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SEC Reporting Skills  
Workshop

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# Proxy Statement Trends and Hot Topics

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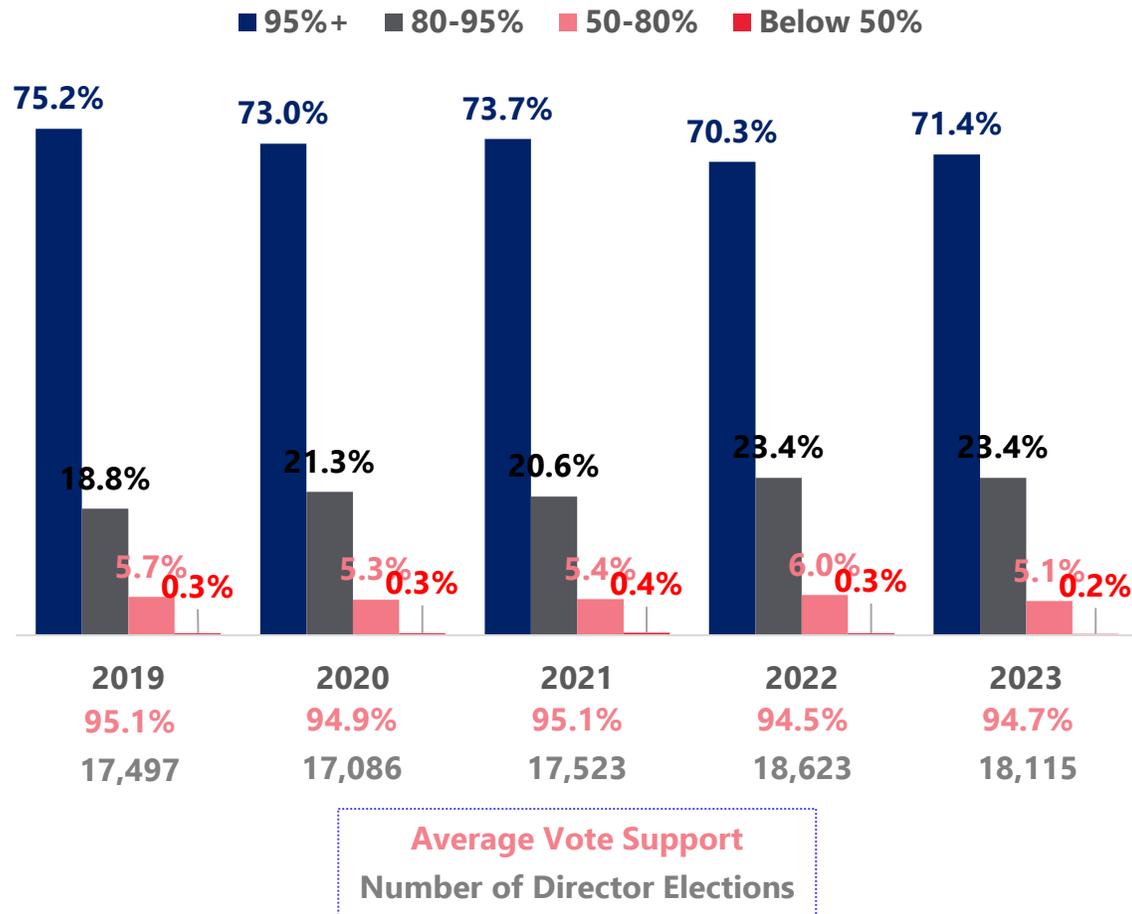
# Agenda

- Director elections
- Adverse governance provisions
- Board diversity
- Overboarding
- Environmental and social oversight
- Compensation disclosures
- Stockholder proposal considerations
- New developments impacting proxy season
- Regulatory updates
- Appendix: 2024 proxy advisory firm policy updates

# Director Elections

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# 2023 Results and Trends Within Russell 3000



- Average support remains around 95%
- Fewer directors receiving “low” support below 80% continues to decrease (around 11% decrease in below-80 results between 2019 and 2023)
- Common issues impacting director elections are:
  - Adverse governance provisions
  - Board composition (including diversity and independence)
    - BlackRock noted composition, particularly independence, as top reason for 2023 non-support of management-proposed directors
  - Board oversight of E&S matters
  - Executive compensation
  - Overboarding
- Improved disclosure can help address issues
  - Blackrock noted fewer transparency-based non-support votes with improved disclosure

Source: Semler Brossy, *2023 Say on Pay & Proxy Results* (September 28, 2023)

# Director Accountability

- Opposition to individual directors continues to increase, with Nominating & Corporate Governance and Compensation Committee chairs most common
- Investors and proxy advisors are holding directors accountable for an expanding list of topics:

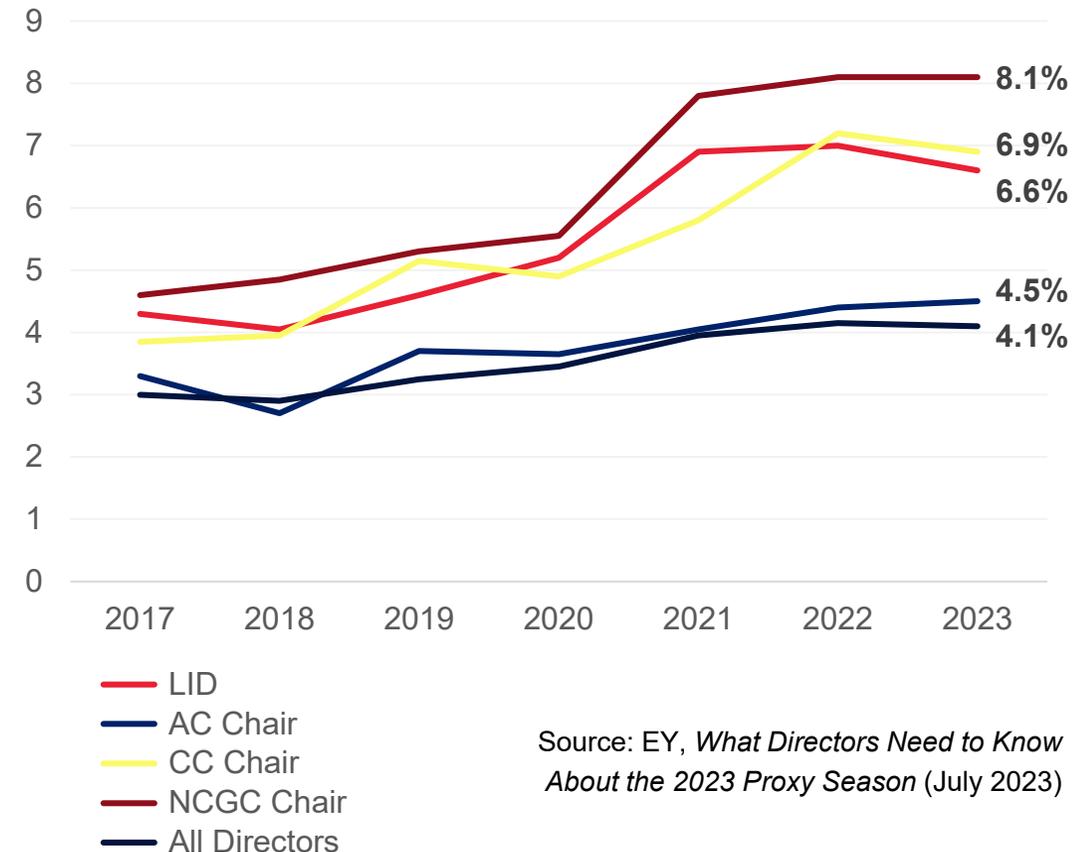
## Traditional governance issues

- Adverse governance provisions
- Lack of responsiveness to prior stockholder concerns
- Oversight issues
- Compensation issues
- Independence issues
- Poor attendance

