Governance & Securities Alert

Weil

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Heads Up for the 2017 Proxy Season:

Proxy Access is Used for the First Time

A New Front Opens in the Campaign for Proxy Access: "Fix-it" Proposals

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Over the last two proxy seasons, governance-oriented activists, pension funds and institutional investors led a charge to afford shareholders "proxy access" -- the right to include their director nominees in a company's proxy statement. Since January 1, 2015, 300 companies have adopted a proxy access bylaw following a shareholder proposal, negotiations with a proponent or proactively.[1] On November 10, 2016, in what appears to be the first use of a proxy access bylaw, GAMCO Investors, Inc. and its affiliated funds disclosed that they had nominated an individual for election to the board of directors of National Fuel Gas Company pursuant to the company's recently adopted proxy access bylaw.

For the 2017 proxy season, a new front in the campaign for proxy access has opened, aimed at companies that have already adopted a proxy access bylaw. The proponents of proxy access have begun to submit so-called "fix-it" proposals seeking to *amend* specific features of adopted bylaws that they believe limit the ability of shareholders to use proxy access effectively. Opening the door to these "fix-it" proposals, the SEC Staff denied no-action relief to seven of the nine companies that sought exclusion on the ground that the proposal had been "substantially implemented" by the original bylaw. However, in granting relief to two companies, the Staff has provided some direction for companies seeking to exclude such proposals. In the relatively few instances to date where these proposals have gone to a shareholder vote, the results have been mixed. It is too early to draw a conclusion about how large institutional investors will react to fix-it proposals, particularly those seeking to amend bylaws that reflect the "3/3/20/20" consensus.

In This Alert

In this Alert, we discuss:

- First use of proxy access
- The SEC Staff's no-action positions on "fix-it" proposals
- Institutional investor and proxy advisory firm policies
- Strategies for addressing proxy access in 2017

Pressure on companies that have not yet adopted proxy access is likely to continue into the 2017 proxy season, with over 50% of companies in the S&P 500 expected to have done so by the time the season ends. As the deadlines approach for shareholder proposals at calendar year reporting companies, boards should be preparing for the possibility of a proxy access proposal or, in some cases, a proposal to *amend* an existing bylaw. In addition, depending on the company's year-end and access nomination window, boards should be aware of the potential for an existing proxy access bylaw to be used for one or more nominations. See our prior Alerts on proxy access available here, here, here, and here.

First Use of Proxy Access Bylaw

On November 10, 2016, GAMCO Investors, Inc. and its affiliated funds filed a Schedule 14N disclosing their nomination of a proxy access candidate for election to the board of directors of National Fuel Gas Company pursuant to the company's recently adopted proxy access bylaw. National Fuel has a nine-member classified board, and its access bylaw has a 3/3/20/20 formulation. GAMCO disclosed in its Schedule 14N aggregate beneficial ownership of 7.8% of National Fuel's common stock, and based on its Schedule 13D filings, GAMCO has beneficially owned more than 3% for more than three years. In 2015, GAMCO submitted a shareholder proposal, which did not pass, requesting that the company engage an investment bank to effectuate a spin-off of the company's utility segment.

I. Beyond the Consensus: Proposals to *Amend* Existing Proxy Access Bylaws

The overwhelming number of proxy access bylaws adopted to date have a 3/3/20/20 formulation: shareholders who have beneficially owned 3% or more of the company's outstanding common stock continuously for at least three years (or group of no more than 20 shareholders meeting such requirements) may include in the company's proxy statement a number of eligible director nominees[2] equal to no more than 20% of the board. The 3/3/20/20 formulation received wide spread support from shareholders voting on the *adoption* of proxy access during the 2016 proxy season. However, proxy access proponents, including John Chevedden, James McRitchie and the New York City Comptroller, are now advocating that companies go beyond this formulation.

In this Alert, we focus on 13 shareholder proposals seeking to amend (or fix) a company's already-adopted proxy access bylaw. This number does not include (i) repeat proposals, such as those submitted by the NYC Comptroller in 2016, to *adopt* proxy access where the company failed to do so in response to the prior years' proposal to adopt,[3] and (ii) fix-it proposals that were submitted but subsequently withdrawn, perhaps as a result of negotiations with the proponent.[4]

As highlighted in the table below, these 13 proposals primarily focus on amending bylaw features that their proponents believe make the implementation of proxy access excessively difficult and less effective than would have been the case under the SEC's judicially invalidated federal proxy access rule, Rule 14a-11.[5]

