

# *2019 Proxy Season Review and Outlook for 2020*

OCTOBER 17, 2019

WILMERHALE® 

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## *Speakers*



*2019 Proxy Season  
Review*

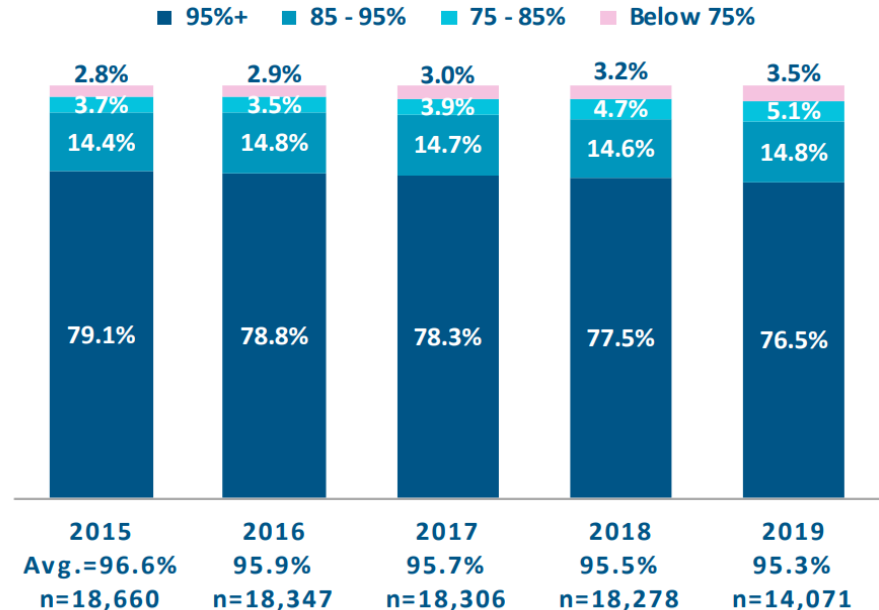
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# *Election of Directors*

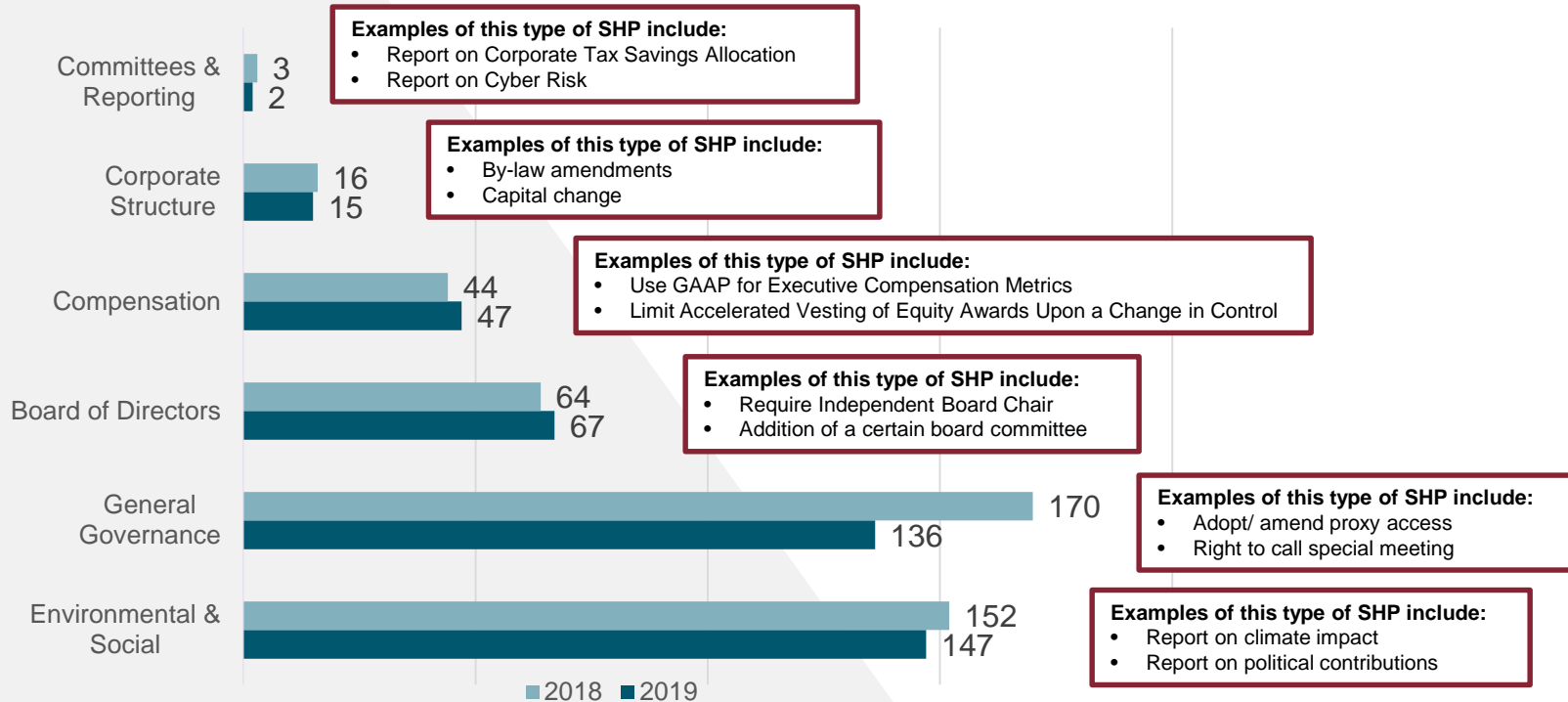
The board related topics that appear to have the most impact on decreased director election support are:

- Overboarding – Investors policy updates becoming stricter on the number of boards directors sit on.
- Composition – Focus on board composition continues with respect to diversity, skill sets, and other factors that ensures the board is composed appropriately.
- Responsiveness and Accountability – Boards expected to be responsive to shareholder votes and specific investor concerns.

