



## **Proxy Access – What You Need to Know**

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# **EXECUTIVE SUMMARY**

## Executive Summary – The Proxy Access Landscape for 2016

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- Shareholder proxy access proposals in 2016
  - The proponents will be back, with shareholder proposals for 3/3/25 proxy access bylaws
  - ISS and many institutional investors will support 3/3/25 proposals, but majority support is not assured
  - SEC no-action practices under Rule 14a-9
    - No relief would be available based on conflicting proposal from management
    - Unclear whether relief is available based on substantial implementation
- Terms of proxy access bylaws
  - Standard proposal is 3/3/25 – most companies have adopted 3/3/20 (effectively similar), but some have pushed the percentage ownership threshold to 5%
  - Other implementation details are getting increasing scrutiny, and ISS and some proponents may give them great importance
- The situation is still fluid: dozens of companies are working on bylaws, ISS and Glass Lewis will publish positions in November, some investor policies are still emerging, and the SEC may yet clarify its position on substantial implementation

## Executive Summary – The Big Picture

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- Proxy access is primarily a ***symbolic issue*** – its practical consequences will be very limited in the long run
- Proxy access bylaws will become ***increasingly common***
- A shareholder proxy access proposal can be ***distracting and disruptive***, and opposing it can be an inefficient expenditure of investor good will
- There are implementation details in the actual bylaw that might be important to proponents, but most of them have ***small potential impact***

## Executive Summary – Tactical Options

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- Three sound options
  - Disarm: Preemptively adopt a proxy access bylaw that will be broadly acceptable to proponents
  - Prepare for peace: Stand by for a proposal, with a plan to negotiate withdrawal and adopt a bylaw
  - Prepare for battle: Stand by for a proposal, with a plan to oppose it
- Which option is best will depend on:
  - The likely strength of support for proxy access among shareholders, based on the specific shareholder profile and other issues in the 2016 proxy
  - Strength of feeling on the board for or against proxy access
  - Appetite for the spotlight on a potentially divisive issue
- Preparation
  - Talk to investor relations and proxy solicitors about how a vote might go
  - Consider sounding out major shareholders on their views
  - Prepare the board and the nominating/governance committee
  - Prepare a bylaw summary to have in reserve and discuss with board and committees
  - Consider drafting a bylaw to have on hand



# **PROXY ACCESS IN THE 2015 SEASON**

## 2015 Season - Background

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*Proxy access is the right of shareholders to include Board of Director candidates on the company's proxy card and in its proxy statement*

- Without proxy access, a shareholder can solicit proxies, but the process is complicated and expensive
- The SEC's attempts to impose proxy access
  - The issue dates back to the 1940s
  - Rule adopted in 2010, vacated by federal court decision in 2011
- Key variables under the 2010 SEC rule – **"3/3/25"**
  - 3% ownership threshold
  - 3-year minimum ownership period
  - Up to 25% of board members can be elected pursuant to proxy access

## 2015 Season – Proxy Access One Company at a Time

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- In the wake of the vacated SEC rule, proponents turned to the Rule 14a-8 process to propose that companies adopt proxy access bylaws
- “One size fits all” gives way to “private ordering” ... but proponents make the same proposal to all companies
- Inspired by the success of some prior shareholder campaigns:
  - Declassified Boards
    - 40% of S&P 500 companies in 2003
    - 83% in 2012
    - 91% in 2013
  - Majority Voting
    - 50% of S&P 500 companies in 2008
    - 85% in 2013

## 2015 Season – Roots in 2014

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- In 2014, proponents submitted proposals to 17 companies – most tracked the 3/3/25 terms of the vacated SEC rule
  - Six proposals received support of majority of votes cast
  - Four proposals with lower ownership thresholds (e.g. 1% for 3 years) each received less than 7% support
- Also in 2014, 4 companies submitted management proposals to a shareholder vote
  - All were 3% / 3 years
  - All received support of majority of votes cast

## 2015 Season – Shareholder Proposal Campaign and SEC Involvement

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- Over 100 companies received precatory proxy access shareholder proposals
  - 75 companies targeted by the New York City Pension Funds
  - All shareholder proposals for 3% / 3 years / 25% of board
- The Whole Foods strategy and the SEC's retreat
  - Whole Foods received a 3/3/25 proposal
  - Management said it would propose 9 % / 5 years
  - In December 2014, the SEC staff granted no-action relief to permit Whole Foods to exclude the proposal under 14a-8(i)(9) based on a conflicting management proposal
  - 24 companies quickly sought similar no-action relief
  - SEC took the unusual step of revoking no-action relief from Whole Foods, and stating that no further guidance would be available under Rule 14a-8(i)(9)

(See Annex A for detailed history of the 2015 proxy season)

## 2015 Season – Tactics and Results

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- Positions of institutional and retail shareholders have not been uniform
- Companies took a variety of approaches with mixed results
  - Differences in shareholder profiles often drove selection of approach during 2015
  - Other key driver was company's recent track record on governance matters and shareholder relations
- Most companies (73) that received a proposal simply included it in the proxy statement, frequently with a management recommendation to vote AGAINST
  - Just over half of the proposals (44) received majority support from shareholders, with an average level of support of 54%
    - Of votes cast by institutional investors, 61% were in favor
    - Of votes cast by retail shareholders, only 15% were in favor

(See Annex A for full details and results from the 2015 proxy season)

## 2015 Season – Tactics and Results (cont'd)

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- A smaller number of companies (16) included the shareholder proposal in the proxy and either:
  - Included a competing management proposal in the proxy, or
  - Adopted a competing bylaw before the shareholders meeting
- At least 19 companies settled with the proponent, agreeing to implement a proxy access bylaw in exchange for withdrawal of the proposal
- In the absence of SEC guidance, apparently no company excluded a shareholder proposal based on a conflicting management proposal

(See Annex A for full details and results from the 2015 proxy season)

## 2015 Season – Proxy Access Bylaws Adopted in 2015

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- During the first three quarters of 2015, 42 companies adopted proxy access bylaws
  - Some adopted in response to a successful vote at the 2015 meeting
  - Some adopted in advance of the meeting in face of a shareholder proposal
  - Some adopted pursuant to a settlement with the shareholder proponent in exchange for withdrawal of the proposal
  - Some adopted unilaterally with no shareholder proposal
- Key considerations in adopting a proxy access bylaw include:
  - The required ownership percentage of the nominator or nominating group
    - Most enacted bylaws require 3%, while a minority require 5%
  - The number of seats available to proxy access nominees
    - Most enacted bylaws allow for up to 20% of the board, with a minority at 25%
    - A small number of enacted bylaws also guarantee at least 2 seats
  - The number of shareholders that can form a group to nominate
    - The majority of bylaws limit the group size to 20

(See Annex C for full details of enacted bylaws)



**LOOKING AHEAD TO THE 2016  
PROXY SEASON**

# 2016 Season – More Companies Are About to Adopt Proxy Access Bylaws

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- There is a significant overhang of companies that are preparing to adopt a proxy access bylaw in the coming months
- As of October 2015:
  - 41 companies where a precatory proxy access proposal (from a shareholder or from management) received majority support have not yet enacted a bylaw in response
  - At least 3 companies that reached settlements with shareholder proponents have not yet enacted a proxy access bylaw
  - Others are considering pre-emptive adoption

## 2016 Season – Proponents Are Raising Issues on Adopted Bylaws

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- The Council of Institutional Investors (close to the shareholder proponents of proxy access) is criticizing “troublesome” proxy access bylaw provisions, including:
  - Limits on the number of shareholders that may form a group
  - Ownership thresholds higher than 3%
  - Provisions that could make fewer than 2 seats available for proxy access nominees
  - Limits on compensatory relationships between nominator and nominee
  - Limits on re-nomination of a nominee who fails to receive a specific percentage of the vote
  - Requirement to state intention to hold shares after the annual meeting
- James McRitchie, an individual “good governance” advocate who has made a number of high-profile proxy access proposals, has criticized “proxy access lite” and drafted a revised form shareholder proposal including the following:
  - No limit on the number of shareholders that may form a group
  - Minimum of 2 board seats available for proxy access candidates
  - Include recallable loaned stock in the calculation of ownership
  - No restrictions on re-nominations