Key Features of Fix-it Proposals

1. ***Aggregation Cap –*** Eliminate the cap on the number of shareholders permitted to aggregate holdings to reach the minimum beneficial ownership threshold (*all 13 proposals)*
2. ***Board Cap –*** Raise the cap on the number of board seats available for proxy access nominees (*12 proposals*)
   - To the greater of 2 or 25% of the board (*8 proposals*)
   - To 25% of the board (*4 proposals*)
3. ***Minimum Support Threshold for Future Nominations –*** Eliminate (or reduce) the restriction on re-nomination in future years of nominees who failed to receive voting support in excess of a specified minimum threshold (e.g., < 25% of votes cast for the election of the director) (*10 proposals)*
4. ***Loaned Shares as "Owned" –*** Amend the provision on when loaned shares count as "owned" for the purposes of the minimum beneficial ownership threshold *(7 proposals)*
   - Increase, from 3 business days to 5 business days, the number of days during which shares may be recallable *(2 proposals)*
   - Provide that loaned shares count as "owned" so long as shareholder represents that it has the legal right to recall the shares and will hold and vote the shares at the meeting *(5 proposals)*
5. ***Post-Meeting Shareholding –*** Eliminate the requirement for proponents to state their intent to hold shares beyond the annual meeting (*4 proposals)*
6. ***Ownership Threshold –*** Reduce the beneficial ownership threshold from 5% to 3% *(6 proposals)*

Staff No-Action Position: Has the Staff Provided Direction to Exclude Fix-it Proposals?

During the 2016 proxy season, more than 40 companies obtained no-action relief from the Staff to exclude a shareholder proposal to *adopt* proxy access on the ground that the company had, pursuant to the standards established in Rule 14a-8(i)(10), "substantially implemented" the shareholder proposal by having previously adopted a proxy access bylaw. In each case, the company's access bylaw contained the minimum 3%, 3-year beneficial ownership requirements. In granting no-action relief to the company, the Staff expressed the view that the company's *adoption* of a proxy access bylaw containing these thresholds achieved the "essential objective" of the shareholder proposal notwithstanding, in many cases, a number of differences between the proposal and the adopted bylaw.

However, the Staff has found the "substantially implemented" argument less persuasive when considering no-action requests to exclude proposals to *amend* an already adopted proxy access bylaws.[6] The Staff has denied relief to seven companies, SBA Communications, H&R Block, Microsoft, Apple, Walgreens, Whole Foods and Disney, and granted relief to two, NVR Inc. [7] and Oshkosh Corporation. In denying no-action relief, the Staff appeared to be distinguishing between a proposal to *adopt* proxy access and a proposal to *amend* an existing bylaw. However, this distinction now appears more nuanced in light of the relief granted to NVR and Oshkosh. After receipt of a fix-it proposal, each of NVR and Oshkosh amended its existing access bylaw to address *half* of the changes requested by the proponent, including lowering the required ownership threshold from 5% to 3%. The Staff ultimately granted no-action relief to each company under (i)(10), indicating that the company's *policies, practices and procedures compare favorably with the guidelines of the proposal, and therefore the company had substantially implemented the proposal*.

Proposal to Amend	Oshkosh Bylaw Amendment	NVR Bylaw Amendment
Reduce from 5% to 3% the ownership threshold	✓	✓
Eliminate 20 shareholder aggregation cap	✗	✗
Eliminate post-meeting holding requirement	✓	✗
Eliminate minimum support threshold for future nomination of candidate (e.g., support by 25% votes cast)	✓	**N/A**
Increase the maximum number of proxy access nominees (20% to the greater of 2 or 25% of the board)	✗	**N/A**
Treatment of loaned shares as "owned"		
Count loaned shares as "owned" so long as shareholder represents that it has the legal right to recall the shares and will hold and vote the shares at the meeting	✗	**N/A**
Increase from 3 business days to 5 business days the number of days within which loaned shares must be recallable to count as "owned"	**N/A**	✓

The Staff's NVR and Oshkosh no-action responses appear to provide some direction to companies seeking to exclude a *multi-pronged* proposal to amend a proxy access bylaw. While the reduction by NVR and Oshkosh of the ownership threshold from 5% to 3% likely weighed heavily in the Staff's decision that the proposal was substantially implemented, the Staff may also be looking for companies to make some number and/or type of other changes to an existing proxy access bylaw in order to find that the *essential objective* of a fix-it proposal with multiple elements has been met. Moreover, the Staff has yet to address a fix-it proposal that is focused exclusively on one feature of a bylaw (*e.g.*, a proposal solely to eliminate an aggregation cap).

Results of Shareholder Votes on "Fix-it" Proposals

Results have been mixed for the five proposals to amend access bylaws that have gone to a shareholder vote at an annual meeting: two received majority support and three failed but received significant support. Both proposals receiving majority support sought to amend, among other features, the 5% ownership threshold, a provision that has been largely disfavored by institutional investors, proxy access proponents, as well as the SEC Staff.