## Evolving expectations

- Board and workforce diversity
- E&S disclosure / oversight
- Human capital management
- Overboarding

**AVERAGE VOTING OPPOSITION TO DIRECTORS BY ROLE (S&P 500)**

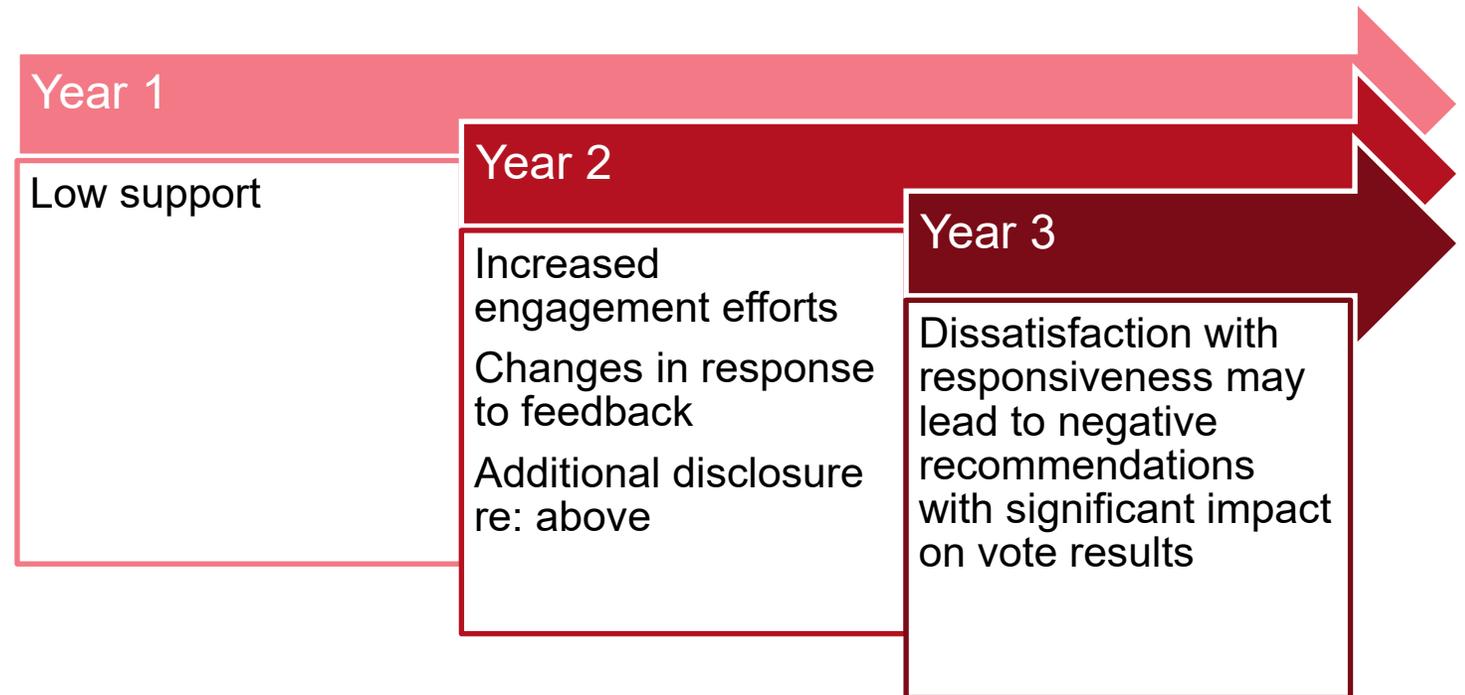


Source: EY, *What Directors Need to Know About the 2023 Proxy Season* (July 2023)

# Practical Implications of Negative Director Vote Recommendations

Potential risks of lower levels of stockholder support for director nominees:

- Reputational harm (company and/or director(s))
- Triggering director resignation policy
- Creating favorable target for activist stockholders & proposals (e.g. shifting to majority voting)
- Increased pressure to make changes



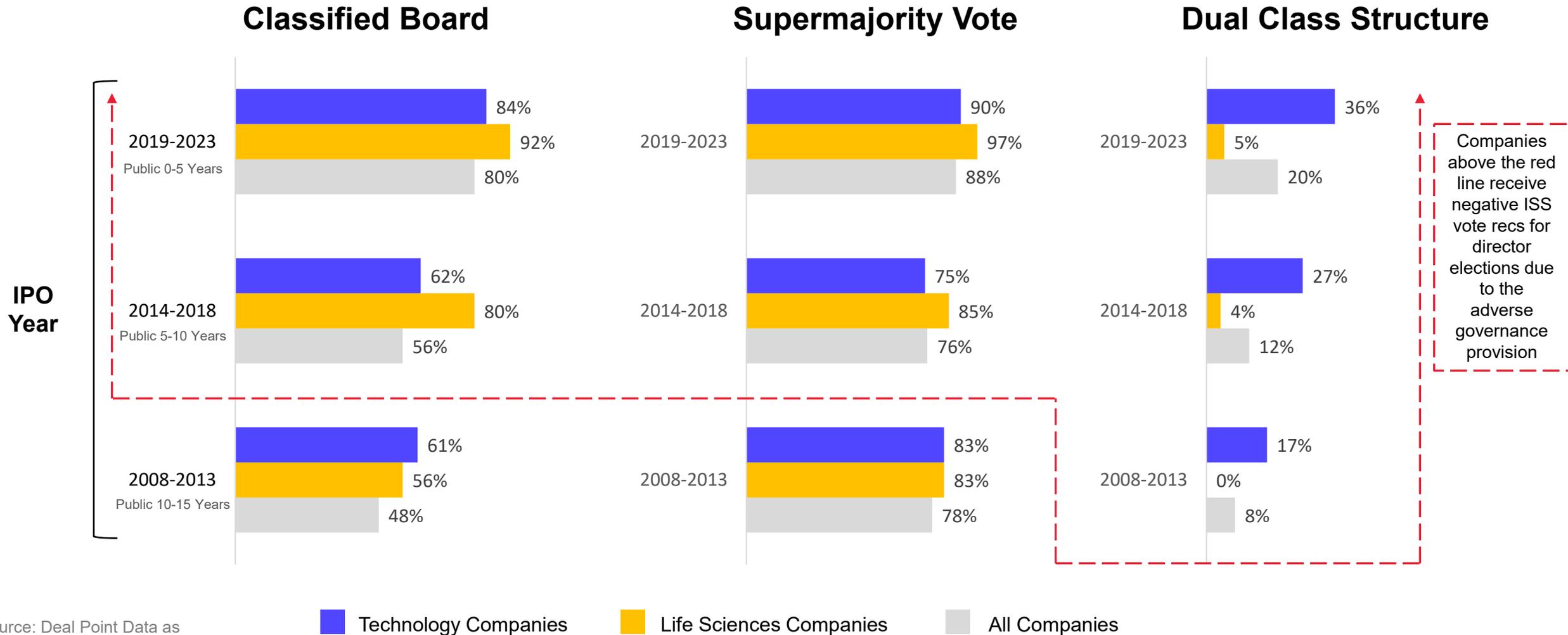
# Adverse Governance Provisions

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# Adverse Governance Provisions Triggering Negative ISS and Glass Lewis Recommendations

