SHEARMAN & STERLING

18TH ANNUAL SURVEY OF THE 100 LARGEST U.S. PUBLIC COMPANIES

Corporate Governance & Executive Compensation Survey 2020

Contents

Introduction

Shearman & Sterling LLP is proud to present its *2020 Corporate Governance & Executive Compensation Survey*. In last year's Survey, we noted that concern for environmental and social issues (the "E" and the "S" of "ESG") had reached an inflection point, having taken center stage from the more traditional governance issues (the "G" of ESG) that had been a staple of investor advocacy and discussion. Following the release of the 2019 Survey, this trend with respect to social issues not only continued, but accelerated, with some influential voices going so far as to question the long-standing shareholder primacy model of the corporation.

Then came 2020. From the COVID-19 pandemic, to growing awareness of and large-scale protests against institutional racism, to the dangers of climate change manifesting in unprecedented wildfires on the west coast, the focus on the corporation's obligation to society at large has only intensified. In response to these developments, in the *2020 Corporate Governance & Executive Compensation Survey* — our 18th annual — we examine these themes and how they are impacting corporate governance and boardroom priorities, in addition to continuing to report on traditional governance topics. Throughout this Survey, we provide insights on specific environmental and social issues, including practical advice for Boards governing amid crisis, human capital management, green loans, ESG metrics in incentive compensation plans and recent shareholder activism trends. With respect to the traditional governance topics, we continue to cover shareholder engagement, shareholder activism, governance practices of newly public companies, CEO pay ratio, compensation clawback policies, cybersecurity and board diversity, among others. Across all topics, our goal is to provide an overview of the current corporate governance landscape and to identify best practices for Boards.

In addition to Insights articles, the Survey consists of a review of key governance characteristics of the Top 100 Companies, which we define as the 100 largest U.S. public, noncontrolled companies that have equity securities listed on the NYSE or Nasdaq, measured by market capitalization and revenue. A list of the Top 100 Companies can be found in "The Survey" section at the end of this publication.

The 2020 Survey was produced under the leadership of the following Shearman & Sterling attorneys:

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Insights

ESG has global recognition from stakeholders in all corners, including investors, employees, customers, governments and other constituencies, focusing on many of the issues that comprise the topic.

Insights

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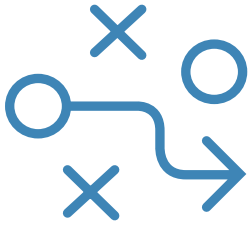
Governance Amid Crisis – How 2020 Changed the Boardroom

The dramatic events of 2020 have impacted every aspect of American life, and the boardroom is no exception. Although 2020 began on a politically charged note with the presidential impeachment process in full swing in a bitterly divided Senate, the national dialogue on corporate governance was breaking exciting new, albeit uncharted, ground with an evolving consensus among business leaders and the largest institutional shareholders around the need to reexamine the purpose of the corporation against the backdrop of the traditional shareholder primacy model of corporate governance. These developments have been driven in substantial part by increasing interest in and emphasis on ESG considerations on the part of institutional investors and a growing number of U.S. public company CEOs. This in turn has accelerated the corporate acknowledgment that demonstrating an awareness and appreciation of ESG considerations is increasingly important to compete not only for capital and investment, but also for human talent, brand connection and customer engagement. Climate change and other environmental concerns have also driven a focus on long-term sustainability that has moved beyond tracking carbon emissions to a broader conversation around sustainable long-term growth, community impact and a growing recognition that shareholder value is aligned with, not at odds with, consideration of a broader set of stakeholder interests.

In one sense, 2020 brought the perfect storm of tests of these principles for boards of public companies. The onset of the COVID-19 pandemic led to an unprecedented economic shock as business and school closures, stay at home orders and a virtual shut down of the global economy led to massive disruption, enormous job losses and unprecedented dislocations in the most basic aspects of human life. The boards of public companies faced wrenching decisions, including weighing actions to ensure business continuity and for some, their very survival, against fears of endangering lives, assessing demands to assist in essential worker safety, designing strategies to retool business models and resize workforces for a prolonged period of lower activity, and considering whether it was appropriate to accept government assistance. Corporations in a variety of industries responded to essential societal needs, such as supplying personal protective equipment for healthcare workers and ventilators to treat the sick, ensuring the continuity of the food supply chain, maintaining access to necessary transportation, and protecting access to the internet to make working from home possible, to name just a few. Then, in the midst of the COVID-19 pandemic, the shocking killing of George Floyd and the subsequent protests in support of the Black Lives Matter movement led to calls for a reexamination of systemic racism and social justice issues throughout society, against the backdrop of ominous reports of how the COVID-19 pandemic had a disproportionate effect on the lives of people of color.

These two crises have demanded the complete focus and attention of corporate boards in ways that no one could have imagined as the year began. But the foundations that have been built through the focus on ESG and the efforts to redefine the role of the corporation seem to be bearing fruit as boards are tested and forced to reckon with the numerous economic and social issues and consequences in the crucible of this defining moment in U.S. history. In this article, we examine some of the recent developments in the debate about the role of the corporation in society and offer some practical guidance for boards to consider as their companies navigate these difficult times and try to prepare for what lies ahead.



Before the COVID-19 pandemic captured national attention and leading into the 2020 proxy season, there were a number of key developments in the debate over the role of the corporation that bear mentioning.

Business Roundtable Statement

In August 2019, the Business Roundtable issued its Statement on the Purpose of a Corporation, which it characterized as the outline of a modern standard of corporate responsibility. Signed by 181 CEOs of the largest public companies, the statement was perceived to be extraordinary in its rejection of the shareholder primacy model, which has been the guiding principal of corporate governance for decades. The statement starts with a defense of free-market capitalism, asserting that it is "the best means of generating good jobs, a strong and sustainable economy, a healthy environment and economic opportunity for all." Instead of asserting that shareholder primacy and free market capitalism alone will deliver on these promises, it goes on to state that all corporations, regardless of industry, share a fundamental commitment to all "stakeholders," naming customers, employees, suppliers and communities, in addition to a company's own shareholders. With respect to employees, the statement stresses a corporation's commitment to fair compensation, important benefits, training and education for a changing world and the fostering of diversity and inclusion. With respect to communities, it notes that the signatories protect the environment by embracing sustainable practices. With respect to shareholders, the statement promises a commitment to long-term value generation, coupled with transparency and engagement.

The statement is only a page long, but it is notable for its widespread adoption and commentary. In part, the statement is a predictable public reaction to the criticisms that have been leveled against corporations for not doing more to address notable global challenges, including climate change, diversity at the highest levels of corporations and income inequality. Certainly, the ESG movement and the increasing engagement with shareholders on ESG topics, as well as vocal calls from investors to embrace a greater corporate "purpose" and sustainable business models, must have been driving factors. But the real challenge for the signatories and other corporations that embrace the statement is how they will demonstrate the commitment to the themes and specific actions laid out in the statement in the way they run their companies every day. There would certainly seem to be substantial room for critics to point to the statement and take companies to task for not meeting its lofty aspirations.

Also significant is the emphasis on engagement with shareholders. Criticism of stakeholder governance has often been based on the notion that corporate boards and managers, given too much leeway to consider other factors would engage in activities that enrich themselves or cultivate special interests at the expense of shareholders. In a sense, the fact that a meaningful ownership percentage of the largest public companies has become concentrated in the hands of institutional owners that are increasingly vocal, influential and critical makes this moment possible. Armed with this influence, and the commitment of companies to engage, shareholders can perhaps safely focus on the long term and allow companies to take into account these "ESG considerations" as they develop a strategy for sustainable long-term growth.

Statements from BlackRock and State Street

BlackRock Chairman and CEO Larry Fink's 2020 annual letter to CEOs, which was published early in 2020 before the COVID-19 pandemic set in in the United States, built on the theme of past letters and the Business Roundtable statement, noting that "a strong sense of purpose and a commitment to stakeholders helps a company connect more deeply with customers and adjust to the changing demands of society… purpose is the engine of long-term profitability." The emphasis of the BlackRock letter was strong on climate change and sustainability with a focus on improving and standardizing sustainability disclosures. Fink's letter called for companies to publish a disclosure in line with industry-specific Sustainability Accounting Standards Board (SASB) guidelines by the end of 2020 and disclose climate-related risks in accordance with the Task Force on Climate-related Financial Disclosures' (TCFD) recommendations.

State Street, in its annual letter to board members, stated that it now views ESG considerations as essential, not optional, for long-term strategy, noting that "shareholder value is increasingly being driven by issues such as climate change, labor practices and consumer product safety." The letter was forceful in pointing out that despite growing recognition among board members of the importance of ESG issues, fewer than 25% of the companies it evaluated have meaningfully identified, incorporated and disclosed material ESG issues in their strategies. State Street therefore announced its plan to use its recently created "R-Factor" ESG scoring system (which is based on SASB standards) to take voting action against directors, commencing with the 2020 proxy season, at companies that are laggards based on their R-Factor scores and who cannot articulate how they plan to improve their scores.

CII Response to Business Roundtable Statement

Shortly after the Business Roundtable statement was issued, the Council of Institutional Investors (CII) issued their own statement that was firmly in opposition. While conceding that boards and managers need to sustain a focus on long-term shareholder value, the CII argued that achieving that objective requires respecting stakeholders but retaining clear accountability to company owners. In CII's view, the Business Roundtable Statement diminishes shareholder rights without proposing new mechanisms for board and management accountability to any other stakeholder group. As noted above, it is the sense of confidence in the ability to directly influence corporate strategy through direct engagement or, when necessary, votes that has enabled investors like BlackRock and State Street to speak out strongly in favor of stakeholder governance. The CII response reflects the more traditional view of its broader investor constituents who are not as convinced that shareholders will continue to be respected as owners. It also reflects traditional arguments against stakeholder governance that corporations are not well equipped to effect public policy and that accountability to everyone is accountability to no one.

2020 PROXY SEASON AND BEYOND

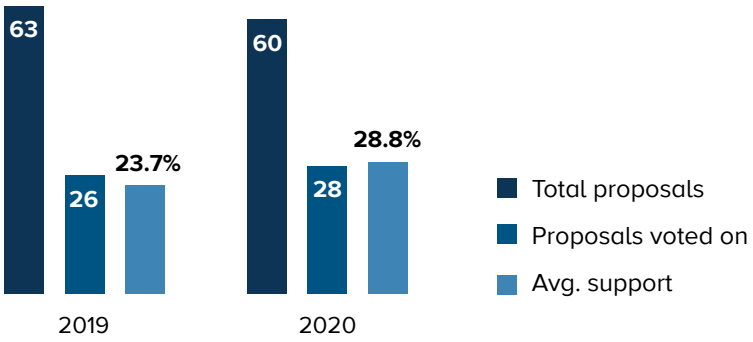
Considered together, a season's shareholder proposals tend to be an indicator of what proponents are thinking about when they formulate their proposal strategies in advance of the season and prepare proposals to meet notice deadlines. Given that the COVID-19 pandemic hit in the middle of the 2020 season, most if not all proposals were submitted before the COVID-19 pandemic and well before the social justice protests began. As such, the shareholder proposals this season reflect the governance priorities at the beginning of the 2020 proxy season rather than the full impact of the subsequent events that are shaping conversations in the boardroom about corporate governance right now.

A significant number of environmental, social and political proposals achieved majority shareholder support in the 2020 season reflecting the growing investor interest in these topics. Some observations on these proposals in the 2020 season are discussed below.[1]

Environmental Proposals

- Environmental proposals, including global warming and other sustainability proposals, continued to be the biggest single category of environmental and social proposals (excluding political proposals), and those that were voted on drew higher percentages of investor support, reflecting a continuing investor focus on climate change.
- Climate change proposals continued to dominate in the environmental space, but there were a number of proposals targeting sustainability issues in specific industries, such as water use in agriculture and deforestation for retail eating establishments.
- Five environmental proposals received majority support: proposals calling for reports on climate change risk, alignment of long-term business strategy with the projected long-term constraints posed by climate change, sustainability, and alignment of operations or lobbying with the goals of the Paris Accord. Energy companies were the focus of the majority of these successful proposals.

Environmental Proposals

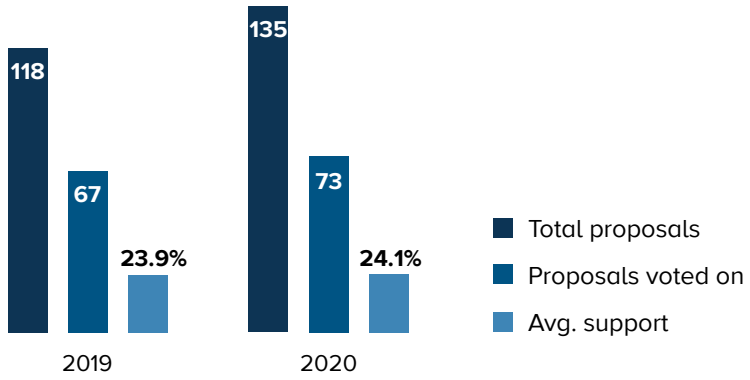


[1] The data in this section was sourced from FactSet Research Systems and covers the period of January 1 to July 31 for both 2019 and 2020.

Social Proposals/Human Capital

- Diversity related proposals continued to be a significant factor in the 2020 proxy season. The New York Comptroller's Office sent letters to 56 companies asking them to implement a policy borrowed from the NFL's "Rooney Rule" that would require consideration of qualified women and diverse candidates for director and external CEO searches. Ultimately, the Comptroller's office submitted Rooney Rule proposals at 17 of these companies during the Spring 2020 proxy season, but 13 of them subsequently implemented Rooney Rule policies, and the related proposals were withdrawn.[2]
- Proposals requesting implement reports or policies relating to workplace diversity increased in number and garnered slightly higher average support, achieving majority support in several cases.
- Proposals requesting reports on the pay gap for women or diverse workers were constant as compared to 2019 but average support was lower.
- Proposals relating to companies imposing mandatory arbitration clauses as a condition of employment (which may prevent employees suing their employers, including for sexual harassment) were back in the 2020 season but reframed as requests for reports on the topic. One such proposal submitted by the New York City Comptroller's office achieved majority support.

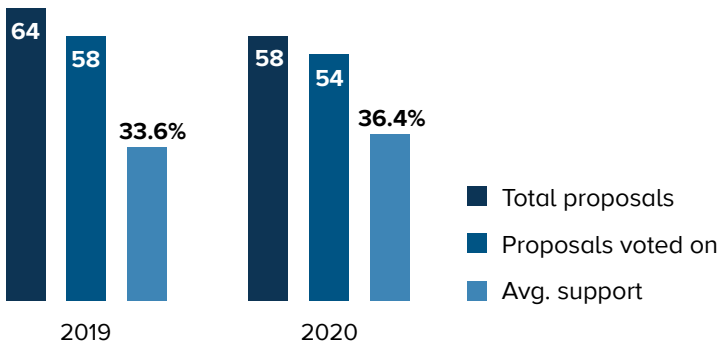
Social Proposals/Human Capital



Political Proposals

- Proposals requesting a disclosure of political spending policies and expenditures continued to represent a significant portion of proposals on environmental, social and political topics in the 2020 proxy season.
- Six proposals achieved a majority vote and average support remained fairly high.

Political Proposals



[2] "NYC Comptroller Stringer and Retirement Systems Announce Precedent-Setting Board/CEO Diversity Search Policies as part of Boardroom 3.0 Initiative," April 14, 2020, https://comptroller.nyc.gov/newsroom/nyc-comptroller-stringer-and-retirement-systems-announce-precedent-setting-board-ceo-diversity-search-policies-as-part-of-boardroom-3-0-initiative/.

LOOKING BEYOND TO 2021

As mentioned above, the 2020 proxy season did not reflect, at least fully, the impact of the COVID-19 pandemic or the subsequent social justice protests. As a result, the stage is set for the 2021 proxy season in which we could see these events play out in shareholder proposals and shareholder engagement at the time of a major rethinking of the role of the corporation in society and a shift towards stakeholder governance.

While the impact on the 2021 proxy season cannot be predicted with certainty, we anticipate there will be more engagement and shareholder proposals in the following areas:

1 **Diversity**

Already a hot topic in previous seasons, the focus is expected to expand beyond ensuring written commitments to seek out diverse board candidates and requirements to have a minimum percentage of diverse directors. We expect more focus on requesting companies to describe the efforts they are taking to recruit, hire, develop and promote diverse candidates throughout the organization. We expect companies to be asked to describe, in reports prepared for the board, what they are doing to make the workplace more inclusive and what is being done to promote the advancement of minority and underrepresented groups.

2 **Social Justice**

We expect that the coming season will see engagement and possibly proposals focused on broader social justice issues. In line with the broader stakeholder responsibility that we see corporations being pushed towards today, companies may be asked to explain to shareholders how they are working towards social justice reforms in the communities in which they operate. As companies were forced to take public positions on the Black Lives Matter movement that went beyond commitments to diversity and inclusion in the workplace, we expect companies to be faced with similar questions about what they are doing to support the fight against systemic racism — what initiatives and programs are supported, what policies are being implemented and what goals are being set.

3 **Human Capital**

The fallout from the economic dislocation of the COVID-19 pandemic has led to mass layoffs and furloughs, severely impacting the lives of millions of Americans. Questions may be asked about how those decisions were made, what alternatives were considered and how choices about executive compensation were made and balanced. We also expect increasing pressure on companies to add ESG targets to executive compensation benchmarks. Lastly, we expect to see shareholders question how workforce health and safety issues were handled during the COVID-19 pandemic and how well the company is prepared to address those challenges in the future.

In the past, shareholder proposals in these areas could be challenged as excludable from the proxy statement under SEC rules because the subject matter was focused on the day-to-day management of the company, which is outside the purview of the shareholders, or that the subject matter has been adequately addressed by the board. Given the events of 2020, it will be even harder than before to argue that these topics do not present significant policy issues that rise to the level of shareholder consideration, and for some of these issues, it may be harder still to argue that the subject matter has been substantially addressed by the board. Companies may also be reluctant to assert in writing that these issues are not worthy of board attention or are a work in progress.

Companies should always consider whether they can make a credible argument for exclusion of a shareholder proposal, but more than in the past, this proxy season companies should seriously consider meaningful engagement with proponents before seeking the SEC's concurrence with exclusion of the proposal from the proxy statement. Companies should be prepared to negotiate with the proponent in an effort to narrow the scope where appropriate, change proposals from requests for specific action to agreed upon disclosures of policies in the proxy statement or identify whether incremental modifications in existing policies may result in withdrawal of the proposal. Letters to the SEC seeking support to exclude a proposal, although intended to be technical rule-based arguments for exclusion, can be read and misinterpreted as a company being, at best, tone-deaf, or at worst, not supportive or even against the broader societal forces seeking change.

WHAT SHOULD BOARDS BE DOING NOW?

Rising calls for stakeholder governance and ESG reporting and risk management would have been work enough for boards in 2020 without the additional challenges associated with the COVID-19 pandemic and the social justice movement. The events of 2020 have caused corporate boards to tackle immediate challenges of business continuity, operational impacts, liquidity concerns, possible business restructurings, employee health and safety, remote working and reopening risks, to name a few, but the longer-term impacts of these crises in the board room are only just being felt. The role of corporations in these events will be the subject of much consideration and interest, which can only lead to more questions and inevitably shareholder proposals.

With this in mind and through the lens of 2020, boards should be actively evaluating their companies' successes and challenges during 2020. Companies should be renewing their defining sense of corporate culture and purpose and have a firm sense of what they are doing for each of their key stakeholders, particularly in the wake of the events of this year. Some practical steps include:

Crisis Management

How did your company respond to the crises that were faced in 2020? The two crises that companies faced in 2020, so far, were decidedly different. The COVID-19 pandemic, although unprecedented in its scope and impact, drew upon the systems and processes that most well-managed companies had in place. The COVID-19 pandemic certainly tested these processes and the planning that was in place, and it also tested the skills and experience of the directors and top executives at many companies. There are many lessons to be learned from the COVID-19 pandemic as it relates to board preparedness and its ability to manage in a crisis. The national reaction to the killing of George Floyd and the Black Lives Matter and social justice protests that ensued and continue today presented a new and different "crisis" for many companies.

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Management and boards have been faced with the pressing and important decision of what the company should say about what is happening in the country at this very moment.

It became clear very quickly that it was not going to be enough for a company to sit back and not express a view. Employees, customers and communities were demanding to hear from the executive suites and boardrooms of corporate America. It became critically important for a company to engage with its employees, customers and community and state what it was committed to do to further the change demanded by calls for social justice reform. This was a new type of crisis for many companies. It did not relate to something triggered by a company event — there was not a problem with a product or an issue of executive misconduct. The board and management were forced to be a voice in the public debate in a new and very open way. It became clear that companies would be evaluated not only on the content of what they said, but also whether it rang true. The message had to connect to the relevant stakeholders, but also be considered authentic. Boards should evaluate how they handled the initial stages of this crisis. They should consider what skills are needed on boards and from advisors for this type of crisis going forward.

Diversity

Review diversity policies across the organization. The importance of a clear and focused statement on board diversity has long been on the agenda of boards. The board should now be focused on how diversity and inclusion are being addressed throughout the organization. The board should be engaged in ensuring management determines whether there are racial and gender barriers in how the company finds, develops, compensates and promotes its talent. The board should also direct management to evaluate its supplier and service provider network to see what can be done to promote diversity objectives. The board should be aware of the concerns and expectations of its employees, customers and the communities in which the company engages.

Human Capital and Community Impact

The COVID-19 pandemic had an enormous impact on working Americans, which will be fresh in the minds of investors and advocates. Questions about the health and safety of employees, severance policies, work-at-home practices and actions to get employees back to work safely are inevitable. Community engagement and responsibility will also loom large as communities across the United States come to terms with the economic and human damage wrought by the COVID-19 pandemic. Every company was forced to react to these challenges, but it will be important to weave those responses into a narrative about what the company has done, as well as its sense of purpose in the community and how it plans to build on the lessons of these events going forward.

Executive Compensation

Getting out in front of 2020 executive compensation disclosure will be an important challenge given the existing focus on income inequality and the impact of the COVID-19 pandemic on company performance and on workers. Early development of a consistent and cogent message around executive pay will be essential, including clarity on what steps were taken during the crisis in terms of salary cuts, pay restoration and how executive compensation actions were made in light of decisions related to the broader workforce in terms of layoffs and furloughs, as well health and safety issues. For many companies, the executive teams performed exceptionally in the face of unprecedented challenges presented by the COVID-19 pandemic, which should be recognized, but the COVID-19 pandemic's impact to workers across the country should be considered as compensation decisions are evaluated. Tricky questions are sure to arise, such as whether grants should be increased to offset lower current values, or how to compensate at a company that has negative returns but outperformed its peer group. Compensation committees will need to be thoughtful about how they approach pay that may seem higher than strictly dictated by financial performance. Recognition of strong executive leadership and decisive action can clearly be taken into account, but other factors will need to be considered, and coherent and specific messaging will be essential.

Practical Implications of Stakeholder Governance

While stakeholder governance may provide boards with more investor support for taking a long-term view and doing the right thing by their employees and communities, it also presents challenges in balancing the competing interests of those stakeholders and ensuring that the board's actions are consistent with its fiduciary duties and ultimately will lead to creating long-term shareholder value. Unlike in many European jurisdictions, for most U.S. public companies, shareholder primacy continues to be a legal requirement for a corporate director as a fiduciary. That does not mean that a director should not or cannot take interests of other stakeholders into account. Highly motivated, well-trained and engaged employees are key to the company's success and the creation of shareholder value. Satisfied and loyal customers will continue to drive the company's business and increase shareholder value. Companies that ignore the communities in which they operate rarely prosper. In this respect, the Business Roundtable may have put into words what many successful companies have been doing all along. Reconciling stakeholder governance with the shareholder primacy requirement embedded in corporate law, and the board's determination that it is ultimately acting in the best interests of shareholders when considering the interests of broader constituencies and communicating that effectively is becoming an important task for boards of U.S. companies. As an interesting case in point, five shareholder proposals were brought in the 2020 season at financial services companies who were signatories to the Business Roundtable statement requesting a report on changes to governance documents in light of the statement. Companies should be engaging in a holistic review of their businesses, including their interactions with key stakeholders, to ensure consistency with this new sense of corporate purpose. This includes consideration of external activities and relationships with broader social implications that can no longer be separated from a company's core business activities. Public and employee perceptions have become key risks as they can have an immediate and significant business impact.

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Among other things, companies should be considering the following:

- What are the key ESG risks, and what impact do these risks have on the business and shareholder value?
- How do policies and the actions of the board and executive management in addressing human capital issues and engagement with customers, suppliers and the community relate to, or even conflict with, the exercise by directors of their fiduciary duties and their legal obligations to shareholders?
- Who are the company's suppliers and service providers? Beyond questions of diversity and human rights, are they perceived as good corporate citizens?
- Are the company's products and services, or the way its products and services are being used, consistent with the overall message the company wants to convey to its stakeholders, and do they reflect how its stakeholders expect the company to be operating as part of society? Does the company need to take action to mitigate or prevent actual or perceived social harm?
- What industry and advocacy groups does the company participate in or support? Do the objectives of these organizations align with how the company wants to be perceived, the sentiments of its customers and employees and with public views more broadly?
- How does the company manage its political contributions and lobbying efforts? Are they consistent with its messaging on corporate purpose?

CONCLUSION

The trend we have seen over the last several years towards a deeper corporate focus on ESG issues has not abated. Governance has always been a priority for shareholders, and environmental issues have gained focus over the last few years as climate change issues took on greater meaning, representing a global sustainability challenge that demands broad-based corporate action. More recently, calls for stakeholder governance from both corporate leaders and shareholders and the unexpected but powerful impacts of the COVID-19 pandemic and the social justice movement have intensified the focus on the social aspects of the ESG debate. Company boards must engage on these issues.

This heightened emphasis will force a deeper consideration of issues related to the company's human capital. Diversity has moved well past the boardroom and the executive suite, as it is clear that increasing diversity in the top roles in corporate America will not come with a Rooney Rule alone, but with increasing diversity in those roles and opportunities that are considered the early stepping stones for the top jobs. We are also seeing more and more companies demanding that those that do business with them, including key suppliers and service providers, meet baseline levels of diversity. Companies will have to make changes in recruitment, hiring, training, mentoring and promotion to reflect the expectations that have developed, as calls for greater diversity and fairer pay will no doubt escalate in the wake of the COVID-19 pandemic and social justice protests. Compensation issues will also take on even greater significance with companies needing to put executive compensation in context in a year where the economy has suffered, company revenue streams have been decimated and unemployment rates have dramatically increased.

Political polarization and the politicization of what should be non-political areas of business have forced companies and boards to react to current events and introduced new risks around public perceptions. It is becoming harder for companies to "stick to their knitting" and stay out of the political and social debate. Increasingly, companies and their boards are called on to comment on or make statements about current events that have broad public impact and therefore matter to their employees and customers, such as the Black Lives Matter movement. These forces may bring renewed attention to corporate political activities and lobbying policies and disclosures, and a company's efforts in those areas will need to support its broader efforts at establishing a coherent public image. Separately, with stakeholder governance taking shape, companies will face new challenges in navigating a consistent course of conduct and messaging on complicated social issues where there will always be critics. In addition, boards of U.S. companies will need to assess the interests of customers, employees, communities and other stakeholders, reconcile them with the interests of shareholders and communicate a convincing strategy for producing long-term shareholder value. This will put more emphasis on skillful shareholder engagement. Fortunately, major institutional investors seem not only willing, but eager to engage.

