



2024 Proxy Season Preview

By Shirley Westcott



Overview

Against the backdrop of the upcoming presidential election and heightened economic uncertainty, U.S. corporations can expect a tumultuous 2024 proxy season as the environmental, social and governance (ESG) debate plays out at annual meetings and in courtrooms, state houses and the halls of Congress.

Notwithstanding a two-year decline in average support for their initiatives, shareholder proponents remain undeterred in filing another onslaught of resolutions, which reached nearly 1,000 last year, of which nearly two-thirds involved environmental and social (E&S) issues. To date, over 660 filings have been publicized with an emphasis on election spending; climate change; and diversity, equity and inclusion (DEI) programs (see Table 1).

Overall results, however, are unlikely to improve. Big investors--as well as proxy advisor Institutional Shareholder Services (ISS)--made few or no substantive changes to their 2024 voting policies, and some, such as BlackRock and Fidelity Investments, explicitly highlighted their aversion to overly prescriptive proposals. Early votes are already showing tepid support for many E&S and compensation-related proposals, while traditional governance topics are continuing to attract strong investor interest, including two majority votes to date (see Table 2).

In view of this, companies appear more motivated to push back on this year's proposals. The Interfaith Center on Corporate Responsibility reported that its members have withdrawn fewer resolutions than last year's 31%, which may signal that companies are opting to let proposals go to a vote rather than negotiate a settlement. No-action request letters are also up 28% from the number submitted during all of 2023. Exxon Mobil went a step further by foregoing the no-action process in favor of a judicial opinion on the excludability of a greenhouse gas (GHG) emissions proposal. A favorable judgment could have a chilling effect on future shareholder resolutions, especially if other issuers feel emboldened to take a "direct to court" approach.

Other developments to watch this season include:

Climate change: In a blow to environmentalists, the SEC's newly released climate change disclosure rule was markedly scaled back from its original proposal, while the implementation of California's more sweeping climate reporting rules, which were enacted last fall, may be delayed due to the state's budget shortfalls. Legal challenges to both are in the works. While climate activists will carry on pursuing their goals through private ordering, they cannot count on the cooperation of major asset managers, a number of whom recently pulled out of Climate Action 100+ (CA 100+), a global investment coalition that has been pressing companies to decarbonize.

Heightened union activity: Union pension plans will be highly active this season with nearly 80 resolutions filed—up from 53 in 2023—primarily dealing with employees' right to organize and worker health and safety. Efforts to unionize Starbucks workers erupted into a proxy fight which ultimately aided in bringing the parties to the negotiating table to secure collective bargaining agreements and resolve litigation. This may encourage other labor activists to mount board challenges using the universal proxy regime.

Emerging shareholder proposal themes: A variety of new shareholder proposals is debuting this season, including the responsible use of artificial intelligence (AI), protecting biodiversity and nature, and paying employees a living wage. Others have been revived or refashioned from earlier years. These include John Chevedden’s shareholder “say on director pay” and the United Brotherhood of Carpenters and Joiners’ (UBC) call for stiffer director resignation policies, both of which are being challenged as a violation of state law. James McRitchie’s new version of fair election resolutions has already met with success with half of the targets agreeing to comply. More of these proposals can be expected in the future.

Anti-ESG: Conservative proponents—particularly the National Center for Public Policy Research (NCPPR) and the National Legal and Policy Center (NLPC)-- will be fully engaged in the 2024 proxy season after sponsoring over 100 resolutions in 2023. A primary focus is fiduciary duty concerns related to ESG, along with protecting civil liberties in the workplace, financial institutions’ “debanking” practices, the risks associated with decarbonization goals, and business relationships with the Chinese Communist Party. Although their resolutions typically draw negligible support—and essentially none from large asset managers and proxy advisors—they will bring public attention to companies that involve themselves in controversial social and political issues.

These and other trending topics in the offing for the 2024 proxy season are discussed in more detail below.

