



## E&S Shareholder Proposals After the SEC's Policy Shift: An Intelligize Report

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In 2021, Walmart faced a shareholder proposal on the incendiary topic of abortion rights. With states passing increasingly restrictive abortion laws, the proposal asked the company to report on the risks that such laws posed to it. Walmart had no interest in holding a vote on the issue. Instead, like many companies facing divisive proposals, it asked for the Securities and Exchange Commission's blessing to exclude the proposal from its proxy materials. And like many other companies before it, Walmart was allowed to do so.

Then something happened. In late 2021, the SEC narrowed the broad and often-cited rule that Walmart had used to avoid a vote on the abortion-related proposal. Observers anticipated that because of the SEC's shift, public companies would be forced to hold votes on a flood of previously excludable proposals, particularly those relating to hot-button environmental and social issues.

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Sure enough, when the same proposal came before Walmart in 2022, the SEC rejected the company's request to exclude it. Against Walmart's wishes, the issue went to a vote.

Everything, it seemed, had changed. Or had it?

Intelligize set out to investigate that question, which has its origins in Rule 14a-8 of the Securities Exchange Act. The subparts of that rule lay out circumstances in which public companies can exclude shareholder proposals from a vote. The guidance that the SEC's Division of Corporation Finance issued in November 2021, in the form of a Staff Legal Bulletin, focused on two subparts: the "ordinary business exception" in Rule 14a-8(i)(7) and the "economic relevance" exception in Rule 14a-8(i)(5).



### Ordinary business

As it suggests, the ordinary business exception allows companies to exclude proposals that "deal with a matter relating to the company's ordinary business operations." In 2021, Walmart successfully argued that the abortion-related proposal affected its ordinary business operations, particularly "the Company's management of its workforce." The SEC's November [Staff Legal Bulletin](#), however, clarified that going forward, it will not allow the exclusion of proposals raising issues with a "broad societal impact." The SEC specifically pointed to proposals addressing human capital management and climate change as the type that would not likely be excluded under Rule 14a-8(i)(7).

### Economic relevance

The SEC similarly narrowed the applicability of Rule 14a-8(i)(5), which allows companies to exclude proposals that relate to operations that account for less than 5% of the company's assets, net earnings, and gross sales in the most recent fiscal year. Under the SLB, however, issues of broad societal impact can't be excluded even if they fall below those benchmarks of economic relevance.

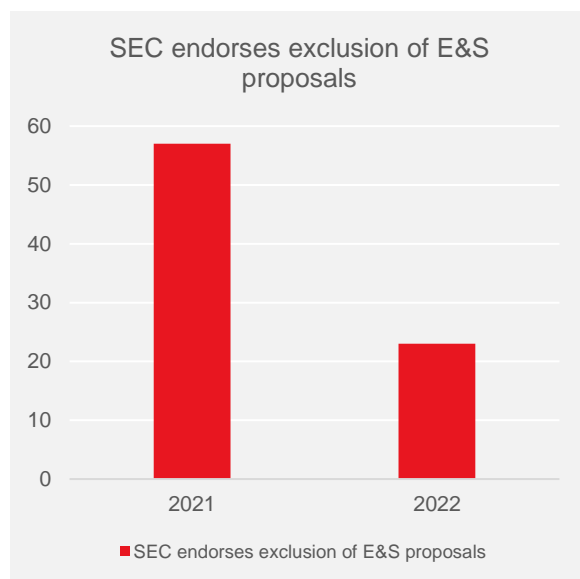
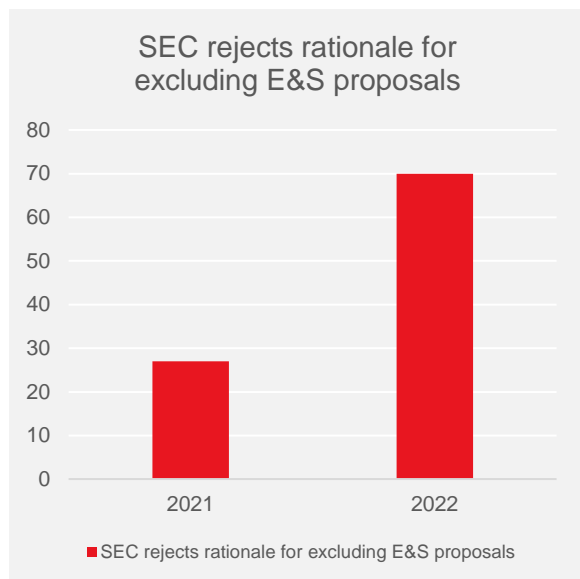
Astute commentators were virtually unanimous in concluding that the SLB would “[ease the path for shareholder proposals, notably those related to environmental, social and governance \(ESG\) matters, to make it into the proxy statement.](#)” Now that we have experienced one proxy season with the SLB in effect, and as we prepare to enter a second, it seemed a fitting moment to test that common assumption.