Kristina L. Trauger, Judy Little, Cassandra Cuellar and Mark A. Dunham, Jr.

Preparing for IPO Success: The Transition in the Founder's Role and Corporate Culture

The decision to undertake an initial public offering (IPO) is an exciting milestone in a company's life cycle. Founders considering an IPO should weigh the significant differences between private and public company corporate culture, particularly as to the composition of the board, the depth of the management team and the realities of broad investor oversight. Founders should also be aware that a necessary, but sometimes difficult, part of going public is redefining the founder's role in the newly public company.

Private, start-up companies are by necessity characterized by flexibility, innovation, close relationships between the founder and employees and a culture that reflects the founder's identity and management style. The early stage company is often a reflection of the founder's vision. Moreover, the founder may have significant control over decision making, particularly if the founder has largely bootstrapped the company, with accountability only to venture capital firms or angel investors that have provided outside funding.

The talent, vision and enthusiasm required to take an idea and grow it into a viable business versus the skills necessary to direct a publicly traded company can differ significantly. Unlike independent private companies, public companies have myriad complex financial and other disclosure obligations. A broad spectrum of stakeholders expect management to oversee relationships with analysts and investors, and changing regulatory requirements and best practices. Investors in public companies want to know that the company they are investing in has directors and senior executives with public company experience.

ASSEMBLING THE TEAM AND SETTING THE TONE

The transition from a private company to a public company involves not only a shift in culture and mindset, but also a shift in governance structure.

As a public company, a considerable number of substantive governance and related disclosure requirements are mandated through federal legislation, rules promulgated by the U.S. Securities and Exchange Commission (SEC) and stock exchange listing standards. For new public companies, the broad array of compliance obligations can be daunting. In the immediate term, the post-IPO public company must comply with numerous governance requirements related to: its board composition; the formation and composition of the audit, compensation and nomination committees; the internal audit function; and corporate governance policies, including the board committee charters. The transition to the public company framework imposes a shift in accountability. While the private company model may be led by a strong founder or founding team, the legal framework of the public company requires board-centered governance.

The Board Shift

A private company board is typically an assortment of founders, key members of management and designees of major investors. Founders typically have significant influence over who joins the board, whether through careful negotiation of board dynamics during fundraising rounds or outright control of a majority of the board seats. Private company boards are not required to make any determination of independence. Often, directors identified as "independent" are persons who have significant relationships with the founders or major investors. The

function of an independent director in a private company is often to be a neutral voice on the board who can mediate between the interests of the founders and the investors.

In contrast, an intricate web of SEC regulations, state corporate law requirements and stock exchange rules governs the composition of a public company board. The four most significant differences between private and public company boards are:

1. A public company board must be comprised of a majority of independent directors, and there are regulations governing that determination
2. The CEO of the company and the Chair of the board are usually different people in a public company or there is a lead director
3. Increasingly, states, shareholders and investment banks are suggesting or mandating that public company boards achieve gender and racial diversity
4. Public company boards must consider proxy advisory firms and institutional shareholder guidelines

The major stock exchanges require that boards of listed companies be comprised of a majority of independent directors. In determining whether a director is independent, the board must make an affirmative determination that the director does not have a "material relationship" with the company, generally meaning that the director does not have a direct relationship with the company as a partner, shareholder or officer of the company or an organization that has a relationship with the company, and has no relationship that would interfere with the exercise of such director's independent judgment, duties and responsibilities.

For founders first making the shift from private company to public company, relinquishing control of the board can be difficult. In private companies, it is common for the CEO to serve as Chair. In public companies, these roles are typically separated as a result of pressure from activist shareholders, institutional investors, proxy advisory firms and regulators seeking better corporate governance and management oversight.

Some public companies appoint a "lead independent director" or "lead director." A lead director monitors management decisions, acts as an intermediary between the CEO/chairperson and the other board members and collaborates with the CEO/chairperson on setting the board's agenda.

DIVERSITY IN THE BOARD ROOM

Public companies are under increasing pressure from state governments, shareholders, regulators and even underwriters to diversify their board. For example, the states of California and Washington have passed laws mandating certain levels of gender diversity on their boards.[1] Illinois, Maryland and New York have passed laws imposing mandatory board diversity reporting requirements.[2] Additionally, several states — including Hawaii, Michigan, New Jersey and Pennsylvania — are actively considering similar measures.[3] On August 30, 2020, the California legislature enacted Assembly Bill 979, which would require boards of public companies with their principal executive office in California to comply with certain minimum ratios of directors from underrepresented communities. The bill defines an individual from an underrepresented community as a person who self-identifies as Black, African-American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, Alaska Native, lesbian, gay, bisexual, or transgender. If signed into law, by the end of 2021, boards must be composed of at least one member of an underrepresented community. By the end of 2022, boards must be composed of a minimum number of directors from underrepresented communities based on the size of the board.[4] In October 2019, The New York City Comptroller's Office launched its Board Accountability Project 3.0 campaign, sending letters to 56 companies seeking the implementation of policies requiring the consideration of qualified women and racially/ethnically diverse candidates for director and external CEO searches and submitting shareholder proposals at 17 of the targeted companies that did not adequately address its request.[5]

Private stakeholders continue to exert pressure on companies to diversify their boards. For example, private equity firm KKR & Co. added at least two diverse directors to each of the boards within its U.S. portfolio of companies, amounting to approximately 70 female or ethnic minority directors.[5] Carlyle Group Inc. set a goal of achieving 30% diversity of all directors on the boards of companies it backs by 2023.[6] In January 2020, Goldman Sachs' CEO stated that Goldman Sachs would no longer take a company public if there was not at least one diverse board director.[7] Additionally, in June 2019, Intercontinental Exchange launched the NYSE Board Advisory Council, a council that will proactively address the lack of diversity on corporate boards.[8]

This is in marked contrast to most private company boards. The 2019 Study of Gender Diversity in Private Company Boardrooms found that the majority of private companies did not have a single woman on the board, and that only 7% of board seats were held by women.[9] As a result, private companies considering an IPO may need to actively recruit diverse candidates to comply with applicable laws, make the company attractive to certain investors or to secure an underwriter.

[1] *See* California Corporations Code § 301.3; *see also* Washington State Women on Corporate Boards Act, SSB 6037.

[2] *See* Illinois H.B. 3394, Maryland S.B. 911, New York Business Corporation Law § 408.

[3] *See* Hawaii H.B. 2720, Michigan S.B. 115, New Jersey S.B. 3469, Pennsylvania H.R. 0114.

[4] *See* An act to amend Section 301.3 of, and to add Sections 301.4 and 2115.6 to, the Corporations Code, relating to corporations, CA A. B. 979 (2020).

[5] Michael Garland, Jennifer Conovitz and Yumi Narita, *NYC Comptroller's Boardroom Accountability 3.0 Results*, Harvard Law School Forum on Corporate Governance, https://corpgov.law.harvard.edu/2020/06/24/nyc-comptrollers-boardroom-accountability-3-0-results/, June 24, 2020.

[6] Melissa Karsh, *KKR Expands Board Diversity at Its U.S.-Based Businesses*, https://www.bnnbloomberg.ca/kkr-expands-board-diversity-at-its-u-s-based-businesses-1.1482792, August 20, 2020.

[7] The Goldman Sachs Group, Inc., *Goldman Sachs' Commitment to Board Diversity*, https://www.goldmansachs.com/what-we-do/investing-and-lending/launch-with-gs/pages/commitment-to-diversity.html, February 4, 2020.

[8] New York Stock Exchange, *Initiative to Advance Board Diversity*, https://www.nyse.com/boardadvisory/about-the-council, August 20, 2020.

[9] Ann Shepherd, Him for Her, Lauren Rivera, *2019 Study of Gender Diversity in Private Company Boardrooms*, https://news.crunchbase.com/news/2019-study-of-gender-diversity-in-private-company-boardrooms/, 2019.

The Management Shift

For private companies, management is typically focused on running the business with attention to regulations specific to that industry. Management is chosen primarily for industry experience and relationships.

Public company management is tasked not only with focusing on operations but ensuring compliance with numerous financial and disclosure regulations, working with outside auditors and establishing disclosure controls and procedures. As such, potential investors seek assurance that the post-IPO company will be led by a "proven" management team. Moreover, public company CEOs and CFOs are required to certify as to the appropriateness of the public company's financial statements and disclosures and to certify that they fairly present, in all material respects, the operations and financial condition of the company. They are also required to provide similar assurances to the company auditor. A CFO with significant experience with public company accounting and auditing requirements is essential along with a strong accounting team to help develop, monitor and maintain controls and procedures.

Shareholder engagement is another challenge unique to the post-IPO company. CEOs and other key executives must become accustomed to engaging with activist shareholders, institutional investors and proxy advisory firms such as Institutional Shareholder Services, Inc. (ISS) and Glass, Lewis & Co. ("Glass Lewis"). Public company executives must be willing to continually adapt to changing shareholder concerns in a dynamic, quickly evolving landscape. A management team that is capable of interacting with investors on a proactive basis is also important.

THE FOUNDER'S ROLE POST-IPO

The founder's ongoing role at the public company is an important matter that should be resolved early on in the "going public" process. A founder's public company role can range from CEO to chairman to a member of the board. In some cases, the position may turn on the founder's background and experience. For example, a founder of a biotech company with a science background and minimal experience in finance may be less likely to serve as a CEO post-IPO, as compared to a CEO with an extensive finance background. Nevertheless, investors may feel comfortable with a founder-CEO that lacks public company experience if the founder structures a strong, experienced management team and board to support him or her.

RECOMMENDATIONS

As founders lead their companies toward a potential IPO, understanding and preparing for the cultural shift from a private to public company is key. Determining the founder's role in the post-IPO structure and finding and recruiting the right director slate and management team can be a lengthy, time-consuming and, with respect to giving up control, a difficult process. In the end, however, a robust independent board and "proven" management team will make the company attractive to investors and position the new public company for success.

George A. Casey, Scott D. Petepiece and Lara Aryani

Recent Shareholder Activism Trends

Shareholder activism trends in 2019 remained largely consistent with prior years, perhaps underscoring the lasting role that shareholder activism will play in the foreseeable future. The advent of the COVID-19 pandemic ruptured existing patterns of market, investor and activist engagement that would have otherwise continued through the second quarter and second half of 2020. As of this writing, the market remains in flux as the world continues to grapple with controlling the COVID-19 pandemic and mitigating the damage it has caused. It remains to be seen how long the turmoil will last and, once it dissipates, whether business will resume where it left off, or if the COVID-19 pandemic will leave a lasting imprint on market activity, including shareholder activism, in the post-COVID-19 world.

SHAREHOLDER ACTIVISM TRENDS

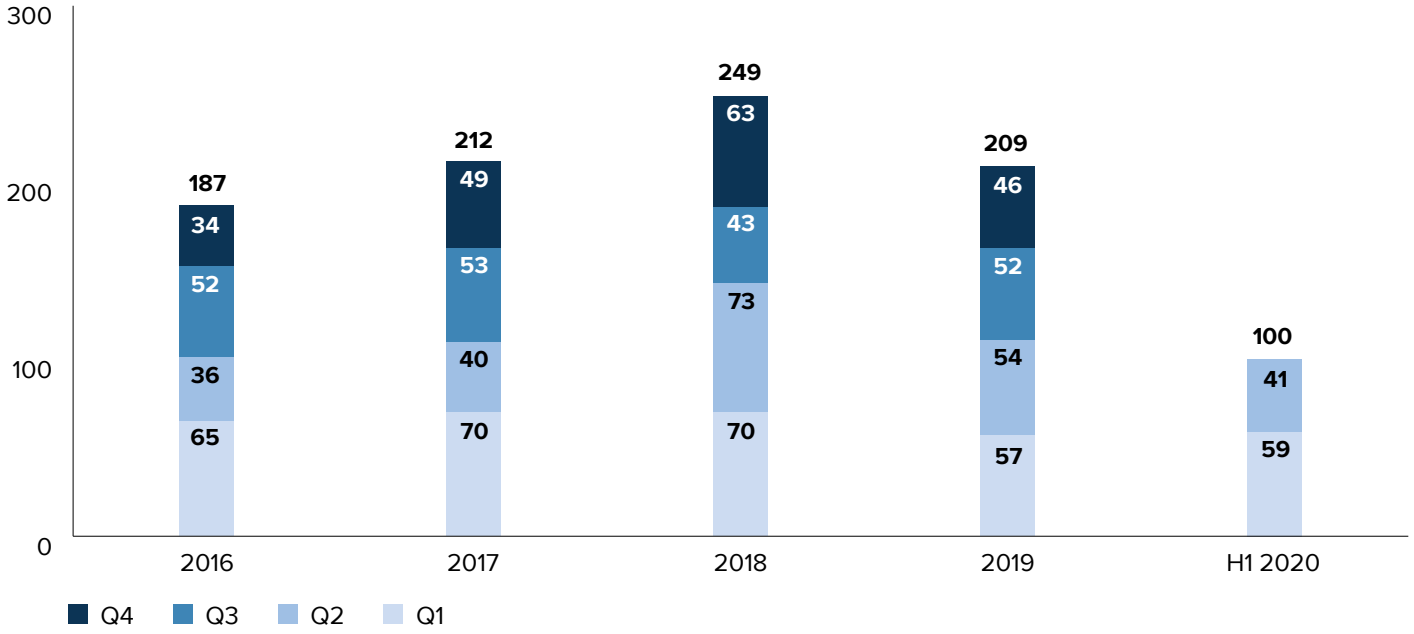
Endures Before COVID-19

Shareholder activism has endured as a fixture of the corporate landscape. After reaching record highs in 2018, shareholder activism activity declined slightly in 2019 but remained consistent with multi-year historic averages.

Stalls After COVID-19

Activist engagement, which typically peaks during proxy season in the first half of each year, declined in the first half of 2020 with the onset of the COVID-19 pandemic. Because activist investors typically hold their shares for some period of time after launching a proxy contest, the share sell-offs and capital outflows that accompany market volatility can inhibit shareholder activism. With director nomination deadlines for many companies falling in the first quarter of the year and annual meetings falling in the second quarter, many activists that would have spent the first half of 2020 nominating directors and launching proxy contests opted not to nominate any directors or to seek settlements on nominations they had already made.

While the desire to maintain liquidity during economic uncertainty may be the primary driver for decreased activism in the first half of 2020, some activist investors may also have been concerned that campaigns initiated during the peak of the COVID-19 pandemic would be seen as "tone deaf" and detracting from the target company's focus on priorities such as the health of their workforce and rebounding from the crisis.

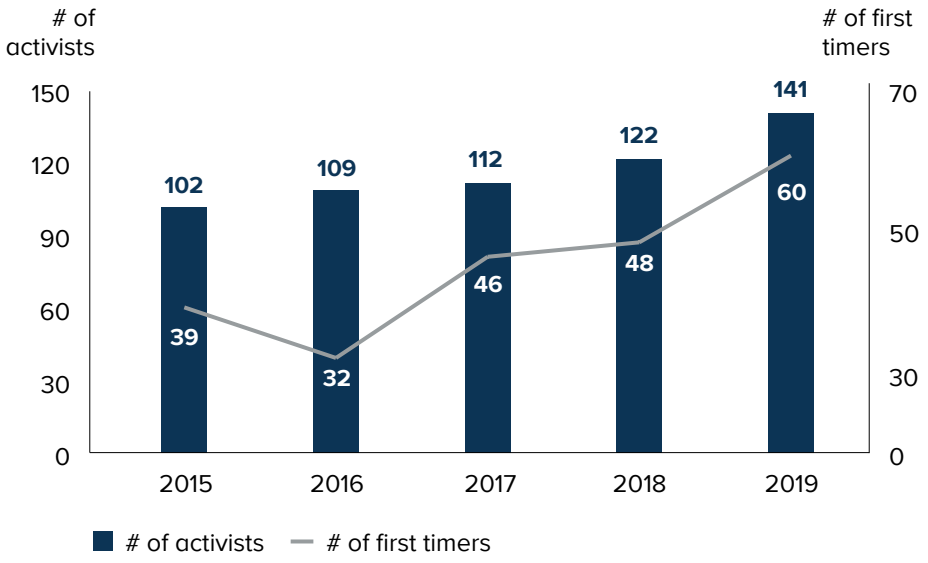


Source: Lazard, *Review of Shareholder Activism – H1 2020*, July 14, 2020, https://www.lazard.com/perspective/lazards-quarterly-review-of-shareholder-activism-h1-2020/.

ACTIVIST RANKS

Grow Before COVID-19

Notwithstanding fewer activist campaigns in 2019 compared to 2018, the number of activist funds continued its upward trend with a historic high of 141, of whom 60 were first time activists.



Source: FactSet.

Still Grow After COVID-19

As of the end of the second quarter of 2020

68%

of the campaigns in Europe were initiated by occasional activists or institutional and other investors, compared with

52%

of the campaigns over the same period in 2019

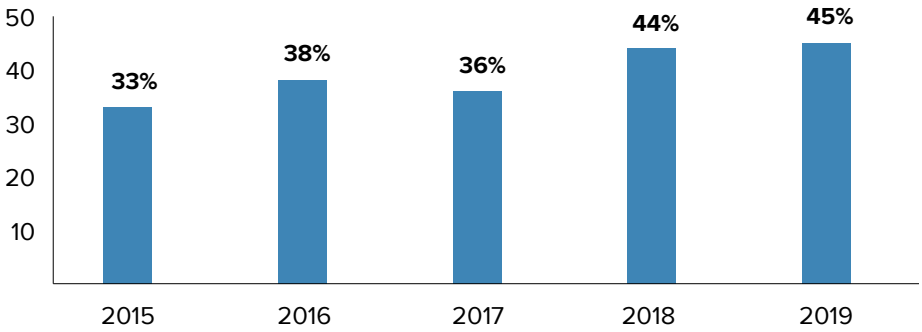
Recent campaigns by private equity firm KKR at Dave & Busters and a consortium of Elliott, MFS, Capital Group and Fidelity at CenterPoint also show the broadening of the activist investor landscape and willingness of long-term institutional investors to engage on activist campaigns.

M&A-FOCUSED ACTIVISM

Up Before COVID-19

Companies are increasingly learning the lessons of prior activist campaigns and addressing vulnerabilities that activists have historically targeted, particularly relating to governance. As such, activist investors are gradually shifting their focus to M&A (e.g., agitating for a sale, opposing announced deals), with nearly half of all campaigns in 2019 involving an M&A thesis.

% of M&A Related Campaigns Launched Globally



Source: FactSet.

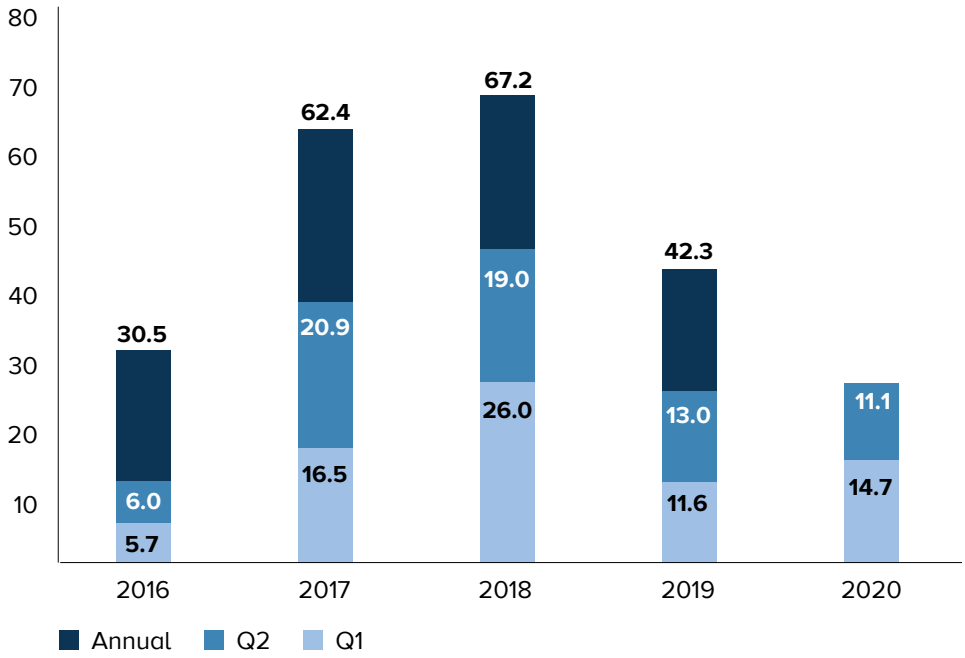
Down After COVID-19

With M&A-focused campaigns steadily comprising an increasing proportion of shareholder activist campaigns and reaching an all time high of 45% of all shareholder activist campaigns in 2019, decreased M&A activity in the first half of 2020 undoubtedly put downward pressure on the number of activist campaigns. As long as M&A activity continues to be depressed, shareholder activism will likely be similarly affected.

ACTIVISTS ARE ACTIVE

While economic volatility had a chilling effect on the number of campaigns in 2020 thus far, activists have been anything but idle. Many activists have spent the last few months raising capital for new campaigns, building ownership stakes while stock prices were low and preparing to launch new campaigns in the latter half of 2020. Nevertheless, increased capital outflows, particularly following the stock market dip in March 2020, put pressure on smaller firms that may have been less diversified and well-capitalized than their more established peers.

Global Capital Deployment (in Billions)



Source: Lazard, *Review of Shareholder Activism – H1 2020*, July 14, 2020, https://www.lazard.com/perspective/lazards-quarterly-review-of-shareholder-activism-h1-2020/.

POISON PILLS CAME BACK

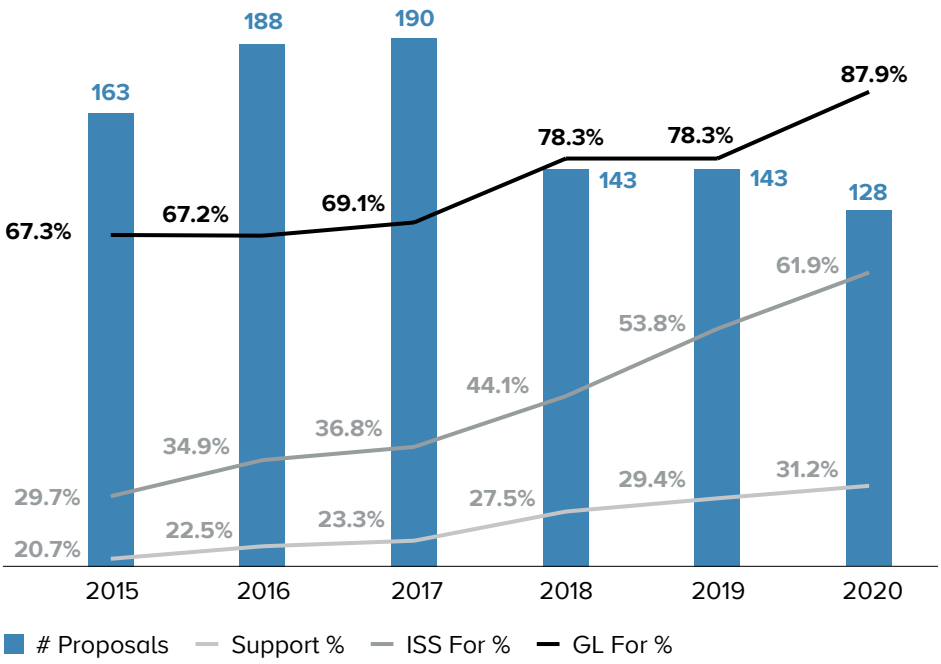
When stock markets plunged in March 2020 following the global shut-down amid the growing COVID-19 pandemic, companies began adopting defensive postures to preempt shareholder activism and implementing shareholder rights plans at rates not seen in a long time. Many of these plans have notably been adopted by companies in the absence of a specific takeover or activist threat. But as markets slowly recovered in April through the time of this writing, poison pill adoptions have tapered off. As the COVID-19 pandemic evolves and markets respond, it remains to be seen whether another market downturn will again trigger a new wave of poison pill adoptions. While proxy advisors such as ISS and Glass Lewis have historically been wary of shareholder rights plans, they acknowledged that the COVID-19 pandemic has created a "reasonable context" for adopting a poison pill that has acceptable features and meets certain conditions.

MOST COMPANIES UNCONCERNED

Nevertheless, fewer than a quarter of companies surveyed have been targeted by an activist investor and a majority of companies view activism as little to no threat to their company.[1]

[1] IR Magazine, *Shareholder Activism Report 2020*, May 4, 2020, https://www.irmagazine.com/activism/shareholder-activism-report-now-available.

FOCUS ON ESG



ESG will continue to be a major focus for investors

Source: Proxy Insight E&S Proposals, Russell 3000, 2020 YTD is as of June 30, 2020.

The increased focus on ESG from institutional investors, proxy advisors and other corporate constituents continued through 2019. Not only were institutional investors like BlackRock, Vanguard and State Street more publicly vocal about the importance they are placing on ESG-related matters, but they also signaled an increased willingness to encourage and support ESG-driven activist campaigns.

While environmental and social matters have lagged somewhat behind governance as a focus of activist campaigns, support for environmental and social shareholder proposals has climbed steadily. For Russell 3000 companies, for example, each year, including 2020, has brought new all-time-high support for Environmental and Social (E&S) proposals, indicating that activists are not only more willing to pressure corporate boards on ESG matters, but they are also able to garner more support than ever from other shareholders on their ESG-related campaigns. The number of shareholder resolutions proposed in the first half of 2020 is significantly lower compared to the same period in prior years, but interestingly, as of June 30, 2020, the number of E&S-related shareholder resolutions remained on par for the same period in 2019.

In the short-term, ESG-related activism will likely see the same decline as other activist campaigns have experienced since the onset of the COVID-19 pandemic. ISS/Glass Lewis, who have been among the strongest advocates for ESG matters, acknowledged that these issues may be subject to "shifting timeframes and priorities," given the immediate concerns created by the crisis.

While the COVID-19 pandemic may have had a chilling effect on the initiation of new activist campaigns, it may ultimately heighten the focus on ESG. As the temporary slowdown in activist campaigns ends, investors and the other corporate constituents may

press companies to explain the actions they took (or did not take) as the crisis unfolded, especially as it relates to managing their workforce and executive compensation. If the crisis exposes governance shortcomings, then activists may want to push forward replacements who they believe would be better managers and would mitigate risks relating to executive succession and diversity (or lack thereof).

Although ISS/Glass Lewis have acknowledged that ESG actions may be delayed and that corporations may need to adopt defensive measures like poison pills during the crisis, they have also insisted that ESG is as important as ever as companies navigate the "new normal" created by the COVID-19 pandemic. Expected areas of heightened focus include human capital management ("with widespread layoffs, varied treatment of employees, concerns regarding quality healthcare and the failure to provide safe working environments at many companies, this shareholder concern is likely to have a breakout moment in shareholder proposals next year," predicts Glass Lewis)[2], racial and gender diversity, climate change and risk management.

