GIBSON DUNN

SHAREHOLDER PROPOSAL DEVELOPMENTS DURING THE 2018 PROXY SEASON

July 12, 2018

To Our Clients and Friends:

This client alert provides an overview of shareholder proposals submitted to public companies during the 2018 proxy season,[1] including statistics and notable decisions from the staff (the "Staff") of the Securities and Exchange Commission (the "SEC") on no-action requests.[2]

I. TOP SHAREHOLDER PROPOSAL TAKEAWAYS FROM THE 2018 PROXY SEASON

As discussed in further detail below, based on the results of the 2018 proxy season, there are several key takeaways to consider for the coming year:

- ***Shareholder proposals continue to be used by certain shareholders and to demand significant time and attention.*** Although the overall number of shareholder proposals submitted decreased 5% to 788, the average support for proposals voted on increased by almost 4 percentage points to 32.7%, suggesting increased traction among institutional investors. In addition, the percentage of proposals that were withdrawn increased by 6 percentage points to 15%, and the number of proponents submitting proposals increased by 20%. However, there are also some interesting ongoing developments with respect to the potential reform of the shareholder proposal rules (including the possibility of increased resubmission thresholds).

- ***It's generally becoming more challenging to exclude proposals, but the Staff has applied a more nuanced analysis in certain areas.*** Success rates on no-action requests decreased by 12 percentage points to 64%, the lowest level since 2015. This is one reason (among several) why companies may want to consider potential engagement and negotiation opportunities

---

[1] For purposes of reporting statistics regarding shareholder proposals and no-action requests, references to the "2018 proxy season" refer to the period between October 1, 2017, and June 1, 2018. Data regarding no-action letter requests as well as no-action letters was derived from the information available on the SEC's website. Unless otherwise noted, all data on shareholder proposals submitted, withdrawn, and voted on is derived from Institutional Shareholder Services ("ISS") publications and the ISS shareholder proposals and voting analytics databases, and generally includes proposals submitted and reported in these databases at any time prior to June 1, 2018, for annual meetings of shareholders at Russell 3000 companies held in 2018. References in this alert to proposals "submitted" include shareholder proposals voted on or excluded pursuant to a no-action request, or that the proponent withdrew. All shareholder proposal data should be considered approximate. Voting results are reported on a votes cast basis calculated under Rule 14a-8 (votes for or against) and without regard to whether the company's voting standards take into account the impact of abstentions. Where statistics are provided for prior years, the data is for a comparable period in those years.

[2] Gibson, Dunn & Crutcher LLP assisted companies in submitting the shareholder proposal no-action requests discussed in this alert that are marked with an asterisk (*).

with proponents as a key strategic option for dealing with certain proposals and proponents. However, it does not have to be one or the other—20% of no-action requests submitted during the 2018 proxy season were withdrawn (up from 14% in 2017), suggesting that the dialogue with proponents can (and should) continue after filing a no-action request. In addition, companies are continuing to experience high levels of success across several exclusion grounds, including substantial implementation arguments and micromanagement-focused ordinary business arguments.

- ***Initial attempts at applying the Staff's board analysis guidance from last November generally were unsuccessful, but they laid a foundation that may help develop successful arguments going forward.*** The Staff's announcement that it will consider, in some cases, a board's analysis in ordinary business and economic relevance exclusion requests provided companies with a new opportunity to exclude proposals on these bases. Among other things, under the new guidance, the Staff will consider a board's analysis that a policy issue is not sufficiently significant to the company's business operations and therefore the proposal is appropriately excludable as ordinary business. In practice, none of the ordinary business no-action requests that included a board analysis were successful in persuading the Staff that the proposal was not significant to the company (although one request based on economic relevance was successful). Nevertheless, the additional guidance the Staff provided through its no-action request decisions should help provide a roadmap for successful requests next year, and, therefore, we believe that companies should not give up on trying to apply this guidance. It will be important for companies to make a determination early on as to whether they will seek to include the board's analysis in a particular no-action request so that they have the necessary time to create a robust process to allow the board to produce a thoughtful and well-reasoned analysis.

- ***Social and environmental proposals continue to be significant focus areas for proponents, representing 43% of all proposals submitted.*** Climate change, the largest category of these proposals, continued to do well with average support of 32.8% and a few proposals garnering majority support. We expect these proposals will continue to be popular going into next year. Board diversity is another proposal topic with continuing momentum, with many companies strengthening their board diversity commitments and policies to negotiate the withdrawal of these proposals. In addition, large asset managers are increasingly articulating their support for greater board diversity.

- ***Don't forget to monitor your EDGAR page for shareholder-submitted PX14A6G filings.*** Over the past two years, there has been a significant increase in the number of exempt solicitation filings, with filings for 2018 up 43% versus 2016. With John Chevedden recently starting to submit these filings, we expect this trend to continue into next year. At the same time, these filings are prone to abuse because they have, to date, escaped regulatory scrutiny.

II. SHAREHOLDER PROPOSAL STATISTICS AND VOTING RESULTS

A. Overview of Shareholder Proposals Submitted

Shareholders submitted 788 proposals during the 2018 proxy season, down 5% from 827 in 2017 and down 14% from 916 in 2016.

Across four broad categories[3] of shareholder proposals in 2018—social and environmental, governance, corporate civic engagement, and executive compensation—social and environmental proposals continued to be the most frequently submitted proposals (representing 43% of all proposals submitted), followed by governance proposals (36%), corporate civic engagement proposals (12%), executive compensation proposals (7%), and other proposals (2%). Key year-over-year trends in these categories include:

- **Social and environmental proposals**

  - **Social proposals**. The number of social proposals submitted during the 2018 proxy season increased slightly to 202 (compared to 201 in 2017). The largest sub-category, representing 34% of these proposals, continued to be anti-discrimination and diversity-related proposals, with 68 submitted in 2018 (down from 69 in 2017).

  - **Environmental proposals**. Environmental proposals remained popular during the 2018 proxy season, with 139 proposals submitted (down from 144 in 2017). The largest sub-category, representing 52% of these proposals, continued to be climate change proposals, with 72 submitted in 2018 (up from 69 in 2017).

---

[3] Categorizing shareholder proposals can, at times, be a subjective endeavor. We categorize shareholder proposals based on subject matter as follows:

Social proposals cover a wide range of issues and include proposals relating to: (i) discrimination and other diversity-related issues (including board diversity); (ii) the gender/ethnicity pay gap; (iii) board committees on human rights; (iv) social and environmental qualifications for director nominees; (v) reporting on societal concerns, such as dissemination of misinformation ("fake news") and gun safety; and (vi) reporting on drug pricing increases.

Environmental proposals include proposals addressing: (i) climate change (including climate change reporting, greenhouse gas emissions goals, climate change risks, and public policy advocacy on climate change); (ii) recycling; (iii) renewable energy; (iv) hydraulic fracturing; and (v) sustainability reporting.

Governance proposals include proposals addressing: (i) shareholder special meeting rights; (ii) proxy access; (iii) majority voting for director elections; (iv) independent board chairman; (v) declassifying the board of directors; (vi) shareholder written consent; (vii) eliminate/reduce supermajority voting; (viii) director term limits; and (ix) stock ownership guidelines.

