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**FOLEY**  
FOLEY & LARDNER LLP

Wednesday, November 11th, 2020

*9:00 a.m. – 10:30 a.m. CST*

NATIONAL DIRECTORS INSTITUTE

# Webinar Housekeeping

- Questions can be entered via the Q&A widget open on the left-hand side of your screen. We will address questions at the end of the program, time permitting.
- The recorded version of this presentation will be available on [Foley.com](https://www.foley.com) in the next few days and you can get a copy of the slides in the Resource List widget on the right-hand side of your screen.

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# '21 or Bust: ES&G in the Age Of COVID-19

# PANELISTS



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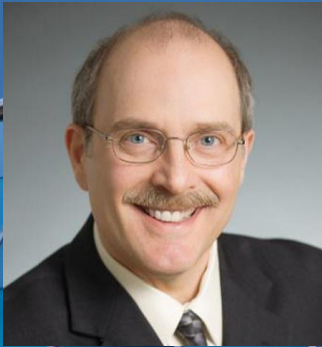
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# 21 Cards in Deck

Uncertainties created by COVID-19 and elections alter stakes



<b>PLAN B</b>	<b>VENUE SHOPPING</b>	<b>BACK 2 BASICS</b>
<b>PANDEMIC PROTOCOLS</b>	<b>BOARDROOM BLOWBACK</b>	<b>DESIGNER DRUGS</b>
<b>MEETING MAKEOVERS</b>	<b>PERSONNEL PROBLEMS</b>	<b>LOBBY HOBBY</b>
<b>PAY PAUSED</b>	<b>E\$G METRICS</b>	<b>ACCOUNTING ANXIETY</b>
<b>RETHINKING REFRESHMENT</b>	<b>FROZEN FUNDS</b>	<b>IPO(MG)</b>
<b>TWENTY THIRTY</b>	<b>CONTROL CONTESTS</b>	<b>RESTLESS UNICORNS</b>
<b>HEATED PROXY</b>	<b>SHIFTING SEATS</b>	<b>BOOM OR BUST?</b>

# Plan B: 2020 Election Impacts

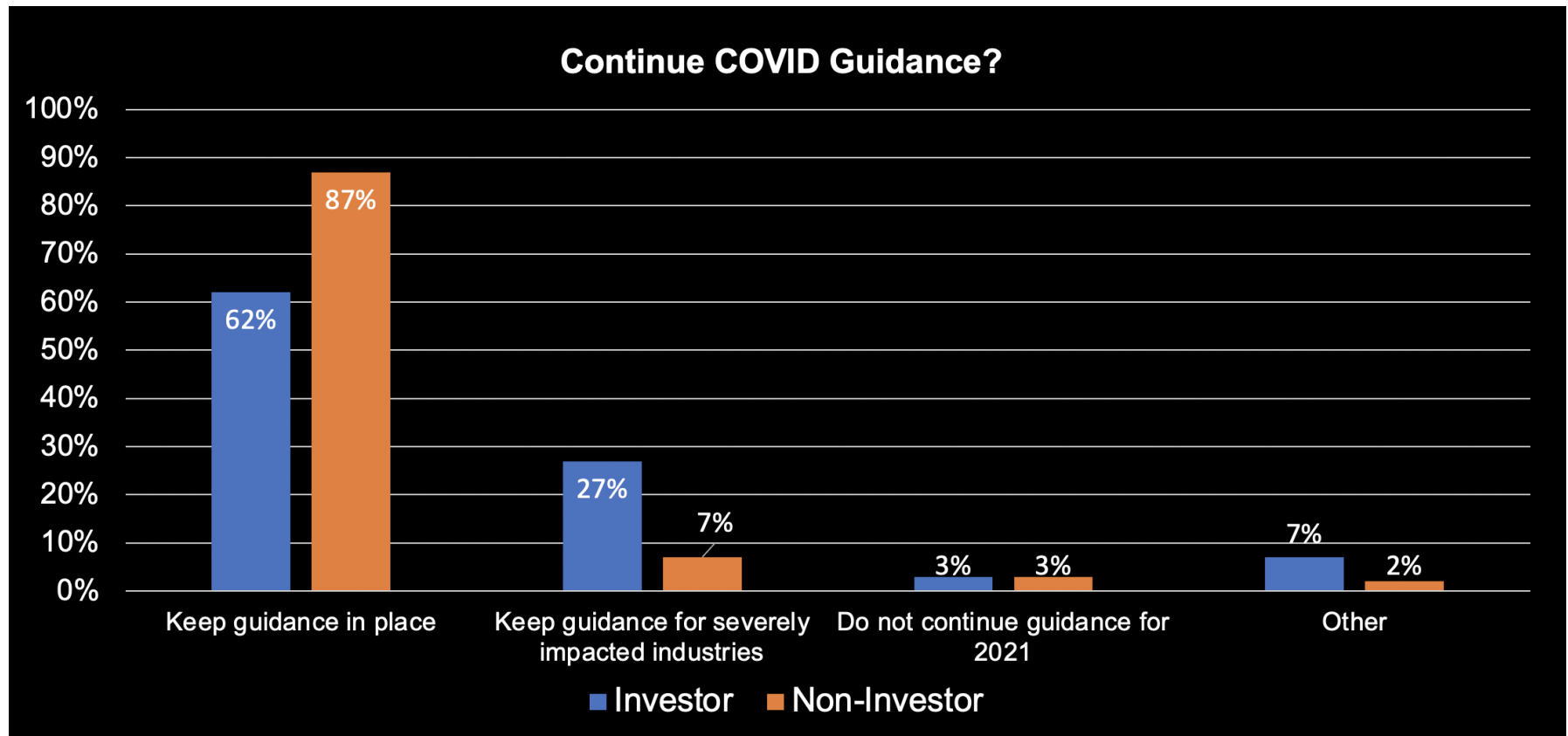
Proxy season fallout will be widespread in 2021

- Regulatory Environment
  - SEC agenda
    - Disclosure requirements
  - Climate risk
  - Political spending
  - Human capital
  - Board diversity
  - DoL agenda
- Legislative Agenda
  - Gridlock?
  - Congressional Review Act