The COVID-19 pandemic may have temporarily quieted new activist campaigns, but the conditions that forced the slowdown will soon dissipate. That some activist firms spent the first half of 2020 buying stock at low prices suggests that certain well-capitalized firms are spending their time in quarantine preparing to restart their campaigns. So while companies may have enjoyed a temporary reprieve from shareholder activism, those that fail to proactively and effectively address the issues brought to the fore by the COVID-19 pandemic do so at their peril. When activist campaigns resume, companies may find themselves more vulnerable than they were before the COVID-19 pandemic, and with activist ranks continuing to grow, a broader and more powerful base of shareholders may be in the wings waiting for activist engagement to resume.

[2] Glass Lewis, *COVID-19: The New Rules for ESG*, May 18, 2020, https://www.irmagazine.com/research-reports/covid-19-new-rules-esg.

Matthew H. Behrens, Annie P. Anderson and Sonia S. Khandekar

ESG Slowly Finding its Way into Incentive Compensation Plans

Incentive compensation has long been a board's primary tool to ensure that the interests of management are aligned with the interests of a company's shareholders. To that end, the ongoing challenge facing compensation committees is choosing metrics that motivate management to optimize shareholder value without incentivizing behaviors that focus on short-term stock price appreciation that can threaten the company's long-term interests. As a result, traditional incentive compensation metrics measure performance through quantitative shareholder return and financial and operational metrics that reward longer-term performance. Although the traditional metrics still dominate, a number of forces have recently resulted in the incorporation of more qualitative ESG factors. This article discusses the forces encouraging companies to adopt ESG metrics and analyzes how companies are incorporating ESG metrics into their incentive compensation programs.

THE FORCES OF CHANGE

A number of forces have led to the increased use of ESG metrics in incentive compensation plans. These include:

1 **Institutional Investor Focus on Sustainability**

As Larry Fink, Chairman and CEO of BlackRock noted in his January 2020 letter to CEOs, the failure to focus on the needs of a broad range of stakeholders will damage long-term profitability. This view is widely held by asset managers. According to the 2019 RBC Global Asset Management Responsible Investing Survey, 70% of institutional investors in Canada, the United States and the United Kingdom apply ESG principles to investment decisions, with over half of those investors citing a positive performance impact as the prime motivator. As a sign that ESG investing is an increased priority, reports indicate that the amount of assets invested in sustainable funds in 2019 was nearly four times larger than in 2018.[1]

2 **Shifting Views of the Role of the Corporation**

In August 2019, more than 180 CEOs signed onto a Business Roundtable statement that, for the first time, rejected the view that companies exist principally to serve their shareholders. Rather, the statement asserted that corporations should commit to serving the interests of all stakeholders, including, in addition to shareholders, customers, employees, suppliers and communities. The Business Roundtable's updated position reflects increasing investor, employee and community pressure on companies to not only advance profits, but to also contribute to addressing societal problems such as income inequality, diversity and environmental sustainability. The incorporation of ESG into incentive compensation plans could become a key measure that observers will use to track whether the signatories' companies are actually honoring this redefined philosophy with real changes in practices.

[1] *See* Financial Factors in Selecting Plan Investments, Proposed Rule, § 2550.404a-1, citing Jon Hale, "The ESG Fund Universe is Rapidly Expanding," https://www.morningstar.com/articles/972860/the-esg-fund-universe-is-rapidly-expanding (March 19, 2020).

3 **Changes to 162(m) of the Internal Revenue Code**

Section 162(m) of the Internal Revenue Code provides that compensation in excess of $1 million paid to certain covered employees of public companies is not deductible. Prior to the passage of the Tax Cuts and Jobs Act, "performance-based compensation" was not subject to the $1 million limitation. To constitute "performance-based compensation," the compensation was required to be paid pursuant to objectively determinable performance goals, and the corporation was not permitted to exercise discretion to increase amounts payable once performance was certified. With the removal of the "performance-based compensation" exemption from Section 162(m), companies now have greater latitude to use qualitative performance metrics and to implement a bonus "modifier," which enables companies to increase the payable bonus as a result of a subjective determination, such as a commitment to the company's ESG principles.

Proposed DOL Rules on ESG Investing for ERISA Plans

Although institutional investors are demonstrating an increased desire to engage in ESG investing, a proposed rule from the Department of Labor (DOL) may curtail these efforts. The proposed rule addresses ESG investing in the ERISA context. The DOL holds a longstanding position that ERISA fiduciaries should consider economic returns as of primary importance in selecting plan investments, but as Administrations have changed, the guidance from the DOL with respect to investments that also consider promotion of social, environmental or other policy goals has also changed.

The proposed rule is viewed as discouraging ESG investing by suggesting that ESG investing raises heightened concerns under ERISA. Pursuant to the proposed rule, ESG factors may be considered only to the extent they present material economic risks or opportunities. In addition, if two alternative investments appear economically indistinguishable, a fiduciary may "break the tie" by relying on ESG factors. However, the break-the-tie rule is not new, and because the DOL believes true ties rarely exist, a fiduciary must document the basis for concluding that the investment alternatives were indistinguishable.

The proposed rule is not without controversy, as evidenced by the over 8,000 comment letters sent to the DOL. The overwhelming feedback in these letters is against the proposed rule, with opponents arguing that ESG factors are already integrated into the decision-making processes of asset managers and are considered financially material.

ACTION ITEMS FOR INCORPORATING ESG METRICS INTO INCENTIVE PROGRAMS

The following is a list of action items for companies looking to consider incorporating ESG metrics into their incentive compensation programs:

1 **Engage with Shareholders**

As part of a company's regular shareholder engagement processes, companies should discuss the inclusion of ESG metrics in their incentive compensation programs. Companies should highlight the long-term value and sustainability that these metrics promote.

2 **Identify the Appropriate Metrics**

Consider what ESG metrics are appropriate for the company, what ESG metrics reflect the company's tie to long-term growth and what ESG metrics address risk management considerations. Companies should also consider whether the metrics will incorporate third-party measures, like those of Sustainability Accounting Standards Board, or internally generated targets or goals.

3 **Ensure a Line of Sight between Executive Actions and Performance**

Incentive compensation metrics have little value if executives cannot control the desired outcome. For example, while improved safety may be an important goal, it is likely that the CFO has little direct ability to effect change in this regard.

4 **Set Goals, but Allow for Discretion**

With a lack of historical context by which to measure ESG progress, consider providing the compensation committee with discretion to determine how executives have performed with respect to the company's ESG goals. Also, determine whether goals should be annual or long-term. As shown in the Survey data, most ESG metrics are tied to annual incentive plans, reflecting the long-held belief that long-term goals should relate to the achievement of financial and shareholder return metrics.

5 **Effectively Track/Report On ESG Metrics and Controls**

Unlike financial metrics, ESG performance cannot be assessed through numbers on a spreadsheet usually and instead requires a subjective analysis. Therefore, ensure a reporting infrastructure is in place to track ESG metrics and controls, so that ESG performance can be meaningfully assessed on executive scorecards. In addition, determine whether the company will report on ESG performance outside of annual proxy filings.

2020 SURVEY — COVID-19 & ANNUAL INCENTIVE COMPENSATION

Under the federal securities laws, public companies are not required to disclose the details of their 2020 annual incentive compensation until they file their next annual proxy statement. For most companies, this means that disclosure is not required until Spring 2021.

Even if not required, companies may elect to disclose COVID-19-related adjustments they are making to incentive compensation programs. Further, Institutional Shareholder Services has posited that any COVID-19-related changes to incentive compensation should be disclosed through Form 8-K filings.

Companies have announced that they will reduce annual incentive payouts for executive officers; adjust executive payouts to align with payouts to the general employee population; and lower minimum performance thresholds or otherwise revise performance and payout ranges. Others have offered one-time equity awards to executives in lieu of annual incentive opportunities or divided the year into multiple segments, with different performance objectives applying to the different parts.

We expect that at many companies, discussions regarding 2020 annual incentive compensation are ongoing. We also expect that approaches to incentive compensation will continue to evolve as the impact of COVID-19 unfolds. The approach to modifications in annual plans versus long-term plans may be of particular interest to watch, and ISS and investors are likely to view adjustments in short- and long-term plans differently, with more flexibility for 2020 plans.

ESG METRICS IN THE INCENTIVE COMPENSATION PLANS OF THE TOP 100 COMPANIES

36

of the Top 100 Companies use ESG metrics in their executive compensation programs

28 of these companies include the metrics in their annual plan

3 in their long-term plan and

5 as part of their annual determination of total target compensation

ESG means different things to different companies. This is how the 36 companies that used ESG metrics defined ESG

32 consider talent and succession

31 specify that increasing diversity is part of the talent and succession analysis

6 include environmental sustainability as a metric

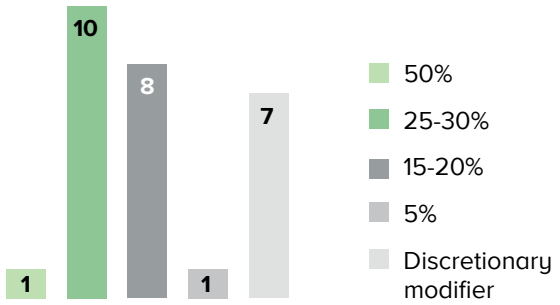
5 also include a metric that relates to increasing the health and safety of their employees

1 includes working to increase the legal age to purchase tobacco as a metric

2 **have ESG metrics that only apply to the CEO and one company weights ESG metrics higher for the CEO**

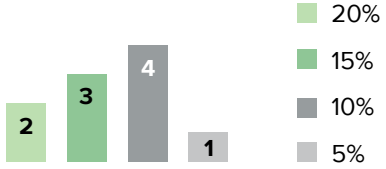
27 **of the Top 100 Companies incorporate ESG metrics into a holistic qualitative review of individual performance**

Percentage Weighting of ESG Metrics as Part of Holistic Qualitative Review of Individual Performance



10 **of the Top 100 Companies include ESG as an individual metric (one company includes ESG as an element of a holistic qualitative review and also as an individual metric)**

Weighting of Individual ESG Metric



Insights

Gillian Emmett Moldowan and
Maxmilien R. Bradley

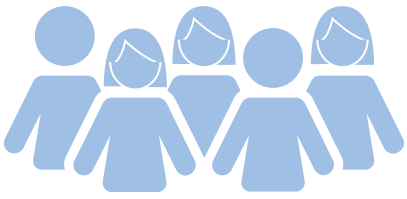
Preparing the Board for Human Capital Management Oversight and Disclosure

Boards have long focused on executive hiring, leadership transition and compensation as key areas of oversight, but largely have not been tasked with direct oversight of human capital management more broadly, which has historically been viewed as an area of management responsibility. In a recent paper, former Delaware Supreme Court Chief Justice Leo Strine and co-author Kirby Smith argue that the focus of the board should expand. Strine and Smith encourage a "reconceived compensation committee" that "would focus on the company's entire workforce, not just senior management" and oversee workforce pay, benefits, safety, racial and gender equality, sexual harassment, inclusion, training and promotion.[1] In short, a board committee focused on workforce issues at large.

Increased focus on human capital management, and the perspective that workforce considerations can be material to shareholders, have also influenced a separate but related change in corporate governance: mandatory human capital management disclosure by public companies. The SEC recently adopted rules that require public companies to describe, to the extent material to an understanding of the company's business taken as a whole, their human capital resources, including the number of employees and any human capital measures or objectives that the company focuses on in managing the business.[2]

These changes in corporate governance in the human capital management area are motivated by developments that predate the COVID-19 pandemic. The pandemic has made them all the more germane. The impacts of the pandemic on workforces should have made clear to every company and to every board that there must be at least some aspect of enterprise risk management and long-term strategic planning that focuses on workers outside the executive group. And, clearly, that aspect of human capital management — the issues that form a component of enterprise risk management and long-term strategic planning — is a board issue.

But positioning human capital management as a board issue, and expanding board focus from executive compensation to the workforce at large, will, for many boards, require significant change. The first practical step companies can take in implementing this change is the development of a robust body of year-over-year human capital data. Developing this data will allow the board to effectively oversee the aspects of human capital management that fall within its oversight and simultaneously help the company to provide meaningful human capital management disclosure to meet the requirements of the new human capital management disclosure rule.



[1] *See* Leo E. Strine, Jr. & Kirby M. Smith, "Toward Fair Gainsharing and a Quality Workplace for Employees: How a Reconceived Compensation Committee Might Help Make Corporations More Responsible Employers and Restore Faith in American Capitalism," forthcoming in *The Business Lawyer* (Winter 2020-2021).

[2] Modernization of Regulation S-K, Items 101, 103, and 105, SEC Release Nos. 33-10825; 34-89670 (August 26, 2020).

HUMAN CAPITAL MANAGEMENT IN THE BOARDROOM

Boards need a robust body of year-over-year human capital data to provide an effective and measurable method of oversight. Certain basic human capital data, like retention and turnover rates, may already be collected by some companies, and some boards may already review this data on a periodic basis. But these basic measurements do not provide the full range of human capital information needed for effective board oversight. To fulfill their oversight role, boards need more robust and more expansive human capital measurements, particularly those that will result in a body of year-over-year data that boards may use to track human capital management progress over time.

Where should boards look to develop these human capital measurements? The human resources management team should identify for the board the human capital data that is already collected and tracked. As a process matter, this will require the company to establish a "board-ready" human resources management team member or other executive trained to report to the board on this issue if such a member of the team is not already in place.

Executive Officers with Title Indicating Oversight of Human Capital Management

Important Issues for the Human Capital Management Team to Address for the Board

- What categories of human capital data are already collected?
- Do the categories of human capital data collected remain constant from year to year?
- Does the data get benchmarked against peers?
- Do the categories of human capital data collected measure the entire workforce (including contract and temporary workers) or discrete sectors of the workforce?
- How were the particular categories and measurements of human capital selected, and how do they relate to the company's overall business planning and risk management goals?

The answer to this last question may be the most important. Not only is tying human capital management to larger business planning initiatives and risk management necessary for meaningful board oversight of those initiatives, it is also an important step in developing disclosure that meets the requirement of the new human capital management disclosure rule: to discuss, to the extent material, the human capital measures or objectives that management focuses on in running the business.

Any new categories of human capital measurements should then be added to the categories that are already collected and tracked. These new categories should align with the company's business planning goals and risk management objectives and allow the board to oversee management's achievement of those goals. Therefore, it is important that companies choose categories that will result in a body of year-over-year data that boards may use to track human capital management progress over time.

Companies may look to various sources for categories of potential human capital measurements from which to choose. One such source is Sustainability Accounting Standards Board (SASB). These fall into the general categories of labor practices, employee health and safety and employee engagement, diversity and inclusion and include the specific measurements listed below.

SASB Human Capital Measurements

Labor Practices

1. Percentage of workforce covered under collective bargaining agreements
2. Number and duration of strikes and lockouts
3. Average hourly wage and percentage of employees earning minimum wage
4. Voluntary and involuntary turnover rates
5. Monetary losses as a result of legal proceedings associated with labor law violations

Employee Health and Safety

1. Total recordable incident rates, fatality rates and near miss frequency rates
2. Average hours of health, safety and emergency response training for workers
3. Percentage of staff who work in areas where smoking is allowed
4. Monetary losses as a result of legal proceedings associated with health and safety violations

Employee Engagement, Diversity and Inclusion

1. Percentage of gender and racial/ethnic group representations
2. Percentage of employees that are foreign nationals
3. Percentage of workers located offshore
4. Monetary losses as a result of legal proceedings associated with employment discrimination

Companies may also consider categories of human capital information and measurements that investors and other stakeholders have asked the company to disclose or that peer companies disclose. Human capital management issues in shareholder proposals (both for the company and for competitor or peer companies) should be reviewed. In addition, companies should consider the categories of human capital measurements that have been advocated for by strong proponents of these disclosures such as public pension funds and social impact funds. For example, the Human Capital Management Coalition (HCMC), a group representing large and influential public pension funds, has proposed the following measures.

HCMC Human Capital Measurements

Workforce Demographics
Number of full-time and part-time workers, number of contingent workers

Workforce Composition
Diversity, pay equity ratios

Workforce Stability
Turnover (voluntary and involuntary), internal hire rate

Workforce Health and Safety
Work-related injuries and fatalities, lost day rate

Workforce Productivity
Return on cost of workforce, profit/revenue for full-time employee

A company that identifies how human capital issues relate to business planning and risk management and builds selected categories of human capital measurements will take a strong first step in developing the robust body of year-over-year human capital data necessary for its board to fulfill an expanded human capital management oversight role. Of course, companies, in certain instances in collaboration with their boards, will need to select among these categories with discretion, considering the particular business and industry of the company and the company's specific human capital goals.

Are boards already beginning to expand their oversight role from the narrow focus on executive compensation to the broad scope of workforce issues at large? One indication is the name given by the Top 100 Companies to the board committee focused on executive compensation, which suggests that some boards have made this change or are preparing to do so. Many of these names are no longer simply "compensation committee," but instead use key words indicating a broader focus, as shown on the right.

Name of Committee Responsible for Executive Compensation

Compensation committee, executive compensation committee or management compensation committee (unchanged)

Name has changed to indicate a focus in addition to executive compensation

Of the Companies that Added a Word(s) to Committee Name that Indicates a Human Capital Focus in Addition to Executive Compensation, the Key Words Used in the Name Include

Management development, management planning, leadership development or talent development

Human resources, management resources, people resources, personnel or talent

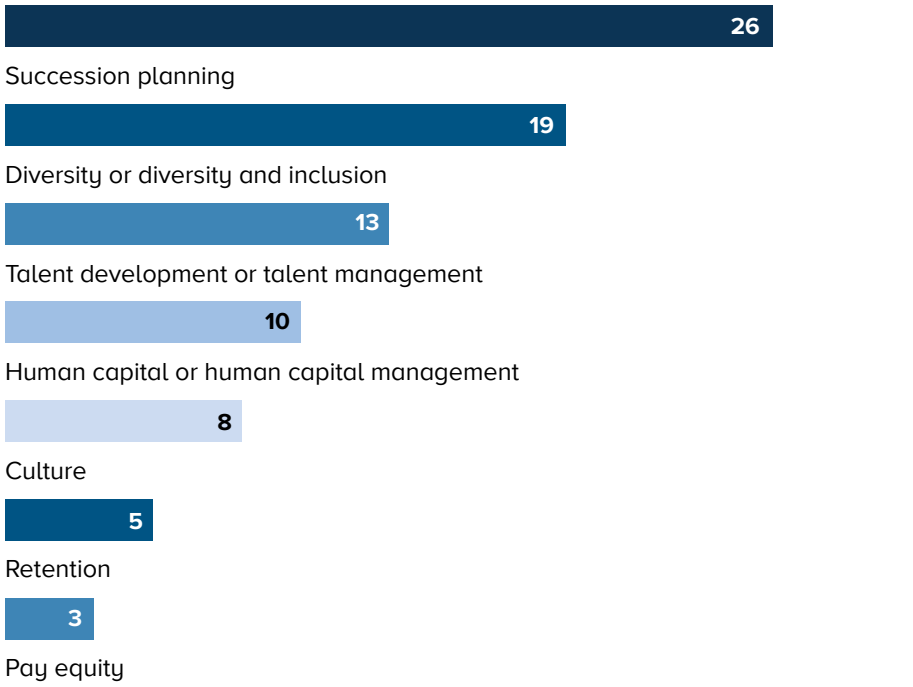
Benefits

Succession

Human capital

In addition, in describing the focus of these committees, even where the committee name has not changed, the proxy statements of many of the Top 100 Companies indicate a scope that expands well beyond executive compensation. Examples of the most common areas of committee focus in addition to executive compensation are shown to the right.

Additional Areas of Focus for Committee Focused on Executive Compensation



HUMAN CAPITAL MANAGEMENT IN PUBLIC DISCLOSURE

Developing a robust body of year-over-year human capital data is important not only for effective board oversight of human capital management, but also for approaching the newly required human capital management disclosure.

The new disclosure rule resulted, in significant part, from increasing calls over the past few years for mandatory human capital management disclosure. Select examples include the HCMC petition to the SEC for rulemaking requiring human capital disclosure; the views expressed by SEC Chairman Jay Clayton to the SEC Investor Advisory Committee that human capital is, for some companies, a "mission-critical asset" and by the SEC's Investor Advisory Committee in turn that human capital is the "primary source of value" of many of the most dynamic U.S. companies; and BlackRock's identification of human capital management as an engagement priority and an important investment issue.[4]

These developments have significantly influenced the adoption of a new disclosure rule requiring public companies to describe, to the extent material to an understanding of the company's business taken as a whole, the company's human capital resources, including the number of employees and any human capital measures or objectives that the company focuses on in managing the business. Importantly, the rule is not prescriptive and is principles-based, leaving it to the company to determine what human capital resources are material to the company and its particular circumstances. This means that the rule does not require companies to disclose any particular human capital metrics or measurements (other than number of employees, if the company determines that metric to be material to an understanding of the company's business as a whole). While this approach is not unexpected, it is likely to be viewed as inadequate by many public commenters who supported more prescriptive, and from their perspective, rigorous, requirements and the mandatory disclosure of

[4] Letter to William Hinman, Director, SEC Division of Corporation Finance, from the Human Capital Management Coalition (July 6, 2017); Chairman Jay Clayton, Remarks to the SEC Investor Advisory Committee (March 28, 2019); Recommendation of the SEC Investor Advisory Committee, Human Capital Management Disclosure (March 28, 2019); BlackRock, Commentary, Investment Stewardship's Approach to Engagement on Human Capital Management, https://www.blackrock.com/corporate/about-us/investment-stewardship#engagement-priorities.

specified quantitative human capital metrics. The new rule has already been criticized by two SEC Commissioners who did not approve its adoption. Commissioner Allison Lee criticized the rule for failing to require the disclosure of even "simple, commonly kept metrics such as part time vs. full time workers, workforce expenses, turnover and diversity," and Commissioner Caroline Crenshaw characterized the rule as "a generic and vague principles-based requirement" that will not give investors the human capital information they need because of its "failure to adopt detailed, specific disclosure requirements concerning human capital."[5]

The new disclosure rule does not prescribe specific metrics that must be disclosed, but companies do need to consider human capital measurements that could be material to their disclosure. Measures that address the attraction, development and retention of personnel are given as non-exclusive examples of the types of measures that may be material under the rule. These are just examples, and each company must perform its own analysis of the human capital measures that are material to an understanding of its business. SEC Chairman Jay Clayton underscored the fact that the new disclosure rule is principles-based, but also noted that he does "expect to see meaningful qualitative and quantitative disclosure, including, as appropriate, disclosure of metrics that companies actually use in managing their affairs" and that "as is the case with non-GAAP financial measures, [he] would also expect companies to maintain metric definitions constant from period to period or to disclose prominently any changes to the metrics used or the definition of those metrics."[6]

How should companies prepare to meet this new disclosure requirement? The steps outlined in the section above can serve as an excellent start. Discussions between the board, executive management and the human resources management team regarding the categories of human capital measurements that are already collected and tracked, and crucially, how those categories relate to the company's business planning goals and risk management, are necessary to prepare to meet the requirement to disclose the "human capital measures or objectives that the company focuses on in managing the business." Companies can then use the robust body of year-over-year human capital data developed for the board's expanded human capital management oversight rule to provide human capital disclosure, including progress over time, on an ongoing basis. In this way, developing this data now will allow the board to more effectively oversee and measure human capital management and simultaneously allow the company to provide meaningful human capital management disclosure in accordance with the new disclosure rule.

Even before the new disclosure rule, were companies already providing these enhanced human capital management disclosures? Companies have long disclosed certain information relating to employees to the extent it directly impacts financial statements (for instance, valuation and liability matters with respect to pension plans). But outside of this area and the area of executive compensation, available data suggests that notwithstanding the calls for enhanced human capital disclosures, the only workforce-related measurement many companies have been disclosing are the minimum required by Item 101 of Regulation S-K prior to its amendment with the new disclosure rule: total number of employees, or subtle variations on this required disclosure.

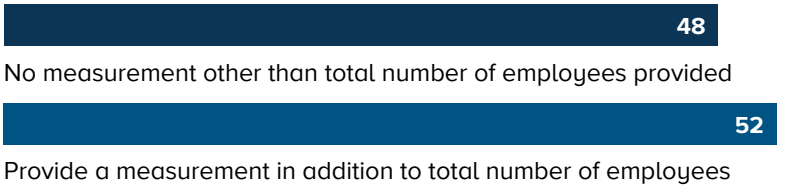
Although the new disclosure rule is not prescriptive and does not identify measures that all companies must report, the pressure to include human capital disclosures (including measures) is growing and unlikely to slow down. Institutional investors, proxy advisory firms and investor advocates are all expecting more in this area. It is important to prepare the board for this now.

[5] SEC Commissioner Allison Herren Lee, Regulation S-K and ESG Disclosures: An Unsustainable Silence (August 26, 2020); SEC Commissioner Caroline Crenshaw, Statement on the "Modernization" of Regulation S-K Items 101, 103, and 105 (August 26, 2020).

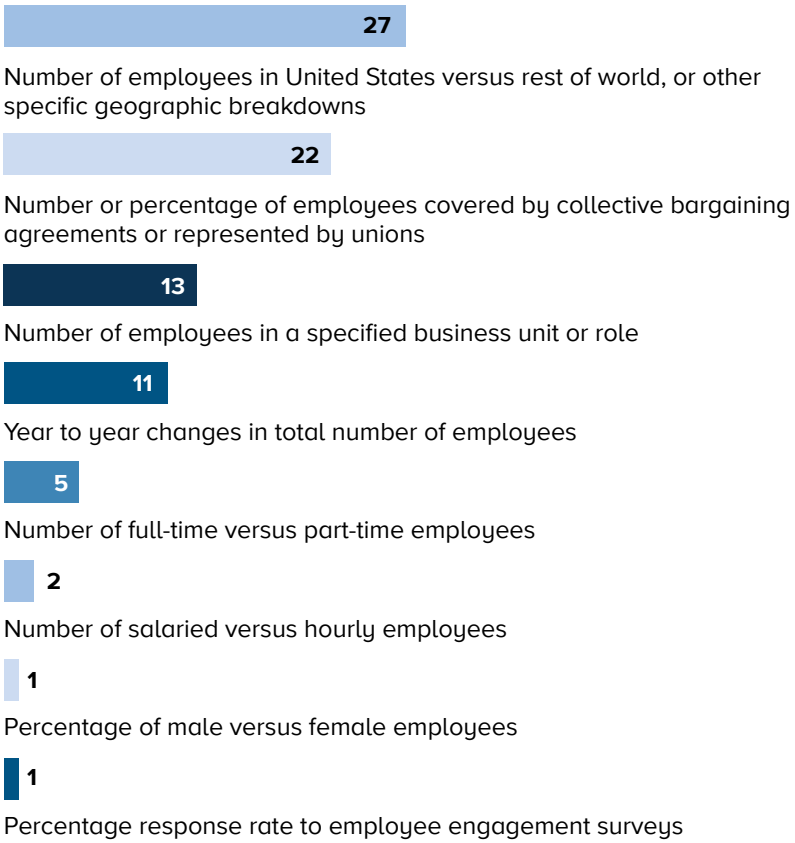
[6] SEC Chairman Jay Clayton, Modernizing the Framework for Business, Legal Proceedings and Risk Factor Disclosures (August 26, 2020).