Table 1: Most Numerous Shareholder Proposal Filings: 2024 – 2023

Proposal	2024 (as of March 11)	Proposal	2023
GHG emissions reduction	38	Independent Chairman	91
Lobbying disclosure	37	GHG emissions reduction	70
Majority voting/director resignation policy	35	Severance pay	52
Supermajority voting	27	Special meetings	47
Workplace diversity, DEI report	26	Workplace diversity, DEI report	36
Miscellaneous governance*	24	Lobbying disclosure	34
Political contributions	23	Advance notice/UPC bylaws	32
Advance notice/UPC bylaws	20	Racial equity/civil rights audit/report (liberal version)	29
Independent chairman	19	Abortion access (liberal version)	25
Recycling	15	Climate change finance	23

Source: SEC filings, proponent websites and media reports.

**Nineteen of these proposals were filed by Chris Mueller and his affiliates regarding companies’ direct stock purchase plans offered through their transfer agent, Computershare.

Table 2: Shareholder Proposal Votes (through March 11)

Governance Proposals	Number Voted	Majority Votes	Average Support
Supermajority voting	1	1	71.5%
Special meetings	1	1	55.5%
Independent Chairman	1		31.6%
Compensation Proposals	Number Voted	Majority Votes	Average Support
Severance pay	3		17.6%
Gender/racial pay equity	2		26.2%
Living wage	1		9.7%
E&S Proposals	Number Voted	Majority Votes	Average Support
Animal welfare	1		5.4%
GHG emissions	1	1	56.6%
Climate risk in retirement plans	1		13.2%
Deforestation	1		3.3%
Recycling	1		4.0%
Artificial intelligence	1		37.5%
Abortion access	1		7.8%
Child labor	1		12.1%
Lobbying disclosure	1		16.8%
Lobbying alignment on climate change	1		10.2%
Tobacco waste	1		5.0%
E&S policy risk	1		5.7%
Conservative Proposals	Number Voted	Majority Votes	Average Support
Greenwashing risk	1		1.9%
Climate change congruency	1		1.1%
Racial/civil rights audit	1		1.1%
Workplace (viewpoint) diversity	2		1.4%
Human rights policy	1		1.6%
Censorship	1		1.8%

Note: Results are based on “for” votes as a percentage of “for” and “against” votes.

E&S Issues

Workers' Rights

Activists affiliated with organized labor are continuing their two-year effort to promote freedom of association and collective bargaining rights, which was elevated to a proxy contest at Starbucks where unionization efforts have intensified since 2021. Although the Strategic Organizing Center's labor-friendly short slate had longshot chances of prevailing—and was rejected by ISS and Glass Lewis—the additional pressure on Starbucks no doubt motivated it to restart contract negotiations with Workers United. The fight was dropped a week before the annual meeting.

Starbucks' boardroom battle followed the release of a third-party review of the company's commitment to respect workers' rights, as called for in a 2023 majority-supported shareholder resolution. However, the proponents deemed the report inadequate because it lacked input from employees and failed to measure the company's adherence to international labor standards. A workers' rights analysis at Apple was also criticized for many of the same reasons. Over a dozen proposals calling for a similar assessment or a non-interference policy have been filed for 2024. The SOC Investment Group has additionally submitted a resolution at Delta Air Lines to disclose "labor suppression" expenditures that are intended or could be viewed as dissuading employees from joining or supporting a union.

The American Federation of Labor & Congress of Industrial Organizations (AFL-CIO) is conducting its own proxy solicitation at Warrior Met Coal in support of its five shareholder resolutions that address anti-takeover mechanisms, severance pay and freedom of association. The company maintains that this effort is solely designed to increase the collective bargaining power of the United Mine Workers of America—an AFL-CIO affiliate—which ended a 23-month strike in early 2023 without reaching a new contract with the company.

Proposals on worker safety have more than doubled in volume this year as a result of AFL-CIO campaigns at railroad companies following the East Palestine derailment and at wireless carriers due to deaths and injuries to cell tower technicians. The resolutions seek the adoption of a board safety committee or a third-party safety assessment. Excluding a floor proposal, last year's worker safety resolutions received 34% average support and one majority vote.