(See Annex B for further details)

## 2016 Season – Proxy Advisory Firms Are Developing Their Positions

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- Where a company has not received a shareholder proxy access bylaw proposal:
  - ISS has not released any recommendation
- When a company includes a shareholder or management proposal in its proxy statement:
  - ISS generally recommends in favor of proxy access proposals at 3/3/25
- If a company fails to implement a bylaw following a majority-supported shareholder proposal:
  - ISS will recommend withhold or against votes for directors

## 2016 Season – Proxy Advisory Firms Are Developing Their Positions (cont'd)

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- When a company has implemented proxy access in response to a successful shareholder or management proposal:
  - The company may still be at risk for withhold or against votes for directors based on the features of the bylaw
  - ISS's policy survey conducted in August-September 2015 asked whether the following features should be viewed as sufficiently problematic to potentially warrant withhold or against votes for directors (with a majority of investor respondents answering "yes"):
    - Ownership threshold above 3%
    - Aggregation limit of less than 20
    - Cap on nominees at less than 20% of the board
    - More restrictive advance notice requirements
    - Extensive information disclosures
    - Restrictions on compensation arrangements with nominating shareholder
    - Renomination restrictions for nominees who fail to receive a stipulated level of support or who withdraw their nomination
- Final ISS policy for 2016 will be released in November 2015
- Glass Lewis has so far reviewed proposals on a case-by-case basis, and will release its policy updates in November 2015

## 2016 Season – Proponents Will Target More Companies

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- New York City pension funds have indicated continued focus on proxy access
  - The “Boardroom Accountability Project” is intended to be a multi-year project
  - Spokesman Mike Garland says shareholder proposals will continue during the upcoming season, though he has not given specifics
- Other public pension funds are likely to continue supporting the project
  - CalPERS and CalSTRS support 3/3/25 and have said they will actively encourage companies to adopt proxy access
  - The UAW Retiree Medical Trust made at least 6 proposals in the 2015 season at 3/3/25, targeting companies in the health care sector
- McRitchie has amended his standard proxy access shareholder proposal for use in the coming season, and expects the issue to be at the forefront of the next few proxy seasons

## 2016 Season – Positions of Institutional Investors Are Still Evolving

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- TIAA-CREF supports 3/3/25, and is actively encouraging companies to adopt proxy access along those lines
- T. Rowe Price supports 3% with a holding period of between 2 and 3 years
- Blackrock continues to consider proxy access on a case-by-case basis but generally supports 3/3/25 (and has announced its intention to adopt its own bylaw at 3/3/25)
- Vanguard generally supports proxy access, but at 5% / 3 years
- Fidelity has continued to vote against both shareholder and management proposals for proxy access

# 2016 Season – Strict Limitations and Continued Uncertainty on Ability to Exclude Shareholder Proposals

## Conflicting Proposal (Rule 14a-8(i)(9))

- Can a company exclude a shareholder proposal on the grounds that management will make a conflicting proposal?
  - SEC granted and then revoked no-action relief to Whole Foods, and refused to consider relief based on conflicting proposals for the 2015 proxy season
  - SEC released guidance in October 2015 under which no-action relief will usually not be available for a proxy access proposal
    - Review will focus on whether there is a direct conflict between the proposals, i.e., a shareholder “could not logically vote in favor of both proposals” or “a vote for one proposal is tantamount to a vote against the other proposal”
    - The guidance gives the specific example of competing shareholder and management proposals with different thresholds, and say there is no direct conflict because they seek a similar objective

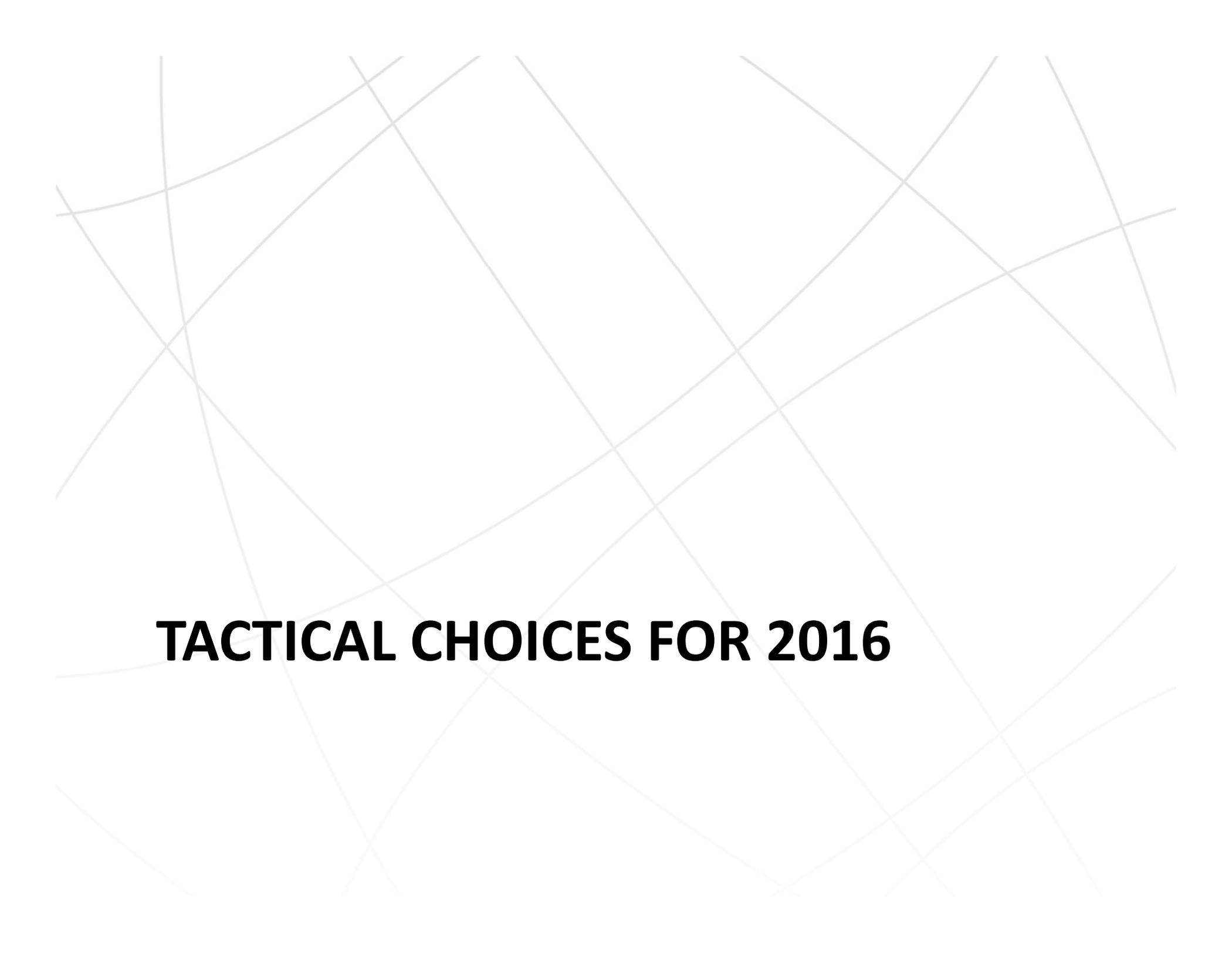
## Substantial implementation (Rule 14a-8(i)(10))

- When can a company exclude a shareholder proposal on the grounds that it has substantially implemented the proposal with an adopted bylaw?
  - SEC gave General Electric no-action relief in March 2015 based on substantial implementation
  - Shareholder proposal: 3% / 3 years / 20% of board seats / no limit on group
  - Adopted bylaw: Consistent with shareholder proposal, with an additional limit of 20 shareholders who may form a group
- What constitutes substantial implementation? It is unclear how far the GE precedent will extend; on other issues, the SEC staff has sometimes changed its view of whether no-action relief on the basis of substantial implementation is available
- What steps must be taken to qualify as “substantial”? Unclear whether full adoption of a bylaw by the board would be required
- The SEC’s revised position on (i)(9) may suggest a general hostility on the part of the SEC toward the exclusion of proxy access proposals