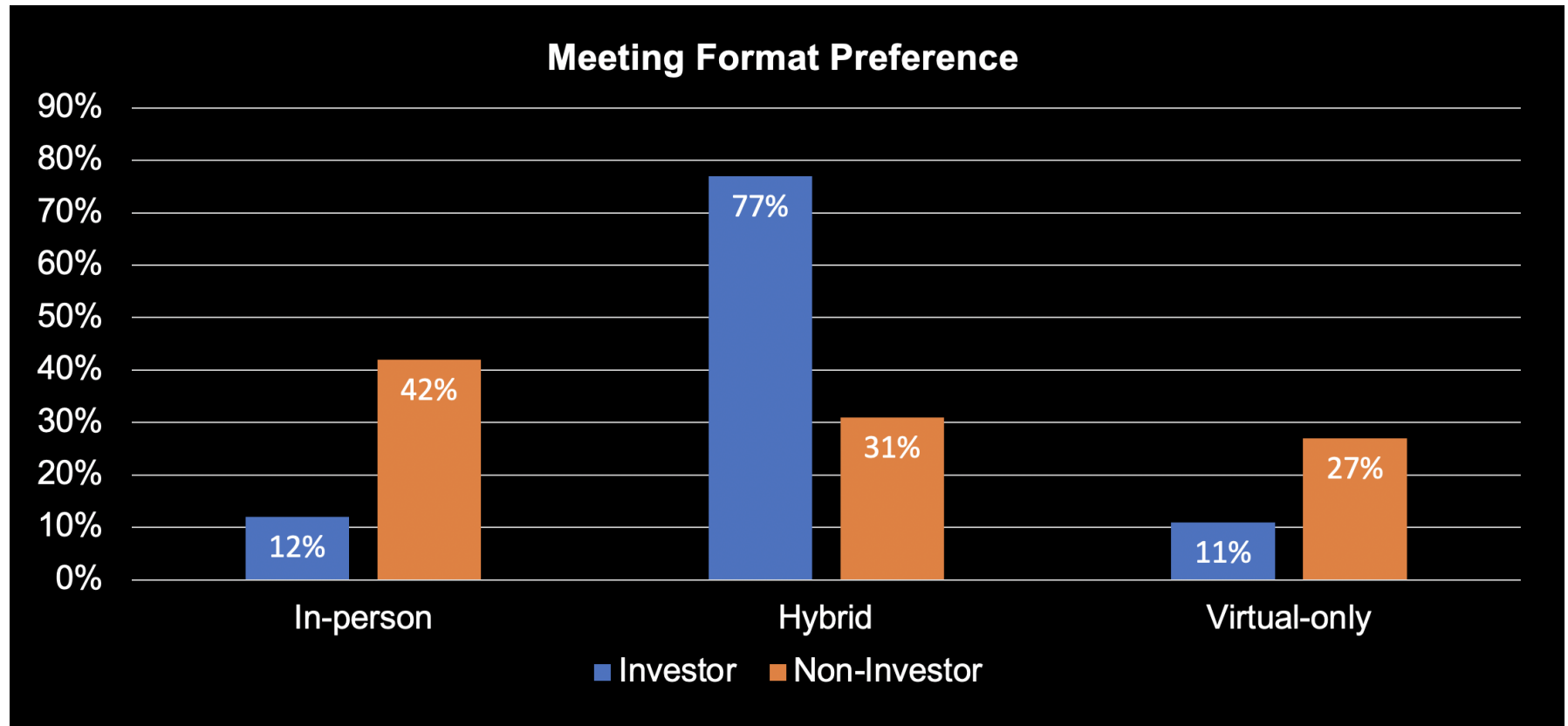
# Pandemic Protocols: Continuation of Covid-19 Guidance

Survey: What is your organization's view with respect to the continuation into 2021 of ISS's policy guidance issued in response to the pandemic?



# Meeting Makeovers: Investors Prefer Hybrid Format

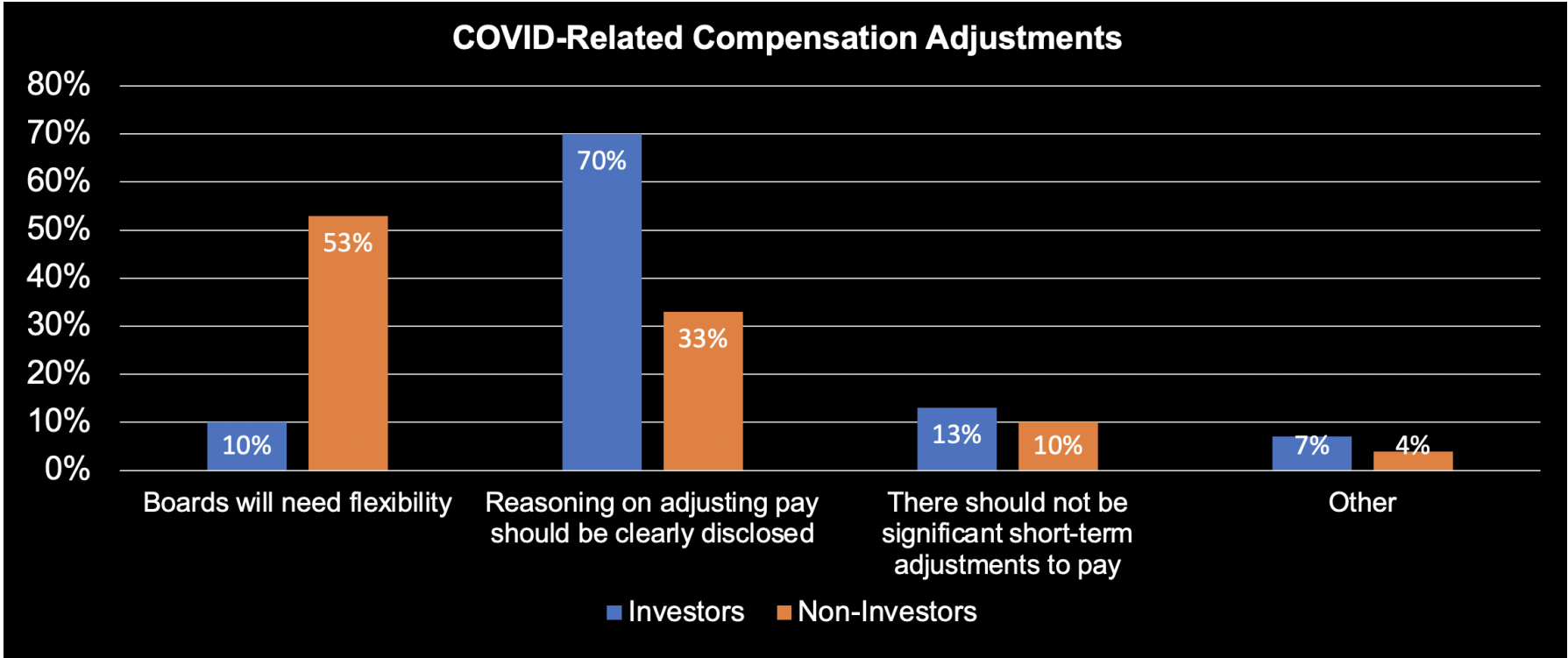
Survey: Absent continuing COVID-19 health and social restrictions, what shareholder meeting format does your organization prefer?





