

# Preparing for the 2024 US Proxy and Annual Reporting Season

November 1, 2023

**Jennifer J. Carlson**

Partner, *Mayer Brown LLP*

+1 650 331 2065

[jennifer.carlson@mayerbrown.com](mailto:jennifer.carlson@mayerbrown.com)

**Ryan J. Liebl**

Partner, *Mayer Brown LLP*

+1 312 701 8392

[riehl@mayerbrown.com](mailto:riehl@mayerbrown.com)

**Kilian Mooté**

Managing Director, *Georgeson*

+1 646 413 4157

[kmooté@georgeson.com](mailto:kmooté@georgeson.com)

**Laura D. Richman**

Counsel, *Mayer Brown LLP*

+1 312 701 7304

[lrichman@mayerbrown.com](mailto:lrichman@mayerbrown.com)

# Agenda

# Agenda

- Pay versus Performance
- Say on Pay
- Shareholder Proposal No-action Requests
- Proposed Amendments to Rule 14a-8
- 2023 Proxy Voting Results
- Possible Proposals for 2024 Proxy Season
- Clawbacks
- Cybersecurity
- Rule 10b5-1
- Share Buyback Disclosure
- Climate Change
- Human Capital Management Disclosure
- Risk Factors
- MD&A
- D&O Questionnaires



# Pay versus Performance

# Pay versus Performance

- Pay versus performance required by Item 402(v) of Regulation S-K
- Pay versus performance required for first time during 2023 proxy season
  - Year's worth of precedents
- Applies to all SEC reporting companies, *except*
  - Foreign private issuers,
  - Registered investment companies and
  - Emerging growth companies.
- Smaller reporting companies and business development companies are subject to the rule

# Pay versus Performance Disclosure

Year	Summary Compensation Total for PEO	Compensation Actually Paid to PEO	Average Summary Compensation Table Total for non-PEO Named Executive Officers	Average Compensation Actually Paid to non-PEO Named Executive Officers	Value of Initial Fixed \$100 Investment Based on:		Net Income*	[Company-Selected Measure]*
					Total Shareholder Return	Peer Group Total Shareholder Return*		
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
Y1								
Y2								
Y3								
Y4*								
Y5*								

# Pay versus Performance Disclosure

**Description of Pay Versus Performance Relationship.** The required tabular disclosure must be accompanied by a clear description of the relationship between:

- Both executive compensation actually paid to the CEO and the average compensation actually paid to the Remaining NEOs, and each of the following:
  1. company TSR and the peer group TSR,
  2. company net income, and
  3. the company-selected measure

# Pay versus Performance Disclosure

- Tabular List
  - Companies (other than SRCs) must provide an unranked list of the three to seven most important financial performance measures used to link executive compensation actually paid to NEOs during the last fiscal year with the company's performance
  - Must include the Company Selected Measure
- Companies are permitted to include non-financial measures in the list if they consider such measures to be among their three to seven most important measures
- If a company uses less than three measures to link NEOs compensation to company performance, only measures actually used must be included



# Pay Versus Performance Comment Letters

- Provide clear description between compensation actually paid and performance measure
  - Not sufficient to say no relationship exists
  - Relationship disclosure must be separate from the table
- Disclose all deductions from summary compensation totals to compensation actually paid
- Headings should accurately reflect amounts used to calculate compensation actually paid
- Reconciliation for non-GAAP performance measures used must be in the proxy statement
- Voluntary supplemental measures must
  - Be identified as supplemental,
  - Not be misleading
  - Not be presented with greater prominence than required disclosure

# Pay Versus Performance C&DIs

- CD&Is issued September 27, 2023
  - **C&DI #128D.14**—include modified or retained awards in connection with an equity restructuring for which compensation required to be recognized
  - **C&DI #128D.15**—calculations for outstanding awards should be determined based on change in fair value from the prior fiscal year end
  - **C&DI #128D.16**—effect of a market condition under U.S. GAAP should be reflected in the fair value of share-based awards containing such a condition, as well as in determining whether the vesting conditions of share-based awards have been met
  - **C&DI #128D.17**—awards that remain outstanding and have not yet vested, because performance or market conditions were not met in an eligible year, are not considered to have failed to meet the applicable vesting conditions
  - **C&DI #128D.18**—if retirement eligibility is the *only* vesting condition, this condition would be considered satisfied for purposes of PVP disclosures and calculation of executive compensation actually paid in the year that the holder becomes retirement eligible
  - **C&DI #128D.19**—if certification by the compensation committee that performance conditions have been attained is an additional substantive vesting condition, and occurs after year-end, then the award would not be considered vested at the end of the fiscal year

# Pay Versus Performance C&DIs (cont'd)

- CD&Is issued September 27, 2023
  - **C&DI #128D.20**—company may use a valuation technique for pay versus performance purposes that differs from the one used to determine the grant date fair value if technique would be permitted under FASB ASC Topic 718
  - **C&DI #128D.21**—not acceptable to value equity awards as of the end of a covered fiscal year based on methods not prescribed by GAAP
  - **C&DI #128D.22**—not required to disclose detailed quantitative or qualitative performance condition for its awards under Item 402(v)(4) to the extent such information would be subject to the confidentiality protections of Instruction 4 to Item 402(b) of Regulation S-K, but must provide as much information as possible without disclosing the confidential information
  - **C&DI #118.08**—revised C&DI addresses non-GAAP financial measures that are presented in pay-related circumstances in the proxy statement to reflect pay versus performance rule
- Other CD&Is were issued February 10, 2023

# Say on Pay



# Say on Pay

## Similar year-over-year support for Say-on-Pay

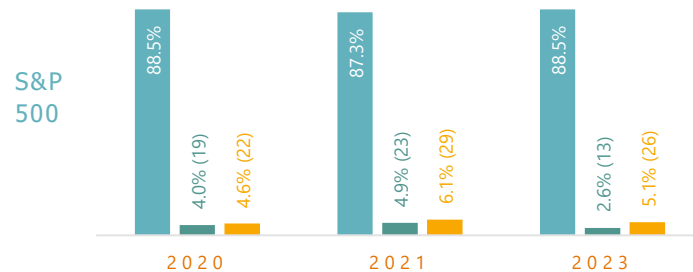
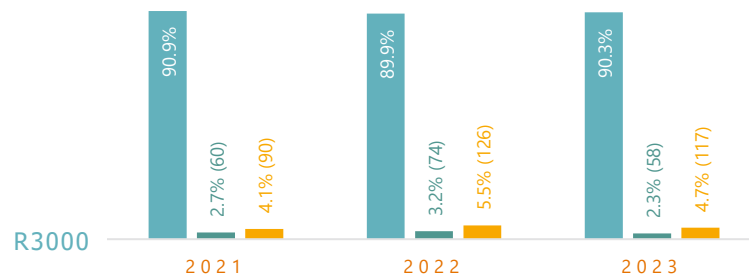
Say-on-pay vote results for the 2023 proxy season at Russell 3000 companies received average support of approximately 90% of votes cast in favor (excluding abstentions), similar to the support received in the proxy year 2022.