## 2016 Season – Company Efforts at Shareholder Outreach Vary

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- During one-on-one meetings, institutional investors (e.g. Blackrock, Vanguard) often expect to hear about a company’s thinking and intention on proxy access
- Companies can make a case that proxy access is not suitable
  - Shareholder support for various proposals (including various ownership thresholds) has been mixed, suggesting shareholders do analyze each case
- Arguments a company might make against a shareholder proposal could include:
  - Shareholder composition
  - Track record on significant governance issues (e.g. staggered board, anti-golden leash bylaws)
  - Track record for responsiveness to shareholders
  - Specific demands on the board (e.g. industry expertise, time commitment)
- Form of engagement
  - Conference call, written campaign, individual calls and one-on-one meetings
  - Reliance on IR team vs. senior management vs. an independent director
    - In contrast to discussions of performance and strategic initiatives, proxy access discussions often are led by the IR team and in-house governance personnel
  - Discuss bylaw text or only the headline issues



# **TACTICAL CHOICES FOR 2016**

# Tactical Choices – Key Background

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- The proponents are not going away
  - Every company should assume it might receive a proposal
  - They will not negotiate on the basic terms of 3% / 3 years, and up to 2 directors
  - They will target at least some companies that already have a proxy access bylaw, where the terms vary from 3/3/25
  - It is possible to negotiate withdrawal in exchange for a commitment to adopt a bylaw
- The proponents – and others, possibly including ISS – are increasingly focused on implementation details
- The situation is still fluid ...
  - ISS policies coming in November
  - Some major investors still developing policies
  - Uncertain SEC position on substantial implementation
  - Overhang of companies adopting bylaws
- ... but a strategy should be in place by the end of November
- The SEC might not clarify (a) whether a shareholder proposal can be excluded based on a conflicting proposal or (b) when it can be excluded based on substantial implementation

## Tactical Choices – The Big Picture

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- Strategic question: **How much does proxy access matter?**
  - Some companies have accepted it with apparent equanimity
  - Others have fought the principle energetically
- It seems likely to make its way into many companies' bylaws
- It is unlikely to change the composition of boards, except in special cases
  - Activist hedge funds (e.g. Trian, Pershing Square, Third Point, Starboard and Icahn) are unlikely to use it
  - Major asset managers (with large positions in thousands of companies) are unlikely to use it
  - Single-issue activists are unlikely to have big enough positions to use it
  - Forming a large group to meet the ownership requirements will be challenging
- Companies with a proxy access bylaw may want to consider expanding proxy disclosure about board composition, the individual strengths of directors, board diversity, and how the mix of directors works well as a whole
- In the long run, it might enhance the position of some long-term shareholders like labor and public pension funds
- In the near term, controversy over whether to adopt a proxy access bylaw may be an unwelcome distraction

# Tactical Choices – The Basic Alternatives

## Homework

- Sound out major shareholders
- Talk to IR and proxy solicitors
- Evaluate how a vote on proxy access might go
- Prepare the Board and relevant committees

**First alternative:**  
preemptively adopt a conciliatory bylaw

- **Advantage:** take the issue off the table
- **Disadvantage:** move into a proxy access regime early and on terms favorable to future nominators

**Second alternative:**  
preemptively adopt an aggressive bylaw

- **Advantage:** move into a proxy access regime on terms most favorable to management and the incumbent board
- **Disadvantage:** aggressive bylaws may be challenged in future years by new shareholder proposals and could trigger withhold or against votes for directors (pending ISS policy update due in November 2015)

**Third alternative:**  
stand by for a proposal, but plan to negotiate withdrawal and adopt a bylaw

- **Advantage:** may defer or avoid entry into proxy access regime
- **Disadvantage:** risk that negotiated withdrawal is more difficult than expected; limits flexibility in parameters of bylaw

**Fourth alternative:**  
stand by for a proposal and plan to oppose it

- **Advantage:** maximizes chances for avoiding proxy access regime
- **Disadvantage:** risk of unfavorable spotlight

## Tactical Choices – Responding to a Shareholder Proposal

If a company without a proxy access bylaw receives a shareholder proposal for proxy access, it will have six options:

- Oppose the proposal based on the company's specific circumstances; this was successful in some cases in 2015 but involved substantial efforts in shareholder engagement

- Negotiate withdrawal in exchange for commitment to adopt a bylaw; this will have to be 3% / 3 years and 20% or 25%, or the proponent will not withdraw

- Support the proposal

- Adopt (or take steps to adopt) a bylaw and exclude the proposal based on substantial implementation; in 2015 the SEC granted no-action relief to permit exclusion, but the circumstances where this is permitted could change or remain uncertain

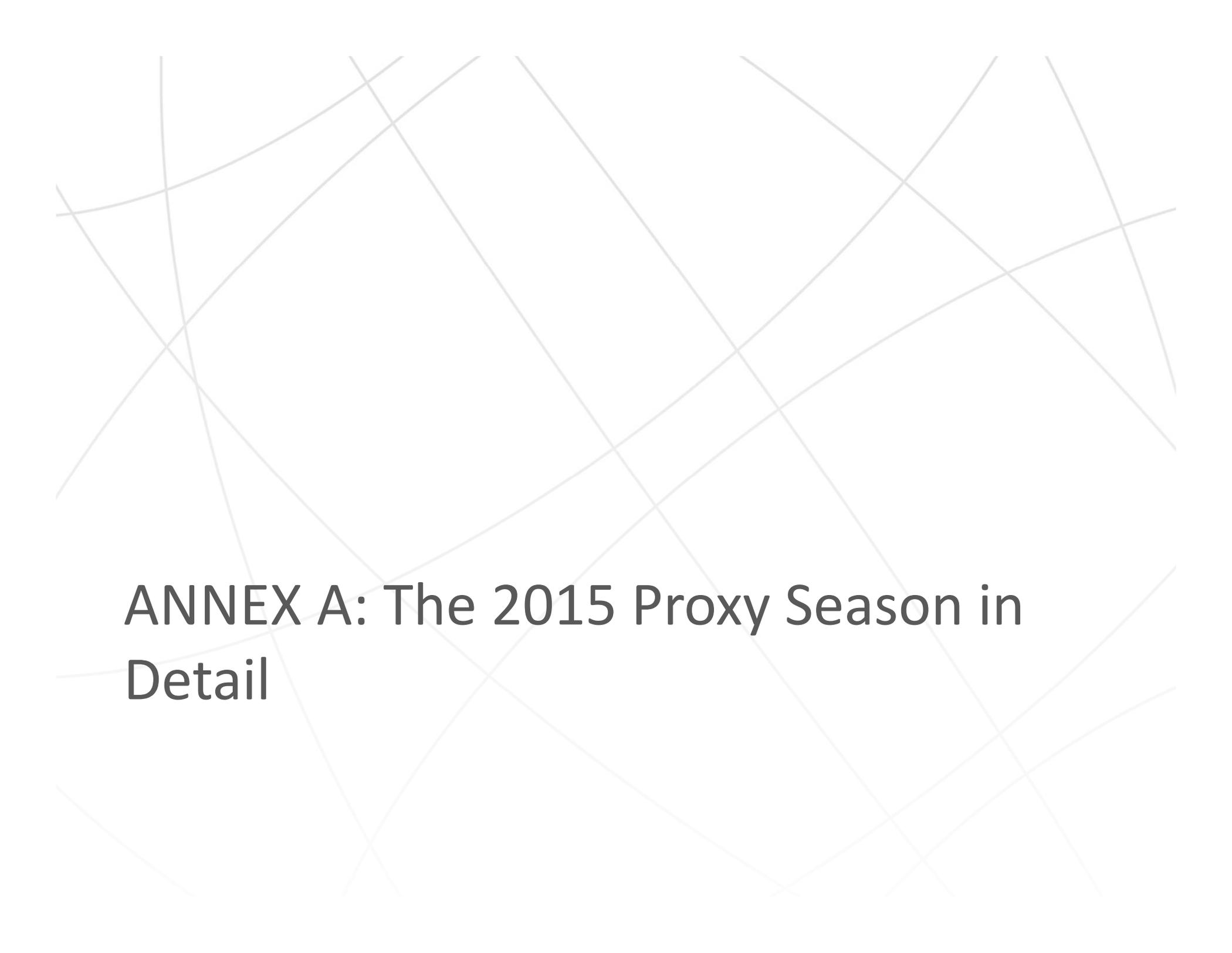
- Include both the shareholder proposal and a competing management proposal