# Pay Paused: Disclosure Key to Investors' Support

Survey: Which of the following most closely reflects your organization's view of executive compensation in the wake of the pandemic?



# Pay Paused: Hitting Play On Bonuses

FAQ: For companies making COVID-related changes to bonus/annual incentive programs, what disclosure would be needed for investors to fully evaluate these decisions?

1. The specific challenges that were incurred as a result of the pandemic and how those challenges rendered the original program design obsolete or the original performance targets impossible to achieve. The disclosure should address how changes are not reflective of poor management performance.
2. For companies making mid-year changes vs. one-time discretionary awards, the company should explain why that approach was taken (as opposed to the alternative approach) and how such actions further investors' interests.
3. One-time discretionary awards should still carry performance-based considerations and companies should disclose the underlying criteria, even if not based on the original metrics or targets. Investors are likely to find generic descriptions (i.e. "strong leadership during challenging times") to be insufficient.
4. The company should discuss how the resulting payouts appropriately reflect both executive and company annual performance. The disclosure should clarify (or estimate) how the resulting payouts compare with what would have been paid under the original program design. Above-target payouts under changed programs will be closely scrutinized.
5. Companies that have designed the following year's (2021) annual incentive program are encouraged to disclose information about positive changes, which may carry mitigating weight in ISS' qualitative evaluation.

# Pay Paused: Retention Tension

## FAQ: How will ISS evaluate COVID-related retention or other one-time awards?

- Given the unprecedented challenges faced by certain public companies and industries in the wake of the pandemic, some companies may grant one-time awards to address concerns resulting from the pandemic, which may include executive retention. As with one-time awards granted outside the context of the pandemic, companies that grant one-time awards should clearly disclose the rationale for the award (including magnitude and structure), as well as describe how the award furthers investors' interests. As in prior years, boilerplate language regarding "retention concerns" will not be viewed as sufficient rationale. Awards should be reasonable in magnitude and an isolated practice. Additionally, the vesting conditions attached to the award should be strongly performance-based and clearly linked to the underlying concerns the award aims to address. In any event, the award vesting schedule should be long-term. Finally, the award should contain shareholder-friendly guardrails to avoid windfall scenarios, including limitations on termination-related vesting.
- While many investors recognize that well-structured retention or other one-time awards may be appropriate in limited circumstances, investors do not expect companies to grant such awards merely as a replacement for forfeited performance-based awards. To the extent one-time awards are granted in the year (or following year) in which incentives are forfeited, companies will be expected to explain the specific issues driving the decision to grant the awards and how the awards further investors' interests. Companies that indicate that one-time awards were granted in consideration of forfeited incentives, for fairness considerations, lowered realizable pay, etc., will also need to explain how such awards do not merely insulate executives from lower pay.

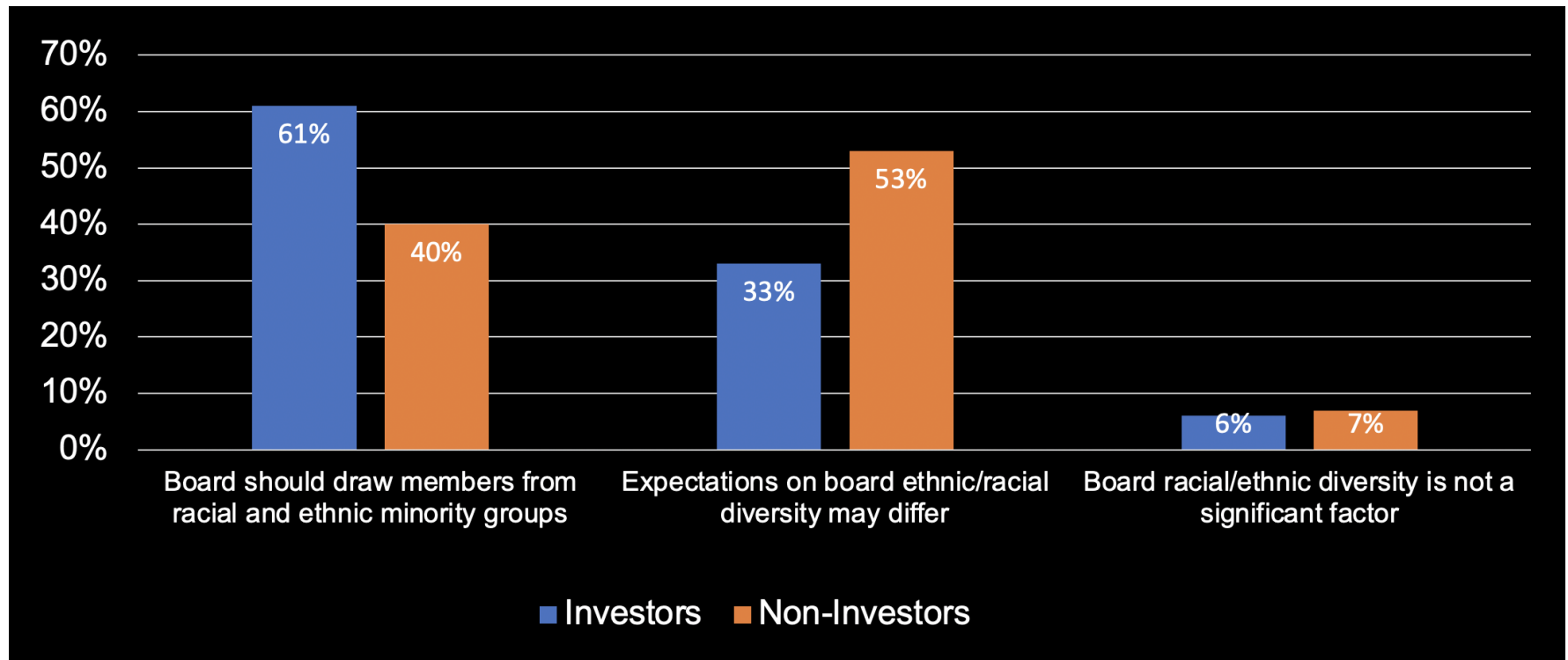
# Pay Paused: Limiting Changes to LTIs

FAQ: How will ISS evaluate COVID-related changes to equity/long-term incentives?

