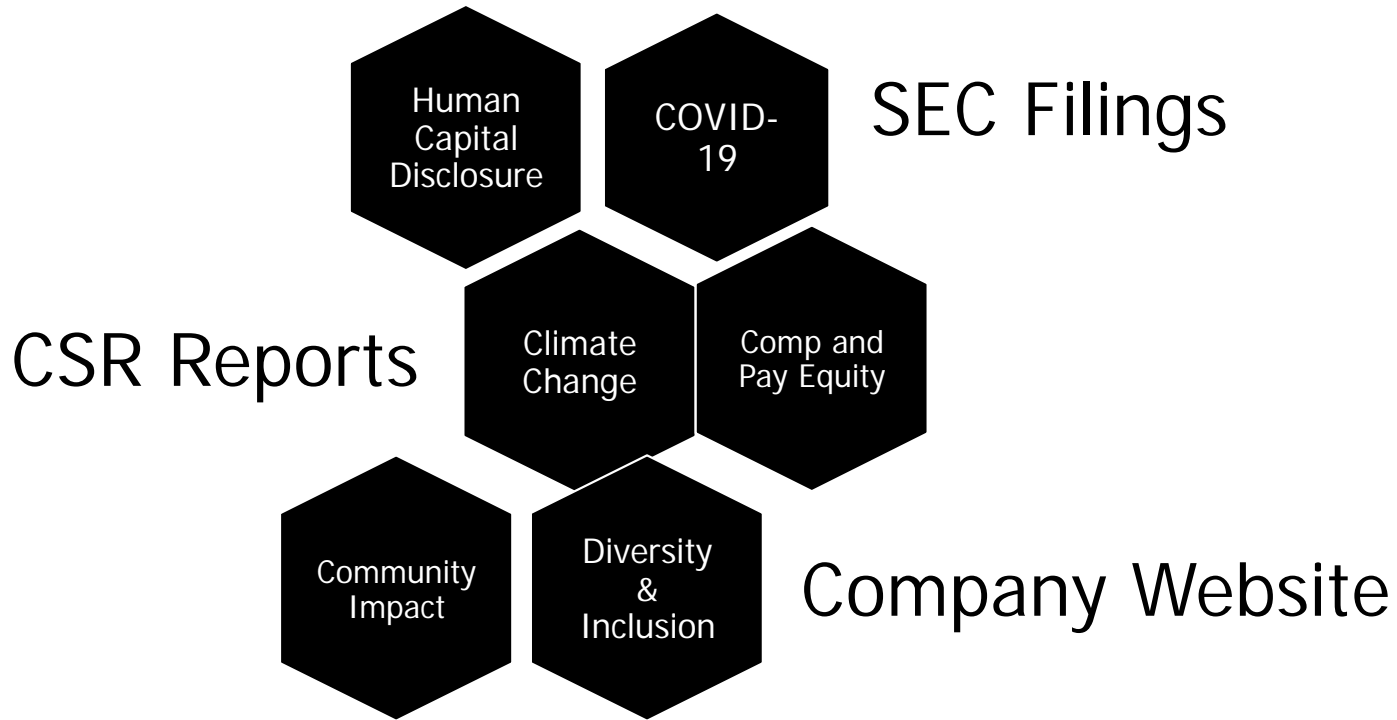
# What Drives ESG Disclosures?

What is the primary motivation behind your company's ESG initiatives?



Source: Intelligize Survey (August 2021)

# Where Do Companies Address ESG Disclosure?



# ESG Risk Management: Litigation Landscape

- An April 2021 study<sup>1</sup> states that global climate litigation has grown dramatically in recent years:
  - Between 1986 and 2020, 1,727 litigation cases were documented worldwide: 1,308 in the U.S. and 419 in other jurisdictions and regional and international courts
  - More than half of the total recorded cases have been brought since 2015
- ESG litigation to date has focused on climate change or catastrophic environmental events
- Expect to see this broaden to also include social issues, such as D&I and social conditions at supply-chain partners
- Public companies are exposed to the following types of ESG litigation:
  - Litigation focused on a company's business and operations as they relate to ESG issues
  - Litigation focused on governance
  - Litigation focused on a company's ESG disclosures
  - Litigation alleging breach of duty of care or duty of loyalty
  - Informal ESG disputes

*1. The Geneva Association, Climate Change Litigation: Insights Into the Evolving Global Landscape, April 2021*

