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Alert
SEC Disclosure and Corporate Governance

What's New for the 2016 Proxy Season

Engagement, Transparency, Proxy Access and More

While shareholders have a wide spectrum of views on corporate objectives, the time horizon for realizing these objectives and environmental, social and governance (ESG) issues, there is an emerging consensus that – regardless of size, industry or profitability– public companies must achieve greater accountability to their shareholders, through engagement and transparency, than ever before. Corporate engagement and transparency now take two forms: direct dialogue, increasingly involving directors, and enhanced proxy statement and other public disclosure that sheds light on the company's strategy and the performance of its board, board committees and management, demonstrates responsiveness to shareholder ESG concerns, and justifies the composition of the board in light of the company's present needs. Throughout this Alert, we offer practical suggestions about "what to do now" to meet shareholder expectations about engagement and transparency and to address a host of other new developments for the 2016 proxy season.

Preparing for the 2016 Proxy Season

1. Achieving Greater Engagement and Transparency

The paradigm of a company's senior management, investor relations team and/or corporate secretary serving as the only points of contact for shareholders, with communications limited to regularly scheduled meetings, conference calls or investor days, or discussions with analysts and portfolio managers at only a few major institutional investors, is fast becoming a relic of the past. Recent high profile proxy fights and activist attacks, the continuing influence of proxy advisory firms, the power and growing advocacy of institutional investors, the SEC's continuing attention to the relationship between directors and shareholders,[1] the impact of social media and the public's wavering confidence in corporations have combined to highlight the need for effective communication throughout the year. BlackRock Chairman and CEO Laurence D. Fink urged this approach in an April 2015 letter to the CEOs of the S&P 500 and the largest companies around the world in which BlackRock invests, calling for "consistent and sustained" engagement – not just during proxy season or at the time of earnings reports.[2]

Some companies are heeding this call and publicly disclosing their programs. Many of these companies are encouraging shareholders to communicate with them at any time of the year through online feedback forms, creating annual engagement calendars, and scheduling regular meetings with their shareholders to hear their concerns and provide meaningful information about the company.[3] Other companies are expressly assigning engagement efforts to existing board committees, such as the nominating and governance committee or, as suggested by Vanguard, to new committees with a sole focus on engagement (*e.g.*, Tempur Sealy International, Inc.'s Stockholder Liaison Committee[4]). Companies such as Allstate, Coca-Cola, EMC, PepsiCo and Prudential Financial have been noted as providing informative disclosure about their engagement programs.[5]

Engagement is not just an issue for large corporations; smaller companies are also facing shareholder pressure to engage. Since 2011, The California State Teachers' Retirement System (CalSTRS) has been targeting and engaging with Russell 2000 companies on majority voting, with an increasing number of companies adopting majority voting in response to a CalSTRS' letter sent in advance of the submission of a shareholder proposal.[6]

Should Directors Engage?

From their vantage point as long-term equity holders of nearly every publicly traded company in the U.S., institutional investors and large asset managers such as BlackRock and Vanguard have advocated that engagement – at least with investors such as themselves – should consist not only of interactions with management but also with the company's lead director or other independent members of the board. In a February 2015 letter to the independent board leaders of 500 of its funds' largest U.S. holdings, Vanguard Chairman and CEO F. William McNabb III encouraged enhanced discussion between directors and shareholders, emphasizing that boards that do this are "more likely to have stronger support of large long-term shareholders."[7] Vanguard's update on its proxy voting and engagement efforts for the 12 months ended June 30, 2015 described the goal of these efforts as providing "constructive input that will better position companies to deliver sustainable value over the long term for all investors."[8] While some boards remain hesitant, proponents of board engagement argue that it can help a board hear directly what shareholders are saying, articulate directly to shareholders the board's commitment to long-term strategy and, in the final analysis, establish a level of confidence in the integrity and independence of the board's stewardship that may help the company weather a future storm.

Transparency goes hand-in-hand with engagement. Just as there is no one mode of engagement, there is no one topic as to which greater transparency will satisfy the expectations of all investors all of the time. Different investors may seek enhanced disclosure regarding the company's business strategy, capital allocation plans, risk tolerance and management, board composition and refreshment, executive compensation, the impact of climate change on short- and long-term corporate performance, or a myriad of other ESG concerns. There are also a variety of vehicles for dissemination of these disclosures. To illustrate, some shareholders want to see social and environmental (sustainability) performance metrics applied and included in periodic reports (primarily the Form 10-K), while others are content with enhanced supplemental disclosure in the form of web-posted sustainability reports. Throughout this Alert, we offer suggestions for increasing transparency about ESG matters. *See Parts 5,6,7,8 and 9 below.*

As investors continue to make their case for engagement, the SEC Staff has made it clear that Regulation FD's ban on selective disclosure of material, non-public company information should not impede constructive engagement between directors and shareholders if desired by all concerned.[9] We provide some guidance in this respect immediately below.

What To Do Now:

- ***Design and Update Shareholder Outreach Programs.*** More and more companies are developing and disclosing formal shareholder engagement programs that extend throughout the year, not only in anticipation of proxy season. In developing such a program, a company should consider its governance profile and potential vulnerabilities, its shareholder base, and its most effective management and board participants. Engagement efforts should be individually tailored to what is of most importance to a specific shareholder. The engagement strategy should be assessed and updated periodically to reflect evolving practice and changes in the company's circumstances.
- ***Use Your Proxy Statement as a Communications Tool—Including about Outreach Itself***. A key opportunity for effective engagement is to use the upcoming proxy statement to put the company's best foot forward on governance. The proxy statement should clearly and concisely discuss matters that shareholders consider important in formulating voting decisions, including the qualifications of the board's nominees, board refreshment policies, oversight activities and the link between corporate performance and executive compensation. This year, if the company has not done so previously, consider highlighting the nature and results of shareholder outreach, including the number of times it took place during the year, who participated on behalf of the company, the total percentage of shares represented at these discussions, a general indication of the topics discussed, how shareholder feedback was conveyed to the board and taken into account (including, importantly, any changes in governance made in response to the feedback) and the channels of communication open to shareholders for engagement in the future. Proxy statement innovations such as the use of charts, figures and images help companies bring to life the story of the company's management, oversight, compensation practices, business practices and shareholder engagement.
- ***Understand Your Shareholder Base and the Positions of Shareholders***. It is critical for companies to understand the sometimes distinct positions of pension funds and other institutional investors on various governance issues. Not every institution follows the position of ISS or Glass Lewis on every issue. In addition, outreach to retail investors (who tend to vote at lower levels and to be less concerned with governance issues than institutions) should not be overlooked.
- ***Ensure Information Flow to the Board***. Particularly where directors do not participate directly in shareholder outreach, it is essential that the board regularly obtain information on any concerns expressed by major shareholders during the company's outreach efforts. A process should be in place to facilitate and organize an unfiltered flow of information from shareholders to directors, giving the board a more direct understanding of how shareholders have responded, or are likely to respond, to their decision-making.
- ***Engage with the Appropriate Contacts at Shareholders.*** Ensure that the person with whom the company is engaging on governance issues is the most appropriate contact to address these issues. The decision-making roles at institutions often are split between voting and investment.
- ***Select and Prepare Directors who will Communicate with Shareholders***. When director involvement is desirable, give thought to selecting the particular director or directors who will communicate with particular shareholders. In some cases, the selection will reflect position (e.g., independent chair or lead independent director); in others, relevant expertise to address the shareholder's key concern (e.g., chair of the compensation or nominating/corporate governance committee). Once identified, these directors should be briefed on the "dos and don'ts" of meeting with shareholders, including Regulation FD. Directors should be cautioned not to "go it alone" and instead to include in the discussion at least one other company representative, such as inside or outside counsel or someone from investor relations, human resources or finance.[10]

- ***Consider Regulation FD and Proxy Rules.*** Be mindful of Regulation FD, but do not use it as a shield or barrier to director-shareholder communication if you otherwise decide that such communication is in the company's best interests. For those companies that opt to authorize one or more directors to meet with shareholders, the SEC Staff recommends consideration of "implementing policies and procedures intended to help avoid Regulation FD violations, such as pre-clearing discussion topics with the shareholder or having company counsel attend the meeting."[11] To give their directors and/or other representatives ample FD protection when meeting with shareholders, whether in person or by telephone or videoconference, companies should provide full and fair disclosure of their key governance practices and any pertinent corporate performance metrics in their proxy statements and/or periodic reports.[12] (In this connection, companies should keep in mind the SEC Chair's recent admonition to ensure that non-GAAP financial measures are used appropriately in both SEC-filed documents and other, less formal communications such as earnings calls and releases.)[13] Equally important, companies should consider the need to file, as proxy materials, any written communications prepared by or on behalf of directors that are provided to shareholders in this context, depending on the timing of these communications and their relationship to any matters to be submitted to a shareholder vote at an annual or other meeting of shareholders.

2. Understanding the Spectrum of Shareholder Views

To understand the increasing shareholder emphasis on engagement and transparency, particularly as these twin objectives come into play in drafting the upcoming annual report and proxy statement and in preparing for the annual meeting, it is important for a company's board and management to recognize the spectrum of views likely to be found within the company's own shareholder base on such issues as corporate objectives, the time horizon for realizing these objectives and a variety of ESG issues. In this connection, it may be helpful to step back and consider how current trends in shareholder activism and recent public stands by major institutions may influence the voting and investment behavior of your shareholders.

Current Trends in Activism

Today the term "activism" encompasses a wide variety of investor priorities and views – from "traditional" governance matters such as separation of the roles of CEO and board chair, elimination of classified boards and now proxy access, to changes in capital allocation policies and the more immediate realization of economic returns, to a host of sustainability issues such as disclosure of corporate political contributions and lobbying expenses, human rights and sustainability reporting. It is becoming increasingly difficult to divide shareholders into the traditional categories of those focused on long-term equity ownership and therefore long-term corporate performance goals; hedge funds and others seeking short-term profitability and a quick exit; single-issue governance activists; and those primarily concerned with environmental/social/human rights issues. For example, a combination of specific ESG concerns prompted the New York City Comptroller to launch an unprecedented proxy access campaign last year and to expand this campaign in 2016.[14] *See Part 3 below*.

Activist hedge funds launched 360 publicly announced campaigns during 2015, compared to 301 during 2014.[15] The actual number of activist campaigns is likely much higher, as it is estimated that less than a third become public.[16] During 2015, activists focused on promoting M&A transactions and strategic corporate alternatives such as spin-offs, split-offs, or divestitures; operational improvements; changes in the board and/or management; and immediate returns of value to shareholders through special dividends or share buybacks. One estimate of the "success rate" of publicly announced campaigns finds 62.5% of such campaigns at least partially successful in achieving their desired outcomes in 2015, up from 59.9% in 2014.[17]

Contributing to that success was support from mutual funds and public pension funds, which, in some cases, even partnered with activist investors in their campaigns. For example, the percentage of dissident proxy cards that BlackRock, T. Rowe Price and Vanguard have voted to support has increased every year since 2011.[18] Mutual funds sided with Starboard in a successful campaign to replace the entire board of Darden Restaurants and in a campaign at General Motors.[19] Furthermore, CalSTRS, the second largest pension fund in the US, is increasingly investing in, or co-investing with, activist funds that targeted individual companies such as DuPont, PepsiCo and Perry Ellis International.

Perhaps the most significant development in shareholder activism during 2015 has been the increase in settlements between activists and target companies. In a recent survey, over 90% of the most prolific activists noted that they found it less difficult to reach a resolution with management than in prior years.[20] In particular, companies increasingly are granting activists board seats as part of a settlement. Recent high-profile settlements include ConAgra Foods agreeing to a board settlement with Jana Partners, and Trian naming an advisor to the board of PepsiCo and gaining two board seats at Sysco and a board seat at BNY Mellon.

In some instances, companies have even welcomed activists as significant investors. In October 2015, Trian Partners (founded by activist Nelson Peltz) announced that it had invested $2.5 billion to become a top ten shareholder of GE, the result of dialogue between Mr. Peltz and members of GE management.[21] Mr. Peltz, who reportedly did not request a board seat for Trian, issued a white paper faulting the stock market for undervaluing GE.[22]

The Institutional View

While the interests of hedge funds and institutional investors may align in certain circumstances, major institutional shareholders and asset managers have taken a public stand on the importance of companies taking a long-term approach to creating value. For example, in his April 2015 letter to CEOs, BlackRock Chairman and CEO Laurence D. Fink strongly advocated this approach despite “the acute pressure, growing with every quarter, to meet short-term financial goals.” Mr. Fink acknowledged that returning capital to shareholders can be “a vital part of a responsible capital strategy,” and that some activists take a long-term view and foster productive change. However, he expressed deep concern that many companies have undertaken actions such as stock buybacks or increased dividends to deliver immediate returns to shareholders “while underinvesting in innovation, skilled workforces or essential capital expenditures necessary to sustain long-term growth.” He indicated that BlackRock’s “starting point” is to support management, particularly during difficult periods. Making a compelling case for enhanced transparency, however, Mr. Fink emphasized that this is more likely to occur where management has articulated its strategy for sustainable long-term growth and has offered credible metrics against which to assess performance.[23]

BlackRock and Vanguard have both publicly cautioned that they will actively engage with companies on governance factors that, in their view, detract from long-term, sustainable financial performance.”[24] For example, in his February 2015 letter to independent board leaders (also discussed in *Part 1 above*), Vanguard Chairman and CEO McNabb stated that “some have mistakenly assumed that our predominately passive management style suggests a passive attitude with respect to corporate governance. Nothing could be further from the truth.” Vanguard espouses six governance principles: (1) a substantially independent board with independent board leadership; (2) accountability of management to the board and of the board to stockholders; (3) shareholder voting rights consistent with economic interests (one share, one vote); (4) annual director elections and minimal anti-takeover devices; (5) executive compensation tied to the creation of long-term shareholder value; and (6) shareholder engagement. The voting record of the Vanguard funds for the 12 months ended June 30, 2015 indicates that the funds largely supported management’s nominees and say-on-pay and other proposals. However, there are clear instances in which the funds used their voting power to signal a need for improvement or to effect changes in the board.

Because the pace and pressures of shareholder activism continue to escalate, it is all the more important for a company’s management and board to meet the institutional calls for meaningful ongoing engagement and to prepare for activism even during periods of relative calm and corporate profitability. We offer some suggestions below for anticipating and addressing an activist challenge, recognizing that each company must formulate its own approach in light of the relevant facts and circumstances.

What To Do Now:

- ***Review Business and Governance Strategies***. Management and the board should regularly review the company's business strategy, capital return policy, analyst and investor perspectives, as well as executive compensation and other governance issues in light of the company's particular needs and circumstances and adjust strategies and defenses to meet changing market conditions. Companies should proactively address reasons for any negative management and/or corporate performance issues, and understand both how an activist might advocate increasing short-term shareholder value (e.g., through spin-offs and divestitures or financial engineering such as stock buybacks and increased debt) and vulnerabilities in the company's response to such criticisms. Activists often use a company's short-term performance problems or perceived governance, compensation, ethics or compliance issues to attract support from institutional investors.
- ***Review Board Composition and Tenure.*** Board composition and, in particular, tenure issues are "low-hanging fruit" from an activist's perspective. As we discuss in *Part 6 below*, institutional investors have been vocal about the importance of companies having the right mix of directors in terms of tenure, independence, experience and skills relevant to the company's present needs and, in some cases, diversity. There is increased focus on whether long tenure compromises independence, and whether reliance on bright-line stock exchange tests is sufficient to establish independence in all circumstances. Nominating committees should take a proactive approach to evaluating these factors and reviewing the policies and processes used for board refreshment and self-evaluations. As we note throughout this Alert, the upcoming proxy statement offers a prime opportunity to present the board's considered approach to these matters.
- ***Think Like an Activist and Prepare.*** Management and the board should think like an activist and assess preemptively where the company's possible governance, financial and operational weaknesses (as well as its strengths) lie. Management and the board should work with outside advisers to prepare and develop a response plan for activism.
- ***Know Your Shareholders.*** As discussed in *Part 1 above*, companies should know who their major shareholders are and cultivate good relationships with them throughout the year, not just during proxy season. Not only should companies listen carefully to their shareholders and other important stakeholders, but they also should communicate a consistent message to the public regarding their business strategies and performance goals. In particular, the best case for voting in favor of the company's board nominees and/or other management-proposed agenda items should be made clearly and concisely in both the proxy statement and other, less formal written or oral communications with shareholders.
- ***Stay Informed.*** Companies should educate themselves on the voting policies and guidelines of their major investors before engaging with them. Boards should be fully and regularly informed of shareholders' views and public perceptions of the company's governance structure and performance, and should not rely unduly on management to provide the requisite information. Directors should ask questions and should not make the mistake of assuming, for example, that large institutional investors vote in lock-step with proxy advisory firm recommendations. Although activists may bring a new perspective that cannot be ignored, the board ultimately has the fiduciary duty to make independent judgments about what is in the best interest of the company and its shareholders.
- ***Monitor Movements in Share Ownership.*** Monitor significant movements in share ownership and public sentiment about the company, including but not limited to those of analysts, proxy advisors, major institutional shareholders and other relevant constituencies.
- ***Understand the Company's Defense Profile.*** Companies should periodically review their bylaws, including the advance notice provisions, in light of changes in applicable state corporate law and the market environment. As many companies move to de-stagger their boards and otherwise dismantle longstanding takeover defenses in response to investor demands, an effective advance notice bylaw provision has become increasingly important.

On the Horizon: Universal Proxy Ballots

The Staff of the SEC's Division of Corporation Finance is currently working on rulemaking recommendations for the implementation of universal proxy ballots in contested elections. Existing federal proxy rules, state law requirements and practical considerations make it virtually impossible for shareholders in a contested election to choose freely among management and proponent nominees on each side's proxy cards, unless they attend and vote in person at the shareholders' meeting. As a result, shareholders executing a proxy card currently must choose between voting for the entire slate of candidates put forward by management or voting for the slate put forth by the proponent.[25] The adoption of a universal proxy ballot system would mean that a single proxy card would list both management and proponent nominees and allow shareholders to vote for a mix of nominees in a contested election. Some have argued that the existing system favors management's nominees and that a universal ballot would serve to bolster activist campaigns, particularly when seeking minority board representation. On the other hand, a universal ballot could help management limit the impact of an activist's campaign by recommending that shareholders vote for only certain nominees on the dissident's slate.