## BREAKDOWN OF DIRECTOR ELECTION RESULTS

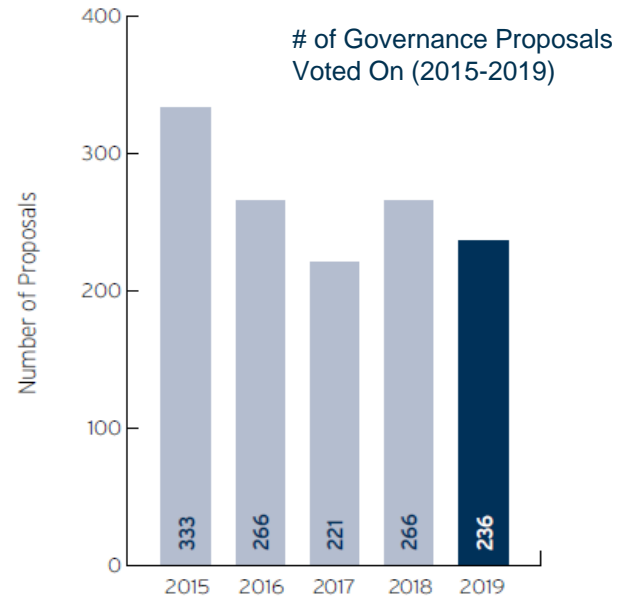
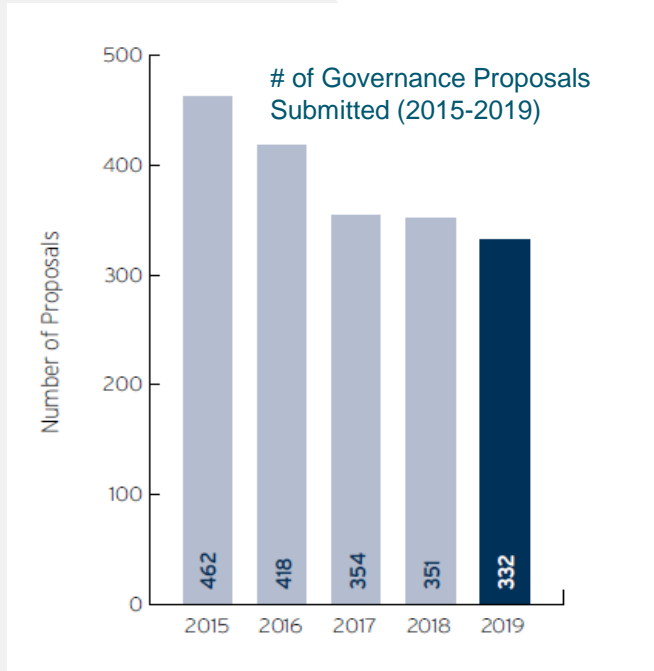


# Shareholder Proposals by Category

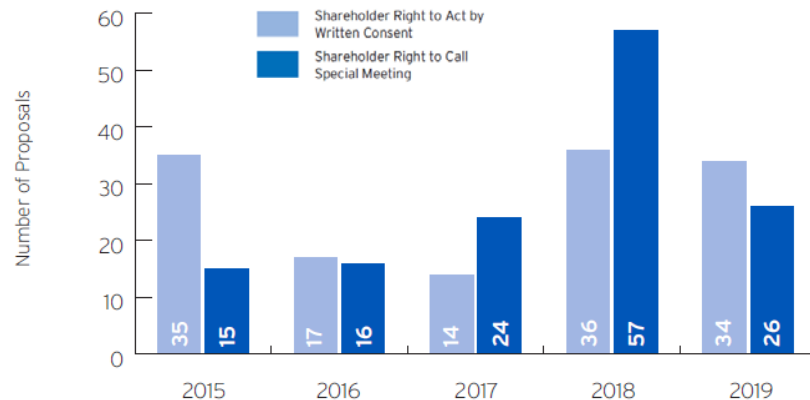
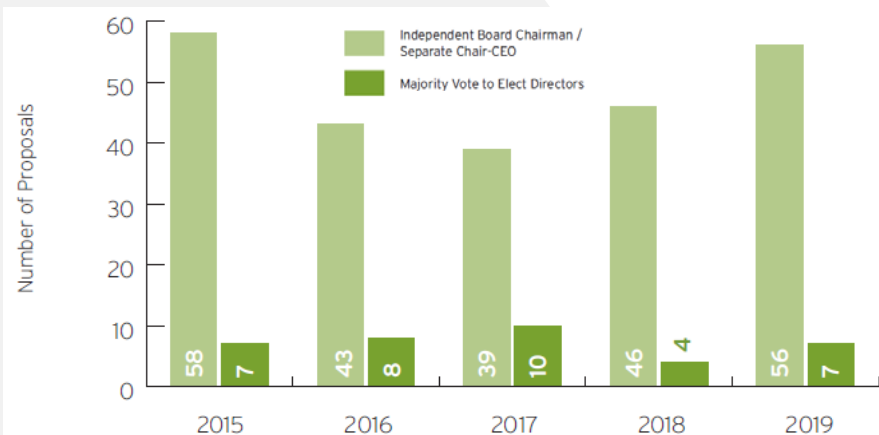


Data gathered from annual meetings occurring July 1 – June 15 for related year  
 Data gathered from Proxy Insight Ltd.

# Shareholder Proposals – Governance



# Shareholder Proposals – Board Related / Shareholder Rights



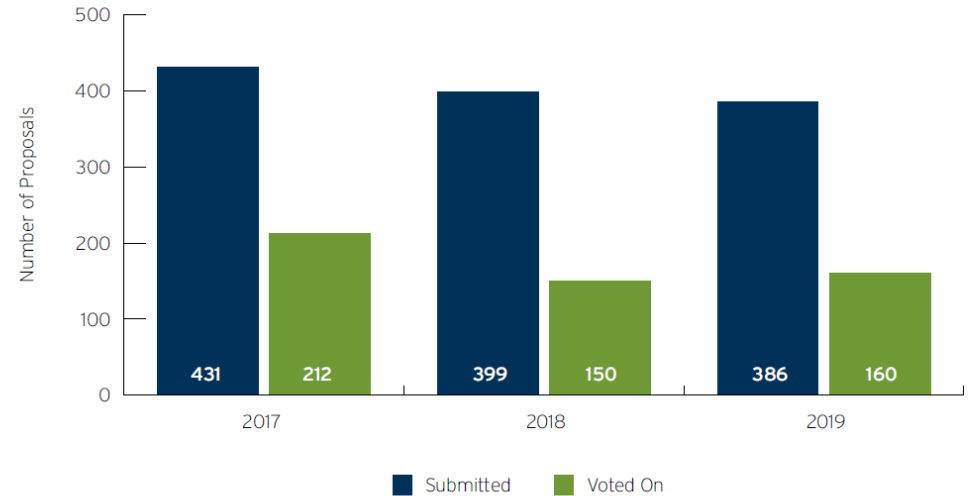
	Average % of Shareholder Support – Based on Votes Cast				
	2015	2016	2017	2018	2019
Independent Board Chairman / Separate Chair-CEO	30%	29%	30%	32%	29%
Majority Vote to Elect Directors	66%	51%	54%	62%	78%

	Average % of Shareholder Support – Based on Votes Cast				
	2015	2016	2017	2018	2019
Shareholder Right to Act by Written Consent	39%	41%	45%	42%	39%
Shareholder Right to Call Special Meeting	43%	43%	42%	40%	43%