[7] Many of the Top 100 Companies provide more than one of the additional measurements.

Human Capital Measurements Disclosed in Forms 10-K



Of the Companies that Provide a Measurement in Addition to Total Number of Employees, the Measurements Disclosed Are[7]



CONCLUSION

For every company, there is likely at least one aspect, if not more than one aspect, of enterprise risk management and long-term strategic planning that is a function of workers outside the executive group. And those identified aspects are board issues. Developing a robust body of year-over-year human capital data will enable the board to more effectively oversee and measure the aspects of human capital management that fall under its oversight, and simultaneously allow the company to provide meaningful human capital management disclosure in accordance with the new human capital management disclosure rule.

Mehran Massih and Jason Pratt

The Rise of the Green Loan Market

Driven by stakeholder pressure, public companies are increasingly making so-called "green" and environmental, social and governance (ESG) commitments and investments. An outgrowth of this trend is the use of green and ESG-linked loans to pay for these commitments and investments.

The rise of this green loan market follows in the footsteps of the now firmly-established green bond market.

Challenges to green loan market participants include how to to select, measure and validate green loans, and how to allocate green risks in loan documentation. Perhaps the greatest challenge for green finance participants in general, affecting both loans and bonds, is the risk of "green washing" — i.e., market confusion regarding whether green-promoted financial products in fact further market participants' publicly-promoted green goals. To manage green washing risks, industry groups have promoted guidelines, most notably the so-called Green Loan Principles and the Sustainability-Linked Loan Principles, to bring order to a still rather ad hoc and voluntary green finance market.

There is a widespread perception, however, that industry-driven, voluntary guidelines are insufficiently robust to prevent market confusion. To promote more uniformity, the European Union (EU) is taking steps to adopt standards for green and ESG-linked financial products.

The United States for the most part has not yet followed suit. There are signs, however, that the U.S. Securities and Exchange Commission (SEC) may be moving towards mandating uniform green disclosures in SEC-regulated documents.

A review of public-disclosures demonstrates that participation in the green finance market is itself now part of banks' and companies' ESG narratives.

In response to the COVID-19 pandemic, borrowers shifted from advancing strategic objectives, including ESG objectives, to shoring up liquidity. That said, a focus on corporate ESG initiatives remains strong. Recent scholarship indicates that green and ESG-linked financial products are out-performing products without green attributes, and that the investor market does not perceive a downside to directing investment to these products.[1] We anticipate a continuation of the rapid expansion of this market.

KEY TERMS

Commonly-used terms in the green loan market include the following:

Green Loans
Green loans are any type of loan instrument made available exclusively to finance or refinance green projects, such as those tied to increasing energy efficiency, reducing or controlling carbon emissions or reducing water consumption.

ESG Loans
ESG-linked loans, also referred to as ESG loans, are any type of loan instrument and/or contingent facility, such as a bonding line, guarantee line or letter of credit, that incentivizes the borrower to meet pre-determined sustainability targets.

Continued on next page.

[1] *See* Jon Hale, "U.S. ESG Funds Outperformed Conventional Funds in 2019," https://www.morningstar.com/articles/973590/us-esg-funds-outperformed-conventional-funds-in-2019 (April 6, 2020).

Predetermined Sustainability Targets
Predetermined Sustainability Targets (PSTs) are established metrics to further sustainability goals and can relate to, among other things, an increase in energy efficiency, the promotion of biodiversity or improvements in working or social conditions.

Unlike with a green loan, proceeds from an ESG loan do not need to be allocated to a green project. In most cases, proceeds from ESG loans are allowed to be used for general corporate purposes. With an ESG loan, the loan terms for the borrower, such as through margin determinations over the life of the loan, may become more favorable if the borrower meets its PSTs or less favorable if it does not meet them.

Green loans and, when the "E" in ESG is the focus of the loan, ESG loans are also often referred to as sustainable loans or sustainability-linked loans.

SELECTION, MEASUREMENT, VALIDATION AND CONTRACTUAL PROVISIONS

In the absence of governmental regulation or significant guidance, lenders and borrowers, both individually and as members of industry groups, have settled on some broad approaches to loan selection, measurement and validation, and how these are handled in loan agreements

Green Loans
For green loans, a lender typically requires that a borrower submit a satisfactory action plan that sets out precisely how the loan proceeds will be spent.

A lender's internal sustainability auditors or its outside consultants, commonly referred to as second-party opinion providers, will analyze the proposed green project, as well as the borrower's capacity to ensure that the loan proceeds are spent on the project and its ability to effectively manage any risks posed by the project. This review results in the lender or second-party opinion provider issuing an evaluation report.

Should the lender choose to proceed with the loan, the loan agreement will require the borrower to monitor the progress of the green project and meet and maintain any specific milestones — e.g., in the context of green buildings, achieving the US Green Building Council's Leadership in Energy and Environmental Design, or LEED, certification.

The agreement will also require the borrower to report on the progress of the green project on its website and/or in reports submitted to the lender. Some industry guidance documents call for annual reporting, although a lender may require more frequent reporting.

A lender may also require a borrower's reports to be verified or certified periodically by independent third parties and for the borrower to provide access to personnel, documents and perhaps projects for this purpose. Depending on a lender's familiarity with a borrower and confidence in its internal oversight processes, a borrower's self-certification procedure could suffice.

The loan documentation may require funds to be segregated in a dedicated account, a concept familiar to project finance borrowers. This may not be required if the borrower operates exclusively in green industries or if the lender is satisfied that a borrower has effective internal fund allocation controls and procedures.

The documentation is likely to include some negative consequences for the borrower in the event it fails to meet its green obligations — for example, by spending the funds on a project other than the agreed project or failing to obtain a relevant certification. The documentation may require a borrower to segregate funds in a dedicated account to remedy the relevant breach.

A mandatory prepayment is a more aggressive remedy. If such a remedy were agreed to in principle, the borrower might consider whether a cure period is appropriate. Penalty clauses, however, are not a favored provision as they could have the perverse result of the lender reaping benefits from the borrower's green failures.

ESG Loans
For ESG loans, the first step is for the lender and borrower to agree on the PSTs — what metrics are relevant and how they will be judged. The most central loan provision is a reduction in margin if the borrower meets the PSTs.

If a borrower fails to meet the PSTs, and to eliminate the outcome of a lender enjoying a higher margin based on a borrower's ESG failures, a payment could be required to an account with funds only being available to improve the borrower's sustainability profile, sometimes requiring the lender's prior consent for incurrence. Similar to green loans, ESG loans typically require meeting milestones, regular reporting and third-party verification or certification of results.

GREEN WASHING

A chief concern for green loan participants is greenwashing. Greenwashing, where lenders or borrowers promote a loan as green-linked when the projects and assets underlying it could have dubious green credentials, is a fundamental risk of participating in the largely unregulated green and ESG-linked loan financial markets.

Industry-Driven Initiatives

In part to combat the danger posed by greenwashing, many financial institutions have adopted internal green vetting and performance standards. It is recognized, however, that relying on individual banks' internal standards lends itself to potential market confusion by introducing multiple standards.

To foster consistency, industry groups have promulgated voluntary and now widely followed green standards. The two highest profile guidance documents, issued by the Loan Syndication & Trading Association, Loan Market Association, and Asia Pacific Loan Market Association, are the Green Loan Principles (GLPs), published in March 2018, and the Sustainability-Linked Loan Principles (SLLPs), published in March 2019.

The GLPs and SLLPs have much in common. Both set out four core components, all of which must be satisfied for a loan to be deemed green-linked or ESG-linked.

For green loans, (1) the proceeds should be used for green projects that address green concerns, e.g., climate change, natural resources depletion, loss of biodiversity and air, water and soil pollution; the projects should be described in the loan documents and marketing materials; and the borrower should assess, quantify, measure and report the green benefits of the project, (2) the borrower should communicate to the lender its environmental objectives, and how its project fits within eligible categories of green projects, (3) the proceeds should be credited to a dedicated account and (4) relevant information, including qualitative performance indicators and quantitative performance measures, should be reported to lenders.

For ESG loans, (1) the borrower should describe to the lender its sustainability objectives and strategies and how they align with PSTs, and should disclose any standards or certification to which it seeks to conform, (2) the borrower and the lender should negotiate the PSTs, (3) the borrower should make information regarding its sustainability targets readily available, provide such information to institutions participating in the loan at least once a year and perhaps share the information publicly, such as in its annual reports and (4) the borrower should seek an external review of its performance against the PSTs, especially if the information is not publicly disclosed or if there is no assurance statement made by the borrower to the lender.

Neither the GLPs and SLLPs provide a black-and-white test on third-party review and verification. The GLPs suggest third-party review when appropriate, indicating that third-party experts could simply be consulted or, more robustly, could be retained to verify, certify or rate the green loan or green loan framework. The GLPs also, however, note the relationship-driven nature of the loan market and suggest that self-certification by a borrower may be sufficient.

Similarly, the SLLPs indicate that borrowers could seek a third-party opinion regarding the appropriateness of its PSTs and verification, at least annually, of whether it is meeting the PSTs, and that any such external reviewer should be agreed to by the lenders. The SLLPs also contemplate circumstances where the borrower has the internal expertise to evaluate the PSTs and its performance and communicate this expertise to the lenders.

United States

A criticism of the current U.S. green and ESG disclosure practice is that, absent regulatory requirements or at least SEC guidance, there is little uniformity in either the form or substance of reporting among issuers. Some issue robust stand-alone reports extraneous to their SEC-required filings while others include ESG disclosure in their annual reports or other filings required by the Securities Exchange Act of 1934. Some issuers adhere to third-party standards such as the Global Reporting Initiative while others have adopted additional disclosure policies. Still, other issuers do not report on their own but rather reply to surveys requested by ESG data providers, which in turn provide ESG information or scoring systems to investors. Larger or better financed companies are often in a better position to respond to these surveys. Thus, one unintended result can be that smaller companies obtain a lower ESG "score" in these surveys, potentially negatively impacting their stock price and their ability to access capital.

Motivated by the market confusion caused by a lack of consistent and comparable data, on May 14, 2020, an SEC subcommittee formally called on the SEC to develop rules for green and ESG disclosure.[2]

The subcommittee noted that "investors consider certain ESG information material to their investment and voting decisions, regardless of whether their investment mandates include an "ESG-specific" strategy…" and "our work has informed us that this information is material to investors regardless of an [i]ssuer's business line, model or geography, and is different for every issuer." Despite the materiality of green and ESG considerations to investors across industries and "… despite a plethora of data, there is a lack of material, comparable, consistent information available upon which to base some of these decisions."

The subcommittee was also motivated by: (1) a belief that issuers should provide material green and ESG information directly to the market for purposes of investment and voting decisions, as opposed to data providers gathering information from sources other than issuers themselves; (2) a determination to "level the playing field" between large companies that can better manage the current ad hoc system with its plethora of data purveyors and survey providers and smaller companies; and (3) a recognition that "[i]n time, without the availability of reliable ESG-related material information for all [U.S.] [i]ssuers, capital could be redirected by investors with their own sets of mandated ESG duties to companies outside the [United States] that are required to report ESG data pursuant to disclosure obligations of non-[U.S.] regulators, rendering [U.S.] [i]ssuers at a distinct disadvantage to access future international capital."

To date, there have been no substantial follow-up efforts by the SEC, and the ad hoc system that green market participants must navigate, including with respect to ESG disclosure, remains.

[2] SEC, "Recommendation from the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee Relating to ESG Disclosure," https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-of-the-investor-as-owner-subcommittee-on-esg-disclosure.pdf (May 14, 2020).

European Union

The EU is taking more concrete steps in this area, albeit in stages and not as yet complete. In May 2018, the European Commission adopted a package of measures to implement its ambitious action plan on sustainable finance. The package has included:

- Revision of voluntary guidelines that accompany the EU Non-Financial Reporting Directive applicable to large public interest companies with more than 500 employees, in order to provide guidance on disclosure of climate-related information in line with the Financial Stability Board's Task Force on Climate-related Financial Disclosure, as well as metrics developed under a new Taxonomy, discussed below
- Requirements relating to sustainable investments and sustainability that oblige institutional investors and asset managers to disclose how they integrate ESG factors in their risk processes
- Requirements for new EU benchmarks of low-carbon and positive-carbon impact benchmarks, as well as related disclosure requirements for benchmark administrators
- A forthcoming EU green bond standard and EU eco-labels for retail investment products

The EU's Green Taxonomy

One of the significant milestones that has recently been reached as part of the European Commission's 2018 action plan on sustainable finance — largely to counter greenwashing and the application of multiple ad hoc standards — is publication in June 2020 of the Taxonomy Regulation,[3] touted as the "world's first ever green list." The Taxonomy Regulation is significant because it establishes an EU-wide classification system — in effect, a glossary or "taxonomy" — for determining whether an economic activity is environmentally sustainable for purposes of investment. It purports to provide businesses and investors with a common language to identify which economic activities can be considered "green."

Although the Taxonomy Regulation has a prescribed scope, the mere fact that a pan-European package of "green" criteria has been published for the first time in a rulemaking instrument will likely give the Taxonomy a much larger life. At least for the time being, the Taxonomy is likely to become the go-to reference point for sustainability criteria in any investment or financing context, potentially regardless of jurisdiction.

The Regulation Recognizes Six Broad "Environmental Objectives:"

1	Climate change mitigation
2	Climate change adaptation
3	Sustainable use and protection of water and marine resources
4	Transition to a circular economy (i.e., waste prevention, reuse and recycling)
5	Pollution prevention and control
6	Protection and restoration of biodiversity and ecosystems

The technical screening criteria of the Taxonomy Regulation are its centerpiece and will be developed in stages. So far, the Technical Expert Group, a body of the European Commission, has developed technical screening criteria for 70 activities in eight economic sectors contributing to climate change mitigation and 68 activities contributing to climate change adaptation. The sectors covered so far include agriculture; forestry and fishing; manufacturing, electricity, gas, steam and air conditioning supply; water, sewerage, waste and remediation; transportation and storage; information and communication technologies and construction and real estate. Criteria for the remaining objectives will be forthcoming.

[3] Regulation (EU) 2020/852.

Insights

Lisa M. Brill, Kris Ferranti, Malcolm K. Montgomery and John L. Opar

Impact Investing in Commercial Real Estate

Commercial real estate (CRE) is comprised of a number of varied sectors — office, industrial (logistics), multi-family, retail, hospitality and, increasingly, specialized uses, such as senior care, medical office and student housing. The industry also has a diverse investor base. Virtually all public real estate companies are structured as real estate investment trusts (REITs). They are a dynamic force in the industry, but REITs directly account for only 10% of commercial real estate investment in the United States.[1] Real estate investment funds are often privately placed but may be sponsored by publicly traded vehicles. Family offices predate, by decades if not centuries, both REITs and investment funds as significant players in the CRE space. Non-U.S. investors have come to play an increasingly important role and are estimated to have been involved in 8% of U.S. deal volume in 2019, having previously accounted for as much as 18% of U.S. deal volume in 2015.[2] However, each of these groups — REITs, investment funds, family offices and foreign investors — have had, and will no doubt continue to have, a significant impact on the growth of impact investing across the industry.

LEED CERTIFICATION AND ITS PROGENY

As compared to other industries, the commercial real estate industry was early to the impact investing trend. LEED, or Leadership in Energy and Environmental Design, is a program begun in 1993 by the U.S. Green Building Council to establish a system for rating building construction. The program has evolved over the last 25+ years to reflect technological advances and to comprehend maintenance and operation, as well as design and construction, and now represents just one of a number of programs established to promote the goal of sustainability. Perhaps viewed initially by developers merely as an opportunity to market new properties against another criterion, LEED and similar indices are now accepted measures for assessing buildings for thermal and acoustic comfort of occupants and overall environmental impact and human benefits. The LEED Homes rating system includes categories for transportation access and reserved open space. LEED standards have been applied to approximately 70,000 commercial projects in the U.S., comprising approximately 1 billion square meters.[3] Promotion of LEED and equivalent standards can continue to be a means of impact investing on the part of not only developers and builders, but equity investors, lenders and tenants and other end users as well.

[1] *See* Alexandra Thompson, "Total Size of U.S. Commercial Real Estate Estimated Between $14 and $17 Trillion," https://www.reit.com/news/blog/market-commentary/total-size-us-commercial-real-estate-estimated-between-14-and-17 (July 9, 2019).

[2] *See* Real Capital Analytics, "Cross-Border Purchases of US Property Fall Below $50b," https://www.rcanalytics.com/us-cross-border-q419/ (February 19, 2020).

[3] U.S. Green Building Council Country Market Brief: United States at https://www.usgbc.org/resources/country-market-brief. Numbers include registered (not yet certified) and certified commercial projects.

CURRENT INITIATIVES

The commercial real estate industry has recognized that promoting ESG is not only a laudable goal in itself, but also one that can enhance the bottom line. Delivering energy-efficient buildings can lower operating costs and appeal to the growing demand by commercial and residential tenants for environmentally friendly space.

Promoting sustainability represents an important, but by no means the only, intersection between commercial real estate and impact investing. Community-focused initiatives and opportunities abound. Many large cities suffer from a shortage of affordable housing. Incentive programs are common and reward builders of affordable housing with transferable zoning bonuses, in effect trying to further the convergence between "doing good" and "doing well." Incentives have also been used to facilitate construction or rehabilitation of public improvements, such as subway stations, parks and roadways, creating a "win-win" for the community and the developer. Other initiatives include solar arrays, rooftop farms, EV charging stations, water reuse programs and waste diversion.

Prologis, Inc., the public REIT which is a very prominent player in the logistics space, has created a workforce training program, offering courses and curricula to train workers for logistics and warehousing jobs.[4] The training is intended to translate into local job opportunities with the courier and distribution companies, which occupy Prologis projects and who are eager for access to skilled workers.

Climate Action 100+ is a consortium of institutional investors using their individual and collective market clout as leverage for climate change.[5] NAREIT, the national representative organization for real estate investment trusts, reports that 58% of NAREIT members incorporate climate change into their core business processes.[6]

BlackRock, a significant real estate investor both directly and through investment funds, has adopted a Responsible Contractor Policy for assets and companies in which BlackRock or funds managed by BlackRock have a controlling interest.[7] The guidelines include provisions for a competitive and inclusive bidding process and a position of neutrality on labor union organization.

OPPORTUNITY ZONES

Federal tax legislation enacted in late 2017 as part of the Tax Cuts and Jobs Act introduced a new tool to promote socially beneficial real estate development. For some taxable investors, investment in opportunity zones represents a means of achieving tax deferral of certain capital gains invested in qualifying projects. But the identification of projects that meet the Internal Revenue Code requirements also presents a broader opportunity — to showcase to all investors, whether or not tax-advantaged, projects with a positive social impact, be it in creating more community space, more extensive and healthy grocery and dining options or promoting local retail businesses.

For many investors, opportunity zones offer a shortcut to socially responsible investment by eliminating the need for ESG-conscious investors to conduct their own diligence. Indeed, several initiatives are underway to enable developers and investors to access technology which tracks the positive social impact that can be realized from these projects and attempts to do so based on objective, measurable criteria.

[4] *See* Sarah Borchersen-Keto, "Prologis Reaping Benefits from its Focus on ESG Initiatives," August 30, 2019, https://www.reit.com/news/articles/prologisreaping-benefits-its-focus-esg-initiatives (August 30, 2019).

[5] https://www.climateaction100.org.

[6] NAREIT, REIT Industry ESG Report, June 2020.

[7] *See* Erika Morphy, "BlackRock Adds a Responsible Contractor Policy to its Real Assets Governance," https://www.globest.com/2019/06/14/blackrock-adds-a-responsible-contractor-policy-to-its-real-assets-governance/ (June 14, 2019).

CHALLENGES

We have, of course, all been living with the COVID-19 pandemic for several months now. Its impact on commercial real estate has been enormous, particularly in the hospitality, retail and multi-family sectors. It has been virtually impossible for appraisers and investors to settle on any reliable measures of value, given the virtual standstill in the market and the inability to assess the duration of the COVID-19 pandemic and its longer-term impact. One of the many deleterious effects of the COVID-19 pandemic has thus been the deferral or rethinking of capital projects and their anticipated positive environmental and societal impact.

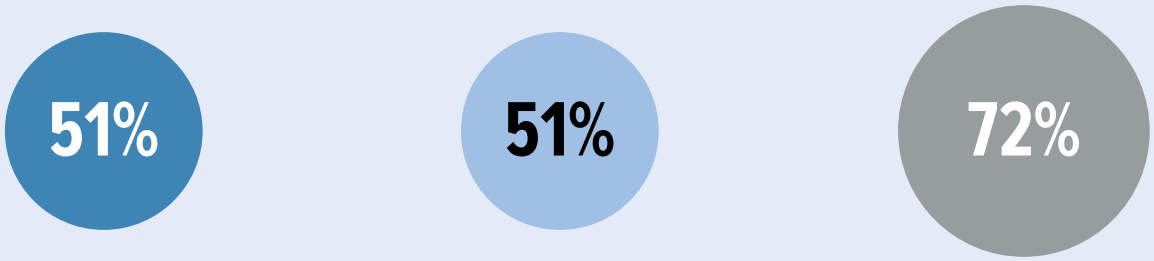
There are longer-term challenges as well. Not all investment markets are created equal. Rent demand or ultimate value appreciation in a gateway city may well justify the additional cost of constructing a Class A office building or multifamily housing which satisfies LEED or other sustainability measures. But what of secondary and tertiary markets? Will local demand or anticipated capitalization rates on exit support the additional expenditure?

Building regulations in major cities may well mandate a level of sustainability consistent with LEED or equivalent standards. Land use regulations in those markets may also require minimum green space or community space, thereby legislating some degree of positive social impact as a condition to new development. However, a few jurisdictions have legislated away from LEED compliance by adopting other less stringent industry standards. Can local builders be expected to voluntarily go the extra mile if a commensurate return is not assured?

Public companies have led the way in reporting ESG initiatives. 78 of the top 100 REITs by equity market capitalization report owning green certified buildings, and as shown in the chart below, more than 50% of the REIT industry report on levels of carbon emissions and energy usage and community development programs.[8] But, as noted earlier, REITs still represent a small, though significant, percentage of the commercial real estate industry. Institutional investors certainly have the clout to demand similar disclosures from investment fund sponsors; however, the balance of the market still lacks transparency.

And how reliable are measurements of more subjective social impacts? How can developers, investors and lenders assess social impact, such as local job growth? Perhaps the demand for objective criteria will lead to enhanced technological tools akin to those being developed for opportunity zones — in effect the social benefit equivalent of a LEED certification.

Percentage of Top REITs Reporting ESG Initiatives



[8] Percentage of equity market capitalization of the top 100 REITs. "REIT ESG Dashboard," https://www.reit.com/investing/reits-sustainability/reit-esg-dashboard.

THE WAY FORWARD

While the initiatives noted above are commendable and bode well for the future, there is no doubt much more work to be done. The ultimate goal is, in effect, to eliminate the need for "impact investing," to create a market place where positive community impact and climate change and other environmental concerns are no longer on a separate checklist, but rather ingrained in investment culture.

Each participant in the commercial real estate community has a role to play in achieving this goal. The roles of developers and builders are perhaps the most apparent — to plan projects that enhance the life of the local community and to do so with materials and protocols that are environmentally efficacious. They should not stand alone. Public companies can use their platforms to disseminate information about their initiatives to the investment and broader communities — to make sustainability and community benefit core parts of their investment analyses (whether in connection with new development, commercial real estate acquisitions or lending) and to further public dialogue on these issues. Pension funds and other investors have been and should continue to be a force behind the scenes, by targeting ESG-conscious investment funds or partners and thus to promote impact investing throughout the investment chain. Commercial space users can drive the market by demanding a product that is both environmentally friendly and community sensitive. The guiding principle should, of course, be to continue to "walk the walk."

Commercial space users can drive the market by demanding a product that is both environmentally friendly and community sensitive

Richard B. Alsop, Jeff Hoschander, Clare O'Brien and Kristina L. Trauger

Federal Forum-Selection Provisions in the Wake of *Cyan* and *Salzberg*

CYAN AND *SALZBERG*

Subject to various limitations and defenses, the Securities Act of 1933 ("Securities Act") provides a private right of action to purchasers of securities in connection with an offering for material misrepresentations by the issuer. In order to address "perceived abuses of the class-action vehicle in litigation involving nationally traded securities," Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA) and subsequently the Securities Litigation Uniform Standards Act of 1998 (SLUSA), which implemented certain protections for defendants in connection with such litigation.[1]

However, in an adaptive effort to evade some of the hurdles presented in federal courts, certain plaintiffs attempted to file cases asserting Securities Act claims in state courts. In *Cyan Inc. v. Beaver County Employees Retirement Fund*, the U.S. Supreme Court held that SLUSA did not strip state courts of jurisdiction to adjudicate class actions brought exclusively under the Securities Act and did not empower defendants to remove such actions from state to federal court.[2] Notably, however, the applicability of certain protections under the PSLRA was not before or addressed by the Court in *Cyan*.

Following the March 2018 decision in *Cyan*, there has been a proliferation of case filings asserting putative class action claims under the Securities Act in state courts throughout the United States. For example, one report identified more than 80 Securities Act cases filed in state courts since early 2018 (when *Cyan* was decided) through the end of 2019 (while fewer than 20 such cases were filed in total during the five-year period between 2010–2014).[3] Frequently, actions alleging the same claims of misrepresentations in connection with the same securities offering on behalf of the same putative class of plaintiffs are filed in federal courts as well. Thus, defendants often must defend against parallel lawsuits in federal court and state court (and sometimes courts in multiple states).

In order to avoid the inefficiencies of such state court filings, several corporations added a federal forum-selection provision (or FFP) to their respective certificates of incorporation, requiring claims under the Securities Act to be filed exclusively in federal court. Two days shy of the two-year anniversary of the U.S. Supreme Court's decision in *Cyan*, on March 18, 2020, the Supreme Court of Delaware — in *Salzberg v. Sciabacucchi*[4] — reversed a lower court decision and held that Delaware corporations can implement FFPs for Securities Act claims in their certificates of incorporation.

[1] *Cyan Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061, 1066-67 (2018). *See also* Conf. Rpt. 104-369, H.R. 1058, 33 (November 28, 1995).

[2] 138 S. Ct. at 1066.

[3] Cornerstone Research: Securities Class Action Filings 2019 Year in Review, available at https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review.

[4] 227 A.3d 102 (Del. 2020).