Adverse Governance Provision	ISS will issue negative vote recommendations against:		GL will issue negative vote recommendations against:	
	Applicable Directors	@ Applicable Companies	Applicable Directors	@ Applicable Companies
Classified Board	NCGC members <sup>(1)</sup> excluding new nominees <sup>(2)</sup>	Companies that hold or held their first annual meeting after Feb. 1, 2015	All directors who served at the time of IPO	Companies with IPO the prior year
Supermajority Vote Requirements to Amend Governing Documents	NCGC members <sup>(1)</sup> excluding new nominees <sup>(2)</sup>	Companies that hold or held their first annual meeting after Feb. 1, 2015	NCGC members	Companies with IPO the prior year
Multi-Class Share Structures With Unequal Voting Rights	NCGC members <u>plus</u> any directors holding super-voting shares that provide voting control	All companies	All directors who served at the time of IPO	Companies with IPO the prior year
			NCGC chair <sup>(1)</sup>	All other companies
<b>Important Note:</b> Negative recommendations generally are extended to other directors if relevant directors are not standing for election due to company's classified board	<b>unless</b> the provision is subject to a reasonable sunset <sup>(3)</sup>		<b>unless</b> the provision is subject to a reasonable sunset <sup>(2)</sup> <b>or</b> submitted for stockholder vote at first annual meeting after IPO <sup>(3)</sup>	
	<sup>(1)</sup> Negative vote recommendation will be limited to NCGC chair if company has a classified board <u>or</u> a supermajority vote requirement, but not both <sup>(2)</sup> A "new nominee" is a director who has served for less than one year and is being presented for election by stockholders for the first time <sup>(3)</sup> 7 years or less from the date of going public		<sup>(1)</sup> If the NCGC chair is not up for reelection because the board is classified, GL will recommend against other NCGC members <sup>(2)</sup> 7 years or less for multi-class share structure; 3-5 years for classified board <sup>(3)</sup> Stockholder ratification of an existing provision is likely insufficient	

# Prevalence of Adverse Governance Provisions at Russell 3000 Companies Today



# Board Diversity

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# Recent Developments in Board (and Workforce) Diversity

- **Nasdaq's rule:** Nasdaq-listed companies must
  - Provide board diversity matrix
  - Comply with diversity objectives (e.g., having at least one diverse director by Dec. 31, 2023)
    - Or explain why objectives not met

Note: The Fifth Circuit upheld Nasdaq's board diversity rule in October 2023

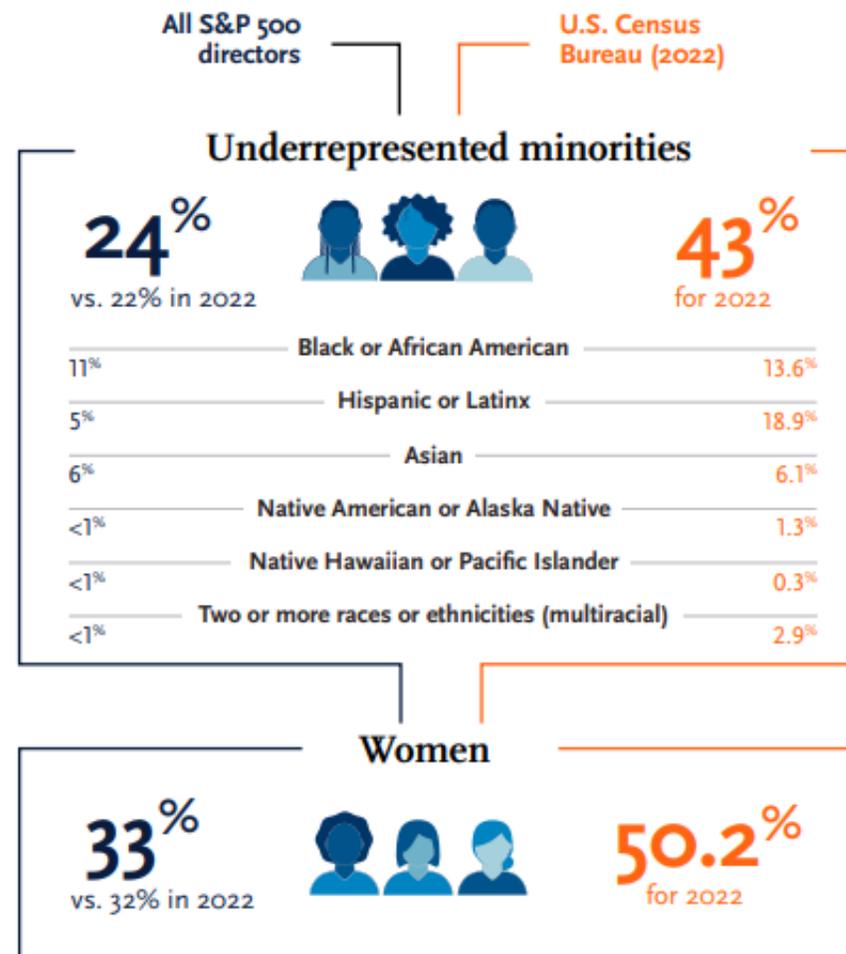
- **State legislation:** California's board diversity mandates remain subject to ongoing litigation; enforcement and penalties seem to be on hold pending resolution
- **ISS, Glass Lewis and institutional investors** have enhanced both board composition/diversity and disclosure policies in recent years

- **SEC** expected to require increased director/nominee diversity disclosure in 2024
- **Stockholder derivative lawsuits** encountering procedural holdups
- Investors increasingly calling for **EEO-1 data disclosure**
  - e.g., State Street will vote against CC chairs of S&P 500 companies that do not disclose
- **SFFA v. Harvard:** SCOTUS decision striking down affirmative action in university admissions currently only applies to higher education, not private employers, but companies should remain alert to ripple effects (many are reviewing existing DEI policies and hiring practices)

# Diversity Trends

## SpencerStuart, 2023 S&P 500 Board Diversity Snapshot:

- Composition
  - 67% of new directors appointed in 2023 are diverse (i.e., directors who self-identify as female and/or underrepresented minorities)
    - Women make up 46% of new directors (up from 24% in 2013)
    - Black or African American individuals make up 15% of new directors (down from 33% in 2021)
- Disclosure
  - 97% of boards disclose their *racial/ethnic composition* (up from 60% in 2021); 47% of boards provide this disclosure on an individual level (up from 28% in 2021)
  - 98% of boards disclose the *gender diversity* of directors
  - 56% of boards disclose a “Rooney rule” type policy (up from 39% in 2021)
  - 19% of boards included *LGBTQ+ disclosure* (general statement or individual identification) (up from 6% in 2021)



# Notable Board Diversity Policies Impacting Director Elections: ISS and Glass Lewis

	Gender	Racial/Ethnic
ISS	Against NCGC chair where board has <u>no women members (all companies)</u>	Against NCGC chair of a <u>Russell 3000 or S&amp;P 1500 company</u> where board has <u>no apparent ethnically or racially diverse members</u>
Glass Lewis	Against NCGC chair of a <u>Russell 3000 company</u> where board is <u>less than 30% gender diverse</u> <u>or</u> all NCGC members where board has <u>no gender diverse members</u>	Against NCGC chair of a <u>Russell 1000 company</u> where board has <u>no members from an underrepresented community</u>
	Against NCGC chair of a <u>company outside the Russell 3000 index</u> where board has <u>no gender diverse members</u>	Against NCGC chair of a <u>Russell 1000 company</u> where <u>company does not provide any disclosure of individual or aggregate racial/ethnic board demographic information</u>
Glass Lewis	Against NCGC chair of a <u>Russell 1000 company</u> where company does not provide any disclosure in any of the following categories: (a) the board's current percentage of racial/ethnic diversity; (b) whether the board's definition of diversity explicitly includes gender and/or race/ethnicity; (c) whether the board as adopted a Rooney Rule; or (d) board skills disclosure	
	Against NCGC chair of a <u>Nasdaq-listed company</u> where company has not complied with Nasdaq's board diversity disclosure rule	
	Will recommend in accordance with mandated board composition requirements set forth in applicable state laws when they come into effect (Glass Lewis is currently refraining from issuing recommendations pursuant to California's board diversity laws, as they are currently in the appeals process after being deemed unconstitutional in Spring 2022)	