# Shareholder Proposals – Environmental and Social

## Examples of E&S Proposals

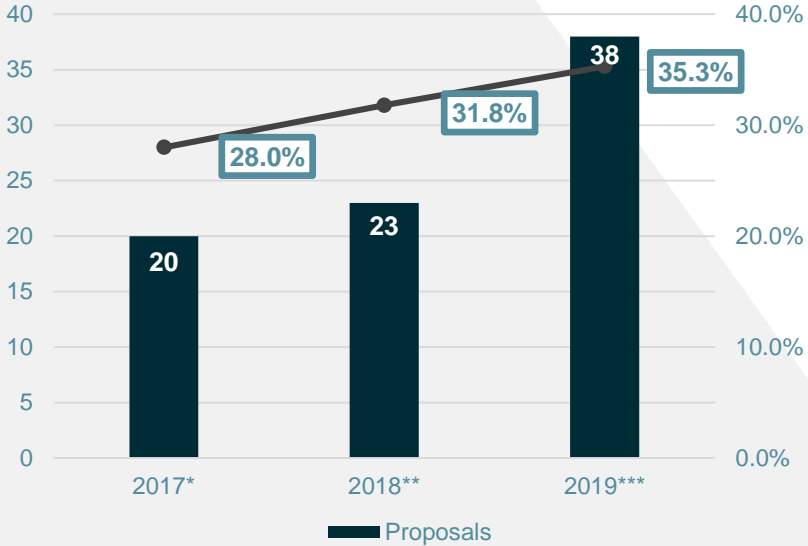
- Board Diversity
- Employment Diversity
- Lobbying and Political Contributions
- Gender Pay Gap
- Environmental / GHG / Climate Change / Sustainability Reporting
- Public Health and Welfare
- Human Rights
- Sexual Harassment



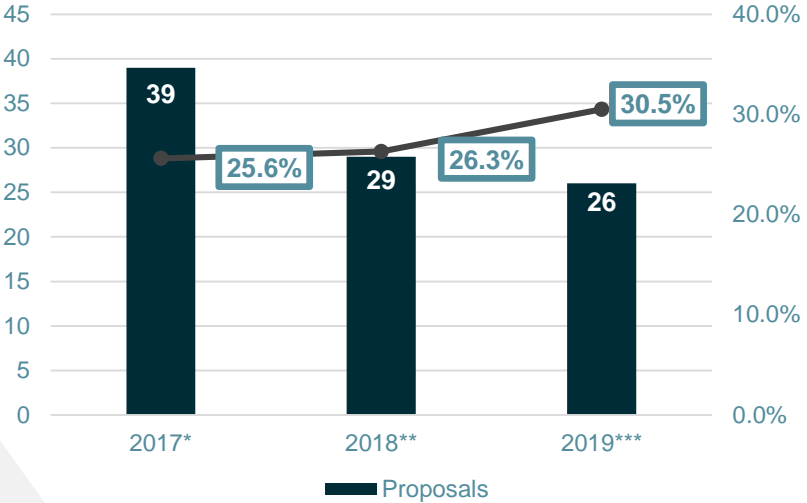


# Shareholder Proposals – Environmental and Social

### Report on Political Contributions



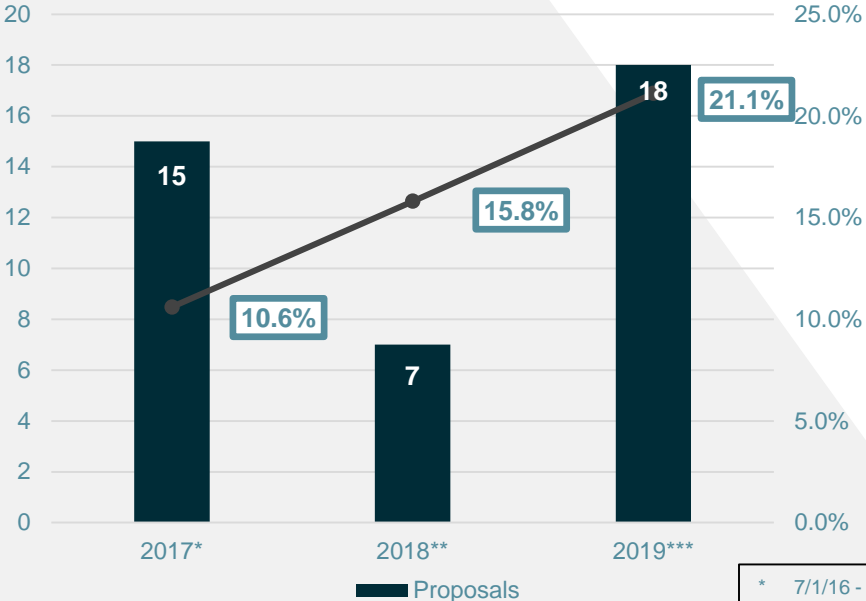
### Report on Lobbying Payments and Policy



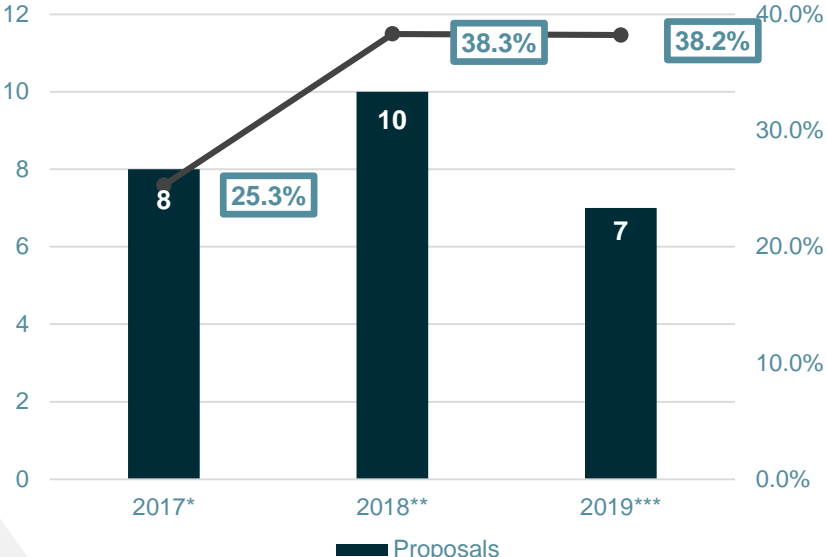
\* 7/1/16 - 6/30/17  
\*\* 7/1/17 - 6/30/18  
\*\*\* 7/1/18 - 6/30/19