# ESG Risk Management – Things to Consider

- Institutional investors and proxy advisory firms are focusing heavily on Board oversight of ESG and ESG risk management
- Boards should keep the following in mind:
  - Lack of measurability and reporting standards – currently, there is no equivalent of GAAP for ESG measurement and reporting
  - Litigation/activist campaigns from shareholders over alleged breach of fiduciary duties for failing to maximize profits or litigation/activist campaigns from other stakeholders (e.g., consumers/advocacy groups) over allegedly false or misleading statements concerning ESG commitments
- Increased SEC regulation (e.g., human capital) and enforcement limiting board discretion
- Increased federal and state legislation (e.g., Senator Warren's proposed Accountable Capitalism Act, California legislation mandating board diversity) limiting board discretion or creating private rights of action



# ESG Risk Management – Best Practices

- Conduct internal audits of ESG-related disclosures, and ensure that all statements can be backed up
- For particularly material ESG disclosures, consider third-party verification
- Consider what frameworks are currently used for reporting, and what frameworks may be used in the future – and prepare accordingly
- Use forward-looking statements where appropriate
- Know the difference between disclosing commitments/targets and stating aspirational goals

## ESG Risk Management (cont.)

- In March 2021, a U.S. District Court (N.D. Cal.) granted Facebook's motion to dismiss a lawsuit filed against it alleging that Facebook made misleading statements about diversity
- The plaintiffs' lawyers argued that statements in the 2019 and 2020 proxy statements — that Facebook is committed to diversity — were materially false
- The court found that the plaintiff did not plausibly plead a materially false statement because, among other matters, the aspirational assertions in the proxy statements were non-actionable
- The court's opinion provided a summary of whether statements in a proxy or other SEC filings are in the nature of "non-actionable puffery or aspirational," such as:
  - Statements to commit to certain "shared values" are not capable of objective verification
  - Statements about commitment to a "diverse workforce" and "an inclusive and positive working environment" were "immaterial puffery"
  - Commitment to ethical practices is "inherently aspirational and hence immaterial"
  - Commitment to highest standards of governance is "quintessential, non-actionable puffery"

# How Else Should Companies Think About ESG Disclosure?



## Industry

What specific ESG disclosures are germane to our industry?



## Peer Group

What are our peers doing?



## Level of Stakeholder Engagement

Have we received feedback from shareholders, employees, board members, activists, proxy advisors, or other institutions?

# COVID-Related Proxy Disclosure: HCM and Corporate Citizenship

- **Human Capital Management**

- “Human capital management” (HCM) includes (i) diversity and inclusion; (ii) corporate culture and values; (iii) employee development, wellbeing and engagement; and (iv) compensation and non-monetary benefits
- Interplay with COVID:
  - Addressing personnel decisions
  - Employee engagement, particularly in the time of COVID

- **Corporate Citizenship**

- Encompasses social impact, sustainability efforts, general corporate responsibility initiatives
- Interplay with COVID –
  - How the company has supported its community during the pandemic
  - Letter from chair/CEO

# 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 and Inclusion – ISS and NYC Comptroller Updates

- ISS has asked companies for disclosure of the race/ethnicity of each director and named executive officer, both on an aggregate and self-identified basis
  - Indicated that this outreach is an effort to ensure the accuracy of data in research and proxy reports
- NYC Comptroller Scott Stringer has asked companies to adopt a “Rooney Rule” diversity search policy requiring that qualified female and racially/ethnically diverse candidates be included in the pool of nominees from which directors and CEOs are selected
- NYC Comptroller also has called for companies to publicly disclose their annual EEO-1 report data in order to match their statements regarding commitments to diversity and inclusion

# Nasdaq Board Diversity Rule

- Nasdaq will require listed companies to “comply or explain” with board diversity requirements, which will require most Nasdaq-listed companies to have at least:
  - One director who self-identifies as female (regardless of the director’s designated sex at birth)
  - One director who self-identifies as an underrepresented racial or ethnic minority or LGBTQ+
- Companies must provide a board diversity matrix disclosing self-identified board diversity
- Listed companies must comply with the new Nasdaq diversity rule by the later of the below dates or the date of the company’s annual proxy statement in the same year:
  - Aug. 6, 2023\* (one director) and Aug. 6, 2025 (two directors) – Nasdaq Global Select and Nasdaq Global Market
  - Aug. 6, 2023\* (one director) and Aug. 6, 2026 (two directors) – Nasdaq Capital Market
- If a company fails to meet these goals, it must provide an explanation regarding its non-compliance by the later of 180 days from the deficiency date or the company’s next annual shareholders meeting.