## Tactical Choices – Pre-Emptive Adoption Considerations

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- Strategic decision: For pre-emptive adopters, how much do the implementation details matter?
- Whether to deviate from 3/3/25 model
- Whether to be aggressive on secondary drafting issues
  - Number of shareholders who may form a group and how to count separate funds under common control for this purpose
  - Inclusion or exclusion of loaned shares
  - Proponents' intent to hold shares past the annual meeting
  - Prohibition on compensatory arrangements between nominator and nominee
  - Interaction with advance notice nominees
  - Addressing creeping control
  - Renominations of nominees with low levels of support
- Risk of not immunizing company from future shareholder proposals

(See Annex C for further detail on the primary and secondary drafting issues)



# ANNEX A: The 2015 Proxy Season in Detail

## Wave of Proxy Access Shareholder Proposals and SEC Response

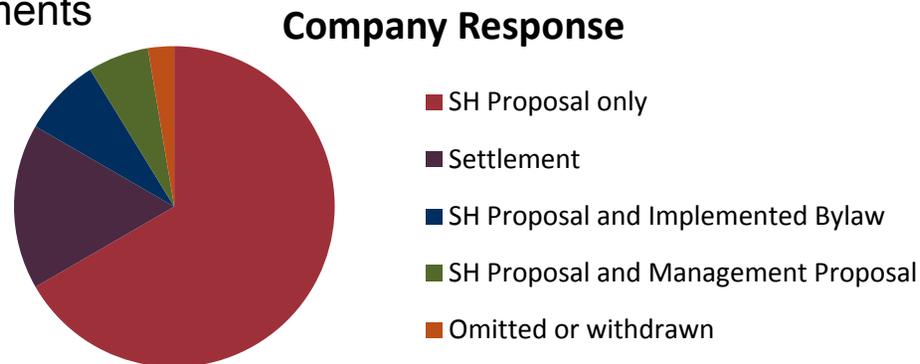
- The New York City Pension Funds launched the “Boardroom Accountability Project” in November 2014, targeting 75 companies with shareholder proxy access proposals
  - All proposals reflected standard 3/3/25
- Approximately 40 additional companies received identical or very similar proposals
- Whole Foods was the first company to seek to exclude a shareholder proposal on the basis of a **conflicting management proposal**
  - Management proposal reflected 9% / 5 year requirements
  - SEC granted no-action relief in December 2015
  - Two dozen other companies sought similar no-action relief on the basis of a conflicting management proposal

## Wave of Proxy Access Shareholder Proposals and SEC Response (cont'd)

- Whole Foods shareholder proponent James McRitchie appealed the no-action decision to the full SEC
  - The full SEC took the unusual step of reviewing and withdrawing the no-action relief
  - SEC also stated that it would express no view on the application of conflicting management proposals under Rule 14a-8(i)(9) during the 2015 proxy season
  - In October 2015, the SEC released Staff Legal Bulletin 14H clarifying its position on 14a-8(i)(9)
    - No-action relief would again become available, but the SEC's review would focus on whether the proposals are in direct conflict such that a vote for one proposal was tantamount to a vote against the other
    - Included the specific example of competing proxy access proposals as a situation where no-action relief would **not** be appropriate since a shareholder could logically vote in favor of both while still preferring one over the other
- SEC did grant no-action relief to General Electric in March 2015 when it sought to exclude a proposal on the basis of **substantial implementation**
  - Management's implemented bylaw reflected the shareholder proposal's basic terms of 3% / 3 years and 20% of seats, but added a 20-member limit on the size of the group

## Company Responses to Proxy Access Proposals in 2015

- Company response to shareholder proposals was mixed
- 76 companies simply included the shareholder proposal in their proxy statement
  - Most companies offered a statement in opposition, with 2 companies including a statement in support of the proposal, and 1 company taking no position
- At least 19 companies reached settlements with the shareholder proponent, agreeing to implement a proxy access bylaw in exchange for withdrawal of the proposal
- 9 companies included the shareholder proposal but also adopted their own proxy access bylaw in advance of the meeting
- 8 companies included both the shareholder proposal and a competing management proposal
- At 3 companies, the proposals were omitted or withdrawn by the proponent for failure to meet technical requirements



## Shareholder Proposals Submitted to a Vote

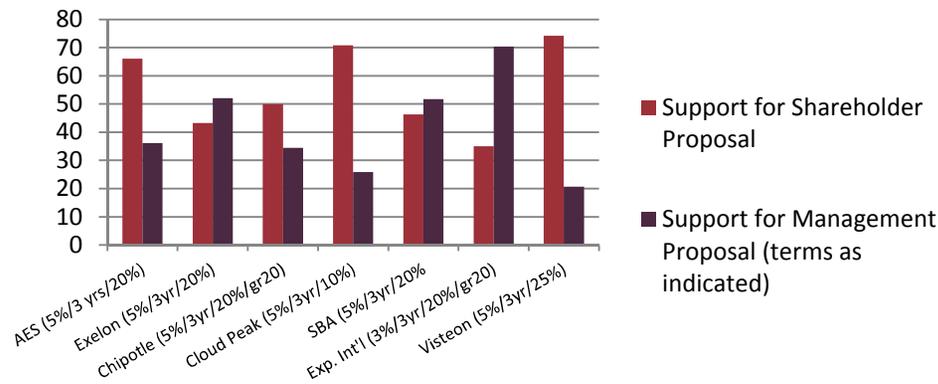
- At the 76 companies where the shareholder proposal was put to a vote without any other action by management:
  - Proposals passed at 44 companies with an average level of support of approximately 54%
  - Proposal did not pass at 28 companies
  - Not yet voted on at 4 companies

## Company Reached Settlement with Shareholder Proponent

- Each settlement provided for a proxy access bylaw with thresholds at 3% / 3 years and either 20% or 25% of the board
- Settlements commonly included a limit on the size of the group, at either 20 or 25.
  - Settlement terms seem to have been limited to these items without discussion of further detail
- Method of implementation differed:
  - Some companies pledged to propose a bylaw amendment in their next proxy statement
  - Some companies pledged to adopt a conforming bylaw within a set timeline

# Shareholder Proposal and Competing Management Proposal Submitted to a Vote

- At the 7 companies where both the shareholder proposal (3/3/25) and competing management proposals were submitted to a vote:
  - Shareholder proposal **passed** and management proposal **failed**: 3 companies
    - In each case the management proposed 5%/3 years and either 10%, 20% or 25% of the board
  - Shareholder proposal **failed** and management proposal **passed**: 3 companies
    - Two management proposals passed at 5%/ 3 years/ 20% and one proposal passed at 3%/3 years/ 20% of the board, and a limit on the group of 20 shareholders
  - Both proposals **failed**: 1 company (Chipotle)
    - Shareholder proposed 3%/ 3 years and 25% of the board; management proposed 5%/ 3 years/ 20% of the board and a limit on the group of 20 shareholders