# Shareholder Proposals – Environmental and Social

Report on Gender Pay Gap and Pay Disparity

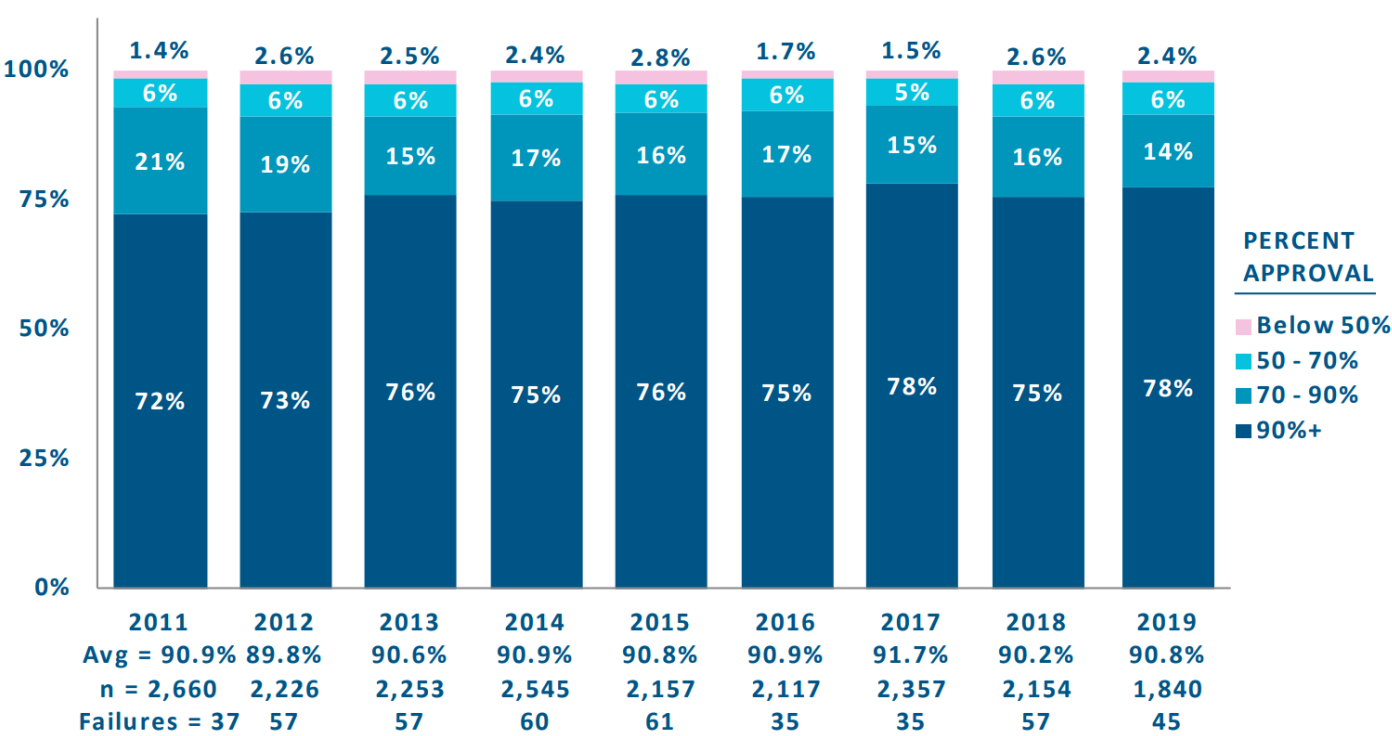


Prepare Employment Diversity Report / Disclose EEO Data



\* 7/1/16 - 6/30/17  
 \*\* 7/1/17 - 6/30/18  
 \*\*\* 7/1/18 - 6/30/19

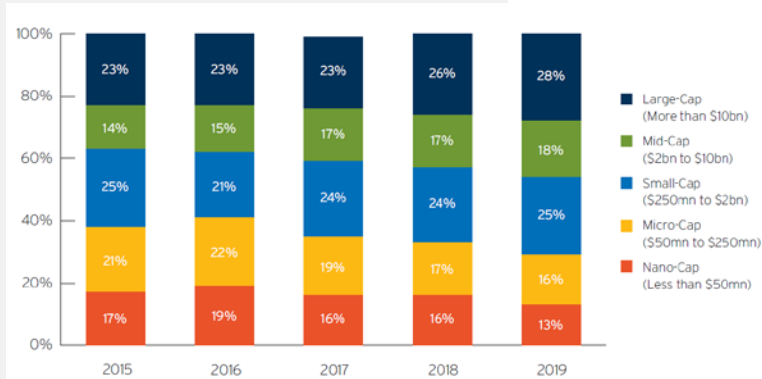
# Say on Pay



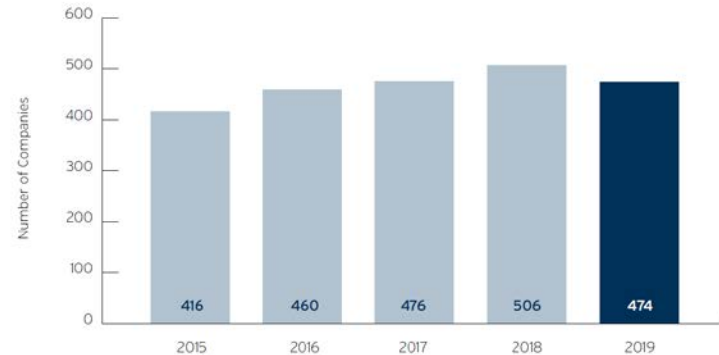
Source: Semler Brossy, June 2019

# U.S. Activism Trends 2015 – 2019

**Market Caps of U.S. Companies Publicly Subjected to Activist Demands 2015 to 2019**



**Number of U.S. Companies Publicly Subjected to Activist Demands 2015 to 2019**





*Governance  
Developments*

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# Activism Trends – 1H 2019

M&A activism was prevalent in the U.S., while traditional activism increasingly took place behind the scenes with activists taking a “constructivist” tone to drive change at targets

## M&A

- > Activists strongly asserted opposition to M&A transactions with a record 18 U.S. companies receiving push back to announced M&A
- > Investor appetite to drive targets to undertake M&A declined given the common view that U.S. equities are highly valued

## Proxy Fights

- > Contested meetings and settlements declined in the first half of 2019 as many activists turned to a more behind the scenes approach
- > Disagreements are increasingly being kept out of the spotlight as companies faced activists who themselves were seeking to portray themselves publicly as “constructivists”

## By the Numbers<sup>(1)</sup>

	1H 2018	1H 2019	
Activist Demands Opposing M&A	16	18	↑
Activist Demands Pushing for M&A	50	37	↓
Contested Vote Meetings	16	6	↓
Seats Won by Activists at Contested Votes	27	3	↓
Activist Settlements	104	72	↓
Seats Won by Activists via Settlement	170	129	↓

## 2018 ACTIVISM TRENDS CONTINUE

Growth of Global Activism	Activists Play the Role of Constructivist	Activists Embrace ESG
<ul style="list-style-type: none"> <li>&gt; Many prominent situations took place overseas, led by Third Point (Nestlé and Sony), Elliott (Telecom Italia and Hyundai) and Starboard (Mellanox)</li> <li>&gt; Elliott's presence is registered worldwide, with marquee targets including Pernod Ricard, TIM, and ThyssenKrupp</li> </ul>	<ul style="list-style-type: none"> <li>&gt; Activists have sought to shed the potentially negative connotations of their moniker by adopting the label and approach of “constructivists”</li> <li>&gt; Examples include situations led by Value Act (Citigroup), Trian (P&amp;G), Cevian (Nordea Bank), Third Point (Nestlé), Elliott (SAP) and Starboard (Papa John's)</li> </ul>	<ul style="list-style-type: none"> <li>&gt; Third Point systemized its governance practice, including data analytics on CEO pay with a focus on using financial returns metrics rather than TSR, EPS, or revenue-oriented metrics</li> <li>&gt; Board gender diversity was a key factor in recent campaigns and will become increasingly integrated into activism situations</li> </ul>