RISKS OF PROLIFERATION OF STATE COURT SECURITIES ACT LITIGATION

The proliferation of Securities Act cases filed in state courts throughout the United States raises the prospect of duplicative lawsuits involving the same claims in state and federal court, which increases litigation cost, complexity and risk. As the Delaware Supreme Court explained in *Salzberg*, "the costs and inefficiencies of multiple cases being litigated simultaneously in both state and federal courts are obvious."[5]

Even in the absence of parallel, duplicative federal litigation, Securities Act claims in state court present additional risk as compared to identical federal litigation. Significantly, the pleading standard in certain states is sometimes argued to be less demanding than the standard applicable in federal courts. Federal courts generally require a complaint to allege facts sufficient to show that the claim is plausible on its face and do not rely on conclusory allegations. By contrast, certain states may apply a more lenient pleading standard. As a result, claims may be more likely to survive a motion to dismiss in certain state courts than in federal courts, thereby extending the litigation and potentially increasing settlement costs, and the disincentives to file weaker claims may be lower than they would be in federal courts.

Additionally, certain procedural protections available to defendants in federal court may not be applied by certain state courts. Most notably, under the PSLRA, there is an automatic stay of discovery while a motion to dismiss is pending, which is applied universally in federal court. While some state courts have recognized the applicability of the PSLRA discovery stay, this issue is sometimes contested by plaintiffs in state courts.

FEDERAL FORUM-SELECTION PROVISIONS MAY MITIGATE THESE RISKS

A provision in a company's certificate of incorporation or bylaws providing that the U.S. federal district courts are the exclusive forum for Securities Act claims may preclude the prosecution of these claims in state courts. For example, provisions in the certificates of incorporation for three corporations were at issue in *Salzberg*. Two provided:

> Unless the company consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring any interest in any security of [the company] shall be deemed to have notice of and consented to [this provision].[6]

In *Salzberg*, the Delaware Supreme Court held that this provision in the certificates of incorporation of Delaware corporations is facially valid, stating that federal forum-selection provisions "can provide a corporation with certain efficiencies in managing the procedural aspects of securities litigation."[7]

If enforced, such an FFP would necessarily divert Securities Act claims exclusively to federal courts, where there would be no ambiguity about the applicability of federal procedural protections. There would also be no risk of duplicative parallel federal and state cases asserting the same Securities Act claims or a multiplicity of such cases in state courts around the country.

[5] *Id.* at 115.

[6] *Id.* at 111–12. The provision for the third corporation varied modestly.

[7] *Id.* at 114.

REMAINING UNCERTAINTIES

Enforceability Outside of Delaware

Courts throughout the country typically (1) abide by the "internal affairs" doctrine and apply the law of the state of incorporation to internal corporate matters and (2) enforce forum-selection clauses in contracts.[8] Forum-selection provisions in bylaws and certificates of incorporation with respect to stockholder derivative claims have also been enforced. Moreover, at least one state court in California has already enforced an FFP in favor of a Delaware corporation and its officers and directors. Nevertheless, there remains some uncertainty as to whether a particular state court outside of Delaware would enforce an FFP in a corporation's certificate of incorporation or bylaws and divest itself of jurisdiction over federal Securities Act claims.

Certificates of Incorporation vs. Bylaws

In *Salzberg*, the Delaware Supreme Court upheld federal forum-selection provisions in the certificates of incorporation of three corporations as facially valid under Delaware General Corporation Law (DGCL) Section 102(b)(1), which addresses permissible provisions in Delaware certificates of incorporation. The reasoning and language of *Salzberg* and other Delaware decisions — as well as the analogous nature of DGCL statutory provisions addressing bylaws — suggest that FFPs would also be effective if adopted as bylaws, including by boards of directors with authority under the company's certificate of incorporation to adopt, amend or repeal bylaws.

In *Salzberg*, the Delaware Supreme Court found that federal forum-selection provisions address "intra-corporate litigation" and could "easily fall" into categories of permitted provisions under DGCL Section 102(b)(1), including (i) the "management of the business" and "conduct of the affairs of the corporation" and (ii) "creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders… ."[9] DGCL Section 109(b) uses nearly identical language for categories of permitted bylaws.[10]

Moreover, *Salzberg* relied in part on the decision in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*,[11] which upheld a different forum-selection provision (requiring internal affairs claims to be litigated in Delaware) adopted in a corporation's *bylaws*. Indeed, the *Salzberg* court concluded by quoting *Boilermakers* and noting that the "DGCL was intended to provide directors and stockholders with flexibility and wide discretion for private ordering and adaptation to new situations. '[T]hat a *board's* action might involve a new use of plain statutory authority does not make it invalid under our law, and the *boards* of Delaware corporations have the flexibility to respond to changing dynamics in ways that are authorized by our statutory law.'"[12]

Further, the Delaware Supreme Court noted that historically "forum selection provisions . . . were valid under Section 102(b) [i.e., certificates] and Section 109(b) [i.e., bylaws]."[13] Likewise, the court seemed to equate bylaws with certificate provisions in stating that "a *bylaw* that seeks to regulate the forum in which such 'intra-corporate' litigation can occur is . . . facially valid under Section 102(b)(1)."[14]

Nevertheless, *Salzberg* noted that "FFPs, as charter provisions, must be subjected to, and approved by a vote of the stockholders" and "[t]he logic underlying the validity of traditional contractual forum-selection clauses has some force in this stockholder-approved charter context."[15] The court also highlighted that "stockholder-approved charter amendments are given great respect under our law."[16]

[8] *See, e.g., Salzberg*, 227 A.3d at 132, 135–36.

[9] *Id.* at 113–14.

[10] *See* 8 Del. Code § 109(b).

[11] 73 A.3d 934 (Del. Ch. 2013).

[12] 227 A.3d at 137–38 (emphasis added).

[13] *Id.* at 120.

[14] *Id.* at 114 (emphasis added).

[15] *Id.* at 133.

[16] *Id.* at 116.

Validity of Provisions Adopted by Non-Delaware Corporations

While many states take guidance from Delaware with respect to corporate law, the validity of federal forum-selection provisions for non-Delaware entities will depend on applicable corporate statutes and law in each relevant jurisdiction. A similar analysis would likely apply with respect to a non-U.S. issuer. A state court faced with claims subject to a federal forum-selection provision and involving an entity organized in another state or outside the U.S. would likely make a threshold assessment as to whether the provision is authorized under the laws of the relevant state or foreign jurisdiction.

WHAT SHOULD COMPANIES CONSIDER NOW?

1 **General Consideration**

Corporations contemplating public equity offerings or having engaged in such offerings in the recent past should consider adding an FFP to their certificates of incorporation or bylaws.

2 **Pre-IPO and Controlled Corporations**

Because an FFP in a certificate of incorporation is the type of provision that was specifically upheld by the Delaware Supreme Court in *Salzberg*, this might be the preferred approach for pre-IPO or controlled corporations for which an amendment to the certificate may be a reasonably efficient option.

3 **Publicly Held Non-Controlled Corporations**

For diversely held public corporations, adoption of an FFP in a bylaw may be more efficient.

4 **Corporations Incorporated in Other Jurisdictions**

Non-Delaware corporations — whether incorporated in other states or organized in non-U.S. jurisdictions — should consider adopting FFPs in their organizational documents unless prohibited or apparently unenforceable under applicable law in the relevant jurisdiction.

The Survey

The Survey consists of a review of key governance characteristics of the Top 100 Companies, including a review of key ESG matters.

53

of the Top 100 Companies had 30% or more women on the board

51

of the Top 100 Companies have added one or more female directors since September 30, 2018

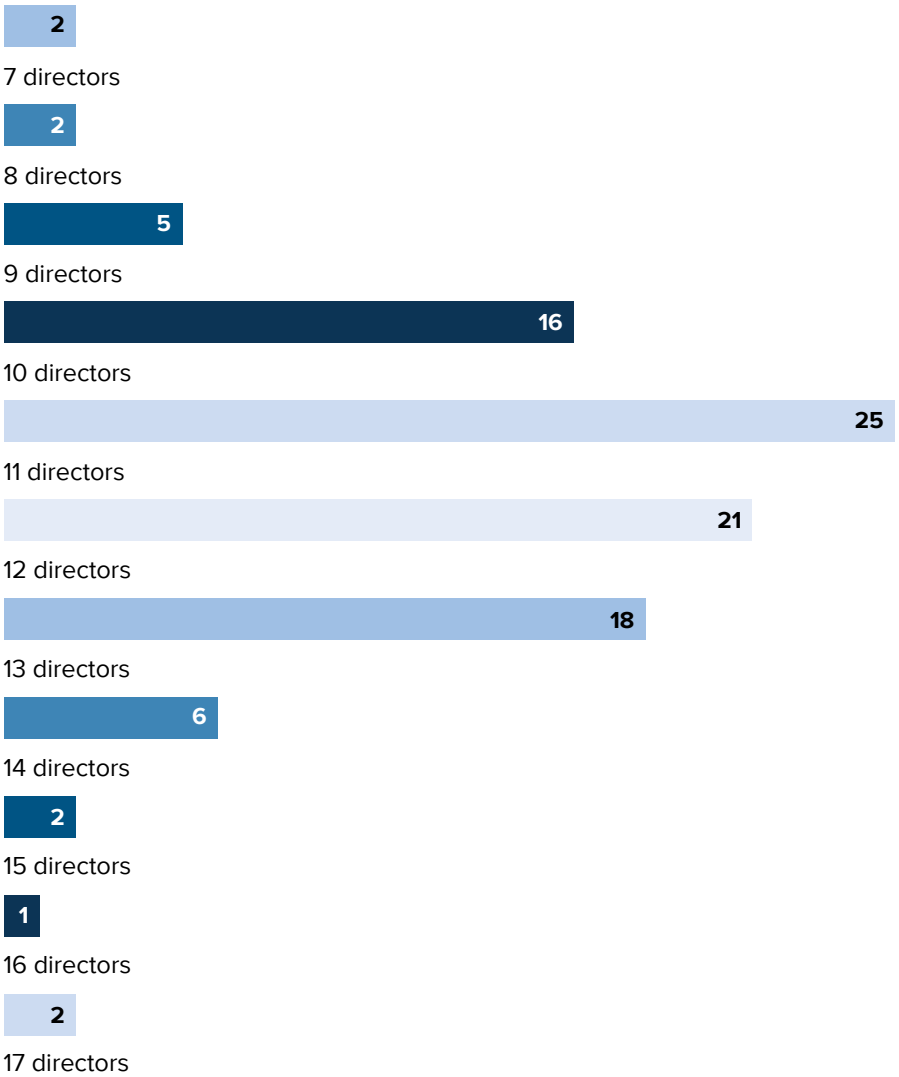
8

board chairs of the Top 100 Companies are women

Board Size and Leadership

The average size of the board of the Top 100 Companies has decreased from 12.5 directors in 2015 to 11.6 directors in 2020 and 39 of the Top 100 Companies have separated the CEO and board chair positions.

Board Size of the Top 100 Companies



Size of the Board

The Board Size of the Top 100 Companies Ranged from

7 to 17 directors with an average of

11.6 directors

The Board Size of

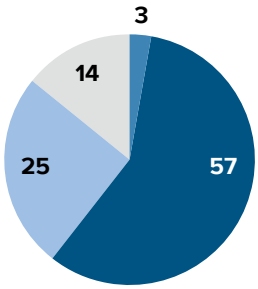
80 of the Top 100 Companies ranged from

10–13 directors

Of the Top 100 Companies

Have a Lead Independent Director

Had an Executive Officer as a board chair the last 3 years



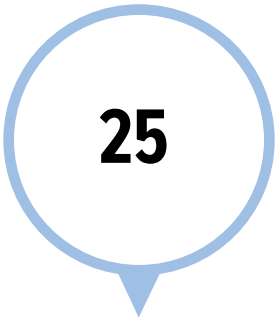
- Same CEO and Chair with no Lead Independent Director
- Same CEO and Chair with Lead Independent Director
- Separate CEO and Chair (Chair Independent)
- Separate CEO and Chair (Chair not Independent)

* One Top 100 Company did not have a Chair of the board.

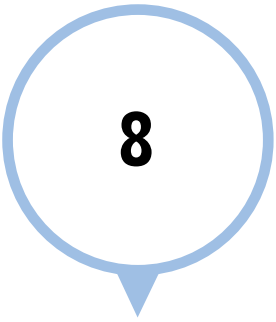
Separation of the CEO and Chair

of the Top 100 Companies currently have separated the roles of board chair and CEO

Of Those Companies



have independent board chairs



board chairs of the Top 100 Companies are women (including four who are also the CEO of their company)

Director Independence

Independent directors constituted

an average of

87%

of the directors on the boards of the Top 100 Companies.

Over the last 10 years, the number of companies at which the CEO is the only non-independent director has increased significantly.

93

of the Top 100 Companies have boards composed of 75% or more independent directors

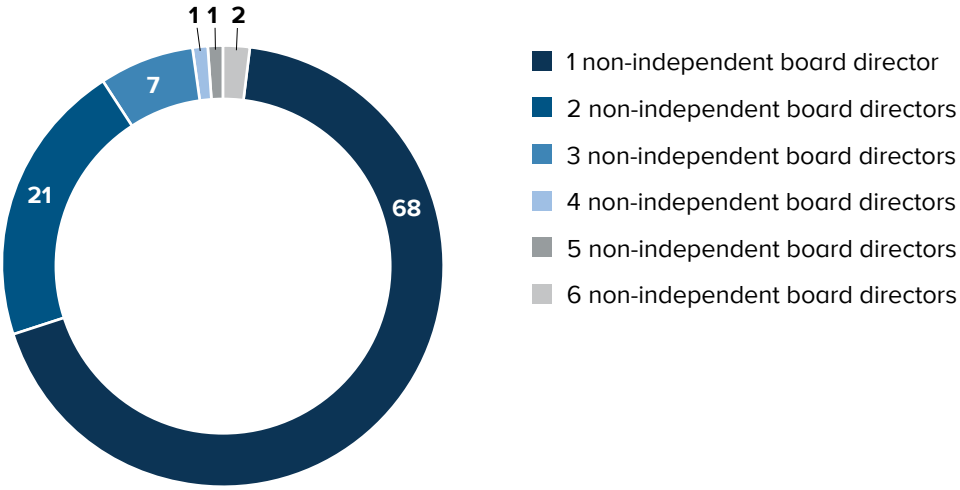
17

of the Top 100 Companies have management directors (other than the CEO) who are not independent, including 2 Top 100 Companies that have their CFO on the board and 3 Top 100 Companies that have their COO on the board

19

of the Top 100 Companies have non-management directors who are not independent

Number of Non-Independent Directors*

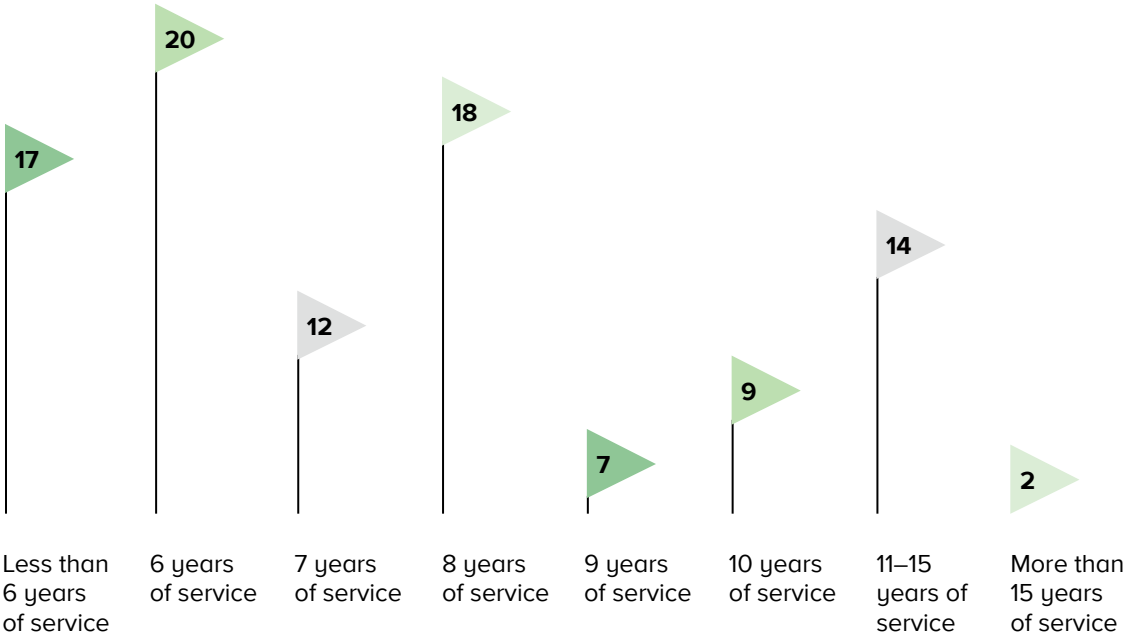


* Includes one company where the two non-independent directors are co-CEOs.

Board Refreshment

Board refreshment continues to be one of the key issues facing nominating and governance committees, and boards as a whole, as they are increasingly under pressure to change the face of the boardroom by reexamining topics such as director tenure, experience, performance and diversity, with gender and ethnic diversity at the forefront.

Average Director Tenure



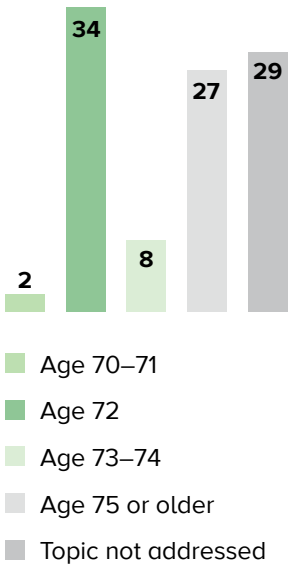
The average board tenure at the Top 100 Companies is 8 years.

Mechanisms to Encourage Board Refreshment

Three of the principal board refreshment mechanisms are mandatory retirement age, term limits and the board self-evaluation process. While the use of a mandatory retirement age mechanism continues to be high and term limits continue to be low, use of the board self-evaluation process mechanism appears to be increasing.

Mandatory Retirement Age

Although not required by either the NYSE or Nasdaq listing standards, 71 of the Top 100 Companies have disclosed a mandatory retirement age for their non-management directors. Of these, 42 companies expressly permit the board or a committee of the board to make exceptions to the retirement age policy. Similar to 2019, age 72 continues to be the most common age set for mandatory retirement. Mandatory age of 75 or older decreased from 30 of the Top 100 Companies in 2019 to 27 companies in 2020.



Term Limits

Eight of the Top 100 Companies have adopted mandatory term limits for their directors, a slight decrease from 10 in 2019. The mandatory term limits apply only to non-management directors at six of these companies. 66 of the Top 100 Companies specifically state that term limits have not been adopted, most citing the value of the insight and knowledge that directors who have served for an extended period of time can provide about the company's business. Many of these companies also state that periodic reviews by the board or a board committee of each director's performance serve as an appropriate alternative to mandatory term limits. Of the 66 Top 100 Companies that specifically state that term limits have not been adopted, two adopted average tenure limits of 10 years and one adopted an average tenure limit of 9 years.

66

State that term limits should not be adopted

23

Do not address the topic of term limits

8

Have term limits ranging from 15 to 20 years

3

Have adopted average tenure limits instead

Women in Leadership

WOMEN IN THE C-SUITE AT THE TOP 100 COMPANIES

5 served as the CEO

11 served as the CFO

1 company has both a female CEO and female CFO

8 served as board chair

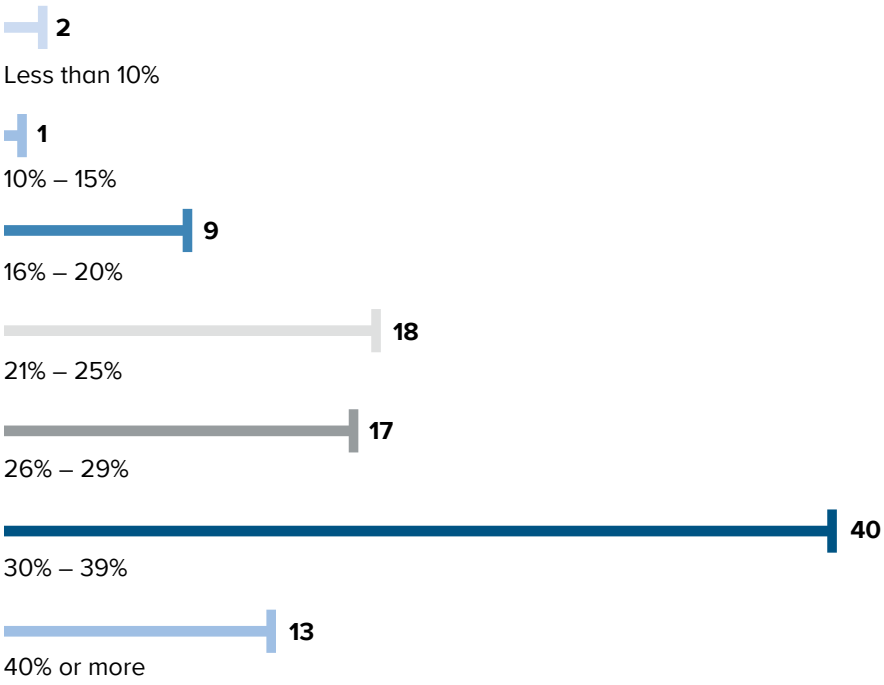
33 served as the general counsel

Women in the Boardroom

Women held approximately 30% of the total number of board seats at the Top 100 Companies in 2020, up from 28% in 2019. The number of Top 100 Companies with a board comprised of 30% or more women rose from 46 companies to 53 companies over the past year. Thirteen of the Top 100 Companies have a board with 40% or more women members, up from 10 in 2019.

Gender Diversity on the Board

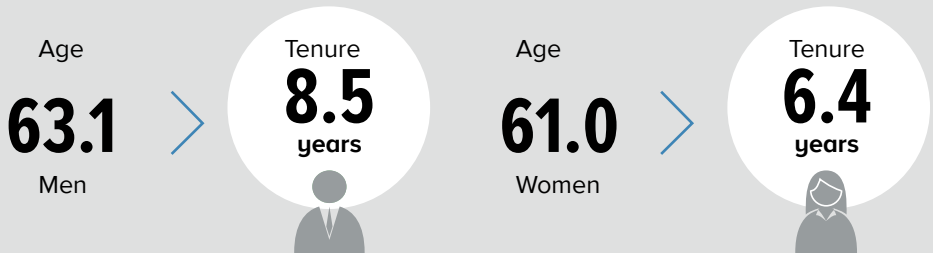
(% of women on the board)



FAST FACTS

Average Age and Tenure

The average age and tenure of female directors is less than male directors



Director Skill Set

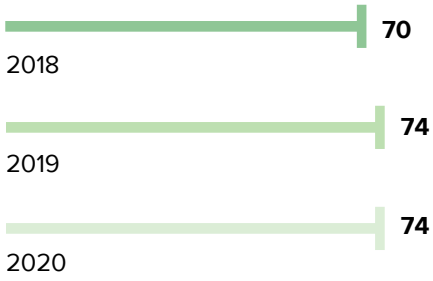
Inclusion of a director skills matrix and information about director diversity in the proxy statements of the Top 100 Companies continued to increase in 2020.

Director Skills Matrix

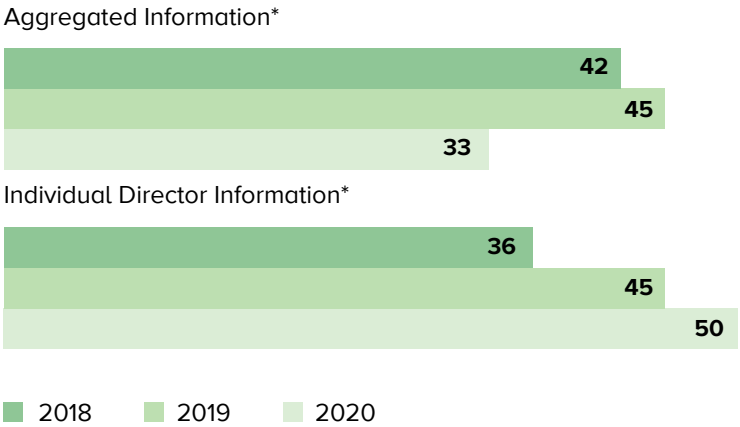
One of many initiatives to encourage public companies to promote diversity on public company boards has been to encourage public companies to add a director skills matrix as part of their proxy statement disclosures.

No Matrix Provided

Director Skills Matrix Presented



Companies vary considerably in how they present the experience, qualifications, attributes and skills of directors in the matrix. The information may be presented in the aggregate or identify specific directors who have such experience, qualifications, attributes and skills.

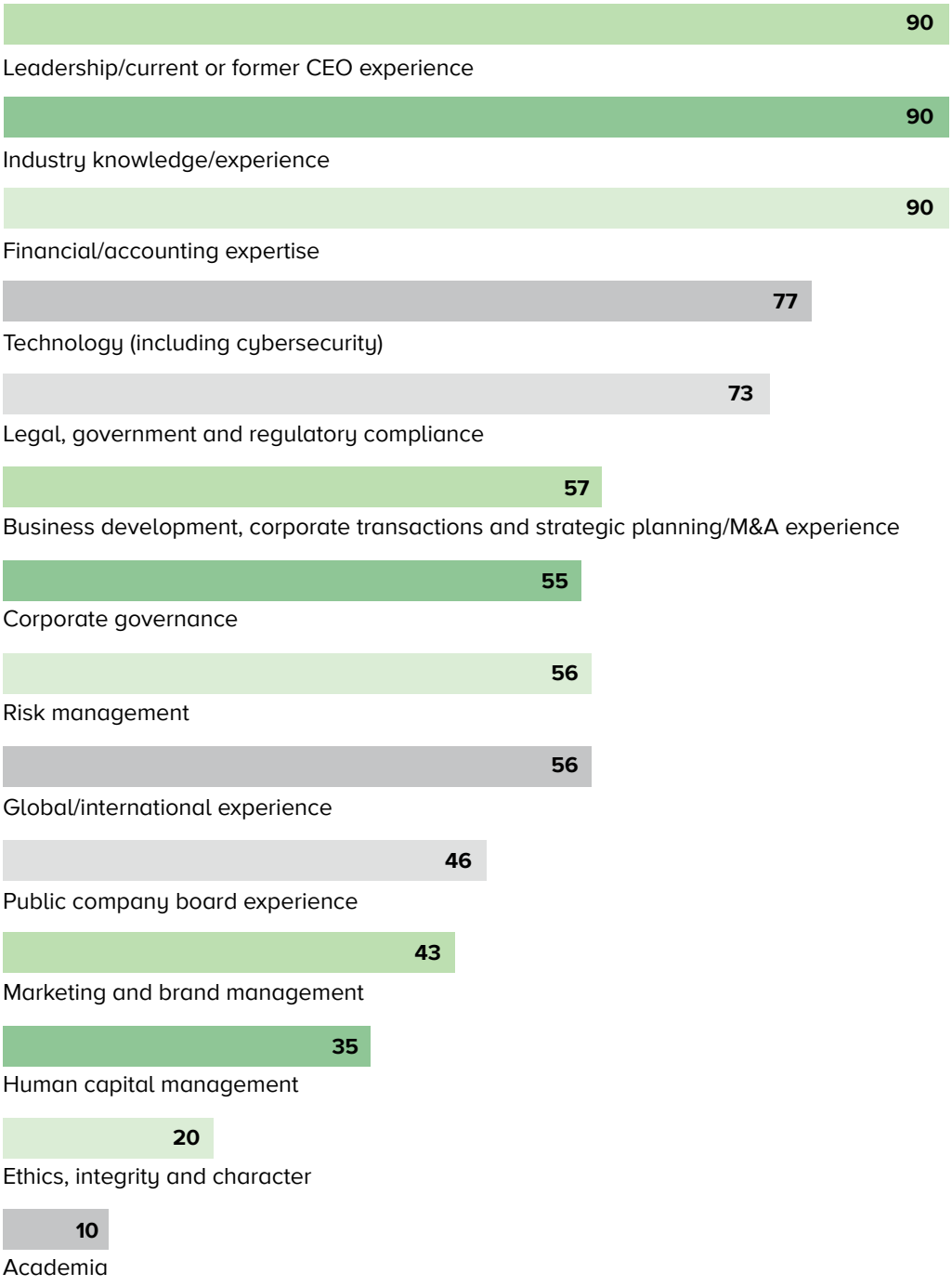


* Some companies included both aggregated information and individual director information in their director skills matrix.