Recent events have signaled that rulemaking could be imminent. In 2014, the Council of Institutional Investors (CII) reignited interest in universal ballots with a petition to the SEC requesting an amendment to the proxy rules to facilitate their use.[26] In February 2015, the SEC hosted a Proxy Voting Roundtable that included a panel discussion on this topic.[27] In April 2015, The California Public Employees' Retirement System (CalPERS) submitted a supplement to the Proxy Voting Roundtable in which it provided its written endorsement for the use of universal ballots.[28] SEC Chair Mary Jo White championed a universal ballot rulemaking initiative in a June 2015 speech,[29] urging companies not to wait for the SEC to act and to "[g]ive meaningful consideration to using some form of a universal proxy ballot even though the proxy rules currently do not require it."[30]

Specific issues the Staff is grappling with in connection with this rulemaking initiative include: (1) whether universal ballots should be optional or mandatory for all parties in an election contest; (2) how the ballots should look and whether both sides should be required to use identical universal ballots; (3) whether universal proxies should be available in all contests or just in "short slate" elections; (4) whether any eligibility requirements to use universal ballots should be imposed on shareholders; and (5) what timing, filing and dissemination requirements should be imposed on shareholders seeking to use universal ballots.

3. Keeping Up With Fast-Moving Proxy Access Developments

"Proxy access" represents another turning point in the corporate governance of public companies. Designed to enable shareholders to use a company's proxy statement and proxy card to nominate one or more director candidates of their own, it is increasingly gaining acceptance as corporate behemoths such as Apple, General Electric, Microsoft, IBM, Chevron, Coca-Cola, Merck, Staples, McDonald's, Goldman Sachs, JPMorgan Chase and others adopt proxy access bylaws.

Proxy access came to the forefront during the 2015 proxy season through Rule 14a-8 proposals submitted by certain pension funds and other governance-oriented activists, including 75 proposals submitted by the Boardroom Accountability Project launched by the New York City Comptroller and the New York City Pension Funds. In 2015, over 91 proxy access proposals were submitted to a shareholder vote, with 55 receiving majority support.[31] Since January 1, 2015, 124 companies have adopted proxy access bylaws, whether voluntarily or in response to a shareholder proposal, and a recent uptick in companies implementing proxy access indicates that many boards have been addressing the topic in anticipation of their 2016 annual meetings.[32] It remains to be seen whether, this season, any of the companies that have adopted proxy access will face the first round of proxy access nominees. In *Appendix I*, we provide the list of companies that have adopted proxy access bylaws since January 1, 2015.

Proxy access bylaws adopted during 2015 by and large contained the following formulation: 3% ownership / 3-year holding period / 20 shareholder aggregation limit / 20% of the board limit. We anticipate that, for the 2016 proxy season, attention will turn to more granular issues, including those that have been identified as "troublesome" by CII or "problematic" by ISS. ISS's recent FAQs, which are discussed in our recent Alert available here, provide guidance on how ISS will determine whether a board-adopted proxy access bylaw qualifies as "responsive" to a majority-supported shareholder proposal or whether it is too restrictive to qualify as "responsive" and therefore could result in a negative recommendation against the election of directors.

"Especially" and "Potentially" Problematic Provisions

ISS views the following as "especially" problematic provisions that effectively nullify the proxy access right: (1) aggregation limits that count individual funds within a mutual fund family as separate shareholders; and (2) a requirement to hold company shares after the annual meeting. While proxy access bylaws adopted in 2015 generally did not include an aggregation limit on funds within a mutual fund family, more than half of the proxy access bylaws adopted in 2015 include provisions that require nominating shareholders to provide a statement of intent to maintain ownership after the meeting. We expect that the requirement to hold company shares after the annual meeting will cause many companies that have already adopted a proxy access bylaw to revisit their bylaw.

ISS also identified five other provisions as "potentially" problematic, especially when used in combination: (1) prohibitions on resubmission of failed nominees in subsequent years; (2) restrictions on third-party compensation of proxy access nominees; (3) restrictions on the use of proxy access and proxy contest procedures for the same meeting; (4) how long and under what terms an elected shareholder nominee will count towards the maximum number of proxy access nominees; and (5) when the right will be fully implemented and accessible to qualifying shareholders. Every proxy access bylaw adopted in 2015 contains one or more of these provisions; however, it is not clear which provisions in a proxy access bylaw, either individually or in combination, will rise to the level of "problematic."

Institutional investors have not publicly taken positions on these "problematic" provisions. However, certain institutions such as T. Rowe Price, which implemented proxy access in December 2015, and BlackRock, which intends to present a proxy access proposal at its May 2016 annual meeting,[33] may provide insight into their positions through their own proxy access bylaws. For example, T. Rowe Price's proxy access bylaw disqualifies resubmitted proxy access nominees who did not receive at least 25% support in the prior year's election, but it does not restrict the use of proxy access and proxy contest procedures for the same meeting.[34]

Round 2 of the Boardroom Accountability Project and Other Recent Proposals

Thus far for the 2016 season, we have seen proxy access proposals from James McRitchie and John Chevedden that focus on the following provisions: (1) requiring that the number of shareholders forming a group be "unrestricted"; (2) setting the number of access candidates appearing in proxy materials at one-quarter of the directors then serving but in no event less than two; and (3) requiring that the nomination or renomination of access nominees not be subject to any restrictions that do not apply to other board nominees."[35]

On January 11, 2016, the New York City Comptroller announced that, in an expansion of the Boardroom Accountability Project, the New York City Pension Funds had submitted proxy access proposals to 72 companies. Of these, the Comptroller said 36 had received a second round of proposals because they had not yet instituted or agreed to institute a "3% bylaw with viable terms." The Comptroller noted that these recipients included companies that had instituted "unworkable bylaws requiring 5% ownership." The Comptroller described the other 36 linkage companies, which were receiving proposals for the first time, as including 18 of the New York City Pension Funds' largest portfolio companies, 7 coal-intensive utilities, 9 board diversity "laggards" and 9 with excessive CEO pay. The Comptroller also noted that a total of 15 of its 2016 proposals have been withdrawn to date (6 from the first group and 9 from the second) after the companies instituted, or agreed to institute, a 3% bylaw. In contrast with the McRitchie and Chevedden proposals, the Comptroller's proposals for the 2016 season appear to mirror those submitted during the 2015 season and do not preclude companies from including limits on aggregation or additional limitations on proxy access. The companies from which the Comptroller's proposals have been withdrawn have all adopted proxy access bylaws that limit the number of proxy access nominees to the greater of 2 or 20% of the board and also limit to 20 the number of shareholders that may aggregate their shares.[36]

Many companies that recently adopted proxy access bylaws in connection with receiving a shareholder proposal have sought relief from the SEC under Rule 14a-8(i)(10) to exclude the proposal, on the ground that it has been substantially implemented (as GE successfully contended in 2015).[37] While bylaws include various combinations of the "troublesome" and "problematic" provisions identified by CII and ISS, respectively, these companies maintain that their adoption of proxy access achieves the "essential objective" of the proposal – to adopt a proxy access right – which the SEC noted in its response to GE.[38] We have yet to see the SEC's response to these recent no action requests. *See Part 4 below.*

What To Do Now:

- ***Understand the Positions of Key Shareholders on Proxy Access.*** Working with their proxy solicitors, companies that have not adopted access, or that have adopted an earlier version of access, should educate themselves about the positions of their institutional investors on access generally, as well as on specific access provisions, to see how they would impact the vote on an access proposal at their 2016 annual meeting.
- ***Evaluate Alternatives for Addressing Proxy Access.*** Depending on the company's experience to date and its approach to shareholders' governance initiatives, there are three basic ways to address proxy access in 2016. In our recent Alert available here, we provide a strategic roadmap to help companies and their boards consider these alternatives: (1) wait-and-see, prepare and engage; (2) adopt in advance of the 2016 annual meeting; or (3) put a management proposal on the ballot. Note that doing nothing is not really an option.
- ***Consider How Proxy Access Would Actually Play Out for Your Company.*** Understanding how a proxy access bylaw works and how it would fit into your proxy season calendar and process is important for to developing a position on various elements of a proxy access bylaw.
- ***Prepare a Draft Bylaw to Keep "On the Shelf."*** For companies that have not yet adopted proxy access, putting together a draft bylaw will provide an opportunity to thoughtfully consider all of the complexities and choices before it becomes a matter of urgency.

4. Anticipating Other Shareholder Proposals

In 2015, shareholders submitted more than 1,030 proposals to approximately 540 companies, of which 45% related to environmental and social issues, nearly 43% were governance-related and about 12% addressed compensation topics.[39] See *Part 7 below*. We expect to see more shareholder proposals on the ballot in 2016, particularly given what seems to be a more conservative position by the SEC Staff on the excludability of many proposals.

When is a Proposal "Conflicting" and thus Excludable under Rule 14a-8(i)(9)?

After imposing a moratorium in 2015 on the use of Rule 14a-8(i)(9) to exclude shareholder proposals based on the inclusion of a "conflicting" management proposal, the SEC Division of Corporation Finance issued Staff Legal Bulletin No.14H (CF) on October 22, 2015[40] and resumed processing companies' (i)(9) no-action requests. Under the new guidance, a company will not be able to exclude a shareholder proposal under (i)(9) unless the shareholder proposal "directly conflicts" with the management proposal. A proposal will not be found to "directly conflict" unless "a reasonable shareholder could not logically vote in favor of both proposals" – meaning that a vote for one proposal would be tantamount to a vote against the other proposal. We expect that this guidance will severely limit the use of (i)(9) as a basis for excluding shareholder proposals.

In SLB 14H, the Staff offered the following examples of proposals it would exclude because of direct conflicts: (1) where a company seeks votes to approve a merger and the shareholder proposal seeks votes against; and (2) where a shareholder proposal seeks to separate the positions of chairman and CEO and the company seeks approval of a bylaw requiring these positions to be combined. The Staff also offered the following examples of shareholder proposals it would not consider to be in direct conflict because, in the staff's view, both proposals have similar objectives and a reasonable shareholder could prefer one proposal over the other but logically vote for both: (1) where the company proposes a proxy access bylaw with one ownership level/holding period/board seat limit and the shareholder proposal has a different formulation; and (2) where the shareholder proposal seeks an equity award policy with minimum 4-year vesting and the company proposes an incentive plan that gives the compensation committee discretion to set vesting.

The Staff's guidance may breathe new life into proposals calling for shareholder rights to call special meetings, which companies had previously been able to exclude pursuant to (i)(9) by simply proposing a different ownership threshold (*e.g.*, a shareholder proposal at 10% was previously excludable as conflicting with a management proposal at 20%). Companies can seek to engage with shareholders to reach a middle ground, or be prepared to place two proposals with different thresholds on the ballot.

When is a Proposal Related to "Ordinary Business Operations" and thus Excludable under Rule 14a-8(i)(7)?

In SLB 14H, the Staff also reaffirmed the historical interpretation that proposals that focus on a significant policy issue transcend a company's ordinary business operations and therefore are *not* excludable under Rule 14a-8(i)(7). The guidance referred to the *Trinity Wall Street v. Wal-Mart Stores, Inc.* case,[41] which originated with a shareholder proposal requesting that the charter of Wal-Mart's nominating and governance committee be amended to add oversight of policies and standards governing Wal-Mart's decision whether or not to sell guns. The Staff granted Wal-Mart's request to exclude the proposal on the ground that it related to Wal-Mart's ordinary business operations and did not focus on a significant policy issue. The U.S. Court of Appeals for the Third Circuit also ruled in favor of Wal-Mart's ability to exclude the proposal. In doing so, however, the majority opinion introduced a two-part test as to when the (i)(7) exception would apply: first, the shareholder proposal must focus on a significant policy issue, not just "the choosing of one among tens of thousands of products it sells," and second, the subject matter of the proposal must "transcend" the company's ordinary business operations, meaning that the policy issue must be "divorced from how a company approaches the nitty-gritty of its core business."

In SLB No. 14H, the Staff stated that it will not follow the "new analytical approach" introduced by the Third Circuit, which it believes could lead to the unwarranted exclusion of shareholder proposals. Rather, the Staff will continue to interpret (i)(7) consistent with the SEC's historical practice, and the concurring opinion in the Wal-Mart case: "a proposal may transcend a company's ordinary business even if the significant policy issue relates to the 'nitty-gritty of its core business'." We are seeing this interpretation unfold for the 2016 proxy season as the SEC declines relief to companies that submitted no-action requests on the basis of an (i)(7) exclusion in response to a shareholder proposal for boards to adopt and issue (or amend) a general payout policy to give preference to share repurchases over cash dividends as a method of returning capital to shareholders.[42]

For more detail on the SEC guidance on when proposals "directly conflict" and when "a proposal may transcend a company's ordinary business" see our recent Alert available here.

When is a Proposal "Substantially Implemented" and thus Excludable Under Rule 14a-8(i)(10)?

Finally, companies facing a proxy access proposal, and those that have already adopted proxy access, are also considering their ability to exclude a shareholder proposal on the ground that the company has "substantially implemented" the proposal under Rule 14a-8(i)(10). For example, in 2015, GE successfully sought no-action relief pursuant to (i)(10) to omit a shareholder proposal from its proxy statement on the basis that GE had already "substantially implemented" proxy access. The bylaw adopted by GE mirrored the proposal in requiring 3% ownership and a 3-year holding period and in limiting access nominees to 20% of the board. However, while the proposal referred to nominations by a "shareholder or group," the bylaw imposed a 20-shareholder aggregation limit.

The SEC noted GE's representation that "the board has adopted a proxy access bylaw that addresses the proposal's essential objective."[43]

Going forward, it is unclear where the SEC will draw the line on "substantially implemented," or how closely a company's proxy access bylaw will need to track the proponent's version in order to meet the requirements of (i)(10). The increasingly granular focus by CII, ISS and others on bylaw provisions they consider unacceptable could inform the Staff's views on "substantially implemented."

5. Considering the Impact of ISS and Glass Lewis Voting Policy Updates

In November 2015, ISS and Glass Lewis updated certain aspects of their proxy voting policies effective for the 2016 proxy season. The key changes are discussed briefly below; for more information, please see our Alert, dated November 23, 2015, available here. On December 18, 2015, ISS released non-compensation-related FAQs[44] and, on the same date, two additional sets of FAQs related to U.S. executive compensation policies (available here[45]) and equity compensation plans (available here[46]).

Overboarding

Citing an "explosion" in the time commitment needed for board service, both ISS and Glass Lewis have lowered from 6 to 5 the maximum number of public company directorships a director (other than the CEO) may have before being considered "overboarded." For the CEO, ISS has kept the ceiling at 3 (counting subsidiary boards separately); Glass Lewis has lowered it to 2. ISS and Glass Lewis both provide a one-year transition period: overboarding in 2016 will result in cautionary language in the proxy voting report; in 2017, a negative recommendation. In the case of overboarded CEOs, ISS will not recommend against the CEO for election to the board of the company where he or she serves as CEO or to the board of any controlled (>50%) subsidiary. However, ISS may on a case-by-case basis recommend against a CEO's election to outside boards and to the boards of subsidiaries of the public company where the CEO serves that are not controlled (<50%). In this regard, it is worth noting that SEC Chair White has expressed concern that overboarding may detract from effective audit committee service. *See Part 8 below.*

Proxy Access

ISS's new FAQs provide guidance on how ISS will evaluate a board's responsiveness to a majority-supported shareholder access proposal. ISS has also provided a framework to evaluate candidates nominated by proxy access. ISS added proxy access as a "zero weight" factor for QuickScore 3.0 (likely presaging a weighting next year). Glass Lewis has not provided any new insight into how it will evaluate shareholder proposals on proxy access, or which proxy access bylaw provisions will be considered so restrictive as to call into question a board's responsiveness to a majority-supported shareholder proposal, but has offered some guidance on how it reviews conflicting proposals. *See Part 3 above*.

Unilateral Board Actions

Directors of IPO companies are for the first time expressly subject to ISS issuing a negative recommendation if, prior to or in connection with the IPO, the company's board adopted charter or bylaw amendments that ISS believes materially diminish shareholder rights. At existing public companies, amendments to (1) classify the board, (2) establish supermajority vote requirements or (3) eliminate shareholders' ability to amend bylaws will result in ISS issuing a negative recommendation against directors until such time as the rights are restored or the unilateral action is ratified by a shareholder vote.

Insufficient Compensation Disclosure by Externally-Managed Issuers (EMIs)

ISS will now generally recommend against say-on-pay where insufficient compensation disclosure (e.g., disclosure of only the aggregate management fee) precludes a reasonable assessment of pay programs and practices applicable to the EMI's named executive officers. Many REITs are EMIs.

Shareholder Proposals Seeking Environmental and Social Disclosure

ISS has clarified and somewhat broadened the criteria it will consider in evaluating shareholder proposals seeking company reports on (1) animal welfare, (2) pharmaceutical pricing and related matters and (3) climate change/greenhouse gas emissions. In the case of animal welfare, the criteria are now broadened to address practices in the supply chain relating to the treatment of animals. *See Part 7 below*.

Conflicting Management and Shareholder Proposals

Glass Lewis now specifies the factors it will consider in assessing conflicting shareholder and management proposals. This is of increasing importance in light of the SEC's recent indication that it will strictly construe whether a shareholder proposal is truly "conflicting" and therefore qualifies for exclusion under Rule 14a-8(i)(9). See *Part 4 above.*

Performance Failures Associated with Board Composition or Environmental or Social Risk Oversight

Glass Lewis "may consider" recommending against the nominating committee chair where it believes a board's failure to ensure that it has directors with relevant experience, either through periodic director assessment or board refreshment, has contributed to the company's "poor performance." (Glass Lewis did not indicate how it will establish that board composition has contributed to "poor performance" or how it will define such performance.) Glass Lewis also has indicated that, where the board or management has failed to sufficiently identify and manage a material environmental or social risk that either did – or could – negatively impact shareholder value, it will recommend voting against directors responsible for risk oversight. *See Part 6 below.*

Exclusive Forum Bylaws for IPO Companies

For newly public companies, Glass Lewis will no longer automatically recommend a vote against the nominating committee chair due to the presence of an exclusive forum bylaw at the time of the IPO. Instead, Glass Lewis will consider such provision in the context of a company's overall shareholder rights profile. For a discussion of exclusive forum bylaws, *see Part 10 below*.

