

# Alert

## SEC Disclosure and Corporate Governance

### **Heads Up for the 2016 Proxy Season Navigating Proxy Access: A Roadmap for the Board of Directors**

The subject of “proxy access” represents another turning point in the corporate governance of public companies that many boards of directors will need to face, and for some, much sooner than later. Proxy access, which has come to the forefront through Rule 14a-8 proposals submitted by certain pension funds and other governance-oriented activists, is designed to enable shareholders to use a company’s proxy statement and proxy card to nominate one or more director candidates of their own. In this Alert, we provide a strategic roadmap for boards to use in considering what to do about proxy access and when to do it. We also describe the range of choices a company has in crafting a proxy access bylaw, identifying the provisions for which there is emerging consensus as well as those that appear problematic in the view of some institutional investors and proxy advisory firms. By all indications, the proxy access movement has the momentum to spread through large companies much in the same way as majority voting.

#### **What to Expect for 2016**

- Pressure on boards to respond in 2016 to access proposals that received majority support in 2015
- A wave of access proposals at companies targeted in 2015 and at new companies
- Spotlight on provisions that certain investors and proxy advisors are labeling as “troublesome” or “problematic”
- Demands from some proponents to adopt an access bylaw consistent with CII’s Best Practices
- Heightened need for engagement on proxy access and other governance matters
- More detailed voting guidance on proxy access from proxy advisors
- SEC guidance on the “Whole Foods” issue – when a company may exclude an access (or other) shareholder proposal that “directly conflicts” with a management proposal
- Possible first time use of access bylaws to nominate directors

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### I. Overview

During the 2015 proxy season, 113 companies of various sizes and industries received a shareholder proposal demanding that the company amend its bylaws to establish “proxy-access.”<sup>1</sup> As of the writing of this Alert, these proposals have gone to a vote at 95 companies. At over half, the proposals won the support of holders of a majority of shares voted (“majority support”), with votes cast in favor averaging 58.9%.<sup>2</sup> In 2015 to date, 47 companies have adopted proxy access bylaws. These bylaws generally require 3% ownership for 3 years by the nominating shareholder, a cap at 20 on the number of shareholders that may aggregate their holdings, and a cap on the number of “access nominees” at 20% to 25% of the board.

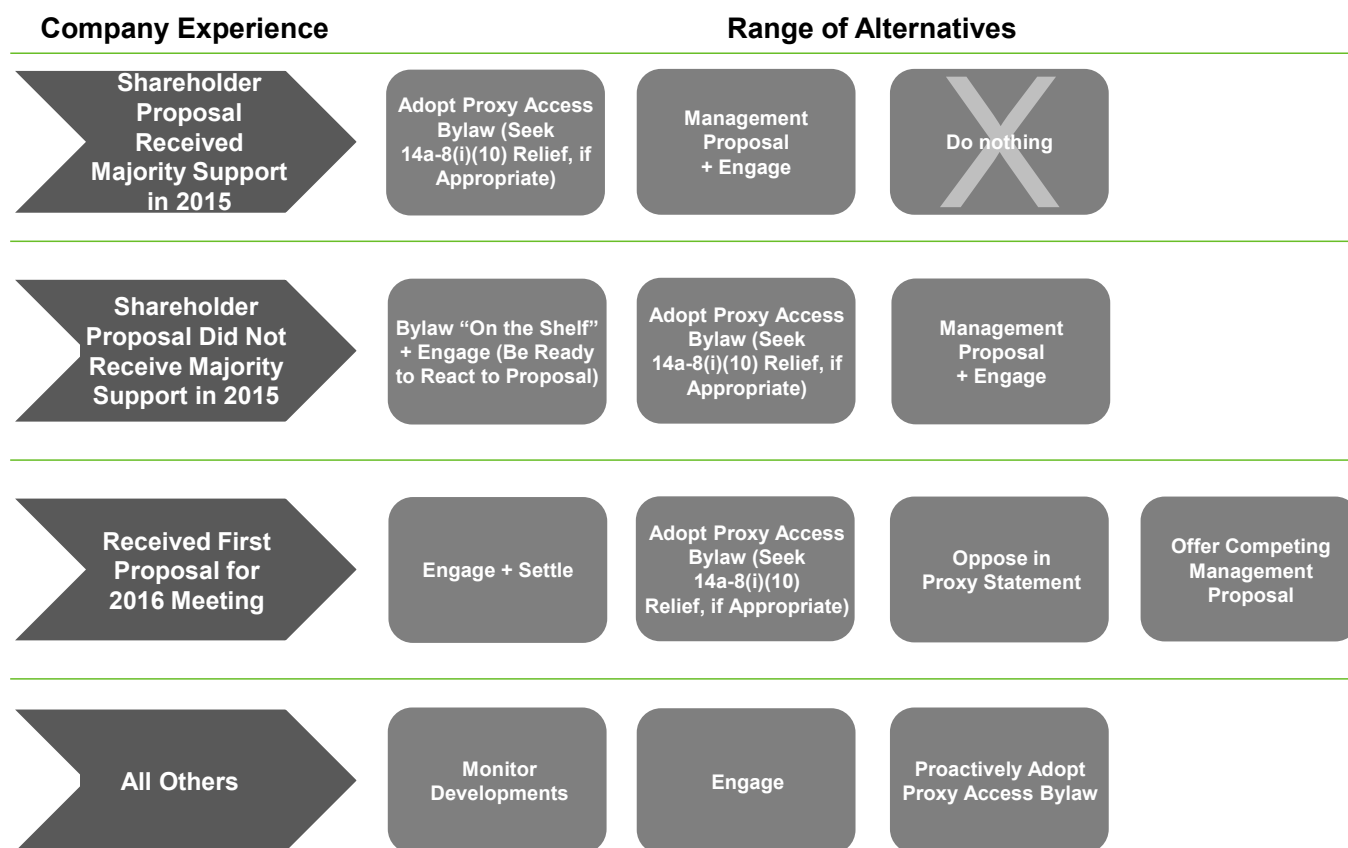
We expect the 2016 proxy season to be dominated by access proposals. We also expect a more intense focus on provisions in proxy access bylaws that certain investors and proxy advisors are labeling as “troublesome” or “problematic.” As the deadlines for shareholder proposals at calendar year companies rapidly approach, every board, regardless of company size or industry, should be prepared for the possibility of a proxy access proposal.

We have provided [Appendix I](#) and [Appendix II](#) to help companies learn from the experiences of others and analyze the posture of peer companies.

### II. Strategies for 2016: A Roadmap of Alternatives for Proxy Access

Companies should thoughtfully consider their approach to proxy access for the 2016 proxy season. Whether to adopt proxy access preemptively, by way of either a company-adopted bylaw or a management proposal at the next annual meeting, or to take a wait-and-see approach, depends upon whether the company received a proxy access proposal during the 2015 season and the results of the vote, as well as the company’s shareholder base, performance, governance profile and risk tolerance.

Set forth below is a roadmap of alternatives for proxy access based on a company's experience to date.



### Alternative 1: Wait-and-See, Prepare and Engage

Taking a watchful "wait-and-see" approach is a particularly viable alternative for companies that have not yet received a proxy access proposal or at which a 2015 shareholder-sponsored access proposal failed to garner majority support. Companies that take this approach should use the time wisely to stay fully informed as to available alternatives and to seek shareholder views on proxy access in connection with their pre-annual meeting engagement efforts. The board should also consider the merits of developing a proxy access bylaw to put "on the shelf." This would enable the board to respond promptly to a shareholder proposal by either (i) negotiating with the proponent to withdraw its proposal in light of the company's commitment to adopt a proxy access bylaw or agreeing to present a management proposal at the annual meeting on mutually acceptable terms or (ii) quickly adopting a proxy access bylaw that had already been carefully considered and, if timely, seeking SEC no-action relief to exclude the shareholder proposal on the grounds of "substantial implementation" pursuant to SEC Rule 14a-8(i)(10).<sup>3</sup>

### Alternative 2: Adopt a Proxy Access Bylaw Prior to the 2016 Annual Meeting

Companies at which a shareholder-sponsored access proposal received majority support in 2015 should recognize that, although the proposal was advisory in nature, shareholders and proxy advisory firms will consider in the upcoming season whether the board has adequately addressed it. One increasingly prevalent manner of addressing a majority-supported proposal is for the company to adopt a proxy access bylaw. Thus far in 2015, a proxy access bylaw has been adopted by 10 of the 51 companies where a shareholder proposal for proxy access received majority support.<sup>4</sup> In formulating the bylaw, companies should carefully consider how they respond to the standards in the

shareholder-approved proposal and any subsequent feedback received from shareholders. If ISS believes a company did not adequately respond to a shareholder-supported proposal, it may recommend against the election of directors or nominating/governance committee members.

Companies that have not received an access proposal or at which a shareholder proposal did not receive majority support have a greater degree of flexibility in determining whether, and if so on what terms, to preemptively adopt a proxy access bylaw.

Companies that adopt a proxy access bylaw should understand that doing so will not insulate the company from future proposals on different terms. Preemptive adoption will, however, better position a company to negotiate with a proponent or seek no-action relief to exclude a shareholder proposal pursuant to SEC Rule 14a-8(i)(10). In considering whether to grant relief, the SEC Staff will closely compare a company-adopted bylaw to a shareholder proposal to evaluate whether the proposal has been “substantially implemented.”

### **Alternative 3: Submit a Management Proposal to Shareholder Vote at the 2016 Annual Meeting**

There are several reasons why a company may wish to submit a management-sponsored proxy access proposal for shareholder vote: (i) a shareholder access proposal received majority support at the prior annual meeting; (ii) the company wishes to preempt a shareholder proposal for the forthcoming annual meeting; (iii) the company has received a proposal and wishes to offer a competing management proposal on its own terms; or (iv) the company wishes to demonstrate its general commitment to corporate governance.