Corporate civic engagement proposals include proposals addressing: (i) political contributions disclosure; (ii) lobbying policies and practices disclosure; and (iii) support for charitable organizations.

Executive compensation proposals include proposals addressing: (i) compensation clawback policies; (ii) performance metrics; (iii) severance and change of control payments; (iv) equity award vesting; (v) executive compensation disclosure; and (vi) limitations on executive compensation.

- **Governance proposals**. The number of governance proposals submitted during the 2018 proxy season declined slightly to 281 (compared to 288 in 2017). The largest sub-category, representing 27% of these proposals, was shareholder special meeting rights proposals, with 75 submitted (up significantly from 26 in 2017). This reflects a shift in focus from 2017, when proxy access was the largest sub-category of these proposals.

- **Corporate civic engagement proposals**. The number of corporate civic engagement proposals submitted during the 2018 proxy season decreased to 92 (compared to 111 in 2017). The largest sub-category, representing 92% of these proposals, continued to be political contributions and lobbying expenditures, with 85 submitted in 2018 (compared to 87 in 2017).

- **Executive compensation proposals**. The number of executive compensation proposals submitted during the 2018 proxy season increased slightly to 55 (compared to 48 in 2017). The largest sub-category, representing 36% of these proposals, was proposals seeking to include social or environmental-focused performance measures (including, among other things, diversity, cybersecurity, data privacy and risks arising from drug pricing) in executive compensation, with 20 submitted in 2018 (compared to 10 in 2017).

The five most popular sub-categories of proposals, which are shown in the table below, did not change significantly over the last two proxy seasons (other than the decline in popularity of proxy access proposals noted above).

Top Proposals by Percentage of Total Submitted	
2018	**2017**
Political contributions & lobbying (11%)	Proxy access (14%)
Shareholder special meeting rights (10%)	Political contributions & lobbying (11%)
Climate change (9%)	Climate change (8%)
Anti-discrimination & diversity (9%)	Anti-discrimination & diversity (8%)
Independent chair (7%)	Independent chair (6%)

In terms of who submitted proposals, there were 224 different proponents this year, up from 187 proponents last year. Combined with the fact that fewer proposals were submitted this year versus last, this means that, on average, individual proponents submitted fewer proposals. As in prior years, John Chevedden and shareholders associated with him (including James McRitchie, Kenneth and William Steiner, and Myra Young) submitted or co-filed the most shareholder proposals during the 2018 proxy season—187 or 24% of all proposals. Proponents that have submitted (or co-filed) at least 20 proposals this year include:

Top Proponents by Number Submitted		
Proponent	**#**	**Primary focus areas**
John Chevedden & associates	187	Governance & executive compensation
New York State Common Retirement Fund	48	Political, diversity & environmental
Trillium Asset Management	35	Environmental
Zevin Asset Management	29	Political, diversity & environmental
As You Sow Foundation	28	Environmental
Walden Asset Management	26	Political & diversity
Mercy Investment Services	23	Political, diversity & environmental

B. Overview of Shareholder Proposal Outcomes

The table below shows the outcomes of the 788 shareholder proposals submitted during the 2018 proxy season (as compared to the 827 proposals submitted in 2017). One of the big trends this year was the significant increase in the number of proposals that were withdrawn, which now almost equals the number of proposals that were excluded.

Shareholder Proposal Outcomes[4]		
	2018	**2017**
Excluded pursuant to a no-action request	16% (125)	23% (189)
Withdrawn by the proponent	15% (116)	9% (77)
Went to a vote	41% (325)	40% (331)
Pending a vote	19% (153)	28% (234)

Shareholder proposals voted on during the 2018 proxy season averaged support of 32.7%, up from 29.0% in 2017. The proposals that received the highest support, including two categories of proposals that averaged majority support, were:

Top Proposals by Voting Results[5]		
Proposal	**2018**	**2017**
Eliminate/reduce supermajority voting	74.7% (8)	64.3% (7)
Majority voting in director elections	59.9% (2)	62.3% (7)
Shareholder action by written consent	41.8% (33)	45.6% (12)
Shareholder special meeting rights	41.2% (51)	42.9% (15)
Climate change	32.8% (20)	32.6% (28)
Political contributions & lobbying	29.5% (45)	27.8% (20)

Overall, 10.2% of shareholder proposals voted on during the 2018 proxy season received majority support, compared to 10.9% of proposals the prior year. The table below shows the

[4] Excludes proposals that, for other reasons, were not in the proxy or were not voted on, including, for example, due to postponement of the meeting or failure of the proponent to present the proposal at the meeting. As a result, in each year, percentages may not add to 100%.

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

principal topics addressed in proposals that received majority support during the 2018 and 2017 proxy seasons.[6]

Proposals that Received Majority Support		
Proposal	**2018**	**2017**
Eliminate/reduce supermajority voting	8	6
Shareholder action by written consent	5	3
Shareholder special meeting rights	5	2
Board declassification	4	2
Climate change	4	3
Sustainability report	2	1
Adopt proxy access	1	13
Majority voting in director elections	1	4
Report on opioids	1	0
Report on gun violence	1	0
Board diversity	0	2

III. SHAREHOLDER PROPOSAL NO-ACTION REQUESTS

A. Overview of No-Action Requests

During the 2018 proxy season, companies submitted 256 no-action requests to the Staff, down 11% from 288 in 2017. This year, the Staff granted 64% of no-action requests, a substantial decrease from 78% in 2017 and the lowest level since 2015. At the same time, the number of withdrawn no-action requests increased by 25% to 52, the highest level since 2015. The table below summarizes the Staff's no-action request responses during the 2018 and 2017 proxy seasons.

No-Action Request Statistics		
	2018	**2017**
Total no-action requests submitted	256	288
No-action requests withdrawn	52	41
Pending no-action requests	10	5
Staff responses	194	242
Exclusions granted	125 (64%)	189 (78%)
Exclusions denied	69 (36%)	53 (22%)

The most common grounds for the Staff to grant no-action requests in 2018 were ordinary business and substantial implementation, each representing 33% of successful requests, and procedural grounds, representing 15% of successful requests.

[6] Voting results are reported on a votes cast basis calculated under Rule 14a-8 (votes for or against) and without regard to whether the company's voting standards take into account the impact of abstentions.

Consistent with the overall year-over-year decline in the percentage of no-action requests granted by the Staff, individual success rates for key no-action request exclusion grounds also saw marked declines, as shown in the following table. We believe that this is attributable to the more challenging nature of the legal arguments raised in these requests, due, in part, to the Staff's new guidance on shareholder proposals and other developments described below.