What To Do Now:

In addition to reviewing the guidance relating to specific proxy voting policy updates provided in our Alert, dated November 23, 2015, available here, we recommend that companies take the following steps:

- ***Evaluate Number of Directorships.*** Evaluate whether your company's directors, including the company's CEO or other executive officers, could be at risk of receiving a public caution from ISS or Glass Lewis and, subsequently, a negative recommendation under the revised overboarding policies. Ensure that directors and executive officers update their annual questionnaires to provide current biographies, including all other boards on which they serve (both public and private). Companies should have a policy requiring prompt notice of changes in employment or directorships, and directors and executive officers should be periodically refreshed about this policy. Directors and executive officers should be particularly mindful about potential overboarding that may arise from board service on private companies that anticipate an IPO.
- ***Carefully Consider Bylaw Amendments.*** Companies, including those preparing for an IPO, that are considering whether to amend their charter or bylaws in a manner that could be viewed by ISS to adversely impact shareholders should carefully consider the impact of such amendments on director elections but should continue to make decisions in the best interest of the company, especially during the IPO transition period. Companies that recently became public or are preparing for an IPO should note what may be a suggestion from ISS that disclosure of a public commitment to put any adverse shareholder provisions to a shareholder vote within three years of the IPO date may result in a period of "grace" during the company's formative years in the public domain.

- ***Verify QuickScore Reports.*** Companies may verify data verification points at any time, except between the company's proxy filing and shareholder meeting.
- ***Register with ISS for Equity Compensation Scorecard.*** Companies planning to seek shareholder approval of an equity compensation plan at the next annual meeting should register to gain access to the ISS Equity Plan Data Verification Portal and review the data points about the company that ISS will consider as part of its scorecard approach.
- ***Understand Vulnerabilities and Potential for Negative ISS Voting Recommendations.*** We encourage all companies to become familiar with the more than 45 circumstances in which ISS may recommended a negative vote regarding director elections (set forth in the *Appendix* to our Alert, available here), or on other proposals that may be included in their proxy statement.
- ***Review and Enhance Proxy Statement Disclosure.*** Companies should review last year's compensation and governance disclosure and consider any investor feedback with an eye toward further improvements. Clear, complete and concise proxy statement disclosure that highlights developments and explains the board's rationale for its governance structure and board nominations in terms of the company's present needs can be a company's best tool for making its case to the proxy advisors – and shareholders generally.

6. Key Issues for the Nom/Gov Committee: Director Tenure, Independence, Gender Diversity and Skills

Vanguard Chairman and CEO McNabb observed pointedly in a speech in October 2014 that board composition is the "single most important factor in good governance."[47] Consistent with this view, the pressure on boards and nominating committees to justify the composition of the board continues to grow. Shareholders and proxy advisory firms are focusing on various elements of board composition, including tenure, independence, gender diversity and relevant experience and skills. As discussed in *Part 5 above*, ISS and Glass Lewis are also zeroing in on the processes used for board nominations and board self-evaluations. ISS has updated QuickScore 3.0 to clarify that, for US companies, a "robust" director self-evaluation policy exists when the company discloses an annual board performance evaluation policy that includes individual director assessments and an external evaluation performed at least once every three years. Glass Lewis, taking an even more aggressive approach, has revised its 2016 voting policies to include a new category pursuant to which it "may consider" recommending against the nominating committee chair where it believes a board's failure to ensure that it has directors with relevant experience, either through periodic director assessment or board refreshment, has contributed to the company's "poor performance."

Director Tenure

While a relatively recent issue in the U.S., investors and regulators in the United Kingdom, France and other countries have been questioning for some time whether long-tenured directors can truly be independent.[48] Most U.S. institutional investors, as well as the proxy advisors, have not expressly favored term limits or bright-line cut-offs as a way of ensuring independence.[49] For example:

- CII's policy focuses on board evaluation of director tenure and encourages boards to weigh whether a "seasoned director should no longer be considered independent."[50] However, CII does not go so far as to endorse term limits or specify the number of years of board service that would make a director "seasoned."
- BlackRock's voting guidelines indicate that it generally will not vote in favor of shareholder proposals seeking the board's adoption of bright-line term limits, but it will not oppose a particular board's decision to impose such limits as a mechanism for board "refreshment."[51] At the same time, BlackRock warns that it may withhold votes from "[t]he independent chair or lead independent director, members of the nominating committee, and/or the longest tenured director(s), where we observe a lack of board responsiveness to shareholders on board composition concerns, evidence of board entrenchment, insufficient attention to board diversity, and/or failure to promote board succession planning over time in line with the company's stated strategic direction."[52]

- On December 16, 2015, CalPERS' Global Governance Policy Ad Hoc Subcommittee approved proposed revisions to the pension fund's Global Governance Principles to require that companies take a comply-or-explain approach on the issue of long-tenured directors. Under the proposed revised principles, a company would have two options regarding a director who has served on the board for more than 12 years: either classify the director as non-independent or annually disclose a basis for continuing to deem him or her independence.[53]

In contrast, in 2014 State Street Global Advisors adopted bright-line guidelines on for determining "excessive" director tenure (noting it generally will "take a skeptical view" of directors whose tenure exceeds nine years).[54] However, reportedly in that year State Street voted against the reelection of only 2% of directors pursuant to its policy, even though it found concerns around lack of board refreshment at approximately 13% of the companies. State Street cited productive dialogues with the companies as the reason for the low number of negative recommendations.[55]

Rather than establish term limits, 73% of S&P 500 boards have established a mandatory retirement age for directors to promote turnover. Of those boards, 93% have a mandatory retirement age of 72 or older, which is a significant change from 57% in 2005 as director retirement ages increasingly skew older. In particular, while more than half of the companies with mandatory retirement ages have set the retirement age at 72 for the last ten years, there has been a 26% increase in the number of companies that have raised the age to 75 or older since 2005 (8% to 34%).

ISS includes director tenure in its QuickScore governance rating system. As discussed in *Part 5 above*, for 2016 ISS clarified that the presence of a "small number" of long-tenured directors (*i.e.*, those on the board longer than 9 years) will not negatively impact the company's QuickScore governance rating. QuickScore does not quantify the term "small number." To date, we have generally found that companies receive a QuickScore "red flag" when long-tenured directors constitute more than one-third of the board. Under ISS's proxy voting policy applicable to management or shareholder proposals to limit the tenure of outside directors, whether through term limits or the adoption of a mandatory retirement age, ISS will "scrutinize boards where the average tenure of all directors exceeds 15 years for independence from management and for sufficient turnover to ensure that new perspectives are being added to the board."[56]

Glass Lewis takes a more flexible position on mandatory age or term limits, stating in its 2015 proxy voting guidelines that "[s]hareholders are better off monitoring the board's approach to corporate governance and the board's stewardship of company performance rather than imposing inflexible rules that don't necessarily correlate with returns or benefits to shareholders." But if a board does adopt such limits, Glass Lewis believes boards should "follow through" and not grant waivers.[57]

The recent adoption by GE of a 15-year term limit for all directors other than the CEO, subject to a two-year transition period for directors serving on the board as of the 2016 annual meeting, may signal a movement among companies to use a bright-line standard to set director expectations about tenure in advance and establish a pathway for director refreshment.[58]

Director Independence

An issue closely linked to director tenure, and recently in the news, [59] is director independence. As noted above, investors such as State Street have become more vocal in questioning how independence is defined and whether independence is compromised after many years on the board.[60] An October 2015 decision by the Delaware Supreme Court in *Delaware County Employees Retirement Fund v. Sanchez*[61] placed a spotlight on the sometimes routine analysis of director independence, which in this instance was also linked to tenure. The *Sanchez* case illustrates that even if a director does not have a direct financial interest in a transaction, the director's independence can be called into question based on long-standing close personal friendships and economically advantageous relationships.

The plaintiffs in *Sanchez* challenged a transaction involving cash payments to Sanchez Resources, LLC, a private company wholly-owned by the family of A.R. Sanchez, Jr., by Sanchez Energy Corporation, a public corporation of which Mr. Sanchez's family was the largest stockholder and which was dependent on Sanchez Resources for all management services. Plaintiffs alleged that a pre-suit demand on Sanchez Energy's five-member board of directors was excused. The parties agreed that two directors, the company's Chairman (Mr. Sanchez) and the company's President (Mr. Sanchez's son), lacked disinterestedness and independence, and the disinterestedness and independence of the board as a whole turned on the independence of a third director, Alan Jackson, with respect to the decision whether the corporation should sue Sanchez Resources. Plaintiffs alleged various relationships between Mr. Jackson and Mr. Sanchez, including (1) a "50-year close friendship"; (2) a $12,500 donation by Mr. Jackson to Mr. Sanchez's 2012 gubernatorial campaign; (3) Mr. Jackson's and his brother's "full-time job and primary source of income" as executives at an insurance agency wholly-owned by a company of which Mr. Sanchez (whom the board of such company had determined was not independent under NASDAQ rules) was the largest stockholder and at which both Mr. Jackson and his brother worked on the Sanchez company accounts; and (4) the fact that Mr. Jackson earned $165,000 as a Sanchez Energy director, representing approximately 30-40% of his total income in 2012.

On the defendants' motion to dismiss, the Court of Chancery concluded that the plaintiffs' allegations were insufficient to overcome the presumption that Mr. Jackson was independent from Mr. Sanchez and dismissed the action for failure to adequately plead that demand was excused. The Delaware Supreme Court reversed, stating that "Delaware courts must analyze all the particularized facts pled by the plaintiffs in their totality and not in isolation from each other" and "in full context," and that in this case plaintiffs alleged "not only that the director had a close friendship of over half a century with the interested party, but that consistent with that deep friendship, the director's primary employment (and that of his brother) was as an executive of a company over which the interested party had substantial influence." The court stated that plaintiffs thus alleged more than a "thin social-circle friendship," such as in the oft-cited decision in *Beam v. Stewart*,[62] where allegations that "directors 'moved in the same social circles, attended the same weddings, developed business relationships before joining the board, and described each other as 'friends'" were held insufficient to establish a lack of independence.

Some will argue that *Sanchez* stands for nothing more than the proposition that an individual is unlikely to sue a close friend of over half a century and someone who controls both his and his brother's income. It is worth noting, however, that the board of Sanchez Resources Corporation had determined that Mr. Jackson was an "independent director" as defined by the rules of the New York Stock Exchange,[63] and that even directors who satisfy the NYSE's bright line rules for independence may lack independence for some purposes. The case thus provides a warning to companies and their nominating committees, particularly in situations involving transactional or related party issues, that reliance on bright-line tests under applicable stock exchange rules may not be sufficient to determine the independence of directors for all purposes. A director's relationship to a potentially interested party must always "be considered in full context."

Gender Diversity

In a November 2015 speech, SEC Chair White cited U.S. boardrooms as one of several areas that have been "stubbornly resistant" to progress in fostering gender diversity.[64] She noted that, in 2015, women comprised only 17.5% of Fortune 1000 company boards and 19.2% of S&P 500 company boards,[65] while "[s]tudy after study shows that diversity of all kinds makes for stronger boards and companies." A December 2015 report of the US Government Accountability Office (GAO) estimated that even if women were to join boards in equal proportions to men beginning in 2015, achieving parity in the boardroom could take more than four decades.[66]

The call for greater gender diversity in the boardroom is resonating with some institutional investors. The Thirty Percent Coalition, which cites support by representatives of investors with $3 trillion in assets under management, has been engaging in a multi-year letter-writing campaign directed to Russell 1000 companies, most recently including 160 companies in the S&P 500 and Russell 1000 that have no women on their boards.[67] In 2013 the New York City Comptroller on behalf of the New York City Pension Funds filed a proposal with C.F. Industries Holdings, Inc., asking the board of directors to "include women and minority candidates in the pool from which Board nominees are chosen," and report to shareholders "its efforts to encourage diversified representation on the board." The proposal received a majority of shareholder votes.[68] BlackRock revised its proxy voting guidelines in 2015 to potentially oppose a board member's reelection for reasons including "insufficient attention to board diversity."[69]

On March 31, 2015, representatives of nine public pension funds with over $1.12 trillion in assets submitted a rulemaking petition to the SEC seeking to require enhanced proxy statement disclosure about the gender, race and ethnicity of board nominees "in order to help us as investors determine whether the board has the appropriate mix to manage risk and avoid groupthink."[70] Specifically, the funds called for an amendment to Item 407(c)(2)(v) of Regulation S-K not only to require this information but also to require that it be presented, along with other nominee qualifications and skills, by means of a user-friendly chart or matrix. According to the GAO report, SEC officials have indicated that they intend to consider the petition as part of the SEC's Disclosure Effectiveness Initiative. In response to the GAO report, which was prepared at her request, Representative Carolyn Maloney (D-NY) recently announced plans to introduce legislation that would instruct the SEC to recommend strategies for increasing the representation of women on boards and require that companies report on their policies to encourage the nomination of women for board seats and the proportions of women on their boards and in senior management.

For the last two years ISS's Quick Score 3.0 has included a weighted factor relating to the number of women directors serving on the board, noting that some academic studies have found a correlation between increasing the number of women on boards and better long-term financial performance. ISS has not indicated a recommended number of women, nor has it made clear how this factor will be weighted in assigning companies a "good" or "bad" governance score.

Relevant Experience and Skills

Investors increasingly keep a watchful eye on board composition. They expect the mix of board members to cover the waterfront of relevant experience and skills and, in particular, to keep pace with changes in a company's strategic priorities and challenges. For example, the proposed revisions to CalPERS' Global Governance Principles advise companies to conduct "routine discussions as part of a rigorous evaluation and succession planning process surrounding director refreshment to ensure boards maintain the necessary mix of skills, diversity and experience to meet strategic objectives."[71] The types of experience and skills most in demand at present include industry-specific knowledge, digital and social media savvy, global business experience and a deep understanding of cybersecurity or other specific company risks.

Concern about the ability of directors to oversee cybersecurity risk, in particular, has reached the national stage. On December 17, 2015, U.S. Senators Jack Reed (D-RI) and Susan Collins (R-ME) introduced the Cybersecurity Disclosure Act of 2015 with the goal of promoting "transparency in the oversight of cybersecurity risks."[72] The proposed bipartisan legislation would require the SEC to issue rules requiring public companies to disclose in their Form 10-Ks or annual proxy statements whether any member of the board has expertise or experience in cybersecurity (to be defined by the SEC in coordination with the National Institute of Standards and Technology) and, if not, why the nominating committee believes having this expertise or experience on the board is not necessary because of other cybersecurity steps taken by the company. While the legislation would not require companies to put cyber experts on their boards, it is clearly premised on the belief that "sunlight" will encourage companies (whether on their own initiative or in response to the prodding of better informed investors) to bolster their oversight of cybersecurity.

What To Do Now:

- ***Assess Gaps Relating to Tenure, Independence, Diversity and Skills.*** Boards and their nominating committees should take a proactive approach to board composition and succession planning by evaluating the tenure, independence, diversity and skills of the board on a regular basis. Boards should also take a holistic view of a director's relationships and connections when evaluating independence in the context of related party transactions, particularly given the heightened attention the outside auditor will be paying to documentation of these and "significant unusual transactions", as well as executive compensation arrangements, in conducting this year's audit under newly applicable PCAOB Auditing Standard No. 18. Boards also should consider revisiting their age limits and tenure, director refreshment and board self-evaluation policies and procedures.

- ***Review and Vary Board Evaluation Process.*** The nominating committee should ensure that the board and key committees are conducting effective self-evaluations that meet evolving standards for robustness. For companies that have traditionally used questionnaires, consider alternating this methodology with one-on-one discussions with the independent chair/lead independent director/nominating committee chair or an external evaluator. Note that ISS QuickScore 3.0 has been revised to consider whether the board is conducting individual director assessments and to also consider whether an independent outside party is assisting with the board self-assessment process at least once every three years.
- ***Enhance Proxy Statement Disclosure.*** Consider using a chart or matrix to make the required information about directors, and possibly additional information about diversity (along with independence and other qualifications, as discussed above), accessible to the reader at a glance. Investors are looking to see how the experience and other qualifications of each director align with company strategy and key areas of risk. Expect large institutional investors and activist shareholders to continue to demand more information regarding "board refreshment" than the minimum required under the SEC's current proxy rules. Accordingly, as noted in *Part 2 above*, companies should give careful thought to how the 2016 proxy statement will address board tenure and other composition and qualification issues, along with the adequacy of the board's self-evaluation process. Some companies previously have done this, for example, by explaining the benefits to the company of a particular director's long service in terms of his or her particular expertise.

Spotlight on Disclosure of Voting Standards in Director Elections

Director Keith F. Higgins and other senior staff of the SEC's Division of Corporation Finance have sent out the word that more careful attention should be paid to the often-overlooked details of proxy statement disclosure of voting standards governing uncontested elections of directors. After the SEC received rulemaking petitions in early 2015 from each of CII[73] and the United Brotherhood of Carpenters and Joiners of America (the Carpenters)[74] highlighting perceived disclosure deficiencies in corporate proxy materials, the Commission's Division of Economic and Risk Analysis compiled a random sample of issuers drawn from the Russell 3000 index. In reviewing the relevant portions of proxy statements and forms of proxy filed this year by issuers in the sample pool, the Division observed several ambiguous, or less than ideal, disclosures similar to those described in the CII and Carpenters petitions, including (but not necessarily limited to) the following: (1) erroneously describing the "plurality plus" voting standard as a "policy on majority voting"; (2) suggesting incorrectly that a "withhold" vote constitutes a vote "against" a director candidate in a plurality voting system; and (3) inconsistencies in descriptions of applicable director election voting standards in the body of the proxy statement vs. the face of the proxy card.