The table below presents the significant elements of each of the thirteen fix-it proposals, the voting result if a shareholder meeting has been held (based on votes cast except as otherwise indicated) and actions taken by the company subsequent to the proposal.

Company / Proponent (Annual Meeting)	Existing Bylaw	Proposal to Amend	Voting Results & Subsequent Action
Fix-it Proposals Voted on to Date (No-Action Not Requested)			
Noble Energy / NYC Comptroller (April 2016)	• 5% ownership • 20% board cap • 20 shareholder aggregation cap • failed nominees not receiving ≥25% voting support ineligible for 2 years	• 3% ownership • 25% board cap • no aggregation cap • reduce voting support threshold to 10%	**Failed** (38% - binding proposal); company subsequently amended its bylaw to adopt *some* of the requested changes[8]
Cabot Oil & Gas/ NYC Comptroller (May 2016)	• 5% ownership • 20% board cap • 10 shareholder aggregation cap • failed nominees not receiving ≥25% voting support ineligible for 2 years • hold *threshold* shares (5%) for 1 year post-meeting • board or shareholders may amend	• 3% ownership • 25% board cap • no aggregation cap • reduce voting support threshold to 10% • *remain a shareholder* for 1 year post- meeting • only shareholders may amend	**Failed** (39% of *outstanding* -- binding proposal) company subsequently amended its bylaw to adopt *some* of the requested changes[9]
New York Community Bancorp. / NYC Comptroller (April 2016)	• 5% ownership • 20% board cap • 10 shareholder aggregation cap • silent on treatment of loaned shares	• 3% ownership • 25% board cap • no aggregation cap • count loaned shares if recallable (no threshold specified)	**Passed** (67%); no further action taken to date
Whole Foods/ James McRitchie (March 2016)	• greater of 1 or 20% board cap • 20 shareholder aggregation cap • failed nominees not receiving ≥25% voting support ineligible for 2 years • loaned shares count as owned if recallable within 3 business days • board discretion to exclude nominee with a third-party compensation arrangement for service as a director	• greater of 2 or 25% board cap • no aggregation cap • eliminate support requirement • loaned shares count as owned if holder represents that it has legal right to recall and will hold and vote the shares at the annual meeting • eliminate prohibition on receipt of third-party compensation, but require *disclosure* • decisions about suitability of nominees should be made by shareholders if possible	**Failed** (39%); no further action take to date

Company / Proponent (Annual Meeting)	Existing Bylaw	Proposal to Amend	Voting Results & Subsequent Action
Fix-it Proposals Voted on to Date ((i)(10) No-Action Relief Denied)			
H&R Block/ James McRitchie (March 2016)	• 20% board cap • 20 shareholder aggregation cap • failed nominees not receiving ≥25% voting support ineligible for 2 years • loaned shares count as owned if recallable within 3 business days	• greater of 2 or 25% board cap • no aggregation cap • eliminate support requirement • loaned shares count as owned if holder represents that it has legal right to recall and will hold and vote the shares at the annual meeting	**Failed** (29%); no further action taken to date
SBA Communications / NYC Comptroller (May 2016)	• 5% ownership • greater of 1 or 20% board cap • 10 shareholder aggregation cap • silent on treatment of loaned shares	• 3% ownership • 25% board cap • no aggregation cap • loaned shares count as owned if recallable within 5 business days	**Passed** (68%); no further action taken to date
No Shareholder Vote to Date ((i)(10)No-Action Relief Denied)			
Microsoft Corporation/ James McRitchie	• greater of 2 or 20% board cap • 20 shareholder aggregation cap • failed nominees not receiving ≥25% voting support ineligible for 2 years	• greater of 2 or 25% board cap • no aggregation cap • eliminate support requirement • decisions about suitability of nominees should be made by shareholders if possible	**Pending** Proposal included in proxy statement for 11/30/2016 annual meeting; company amended bylaws shortly before relief was denied, but not presented in request for relief[10]
Apple, Inc./ James McRitchie	• 20% board cap • 20 shareholder aggregation cap • failed nominees not receiving ≥25% voting support ineligible for 2 years	• greater of 2 or 25% board cap • no aggregation cap • eliminate support requirement	Proxy statement not yet filed
The Walt Disney Company/ James McRitchie	• 20% board cap • 20 shareholder aggregation cap • failed nominees not receiving ≥25% voting support ineligible for 2 years	• greater of 2 or 25% board cap • no aggregation cap • eliminate support requirement	Proxy statement not yet filed

