

# Board Composition and Shareholder Proposal Highlights



**Jeffrey Karpf**  
Partner  
New York  
[jkarpf@cgsh.com](mailto:jkarpf@cgsh.com)



**Sandra Flow**  
Partner  
New York  
[sflow@cgsh.com](mailto:sflow@cgsh.com)



**Mandeep Kalra**  
Associate  
New York  
[mkarla@cgsh.com](mailto:mkarla@cgsh.com)

We foresee investors continuing to both refine and expand their demands on corporate boards in 2020. With the particular focus on board refreshment and diversity, significant pressure is placed on nominating and governance committees to play an increasingly prominent role.

Nominating and governance committees will also need to pay attention to the changing landscape of shareholder proposals, including changes to the SEC's procedures for the 2020 proxy season and the SEC's proposed changes to the Rule 14a-8 process.

## Overboarding

Institutional investors and proxy advisory firms have paid increasing attention to the number of corporate boards on which directors serve. During the 2019 proxy season, 5.8% of directors received support levels below 80%, the highest rate in nine years, which can largely be attributed to investors' changes to, and enforcement of, their overboarding policies.

Vanguard updated its director overboarding policy in April 2019, announcing that it would generally vote against named executive officers serving on more than one outside public company board (a total of two public company boards), though not at the company at which he or she is an executive officer, and against outside directors who sit on more than four public company boards. Vanguard's revised guidelines largely track those of BlackRock, although it applies Blackrock's policy regarding CEO board participation to all named executive officers.

The major proxy advisory firms continue to have more permissive policies. Institutional Shareholder Services (ISS) generally recommends against CEOs who sit on more than three public company boards and other directors who sit on more than five public company boards, while Glass Lewis generally recommends

against executive officers who sit on more than two public company boards and other directors who sit on more than five public company boards. Because Vanguard and BlackRock routinely own in the aggregate approximately 10% of shares of many US public companies, however, boards should take into account Vanguard's and BlackRock's policies, depending on their ownership stakes.

## Board Refreshment

Accompanying this increased focus on director overboarding has been a continued emphasis on board refreshment. Some argue a correlation between lengthy board tenures and diminished board independence from management. For example, The California Public Employees' Retirement System (CalPERS) Global Governance Principles state that "director independence can be compromised at 12 years of service," while ISS's QualityScore metric gives positive scores to companies where non-executive directors with fewer than six years of tenure make up more than one-third of the board.

Nominating and governance committees should be sure to consider board refreshment carefully, addressing any issues of overboarding and lengthy tenures while balancing the benefits of experience along with other skills. These considerations also present nominating and governance committees the opportunity to grapple with another matter of ever increasing importance: diversity.

## Diversity

Diversity maintained its place among the forefront of social and governance issues facing corporate boards in 2019. While the primary focus remained board gender diversity, the year also saw a greater focus on racial and ethnic diversity, as well as management diversity and pay equity, and we expect these trends to accelerate further in 2020.

Out of nearly 50 shareholder proposals regarding diversity that were submitted to companies in 2019, four proposals on board and other employee diversity

matters received majority support. Institutional investors and proxy advisory firms have played a key role in this push. BlackRock has indicated that it will vote against nominating and governance committee members for failure to improve diversity if there are not at least two women directors on the board. Vanguard has declared it will support proposals requesting diversity policies (e.g., the Rooney Rule) and board skills matrices. In 2019, the New York State Comptroller voted against directors on boards with no women at 616 companies and nominating and governance committee members on boards with only one female director at 450 companies. And beginning in 2020, ISS will recommend voting against the chair of the nominating and governance committee of a Russell 3000 or S&P 1500 company that has no women on its board.

**A significant milestone has been achieved: there are no longer any boards in the S&P 500 without any women directors. Increased racial and ethnic diversity on corporate boards, as well as female and minority representation in senior management, have been slower and more pressure on these fronts can be expected in the future.**

Numerous states have also followed California's lead on board diversity: New Jersey, Michigan and Pennsylvania have proposed legislation similar to California's mandate for women directors for companies headquartered in those states, while Illinois, Maryland and New York all passed laws requiring reports or studies on board and/or management diversity.

The emphasis on board gender diversity has produced results, with 46% of S&P 500 board seats now filled by women compared to only 17% in 2009 (and boards are increasingly placing women into committee leadership roles). In fact, a significant milestone has been achieved: there are no longer any boards in the S&P 500 without any women directors.

Increased racial and ethnic diversity on corporate boards, as well as female and minority representation in senior management, have been slower and more pressure on these fronts can be expected in the future. Trillium Asset Management and the New York City Comptroller (as the third stage of its Boardroom Accountability Project) started this drive, showing a willingness to file shareholder proposals with companies that lack racial and ethnic diversity and calling on companies to adopt a version of the Rooney Rule for every open board seat and for CEO appointments.