7. Another Key Issue for the Nom/Gov Committee or Full Board: Sustainability

Sustainability, broadly defined as the pursuit of a business growth strategy by allocating financial or in-kind resources to ESG practices, is not just a buzzword that boards can address simply through their company's marketing efforts. [75] Governance activists, institutional investors and regulators[76] are increasingly calling for (and in some cases requiring) companies and their boards to assess and report on the sustainability of their business operations and investments.[77] According to a recent report, the nominating/corporate governance committee is often assigned responsibility for oversight of sustainability issues.[78]

In May 2015, BlackRock teamed up with nonprofit sustainability leader Ceres to create a guide called "21st Century Engagement: Investor Strategies for Incorporating ESG Considerations into Corporate Interactions."[79] Pension plans have also been vocal in their support for sustainability and responsible investing. CalSTRS has endorsed the Principles for Responsible Investment (PRI) and worked with the Carbon Disclosure Product and Ceres to improve the transparency and disclosure of environmental risk data by corporations.[80] More than 1,300 institutional investors worldwide, representing $59 trillion in assets under management, have signed on to the UN Principles of Responsible Investing, which seek to integrate ESG concerns into investment objectives.[81]

Sustainability Proposals

While about 40% of environmental and social shareholder proposals were withdrawn and support for those that made it onto the ballot was far below the majority threshold needed for passage, proposals on social and environmental policy issues comprised the largest category of proposals submitted in 2015 despite the plethora of proxy access proposals.[82] Since 2010, 89 proposals submitted under Rule 14a-8 aimed at annual sustainability reporting appeared in the proxy statements of 58 companies.[83] We expect that the volume of shareholder proposals on environmental and social issues will continue to grow and that they will garner increasing support. In its proxy voting guidelines, ISS recommends that shareholders "generally vote for proposals requesting that a company report on its policies, initiatives and oversight mechanisms related to social, economic, and environmental sustainability."[84]

Glass Lewis' new proxy voting policy provides that where the board or management has failed to sufficiently identify and manage a material environmental or social risk that either did – or could – negatively impact shareholder value, it will recommend against directors responsible for risk oversight.[85]

Sustainability Reporting

Public companies in larger numbers are disclosing their efforts to enhance the sustainability of their business practices and building capabilities to report on the environmental and societal impacts of their businesses.[86] According to the Governance & Accountability Institute, about 75% of companies in the S&P 500 produced sustainability reports in 2015, is up from 20% in 2011.[87] Companies are also making sustainability-related disclosures in their SEC filings that can be more easily identified and reviewed with a new SEC Sustainability Disclosure Search Tool launched by Ceres in January 2016.[88]

In response to investor concerns, the Sustainability Accounting Standards Board, a nonprofit organization chaired by Michael R. Bloomberg (the SASB), is writing industry standards for material corporate sustainability and environmental reporting to standardize the way companies report sustainability measures that are useful to investors and can be included in the MD&A. In December 2015, the SASB issued provisional standards for the renewable resources and alternative energy sector to help companies disclose sustainability information that is likely to be material.[89] Also in December 2015, the Financial Stability Board, which coordinates international efforts to develop and promote effective regulatory, supervisory and other financial sector policies in the interest of financial stability, launched a Task Force on Climate-related Financial Disclosures, which also will be led by Michael Bloomberg, to make recommendations for consistent company disclosures that will help financial market participants understand their climate-related risks.[90] It remains to be seen if the SEC will endorse or otherwise implement any of these standards, or whether (perhaps prompted by the White House or Congress) it will issue additional interpretive guidance under existing line-item requirements (e.g., MD&A, risk factors) similar to the 2010 interpretive release regarding climate change disclosures.[91]

There has also been an increase in environmental and social policy reporting requirements driven by regulators and stock exchanges around the world.[92] For example, in 2014 the European Council adopted a Directive that will require large public interest entities – which include listed companies as well as some unlisted companies such as banks, insurance companies and other companies that are so designated by European Union Member States because of their activities, size or number of employees – with more than 500 employees in the European Union, to disclose in their annual reports as of their financial year 2017 information on "policies, risks and results as regards environmental matters, social and employee-related aspects, respect for human rights, anti-corruption and bribery issues, and diversity on boards of directors."[93] In addition, Section 54 of the U.K.'s Modern Slavery Act 2015, which went into effect in October 2015, requires businesses (regardless of where organized) that supply goods or services in the U.K. and that have an annual turnover in excess of £36 million (approximately $55 million) to publish an annual statement specifying the steps taken to ensure that slavery and human trafficking have not been present anywhere in their business or supply chain. For additional information on the new U.K. requirements, see our Alert available here.

In the U.S., since 2010 the SEC has emphasized the need for publicly-traded companies to disclose "material impacts" of climate-related changes under existing rules.[94] Recently, such disclosures have been scrutinized by the Attorney General of the State of New York, in particular with respect to energy companies' disclosures regarding the risks they face from future government policies and regulations related to climate change and other environmental issues that could reduce product demand or that may raise public doubt concerning climate change. After a years-long investigation launched pursuant to the State of New York's Martin Act, the New York Attorney General recently announced a settlement with Peabody Energy in which the company agreed to make more robust disclosures in its SEC reports. A similar investigation of Exxon-Mobil is reportedly ongoing.[95]

What To Do Now:

- ***Identify Sustainability Issues That Directly or Indirectly Affect Your Company's Operating Results and/or Financial Performance***. Identifying the key issues that are linked directly or indirectly to operating results or financial performance, including corporate reputation and customer goodwill, will help the board and management to assess the materiality of the impact of ESG issues on the business, which is the fundamental concern of shareholders in this area.
- ***Identify Key Issues of Interest to Shareholders with Respect to Sustainability.*** Keep in mind that "materiality" is defined under the federal securities laws in terms of what shareholders consider important in making investment and/or voting decisions relating to the company's stock. Many large institutional shareholders have positions on sustainability and guiding principles for ESG investing and some even have their own ESG reporting practices.[96] Debt holders also may be influenced by a company's sustainability practices, given the interest in integrating ESG factors into credit risk analysis.[97] In engagement with both equity and debt investors, be prepared to address particular sustainability factors that they consider in assessing investment risk.
- ***Understand New and Evolving Global Sustainability Regulations that Apply to Your Business.*** For example, the Modern Slavery Act of 2015 applies to all companies that do business in the UK in excess of a monetary threshold. In the U.S., SEC rules require conflict minerals disclosure at the federal level but be aware that there is legislation at the state level as well (e.g., the California Transparency in Supply Chains Act, which requires retailers and manufacturers doing business in California to disclose on their websites what efforts they are making, if any, to eradicate human trafficking and slavery in their supply chains).[98]
- ***Review Your Disclosures.*** Ensure that your disclosures properly state the risks and uncertainties that your company faces in sufficient detail to allow investors to make informed decisions. Regulators and others are paying closer attention to the types of disclosures made, including risks in relation to future government policies and regulations. The recent settlement between Peabody Energy and New York State Attorney General and the ongoing investigation of Exxon Mobil's disclosures offer cautionary tales.
- ***Assess Your Industry Peers.*** Understanding where you stand among your peers with respect to sustainability reporting is an important exercise as many environmental and social issues are not just faced by individual companies, but by entire industries.

8. Key Governance Issues for the Audit Committee: Overload, Composition and Reporting

Questions regarding the proper role and responsibilities of audit committees in an era of burgeoning risk, the appropriate criteria to use for selecting effective audit committee members and the transparency of audit committee reporting continue to be widely debated. The SEC weighed in recently on each of these topics, with its Chair and Chief Accountant re-emphasizing this past December at the 2015 AICPA National Conference that the audit committee is a “critical gatekeeper in the chain responsible for high-quality, reliable financial reporting,” and suggesting that investors may need to know more about how well audit committees are doing in overseeing the performance of both management and the outside auditor.[99]

Overload

As new and evolving risks emerge – most notably, the looming threat of cyber breach -- many companies are wrestling with the dilemma of how best to allocate cybersecurity and other risk oversight duties: should such duties reside with the full board, the audit committee, or some other committee of the board?[100] In her December 2015 keynote address, SEC Chair White cautioned against what has been termed “audit committee overload,” the phenomenon of audit committees taking on increasing risk oversight responsibilities that could distract or otherwise prevent them from performing the “core” duties to ensure the integrity of the financial reporting system imposed by the Sarbanes-Oxley Act of 2002 (SOX) and implementing rules of the SEC and the stock exchanges: (1) selection, compensation and oversight of the independent auditor; (2) oversight of internal controls and auditing; (3) establishment and oversight of the administration of an appropriate system for the receipt and treatment of complaints about accounting and auditing matters; and (4) reporting to shareholders. In the SEC Chair’s view, the “[a]udit committees of every company must be entirely committed to their oversight of financial reporting,” and remain mindful that “an increasing workload may dilute … [their] ability to focus on … core responsibilities.”

Composition

Chair White also used her AICPA speech to express concerns that have appeared on the governance radar screens of many investors about the qualifications of those who serve on audit committees. She urged the selection of only those who have the time, commitment and experience to perform the job well, noting that this entails, among other things, the ability to evaluate the performance of the outside auditor and, where necessary, to challenge senior management on major, complex decisions. She questioned whether service on multiple boards, including multiple audit committees, detracts from an audit committee member’s effectiveness. She also questioned whether meeting the technical stock exchange requirements of “financial literacy” or having financial reporting experience in an industry that differs from the company’s own is a sufficient qualification to ensure effectiveness.

Reporting

Finally, in her AICPA speech, Chair White focused on the audit committee’s reporting obligation, which has particular relevance to drafting the 2016 proxy statement. The existing audit committee reporting requirements, set forth in Item 407(d) of Regulation S-K, require the inclusion of an audit committee report in the company’s annual proxy statement. The required contents of the report pre-date SOX and consist of the following: (1) whether the audit committee has reviewed and discussed the company’s financial statements with management; (2) whether the audit committee has discussed with the outside auditors those matters identified in certain (outdated) auditing standards; (3) whether the audit committee has received and reviewed certain written information from the outside auditor relating to the firm’s independence; (4) whether, based on the review and discussions outlined in (1)-(3) above, the audit committee recommends to the full board of directors that the audited financial statements be included in that year’s Form 10-K; and (5) the names of the individual committee members.

In July 2015, the SEC issued a concept release requesting public input on whether improvements should be made to the report.[101] The concept release did not propose any specific rule changes but rather asked numerous questions about possible additional disclosure relating to the audit committee’s oversight of and communications with the outside auditor, the committee's process for selecting the outside auditor, and its evaluation of the qualifications and work of the audit team.

The more than 100 comments on the concept release reflected widely divergent perspectives, with some commenters arguing that the SEC should stay its hand and allow voluntary disclosures (discussed below) to continue to develop and expand. At the opposite end of the spectrum, other commenters expressed strong support for mandatory disclosure rules and a significant expansion of the audit committee report (including, at the very far end, disclosure at the level of transparency of the audit committee report issued by Rolls-Royce in the UK). Taking a middle ground, a third group of commenters urged the SEC to take a flexible, principles-based approach in this area to promote meaningful disclosure reform.[102]

Although Chair White clearly sought to avoid predicting the outcome of the SEC's rulemaking process, she did offer this advice for those preparing the 2016 proxy statement: "[T]he audit committee report serves as a place for engaging with shareholders on important subjects, and the report must continue to meet the needs of investors as their interests and expectations evolve with the marketplace."[103] In a similar vein, a senior member of the SEC's accounting staff encouraged audit committees "to continue to consider the usefulness of their audit committee disclosures and consider whether providing additional disclosure into *how* the audit committee executes its responsibilities would make the disclosures more meaningful."[104] From the SEC's perspective, "[t]he reporting of additional information by the audit committee with respect to its oversight of the auditor may provide useful information to investors as they evaluate the audit committee's performance in connection with, among other things, their vote for or against directors who are members of the audit committee, the ratification of the auditor, or their investment decisions."[105]

Recent surveys of company proxy statements suggest that many companies have heeded calls from investors[106] and policy groups such as the Center for Audit Quality (CAQ), the National Association of Directors and the Association of Audit Committee Members, Inc.,[107] as well as the SEC, to go beyond what current SEC rules require. According to reports from the CAQ and Audit Analytics[108] and the Ernst & Young (EY) Center for Board Matters,[109] respectively, a growing number of companies have voluntarily provided enhanced disclosure in their proxy statements with respect to how and, in some instances, why, they appoint, compensate and oversee the work of their outside auditor. A review of S&P 100 companies' proxy statements conducted by Deloitte produced similar results.[110] According to these studies, "voluntarily enhanced" disclosures have appeared in the audit committee report and other sections of the proxy statement; for example, in the discussion of audit and non-audit fees and/or the board's recommendation that shareholders ratify the audit committee's appointment of the outside auditor. Some companies have consolidated these disclosures in an "audit-related" section of their proxy statements, or have moved more audit-related information into the audit committee report.[111]

Noteworthy findings from the 2015 EY Report include the following:

- 71 % of Fortune 100 companies disclosed, in their 2015 proxy statements, that the audit committee is responsible for the appointment, compensation and oversight of the auditor, compared with only 41% of such companies in 2012.
- 61% of Fortune 100 companies provided proxy disclosure in 2015 indicating that the audit committee was involved in the selection of the outside auditor's lead engagement partner; by comparison, no companies made such disclosure in their 2012 proxy statements.
- 80% of Fortune 100 companies disclosed in 2015 that their audit committees considered non-audit services and fees when assessing the outside auditor's independence; this compares to only 11% in 2012.
- 21% of Fortune 100 companies disclosed that the audit committee was responsible for auditor fee negotiations; none of the companies disclosed this information in their 2012 proxy statements.
- 59% of Fortune 100 companies discussed auditor tenure (median tenure was 18 years), up from 25% in 2012; with respect to the 2015 proxy statements reviewed, EY noted "an emerging approach to retention disclosure,"

with some companies discussing the benefits of longer auditor tenure while describing measures taken to safeguard auditor independence.

- 39% of companies explained, in their 2015 proxy statements, the rationale for appointing their outside auditor, including the criteria applied in assessing the auditor's quality and qualifications; only 17% included this disclosure in their 2012 proxy statements.

These findings are consistent with those presented in the 2015 *Audit Committee Transparency Barometer* co-authored by the CAQ and Audit Analytics. As analyzed in this report, "the data shows double-digit growth in the percentage of S&P 500 companies disclosing information in several key areas of external auditor oversight, including external auditor appointment, engagement partner selection, engagement partner rotation, and evaluation criteria of the external audit firm."[112] At the same time, the relatively small number of S&P 500 companies that were willing, in 2014, to volunteer insights into such matters as the substance of communications between the audit committee and the outside auditor, the connection of audit fees to audit quality, and the reasons for a change in audit fees, declined in 2015.

What To Do Now:

- ***Review Audit Committee Responsibilities.*** The audit committee's annual self-evaluation provides an excellent opportunity for committee members to consider whether they have the bandwidth to conduct any oversight responsibilities that have been assigned to the committee above and beyond its core responsibilities under SOX. If the audit committee believes that the additional responsibilities are incompatible with effective SOX oversight, this concern should be elevated for consideration by the nominating/corporate governance committee or full board.
- ***Review Audit Committee Composition.*** The audit committee's annual self-evaluation is also an excellent opportunity for the committee, in conjunction with the nominating/corporate governance committee, to review the commitments and qualifications of individual audit committee members with a view to determining whether committee membership is optimal or should be refreshed.
- ***Review Audit Committee Disclosure.*** Review last year's audit committee report and those of your peer companies and consider what, if any, additional information would be meaningful to shareholders in making voting decisions (particularly ratification of the selection of the independent auditor and voting for audit committee members standing for election) and/or investment decisions. Also consider integrating (or at least cross-referencing) the various auditor-related disclosures in the proxy statement. Particularly where a long-tenured independent auditor has been reappointed, it may be helpful to investors, and head off criticism, to discuss the material factors the audit committee considered in making its decision and recommending ratification by shareholders. These factors may include the audit committee's perceptions about the effect of the auditor's tenure on its independence; the committee's views on the auditor's industry expertise, service quality and cost; and an overview of the committee's decision-making process. Continued growth in the current trend toward voluntarily enhanced proxy disclosures illuminating the role and responsibilities of audit committees ultimately may persuade the SEC that no further rulemaking is necessary or appropriate, as some comment letters on the concept release have recommended.
- ***A Few Reminders Regarding the SOX Basics.*** As we will discuss more fully in a separate Alert, audit committees should pay particular attention in 2016 to the SEC's views on oversight of their companies' internal control over financial reporting and the details of management's plan for implementation of the new revenue recognition standard, and in communicating with the outside auditor regarding (among other topics) the application of the new PCAOB Auditing Standard No. 18 targeting related parties, significant unusual transactions and financial relationships (including compensation) with executive officers.

9. Key Issues for the Compensation Committee: The Dodd-Frank Final Four and Director Compensation

There are no new SEC rules applicable to 2016 proxy statements emerging from the "Final Four" executive compensation/governance requirements that remain to be implemented under the Dodd-Frank Act. However, in 2015, as discussed below, the SEC was busy moving forward all four rulemaking projects: adopting a final CEO pay ratio disclosure rule and proposing the incentive compensation "clawback" rule, the pay-for-performance disclosure rule and the hedging policy disclosure rule. Companies should be cognizant of these developments and consider whether it makes sense for them to get ahead of the adoption curve in any respect. In addition, companies should be cognizant of ways to mitigate litigation risks that outside directors are continuing to face in connection with making equity awards to themselves notwithstanding stockholder approval of the plans.

CEO Pay Ratio Disclosure

The SEC adopted the controversial pay ratio disclosure rule on August 5, 2015, by adding Item 402(u) to Regulation S-K. The new item will require a company to disclose the ratio of the annual total compensation of its chief executive officer to the median of the annual total compensation of all employees (except the CEO).[113] First, the good news: disclosures will not be required until 2018 (covering compensation for the first full fiscal year beginning on or after January 1, 2017). Now the bad news: while a deceptively simple disclosure rule on its face, compliance with Item 402(u) for the first year will likely turn out to be a complex task, and the disclosure will raise difficult issues not all of which have been anticipated by the SEC. Companies will face the challenges of determining the relevant employee population (probably also by country), determining whether and how to use statistical sampling, identifying the median employee and calculating his or her annual total compensation, and disclosing the ratio and any supporting narrative.

In the final rule, the SEC has provided what appears, at first blush, to be several potentially cost-saving and compliance-simplifying alternatives or exemptions, most notably the flexibility to exclude certain non-U.S. employees from the scope of the rule. However, use of these alternatives or exemptions is typically conditioned on satisfying other requirements and providing additional disclosures, which may not make sense for your company.