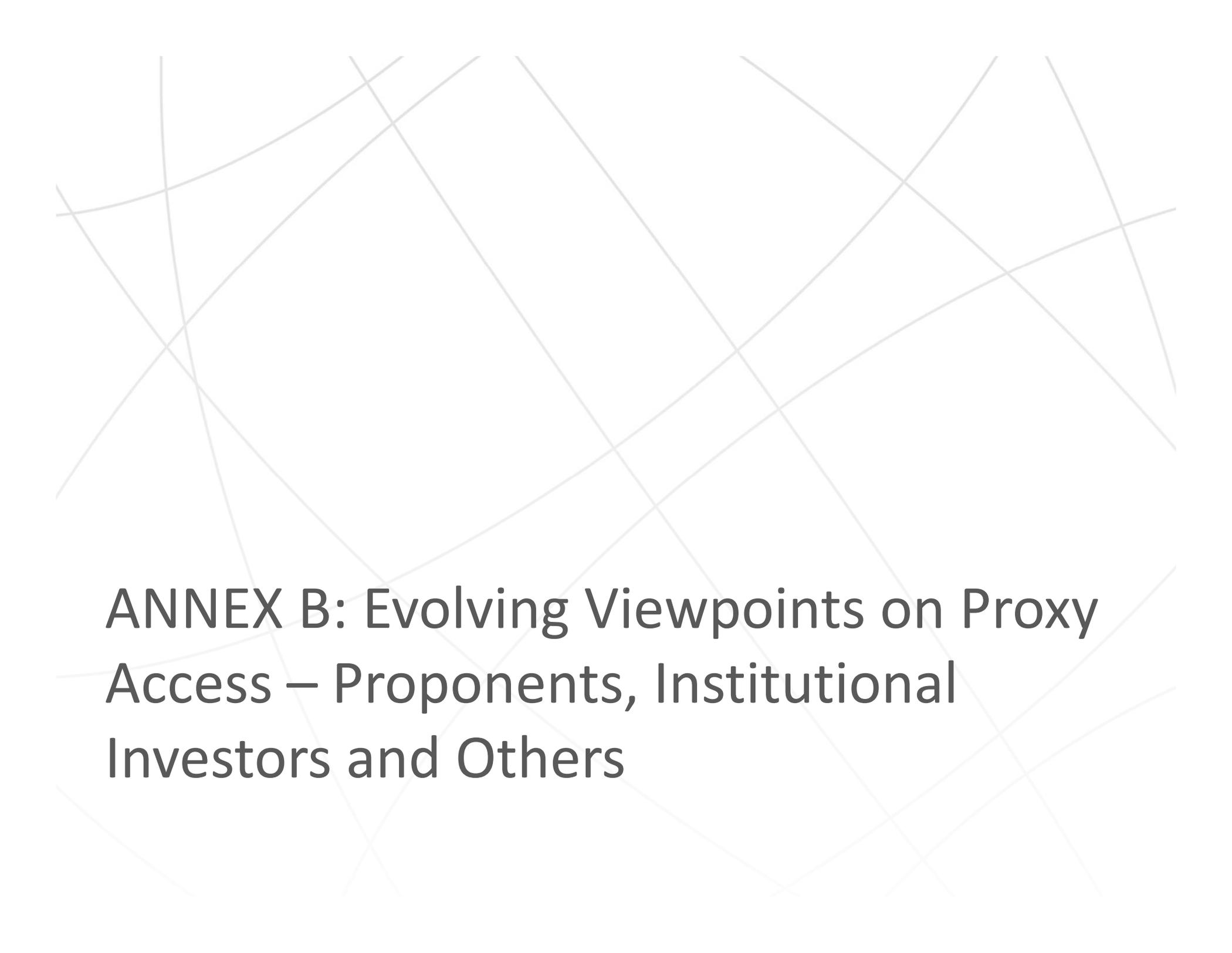


## Shareholder Proposal Submitted to a Vote Following Management's Adoption of a Proxy Access Bylaw

- 9 companies took action to implement a proxy access bylaw in advance of their annual meeting, while still submitting the shareholder proposal to a vote
- Shareholder proposals reflected the standard 3/3/25, but the implemented bylaws utilized a range of thresholds:
  - 3/3/25, group of 5 → Shareholder proposal not approved (Boston Properties)
  - 3% / 3 years / 20% / group of 20 → Shareholder proposal not approved (Rite Aid)
  - 5% / 3 years / 20% / group of 10 (3 companies) →
    - Shareholder proposal not approved at 2 companies (NY Bancorp and Cabot)
    - Shareholder proposal approved at 1 company (HCP)
  - 5% / 3 years / 20% / group of 20 (4 companies) →
    - Shareholder proposal approved and bylaw subsequently amended to 3/3/25 at 2 companies (Priceline and Marathon Oil)
    - Shareholder proposal approved but bylaw not subsequently amended at 1 company (CF Industries)
    - Shareholder proposal not approved at 1 company (Arch Coal)

## Unilateral Adoption

- At least 12 companies have unilaterally adopted a proxy access bylaw in 2015, absent a shareholder proposal
- All such bylaws reflect 3%/3 year holding requirements, and cover either 20% or 25% of the board
- Nearly all include a limit on the size of the group of either 20 or 25 (one does not provide for the formation of groups)



# ANNEX B: Evolving Viewpoints on Proxy Access – Proponents, Institutional Investors and Others

# Proxy Advisory Firms' Positions on Proxy Access Proposals, Pending Updates in November 2015

## ISS

- Identifies as important shareholder right, "one that is complementary to other best-practice corporate governance features"
- ISS will generally recommend a vote in favor of management and shareholder proposals for proxy access that contain:
  - **Ownership threshold** of not more than **3%** of the voting power
  - **Ownership duration** of not longer than **3 years** for each member of the nominating group
  - **Minimal or no limits** on the number of shareholders permitted to form a nominating group, and
  - **Cap** of generally **25%** of the board
- ISS will also review for reasonableness any other restrictions on the right of proxy access and will generally recommend a vote against proposals that are more restrictive than these guidelines
- During 2015 ISS recommended votes in favor of every shareholder proxy access proposal

## Glass Lewis

- Will "consider" supporting "reasonable" proposals that provide "significant, long-term shareholder" an ability to nominate candidates to the board
- Evaluates shareholder proposals on a case-by-case basis; considerations include shareholder rationale, ownership thresholds and holding period, shareholder base, responsiveness of board, company performance, existing anti-takeover devices, other shareholder rights (e.g., right to call special meeting, act by written consent)
- Will evaluate management response to shareholder proposal, including decision to submit own, alternative proposal in lieu of shareholder proposal, on specific facts and circumstances, considering reasonableness and proportionality
  - In evaluating management proposal, will consider variance from shareholder proposal, as well as factors that apply to shareholder proposal analysis
  - In limited cases, may recommend against certain directors if management proposal varies materially from shareholder proposal without sufficient rationale

## Following Approval of Proxy Access Shareholder Proposal: Proxy Advisory Firms' Positions

### ISS

- ISS will determine on a case-by-case basis whether to recommend a vote against or withhold from individual directors, committee members or entire board if board has refrained from acting on a shareholder proposal that received the support of a majority, considering, along with any other appropriate factors:
  - Disclosed outreach efforts to shareholders
  - Rationale provided in proxy statement for level of implementation
  - Subject matter of proposal
  - Level of support for resolution in past meetings
  - Actions taken by board in response to majority vote + shareholder engagement
  - Continuation of underlying issue as voting item on ballot (as shareholder or management proposal)

### Glass Lewis

- Will generally recommend that shareholders vote against all members of the governance committee if:
  - During the member's tenure, a shareholder proposal relating to important shareholder rights received support from a majority of the votes cast (excluding abstentions and broker non-votes); and
  - The Board failed to respond adequately
- In determining whether Board has sufficiently implemented a proposal, will examine whether the bylaw implementing the proposed right is drafted in a way that may unreasonably interfere with shareholders' ability to exercise the right

# Institutional Investor Positions on Proxy Access

- Institutional investors have largely coalesced around the idea of 3% / 3 years

## Blackrock

- May vote against individual directors where Board is given the opportunity to provide proxy access but does not appear to be acting in good faith to do so
- Will closely examine situations in which company excludes or litigates shareholder proposals or counters a proposal unreasonably
- Will consider a Board's publicly disclosed rationale, but exclusion of a shareholder proposal or inclusion of an unreasonable management proposal may equate to depriving shareholders of the ability to weigh in on a critical governance issue

## Fidelity

- Generally votes against both shareholder and management proposals to adopt proxy access

## Vanguard

- Generally supports proxy access provisions that permit:
  - a shareholder or group of shareholders
  - representing **5%** of a company's outstanding shares
  - for at least **three years**
  - to nominate directors for up to 20% of the seats on the Board
- May support different thresholds based on a company's other governance provisions, discussions with shareholder proponents and/or the company and its Board