Company / Proponent (Annual Meeting)	Existing Bylaw	Proposal to Amend	Voting Results & Subsequent Action
Whole Foods/ James McRitchie	• greater of 1 or 20% board cap • 20 shareholder aggregation cap • failed nominees not receiving ≥25% voting support ineligible for 2 years	• greater of 2 or 25% board cap • no aggregation cap • eliminate support requirement	Proxy statement not yet filed
Walgreens Boots Alliance/ John Chevedden	• 20% board cap • 20 shareholder aggregation cap • failed nominees not receiving ≥25% voting support ineligible for 2 years • hold shares post-meeting • loaned shares count as owned if recallable within 5 business days	• greater of 2 or 25% board cap • no aggregation cap • eliminate support requirement • eliminate holding requirement • loaned shares count as owned if holder represents that it has legal right to recall and will hold and vote the shares at the annual meeting	Proxy statement not yet filed
Fix-it Proposal Excluded Based on (i)(10) No-Action Relief			
NVR Inc./ NYC Comptroller	• 5% ownership • 20 shareholder aggregation cap • hold *threshold* shares (3%) post-meeting • loaned shares owned if recallable within 3 business days	• 3% ownership • no aggregation cap • *remain a shareholder* post-meeting • increase to 5 business days	**N/A** ***See above for details of changes made by the company and no-action relief***
Oshkosh Corporation/ John Chevedden	• 5% ownership • greater of 2 or 20% board cap • 20 shareholder aggregation cap • failed nominees not receiving ≥25% voting support ineligible for 2 years • hold shares post-meeting • loaned shares owned if recallable within 5 business days	• 3% ownership • greater of 2 or 25% board cap • no aggregation cap • eliminate support requirement • eliminate holding requirement • loaned shares count as owned if holder represents that it has legal right to recall and will hold and vote the shares at the annual meeting	**N/A** ***See above for details of changes made by the company and no-action relief***

II. Know Your Shareholders

Companies still contemplating whether to adopt proxy access need to consider, and present to their boards of directors and/or governance committees, the range of potential features of a proxy access bylaw, some of which are attracting criticism from shareholders, investors and proxy advisory firms. The Council of Institutional Investors (CII), for example, has identified various proxy access features that it deems "troublesome."[11] ISS has identified provisions that it deems "problematic" or "especially problematic."[12] These and other features of proxy access bylaws are examined in greater detail in the *Annex* to this Alert. 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 proxy access and other major governance topics.

Institution	**Public Position**
BlackRock (adopted proxy access on 5/25/16 after shareholder approval received)	Case-by-case review, but generally supportive.[13]
State Street Global Advisers (adopted proxy access 10/15/15)	Case-by-case review, but generally supportive.[14]
T. Rowe Price (adopted proxy access 12/10/15)	Case-by-case review, but generally supports proposals with a "balanced set of limitations and requirements for proxy access," including the 3%/3-year threshold.[15] Will generally vote against shareholder proposals to *amend* existing bylaws containing 3%/3.
The Vanguard Group	Generally supports proposals with 3% (lowered from 5% last year) /3-year threshold, for up to 20% of the board.[16]
Fidelity Management & Research	Does not support proxy access.[17]
CalPERS	Supports proxy access as a "strategic priority."[18] Supports shareholder proposals at the 3%/3-year threshold, for up to 25% of the board; will issue adverse votes in director elections where a proxy access proposal passed in prior years, but either was not implemented, or was implemented in a manner that limits the shareholders' use of proxy access.
CalSTRS	Supports proxy access.[19]
NYC Comptroller	Supports proxy access as a top priority.[20]
TIAA	Supports proxy access upon satisfaction of reasonable conditions.[21]
United Brotherhood Carpenters	Historically opposed proxy access, but in 2015 sent letters to 50 companies supporting access in limited circumstances where an incumbent director failed to receive majority support and the board does not accept the failed nominee's resignation (a so-called "zombie" director).

The proxy access bylaws that BlackRock, State Street and T. Rowe Price have adopted for themselves have the following features -- which could signal what these institutions may find acceptable when voting on proposals to adopt or amend proxy access bylaws at other companies:

Feature	Black Rock	State Street	T. Rowe
Ownership/Duration	3%/3-years	3%/3-years	3%/3-years
Aggregation Cap	20	20	20
Cap on Number of Proxy Access Nominees	25%	20%	at least 2 or 20%
Restriction on Resubmission of Failed Nominees	Yes, for 2 years if < 25% support	Yes, for 2 years if < 25% support	Yes, for 2 years if < 25% support
Loaned Shares that Count for Ownership	Yes, if recallable on 5 business days' notice	Yes, if recallable on 3 business days' notice	Yes, if recallable on 5 business days' notice
Post-Meeting Holding Requirements	None	None	None
Restrictions on Proxy Access if Proxy Contest	Yes	Yes	Yes

ISS & Glass Lewis Positions

Both ISS and Glass Lewis generally support proxy access. ISS's 2016 voting guidelines state that ISS will generally recommend in favor of management or shareholder proposals on proxy access that have the following features: (i) 3% beneficial ownership; (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. The guidelines state that ISS will also review the reasonableness of any other restrictions on the right of proxy access.