- **For cycles that are currently in-progress (e.g., FY2018-20 or FY2019-21)?**
  - Long-term incentives are meant to cover performance over multiple years. Investor feedback indicates that these programs should be designed to smooth performance over a long-term period and not be altered after the beginning of the cycle based on a short-term market shock. Accordingly, changes to these in-progress cycles will generally be viewed negatively, particularly for companies that exhibit a quantitative pay-for-performance misalignment.
- **Will the approach differ for LTIs awarded in the most recent year (e.g., the go-forward cycle beginning in 2020)?**
  - For award cycles beginning in 2020, investors generally do not expect to see drastic changes to the long-term incentive program unless the underlying business strategy has fundamentally changed. However, more modest alterations to the incentive program could be viewed as reasonable. For example, movement to relative or qualitative metrics may be viewed as reasonable in the event of unclear long-term financial forecasting. More drastic changes, such as shifts to predominantly time-vesting equity or short-term measurement periods, would continue to be viewed negatively. Lastly, companies should clearly explain any changes to the program, to allow investors to evaluate the compensation committee's actions and rationale.

# Rethinking Refreshment: Investors Back Diversity

Survey: Which of the following best describes your organization's view of the importance of ethnic and racial diversity on corporate boards?





# Twenty Thirty: Gender Diversity Upgrade?

## Proposed global ISS Benchmark Policy changes

- **Canada: Gender Diversity** – Updating voting policy to reflect that a higher threshold of women board representation, being a percentage or number constituting 30 percent of the board instead of single board member, must be satisfied at S&P/TSX Composite issuers from 2022 onward.
- **Continental Europe: Gender Diversity** – Introducing a new voting policy to require 30 percent female representation on boards for core (widely held) companies with one-year transition period and minimum of one woman on boards for non-core companies.
- **UK/Ireland: Gender Diversity** – Introducing a new voting policy to require 33 percent female representation on boards at FTSE 350 companies and minimum of one woman on boards of smaller companies.
- **Brazil/Americas Regional: Gender Diversity** – Introducing a new voting policy to require the presence of at least one woman on boards with a one-year transition period prior to implementation.

# Heated Proxy: Investors Consider Votes Over Climate Risks

Survey: What actions, if any, does your organization consider may be appropriate for shareholders to take at a company that they consider to be not effectively reporting on or addressing its climate change risk? (Check all that apply)

Possible Actions	Investors' Rank* (2020)	Investors' Rank (2019)
Engage with the board and company management on their concerns	1 (92%)	1 (91%)
Consider support for shareholder proposals seeking increased disclosure related to greenhouse gas (GHG) emissions or other climate-related measures	2 (87%)	2 (90%)
Consider support for shareholder proposals seeking establishment of specific targets for reduction of GHG emissions, possibly including targets for reducing the carbon footprint associated with the company's products and services	3 (84%)	3 (71%) No scope 3
Consider a vote against directors who are deemed to be responsible for poor climate change risk management oversight	4 (75%)	4 (62%) Audit, risk or relevant committee chair
Urge boards to make appropriate climate-risk related goals part of their executive incentive programs	5 (74%)	NA
Consider support for shareholder proposals calling for an independent board chair (if one is not already in place) due to climate change risk management oversight concerns	6 (65%)	NA
Consider a vote against the company's financial statements, statutory reports, or Corporate Social Responsibility report (in markets where this is an option)	7 (45%)	6 (38%)
Number of respondents who checked at least one answer	157	105

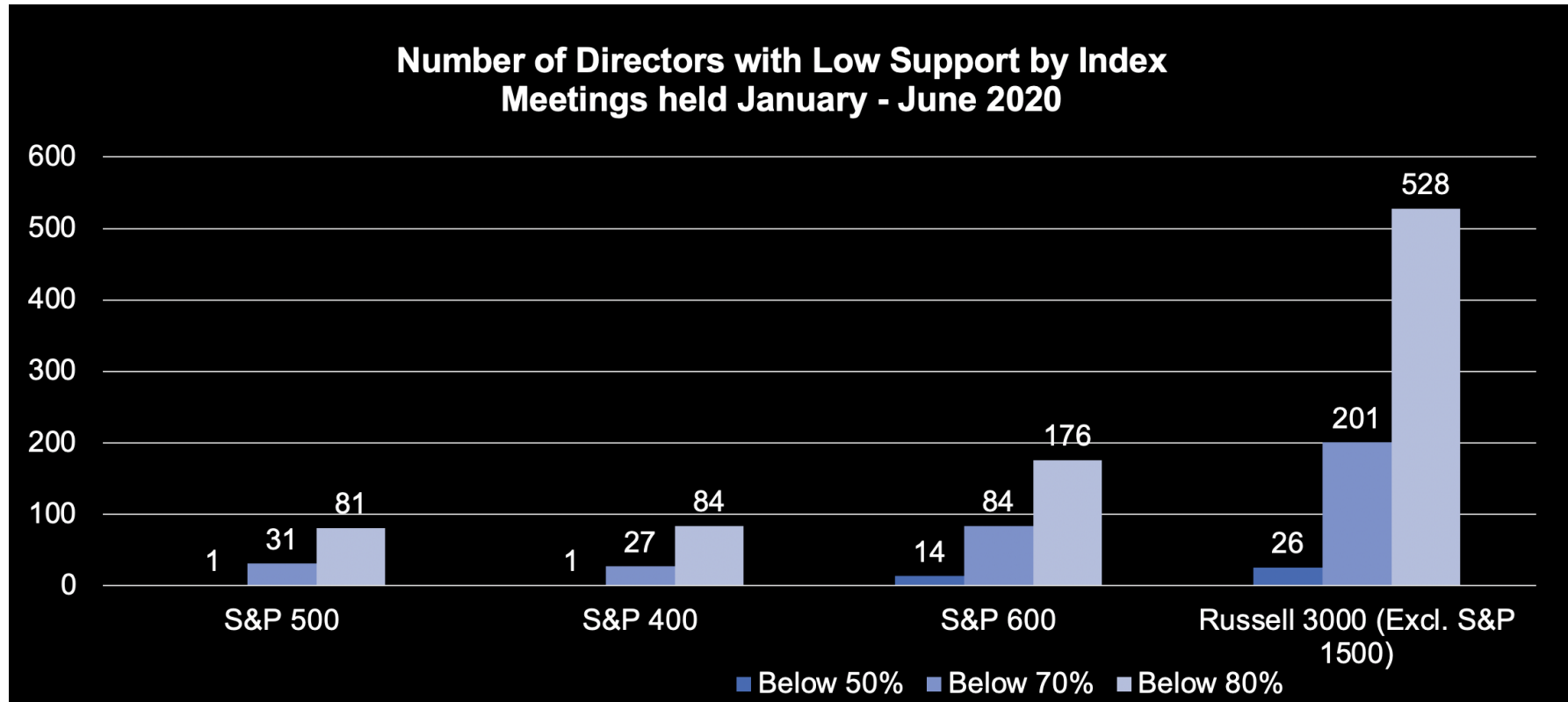
# Venue Shopping: Exclusive Forum Provisions

