

PROXY **M**ONITOR

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A group of business professionals are silhouetted against a large window overlooking a city skyline at night. The scene is dimly lit, with the primary light source being the city lights outside. The professionals are seated around a table, and one individual is leaning over, possibly presenting or reviewing documents. The overall atmosphere is professional and focused.

A Report on Corporate Governance and Shareholder Activism

By James R. Copland
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2015

PROXY MONITOR 2015

A Report on Corporate Governance and Shareholder Activism

EXECUTIVE SUMMARY

In the last two decades, shareholders have gained power relative to corporate boards. One way shareholders exert influence over corporations is by introducing proposals that appear on corporate proxy ballots. In 2015, shareholders were both more active and more successful in these efforts:

- **The number of shareholder proposals is up.** The average large company faced 1.34 shareholder proposals in 2015, up from 1.22 in 2014. This is the highest level of shareholder-proposal activity since 2010. The increase in 2015 has been driven largely by the New York City pension funds' push for "proxy access," which would give large, long-term shareholders the right to nominate their own candidates for director on corporate proxy ballots.
- **The Securities and Exchange Commission has been more lenient in allowing shareholder proposals on the ballot.** Another reason for the uptick in shareholder-proposal activity in 2015 is a more permissive stance adopted by the SEC in assessing shareholder proposals' appropriateness for proxy ballots. In January 2015, the agency suspended the application of its "conflicting proposals" rule—and several companies this year faced shareholder proposals that conflicted with management proposals on the ballot. In 2015, the SEC issued 82 letters assuring companies that it would take no action if they excluded a shareholder proposal from their proxy ballot, down from 116 in 2014; the agency declined to issue no-action letters on 68 petitions in 2015, up from 50 in 2014.
- **A small group of shareholders dominates the shareholder-proposal process.** As in 2014, one-third of all shareholder proposals in 2015 were sponsored by just three individuals and their family members: John Chevedden, the father-son team of William and Kenneth Steiner, and the husband-wife team of James McRitchie and Myra Young. The NYC pension funds sponsored 11 percent of all proposals in 2015, but the overall percentage of shareholder proposals sponsored by labor-affiliated pension funds—28 percent—is

below historical norms because private labor unions' pension funds have been less active. Institutional investors without a labor affiliation or a social, religious, or policy orientation sponsored only one proposal.

- **A plurality of shareholder proposals involve corporate-governance issues.** Forty-three percent of 2015 shareholder proposals involved corporate-governance concerns—including 11 percent that sought proxy access. Forty-two percent involved social or policy issues, including 19 percent that focused on the environment. Although shareholder proposals focusing on corporate political spending or lobbying remained common—17 percent of all proposals—the overall number of such proposals fell to 51, down from 67 in 2014.
- **The percentage of shareholder proposals receiving majority shareholder support is up.** Eleven percent of shareholder proposals were supported by a majority of shareholders in 2015, up from just 4 percent in 2014. This uptick was due to substantial support for proposals seeking proxy access: 23 of 35 proxy-access proposals won majority shareholder backing. Aside from proxy-access proposals, only 4 percent of shareholder proposals—ten in total—received majority shareholder votes. Among the companies in the Fortune 250, not a single shareholder proposal involving social or policy concerns won majority shareholder support over board opposition—as has been the case for the past ten years.

In addition to capturing overall shareholder proposal trends, this report and a companion econometric analysis by University of Tennessee professor Tracie Woitke assess shareholder-proposal activism by public-employee pension funds:

- **Public-pension fund shareholder-proposal activism is associated with lower stock returns.** Fortune 250 companies targeted by shareholder proposals by the five largest state and municipal pension funds from 2006 through 2014 saw their share price, on average, underperform the broader S&P 500 index by 0.9

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percent in the year following the shareholder vote. Companies targeted by the New York State Common Retirement Fund, which in 2010 launched an aggressive shareholder-proposal effort focused on social issues, such as corporate political spending, saw their share price drop by 7.3 percent, relative to the broader market.