Artificial Intelligence

Rapid advancements in artificial intelligence (AI) are prompting greater investor scrutiny of potential societal impacts and risks, including consumer security and privacy, worker displacement, and biases in algorithm-based decision-making.

Shareholder proposals on human and digital-related rights are increasingly shifting towards the ethical use of AI. For 2024, the AFL-CIO is sponsoring resolutions at entertainment and tech companies to publish an AI transparency report on whether they have adopted any ethical guidelines to protect workers, customers and the public from the harms related to the use of AI, such as layoffs due to job automation, the misuse of private data, and the creation of "deepfake" media content. The initiative follows last year's Hollywood strikes, which resulted in AI protections for entertainment industry writers and performers. The first vote, which occurred at Apple, received 37.5% and was supported by ISS and Glass Lewis.

In December, the AFL-CIO additionally struck a partnership with Microsoft to collaborate on how AI will be used and implemented in the workplace. The agreement also commits Microsoft to staying neutral in union organizing drives.

Living Wage

Aside from union activity, the Shareholder Commons, working with U.K.-based ShareAction, has launched a new campaign aimed at creating a “guardrail” on poverty wages and income inequality by pressing a number of retail companies to pay a “living wage” to their employees and contract workers.¹ In the first vote of the season—and what may be the last—the proposal garnered only 9.7% support at Walgreens Boots Alliance and was opposed by ISS and Glass Lewis. Five others that are pending are being successfully challenged as micromanagement.

ShareAction filed the first-ever living wage resolution in 2023, which directed U.K. supermarket chain J. Sainsbury to become accredited by the Living Wage Foundation, which sets out a framework for pay linked to a regional cost-of-living assessment. The resolution received 16.7% support and was opposed by the proxy advisors, as well as by BlackRock and Vanguard which considered it overly prescriptive.

Workplace Diversity

As You Sow is once again spearheading a raft of resolutions asking companies to report on the effectiveness of their DEI efforts. Last year, 70% of the proposals were withdrawn due to company commitments to disclose more material DEI data. Of the 2024 targets, over two-thirds received the lowest scores (0-10) on As You Sow’s Public 3000 Workplace DEI Disclosure Scorecard, which rates nearly 3,000 large-cap U.S. companies on six disclosure factors: workforce composition (EEO-1 reporting), pay equity data, promotion, recruitment and/or hiring, retention and/or turnover, and diversity and inclusion goals.²

Other types of workplace diversity resolutions include a new angle by the New York State Common Retirement Fund (NYSCRF) asking International Paper and Lennar to report on their LGBTQ+ equity and inclusion efforts in their human capital management strategy. Trillium Asset Management is extending this theme by requesting J.B. Hunt Transport Services provide transgender-inclusive healthcare coverage. NLPC is countering by asking six companies that offer such health benefits to include coverage for employees wishing to de-transition.

Following the U.S. Supreme Court’s reversal of college admissions affirmative action last year, corporate DEI programs have faced heightened scrutiny, including from Republican state officials and from legal advocacy groups, which have filed lawsuits and EEOC complaints against a number of companies and organizations. Although most companies have not changed their overall approach to DEI, some are avoiding potentially discriminatory practices such as numerical targets, which may be perceived as quotas, and the use of unconscious bias training.³

¹ The Massachusetts Institute of Technology estimated the living wage for a family of four in the U.S. to be \$25.02 per hour. See <https://livingwage.mit.edu/articles/103-new-data-posted-2023-living-wage-calculator>.

² See As You Sow’s scorecard data at <https://www.asyousow.org/our-work/social-justice/workplace-equity/data-visualization>.

³ See Littler Mendelson’s survey of C-suite executives at https://www.littler.com/files/2024_littler_csuite_survey_report.pdf?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosmarkets&stream=business and Paradigm’s report at https://info.paradigmia.com/hubfs/Paradigm%202023%20State%20of%20DEI%20Report.pdf?_hsmi=283235651&_hsenc=p2ANqtz-AZCBy6c6qUW9GJ984uhoNgnD2_3_1-yFp_UrW9xt5I2sB2sQ0MRNLD_snwvADYqquwqVzXPBhs-KrCD5tNLO9nA3NgA.