S&P 500 companies have garnered higher support this year, with approximately 89% of votes cast in favor, up from 2022 when they received 87% favourable support.

58 Russell 3000 companies failed to receive majority support for their Say on Pay proposals in the 2023 season.

The number of Russell 3000 companies that failed to receive majority support for their say-on-pay proposals or were in the Red Zone (50% to <70%) was down compared to 2022. 8.7% in 2022, 7.0% in 2023

## SAY-ON-PAY SUPPORT 2021 - 2023



■ Average Vote

■ Failed Vote

MAYER | BROWN

Please see Georgeson's [Proxy Season Report](#) for a list of companies that failed to receive majority support for their say-on-pay.

# Say on Pay

- Most say-on-pay proposals pass, often with a substantial majority vote
  - Passing with a relatively small majority vote may raise issues
- Reasons for failed votes include:
  - misalignment between pay and performance
  - problematic pay practices
  - special awards
  - particularly large grants
- “Against” recommendation from ISS does not always result in a failed say-on-pay vote
  - Likely to cause shareholder support to decline
  - Could require additional and more focused shareholder engagement
- Some companies prepare additional materials in support of executive compensation
  - These must be filed with the SEC as definitive additional soliciting material not later than the date first distributed or used to solicit shareholders



# Shareholder Proposal No-Action Requests

# Shareholder Proposal Process

- Rule 14a-8 has both technical and substantive grounds for exclusion
- Analyze shareholder proposals promptly upon receipt
  - Some technical defects that can be cured require notice to shareholders within a specified time frame
- In some circumstances engagement with proponent may lead to withdrawal
- Research precedent and assess whether a no-action request has potential to be effective



# Shareholder Proposal No-action Requests 2023 Proxy Season

- November 2021: Staff Legal Bulletin No. 14L rescinded Staff Legal Bulletins Nos. 14I, 14J, and 14K
  - SLB 14L reversed course on Staff on the ordinary business grounds and economic relevance grounds for excluding shareholder proposals
  - SLB 14L made it much more difficult for companies to exclude proposals under Rule 14a-8(i)(7) or Rule 14a-8(i)(5)
- Fewer no-action requests during 2023 proxy season compared to 2022
- Rate of Staff concurrence with exclusion and number of proposals permitted to be excluded increased during the 2023 proxy season compared to 2022
- There were some exclusions on ESG topics during 2023 proxy season
  - Micromanagement
  - Technical defects



# Proposed Amendments to Rule 14a-8

# Proposed Amendments to Rule 14a-8

- July 2022: SEC proposed amendments to Rule 14a-8
- Proposed amendment to substantial implementation exclusion under Rule 14a-8(i)(10)
  - Specifying that the “essential elements” of a proposal must have been substantially implemented
- Proposed amendment to the duplication exclusion under Rule 14a-8(i)(11)
  - Specifying that “substantially duplicates” means that a proposal “addresses the same subject matter and seeks the same objective by the same means” as a previous proposal
- Proposed amendment to the resubmissions exclusion under Rule 14a-8(i)(12)
  - Changing the “addresses substantially” standard to “substantially duplicates”
  - Addressing the same subject matter and seeking the same objective by the same means as proposal(s) previously included in the company’s proxy materials

# Proposed Amendments to Rule 14a-8 (*cont'd*)

- Proposing release “reaffirmed” the standards of the ordinary business exclusion relating to significant social policy issues and micromanagement
- If adopted substantially as proposed, there may be an increase in shareholder proposals submitted for inclusion in proxy statements
  - Companies may receive multiple proposals containing sufficiently different details on objective and means
- SEC regulatory agenda had targeted final amendments for October 2023
- Even if final amendments adopted soon, unlikely to directly impact 2024 proxy season
  - However, final amendments or even proposal could influence Staff determinations



# 2023 Proxy Voting Results

# INTRODUCTION

An examination of 2023 proxy season voting statistics yields a number of notable observations:

This year we observed  
a total of **947**



shareholder proposal submissions, exceeding the record-breaking number of submissions in the 2022 season (941).

## OF THE 612 PROPOSALS VOTED THIS YEAR:



**86**

related to  
**environmental**  
issues



**207**

involved  
**social**  
issues

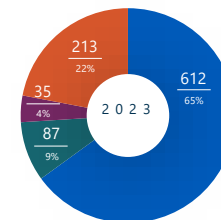
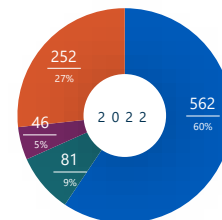
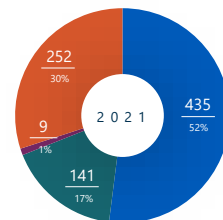


**251**

related to  
**governance**  
issues

Across the E, S, and G categories, an additional 68 voted proposals related to anti-ESG issues

## PROPOSAL ACTIVITY SURPASSED PREVIOUS YEARS' RECORD

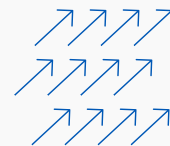


● Voted ● Omitted ● Not present/not in proxy ● Withdrawn

## PROPOSAL ACTIVITY, 2022 - 2023: RUSSELL 3000

	2022	2023
Environmental	177	186
Social	409	421
Governance	355	340
Grand Total	941	947

The number of **anti-ESG proposals submitted increased significantly** from 57 in 2022, to 94 in 2023, representing **almost 10% of proposals submitted this season.**



MAYER | BROWN

For the 2023 proxy season, data is based upon available annual meeting results proxy year for meetings occurring 7/1/2022 through 6/30/2023 for companies within the Russell 3000 Index.



