HAYNES BOONE

Looking Ahead to the 2022 Proxy Season: Key Issues and Developments Facing Investors and Public Companies

January 27, 2022

Panelists

Zally Ahmadi - SVP, Corporate Governance, ESG & Executive Compensation, D.F. King & Co. Inc.

Robert Main - COO and Managing Partner, Sustainable Governance Partners

Laura Wanlass - Partner, Corporate Governance & ESG Practice Leader, AON

Jason Zachary - Partner, Haynes and Boone LLP, Denver and New York offices

Continued Rise of ESG

Notable Developments Include Increased Support Levels for E&S Shareholder Proposals

- During 2020, the COVID-19 pandemic magnified the importance of ESG due to a number of factors, including:
    - Increased Investment in ESG Funds
    - Focus on Employee Health & Safety
    - Investor Focus on Diversity
    - Climate Change Initiatives

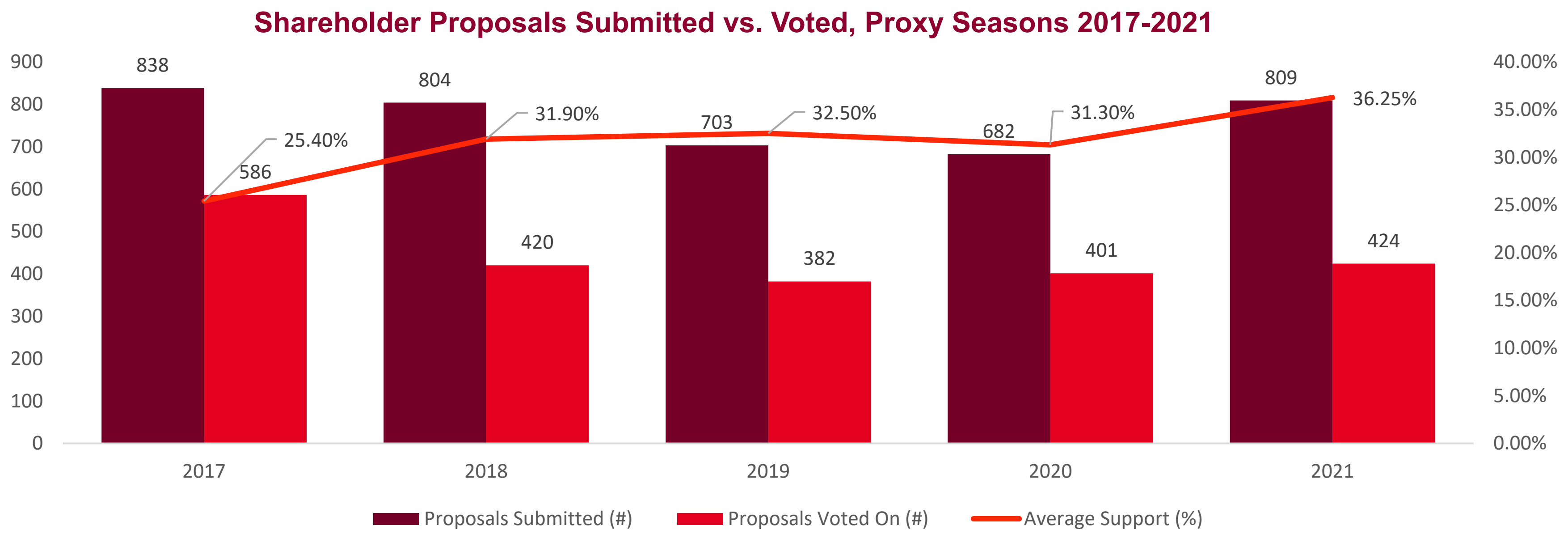
- **During 2021**, we saw a continued focus on these topics, amplified by record levels of support for environmental and social initiatives.

- Social proposal submissions nearly tripled last year, and outpaced governance submissions for the first time. EEO-1 reporting proposal submissions more than tripled last year as well, and average support remains high at 55.7%.

- Nearly half of all environmental proposals that made it onto ballots last year received majority shareholder support, compared to none just two years ago. Requests for climate change reporting received the highest number of submissions as well as the highest number of environmental proposals that received majority shareholder support, followed by proposals requesting reporting or targets for GHG emissions.

- Trending topics received increased spikes in average support levels and increased numbers of passing proposals – these included political contributions/lobbying, EEO-1, board and management diversity, proposals related to human capital management, climate change reporting & GHG emissions.

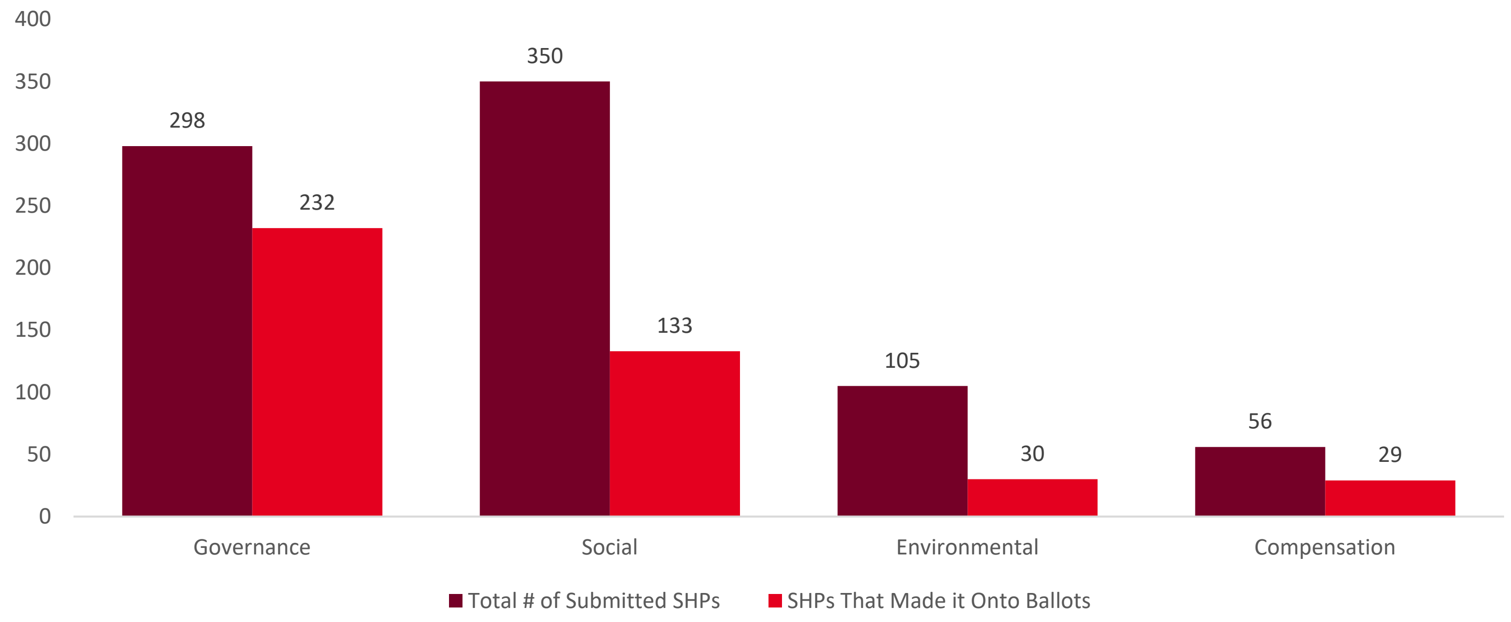
Increases Across the Board: Proposals Submitted, Voted On & Average Support Levels



- **Significantly Higher Number of Proposals Submitted, Continued Strong Support.**
- In 2021, **52%** of proposals went to a vote, slightly down from 2020 (**59%**), due in part to a significantly increased number of social-related proposals, for which withdrawals are more common.
- Approximately **30%** of proposals were withdrawn in **2021,** vs **15%** in 2020 and **26%** in 2019**.**