*\*Later of this date or the date that company files its proxy materials*

## Diversity on Boards and More on the Nasdaq Rule

- For purposes of Rule 5605(f), “Diverse” means an individual who self identifies in one or more of the following categories: female, Underrepresented Minority or LGBTQ+
- Underrepresented Minority means any person who self-identifies as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or two or more races or ethnicities
- Unlikely that NYSE will follow suit
- Current disclosure is largely based on self-identification; note the potential for liability under the securities laws for opportunistic or unproved identifications



# Steps to Consider Taking on Board Diversity

- Add diversity questions to D&O questionnaire (ensure that these are crafted as “self-identifying” and that the respondents explicitly give permission for the information to be shared in SEC filings)
- In addition to gender and race/ethnicity questions, many companies are including questions relating to whether directors and officers self-identify as LGBTQ+, as well as other questions such as ethnic diversity and veteran status
- Most companies are not following the disclosure approach set forth by the Nasdaq rules (i.e., a Board Diversity Matrix), although around 20 companies “early adopted” this approach in 2021
- For 2021, the vast majority of companies presented their board diversity on an aggregate basis, with some opting to clarify how they determined that a certain percentage of the board was diverse

# 2022 PROXIES & BEYOND

# 2022 Proxy Season Preview

- Consider moving away from incentive plan adjustments and one-time awards
- Enhanced board diversity disclosure
  - In 2021, ISS research reports highlighted boards of companies in the Russell 3000 and S&P 1500 that lack racial and ethnic diversity (or lack of such disclosure)
  - Starting in 2022, for company boards with no apparent racial or ethnic diversity, ISS will recommend a vote against the chair of the nominating committee
  - Nasdaq board diversity rule
- Performance metrics based on non-financial ESG factors
- Continued push for more on ESG in proxies
- Proposed NYSE rule regarding how to calculate “votes cast”

# **EXECUTIVE COMPENSATION – COMPENSATION COMMITTEE CONSIDERATIONS**

# Equity Plans: Refresher on the ISS Equity Scorecard

- For the 2021 proxy season, ISS increased the threshold passing score from 55 to 57 points for its S&P 500 model and from 53 to 55 points for its Russell 3000 model.
- ISS considers the following three “pillars” in assessing omnibus equity plans:
  - 45 Points: Plan cost (i.e., dilution and overhang)
  - 38 Points: Grant practices (i.e., burn rate relative to peer companies, CEO vesting terms)
  - 17 Points: Plan features (e.g., minimum vesting periods, extent to which vesting can be accelerated on a discretionary basis, liberal share recycling, change-in-control provisions, dividends paid on unvested awards)
- Strategies when faced with a negative ISS recommendation:
  - Shareholder engagement, focusing on largest institutional holders
  - Well-drafted supplemental proxy material can be effective to rebut ISS’s position (especially if Glass Lewis has expressed support for the plan)

# Equity Plans: What Happened in 2021?

- According to ISS, equity plan proposals rose by 9.5% in 2021, in part due to SPAC activity.
  - The number of proposals continue to increase since a 2018 drop in proposals on account of the repeal of the Section 162(m) performance-based compensation exception.
- The vast majority of companies that put up equity plans for shareholder approval have seen success in 2021.
  - According to ISS, average support for equity plan proposals was 89.5% of votes cast in the 2021 proxy season, while ISS only recommended support for 71% of the proposals it analyzed.
- In the proposed plans, the prevalence of evergreen (automatic share replenishment) increased.

# Equity Plans: What's Next?

- Plan cost is the most heavily weighted pillar. With increasing equity values, ISS and Glass Lewis will likely give a positive recommendation if the share price has increased for months leading up to the proxy filing, and the value of the shares requested under the equity plan results in a low plan cost and dilution below the designated cap.
- If stock prices have been depressed in an industry or for individual companies, companies may need to include more restrictive plan features to gain more points for that pillar to offset a high plan cost.
- Equity clawback policies can help companies earn points in the grant practices pillar without reducing equity grants.
- For plan provisions such as an evergreen feature, option repricing, or buyout without shareholder approval, a liberal change-in-control definition will be an automatic “overriding” factor, resulting in an ISS recommendation against the equity plan.

