

# Preparing for the 2025 Shareholder Proposal Season

Skadden

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## SEC Reporting & Compliance and Corporate Governance Series

# Overview of 2024 Proxy Season

- Number of proposals submitted increased year-over-year
  - Companies more willing to seek no-action letters to exclude proposals
  - More than two-thirds of decided no-action requests granted
  - Fewer negotiated withdrawals
  
- More majority votes for governance proposals; fewer for environmental and social and compensation-related proposals:

	2021	2022	2023	2024 YTD
E&S	39	37	8	3
Governance	54	35	20	44
Compensation	1	4	4	0

## Overview of 2024 Proxy Season (cont'd)

- **BlackRock:** Voted in favor of 4% of E&S proposals for the 12 months ended June 30, 2024 (down from 7% for the prior 12 months)
  - Observed that “the majority of [E&S proposals] were over-reaching, lacked economic merit, or sought outcomes that were unlikely to promote long-term shareholder value”
  - In addition, many “were focused on business risks that companies already had processes in place to address, making them redundant”
- **State Street:** Voted in favor of 6% of environmental proposals and 7% of social proposals in 1H24
  - Decrease in support due to “responsiveness by companies to prior shareholder proposals and the increasing prescriptiveness of the proposals” as well as “companies disclosing adequate information” or requested actions “being too specific”
- **Vanguard:** Did not support a single U.S. E&S proposal during the 12 months ended June 30, 2024
  - Attributable to its view that the proposals “did not address financially material risks to shareholders...or were overly prescriptive in their requests”

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# SEC Updates

# 2024 No-Action Letter Results

- **Ordinary business** is still the most frequently asserted basis for exclusion
  - Staff concurred with more than half of these arguments
  - Relief for proposals relating to hospital food, airline meals, relocation of company HQ, advertising
  - Denied for topics such as AI and deep-sea mining
- **Micromanagement** arguments are often successful
  - Second most common basis for granting no-action
- Significant uptick in grants for **violation of state law**
  - A function of proposals seeking to enhance majority voting standards in director elections
- **Procedural** arguments remain largely successful
- **Substantial implementation** remains challenging as Staff continues to apply a narrow lens
  - Staff granted no-action to approximately one-third of these arguments

# Reminder: Updated Submission Process

- On November 7, 2023, the Staff announced a new submission intake process for shareholder proposal no-action requests
- Shareholder proposal no-action requests and related correspondence must be submitted using a new online shareholder proposal form on the SEC’s website
  - Includes providing “pens down” proxy statement print date
- Emailed materials will no longer be accepted
- Companies must still forward relevant correspondence to proponents (by mail or email)

# Update: SEC Sued Over No-Action Decisions

- The National Center for Public Policy Research (NCPPr) sued the SEC in 2023 in the Fifth Circuit after the Staff granted a no-action request to exclude NCPPr’s proposal requesting disclosure of the risks associated with omitting “viewpoint” and “ideology” from a company’s Equal Employment Opportunity policy
  - NCPPr argued that the SEC (1) acted contrary to law and arbitrarily and capriciously by concurring with companies’ exclusion of shareholder proposals about viewpoint and ideological discrimination and (2) engaged in viewpoint discrimination and the chilling of speech in violation of the First Amendment
  - Company included the proposal in its 2023 proxy statement and it received less than 2% support
- On November 14, 2024, the Fifth Circuit granted the SEC’s motion to dismiss the litigation for lack of jurisdiction
  - Case moot since company included the proposal in its proxy materials
  - Also, Staff no-action letter does not constitute a final order of the SEC or other agency action subject to judicial review
  - NCPPr could still petition for rehearing en banc and/or appeal to the U.S. Supreme Court

# Proposed Amendments to Rule 14a-8 Still Pending

- The SEC proposed amendments to Rule 14a-8 in July 2022
  - **Substantial implementation:** Would require implementation of all of the “essential elements” of the proposal
  - **Duplication:** Would require the proposals to address the same subject matter and seek the same objective by the same measures
  - **Resubmission:** Would require the proposals to address the same subject matter and seek the same objective by the same measures
- Arguably, Staff has been applying these standards already
- Not clear that the SEC in the next administration will move forward on this rulemaking