D.F. KING
An AST Company

Proposals Submitted vs Voted on, by Type

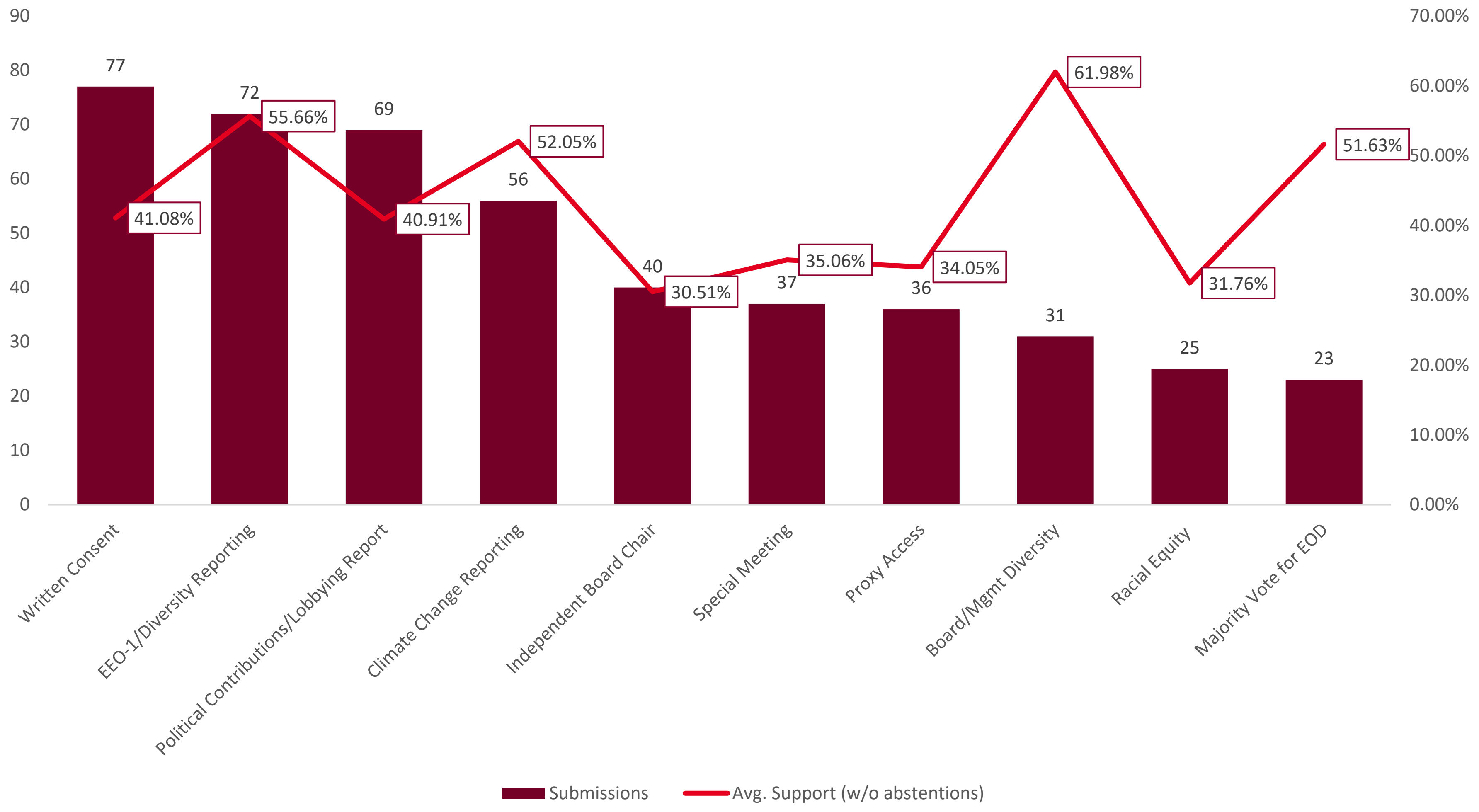


- **2021 saw a surge in social proposals** – Although most were withdrawn, many topics saw significant levels of shareholder support (EEO reporting, board diversity)

- **Governance proposals continue to have a strong presence** – almost 80% went to a vote, and average support for proposals requesting the elimination of supermajority provisions skyrocketed to almost 90%.

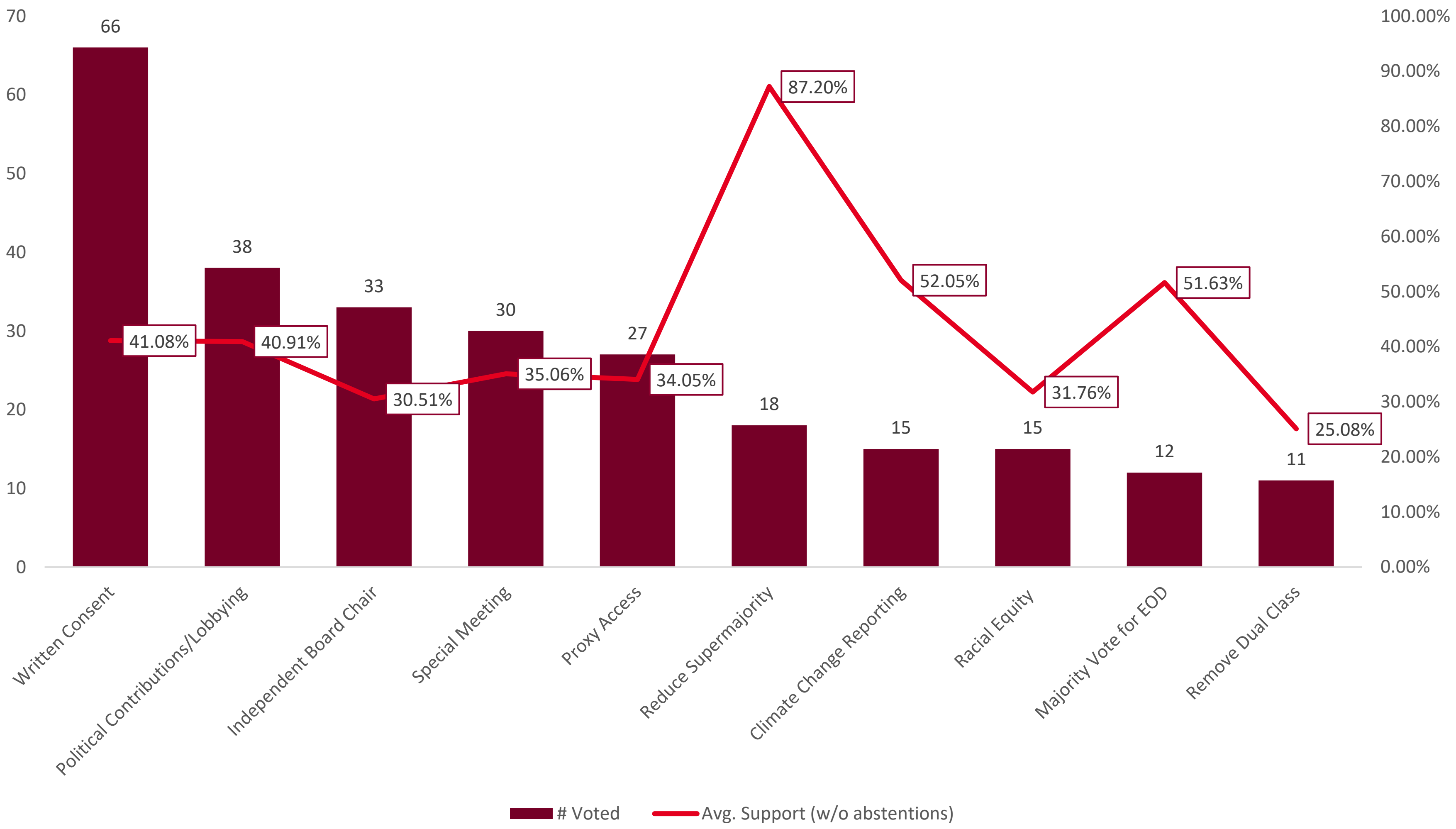
- Although there was just a slight increase in submissions for environmental proposals, **approximately half of all environmental proposals that went to a vote passed.**

Top Shareholder Proposals Submitted in 2021



D.F. KING
An AST Company

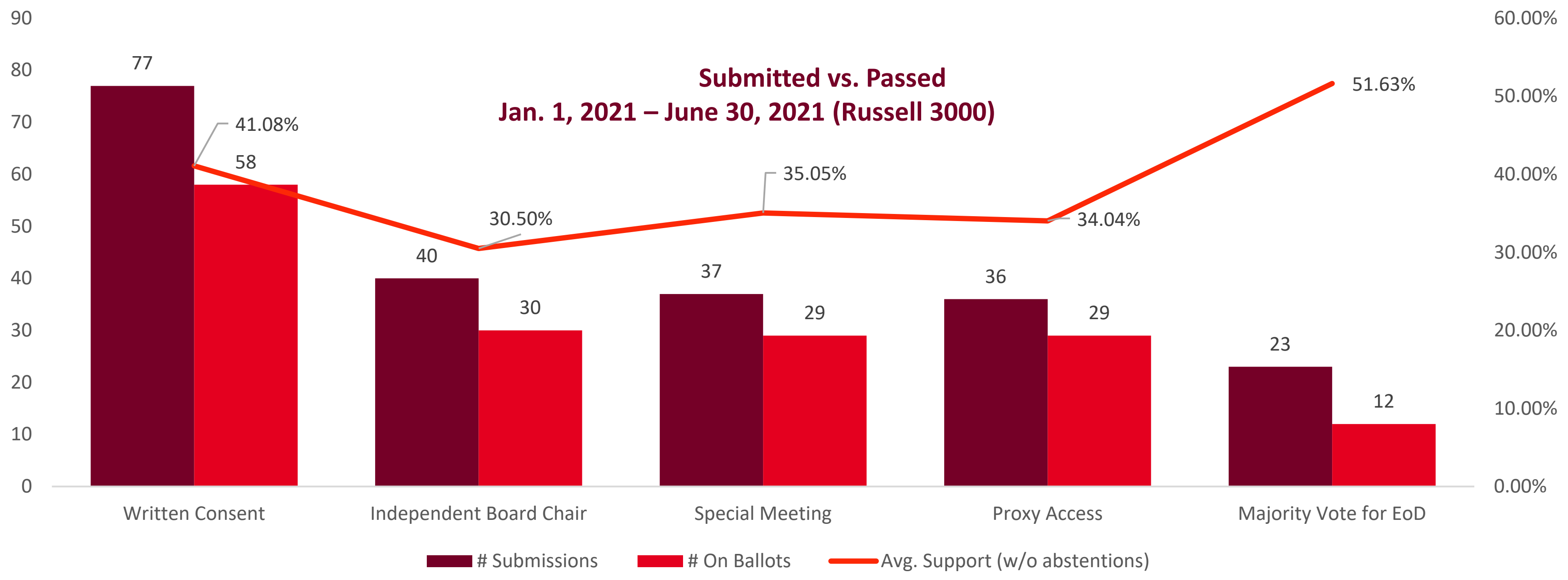
Top Shareholder Proposals Voted on in 2021



D.F. KING
An AST Company

ESG Proposals and ‘Hot Topics’