Success Rates by Exclusion Ground[7]		
Exclusion ground	**2018**	**2017**
Conflicting proposals	88%	100%
Procedural	68%	79%
Substantial implementation	66%	79%
Ordinary business	58%[8]	74%
Vague or false/misleading	0%	11%

Key developments in no-action requests this year, which are discussed in more detail below, include:

- **Recent Staff guidance** – the guidance announced that the Staff will now consider a board's analysis in certain ordinary business and economic relevance no-action requests, and also tried to address potential abuses with respect to proposals by proxy and the use of images;
- **Ordinary business exclusions** – companies experienced a declining success rate overall on these requests, in part due to the impact of the Staff's recent guidance with respect to board analysis, but there was an uptick in successful micromanagement-focused no-action requests;
- **Conflicting proposal exclusions** – this season saw renewed interest among companies to exclude proposals on this basis;
- **Substantial implementation exclusions** – companies saw continued success on these requests, with one-third of all successful no-action requests granted on this ground; and
- **Vague or false and misleading exclusions** – companies faced increasing difficulty on these requests, with the Staff declining to concur that any of the proposals could be excluded.

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

[8] Excluding no-action requests that included a board analysis, this figure was 63%.

B. Recent Staff Guidance – Staff Legal Bulletin No. 14I

As we previously reported here, last November the Staff published additional guidance on shareholder proposals. Staff Legal Bulletin No. 14I ("SLB 14I") announced that the Staff will now consider a board's analysis in certain ordinary business no-action requests (Rule 14a-8(i)(7)) and in economic relevance no-action requests (Rule 14a-8(i)(5)), clarified how the economic relevance exclusion basis would be applied going forward, and addressed the documentation required when proxies submit proposals on behalf of shareholders as well as constraints around the use of graphics and images in shareholder proposals.

1. Board Analysis for Ordinary Business/Economic Relevance Arguments

In SLB 14I, the Staff stated that a company's board of directors is well situated to analyze the implications of a particular proposal for the company and, as a result, the Staff expects certain no-action requests on the basis of ordinary business or economic relevance grounds to include a discussion, if relevant, that reflects the board's analysis of the proposal's significance to the company. Although the Staff noted that the description of the board's analysis should detail the "specific process employed by the board to ensure that its conclusions are well-informed and well-reasoned," we understand from the Staff that the focus of the description of the board's analysis should be on the substantive analysis not the process. In addition, Director of Corporation Finance Bill Hinman has confirmed informally that this analysis can be conducted by a board committee.

Applicability of this guidance. Not every ordinary business and economic relevance no-action request needs to include board analysis. Rather, it is an additional layer of analysis that companies should consider providing when addressing social or other policy considerations that are raised by a proposal where a board's perspective will provide relevant additional context for the Staff's analysis of the significance of the proposal to the company. With respect to ordinary business no-action requests, the board analysis is applicable only for day-to-day business arguments and comes into play when the proposal focuses on a significant policy issue but the issue is not sufficiently significant to the company's business operations.

How companies used this guidance in 2018. During the 2018 proxy season, 29 no-action requests included a board analysis pursuant to SLB 14I, with 18 requests focusing on ordinary business arguments, three requests focusing on economic relevance arguments, and eight requests arguing both. In only one instance did the Staff concur with the exclusion of the proposal and reference the board's analysis of the significance of the proposal to the company's business. In *Dunkin' Brands Group, Inc.* (avail. Feb. 22, 2018), the Staff concurred that a proposal requesting that the board issue a report on the environmental impact of K-Cup Pods could be excluded on economic relevance grounds. The Staff noted that the description of how the board analyzed the issue provided a basis for its decision. However, it is unclear if the board's analysis was the dispositive factor, as the Staff arguably could have reached the same result without this analysis.[9]

[9] The Staff noted that "the Proposal's significance to the Company's business is not apparent on its face" and that "the Proponent has not demonstrated that it is otherwise significantly related to the Company's business."

Key lessons. Below are key early lessons from no-action requests that included a board analysis this proxy season:

- ***Provide sufficient detail regarding the board's analysis, both in ordinary business and economic relevance arguments.*** Consistent with the Staff's commentary that it is looking for more substantive analysis in no-action requests that include board analysis, in denying several of these requests the Staff included the following language or a variant thereof: "[a]lthough your discussion of the board's analysis sets forth several factors the board considered in evaluating the Proposal, it does not provide a sufficient level of detail to reach a determination that exclusion of the Proposal is appropriate."[10]

- ***Focus on demonstrating why the proposal is not significant to the company's operations, both in ordinary business and economic relevance arguments.*** In one ordinary business no-action request, the company included a board analysis to argue that the proposal, which requested that the board form a human rights committee, did not transcend the company's day-to-day operations because human rights were integral to the company's operations. However, the Staff disagreed, noting that the purpose of the board's analysis is to explain why the proposal does not raise a significant issue for the company. In light of this decision, it may be better to focus the significance analysis on the aspects of the proposal that a company has not implemented, rather than on the proposal generally.

- ***Address significant prior company votes on the proposal, both in ordinary business and economic relevance arguments.*** In several of the no-action requests that included a board analysis, the Staff referenced vote totals for similar proposals that the company received in prior years as an issue that was not "adequately addressed" in the board analysis.[11] Although the Staff has not stated a percentage threshold it considers significant, the lowest threshold that the Staff called out in a response denying a request was 25%.[12] Factors that could be relevant to determining whether a support level is "significant" include the number of times the proposal was voted on and received a certain level of support, and how recently the proposal was voted on.

- ***Board analysis should be considered for ordinary business no-action requests relating to proposals that arguably raise a significant policy issue for the company.*** In several no-action requests with respect to proposals that raised a significant policy issue, the Staff denied exclusion, noting that "the no-action request does not include a discussion of the board's analysis, and as a result, we do not have the benefit of the board's views on these matters."[13] Notably, in one of these instances, the company specifically argued that a board

---

[10] *See, e.g.*, *Entergy Corp.* (avail. Mar. 14, 2018); *AmerisourceBergen Corp.* (*The Sisters of St. Francis of Philadelphia*) (avail. Jan. 11, 2018).

[11] *See Alliant Energy Corp.* (avail. Mar. 30, 2018); *Citigroup Inc.* (avail. Mar. 7, 2018); *Citigroup Inc.* (avail. Mar. 6, 2018); *Eli Lilly & Co.* (*NY State Common Retirement Fund*) (avail. Mar. 2, 2018).

[12] *See Citigroup Inc.* (avail. Mar. 6, 2018) (addressing multiple past votes); *Eli Lilly and Co.* (*NY State Common Retirement Fund*) (avail. Mar. 2, 2018) (addressing a single past vote).

[13] *See General Motors Co.* (avail. Apr. 18, 2018); *Verizon Communications Inc.* (avail. Mar. 8, 2018); *Verizon Communications Inc.* (avail. Mar. 7, 2018).

analysis was not needed because the proposal, which called for a report on greenhouse gas emissions of the company's automobile fleet, did not focus on a policy matter, but instead focused on the company's products. The Staff disagreed, and its response helps illustrate the types of proposals where a board's analysis would be useful.[14]

As is often the case with new Staff guidance, this first proxy season with SLB 14I was a learning curve for companies. We believe that companies should not be discouraged by this season's results and should continue to incorporate board analysis in their no-action requests when relevant. We expect that, in upcoming proxy seasons, the Staff will provide further guidance regarding its expectations in this area.