In order to effectively preempt a shareholder proposal, the company must convey its intention to submit a management proposal either by engagement with shareholders or by making a public announcement;<sup>5</sup> otherwise, shareholders will have no visibility into the company’s intention during the period for making a proposal.

In light of the uncertainty about the ability of companies to seek relief from the SEC on the grounds that the shareholder proposal “directly conflicts” with the management proposal, shareholder engagement will be critical for a company that wishes to garner support for its own management proposal. Prior to the 2015 proxy season, directly conflicting or competing proposals were commonly excluded pursuant to Rule 14a-8(i)(9). On January 16, 2015, the SEC’s Division of Corporation Finance announced a reversal of the relief it granted to Whole Foods Market, Inc. to exclude a shareholder proposal on proxy access that “directly conflicted” with Whole Foods’ management proposal.<sup>6</sup> The Division indicated that, at the direction of SEC Chair Mary Jo White, it would not express a view on the application of Rule 14a-8(i)(9) during the 2015 proxy season to any proposal, whether relating to proxy access or any other matter.<sup>7</sup> The Director of the Division of Corporation Finance, Keith F. Higgins, stated at a recent ABA meeting that guidance on Rule 14a-8(i)(9) would be issued by the end of October or early November.<sup>8</sup>

### **Alternative 4: Do Nothing – Not Really an Option**

A “do-nothing” approach in response to a proposal that passed or nearly passed at the prior annual meeting will delay the adoption of proxy access. However, it is also likely to generate a negative voting recommendation from proxy advisory firms,<sup>9</sup> continued pressure from institutional investors, negative publicity and, inevitably, management distraction.

## Weighing the Options: Snapshot of Considerations

In formulating their approach, boards and management should consider the following:

Wait-and-See	Preemptively a Adopt Proxy Access Bylaw	Submit a Management Proposal to a Shareholder Vote
<p><b>Pros:</b></p> <ul style="list-style-type: none"> <li>• Provides additional time to engage with shareholders and build consensus</li> <li>• Provides additional time to assess institutional shareholder positions, proxy advisory firm policies, and market practices</li> <li>• Leaves open multiple avenues for the company</li> </ul>	<p><b>Pros:</b></p> <ul style="list-style-type: none"> <li>• Decreases vulnerability to a shareholder proposal that may include terms the company does not favor</li> <li>• Demonstrates responsiveness to shareholders (if prior proposal passed or nearly passed) and establishes ground for negotiation with shareholder proponents</li> <li>• Provides grounds for exclusion under Rule 14a-8(i)(10) if “substantially implemented”</li> <li>• Could result in adoption of a more company-friendly bylaw</li> </ul>	<p><b>Pros:</b></p> <ul style="list-style-type: none"> <li>• Provides additional time to engage with shareholders and build consensus</li> <li>• Provides additional time to assess institutional shareholder positions, proxy advisory firm policies, and market practices</li> <li>• Demonstrates responsiveness to shareholders (if prior proposal passed or nearly passed)</li> <li>• Could result in adoption of a more company-friendly bylaw</li> </ul>
<p><b>Cons:</b></p> <ul style="list-style-type: none"> <li>• Puts the company on the defensive by allowing a shareholder to act first through public announcement of a campaign or a proposal</li> <li>• Could forestall the opportunity to adopt a more company-friendly bylaw</li> <li>• May expose company to a proposal with new and more onerous provisions than in 2015 formulation</li> </ul>	<p><b>Cons:</b></p> <ul style="list-style-type: none"> <li>• Does not insulate the company from a future proposal with different or more onerous provisions</li> <li>• SEC will closely review whether a company has “substantially implemented” the shareholder proposal for purposes of Rule 14a-8(i)(10)</li> </ul>	<p><b>Cons:</b></p> <ul style="list-style-type: none"> <li>• Does not insulate the company from a future proposal with different or more onerous provisions</li> <li>• Inability to use Rule 14a-8(i)(9) to exclude shareholder proposal that “directly conflicts,” subject to the SEC’s anticipated guidance</li> </ul>

### III. Investor Focus for the 2016 Proxy Season: “Troublesome” and “Problematic” Provisions

#### The 2015 Consensus

Shareholder proposals on proxy access submitted to a shareholder vote during the 2015 proxy season were largely modeled after former SEC Rule 14a-11. The overwhelmingly prevalent formulation for companies that adopted a proxy access bylaw was as follows:

- *Ownership at 3%*. The nominating shareholder(s) must have beneficially owned (in a net long position) 3% or more of the company’s outstanding common stock, although several companies adopted a 5% threshold.
- *3-Year Ownership*. The nominating shareholder(s) must have held such shares continuously for at least three years before submitting the nomination.
- *Shares May be Aggregated*. The number of shareholders permitted to aggregate their holdings to form an eligible nominating group was generally capped at 20.
- *Cap on Number of Proxy Access Nominees*. Shareholder-nominated candidates appearing in company proxy materials could represent 25% of the directors then serving.

See [Appendix I](#) for details the proxy access bylaws adopted by 47 companies in 2015.

#### Beyond the Consensus: Provisions Expected for 2016

The results of all shareholder proposals voted on and settled in 2015 largely favored the adoption of proxy access with a 3% / 3 year / 20 shareholders / 20% formulation. Investor attention is now turning to more granular issues.

In August 2015, the Council on Institutional Investors (CII), an industry group for large institutional investors, published “Best Practices” highlighting the seven provisions it deemed “troublesome” in the proxy access bylaws adopted in 2015, noting that every proxy access bylaw adopted to that date included at least one of the seven “troublesome” provisions.<sup>10</sup> Following in the footsteps of CII, James McRitchie, a frequent shareholder proponent, published in his blog a new template for proxy access proposals in 2016, which seeks to avoid what he terms “proxy access lite” and incorporates some of CII’s Best Practices.<sup>11</sup>

The Comptroller of the City of New York (NYC Comptroller), who was the primary proponent of proxy access in 2015,<sup>12</sup> has not yet announced the focus of his 2016 Boardroom Accountability Project. We expect, at minimum, that he will expand the list of companies receiving a proxy access proposal. In August 2015, the NYC Comptroller and the California Public Employees’ Retirement System (CalPERS) distributed a joint letter to companies at which shareholder proposals for proxy access had received majority support, inquiring as to the steps these companies are or will be taking in order to adopt a proxy access bylaw. The letter also encouraged these companies to adopt a bylaw that is consistent with CII’s Best Practices.

In October 2015, the United Brotherhood of Carpenters Pension Funds (the Carpenters) sent letters to approximately 50 companies that had received a proxy access shareholder proposal in 2015 and also have a majority voting standard and a director resignation policy in place. While the Carpenters’ historical position has been to oppose proxy access, the letter supports proxy access in the limited circumstances where an incumbent director fails to receive majority support and the board does not accept the failed nominee’s resignation, a so called “zombie director.”

The results of ISS’ policy survey for 2015-2016 published on September 28, 2015 also suggest that ISS may revise its voting policy on proxy access to reflect a position on certain “problematic” provisions.<sup>13</sup> See “Proxy Advisory Firm Positions” below.

**“Troublesome” or “Problematic” Provisions at a Glance**

The table below sets forth the “troublesome” provisions identified by CII, which are marked with a “+,” and the “problematic” provisions identified by ISS, which are marked with an “\*\*” and indicates the extent to which they appear in the 47 proxy access bylaws adopted in 2015.

Provision	Adopted in 2015 (# of Companies)	Expected Proponent Focus for 2016
<b>Ownership threshold</b> *+	3% (42) 5% (5)	3%
<b>Ownership duration</b> *+	3 years (47)	3 years
<b>Maximum number of shareholders that may aggregate holdings to meet ownership threshold</b> *+	No limit (6) 20 (34) 15 (1) 10 (4) 5 (1) 1 (1)	Unlimited ability to aggregate or no less than 20 shareholders (preference depends on proponent)
<b>Cap on number of nominees</b> *+	Greater of 2 or 25% (1) Greater of 2 or 20% (8) Greater of 1 or 20% (3) 25% cap (10) 20% cap (25)	At least 2 nominees (irrespective of board size)
<b>Bar on re-nomination based on failure to receive stipulated level of support (%)</b> *+	Not addressed (6) 10% support (2) 20% support (2) 25% support (37)	No restrictions
<b>Disqualification based on nominee’s receipt of third party compensation</b> *+	Yes (14) No (33)	Disclosure of third-party compensation arrangements is acceptable, disqualification is problematic
<b>More restrictive advance notice requirements for access nominees</b> *	**	ISS has called this out but has not yet detailed its view
<b>More extensive information disclosures from access nominee</b> *	**	ISS has called this out but has not yet detailed its view
<b>Securities loaned by shareholder expressly included as “owned”</b> +	Yes (32) No (15)	Expect express requirement that loaned stock that is recallable counts as “owned”
<b>Required statement of intent to hold shares after annual meeting</b> +	Yes (21) No (26)	No requirement to hold shares after meeting

See [Appendix I](#) for details on these “troublesome” or “problematic” provisions contained in the 47 proxy access bylaws adopted in 2015 to date.



## IV. Institutional Investor and Proxy Advisory Firm Positions on Proxy Access

### Know Your Shareholders: Institutional Shareholder Positions

CalPERS, the California State Teachers Retirement System (CalSTRS) and the NYC Comptroller support proxy access as a strategic priority and have been the most vocal leaders of the proxy access movement.<sup>14</sup> Other institutional investors have taken a more measured approach by evaluating proxy access proposals on a case-by-case basis, and still others have not supported proxy access.