Top Corporate Governance Proposals in 2021



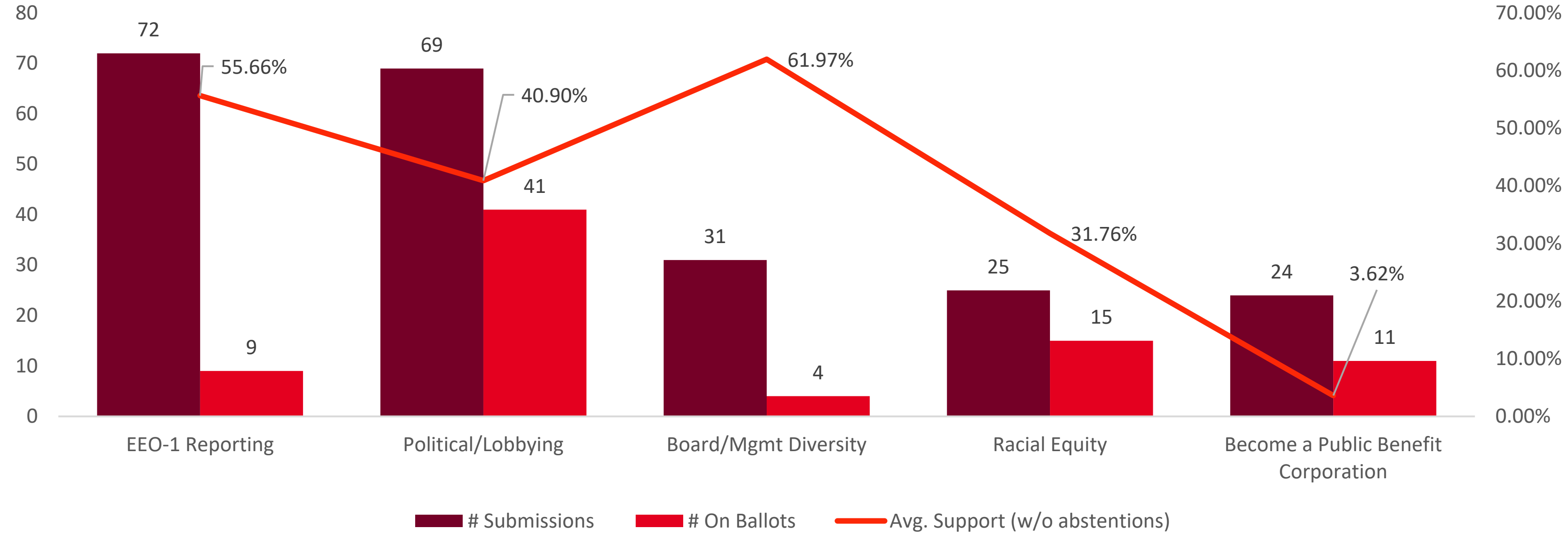
- Overall submissions increased; most governance proposals go to a vote.
- **Written Consent** proposals remain the type with the highest number of submissions.
- There was a decrease in proposals to **lower the ownership threshold to call a special meeting** (37 vs 42 in 2020).
- There was an increase in proposals to **require a majority vote for the election of directors** (23 vs. 13 in 2020).

D.F. KING
An AST Company

Spotlight: Hot Governance Issues

Eliminate Supermajority	□ Average support for proposals requesting an elimination of supermajority voting provisions **skyrocketed to almost 90%;** this has historically been the governance topic that receives the highest level of support, and it is rare for these proposals to be defeated. □ During the 2021 proxy season we saw two times the number of these proposals submitted (18 proposals) compared to the 2020 proxy season, and **all made it onto ballots and ultimately received over a majority of shareholder support**.
Reduce Threshold to Call a Special Meeting	□ **Shareholders' ability to call special meetings is broadly considered to be a fundamental right, but there is less consensus as to the specific ownership threshold that should be required.** □ Proposals on ballots decreased this year, with 29 (2020:40) such proposals going to a vote. □ Average support decreased to 35.06% (2020:42%) □ **The threshold percentage can play a determining factor as to whether these proposals pass**. Of the **four** proposals that received majority support, two were at companies who already allowed special meetings at a 25% threshold (Reduction requests for these proposals were 10% and 15%).
Right to Act by Written Consent	□ **58** went to a vote in 2021, which is on par with what we saw in 2020. □ Average support increased to **41%** in 2020 compared to **35%** in 2020. □ ***Shareholders' decisions to support proposals demanding a right to act by written consent are often influenced by whether shareholders have an existing right to call a special meeting at an acceptable threshold (generally ranging from 10% to 25% depending on the investor).*** □ Significant uptick in proposals that passed – 8 this year, compared to 2 the previous proxy season.

Top Social Proposals in 2021



The number of social proposals increased significantly from 2020, about 38% went to a vote.

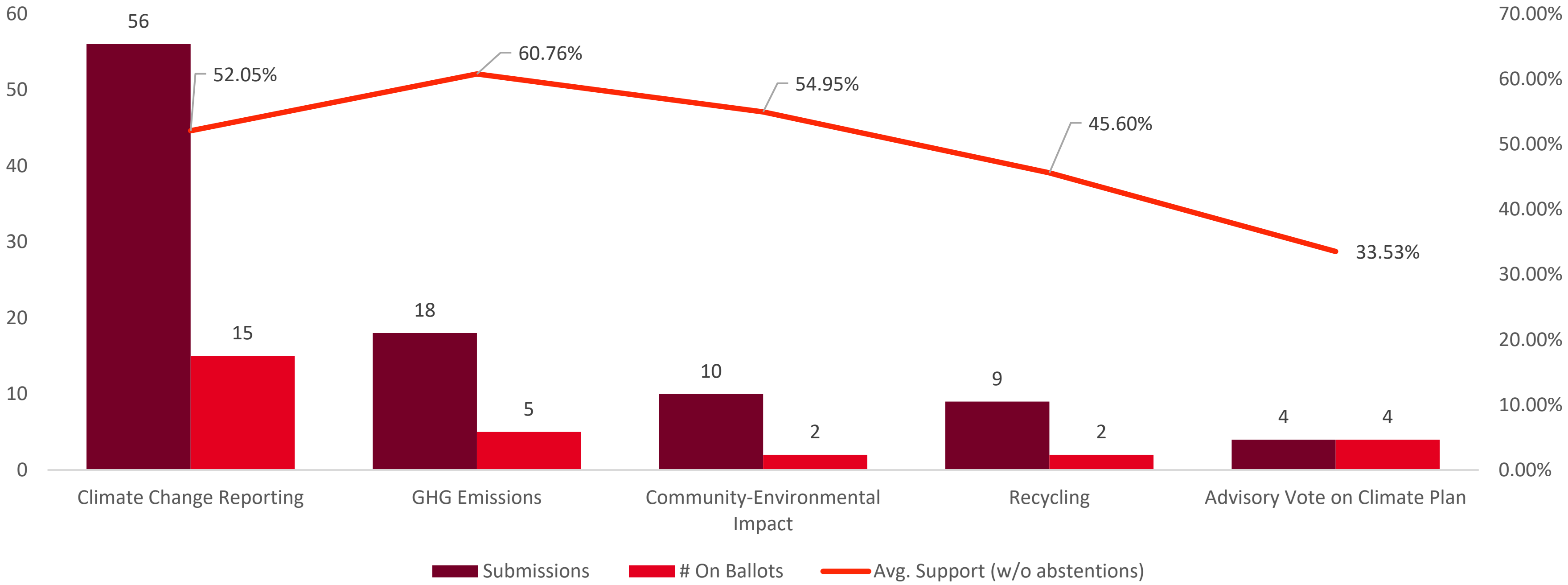
- **EEO-1 Reporting proposals have overtaken political contributions and lobbying proposals;** the latter has held the #1 spot for at least the last 5 years.
- Proposals submissions increased to **258** last year (2019:258), though a smaller percentage made it onto ballots due to increased engagement, negotiation and concessions.
- Strong shareholder support levels were recorded for proposals requesting **EEO-1 reporting** (**55.6%**) and board diversity (**61.9%** vs 13.3% in 2019).

Spotlight: Diversity

Shareholder Proposals	• Increase in EEO proposals submitted (**72** vs.17) and average level of support (**55.6%** vs. **52.6%** in 2020). In addition, support levels for board diversity proposals have nearly doubled over the previous year, likely due to the strengthened position of institutional investors and proxy advisory firms. • Pension funds and social impact investors including the NYC Comptrollers Office, Trillium Asset Management and Calvert Research have launched campaigns demanding various forms of workforce disclosure, including the publication of EEO-1 reports, and are submitting shareholder proposals requesting workforce diversity disclosure at companies that were non-responsive to initial campaign requests.
Institutional Investors – Board & Employee Diversity Policies	➢ **BlackRock**: Expects companies to provide board diversity disclosures (including on race and ethnicity) and disclosures that "fully reflect [a company's] long-term plans to improve diversity, equity, and inclusion, as appropriate by region" "with an eye toward more voting action against boards not exhibiting diversity in 2022." "Encourages" companies to have **two female directors**. ➢ **State Street**: Expects companies to disclose the role diversity plays in their broader HCM practices and long-term strategy, their diversity goals and how they are managed and progressing, diversity of the global employee base and the board, including the racial and ethnic makeup of the board, goals and strategy related to racial and ethnic representation on the board, and a description of how the board executes its diversity and inclusion oversight role. Expects at least **one female director**. For S&P 500 companies, expects disclosure of racial/ethnic makeup of board and, in 2022, expects **at least one director from an underrepresented community**. ➢ **Vanguard**: May vote against directors (nominating and/or governance committee members or others) where there is lack of sufficient progress on board diversity and diversity disclosure.
Proxy Advisory Firm – Board Diversity Policies	➢ **ISS**: Gender: Beginning 2023, ISS will recommend against chair of nom/gov committee for public companies that do not have at least one woman on the board; this provides a one-year grace period for companies that are not in the Russell 3k and S&P 1500 indices to comply. Racial/Ethnic: For 2021, ISS reports for Russell 3000 and S&P 1500 companies merely highlighted boards that lacked racial and ethnic diversity (or lacked disclosure of such). For 2022, if such a company has **no apparent racially or ethnically diverse** board members, will generally recommend against/withhold from the chair of the nominating committee (or other directors on a case-by-case basis). An exception will be made if there was racial and/or ethnic diversity on the board at the preceding annual meeting and the board makes a firm commitment to appoint at least one racially and/or ethnically diverse member within a year. ➢ **Glass Lewis**: In 2021, "noted as a concern" boards with fewer than two female directors, but made voting recommendations based on the requirement of **at least one female board member**. Starting January 1, 2022, it will generally recommend against the nominating chair if the board has fewer than **two female directors**. Beginning 2023, GL will transition from a fixed numerical approach to a percentage-based approach and will generally recommend voting against the nominating chair of a board that is not at least 30% gender diverse at companies within the R3K Index.