**NOTE:** Exceptions may be made for failing to meet lack of diversity standards if a company includes a commitment to increase diversity within a specified timeframe

# Notable Board Diversity Policies Impacting Director Elections: Institutional Investors

	Gender	Racial/Ethnic
BlackRock	<p>Against <a href="#">NCGC members</a> where company has not adequately explained its approach to diversity in its board composition</p> <p>Blackrock believes “boards should aspire to 30% diversity of membership” and encourages large companies (namely, S&amp;P 500 companies) to have “at least two women and a director who identifies as a member from an underrepresented group”</p>	
Vanguard	<p>Against <a href="#">NCGC chair</a> where board is making “insufficient progress in its diversity composition and/or in addressing its board diversity-related disclosures”</p> <p>Vanguard believes (1) boards should, at a minimum, “represent diversity of personal characteristics, inclusive of at least diversity in gender, race, and ethnicity,” (2) “board diversity disclosure should at least include the genders, races, ethnicities, tenures, skills, and experience that are represented on the board,” and (3) “disclosure of personal characteristics (such as race and ethnicity) should be on a self-identified basis and occur at an aggregate level or at the director level”</p>	
State Street	<p>Against <a href="#">NCGC chair</a> of a <a href="#">Russell 3000 company</a> where board is less than 30% gender diverse, unless company engages State Street and provides a specific, timebound plan for reaching 30% representation of women directors</p> <p>Against <a href="#">all incumbent NCGC members</a> where company fails to meet gender diversity expectations for three consecutive years</p>	<p>Against <a href="#">NCGC chair</a> of a <a href="#">S&amp;P 500 company</a> where no director is from an underrepresented racial or ethnic community</p> <p>Against <a href="#">NCGC chair</a> of a <a href="#">Russell 1000 company</a> where company has not disclosed, at a minimum, the board’s gender, racial and ethnic composition on either an aggregate- or individual-level</p>

**TAKEAWAY:** Companies should be familiar with these policies and engage with their stockholders on this topic, particularly if they will not be in compliance with applicable policies ahead of their 2024 annual meeting

# Overboarding

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# Overboarding Policies Impacting Director Elections

Proxy Advisor / Institutional Investor	Maximum Number of Boards Before a Director is Considered Overboarded				Notes
	Public Company CEO	Other Public Company Executive	Public Company Executive Chair	Other Directors	
Glass Lewis	2*	2*	3	5	Mitigating facts and effective disclosure can avoid negative recs; also imposes limits on audit committee service
ISS	3	—	—	5	Lower limit applies only to CEOs
BlackRock <sup>^</sup>	2*	2*	2*	4	Lower limit applies to NEOs and executive chairs
Vanguard	2	2	—	4	Lower limit applies to NEOs; mitigating facts and effective disclosure can avoid withhold votes
State Street <sup>#</sup>	2	2	—	4	Lower limit of 2 applies to NEOs; lower limit of 3 applies to non-employee board chairs and lead independent directors

\* Public company executive may only serve on one outside public company board before being deemed overboarded

<sup>^</sup> BlackRock identified overboarding as its third leading reason for voting against directors in 2023, behind board composition and board independence

<sup>#</sup> **New for 2024**, for S&P 500 companies only, State Street will no longer withhold votes on individual directors due to their time commitments; instead, State Street may vote against the NCGC chair if the company does not publicly disclose an internal policy on director time commitments or if the company's policy does not comply with State Street's expectations

# Environmental and Social Oversight

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# Notable Environmental and Social (E&S) Policies Impacting Director Elections

- **ISS** will recommend voting against [directors, committees or the entire board](#) for E&S issues (including climate change) which constitute a material failure of risk oversight
- **Glass Lewis** will recommend voting against [NCGC chairs](#) at [Russell 1000 companies](#) that fail to provide explicit disclosure concerning the board's role in overseeing E&S issues; GL will track disclosure for [Russell 3000 companies](#)
- **Glass Lewis** may recommend against [appropriate directors](#) at companies that have been materially impacted by a cyber-attack if GL determines board's oversight, response, or disclosures concerning cybersecurity-related issues to be insufficient
- **ISS** and **Glass Lewis** will hold [directors](#) of significant greenhouse gas emitters (e.g., for ISS, Climate Action 100+ companies) to specific standards for climate risk disclosure
- **Vanguard** may vote against [relevant committee members](#) where the board has failed to effectively identify, monitor and ensure management of material social and environmental risks, including climate change
- **BlackRock** may vote against [members of the responsible committee or relevant directors](#) where (1) "the company has failed to provide shareholders with adequate disclosure to conclude that appropriate strategic consideration is given to material risk factors (including, where relevant, sustainability factors)," (2) "the company is not appropriately considering their key stakeholder interests in a way that poses material financial risk to the company and its shareholders" (e.g., human rights risks), **or** (3) "a company's [human capital management] disclosures or practices fall short relative to the market or peers or [BlackRock is] unable to ascertain the board and management's effectiveness in overseeing related risks and opportunities"
- **State Street** may vote against [CC chairs](#) of [S&P 500 companies](#) that do not disclose EEO-1 survey data **or** [directors](#) of [S&P 500 companies](#) that fail to provide sufficient disclosure regarding climate-related risks and opportunities related to that company, or board oversight of climate-related risks and opportunities, in accordance with the TCFD framework

# Director Elections: Pointers for 2024

- **Investors and proxy advisors are holding directors accountable for an expanding list of topics**
  - Companies should monitor updates made to the proxy voting guidelines of their key stakeholders for the 2024 proxy season
- **E&S oversight and disclosure will remain a key priority for investors and proxy advisors**
  - Boards should evaluate the allocation of oversight responsibilities among the board and its committees and then address any gaps or bandwidth concerns (e.g., by establishing new committees, reallocating oversight responsibilities, leveraging management and advisor expertise to develop a deeper working knowledge of key risk areas)
- **Investors continue to tighten overboarding policies and exceptions are increasingly rare**
  - Expanding list of oversight responsibilities being placed on public company directors will likely result in even greater focus on director commitments in 2024

# Compensation Disclosures

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# Say-on-Pay: Russell 3000 and S&P 500 Trends