As with many corporate governance matters, companies should be familiar with the perspectives of different constituencies within their shareholder base – including, most importantly, their largest institutional shareholders – as part of their planning for shareholder engagement on this and other major governance topics.

The table below reflects the positions of certain key institutional investors in 2015.

Institution	Public Position (if known)	How They Voted in 2015 <sup>15</sup>
<b>BlackRock</b>	Case-by-case review, but generally supportive	For
<b>The Vanguard Group</b>	Generally supports proposals with 5% / 3 year holding / 20% cap	Against
<b>State Street Global Advisors</b>	Case-by-case review	For
<b>Fidelity Management &amp; Research</b>	Generally against	Generally Against
<b>BNY Mellon</b>	No public position	For
<b>Capital World Investors</b>	No public position	For
<b>Capital Research Global Investors</b>	Case-by-case review	Generally For
<b>Northern Trust Investments</b>	No public position	Against
<b>Wellington Management</b>	No public position	Against
<b>T. Rowe Price</b>	Supports 3% / 2-3 year holding period	For

Engagement on proxy access is particularly critical for companies that have a large institutional investor base. A survey by Broadridge and PricewaterhouseCoopers of companies that held annual meetings between January 1 and June 30, 2015 and had votes on proxy access proposals found that 61% of the votes cast by institutional investors were in favor of proxy access.<sup>16</sup> In contrast, only 15% of the votes cast by retail investors were in favor of proxy access, which was generally in line with management's recommendations. According to the survey, retail investors voted only 28% of the shares they owned during the 2015 proxy season, which meant that over 97 billion retail shares were not voted.

### Proxy Advisory Firm Positions

As discussed below, ISS and Glass Lewis both generally support proxy access. ISS and Glass Lewis will look to a company's proxy disclosure to evaluate what efforts the company has made to engage with its shareholders and the consistency of any proxy access bylaw adopted or management proposal with the feedback acquired through engagement.



## **ISS**

The 2015 ISS voting guidelines provide that ISS will generally recommend in favor of management and shareholder proposals on proxy access that have the following provisions: (i) an ownership threshold of not more than three percent (3%); (ii) a holding period no longer than three continuous years; (iii) minimal or no limits on the number of shareholders permitted to form a nominating group; and (iv) a cap on the number of proxy access nominee seats at no less than 25% of the board.

In its 2015-2016 policy survey, ISS asked respondents to comment on the material restrictions on proxy access contained in bylaws adopted to date, and asked whether any of those restrictions would be sufficiently problematic to call into question the board's responsiveness to a majority-supported proxy access proposal and, therefore, to warrant negative votes on directors.<sup>17</sup> See “‘Troublesome’ or ‘Problematic’ Restrictions at a Glance” above.

The results of survey indicated that a large majority of institutional investor respondents support a negative voting recommendation against directors of a company that adopts a proxy access bylaw if:

- the ownership threshold exceeds 3% (72%) or 5% (90%);
- the holding period exceed 3 years (90%);
- the maximum size of the nominating group is less than 20 shareholders (76%);
- the cap on the number of board seats is less than 20% (79%);
- proxy access nominations have more restrictive advance notice requirements (70%);
- proxy access nominees must make more extensive information disclosures (80%);
- there are re-nomination restrictions on access nominees who do not received a specified level of voting support (68%); or
- compensation of access nominees by nominating shareholders is restricted (72%).

ISS is expected to release its voting guidelines for the 2016 proxy season in November 2015 after its analysis and consideration of the results of the survey.

## **Glass Lewis**

Glass Lewis' voting guidelines indicate that it generally supports proxy access as a means to ensure that significant shareholders have an ability to nominate candidates to the board; however, it considers each proposal on a case-by-case basis.<sup>18</sup> Specifically, Glass Lewis considers specified minimum ownership and holding period requirements, as well as company size, board independence and diversity, company performance, existence of anti-takeover protections, board responsiveness to shareholders, and opportunities for shareholder action (e.g., ability to act by written consent or right to call a special meeting). Glass Lewis' policy updates are also expected to be released in November 2015.

## **V. Learning from 2015: A Watershed for Proxy Access**

Between 2011, when the federal rule prescribing proxy access – SEC Rule 14a-11 – was vacated by a federal court,<sup>19</sup> and 2015, only 11 companies adopted a form of proxy access, whether voluntarily or as a result of a majority-supported shareholder proposal.<sup>20</sup> From 2012 to 2014, a total of 49 shareholder proposals on access were submitted to companies, but only ten received passing votes.<sup>21</sup>

The 2015 proxy season became a watershed for proxy access due to three important factors:

- The NYC Comptroller, with the support of several New York City pension funds, launched the “Boardroom Accountability Project” targeting 75 public companies for proxy access proposals.<sup>22</sup>
- A consensus began to build around a formulation requiring 3% ownership for a consecutive period of 3 years by a group of no more than 20 shareholders for up to 20-25% of the board.
- As described above, the SEC withdrew relief it granted to Whole Foods to exclude a shareholder proposal in the face of a “conflicting” management proposal and announced that it would not express a view on the application of Rule 14a-8(i)(9) during the 2015 proxy season. During the 2015 proxy season, this resulted in the inclusion of shareholder access proposals that may have otherwise been excluded had relief been available.

#### **Proxy Access in the 2015 Season: Stats-at-a-Glance**

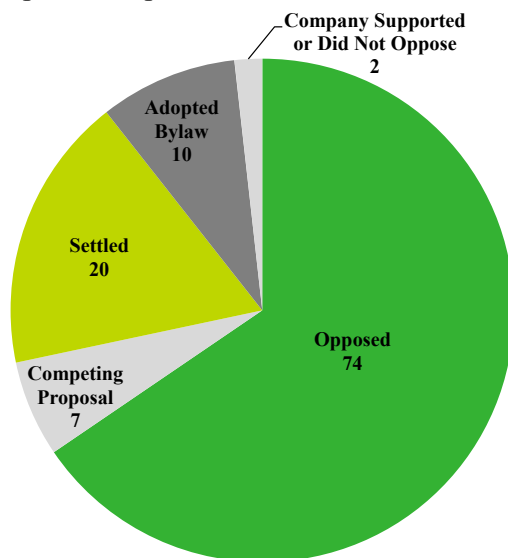
- 113 companies received precatory shareholder proposals for proxy access under Rule 14a-8<sup>23</sup>
  - 10 adopted proxy access prior to their annual meeting. Of these, 1 received no action relief based on “substantial implementation” under Rule 14a-8(i)(10), and 9 essentially made the vote on the shareholder proposal a referendum on the company’s bylaw
  - 74 opposed the shareholder proposal, which was presented in their proxy statements
  - 7 included a competing management proposal in addition to the shareholder proposal
  - 20 settled with the shareholder proponent. Of these, 4 included a binding management proposal in 2015, 1 supported a negotiated shareholder proposal in 2015, 10 adopted a proxy access bylaw, 2 committed to adopt a proxy access bylaw, and 3 committed to present a management proposal in 2016
  - 2 companies supported or did not oppose the shareholder proposal
- 95 companies included a proposal on proxy access – mainly from shareholders, but also from management – in the proxy statements for their 2015 annual meetings
  - Of the 87 annual meetings held to date at which the access proposal was presented by a shareholder, the proposal received majority support at 51 (3 meetings are pending)<sup>24</sup>
  - At the 5 meetings at which an access proposal was presented by management, all received majority support
- 47 companies adopted proxy access in 2015
  - 10 in response to a majority-supported shareholder proposal
  - 2 in response to a shareholder proposal supported by approximately 40% of shareholders in 2015
  - 13 as part of a settlement with a shareholder proponent
  - 2 in response to a shareholder-supported management proposal
  - 1 that successfully omitted the shareholder proposal on the grounds that it was “substantially implemented”
  - 9 prior to the 2015 annual meeting in an effort to defeat the shareholder proposal
  - 10 for which the circumstances were not disclosed
- 61% of votes cast by institutional investors supported some form of proxy access in 2015, while only 15% of votes cast by retail investors supported proxy access<sup>25</sup>

### Company Reactions and Meeting Results in the 2015 Season

Companies that receive shareholder proposals for their 2016 annual meetings should take stock of the decisions made by companies in 2015, and consider how the results of those decisions would play out at their companies. Responses to the 113 proxy access proposals submitted under Rule 14a-8 in 2015 were generally as follows:

- Including the shareholder proposal with a management statement of opposition;
- Submitting a competing proposal;
- Engaging and settling with the shareholder proponent; or
- Adopting a proxy access bylaw and either (a) including a management statement in opposition to the shareholder access proposal in the proxy statement or (b) submitting a timely request for no action relief from the SEC under Rule 14a-8(i)(10) on the ground that the proposal had been “substantially implemented.”