D.F. KING
An AST Company

Top Environmental Proposals in 2021



- Number of proposals increased slightly (**105** vs. **100** in 2019). Perhaps most notably, nearly half of all environmental proposals that made it onto ballots last year received majority shareholder support, compared to none just two years ago.
- **Requests for Climate Change Reporting**: top environmental proposal submitted, most passed. Support skyrocketed from **35%** in 2020 to **52%** in 2021.
- 80% of GHG emissions-related proposals that made it onto ballots **received majority shareholder support** last year, reinforcing the increased investor interest over the past year.
- This year, a '"**say-on-climate"** initiative emerged, where such proposals requested an annual advisory vote on a company's climate-related plans; one such proposal received majority shareholder support.

D.F. KING
An AST Company

Spotlight: Say on Climate Proposals

Proposals requesting an annual shareholder advisory **"say on climate"** vote seeking a climate transition assessment and investor feedback, analogous to the "say on pay" vote for executive compensation.

Proponents: As You Sow and The Children's Investment Fund (TCI) (activist hedge fund magnate Sir Chris Hohn's firm). TCI's campaign began in the U.S. with filings in November 2020. To date, the proponents have reportedly engaged 75 companies with a ***plan to file hundreds of proposals at the end of 2021***.

Results:

- **Two company-sponsored** proposals passed (at Moody's and S&P Global) with shareholder support in excess of **90%**.
  - Notably, both proposals committed to presenting advisory votes at the company's 2022 AGM, *but did not speak to future meetings.*
- **Four** other shareholder proposals were voted on and did not pass:
  - Three received over **30%** support; two of these (at Charter Communications Inc. and Union Pacific Corp.) requested future advisory votes on a climate action plan *that explicitly includes an emissions reduction strategy.*
  - One (at Monster Beverage Corp.) received only **7%** support; requested amendment to bylaws to provide for annual "say on climate" vote.
- **One** was withdrawn (at Alphabet).

Spotlight: Climate Change

- **BlackRock and Vanguard** have disclosed voting decisions in favor of climate change resolutions at companies where they have concerns around the company's management of climate risk. This proxy season, investors have now targeted directors at certain companies based on these concerns.

- **Climate Action 100+** is an initiative aimed at ensuring the world's largest corporate GHG emitters take necessary action on climate change. The companies include 100 'systemically important emitters', and is backed by more than 360 investors with more than $34 trillion in assets under management.

- **Business Roundtable** called on "businesses and governments around the world to work together to limit global temperature rise this century to well below 2 degrees Celsius above pre-industrial levels, consistent with the goals of the Paris Agreement."

- **The Oil and Gas Climate Initiative (OGCI)**, a group that includes some of the largest oil & gas companies in the world, announced a target to reduce the collective average carbon intensity of member companies' aggregated upstream oil and gas operations by 2025.

- '**Say-on-Climate**' initiatives emerged, where such shareholder proposals request an annual advisory vote on a company's climate-related plans.

Institutional Investor Positions on ESG Hot Topics

Topic	BlackRock	Vanguard	State Street
Director Elections	Will consider voting against committee members and/or individual directors where the board: • ***has failed to exercise sufficient oversight with regard to material ESG risk factors***, or • the company ***has failed to provide adequate disclosure*** that board gives appropriate strategic consideration is given to these factors	Will consider oversight of governance failures and/or material or manifested risks, ***including social and environmental risks***, when determining vote against a director or committee.	May vote against directors at S&P 500 companies that are laggards based on their R-Factor score and cannot articulate their plan to improve their score. R-Factor scores draw on multiple data sources and leverages SASB framework and corporate governance codes to generate a unique ESG score
Climate Change Disclosure	Asks companies to (i) publish TCFD- and SASB-aligned reporting, and (ii) disclose their plans for a “net zero” economy, including “how this plan is incorporated into [the company’s] long-term strategy and reviewed by [its] board.”	Clear, comparable, consistent and accurate disclosure enables shareholders to understand the strength of a board’s oversight.	Takes disclosure into account when voting on shareholder proposals related to ESG
Shareholder ESG Proposals	May support proposals, particularly on environmental matters. Voted on roughly 170 ESG SH proposals during the first half of 2021, supported: • **91% of environmental proposals** • 23% of social proposals • 26% of corporate-governance proposals	Case-by-case; tend to support disclosure-oriented proposals and enhancements to company practices. Likely to support proposals for disclosure on : • how climate risks are incorporated into strategy and capital allocation decisions, assessment on climate impact and/or feasibility analysis • workforce demographics or board skills/ diversity	Case-by-case, considering: the materiality of the topic to the company, the content and intent of the proposal. whether the proposal would promote long-term shareholder value and level of board oversight of ESG practices, among other things. → support proposal if the issue is **material** and the company has **poor disclosure and/or practices** relative to SSGA's expectations.
Diversity	• Expects disclosure on board diversity (including data on gender, race and ethnicity) which “fully reflect[s] [a company’s] long-term plans to improve diversity, equity, and inclusion.” • May vote against directors on boards not exhibiting diversity starting 2022.	May vote against directors (nominating and/or governance committee members or others) where there is lack of sufficient progress on board diversity and diversity disclosure.	Expects board to have at least one female director. For S&P 500 companies: - against Nom/Gov Chair if don’t disclose board’s gender, racial and ethnic composition. - In 2022, against Comp Chair if don’t disclose **EEO-1 survey** responses and against Nom/Gov Chair if no director from underrepresented community

SGP

Strategic advice on the ESG issues that matter

The ESG Investor Landscape

Robert Main, Managing Partner

ESG is the "New Standard of Investing"

ESG investing has moved mainstream, as institutional investors have rapidly embraced environmental, social, and governance factors (ESG) in their stock-picking, proxy voting, and advocacy efforts.

Pressures from Stakeholders

- ➢ **Outperformance**
- ➢ **Regulatory Scrutiny**
- ➢ **Client Demand**
- ➢ **Public Pressure**

↓

Institutional Investors

↓

Stock Picking

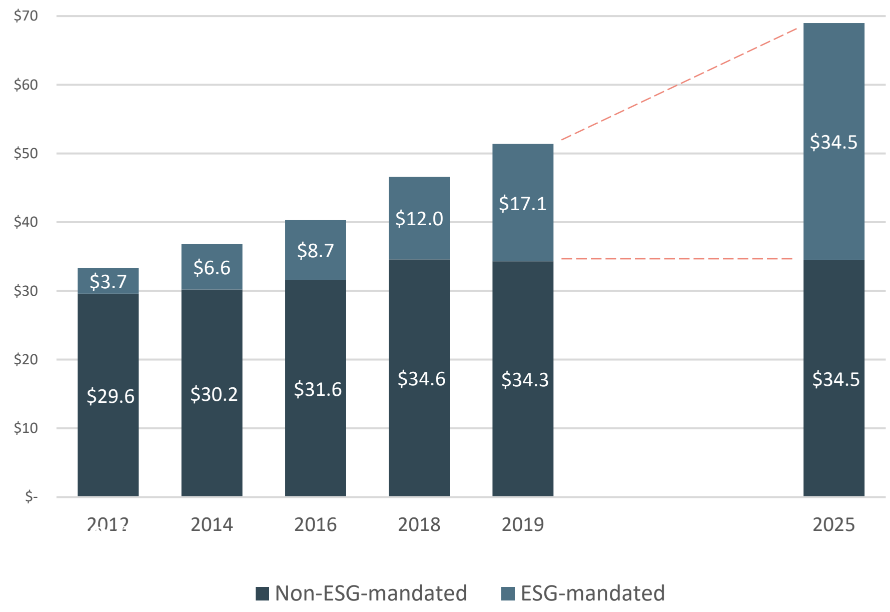
- ➢ ESG integration into "traditional" active funds
- ➢ ESG-specific mandates

Proxy Voting

- ➢ Voting on director elections and shareholder proposals
- ➢ Activism & ESG

ESG assets under management continue to soar.