Biodiversity

Investors are increasing their focus on biodiversity and natural capital with the establishment of the Nature Action 100—a global investor initiative focused on reversing nature and biodiversity loss—and last year’s release of the final recommendations of the Task Force for Nature-Related Financial Disclosures (TNFD). The TNFD builds on the Task Force on Climate-Related Financial Disclosures (TCFD) framework and is consistent with the newly launched International Sustainability Standards Board (ISSB) standards and the approach used by the Global Reporting Initiative (GRI).

In 2023, Vancity Investment Management of Canada filed the first shareholder proposal to invoke the TNFD which asked Costco Wholesale to conduct a material biodiversity dependency and impact assessment identifying the extent the company’s supply chains and operations are vulnerable to risks associated with biodiversity and nature loss. That resolution, along with two filed for 2024 at International Paper and Starbucks, was withdrawn due to company commitments.⁴ Another is pending at Home Depot.

As You Sow has also filed the first-ever deep-sea mining resolutions at General Motors and Tesla calling for a moratorium on the use of deep-sea mined minerals in electric vehicle batteries, which can lead to habitat and ecosystem loss.

GHG Emissions

Resolutions calling for ambitious goals and timelines for reducing value chain GHG emissions in accordance with the Paris Climate Agreement continue to be a dominant theme, with over three dozen filings to date. The targets go beyond heavy emitters to a broader range of sectors where Scope 3 emissions generated by customers and suppliers represent much of the carbon footprint.

So far, a proposal at Jack in the Box has received majority support. The company argued that it would be premature to disclose GHG emissions data or reduction targets until regulations and timelines are finalized by the SEC and under California’s Climate Corporate Data Accountability Act.

Dutch activist group Follow This has produced a ninth round of proposals at U.S. and European oil majors to step up the pace of their emissions reductions in the medium term. This year, Exxon Mobil struck back by bypassing the no-action process and seeking a federal district court ruling to block the resolution based on the ordinary business and resubmission exclusions. Although Follow This and co-filer Arjuna Capital withdrew their proposal—as well as one they filed at Chevron—Exxon is moving ahead with its litigation in the hopes of preventing the same or substantially similar proposals from being submitted to the company in the future.

On the heels of the Exxon lawsuit, Republican lawmakers introduced companion bills in the U.S. Senate and House of Representatives to clarify that public companies may exclude shareholder proposals that interfere with their ordinary business operations, regardless of whether they concern a social policy matter.⁵

⁴ International Paper is one of 14 U.S. companies that voluntarily committed to an early adoption of the TNFD framework. See https://tnfd.global/engage/inaugural-tnfd-early-adopters/?_sfm_adoption_year=2024

⁵ See the RESPITE bill and press release at <https://www.hagerty.senate.gov/wp-content/uploads/2024/01/EHF24063.pdf> and <https://www.hagerty.senate.gov/press-releases/2024/02/01/hagerty-introduces-legislation-to-rid-private-companies-of-progressive-activism/>.

New this year from conservatives is a proposal asking oil and gas companies to consider delinking executive pay from GHG reduction targets and instead emphasize legitimate fiduciary goals. According to Willis Towers Watson (WTW), 44% of S&P 500 firms are using climate and environmental metrics—particularly carbon emissions reduction—in their incentive plans.⁶

On the regulatory front, the SEC finalized the Enhancement and Standardization of Climate-Related Disclosures Rule on March 6, which was significantly pared down from the version proposed in 2022. In addition to eliminating the requirement to disclose Scope 3 emissions—the most controversial aspect of the rule—it eased the reporting of Scope 1 and 2 emissions arising from company operations and energy usage to only those that are material. Smaller companies are exempt from reporting their direct emissions, while large and mid-size firms must obtain third-party attestation. All registrants must disclose significant risks related to climate change, such as severe weather events. Compliance dates will be phased in beginning in 2025.