We caution that a company cannot think about the pay ratio disclosure as solely an SEC compliance exercise. The ratio – which will be very high for most public companies – is expected to receive extensive attention from the media, labor organizations, some shareholders and activists, legislators, and some customers. Comparisons will be made to other companies despite the fact that the rule was not designed to facilitate a comparison of this information from one company to another. Moreover, a company must also prepare to handle its own internal employee relations issues. Most every employee already knows that he or she is paid a lot less than the CEO. What an employee will learn, however, after the media's spotlight on the new disclosures, is how his or her compensation compares to that of the company's median employee and to that of the median employee at other companies. Each company will need to develop a communication strategy for aligning external and internal messaging.

Clawback Rule

The Dodd-Frank rulemaking that likely will attract the most interest in the C-suite (and will require the most involvement of the compensation committee) is the SEC's proposed rule, issued on July 1, 2015, relating to clawbacks of incentive compensation.[114] The rule, if adopted substantially as proposed, would direct national securities exchanges like the NYSE and Nasdaq to establish listing standards that require a listed company to adopt a recovery (clawback) policy applicable to excess incentive-based compensation received by current and former Section 16 officers in the three completed fiscal years immediately preceding the date the company is required to prepare a restatement of its previously issued financial statements to correct a material error.

Although some companies already have a clawback policy, the proposal's mandated policy requirements will present challenges, due to their breadth and inflexibility. In significant contrast to SOX Section 304 (the provision used by the SEC to obtain clawbacks), the rule would have a no fault standard (a clawback may be required even if there was no misconduct and the executive was not responsible for the material financial statement errors). Moreover, as proposed, the SEC has given corporate boards very narrow discretion on when they could choose not to seek recovery pursuant to a clawback policy. The two instances are (1) when the direct costs of enforcing recovery would exceed the recoverable amounts, and (2) when recovery would violate home country law. In the first instance, a company is still required to make a reasonable attempt at recovering the excess compensation, documenting such attempts, providing the underlying documentation to the stock exchange and disclosing why it chose not to pursue recovery. In the second instance, a company is required to obtain an opinion from home country counsel stating that seeking recovery would violate home country law.

The types of incentive compensation subject to clawback would be equity or non-equity-based awards that are granted, earned or vested based wholly or in part upon the attainment of any measure based on or derived from financial reporting measures (which include accounting-related measures such as revenues and EBITDA and performance measures such as stock price and total shareholder return, or "TSR"). Therefore, many types of awards and payments that companies consider "performance-based" would come within the scope of the rule. However, the following are examples of compensation that would not come within the scope of the proposed clawback rule: salaries; bonuses paid solely at the discretion of the compensation committee or board that are not paid from a "bonus pool," the size of which is determined based wholly or in part on satisfying a financial reporting measure performance goal; bonuses paid solely upon satisfying one or more subjective standards and/or completion of a specified employment period; non-equity incentive plan awards earned solely upon satisfying one or more strategic measures or operational measures; and equity awards for which the grant is not contingent upon achieving any financial reporting measure performance goal and vesting is contingent solely upon completion of a specified employment period (e.g., time-based options, restricted stock or RSUs) and/or attaining one or more non-financial reporting measures

Pay-for- Performance Disclosure

On April 29, 2015, the SEC issued a proposal to implement the Congressional pay-for-performance disclosure mandate set forth in Section 953(a) of the Dodd-Frank Act.[115] The new disclosure would appear in tabular format in proxy or information statements in which executive compensation disclosure otherwise is required (excluding that of foreign private issuers, which are not subject to the SEC's proxy rules), and would entail a comparison of (a) compensation "actually paid" to the Principal Executive Officer (i.e. the CEO), a defined term which means the total compensation figure disclosed in the present Summary Compensation Table, with certain adjustments to the amounts included for pensions and equity awards, with (b) the company's financial performance, to be measured in terms of cumulative TSR in accordance with the methodology prescribed by Item 201(e) of Regulation S-K (the existing requirement for disclosure of a stock price performance graph). The proposed table would be designed to permit a comparison of the company's TSR with the TSR of companies in a specified peer group over the same period. The company also would have to present, in the proposed new table, the average of the reported amounts "actually paid" in respect of the other named executive officers whose compensation appears in the Summary Compensation Table (to be calculated in the same manner as for the CEO).

Based on the information presented in the table, companies would be required to describe, either in a narrative or graphic presentation, or some combination of the two: (a) the relationship between the executive compensation "actually paid" to the CEO and the other named executive officers (again, an average for the latter) and the company's TSR; and (b) a comparison of the company's TSR with that of its selected peer group. With respect to the period of this comparison, larger reporting companies would have to provide this comparative disclosure for the last five fiscal years (three years for smaller reporting companies), with a transition period. In addition, smaller reporting companies would not be subject to the peer-group TSR comparison, but as noted would have to calculate their own TSR. Last but by no means least, companies would have to tag the disclosure in an interactive data format using eXtensible Business Reporting Language, or XBRL (with phase-in relief for smaller reporting companies).

Hedging Policy Disclosure

The SEC proposed a hedging policy disclosure requirement on February 9, 2015, to implement Section 955 of the Dodd-Frank Act, as described our prior alert.[116] It is the least controversial of the four Dodd-Frank responsive rulemakings. If the rule were to be adopted substantially as proposed, it would not prohibit hedging-related activities by directors, officers and/or other company personnel. Instead, disclosure would be required in annual meeting proxy statements of whether the company permits any employees (not limited to officers) or directors, or their designees, to purchase financial instruments (such as collars) or otherwise engage in transactions that are designed to or have the effect of hedging or offsetting any decrease in the market value of the company's equity securities (however acquired). A company that permits hedging transactions by some but not all employees would need to disclose the categories of persons who are permitted to engage in hedging and those who are not. Also, a company would be required to disclose the categories of hedging transactions it permits and those it prohibits (unless it either permits all, or does not permit any, hedging transactions).

The SEC's proposal does not define "hedging" – which can be a good thing – leaving it to companies to exercise a principles-based approach to determining what types of arrangements are covered. However, we expect the SEC to clarify in the final rule that it did not intend "hedging" to include many "plain-vanilla" portfolio diversification strategies such as owning mutual funds, index funds, or stocks counter-cyclical to the company's stock or industry.

Non-Employee Director Compensation

Delaware Court of Chancery decisions continue to place a spotlight on the requirements for securing the protection of the business judgment rule for the relevant board decision-making in the event of a stockholder challenge to a typical design feature of stockholder-approved equity plans covering non-employee directors. Where the business judgment rule does not apply, directors are required to prove the "entire fairness" of the compensation – a difficult burden to meet on a motion to dismiss.

Most public companies have stockholder-approved equity plans from which non-employee directors receive equity awards as part of their board fees. Historically, the amounts of such awards had been determined based on a fixed formula included in the plan, but for some time now companies seeking flexibility have used plans granting directors discretion in determining the equity amounts they award themselves. Recent Delaware decisions have concluded that the non-employee director defendants who award themselves compensation under a shareholder-approved plan that does not specify and limit the amounts to be received by the directors are not entitled to business judgment rule protection and thus are required to prove the "entire fairness" of the compensation.

For example, in denying the defendants' motion to dismiss in *Seinfeld v. Slager*,[117] the court noted that the company's plan conferred upon the directors "the theoretical ability to award themselves as much as tens of millions of dollars per year, with few limitations" and that "there must be some meaningful limit imposed by the stockholders on the Board for the plan to receive . . . the blessing of the business judgment rule." The plan at issue in *Seinfeld* had an annual per-person limit of 1.25 million shares, which could have theoretically represented $21.7 million of grant date value or more, according to the court. Similar concerns were echoed more recently by the court in *Calma v. Templeton*,[118] which involved a stock compensation plan that limited compensation to 1 million restricted stock units annually but did "not specify the compensation that the Company's non-employee directors will receive annually" or impose "sub-limits varied by position with the Company."[119] The court denied a motion to dismiss, finding that stockholder approval of the plan did not ratify the compensation committee's subsequent awards under the plan because the company did not seek or obtain stockholder approval of "any action *bearing specifically on the magnitude of compensation to be paid to its non-employee directors*."[120] The court stated that the plan did "not set forth the specific compensation to be granted to non-employee directors" or "any director-specific 'ceilings' on the compensation that could be granted to the Company's directors."[121] The court accordingly held as follows: "Thus, in my opinion, upfront stockholder approval by Citrix stockholders of the Plan's generic limits on compensation for all beneficiaries under the Plan does not establish a ratification defense for the [directors'] RSU Awards because, when the Board sought stockholder approval of the broad parameters of the Plan and the generic limits specified therein, Citrix stockholders were not asked to approve any *action specific to director compensation*. They were simply asked to approve, in very broad terms, the Plan itself."[122]

The court also found, for the purpose of its decision denying the motion to dismiss, that it was reasonably conceivable that the RSU awards were not entirely fair. The parties had framed the issue of whether the awards were entirely fair as a matter of whether company's non-employee director compensation practices were in line with those of the company's "peer" group. The defendants claimed that the company's peer group for director compensation purposes was the 14 companies identified as its peers in its SEC filings. The plaintiff, on the other hand, claimed that the appropriate peer group should be limited to only five of the company's 14 selected peers, contending that the other nine were not comparable to the company in light of their higher market capitalizations, revenues, and other income metrics. The court held that the plaintiff "raised meaningful questions" with respect to the appropriate composition of the appropriate peer group that could not resolved at the motion to dismiss stage.

What To Do Now:

- ***Monitor, and Provide Regular Board Updates on, the Status of the SEC's Remaining Dodd-Frank Compensation/Governance Rulemaking Projects.*** Companies should keep track of, and update their boards of directors on, the status of the three remaining Dodd-Frank compensation/governance rules, and continue to evaluate the potential impact of these rules while awaiting further SEC action. We expect final rules on the remaining three to be adopted in, but not effective for, 2016.
- ***CEO Pay Ratio Disclosure.*** Now that the new CEO pay ratio rule is final, it is advisable to begin preparing during 2016 even though disclosure will not be required until 2018. Companies with large, multi-national workforces and multiple payroll systems can expect compliance with the new rule to be particularly challenging for the first year. Some of the first things to do are understanding the new rule, assembling a multi-disciplinary team, and performing a company assessment of the compliance effort that will be required. For example, sources of data must be identified, payroll systems may need to be evaluated, data privacy laws researched, and external consultants may need to be engaged to assist in developing and validating statistical sampling techniques. Beyond compliance, a company must develop a communication strategy (internal and external) to manage the effects of these upcoming disclosures in anticipation of the expected extensive media attention and employee-relations impact.
- ***Clawback Policies***. The clawback rule, when adopted by the SEC and then NYSE and Nasdaq (through amendments to their respective listing standards), will become an integral, substantive factor in a company's executive compensation program. As proposed, there is very limited discretion with respect to when a company could choose not to seek recovery pursuant to a clawback policy. Consequently, companies must undertake a complete review of their programs (potentially even legacy programs) with a view toward determining which arrangements will fall within the scope of the clawback rule. A company will need to prepare or revise its policy and determine how to enforce and implement it, particularly for existing compensation arrangements. These tasks cannot be done overnight and will require multiple disciplines (e.g., tax, accounting,[123] HR, employment litigators) and guidance and oversight from the compensation committee. Companies also will need to consider potential unintended consequences of the rule. Examples include: executives negotiating to prefer categories of compensation that are exempt from a clawback; and conflicts of interest in determining whether an accounting restatement is necessary (e.g., executives might adopt behaviors that are resistant to a restatement). Obviously, the compensation committee will need to be briefed fully on these matters in order for them to oversee the process of designing and implementing an appropriate clawback policy that complies with the rule, when adopted. As part of its oversight, it may be helpful for the compensation committee to work with, or at least to obtain the input of, the audit committee.
- ***Pay-for-Performance Disclosure.*** Over the past several years, many larger companies have been sharpening and otherwise improving the quality of their executive pay disclosures through the use of executive summaries, tables, charts and/or graphs designed to illustrate the relationship between corporate performance, however

measured by the particular company for purposes of compensation decision-making, and the disclosed compensation of the CEO and other named executive officers. Such "additional" disclosures are acceptable to the SEC Staff, so long as they do not obscure or conflict with the mandated tabular and narrative disclosures. For more detail on what investors think about the quality of executive compensation disclosure in proxy statements, we suggest that you take a look at the results of a Stanford Graduate School of Business survey of institutional investors entitled *2015 Investor Survey: Deconstructing Proxy Statements – What Matters to Investors.*[124] Companies should familiarize themselves with the proposed rules and consider preparing a mock-up of disclosure under them. However, we do not believe the rule, as proposed, will dramatically influence compensation programs.

- ***Hedging Policy Disclosure.*** The hedging policy disclosure rule proposed by the SEC will require almost all companies to re-evaluate or adopt "hedging polices." While the overwhelming majority of large capitalization companies already have hedging policies, a majority of smaller capitalization companies do not. Most existing policies only address hedging by executive officers and directors. However, the proposed rule goes further, covering all employees. What should the company's policy be for this broader category? The SEC proposal has also ignited a discussion of exactly what is meant by the term "hedging," which is not defined in the proposed rule. While we expect the SEC to permit a principled-based approach, a company may need to provide details in its policy (the proposal calls for disclosure of the categories of hedging transactions a company permits and those it prohibits unless it either permits all, or does not permit any). It is important to remember that hedging by company insiders (an executive or director) is considered by ISS to signal a governance failure relating to risk oversight, and that any amount of hedging by a company insider (an executive or director) will be considered a problematic practice warranting a negative vote recommendation against appropriate board members. We suggest that a company present the "hedging policy" issue to the board's compensation and governance committees in a holistic manner, together with a review of the company's insider trading policy, pledging policy, share ownership policy, etc.
- ***Non-Employee Director Compensation.*** Companies and their counsel must recognize that, in order for outside directors to receive the protection of the business judgment rule's deferential standard of review, stockholder approved equity plans require specific and meaningful limits on the value of equity that non-employee directors receive under the plans, such as an annual per-person limit on the number or dollar value of shares that may be granted to a non-employee director. Both the *Calma* and *Seinfeld* cases discussed above cited *In re 3COM Corp. Shareholders Litigation,*[125] a decision holding that the option plan at issue had "sufficiently defined terms" and thus that directors were entitled to the benefit of the business judgment rule. Company counsel should review *Seinfeld*, *Calma* and *3COM*, monitor developments in this area and determine how to balance the desire for flexibility with litigation certainty. Companies may also want to consider meaningful shareholder approved limits on total compensation -- both equity and cash. Companies should also regularly review their director compensation programs against those of an appropriate peer group, recognizing that the selection of the peer group itself may be subject to judicial "second-guessing" under the entire fairness standard.

10. Developments in Litigation-Related Bylaws: Exclusive Forum and Fee-Shifting

On June 24, 2015, Delaware enacted several amendments to the Delaware General Corporation Law (the DGCL), effective August 1, 2015. The amendments clarify Delaware's position on the adoption of exclusive forum and fee-shifting provisions by companies incorporated in that state. For additional background on these developments, please see our Alert available here.

Exclusive Forum Provisions

Exclusive forum, or forum selection, provisions generally provide that derivative and other litigation involving a corporation's internal affairs may be brought only in the courts of one state – typically the state of incorporation, which, for many large companies, is Delaware. During the last few years, the boards of an increasing number of companies have adopted forum selection bylaws and companies undertaking IPOs have included exclusive forum provisions in their organizational documents. As stated in the leading Delaware decision on the subject, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*,[126] "forum selection bylaws are designed to bring order to what the boards . . . perceive to be a chaotic filing of duplicative and inefficient derivative and corporate suits against the directors and the corporations."[127] As noted on December 10, 2015 by the Supreme Court of Oregon in a decision reversing a trial court decision declining to honor such a provision: "Not only does the forum-selection bylaw keep TriQuint's assets from being diluted by a multiplicity of suits in various states, but Delaware, the state in which TriQuint is incorporated, is the 'most obviously reasonable forum [for internal affairs cases because those cases] * * * will be decided in the courts whose Supreme Court has the authoritative final say as to what the governing law means.'"[128]

The DGCL amendments include new Section 115, which authorizes the charter or bylaws of a Delaware corporation to include a forum selection clause requiring lawsuits asserting "any or all internal corporate claims" to be "brought solely and exclusively in any or all of the courts in [Delaware]." Section 115 defines "internal corporate claims" as those "based on a violation of a duty by a current or former director or officer or stockholder in such capacity," which would include most derivative and other corporate governance claims, as well as "other claims as to which the DGCL confers jurisdiction upon the Delaware Court of Chancery."

While Section 115 allows Delaware corporations to select Delaware as a forum, it does not preclude corporations from selecting another forum in addition to Delaware. However, Section 115 *prohibits* Delaware corporations from selecting a non-Delaware forum as the exclusive forum.

Although Delaware legally entitles corporations to adopt forum selection clauses, such clauses are not mandated and may still be subject to challenges if adopted. New Section 115 does not shield a corporation from judicial scrutiny of claims that a forum selection clause operates or was adopted inequitably, but such challenges have for the most part failed.[129] Where possible, however, companies that adopt such provisions are best protected by doing so on the proverbial "clear day," when no specific shareholder litigation is on the horizon.

In evaluating the pros and cons of board adoption of an exclusive forum bylaw amendment without a shareholder vote, companies also should be aware of the positions taken by the major proxy advisory firms. ISS will evaluate a board's unilateral amendment of company bylaws to include an exclusive venue/forum provision on a case-by-case basis to determine whether the amendment will be "materially adverse to shareholder rights." If the answer is yes, ISS will recommend a vote against the board.[130] That said, ISS generally will not consider these amendments to be "materially adverse" if they limit litigation to the company's state of incorporation. With respect to bylaw and charter forum selection provisions adopted by pre-IPO companies, where controlling shareholders typically have the power to shape the post-IPO governance structure of such companies through their organizational documents, ISS will consider such factors as the proximity of the planned IPO and the continuity of the board of directors in determining whether the rights of post-IPO shareholders may have been diminished.