# ISS Compensation Policies: Director Pay

- 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.
- Benchmarking and fulsome director compensation disclosure is important
- The following circumstances were reasons cited for pay decisions:
  - One-time onboarding grants for new directors
  - Payments related to corporate transactions or special circumstances (such as special committee service)



# ISS Compensation Policies: Severance

- ISS expects fulsome disclosure of payments made to terminating executives, stating that severance pay is not appropriate for executives who voluntarily resign or retire
  - Clear and direct disclosure about the nature of an executive's termination
    - 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

# COVID-19 Pay Actions

- Base Salary adjustments
- Annual incentive bonus structure changes
- One-time discretionary awards
- Limited adjustments to long-term incentive awards

# Incentive Compensation Trends

- Discretionary bonuses
- Decrease in option/SAR grants
- Increase in grants of restricted stock/restricted stock units
  - Performance vesting

# Legislative Proposals: Potential Tax Increases

- Increase in top tax rate to 39.6% (current 37%) for married couples with taxable income over \$450,000 (single taxpayers over \$400,000)
- Increase in top capital gains rate to 25% (current 20%)
- 3% surcharge on income over \$5 million
- Increase in the corporate tax rate up to 26.5% (current 21%)
- Increase in FICA tax rates

# CLE

- If you registered noting that you need CLE the code is **BT98UD3**. Please be sure fill out the post event survey and enter this code and save this number; you will need this to receive a Certificate of Attendance. You will be contacted within 30-60 days by our CLE administrative team.
- We will process your credits for other states where this program has been approved.
- Questions? Please email Sarah Trousdale at [sarah.trousdale@morganlewis.com](mailto:sarah.trousdale@morganlewis.com)

# SHAREHOLDER PROPOSALS – WHAT HAPPENED IN 2021, AND WHAT'S TO COME

# Shareholder Proposal Trends in 2021

- There has been an increase in the number of overall shareholder proposals in 2021 compared to 2020, both in terms of those submitted and those voted on
  - Submissions increased by almost 20% from 682 to 809 proposals
  - Submissions that were voted on increased from 401 to 424 proposals
- 74 proposals (17.5%) that went to a vote received majority support compared to 54 (13.5%) in 2020; more proposals received majority support in 2021 than in any of the last five years

# Example Proposals Voted Upon

Proposal Type	Proposal Topic	Companies Receiving Such Proposals
Workplace Diversity	<ul style="list-style-type: none"> <li>• Reports on effectiveness of programs related to recruitment, retention, and promotion of protected classes</li> </ul>	<ul style="list-style-type: none"> <li>• American Express</li> <li>• Berkshire Hathaway</li> <li>• Charter Communications</li> <li>• International Business Machines</li> <li>• Union Pacific</li> <li>• United Parcel Service</li> </ul>
Climate Change	<ul style="list-style-type: none"> <li>• Scope 3 greenhouse gas emissions reduction</li> <li>• Reports on conforming to public statements regarding environmental goals</li> <li>• Say on climate</li> </ul>	<ul style="list-style-type: none"> <li>• Chevron</li> <li>• ConocoPhillips</li> <li>• Phillips 66</li> <li>• Sempra Energy</li> <li>• United Airlines</li> <li>• Delta Airlines</li> </ul>
Political Activities	<ul style="list-style-type: none"> <li>• Political and electioneering congruency report</li> </ul>	<ul style="list-style-type: none"> <li>• Home Depot</li> <li>• JPMorgan Chase</li> <li>• Pfizer</li> </ul>
COVID-19	<ul style="list-style-type: none"> <li>• Reports on COVID-19 drug pricing and access</li> <li>• Essential workers' rights and safety</li> </ul>	<ul style="list-style-type: none"> <li>• Johnson &amp; Johnson</li> <li>• Pfizer</li> <li>• Merck</li> <li>• Wendy's</li> </ul>



# Environmental and Social Proposals Generally

- Environmental and social (E&S) proposals composed an increasing percentage of proposals receiving majority support – increasing from 33% in 2020 to 42% in 2021
- Environmental proposals increased 13% year over year
  - Most of this increase was driven by proposals related to climate change
- Social proposals increased 37% year over year
  - Civil rights, human rights, and racial justice issues went to vote more frequently and received higher support