Managed Assets in the U.S. ($Trillion)



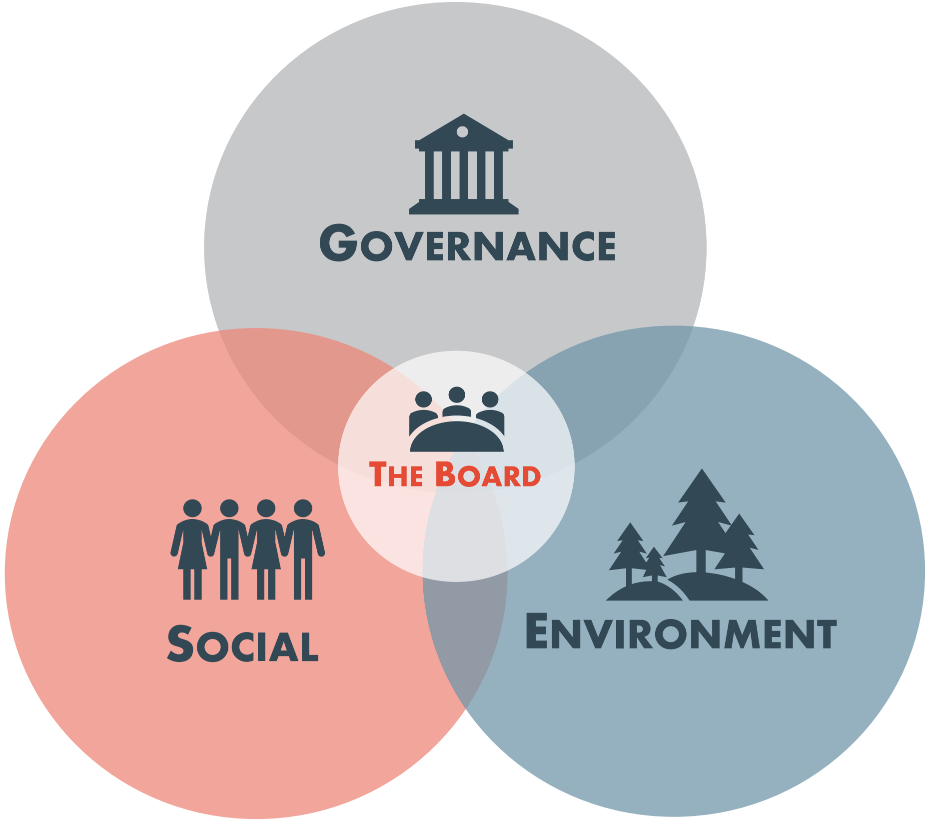
Source: US SIF Foundation data through 2019; Deloitte Center for Financial Services analysis through 2025.

ESG: Broadening the Lens on Risk & Return

Investors are focused on a range of risks and opportunities under the broad rubric of "ESG." These issues and factors may seem disparate but are linked by investor views on **which ESG issues are material** and their expectations for **Board oversight.**

Human Capital
- Culture and employee engagement
- Diversity & inclusion
- Employee health & safety
- Human rights
- Labor practices
- Talent attraction & retention

Social Capital
- Access & affordability
- Brand equity
- Community relations
- Customer privacy
- Product quality & safety



Corporate Governance
- Board composition
- Executive compensation
- Shareholder rights

Risk Oversight
- Business ethics
- Competitive behavior
- Data security
- Supply chain management

Environment
- Climate risk
- Energy management
- GHG emissions
- Hazardous materials & waste management
- Product packaging & distribution
- Water & wastewater management

Investors Want Transparent, Decision Useful ESG Data

Investors are using a growing mix of resources to glean insights on the ESG issues that are financially relevant for each company. No rating or ranking is the magic bullet, and top-line ratings are of little use to most investors.

"Voluntary" Disclosure Standards

Publish guidance for self-reporting by companies

Value Reporting Foundation, SASB, GRI, CDSB (Climate Disclosure Standards Board), TCFD (Task Force on Climate-Related Financial Disclosures)

Ratings, Rankings, & Indices

Raters and indices using public & private data

Sustainalytics, S&P Global, MSCI, CDP, FTSE4Good, CSRHUB (Sustainability management tools), ecovadis

Data Aggregators

Aggregate publicly-available for sale to investors

Bloomberg, Refinitiv, FactSet, Truvalue Labs

IFRS

At COP26 the IFRS announced the creation of the International Sustainability Standards Board (ISSB). This organization will **set global sustainability reporting standards**. The Value Reporting Foundation (formerly SASB and IR Framework) and CDSB will be acquired by ISSB in 2022, driving reporting consolidation.

BlackRock

BlackRock is applying more scrutiny to board oversight of relevant environmental and social topics. Their 2021 voting record showed a significant increase in support for shareholder proposals and opposition to directors who failed to make progress on issues like climate and diversity. Larry Fink's 2022 letter to CEOs reiterated these themes, but broke little new ground.

ESG Positions & Focus Areas

Board

- **The Board:** Expects a board to oversee a 'sustainable business plan.' They "expect directors to have sufficient fluency on climate risk and the energy transition to enable the whole board – rather than a single director who is a 'climate expert' – to provide appropriate oversight."
- **Disclosure:** Prefers SASB and TCFD aligned reporting, but it is not mandatory for director support.

Climate Risk

- **Net Zero:** Expects companies to disclose a plan for how they will operate in a low-carbon economy, including short-, medium-, and long-term targets.
- **Scope 3:** Expects companies to disclose Scope 1 & 2 emissions and reduction targets, and carbon-intensive companies to disclose Scope 3 emissions.
- **"Just Transition":** Advocates for a 'just and equitable transition' to a low-carbon world, which calls for the reallocation of labor and resources from carbon-intensive industries to cleaner alternatives in order to preserve economic opportunities and mitigate downstream community impacts.

Executive Compensation

- **Director Accountability:** In cases where a company has failed to align pay with performance, BLK will vote against the Say on Pay proposal and the relevant compensation committee members.

Diversity, Equity & Inclusion

- **Board diversity:** BLK believes that boards should aspire to 30% diversity of membership and encourages companies to have at least two directors on their board who identify as women and at least one who identifies as a member of an underrepresented group.

SSGA is focused on two primary issues; addressing the systemic risk posed by climate change and supporting the movement towards more diverse boards and workforces. On a traditional governance issue, it has recently introduced a more pragmatic approach to evaluating director overboarding.

ESG Positions & Focus Areas

Climate Risk

- **Climate targets:** SSGA generally expects short- and medium-term GHG emission targets covering Scopes 1 and 2 emissions, as well as disclosure of how those targets align with a 1.5 degree C future. Disclosure should be aligned with TCFD.
- **Decarbonization strategy:** SSGA seeks to understand why selected decarbonization actions are best suited given the company's position.
- **Board oversight:** SSGA expects board-level oversight of climate strategy, including Committee-level ownership and specific directors' "climate fluency".

Diversity, Equity & Inclusion

- **Board diversity:** SSGA will vote against the chair of NomGov committee, or the board leader, if a company lacks any women (all companies) or racially diverse directors (S&P 500). In addition, SSGA expects boards to disclose the racial and ethnic diversity of their boards.
    - Beginning in 2023, they expect companies in major indices to have 30% women directors.
- **Workforce diversity:** SSGA is focused on diversity disclosure and expects all companies to disclose their EEO-1 reports. In 2022, they will vote against directors at S&P 500 companies if they don't disclose EEO-1 reports.

Director Commitments

- **Overboarding:** SSGA has refined its policy to provide directors with greater flexibility, however companies must disclose a director commitment policy that includes a numerical limit on public board service. In addition, service as a director on a SPAC board, will not be considered by SSGA when evaluating commitments.

Vanguard®

SGP

Though its support for environmental and social shareholder proposals jumped in 2021 versus prior years, Vanguard will generally not be prescriptive on E&S strategy or targets. However, it will focus on board oversight of those issues and whether there is sufficient disclosure for the broader market to assess a company's practices. No new policies for 2022.

ESG Positions & Focus Areas

Board Composition:

- **Board diversity:** Vanguard continues to focus on greater gender and racial/ethnic diversity among directors; they are careful not to dictate 'quotas' but expect boards to be moving toward similar proportions as their employees and communities that the company serves. Company directors may be held accountable when progress falls short of market norms.
- **Board disclosure:** Vanguard expects companies to share their perspectives on board diversity, disclose metrics related to board diversity, expand the search for new directors, and make continual progress.

Climate Risk:

- **Board oversight:** Vanguard expects companies to have a "climate-competent board", including (i) directors with relevant experience, and (ii) a director education program that includes engagement with external experts and stakeholders. Vanguard may withhold support from directors if it perceives a climate risk oversight failure.
- **Disclosure:** Vanguard expects TCFD-aligned disclosure (in addition to SASB-aligned disclosure), with forward-looking analysis of the impact of climate change to its business.
- **Targets:** Vanguard encourages companies to set targets to align with the Paris Climate Agreement's goals.

Social:

- **Workforce diversity:** Vanguard has broadened its diversity focus to also cover executive teams and workforces. For now, they are primarily focused on (i) board involvement in overseeing diversity and (ii) disclosure of workforce diversity measures at executive, non-executive, and overall workforce levels. They are supportive of the movement to publish EEO-1 reports.

Activist investors use ESG as the "tip of the spear"

In order to bring the Big 3 under the tent and gain their votes, hedge fund activists have consistently incorporated G-oriented attacks into proxy fights for board seats…

"G" AREAS OF FOCUS

- Board skills & experience
- Director tenure
- Executive compensation
- Lack of independence
- Governance structures
- Overboarding

… and, as activists' "COVID pause" comes to end, they are increasingly weaponizing E&S issues. Moreover, new activist funds are being launched with the express purpose of ESG-oriented proxy fights.

"E" & "S" AREAS OF FOCUS

- Climate strategy
- Director diversity
- Social impact of products
- Executive diversity

The ESG Investor Landscape: What Lies Ahead

Shareholders now channel their dissatisfaction with companies' ESG practices into votes against directors and for E&S shareholder proposals. In the future, **we expect these trends to accelerate** and new potential trends to emerge.