Board Skills Information

SEC rules require companies to disclose the "experience, qualifications, attributes and skills that led to the conclusion that the person should serve as a director for the registrant at the time the disclosure is made, in light of the registrant's business and structure." As a result of this disclosure requirement, companies typically discuss director experience, qualifications, attributes and skills as part of each director's biography. There is a movement toward presenting this information in a matrix format so that shareholders can have a picture of the experience, qualifications, attributes and skills of the board as a whole.

Skills, Experiences and Characteristics Identified as Important in Selection of Directors

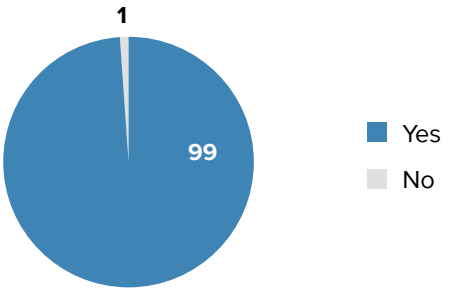


ESG Disclosure and Governance

99

Top 100 Companies issued a CSR Report

Does the Company Issue a CSR Report?*

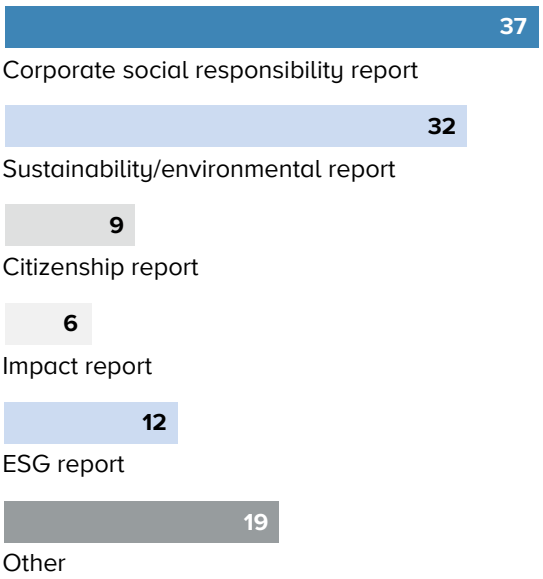


* Eight of the Top 100 Companies have ESG-dedicated websites only.

Of the 99 Companies that Issued a CSR Report, have they Issued an Updated CSR Report for 2019?

* Includes ESG website updates for 2019.

Name of the CSR Report*



* A total of 115 reports were published by the Top 100 Companies. 81 of the Top 100 Companies published 1 report, 7 published 2 reports, 1 published 3 reports, 1 published 4 reports and 1 published 5 reports.

Is the CSR Report Issued as a Single CSR Report* or in Multiple CSR Reports?

*ESG-dedicated websites are noted as a single report.

Does the Company Announce the Issuance of CSR Report in a Press Release?

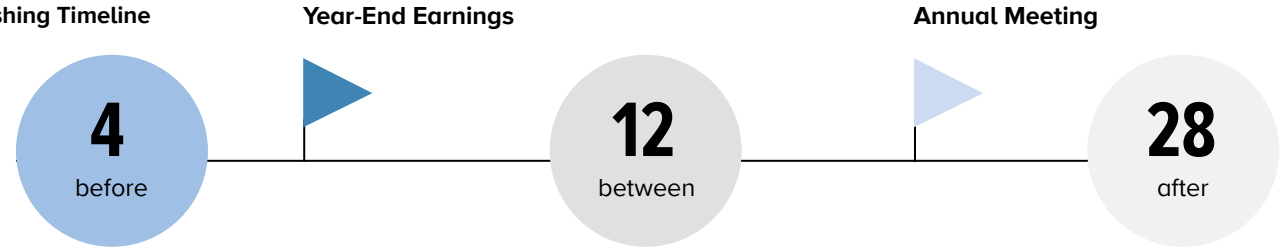
Of the 64 Top 100 Companies that issued an updated CSR Report before June 30, 2020, 44 identified the date of issuance of the report and

16 issued their reports prior to their annual meeting, and

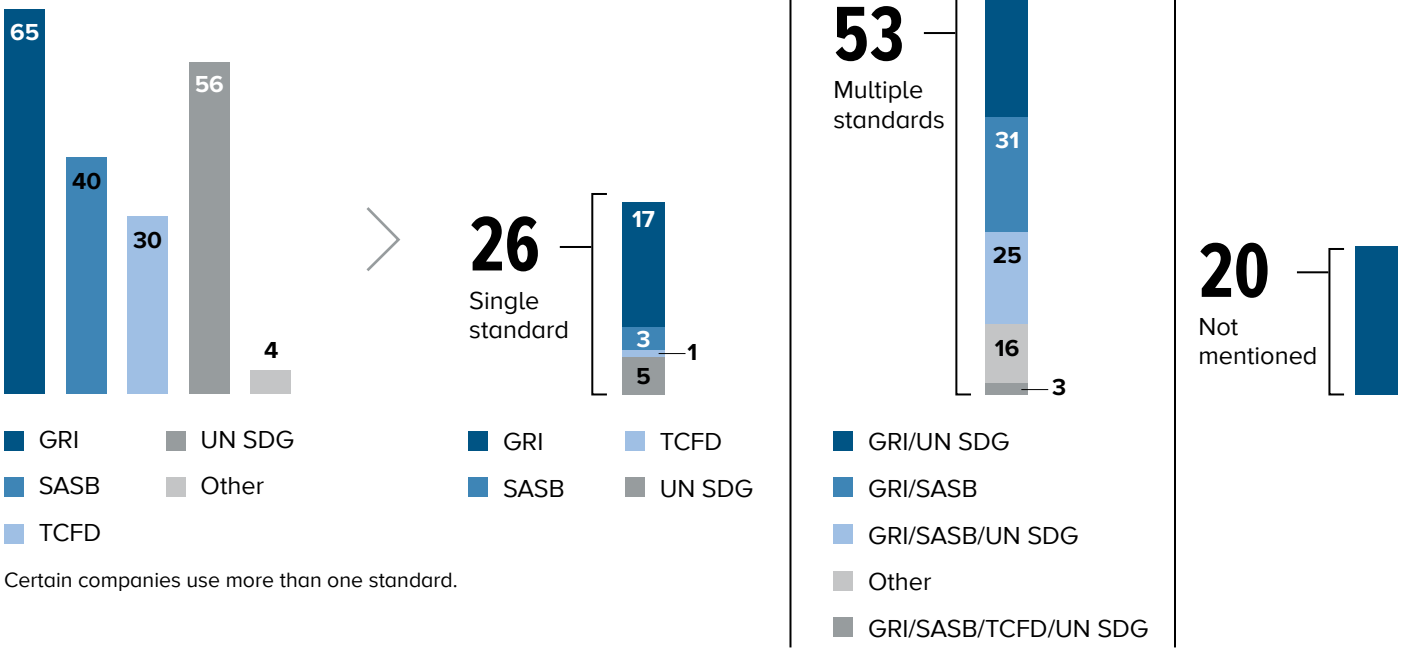
28 issued their reports after their annual meeting

When is this CSR Report Made Public?

44 Companies with CSR report date



What Standards did the Company Reference in Preparing its Main CSR Report?



Certain companies use more than one standard.

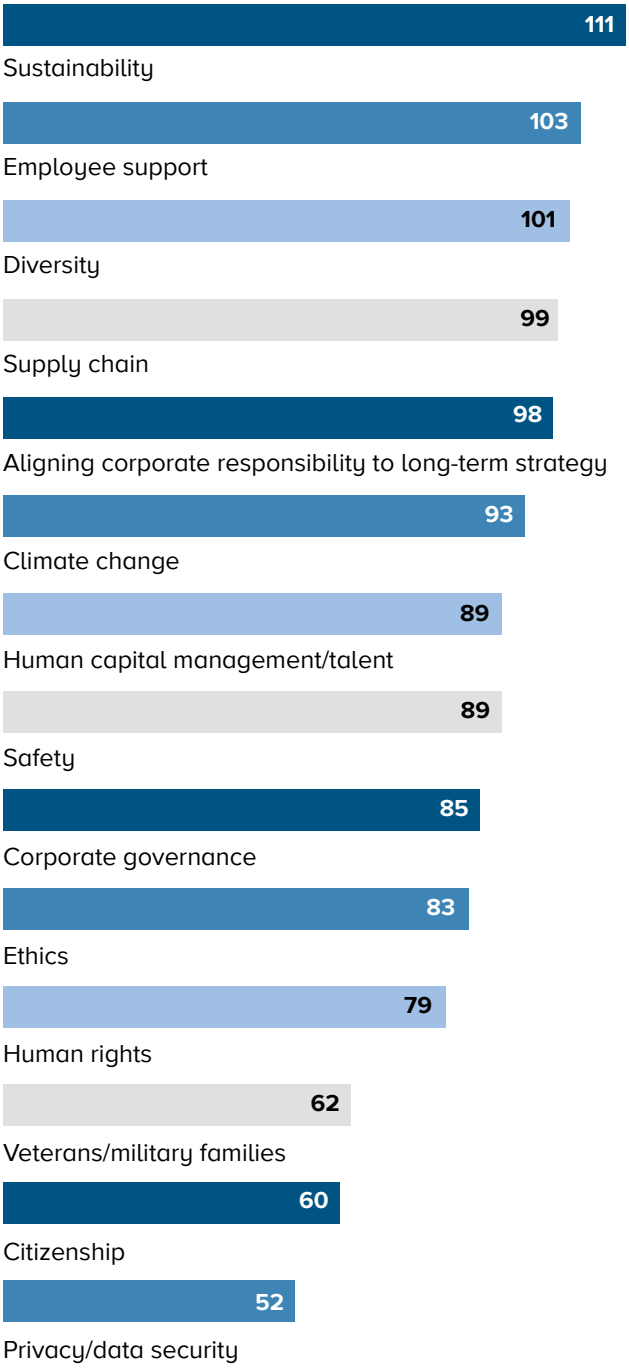
Does the Company Disclose its Alignment with the United Nation's Sustainable Development Goals (SDGs)?

Does the CSR Report Contain a Letter From Their CEO?

Does the Company Have a "Chief Sustainability Officer" (or Other Officer with a Similar Title)?

There was a reasonable degree of consistency in the topics covered in the CSR reports of the Top 100 Companies

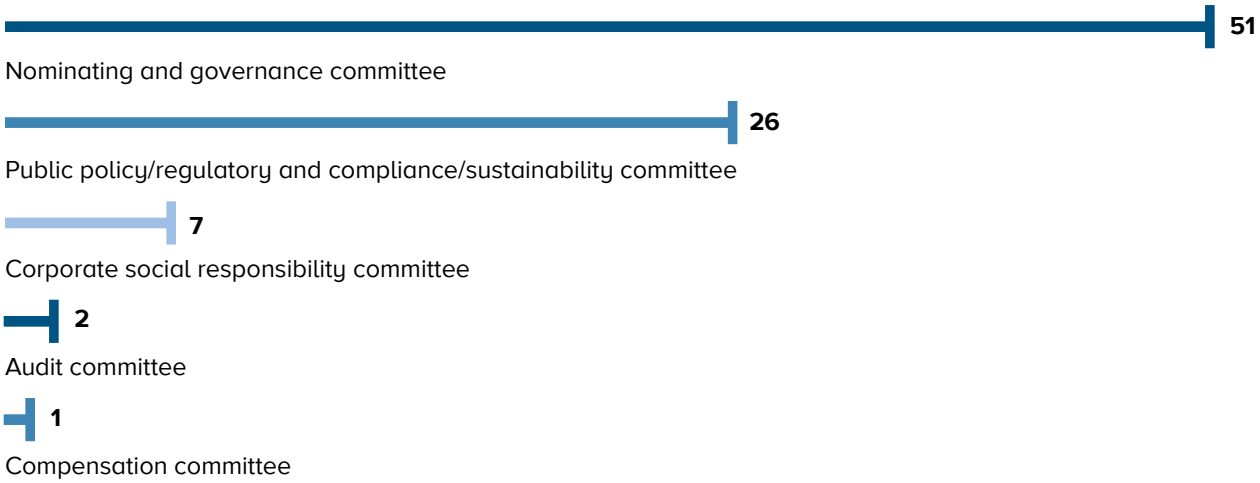
What Topics are Covered in the CSR Report?



Does the Company Disclose the Board's Oversight of ESG Matters in its Proxy Statement?

How Does the Board Allocate Responsibility for ESG Oversight?

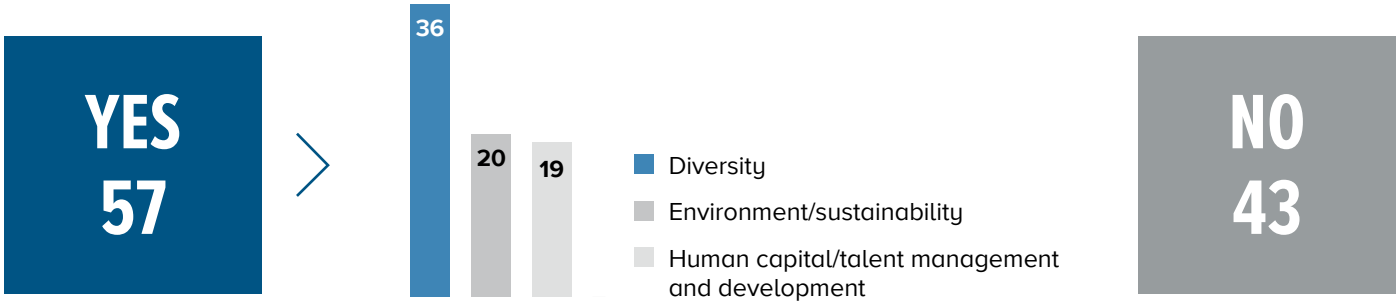
Committees Responsible for ESG Oversight**



** Based on a review of proxy statements, committee charters and corporate governance guidelines; of the 82 of the Top 100 Companies that disclosed which board committee(s) had responsibility for ESG oversight, 6 of the Top 100 Companies had 2 or more committees responsible for such oversight.

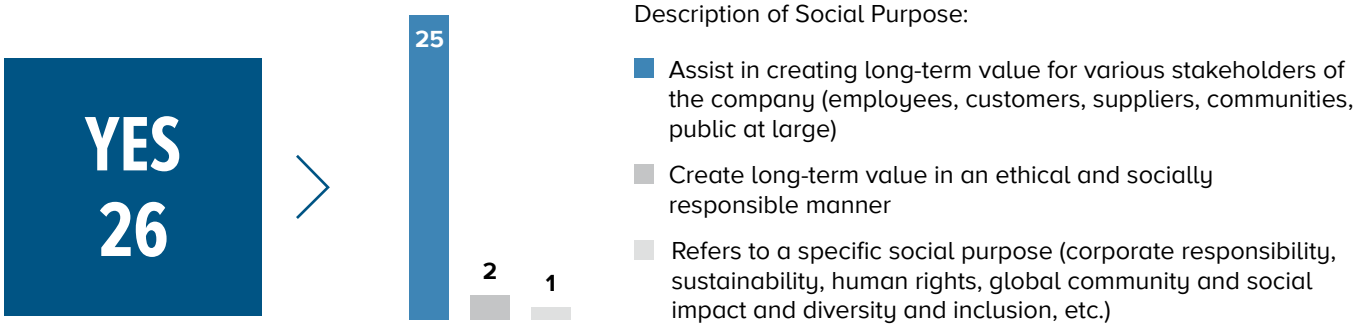
Is ESG Oversight Disclosed in Committee Charters or Corporate Governance Guidelines?

Does the Proxy Statement Identify ESG Factors as a Skill Set in the Director Skills Matrix or Narrative Description?***



*** Some companies included more than one ESG factor as a skill set in their director skills matrix or narrative description.

Does the Company's Corporate Governance Guidelines State a "Social Purpose" as Being Important to the Company?



Green Disclosure

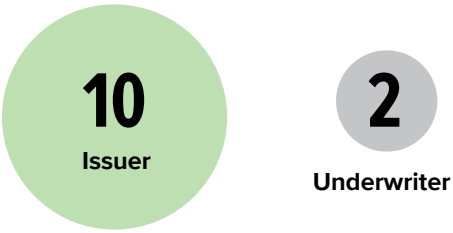
Given the green bond market is older and more established than the green loan market, it is not surprising that in 2019 most green disclosure related to bonds and not loans.

Perhaps reflecting the maturity of the green bond market compared to the newness of the green loan market, the Survey of the Top 100 Companies was dominated by bond-related disclosure. From 2016 to 2020, 10 of the Top 100 Companies publicly disclosed their participation in the green bond market. The four categories of projects most often disclosed relate to (1) green buildings, (2) renewable energy, (3) energy efficiency and (4) sustainable water and wastewater management. The most common referenced standards are the Green Bond Principles (which, like the Green Loan Principles and the Sustainability-Linked Loan Principles, are promulgated by the Loan Syndication & Trading Association, Loan Market Association and Asia Pacific Loan Market Association). Where the disclosure includes a discussion of performance reporting, a clear majority relied on external sources (second party opinions, independent accountants) rather than internal sources (internal audits, evaluation by internal ESG teams), and a clear majority also reported on a schedule (at least annually) rather than reported only once.

10

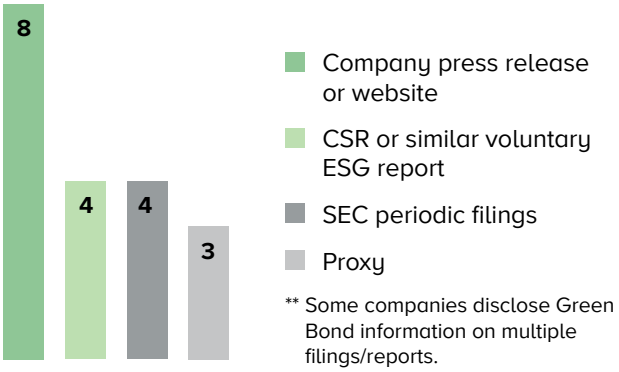
of the Top 100 Companies issued 16 Green Bonds between 2016-2020

Role in Green Bond Offerings*



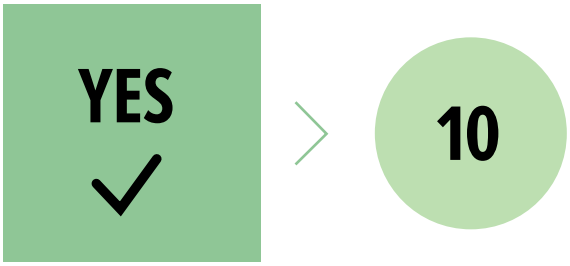
* Some companies acted as issuers and underwriters in different green bond offerings.

Where are Green Bonds Disclosed?**



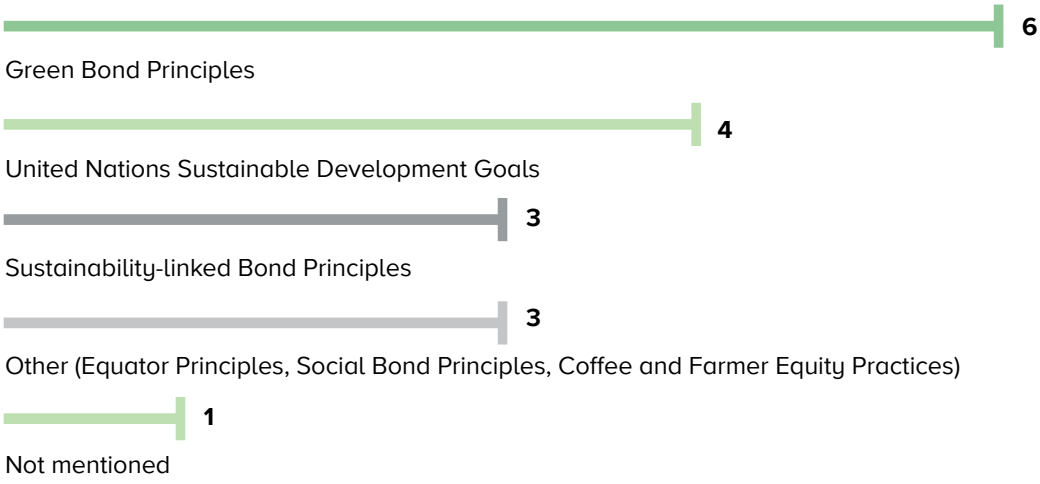
** Some companies disclose Green Bond information on multiple filings/reports.

Of the 10 Top 100 Companies that were Involved in Green Bond Offerings, How Many Disclosed the Amount of the Bond Offerings?

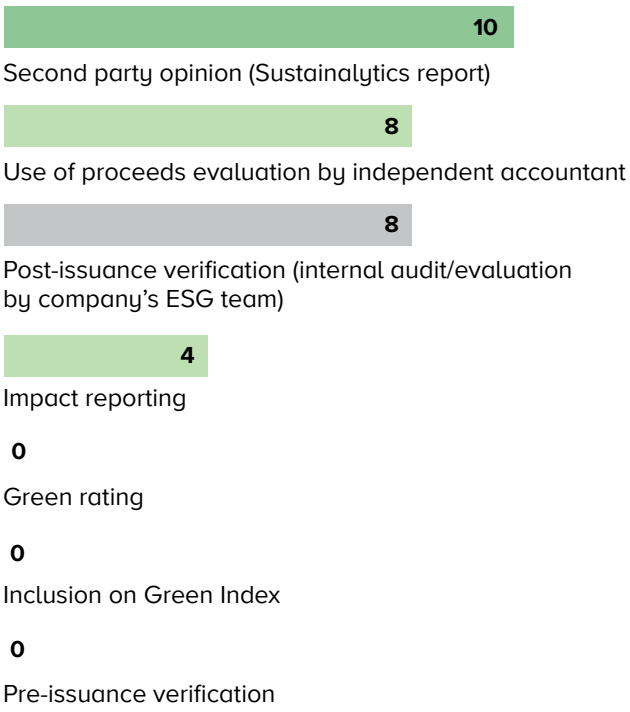


Green Projects/Areas Covered by Green Bond Offerings

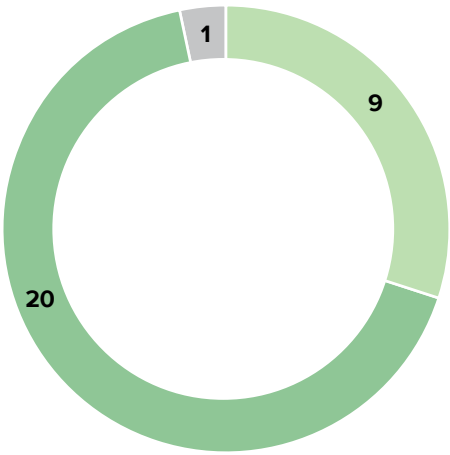
Standards Referenced



What Assurance, Audit or Review has Been Required With Respect to Conformance With any Standards?



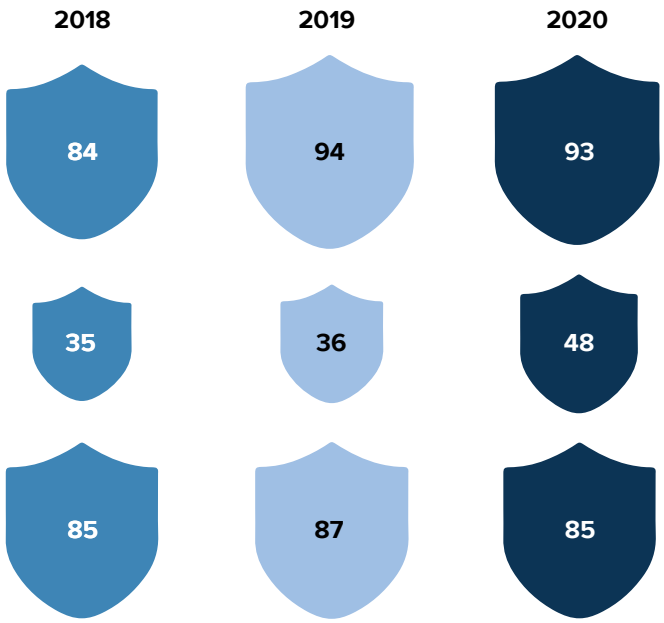
If Assurance, Audit or Review is Required, How Often is it Required?



- At least once a year
- More than once a year
- On the occurrence of specific events (after full allocation of the net proceeds)

Cybersecurity

Cybersecurity and data protection and related risk management discussions continue to be areas of focus for directors.



Responsibility for Cybersecurity Matters

The number of Top 100 Companies that indicated that the board and/or a board committee had responsibility for cybersecurity matters:

Directors With Cybersecurity Experience

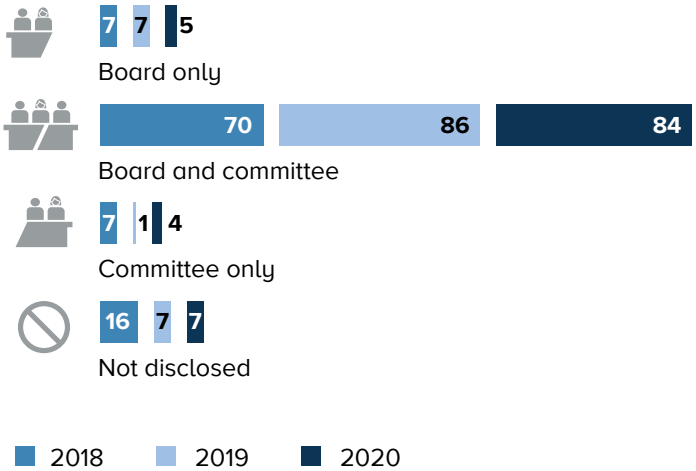
The number of Top 100 Companies that specifically identified directors with cybersecurity or data security experience:

Cybersecurity Risk Management

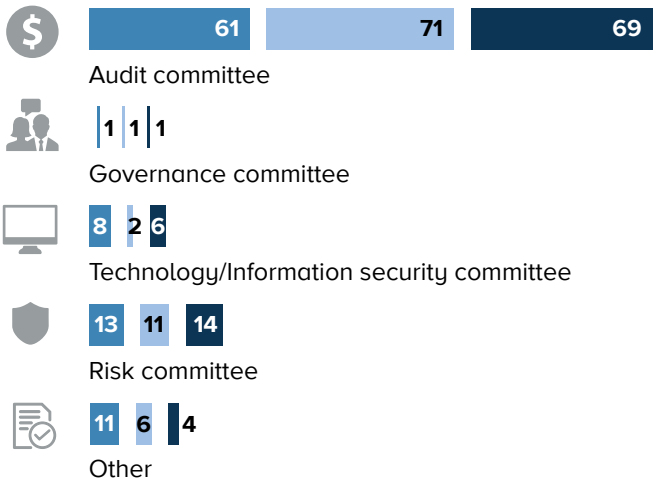
The number of Top 100 Companies that identified cybersecurity as part of the board's oversight role over risk management:

At the Top 100 Companies:

Who has responsibility for cybersecurity and/or data security/privacy?