## Environmental and Social Proposals Generally (cont.)

- It has been a historic year for E&S proposals with 34 receiving majority support
  - 6 such proposals passing unopposed
  - 11 workforce diversity proposals voted on with 61.56% average support, an increase from 2020
  - 23 climate change proposals voted on with 49.9% average support, an increase from 2020
  - 4 gender and racial pay equity proposals voted on with 24% average support, a decrease from 2020
  - 12 proposals on disparate racial impacts of corporate activity, but none received majority support
- There has been an increase in withdrawals, with 46% of social and 62% of environmental proposals being withdrawn, likely indicating a willingness of companies to engage with proponents or to take proactive measures
  - Average support for environmental proposals increased from 31% to 41%
    - Boards have begun supporting shareholder proposals related to environmental issues
  - Average support for social proposals increased from 28% to 31%

# Environmental Proposals

- Environmental and Sustainability Proposals
  - There were 81 environmentally focused proposals submitted during the 2021 proxy season
    - 54 of these proposals focused on climate change
    - 5 of these proposals focused on sustainability
    - 22 of these proposals focused on other issues pertaining to the environment
  - Each proposal category enjoyed increased support in 2021 over 2020

# Environmental Proposals

- Every proposal requesting that companies set greenhouse gas emission targets that went to a vote received majority support
  - These are no longer directed solely at finance and energy companies, but are now directed at all industries
  - Boards have come out in support of some of these proposals
- Five out of six proposals (83%) requesting information on climate lobbying received majority support
  - These proposals seek reports on how a company's lobbying, direct and through trade associations, impacts climate issues
- Increase in the say-on-climate proposals, which attempt to secure dedicated ballot items enabling investors to express views on companies' climate-related risk management on a recurring basis or to hold a vote on a company's climate transition plan
  - Management, as well as proponents, have been bringing forth say-on-climate votes primarily at European companies – all overwhelmingly supported

# Social Proposals

- Submissions of social proposals increased by more than 20% year over year, to 293 submissions, of which 114 received a vote, and 18 received majority support
  - This increase was driven almost entirely by a near doubling year-over-year of submissions related to workforce diversity, equity and inclusion
- Prominent proposals included requests for EEO-1 reporting and policies and for reports on employee diversity
  - 2/3 of proposals asking companies to provide more information concerning the diversity of their workforces received majority support

## Social Proposals (cont.)

- Proposals on human capital management received an average of 45% shareholder support in 2021, as opposed to 28% in 2020
  - All proposals asking for more information on mandatory arbitration policies that went to a vote received majority support
- 18 companies received proposals asking them to become public benefit corporations
  - These received extremely weak shareholder support
- Almost 40% of social proposals were ultimately withdrawn

# Political Spending and Lobbying Proposals

- Political Spending and Lobbying
  - There were 66 proposals pertaining to political spending, lobbying, and politics generally
    - 58 of these proposals focused on lobbying and political activities
    - Values congruency and lobbying proposals both saw upswings in average support in 2021
      - Six proposals regarding disclosure of political contributions received majority support
      - Three proposals regarding lobbying received majority support
    - 8 of these proposals were politically conservative proposals

# Governance Proposals

- Governance proposals decreased from 66% of proposals receiving majority support in 2020 to 58% in 2021
  - 2021 has continued the five-year trend of the number of governance proposals submitted declining, but they continue to be a significant driver of proposals that make it to a vote
    - For example, there were 72 written consent-related proposals submitted, the most in the past decade – and of these, only 65 went to a vote, with only seven ultimately passing
    - 36 governance proposals total were passed
- Board diversity has become a greater focus of investors and regulators
  - Proposals on the topic are accordingly rare (four in 2021 calling for commitments to diversity or more disclosure of board diversity) and receive extremely high support