As anticipated, the SEC's final rule is drawing criticism from all sides. Industry groups and Republican state attorneys general, who contend that the Commission is overstepping its authority, are poised to mount legal challenges. Environmental activists, who feel the rule does not go far enough, will continue to press companies through shareholder proposals and engagement to voluntarily provide the disclosures they want. A final blow would be a GOP sweep in the 2024 elections which could upend the rule entirely.

Fossil Fuel Financing

After receiving mixed results in 2023, shareholder proponents have modified their proposals on financed emissions so they are less prescriptive. Resolutions at banks and insurers calling for curbing or phasing out the funding and underwriting of new fossil fuel supplies received meager levels of average support in 2023 (9.2%) and 2022 (11.9%). This year, the Green Century Funds and As You Sow are partnering on a more generic resolution at Chubb to simply disclose the GHG emissions from its underwriting, insuring and investment activities. At major banks, rather than asking for a transition plan, As You Sow wants disclosure of the proportion of sector emissions attributable to clients that are not aligned with a credible net-zero pathway. However, these are not surviving micromanagement challenges.

The New York City Retirement Systems (NYCRS) also changed up its resolutions for 2024 and is now asking five U.S. banks to live up to their net-zero commitments by setting and reporting targets for their clean energy to fossil fuel finance ratios. One target—JPMorgan Chase—agreed to comply. NYCRS's 2023 proposals, which requested banks to set 2030 absolute GHG emissions reduction targets for their oil and gas and power sector lending and underwriting, averaged only 12.2% support.

On the conservative side, NLPC is asking several major banks to oversee an audit analyzing the economic and humanitarian impacts of its climate transition policies on emerging nations that rely heavily on fossil fuels and other non-renewable sources of power.

⁶ See the WTW's press release and study at <https://www.wtwco.com/en-us/news/2024/01/north-american-companies-continue-to-link-executive-pay-programs-to-esg-measures-wtw-study-finds> and <https://www.wtwco.com/en-gb/insights/2024/01/global-report-on-esg-metrics-in-incentive-plans-2023>.

Climate Risk in Retirement Plan Options

For a third year, As You Sow is taking aim at a handful of companies for their use of the Vanguard Target Retirement Funds as their default 401(k) retirement plan option because of their significant investments in fossil fuel companies and firms that contribute to deforestation. The proposals ask how the companies are aligning their retirement plan options with their climate goals or, alternatively, how they are protecting plan beneficiaries with a longer investment time horizon from climate risk in their retirement options. Although they have failed to gain much traction in the past—averaging 7.8% in 2023 and 8.8% in 2022—the resolution received 13.2% at Intuit’s 2024 annual meeting, the highest vote ever. Another remains pending at Alphabet.

American Airlines is facing the opposite situation. In mid-February, a federal court judge rejected the company’s request to dismiss one of the first private sector lawsuits alleging that a retirement plan fiduciary violated the Employee Retirement Income Security Act (ERISA) by investing plan assets with managers who pursued ESG objectives that underperformed relative to non-ESG investments. If the lawsuit is successful, it could spark a rash of litigation to recover losses from ESG decisions.

Proxy Voting Record Review

In view of their declining support for ESG resolutions, four major financial firms—BlackRock, State Street, Goldman Sachs Group and JPMorgan Chase—are being targeted by faith-based organizations to report on misalignments between their 2023 proxy voting records and policies and their public commitments on climate change and racial justice. Prior resolutions on proxy voting congruency, which date back to 2015, have generated only marginal support and were generally opposed by the proxy advisors. The Sierra Club has also introduced a new proposal asking BlackRock and State Street to use “climate stewardship” in addition to proxy voting to drive real-world decarbonization.