# INTRODUCTION



Across E, S and G, 4, 5 and 24 proposals passed in each respective category. This translates into passage rates of approximately 5%, 2%, and 10% respectively (excluding anti-ESG proposals).<sup>1</sup> Overall, the number of proposals receiving majority support has significantly declined year-over-year compared to 2022.

## DIRECTOR ELECTIONS

94.4%

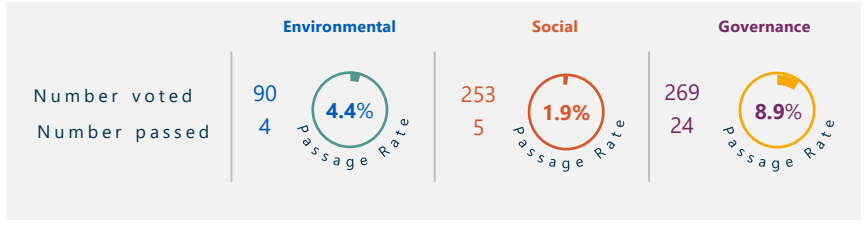


94.7%



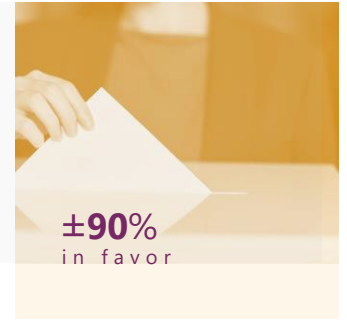
Director election support at Russell 3000 continued to be strong, **averaging 94.4% for the proxy year 2023**, similar to average **support of 94.7%** for the full proxy year 2022.

## PROPOSALS VOTED, INCLUDING ANTI-ESG PROPOSALS<sup>2</sup>



## SAY-ON-PAY VOTING

Say-on-pay vote results for the 2023 proxy season at Russell 3000 companies **received an average support of approximately 90%** of votes cast in favor (excluding abstentions), **similar to the support received in the proxy year 2022.**



1. Average passing rate was impacted by less than 1% when excluding anti-ESG proposals  
2. None of the passing proposals were anti-ESG  
3. These pie charts are inclusive of anti-ESG proposals.

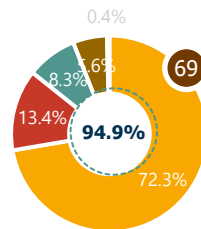
# DIRECTORS ELECTIONS

## Consistent Year-over-Year Director Election Support

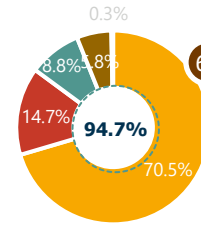
- Director election support at Russell 3000 companies continued to be strong, averaging 94.4% for the proxy year 2023, similar to average support of 94.7% for the full proxy year 2022.
- 46 directors received less than majority support, down 15 from 2022
- Directors receiving 95+% support declined (with 68.1% directors receiving such support in 2023 compared to 70.5% in 2022).

## AVERAGE DIRECTOR SUPPORT 2021 - 2023

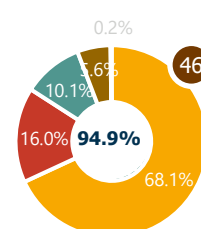
R3000



2021

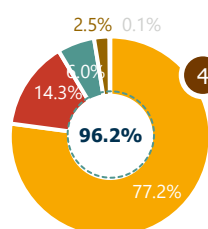


2022

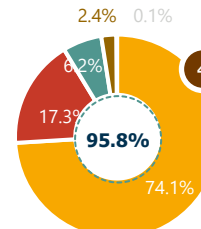


2023

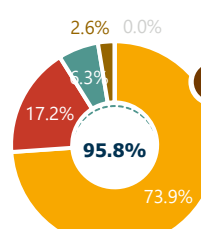
S&P 500



2021



2022



2023

● 95% +   
 ● 90-95%   
 ● 80-89.99%   
 ● 50-79.99%   
 ● Below 50

● Majority withhold or against

%

Average support

MAYER | BROWN



# SHAREHOLDER PROPOSALS ENVIRONMENTAL

The volume of environmental-focused proposals increased slightly from 186 proposals submitted (including 6 anti-ESG) during the 2023 season compared to 177 total environmental proposals for the 2022 season.

90 Environmental proposals were voted this proxy season, compared to 60 voted during the 2022 season.

In 2022, only 6 environmental proposals were omitted and 103 withdrawn, compared to 13 omitted and 75 withdrawn 2023.

Support for environmental proposals in the 2023 proxy season is down from last year's 38% average (2022) at around 23% (2023).

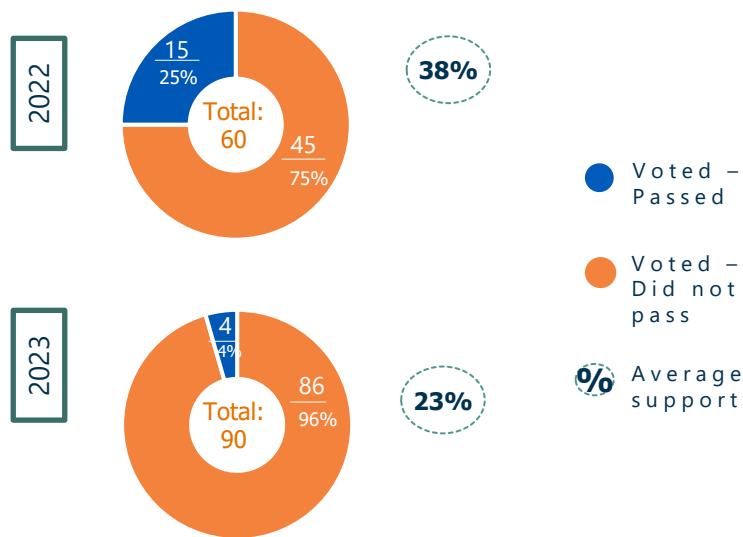
One factor contributing to dampened support may be that the environmental proposals during the 2023 season have seen significantly less support from both ISS and Glass Lewis. "FOR" recommendations on environmental proposals of all kinds have decreased by similar amounts, roughly 20 and 18 percentage points for ISS and Glass Lewis respectively.

The vast majority of climate-related proposals focus on GHG emissions reduction including target setting and climate transition plans.