# Corporate Governance Proposals

# Overview: Majority-Supported Governance Proposals

Governance Topic	# of Majority-Supported Proposals
Eliminate supermajority voting provisions	31*
Board declassification	6*
Provide shareholders with a right to call special meetings	3
Reduce ownership threshold for shareholders to call special meetings	2
Provide shareholders with a proxy access right	1*
Adopt poison pill bylaw requiring shareholder approval within one year of adoption	1

\*13 proposals to eliminate supermajority voting provisions, one proposal on board declassification and the one proposal on proxy access were not opposed by the board

- According to ISS, at Russell 3000 companies holding director elections from January 1 to June 30, 2024, 34 directors at 26 companies failed to receive majority support (down from 38 directors at 26 companies in 1H23)
  - In 1H24, only two directors at one S&P 500 company failed to receive majority support, up from one director (at the same company) in 1H23
  - From 2015-2024, the number of Russell 3000 directors failing to receive majority support in 1H ranged from 26 to 58 (average 42)
  - Main reasons in 2024:
    - » Multi-class capital structure with unequal voting rights or other problematic governance structure
    - » Poor responsiveness to failed director elections
    - » Extension of poison pills without shareholder approval
    - » Board lacking racial/ethnic diversity

## Director Election Matters (cont'd)

- One set of shareholder proposals, submitted by the United Brotherhood of Carpenters, sought adoption of a “director election resignation bylaw”
  - Amend bylaws to require board to accept the resignation of a director who fails to get majority support absent finding a compelling reason to not accept the resignation
  - If the “holdover” director fails to get majority support at the next election, new resignation automatically effective 30 days after certification of the vote
  - Voted on at 8 companies
  - Average support of 17.6% of votes cast
- Another set of proposals, submitted by individual investors, sought adoption of a corporate governance guideline providing that a director who fails to get majority support in an uncontested election would be ineligible to be nominated by the board at the next shareholder meeting
  - Voted on at 6 companies
  - Average support of 16.1% of votes cast

# Special Meeting Proposals

- Shareholders have a right to call a special meeting at approximately 75.6% of S&P 500 companies and 61.4% of Russell 1000 companies
- Among S&P 500 and Russell 3000 companies with a special meeting right, a 25% ownership threshold for calling a meeting is most common
- Of the 44 corporate governance-related shareholder proposals to receive majority support, 5 related to special meeting rights

## Special Meeting Proposals (cont'd)

- 8 proposals sought to establish a new right for shareholders to call special meetings (10% or 15% threshold) where such a right did not already exist
  - Voting results varied by company proposals in response to the shareholder proposal

Company Response	Number of Proposals Receiving Majority Support	Average Support
Two companies had no “competing” or “mitigating” proposal	2	61.4% (52%, 70.8%)
Five companies had a “competing” proposal for a 25% special meeting right	1	45.4%
One company had a non-binding management advisory vote on a 25% special meeting right	0	44.8%

## Special Meeting Proposals (cont'd)

- 15 proposals sought a reduction in the ownership threshold required for shareholders to call a special meeting

Proposed vs. Existing Thresholds (No.)	Number of Proposals Receiving Majority Support	Average Support
10% vs 40% or higher (3)	2	55.5%
10% or 15% vs 20% or 25% (10)	0	42.4%
10% vs 15% (2)	0	25.1%

# Written Consent Proposals

- Shareholder ability to act by written consent provides another method of shareholder action between annual meetings, but without some of the procedural protections involved in calling a special meeting
  - Permitted at approximately 29.4% of S&P 500 companies and 26.2% of Russell 1000 companies
- Note that each company with a shareholder proposal to provide a right to act by written consent either already provided (or was proposing) a shareholder special meeting right and no written consent proposal received majority support

Special Meeting Right (# of Proposals)	Average Support
20% or 25% (5)	43.4%
15% (1)	34.8%
10% (1)	13.4%
Proposed 25% (1)	27.2%

# Independent Chair Proposals

- According to the 2024 U.S. Spencer Stuart Board Index, which looks at S&P 500 boards:

	2024	2014
Combined CEO/Chair	40%	53%
Independent Chair	39%	28%
Executive Chair/Other Non-Independent Chair	21%	18%

- For 2016-2023, only four independent chair proposals (one in 2018, two in 2020, and one in 2021) out of 402 received majority support
- For 2024, 41 proposals came to a vote:
  - None received majority support
  - Average support was 30.1% of votes cast (same as 2023)
  - ISS recommended in favor of 44% of proposals, up from 38% (2023)
    - » Average support was 35.4% with an ISS favorable recommendation and 25.9% with an ISS negative recommendation

# Elimination of Supermajority Voting Requirements

- Drove the significant increase in majority-supported governance proposals
- 31 of 43 proposals received majority support, with average support of 71.0% of votes cast
  - Management did not oppose 13 proposals; average support 93.7%
  - ISS recommended “against” 3 proposals; average support 8.9%
  - ISS recommended “for” and management recommended “against” 27 proposals; average support 67.0% (18 receiving majority support)
    - » 8 of the 9 proposals that did not receive majority support received >40% support

# Other Governance Proposal Topics

- Board declassification
  - Majority support at 6 of 7 companies
  - Failed at a controlled company
  - Unopposed at one company (97.8% of votes cast)
  - Average support at the 5 other companies of 65.5% of votes cast
- Majority voting in uncontested director elections
  - Both companies had plurality voting
  - Neither proposal received majority support (average support of 37.7% of votes cast)
- Adopt proxy access
  - One proposal, unopposed, received 99.2% of votes cast
- Allow for removal of directors with or without cause
  - One proposal, received 7.9% of votes cast
  - In 2023, proposal at same company received 53% of votes cast
  - Company had already implemented by deleting “for cause” requirement
- Enhance board diversity
  - One proposal, received 26.5% of votes cast
- Disclose a board skills/diversity matrix
  - Two proposals, average support of 25.3% of votes cast

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# Environmental and Social Proposals

# Environmental and Social Proposals Overview

- According to ISS data, median support for E&S proposals through August 2024 was comparable to 2023 and remains below the recent high-water marks in 2021:

	2021	2022	2023	2024
Environmental proposals	39.8% (40 proposals)	26.5% (77 proposals)	18.4% (106 proposals)	20.7% (82 proposals)
Social proposals	31.8% (131 proposals)	24.3% (203 proposals)	18.1% (205 proposals)	17.2% (212 proposals)

- Year-to-date, three E&S proposals have received a majority of votes cast (down from 8 in 2023):
  - Two proposals relating to disclosure of GHG emissions reduction targets
  - One proposal relating to disclosure of political contributions

# Climate Change and Environmental-Related Proposals

- 38 proposals covering a variety of climate change and GHG topics
  - Average support of 24.3% of votes cast
  - Two proposals on disclosure of GHG reduction targets by chain restaurant companies received majority support and a third proposal at a chain restaurant company received 49.9% of votes cast
  - ISS supported 63% of these proposals
- 25 proposals covering a wide variety of environmental topics, including reducing plastic use, packaging, biodiversity, deforestation, environmental justice, deep-sea mining and water risk
  - Average support of 15.9% of votes cast
  - None received majority support
  - ISS supported 44% of these proposals

# Workforce-Related Proposals

- Proposals relating to employees' collective bargaining rights
  - 10 proposals received average support of 25.7% of votes cast (down from 35.8% in 2023)
- Proposals seeking a report on the prevention of workplace harassment and discrimination
  - 4 proposals received average support of 16.0% of votes cast (down from 26.2% in 2023)
- Proposals seeking a report on the effectiveness of companies' DEI efforts
  - 14 proposals received average support of 21.3% of votes cast (down from 27.0% in 2023)
- Proposals seeking a third-party racial equity audit
  - 6 proposals received average support of 13.5% of votes cast (down from 22.3% in 2023)