2017 **Deference as Default**	Current **Age of Awakening**	2025-2030 **Age of Dissent**
➢ Closed door engagements were primary investor tool	➢ Increasing # of E&S-related votes against directors	➢ Director support levels drop
➢ Limited votes against management and directors	➢ Record # of E&S shareholder proposals passed in 2021	➢ More shareholder proposals on E&S topics, most will pass
➢ Rare support for E&S shareholder proposals	➢ Engagement remains critical, but not only tool	➢ More proactive 'naming & shaming' campaigns
➢ Advocacy focused on the 'G'	➢ Industry advocacy primarily focused on E&S topics	➢ Hedge fund and ESG activists continue to gain influence
➢ Limited transparency; reluctant to 'name & shame'	➢ Increased transparency, including naming & shaming	➢ Increased divestment

ISS and Glass Lewis Policy Updates

ISS 2022 Policy Updates (Excluding Diversity)

Policy	Policy Description
Burn Rate Methodology	• ISS released a new burn rate thresholds and a methodology change that goes into effect for the 2023 proxy season by adopting a "Value-Adjusted Burn Rate" (VABR) approach to measuring the amount of shareholder wealth for equity compensation on an annual and three-year basis • For 2022 annual shareholder meetings, the VABR will be displayed in ISS reports for informational purposes only and will not affect ISS' Equity Plan Scorecard (EPSC) evaluation or scoring • For annual meetings on or after February 1, 2023, the VABR will replace the existing burn rate factor. **Key Takeaway: Companies should review their Form 10-K stock plan footnote disclosures and proxy proposal disclosures to ensure they maximize their ISS burn rate profiles with adequate grant information. This is especially important when equity compensation is granted in lieu of earned annual bonus or when there has been substantial M&A activity.**
Quantitative Concern Thresholds	• ISS made minor adjustments to the Relative Degree of Alignment (RDA) and Multiple of Median (MOM) thresholds. • For Russell 3000 companies, the score for a Low concern on the RDA test lowered to -38.5 (from -38), giving companies more space to pass this test. The Low MOM threshold increased from 1.74 to 1.84. RDA for S&P 500 companies also changed to -38.5 and MOM changed to 1.69. **Key Takeaway: These changes benefits companies as CEO compensation can be further from the peer group median compensation and still be a Low concern for MOM. Similarly for RDA, pay and performance can be further misaligned and still be a Low concern.**
Covid-19 Related Pay Decisions	• **Changes to Bonus/Annual Incentive Programs:** Pandemic-related changes to these programs in the middle of the year will be viewed negatively, especially in conjunction with a pay-for-performance disconnect. • **External Factors Impacting Goal Setting:** With respect to ISS' analysis of incentive plan rigor, investors have indicated that lower performance expectations that reflect external factors (such as operational impacts due to the pandemic) may be a reasonable explanation for lower goal setting. These cases should be accompanied by disclosure that addresses the board's rationale for lower targets. • **Incentive Award Evaluation**: Changes to in-progress long-term incentive awards will be viewed negatively, especially for companies that exhibit a quantitative pay-for-performance misalignment. Modest alterations to go-forward cycles may be viewed as reasonable, particularly for companies that continue to incur severe negative impacts over a long-term period. **Key Takeaway: Changes in compensation plans will be viewed negatively and companies are encouraged to provide added disclosure on why such actions were necessary and how the pandemic affected these changes**
Board Accountability Unequal Voting Rights	• ISS rescinded the grandfathering clause that exempted companies that were public prior to 2015 from the ISS unequal voting rights • For annual meetings on or after February 1, 2023, ISS will generally recommend against relevant directors at all non-REIT U.S. companies with unequal voting rights, irrespective of when they first became public companies. • The only exceptions would be if the company has subjected the unequal voting rights provision to a sunset of no more than seven years from becoming a public company, has provided sufficient alternative protections for minority shareholders, or situations in which the unequal voting rights are considered de minimis **Key Takeaway: Companies with unequal voting rights need to prepare for negative recommendations in 2022, regardless of prior year recommendation for directors**

Glass Lewis 2022 Policy Updates (Excluding Diversity)

Policy	Policy Description
Disclosure of Director Diversity & Skills	For the 2022 proxy season, Glass Lewis will now consider recommending against the **chair of nom/gov committees at S&P 500** companies with poor disclosure of director diversity and skills. Glass Lewis defines poor disclosure as not providing any disclosure in each of the following categories: • The board's current percentage of racial/ethnic diversity; • Whether the board's definition of diversity explicitly includes gender and/or race/ethnicity; • Whether the board has adopted a policy requiring women and minorities to be included in the initial pool of candidates when selecting new director nominees (i.e., the "Rooney Rule"); and • Board skills disclosure. **Key Takeaway: Companies need to review their proxy disclosure to make sure it is robust in describing the diversity and board skills of directors**
Environmental and Social Risk Oversight	• Glass Lewis will generally recommend voting against the **chair of nom/gov committees at S&P 500** companies when there is a failure to provide explicit disclosure concerning the board's role in overseeing environmental and social issues. • For Russell 1000 companies, Glass Lewis will cite boards that do not provide clear disclosure concerning board-level oversight of environmental and/or social issues. **Key Takeaway: Companies should also review their proxy disclosure to make sure it is robust and includes oversight of ESG**
Holding a Committee Chair Accountable in Staggered Elections	• Beginning in 2022, in cases where a board committee chair is not up for election due to a staggered board, and where Glass Lewis identified concerns that would lead to a negative vote recommendation, Glass Lewis will generally recommend voting against other members of the committee who are up for election on a case-by-case basis. **Key Takeaway: Companies should review relevant policies to ensure no material concerns will be identified by Glass Lewis leading to negative vote recommendations for directors up for election**
Multi-Class Share Structures With Unequal Voting Rights	• Glass Lewis will now recommend against the **chair of the nom/gov committee** at companies with a multi-class share structure and unequal voting rights when the company does not provide for a reasonable sunset of the multi-class share structure (generally seven years or less). Previously, Glass Lewis recommended voting against all members of the board who served at the time of the IPO. **Key Takeaway: No action necessary**
Waiver of Age and Tenure Policies	• In cases where the board has waived its term/age limits for directors for two or more consecutive years, Glass Lewis will generally recommend against the **chair of the nom/gov committee**, unless a compelling rationale is provided for why the board is proposing to waive this rule, such as consummation of a corporate transaction. **Key Takeaway: Companies should review relevant policies and provide a compelling rationale if companies waive the term/age limits for directors**

Note: Glass Lewis did not make any material adjustments to their compensation policy and only clarified certain elements within their guidelines.

Board Diversity Policy Updates

Stakeholder	Current / Upcoming Policy
Nasdaq[1]	▪ Generally, requires all Nasdaq-listed companies to have (or explain why they do not have): One self-identified female director, and one director who self-identifies as either an underrepresented minority or LGBTQ+ (one diverse director by August 2023 and a second diverse director by August 2025)* ▪ By August 2022, **all public companies will need to disclose** board diversity characteristics in a matrix format that meets the requirement of the Nasdaq rule
ISS	▪ ISS will generally recommend against the nominating committee chair of a board with no female members. **This policy will extend to all US companies starting in 2023** (including companies not included in the Russell 3000 or S&P 1500 index) ▪ ISS will recommend against the nominating committee chair where **no racially or ethnically diverse directors have been publicly identified** ▪ The racial/ethnic diversity requirement currently applies only to companies in the Russell 3000 or S&P 1500
Glass Lewis	▪ Glass Lewis will generally recommend **against the nominating committee chair of a board in Russell 3000 companies with less than 2 female board members**. For companies outside of the Russell 3000 the requirement is one female member ▪ Glass Lewis will recommend against the nominating and governance committee if the **Nasdaq required disclosures have not been implemented** in meetings held after August 8, 2022 ▪ Glass Lewis will recommend against the chair of the nominating and governance committee for **California headquartered companies (or any other states with similar legislation) who do not have at least one director from an underrepresented community**

1. There is already a court challenge filed against the SEC from the Alliance for Fair Board Recruitment, which has since been joined by 17 states. We will keep you updated on any developments in cases challenging this rule.

Say-on-Pay: 2021 Voting Metrics

- For 2021, there were **65 say-on-pay failures (2.8%)** in the current Russell 3000 index as compared to **53 failures** for all of 2020.

- S&P 500 index had **20 say-on-pay failures (4.1%)** as compared to **12 failures** for all of 2021

- ISS Say-on-Pay Vote Recommendations by Quantitative Concern level
  – High Concern (49% For – 51% Against)
  – Medium Concern (67% For – 33% Against)
  – Low Concern (96% For – 4% Against)

Industry Grouping	2021 Voting Results		2020 Voting Results	
	Average % Support	ISS Against Recommendation	Average % Support	ISS Against Recommendation
Russell 3000	90.6%	11.6%	91.0%	11.7%
S&P 500	88.3%	8.8%	89.9%	10.5%

Reasons for Say on Pay Failures and Against Recommendations

Severance

- Problematic severance and change-in-control provisions in new or materially amended executive agreements
- Severance payments to named executive officers that exceeded what the individual would have originally received upon a voluntary termination.

Plan Design

- Covid-19 Adjustments to STI/LTI Plans – allowing performance options to vest despite not achieving goals
- One-time awards and retention awards that were not performance driven
- Adjustments to in-cycle, long-term equity awards where the award paid out at or above target

Discretion

- Scrutiny around the “Use of Committee Discretion” and discretionary bonuses awarded to NEOs
- Magnitude of NEO Pay
- Compensation Committee responsiveness to previous year’s say on pay vote outcome and investor concerns

Considerations for the 2022 Proxy Season

Know how your top investors use ISS/Glass Lewis reports (checking policies, voting pattern data)

Know how you will fare on the quantitative P4P and share request models of ISS/GL—as it tells you how much scrutiny you may receive (even from investors not following ISS/GL but using this info as a filter)

If you have any new or materially amended contracts, review for any potential negative exposure for problematic or concerning pay practices

Any special one-off awards require a lot of attention, as you think through shareholder engagement and disclosure

Recognize you need to be taking action if your voting results have declined year over year and/or if you triggered the ISS or Glass Lewis board responsiveness policies

If you are adopting any “outlier” or “innovative” designs, there is likely some exposure

Directors are in the cross-hairs (diversity, oversight, accountability, overboarding, etc.)

