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DEI Strategic Services Alert

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DEI considerations for the 2023 proxy season

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As shareholder proposal deadlines for 2023 proxy statements approach, companies should examine their DEI programs and disclosures through a corporate governance lens.



What's the Impact?

- / We expect a continued increase in demands for public companies to share more details about the impact of their DEI initiatives
- / The ability to avoid shareholder proposals for greater DEI disclosures is diminishing
- / Companies can act now to manage shareholder requests and third-party audits

The end of 2022 marks the intersection of two important dates for many public companies and their DEI initiatives: it is the halfway point for companies who announced public DEI targets and commitments for the year 2025, and it is the beginning of the 2023 proxy season. In the 2022

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proxy season, social proposals increased from 99 to 215 year over year, making up [39% of all shareholder proposals](#).

We previously discussed the [rise of racial equity audits](#) and the increased number of [shareholder actions related to DEI programs](#). Of the [43 filed shareholder proposals](#) related to racial equity and civil rights audits, 31 were voted on and eight passed, compared to nine going to vote and none passing in 2021. At Russell 3000 companies, shareholders filed 155 human capital management-related proposals. That is up from 136 in 2021, 11 in 2020, and 12 in 2019. In 2022, shareholders voted on 11 proposals on board diversity, five on workplace diversity, and two on divulging EEO-1 data on workforce demographics and its breakdown by gender and race.

As the 2023 proxy season begins, we expect each of these trends to continue, placing additional pressure on public companies to either share more details about the impact of their DEI initiatives or rely on third parties to do the same at the request of their shareholders. A growing number of corporations, including American Express, Morgan Stanley, Starbucks, and Tyson, have agreed to conduct racial equity audits, either preceding or immediately following shareholder votes for the same.

While the demand for greater disclosure from public companies about their DEI programs is increasing, the ability of these companies to avoid shareholder proposals for greater DEI disclosures is diminishing. Recent changes to SEC rules limit the availability of one of the tools companies use to avoid inclusion of these types of proposals in their proxy materials and the subsequent shareholder votes.

Rule 14a-8 of the Exchange Act of 1934 permits a company to exclude a shareholder proposal from its proxy materials if the proposal fails to meet certain procedural and substantive requirements. Companies often request no-action relief from the staff if they omit a proposal based on one of these exclusions. With [Staff Legal Bulletin No. 14L](#) from November 2021, however, the staff stated it would “no longer focus on determining the nexus between a policy issue and the company but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal.”

As a result, the SEC staff rejected more no-action requests during the 2022 proxy season (in the Russell 3000, 106 rejections out of 233 requests) than in 2021 (58 rejections out of 258 requests), and the number of shareholder proposals that management omitted from the proxy ballot after obtaining no-action relief was cut in half—from 136 in 2021 to 71 this year. By contrast, voted [proposals jumped 15 percent](#), from 480 to 555.

There are certain steps that public companies can take to successfully shield themselves from shareholder requests for greater DEI disclosures and third-party audits. For example, a company can proactively provide sufficient DEI disclosures on its own, obviating the need for the shareholder request. In January 2022, the SEC provided a no-action letter to Starbucks Inc. to exclude a civil rights and non-discrimination audit proposal, based on the company’s [prior public DEI disclosures](#).

What this means for you?

As the deadline for the submission of shareholder proposals for inclusion in 2023 proxy statements approaches, companies should reevaluate their DEI programs and relevant disclosures. Questions companies may want to consider include:

- / Are your shareholders satisfied with your current DEI disclosures?
- / Is it time to revisit and revise our DEI commitments and goals, in light of the progress you've made (or haven't made) over the last two years?
- / Does a pro-active DEI audit make sense for your organization to ensure effective and accountability of your current DEI initiatives?
- / Are you prepared for potential shareholder proposals regarding your DEI program and the potential PR implications?

Nixon Peabody's DEI Strategic Services team works with clients to develop inclusive cultures, drive business success, and elevate their brands. Learn more about our [three-phased approach](#) to help clients (1) assess current efforts, (2) address challenges, and (3) guide long-term success.

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