Glass Lewis' voting guidelines indicate that it generally supports proxy access as a means to ensure that significant, long-term shareholders have an ability to nominate candidates to the board; however, it considers each proposal on a case-by-case basis.[22] Specifically, the guidelines state that 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).

ISS Position on Board Responsiveness to Majority Supported Shareholder Proposals

Companies that adopt proxy access following majority support of a shareholder access proposal at the prior year's annual meeting should carefully evaluate any ways in which the company-adopted bylaw differs from the shareholder proposal. ISS's FAQ provides guidance on when ISS is likely to recommend a vote against directors because ISS views the board's implementation a majority-supported proxy access shareholder proposal insufficient and non-responsive to the proposal. Among other factors, ISS will evaluate whether the major points of the shareholder proposal were implemented by the company-adopted bylaw and whether the

adopted bylaw contains other features that "unnecessarily restrict the use a proxy access right" and/or that ISS views as "especially" or "potentially" problematic.[23] ISS has not provided guidance on how it will evaluate a proxy access bylaw adopted in other contexts (i.e., not in response to a majority-supported shareholder proposal), or how it will evaluate competing shareholder and management proposals

In 2016, ISS issued "against" or "withhold" recommendations in director elections at five companies that ISS viewed as not having been responsive to a majority-supported shareholder proxy access proposal voted on the prior year: CBL & Associate Properties, Inc., Cheniere Energy, Inc., Cloud Peak Energy Inc. (recommendation reversed after company amended its bylaw), Nabors Industries Ltd. and Netflix, Inc. ISS targeted (i) a lead director and a governance committee chair at one of these companies, (ii) the entire governance committee at two of these companies, and (iii) the entire board at two of these companies, that, in ISS's view, had a history of non-responsiveness. In making its voting recommendations, ISS called out differences between the shareholder proposal and the company-adopted proxy access bylaw, stating that the company-adopted bylaw was "significantly more restrictive than the majority-supported shareholder proposal," or, in the case of Netflix, that the company had not adopted a proxy access bylaw. It is important to note that many of the features that ISS identified as "problematic" in these cases are included in the proxy access bylaws adopted by a large number of companies to date. We address many of these features in the *Annex* to this Alert.

ISS Quality Score

For 2017, ISS's Quality Score (formerly QuickScore) will include four newly weighted questions about proxy access focusing on ownership threshold and duration, cap on board nominees and aggregation limits. See our prior Alert on ISS Quality Score available here.

III. Strategies for 2017: Weighing the Options

Companies that have not adopted proxy access should thoughtfully consider their approach in anticipation of the 2017 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 previously received a proxy access proposal that was submitted to a shareholder vote and the results of that vote, as well as the company's shareholder base, performance, governance profile and risk tolerance. A "do-nothing" approach is not an advisable alternative for any company, as it can leave the company on the defensive and unprepared.

In formulating the approach for their company, we recommend that boards and management consider the following:

Wait-and See	Preemptively Adopt	Submit a Management Proposal to a Shareholder Vote
Pros: • Provides additional time to engage with shareholders and build consensus • Provides additional time to assess proposal trends, institutional shareholder positions, proxy advisory firm policies, and market practices • Leaves open multiple avenues for the company • Board should consider putting bylaw "on the shelf"	***Pros:*** • Permits company to adopt based on features it finds desirable • Decreases vulnerability to a shareholder proposal that may include terms the company does not favor • Demonstrates responsiveness to shareholders and favored governance practices and establishes ground for negotiation with shareholder proponents • Provides grounds for exclusion of a proposal to *adopt* proxy access under Rule 14a-8(i)(10) if "substantially implemented"	***Pros:*** • Provides additional time to engage with shareholders and build consensus • Provides additional time to assess proposal trends, institutional shareholder positions, proxy advisory firm policies, and market practices • Demonstrates responsiveness to shareholders and favored governance practices • Permits company to adopt based on features it finds desirable • Shareholder approval of management proposal could reduce likelihood of receiving a fix-it proposal[24]
Cons: • Puts the company on the defensive by allowing a shareholder to act first • Could forestall the opportunity to adopt a more company-friendly bylaw • May expose company to a proposal with new and more onerous provisions	***Cons:*** • Does not insulate the company from a fix-it proposal with different or more onerous provisions	***Cons:*** • Does not insulate the company from a fix-it proposal with different or more onerous provisions • Inability to use Rule 14a-8(i)(10) to exclude shareholder proposal by not having "substantially implemented"

Whatever the approach taken, we believe that constructive engagement on proxy access should be added to the discussion topics between a company and its shareholders. Moreover, investors and proxy advisory firms will look to a company's disclosure on engagement to evaluate the consistency of any proxy access bylaw adopted or proposed by management with the feedback received through engagement.