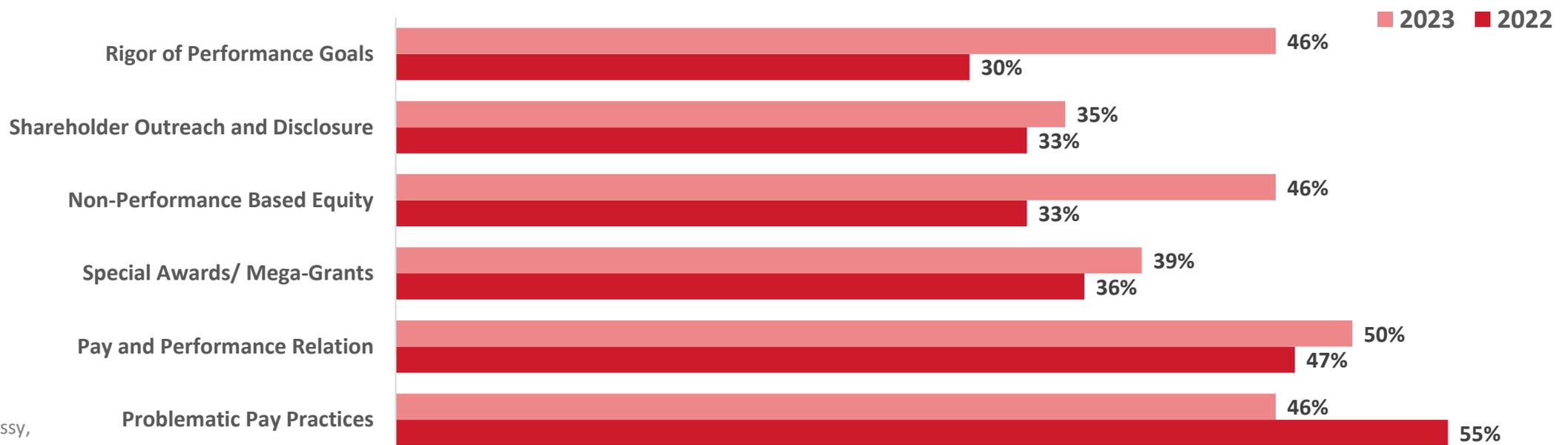
	Russell 3000				S&P 500			
	2021 YTD	2022 YTD	2023 YTD	YOY Trend	2021 YTD	2022 YTD	2023 YTD	YOY Trend
Average Support	90.5%	89.5%	<b>90.2%</b>	↑ 0.7%	88.1%	87.1%	<b>88.5%</b>	↑ 1.4%
Percentage with ≥ 70% Support	93.0%	91.0%	<b>93.1%</b>	↑ 2.1%	91.7%	89.5%	<b>93.1%</b>	↑ 3.6%
Failure Rate	2.7%	3.5%	<b>2.2%</b>	↓ 1.3%	4.0%	4.9%	<b>2.8%</b>	↓ 2.1%
Negative ISS Vote Recommendation Rate (%)	11.2%	13.6%	<b>12.0%</b>	↓ 1.6%	11.0%	12.3%	<b>9.3%</b>	↓ 3.0%
Average Support with Positive ISS Vote Recommendation	94.0%	93.8%	<b>93.4%</b>	≈	92.3%	91.9%	<b>91.8%</b>	≈
Average Support with Negative ISS Vote Recommendation	66.6%	62.7%	<b>67.6%</b>	↑ 4.9%	57.1%	53.4%	<b>57.7%</b>	↑ 4.3%

Source: ISS Voting Analytics;  
YTD means January 1 to August 31, 2023

Positive Trend for Companies | Negative Trend for Companies | No statistically meaningful trend

# Negative ISS Recommendations and Low Vote Support in 2023 Were Driven by the Usual Suspects

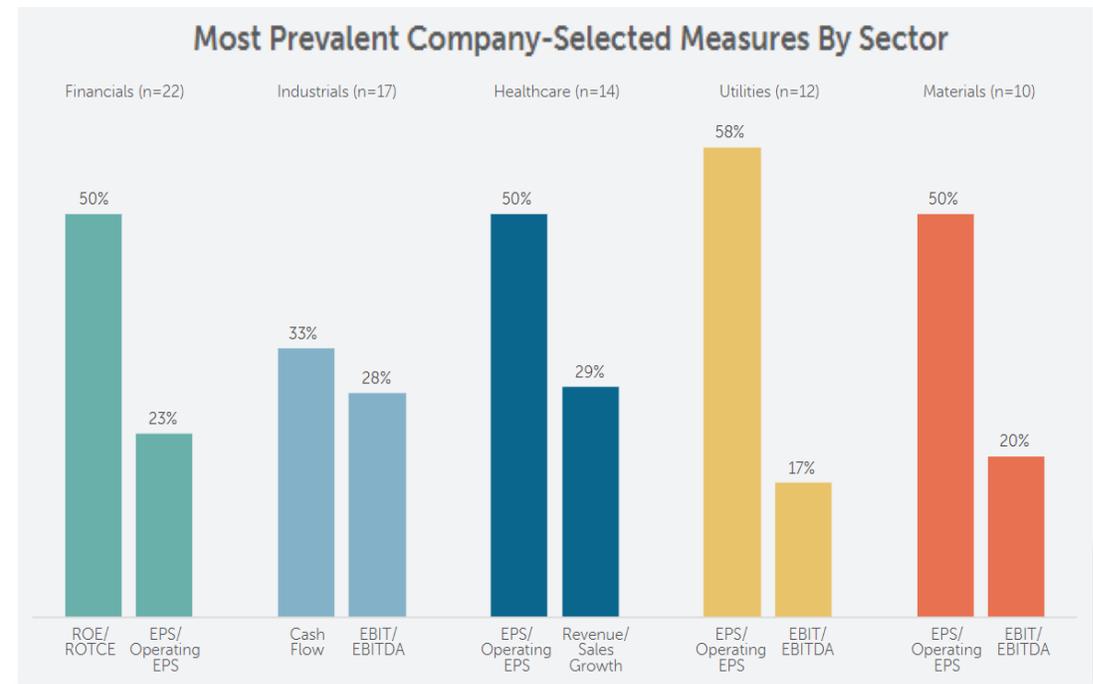
- Common reasons for low say-on-pay support:
  - Pay-for-performance disconnect (dominant reason is relative misalignment of CEO pay and TSR)
  - Problematic pay practices (e.g., mega-grants, one-off awards, excessive CIC/severance packages)
  - Lack of stockholder responsiveness (triggers: for ISS, < 70% support, and for Glass Lewis, ≤ 80% support)



Source: Semler Brossy, 2023 Say on Pay & Proxy Results (September 28, 2023)

# Pay Versus Performance: 2023 Takeaways

- 2023 marked the first year public companies were required to provide new “pay versus performance” (PvP) disclosure reflecting the relationship between “compensation actually paid” to a company’s NEOs and the company’s financial performance
- Takeaways from 2023 PvP disclosures:
  - **Impact** – disclosures had **little impact on say-on-pay proposals**
  - **Peer TSR group** – **vast majority chose index from their 10-K performance graph** (i.e., industry / line-of-business index)
  - **Company-selected measure (CSM)** – varied by industry, but **earnings metrics most popular**
  - **Relationship disclosures** – **most adopted a graph-only approach**, some companies adopted a combination approach and very few companies adopted a narrative-only approach
  - **Tabular list** – **most provided minimum number of financial metrics** and generally disclose only one non-financial metric, if any
  - **Supplemental disclosure** – very few elected to provide supplemental disclosure, indicating many view this as merely a **compliance exercise**



Source: CAP, *Pay Versus Performance Disclosure – Findings from 100 S&P 500 Filers* (April 10, 2023)

# Clawback Policies: Proxy Disclosure Implications

## Proxy Disclosure Implications

- Update description of clawback policy in executive compensation narrative
- If policy triggered, the company must disclose how it applied the policy, including:
  - Date accounting statement required
  - Aggregate \$ amount of erroneously awarded compensation attributable to restatement
    - Including analysis of how amount calculated
  - Aggregate amount outstanding / due from any current or former NEO for 180 days or more
  - If recovery impracticable, amount of recovery forgone and a brief description of rationale for not pursuing

- Any amounts recovered pursuant to a clawback policy will reduce
  - Amount reported in the applicable column of the Summary Compensation Table (SCT) and the “Total” column of same
  - For the fiscal year in which the amount recovered initially was reported
  - Amount must be identified by footnote

