



2023 Proxy Season – An Early Look at the Numbers

April 5, 2023

The 2023 proxy season is ramping up. Here's an early look at the numbers and emerging trends.

Increased Shareholder Proposal Activity

Two hundred eighty-eight (288) 14a-8 shareholder proposals appeared in the definitive proxy statements of SEC reporting companies filed between January 1, 2023 and March 31, 2023. That's the most recorded in the first three months of any year since Deal Point Data (DPD) began tracking this activity on January 1, 2017 and is on pace to surpass 2022's previous high of 568 proposals that were voted on.

14a-8 Shareholder Proposals							
	2017	2018	2019	2020	2021	2022	2023
Number of Proposals (in Proxy)	220	229	185	192	210	252	288

Definitive proxy statements filed from January 1 to March 31 of each year.

Conservative ("anti-ESG") proponents are also stepping up their activity. With less than half of S&P 1500 companies having filed their definitive proxy materials for their 2023 annual meetings, there have been more shareholder proposals disclosed (i.e., proposal appeared in a company's definitive proxy statement and/or was included in a no-action letter) by anti-ESG proponents than any previous entire year.

Proposals Submitted by Conservative ("Anti-ESG") Proponents							
	2017	2018	2019	2020	2021	2022	2023*
Number of Proposals	19	14	14	21	24	55	61

* Based on annual meeting year. 2023 as of March 31, all others are full-year totals.

Anti-ESG activists are not limited to engaging only companies. In one interesting case, an anti-ESG activist used an unusual tactic and took on a pro-ESG activist directly. DPD has previously written about the growth of using Notice of Exempt Solicitation filings (Form PX14A6G) to lobby fellow shareholders on specific issues that are subject to an upcoming vote ([A Review of Notice of Exempt Solicitation Filings](#)). The National Legal and Policy Center, a leading conservative activist, filed an exempt solicitation at The Coca-Cola Company on March 29 urging shareholders to vote AGAINST the proposal sponsored by As You Sow that requested the company report on risks from state policies restricting reproductive rights. Exempt solicitations to vote against another shareholder's proposal are exceedingly rare. In fact, it's only the second since DPD began tracking this activity in 2017 (out of over 1,300 PX14A6G filings).



Less No-Action Requests and Success

SEC guidance in November 2021 (SLB No. 14L) making it more difficult to exclude 14a-8 proposals has resulted in fewer overall requests and lower no-action success rates. A comparison of the volume of no-action requests for the period between December 1 and March 31, when most no-action requests for the proxy season are made, shows that the number of requests are down 26% versus the 2022 proxy season and 36% as compared to the 2021 proxy season. Success rates are also lower but have ticked up since last year. Based on the number of proposals with a no-action request where the SEC made a ruling (i.e., Concur or Unable to Concur), companies have been successful 52% of the time so far this year. That’s up from last year’s historically low 41% success rate but still lower than previous years.

No-Action Success Rate																
	2017		2018		2019		2020		2021		2022		2023		All Years	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%
Proposals with SEC No-Action Decision	246		212		191		186		218		200		106		1,359	
Concur	190	77.2	138	65.1	132	69.1	130	69.9	152	69.7	82	41.0	55	51.9	879	64.7
Unable to Concur	56	22.8	74	34.9	59	30.9	56	30.1	66	30.3	118	59.0	51	48.1	480	35.3

Based on meeting date year. 2023 as of March 31, all others full year.

Delaware Officer Exculpation – Modest Uptake and No Guarantee to Pass

Effective August 1, 2022, the Delaware General Corporation Law (“DGCL”) was amended to authorize corporations to adopt a provision in their charter to limit the liability of certain corporate officers for breach of the duty of care in certain actions. Prior to the change, the DGCL limited exculpation to directors alone. In response to the change, several Delaware incorporated companies have voted on or filed proxy materials seeking to amend their charter to extend exculpation to its officers. As of March 31, 2023, 119 companies in DPD’s coverage universe have voted on a charter amendment to provide for the exculpation of officers or disclosed an upcoming vote to do so (including those disclosed in preliminary proxy statements). Proposing the charter amendment does not ensure adoption, as three of the 19 companies that have held the vote failed to secure the requisite level of shareholder support for passage. It appears that most Delaware companies are taking a wait-and-see approach regarding this issue. Of the 744 Delaware incorporated companies in DPD’s coverage universe that have filed definitive annual meeting proxy statements since the August 1, 2022 DGCL amendment, only 63 companies (approximately 9%), have included an officer exculpation proposal on the ballot.

Proxy Fights – Similar to Prior Years

As of March 31, 2023, 50 board seat proxy fights have been announced for annual meetings scheduled or expected to be held in 2023 (including nominations at closed-end funds). While many commentators expected a rise in the number of proxy fights in the 2023 proxy season – the first with the universal proxy card or “UPC” rules (i.e., Rule 14a-19) in effect – such a rise has yet to materialize. One of the most anticipated questions entering the 2023 proxy season was whether ESG focused activists, who primarily use the 14a-8 shareholder proposal process to further their goals, would take advantage of the potential reduced costs to run a proxy contest using the UPC rule and nominate their own director candidates. Thus far the answer is no – proxy fights announced have focused on economic issues, and the types of shareholders nominating competing director nominees resemble those in prior years (i.e., hedge funds, current and former and directors, and founders).

2023 Annual Meeting Proxy Fights		
Proxy Fight Outcome	Number	% of Total
Formal Settlement (Seats)	8	16
Nomination Rejected (Ended)	1	2
Pending	35	70
Went to a Vote (Activist Win)	1	2
Withdrawn - Disclosed	6	10

Announced as of March 31, 2023

Preparedness for 14a-19 (Universal Proxy Card)

In response to the universal proxy rules adopted by the SEC on November 17, 2021 effective for shareholder meetings held after August 31, 2022, numerous companies have amended their bylaws to address matters relating to the universal proxy and to require nominating shareholders to comply with the rule. As of March 31, 2023, 758 companies in DPD’s coverage universe have amended their bylaws to require a nominating shareholder to comply with Rule 14a-19.

As often seen with new developments in corporate governance, large-cap companies have been the most responsive. One hundred eighty-nine (189) companies in the S&P 500 (38%) have amended their bylaws to require Rule 14a-19 compliance. Small-cap companies have also moved on this issue, albeit at slightly lower rates. One hundred thirty-five (135) companies in the S&P 600 (23%) require Rule 14a-19 compliance.

Bylaws Require 14a-19 (UPC) Compliance		
Index	# of Companies	% of Total
S&P 500	189	38
S&P 400	120	30
S&P 600	135	23
S&P 1500	444	30

As of March 31, 2023

Companies are taking varying approaches with respect to Rule 14a-19 compliance. On one end of the compliance spectrum, companies have simply added language that a stockholder needs to comply with Rule 14a-19 or certain of its requirements (e.g., that the shareholder solicit proxies from holders of shares representing 67% of the voting power). At the other end, companies are taking a more comprehensive approach by requiring the shareholder deliver evidence that it has complied with the rule's requirements and providing the company a remedy if a stockholder fails to satisfy the requirements (e.g., will disregard any proxies or votes solicited for the nominee or will disregard the nomination of the proposed nominee). Some companies have extended the information required by Rule 14a-19(b) to their existing advance notice requirements.

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