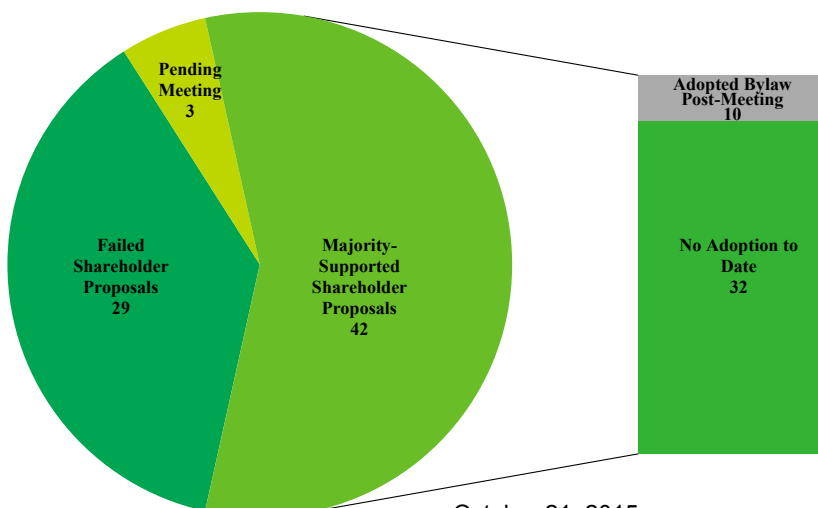
The chart below summarizes how companies responded in 2015.



We discuss these outcomes below and present the material elements of 2015 access proposals in [Appendix II](#).

#### 1. Company Opposition

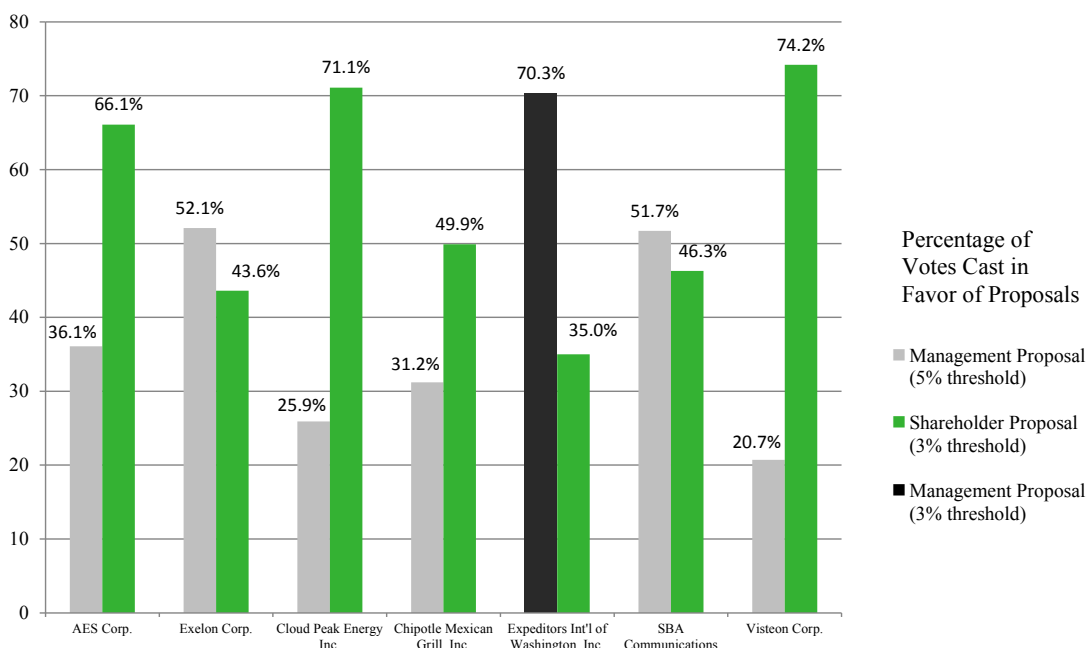
The majority of companies that received shareholder proposals for proxy access during the 2015 proxy season showed their lack of enthusiasm for proxy access by including in their proxy statement a management statement in opposition to the shareholder proposal. Of the 74 companies that included opposition statements, proposals at 42 companies (57.5%) received majority support.



Management opposition statements were broadly similar, citing to rights currently available to shareholders, including, as relevant, majority voting, the ability to call a special meeting, the ability to engage directly with directors regarding nominations, current governance strengths and director nomination practices enabling shareholders to give input, as well as abuses that could result from certain shareholders utilizing proxy access.

## 2. Competing Proxy Access Proposals

Seven companies brought competing management and shareholder access proposals to a vote in 2015 to date. The key difference between the proposals was that the management proposals required 5% ownership (other than Expeditors International of Washington, Inc., which required 3%) for 3 years, while the shareholder proposals required 3% ownership for 3 years. The voting results were mixed. SEC Chair White observed in a June 2015 speech that, in her view, the voting results indicated that shareholders were not confused by competing proposals.<sup>26</sup>



## 3. Settlements with Proponents

Twenty companies settled with shareholder proponents (8 with the NYC Comptroller and 12 with others). The settlements generally provided for either the adoption of, or agreement to submit a management proposal for, a proxy access bylaw requiring 3% ownership for 3 years by the shareholder proponent, allowing a group of up to 20 shareholders to aggregate their holdings, and a cap on number of shareholder nominees of up to 20% or 25% of the board.

Settlement Reached	Companies that Settled with Proponent
<b>Binding Management Proposal</b>	Abercrombie and Fitch,* Big Lots,* McKesson,* FirstMerit
<b>Supported Negotiated Shareholder Proposal</b>	Citigroup
<b>Adopted Proxy Access Bylaw</b>	Bank of America, Biogen Corp., Broadridge Financial Solutions, H&R Block, Microsoft, Clorox, VEREIT,* Whole Foods, Yum! Brands, United Therapeutics*
<b>Committed to Adopt</b>	Kindred Healthcare, Staples*
<b>Committed to 2016 Management Proposal</b>	Splunk,* Whiting Petroleum*, Wendy's

\* Indicates proposal from NYC Comptroller

#### 4. Proxy Access Bylaw Adopted in Advance of Annual Meeting

Following the receipt of a shareholder proposal, 9 companies unilaterally adopted a proxy access bylaw and included in their proxy statements a management statement opposing the shareholder proposal. These mixed results further demonstrate the importance of understanding investor views before adopting a proxy access bylaw. See [Appendix II](#) for additional detail on each of these proposals and the proponents.

Company	Formulation of Shareholder Proposal or Adopted Bylaw	Support for Shareholder Proposal (F/F+A) (%)
<b>Shareholder Proposal for all of the companies listed below</b>	3% / 3 years / no limit on shareholder group / 25% of board	
<b>Adopted Proxy Access Bylaws:</b>		
Arch Coal	5% / 3 years / 20 shareholders / 20% of board	36.3%
Boston Properties	5% / 3 years / 5 shareholders / 20% of board	46.3%
Cabot Oil & Gas	5% / 3 years / 10 shareholders / 20% of board	45.3%
CF Industries* Holdings	5% / 3 years / 20 shareholders / 25% of board	<b>57.4%</b>
HCP, Inc.	5% / 3 years / 10 shareholders / 20% of board	<b>55.5%</b>
Marathon Oil*	5% / 3 years / 20 shareholders / 20% of board	<b>62.7%</b>
New York Community Bancorp	5% / 3 years / 10 shareholders / 20% of board	44.4%
Priceline*	5% / 3 years / 20 shareholders / 20% of board	<b>53.5%</b>
Rite Aid	3% / 3 years / 20 shareholders / 20% of board	37.3%

\* Indicates that the company later revised its proxy access bylaw to reflect majority-supported shareholder proposal.

General Electric Company received relief from the SEC Staff to exclude a shareholder access proposal pursuant to Rule 14a-8(i)(10) on the ground that GE had “substantially implemented” the shareholder proposal by adopting a proxy access bylaw. In its request for relief, GE compared each element of the shareholder proposal to its adopted proxy access bylaw. All provisions were identical except that GE limited to 20 the number of shareholders permitted to aggregate their holdings to form a group for purposes of reaching the 3% ownership threshold (the proposal was silent on the permitted number of shareholders).

Senior Division of Corporation Finance officials have expressed the view during recent conferences that they expect more (i)(10) no-action requests for the upcoming season given the enhanced focus on aggregation caps and other features of the access formulation. In connection with its review of Rule 14a-8(i)(9), the Staff could also take a closer look at Rule 14a-8(i)(10) to provide more explicit guidance as to what qualifies as “substantially implemented.” Companies planning to exclude a shareholder access proposal based on substantial implementation should keep a close eye on these developments.

## VI. Implications of Proxy Access for the Future

The immediate question is whether shareholders will seek to use previously-adopted proxy access bylaws to nominate directors for election in the 2016 proxy season. Looked at more broadly, the recent victories of shareholder proponents for proxy access, together with the focus of the investor community on director refreshment, qualifications and skills, are likely to heighten pressures on boards to further engage and evaluate board composition and the director selection process as whole.

### What to Do Now: Prepare, Stay Informed, and Engage

1. Understand the available alternatives for addressing proxy access depending on the company's experience to date.
2. Understand the positions of key shareholders on proxy access.
3. Monitor proxy access developments and proxy advisor and institutional investor views on “troublesome” or “problematic” provisions.
4. For companies that have not to date received a proposal, consider preparing a draft bylaw to keep “on the shelf.”
5. Engage with shareholders – not only on proxy access, but on all key issues.