## Widespread unilateral adoption following recent court decisions

- Federal Forum Selection Provisions—Require that U.S. federal courts be the sole forum for shareholders to litigate claims arising under federal securities law
  - Proposed General Recommendation: Generally vote for federal forum selection provisions in the charter or bylaws that specify "the district courts of the United States" as the exclusive forum for federal securities law matters. Vote against provisions that restrict the forum to a particular federal district court.
- State Law Exclusive Forum Provisions—Restrict shareholders' ability to bring derivative lawsuits for claims arising out of state law to the courts of a particular state (generally state of incorporation)
  - Proposed General Recommendation: Generally vote for charter or bylaw provisions that specify Delaware as the exclusive forum for corporate law matters for Delaware corporations, in the absence of serious concerns about corporate governance or board responsiveness to shareholders.
  - For states of incorporation other than Delaware, vote case-by-case, considering:
    - Stated rationale for adopting such a provision;
    - Disclosure of past harm from duplicative shareholder lawsuits in more than one forum;
    - Breadth of application including the types of lawsuits to which it would apply; and
    - Governance features such as shareholders' ability to repeal the provision at a later date.
- Going forward, unilateral adoption of such provisions will generally be considered a one-time failure under the Unilateral Bylaw/Charter Amendments policy.

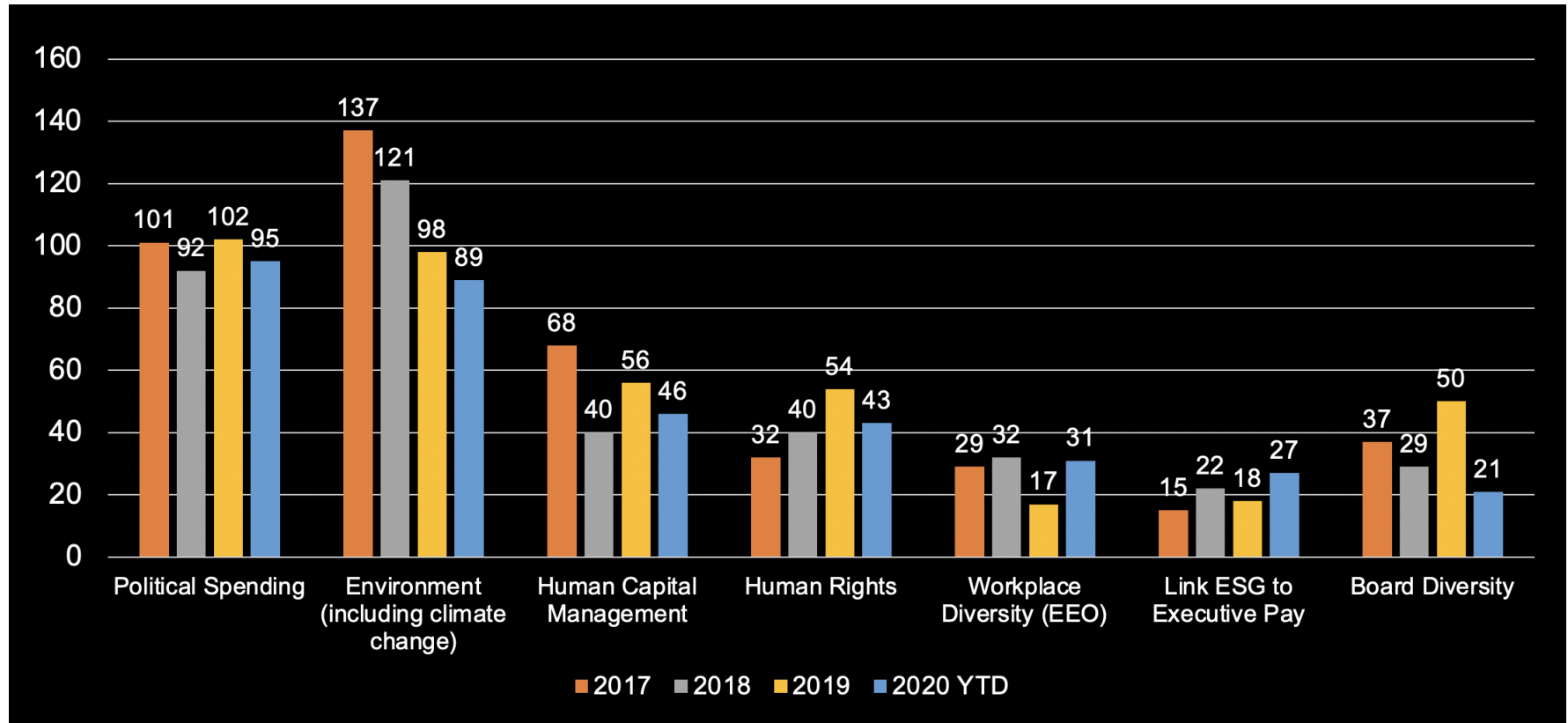
# Boardroom Blowback: Directors Draw Dissent