Glass Lewis recently relaxed its policy for pre-IPO companies.[131] Under its revised policy, if a company adopts an exclusive forum bylaw provision pre-IPO, Glass Lewis will no longer automatically make a negative recommendation. Instead, Glass Lewis will weigh the presence of an exclusive forum provision in a newly-public company's bylaws in light of other provisions that may limit shareholder rights, such as supermajority vote requirements, a classified board, or a fee-shifting bylaw. Glass Lewis has not changed its policy to automatically recommend against the nominating and governance committee chair (or the entire committee) when a company adopts an exclusive forum provision without shareholder approval outside of the spin-off, merger or IPO context.

Fee-Shifting or "Loser Pays" Provisions

Fee shifting bylaws – sometimes called "loser-pays" provisions – have attracted increased attention since the Delaware Supreme Court's May 2013 ruling in *ATP Tour, Inc. v. Deutscher Tennis Bund*,[132] upholding the decision of the board of a Delaware non-stock membership corporation to adopt a bylaw shifting the burden of the defense's legal fees and costs to unsuccessful plaintiffs in intra-corporate litigation. While some commentators concluded that the Delaware Supreme Court's language was equally applicable to public stock corporations, newly added Section

102(f) of the DGCL now precludes the adoption of fee-shifting provisions in a corporation's charter or bylaws, stating that a "certificate of incorporation may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim." Section 109(b) contains the same language with respect to a corporation's bylaws.[133] These prohibitions on fee-shifting provisions in a charter or a bylaw, however, do not "prevent the application of such provisions pursuant to a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced."

Where fee-shifting bylaws are not prohibited by state law, ISS' and Glass Lewis' policies on board adoption of such bylaws without stockholder approval are unchanged since last year's updates. ISS' voting policy presumes that such provisions, if adopted without stockholder approval, are "materially adverse" to shareholders and will recommend a vote against the entire board. Even if management seeks a vote on a fee-shifting bylaw, ISS generally will recommend a negative vote if the bylaw mandates that plaintiff pays defense fees and costs unless 100% successful in litigation.[134] Glass Lewis states that it "may" recommend a vote against the chair of the board's governance committee, or the entire committee, if the board acts without stockholder approval to adopt bylaws that require shareholder-plaintiffs to pay the company's legal expenses in the absence of a court victory, or to arbitrate claims against the company in a non-judicial forum. Should the company submit the proposed adoption of such a fee-shifting bylaw or charter provision to a shareholder vote, Glass Lewis generally will urge shareholders to vote "against" the provision.[135]

What to Do Now:

- ***Deliberate Carefully Before Adoption***. Board adoption of an exclusive forum provision should follow careful deliberation, as reflected in board minutes, concerning the potential burdens on the corporation of litigating in multiple jurisdictions, and how such a provision will further the best interests of the company and its shareholders. This is particularly important in situations where the provision is adopted in reasonably close temporal proximity to the board's approval of a specific transaction or other corporate action likely to result in litigation. Care also should be taken to provide the board with authority to waive the exclusive forum requirement in situations where directors conclude that litigation in a different forum (perhaps a federal district court where related federal securities law litigation is pending) would serve the best interests of the corporation and its stockholders. Fee-shifting bylaws are prohibited in Delaware, and should be considered and adopted only with great caution and care by corporations organized outside of Delaware.
- ***Adopters Should Prepare to Engage and to Provide Enhanced Disclosure***. Companies whose boards have adopted exclusive forum bylaws, or any other bylaw that is regarded as materially diminishing shareholder rights, should be prepared to engage with the proxy advisory firms and investors. We recommend that companies also explain in their proxy statements how the adoption of such a provision will benefit the company and its shareholders – i.e., by reducing costs to the particular corporation and its shareholders imposed by multi-forum litigation. A company may also wish to contact its analyst at ISS in anticipation of or shortly after filing the proxy statement to talk through this and any other issues that could cause ISS to issue a negative vote recommendation. Glass Lewis typically will not engage in such discussions with companies.

* * *

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:

Howard B. Dicker	Bio Page	howard.dicker@weil.com	+1 212 310 8858
Catherine T. Dixon	Bio Page	cathy.dixon@weil.com	+1 202 682 7147
Lyuba Goltser	Bio Page	lyuba.goltser@weil.com	+1 212 310 8048
P.J. Himelfarb	Bio Page	pj.himelfarb@weil.com	+1 214 746 7811
Ellen J. Odoner	Bio Page	ellen.odoner@weil.com	+1 212 310 8438
Adé K. Heyliger	Bio Page	ade.heyliger@weil.com	+1 202 682 7095
Kaitlin Descovich	Bio Page	kaitlin.descovich@weil.com	+1 212 310 8103
Joanna Jia	Bio Page	joanna.jia@weil.com	+1 212 310 8089
Megan Pendleton	Bio Page	megan.pendleton@weil.com	+1 212 310 8874
Reid Powell	Bio Page	reid.powell@weil.com	+1 212 310 8831

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ENDNOTES

[1] In a wide-ranging speech to the attendees of the Stanford University Directors' College in mid-2014, SEC Chair White urged directors to undertake an "open and constructive dialogue" with institutional and retail shareholders alike, and to pay special attention to shareholder proposals received by their companies. Specifically, she advised directors to "[a]sk your management team about them [shareholder proposals] and about the proposals that other companies are receiving that could be relevant to your company …. [and] [l]ook at the voting results at shareholder meetings – the percentage of votes for a shareholder-supported resolution or against a management-supported resolution are important, irrespective of whether the resolution is approved, or not." *See* Remarks of SEC Chair Mary Jo White before the Stanford University Directors' College, *"A Few Things Directors Should Know About the SEC"* (Stanford, California, June 23, 2014), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370542148863. Again, in March 2015, the Chair noted that "[i]ncreasingly, companies are talking to their shareholders, including the so-called activist[s] …" which, in her view, "is generally a very good thing. Increased engagement is important and a growing necessity for many companies today." Remarks of Mary Jo White, SEC Chair, to the Tulane University Law School 27th Annual Corporate Law Institute, *"A Few Observations on Shareholders in 2015"* (New Orleans, Louisiana, March 19, 2015), *available at* http://www.sec.gov/news/speech/observations-on-shareholders-2015.html.

[2] *See*, e.g., Laurence Fink, Letter, April 14, 2015, *available at* www.businessinsider.com/larry-fink-letter-to-ceos-2015-4. *See also* BlackRock, *Global Corporate Governance and Engagement Principles* (2014), *available at* http://www.blackrock.com/corporate/en-us/literature/fact-sheet/blk-responsible-investment-1engprinciples-global-122011.pdf.

[3] *See e.g.*, PepsiCo Proxy Statement on Schedule 14A filed with the SEC on Mar. 25, 2015, at 17, *available at* https://www.pepsico.com/docs/album/default-document-library/pepsico-2015-proxy-statement.pdf; Prudential, *Our Approach to Shareholder Engagement*, *available at* http://corporate.prudential.com/view/page/corp/31846.

[4] *See* Tempur Sealy International, Inc., Stockholder Liaison Committee Charter (Adopted June 17, 2015), *available at* http://files.shareholder.com/downloads/TPX/178663688x0x839669/0A592861-C4EC-44E1-94DC-2A8530453652/TPX_Stockholder_Liaison_Committee_Charter_-vFinal.pdf.

[5] *See* Council of Institutional Investors, *Best Disclosure: Company Shareholder Engagement* (Dec. 2015), *available at* http://www.cii.org/files/about_us/press_releases/2015/12_2_15_best_disclosure_shareholder_engagement.pdf.

[6] *See* Ricardo Duran, *Majority Voting Standard Gains Ground, CalSTRS Corporate Governance Annual Report Shows*, (Dec. 5, 2014), *available at* http://www.calstrs.com/news-release/majority-voting-standard-gains-ground-calstrs-corporate-governance-annual-report-shows.

[7] *See* Text of Letter from F. William McNabb III, Vanguard's Chair and CEO, dated February 27, 2015, *available at* https://about.vanguard.com/vanguard-proxy-voting/CEO_Letter_03_02_ext.pdf.

[8] *See* Vanguard, *Our proxy voting and engagement efforts: An update* (Dec. 2015), *available at* https://about.vanguard.com/vanguard-proxy-voting/update-on-voting/index.html.

[9] *See* Division of Corporation Finance Compliance and Disclosure Interpretation, Regulation FD, No. 101.11 (added July 2010), *available at* https://www.sec.gov/divisions/corpfin/guidance/regfd-interp.htm.

[10] *See* Catherine Bromilow, Mary Ann Cloyd, Catherine Dixon, P.J. Himelfarb and John Morrow, *Director Dialogue with Shareholders*, The Conference Board (May/June 2014) (Director Dialogue, The Corporate Board), *available at* http://www.weil.com/~/media/files/pdfs/directordialoguewithshareholders.pdf.

[11] *See* Director Dialogue, The Corporate Board, *supra* note 10.

[12] *See* Regulation S-T, Compliance & Disclosure Interpretations, Question No. 118.01 (Jan. 23, 2015), *available at* http://www.sec.gov/divisions/corpfin/guidance/regs-tinterp.htm.

[13] *See* SEC Chair Mary Jo White, Keynote Address at the 2015 AICPA National Conference on Current SEC and PCAOB Developments, *Maintaining High-Quality, Reliable Financial Reporting: A Shared and Weighty Responsibility* (Washington, D.C., Dec. 9, 2015) (White, AICPA Keynote Address), *available at* http://www.sec.gov/news/speech/keynote-2015-aicpa-white.html.

[14] *See* Announcement of expansion of the New York City Comptroller's Boardroom Accountability Project, Press Release (Jan. 11, 2016), *available at* http://comptroller.nyc.gov/newsroom/comptroller-stringer-new-york-city-funds-announce-expansion-of-boardroom-accountability-project/.

[15] *See* David Benoit, "Activism's Long Road From Corporate Raiding to a Banner Year," *The Wall Street Journal* (Dec. 27, 2015), *available at* http://www.wsj.com/articles/activisms-long-road-from-corporate-raiding-to-banner-year-1451070910.

[16] *See* Activist Insight, *Activist Investing – An Annual Review of Trends in Shareholder Activism*, at 8 (Mar. 2015).

[17] *See* T. Kim, "Activists win again with Yum. Which stock is next?," *CNBC* (Oct. 20, 2015), *available at* http://www.cnbc.com/2015/10/20/activists-win-again-with-yum-which-stock-is-next.html.

[18] *See* M. Flaherty and S. Cruise, "Shareholder activism grows overseas as US market gets crowded," *Reuters* (Aug. 31, 2015), *available at* http://www.reuters.com/article/funds-activists-overseas-idUSL4N11342X20150831.

[19] *See* D. Benoit and K. Grind, "Activist Investors' Secret Ally: Big Mutual Funds," *The Wall Street Journal* (Aug. 9, 2015), *available at* http://www.wsj.com/articles/activist-investors-secret-ally-big-mutual-funds-1439173910.

[20] *See* FTI Consulting and Activist Insight, *The Shareholder Activists' View 2015 (Part II of II)* (Nov. 2015).

[21] *See* Trian Partners Press Release, "Trian Discloses $2.5 billion stake in GE," (Oct. 5, 2015), *available at* https://www.trianpartners.com/content/uploads/2015/10/Trian-GE-Press-Release.pdf.

[22] *See* Trian Partners, "Transformation Underway…But Nobody Cares," *White Paper* (Oct. 5, 2015), *available at* http://trianwhitepapers.com/wp-content/uploads/2015/10/Trian-GE-WP-Presentation.pdf. "Management has taken bold steps to reshape the company. We believe management must be given credit for the transformation that is now underway."

[23] *See* Andrew Ross Sorkin, "BlackRock's Chief, Laurence Fink, Urges Other C.E.O.s to Stop Being So Nice to Investors," *The New York Times* (Apr. 13, 2015) *available at* http://www.nytimes.com/2015/04/14/business/dealbook/blackrocks-chief-laurence-fink-urges-other-ceos-to-stop-being-so-nice-to-investors.html?_r=0.

[24] *See* Larry Fink, Text of letter encouraging a focus on long-term growth strategies, *The Wall Street Journal*, at 5 (Mar. 21, 2014), *available at* http://online.wsj.com/public/resources/documents/LDF_letter_to_corporates_2014_public.pdf.

[25] While a proponent putting forth a minority slate of candidates under the "short slate" rule (Exchange Act Rule 14a-4(d)(4)) may "round out" its slate with company nominees, it is the proponent who chooses which management nominees shareholders using the proponent's proxy card must support. Further, while current proxy rules permit management and proponent nominees to consent to appear on each other's proxy cards, such consent is rarely, if ever, given.

[26] See the "Request for rulemaking to amend Section 14 of the Securities Exchange Act of 1934 to facilitate the use of universal proxy cards in contested elections," submitted to the SEC by Glenn Davis, Director of Research, Council of Institutional Investors, and available at http://www.sec.gov/rules/petitions/2014/petn4-672.pdf.

[27] *See* Securities and Exchange Commission, "SEC Announces Agenda, Panelists for Proxy Voting Roundtable," (Feb. 12, 2015), *available at* http://www.sec.gov/news/pressrelease/2015-32.html.

[28] See "File No. 4-681, Proxy Voting Roundtable – Request for Comment," submitted by CalPERS and available at https://www.calpers.ca.gov/docs/2015-04-06-universal-proxy-access.pdf.

[29] *See* "Building Meaningful Communication and Engagement with Shareholders," speech delivered by Chair White at the Society of Corporate Secretaries and Governance Professionals 69th National Conference in Chicago, Illinois (June 25, 2015) (Chair White Society Speech), *available at* http://www.sec.gov/news/speech/building-meaningful-communication-and-engagement-with-shareholde.html.

[30] *See* Chair White Society Speech, *supra* note 29.

[31] *See* Institutional Shareholder Services, "Voting Analytics, Proposals" (for meetings between January 1, 2015 and December 31, 2015). These numbers does not reflect management-only proposals, proposals that were not voted at a meeting, proposals that were omitted because the shareholder proponents were ineligible under Rule 14a-8(b), or voluntarily adopted proxy access bylaws.

[32] *See, e.g.*, Joann Lublin, "Investors Gain Greater Clout Over Boards," *The Wall Street Journal* (Jan. 11, 2016), *available at* http://www.wsj.com/articles/investors-gain-greater-clout-over-boards-1452470402.

[33] *See, e.g.*, 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/.

[34] *See* T. Rowe Price Group, Amended and Restated By-Laws (Dec. 10, 2015), *available at* https://www.sec.gov/Archives/edgar/data/1113169/000111316915000029/trow-amendedandrestatedbyl.htm.

[35] *See, e.g.*, James McRitchie, Avoiding Proxy Access Lite: QUALCOMM Proposal (Sept. 23, 2015), available at http://www.corpgov.net/2015/09/avoiding-proxy-access-lite-qualcomm-proposal/.

[36] See Office of the Comptroller of New York City, *Boardroom Accountability Project*, available at http://comptroller.nyc.gov/boardroomaccountability/bap-proxy-access-proposal/ for the companies targeted in 2015 and in 2016 and for an example of the NYC Comptroller's proxy access proposal.

[37] *See, e.g.*, Dun & Bradstreet Corporation, SEC No-Action Letter (filed Dec. 29, 2015); General Dynamics Corporation, SEC No-Action Letter (filed Dec. 22, 2015); Baxter International Inc., SEC No-Action Letter (filed Dec. 21, 2015); PPG Industries, Inc., SEC No-Action Letter (filed 12/18/2015); Kimberly-Clark Corp., SEC No-Action Letter (filed Dec. 18, 2015); The Coca-Cola Company, SEC No-Action Letter (filed Dec. 18, 2015).

[38] *See* General Electric Company, SEC No-Action Letter (Mar. 3, 2015) (GE No Action Letter), *available at* https://www.sec.gov/Archives/edgar/vprr/15/9999999997-15-002921.

[39] *See* Patrick McGurn and Edward Kamonjoh, *ISS: Preliminary 2015 Post-Season Review*, at 1, 10 (July 30, 2015) (ISS Post-Season Review), *available at* http://www.issgovernance.com/file/publications/1_preliminary-2015-proxy-season-review-united-states.pdf.

[40] Staff Legal Bulletin No. 14H(CF) is available at https://www.sec.gov/interps/legal/cfslb14h.htm.

[41] 792 F.3d (3rd Cir. 2015).

[42] *See, e.g.*, Minerals Technologies, Inc., SEC No-Action Letter (Jan. 13, 2016); ITT Corporation, SEC No-Action Letter (Jan. 12, 2016); PPG Industries, Inc., SEC No-Action Letter (Jan. 12, 2016); Praxair, Inc., SEC No-Action Letter (Jan. 12, 2016); Reynolds American Inc., SEC No-Action Letter (Jan. 12, 2016).

[43] *See* GE No Action Letter, *supra* note 38.

[44] Institutional Shareholder Services, U.S. Proxy Voting Policies and Procedures (Excluding Compensation-Related), Frequently Asked Questions (Dec. 18, 2015) (ISS FAQs, December 2015), *available at* http://www.issgovernance.com/file/policy/us-policies-and-procedures-faq-dec-2015.pdf.

[45] Institutional Shareholder Services, U.S. Executive Compensation Policies, Frequently Asked Questions (Dec. 18, 2015), *available at* http://www.issgovernance.com/file/policy/us-executive-compensation-policies-faq-dec-2015.pdf.

[46] Institutional Shareholder Services, U.S. Equity Compensation Plans, Frequently Asked Questions (Dec. 18, 2015), *available at* http://www.issgovernance.com/file/policy/1_us-equity-compensation-plans-faq-dec-2015.pdf.

[47] *See* Remarks of F. William McNabb III, Vanguard Chairman and CEO, to the University of Delaware's Weinberg Center for Corporate Governance,*" Getting to know you: Sharing Practical governance viewpoints"* (Wilmington, Del., Oct. 30, 2014), *available at* http://www.lerner.udel.edu/sites/default/files/WCCG/PDFs/events/Transcript%20_UDel%20Corp%20Governance%2010%2030%202014_%20FINAL%20for%20UD%20website.pdf.

[48] In the United Kingdom, a presumption exists that directors who have served for more than nine years are not independent. In France, directors may not be deemed independent after the end of a term in which they reach 12 years of service on the board. The French rule creates an effective term limit, as longer-serving directors are not eligible for audit committee membership or other board roles left to independent directors.