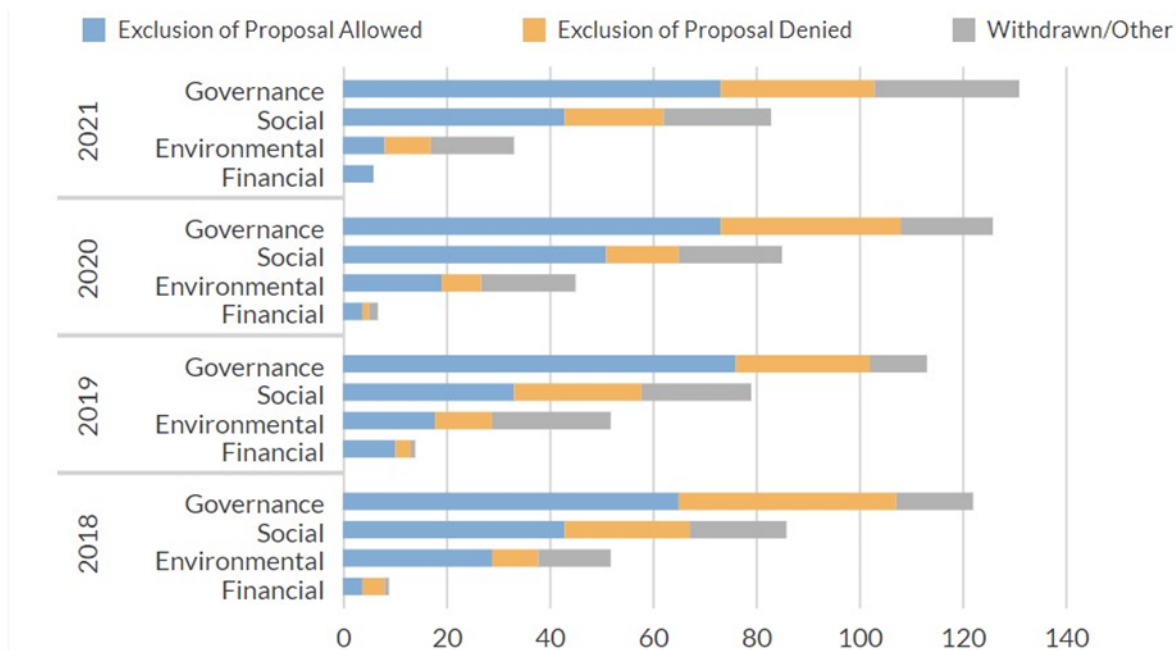


# Compensation-Related Proposals

- Compensation-related proposals have been declining, down to 26 proposals in 2021, as opposed to 86 in 2015
  - Support for compensation-related proposals also declined year over year; none had majority support in 2021
- Recent proposals tend to focus on the integration of metrics such as sustainability, data privacy, human resources, customer service, employee health and safety, and workforce diversity, etc. in determining executive compensation
- Another recent hot topic has been calling for consideration of the CEO to average employee pay ratio when setting executive compensation
- More traditional proposals such as prohibition of accelerated vesting of equity awards, calling for the deferral of bonuses, or calling for clawback policies related to misconduct are still being put forth

# No-Action Relief in the 2021 Proxy Season

## Request Outcome by Proposal Category



Source:  
Intelligize, as of September 26, 2021

## No-Action Relief in the 2021 Proxy Season (cont.)

- From October 1, 2020, through September 26, 2021, the Staff issued 212 responses to no-action requests
  - A further 66 no-action requests were withdrawn prior to Staff response
- The Staff issued letters in 13 instances and issued oral responses otherwise
  - This was a sharp decrease in the number of letters issued from 31 the prior year
  - Oral responses are publicly disclosed in a spreadsheet on the SEC's website, but no information is given other than the company, the proponent, dates of the request and disposition, bases asserted for exclusion of the proposal, disposition of the request, and whether there is an associated letter
- Of those 212 proposals for which a decision on no-action relief has been rendered, the Staff has granted relief in 145 cases (68.4%) and denied relief in 67 cases (31.6%)

# Topics of Shareholder Proposals

- Over the last 12 months, the most common categories of shareholder proposals for which Rule 14a-8 no-action release has been requested have been:

Proposal Category	2021 Count	2020 Count	Change
Social / Discrimination and Diversity	36	21	71.4%
Governance / Internal Controls	28	6	367%
Governance / Vote Requirements	24	25	(4.0)%
Governance / Compensation	22	23	(4.3)%
Social / Political and Charitable Contributions	19	12	58.3%
Governance / Written Consent	18	7	157.1%
Social / Human Rights	17	27	(37.0)%
Environmental / Climate Change	16	36	(55.6)%
Governance / Chair Independence	10	0	-
Governance / Special Meetings	10	10	-
Governance / Proxy Access	9	6	50%
Social / Public Health	7	2	250%