2. A More Nuanced Application of the Economic Relevance Exclusion

Rule 14a-8(i)(5) permits exclusion of a shareholder proposal that relates to operations that: (1) account for less than 5% of a company's total assets, net earnings and gross sales; and (2) are not otherwise significantly related to the company's business. In applying this rule, the Staff historically denied exclusion of a proposal when a company conducted any amount of business related to the proposal and the proposal raised a significant social or ethical concern. As a result, the Staff's past interpretations of the "otherwise significantly related" prong largely collapsed the analysis with that of the ordinary business exception. In SLB 14I, the Staff announced that it will refocus on the language of the economic relevance exception and concentrate on a proposal's significance to the company's business rather than the significance of the proposal in the abstract. As discussed above, the Staff indicated that this is where a board analysis would be helpful in evaluating these requests, and one company successfully excluded a proposal on this basis during the 2018 proxy season.[15]

3. Proposals by Proxy

The Staff addressed the documentation that it expects to be provided when a shareholder delegates authority to a proxy to submit a proposal on its behalf. Specifically, the documentation should be signed and dated by the shareholder and identify both the shareholder and the delegated proxy, as well as the specific company, proposal and shareholder meeting. This guidance, which overturned an earlier position taken by the Staff,[16] resulted in at least some proponents providing the specified documentation.

Two companies attempted to use this guidance to argue that a proposal was excludable, with the Staff denying one no-action request and the company withdrawing the other. In *Hospitality Properties Trust* (avail. Mar. 20, 2018), the proponent, the Comptroller of the City of New York, who was acting on behalf of the New York City pension system, did not include documentation demonstrating express authorization to submit the proposal as described in SLB 14I, but there was publicly available information showing that the proponent was indeed a fiduciary and

---

[14] *See General Motors Co.* (avail. Apr. 18, 2018).

[15] *See Dunkin' Brands Group, Inc.* (avail. Feb. 22, 2018).

[16] *See Baker Hughes Inc.* (avail. Feb. 22, 2016).

authorized agent of the shareholder, resulting in the Staff denying the request. This suggests that the documentation requirements listed in SLB 14I may not apply when it is clear from the public record that the proponent is a fiduciary or investment advisor of the shareholder.[17]

4. Images in Shareholder Proposals

The Staff clarified that, consistent with its no-action request decisions in 2017, images generally are permitted in shareholder proposals. However, recognizing the potential for abuse in this area, the Staff explained that an image may be excluded under Rule 14a-8(i)(3) if it: (1) is materially false or misleading; (2) renders the proposal vague or indefinite; (3) impugns character, integrity or personal reputation or alleges improper conduct without a proper basis; or (4) is irrelevant to the subject matter of the proposal. Two companies used this guidance to argue that an image was excludable. In *General Electric Co.* (avail. Mar. 1, 2018)*, the Staff concurred that an image containing a chart, nonsensical equations, and emoji was excludable as irrelevant to the cumulative voting proposal accompanying the image. The other no-action request was decided on other grounds, and the Staff did not address whether the image in that instance was excludable.[18]

C. A Couple of Interesting Trends with Ordinary Business Exclusions

Ordinary business no-action requests remained common, representing 33% of no-action requests during the 2018 proxy season, but companies' success rate on these requests declined from 74% in 2017 to 58% this year overall (63% excluding the no-action requests that included a board analysis). Two trends with these requests—one favorable to proponents and the other favorable to companies—are worth noting.

1. Executive Compensation Proposals

This season saw a new approach to last year's shareholder proposal campaign targeting how pharmaceutical companies determine the price of their products. It potentially foreshadows a trend in proponents reformulating proposals to focus on executive compensation in order to overcome ordinary business challenges.

Last year—companies were successful. During the 2017 proxy season, pharmaceutical pricing proposals requested "a report listing the rates of price increases year-to-year of the company's top ten selling branded prescription drugs between 2010 and 2016, including the rationale and criteria used for these price increases." The Staff concurred that the proposals were excludable on ordinary business grounds because they related "to the rationale and criteria for price increases of the company's top ten selling branded prescription drugs in the last six years."[19]

---

[17] *See also DTE Energy Co.* (withdrawn Jan. 25, 2018) (arguing that the proponents had not provided sufficient documentation pursuant to SLB 14I demonstrating express authorization to submit the proposal).

[18] *See Ford Motor Co.* (avail. Jan. 2, 2018).

[19] *See*, *e.g.*, *Eli Lilly & Co*. (avail. Feb. 10, 2017).

This year—proponents were successful. Pivoting from their challenges in 2017, proponents this year reformulated the proposals to instead request that the board's compensation committee "report annually to shareholders on the extent to which risks related to public concern over drug pricing strategies are integrated into incentive compensation policies, plans and programs (together, 'arrangements') for senior executives." Each of the five companies that received this new proposal attempted to exclude it on ordinary business grounds, with several arguing that the proposal was essentially the same as the 2017 formulation as it similarly focused on "key pricing decisions about its products and related risks."[20] The companies also argued that the thrust and focus of the proposal was not executive compensation, a point that most of the proponents attempted to refute. In contrast to last year, apparently elevating form over substance, the Staff sided with the proponents.

And, it's not limited to pharmaceutical pricing proposals. This approach of re-focusing an ordinary business matter on executive compensation was also used outside of the pharmaceutical pricing context. In *Verizon Communications Inc.* (avail. Mar. 7, 2018), the company was unable to exclude as ordinary business a proposal requesting that "a board committee publish a report assessing the feasibility of integrating cyber security and data privacy metrics into the performance measures of senior executives under the company's compensation incentive plans." In contrast, last year, the Staff concurred with the exclusion as ordinary business of a proposal requesting a report on the company's progress in implementing its various commitments pertaining to privacy, free expression and data security, noting that the proposal relates to procedures for protecting customer information.[21]

2. Micromanagement Exclusions

During the 2018 proxy season, companies continued to be successful in excluding proposals on ordinary business grounds because the proposal sought to "micromanage" the company. The Staff concurred with the exclusion of 11 proposals on this basis, up from four in 2017. These letters are notable because, prior to 2017, the Staff rarely concurred with no-action requests based on the micromanagement prong of the ordinary business exception, but reflect the Staff's sensitivity to more detailed proposals addressing complex topics.

Net-zero GHG emissions. As with the 2017 proxy season, the most common proposal excluded on micromanagement grounds, with six instances, was a request that a company evaluate the feasibility of achieving "net-zero" greenhouse gas ("GHG") emissions from the company, typically by a specific timeframe.[22] In each case, the Staff noted that the proposal sought to "micromanage the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." In one instance, *EOG Resources, Inc.*, the Staff concurred with exclusion of a proposal dealing with the

---

[20] *See, e.g.*, *Biogen Inc.* (avail. Mar. 16, 2018); *Bristol-Myers Squibb Co.* (avail. Mar. 16, 2018); *AbbVie Inc.* (avail. Mar. 14, 2018); *Eli Lilly and Co.* (*Mercy Investment Services*) (avail. Mar. 2, 2018).

[21] *See Verizon Communications Inc.* (avail. Feb. 16, 2017).