Increased External Focus on Human Capital

- Institutional investors[1], shareholder activists, and the SEC are requiring increased transparency from public companies about how they are managing their human capital risks

- As the first SEC mandated ESG-related risk disclosure, in August 2020, the SEC amended its rules to require public companies to disclose their human capital resources to the extent material
  - Last year, many companies had little time to prepare Form 10-K disclosures regarding human capital management in response to SEC rules adopted in late 2020
  - Going into 2022 companies are focused on increasing disclosure across HCM topics, related to diversity, equity and inclusion, employee attraction, retention, and workforce development

- Given that “Human Capital” is considered a material ESG risk for all companies regardless of industry, **companies can improve their ESG profiles by effectively managing their human capital management** activities and reporting strategy across the Form 10-K, the proxy statement, corporate website, and ESG report

- As a result of this enhanced focus, many boards have expanded their oversight and consideration of human capital management (HCM) and Diversity, Equity and Inclusion (DEI) to encompass issues beyond executive officer hiring and compensation

1. For example, Vanguard and Blackrock both explicitly mention an expectation of board oversight of diversity, equity and inclusion (“DEI”) in their most recent proxy voting policy statements. Both investors also frequently ask for insights on human capital management strategy during engagement conversations.

Pressure from Many Directions

- **Shareholder Activism**
  - Over 400 ESG-related shareholder proposals were filed in the 2021 proxy season
  - 2022 proxy season is expected to continue the HCM-related proposal momentum, with topics like[2]:
    - Workforce Diversity and EEO-1 reporting
    - Diversity & Inclusion Reporting
    - Pay equity
    - Race equity audits

- **Institutional Investors** have released proxy voting guidelines with an increased focus on transparency and business-specific ESG and workforce risks :
  - Blackrock may vote against relevant committee members or in support of shareholder proposals if it believes that a company's disclosures/practices fall short of industry standards or are ineffective at overseeing HCM risks and opportunities
  - State Street will vote against Chair of Comp Committee at S&P 500 companies that do not disclose their EEO-1 survey responses
  - Vanguard mention an expectation of board oversight of diversity, equity and inclusion ("DEI") in their most recent proxy voting policy statements

- **Employees & Talent Strategy:** heightened emphasis on gender, racial, and ethnic equity, and an increasingly tight labor market have led to a greater focus on ESG with a laser focus on human capital management

1. ESG proposals that gained significant or majority support in the 2021 proxy season are expected to be resubmitted

Human Capital Management Disclosure Strategy

- Investors, regulators, employees, customers, ESG raters, and other key stakeholders are **sourcing** Company data on their HCM oversight, practices, and metrics **from a variety of sources,** such as:

Disclosure	Considerations
Form 10-K	– Qualitative practices, limited quantitative data
DEF 14A	– Board oversight/HCM metrics & exec comp, board diversity metrics, or even Company response to shareholder proposals on HCM or DEI related topics
Corporate Website	– Employee demographics-including links to EEO-1 data, qualitative HCM practices
ESG/Sustainability Report	– Quantitative and Qualitative (practices, goals, policies)

- External reviewers are looking for **consistency and quantitative metrics** to back up publicly stated qualitative goals, and comparing companies to peers to determine **outlier status or inadequacy**

SEC and Regulatory Updates

Virtual Meetings—Here to Stay?

- Seismic shift to virtual stockholders' meetings in 2020

- Many public companies saw multiple benefits to the virtual meeting format, including reduced costs, the elimination of travel time, the ability for more stockholders to attend the meeting, as well as the ability of the company to solicit and prepare for Q&A prior to the meeting.

- However, the proxy advisory firms, institutional investors as well as governance organizations have weighed in with their views on whether virtual stockholder meetings are in the best interests of the stockholders and how they should be conducted.

- 2022 will be another strong year for virtual meetings in light of the continuing effects of the pandemic.

- Corporation Finance updated its Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns to encourage issuers to continue to provide shareholder proponents or their representatives with the ability to present their proposals through alternative means, such as by phone, during the 2022 proxy season.

Virtual Meetings

ISS

- Encourages disclosure of the reasons for a virtual-only meeting format and the circumstances under which virtual meetings will be held. Also encourages companies to provide shareholders with a *meaningful* opportunity to participate as fully as possible (as for an in-person meeting)

Glass Lewis

- Generally, recommend voting **AGAINST** members of the governance committee where the board is planning to hold a virtual-only shareholder meeting and the company does not provide robust proxy disclosures addressing the ability of shareholders to participate in the meeting as they would at an in-person meeting

Virtual Meetings

BlackRock

- Expects shareholders to have a meaningful *opportunity* to participate in the meeting and interact with the board and management in the virtual setting

State Street

- Issued a statement that it expects that shareholders be provided the same rights and opportunities as would be available through a physical meeting, including in particular the ability to have "active and robust interactions with management and the board at appropriate times."

Virtual Meeting Reminders

- Decide on type of meeting early (in-person, hybrid, virtual)
- Type of virtual platform: audio-only or video
- Determine applicable corporate law requirements
  - Requirements for making shareholder lists available
- Confirm technology and logistics

Shareholder Proposal Landscape

- Staff Legal Bulletin 14L issued November 3, 2021
- Rescinded SLB Nos. 14I, 14J and 14K
- Ordinary course of business exclusion
  - Staff will not focus on the nexus between a policy issue and the company
  - Staff will focus on the significance of social policy that is the subject of proposal
  - Human capital management as an example
- Micromanagement
  - Proposals promoting timeframes or methods are not necessarily micromanagement
  - Climate change as an example

HAYNES BOONE

Shareholder Proposal Landscape

- Economic relevance
  - Rule provides for exclusion of proposals
    - involving operations involving less than 5% of total assets and less than 5% of net earnings and gross sales for its most recent fiscal year, and
    - not otherwise significantly related to the company's business
  - SLB 14L provides that proposals that raise issues of broad social or ethical concern related to the company's business may not be excluded, even if the relevant business falls below the economic thresholds
- No need for board analyses for ordinary course or economic relevance no-action requests
- Various procedural guidance as well

Universal Proxy

On November 17, 2021, the SEC announced the adoption of new rules requiring the use of universal proxy cards in contested director elections. (Rule 14a-19)

The new rules are effective for any shareholder meeting held after **August 31, 2022**.

Background

Currently, a dissident shareholder identifies its set of director nominees on a separate proxy card from the issuer's proxy card, and shareholders voting by proxy must pick either the dissident's proxy card or the issuer's proxy card, but cannot mix and match between the two slates of directors on the proxy cards.

However, if that same shareholder opts to attend the meeting in person, the shareholder may use a ballot to mix and match between the two slates of directors.

Universal Proxy

Exception

"Short slate rule" allows a dissident shareholder who is not trying to replace a majority of the board to name on its proxy card the issuer's nominees for which it is **not seeking proxy authority**.

The dissident shareholder identifies by name the issuer's nominees **it is targeting** to be removed from the board.

Universal Proxy

Proxies for Contested Director Elections

New Rule 14a-19 allows shareholders voting by proxy to mix and match between the two slates of directors, just as they could if they attended the meeting in person.

It requires the issuer and the dissident shareholder to combine all director nominees on one proxy card, and requires this universal proxy card to meet certain presentation and formatting requirements.

The new rules do not require universal proxy cards to be identical

The new rules establish notice requirements to give the parties sufficient time to prepare a form of proxy that complies with the universal proxy requirements.

Dissident shareholders are required to solicit holders of shares representing at least 67% of the voting power of the shares entitled to vote.

Universal Proxy

Proxies for All Director Elections

The new rules require issuers to include “against” and “abstain” voting options for director elections in proxy cards when those standards are applicable.

Whether a particular voting option is applicable depends on the voting standard governing the director election.

- If the election is governed under a majority voting standard, which gives legal effect to an “against” vote and nominees are only elected if they receive affirmative “for” votes from a majority of voting shares, then proxy cards must include both an “against” option and an “abstain” option.

- If the election is governed under a plurality voting standard, a director nominee is elected by receiving more affirmative “for” votes than competing nominees, then the proxy card does not need to include an “against” voting option, as it has no legal effect and is unnecessarily confusing to voters.

- Amended Item 21(b) of Schedule 14A requires issuers to disclose within the proxy statement the effect of a “withhold” vote on director elections.

Nasdaq Board Diversity Objective Rule (Nasdaq Rule 5605(f))

- Each Nasdaq-listed company must have, or explain why it does not have, at least two members of its board of directors who are **diverse**, including:
  - At least one director who self-identifies as female; and
  - At least one additional director who self-identifies as an underrepresented minority or LGBTQ+.

- Different Requirements:
  - Foreign issuers
  - Smaller reporting companies (may have two female directors count as "diverse")
  - Companies with smaller boards (5 or less directors when become subject to rule)
    - Requires one diverse director
  - Certain exempt issuers (such as SPACs and limited partnerships)

Public Disclosure Alternative

- If a company elects to satisfy the requirements by disclosure, the company must:

  (1) Specify the requirements of Rule 5605(f)(2) that are applicable; and

  (2) Explain why it does not have the minimum number of diverse directors.

- Required disclosure may be (a) in the proxy statement (or Form 10-K, if no proxy statement filed) or (b) on the company's website.

- Nasdaq has stated that it will not judge the merits of a company's explanation for not meeting the diversity objective.

Board Diversity Matrix Disclosure (Nasdaq Rule 5606)

- Nasdaq-listed companies must annually disclose self-identified board diversity data in a substantially similar format as Nasdaq's form Board Diversity Matrix.
- After the first year of disclosure, the matrix must include data for the current year and the prior year.
- Required disclosure may be (a) in the proxy statement (or Form 10-K, if no proxy statement filed) or (b) on the company's website.
- A company may send a request to drivingdiversity@nasdaq.com to see if the matrix qualifies as substantially similar.