## Council of Institutional Investors

- Supports proxy access provisions that permit:
  - a long-term investor or group of long-term investors
  - owning in the aggregate at least **3%** of a company's voting stock
  - for at least **two years**
  - to nominate less than a majority of the directors
- Company proxy materials and related mailings should provide equal space and equal treatment of nominations by qualifying investors

# Council of Institutional Investors - Best Practices (published August 2015)

Practice	CII View	Rationale/Basis
<b>Ownership requirement of 5%</b>	Ownership requirement of 3%	Inability of large public pension funds to meet the threshold, even if holdings were combined; consistency with vacated SEC rule
<b>Percentage of board members that may be elected could result in fewer than two proxy access candidates</b>	At least two candidates	Meaningful representation on the board and ability to serve on multiple committees
<b>Aggregation of shareholders limited to specified number</b>	Unlimited group	Proxy access is not viable without aggregation; aggregation of even the 20 largest public pension funds would not meet 3% at most companies; consistency with vacated SEC rule
<b>Lack of clarity on whether loaned securities count toward the ownership threshold</b>	Loaned securities should count if recallable	Share lending is a common practice not inconsistent with long-term investment in a company
<b>Requirement to continue to hold required percentage of shares past the annual meeting</b>	Hold shares through annual meeting	Nominating shareholders may not know their intent until after the election; pre-filing holding period and requirement to hold until annual meeting date achieve goal of limiting proxy access to longer-term shareholders; consistency with vacated SEC rule
<b>Re-nomination restrictions when nominee fails to receive a specific percentage of votes</b>	No limitation	Resubmission requirements are not applicable to management candidates, so should not apply to proxy access candidates; consistency with vacated SEC rule
<b>Prohibition of compensation arrangements between nominee and nominator</b>	Disclosure of arrangements to company but no prohibition	Companies should defer decisions about suitability of candidates to shareholder votes; would unduly limit the pool of eligible board candidates

## ISS policy survey

- In its 2015 policy survey, ISS sought feedback on boards' responses to a successful shareholder or management proxy access proposal
- The survey asked whether certain limitations in an enacted bylaw should warrant withhold or “against” votes for directors

Bylaw Provision	Investors Voting Yes	Non-Investors Voting Yes
Ownership threshold above 3%	72%	14%
Ownership threshold above 5%	90%	52%
Ownership duration greater than 3 years	90%	44%
Aggregate limitation of fewer than 20 shareholders	76%	23%
Cap on nominees set at less than 20% of the existing board	79%	25%
More restrictive advance notice requirements	70%	20%
Information disclosures that are more extensive than those required of the company's nominees, the SEC, or relevant exchanges	80%	39%
Renomination restrictions in the event a proxy access nominee fails to receive a stipulated level of support or withdraws his/her nomination	68%	20%
Restrictions on compensation of access nominees by nominating shareholders	72%	26%

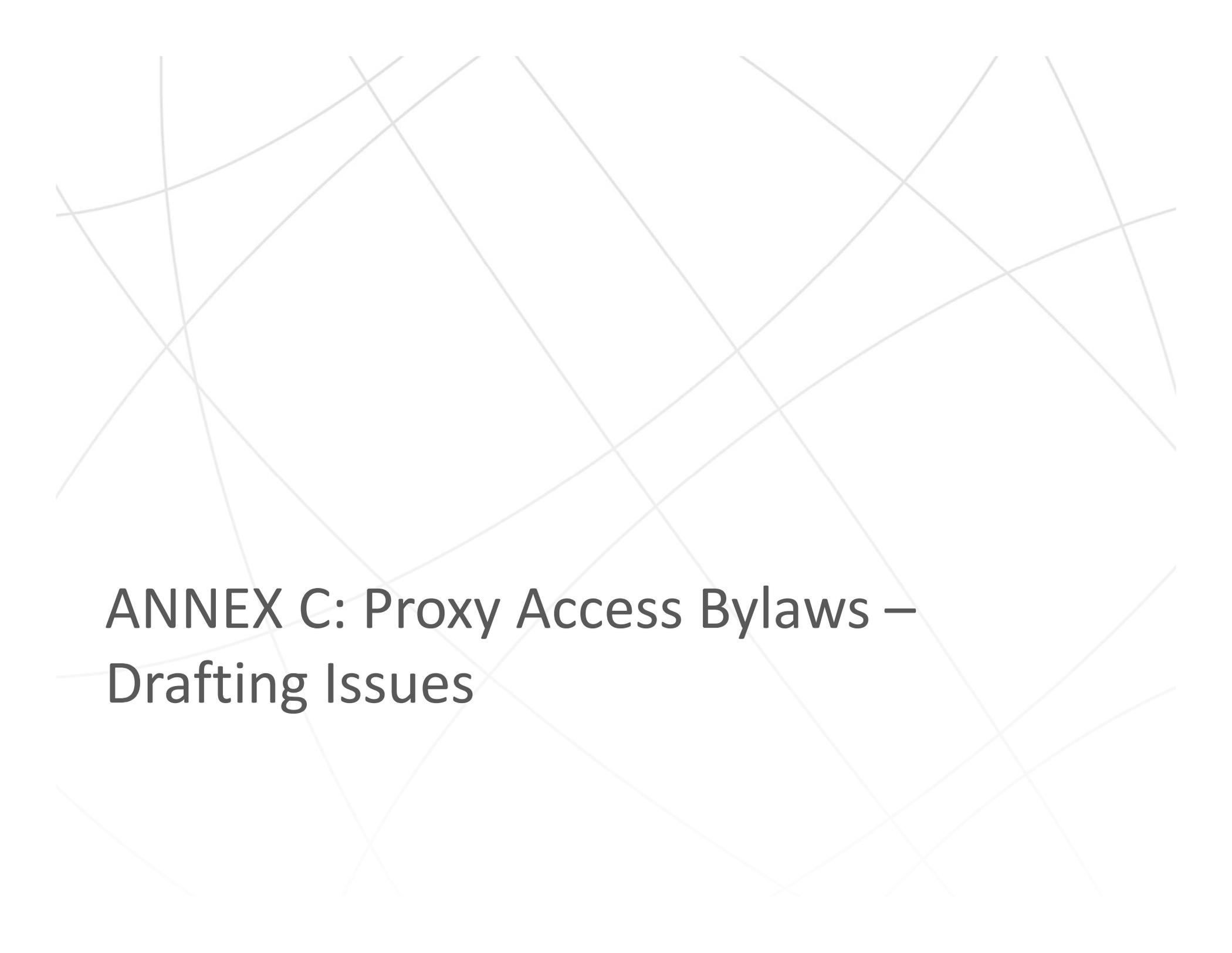
## Jim McRitchie – Revised Shareholder Proposal Template

RESOLVED: Shareholders of X (the “Company”) ask the board of directors (the “Board”) to adopt, and present for shareholder approval, a “proxy access” bylaw as follows:

Require the Company to include in proxy materials prepared for a shareholder meeting at which directors are to be elected the name, Disclosure and Statement (as defined herein) of any person nominated for election to the board by a shareholder or an unrestricted number of shareholders forming a group (the “Nominator”) that meets the criteria established below.

- Allow shareholders to vote on such nominee on the Company’s proxy card.
- The number of shareholder-nominated candidates appearing in proxy materials should not exceed one quarter of the directors then serving **or two, whichever is greater**. This bylaw should supplement existing rights under Company bylaws, providing that a Nominator must:
  - have beneficially owned 3% or more of the Company’s outstanding common stock, **including recallable loaned stock**, continuously for at least three years before submitting the nomination;
  - give the Company, within the time period identified in its bylaws, written notice of the information required by the bylaws and any Securities and Exchange Commission (SEC) rules about (i) the nominee, including consent to being named in proxy materials and to serving as director if elected; and (ii) the Nominator, including proof it owns the required shares (the “Disclosure”); and
  - certify that (i) it will assume liability stemming from any legal or regulatory violation arising out of the Nominator’s communications with the Company shareholders, including the Disclosure and Statement; (ii) it will comply with all applicable laws and regulations if it uses soliciting material other than the Company’s proxy materials; and (iii) to the best of its knowledge, the required shares were acquired in the ordinary course of business, not to change or influence control at the Company.