Concerns over accountability, responsiveness and gender diversity drive low support level



# Double Down: Personnel Problems/E\$g Metrics

Number of E&S resolutions filed by proposal category and year (as of July 30, 2020)

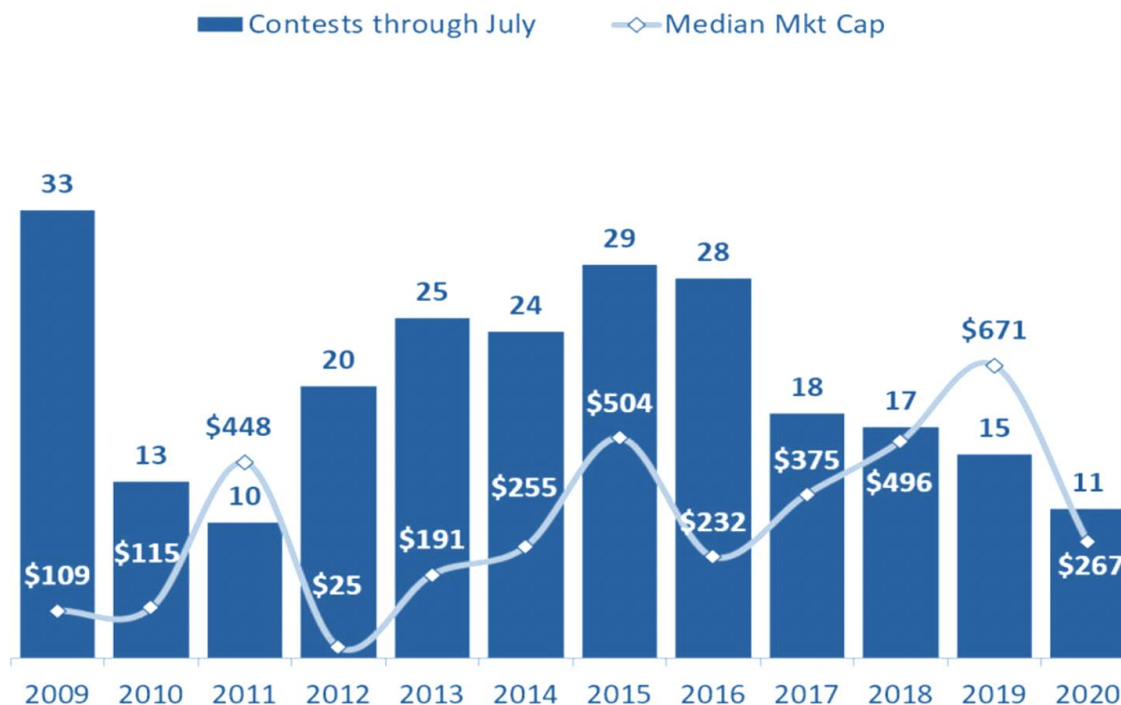




# Double Down: Frozen Funds/Control Contests

Fewer fights reach meetings as targeted boards provide seats to dissidents

- Cash Preservation
  - Dividends suspended
  - Buybacks deferred
  - Cautious acquirers
  - Opportunism outrage
- **Fewer Fights**
  - Thru July, only 11 contests reached votes—lowest level since 2011
- **Smaller Targets**
  - Median market cap is \$267M—lowest since 2016
- **Higher “Battling” Average**
  - Dissidents’ success rate soars to 82%—highest success rate in more than a decade despite more fights for control



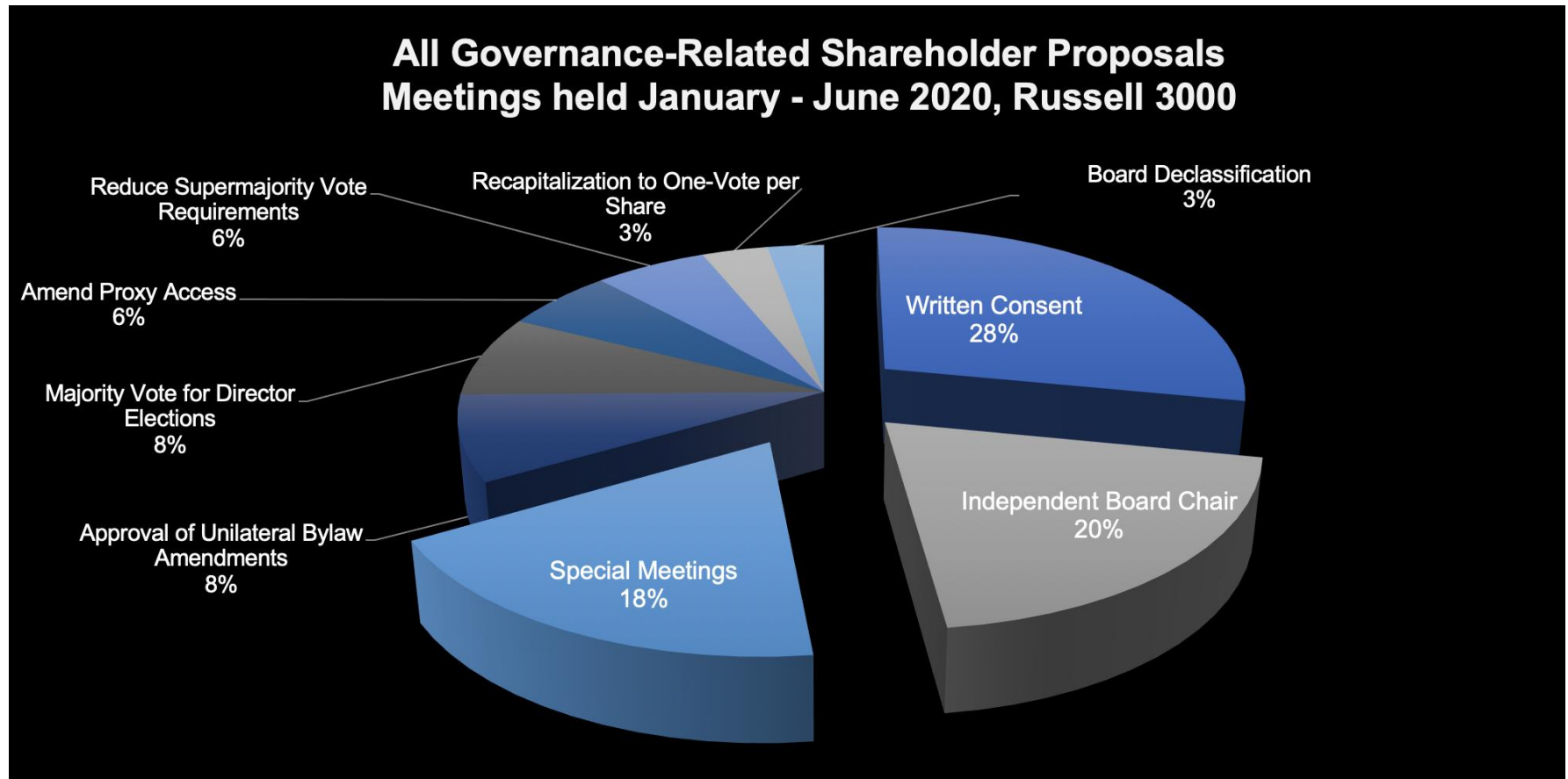
# Shifting Seats: Targeted Calls For Independent Chairs