What to Do Now: Prepare, Engage and Stay Informed

1. Evaluate alternatives for addressing proxy access in light of on the company's experience to date.
2. Engage with shareholders – not only on proxy access, but on all key governance issues.
3. Understand the positions of key shareholders on proxy access.
4. Monitor proxy access developments, including the use of proxy access for nominations, SEC Staff positions on exclusion and the features and voting outcomes of fix-it proposals that are submitted for shareholder vote.
5. For companies that have not yet received a proposal, prepare a draft bylaw to keep "on the shelf."

Annex
Proxy Access Features Under Scrutiny

The following table presents certain proxy access features included in the bylaws of the 300 companies that have adopted proxy access since 2015. Set forth below are proxy access features that (1) have been the subject of fix-it proposals, (2) have been identified as "potentially" or "especially" problematic by ISS, and/or (3) have been identified as "troublesome" by CII.

Provision	Adopted (# of companies)	Expect Focus for 2017
Ownership threshold	3% (296) 5% (4)	3% is the prevalent threshold. Shareholder proponents, ISS, CII and institutional investors generally support a 3% threshold. Fix-it proposals seek a reduction in the required beneficial ownership from 5% to 3%.
Aggregation cap	No limit (8) 50 (1) 30 (1) 25 (11) 20 (272) 15 (3) 10 (3) 5 (1)	CII does not support caps on aggregation. CII notes that "even if the 20 largest public pension funds were able to aggregate their shares, they would not meet the 3% criteria at most of the companies examined." ISS seems generally supportive of the 20-shareholder cap but will review closely if the bylaw was adopted subsequent to a majority supported shareholder proposal.[25] Fix-it proposals seek unlimited aggregation.
Cap on number of nominees	Greater of 2 or 20% (179) Greater of 2 or 25% (16) Greater of 1 or 20% (6) Greater of 1 or 25% (1) 25% (26) 20% (72)	Over half of the companies that have adopted proxy access to date set their permitted number of proxy access nominees at the greater of 2 directors or 20% of the board. Fix-it proposals seek either (i) the greater of 2 directors or 25% of the board or (ii) 25% of the board. CII views any restriction that could result in less than 2 nominees as troublesome. ISS supports generally supports a cap of 25% of the board.
Bar on resubmission of failed nominees (based on failure to receive stipulated % of support)	33% support (1) 25% support (157) 20% support (17) 15% support (5) 10% support (16) Not addressed (104)	Most proxy access bylaws restrict the submission of a failed proxy access nominee in future years. The most popular formulation is a 2-year prohibition if the nominee does not receive at least 25% voting support. Both ISS and CII are critical of this feature. ISS views prohibitions on resubmission of failed nominees in subsequent years as "potentially problematic." Fix-it proposals seek to eliminate or lessen the restriction.
Treatment of "loaned" shares	Yes (280) No (20)	Given the frequency of securities lending, the issue of whether loaned shares count as "owned" for purposes of meeting the ownership and duration thresholds is important to many institutional investors. To date, the vast majority of proxy access bylaws expressly count loaned shares as owned, but require loaned shares to be recallable on 3 or 5 business days' notice, with 5 days having greater support from investors. Fix-it proposals seek to liberalize when loaned shares count as "owned" for the purposes of ownership threshold.