The SEC has not taken much action on this topic, but in February 2019, the SEC staff released two new Compliance and Disclosure Interpretations (C&DIs) stating that it expects a discussion of how nominating and governance committees consider director self-identified diversity characteristics.

## Trends in Proxy Proposals

Dovetailing with the focus on management and board diversity, pay equity proposals continued to increase in prominence. Sustainable investor Arjuna Capital filed over 20 proposals regarding gender pay equity and continued to publish its Gender Pay Scorecard. Citigroup has already agreed to Arjuna's demands to publish median pay gap data for women and minorities. ISS has taken note and revised its proxy voting policies to signal that it will consider supporting shareholder proposals for disclosures of pay data by race or ethnicity, in addition to gender, and will make its determinations on a case-by-case basis, taking into account the company's current policies and disclosures and recent controversies related to gender, race or ethnicity pay gaps.

Beyond board refreshment and diversity, for the third year in a row, environmental, social and governance (ESG) proposals were a majority of all shareholder proposals filed in the 2019 proxy season, with their subject matter running the gamut. Support for ESG proposals rose for the fourth consecutive year, and 42% of ESG proposals received above 30% support. Highlighting the significance of shareholder engagement, voluntary withdrawals of ESG proposals also increased, as

nearly half were withdrawn. For additional details, see [Navigating the ESG Landscape](#) in this memo.

Political spending proposals have increased in advance of the 2020 US elections, making up a majority of ESG proposals filed in 2019. Four ESG proposals passed in 2019, the highest rate since 2016, and all of them related to political contributions and lobbying disclosure. The so-called "Chevedden Group" (Chevedden, McRitchie, the Steiners and Young) accounted for nearly a third of political spending proposals, indicating that they have scaled back efforts from proxy access and special meeting proposals to enter the social proposal realm.

**Dovetailing with the focus on management and board diversity, pay equity proposals continued to increase in prominence. Sustainable investor Arjuna Capital filed over 20 proposals regarding gender pay equity and continued to publish its Gender Pay Scorecard.**

But shareholders have not abandoned governance as a subject of proposals. There was a slight upward trend in proposals to split the role of board chair and chief executive officer in 2019, and independent chair proposals were the most common type of governance proposal companies received, with half submitted by Chevedden. As in 2018, none of the proposals passed in 2019, but average support remained relatively stable. Proposals submitted by shareholders on action by written consent also continued to increase, with six such proposals receiving majority support. And although there was a significant decrease in the number of proposals to reduce shareholder meeting thresholds (25 in 2019, compared to 56 in 2018), average support for these proposals was relatively high at 43%, with five proposals passing.

## SEC Updates

During the second half of 2019, the SEC announced a series of procedural changes, guidance and proposals to revamp how it and companies manage shareholder proposals. In September 2019, the staff of the Division of Corporation Finance announced it may respond orally to a no-action request or decline to state a view and will generally reserve written responses for instances where the staff “believes doing so would provide value, such as more broadly applicable guidance about complying with Rule 14a-8.”<sup>1</sup> The staff released its first response under this new process and posted a Shareholder Proposal No-Action chart on the SEC website in November 2019 ([view it here](#)). The chart has been updated regularly, and companies and proponents have been receiving emails notifying them to check the website when an oral informal response is given.

In response to these changes, Glass Lewis announced it will generally recommend a vote against members of a company’s governance committee if a company omits a shareholder proposal from its proxy statement without evidence of receiving no-action relief from the SEC and if a company fails to provide disclosure regarding an oral response from the SEC granting no-action relief that lacks a written record of its determination.

In October 2019, the staff released Staff Legal Bulletin (SLB) No. 14K ([view it here](#)), which emphasized the staff’s view that in making no-action relief requests, it is helpful for the company to include a well-developed discussion of the board’s analysis of whether the particular policy issue raised by the proposal is sufficiently significant to that company. Finally, in November 2019, the SEC proposed amendments to modernize the procedures to include a shareholder proposal in a company’s proxy statement under Exchange Act Rule 14a-8.

Nominating and governance committees should follow carefully the development of the 2020 proxy season in response to the procedural changes from the SEC, as well as the proposed 14a-8 rules and the proposed rules with respect to proxy advisory firms as these may have long-reaching impacts on the shareholder proposal and engagement landscape going forward. For more information on these developments, see [SEC Disclosure and Proxy Guidance and Proposals](#) in this memo.

---

<sup>1</sup> See Announcement Regarding Rule 14a-8 No-Action Requests, available [here](#).