[22] *See, e.g., PayPal Holdings, Inc.* (avail. Mar. 6, 2018); *Amazon.com, Inc.* (avail. Mar. 6, 2018)*; *Verizon Communications Inc.* (avail. Mar. 6, 2018); *EOG Resources, Inc.* (avail. Feb. 26, 2018, *recon. denied* Mar. 12, 2018); *Deere & Co.* (avail. Dec. 7, 2017).

complex issue of GHG emissions even though the proposal did not require a specific emissions target or timeframe. In another instance, *PayPal Holdings, Inc.*, the Staff concurred in the exclusion of a nearly identical proposal (same resolved clause, but some differences in the supporting statement) that the company had been unable to exclude the prior year.[23] Although the 2018 no-action request generally focused more on how the proposal micromanaged the company's specific operations compared to the 2017 request, it is possible that this decision reflects a greater willingness by the Staff to view these types of proposals as micromanaging companies.

Other proposals focused on specific methods for implementing complex policies. In four micromanagement no-action requests, each on a different topic,[24] the Staff granted the request because the proposal was "seeking to impose specific methods for implementing complex policies." In one of these letters, *JPMorgan Chase & Co. (The Christensen Fund)*, the Staff enumerated all of the assessments that the proposal called on the company to implement to satisfy the proposal's request for a report on the risks associated with providing financial services for tar sands production and transportation. The Staff's inclusion of this reasoning underscores the point that the more prescriptive a proposal, the more likely the Staff will view it as micromanaging the company.

D. New Life for Conflicting Proposal Exclusions

This proxy season saw a marked increase in the number of no-action requests relying on conflicting proposal grounds (Rule 14a-8(i)(9)). There were eight no-action requests submitted during the 2018 proxy season (compared with just two in 2017), all of which dealt with shareholder special meeting rights. All but one of the no-action requests were granted. The uptick in and success of these no-action requests is notable as it comes after the Staff narrowed the application of this basis for exclusion in 2015,[25] and, as discussed below, indicates renewed interest among companies to exclude proposals on this basis.

A twist on when a management proposal "directly conflicts" with a shareholder proposal. A number of companies[26] argued that proposals calling for shareholder special meeting rights at a 10% ownership threshold could be excluded because the proposals directly conflicted with management-sponsored proposals. The important fact here is that the companies had existing rights for shareholders to call special meetings and the management proposals asked shareholders to ratify the existing special meeting provisions, which included a higher ownership

---

[23] *See PayPal Holdings, Inc.* (avail. Mar. 13, 2017).

[24] *See RH* (avail. May 11, 2018) (sale of down products); *SeaWorld Entertainment, Inc.* (avail. Apr. 23, 2018) (captive breeding); *JPMorgan Chase & Co. (Harrington)* (avail. Mar. 30, 2018) (indigenous rights); *JPMorgan Chase & Co. (The Christensen Fund)* (avail. Mar. 30, 2018) (lending to support tar sands production and transportation).

[25] *See* Staff Legal Bulletin No. 14H (Oct. 22, 2015) ("SLB 14H"), which narrowed the application of the conflicting proposal exclusion ground to a direct conflict where a "reasonable shareholder could not logically vote in favor of both proposals, *i.e.*, a vote for one proposal is tantamount to a vote against the other proposal." *See also* our client alert on this development, *available here*.

[26] *See, e.g.*, *CF Industries Holdings, Inc.* (avail. Jan. 30, 2018).

threshold (25% in many cases), rather than adopt new rights with a different threshold than specified in the shareholder proposals (which likely would not be excludable under SLB 14H). These companies asserted that shareholders could not logically vote in favor of both proposals, and the Staff concurred.[27]

CII Letter in response. In response to the Staff's decision in one of these conflicting proposal letters, the Council of Institutional Investors ("CII") wrote a letter to Director of Corporation Finance Bill Hinman objecting to the Staff's decision.[28] CII asserted that: (1) shareholders *could* logically vote for both proposals, explaining that shareholders could approve of a special meeting bylaw generally but would prefer a 10% ownership threshold; and (2) companies relying on the conflicting proposal exclusion basis should be required to provide evidence that management had contemplated its proposal *prior* to receipt of a shareholder proposal to prevent alleged gamesmanship and circumvention of the proxy rules.

The Staff's response. Three weeks later, in *Capital One Financial Corp*. (avail. Feb. 21, 2018)*, the Staff granted relief on a similar set of facts as the proposal that drew the response from CII, but the Staff, in an apparent nod to the CII Letter, conditioned exclusion on the company providing the following disclosures in its proxy statement: (1) a statement that the company had omitted a shareholder proposal to lower the ownership threshold to call a special meeting; (2) a statement that the company believed a vote in favor of the management proposal to ratify the existing special meeting threshold was equivalent to a vote against a proposal to lower the threshold; (3) a description of the impact on the special meeting threshold, if any, if the management proposal was not approved; and (4) a description of the company's expected course of action if the management proposal was not approved.[29] Following this decision, the Staff granted relief on similar sets of facts and with the same disclosure conditions in several other instances.[30]

Although this line of no-action requests exclusively focused on shareholder special meeting rights, it is possible that companies may be able to use this "ratification approach" to exclude proposals in other areas. It is important to keep in mind, however, that achieving majority support for a ratification proposal may not be a slam dunk. In this regard, while the six special

---

[27] Compare this with the Staff's decision in *American Airlines Group Inc.* (avail. Apr. 2, 2018), in which the Staff declined to permit exclusion of a 10% special meeting proposal on a different set of facts. In that case, the company did not have an existing right for shareholders to call a special meeting but planned to present a management proposal to implement one and adopt a 20% threshold. The Staff, noting this, denied relief and stated that "the proposals do not present shareholders with conflicting decisions such that a reasonable shareholder could not logically vote in favor of both proposals."

[28] Letter from Jeffrey P. Mahoney to William H. Hinman, Council of Institutional Investors (Jan. 31, 2018), *available here*.

[29] *See also* Item 18 of Schedule 14A ("If action is to be taken with respect to any matter which is not required to be submitted to a vote of security holders, state the nature of such matter, the reasons for submitting it to a vote of security holders and what action is intended to be taken by the registrant in the event of a negative vote on the matter by the security holders").

[30] *See, e.g.*, *Skyworks Solutions, Inc.* (avail. Mar. 23, 2018); *eBay Inc.* (avail. Feb. 26, 2018); *JPMorgan Chase & Co.* (avail. Feb. 26, 2018); *ITT Inc.* (avail. Feb. 22, 2018).

meeting right ratification proposals that ultimately went to a vote this year were approved, support ranged from 52% to 72%.

E. Continued Success in Substantial Implementation Exclusions

Substantial implementation (Rule 14a-8(i)(10)) continued to be one of the most successful exclusion bases during the 2018 proxy season, with 33% of all exclusions granted on this basis, the same as in 2017. This year, 66% of these requests (41 of 62) were successful, compared to 79% in 2017. As with last year, governance proposals achieved the most frequent success, including elimination/reduction of supermajority voting provisions (9), adoption of proxy access (6), amendments to shareholder special meeting rights (3), and board declassification (3).