(1) Source: Activist Insight, “Shareholder Activism in H1 2019,” July 2019

# Active Managers Deploy Traditional Activist Strategies

Active managers have turned to traditional activist tactics to drive their agendas - airing disagreements on strategy, performance, and management in public that were previously kept behind closed doors

## Proxy Fight Campaigns

NEUBERGER BERMAN

VERINT

- > Neuberger Berman nominated three directors to the Verint Systems Board at its 2019 annual meeting in an effort to push the company to clarify its strategy and corporate structure
- > Neuberger Berman withdrew its slate after Verint agreed to enhance its financial reporting and capital allocation practices, as well as consult Neuberger Berman on its Board refreshment efforts (including the addition of a new director)

Fidelity INTERNATIONAL

ESSILORLUXOTTICA

- > Fidelity International led a large group of major institutional investors, including Legal & General and Baillie Gifford, in supporting the election of two new directors to EssilorLuxottica's board at its 2019 annual meeting
- > Ultimately, EssilorLuxottica's shareholders rejected the election of the two proposed directors. However, the Company acknowledged that it perhaps had "not shown the best of itself" with the integration of the two companies and, to address concerns about a leadership stalemate, the company granted the co-CEOs more power to better enable them to work together

## M&A Campaigns

STARBOARD VALUE

WELLINGTON MANAGEMENT

Bristol-Myers Squibb

Celgene

- > Starboard and Wellington publicly opposed Bristol-Myers Squibb's (BMY) proposed acquisition of Celgene
- > Starboard nominated five director candidates for election to BMY's board
- > Starboard backed down after ISS and Glass Lewis recommended in favor of the deal, and BMY shareholders approved the acquisition

ICAHN ENTERPRISES L.P.

T.Rowe Price

OXY

Anadarko Petroleum Corporation

- > Carl Icahn and T. Rowe Price publicly criticized Occidental's (OXY) decision to purchase Anadarko
- > To increase the cash portion of its bid, OXY issued preferred stock to Warren Buffett, a move some shareholders saw as an effort to avoid a shareholder vote
- > Icahn filed a lawsuit (which remains ongoing) and launched a proxy fight to replace four OXY directors and amend the bylaws through a consent solicitation

# Activated Employees Seek Corporate Change

Employees, particularly in the tech sector, are increasingly pushing for direct change at their employers by speaking out online, staging walkouts and submitting shareholder proposals

Employee Activists Are Speaking Up About Corporate Practices and Are Receiving Political Support and Heightened Media Attention

Alphabet

**November 2018:** Employee walkout over handling of sexual harassment cases and subsequent shareholder proposals on non-disclosure agreements in harassment and discrimination cases  
– Alphabet ultimately ended “forced arbitration” practices and was followed by Facebook, Airbnb, and eBay

amazon

**May 2019:** Employee-sponsored shareholder proposal on climate change voted at AGM; employee strike in four countries to protest working conditions at fulfillment centers

Walmart

**June 2019:** Sen. Bernie Sanders (I-Vt.) spoke as a proxy at Walmart’s annual meeting, proposing employee board representation

## By the Numbers

20,000

Alphabet employees that participated in a walkout to protest the firm’s handling of sexual harassment<sup>(2)</sup>

8,111

Number of Amazon employees that signed a climate plan shareholder proposal<sup>(1)</sup>

40%

Employee board representation in proposed legislation by Sen. Elizabeth Warren (D-Mass.)<sup>(3)</sup>

What’s Driving This Change



Generational shifts about the roles of employees and corporations in society



Growing influence of social media



Ability to find common cause with SRI and other similarly-situated investors



Employees have stock holdings



Tight labor market

## Takeaway

- ✓ The ability of workers to find common cause with certain investors, and effectuate sophisticated campaigns via traditional and social media, presents both a substantial departure from years past and new challenges for management teams and boards

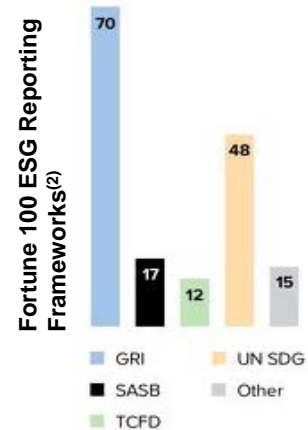
(1) Source: Medium, “Open letter to Jeff Bezos and the Amazon Board of Directors,” April 2019  
(2) Source: New York Times, “Employee Activism Is Alive in Tech. It Stops Short of Organizing Unions,” July 2019  
(3) Source: Office of Senator Elizabeth Warren, “Warren Introduces Accountable Capitalism Act,” August 2018



# Environmental and Social Considerations Have a Growing Role in Investors' Voting, Engagement and Capital Allocation Determinations

Investors' interests in E&S matters are wide-ranging and include:

- Human capital management
- ESG-focused executive comp metrics
- Climate risk
- Diversity, expanding beyond gender and out of the boardroom



## Diversity by the Numbers

**8%**  
*decline*

Directors viewing diversity as “very important” declined from 46% to 38% from 2018 to 2019<sup>(1)</sup>

**56**

Companies in the S&P 500 recently targeted by the NYC Comptroller’s Boardroom Accountability Project 3.0

**45%**

Russell 3000 new board positions filled by women in 2019<sup>(3)</sup>

(1) <https://www.pwc.com/us/en/services/governance-insights-center/library/annual-corporate-directors-survey.html>

(2) <http://digital.shearman.com/i/1162884-2019-corporate-governance-executive-compensation-survey>

(3) ISS’s U.S. Board Diversity Trends in 2019 [https://www.issgovernance.com/file/publications/ISS\\_US\\_Board\\_Diversity\\_Trends\\_in\\_2019.pdf](https://www.issgovernance.com/file/publications/ISS_US_Board_Diversity_Trends_in_2019.pdf)

# Shareholder Focus on Public Health Matters Continues

- Evolving views on topics such as gun control and the opioid epidemic will continue to shape the shareholder proposal landscape