Provision	Adopted (# of companies)	Expect Focus for 2017
Post-meeting holding requirement for nominating shareholders	Yes (87) No (213)	Many early adopters of proxy access require the nominating shareholder or group to state whether it intends to own the required shares for at least one year after the annual meeting if their nominee is elected. ISS and CII oppose post-meeting holding requirements. ISS views such a requirement so restrictive as to "effectively nullify the proxy access right," and has labeled it "especially problematic." Fix-it proposals request elimination of this feature.
Prohibition on nominee's receipt of third party compensation for candidacy and/or directorships	Yes (38) No (262)	Most proxy access bylaws require *disclosure* of compensation for service as a *director* and many require *disclosure* of compensation related to such person's service as a *nominee.* A small number prohibit receipt of compensation by a proxy access candidate for service as a director or nominee. While receipt of compensation from third-parties clearly raises concerns about conflicts of interest, express prohibitions or provisions disqualifying proxy access candidates based on receipt of compensation are met with great criticism from CII, ISS and others. ISS views restrictions on third-party compensation for service as a *nominee* as "potentially problematic." A fix-it proposal submitted to Whole Foods requested the elimination of restrictions on receipt of third-party compensation for service as a director.
Restrictions or prohibitions on use of proxy access and proxy contests of the same meeting	Yes (241) No (59)	Most proxy access bylaws either restrict or prohibit the use proxy access in the event of a proxy contest at the same meeting. Generally, these bylaws give the board discretion to exclude access nominees in these circumstances. Some reduce the maximum number of proxy access nominees by the number of advanced notice nominees. ISS views restrictions on the use of proxy access and advanced notice for the same meetings as "potentially problematic." To date, no fix-it proposal has focused on the interplay between proxy access and a proxy contest.
Reduction on maximum number of nominees by the number of elected nominees	Yes (230) No (70)	In an attempt to limit "re-use" of proxy access and minimize significant changes to board composition, some bylaws reduce the maximum number of proxy access seats available by the number of directors elected as proxy access nominees in the last 2 years. ISS considers the length and terms by which an elected shareholder nominee will count towards the maximum number of proxy access nominees as "potentially problematic." To date, no fix-it proposal has focused on this provision.

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ENDNOTES

[1] Since 2015, 173 proxy access shareholder proposals have been voted on with approximately 55% of those proposals garnering majority support. *See,* Institutional Shareholder Services, "Voting Analytics, Shareholder Proposals" as of November 10, 2016. 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] Most proxy access bylaws include restrictions on the eligibility of nominees such as independence under stock exchange or other standards, and that election would not cause violation of the company's bylaws, charter, or other rules or regulations, the nominee is not the subject of a pending criminal proceeding or convicted of a criminal offense in the past ten years, the nominee has not served as a director of a competitors in the last three years, and the nominee and the shareholder have not provided to the company information that was materially untrue or made materially misleading omissions. Some companies also include industry-specific requirements.

[3] City of New York, Office of the Comptroller, *Boardroom Accountability Project, available* at http://comptroller.nyc.gov/boardroom-accountability/. In 2016, the NYC Comptroller targeted 72 companies with proxy access proposals, 36 of which had received proposals from the Comptroller's office in 2015. The companies targeted in 2016 included companies that had not yet adopted proxy access and at least four companies that had adopted proxy access on terms that were not acceptable to the Comptroller.

[4] We are aware that companies have received proposals to amend proxy access bylaws that are not yet publicly available. In addition, at least one company has sought to exclude a fix-it proposal on grounds that do not include substantial implementation under (i)(10).

[5] *See, e.g.*, James McRitchie, Fixing Proxy Access Lite, http://www.corpgov.net/2015/09/fixing-proxy-access-lite/.

[6] Several letters also request relief pursuant to Rule 14a-8(c) arguing in the alternative that the multiple requested amendments are each separate and distinct items constituting more than one proposal. *See,* The Walt Disney Corporation, No Action Letter (avail. Oct. 20, 2016); Whole Foods Market, Inc., No Action Letter (avail. Oct. 14, 2016); Walgreens Boots Alliance, Inc., No Action Letter (avail. Sept. 19, 2016). The proponent in Walgreens subsequently modified the proposal language to assert that the requested changes constitute one "unified" proposal.

[7] NVR first received a proposal from the NYC Comptroller for its May 2015 annual meeting. The NYC proposal failed to garner majority support, but NVR adopted proxy access in November 2015 with a 5/3/20/20 formulation. Upon receiving a proposal to amend its proxy access bylaw for the 2016 annual meeting, NVR requested and was denied no-action relief. NVR subsequently amended its bylaw to address two of the four requested amendments (including lowering the ownership threshold to 3%) and, upon reconsideration, the Staff granted relief.

[8] On July 27, 2016, Noble Energy amended its proxy access bylaw to (i) decrease the share ownership threshold from 5% to 3%, (ii) increase the aggregation limit from 20 to 25 shareholders, (iii) provide that funds under common management are treated as one shareholder, (iv) to increase the maximum number of board candidates from 20% to 25% of the board, (v) provide that eligible stockholder(s) may always nominate at least one board candidate by means of proxy access, and (vi) reduce from 25% to 15% the level of voting support needed to re-nominate a proxy access candidate in the following two years.

[9] On July 27, 2016, Cabot Oil & Gas amended its proxy access bylaw to (i) decrease the share ownership threshold from 5% to 3%, (ii) increase the aggregation limit from 10 to 20 shareholders, (iii) provide that funds under common management are treated as one shareholder, (iv) increase from three to five days the number of business days within which a shareholder may recall loaned shares in order to count as "owned", and (v) remove the requirement that shareholders state their intent to maintain their ownership for one year after the annual meeting.