## TOPICS OF PASSING ENVIRONMENTAL PROPOSALS

2023 PASSING ENVIRONMENTAL SHAREHOLDER BY TYPE	NUMBER OF PROPOSALS PASSED
Methane	●
Plastic/ Sustainable Packaging	● ●
Report on Climate Lobbying	●
KEY: ● = 1 proposal	

## ENVIRONMENTAL SHAREHOLDER PROPOSALS: 2022 – 2023, VOTED AND PASSED\*



MAYER | BROWN

\* Includes Anti-ESG proposals

# SHAREHOLDER PROPOSALS

## SOCIAL

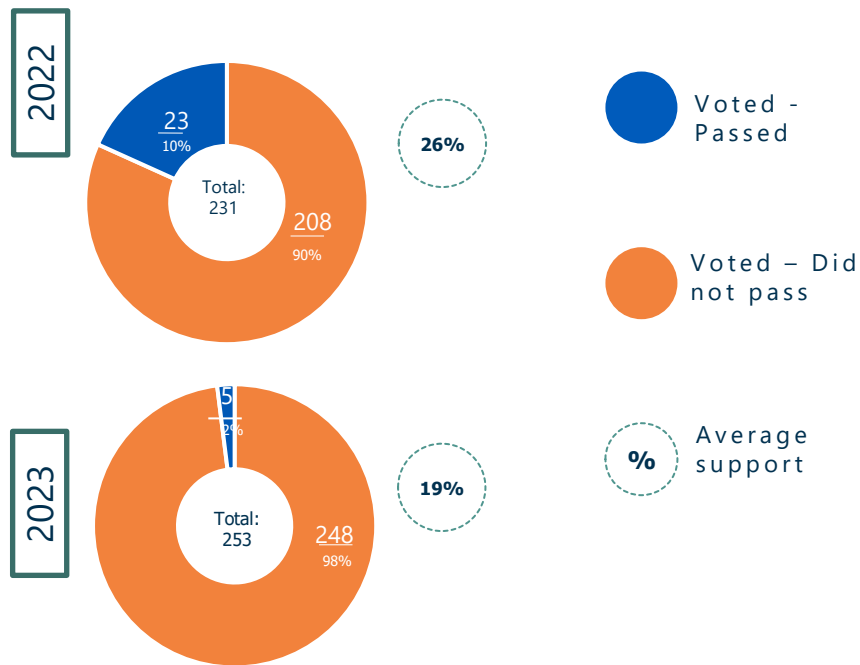
- The volume of shareholder proposals focused on social topics increased this year, with 421 social-focused proposals filed, surpassing the 2022 high of 409.
- Average support for all social proposals, including anti-ESG, dropped by 7 percentage points, from 26% to 19%; only 5 shareholder proposals received majority support, compared to 23 in 2022.
- Support across nearly all social proposal themes is down, with average support for racial equity audits down by 20 percentage points, reproductive rights down by 15 percentage points, and mandatory employee arbitration support decreasing by over 10 percentage points.
- This year, DEI related proposals remained a major focus for proponents. Proponents have made more specific and detailed requests of companies.

### TOPICS OF PASSING SOCIAL PROPOSALS

2023 PASSING SOCIAL SHAREHOLDER BY TYPE	NUMBER OF PROPOSALS PASSED
DEI	●
Freedom of Association	●
Human Rights	●
Pay Gap	●
Workplace Harassment	●

KEY: ● = 1 proposal

### SOCIAL SHAREHOLDER PROPOSALS: 2022 – 2023, VOTED AND PASSED\*



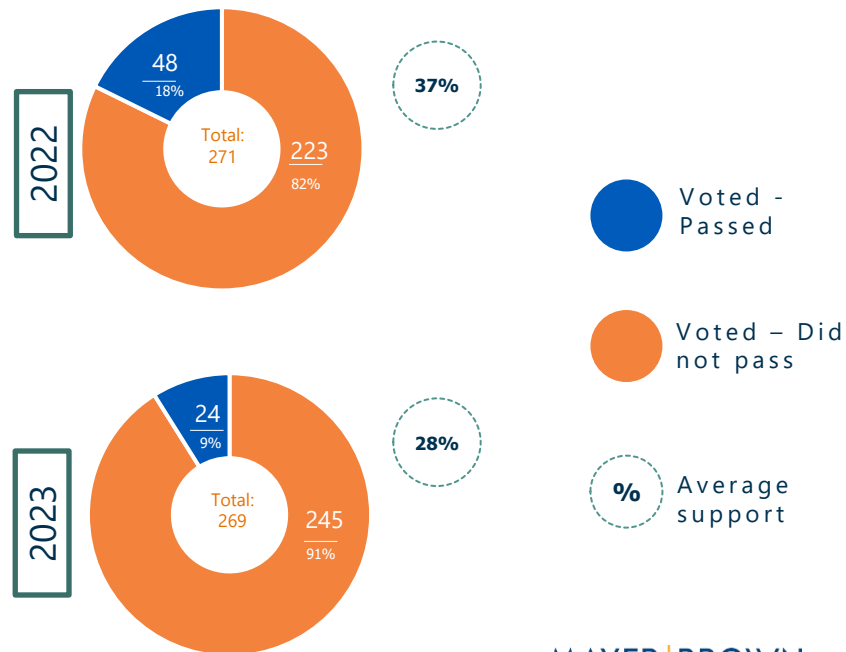
\* Includes Anti-ESG proposals

# SHAREHOLDER PROPOSALS

## GOVERNANCE

- The volume of governance-focused proposals appears to have decreased in 2023, with 340 proposals filed (including 21 anti-ESG proposals), compared to 2022 wherein 355 proposals were filed.
- Average support for all governance proposals was 28%.
- 24 shareholder proposals received majority support, compared to 48 in 2022.
- The topic of separation for the roles of board chair and CEO saw increased focus in 2023, with 82 such proposals submitted (excluding anti-ESG), representing a 57% increase from the submission level in the 2022 season (52 proposals excluding anti-ESG submitted in 2022); Average level of support was 31%, up slightly from 2022 average support level of 30%
- There was an increase in the number of severance-related shareholder proposals submitted this season; 47 submitted, 41 were voted and 4 received majority support

### GOVERNANCE SHAREHOLDER PROPOSALS: 2022 – 2023, VOTED AND PASSED\*



## SHAREHOLDER PROPOSALS

# ANTI-ESG

Year-over-year the number of anti-ESG proposals submitted increased significantly from 57 in 2022, to 94 in 2023, representing almost 10% of proposals submitted this season.