Survey: Which of the following governance or risk oversight failures does your organization consider to be significant when evaluating an independent chair proposal? (check all that apply)

Rankings are based on number of responses for each answer choice	Investors' Rank*	Non-Investors' Rank*
Significant misconduct or mismanagement by the company, board or senior executives resulting in legal and reputational risks	1 (90%)	1 (78%)
Unilateral board actions that have materially diminished shareholder rights without shareholder agreement or ratification	2 (89%)	4 (46%)
Significant failures of audit or internal control oversight	3 (83%)	2 (55%)
Insufficient board responsiveness to a majority shareholder vote (for example, against a say on pay vote or director election or for a shareholder proposal)	4 (82%)	3 (48%)
Significant concerns about failure to address risks to the business model or the company's long-term viability such as those related to climate change	5 (81%)	5 (35%)
Significant failures of human capital management	6 (66%)	6 (30%)
Number of respondents who checked at least one answer	150	175

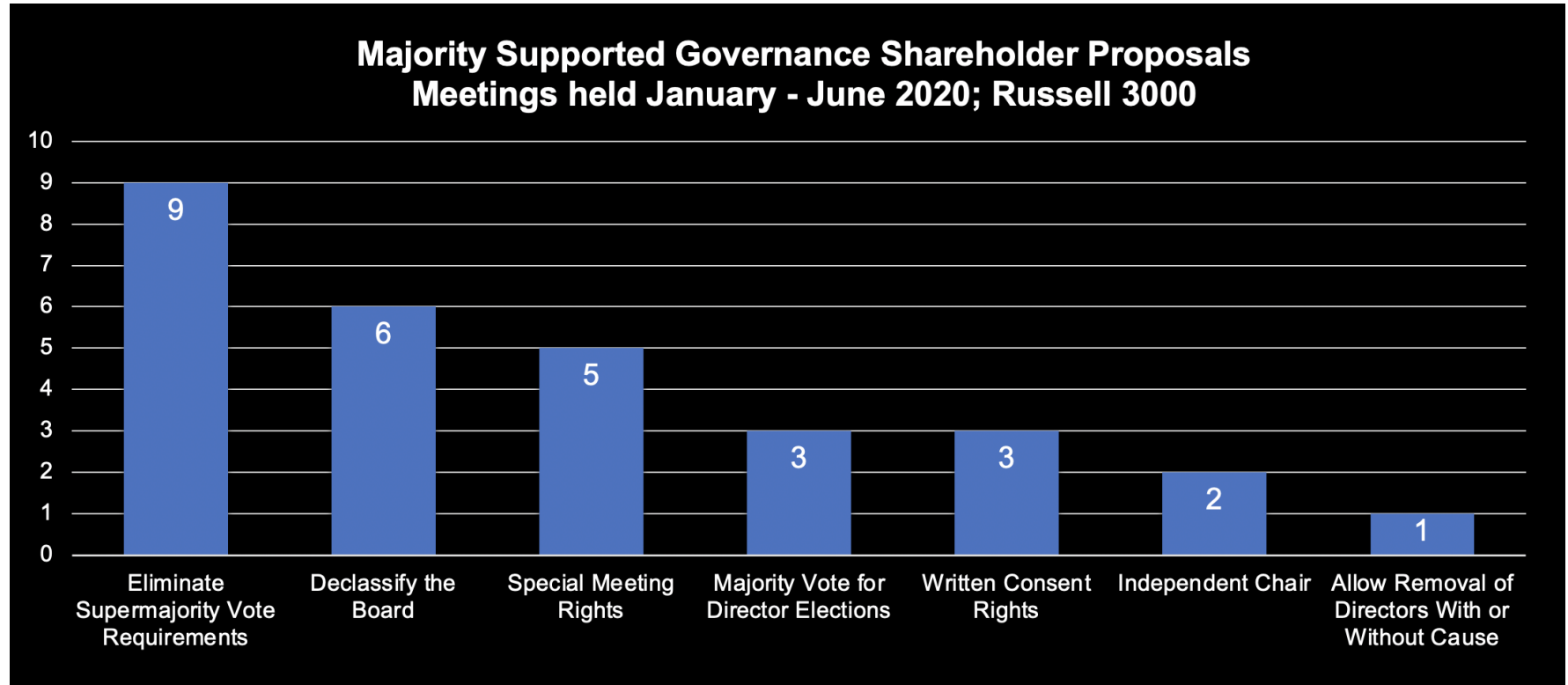
# Back To Basics: Shareholder Rights Issues Top Agendas

Written consent, independent chair and special meeting resolutions lead governance pack