[10] On September 20, 2016, Microsoft amended its proxy bylaw to (i) clarify when groups of funds count as a single shareholder for purposes of meeting the 3% ownership threshold, (ii) increase from three to five days the number of business days within which a shareholder may recall loaned shares in order to count as "owned", (iii) eliminate the requirement that loaned shares be recalled at the time a nominating shareholder provides notice to the company, (iv) clarify certain indemnification provisions, and (v) reduce from 25% to 15% the level of voting support needed to re-nominate a proxy access candidate in the following two years.

[11] *See* Council of Institutional Investors, Proxy Access: Best Practices, available at *http://www.cii.org/files/publications/misc/08_05_15_Best%20Practices%20-%20Proxy%20Access.pdf.*

[12] *See* Institutional Shareholder Services, U.S. Proxy Voting Policies and Procedures (Excluding Compensation-Related) – Frequently Asked Questions (last updated March 14, 2016 at 20, available at https://www.issgovernance.com/file/policy/us-policies-and-procedures-faq-dec-2015.pdf.

[13] *See* BlackRock, Proxy Voting Guidelines for U.S. Securities (February 2015), available at http://www.blackrock.com/corporate/en-no/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf.

[14] *See* State Street Global Advisors, Proxy Voting and Engagement Guidelines (March 2016), available at https://www.ssga.com/investment-topics/environmental-social-governance/2016/Proxy-Voting-and-Engagement-Guidelines-US-20160301.pdf.

[15] *See* T. Rowe Price, Proxy Voting Policies, available at https://www3.troweprice.com/usis/content/trowecorp/en/about/investment-philosophy/esg-investment-policy/_jcr_content/band-wrapper/paragraph_pdfs/right-pdf-01/pdffile.

[16] *See* Vanguard, Proxy Voting Guidelines, available at https://about.vanguard.com/vanguard-proxy-voting/voting-guidelines/.

[17] *See* Fidelity Corporate Governance and Proxy Guidelines, available at https://www.fidelity.com/about-fidelity/fidelity-by-numbers/fmr/proxy-guidelines.

[18] *See* CalPERS, Global Governance 2016 Proxy Voting Priorities (February 16, 2016), available at https://www.calpers.ca.gov/docs/board-agendas/201602/invest/item10a-04.pdf; CalPERS, Statement of Investment Policy and Global Governance Principles (March 16, 2016), available at https://www.calpers.ca.gov/docs/policy-global-governance.pdf; *See* Video, "Insight: Anne Simpson – In Pursuit of Proxy Access" (June 29, 2015), *available* at https://www.youtube.com/watch?v=NnhpG0nEC84.

[19] *See* CalSTRS, Corporate Governance Principles (July 14, 2016), available at http://www.calstrs.com/sites/main/files/file-attachments/corporate_governance_principles_1.pdf.

[20] *See* note 3 above.

[21] *See* TIAA-CREF, Policy Statement on Corporate Governance (6th ed.), available at http://www1.tiaa-cref.org/ucm/groups/content/@ap_ucm_p_tcp/documents/document/tiaa01007871.pdf.

[22] *See* Glass Lewis, 2016 Voting Guidelines (United States), available at http://www.glasslewis.com/wp-content/uploads/2016/01/2016_Guidelines_United_States.pdf.

[23] *See* Institutional Shareholder Services, U.S. Proxy Voting Policies and Procedures (Excluding Compensation-Related) – Frequently Asked Questions (last updated March 14, 2016 at 19-20, available at https://www.issgovernance.com/file/policy/us-policies-and-procedures-faq-dec-2015.pdf.

[24] At SBA Communications' 2015 annual meeting, both a shareholder access proposal and a management access proposal were submitted to a shareholder vote. Shareholders supported management's proposal, which was subsequently adopted by the company. However, for the 2016 annual meeting, the NYC Comptroller submitted a fix-it proposal, which received majority-shareholder support.

[25] ISS's FAQ on proxy access seems to support of an aggregation limit of no less than 20 shareholders. However, the FAQ also provides that in cases where a company's aggregation limit or the cap on nominees differs from what was specifically stated in the shareholder proposal, ISS may issue a negative vote recommendation when the company does not disclose its specific shareholder outreach efforts and engagement. Institutional Shareholder Services, U.S. Proxy Voting Policies and Procedures (Excluding Compensation-Related) – Frequently Asked Questions (last updated March 14, 2016 at 19 and 28, available at https://www.issgovernance.com/file/policy/us-policies-and-procedures-faq-dec-2015.pdf.