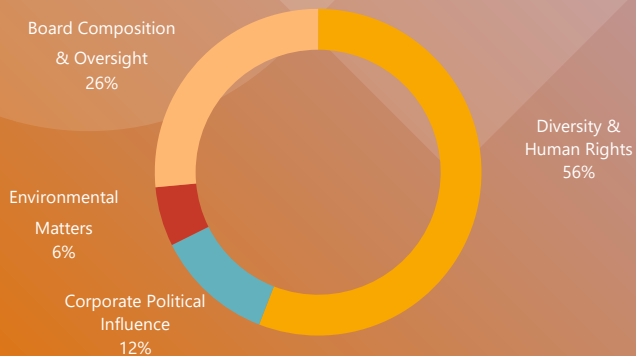
The vast majority of these proposals are focused on social issues, although there has also been an increase in the number of both governance and environmental proposals from anti-ESG proponents in the 2023 season.

A total of 68 anti-ESG proposals were voted this season: 46 social, 18 governance and 4 environmental.

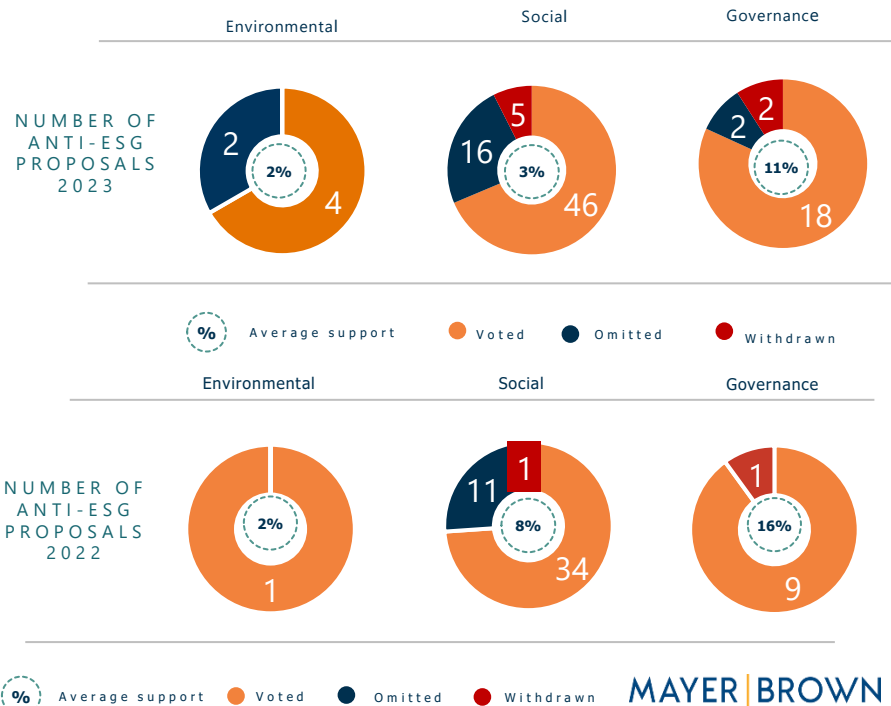
None of these anti-ESG proposals passed or received majority support this year.

This year's voting results provide no indication that investor perspective on ESG as a material risk has shifted as a result of these anti-ESG proposals.

### ANTI-ESG PROPOSALS SUBMITTED BY TYPE, 2023



### ANTI-ESG SHAREHOLDER PROPOSALS: 2022 – 2023





# Clawbacks

# Clawbacks

- Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) of 2010 added Section 10D to the Securities Exchange Act of 1934, requiring the SEC to direct national securities exchanges to establish listing standards that prohibit the listing of any security of a company that does not adopt and implement a written policy requiring the recovery, or “clawback,” of certain incentive-based executive compensation payments.
- On October 26, 2022 the US Securities and Exchange Commission (SEC) adopted new Rule 10D-1, directing national securities exchanges to establish listing standards that prohibit the listing of any security of a company that does not adopt and implement a written policy requiring the recovery, or “clawback,” of certain incentive-based executive compensation.
- SEC approved the final listing standards for NYSE and NASDAQ on June 9, 2023 with such standards becoming effective on October 2, 2023.
- Listed companies must adopt a compliant policy to be effective no later than December 1, 2023 that applies to all incentive-based compensation received on or after October 2, 2023.

# Clawbacks

- General rule: Mandatory clawback in the event of a restatement of erroneously awarded compensation that was received by a covered executive officer.
  - No discretion on enforcement: Only three limited exceptions (cost of enforcement exceeds recovery, home country law and tax-qualified plan)
  - No reduction for taxes paid by the Executives.
  - No indemnification of Executives.
  - No fault required.

# Clawbacks

- Key Concepts:
- “Covered Executive” means all of the Company’s current and former executive officers using the Section 16 definition (generally includes “president, principal financial officer, principal accounting officer (or if there is no such accounting officer, the controller), any vice-president of the company in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions [for the company]”).
- “Erroneously Awarded Compensation” means the amount of Incentive-Based Compensation received by a Covered Executive that exceeds the amount of Incentive-Based Compensation that otherwise would have been received had it been determined based on the restated financial statements.



# Clawbacks

- “Incentive-Based Compensation” means all compensation (including cash bonuses or other cash incentive awards (including any deferred element thereof), and vested and unvested equity awards, including options, restricted stock and restricted stock units, performance stock unit awards and performance stock awards) from the Company or a subsidiary of the Company that is granted, earned, or vested based wholly or in part upon the attainment of a Financial Reporting Measure.
- “Financial Reporting Measures” are measures that are determined and presented in accordance with the accounting principles used in preparing the Company’s financial statements, and any measures that are derived wholly or in part from such measures, including stock price and total shareholder return.
- “Restatement” means an accounting restatement of the Company’s financial statements due to material noncompliance with any financial reporting requirement under the federal securities laws, including any required accounting restatement to correct an error in previously issued financial statements that is material to the previously issued financial statements, or that would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period.

# Clawbacks

- Compliant clawback policy needs to be effective with respect to incentive-based compensation received on or after October 2, 2023 (policy can be adopted up to December 1, 2023).
- Consider having clawback policy permit offset of future compensation to satisfy clawback requirements (including compensation paid by subsidiary or affiliate). Also consider provision that permits suspension of payment of incentive-based compensation during period of uncertainty whether clawback may be required.
  - May make enforcement easier.
  - May have tax benefits for Executive (need to analyze at the time and be careful of 409A).
- Require covered executives to sign an acknowledgement letter (use future grants as consideration).
- Add a provision that makes clear that the terms of the clawback policy trump any other agreement between company and executive.