## Other Disclosure Implications

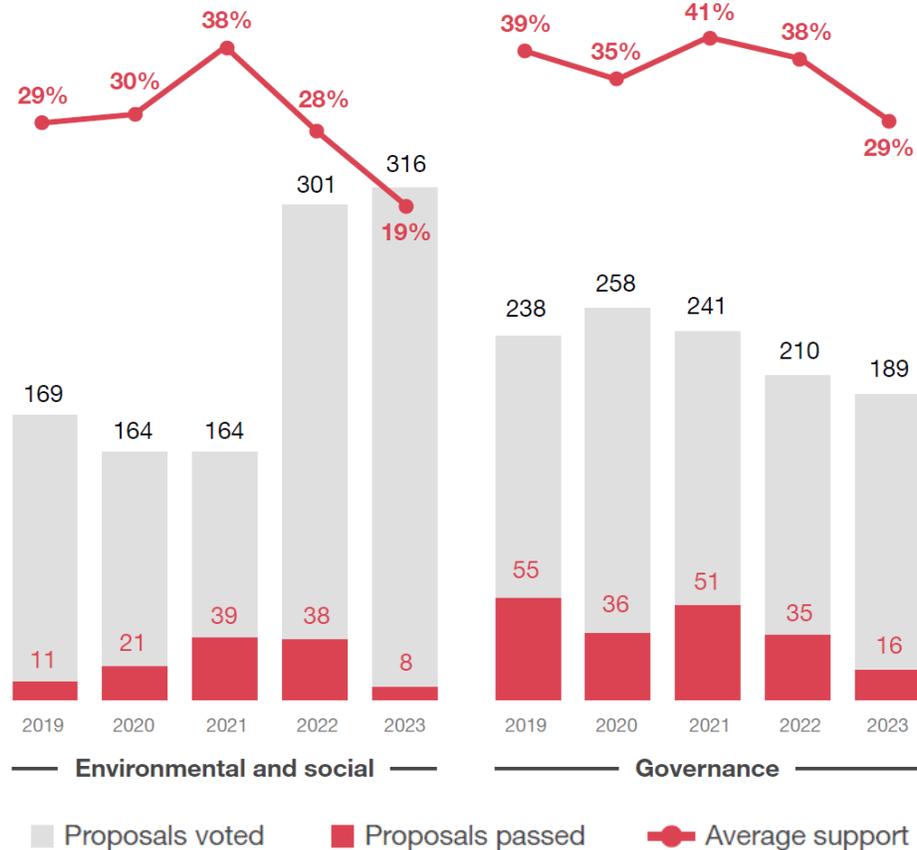
- File clawback policy as an exhibit to Form 10-K
- Add two new check boxes on the Form 10-K cover page indicating whether
  - Filing contains correction of an error to previously issued financial statements
  - Any of those corrections involved a restatement that triggered a clawback analysis

*Reminder: Adoption deadline was December 1, 2023 - listings standards provide remediation procedures for lateness*

# Stockholder Proposal Considerations

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# Overview of 2023 Stockholder Proposals



Source: PwC, *Boardroom Recap: The 2023 Proxy Season* (September 2023)

- The 2023 season saw an increased number of stockholder proposals, but lower stockholder support across all categories of proposals
- The number of executive compensation proposals increased significantly, largely those seeking stockholder approval of certain executive severance agreements
- The number of E&S proposals increased and accounted for more than half of the proposals tracked; however, support for these proposals plummeted, dropping to 19%
  - Anti-ESG efforts increased, but proposals that made it to vote averaged only 6% support and none passed
- The number of no-action requests decreased; however, the success rate for no-action requests increased (though still significantly below the success rate in 2021)

# Delaware Officer Exculpation: Year 1 in Review

- **Background:** In August 2022, the DGCL was amended to extend exculpation rights to executive officers, thereby permitting Delaware-incorporated companies to adopt exculpatory language in their charters to limit the personal liability of not only directors but also officers for duty of care violations
- In response, 249 companies proposed charter amendments in the first half of 2023 – all but 39 passed (84% passage rate)
  - Nearly half of the companies whose proposals failed had supermajority vote requirements, and the remainder had insufficient shareholder participation at the annual meeting, which made it difficult to receive the approval of a majority of outstanding shares
- Proxy advisory recommendations did not appear to have a meaningful impact on vote outcomes
  - **ISS** supported all but 45 proposals (82% positive vote recommendation rate) – where ISS recommended against these proposals, it was largely at controlled companies or firms with dual-class stock structures or other poor governance features
  - **GL** opposed all of this year’s proposals on the basis that shareholders should not relinquish their right to sue executive officers for breaches of their duty of care unless a “compelling rationale” is provided for adopting the provision – apparently, no company met this threshold

**Looking Forward:** For companies that took “wait and see” approach in 2023, consider adopting officer exculpation in 2024, but review governing documents and Delaware law closely to confirm the procedures for adopting such amendment, including board and stockholder voting requirements – if considering doing so, remember to build in time for the preliminary proxy statement filing and SEC review thereof

# What to Know for 2024

- The number of E&S proposals continues to rise and will likely continue in 2024, including the anti-ESG efforts, despite decreased stockholder support
- Engagement with stockholders on E&S issues and expectations prior to 2024 will be critical
- Governance proposals will likely remain consistent in terms of both frequency and substance in 2024
- Know the playbook for addressing stockholder proposals
- **Reminder**: GL will recommend voting against the **NCGC chair** if the identity of the proponent (or lead proponent, if multiple proponents) of any stockholder proposal that may go to a vote is not clearly disclosed in proxy statement

# New Developments Impacting Proxy Season

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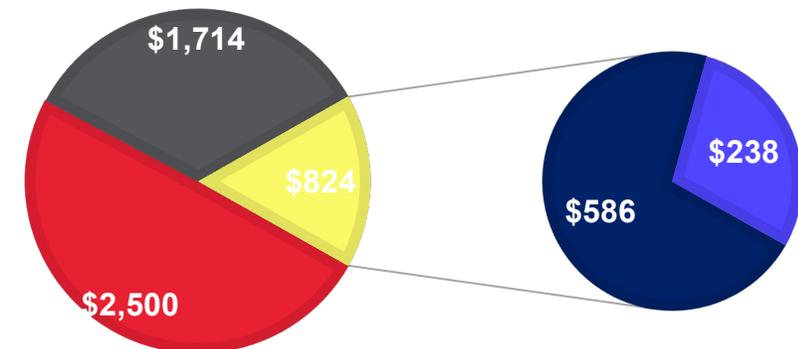
# Growing Trend: Proxy Voting Choice / Pass-Through Voting

- BlackRock, Vanguard and State Street have each launched pass-through voting programs that allow certain clients to direct how the fund votes their portion of shares
- The voting choices available to clients differ between the Big Three, but generally include at least two of the following:
  - Clients exercise control over their voting
  - Clients take a hybrid approach to voting
  - Clients choose from a slate of third-party policies (e.g., ISS and/or GL)
  - Clients rely on fund's judgment for all voting decisions
  - Clients direct fund to cast votes consistent with board recs
- Trend is likely a reaction to growing pressure on large asset managers who can have an outsized influence on proxy voting matters, but other asset managers are expected to follow suit
- **Practical implications:** projecting proxy proposal outcomes will become increasingly more challenging; ISS and Glass Lewis may become even more influential

## BlackRock's Index Equity Clients Participating in Voting Choice as of June 30, 2023

### INVESTMENT \$ VALUE (IN BILLIONS)

- Non-eligible index equity
- Eligible for Voting Choice but not exercising
- Exercising Voting Choice



# Stockholder Proposals: Universal Proxy

- Universal Proxy Rules – 14a-19 (adopted November 2021; effective September 2022)
- “Universal Proxy Card” – refers to inclusion of both company and dissident nominees, as well as certain other shareholder nominees resulting from proxy access
  - Allows stockholders to choose a combination of candidates from competing slates while voting virtually (not just at the meeting)
- Amended formatting and presentation requirements (generally for clarity and to reduce bias)
- Notification Deadline: Dissident must provide information about proposed candidates by 60 days prior to annual meeting
  - 14a-19 is a minimum period that does not override or supersede earlier advance notice bylaw deadline (usually 90-120 days), but imposes additional requirements which lend it independent significance
  - Disclose the advance notice deadline in your proxy (if earlier), but include statement regarding need to comply with additional requirements of 14a-19
- Notice must include those whom dissident (actually) intends to include, and may include alternates