## Workforce-Related Proposals (cont'd)

- Proposals seeking a report on gender and/or racial pay gaps
  - 16 proposals received average support of 29.0% of votes cast (down from 33.4% in 2023)
- Proposals seeking a report on workplace health and safety matters
  - 5 proposals received average support of 22.8% of votes cast (down from 42.3% in 2023)
- Proposals seeking a report on the risks to the company from state policies restricting reproductive rights and company strategies to mitigate these risks
  - 4 proposals received average support of 9.6% of votes cast (down from 11.6% in 2023)

# Political Spending/Lobbying Proposals

- Proposals seeking disclosure of political contributions
  - 20 proposals received average support of 32.0% of votes cast (flat with 31.2% in 2023), with one proposal receiving majority support
- Proposals seeking a report on the congruency of political contributions or lobbying expenditures with company values
  - 11 proposals received average support of 16.2% of votes cast (down from 24.3% in 2023)
- Proposals seeking lobbying payments disclosure
  - 22 proposals received average support of 29.0% of votes cast (down from 31.7% in 2023)
- Proposals seeking a report on climate lobbying matters
  - 10 proposals received average support of 23.8% of votes cast (down from 32.8% in 2023)
- Less traditional proposals
  - 2 proposals relating to global public policy and political influence received average support of 15.0% of votes cast (down from 16.8% in 2023)
  - 2 proposals relating to third-party reporting of political expenditures received average support of 4.4% of votes cast (down from 6.5% in 2023)

# Miscellaneous Proposals

- 6 proposals relating to artificial intelligence
  - 4 requested disclosure on the company’s use of AI and any ethical guidelines regarding such use, as well as disclosure of the board’s role in overseeing AI usage
    - » Average support of 26.8% of votes cast
  - 2 requested a report assessing the risks to the company’s operations and the public welfare presented by the company’s role in facilitating disinformation generated or amplified by AI
    - » Average support of 17.2% of votes cast
- 11 proposals seeking a report on risks related to discrimination based on an individual’s religious or political views averaged 2.4% support
- 8 proposals seeking a report on directors’ charitable contribution averaged 2.7% support

# Executive Compensation-Related Proposals

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- Most common proposal requested adoption of a policy that the board of directors seek shareholder approval of any senior manager's new or renewed pay package that provides for severance or termination payments — including the vesting of equity awards — with an estimated value exceeding 2.99 times the sum of the executive's base salary and short-term bonus
  - 30 proposals
  - Received average support of 14.7% of votes cast (down from 24.0% in 2023)
  - ISS recommended in favor of 10 proposals — 33.6% average support (down from 42.7% in 2023)
  - ISS recommended against 20 proposals — 6.5% average support (down from 9.2% in 2023)

## Executive Compensation-Related Proposals (cont'd)

- Next most common proposal requested amending compensation “clawback” policies to address circumstances other than restatement of financial statements
  - 20 proposals
  - Received average support of 25.4% of votes cast
  - ISS recommended in favor of 14 proposals – 33.2% average support
  - ISS recommended against 6 proposals – 7.1% average support
- 4 proposals to include GHG emissions reduction goals or other ESG or sustainability metrics in executive compensation received average support of 13.6% of votes cast
- 5 proposals seeking a bylaw amendment regarding shareholder approval of director compensation received average support of 2.0% of votes cast

# — Practical Points and Other Matters

## Practical Points/Reminders

- Make sure mailroom, CEO's assistant, investor relations, etc., know to whom to forward incoming shareholder proposals
  - Similarly, ensure relevant fax machines and email addresses are checked regularly
- Keep envelopes with postmarks or FedEx shipping labels to verify the date a paper submission was sent by mail or courier
- Promptly review a proposal for procedural deficiencies — proof of ownership, statement of intent to hold shares through the meeting date, 500-word limit, availability for engagement, multiple proposals — and promptly send any deficiency notices
  - No deficiency notice is required where the defect cannot be cured, e.g., missing the submission deadline
- Don't forget to send the opposition statement to the proponent no later than 30 days prior to filing your definitive proxy statement
  - Send even if a no-action request is still pending