# Clawbacks—Reporting Requirements

- Clawback policy must be filed as exhibit 97 to annual report on Form 10-K, 20-F or 40-F, as applicable
- Clawback-related checkboxes needed on cover page of annual report
- NYSE companies must confirm their timely adoption of the clawback policy to NYSE no later than December 31, 2023
- If a clawback is triggered additional disclosures regarding the company's actions must be disclosed

# Cybersecurity Disclosure



# Cybersecurity Disclosure

- On July 26, 2023, the SEC issued a release adopting final rules aimed at standardizing and enhancing disclosure relating to cybersecurity incidents and risk management processes. The SEC had proposed rules on March 9, 2022.
- New Form 8-K/6-K Disclosure: Incidents
  - National Security and Public Safety Delay
- New Regulation S-K Disclosure: Process
  - Addressing Cyber Processes
  - Boards and Governance

# Cybersecurity: Incident Disclosure on Form 8-K

Final Rule	What to disclose	When to disclose
<p><b>Incident Disclosures:</b> Item 1.05 of Form 8-K</p>	<p>Disclose any cybersecurity incidents determined to be material and describe the material aspects of:</p> <ul style="list-style-type: none"> <li>• the nature, scope and timing of the incident; and</li> <li>• the impact or reasonably likely impact of the incident on the registrant, including on the registrant’s financial condition and results of operations.</li> </ul> <p>The registrant need <i>not</i> disclose specific or technical information about its planned response to the incident or its cybersecurity systems, or potential system vulnerabilities, in such detail as would impede the registrant’s response or remediation of the incident.</p>	<ul style="list-style-type: none"> <li>• Disclose within four business days after the registrant determines it has experienced a <i>material</i> cybersecurity incident.</li> <li>• A registrant must determine whether a cybersecurity incident is material “without unreasonable delay.”</li> <li>• A registrant may delay filing an Item 1.05 on Form 8-K if the United States Attorney General determines that immediate disclosure would pose substantial risk to national security or public safety.</li> </ul>
<p><b>Incident Disclosures:</b> Amendment to Item 1.05 of Form 8-K</p>	<p>Include a statement in its Item 1.05 on Form 8-K to identify information that was either:</p> <ul style="list-style-type: none"> <li>• not determined when the initial Form 8-K was filed; or</li> <li>• unavailable when the initial Form 8-K was filed.</li> </ul>	<p>The amendment to Item 1.05 on Form 8-K must be filed within four business days after either:</p> <ul style="list-style-type: none"> <li>• the registrant, without unreasonable delay, determines such information exists; or</li> <li>• the information to be disclosed in the amendment becomes available.</li> </ul>

# Cybersecurity: Process Disclosure under Reg. S-K

Final Rule	What to disclose	When to disclose
<p><b>Process Disclosures:</b> Item 106(b) of Regulation S-K</p>	<p>Describe:</p> <ul style="list-style-type: none"> <li>• processes, if any, to identify, assess and manage cybersecurity risks; and</li> <li>• whether any risks from cybersecurity threats have materially affected or are reasonably likely to materially affect business strategy, results of operations, or financial condition.</li> </ul>	<p>Disclose in registrant’s annual report (i.e., Form 10-K).</p>
<p><b>Process Disclosures:</b> Item 106(c)(1) of Regulation S-K</p>	<p>Describe the Board of Directors’ oversight of cybersecurity risk.</p> <p>Registrants need <i>not</i> disclose information about the frequency of board discussions of cybersecurity or information about any director expertise in the field.</p>	<p>Disclose in registrant’s annual report (i.e., Form 10-K).</p>
<p><b>Process Disclosures:</b> Item 106(c)(2) of Regulation S-K</p>	<p>Describe management’s role in assessing and managing material risks from cybersecurity threats.</p>	<p>Disclose in registrant’s annual report (i.e., Form 10-K).</p>

# Cybersecurity: Foreign Private Issuers

<b>Final Rules affecting Foreign Private Issuers</b>		
Amendment to General Instruction B of Form 6-K	Foreign private issuers (“FPIs”) must furnish on Form 6-K information on material cybersecurity incidents that they disclose or otherwise publicize in a foreign jurisdiction, to any stock exchange, or to security holders.	Disclose timely, in a manner consistent with the general purpose and use of Form 6-K.
Item 16J on Form 20-F	FPIs must describe: <ul style="list-style-type: none"><li>• Board’s oversight of risks from cybersecurity threats;</li><li>• Management’s role in assessing and managing material risks from cybersecurity threats.</li></ul>	Disclose in FPI’s annual report only ( <i>i.e.</i> , Form 20-F).



# Cybersecurity: Effective Date

- With respect to compliance with the incident disclosure requirements in Item 1.05 of Form 8–K and in Form 6–K, all registrants other than smaller reporting companies must begin complying on December 18, 2023.
  - Smaller reporting companies are being given an additional 180 days from the non-smaller reporting company compliance date before they must begin complying with Item 1.05 of Form 8–K, on June 15, 2024.
- With respect to Item 106 of Regulation S–K and Item 16K of Form 20–F, all registrants must provide such disclosures beginning with annual reports for fiscal years ending on or after December 15, 2023.
- With respect to compliance with the structured data requirements, all registrants must tag disclosures required under the Final Rules in Inline XBRL beginning one year after the initial compliance date for any issuer for the related disclosure requirement.
  - For Item 1.05 of Form 8–K and Form 6–K all registrants must begin tagging responsive disclosure in Inline XBRL beginning on December 18, 2024.
  - For Item 106 of Regulation S–K and Item 16K of Form 20–F, all registrants must begin tagging responsive disclosure in Inline XBRL beginning with annual reports for fiscal years ending on or after December 15, 2024.