# Universal Proxy: Year 1 in Review

- Did not result in increased # of proxy fights, but settlements increased and occurred earlier in the season; most proxy fights took place at smaller companies; average cost of conducting proxy fight did not decrease
- Over 685 companies amended advance notice bylaws in response to universal proxy; some common amendments:
  - Align advance notice bylaw provisions to the Rule 14a-19 requirements
  - Require nominating stockholder provide information updates of compliance with Rule 14a-19 and specify that failure to meet Rule 14a-9 requirements are disqualifying
  - Require nominating stockholder to use a proxy card color other than white
  - Require nominating stockholder to disclose arrangements or relationships with 3rd parties that support their nomination activities
- Proxy advisory firms generally didn't take issue with a middle of the road approach most companies took, but had limited tolerance for advance notice requirements viewed as impeding or stifling the stockholder election process
- Some stockholders filed proposals in response that require stockholder approval of certain advance notice bylaw amendments

**Looking Forward:** For companies that took “wait and see” approach / did not amend Bylaws, revisions should be adopted on a “clear day” when there are no activism concerns and err towards a middle of the road approach

# Regulatory Updates

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# DGCL Amendment to §242: Amendments to Certificate of Incorporation

- Generally, under § 242(b), charter amendments require approval by (a) the board of directors and (b) holders of a **majority in voting power of the outstanding common stock entitled to vote thereon** and by the holders of a majority in voting power of each class entitled to vote thereon as a class
- Effective August 1, 2023, a new subsection (d) was added to DGCL § 242:
  - ***Forward Stock Splits and Proportionate Authorized Share Increases (242(d)(1))***: Provided the Company's charter does not expressly require otherwise, no SH meeting or vote is required where the amendment (a) effectuates a forward stock split and (b) proportionately increases the company's authorized shares, so long as the company has only one class of stock outstanding and it is not divided into series
  - ***Reverse Stock Splits and Other Changes to Number of Authorized Shares (242(d)(2))***: Provided the Company's charter does not expressly require otherwise, for companies listed on a national securities exchange, an amendment to increase or decrease the authorized number of shares of a class of capital stock or to effectuate a reverse stock split now only requires the affirmative vote of a majority of the votes cast by the SH entitled to vote thereon

**Looking Forward**: For companies expecting to propose a reverse split / change in number of authorized shares, review governing documents carefully and make sure to update the voting standards rather than relying on precedent (and, of course, reach out to NYSE for a “routine” vs. “non-routine” determination

# Insider Trading: Proxy Disclosure Implications

Beginning in first full fiscal period that begins on or after April 1, 2023 (October 1, 2023 for SRCs) (FY 2024; 2025 Proxy Season)

[Insider Trading Policies](#): Must disclose whether the Company has adopted insider trading policies and procedures designed to promote compliance with insider trading laws, regulations and listing standard, or explain why not

[Option Awards](#): Must disclose in proxy:

- Tabular disclosure of option award, stock appreciation right or other option-like instrument granted in past fiscal year to an NEO within 4 business days before and 1 business day after the filing of a Form 10-Q, Form 10-K or release of MNPI, including (i) name of NEO, (ii) grant date, (iii) number of securities, (iv) exercise price, (v) grant date fair value and (vi) % change in closing market price of the securities underlying the award between 1 trading day before and after the release of MNPI
- Narrative disclosure of policies and practices on the timing of awards of option awards, stock appreciation rights or other option-like instruments in relation to the disclosure of MNPI, including:
  1. How BOD determines when to grant such awards
  2. Whether (and if so, how) the BOD takes MNPI into account when determining the timing and terms of such an award
  3. Whether the company has timed the disclosure of MNPI for the purpose of affecting the value of executive compensation

# Final Rule: Cybersecurity Disclosures

On July 26, 2023, the SEC adopted final rules re cybersecurity disclosures for public companies:

- **Form 8-K**: New Item 1.05 to disclose material info re cybersecurity incident within 4 business days of determination that incident was material, with narrow exception for substantial risk to national security or public safety

*Other than SRCs, must comply on the later of 90 days following publication of the adopting release in the Fed. Reg. or December 18, 2023; SRCs must comply on later of 270 days from publication of adopting release in the Fed. Reg. or June 15, 2024*

- **Form 10-K**: New Item 106 requiring disclosure re:
  - A company's process, if any, for assessing, identifying and managing material risks from cybersecurity threats
  - Whether any risks from cybersecurity threats, including as a result of any previous cybersecurity incidents, have materially affected or are reasonably likely to materially affect a company's business strategy, results of operations or financial condition
  - BOD oversight of risks from cybersecurity threats
  - Management's role in assessing and managing material risks from cybersecurity threats

*Must comply beginning with annual reports for fiscal years ending on or after December 15, 2023*

**NOTE:** The initial proposed rule would have required companies to disclose the cybersecurity expertise of members of the BOD in the proxy statement – the Final Rule removed this requirement

# SEC Agenda: Shareholder Proposals – 14a-8

- Rule 14a-8 Amendments (proposed July 2022; *targeted October 2023*) – narrows three of the bases for excluding a shareholder proposal:
  1. “Substantial Implementation” – proposed to mean “implementation of the essential elements of the proposal” (i.e., all, if “essential,” even if not by precisely the method requested)
  2. “Substantially Duplicative” of another current proposal – proposed to mean “addresses the same subject matter and seeks the same objective by the same means” as another proposal being included at the meeting
  3. “Substantially the Same Subject Matter” as proposal included in last 5 years – changed to conform with “Substantially Duplicative” standard for current meeting

In June 2023, Commissioner Uyeda discussed stockholder proposals under rule 14a-8, noting the recent increase in submission of stockholder proposals, decline in grant of no-action requests and decline in percentage of favorable votes for stockholder proposals. Uyeda expressed concern over the no-action letter process, asserting stockholder proposal overload and the high costs to respond. Uyeda offered three approaches to address these consequences of the recent changes: “(1) greater use of private ordering to manage shareholder proposals; (2) exclude proposals on social policy issues that lack a material relationship with the company; and (3) changes to how the Commission staff processes shareholder proposals.”

# Other Expected Releases from SEC Agenda

Topic	Stage	Expected
<p><u>Climate Change Disclosure</u>: Proposed new rules would require public companies to disclose info about any material climate-related impacts on strategy, business model, and outlook; governance of climate-related risks; climate-risk management; GHG metrics in FS; and climate-related targets and goals, if any</p> <p>Proposal would also mandate disclosure of Scope 1 &amp; 2 GHG emissions, and, for larger companies, Scope 3 GHG emissions if material (or included in the company’s emissions reduction target), with a phased-in attestation requirement for Scopes 1 and 2 for large accelerated filers and accelerated filer</p>	Final Rule	April 2024
<p><u>Human Capital Management Disclosure</u>: May recommend amendments to enhance company disclosures re human capital management following lack of meaningful numbers re human capital in disclosures under initial principles-based rule</p>	Proposal	April 2024
<p><u>Corporate Board Diversity Disclosure</u>: May recommend amendments to the proxy rules to enhance company disclosures about the diversity of board members and nominees</p>	Proposal	October 2024
<p><u>Incentive-Based Compensation Arrangements</u>: May repropose “regulations and guidelines with respect to incentive-based compensation practices at certain financial institutions that have \$1 billion or more in total assets as required by the Dodd Frank Act”</p>	Proposal	April 2024