A number of large asset managers slashed their support for E&S resolutions last year on the basis that they were too prescriptive or because the targeted companies had demonstrated progress on the underlying issue.⁷ During the 2023 proxy year (July 1, 2022, through June 30, 2023), Vanguard supported only 2% of E&S resolutions, down from 12% the prior year, while BlackRock voted in favor of 7% of E&S resolutions, down from 22% the year before. State Street backed 32% of ESG resolutions in the first half of 2023, down from 44% in 2022.⁸

More recently, JPMorgan Asset Management (JPMAM), PIMCO, Invesco and State Street announced their departures from CA 100+, while BlackRock is transferring its membership to its smaller international arm. State Street and BlackRock took issue with the coalition’s “Phase 2” corporate engagement priorities, which take effect in June. Under the new requirements, signatories will shift from pressing portfolio companies for climate disclosures to pushing for GHG emissions reductions. JPMAM, Invesco and PIMCO said they prefer to use their own frameworks for engaging portfolio companies on sustainability.

⁷ See BlackRock’s Stewardship Report at <https://www.blackrock.com/corporate/literature/publication/2023-investment-stewardship-voting-spotlight.pdf>. See Vanguard’s U.S. Regional Brief at https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/policies-and-reports/us_2023_regional_brief.pdf. See State Street’s Q2 2023 Stewardship Report at <https://www.ssga.com/library-content/assets/pdf/global/asset-stewardship/2023/asset-stewardship-report-q2-2023.pdf>.

⁸ See Morningstar’s report at <https://www.morningstar.com/sustainable-investing/big-us-fund-companies-retreat-support-esg-proxy-votes>. Also see the reports by ShareAction at <https://shareaction.org/news/worlds-largest-asset-managers-turn-their-backs-on-people-and-planet-with-worst-voting-performance-yet> and by Majority Action at https://static1.squarespace.com/static/5d4df99c531b6d0001b48264/t/654a7e9cd5b906544341379c/1699380965060/MA_CITB_11.06_DIGITAL_FINAL.pdf.

Political Activities

Coinciding with the 2024 federal election cycle, proponents are ramping up their resolutions on corporate political influence, activities, and expenditures. Affiliates of the Center for Political Accountability plan to submit 40 resolutions—the most since 2020—seeking more disclosure of political contributions and third-party spending. Nearly as many proposals on lobbying disclosure have been filed, with over half sponsored by Chevedden and his affiliates.

Social media firms Alphabet and Meta Platforms are facing a total of six proposals dealing with content moderation in view of elections taking place in 64 countries this year. These include requests for reports on generative AI misinformation and disinformation and on the use of AI in targeting users with political campaign ads. As You Sow is going a step further and asking Meta Platforms to prohibit all political advertising on its platform.

Conservative proponents are seizing on the consumer backlash and financial fallout that has beset companies and brands such as Walt Disney, Target, and Bud Light by calling for greater board oversight of companies' policy positions, advocacy and partnerships on social and political matters. NLPC and NCPPR are asking half a dozen companies to create a board committee to examine the consequences of such actions on their financial sustainability. NLPC is probing deeper at Comcast by calling for disclosure of its director nominees' political and charitable donations to ascertain political bias. And in line with legislation reintroduced in the U.S. Senate in 2023, an NCPPR proposal at Dick's Sporting Goods would amend the by-laws to commit the board to waiving the business judgment rule presumption in cases where the company engaged in politically divisive conduct.⁹

⁹ See S. 2829, the "Mind Your Own Business Act," sponsored by Senator Marco Rubio (R-FL) at https://www.rubio.senate.gov/wp-content/uploads/_cache/files/e89472b3-4fc2-4060-93b3-2f8ded53be12/ABB99C7DC3B70C1225E3AA655F6548D6.09.23.21-final-rubio-mind-your-own-business-act.pdf

Governance Issues

Holdover Directors

After a one-year hiatus, the UBC is resuming its campaign on the treatment of directors who fail their election. Similar to proposals filed in 2022—which were ultimately withdrawn—the UBC is asking over two dozen companies to adopt a director resignation bylaw that would require each director nominee to submit an irrevocable conditional resignation upon failure of election. If the board does not accept the resignation and the holdover director fails election at the following annual meeting, his resignation will be automatically effective 30 days after the certification of the vote. Most are being challenged as a violation of state law, though one is scheduled for a vote at PulteGroup’s May annual meeting.