The Staff continues to take different approaches on "adopt" versus "amend" proxy access proposals. Similar to last year, several companies in 2018 successfully excluded proposals to adopt proxy access on the basis of substantial implementation. In each of these letters, the Staff concurred with the company's assertion that the proposal's essential objectives had been achieved through the proxy access bylaws that the company adopted in response to the proposal, notwithstanding the fact that the bylaws limited the size of the nominating group to 20 shareholders and the number of access candidates to 20% of the board while the proposal requested an unlimited nominating group size and the ability to nominate up to 25% of the board.[31] In contrast, the Staff rejected similar arguments in a number of letters where the company already had a proxy access right and the proposal requested amendments to eliminate the group limitation and to increase the number of potential access candidates.[32] This suggests that the Staff continues to view the thrust and focus of "amend proxy access" proposals differently from "adopt proxy access" proposals, and, therefore, companies that have already adopted proxy access may still have an uphill battle in convincing the Staff on a substantial implementation argument.

F. Vague or False/Misleading Exclusions Continued to Be Challenging

It has become increasingly difficult to obtain no-action relief on the basis that a proposal is inherently vague or materially false and misleading (Rule 14a-8(i)(3)). During the 2018 proxy season, the Staff did not grant any of the 32 no-action requests submitted on these grounds.[33] This is consistent with 2017, when almost all of these requests were denied.

Reversal in Staff's view on external references in proposals. Notably, a number of no-action requests argued that a proposal was vague or indefinite because it made references to external documents to describe or explain certain substantive provisions in the proposal. These requests relied on a line of no-action letters in which the Staff stated that, when evaluating these

---

[31] *See, e.g.*, *Delta Air Lines, Inc.* (avail. Mar. 12, 2018)*; *Assembly Biosciences, Inc.* (avail. Feb. 26, 2018); *HCA Healthcare, Inc.* (avail. Jan. 23, 2018); *JetBlue Airways Corp.* (avail. Jan. 23, 2018).

[32] *See, e.g.*, *Alaska Air Group Inc.* (avail. Feb. 12, 2018); *Raytheon Co.* (avail. Feb. 12, 2018).

[33] Excludes the Staff's granting of a request to permit exclusion of an image (but not the text of the proposal), as discussed above.

proposals, "we consider only the information contained in the proposal and supporting statement."[34] Since then, the Staff appears to have reversed its position as similar no-action requests challenging a number of proposals in 2018 that relied on external materials to define certain terms were denied.[35]

IV. KEY SHAREHOLDER PROPOSAL TOPICS DURING THE 2018 PROXY SEASON

A. Environmental Proposals

Environmental proposals continued to be popular during the 2018 proxy season, with shareholders submitting 139 proposals compared to 144 in 2017. Average support for these proposals edged up to 30.5% (38 proposals) compared to 28.9% in 2017 (55 proposals).

Climate change proposals. As was the case in 2017, the largest group of environmental proposals related to climate change, with 72 submitted in 2018. The 20 climate change proposals voted on in 2018 averaged support of 32.8%, similar to the prior year. These proposals tend to have a higher success rate at oil and gas and financial services companies, with four proposals receiving majority support. These included proposals by various proponents calling for: (1) a report on the impact of climate change policies, including commitments to limit global temperature change to two degrees Celsius, at Anadarko Petroleum Corporation (52.5%) and Kinder Morgan, Inc. (59.7%, up from 38.2% on the same proposal in 2017); (2) a report on methane emissions management at Range Resources Corporation (50.3%); and (3) adoption of company-wide goals for reducing GHG emissions at Genesee & Wyoming Inc. (54.3%). These results reflect the continuing trend of increased support from large asset managers,[36] which may be attributable to increased pressure from their clients. These results also reflect increased support by ISS, with the proxy advisory firm supporting 90% of climate change proposals in 2018 compared to 82% in 2017.

Other proposals. In addition to climate change proposals, other popular environmental proposals included 29 proposals requesting sustainability reports, with eight proposals voted on averaging 37.0% support; and 14 proposals focusing on renewable energy, with two proposals voted on averaging 20.3% support.

B. Board Diversity Proposals

As was the case last year, board diversity continued to be a hot button issue during the 2018 proxy season.

---

[34] *See, e.g., McKesson Corp.* (avail. Apr. 17, 2013) (allowing for exclusion of a proposal requesting an independent board chair where the proposal relied on and referenced New York Stock Exchange ("NYSE") listing standards for the definition of "independent director" but did not provide sufficient information about the term); *KeyCorp* (avail. Mar. 15, 2013) (substantively the same)*.

[35] *See, e.g., Sears Holdings Corp.* (avail. Feb. 9, 2018) (denying exclusion of an independent chair proposal referencing the NYSE's requirements for independence where the company was a Nasdaq-listed company).

[36] *See, e.g.,* Letter from Larry Fink, Chairman and Chief Executive Officer of BlackRock, to CEOs (Jan. 2018), *available here*.

What we saw this year. During the 2018 proxy season, shareholders submitted 30 proposals requesting the adoption of a board diversity policy or a report on board diversity, compared to 35 in 2017. The three proposals voted on in 2018 averaged support of 24.5% (compared to eight proposals averaging 28.3% support in 2017), and ISS recommended votes in favor of all of them. Continuing the trend from prior years, a significant number of these proposals (70%) were withdrawn, typically due to companies reaching agreements with the proponents.[37] For example, companies are increasingly adopting a variant of the "Rooney Rule" for director recruitment—that is, committing to include women and ethnically diverse candidates in the pool from which nominees are selected.

Expectations going forward. We expect continued momentum on these proposals in light of the trend among large institutional investors of taking a stronger stance on board diversity. While they have pushed for greater board diversity for years, historically, they have been reluctant to issue specific numerical targets or goals and have taken into account the companies' existing practices.[38] That is changing, however, as BlackRock announced in its 2018 proxy voting guidelines that all companies should have at least two female directors on the board.[39] Similarly, a number of other large investors, such as State Street Global Advisors, New York State Common Retirement Fund, and Legal & General Investment Management, have also indicated that they intend to vote against boards with few or no female directors.[40]

C. Employment Diversity and Anti-discrimination Proposals

Proposals focused on companies' employment diversity and anti-discrimination efforts were popular during the 2018 proxy season, with shareholders submitting 58 proposals (up slightly from the 53 submitted in 2017). The main focus areas of these proposals included gender pay gaps (24), employment diversity reports (23), sexual orientation and gender anti-discrimination policies (9), and anti-discrimination reports (2). Aside from gender pay gap proposals, which are discussed below, only the employment diversity report proposals went to a vote. These proposals received relatively strong support and ISS backing, with the seven proposals voted on averaging 37.9% support.

Gender pay gap proposals. The shareholder proposal campaign calling for a report on the size of a company's gender pay gap and policies and goals to reduce that gap fared well during the 2018 proxy season. Shareholders submitted 24 proposals (up from 19 in 2017), although only one proposal was voted on, which received 15.1% support. The notable trend this year is the significant increase in companies' implementation of these proposals, perhaps to avoid a public debate on this issue or to demonstrate the robustness of their practices. The Arjuna Capital

---

[37] *See, e.g.*, *DiNapoli: State Pension Fund Will Vote Against Board Members at Corporations with no Women Directors*, Office of the State of New York Comptroller (Mar. 21, 2018), *available here*.

[38] *See, e.g.*, *CalPERS Likely to Reject Diversity Engagement Targets*, Chief Investment Officer (Apr. 13, 2018), *available here*.