Company	Ticker	Proposal Name	Investor									
			Vanguard Group, Inc.	BlackRock	SSGA Funds Management, Inc. (State Street)	Fidelity Management & Research Co. (FMR)	Capital Group (Multi-Managed)	T. Rowe Price Associates, Inc.	BNY Mellon	Legal & General Investment Management	Wellington Management Company	Northern Trust Investments
Altria Group	MO	Reduce Nicotine Levels in Tobacco Products	•	•	•	•	•	•	•	•	•	•
Merck & Company Inc.	MRK	Report on Integrating Risks Related to Drug Pricing into Senior Executive Compensation	•	•	•	•	•	•	•	•	•	•
American Outdoor Brands Corp.	AOBC	Report on Gun Violence	•	•	•			•	•			•
Duke Energy Corporation	DUK	Report on the Public Health Risk of Duquesne's Coal Use	•	•	•	•	•	•	•	•	•	•
Mallinckrodt plc	MNK	Report on Governance Measures Implemented Related to Opioids	•	•	•	•	•	•	•	•	•	•
Rite Aid Corporation	RAD	Shareholder Proposal Regarding Report on Response to Opioid Epidemic	•	•	•	•	•	•	•			•
Johnson & Johnson	JNJ	Report on Integrating Risks Related to Drug Pricing into Senior Executive Compensation	•	•	•	•	•	•	•	•	•	•
Exxon Mobil Corporation	XOM	Report on Risks of Petrochemical Operations in Flood Prone Areas	•	•	•	•	•	•	•	•	•	•
AbbVie Inc.	ABBV	Report on Drug Pricing	•	•	•	•	•	•	•	•	•	•
Verizon Communications Inc.	VZ	Report on Online Child Exploitation	•	•	•	•	•	•	•	•	•	•
Coca-Cola Company (The)	KO	Report on the Health Impacts and Risks of Sugar in the Company's Products	•	•	•	•	•	•	•	•	•	•
Vertex Pharmaceuticals Incorporated	VRTX	Report on Integrating Risks Related to Drug Pricing into Senior Executive Compensation	•	•	•	•	•	•	•	•	•	•
PepsiCo Inc.	PEP	Report on Pesticide Management	•	•	•	•	•	•	•	•	•	•
Walgreens Boots Alliance Inc	WBA	Report on Governance Measures Implemented Related to Opioids	•	•	•	•	•	•	•	•	•	•
Darden Restaurants Inc.	DRI	Assess Feasibility of Adopting a Policy to Phase Out Use of Antibiotics	•	•	•	•	•	•	•	•	•	•
Pfizer Inc.	PFE	Report on Integrating Risks Related to Drug Pricing into Senior Executive Compensation	•	•	•	•	•	•	•	•	•	•
DuPont de Nemours, Inc.	DD	Report on Public Health Risks of Petrochemical Operations in Flood Prone Areas	•	•	•	•	•	•	•	•	•	•

• For • Against • Abstain • Split □ Did Not Vote

# *Shareholder Proposals – New Process*

- **Staff Role in Process:** On September 6, 2019, the Division of Corporation Finance announced changes in its process for administering shareholder proposals:
  - Staff will “continue to actively monitor correspondence and provide informal guidance to companies and proponents as appropriate”;
  - Instead of issuing a written response letter, the staff may respond orally; written responses will be reserved for instances where the staff “believes doing so would provide value, such as more broadly applicable guidance about complying with Rule 14a-8”; and
  - The staff may respond that it concurs, disagrees or declines to state a view. The staff states that “interested parties should not interpret [the staff’s declining to take a view] as indicating that the proposal must be included” in a company’s proxy statement.

# *Shareholder Proposal Developments – Staff Guidance*

- **Board Analysis:** Staff Legal Bulletin No. 14I (Nov. 2017) provided that companies could bolster certain types of Rule 14a-8 no-action requests with a discussion of the board’s analysis of whether a proposal
  - Is “otherwise significantly related” to a company’s business, in the case of a “relevance” no-action request under Rule 14a-8(i)(5); or
  - Focuses on sufficiently significant policy issues with a nexus to the company’s business operations, in the case of an “ordinary business” no-action request under Rule 14a-8(i)(7).
- In October 2018, the SEC staff published Staff Legal Bulletin No. 14J (SLB 14J), which reiterated that a well-developed discussion of the board’s analysis can assist the SEC staff in evaluating certain no-action requests
  - Virtually all attempts to utilize board analysis have been unsuccessful
  - Nonetheless, the staff continues to encourage companies to use

# *Shareholder Proposal Developments – Staff Guidance*

- **Micromanagement:** SLB 14J explains that the policy underlying the ordinary business exception rests on both the proposal’s subject matter and whether it micromanages a company
  - A proposal may be excludable under micromanagement, even with a proper subject matter, if it “probe[s] too deeply into matters of a complex nature” when it involves “intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies”
  - Saw expanded success with micromanagement arguments in 2018 and 2019 proxy seasons
  - Sensitivity among environmental proponents – NYC Comptroller lawsuit to enjoin TransDigm Group from soliciting proxies without including a GHG proposal in 2019 proxy season

# *Shareholder Proposals – Exempt Solicitations*

- Increased use by shareholder proponents over past two seasons of **Notices of Exempt Solicitations** under Exchange Act Rule 14a-6(g)
  - Rule 14a-6(g) requires a person who owns more than \$5 million of a company's stock and who conducts an exempt solicitation of the company's shareholders to file all written materials on EDGAR (tagged as PX14A6G)
  - These voluntary notices by shareholders who do not meet the \$5 million threshold caused confusion among shareholders and raised concern about abuses
  - In response, the SEC Staff issued two new CDIs in July 2018 specifying certain requirements for voluntary filings, including disclosure that the filing is made on a voluntary basis

# *Investors' Stewardship Activities Highlight the Importance of Engagement for Issuers*

- Many investors prefer to use engagement as the primary lever to express views
- Companies' engagement histories are a key factor in decision-making processes when voting at shareholder meetings
- Engagement and voting on E&S topics is focused on the long-term shareholder value implications of these matters
- Board accountability and board composition are key areas of focus across investors

# *Stewardship Has Come Under the Microscope*

- The voting responsibility of investors, as well as how voting aligns with stated policy, are being scrutinized by regulators, other shareholders and the PRI
- It remains to be seen if and how this scrutiny will impact investors' stewardship activities in upcoming proxy seasons



# *Director Overboarding*

- Continues to be a concern in recruiting new directors
- Proxy Advisory Firm Policies
  - ISS will generally recommend against individual directors who sit on more than five public company boards in total or are CEOs of public companies and sit on the boards of more than two public companies besides their own (withhold recommendations only at their outside boards)
  - Glass Lewis will generally recommend against individual directors who sit on more than five public company boards in total or serve as an executive officer of any public company while serving on more than two public company boards in total
  - Many investors now have limitations that are stricter than the ISS and GL standards, including Vanguard and BlackRock where the total limit for outside directors is now four boards and two for the CEO

# Business Roundtable Statement on Corporate Purpose

## BRT Purpose Statement

- > Statement redefines the “purpose of a corporation” to promote **“an economy that serves all Americans”** by fulfilling commitments to stakeholders such as customers and employees along with shareholders, rather than to solely seek to deliver long-term value to shareholders
- > Signed by 181 public and private company CEOs ranging from Fortune 100 companies to large private consulting firms and large institutional investors
- > Sentiment of statement is in line with ideas previously expressed by BlackRock, whose CEO discussed the concept of purpose and its link with profit in his last two annual letters

## Council of Institutional Investors Response

*CII is an association of U.S. asset owners, primarily pension funds, state and local entities, with combined assets of \$4 trillion and asset managers with more than \$35 trillion in assets under management.*

- > Issued a statement in response to the BRT, noting that **“accountability to everyone means accountability to no one”** and registering that the BRT’s statement places shareholders last among corporate obligations
- > CII provided a redline mark-up of the BRT statement to illustrate alternative framing
  - > Edits are intended to illustrate how CII believes the BRT could have used this letter to reinforce that idea that commitments to stakeholders are part of generating long-term value for shareholders

August 26, 2019

What language would CII have supported?