Board Diversity Matrix Sample

Board Diversity Matrix (As of [DATE])				
Total Number of Directors	#			
	Female	Male	Non-Binary	Did Not Disclose Gender
Part I: Gender Identity				
Directors	#	#	#	#
Part II: Demographic Background				
African American or Black	#	#	#	#
Alaskan Native or Native American	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+	#			
Did Not Disclose Demographic Background	#			

Phase-In of Nasdaq Disclosure Rules

- There is a two- to five-year phase-in process for filers to meet the diversity objectives, depending on the size of the company and the Nasdaq tier.

- Currently listed companies (listed on Nasdaq prior to August 6, 2021) must:
  - Post an initial board matrix to their website by August 8, 2022; or
  - Include the matrix in their 2022 proxy statement, whichever comes later.

Phase-In Schedules

<table>
<tr><th>Companies Listed on Nasdaq prior to August 6, 2021</th><th>Initial Board Matrix</th><th>One Diverse Director or Provide Explanation</th><th>Two Diverse Directors or Provide Explanation</th></tr>
<tr><td>Nasdaq’s Global Select or Global Markets</td><td rowspan="3">August 8, 2022, or the date the company files its 2022 proxy, whichever is later</td><td rowspan="3">August 7, 2023
(2 years)</td><td>August 6, 2025
(4 years)</td></tr>
<tr><td>Nasdaq Capital Market</td><td>August 6, 2026
(5 years)</td></tr>
<tr><td>Boards with 5 or fewer directors</td><td>N/A</td></tr>
</table>

<table>
<tr><th>Newly Listed Companies</th><th>Initial Board Matrix</th><th>One Diverse Director or Provide Explanation</th><th>Two Diverse Directors or Provide Explanation</th></tr>
<tr><td>Nasdaq’s Global Select or Global Markets</td><td rowspan="3">One year from the date of listing</td><td>One year from listing date, or the date the company files its proxy statement for its first annual meeting following listing date, whichever is later</td><td rowspan="2">Two years from the date of listing or the date of filing its proxy statement for its second annual meeting following the listing, whichever is later</td></tr>
<tr><td>Nasdaq Capital Market</td><td>N/A</td></tr>
<tr><td>Boards with 5 or fewer directors</td><td>Two years from the date of listing or the date of filing its proxy statement for its second annual meeting following the listing, whichever is later</td><td>N/A</td></tr>
</table>

NYSE Rule Changes

Shareholder Approval Rules

- NYSE amended Sections 312.03(b) and 312.03(c) regarding shareholder approval of related party issuances and the issuance of 20% or more of a company's stock to bring the NYSE's rules into closer alignment with those of Nasdaq.

Related Party Transactions Rule

- NYSE amended Section 314.00 to reverse certain of the changes adopted in April 2021 such that "related party transactions" will once again be subject to review only if they: (i) in the case of domestic companies, have a transaction value greater than $120,000 and (ii) in the case of foreign private issuers, are material to the company.
- Requires a company's audit committee or another independent body of a company's board of directors to review in advance those "related party transactions" that must be disclosed (i) by domestic companies under Item 404 of Regulation S-K, and (ii) by foreign private issuers under Item 7.B of Form 20-F

Amendments to Voting Standards

- Section 312.07 requires a majority of votes cast standard when shareholder approval is a prerequisite to the listing of any additional or new securities of a listed company.
- Historically, the NYSE advised companies that abstentions had to be treated as votes cast for this rule.
- The NYSE amended the rule to specify that a company must calculate the votes cast in accordance with its governing documents and any applicable state law

Topics to Watch in 2022

Perks

Review Division of Corporation Finance compliance and disclosure interpretation (CD&I) 219.051 to determine considerations related to benefits provided to executive officers because of the COVID-19 pandemic are perquisites or personal benefits as part of compensation disclosure.

Risk Oversight

Evaluate Item 407(h) of Regulation S-K to determine the extent of the boards role in the risk and oversight responsibilities related to the risk to the organization of ESG initiatives to solidify corporate governance disclosure.

Corporate Political Spending/Lobbying & Trade Association Activity

Evaluate whether pressure will likely come from internal (employees and management) or external (investors, activists, media) sources.

Consider whether disclosure should be focused on transparency around corporate political donations and lobbying efforts, vigilance about external affiliations, or educating stakeholder groups.

Topics to Watch in 2022

CEO Pay Ratio

Determine if pay ratio disclosure requires updating. Consider potential need to select a new median employee for CEO pay ratio calculation and disclosure based on possible changes in employee population or compensation arrangements because of COVID-19 impacts.

Spring Loaded Compensation Awards

The SEC recently provided guidance on how to account for and disclose equity compensation awards granted shortly before certain MNPI is released.

Director Compensation

Carefully review existing director compensation arrangements to minimize litigation risk linked to director compensation.

Items on the Horizon

Rule 10b5-1 Trading Plans

Share Repurchase Programs

Section 16

Clawback Policies

Pay-versus-Performance

Rule 10b5-1 Trading Plans

In December 2021, the SEC released proposed rules that would add new conditions to the existing affirmative defense under Rule 10b5-1 and new disclosure requirements regarding trading arrangements by issuers and their directors and officers.

Best practice standards and brokers that administer Rule 10b5-1 trading plans typically require a cooling-off period of 30–60 days, there is no mandatory waiting period under SEC rules between the date of adoption or amendment to a Rule 10b5-1 trading plan and the date of the first transaction executed under the plan.

The SEC's proposal adds a minimum 120-day cooling-off period after the date of adoption or amendment before transactions under the plan may begin for plans adopted by company offers and directors.

The proposed rules also limit overlapping trading arrangements and add certification requirements.

Company officers and directors would be required to certify at the time of the adoption of the trading arrangement that they are not aware of material nonpublic information and that they are adopting the plan in good faith.

Rule 10b5-1 Trading Plans

Require companies to disclose details about trading plans adopted during the reporting quarter and mandate disclosure of insider trading policies and procedures.

Action Items

Although the proposed rules have not taken effect, companies may consider whether they should impose requirements (such as the 120-day cooling-off period for officers and directors) for Rule 10b5-1 trading plans adopted or amended while the rules are pending.

Share Repurchase Programs

- SEC proposed amendments to Item 703 of Regulation S-K and a new Form SR to expand the disclosure of issuer (or any affiliated purchaser) repurchases of registered equity securities to provide greater transparency for investors.

- Require additional details in connection with quarterly disclosures, including the objective or rationale for share repurchases and the process or criteria for determining the amount of repurchases.

  - Whether any of its Section 16 officers/directors purchased or sold shares that is the subject of the share repurchase plan within 10 business days before or after the announcement of the repurchase plan or program.

- Form SR would impose daily disclosure obligations on issuers that repurchase shares, with the filing due by the end of the next business day following the transaction.

Section 16

SEC proposed to amend Form 4 and Form 5 to add a checkbox which insiders would be required to check when reporting a transaction that occurred pursuant to a Rule 10b5-1(c) trading arrangement.

Filers would also be required to disclose the date the trading plan was adopted.

SEC has proposed to add a second, optional checkbox to Forms 4 and 5 to allow filers to indicate that a reported transaction was made pursuant to a trading plan that was not intended to comply with Rule 10b5-1(c).

SEC has proposed to amend Rule 16a-3 to require that gifts, which currently may be reported on Form 5 after the end of the issuer's fiscal year, be reported on Form 4 within two business days.

Status of Clawback Policies

Brief History of the Clawback Rule Proposal

Congress first mandated clawbacks under Section 304 of the Sarbanes-Oxley Act of 2002, which requires public companies to clawback incentive-based compensation paid to their CEOs and CFOs in the event of an accounting restatement due to material noncompliance with financial reporting requirements.

Following the financial crisis of 2007-08, Congress broadened its clawback requirements pursuant to the Dodd-Frank Act (*i.e.,* require the SEC to adopt a rule that directs national securities exchanges to prohibit the listing of any security of a company that fails to develop and implement a clawback policy and must recover from any current or former executive officer up to three years of any incentive-based compensation).

The clawback rule was previously proposed by the SEC in 2015.

In October 2021, the SEC re-opened comment on the clawback rule.

Clawback policies are viewed favorably by ISS, and more than 90% of the companies in the S&P 500 index already have a clawback policy in place.

Status of Clawback Policies

Clawback Requirements

- Apply specifically to incentive-based compensation that is based on financial information.
- Recover the excess between what they actually received and the amounts that would have been paid under the numbers in the restated financial statements.
- Apply to the three fiscal years preceding the date of the restatement.
- Apply on a "no fault" basis, without regard to whether any misconduct occurred, or whether an executive officer had any responsibility related to the financial statements.
- Two exceptions:
  - (i) where it would be impracticable to do so, such as where the direct expense of enforcing recovery would exceed the amount to be recovered, and
  - (ii) where recovery would violate home country law with respect to foreign private issuers.

Status of Clawback Policies

Clawback Requirements

- Companies would be prohibited from indemnifying executives against the loss of any recovered compensation pursuant to the clawback policy.
- Required to file the clawback policy as an exhibit to its annual report and disclose the company's actions to enforce the clawback policy, including information regarding recoveries, such as the amounts and the names of the executives involved'

Status of Clawback Policies

Compensation Committee Action Items

- Review the company's existing clawback policies and procedures for compliance with the proposed clawback rule;

- Ensure processes are in place for careful recordkeeping to comply with the three-year clawback period applicable to current and former executives; and

- Review the compensation committee's charter to confirm the committee is able to enforce any required clawback policy.

Pay-versus-Performance

- The long-awaited pay for performance rules are back on the SEC's agenda.

- Requires companies to provide a table that compares the "compensation actually paid" to executive officers with the company's total shareholder return (TSR), along with the returns for companies in the same industry.

- When the SEC's agenda—which is updated twice a year—was unveiled in June 2021, it reflected Chairman Gensler's priorities and the SEC's desire to finalize pay versus performance rule in the spring of 2022.

- December 2021 agenda notes that the SEC intends to reopen the comment period of the 2015 proposal by this spring 2022.

HAYNES BOONE