[39] *Proxy voting guidelines for U.S. securities*, BlackRock (Feb. 2018), *available here*.

[40] *Proxy Voting and Engagement Guidelines, North America*, State Street Global Advisors (Mar. 2018), *available here*; Proxy Insight, *Proxy Monthly* (Mar. 2018), *available here*.

campaign, which targeted nine financial services companies, resulted in agreements by seven of them—American Express, Bank of America, Bank of New York Mellon, Citigroup, JPMorgan, Mastercard and Wells Fargo—to disclose activities to advance gender pay equity.[41] Similarly, the Pax World Funds campaign, which targeted financial services and technology companies, resulted in similar commitments from Discover Financial Services, HP and KeyCorp.[42]

D. Proxy Access Proposals

As proxy access has become the majority practice in the S&P 500 (more than 70% have adopted as of June 13, 2018),[43] the proxy access shareholder proposal campaign has, predictably, continued to wane. Notably, during the 2018 proxy season, shareholders submitted fewer than half of the number of proxy access proposals submitted in 2017 (48 compared to 112). Similarly, the five proposals voted on requesting the adoption of a proxy access bylaw averaged support of only 34.8%, almost 30 percentage points less than the 63.1% support these types of proposals received in 2017, reflecting significant or controlling voting blocks at several of the companies. And, only one of these proposals received majority support, compared to 13 proposals in 2017. The 21 proposals voted on requesting the amendment of an existing proxy access bylaw fared similarly to last year, averaging support of 27.9% (down from 28.5% in 2017). We expect the proxy access shareholder proposal campaign to continue to wane in future years, particularly given that "amend proxy access" proposals do not appear to be gaining traction with institutional investors.

E. Other Emerging Issues

Content management proposals. As part of the increased public scrutiny following the 2016 U.S. Presidential Election of companies with a significant social media and Internet news component, two categories of shareholder proposals related to management of social media and news content, as it relates to the proliferation of so-called "fake news," were submitted to companies during the 2018 proxy season.

- ***"Tell the truth" proposals.*** David Ridenour and the National Center for Public Policy Research submitted three proposals in 2018 requesting companies adopt a policy requiring that "the company's news operations tell the truth" and to issue an annual report "explaining instances where the company failed to meet this basic journalistic obligation." Each of these proposals was challenged at the SEC, and the Staff concurred that each company could exclude the proposal from its proxy materials—two[44] on the grounds that the proposal related

---

[41] *See Arjuna Capital: JPMorgan Chase Agrees to Close Gender Pay Gap*, PR Newswire (Feb. 23, 2018), *available here*; *#MeToo movement puts pressure on U.S. banks to disclose diversity data,* Thomson Reuters (Jan. 30, 2018), *available here*.

[42] *See Pax World Funds Persuades Finance and Tech Companies to Close Gender Pay Gap*, Pax World Funds (Mar. 13, 2018), *available here*.

[43] This data was derived from the SharkRepellent.net database.

[44] *See Time Warner Inc.* (*David Ridenour*) (avail. Mar. 13, 2018)*; *The Walt Disney Co.* (avail. Dec. 12, 2017).

to the company's ordinary business operations because it focused on the content of news programming and one[45] on procedural grounds.

- ***Content controversy proposals.*** A consortium of proponents led by Arjuna Capital and the New York State Comptroller submitted three proposals to companies requesting that the company issue a report relating to the efficacy of its terms of service related to content policies and assessing the risks posed by "content management controversies." For example, at Alphabet the proposal focused on election interference, whereas at Twitter the proposal focused on "fake news, hate speech and sexual harassment." These proposals, which were not challenged at the SEC, were all supported by ISS and averaged 19.6% support.

One-vote-per-share proposals. Against the backdrop of the recent increase in public debate and investor focus around the appropriateness of dual-class share structures,[46] proponents submitted eight proposals during the 2018 proxy season seeking the elimination of these structures so that each share of stock has one vote. Seven of these proposals were voted on, averaging support of 27.5%, with ISS recommending votes in favor of all of them. The remaining proposal was successfully challenged and excluded on the grounds that it was beyond the company's power to effectuate.[47]

V. PROPONENTS INCREASINGLY USING EXEMPT SOLICITATION FILINGS

During the 2018 proxy season, both institutional and individual investors increasingly used exempt solicitation filings as a means of publicizing shareholder proposals being voted on at annual meetings. Investors have been making these filings for years, but this year is on track for the highest number of exempt solicitation filings ever. As of June 19, 2018, 140 filings have been made this year, up from 119 and 98 as of the same dates in 2017 and 2016, respectively. This is due in large part to a marked increase in filings made by individual shareholder proposal proponents.

Background on PX14A6G filings. Under Rule 14a-6(g), any person who owns more than $5 million of a company's securities and who solicits shareholders on a topic, but does not seek proxy voting authority, is required to file with the SEC a Notice of Exempt Solicitation, which appears on the company's EDGAR page as a PX14A6G filing, setting forth all written materials used in the solicitation. Public pension funds and other institutional investors often file these notices to respond to a company's statement in opposition to a shareholder proposal or to

---

[45] *See Comcast Corp.* (avail. Feb. 26, 2018).

[46] *See, e.g., Recommendation of the Investor as Owner Subcommittee: Dual Class and Other Entrenching Governance Structures in Public Companies*, SEC Investor Advisory Committee (Feb. 27, 2018), *available here* (recommending that the SEC "respond to the increase in dual class and other entrenching governance structures by continuing to scrutinize disclosure documents filed by companies with such structures … and developing guidance to address a range of issues that such structures raise"); *Stocks Are Forever, and Your Future Grandchild Knows It*, Bloomberg (Feb. 19, 2018), *available here*; *Dual-Class Stock*, Council of Institutional Investors, *available here* (highlighting CII's campaign over the last few years to urge the stock exchanges to prohibit the listing of companies with dual-class structures or require sunset provisions).

[47] *See Comcast Corp*. (avail. Mar. 13, 2018).

encourage shareholders to vote a specific way on say-on-pay proposals and in "vote no" campaigns against directors. To date, the SEC has not restricted shareholders owning less than $5 million of a company's securities from voluntarily making these filings to publicize their views on various proposals, notwithstanding that they may misleadingly suggest that the filing person is a significant shareholder.

Chevedden gets in on the PX14A6G action. The 2018 proxy season marked the first use of exempt solicitation filings by John Chevedden. As of June 19, 2018, Mr. Chevedden has submitted 19 of these filings, which focus primarily on criticizing special meeting threshold ratification proposals submitted by management (discussed above)[48] and attempting to bolster support for shareholder proposals.[49] As he often does in the supporting statements of his shareholder proposals, Mr. Chevedden included language maligning the company and individual directors in several of these filings and addressing topics entirely unrelated to the proposal at issue. For instance, in response to a company proposal seeking shareholder ratification of the company's existing special meeting stock ownership threshold, Mr. Chevedden filed a series of notices at eBay Inc. in which he criticized the company's proposal.[50]

Potential for abuse. The Rule 14a-6(g) filing requirement, which was adopted to provide companies and shareholders notice of solicitations being conducted by large institutional holders, ironically has itself turned into a means of conducting a solicitation. In addition to sometimes including language attacking the company or maligning directors, these filings can be confusing to shareholders and other stakeholders. To date, the SEC has not required that voluntary filers include information about the filer that clearly demonstrates that the notice was not filed by the company. Nor are any filers required to provide information in the notice about their relationship to the matter they are soliciting on or their share ownership in the company (or even to demonstrate that they are, in fact, a shareholder).[51] Moreover, it is unclear what practical and timely recourse a company would have if materially false and misleading statements are included in these filings.