The Nominator may submit with the Disclosure a statement not exceeding 500 words in support of the nominee (the “Statement”). The Board should adopt procedures for promptly resolving disputes over whether notice of a nomination was timely, whether the Disclosure and Statement satisfy the bylaw and applicable federal regulations, and the priority given to multiple nominations exceeding the one-quarter limit. **No additional restrictions that do not apply to other board nominees should be placed on these nominations or re-nominations.**



# ANNEX C: Proxy Access Bylaws – Drafting Issues

# Drafting a Proxy Access Bylaw – Market Trends

Bylaw Provision	Percentage of Enacted Bylaws	Notes
<b>Percentage ownership requirement</b>		
3%	89%	Most institutional shareholders and proxy advisory firms support 3%, but Vanguard continues to support 5%
5%	11%	
<b>Maximum number of access candidates</b>		
20% of board	81%	CII and McRitchie have criticized bylaws that do not provide for at least 2 directors
25% of board	19%	
Also guarantees at least 2 directors	31%	
<b>Number of shareholders that may form a group</b>		
5	2%	CII supports an unlimited group, and ISS generally supports proposals with minimal or no limits
10	7%	
15	3%	
20	83%	
Unlimited	3%	
No groups permitted	2%	
<b>Consideration of funds under common ownership and control</b>		
Count as one shareholder for purposes of group	64%	Where shareholder group size is limited, mutual fund investors have shown particular interest in ensuring that funds under common are counted as one shareholder
Will not count as one shareholder	2%	
Not addressed in bylaw	34%	

## Drafting a Proxy Access Bylaw – Market Trends

Bylaw Provision		Percentage of Enacted Bylaws	Notes
<b>Nominator's holding requirement</b>			
	3 years and through the date of annual meeting	55%	CII and other institutional shareholders have expressed their opposition to the requirement that a nominating shareholder be required to represent an intention to continue to hold the shares for one year following the meeting; SEC's vacated rule required a statement as to intent with respect to continued ownership
	3 years, through the date of annual meeting, and for one year following	10%	
	3 years, through the date of annual meeting, and for the duration of the elected nominee's term	2%	
	3 years, through the date of annual meeting, and representation as to intent for one year following	33%	
<b>Notice deadline</b>			
	90-120 days from the anniversary of the mailing of the prior year's proxy statement	3%	A minority of bylaws adopt the company's existing advance notice deadline, but the majority have implemented an earlier deadline for proxy access. A deadline of between 120 and 150 days prior to the anniversary of the distribution of the prior year's proxy statement is consistent with the vacated SEC rule.
	90-120 days from the anniversary of the prior year's meeting date	7%	
	120-150 days from the anniversary of the mailing of the prior year's proxy statement	71%	
	120-150 days from the anniversary of the prior year's meeting date	12%	
	Other	7%	
<b>Inclusion of loaned shares to meet holding requirement</b>			
	Always count	3%	CII and other institutional shareholders have expressed their view that loaned shares should count for purposes of meeting the holding requirement; Mike Garland has indicated that the NYC pension fund does not object to requiring such shares to be recallable and recalled
	If recallable	45%	
	If recallable and recalled	26%	
	Not addressed in bylaw	26%	

# Drafting a Proxy Access Bylaw – Market Trends

Bylaw Provision		Percentage of Enacted Bylaws	Notes
<b>Interaction with advance notice nominees</b>			
	Advance notice nominee reduces board cap	12%	*Rather than a blanket exclusion, some bylaws prohibit the nominating shareholder from nominating any other director pursuant to the advance notice bylaws; some prohibit any shareholder from nominating a proxy access nominee, and other bylaws prohibit the use of proxy access if a certain percentage (typically 30% or 50%) of the current board is being nominated pursuant to the advance notice bylaw
	Any advance notice nominee by any nominator eliminates possibility of proxy access	57%	
	Other restriction*	29%	
	No restrictions	2%	
<b>Compensation arrangements between nominator and nominee</b>			
	Must be disclosed in nomination notice	64%	CII supports disclosure to company rather than a prohibition, which is consistent with the SEC's original rule
	Nominee would be excluded	31%	
	Not addressed	5%	
<b>Treatment of incumbent access directors</b>			
	Would count against maximum number of proxy access nominees for the following two years	38%	Mike Garland of the NYC pension fund noted that he believes creeping control should be addressed by prohibiting the nominating shareholder from nominating an additional nominee in the following 2 years after a successful nomination
	Would count against maximum number of proxy access nominees for the following three years	20%	
	Would count against maximum number of proxy access nominees as long as the director is in office	7%	
	Does not count against maximum number of proxy access nominees	35%	

## Drafting a Proxy Access Bylaw – Market Trends

Bylaw Provision		Percentage of Enacted Bylaws	Notes
<b>Successful nominator</b>			
	May not nominate access nominee in the following two years	7%	
	Not addressed in bylaw	93%	
<b>Exclusions of repeat nominees with low levels of support</b>			
	Nominee with less than 10% support excluded	2%	CII does not support exclusions for low levels of support, since management is not subject to similar requirements; Mike Garland of the NYC pension fund has indicated that the 25% threshold may be too high
	Nominee with less than 20% support excluded	5%	
	Nominee with less than 25% support excluded	72%	
	No exclusions	21%	
<b>Requirement for nominator to appear at annual meeting</b>			
	Nominator must appear	81%	
	Not addressed in bylaw	19%	

Note: All figures as of October 31, 2015. Reflects 56 enacted bylaws during 2015; does not include the approximately 15 bylaws enacted prior to 2015 (e.g. Verizon, Hewlett Packard, Western Union).

## Proxy Access Bylaws – Selected Provisions by Company

Company	Process of Adoption	Ownership%	Cap (Max % of Board)	Group Limit	Funds Count as One Shareholder	Count Loaned Shares	1 Year Ownership Requirement Following Annual Meeting	Advance Notice Nominees	Compensation Arrangements	Incumbent Access Directors Count Against Cap	Exclude Nominees with Low Levels of Support
Anadarko	Following approved SH proposal	3%	20% (at least 2)	20	✓	If recallable and recalled	Statement as to intent	Blanket exclusion	Disclose	2 years	<25%
Altria	Unilateral adoption	3%	20% (at least 2)	20	✓	If recallable	None	Blanket exclusion	Disclose	2 years	None
Arch Coal	In advance of vote on SH proposal	5%	20%	20			Statement as to intent	Blanket exclusion	Disclose	None	<25%
Bank of America	Settlement	3%	20%	20	✓	If recallable	✓	Reduces cap	Disclose	None	<20%
Bank of New York Mellon	Unilateral adoption	3%	20% (at least 2)	20	✓	If recallable and recalled	None	Blanket exclusion	Disclose	2 years	None
Big Lots	Following approved SH proposal	3%	25%	No limit			None	No exclusion	Prohibited	None	<25%
Biogen	Settlement	3%	25%	20			Statement as to intent	Other	Prohibited	3 years	<25%
Boston Properties	In advance of vote on SH proposal	3%	25%	5			None	Blanket exclusion	Prohibited	Forever	<25%
Broadridge	Proposal withdrawn following adoption	3%	25%	20	NO	If recallable	None	Other	Prohibited	3 years	<25%
Cabot	In advance of vote on SH proposal	5%	20%	10			Statement as to intent	Blanket exclusion	Prohibited	None	<25%