Along the same lines, the UBC is asking at least one company to add a collapsing stagger feature to its classified board whereby if all directors in a class fail their election, then that class of holdover directors must stand for reelection at the next annual meeting along with the class that is scheduled for reelection.

Two of the companies targeted by the UBC—CVS Health and Zoetis—as well as several others received proposals from Chevedden and Kenneth Steiner to adopt a governance guideline, rule, or bylaw provision that any director who fails to obtain a majority vote in an uncontested election will not be renominated to the board.

Fair Elections

For a second year, McRitchie is focusing on the fair treatment of shareholder director nominees under the universal proxy regime, which took effect in 2022. In 2023, his proposals sought shareholder approval of advance notice bylaws which contained onerous notice periods and disclosure requirements for shareholder nominations. The resolutions averaged 14.2% support and were backed by Glass Lewis and opposed by ISS.

McRitchie’s 2024 iteration asks a number of companies to adopt and disclose a policy to ensure that shareholder nominees will be treated equitably and that such nominations will not be encumbered by unnecessary administrative or evidentiary requirements. So far, he has withdrawn at half his targets which agreed to add language to their proxy statements or governance guidelines stipulating that the board’s determination of a shareholder nominee’s eligibility would be based on the requirements of Rule 14a-19, applicable law and the company’s bylaws and not on their suitability to serve on the board.¹⁰ Notably, McRitchie has engaged a law firm to examine bylaw provisions at his portfolio companies and, if necessary, take legal action to ensure that those that unduly restrict the shareholder franchise will be removed or struck down.¹¹

The Oregon Public Employees Retirement System has submitted a variation at 10 companies advocating a nomination neutrality policy to ensure that shareholder nominees are not subject to stricter standards than management nominees regarding advance notice and information requirements.¹²

¹⁰ See McRitchie’s discussion of his campaign at <https://www.corpgov.net/2024/02/fair-treatment-of-shareholder-nominees-progress-holdouts/>.

¹¹ According to Deal Point Data, at least 900 companies modified their advance notice bylaws in 2023, up from 553 in 2022 and less than 150 the year before the SEC rule changes. While most of the revisions related to compliance with the universal proxy rule, many companies also took the opportunity to enhance other procedural mechanics and disclosure requirements to submit proposals or nominate directors. See https://www.dealpointdata.com/res/dpd_record_charter_bylaw_amendments_20240111.pdf.

¹² See the Oregon State Treasury’s discussion of its Nomination Neutrality Initiative at <https://corpgov.law.harvard.edu/2024/02/26/oregon-state-treasury-nomination-neutrality/>.

Client Voting Preferences

McRitchie is urging a number of financial institutions to offer clients granular proxy voting preferences so they can maximize portfolio-wide returns by pursuing voting strategies that push certain companies to address E&S externalities. Another proposal variation asks them to address misalignments between the proxy votes the firm casts on behalf of its clients and the clients' values and preferences.

In recent years, major asset managers, such as BlackRock, Vanguard, and State Street, have developed voting choice programs for their investors. However, McRitchie feels that these programs present limited options due to their overreliance on proxy advisor policies.

Director Pay

After filing last year's record number of independent chair proposals, Chevedden is delving into another aspect of board independence, namely the setting of director pay. This year, he has put forth binding bylaw resolutions at a half dozen companies that would bar their directors from fixing director compensation above \$1 annually unless approved by a majority of shareholders in advance of the fiscal year it will be paid. All are being challenged as a violation of state law. Similar "say on director pay" proposals last came up in the early years of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Overboarding

Building on its 2023 proposals on director interlocks, NCPPR is asking three companies to adopt a policy—to be phased in by the 2025 annual meeting—requiring directors to disclose in their official biographies their expected allocation of hours among all of their formal commitments.

Although the proposal is being successfully challenged as micromanagement, it highlights the shift in how investors are assessing directors' time constraints. Some, such as such as NYSCRF and the California State Teachers' Retirement System (CalSTRS), are looking beyond public company board seats and taking into account directors' other commitments, such as participation in key board committees and private company board service. Others, such as State Street and Vanguard, want companies to adopt and disclose an internal overboarding policy.