To determine the impact of the SLB on shareholder proposals—specifically those relating to environmental and social issues—we considered several questions.

## Did the SEC Send More E&S Proposals to a Vote?

In a word, yes.

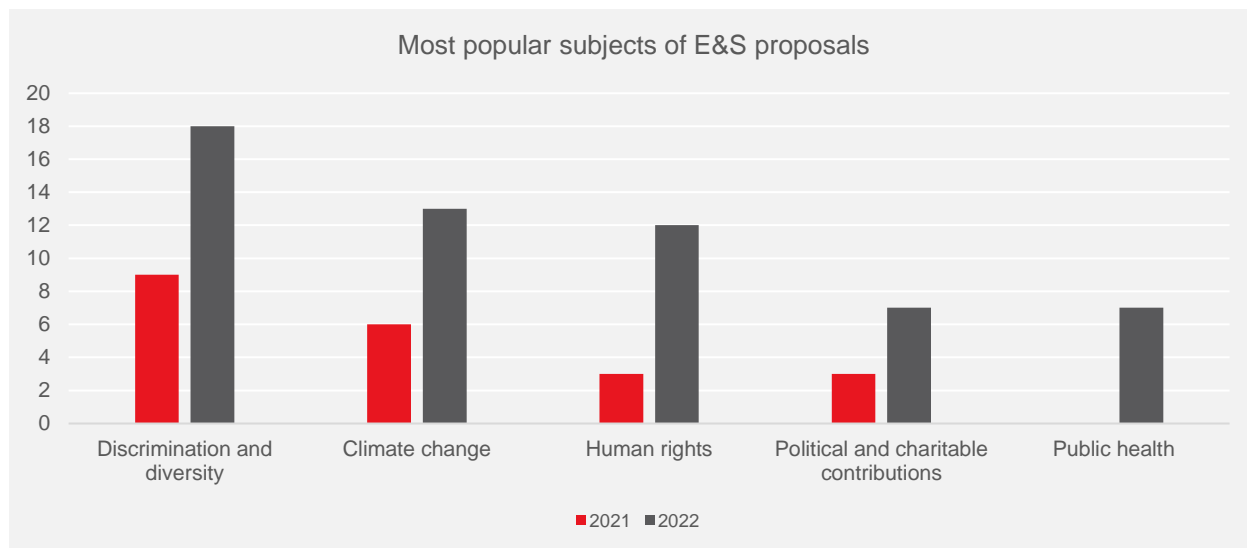
For the 2021 and 2022 proxy seasons, we examined all E&S proposals that companies asked permission to exclude from their proxy materials through the SEC’s “no-action” letter process.



As predicted, the shift in SEC guidance increased the number of shareholder proposals on which companies had to hold votes—in fact, it more than doubled it. Conversely, the number of proposals the SEC allowed companies to exclude dropped by more than 50%.

## What Topics Did They Address?

Perhaps surprisingly, even with the SEC opening the door to more E&S proposals, the scope of topics addressed in E&S-oriented shareholder proposals has not broadened in a meaningful way—at least not yet. Most proposals remained concentrated in familiar territory.