## Proxy Access Bylaws – Selected Provisions by Company

Company	Process of Adoption	Ownership %	Cap (Max % of Board)	Group Limit	Funds Count as One Shareholder	Count Loaned Shares	1 Year Ownership Requirement Following Annual Meeting	Advance Notice Nominees	Compensation Arrangements	Incumbent Access Directors Count Against Cap	Exclude Nominees with Low Levels of Support
Capital One Financial	Unilateral adoption	3%	20%	20	✓	If recallable	Statement as to intent during the term of elected Nominee	Blanket exclusion	Disclose	3 years	<25%
CF Industries	In advance of vote on SH proposal	5%	20%	20			Statement as to intent	Other	Disclose	None	<25%
Citigroup	Following approved SH proposal	3%	20% (at least 2)	20	✓	If recallable	None	Reduces cap	Disclose	3 years	None
Chevron Corp.	Following approved SH proposal	3%	20% (at least 2)	20	✓	If recallable and recalled	None	Blanket exclusion	Disclose	None	<25%
Clorox	Settlement	3%	20%	20	✓	If recallable	None	Blanket exclusion	Disclose	2 years	<20%
Cloud Peak Energy	Competing proposals (SH proposal approved)	3%	20%	20		If recallable	Statement as to intent	Other	Disclose	None	None
Coca-Cola	Following failed SH proposal	3%	20% (at least 2)	20	✓	If recallable	None	Blanket exclusion	Disclose	None	<25%
Conoco Phillips	Following approved SH proposal	3%	20% (at least 2)	20	✓	If recallable and recalled	Statement as to intent	Blanket exclusion		3 years	None
CSX	Unilateral adoption	3%	20% (at least 2)	20	✓	If recallable	None	Other	Disclose	2 years	<25%

## Proxy Access Bylaws – Selected Provisions by Company

Company	Process of Adoption	Ownership %	Cap (Max % of Board)	Group Limit	Funds Count as One Shareholder	Count Loaned Shares	1 Year Ownership Requirement Following Annual Meeting	Advance Notice Nominees	Compensation Arrangements	Incumbent Access Directors Count Against Cap	Exclude Nominees with Low Levels of Support
DTE Energy	Following approved SH Proposal	3%	20% (at least 2)	20	✓	If recallable	None	Other	Disclose	2 years	None
EOG Resources	Following approved SH Proposal	3%	20%	20	✓	If recallable	None	Reduces cap	Disclose	None	<10%
EQT	Following approved SH proposal	3%	20% (at least 2)	20	✓	If recallable	None	Reduces cap	Disclose	2 years	None
Equity Residential	Following approved SH Proposal	3%	20%	20	✓	If recallable and recalled	None	Blanket exclusion	Disclose	2 years	None
FirstMerit	Settlement	3%	20%	20	✓		✓	Blanket exclusion		None	<25%
General Electric	Adopted and omitted SH proposal	3%	20%	20	✓	If recallable	✓	Blanket exclusion	Disclose	None	<25%
Goldman Sachs	Unilateral adoption	3%	20% (at least 2)	15	✓	If recallable	Rep as to intent to hold	Blanket exclusion	Disclose	2 years	<20%
H&R Block	Settlement	3%	20%	20	✓	If recallable	None	Blanket exclusion	Prohibited	None	<25%
Hasbro Inc.	Following approved SH Proposal	3%	20% (at least 2)	20	✓	If recallable	None	Other	Disclose	None	<25%

## Proxy Access Bylaws – Selected Provisions by Company

Company	Process of Adoption	Ownership %	Cap (Max % of Board)	Group Limit	Funds Count as One Shareholder	Count Loaned Shares	1 Year Ownership Requirement Following Annual Meeting	Advance Notice Nominees	Compensation Arrangements	Incumbent Access Directors Count Against Cap	Exclude Nominees with Low Levels of Support
HCP	In advance of SH proposal	5%	20%	10			Statement as to intent	Blanket exclusion		2 years	<25%
Marathon Oil	In advance of SH proposal	3%	25%	20			Statement as to intent	Other	Prohibited	None	<25%
McDonalds	Following approved SH proposal	3%	20% (at least 2)	20	✓	If recallable	None	Reduces cap	Disclose	2 years	None
McKesson	Settlement	3%	20%	20		If recallable	None	Blanket exclusion	Disclose	None	<25%
Merck	Unilateral adoption	3%	20%	20	✓	If recallable	✓	Blanket exclusion	Prohibited	3 years	<25%
Microsoft	Settlement	3%	20% (at least 2)	20	✓	If recallable and recalled	None	Blanket exclusion	Disclose	2 years	<25%
Mondelez	Unilateral adoption	3%	20% (at least 2)	20	✓	If recallable	None	Blanket exclusion	Disclose	2 years	<25%
Monsanto	Following approved SH proposal	3%	20%	20			Statement as to Intent	Other	Prohibited	None	<25%
Morgan Stanley	Unilateral adoption	3%	20% (at least 2)	20	✓	If recallable and recalled	None	Other	Disclose	2 years	<25%
NY Community Bancorp	In advance of SH proposal	5%	20%	10		✓	None	Blanket exclusion	Disclose	3 years	<25%

## Proxy Access Bylaws – Selected Provisions by Company

Company	Process of Adoption	Ownership %	Cap (Max % of Board)	Group Limit	Funds Count as One Shareholder	Count Loaned Shares	1 Year Ownership Requirement Following Annual Meeting	Advance Notice Nominees	Compensation Arrangements	Incumbent Access Directors Count Against Cap	Exclude Nominees with Low Levels of Support
Noble Energy	Following failed SH proposal	5%	20%	20			Statement as to intent	Blanket exclusion	Prohibited	None	<25%
Occidental	Following approved SH proposal	3%	20%	20	✓	If recallable and recalled	Statement as to intent	Blanket exclusion	Disclose re nomination; prohibited re directorship	3 years	<25%
Phillip Morris	Unilateral adoption	3%	20%	15	✓	If recallable	Statement as to intent	Blanket exclusion	Disclose	3 years	<25%
Priceline	In advance of SH proposal	3%	25%	No limit		If recallable	Statement as to intent	Other	Prohibited	None	<25%
Progressive	Unilateral adoption	3%	20%	20	✓	If recallable and recalled	None	Reduces cap	Disclose	2 years	<25%
Prudential	Unilateral adoption	3%	20%	20	✓	If recallable	Statement as to intent	Blanket exclusion	Disclose	None	<25%
Regency	Unilateral adoption	3%	25%	1			None	Blanket exclusion	Prohibited	Forever	<25%
Rite Aid	In advance of SH proposal	3%	20%	20			Statement as to intent	Blanket exclusion	Disclose	2 years	<25%
SBA	Competing proposals (MG approved)	5%	20%	10			None	Blanket exclusion	Prohibited	3 years	<25%

## Proxy Access Bylaws – Selected Provisions by Company

Company	Process of Adoption	Ownership %	Cap (Max % of Board)	Group Limit	Funds Count as One Shareholder	Count Loaned Shares	1 Year Ownership Requirement Following Annual Meeting	Advance Notice Nominees	Compensation Arrangements	Incumbent Access Directors Count Against Cap	Exclude Nominees with Low Levels of Support
SLM	Response to 2014 SH proposal	3%	25%	20			None	Other		2 years	<25%
State Street	Unilateral adoption	3%	20%	20	✓		None	Other	Disclose	None	<25%
TCF Financial	Following approved SH proposal	3%	25%	20			✓	Blanket exclusion	Disclose	2 years	None
United Natural Foods	Unilateral adoption	3%	20%	20	✓	If recallable and recalled	Statement as to intent	Other	Prohibit	3 years	<25%
United Technologies	Unilateral adoption	3%	20%	20	✓	✓	None	Reduces cap	Disclose	2 years	None
United Therapeutics	Adopted, then SH proposal withdrawn	3%	20% (25% if <10)	20	✓	If recallable and recalled	None	Blanket exclusion	Disclose	Forever	<25%
VEREIT	Unilateral adoption	3%	25%	20	✓	If recallable	None	Blanket exclusion	Prohibited	Forever	<25%
Walgreens Boots Alliance	Following failed SH proposal	3%	20%	20	✓	No	Statement as to intent	Blanket exclusion	Disclose	None	<25%
Whole Foods	Settlement	3%	20%	20	✓	If recallable and recalled	Statement as to intent	Other	Prohibited	3 years	<25%
Yum! Brands	Settlement	3%	20%	20		If recallable and recalled	Statement as to intent	Other	Prohibited	None	<25%



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