Source:  
Intelligize, as of September 26, 2021

# Recent Developments in No-Action Requests

- The Staff of the Division of Corporation Finance did not issue new guidance regarding companies' abilities to exclude shareholder proposals from their proxy statements heading into the 2021 season
- Slightly more companies contained board analyses in their no-action requests this year, and these requests had an increased success rate
  - The "board analysis" concept was introduced comparatively recently, in 2017
  - Analyses put forth by the board of directors of a company may assist with the exclusion of proposals upon certain bases, including lack of relevance (Rule 14a-8(i)(5)), ordinary business (Rule 14a-8(i)(7)), and substantial implementation (Rule 14a-8(i)(10))
    - This year, the majority of granted no-action requests that included board analyses were submitted under Rule 14a-8(i)(10)
  - One of the few no-action letters published by the Staff reiterates that the significant policy issue analysis under Rule 14a-8(i)(7) is a facts and circumstances analysis specific to a company's business and operations, rather than one that views issues as having universal significance

# Status of SEC Proposed Amendments to Rule 14a-8

- In September 2020, the SEC released final rules amending procedural requirements and resubmission thresholds for shareholder proposals under Rule 14a-8
  - These rules will apply to shareholder proposals submitted for annual meetings occurring in the 2022 calendar year
- The SEC's final rules revised ownership requirements to be eligible to submit a proposal
  - If the value of the shareholder's stock totals \$2,000, the shareholder must have held the shares continuously for at least 3 years
  - If the value of the shareholder's stock totals \$15,000, the shareholder must have held the shares continuously for at least 2 years
  - If the value of the shareholder's stock totals \$25,000, the shareholder must have held the shares continuously for at least 1 year

## Status of SEC Proposed Amendments to Rule 14a-8 (cont.)

- The SEC's final rules raise the "resubmission thresholds" for proposals
  - The 1<sup>st</sup> submission requires a 5% approval under the final rules
  - The 2<sup>nd</sup> submission requires a 15% approval under the final rules
  - The 3<sup>rd</sup> submission requires a 25% approval under the final rules
- Shareholders cannot aggregate holdings to meet eligibility requirements
- There is a one proposal limit for proposals that can be submitted directly or indirectly by "a person"
  - This includes proposals submitted as representative for other shareholders
  - The final rules require additional documentation where the representative submits the proposal on behalf of the proponent
- The proponent must indicate their availability between 10 and 30 calendar days after the proposal is submitted to meet with the company to discuss the proposal

# Shareholder Proposal Trends for 2022

- Impact of revised Rule 14a-8
- Trend of increasing number of climate and environment-focused proposals likely to continue
  - Likely topics are alignment with Paris Agreement goals, greenhouse gas emissions, and enhanced sustainability disclosure
  - Expect many “say on climate” proposals as well
- Concealment clauses
  - Removing harassment/discrimination from scope of non-disclosure/non-disparagement agreements
- Continuing focus on workplace equity
  - Expansion beyond gender and racial pay equity to include disclosure of recruitment, retention, and promotion of diverse employees
- Continuing focus on political spending and values congruency



# QUESTIONS?

# JOIN US

Wednesday, October 13, 2021

## US Disclosure and Reporting Updates

Our panelists will discuss developments and considerations for exchange act reporting, including mandatory compliance of the MD&A and financial disclosure rules that the SEC recently adopted, review of disclosure from early compliers and the impact of Nasdaq's new board diversity rule.

To view today's presentation and for a list of upcoming programs, please visit [here](#).

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Leland counsels public companies on the federal securities laws and corporate governance. Before joining Morgan Lewis, Leland served the US Securities and Exchange Commission (SEC) for five years as an attorney-adviser in the Division of Corporation Finance, where he reviewed transactions including securities offerings, acquisitions and divestments, as well as periodic reports and proxy statements.

While at the SEC, Leland also served as a member of the Rule 14a-8 Shareholder Proposal Taskforce in the Division of Corporation Finance's Office of Chief Counsel, where he considered various rationales presented by public companies to exclude shareholder proposals from their proxy materials. He also served in the Office of Disclosure Standards, which critically evaluates the Division of Corporation Finance's filing review program for quality and consistency, and tests the Division's internal controls and procedures.