## How Did Repeat Proposals Fare?

*In another surprise finding, we discovered only two instances in which a proposal that had been excluded in the 2021 proxy survived the no-action-letter process in 2022. One of those was the Walmart proposal. In 2022, the SEC told the company that the proposal “transcends ordinary business matters” and thus could not be excluded.*

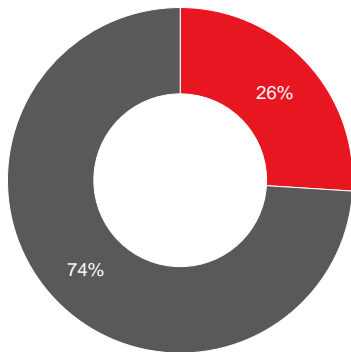
In 2021, Expeditors International of Washington Inc. was [allowed](#) to exclude a [proposal](#) asking the company to provide a semi-annual report on its contributions to political campaigns or political advertising. Expeditors International did not rely on the “ordinary business” or relevance exceptions, but rather, under Rule 14a-8(i)(10), the justification that it had already substantially implemented the proposal. That exception was not a focus of the SLB; even so, in 2022 the SEC reversed itself. That year, Expeditors International received an identical proposal from the same proponent and [asked](#) to exclude it again on the grounds that it had been substantially implemented. Without providing its reasoning, the SEC [refused to concur](#). (The proposal [failed](#).)

With only two shareholders submitting identical proposals in 2021 and 2022, it’s clear that shareholders have not yet attempted to take full advantage of the SEC’s changed approach.

## Did Shareholders Vote for Them?

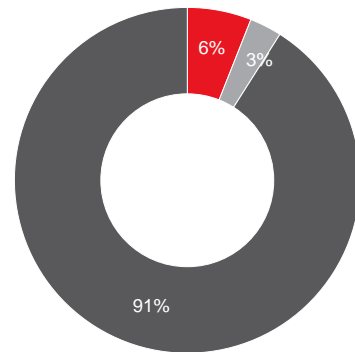
In theory, the SEC’s decision to force a vote on an E&S proposal is entirely separate from the shareholders’ decision to vote for or against the proposal. Nonetheless, we were interested to see whether any correlation existed between the change in the SEC’s approach and the success rate of E&S proposals that went to a vote. We found, if anything, a negative correlation.

Shareholder Votes on E&S Proposals: 2021 (27 proposals)

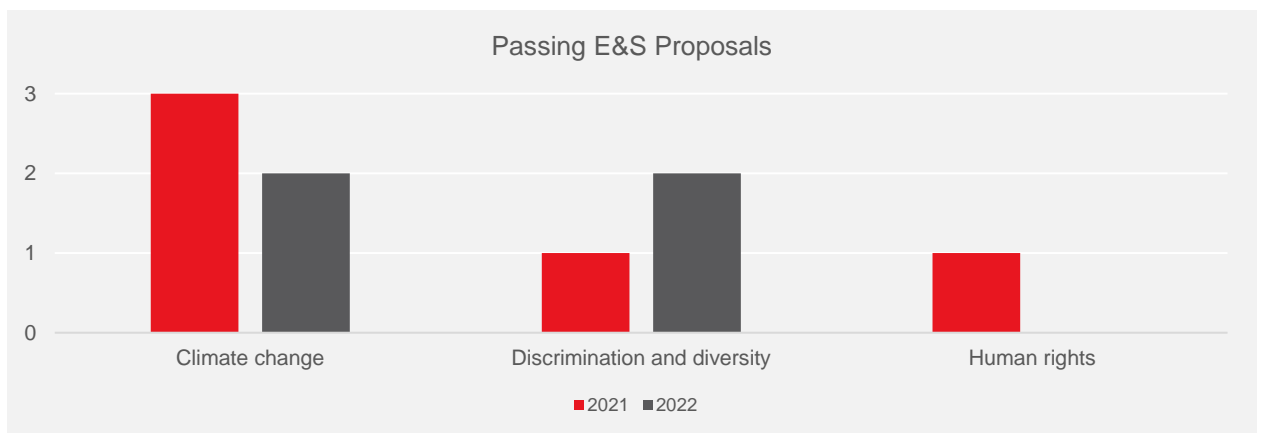


■ Passed ■ Failed

Shareholder Votes on E&S Proposals: 2022 (68 proposals)



■ Passed ■ Withdrawn ■ Failed



E&S proposals had a markedly lower success rate at annual meetings in 2022, and the difference can’t be attributed to the subject matter of the proposals.