Appendix:  
2024 Proxy Advisory Firm  
Policy Updates

Cooley

# Overview of Proxy Advisory Firms

- **Who are they?** ISS (Institutional Shareholder Services) is the largest and most influential proxy advisory firm; GL (Glass Lewis) is the second largest
- **What do they do?** Provide research, analysis and proxy proposal vote recommendations to institutional investors who pay them
  - ISS also provides various types of consulting services to public companies, including assisting with structuring proxy proposals to get ISS support, analyzing pay for performance alignment and improving corporate governance practices (they get criticized for this but have adopted policies intended to guard against possible conflicts of interest)
- **Why are they influential?** Institutional investors can rely on the advice from proxy advisory firms to fulfill their fiduciary obligations when voting their shares
- **How influential are they among institutional investors?**
  - Some institutional investors robotically follow proxy advisory firm recommendations
  - Others use the research to assist with their own voting decisions – they consider the recommendations but do not robotically follow them
  - Some, but not all, have their own independent proxy voting guidelines
- **Influence varies from company to company and changes over time with changes in a company's stockholder base;** each public company should understand who its stockholders are and what influences their voting

# Summary of ISS and Glass Lewis Updates for 2024 (US Companies)

## ISS Update

- Stockholder proposals concerning executive severance agreements and golden parachutes

## Glass Lewis Updates

- Compensation
  - Clawback provisions
  - Executive ownership guidelines
  - Compensation based on non-GAAP metrics
  - Proposals to approve individual equity awards
  - Impact of pay-versus-performance disclosure
- Board oversight and composition
  - Cyber risk oversight
  - Board oversight of environmental and social issues
  - Board accountability for climate-related issues
  - Board diversity
  - Interlocking directorships
- Other matters
  - Material weaknesses
  - Board responsiveness
  - Net operating loss (NOL) pills
  - Control share statutes

# ISS 2024 Policy Update

- ISS adopted only one policy update for the US market for 2024, which relates to **stockholder proposals concerning executive severance agreements and golden parachutes**
- The update codifies the case-by-case approach ISS uses when analyzing stockholder proposals requiring that executive severance arrangements or payments be submitted for stockholder ratification, including by:
  - Harmonizing the factors used to analyze both regular termination severance and change-in-control-related severance (i.e., golden parachutes); and
  - Clarifying the key factors considered in such case-by-case analysis

# Glass Lewis 2024 Policy Updates: Compensation

- **Clawback provisions:** GL believes, in addition to meeting listing requirements, effective clawback policies should provide companies with the ability to recoup incentive payments (whether time-based or performance-based) when *there is evidence of problematic decisions or actions (e.g., material misconduct, material reputational failure, material risk management failure or material operational failure)*, the consequences of which have not already been reflected in incentive payments and where recovery is warranted
  - Where a company ultimately determines not to follow through with recovery, if the company does not provide a thorough, detailed discussion of its decision to not pursue recoupment, this lack of disclosure may play a role in GL's say-on-pay vote recommendation
  - GL will continue to issue negative vote recommendations for **all compensation committee members** when a new employment contract given to an executive does not include a clawback provision and the company had a material restatement, especially if such restatement was due to fraud
- **Executive ownership guidelines:** GL believes companies should clearly disclose their executive ownership requirements in the CD&A and *how various equity awards are counted or excluded* from the ownership level calculation; counting unearned performance-based full value awards or unexercised stock options without a cogent rationale may be viewed as problematic by GL

# Glass Lewis 2024 Policy Updates: Compensation

- **Compensation based on non-GAAP metrics:** in situations where significant adjustments were applied to performance results, the absence of a thorough, detailed discussion within the proxy of adjustments akin to a GAAP-to-non-GAAP reconciliation and their impact on payouts will impact GL's assessment of the quality of disclosure and, in turn, may play a role in GL's say-on-pay vote recommendation
- **Proposals to approve individual equity awards:** for proposals for stockholders to approve individual equity award grants, where the recipient of the proposed grant is also a large stockholder of the company whose vote can materially affect the passage of the proposal, GL believes provisions that require a non-vote, or vote of abstention, from the recipient may help address potential conflicts of interest and will be viewed by GL as a favorable feature
- **Impact of pay-versus-performance (PvP) disclosure:** GL may use the PvP disclosures mandated by the SEC (specifically, the "compensation actually paid" data) as part of its supplemental quantitative assessments supporting its primary pay-for-performance grade

# Glass Lewis 2024 Policy Updates: Board Oversight

- **Cyber risk oversight:** in the absence of material cybersecurity incidents, GL will generally **not** make vote recommendations based on a company's oversight or disclosure concerning cyber-related issues, but in instances where a company has been materially impacted by a cyber-attack:
  - GL believes stockholders can reasonably expect periodic updates from the company communicating its ongoing progress towards resolving and remediating the impact of the cyber-attack; and
  - GL may recommend against **appropriate directors** where *GL finds the board's oversight, response or disclosures concerning cybersecurity-related issues to be insufficient or are not provided to stockholders*
- **Board oversight of environmental and social (E&S) issues:** for Russell 1000 companies, GL will generally recommend against the **NCGC chair** where the *company fails to provide explicit disclosure concerning the board's role in overseeing material E&S issues* (including, e.g., climate change, human capital management, diversity, stakeholder relations, or health, safety and the environment), and also will track board oversight of such matters for Russell 3000 companies; new for 2024, when evaluating the board's role in overseeing E&S issues, GL will examine a company's charters and governing documents to determine if the company has codified a meaningful level of oversight of and accountability for a company's material environmental and social impacts
- **Board accountability for climate-related issues:** for (1) S&P 500 companies operating in industries where SASB has determined that the companies' GHG emissions represent a financially material risk and (2) companies where GL believes emissions or climate impacts, or stakeholder scrutiny thereof, represent an outsized financially material risk, GL may recommend against the **chair of the committee (or board) charged with oversight of climate-related issues** if the *company has not (1) produced climate-related disclosures in line with TCFD's recommendations or (2) disclosed explicit and clearly defined board-level oversight responsibilities for climate-related issues*

# Glass Lewis 2024 Policy Updates: Board Oversight

- **Board diversity:** GL clarified that, when a company’s board has insufficient diversity under its policies, it may refrain from issuing negative vote recommendations if the company discloses *a timeline of when the board intends to appoint additional diverse directors*, with such timeline being “generally by the next annual meeting or as soon as reasonably practicable”
- **Board underrepresented community diversity:** GL revised its definition of “underrepresented community director” to replace its reference to an individual who self-identifies as “gay, lesbian, bisexual, or transgender” with an individual who self-identifies as “a member of the LGBTQIA+ community”
- **Interlocking directorships:** GL clarified its policy on interlocking directorships to provide that, on a case-by-case basis, it evaluates interlocking relationships other than interlocking directorships where CEOs or other top executives serve on each other’s boards, such as interlocks with *close family members of executives or within group companies*

# Glass Lewis 2024 Policy Updates: Other Matters

- **Board responsiveness:** in determining whether a proposal has significant stockholder opposition to management’s recommendation, GL clarified that the 20% opposition threshold means 20% or more of votes on the proposal are cast as “against” and/or “abstain”
- **Material weaknesses:** GL will consider recommending voting against [all audit committee members](#) who served on the committee during the time when a material weakness is identified when:
  - The material weakness has been reported and the company has not disclosed a remediation plan; or
  - The material weakness has been ongoing for more than one year and the company has not disclosed an updated remediation plan that clearly outlines the company’s progress toward remediating the material weakness
- **Net operating loss (NOL) pills:** when assessing NOL pill adoption proposals, GL will now consider two new factors: (1) the inclusion of an “acting in concert” provision; and (2) whether the pill is implemented following the filing of a Schedule 13D by a stockholder or there is evidence of hostile activity or stockholder activism
- **Control share statutes:** for closed-end investment companies and business development companies, GL will generally recommend voting (1) for proposals to opt out of control share acquisition statutes unless doing so would allow the completion of a takeover that is not in stockholders’ best interests, (2) against proposals to amend the company’s charter to include control share acquisition statutes, and (3) against the [NCGC chair](#) in cases where the *company received a public buyout offer and relied on a control share statute as a defense mechanism in the prior year*, absent a compelling rationale as to why a rejected acquisition was not in stockholders’ best interests