In addition to working at the SEC prior to joining Morgan Lewis, Leland taught at the Georgetown University Law Center as an adjunct professor of law. He instructed foreign-trained attorneys on American common law jurisprudence, efficient research methods and legal analysis. He also previously served as a C.V. Starr Lecturer of Law at the Peking University School of Transnational Law in Shenzhen, China, where he taught deal documentation, contract drafting, and legal research and writing.

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Celia focuses her practice on counseling public companies and their boards with respect to corporate governance, federal securities, stock exchange, shareholder engagement, and executive compensation matters.

Drawing on her previous tenure as an attorney-advisor with the US Securities and Exchange Commission in the Division of Corporation Finance, Celia has experience with securities disclosure issues that impact public companies' ongoing reporting obligations and proxy-related matters that impact public companies and their officers and directors. She also advises companies in connection with public capital raising transactions, including through IPOs, secondary offerings, and debt offerings.

Celia currently serves as the deputy leader of the firm's capital markets and public companies practice and co-chairs the firm's environmental, social, and governance (ESG) and sustainable business team.

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

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

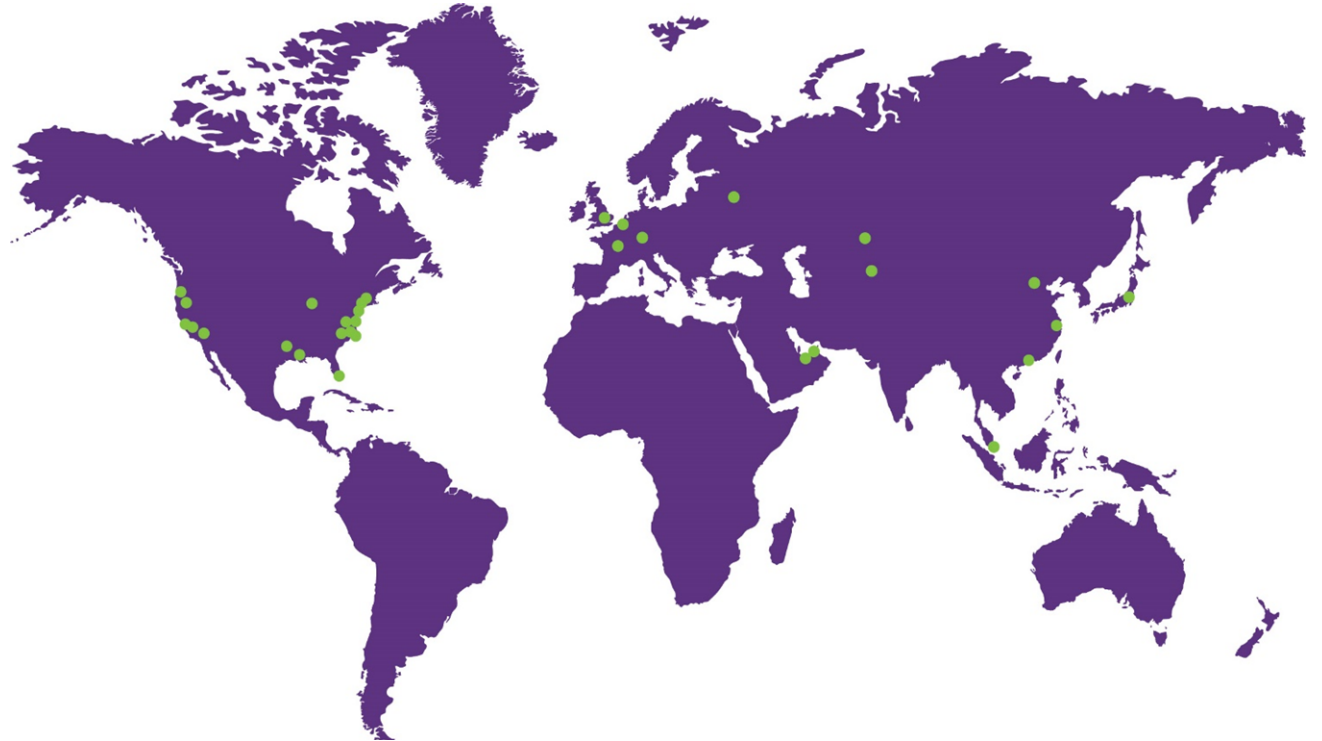
As part of an active pro bono practice, David has helped entities file with the IRS for tax-exempt status under Section 501(c)(3) of the IRC. He is also an adjunct professor at Villanova University, where he teaches executive compensation planning during the summer session.

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