*The text below marks up the Business Roundtable “Statement on the Purpose of a Corporation” in a manner that CII would have supported.*

Americans deserve an economy that allows each person to succeed through hard work and creativity and to lead a life of meaning and dignity. We believe the free-market system is the best means of generating good jobs, a strong and sustainable economy, innovation, a healthy environment and economic opportunity for all.

Businesses play a vital role in the economy by creating jobs, fostering innovation and providing essential goods and services. Businesses make and sell consumer products; manufacture equipment and vehicles; support the national defense; grow and produce food; provide health care; generate and deliver energy; and offer financial, communications and other services that underpin economic growth.

While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders. **As part of generating long-term value to shareholders, we commit to:**

- Delivering value to our customers. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations.
- Investing in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world. We foster diversity and inclusion, dignity and respect.
- Dealing fairly and ethically with our suppliers. We are dedicated to serving as good partners to the other companies, large and small, that help us meet our missions.
- Supporting the communities in which we work. We respect the people in our communities and protect the environment by embracing sustainable practices across our businesses.
- **Generating long-term value for shareholders, who provide the capital that allows companies to invest, grow, and innovate. We are committed to transparency and effective engagement with shareholders.**

Each of our stakeholders is essential. We commit to **deliver value to all of them, a sharper understanding of how they contribute to long-term shareholder value, and to sound business decisions enlightened by that understanding**, for the future success of our companies, our communities and our country.

<sup>1</sup> From CII *Policy on Corporate Governance*.

Section 1.4: “Corporate governance structures and practices should protect and enhance a company’s accountability to its shareholders, and ensure that they are treated equally. An action should not be taken if its purpose is to reduce accountability to shareholders.”

Section 1.6: “CII believes companies should adhere to responsible business practices and practice good corporate citizenship. Promotion, adoption and effective implementation of guidelines for the responsible conduct of business and business relationships are consistent with the fiduciary responsibility of protecting long-term investment interests.”

<sup>2</sup> CII also believes that an important “stakeholder” element is fair treatment for holders of bonds and other corporate securities that have only limited or no voting rights, which BRT did not seek to address in this statement.



# *Disclosure*

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# *2019 Form 10-K*

## **What's New**

- Inline XBRL/Cover page tagging (for LAFs)
- FAST Act Modernization and Simplification of Regulation S-K
  - Cover page changes
  - Exhibits and confidential treatment
  - Description of properties
  - Risk factors
  - MD&A
  - Incorporation by reference

## **Other Focus Areas**

- Risk factors
  - Brexit, LIBOR phaseout and cybersecurity
  - Scope of exclusive forum provision
  - Recent enforcement cases
- Auditor report – CAMs disclosure
- Proposed amendments to Reg. S-K to modernize the description of business, legal proceedings and risk factors disclosures

# *Inline XBRL and Cover Page Tagging*

- Phase-in compliance schedule for Inline XBRL and cover page tagging is as follows:

<b>Filer Type</b>	<b>Compliance Date</b>
Large Accelerated filers that prepare financial statements in accordance with U.S. GAAP	Fiscal period ending on or after June 15, 2019
Accelerated filers that prepare financial statements in accordance with U.S. GAAP	Fiscal period ending on or after June 15, 2020
All other filers	Fiscal period ending on or after June 15, 2021

- Companies are required to use Inline XBRL beginning with their first Form 10-Q for a fiscal period ending on or after the applicable compliance date
- When an interactive data file is submitted using Inline XBRL, the exhibit index should include the word “Inline” in the description for any such exhibit
- All cover page data must be tagged in Inline XBRL and a new exhibit, Cover Page Interactive Data File, is required

# *Cover Page Changes*

- Include the trading symbol for each class of registered securities
- No longer required to include the Section 16 reporting compliance checkbox

# *Exhibits and Confidential Treatment*

- Companies may redact from exhibits filed under S-K Item 601(b)(2) or (b)(10) without submitting a confidential treatment request (CTR) if the redacted provisions are both (x) not material and (y) would likely cause competitive harm to the company if publicly disclosed
  - Eliminates requirement to submit a CTR and have it approved by the SEC staff, but old process and rules remain available
  - Mark the exhibit index to indicate that portions of the exhibit have been omitted
  - Include prominent statement on first page of redacted exhibit that omitted information is not material and would likely cause competitive harm to the company if publicly disclosed
  - Indicate by brackets where the information is omitted from the filed exhibit
  - SEC can request unredacted copy and underlying materiality and competitive harm analysis on a supplemental basis (and could request that exhibit be refiled to disclosed additional information)
- Substantive rules for when information may be redacted have not changed

# *Exhibits and Confidential Treatment*

- S-K Item 601(a)(5) allows omission of schedules (or similar attachments) to all exhibits if the schedules (1) do not contain information material to an investment or voting decision and (2) the information is not otherwise disclosed in the exhibit or the related filing
  - Filed exhibit must list (or otherwise reference) omitted schedules
  - Company must provide copy of any omitted schedule to SEC upon request
- Personal information (such as bank account numbers, social security numbers and home addresses) can be redacted from exhibits without filing a CTR



## *Other Exhibit Changes*

- Form 10-K must now include a new exhibit (S-K Item 601(b)(4)(vi)) which includes a description of each class of securities registered under Section 12 of the Exchange Act
  - Can incorporate the exhibit by reference and hyperlink to the previously filed exhibit by reference in future Form 10-Ks, so long as there has not been any change to the required information in the interim
- Material contracts not made in the ordinary course need only be filed with the Form 10-K if the contract is to be performed at or after the filing
  - No longer required to file contracts not made in the ordinary course that have been fully performed just because they were entered into within two years of the Form 10-K

## *Properties (S-K Item 102)*

- Obligation to disclose location and general character of principal physical properties is now limited to properties that are material to the company
- Revised instructions say company should “engage in a comprehensive consideration of the materiality of its properties” taking into account both quantitative and qualitative factors
  - Final rule release acknowledges that descriptions of headquarters, office space or ancillary facilities may be unimportant to investors
- Descriptions of material properties may be provided on an individual or collective basis, as appropriate
- Specific disclosure requirements for mining, real estate and oil and gas companies were not changed

## ***Risk Factors (S-K Item 105; former Item 503(c))***

- Minor non-substantive tweaks to reflect relocation of item from Subpart 500 (Registration Statement and Prospectus Provisions) to a new Item 105 under Subpart 100 (Business)
- Prior examples of potential risk factors deleted, to avoid encouraging boilerplate inclusion of generic risk factors
- Existing requirement that risk factors be presented in plain English explicitly added as part of S-K Item 105