Supersized Pay

This season's headiest pay story may be Tesla CEO Elon Musk's \$56 billion incentive scheme, which was invalidated by the Delaware Chancery Court due to the "deeply flawed" approval process both in terms of the fairness of the compensation and the independence of the board. The package, which was granted in 2018, consisted of 304 stock options structured in 12 tranches, each with rigorous revenue, profit and stock price growth hurdles. Musk receives no cash compensation and is restricted from selling his stock for five years.

While the ruling serves as a reminder of the importance of arm's length pay negotiations, it has also raised concerns that a judge can nullify compensation that was earned and override the decision-making of the shareholders who approved it—in this case, 73% of the disinterested shares, including Tesla's largest institutional investors at the time—Baillie Gifford, Fidelity Management and Research, and T. Rowe Price Associates. One shareholder that cast a favorable vote—Allianz Global Investors—said in its voting rationale that despite the high quantum, it recognized the stretching nature of the compensation package and the exceptional contribution of Elon Musk to Tesla's value. Musk ultimately met all of his performance targets and delivered a stunning 800% stock return over the past five years.

In view of this, shareholders may be hard-pressed to show buyer's remorse at Tesla's 2024 annual meeting. Any fallout is likely to arise from a shift in the shareholder base. Of Tesla's current top five institutional holders, only one—BlackRock—backed the 2018 CEO performance award. ISS and Glass Lewis opposed it.

The Chancery Court decision may not be the final word on the Tesla pay fracas. The company is expected to appeal it to the Delaware Supreme Court, including how much the attorneys for the plaintiff—individual investor Richard Tornetta—are seeking in legal fees: an unprecedented \$6 billion in Tesla shares, which reportedly equates to about \$300,000 per hour. Musk also plans to seek shareholder approval to reincorporate the company in Texas, where it is headquartered. Texas is opening business courts in September to provide an alternative to other jurisdictions such as Delaware.

On the Horizon

While the SEC’s climate disclosure rule was the most prominent item on the fall Regulatory Flexibility Agenda, issuers should not lose sight of other rulemakings on the schedule for April.¹³ These include proposed rules on human capital management disclosure and final rules amending three of the 13 substantive bases for excluding shareholder proposals under Rule 14a-8. The latter will limit companies’ ability to omit resolutions under the substantial implementation, duplication, and resubmission exceptions as follows:

- **Substantial implementation:** To qualify as substantially implemented, the company must have implemented all of the proposal’s essential elements.
- **Duplication:** To qualify as substantially duplicative of another shareholder proposal, the resolution must address the same subject matter and seek the same objective by the same means.
- **Resubmission:** A proposal will constitute a resubmission if it substantially duplicates a prior resolution that addressed the same subject matter and sought the same objective by the same means. No changes are being made to the resubmission thresholds.

Also in April, the Walt Disney board will face off against multiple dissident slates. Among the labyrinth of moving parts is Nelson Peltz’s Trian Partners, which is making its second foray at the company after dropping its 2023 campaign. Ancora Holdings is backing Trian, while another hedge fund—ValueAct Capital—has allied with CEO Bob Iger and the Disney board. Blackwells Capital, which supports the company’s strategy, is seeking three board seats through board expansion. It has a proposal on the ballot that would allow incumbent directors who fail to be elected to be reinstated to the board.

An additional variable in the contest is the disposition of the retail shareholder base, which accounts for over one third of Disney’s stock. A newly emerged startup—the Shareholder Vote Exchange—is letting individual investors auction their proxy voting rights on its online platform, and in early March an unknown bidder offered \$100,000 for 500,000 Disney proxy votes. While this activity may not significantly impact the outcome of the proxy fight, an online marketplace for buying and selling proxy votes could have broader implications for ESG activist campaigns in the future.

¹³ See the Fall 2023 Reg Flex Agenda at https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3235&csrf_token=2A98B502DDFA4B831FC24A0EFD3101999F2B-C1A7968B8E1FF69FD951C002F4177D5DAEE481C016EF7105216550D4C54B29B7.