# Insider Trading Disclosure

# Insider Trading – Quarterly Disclosure

- Quarterly disclosure of adoption or termination of 10b5-1 Plans and “non-Rule 10b5-1 trading arrangements” by officers and directors. Item 408 of Reg S-K.
  - Applies to public companies using domestic forms (e.g., Form 10-Q and Form 10-K) (i.e., not applicable to foreign private issuers (FPIs))
  - Disclosures must include material terms (other than price) of the 10b5-1 Plan or arrangement, such as date of adoption or termination; duration; number of securities to be sold or purchased; and whether intended to satisfy Rule 10b5-1
- CD&Is issued August 25, 2023
  - **C&DI #133A.01**—no disclosure required for a plan that ends due to expiration or completion, without individual action
  - **C&DI #133A.02**—disclosure required for plans where officer/director has a pecuniary interest reportable under Section 16, where the individual decided to adopt or terminate the plan

# Insider Trading – Annual Disclosure

- Annual disclosure of internal insider trading policies and procedures designed to promote compliance by directors, officers and the issuer, with insider trading laws
  - If an issuer has not adopted such policies it would have to disclose why it has not done so
  - Insider trading policies themselves must be included as Exhibit 19
  - FPIs to make similar annual disclosures in Form 20-F
  - **C&DI #120.26**—disclosures required in Form 10-K for FYE December 31, 2024
- Unlike the proposal, issuers are not required to describe their policies and procedures within the body of the periodic report. Instead they must disclose the insider trading policy itself.
- Posting to the website is not enough



# Insider Trading – Executive Compensation

## Option Grants & Similar Equity Grants Made Close in Time to the Release of MNPI

- Required in Form 10-K and certain proxy and information statements; not required for FPIs ([C&DI #120.27](#)) —disclosures required in proxy for first election of directors after December 31, 2024)
- Narrative disclosure of policies/practices regarding the timing of awards and release of MNPI
- Tabular disclosure of awards, on an award-by-award basis, granted to NEOs/directors in the period beginning (i) four business days before the filing of a periodic report (10-Q or 10-K), or current report on Form 8-K that contains MNPI (other than an 8-K disclosing the grant); and (ii) ending one business day after filing such report:

Name	Grant date	Number of securities underlying the award	Exercise price of the award (\$/Sh)	Grant date fair value of the award	Percentage change in the closing market price of the securities underlying the award between the trading day ending immediately prior to the disclosure of material nonpublic information and the trading day beginning immediately following the disclosure of material nonpublic information
PEO					
PEO					
A					
B					
C					

# Share Buyback Disclosure

# Share Buyback Disclosure

- Periodic disclosure for daily tabular buyback disclosure
  - Issuers filing on domestic SEC forms must provide day-by-day buyback disclosure quarterly on new Exhibit 26 to Forms 10-K and 10-Q
  - FPIs reporting on FPI forms must provide day-by-day buyback disclosure quarterly on new Form F-SR (or incorporate by reference Form 6-K disclosures that satisfy Form F-SR)
  - Listed Closed-End Funds must provide day-by-day buyback disclosure annually and semi-annually on Form N-SCR
- Periodic narrative disclosure for share repurchases
  - Narrative relating to tabular disclosure
  - Disclosure of issuer adoption or termination of trading plan

# Share Buyback Tabular Disclosure

## ISSUER PURCHASES OF EQUITY SECURITIES

Use the checkbox to indicate if any officer or director reporting pursuant to [section 16\(a\) of the Exchange Act \(15 U.S.C. 78p\(a\)\)](#), or for foreign private issuers as defined by [Rule 3b-4\(c\) \(17 CFR 240.3b-4\(c\)\)](#), any director or member of senior management who would be identified pursuant to [Item 1 of Form 20-F \(17 CFR 249.220f\)](#), purchased or sold shares or other units of the class of the issuer's equity securities that are registered pursuant to [section 12 of the Exchange Act](#) and subject of a publicly announced plan or program within four (4) business days before or after the issuer's announcement of such repurchase plan or program or the announcement of an increase of an existing share repurchase plan or program.

(a) Execution Date	(b) Class of Shares (or Units)	(c) Total Number of Shares (or Units) Purchased	(d) Average Price Paid per Share (or Unit)	(e) Total Number of Shares (or Units) Purchased as Part of Publicly Announced Plans or Programs	(f) Aggregate Maximum Number (or Approximate Dollar Value) of Shares (or Units) that May Yet Be Purchased Under the Publicly Announced Plans or Programs	(g) Total Number of Shares (or Units) Purchased on the Open Market	(h) Total Number of Shares (or Units) Purchased that are Intended to Qualify for the Safe Harbor in <a href="#">Rule 10b-18</a>	(i) Total Number of Shares (or Units) Purchased Pursuant to a Plan that is Intended to Satisfy the Affirmative Defense Conditions of <a href="#">Rule 10b5-1(c)</a>
Total								



# Share Buyback Narrative Disclosure

- Narrative information relating to repurchases in the tabular disclosure
- Quarterly disclosure of adoption or termination of 10b5-1 trading arrangement by company on Form 10-Q and Form 10-K. Item 408 of Reg S-K.
  - Include material terms (other than price) of the 10b5-1 trading arrangement, such as date of adoption or termination; duration; and number of securities to be sold or purchased
- Any policies and procedures relating to purchases and sales of the company securities by officers and directors during a repurchase program
- Disclosures pursuant to Items 408(d), 601 and 703 of Regulation S-K, Item 16E of Form 20-F, Item 14 of Form N-CSR, and Form F-SR must be tagged in Inline XBRL
  - Detail tagging of the quantitative amounts disclosed in the required tabular disclosures
  - Block text tagging and detail tagging of required narrative and quantitative information.

# Climate Change Disclosure Update

# Climate Change Disclosure

- Existing SEC rules and guidance
  - Principles-based approach
  - 2010 climate change guidance
  - Comment letters/September 2021 sample letter
- Coordinate disclosure in 2024 annual report, proxy statement and any sustainability report; consider:
  - Climate change risk and risk management
  - Plans and costs for climate change mitigation strategies in MD&A
  - Climate change goals and GHG emission reporting

# California Climate Accountability Package

- **SB-253: Climate Corporate Data Accountability Act (relating to emissions disclosure)**
  - Applicable to companies with over \$1 billion in annual revenue and doing business in CA
  - Disclose Scope 1 and Scope 2 GHG emissions in 2026; Scope 3 in 2027
  - Penalties of up to \$500,000 per year
- **SB-261: Climate-Related Financial Risk Act (relating to climate-related financial risk disclosure)**
  - Applicable to companies with over \$500 million in annual revenue and doing business in CA
  - Disclose (i) climate-related financial risks and (ii) measures taken to reduce risk by January 1, 2026
  - Penalties of up to \$50,000 per year