\* \* \* \* \*

If you have any questions on these matters, please do not hesitate to speak to your regular contact at Weil, Gotshal & Manges LLP or to any member of Weil's Public Company Advisory Group:

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*We thank our colleague Kaitlin Descovich for her contribution to this Alert.*

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## ENDNOTES

1. Institutional Shareholder Services “Voting Analytics, Proposals” as of October 16, 2015. This number does not include management-only proposals, proposals that were omitted because the shareholder proponents were ineligible under Rule 14a-8(b), or voluntarily adopted proxy access bylaws.
2. Institutional Shareholder Services “Voting Analytics, Proposals” as of October 16, 2015.
3. See Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended. If the company intends to exclude a shareholder proposal from its proxy materials, it must submit request for relief to the SEC no later than 80 calendar days before it files its definitive proxy statement and form of proxy.
4. These companies are: Monsanto Company, EOG Resources Inc., DTE Energy, Anadarko Petroleum Inc., Chevron Corp., Conoco Phillips, Hasbro Inc., Occidental Petroleum Corp., EQT Corp. and Equity Residential.
5. On October 6, 2015, BlackRock Inc. announced that it would voluntarily submit a management proposal on proxy access to a shareholder vote at its 2016 annual meeting. See David Benoit, *BlackRock Takes Its Own Advice on Proxy Access*, The Wall Street Journal (Oct. 7, 2015), available at <http://blogs.wsj.com/moneybeat/2015/10/07/blackrock-takes-its-own-advice-on-proxy-access/>.
6. Whole Foods’ management proposal provided for a 9%/5-year formulation (later changed to 5%/5 years), with a cap on proxy access nominees of 10% of the board, and that only a single eligible shareholder or a group of funds under common management could propose an access nominee. The shareholder proposal provided for a 3%/3-year formulation, with a cap on proxy access nominees of 25% of the board, and an unlimited number of eligible shareholders permitted to aggregate their shares. After the Division reversed the relief granted, Whole Foods postponed its annual meeting to give it more time to consider its alternatives, and ultimately settled with the proponent, James McRitchie, who withdrew the proposal. Under the settlement, Whole Foods adopted a proxy access bylaw with a formulation of 3% / 3 years / 20% of the board / 20 shareholders.
7. See Securities and Exchange Commission, Statement from Chair White Directing Staff to Review Commission Rule for Excluding Conflicting Proxy Proposals (Jan. 16, 2015), available at <http://www.sec.gov/news/statement/statement-on-conflicting-proxy-proposals.html>. See Announcement of the SEC Division of Corporation Finance Related to Exchange Act Rule 14a-8(i)(9) For Current Proxy Season, available at <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/jamesmcritchiecheveddenrecon011615-14a8.pdf>.
8. The Staff decision to express no view regarding Rule 14a-8(i)(9) also impacted the consideration of other shareholder proposal topics such as shareholders’ ability to call a special meeting (e.g., a shareholder proposal at a 10% threshold conflicting management with a proposal at 20%).
9. See Institutional Shareholder Services, 2015 U.S. Summary Proxy Voting Guidelines (updated Mar. 4, 2015) at 14, available at [http://www.issgovernance.com/file/policy/1\\_2015-us-summary-voting-guidelines-updated.pdf](http://www.issgovernance.com/file/policy/1_2015-us-summary-voting-guidelines-updated.pdf). ISS will look at the following factors to assess whether a board has adequately addressed a majority-supported shareholder resolution: disclosed outreach efforts by the board to shareholders in the wake of the vote; rationale provided in the proxy statement for the level of implementation; the subject matter of the proposal; the level of support for and opposition to the resolution in past meetings; actions taken by the board in response to the majority vote and its engagement with shareholders; the continuation of the underlying issue as a voting item on the ballot (as either shareholder or management proposals); and other factors as appropriate.
10. See Council of Institutional Investors, Proxy Access: Best Practices (August 2015), at 3-5, available at [http://www.cii.org/files/publications/misc/08\\_05\\_15\\_Best%20Practices%20-%20Proxy%20Access.pdf](http://www.cii.org/files/publications/misc/08_05_15_Best%20Practices%20-%20Proxy%20Access.pdf).
11. See James McRitchie, “Avoiding Proxy Access Lite,” Corporate Governance Blog (Sept. 23, 2015), available at <http://www.corpgov.net/2015/09/avoiding-proxy-access-lite-qualcomm-proposal/>.
12. See Office of the Comptroller of New York City, *Boardroom Accountability Project*, available at <http://comptroller.nyc.gov/boardroom-accountability/bap-proxy-access-proposal/> for an example of the NYC Comptroller’s 2015 proxy access proposal.
13. See Institutional Shareholder Services, 2015-2016 ISS Global Policy Survey: Summary of Results (Sept. 28, 2015) available at <http://www.issgovernance.com/file/publications/ISS2015-2016PolicySurveyResultsReport.pdf>.
14. See Video, “Insight: Anne Simpson – In Pursuit of Proxy Access” (June 29, 2015), available at <https://www.youtube.com/watch?v=NnhpG0nEC84>; Adam Brown, “CalSTRs Adds Fuel to Fight for Proxy Access with Promise of Support,” IR Magazine (Feb. 13, 2015), available at <http://www.irmagazine.com/articles/corporate-governance/20610/calstrs-adds-fuel-fight-proxy-access-promise-support/>; City of New York, Office of the Comptroller, *Boardroom Accountability Project*, available at <http://comptroller.nyc.gov/boardroom-accountability/>.
15. Data provided by Georgeson Inc. (as of Oct. 2, 2015).
16. See Broadridge and PricewaterhouseCoopers LP, *Proxy Pulse 2015: Proxy Season Wrap-Up* (3d ed. 2015) at 2, available at <http://proxypulse.broadridge.com/>.



17. In its annual policy survey, ISS seeks feedback from investors in order to frame its voting recommendations for the upcoming proxy season. The initial results of the survey were issued on September 28, 2015 and will be incorporated into ISS's policy updates typically issued in November. See Institutional Shareholder Services, 2015-2016 ISS Global Policy Survey: Summary of Results (Sept. 28, 2015) available at <http://www.issgovernance.com/file/publications/ISS2015-2016PolicySurveyResultsReport.pdf>.
18. See Glass Lewis, 2015 Voting Guidelines (United States), available at [http://www.glasslewis.com/assets/uploads/2013/12/2015\\_GUIDELINES\\_United\\_States.pdf](http://www.glasslewis.com/assets/uploads/2013/12/2015_GUIDELINES_United_States.pdf).
19. See *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).
20. These companies are: American Railcar Industries, CenturyLink, Chesapeake Energy, Darden Restaurants, Hewlett Packard Co., Kilroy Realty, KSW (now private), LSB Industries, Panhandle Oil & Gas, Verizon Communications and Western Union Co.
21. Institutional Shareholder Services, Governance Analytics (Oct. 16, 2015).
22. The Boardroom Accountability Project involved the simultaneous delivery of 75 proxy access proposals. The companies were targeted based on three priority issues: environmental, diversity, and compensation issues. See New York City Comptroller, Boardroom Accountability Project, available at <http://comptroller.nyc.gov/boardroom-accountability/>.
23. This number does not include management proposals, proposals that were omitted because the shareholder proponents were ineligible under Rule 14a-8(b), or voluntarily adopted proxy access bylaws.
24. As of October 16, 2015, the results from three annual meetings remain outstanding (Oracle Corp., Nov. 18, 2015; Cisco Systems, Inc., Nov. 19, 2015; and Hain Celestial, Nov. 19, 2015).
25. See Broadridge and PricewaterhouseCoopers LP, *Proxy Pulse 2015: Proxy Season Wrap-Up* (3d ed. 2015) at 2, available at <http://proxypulse.broadridge.com/>.
26. SEC Chair Mary Jo White, Speech: Building Meaningful Communication and Engagement with Shareholders, at the Society of Corporate Secretaries and Governance Professionals 69th National Conference (June 25, 2015), available at <http://www.sec.gov/news/speech/building-meaningful-communication-and-engagement-with-shareholde.html>.

**APPENDIX I**  
**Review of Proxy Access Bylaws Adopted in 2015**  
(as of October 16, 2015)

As of October 16, 2015, 47 companies adopted proxy access bylaws in 2015. Set forth below is the list of proxy access adopters in 2015 and the proxy access formulations adopted, including their positions on “troublesome” or “problematic” provisions identified by CII and ISS, respectively.

		<b>Ownership Threshold</b>	<b>Limit on # of Proxy Access Nominees</b>	<b>Group Limitation (# of shareholders)</b>	<b>Loaned Shares Count as Owned</b>	<b>Requires Intent to Hold Shares After Meeting</b>	<b>Re-nomination Restriction</b>	<b>Prohibits Compensation Arrangements with Third Parties</b>	<b>More Restrictive Advance Notice Period</b>
<b>Bylaws Adopted in 2015:</b>		3% (42) 5% (5)	20% (25) 25% (10) Greater of 2 or 20% (8) Greater of 1 or 20% (3) Greater of 2 or 25% (1)	None (5) 20 (35) 15 (1) 10 (4) 5 (1) 1 (1)	Yes (32) No (15)	Yes (21) No (26)	Bar on re-nomination if % of shareholder support not received:  None (6) 10% (2) 20% (2) 25% (37)	Yes (14) No (33)	Different advance notice period for proxy access (32)  Same advance notice period for director nominees (15)
<b>Competing Shareholder and Management Proposals:</b> 1 company that presented both management and shareholder proxy access proposals adopted a proxy access bylaw based on its majority-supported management proposal.									
<b>1</b>	<b>SBA Communications Corp.</b>	5%	Greater of 1 director or 20%	10	Silent	No	25%	Yes	Proxy access: 120 days / meeting date  Advance notice: 150-120 days / meeting date
<b>Company Opposed:</b> 12 companies that voted on shareholder proposals for proxy access have adopted a proxy access bylaw – 10 were supported by a majority of shareholders and 2 were supported by approximately 40%.									
<b>1</b>	<b>Anadarko Petroleum Corp.</b>	3%	25%	20	Yes (if loan may be recalled on 5 business days’ notice and the shares were recalled and held through annual meeting)	Yes	Not addressed	No	Proxy access: 150-120 days / mailing date  Advance notice: 120-90 days / meeting date
<b>2</b>	<b>Chevron Corp.</b>	3%	20%	20	Yes (if loan may be recalled on 3 business days’ notice)	No	25%	No	Proxy access: 150-120 days / mailing date  Advance notice: 120-90 days / meeting
<b>3</b>	<b>Coca Cola Company</b>	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on 3 business days’ notice)	No	25%	No	Proxy access: 150-120 days / mailing date  Advance notice: 120-90 days / meeting date
<b>4</b>	<b>Conoco Philips</b>	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on 5 business days’ notice and the shares were recalled and held through annual meeting)	Yes	Not addressed	No	Proxy access: 150-120 days / mailing date  Advance notice: 120-90 days / meeting date