## *MD&A (S-K Item 303(a))*

- Companies that are required to include financial statements covering three years may omit discussion of the earliest of the three years if that discussion was included in any prior filing on EDGAR
  - For example, in the Form 10-K for the calendar year ended 12/31/19, do not need to address the year ended 12/31/17 in MD&A
  - Must identify the location in the prior filing where the omitted discussion can be found
- Revised to emphasize that companies may use any presentation that enhances a reader's understanding (eliminating prior reference suggesting use of year-to-year comparisons, but most companies will continue to use year-to-year comparisons)
- Eliminated former instruction to discuss trend info with respect to five-year selected financial data (but MD&A still requires disclosure of known trends, so unlikely to result in any change in practice)
- No change to existing scope requirement for smaller reporting companies

# *Incorporation by Reference*

- Financial statements may not incorporate by reference or cross-reference to information outside the financial statements (except as specifically permitted by SEC or accounting rules)
- S-K Item 10(d), which limited incorporating documents filed more than five years ago (unless part of a registration statement or identified by physical location), has been eliminated
  - Restriction on double incorporation by reference retained but moved from S-K Item 10(d) to Rule 12b-23(e) and Schedule 14A
- Rule 12b-32 (Incorporation of Exhibits by Reference) eliminated, with relevant provisions regarding incorporation by reference of exhibits moved to Rule 12b-23 (Incorporation by Reference)
- Required to clearly describe the specific location of information incorporated by reference
- Active hyperlinks are required when information is incorporated by reference from EDGAR (instead of filing the material as an exhibit)

## *Clean up Change for Form 10-K*

- When information regarding executive officers required by S-K Item 401 is provided in Part I of Form 10-K (rather than the proxy statement), the caption for the separate section should be “Information about our Executive Officers” (instead of “Executive officers of the registrant”)

# *Proxy Statement for 2020 Annual Meeting*

## **What's New**

- Disclosure of hedging policies
- FAST Act Modernization and Simplification of Regulation S-K

## **Other Focus Areas**

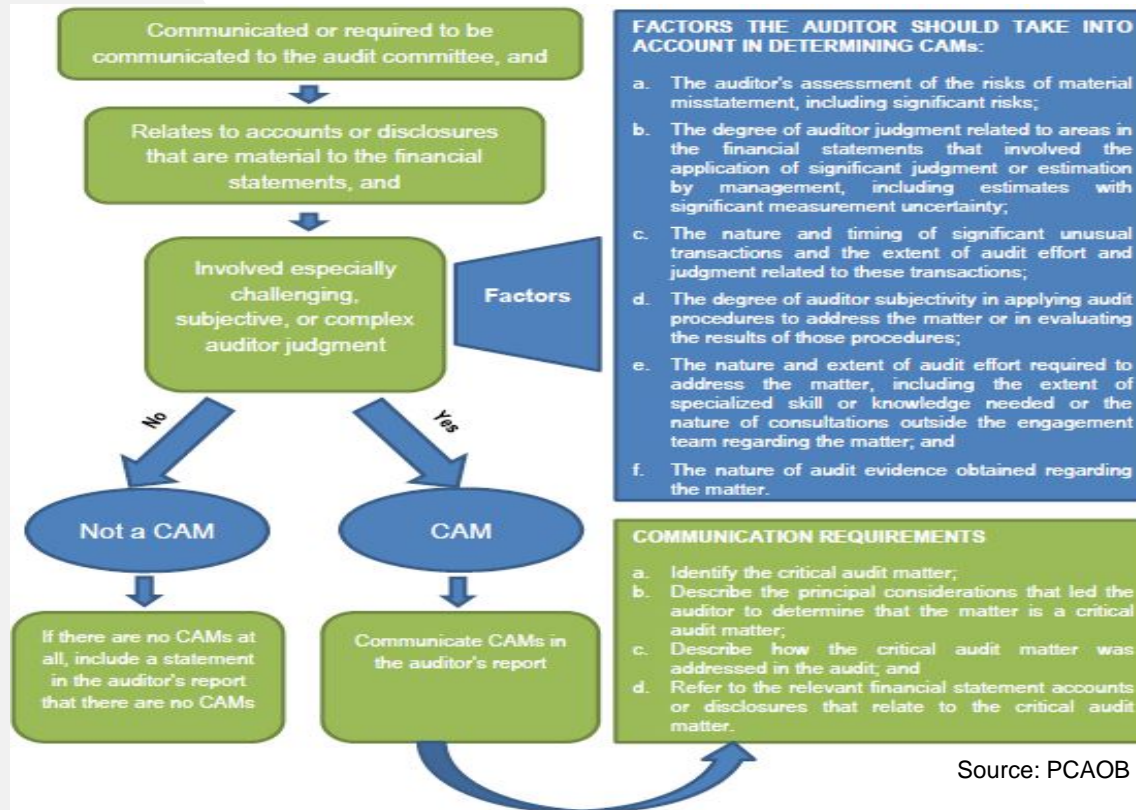
- Board diversity and director qualification disclosure
  - New C&DI regarding diversity disclosure
- ESG disclosure
- Human capital management disclosure
- Enhanced audit committee disclosures

## *Clean Up Changes for Proxy Statement*

- Disclosure of Section 16 delinquencies under S-K Item 405 must now be captioned “Delinquent Section 16(a) Reports” (instead of “Section 16(a) Beneficial Ownership Reporting Compliance”)
  - New instruction encourages exclusion of this section when there are no Section 16 delinquencies to report
- Audit committee report reference to outdated auditing standards replaced with a generic reference to “the applicable requirements of the Public Company Accounting Oversight Board (“PCAOB”) and the Commission”
- Clarification that EGCs are not required to include a compensation committee report



# Determining and Communicating Critical Audit Matters (“CAMs”)



# *Auditing and Accounting Developments*

- Audit committees continue to provide enhanced voluntary disclosures
  - Notable growth areas include oversight of cybersecurity, reasons for reappointing the auditor, and that the audit committee evaluates the independent auditor
- Regulators, investors and stakeholders remain interested in the transparency of audit committee activities, which some audit committees are disclosing
- SEC continues to comment on non-GAAP disclosures, particularly individually tailored accounting principles, though incidence of comments overall has declined
- FASB is considering a delay of its current expected credit losses standard for smaller reporting companies
- In June, the SEC updated its auditor independence FAQs and remains focused on policing auditor independence issues

## *A Few More Action Items*

- Description of Securities – Begin preparing new exhibit
- D&O Questionnaires – No changes required
  - Monitor Nasdaq proposal to change “Family Member” definition
  - Review any director self-identification question
- Committee Charters – No changes required
  - May want to revise audit committee charter to track SEC rule changes to the text of the audit committee report
- Controls and Procedures – It’s Like Flossing
  - Several recent enforcement actions highlight the importance of implementing (and then following) effective policies

# *Webinar Guidelines*

- Participants are in listen-only mode
- Submit questions via the Q&A feature
- Questions will be answered as time permits
- Offering 1 CLE credit in California and New York\*

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# Questions

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