## Why Did Shareholders Vote for the Successful Ones?

Taking our investigation a last step further, we sought out commonalities among the E&S proposals that shareholders approved in 2021 and 2022, to see if they offered lessons for the future. Across both years, only nine E&S proposals passed (after going through the no-action process). Even in that small group, however, some themes emerged.

In three cases—a full third of the entire group—management chose not to resist the proposals. [Wendy's](#) faced a vote on how it protects “workers in its food supply chain from human rights violations, including harms associated with COVID-19.” [IBM](#), meanwhile, faced a vote on the effectiveness of its diversity, equity and inclusion programs. Both companies outright supported the shareholder proposals. [Dominion Energy](#) didn't go quite so far but, facing a vote on a climate-change issue relating to its “natural gas-based infrastructure,” it adopted a neutral position.

In a fourth case, management opposed the proposal, but its opposition may have lacked credibility. We're talking about [Exxon Mobil](#), which in 2021 opposed a measure requiring it to report on the alignment between its lobbying activities and the goals of the Paris Climate Agreement. At the time, Exxon's board was under siege [in a proxy contest](#) with activist investment firm Engine No. 1, which accused the company of an obstinate refusal to prepare for a low-carbon future. At the shareholder meeting, three of Engine No. 1's nominees were elected to Exxon's board of directors. It was a landmark moment in shareholder activism that has inspired both change (Exxon has [bolstered its climate strategy](#)) and backlash (conservative activists have placed a [“pro-fossil fuel” candidate up for the board this year](#)). Regardless, Engine No. 1's campaign may have limited the force of the company's statements on climate-related topics, allowing the proposal to succeed over its opposition.

In three additional cases—all in 2022—companies effectively asked shareholders to take their word that the request in the proposal was not a good use of their resources. All of them lost.

The Walt Disney Co. and McDonald's both faced DEI-related proposals, and both claimed to support the larger goals behind them. In response to a proposal asking for a report on a potential gender or racial pay gap, however, [Disney](#) argued that it wasn't “a necessary and effective use of [c]ompany resources given the policies, practices and reporting that the [c]ompany already has in place to achieve that end.” Likewise, while expressing “align[ment] with this proposal's stated goal, [McDonald's](#) opposed a civil rights audit based on its own assessment that “shareholders would be better served” by the company's existing “robust strategies” on civil rights and gender and racial equity. Neither provided hard data to support their positions, and neither won.

Similarly, [Chubb](#) faced a proposal requesting a report on how it intends to reduce greenhouse gas emissions in alignment with the Paris Climate Accord. Chubb responded, effectively, that it would be too hard to accomplish: “To the extent the report seeks to require Chubb to measure the GHG emissions of its insureds or the companies in which it has investments, the proposal should be rejected because it would be impossible for Chubb to undertake such a task.” Voters found that rationale unpersuasive.

## Conclusion

At one level, the impact of the SEC's Staff Legal Bulletin is entirely expected: Fewer environmental and social shareholder proposals were excluded from proxy materials in 2021, and more went to a vote. But the full story is not so simple. Our analysis offers ample evidence that the 2022 season was not an unmitigated success for proponents of E&S proposals. The scope of E&S proposal topics did not expand. Few repeat proposals passed. Perhaps most dramatically, the success rate of E&S proposals going to a vote declined.

The full impact of the SLB may only be apparent with the benefit of more experience, and more time for proposals to gain traction over time. For now, its legacy is a surprisingly mixed one.



## Methodology

The findings are based on shareholder proposal no-action letters publicly available between Oct. 1, 2020 and June 30, 2021 in comparison to those publicly available between Oct. 1, 2021 and June 30, 2022. The observed environmental and social proposals from these time periods were examined along with relevant proxy statements for those proposals presented at shareholder meetings and the subsequent 8-Ks reporting voting results. The data was pulled as of July 6, 2022.

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