[49] *See* Shirley Westcott, *2015 Proxy Season Preview*, Alliance Advisors (April 2015), *available at* http://allianceadvisorsllc.com/newsletters/2015-proxy-season-preview-apr-2015.

[50] *See* Amy Borrus, "More on CII's New Policies on Universal Proxy and Board Tenure," *CII Governance Alert*, *available at* http://www.cii.org/article_content.asp?article=208.

[51] *See* BlackRock, Proxy Voting Guidelines for U.S. securities (February 2015) (BlackRock Proxy Voting Guidelines), at 3, *available at* http://www.blackrock.com/corporate/en-us/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf.

[52] *See* BlackRock Proxy Voting Guidelines, *supra* note 51, at 3.

[53] *See* Council of Institutional Investors, Governance Alert (Dec. 17, 2015) (CII Governance Alert), available at http://campaign.r20.constantcontact.com/render?ca=49feac6c-537b-41c9-84ef-383408d8a6fd&c=0386e180-9a71-11e3-ac5e-drae529a8250&ch=04ce7cb0-9a71-11e3-ad42-drae529a8250.

[54] State Street Global Advisors' 2014 revised voting policy on director tenure provides specific guidance relating to the number of years of board service deemed to be excessive, and board succession planning. In general, State Street uses a formula based on a comparison with the market standard, defined as the average director term for a company's peers. Companies with classified or staggered boards will be held to a "higher standard," since the inability of shareholders to vote on the election of all directors on an annual basis may further limit the opportunities for board refreshment. *See* Rakhi Kumar, State Street Global Advisors, *Addressing the Need for Board Refreshment and Director Succession in Investee Companies* (Feb. 2015), *available at* http://ssga.co.nz/library/povw/733339_Addressing_the_Need_for_Board_Refreshment...in_Investee_Companies_1_CCRI1399281503.pdf.

[55] *See* State Street Global Advisors 2014 Annual Stewardship Report, at 18 (2014 Year End), *available at* https://www.ssga.com/investment-topics/environmental-social-governance/2015/2014-Annual-Stewardship-Report.pdf.

[56] *See* Institutional Shareholder Services, *2016 U.S. Summary Proxy Voting Guidelines*, at 19 (updated Dec. 18, 2015) (ISS Summary Voting Guidelines), *available at* http://www.issgovernance.com/file/policy/2016-us-summary-voting-guidelines-dec-2015.pdf.

[57] *See* Glass Lewis, *2015 Proxy Season Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice*, at 21, *available at* http://www.glasslewis.com/assets/uploads/2013/12/2015_GUIDELINES_United_States.pdf.

[58] *See* General Electric Company's Corporate Governance Principles, *available at* http://www.ge.com/sites/default/files/GE_governance_principles.pdf.

[59] *See* Theo Francis and Joann S. Lublin, "Boards Get More Independent, but Ties Endure," *The Wall Street Journal* (Jan. 20, 2016), *available at* http://www.wsj.com/articles/boards-get-more-independent-but-ties-endure-1453234607?mod=djemCFO_h.

[60] *See* Julie Hembrock Daum, Spencer Stuart NYSE Corporate Governance Guide, "Building a balanced board," *available at* https://www.spencerstuart.com/research-and-insight/building-a-balanced-board.

[61] 124 A.3d 1017 (Del. 2015).

[62] 845 A.2d 1040 (Del. 2004).

[63] *See* Sanchez Energy Corporation, Schedule 14A (filed Apr. 25, 2014), at 11, *available at* http://www.sec.gov/Archives/edgar/data/1528837/000104746914004138/a2219790zdef14a.htm.

[64] *See* Remarks of SEC Chair Mary Jo White, Keynote Remarks at the Women's Forum of New York Breakfast of Corporate Champions, "The Pursuit of Gender Parity in the American Boardroom" (Nov. 19, 2015), *available at* http://www.sec.gov/news/speech/gender-parity-in-the-american-boardroom.html.

[65] *See* 2020 Women on Boards, "Steady Gains Made by Women on Fortune 1000 Company Boards" (Nov. 19, 2015), *available at* https://www.2020wob.com/about/press/release/2020-women-boards-releases-2014-gender-diversity-index; *see also* Catalyst, "Women in S&P 500 Companies" (2015), *available at* http://www.catalyst.org/knowledge/women-sp-500-companies.

[66] *See* Government Accountability Office, "Corporate Boards: Strategies to Address Representation of Women to Include Federal Disclosure Requirements," GAO-16-39 (Dec. 2015), *available at* http://www.gao.gov/assets/680/674008.pdf.

[67] *See* Thirty Percent Coalition: Gender Diverse Boardrooms, "Increase the Pace of Gender Diversity in the Boardroom," *available at* http://www.30percentcoalition.org/.

[68] *See* Proposal 6 in C.F. Industries Holdings, Inc.'s Proxy Statement, filed with the SEC on Apr. 3, 2014, at 53, *available at* https://www.sec.gov/Archives/edgar/data/1324404/000104746913003875/a2213922zdef14a.htm.

[69] Kirsten Grind and Joann S. Lublin, "Vanguard and Blackrock Plan to Get More Assertive with Their Investments," *The Wall Street Journal* (Mar. 4, 2015), *available at* http://www.wsj.com/articles/vanguard-and-blackrock-plan-to-get-more-assertive-with-their-investments-1425445200.

[70] *See* Letter to Elizabeth M. Murphy, Secretary, Securities Exchange Commission, *Petition for Amendment of Proxy Rule Regarding Board Nominee Disclosure*, from certain pension funds, dated Mar. 31, 2015, *available at* https://www.sec.gov/rules/petitions/2015/petn4-682.pdf.

[71] *See* CII Governance Alert, *supra* note 53.

[72] *See* Cybersecurity Disclosure Act of 2015, S. 2410, 114th Cong. (introduced on Dec. 17, 2015), *available at* https://www.congress.gov/bill/114th-congress/senate-bill/2410/text.

[73] Letter to Keith F. Huggins, Director, Division of Corporation Finance, Securities and Exchange Commission, from Glenn Davis, CII Director of Research, dated June 12, 2015, available at http://www.sec.gov/rules/petitions/2015/petn4-686.pdf.

[74] Letter to Brent J. Fields, Secretary, Securities and Exchange Commission, from Edward J. Durkin, Director, Corporate Affairs Department, United Brotherhood of Carpenters, dated Mar. 10, 2015, available at http://www.sec.gov/rules/petitions/2015/petn4-630-supp.pdf.

[75] *See* The Conference Board, *The Business Case for Corporate Investment in ESG Practices* (July 2015) (Conference Board ESG Business Case Report), *available at* https://www.conference-board.org/publications/publicationdetail.cfm?publicationid=2996.

[76] The rules regarding conflict minerals reporting also require specialized reporting in connection with the impact of supply chains on particular issues. See Weil's alert "*New SEC Staff Guidance on Dodd-Frank Conflict Minerals and Resource Extraction Payment Disclosure Obligations*," *available at* http://www.weil.com/~/media/files/pdfs/Weil_Alert_Corp_Gov_SEC_June10_2013.pdf, for various guidance related to conflict minerals reporting requirements. More generally, the SEC requires MD&A and risk factor disclosure, when material, of risks, trends and uncertainties relating to the impact of climate change and other environmental factors on the company's financial condition and operating results.

See Commission Guidance Regarding Disclosure Related to Climate Change, SEC Rel. No. 33-9106 (Feb. 2, 2010), *available at* http://www.sec.gov/rules/interp/2010/33-9106.pdf.

[77] *See* PwC Investor Resource Institute, *Sustainability Goes Mainstream: Insights into Investor Views* (May 2014), available at https://www.pwc.com/us/en/pwc-investor-resource-institute/publications/assets/pwc-sustainability-goes-mainstream-investor-views.pdf (PwC Sustainability Survey); *see also* Veena Ramani, *View from the Top: How Corporate Boards can Engage on Sustainability and Performance*, Ceres Inc. (October 2015), *available at* https://www.ceres.org/view-from-the-top.

[78] *See* Sustainable Investments Institute, *Board Oversight of Sustainability Issues: A Study of the S&P 500* (Mar. 31, 2014), *available at* http://irrcinstitute.org/wp-content/uploads/2015/09/final_2014_si2_irrci_report_on_board_oversight_of_sustainability_issues_public1.pdf.

[79] *See* BlackRock, 21st Century Engagement: Investor Strategies for ESG Considerations into Corporate Interactions, *available at* https://www.blackrock.com/corporate/en-us/about-us/responsible-investment/responsible-investment-reports; *see also* BlackRock, Ceres Launch Investor Guide on US Corporate Engagement (May 28, 2015), available at http://www.ceres.org/press/press-releases/blackrock-ceres-launch-investor-guide-on-us-corporate-engagement. The guide provides tactics and case studies from 37 engagements experts in six countries. In October 2015, BlackRock launched its BlackRock Impact US Equity Fund, a mutual fund for investors that aims to invest in measurable social and environmental outcomes.

[80] *See* CalSTRS, Sustainability Risk Management, *available at* http://www.calstrs.com/sustainability-risk-management-0.

[81] *See* Russell Reynolds Associates, *Global and Regional Trends in Corporate Governance for 2016* (Dec. 10, 2015), at 3, *available at* http://www.russellreynolds.com/insights/thoughtleadership/Documents/Global%20and%20Regional%20Trends%20for%20%20Corporate%20Governance%20in%202016.pdf.

[82] *See* ISS Post-Season Review, *supra* note 39.

[83] Data summarized from ISS Corporate Solutions Voting Analytics (Nov. 18, 2015).

[84] *See* ISS Summary Voting Guidelines, *supra* note 56.

[85] *See* Glass Lewis, *Proxy Paper™ Guidelines: 2016 Proxy Season – An Overview of the Glass Lewis Approach to Proxy Advice, United States* (Nov. 2016) (Glass Lewis 2016 Proxy Season Voting Guidelines), *available at* http://www.glasslewis.com/assets/uploads/2015/11/GUIDELINES_United_States_20161.pdf.

[86] *See, e.g.*, GM Sustainability Report, *available at* http://www.gmsustainability.com/; Sustainability: The Coca-Cola Company, *available at* http://www.coca-colacompany.com/sustainability/; Shell Sustainability Report, *available at* http://www.shell.com/global/environment-society/reporting/s-reports.html; GE Sustainability, *available at* http://www.gesustainability.com/; Walmart Global Responsibility Report, *available at* http://corporate.walmart.com/global-responsibility/global-responsibility-report.

[87] *See* Emily Chasan, "Investors Want More from Sustainability Reporting, Says Former SEC Head," *The Wall Street Journal* (Nov. 12, 2015) (WSJ Sustainability Reporting), *available at* http://blogs.wsj.com/cfo/2015/11/12/investors-want-more-from-sustainability-reporting-says-former-sec-head/.

[88] *See* Ceres, SEC Sustainability Disclosure Search Tool, *available at* http://www.ceres.org/resources/tools/sec-sustainability-disclosure.

[89] *See* SASB Issues Provisional Sustainability Accounting Standards for Renewable Resources & Alternative Energy Sector (Dec. 16, 2015), *available at* http://www.prnewswire.com/news-releases/sasb-issues-provisional-sustainability-accounting-standards-for-renewable-resources--alternative-energy-sector-300193407.html.

[90] *See* FSB to establish Task Force on Climate-related Financial Disclosures (Dec. 4. 2015), *available at* http://www.fsb.org/wp-content/uploads/Climate-change-task-force-press-release.pdf.

[91] *See* Commission Guidance Regarding Disclosure Related to Climate Change, 17 CFR Parts 211, 231 and 241 (SEC Climate Change Guidance), *available at* https://www.sec.gov/rules/interp/2010/33-9106.pdf.

[92] For a comprehensive review of disclosure efforts by governments and stock exchanges, see the table on Global CSR Disclosure provided by the Initiative for Responsible Global Investment of The Hauser Institute for Civil Society at the Center for Public Leadership at the Harvard Kennedy School, which is available at http://hausercenter.org/iri/about/global-csr-disclosure-requirements.

[93] *See* Directive 2014/95/EU, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095; *see also* European Commission Statement, *Improving Corporate Governance: Europe's Largest Companies Will Have to Be More Transparent About How They Operate* (Apr. 15, 2014), *available at* http://europa.eu/rapid/press-release_STATEMENT-14-124_en.htm.

[94] *See* SEC Climate Change Guidance, *supra* note 91.

[95] *See* Clifford Krauss, "Peabody Energy Agrees to Greater Disclosures of Financial Risks," *The New York Times* (Nov. 9, 2015), *available at* http://www.nytimes.com/2015/11/09/business/energy-environment/peabody-energy-agrees-to-greater-disclosures-of-financial-risks.html; *see also* Chris Mooney, "New York is investigating Exxon Mobil for allegedly misleading the public about climate change," *The Washington Post* (Nov. 5, 2015), *available at* https://www.washingtonpost.com/news/energy-environment/wp/2015/11/05/exxonmobil-under-investigation-for-misleading-the-public-about-climate-change/; *see also* Lauren Kurtz, "New York State Attorney General Subpoenas Exxon Mobil," *Climate Change Blog*, Columbia Law School Sabin Center for Climate Change Law (Nov. 9, 2015), *available at* http://blogs.law.columbia.edu/climatechange/2015/11/09/new-york-state-attorney-general-subpoenas-exxon-mobil/.

[96] *See, e.g.*, BlackRock, "Global corporate governance and engagement principles" (June 2014), *available at* https://www.blackrock.com/corporate/en-cn/literature/fact-sheet/blk-responsible-investment-1engprinciples-global-122011.pdf (setting forth BlackRock's ESG investment principles); *see also* T. Rowe Price, "Building on Our Values: Corporate Social Responsibility Report" (2014), *available at* http://corporate.troweprice.com/ccw/home/responsibility/corporateSocialResponsibilityReports.do.

[97] *See, e.g.*, Breckinridge Capital Advisors, ESG Integration in Corporate Fixed Income (Jan. 2015), *available at* http://www.breckinridge.com/pdf/whitepapers/ESG%20Integration%20in%20Corporate%20Fixed%20Income.pdf. *See also* McKinsey & Company, "Profits with a purpose: How organizing for sustainability can benefit the bottom line" (2014), *available at* http://www.mckinsey.com.

[98] *See* Office of the California Attorney General, The California Transparency in Supply Chains Act: A Resource Guide (2015), *available at* http://www.oag.ca.gov/sites/all/sites/agweb/pdfs/sb657/resource-guide.pdf.

[99] *See* White, AICPA Keynote Address, *supra* note 13; SEC Chief Accountant James V. Schnurr, Remarks before the 2015 AICPA National Conference on Current SEC and PCAOB Developments (Washington, D.C., Dec. 9, 2015), *available at* http://www.sec.gov/news/speech/schnurr-remarls-aicpa-2015-conference-sec-pcaob-developments.htm; *see also* SEC Deputy Chief Accountant Brian T. Croteau, Remarks before the 2015 AICPA National Conference on Current SEC and PCAOB Developments (Washington, D.C., Dec. 9, 2015) (Croteau Remarks), *available at* http://www.sec.gov/news/speech/croteau-2015-aicpa.html.

[100] *See* L. Frost, "Audit Committees Face Mounting Workloads in 2016," *Financial Times Agenda* (Dec. 21, 2015); J. Lumb, "PLI Panelists Address Expanding Role of Audit Committees," *SEC Today* (Feb. 11, 2015); *see also* KPMG's Audit Committee Institute, *Audit Committee Guide*, at 29 (Sept. 2015).

[101] SEC Securities Act Rel. No. 33-9862 (discussing the SEC's Concept Release, Securities Act Release No. 9862, "Possible Revisions to Audit Committee Disclosures (July 1, 2015) (Concept Release), *available at* https://www.sec.gov/rules/concept/2015/33-9862.pdf).

[102] For a helpful summary of the comment letters, see Croteau Remarks, *supra* note 99.

[103] *See* White, AICPA Keynote Address, *supra* note 13.

[104] Croteau Remarks (emphasis in the original), *supra* note 99.

[105] Concept Release, *supra* note 101, at 5.

[106] *See, e.g.*, CII Governance Alert, *Carpenters' Fund Continues to Make Progress on Audit Disclosure* (July 2015), available at http://www.cii.org/article.content.asp?edition=4&section=13&article=603 (describing the union pension fund's three-year letter-writing campaign, targeting certain S&P 500 companies, seeking additional information regarding the audit committee's oversight of the outside auditor); *see also* BlackRock Proxy Voting Guidelines (indicating that the fund examines the Audit Committee Report "for insights into the scope of the audit committee's responsibilities, including an overview of audit committee processes, issues on the audit committee's agenda and key decisions taken by the audit committee.").

[107] *See* Audit Committee Collaboration, *Enhancing the Audit Committee Report: A Call to Action* (Nov. 2013), *available at* http://www.thecaq.org/reports-and-publications/enhancing-the-audit-committee-report-a-call-to-action. This collaboration consisted not only of the CAQ, but also the National Association of Corporate Directors, Corporate Board Member/NYSE Euronext, Tapestry Networks, the Directors' Council, and the Association of Audit Committee Members.

[108] *See* CAQ/Audit Analytics, *Audit Committee Transparency Barometer Report 2015* (2015 CAQ/AA Audit Committee Transparency Barometer), *available at* http://www.thecaq.org/docs/default-source/reports-and-publications/2015-audit-committee-transparency-barometer.pdf?sfvrsn=2/2015-audit-committee-transparency-barometer.

[109] *See* EY Center for Board Matters, "Audit committee reporting to shareholders in 2015" (Sept. 2015) (2015 EY Report), *available at* http://www.ey.com/GL/en/issues/Governance-and-reporting/EY-audit-committee-reporting-to-shareholders-in-2015; *see also* EY Center for Board Matters, *Let's talk: governance – Audit committee reporting to shareholders 2014 proxy season update* (Aug. 2014), *available at* http://www.ey.com/Publication/vwLUAssets/ey-lets-talk-governance-august-2014/$FILE/ey-lets-talk-governance-august-2014.pdf.

[110] *See* Deloitte, "Current trends in audit committee reporting" (Nov. 18, 2015), *available at* http://ww2.deloitte.com/content/dam/Deloitte/us/Documents/audit/us-audit-current-trends-audit-committee-reporting.pdf.