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of shareholders)	Loaned Shares Count as Owned	Requires Intent to Hold Shares After Meeting	Re-nomination Restriction	Prohibits Compensation Arrangements with Third Parties	More Restrictive Advance Notice Period
5	DTE Energy Co.	3%	Greater of 2 or 20%	None	Yes (if loan may be recalled on 5 business days' notice)	No	Not addressed	No	Proxy access and advance notice: 150-120 days / meeting date
6	EOG Resources	3%	20%	20	Yes (if loan may be recalled on 3 business days' notice)	No	10%	No	Proxy access and advance notice: 120-90 days / meeting date
7	EQT Corp.	3%	Greater of 2 or 20%	20	Yes (if loan is recallable or revocable at any time)	No	Not addressed	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
8	Equity Residential	3%	20%	20	Yes (if loan may be recalled on 3 business days' notice and the shares were recalled and held through annual meeting)	No	Not addressed	No	Proxy access and advance notice: 150-120 days / meeting date
9	Hasbro, Inc.	3%	Greater of 2 or 20%	None	Yes (if loan may be recalled on 3 business days' notice)	Yes	25%	No	Proxy access and advance notice: 120-90 days / meeting date
10	Monsanto	3%	20%	20	Silent	Yes	25%	Yes	Proxy access: 150-120 days / issuance date Advance notice: 90-60 days / meeting date
11	Occidental Petroleum Corp.	3%	25% or not less than 2	20	Yes (if loan may be recalled on 5 business days' notice and the shares were recalled and held through annual meeting)	Yes	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 70-90 days prior to meeting date
12	Walgreens Boots Alliance, Inc.	3%	20%	20	Yes (if loaned shares may be recalled on 5 business days' notice)	No	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
<b>Management Proposal:</b> 1 company adopted a proxy access bylaw after a management proposal received majority support. The proposal was presented after a shareholder proposal was majority-supported at the 2014 annual meeting.									
1	SLM Corp.	3%	25%	20	Silent	No	25%	No	Proxy access and advance notice: 120-90 days / date of proxy statement
<b>Settled with Proponent:</b> 13 companies adopted a proxy access bylaw after a settlement with the shareholder proponent, 3 after a management proposal received majority support.									
1	Bank of America Corp.	3%	20%	20	Yes (if loan may be terminated on 3 days' notice)	Yes	20%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-75 days / meeting date

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of shareholders)	Loaned Shares Count as Owned	Requires Intent to Hold Shares After Meeting	Re-nomination Restriction	Prohibits Compensation Arrangements with Third Parties	More Restrictive Advance Notice Period
2	Big Lots, Inc.	3%	25%	None	Silent	No	25%	Yes	Proxy access: 120 days / mailing date Advance notice: 150-120 days / mailing date
3	Biogen Corp.	3%	25%	20	Silent	Yes	25%	Yes	Proxy access: 150-120 days / issuing date Advance notice: 120-90 days / issuing date
4	Broadridge Financial Solutions, Inc.	3%	25%	20	Yes (if loan may be recalled on 3 business days' notice)	No	25%	Yes	Proxy access and advance notice: 150-120 days / meeting date
5	Clorox Company	3%	20%	20	Yes (if loan may be recalled on 5 business days' notice)	No	20%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
6	FirstMerit Corp.	3%	20%	20	Silent	Yes	25%	No	Proxy access and advance notice: 90 days / meeting date
7	H&R Block	3%	20%	20	Yes (if loan may be recalled on 3 business days' notice)	No	25%	Yes	Proxy access and advance notice: 120-90 days / meeting date
8	McKesson Corp.	3%	20%	20	Yes (if loan may be recalled on 3 business days' notice)	No	25%	No	Proxy access: 150-120 days / meeting date Advance notice: 120-90 days / meeting date
9	Microsoft Co.	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on 3 business days' notice and the shares were recalled and held through annual meeting)	No	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 90-60 days / meeting date
10	United Therapeutics Inc.	3%	20%	20	Yes (if loan may be recalled on 3 business days' notice and the shares were recalled and held through annual meeting)	No	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
11	VEREIT Inc.	3%	25%	20	Yes (if loan may be terminated within 5 days)	No	25%	Yes	Proxy access: 120 days / meeting date Advance notice: 150-120 days / meeting date
12	Whole Foods Market, Inc.	3%	20%	20	Yes (if loan may be recalled on 3 business days' notice and the shares were recalled and held through annual meeting)	Yes	25%	Yes	Proxy access: 120 days / mailing date Advance notice: 150-120 days / mailing date

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of shareholders)	Loaned Shares Count as Owned	Requires Intent to Hold Shares After Meeting	Re-nomination Restriction	Prohibits Compensation Arrangements with Third Parties	More Restrictive Advance Notice Period
13	Yum! Brands	3%	20%	20	Yes (if loan may be recalled on 3 business days' notice and the shares were recalled and held through annual meeting)	Yes	25%	Yes	Proxy access: 150-120 days / date of proxy statement Advance notice: 90 days / meeting date
<b>Bylaw Adopted Prior to Annual Meeting:</b> 9 companies adopted proxy access bylaws prior to the 2015 annual meeting and opposed the shareholder proposal.									
1	Arch Coal, Inc.	5%	20%	20	Silent	No	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 70-90 days / meeting date
2	Boston Properties Inc.	3%	25%	5	Silent	No	25%	Yes	Proxy access: 120 days / date of proxy statement Advance notice: 75-120 days / meeting date
3	Cabot Oil & Gas	5%	20%	10	Silent	No	25%	Yes	Proxy access: 150-120 days / date of proxy statement Advance notice: 120-90 days / meeting date
4	CF Industries Holdings, Inc.	3%	25%	20	Yes	Yes	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
5	HCP, Inc.	5%	20%	10	Silent	Yes	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 90-60 days / meeting date
6	Marathon Oil	3%	25%	20	Silent	No	25%	No	Proxy access and advance notice: 120-90 days / meeting date
7	New York Community Bancorp	5%	20%	10	Silent	Yes	20%	No	Proxy access: 150-120 days / mailing date Advance notice: 90 days prior to meeting date
8	Priceline Group Inc.	3%	20%	None	Yes (if loan may be recalled on 3 business days' notice)	No	25%	Yes	Proxy access: 150-120 days / meeting date Advance notice: 120-90 days / meeting date
9	Rite Aid Corp.	3%	20%	20	Silent	Yes	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
<b>Adopted Bylaw and Excluded:</b> 1 company "substantially implemented" the shareholder proposal and received no action relief from the SEC pursuant to Rule 14a-8(i)(10) to exclude the shareholder proposal.									
1	General Electric Co.	3%	20%	20	Yes (if loan may be recalled on 3 business days' notice)	Yes	25%	No	Proxy access and advance notice: 150-120 days / mailing date

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of shareholders)	Loaned Shares Count as Owned	Requires Intent to Hold Shares After Meeting	Re-nomination Restriction	Prohibits Compensation Arrangements with Third Parties	More Restrictive Advance Notice Period
<b>Voluntary Adoption / No Known Proposal:</b> 10 other companies adopted proxy access bylaws without public disclosure of a shareholder proposal.									
1	Capital One	3%	20%	20	Yes (if loan may be recalled on 3 business days' notice)	No	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting
2	CSX Corp.	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on not less than 3 business days' notice)	No	25%	No	Proxy access: 120 days / mailing date Advance notice: 120-90 days / meeting
3	Merck & Co.	3%	20%	20	Yes (if loan may be recalled on 3 business days' notice)	Yes	25%	Yes	Proxy access: 150-120 days / mailing date Advance notice: 150-120 days / meeting date
4	Mondelez International	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on 3 business days' notice)	No	25%	No	Proxy access: 120 days / meeting date Advance notice: 150-120 days / meeting date
5	PayPal Holdings, Inc.	3%	20%	15	Silent	No	10%	No	Proxy access and advance notice: 120 days / meeting date
6	Philip Morris Inc.	3%	20%	None	Yes (if loan may be recalled on 3 business days' notice)	Yes	25%	No	Proxy access and advance notice: 150-120 days / meeting date
7	Progressive	3%	Greater of 1 director or 20%	20	Yes (recall prior to annual meeting)	No	25%	No	Proxy access: 120 days / mailing date Advance notice: 120-90 days / meeting date
8	Prudential Financial Corp.	3%	20%	20	Yes (if loan may be recalled on 3 business days' notice)	Yes	25%	No	Proxy access and advance notice: 150-120 days / meeting date
9	Regency Centers Corp.	3%	25%	1	Silent	No	25%	Yes	Proxy access and advance notice: 120 days / date of proxy statement
10	United Technologies Corp.	3%	Greater of 1 or 20%	20	Yes	No	Not addressed	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date