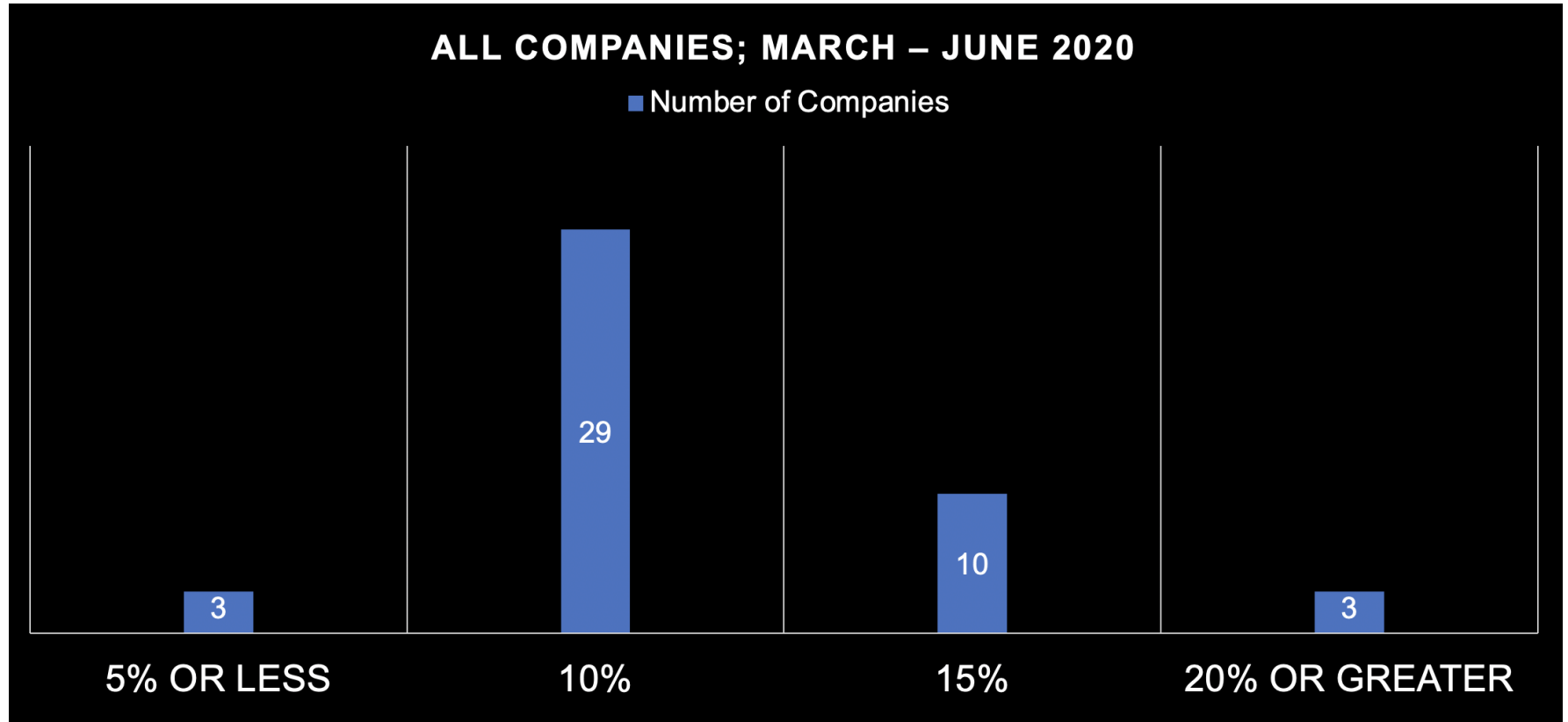
# Back 2 Basics: Perennial Topics Produce Us Majority Votes

Support spikes for calls to eliminate supermajority vote requirements and classified boards



# Designer Drugs: Pandemic Spurs Pill Popping

Ownership triggers for recently adopted poison pills





# Lobby Hobby: Political Spending Tops E&S Leader Board

Record 20 majority-supported E&S resolutions in 2020, up from 12 in 2019 and 10 in 2018

Topic	Company	Shareholder Resolution	Support
Board Diversity	National Healthcare Corporation	Report on Plans to Increase Board Diversity	59.2%
Board Diversity	Expeditors International Inc.	Adopt a Policy on Board Diversity	52.9%
Climate Change	Dollar Tree	Report on Aligning Business Strategy with Climate Change Constraints	73.5%
Climate Change	Ovintiv	Report on Climate Change Risks	56.4%
Climate Change	J.B. Hunt Transport Services	Report on Aligning GHG Emissions Reductions with Paris Agreement Goals	54.5%
Climate Change	Phillips 66	Report on Risks of Gulf Coast Petrochemical Investments	54.7%
Healthcare	Johnson & Johnson	Report on Governance Measures to Monitor Risks of Opioid Crisis	60.9%
Human Capital Management	Genuine Parts Company	Report on Material Human Capital Risks	79.1%
Human Capital Management	O'Reilly Automotive, Inc.	Report on Material Human Capital Risks	66.0%
Human Capital Management	Chipotle Mexican Grille	Report on Employment-Related Arbitration	51.0%
Political Spending	Activision Blizzard, Inc.	Report on Political Contributions	58.6%
Political Spending	Western Union Company	Report on Political Contributions	53.3%
Political Spending	J.B. Hunt Transport Services	Report on Political Contributions	53.2%
Political Spending	Alaska Air Group	Report on Lobbying Payments and Policy	52.3%
Political Spending	McKesson	Report on Lobbying Payments and Policy	52.1%
Political Spending	Centene Corporation	Report on Political Contributions	51.4%
Political Spending	Chevron	Report on Climate Related Lobbying	53.5%
Sustainability	Enphase Energy	Report on Sustainability	52.3%
Workforce Diversity	Fortinet	Report on Workforce Diversity	70.0%
Workforce Diversity	Fastenal Company	Report on Workforce Diversity	61.0%

# Wild Cards

## ESG lightning round

- **Accounting Anxiety**
  - Will global reform tide engulf Big Four accounting firms?
- **IP-OMG**
  - Will big SPAC attack and direct listing boom change the way startups go public?
- **Restless Unicorns**
  - Why do dual class shares continue to draw favor with founders?
- **Boom or Bust**
  - What are the biggest wild cards that could impact the 2021 season?

# Questions

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Your turn to play



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# Thank You



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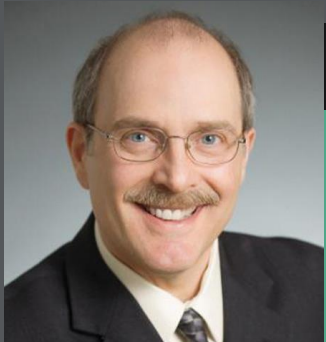
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