If a committee is involved, which committee?*



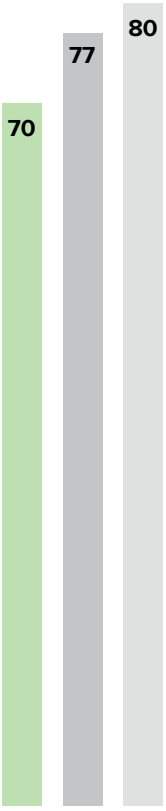
* For several companies, responsibility for cybersecurity and/or data security/privacy is shared by two or more committees.

Board Diversity

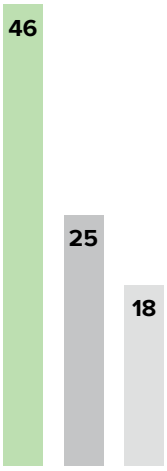
Board diversity disclosures continued to increase in 2020 with more companies presenting this data on an aggregated basis.

Companies vary considerably in how they present information regarding board diversity in their proxy statements. In 2020, the number of Top 100 Companies that presented information about the diversity of their boards on an aggregated basis, as opposed to presenting director-specific information, increased from 77 companies in 2019 to 80 companies in 2020.

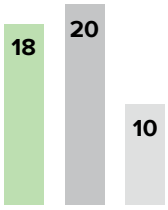
Aggregated Diversity Information For All Directors*



Director-Specific Diversity Information Presented*



No Board Diversity Information Presented

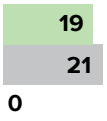


2018 2019 2020

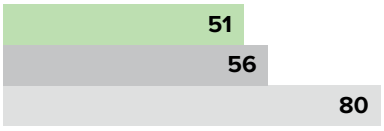
* Includes companies that presented both aggregated and director-specific diversity information.

All 80 Top 100 Companies that have presented aggregated diversity information in 2020 had presented diversity information in separate categories.

Presented Aggregated Diversity Information

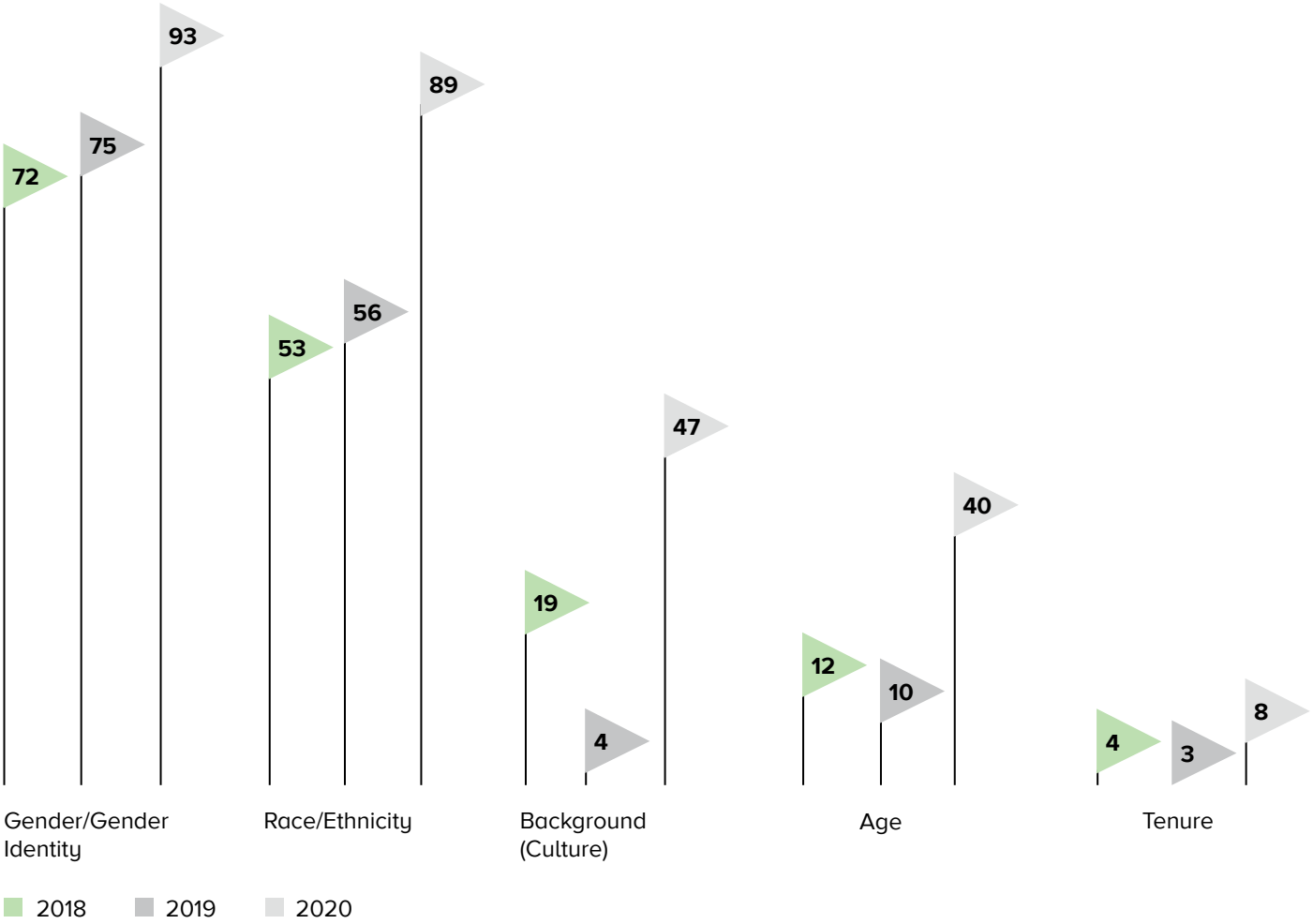


Presented Diversity Information in Separate Categories

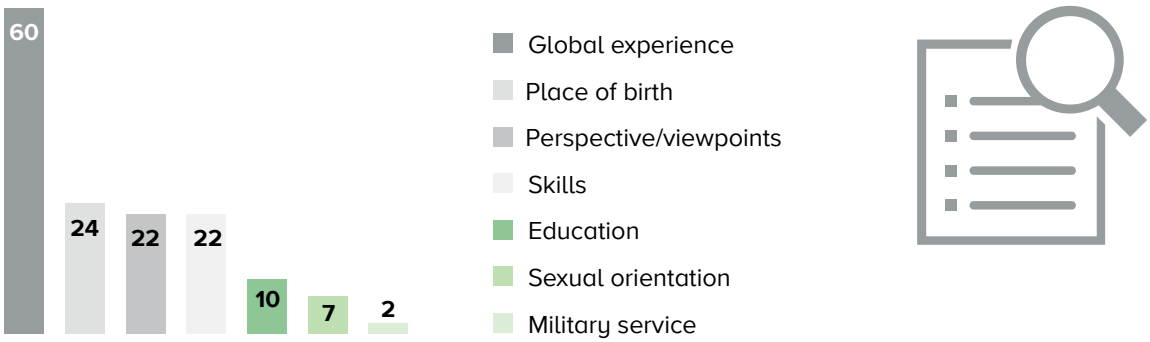


2018 2019 2020

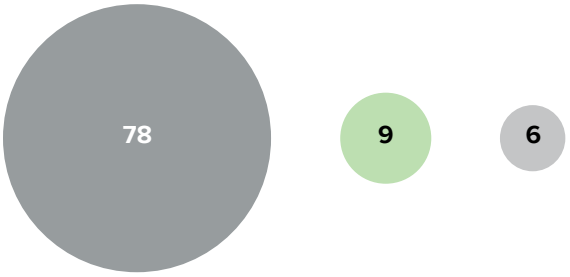
The most commonly identified categories of board diversity continue to be gender/gender identity, which increased from 75 companies in 2019 to 93 companies in 2020 and race/ethnicity, which increased from 56 companies in 2019 to 89 companies in 2020. Various other categories that were presented included age, the cultural background of directors, such as national origin, citizenship and place of birth and tenure.



Others (in 2020)

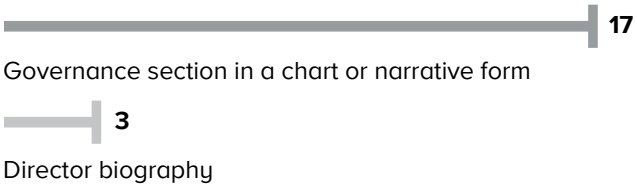


Of the 80 Top 100 Companies That Had Presented Aggregate Diversity Information in Separate Categories, the Below Categories Were Presented*



*Includes companies that presented more than one category of aggregate diversity information.

Of the 18 Top 100 Companies That had Presented Director-Specific Diversity Information, the Information was Presented in*

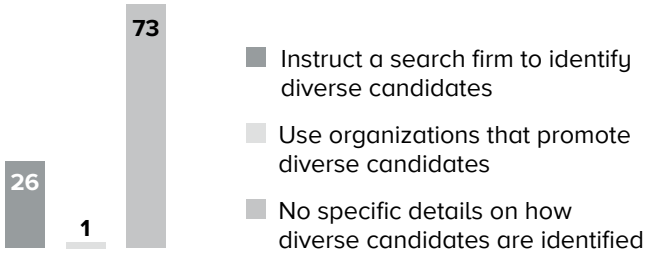


*Includes companies that presented director-specific diversity information in both director biographies and in the governance section in a chart or narrative form.

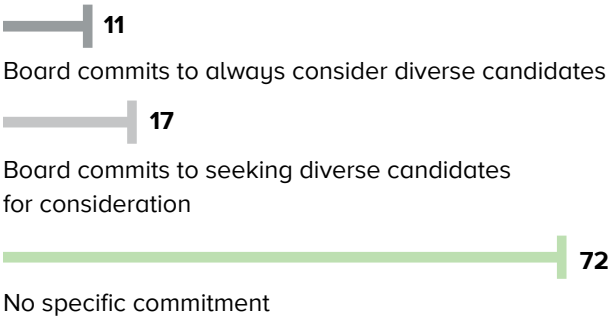
0

None of the Top 100 Companies committed to a percentage or number of diverse representation on the board

Board's Approach to Identifying Diverse Director Candidates



Board Commitments to Always Consider Diverse Candidates in Connection with Identifying New Director Nominees (Rooney Rule)



51 **of the Top 100 Companies have added one or more female directors since September 30, 2018**

18 **of the Top 100 Companies have headquarters/principal executive offices in California**

Of those 18,

11 **companies have added one or more female directors since September 30, 2018**

IPO Governance Practices

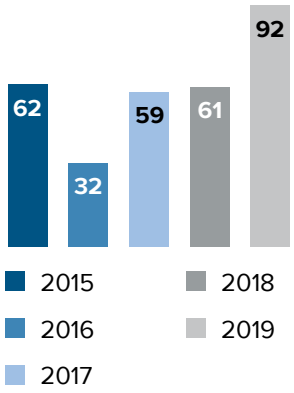
IPO companies continue to adopt the corporate governance practices that work for them, regardless of ISS voting policies.

Comparing IPOs From 2015 to 2019

ISS initiated voting policies in 2015, updated in 2017, with respect to newly public companies, seemingly designed to influence the governance practices of companies considering an initial public offering in the United States by recommending a vote against directors of newly public companies due to the adoption of governance policies that diminish shareholder rights. We look back on our Surveys of IPO companies since 2016 to consider whether the voting policies have had a significant impact over time.

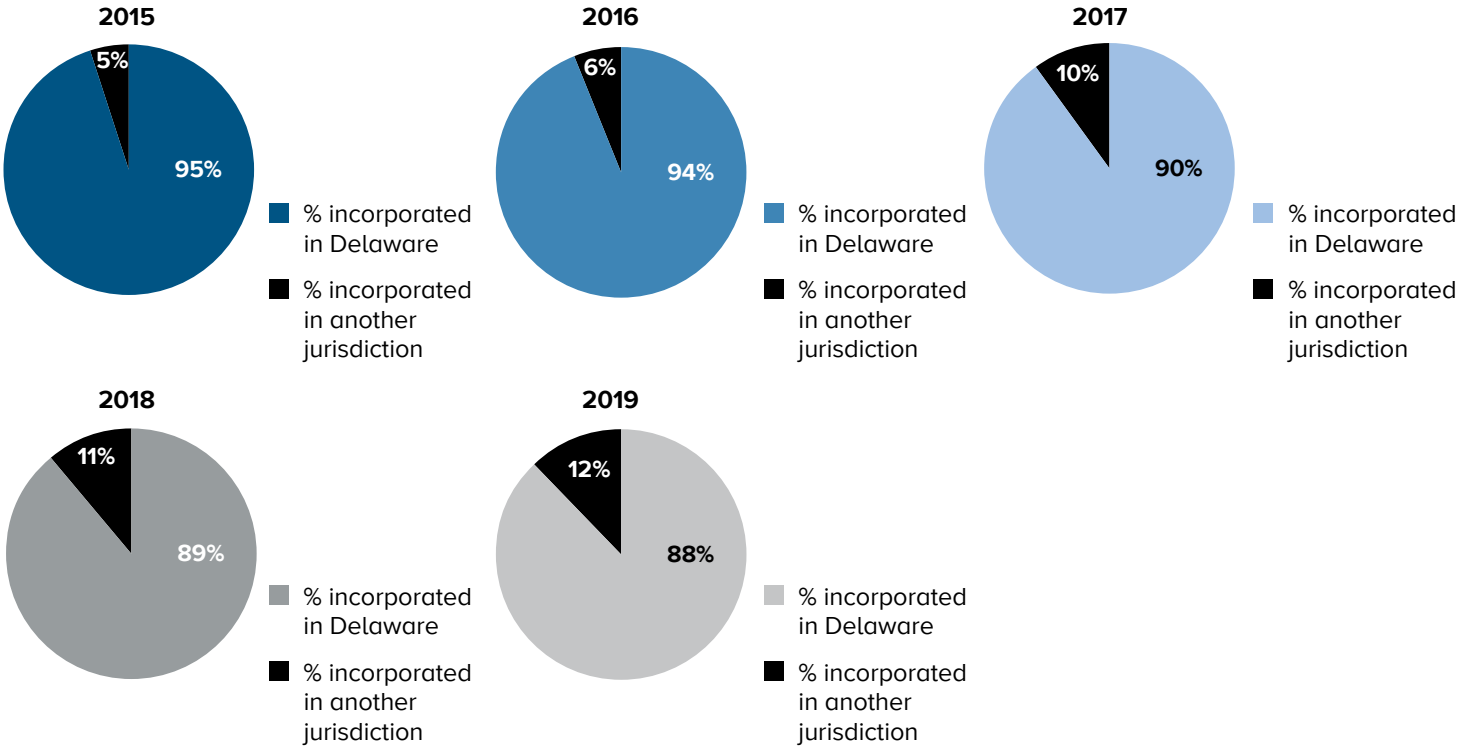
In order to evaluate the impact of the ISS policy and voting recommendations, we examined IPOs that were priced with a size of at least $100 million to analyze governance practices that we would expect to be considered problematic by ISS. Foreign private issuers, special purpose acquisition companies, master limited partnerships and real estate investment trusts were excluded. IPOs were roughly evenly split between the NYSE and Nasdaq.

Number of IPOs Surveyed



State of Incorporation

Although Delaware continues to be the most popular state of incorporation for IPO companies, the percentage of Delaware-domiciled corporations in 2019 again declined slightly compared to prior years.

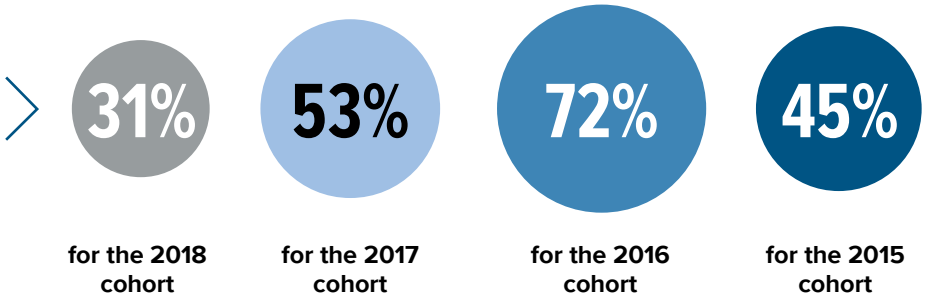


Controlled Companies

Of the 92 companies surveyed that have conducted their IPO in 2019

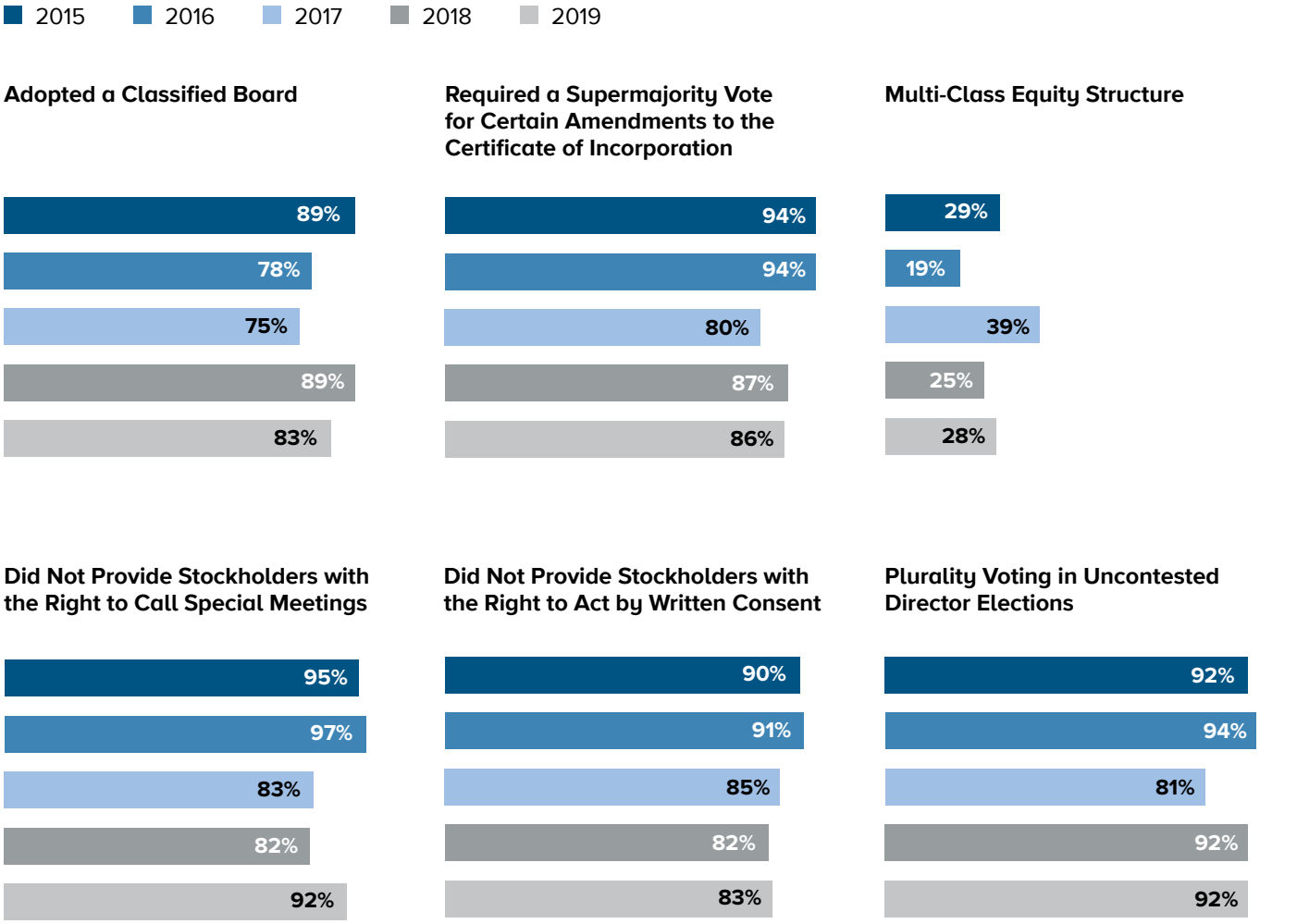
23%

remained controlled companies (after the IPO) (i.e., more than 50% of the voting power was owned by a single person or group)

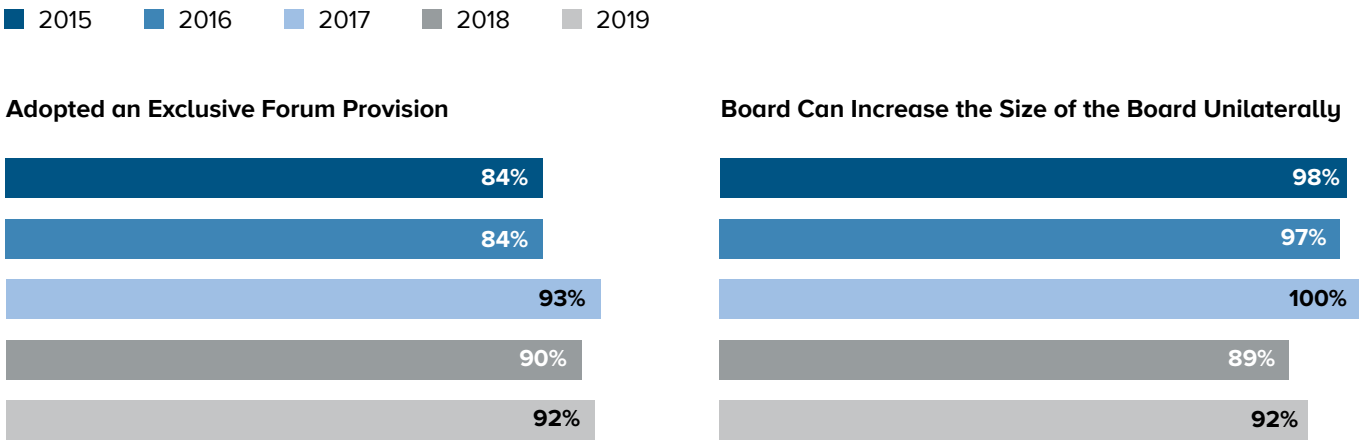


for the 2018 cohort | **for the 2017 cohort** | **for the 2016 cohort** | **for the 2015 cohort**

Governance Practices Adopted by IPO Companies



Consistent with the prior years' Surveys, many 2019 IPO companies adopted certain other corporate governance practices that may face ISS scrutiny in the future.



Conclusion

When the ISS voting policies on the corporate governance practices of newly public companies were initiated in 2015, we expected law firms and banks would initially advise IPO companies not to overreact to the then-new ISS policy as investors have traditionally been relatively insensitive to the specifics of corporate governance practices for newly public companies. Our Survey of IPO companies from 2015 through 2019 has shown that companies continue to adopt the corporate governance practices without regard to ISS voting policies. While boards of newly public companies should be aware of ISS voting recommendations and corporate governance trends, and consider whether certain governance practices would benefit the company, boards do not seem to be overly concerned about adopting policies simply to fit within ISS voting policies.

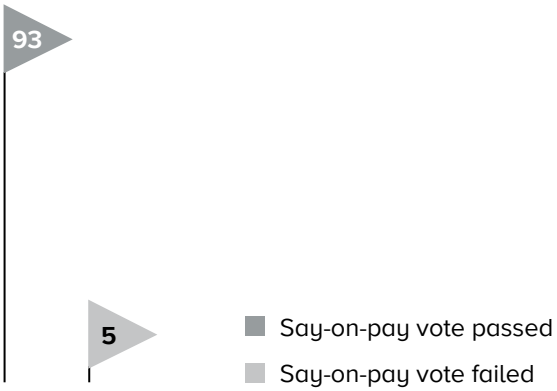
Say-On-Pay

2020 represented the ninth proxy season under the Dodd-Frank Act's mandatory say-on-pay regime. Although most Top 100 Companies continue to receive high approval rates, this year saw twice as many Top 100 Companies fail than last year.

Of the Top 100 Companies

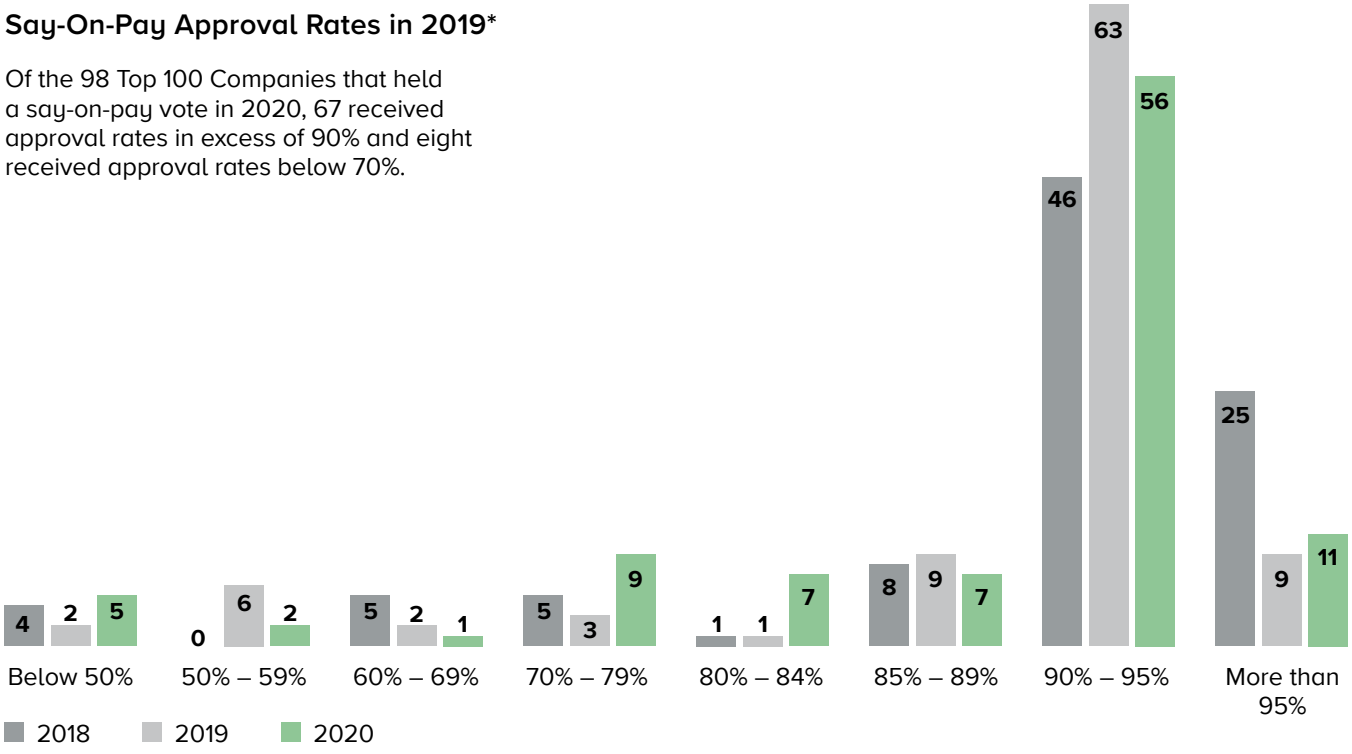
98

Held a say-on-pay vote in 2020



Say-On-Pay Approval Rates in 2019*

Of the 98 Top 100 Companies that held a say-on-pay vote in 2020, 67 received approval rates in excess of 90% and eight received approval rates below 70%.