**APPENDIX II**  
**Results of Proxy Access Proposals in 2015**  
(as of October 16, 2015)

	Company	Proponent	% Required Ownership	Group Limitation (if any)	Required Length of Ownership	Nominee Limitation (% of Board)	Vote Result <sup>1</sup>	Post-Meeting Action / Settlement, as Applicable
<b>Competing Shareholder and Management Proposals:</b> 7 competing management were presented. 3 management proposals received majority support, 3 shareholder proposals received majority support and neither proposal garnered majority support at one company.								
1	AES Corp.	NYC Comptroller	3%	None	3 years	25%	66.1%	None
		Management	5%	None	3 years	20% (not less than 1)	36.1%	
2	Chipotle Mexican Grill, Inc.	NYC Comptroller	3%	None	3 years	25%	49.9%	None
		Management	5%	20	3 years	20%	31.2%	
3	Cloud Peak Energy, Inc.	NYC Comptroller	3%	None	3 years	25%	71.1%	None
		Management	5%	Single only	3 years	10% (not less than 1)	25.9%	
4	Exelon Corp.	NYC Comptroller	3%	None	3 years	25%	43.6%	Binding proposal for 2016 meeting (based on shareholder-supported proposal)
		Management	5%	20	3 years	20%	52.1%	
5	Expeditors International of Washington, Inc.	NYC Comptroller	3%	None	3 years	25%	35.0%	None
		Management	3%	20	3 years	20%	70.3%	
6	SBA Communications, Inc.	NYC Comptroller	3%	None	3 years	25%	46.3%	Adopted bylaw: 5% / 3 years / group of up to 10 shareholders / 20% of board
		Management	5%	10	3 years	20%	51.7%	
7	Visteon Corp.	NYC Comptroller	3%	None	3 years	25%	74.2%	None
		Management	5%	Unspecified limit	3 years	25%	20.7%	

1. See ISS Governance Analytics (Oct. 16, 2016) (percentage based on F / F + A). Shading indicates majority support for shareholder proposal.



	Company	Proponent	% Required Ownership	Group Limitation (if any)	Required Length of Ownership	Nominee Limitation (% of Board)	Vote Result	Post-Meeting Action / Settlement, as Applicable
<b>Company Opposed:</b> 74 companies opposed the shareholder proposal in their proxy statements; 42 were supported by a majority of shareholders.								
1	<b>Alexion Pharmaceuticals, Inc.</b>	NYC Comptroller	3%	None	3 years	25%	49.2%	None
2	<b>Alliance Data Systems Corporation</b>	NYC Comptroller	3%	None	3 years	25%	55.7%	None
3	<b>Alpha Natural Resources, Inc.</b>	NYC Comptroller	3%	None	3 years	25%	65.9%	None
4	<b>Amazon.com Inc.</b>	James McRitchie	3%	None	3 years	25%	41.3%	None
5	<b>American Electric Power</b>	NYC Comptroller	3%	None	3 years	25%	67.2%	None
6	<b>Anadarko Petroleum Corporation</b>	NYC Comptroller	3%	None	3 years	25%	59.4%	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 20% of board
7	<b>Anthem, Inc.</b>	Harrington Investments	3%	None	3 years	25%	66.5%	None
8	<b>Apartment Investment and Management Company</b>	NYC Comptroller	3%	None	3 years	25%	57.7%	None
9	<b>Apple Inc.</b>	James McRitchie	3%	None	3 years	25%	39.2%	None
10	<b>AvalonBay Communities, Inc.</b>	NYC Comptroller	3%	None	3 years	25%	65.0%	None
11	<b>Avon Products Inc.</b>	NYC Comptroller	3%	None	3 years	25%	75.7%	None
12	<b>CBL &amp; Associates Properties, Inc.</b>	CT Retirement Plans	3%	None	3 years	25%	68.9%	None
13	<b>Cheniere Energy, Inc.</b>	NYC Comptroller	3%	None	3 years	25%	63.1%	None
14	<b>Chevron Corp.</b>	NYC Comptroller	3%	None	3 years	25%	55.3%	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 20% of board

	Company	Proponent	% Required Ownership	Group Limitation (if any)	Required Length of Ownership	Nominee Limitation (% of Board)	Vote Result	Post-Meeting Action / Settlement, as Applicable
15	Cimarex Energy Co.	NYC Comptroller	3%	None	3 years	25%	56.2%	None
16	Cisco Systems, Inc.	James McRitchie	3%	None	3 years	25%	<i>Pending</i>	
17	Community Health Systems, Inc.	CT Retirement Plans	3%	None	3 years	25%	49.8%	None
18	Comstock Resources, Inc.	Phila. Public Employees Retirement Sys.	3%	None	3 years	25%	N/A	Proxy access not voted on at the annual meeting
19	ConocoPhillips	NYC Comptroller	3%	None	3 years	25%	54.3%	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / greater of 2 or 20% of board (first available for use for 2017 annual meeting)
20	CONSOL Energy Inc.	NYC Comptroller	3%	None	3 years	25%	47.0%	None
21	CSP Inc.	NYC Comptroller	3%	None	3 years	25%	49.0%	None
22	Davita HealthCare Partners	UAW Retiree Medical Trust	3%	None	3 years	25%	43.7%	None
23	Devon Energy Corp.	NYC Comptroller	3%	None	3 years	25%	58.1%	None
24	Domino's Pizza, Inc.	Marco Consulting Group	3%	None	3 years	25%	45.7%	None
25	DTE Energy Company	NYC Comptroller	3%	None	3 years	25%	61.7%	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 20% of board
26	Duke Energy Corp.	NYC Comptroller	3%	None	3 years	25%	62.7%	None
27	Ebay, Inc.	NYC Comptroller	3%	None	3 years	25%	59.4%	None
28	Electronic Arts Inc.	NYC Comptroller	3%	None	3 years	25%	55.0%	None
29	EOG Resources, Inc.	NYC Comptroller	3%	None	3 years	25%	50.7%	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 20% of board

	<b>Company</b>	<b>Proponent</b>	<b>% Required Ownership</b>	<b>Group Limitation (if any)</b>	<b>Required Length of Ownership</b>	<b>Nominee Limitation (% of Board)</b>	<b>Vote Result</b>	<b>Post-Meeting Action / Settlement, as Applicable</b>
30	<b>EQT Corp</b>	NYC Comptroller	3%	None	3 years	25%	66.3%	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 20% of board
31	<b>Equity Residential</b>	NYC Comptroller	3%	None	3 years	25%	56.1%	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 20% of board
32	<b>ExxonMobil Corp.</b>	NYC Comptroller	3%	None	3 years	25%	49.4%	None
33	<b>FedEx Corporation</b>	Marco Consulting Group	3%	None	3 years	25%	54.3%	None
34	<b>Fidelity National Financial</b>	NYC Comptroller	3%	None	3 years	25%	60.9%	None
35	<b>First Energy Corp.</b>	NYC Comptroller	3%	None	3 years	25%	71.4%	None
36	<b>FleetCor Technologies, Inc.</b>	NYC Comptroller	3%	None	3 years	25%	46.9%	None
37	<b>Freeport-McMoran, Inc.</b>	NYC Comptroller	3%	None	3 years	25%	64.9%	Disclosed intention to adopt in 2016
38	<b>Hasbro, Inc.</b>	NYC Comptroller	3%	None	3 years	25%	68.6%	None
39	<b>Hess Corporation</b>	NYC Comptroller	3%	None	3 years	25%	51.1%	None
40	<b>Kohls Corp.</b>	CalPERS	3%	None	3 years	25%	73.3%	None
41	<b>Level 3 Communications, Inc.</b>	NYC Comptroller	3%	None	3 years	25%	43.6%	None
42	<b>Monsanto Company</b>	NYC Comptroller	3%	None	3 years	25%	53.5%	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 20% of board
43	<b>McDonald's Corporation</b>	UAW Retirees Medical Benefits Trust	3%	None	3 years	25%	61.7%	None
44	<b>Monster Beverage Corporation</b>	NYC Comptroller	3%	None	3 years	25%	41.9%	None

	Company	Proponent	% Required Ownership	Group Limitation (if any)	Required Length of Ownership	Nominee Limitation (% of Board)	Vote Result	Post-Meeting Action / Settlement, as Applicable
45	Murphy Oil Corporation	NYC Comptroller	3%	None	3 years	25%	53.0%	None
46	Nabors Industries Ltd.	NYC Comptroller	3%	None	3 years	25%	67.0%	None
47	Netflix, Inc.	NYC Comptroller	3%	None	3 years	25%	71.0%	None
48	Noble Energy, Inc.	NYC Comptroller	3%	None	3 years	25%	42.4%	None
49	NVR, Inc.	NYC Comptroller	3%	None	3 years	25%	41.5%	None
50	Occidental Petroleum Corp.	NYC Comptroller	3%	None	3 years	25%	62.0%	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / greater of 2 or 20% of board
51	Oracle Corp.	Nathan Cummings Foundation	3%	None	3 years	25%	<i>Pending</i>	
52	PACCAR Inc.	NYC Comptroller	3%	None	3 years	25%	42.0%	None
53	Peabody Energy Corporation	NYC Comptroller	3%	None	3 years	25%	48.7%	None
54	Pioneer Natural Resources Company	NYC Comptroller	3%	None	3 years	25%	49.4%	None
55	PPL Corporation	NYC Comptroller	3%	None	3 years	25%	61.4%	None
56	Precision Castparts Corp.	NYC Comptroller	3%	None	3 years	25%	58.7%	None
57	Procter & Gamble	NYC Comptroller	3%	None	3 years	25%	N/A	Proxy access not voted on at the annual meeting (proponent not present)
58	Range Resources Corporation	NYC Comptroller	3%	None	3 years	25%	60.9%	None
59	Regeneron Pharmaceuticals	NYC Comptroller	3%	None	3 years	25%	28.0%	None
60	Roper Technologies, Inc.	<i>Not available</i>	3%	None	3 years	25%	66.4%	None
61	Southern Company	NYC Comptroller	3%	None	3 years	25%	46.2%	None
62	Southwestern Energy Company	NYC Comptroller	3%	None	3 years	25%	56.3%	None
63	St. Jude Medical, Inc.	UAW Retirees Medical Benefits Trust	3%	None	3 years	25%	72.3%	None