# Human Capital Management Disclosure Update

# Human Capital Management Disclosure

- 2020 – Human Capital added as a line item to Regulation S-K (Item 101(c))
- Wide variation in disclosure, with some common themes:
  - Diversity, equity and inclusion (DEI)
  - Geographic location of employees
  - Recruitment, turnover, retention, training and engagement
  - Remote/hybrid work and COVID-19
- SEC Regulatory Agenda – October 2023



# Risk Factors

# Risk Factors

- Material factors that make investment in a company speculative or risky
- Tailored to the specific company—not boilerplate
- Take a fresh look at complete set of risk factors for annual report
  - Any updating needed?
  - Any new risk factors to add?
- Avoid describing risk only in hypothetical terms if a material event of that nature has occurred



# Potential Risk Factors

- Inflation as a risk factor
  - Staff comment specified that if inflationary pressures have materially impacted operations, company should identify the types of inflationary pressure it is facing and how its business has been affected
- Cybersecurity risk factor
- AI risk factor
- Climate change risk factor
- Russia/Ukraine war risk factor
- Labor relations risk factor
- Government shutdown risk factor

# MD&A

# MD&A

- Objective “is to provide material information relevant to an assessment of the financial condition and results of operations of the registrant”
- Focus “specifically on material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition”
- Annual report MD&A to provide management’s perspective on financial condition and results of operations, including
  - Liquidity
  - Capital Resources
  - Critical Accounting Estimates

# Potential MD&A Comments

- Inflation to be discussed if material
  - Staff comment to clarify impact of inflation on company, if material, and identify mitigating actions
  - Staff comment to present percentage change or total dollar impact of price increases and wage increases impacting results if quantifiable
- ESG matters such as climate change or human capital management
- Provide detail on
  - Quantification of period to period changes where multiple causes
  - Around period to period variations



# D&O Questionnaires

# D&O Questionnaires

- Adoption or termination of Rule 10b5-1 plan or similar trading arrangement
- Questions regarding director expertise in areas such as climate change or cybersecurity
- Self-identified diversity characteristics
  - Any state or other diversity requirement questions
- Assess whether consent language is sufficiently broad to cover not only the company's proxy statement but any proxy statement of a dissident that triggered the universal proxy requirement

# Panelists



**Ryan J. Liebl**

Partner, Chicago  
[rliebl@mayerbrown.com](mailto:rliebl@mayerbrown.com)  
+1 312 701 8392

- Ryan Liebl is an Employment & Benefits partner in Mayer Brown's Chicago office.
- Ryan focuses his practice on advising public and private companies and individual executives on executive compensation related matters, including designing, drafting and administering nonqualified deferred compensation plans, excess benefit plans, equity compensation plans and agreements, cash-based incentive compensation plans and agreements, severance plans and individual employment and separation agreements.



**Jennifer Carlson**

Partner, Salt Lake City  
[jennifer.carlson@mayerbrown.com](mailto:jennifer.carlson@mayerbrown.com)  
+1 801 907 2720

- Jen Carlson's corporate and securities practice focuses on capital markets transactions, public company disclosure, and corporate governance matters.
- Jen's robust transactional practice is equally balanced between representing companies and underwriters in a variety of capital markets and finance transactions, including debt and equity offerings, liability management transactions, and corporate venture capital investments. In addition to her transactional practice, Jen has extensive experience advising companies on SEC disclosures, stock exchange compliance, fiduciary duties, and corporate governance matters.



**Laura Richman**

Counsel, Chicago  
[lrichman@mayerbrown.com](mailto:lrichman@mayerbrown.com)  
+1 312 701 7304

- Laura Richman is a counsel in Mayer Brown's Corporate & Securities practice. She has a wide-ranging corporate and securities practice, with a strong focus on corporate governance issues and public disclosure obligations.
- Laura's practice includes Securities and Exchange Commission reports, such as proxy statements and annual, quarterly and current reports. Laura regularly counsels clients on ongoing SEC rulemaking impacting public companies, including with respect to climate change, cybersecurity, human capital management and board diversity.
- Laura has practiced with Mayer Brown since 1981.



**Kilian Moote**

Managing Director, ESG Advisory  
Georgeson  
[kmooote@georgeson.com](mailto:kmooote@georgeson.com)

- Kilian Moote is a Managing Director within Georgeson's ESG advisory practice, where he advises clients on developing and implementing effective strategies that align with investors' expectations. Kilian has 15 years of experience working with executives and investors on sustainability, including leading the development of the ESG rating tool KnowTheChain.
- As a leading expert on social and human capital issues he's frequently called on to provide guidance. He is currently advising The Investment Integration Project and involved in an effort to enhance SASB's human capital management standard.



# Supplemental Materials

Read more:

- [2024 U.S. Proxy and Annual Report Season: It's Starting Time!](#)
- [2024 US Proxy Season: Recent Proxy and Annual Report Developments](#)
- [2024 US Proxy Season: Proxy Voting, Governance, and ES Matters](#)
- [SEC Releases New and Revised C&DIs on Pay Versus Performance Disclosures](#)



**OUR FREE WRITINGS & PERSPECTIVES BLOG PROVIDES NEWS AND VIEWS ON SECURITIES REGULATION AND CAPITAL FORMATION.**

The blog provides up-to-the-minute information regarding securities law developments and commentary on developments relating to private placements, IPOs, and other securities topics.



**SUBSCRIBE**

 **Writing on the Wall**

Translating Securities with Mayer Brown

FOR EXPLANATIONS OF OVER 900 SECURITIES, DERIVATIVES, FINANCIAL SERVICES, AND CAPITAL MARKETS TERMS AND PHRASES.

[writingonthewall.com](https://writingonthewall.com)

**MAYER | BROWN**



## Disclaimer

These materials are provided by Mayer Brown and reflect information as of the date of presentation.

The contents are intended to provide a general guide to the subject matter only and should not be treated as a substitute for specific advice concerning individual situations.

You may not copy or modify the materials or use them for any purpose without our express prior written permission.

[Americas](#) | [Asia](#) | [Europe](#) | [Middle East](#)

[mayerbrown.com](https://www.mayerbrown.com)

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Tauil & Chequer Advogados (a Brazilian law partnership) (collectively the "Mayer Brown Practices") and non-legal service providers, which provide consultancy services (the "Mayer Brown Consultancies"). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website. "Mayer Brown" and the Mayer Brown logo are the trademarks of Mayer Brown. © Mayer Brown. All rights reserved.

757261293