As long as the SEC continues to permit shareholders who do not meet the Rule 14a-6(g) threshold to make these filings, we expect their use among shareholder proponents to continue to

---

[48] *See, e.g.*, Notice of Exempt Solicitation (Skyworks Solutions, Inc.) (Apr. 6, 2018), *available here* (encouraging Skyworks Solutions shareholders to vote against a management proposal to ratify the company's existing special meeting threshold).

[49] *See*, *e.g.*, Notice of Exempt Solicitation (HP Inc.) (Apr. 5, 2018), *available here* (encouraging HP shareholders to support a shareholder proposal to provide shareholders with the ability act by written consent).

[50] *See* Notices of Exempt Solicitation (eBay, Inc.): (May 16, 2018), *available here*; (May 18, 2018), *available here*; (May 25, 2018), *available here*. *See also* Notice of Exempt Solicitation (CF Industry Holdings, Inc.) (Mar. 16, 2018), *available here* (characterizing the proposal as "nonsense"); Notice of Exempt Solicitation (JPMorgan Chase & Co.) (Mar. 22, 2018), *available here* (characterizing the proposal as "do-nothing").

[51] Rule 14a-2(b)(1) provides an exemption from the SEC's information and filing requirements for "any solicitation by or on behalf of any person who does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as a proxy for a security holder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization." It is unclear whether that exemption would be available for solicitations made by a person who is not a shareholder.

grow in coming years given the broad dissemination of, and publicity generated by, such filings as well as their ability to date to escape regulatory scrutiny. We recommend companies actively monitor their EDGAR feed for these filings and, to the extent they believe an exempt solicitation filing contains materially false or misleading information, or is clearly not filed by a shareholder of the company, they should inform the Staff.

VI. POTENTIAL REFORM OF THE SHAREHOLDER PROPOSAL RULES

The 2018 proxy season saw continued momentum to amend the shareholder proposal rules.

Financial regulation reform passed, but did not include shareholder proposal reform. In June 2017, the House passed the Financial CHOICE Act,[52] which included a wide range of provisions aimed at financial regulation reform, including the following proposed amendments to Rule 14a-8: (1) strengthen eligibility requirements to submit a proposal by lengthening the time that proponents are required to hold their shares from one year to three years and increasing the share ownership requirement to 1% of the company's stock (essentially eliminating the ability for proponents to satisfy the ownership requirement, in most cases, by holding $2,000 in stock); (2) prohibit proposals by proxy; and (3) increase the resubmission thresholds (the level of support a proposal must receive in order to be resubmitted) to allow exclusion of proposals that previously were voted on in the past five years and most recently received support of less than 6% (currently 3%) if voted on once, 15% (currently 6%) if voted on twice, and 30% (currently 10%) if voted on three times.[53] However, the Financial CHOICE Act faced strong opposition from institutional investors,[54] and in May 2018, the Senate passed its own scaled-back version[55] (which was subsequently signed into law)[56] that included provisions aimed at financial regulation reform, but did not include amendments to Rule 14a-8.

A new bill renews hope of shareholder proposal reform. Building on public support from the Chairman of the SEC and the U.S. Chamber of Commerce, who have come out in support of shareholder proposal reform,[57] on June 7, 2018, the House Financial Services Committee passed

---

[52] *See* H.R. 10, 115th Cong. (2017), *available here*.

[53] These are the same percentages that were proposed but not adopted by the SEC in 1998. *See* Release No. 40018, *available here* ("We had proposed to raise the percentage thresholds respectively to 6%, 15%, and 30%. Many commenters from the investor community expressed serious concerns about this proposal. We have decided not to adopt the proposal, and to leave the thresholds at their current levels.").

[54] *See, e.g.*, *Institutional Investors Oppose Key Provisions of the Financial CHOICE Act*, Council of Institutional Investors (Apr. 24, 2017), *available here*. Public pension funds backing the CII letter include the CalPERS, Colorado Public Employees' Retirement Association and the New York State Teachers' Retirement System.

[55] *See Sweeping Senate Majority Passes Bipartisan Regulatory Reform Bill*, ABA Banking Journal (Mar. 14, 2018), *available here*; Public Law No: 115-174 (2018).

[56] Economic Growth, Regulatory Relief, and Consumer Protection Act, Public Law No: 115-174 (2018).

[57] The Center for Capital Markets Competitiveness, a division of the Chamber, released recommendations for shareholder proposal reform, which included the Financial CHOICE Act's proposed changes to the resubmission thresholds but did not recommend changes to the existing ownership threshold to submit a proposal. *See, e.g.*, *Shareholder Proposal Reform*, Center for Capital Markets Competitiveness (Jul. 26, 2017), *available here*. SEC Chairman Jay Clayton also voiced support for shareholder proposal reform, expressing his

(Cont'd on next page)

a new bill, HR 5756, reviving the shareholder proposal resubmission threshold provisions of the Financial CHOICE Act on a standalone basis.[58] The future of this latest House bill is uncertain. However, it seems clear that shareholder proposal reform, either through legislation or SEC rulemaking, remains a possibility.

The following Gibson Dunn lawyers assisted in the preparation of this client update: Ronald O. Mueller, Elizabeth Ising, Lori Zyskowski, Aaron Briggs, Melanie Gertz, Maya Hoard, David Korvin, Eileen Park, Emily Shroder, Victor Twu, and Geoffrey Walter.

Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have about these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, or any of the following lawyers in the firm's Securities Regulation and Corporate Governance practice group:

Ronald O. Mueller - Washington, D.C. (+1 202-955-8671, rmueller@gibsondunn.com)
Elizabeth Ising - Washington, D.C. (+1 202-955-8287, eising@gibsondunn.com)
Lori Zyskowski - New York (+1 212-351-2309, lzyskowski@gibsondunn.com)
Gillian McPhee - Washington, D.C. (+1 202-955-8201, gmcphee@gibsondunn.com)
Maia Gez - New York (+1 212-351-2612, mgez@gibsondunn.com)
Aaron Briggs - San Francisco (415-393-8297, abriggs@gibsondunn.com)
Julia Lapitskaya - New York (+1 212-351-2354, jlapitskaya@gibsondunn.com)
Michael Titera - Orange County, CA (+1 949-451-4365, mtitera@gibsondunn.com)

(Cont'd from previous page)

view that a majority of shareholders are bearing the costs of the interests of a minority. *See, e.g., A Discussion with SEC Chairman Jay Clayton*, Center for Capital Markets Competitiveness (Jul. 26, 2017), *available here*.

[58] *See* H.R. 5756, 115th Cong. (2018), *available here*.