	Company	Proponent	% Required Ownership	Group Limitation (if any)	Required Length of Ownership	Nominee Limitation (% of Board)	Vote Result	Post-Meeting Action / Settlement, as Applicable
64	TCF Financial Corp.	Firefighter Pension System of KC Missouri Trust	3%	None	3 years	25%	59.9%	None
65	The Coca-Cola Company	John Harrington	3%	None	3 years	25%	40.6%	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 20% of board
66	T-Mobile US, Inc.	Marco Consulting Group	3%	None	3 years	25%	17.6%	None
67	United-Guardian, Inc.	John Chevedden	3%	None	3 years	25%	11.6%	None
68	Urban Outfitters, Inc.	NYC Comptroller	3%	None	3 years	25%	40.6%	None
69	VCA Inc.	NYC Comptroller	3%	None	3 years	25%	58.4%	None
70	Vertex Pharmaceuticals Inc.	NYC Comptroller	3%	None	3 years	25%	49.0%	None
71	Wal Mart Stores, Inc.	<i>Not available</i>	3%	None	3 years	25%	17.2%	None
72	Walgreens Boots Alliance, Inc.	CtW Investment Group	3%	None	3 years	20%	39.9%	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 20% of board
73	Westmoreland Coal Company	NYC Comptroller	3%	None	3 years	25%	35.1%	None
74	Hain Celestial Group	James McRitchie	3%	None	3 years	Greater of 2 or 20%	<i>Pending</i>	
<b>Management Proposal:</b> 1 management proposal received majority support. The proposal was presented in response to a 2014 majority-supported shareholder proposal.								
1	SLM Corporation	Management	3%	20	3 years	25%	92.1%	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 25% of board

	Company	Proponent	% Required Ownership	Group Limitation (if any)	Required Length of Ownership	Nominee Limitation (% of Board)	Vote Result	Post-Meeting Action / Settlement, as Applicable
<b>Management Supported</b> (Majority-Supported)								
1	Apache Corporation	NYC Comptroller	3%	None	3 years	25%	92.7%	None
<b>Management Neither Supported Nor Opposed</b> (Majority-Supported)								
1	Republic Services Inc.	NYC Comptroller	3%	None	3 years	25%	89.0%	None
<b>Settled with Proponent:</b> At each of the 20 companies below, the proponent withdrew the proposal as a result of a settlement with the company. The settlement either involved a management proposal in 2015, the immediate adoption of a proxy access bylaw, commitment to adopt a bylaw by the end of 2015, or commitment to include a management proposal in the 2016 proxy statement.								
1	Abercrombie & Fitch, Inc.	NYC Comptroller	3%	None	3 years	25%	86.4%	Management proposal passed and bylaw to be adopted: 3% / 3 years / group of up to 20 shareholders / 25% of board
2	Bank of America Corporation	Harrington Investments	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	N/A	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 20% of board
3	Biogen Corp.	James McRitchie	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	N/A	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 25% of board
4	Big Lots, Inc.	NYC Comptroller	3%	None	3 years	25%	89.3%	Management proposal passed and bylaw to be adopted: 3% / 3 years / group / 25% of board
5	Broadridge Financial Solutions	James McRitchie	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	N/A	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 25% of board

	<b>Company</b>	<b>Proponent</b>	<b>% Required Ownership</b>	<b>Group Limitation (if any)</b>	<b>Required Length of Ownership</b>	<b>Nominee Limitation (% of Board)</b>	<b>Vote Result</b>	<b>Post-Meeting Action / Settlement, as Applicable</b>
<b>6</b>	<b>Citigroup</b>	James McRitchie	3%	20	3 years	20%	86.9%	Settled on proposal; Bylaw to be adopted
<b>7</b>	<b>Clorox Company</b>	James McRitchie	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	N/A	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 20% of board
<b>8</b>	<b>FirstMerit Corp.</b>	Firefighter Pension System of KC Missouri Trust	3%	None	3 years	25%	86.5%	Proponent withdrew proposal, management proposal passed and bylaw to be adopted: 3% / 3 years / group of up to 20 shareholders / 20% of board
<b>9</b>	<b>H&amp;R Block, Inc.</b>	James McRitchie	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	N/A	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 20% of board
<b>10</b>	<b>Kindred Healthcare</b>	UAW Retirees Medical Benefits Trust	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	N/A	Committed adopt bylaw by end of 2015
<b>11</b>	<b>McKesson Corp.</b>	NYC Comptroller	3%	None	3 years	25%	88.0%	Management proposal passed and bylaw to be adopted: 3% / 3 years / group of up to 20 shareholders / 20% of board
<b>12</b>	<b>Microsoft Corp.</b>	James McRitchie	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	N/A	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 20% of board



	<b>Company</b>	<b>Proponent</b>	<b>% Required Ownership</b>	<b>Group Limitation (if any)</b>	<b>Required Length of Ownership</b>	<b>Nominee Limitation (% of Board)</b>	<b>Vote Result</b>	<b>Post-Meeting Action / Settlement, as Applicable</b>
<b>13</b>	<b>Splunk, Inc.</b>	NYC Comptroller	3%	None	3 years	25%	N/A	Committed to management proposal for 2016
<b>14</b>	<b>Staples, Inc.</b>	NYC Comptroller	3%	None	3 years	25%	N/A	Committed to management proposal for 2016: 3% / single or group / 3 years / 20% (or if less than 10 directors, 25%)
<b>15</b>	<b>United Therapeutics Corp.</b>	NYC Comptroller	3%	None	3 years	25%	N/A	Adopted bylaw: 3% / 3 years / single or group of up to 20 shareholders / 20% of board
<b>16</b>	<b>VEREIT, Inc.</b>	NYC Comptroller	3%	None	3 years	25%	N/A	Adopted bylaw: 3% / 3 years / single or group of up to 20 shareholders / 25% of board
<b>17</b>	<b>Wendy's</b>	Phila. Public Employees Retirement Sys.	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	N/A	Committed to adopt bylaw: 3% / 3 years / single or group / 20% (or if less than 10 directors, 25%)

	Company	Proponent	% Required Ownership	Group Limitation (if any)	Required Length of Ownership	Nominee Limitation (% of Board)	Vote Result	Post-Meeting Action / Settlement, as Applicable
18	Whiting Petroleum	NYC Comptroller	3%	None	3 years	25%	N/A	Committed to management proposal for 2016: 3% / 3 years / group of up to 25 shareholders / 25% of board
19	Whole Foods Market, Inc.	James McRitchie	3%	None	3 years	20%	N/A	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 20% of board
20	Yum! Brands	Marco Consulting Group Trust	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	<i>unknown</i>	N/A	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 20% of board
<b>Bylaw Adopted Prior to Annual Meeting:</b> 9 companies adopted proxy access bylaws in response to a shareholder proposal and opposed the shareholder proposal.								
1	Arch Coal, Inc.	NYC Comptroller	3%	None	3 years	25%	36.3%	None
		Company bylaw	5%	20	3 years	20%		
2	Boston Properties, Inc.	Phila. Public Employees	3%	None	3 years	25%	46.3%	None
		Company bylaw	5%	5	3 years	20%		
3	CF Industries Holdings, Inc.	NYC Comptroller	3%	None	3 years	25%	57.4%	Later revised proxy access bylaw: 3% / 3 years / group of up to 20 shareholders / 25% of board
		Company bylaw	5%	20	3 years	25%		
4	Cabot Oil & Gas Corp.	NYC Comptroller	3%	None	3 years	25%	45.3%	None
		Company bylaw	5%	10	3 years	20%		

	Company	Proponent	% Required Ownership	Group Limitation (if any)	Required Length of Ownership	Nominee Limitation (% of Board)	Vote Result	Post-Meeting Action / Settlement, as Applicable
5	HCP Inc.	NYC Comptroller	3%	None	3 years	25%	55.5%	None
		Adopted bylaw	5%	10	3 years	20%		
6	Marathon Oil Corporation	NYC Comptroller	3%	None	3 years	20%	62.7%	Later revised proxy access bylaw: 3% / 3 years / group of up to 20 shareholders / 25% of board
		Adopted bylaw	5%	20	3 years	25%		
7	New York Community Bancorp	NYC Comptroller; Illinois Board of Investment	3%	None	3 years	20%	44.4%	None
		Adopted bylaw	5%	10	3 years	25%		
8	Priceline Group, Inc.	NYC Comptroller	3%	None	3 years	25%	53.5%	Later revised proxy access bylaw: 3% / 3 years / group of up to 20 shareholders / 25% of board
		Adopted bylaw	5%	20	3 years	20% (unless shareholder owns 10% or more for 3 years then cap is > of 1 or 10%)		
9	Rite Aid Corp.	Steven Krol	3%	None	3 years	25%	37.3%	None
		Adopted bylaw	3%	20	3 years	20		
<b>Adopted Bylaw and Excluded:</b> 1 company “substantially implemented” the shareholder proposal and received no action relief from the SEC pursuant to Rule 14a-8(i)(10) to exclude the shareholder proposal.								
1	General Electric Company	Kevin Mahar	3%	None	3 years	20	n/a	Adopted bylaw: 3% / 3 years / group of up to 20 shareholders / 20% of board