[111] *See* 2015 EY Report, *supra* note 109, at 2.

[112] *See* 2015 CAQ/AA Transparency Barometer, *supra* note 107, at 1.

[113] *See* SEC Release No. 33-9877 (Aug. 5, 2015), *available at* http://www.sec.gov/rules/final/2015/33-9877.pdf.

[114] *See* SEC Release No. 33-9861 (July 1, 2015), *available at* http://www.sec.gov/rules/proposed/2015/33-9861.pdf.

[115] *See* SEC Release No. 34-74835 (Apr. 29, 2015), *available at* https://www.sec.gov/rules/proposed/2015/34-74834.pdf.

[116] *See* SEC Release No. 33-9723 (Feb. 9, 2015), *available at* http://www.sec.gov/rules/proposed/2015/33-9723.pdf.

[117] 2012 WL 2501105 (Del. Ch. June 29, 2012).

[118] 114 A.3d 563, 571 (Del. Ch. 2015) (*Calma*).

[119] *Calma, supra* note 118.

[120] *Calma, supra* note 118 at 588.

[121] *Calma, supra* note 118 at 588.

[122] *Calma, supra* note 118 at 588.

[123] For a discussion of possible accounting ramifications of provisions permitting the exercise of discretion where a clawback otherwise would be triggered, see PwC, *Executive Compensation: Clawbacks – 2014 Proxy Disclosure Study* (Jan. 2015).

[124] This study, which was co-authored by Professor David F. Larcker of Stanford and co-authors Brian Tayan (Stanford Business School), Ronald Schneider (RR Donnelley Financial Services) and Aaron Boyd (Equilar), is available at http://www.gsb.stanford.edu/faculty-research/publications/2015-investor-survey-deconstructing-proxy-statements-what-matters.

[125] 1999 WL 1009210, at *1 (Del. Ch. Oct. 25, 1999).

[126] 73 A.3d 934 (Del. Ch. 2013) (*Boilermakers*).

[127] *Boilermakers*, *supra* note 126, at 953.

[128] *Roberts v. TriQuint Semiconductor, Inc.*, 2015 WL 8539902, at *5 (Or. Dec. 10, 2015).

[129] *See, e.g.*, *In re: CytRx Corp. S'holder Derivative Litig.*, No. 14-6414-GHK-PJW (C.D. Ca. Oct. 30, 2015) (upholding a forum selection bylaw "adopted '*after* Defendants' wrongdoing commenced,'" and noting that "the timing of a forum-selection clause's adoption does not dictate the clause's validity"); *TriQuint*, 2015 WL 8539902, at *5 (forum selection bylaw adopted two days before announcement of a merger was "not invalid or unenforceable under Delaware law as a breach of the board's fiduciary duty" because "Tri-Quint's forum-selection bylaw does not prevent its shareholders from challenging the merger. It only provides where they may do so."); *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229, 242 (Del. Ch. 2014) (enforcing forum selection bylaw adopted the same day company announced a merger agreement).

[130] *See* ISS FAQs, December 2015, *supra* note 44.

[131] *See* Glass Lewis 2016 Proxy Voting Guidelines, *supra* note 85.

[132] 91 A.3d 554 (Del. 2014).

[133] Section 109(b) provided, "The bylaws may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in § 115 of this title."

[134] *See* ISS FAQs, December 2015, *supra* note 44.

[135] *See* Glass Lewis 2016 Proxy Season Voting Guidelines, *supra* note 85.

Appendix I
Review of Proxy Access Bylaws
(as of January 25, 2016)

Since January 1, 2015, 124 companies have adopted proxy access bylaws. Set forth below is the list of those proxy access adopters and the proxy access formulations adopted, including their positions on "troublesome" or "problematic" provisions identified by CII and ISS, respectively.

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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
Bylaws Adopted Since Jan. 1, 2015 (124):		3% (113) 5% (11)	20% (50) 25% (11) Greater of 2 or 20% (57) Greater of 1 or 20% (3) Greater of 2 or 25% (2) Lesser of 20% or # of directors up for election (1)	No limit (6) 25 (2) 20 (106) 15 (2) 10 (4) 5 (1) 1 (1)	Yes (106) Silent (18)	Yes (39) No (85)	Bar on re-nomination if % of shareholder support not received: N/A (34) 10% (6) 15% (1) 20% (5) 25% (78)	Yes (17) No (107)	Different advance notice period for proxy access (92) Same advance notice period for director nominees (32)
Competing Shareholder and Management Proposals: Three companies that presented both management and shareholder proxy access proposals in 2015 adopted a proxy access bylaw, one of which was based on its majority-supported management proposal and the other based on a majority-supported shareholder proposal.									
1	**AES Corp.**	3%	20%	20	Yes (if loan may be recalled on 5 business days' notice, shares were recalled and held until meeting)	Yes	25%	No	Proxy access and advance notice: 150-120 / meeting date

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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	**Cloud Peak Energy Inc.**	3%	Lesser of 20% or # of directors to be elected	20	Yes (if loan may be recalled on 3 business days' notice, shares were recalled and held until meeting)	No	Not addressed	No	Proxy access: 150-120 / mailing date Advance notice: 120-90 days / meeting date
3	**SBA Communications Corp.**	5%	Greater of 1 or 20%	10	Silent	No	25%	Yes	Proxy access: 120 days / meeting date Advance notice: 150-120 days / meeting date
Company Opposed: 28 companies that voted on shareholder proposals for proxy access in 2015 have adopted a proxy access bylaw – 21 were supported by a majority of shareholders and 7 were supported by less than a majority of shareholders.									
1	**Alexion Pharmaceuticals**	3%	Greater of 2 or 20%	20	Yes (if revocable)	No	Not addressed	No	Proxy access and advance notice: 120-90 days / mailing date
2	**American Electric Power**	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on 5 business days' notice)	No	Not addressed	No	Proxy access: 150-120 / mailing date Advance notice: 120-90 days / meeting date
3	**Anadarko Petroleum Corp.**	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 / mailing date Advance notice: 120-90 days / meeting date

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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
4	**Apple Inc.**	3%	20%	20	Yes (if loan may be recalled on 5 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
5	**AvalonBay Communities, Inc.**	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	Not addressed	No	Proxy access and advance notice: 150-120 days / mailing date
6	**Chevron Corp.**	3%	20%	20	Yes (if loan may be recalled on 3 business days' notice)	No	25%	No	Proxy access: 150-120 / mailing date Advance notice: 120-90 days / meeting

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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
7	**Cimarex Energy Corp.**	3%	25%	20	Yes (if loan may be recalled on at more than 5 business days' notice, shares were recalled and held until meeting)	No	20%	No	Proxy access and advance notice: 120-90 days / meeting date
8	**Coca Cola Company**	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
9	**Conoco Philips**	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
10	**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

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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
11	**Duke Energy Corp.**	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)	No	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
12	**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
13	**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

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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
14	**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
15	**Hasbro, Inc.**	3%	Greater of 2 or 20%	None	Yes (if loan may be recalled on 5 business days' notice)	Yes	25%	No	Proxy access and advance notice: 120-90 days / meeting date
16	**Hess Corp.**	3%	Greater of 2 or 20%	20	Yes (if loaned shares may be recalled)	No	Not addressed	No	Proxy access and advance notice: 90 days / meeting date
17	**Level 3 Communications**	3%	20%	20	Silent	No	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
18	**McDonalds Corp.**	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on 5 business days' notice)	No	Not addressed	No	Proxy access: and advance notice: 120-90 days / meeting date
19	**Monsanto**	3%	20%	20	Silent	Yes	25%	Yes	Proxy access: 150-120 days / issuance date Advance notice: 90-60 days / meeting date

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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
20	**Noble Energy Inc.**	5%	20%	20	Silent	No	25%	Yes	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
21	**NVR, Inc.**	5%	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: 120-90 days / mailing date
22	**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
23	**Peabody Energy Corp.**	3%	Greater of 2 or 20%	20	Yes	No	10%	No	Proxy access and advance notice: 120 days / meeting date
24	**Pioneer Natural Resources Co.**	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	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 60 days before meeting

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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
25	**PPL Corp.**	3%	Greater of 2 or 20%	25	Yes (if loan may be recalled on up to 5 business days' notice)	No	Not addressed	No	Proxy access: 150-120 days / mailing date Advance notice: 75 days before meeting
26	**Southwestern Energy Company**	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: 120-90 days / meeting date
27	**TCF Financial Corp**	3%	25%	20	Silent	Yes	Not addressed	No	Proxy access: 150-120 days / mailing date Advance notice: 60-90 days prior to meeting date
28	**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
Management Proposal: One 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.									

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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
1	**SLM Corp.**	3%	25%	20	Silent	No	25%	No	Proxy access and advance notice: 120-90 days / date of proxy statement
Settled with Proponent: 16 companies adopted a proxy access bylaw after a settlement with the shareholder proponent, including 3 after a management proposal received majority support and 1 after a shareholder proposal supported by management 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
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 / 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 / meeting date
5	**Citigroup Inc.**	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on 3 business days' notice)	No	No	No	Proxy access: 150-120 / mailing date Advance notice: 120-90 days / meeting date

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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
6	**Clorox Company**	3%	20%	20	Yes (if loan may be recalled on 5 business days' notice)	No	20%	No	Proxy access: 150-120 / mailing date Advance notice: 120-90 days / meeting date
7	**FirstMerit Corp.**	3%	20%	20	Silent	Yes	25%	No	Proxy access and advance notice: At least 90 days / meeting date
8	**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
9	**Kindred Healthcare Inc.**	3%	Greater of 2 or 20%	20 (or 25 if market cap exceeds $2.5 billion)	Yes (if recalled by last date proxy access notice can be delivered and held until meeting)	No	Not addressed	No	Proxy access: 150-120 days / mailing date Advance notice: 90-60 days / meeting date
10	**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

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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
11	**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
12	**Staples Inc.**	3%	Greater of 2 or 20%	25	Yes (if loan may be recalled on 5 business days' notice and the shares were recalled and held through annual meeting)	No	15%	No	Proxy access and advance notice: 120-90 days / meeting date
13	**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
14	**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

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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
15	**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
16	**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
Bylaw Adopted Prior to Annual Meeting: Nine 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

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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
3	**Cabot Oil & Gas**	5%	20%	10	Silent	No	25%	Yes	Proxy access: 150-120 / 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 / 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 Communit y 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

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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
Adopted Bylaw and Excluded: One 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
Adopted Upon Receipt of 2016 Proposal: Eleven companies adopted a proxy access bylaw upon receipt of a shareholder proposal for its 2016 annual meeting, one of which made a disclosure of such receipt in its filing with the SEC.									
1	**Ameren Corp.**	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: 90-60 days / meeting date
2	**Boeing Company**	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on not more than 5 business days' notice)	No	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
3	**Caterpillar, Inc.**	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on 5 business days' notice)	No	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-60 days / meeting date

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4	**Colgate-Palmolive Company**	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on 5 business days' notice)	Yes	10%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
5	**Dominion Resources Inc.**	3%	Greater of 2 or 20%	20	Yes (if loan 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
6	**Honeywell Internatio nal Inc.**	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)	Yes	25%	Yes	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
7	**Interconti nental Exchange, Inc.**	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on no more than 5 business days' notice and the shares were recalled by record date and held through annual meeting)	No	20%	No	Proxy access: 150-120 / mailing date Advance notice: 120-90 days / meeting

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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
8	**PepsiCo Inc.**	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 / mailing date
9	**Pfizer Inc.**	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)	No	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / mailing date
10	**Visa Inc.**	3%	20%	20	Yes (if recallable on 3 business days' notice and recalled)	Yes	25%	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 share-holders)	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
11	**Wells Fargo & Co.**	3%	Greater of 2 or 20%	20	Yes (if loaned shares may be recalled on 5 or fewer business days' notice)	No	Not addressed	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
Voluntary Adoption / No Known Proposal: 55 other companies adopted proxy access bylaws without public disclosure of a shareholder proposal.									
1	**3M Co.**	3%	Greater of 2 or 20%	20	Yes (if recalled by last date proxy access notice can be delivered and held until meeting)	No	Not addressed	No	Proxy access and advance notice: 120-90 days / proxy filing date
2	**Abbott Laboratories**	3%	20%	20	Yes	No	25%	No	Proxy access and advance notice: 120-90 days / meeting date

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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
3	**Aflac Inc.**	3%	20%	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 and advance notice: 150-120 days / meeting date
4	**Alaska Air Group, Inc.**	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on 3 business days' notice)	Yes	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
5	**Allstate Corp.**	3%	20%	20	Yes (if loan may be recalled on 5 business days' notice)	No	10%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
6	**Altria Group**	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on 3 business days' notice)	No	Not addressed	No	Proxy access and advance notice: 150-120 / mailing date

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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
7	**American International Group**	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: 100 days / meeting date
8	**AmerisourceBergen Corporation**	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
9	**Applied Materials, Inc.**	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: 105-75 days / meeting date
10	**Archer-Daniels-Midland Company**	3%	20%	20	Silent	Yes	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 90-60 days / meeting date

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11	**AT&T Inc.**	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on 5 business days' notice and the shares were recalled by annual meeting)	No	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
12	**Bank of New York Mellon**	3%	20%	20	Yes (if loan may be recalled on 3 business days' notice and has recalled by annual meeting)	No	Not addressed	No	Proxy access: 150-120 / mailing date Advance notice: 120-90 days / meeting
13	**Baxter Internatio nal Inc.**	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on not more than 3 business days' notice)	Yes	25%	No	Proxy access: 150-120 / mailing date Advance notice: 120-90 / meeting date
14	**Capital One**	3%	20%	20	Yes (if loan may be recalled on 3 business days' notice)	No	25%	No	Proxy access: 150-120 / mailing date Advance notice: 120-90 days / meeting

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15	**CarMax Inc.**	3%	20%	20	Yes (if recalled prior to notice deadline and recalled through meeting)	No	Not addressed	No	Proxy access and advance notice: 150-120 days / mailing date
16	**Cheniere Energy**	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)	No	Not addressed	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
17	**Corning Inc.**	3%	Greater of 2 or 20%	20	Yes	No	10%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
18	**Corrections Corp of America**	3%	25%	20	Yes (if loan may be recalled on 3 business days' notice)	No	Not addressed	No	Proxy access and advance notice: 90-60 / meeting date
19	**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

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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
20	**Dun & Bradstreet Corp.**	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)	No	Not addressed	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
21	**Ecolab Inc.**	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	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 150-120 days / meeting date
22	**Edison International**	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on 3 business days' notice)	Yes	Not addressed	No	Proxy access and advance notice: 180-120 mailing date
23	**Flowserve Corp.**	5%	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

		Ownership Threshold	Limit on # of Proxy Access Nominees	Group Limitation (# of share-holders)	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
24	**General Dynamics Corp.**	3%	20%	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: 120-90 days / meeting date
25	**Gilead Sciences, Inc.**	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)	No	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
26	**Goldman Sachs Group**	3%	Greater of 2 or 20%	15	Yes (if may be recalled within a reasonable period of time and has recalled by annual meeting)	Yes	25%	No	Proxy access: 150-120 / mailing date Advance notice: 120-90 days / meeting
27	**Illinois Tool Works Inc.**	3%	Greater of 2 or 25%	20	Yes	No	Not addressed	No	Proxy access and advance notice: 120-90 / meeting date

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28	**International Flavors and Fragrances**	3%	20%	20	Yes (if loan may be recalled on 3 business days' notice)	No	25%	No	Proxy access and advance notice: 120-90 days / meeting date
29	**JP Morgan Chase & Co.**	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on no more than 5 business days' notice and the shares were recalled by record date and held through annual meeting)	Yes	20%	No	Proxy access: 150-120 / mailing date Advance notice: 120-90 days / meeting
30	**Kimberly Clark Corp.**	3%	Greater of 2 or 20%	20	Yes (if recalled by last date proxy access notice can be delivered and held until meeting)	No	Not addressed	No	Proxy access and advance notice: 100-75 days prior to meeting
31	**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

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32	**MGM Resorts International**	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 (except for 2016 meeting: 1/15/2016 – 2/1/5/2016) Advance notice: 120-90 days / meeting date
33	**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
34	**Morgan Stanley**	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: 120-90 days / meeting date
35	**Northrop Grumman Corp.**	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)	No	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 share-holders)	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
36	**Oshkosh Corp.**	5%	20%	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: 70-45 days / mailing date
37	**PayPal Holdings, Inc.**	3%	20%	15	Silent	No	10%	No	Proxy access and advance notice: 120 days / meeting date
38	**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
39	**PPG Industries**	3%	Greater of 2 or 20%	20	Yes	No	Not addressed	No	Proxy access: 150-120 days / mailing date Advance notice: 90 days before meeting
40	**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
41	**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

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42	**Public Service Enterprise Group**	3%	25%	20	Yes (if loan may be recalled on 3 business days' notice)	No	Not addressed	No	Proxy access: 150-120 days / mailing date Advance notice: 90 days before meeting
43	**Qualcomm Inc.**	3%	20%	20	Silent	No	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
44	**Regency Centers Corp.**	3%	25%	1	Silent	No	25%	Yes	Proxy access and advance notice: 120 days / date of proxy statement
45	**Sempra Energy**	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)	No	25%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
46	**Spectra Energy Corp.**	3%	20%	20	Yes (if recallable on 3 business days' notice and recalled)	No	25%	No	Proxy access and advance notice: 120-90 days / date of proxy statement

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47	**State Street 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: 60-90 days / meeting date
48	**Target Corp.**	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: 90 days / meeting date
49	**T. Rowe Price Group Inc.**	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
50	**Union Pacific Corp.**	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)	No	25%	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 share-holders)	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
51	**United Natural Foods**	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%	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
52	**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
53	**US Bancorp**	3%	Greater of 2 or 20%	20	Yes (if loan may be recalled on 5 business days' notice)	No	Not addressed	No	Proxy access: 150-120 days / mailing date Advance notice: 120 days / meeting date
54	**VCA Inc.**	5%	20%	20	Yes (if recallable on 3 business days' notice and recalled)	Yes	Not addressed	No	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date
55	**Windstream Holdings Inc.**	3%	Greater of 2 or 20%	None	Yes	No	Not addressed	Yes	Proxy access: 150-120 days / mailing date Advance notice: 120-90 days / meeting date