* Approval rates are calculated on the ratio of votes "for" over the sum of votes cast plus abstentions, as reported in SEC filings. Ranges include fractional percentages, so, for example, the range of 50%–59% includes all voting results from 50.00% to 59.99%.

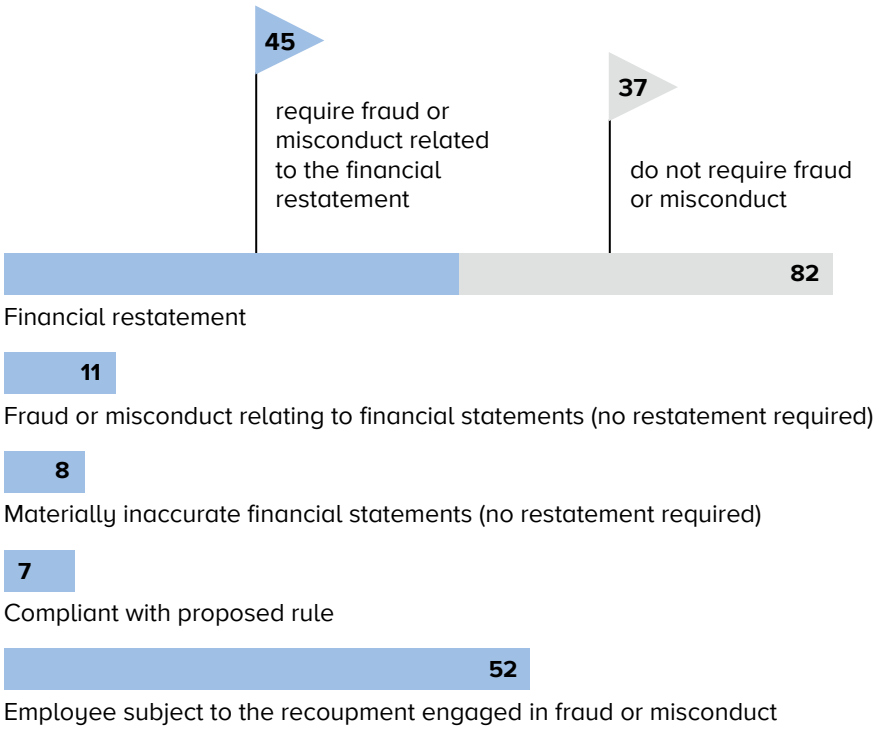
Clawback Policies

The SEC proposed rules implementing Section 954 of the Dodd-Frank Act in 2015, but will likely issue new proposed rules this Fall. Notwithstanding the lack of final rules, many Top 100 Companies voluntarily maintain clawback policies as a best practice. Their policies, however, are not uniform.

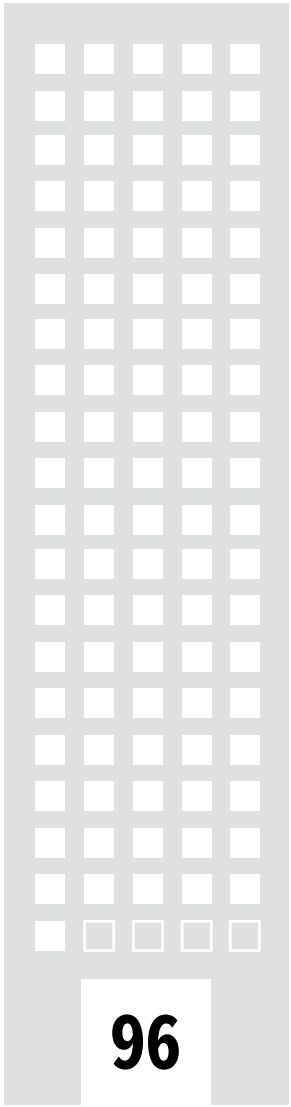
Triggers

The Dodd-Frank Act requires recoupment of compensation upon an accounting restatement due to material noncompliance with any financial reporting requirements. The SEC's proposed rules interpret material noncompliance to mean any error that is material to previously filed financial statements. The restatement need not result from fraud or misconduct by the issuer or any of its employees.

Triggers at the Top 100 Companies Include*



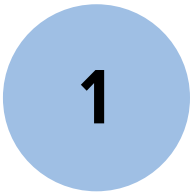
* The policies at 66 of the Top 100 Companies use multiple triggering events.



of the Top 100 Companies expressly disclose that they maintain a financial-related clawback policy

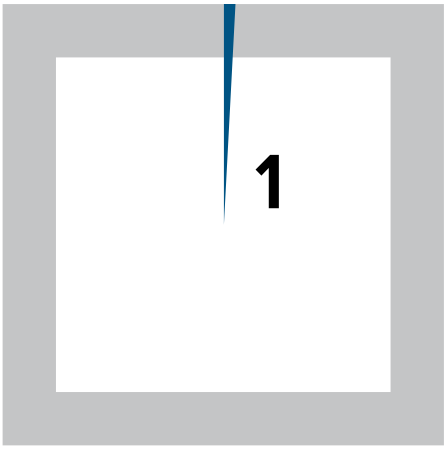
Covered Persons

The threshold issue is determining whose compensation is subject to a clawback.

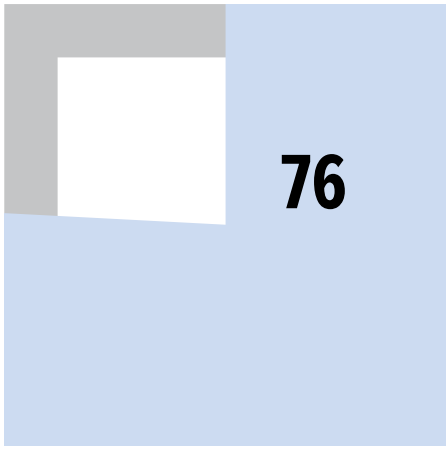


of the Top 100 Companies expressly discloses that the clawback policy applies to former employees or executives

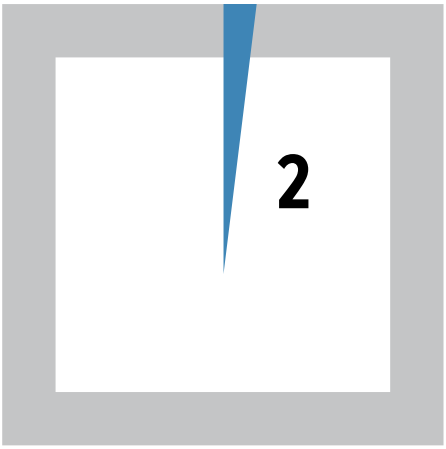
The following individuals are subject to the voluntary financial-related clawbacks at the Top 100 Companies



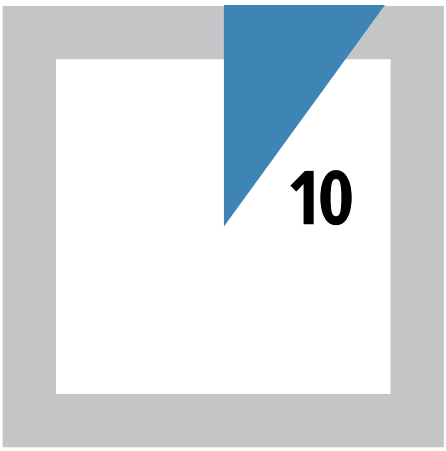
Named executive officers (NEOs) only



All executive officers



Section 16 officers only



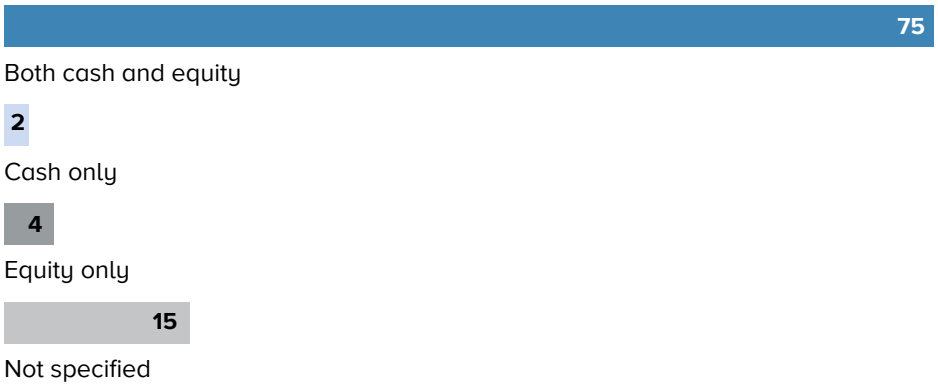
All employees (or all participants in the plans or programs subject to the clawback policy)

Not disclosed

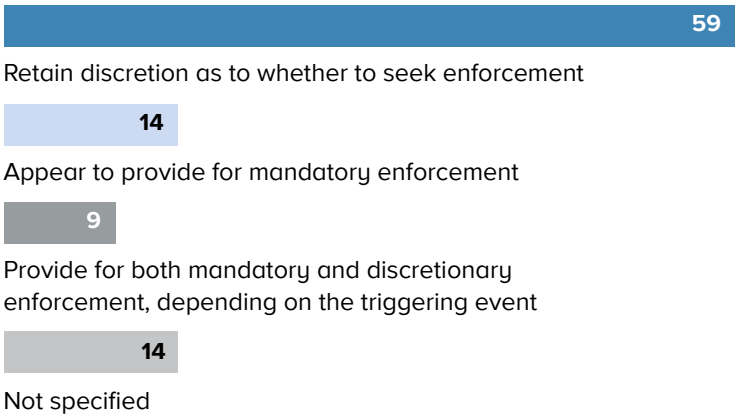
Compensation Subject to Clawback

The Dodd-Frank Act compliant clawback policies will require companies to recover "certain incentive-based compensation (including stock options)." The SEC's proposed rules define incentive-based compensation as including both cash and equity compensation, but time-vested awards are not covered. While voluntary clawback policies generally permit a company to recoup "incentive compensation," the forms of incentive compensation that may be recouped vary.

Of the 96 Top 100 Companies That Maintain a Clawback Policy, They may Recoup

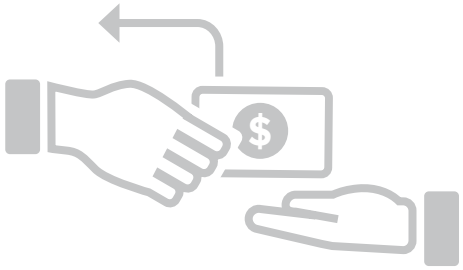


Of the 96 Top 100 Companies That Maintain a Clawback Policy



62

of the Top 100 Companies publicly disclose that they maintain a detrimental conduct clawback policy



Common Triggering Events for the Policies at the Top 100 Companies Include

19
Violation of restrictive covenants (e.g., noncompetes, nonsolicitation and confidentiality agreements)

14
Violation of law (including embezzlement, theft and bribery)

25
Violation of company policy (including code of conduct and code of ethics)

23
Acts resulting in reputational, financial or other harm to the company

16
Failure of risk management

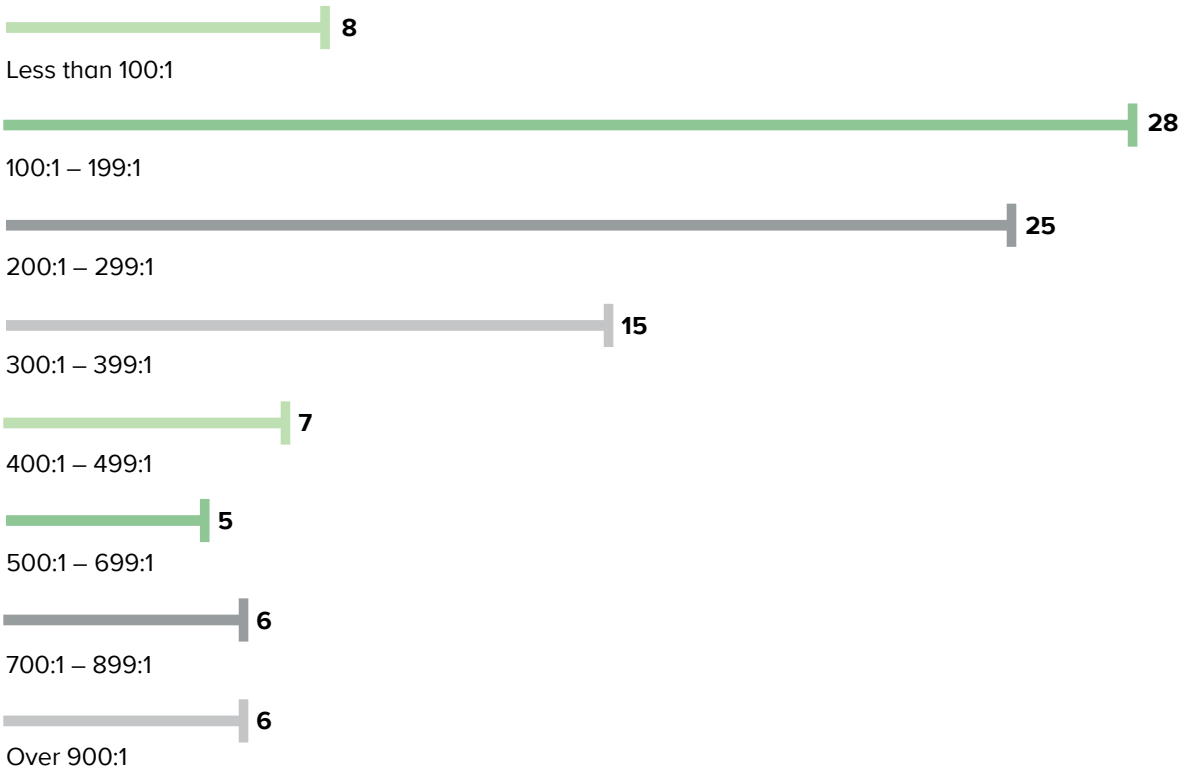
29
General fraud or misconduct

8
Termination for cause or misconduct

CEO Pay Ratio

2020 represented the third proxy season that companies were required to disclose the ratio of CEO pay to pay of the median employee.

Pay Ratios



The CEO pay ratio rules permit companies to use the same median employee for up to three years

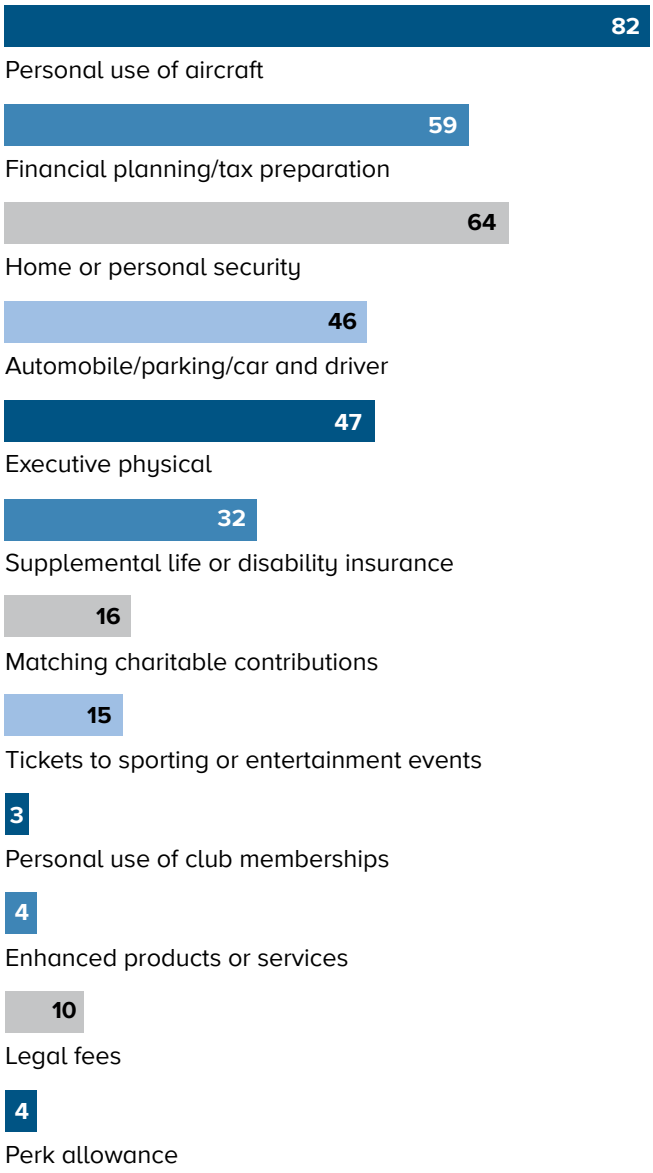
37

of the Top 100 Companies used the same median employee as the previous year. As a result, companies that have relied on the same median employee since year one will need to show a new median employee for the upcoming proxy season

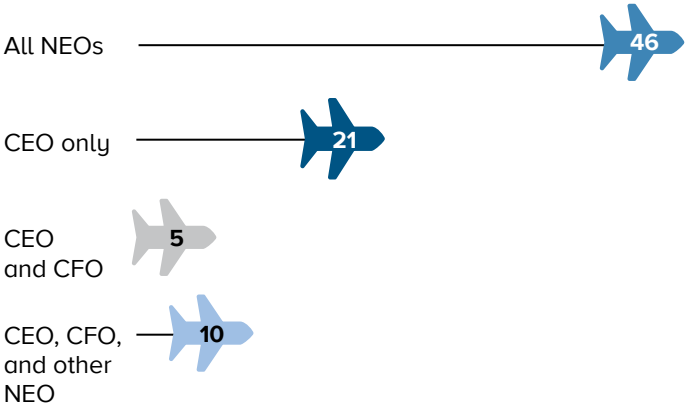
Executive Perquisites

94 of the Top 100 Companies provide executive perquisites

7 of the Top 100 Companies disclosed that they provide tax gross-ups on some or all perks provided to executives



Who is Entitled to Personal Use of Corporate Aircraft?



- 30 of the Top 100 Companies required executives to reimburse the company for all or a portion of their personal aircraft usage
- In many instances, personal usage is limited to availability and requires approval by the CEO

Although the types of perks provided each year has remained consistent, 2021 may show changes as a result of perks offered to executives working from home due to COVID-19

Golden Parachute Provisions

With the advent of say-on-pay and increased focus by institutional investors on executive compensation, golden parachute gross-up provisions have become all but obsolete at the Top 100 Companies. Many of the Top 100 Companies are implementing reduction provisions intended to protect executives from the excise tax.

Change in Control Excise Tax Provisions

Description of Golden Parachute Provisions Under the Code

Section 4999 of the Internal Revenue Code (the "Code") imposes a 20% excise tax on the amount of any "excess parachute payments" received by certain executives, and Section 280G of the Code disallows an employer deduction for those payments. Any gross-up payment made in connection with the excise tax will also be subject to the excise tax and will be non-deductible. If the aggregate present value of all parachute payments paid to an executive (including cash and accelerated equity awards) equals or exceeds three times the executive's base amount, then the executive will be considered to have received an excess parachute payment.

Excess Parachute Payment

Code Sections 280G and 4999 are triggered if all parachute payments equal or exceed three times the executive's base amount. The amount of the excess parachute payment that is not deductible under Section 280G, and subject to the excise tax under Section 4999, is any payment in excess of one times the executive's base amount.

Safe Harbor

The safe harbor is three times the executive's base amount, less one dollar. Many companies use a 2.99 multiple in making their calculations to avoid an inadvertent trigger.

Base Amount

An executive's base amount is the average of his or her compensation from the employer that was includible in his or her gross income for the most recent five calendar years ended prior to the year in which the change in control occurs.

Excise Tax Reduction Provisions

Companies are increasingly adopting measures to protect executives from the excise tax without providing tax gross-ups. The two most common measures include a "cut-back" provision and a "better-of" provision.

"Cut-Back" Provisions

Under a "cut-back" provision, the change in control payments are automatically reduced to the safe harbor amount (or, in many instances, 2.99 times the base amount) so that no excise tax applies.

3 **of the Top 100 Companies maintain a "cut-back" provision**

"Better-Of" Provisions

Under a "better-of" provision, employees will receive change in control payments equal to the greater of (1) the after-tax amount they would have received after the imposition of the Section 4999 excise tax and (2) the "cut-back" amount (i.e., the safe harbor).

44 **of the Top 100 Companies maintain a "better-of" provision**

Golden Parachute Excise Tax Gross-Ups

For the fifth year in a row, only a small number of companies provide some level of "golden parachute" excise tax gross-up protection.

2

of the Top 100 Companies provide a full or modified gross-up to one or more of their NEOs

At both of the companies, the gross-up is only with respect to legacy arrangements. There are no new gross-ups

Full Gross-Ups

3
companies

2018

2
companies

2019

Who is subject to the full gross-up?

CEO — **2**

Other NEO — **2**

Modified Gross-Up

Under a modified gross-up, payment is only made if the change in control payments exceed a specified amount over the safe harbor. For instance, a company may provide that it will only pay a gross-up if the aggregate amount of the change in control payments exceeds the safe harbor amount, generally by 10% or more. At some companies, if the change in control payments are below this percentage, they will be cut back to the safe harbor amount.

0

For the second year in a row, no Top 100 Company provides for a modified gross-up

Survey Methodology

We reviewed the corporate governance and compensation practices of 100 of the largest U.S. public, non-controlled companies that have equity securities listed on the NYSE or Nasdaq. These companies were selected based on a combination of their latest annual revenues and market capitalizations and are referred to as the "Top 100 Companies." We derived the data in this Survey from publicly available sources described below, that were available as of June 1, 2020 (except where otherwise noted).

Shearman & Sterling Would Like to Acknowledge the Following Individuals for Their Contributions to This Survey:

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Teri Tillman
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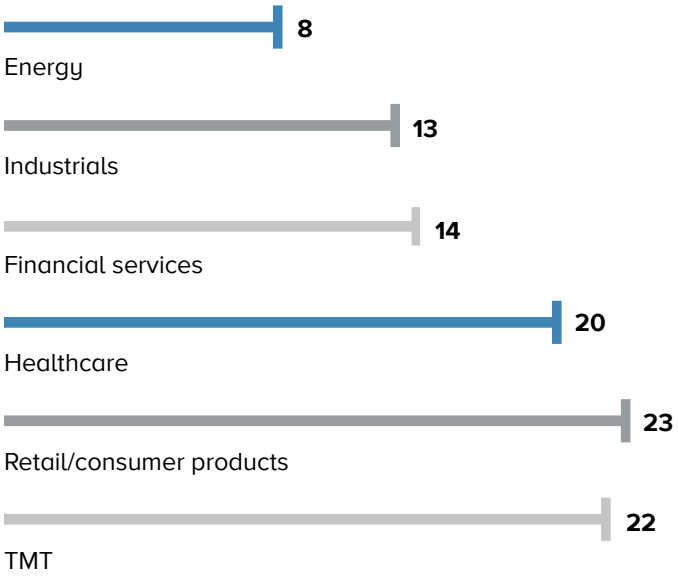
Jenny Xia
Catherine Zachry

Industries of Surveyed Companies



Surveyed Documents:

- ✓ **Annual Proxy Statements**
- ✓ **Company Charters and Bylaws**
- ✓ **Board Committee Charters**
- ✓ **Corporate Governance Guidelines**
- ✓ **Corporate Social Responsibility Reports and Websites**

Top 100 Companies Included in the 2020 Survey:

3M Company
Abbott Laboratories
Abbvie Inc.
Adobe Inc.
Alphabet Inc.
Altria Group, Inc.
Amazon.com, Inc.
American Express Company
American Tower Corporation
AmerisourceBergen Corporation
Amgen Inc.
Anthem, Inc.
Apple Inc.
AT&T Inc.
Bank of America Corporation
Berkshire Hathaway Inc.
BlackRock, Inc.
The Boeing Company
Bristol-Myers Squibb Company
Broadcom Inc.
Cardinal Health, Inc.
Caterpillar Inc.
Charter Communications, Inc.
Chevron Corporation
Cigna Corporation
Cisco Systems, Inc.
Citigroup Inc.
The Coca-Cola Company
Comcast Corporation
Costco Wholesale Corporation
CVS Health Corporation
Danaher Corporation
Deere & Company
Dell Technologies Inc.
Duke Energy Corporation
Eli Lilly and Company
Exxon Mobil Corporation
Facebook, Inc.
FedEx Corporation
Fidelity National Information Services, Inc.
Ford Motor Company
General Electric Company
General Motors Company
Gilead Sciences, Inc.
The Goldman Sachs Group, Inc.
HCA Healthcare, Inc.
The Home Depot, Inc.
Honeywell International Inc.
Humana Inc.
Intel Corporation
International Business Machines Corporation
Johnson & Johnson
JPMorgan Chase & Co.
The Kroger Co.
Lockheed Martin Corporation
Lowe's Companies, Inc.
Marathon Petroleum Corporation
Mastercard Incorporated
McDonald's Corporation
McKesson Corporation
Merck & Co., Inc.
MetLife, Inc.
Microsoft Corporation
Mondelēz International, Inc.
Morgan Stanley
Netflix, Inc.
NextEra Energy, Inc.
NIKE, Inc.
NVIDIA Corporation
Oracle Corporation
PayPal Holdings, Inc.
PepsiCo, Inc.
Pfizer Inc.
Philip Morris International Inc.
Phillips 66
The Proctor & Gamble Company
Prudential Financial, Inc.
QUALCOMM Incorporated
salesforce.com, inc.
The Southern Company
Starbucks Corporation
Stryker Corporation
Sysco Corporation
T-Mobile US, Inc.
Target Corporation
Tesla, Inc.
Texas Instruments Incorporated
Thermo Fisher Scientific Inc.
The TJX Companies, Inc.
Union Pacific Corporation
United Parcel Service, Inc.
United Technologies Corporation
UnitedHealth Group Incorporated
U.S. Bancorp
Valero Energy Corporation
Verizon Communications Inc.
Visa Inc.
Walmart Inc.
The Walt Disney Company
Wells Fargo & Company

7 companies are new to the 2020 Survey.

76 of the Top 100 Companies are listed on the NYSE, and 24 of the Top 100 Companies are listed on Nasdaq.

Creative direction and design: Odgis + Company

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