# ISS Proposed Benchmark Policy Updates

- ISS comment period was open through December 2, 2024
- Poison pills
  - Clarifies factors considered in case-by-case evaluation of board's adoption of a short-term right plan to include the context in which rights plan was adopted and company's overall track record on governance and responsiveness to shareholders
  - Not a substantive change
- SPAC proposals for extensions
  - Codifies ISS's existing approach to support extension requests of up to one year from original termination date
- Natural capital-related proposals
  - Updates current ISS policy on general environmental proposals (e.g., biodiversity, deforestation, water pollution) to group them under natural capital-related
  - Consider alignment of company disclosure and policies with any relevant, broadly accepted reporting frameworks

# Select Glass Lewis U.S. Benchmark Policy Updates

- Board oversight of AI
  - Generally will not make voting recommendation on the basis of a company’s oversight or disclosure concerning AI-related issues unless there is a material incident related to a company’s use or management of AI
  - In the event of material harm to shareholders resulting from insufficient oversight of AI, may recommend against directors responsible for AI oversight
- AI-related shareholder proposals
  - Will evaluate proposals on a case-by-case basis taking into account the proposals’ request, company disclosure and any high-profile controversies
- Board responsiveness to shareholder proposals
  - Reflects expectation that when a proposal receives more than 30% support (votes cast), board should engage with shareholders on the issue and provide disclosure addressing shareholder concerns and company’s outreach
- Reincorporation
  - Will review on a case-by-case basis including evaluating changes in corporate governance provisions/shareholder rights and material differences in corporate statutes and case law
  - In a controlled company situation, will evaluate how independent directors reached their recommendation and if proposal is put to a vote of the disinterested shareholders

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# Biographies

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**Marc Gerber**

Partner  
Washington, D.C.

Marc Gerber concentrates his practice in the areas of mergers and acquisitions, corporate governance, general corporate and securities regulation, and environmental, social and governance (ESG) matters. Mr. Gerber has represented many companies with respect to shareholder activism and takeover preparedness. He also has advised purchasers and sellers in a wide variety of transactions, including private acquisitions and divestitures, negotiated and contested public acquisitions, and proxy fights.

Mr. Gerber advises numerous clients on a full range of corporate governance and related matters, including advising clients on compliance with the corporate governance provisions of the Dodd-Frank Act and the provisions of the Sarbanes-Oxley Act, the rules and regulations of the Securities and Exchange Commission (SEC) and the listing

requirements of the New York Stock Exchange and NASDAQ Stock Market. In addition, he counsels clients on matters concerning their annual meetings and proxy statements, including responding to corporate governance and ESG-related shareholder proposals and interacting with shareholders and proxy advisory firms. Mr. Gerber also advises companies, boards of directors and board committees on corporate governance topics such as shareholder rights plans, advance notice bylaws, proxy access, board independence and board self-evaluation. He has been selected for inclusion in Chambers USA: America's Leading Lawyers for Business and in Best Lawyers in America and was elected as a fellow of the American College of Governance Counsel.

# Biographies



## Gianna McCarthy

Director of Corporate Governance, New York State Common Retirement Fund  
New York, NY

Gianna McCarthy is Director of Corporate Governance of the \$246 billion New York State Common Retirement Fund. She has spent her career promoting investor interests and long-termism in the Congress, in the Courts, at the SEC and at individual companies. She is the architect of the Fund's Sustainable Investment Program. Gianna is responsible for the oversight of proxy voting for the Fund's portfolio of over 3,000 U.S. public equity holdings. She has guided an expansion of the Fund's corporate engagement program, focusing on risk management and board level accountability.

Prior to working for the Fund, Gianna had over ten years' experience in promoting shareholders' interests. She has litigated cases on behalf of and advised shareholders and served as Director of Corporate Governance of the New York City Pension Funds. She received a B.A. in History from Rutgers University and her J.D. from Yeshiva University's Benjamin N. Cardozo School of Law. She is a member of the Board of Directors of The Thirty Percent Coalition and serves on the Pension Fund Leadership Council of Ownership Works. From 2011-2016 she served on the Board of Directors of the Council of Institutional Investors. She was co-chair of its Shareholder Advocacy Committee and is presently a member of the U.S. Asset Owner Advisory Council.



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