- **Social-issue-focused shareholder-proposal activism helps explain a negative share-value effect associated with public-pension fund ownership.** Controlling for various factors, companies in which public-pension funds invested from 2001 through 2013 were less valuable than those owned by private pension funds and other investors. This negative ownership effect was particularly pronounced for companies targeted by the New York State Common Retirement Fund with social-issue proposals and does not exist for the 2001–07 period, when that fund did not sponsor social-issue proposals.
- **Shareholder votes supporting 2015 proxy-access proposals are associated with a negative stock-price reaction.** When shareholders approved a Fortune 250 company’s proxy-access proposal in 2015, the company’s share price underperformed the S&P 500 index by 2.3 percent, on average, in the days following the annual meeting. Conversely, when shareholders voted down a company’s proxy-access proposal, the company’s share price outperformed the market index by an average of 0.5 percent.

In light of these findings, states and municipalities should consider how their public-employee pension funds should engage in future shareholder-proposal activism, if at all.

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ABOUT PROXY MONITOR

The Manhattan Institute's ProxyMonitor.org database, launched in 2011, is the first publicly available database cataloging shareholder proposals¹ and Dodd-Frank-mandated executive-compensation advisory votes² at America's largest companies. This is the fifth annual survey and 35th publication in a series of findings and reports by Manhattan Institute Center for Legal Policy director James R. Copland, each drawing upon information in the database to examine shareholder activism in which investors attempt to influence corporate management through the shareholder voting process.³

DATA

The ProxyMonitor.org database includes the 250 largest publicly traded American companies, by revenues, as determined by *Fortune* magazine. Although we loosely refer to this list as the "Fortune 250," the fact that several of the Fortune 250 companies are not publicly traded means that some of the companies among the 250 largest that are subject to the proxy rules of the Securities and Exchange Commission (SEC) are from the broader Fortune 300 group.⁴

Because the Fortune list changes annually, some companies in the Proxy Monitor data set, while among the 250 largest companies in 2010, 2011, 2012, or 2013, fell out of the list in 2014, the baseline year for the 2015 proxy season. Eleven companies whose annual-meeting shareholder-vote results appear in the ProxyMonitor.org database are excluded from this analysis for 2015 because their 2014 revenues placed them outside the 250 largest companies.⁵ Eleven companies not listed in the database for previous years are among the largest 250 companies for the 2014 base year and are included in the 2015 analysis—to the extent that they have filed materials for annual meetings.⁶ (Another 13 companies listed in the ProxyMonitor.org database for previous years no longer existed as independent U.S.-based publicly traded companies for the 2015 proxy season, due to going private, change-of-control, or relocation actions.)⁷ Although historical numbers will be consistent with those previously reported, these adjustments may marginally alter data reported in earlier findings for 2015.⁸ Data for 2015 are current to August 31, at which time 229 companies had held their annual meetings and 235 had filed proxy documents.

Because the ProxyMonitor.org database is limited to the 250 largest companies by revenues, the analysis in this report does not capture the full set of shareholder-proposal activism. Some shareholder activists have objected to Proxy Monitor data on these grounds,⁹ but the companies in the ProxyMonitor.org database encompass the majority of holdings for most diversified investors in the equity markets, making this analysis appropriate for the average shareholder. From the average shareholder's perspective, the Proxy Monitor data set paints a significantly more accurate picture than do the vote tallies of most shareholder activists, who simply straight-line-average votes across a much larger data set of companies, without regard to market capitalization.

INTRODUCTION

During the last 15 years, shareholders in publicly traded equity markets in the United States have gained power relative to corporate boards of directors.¹⁰ In part, this trend has been driven by shifts in how individuals hold equity investments, as fewer individuals hold shares directly, leading to increasing influence by institutional investors.¹¹ In part, the trend is the result of legal and regulatory changes.¹²

In this new environment, shareholder activists have increasingly sought to leverage their influence to change corporate behavior.¹³ Such activism varies, from hedge funds seeking to leverage their significant stakes in a given company to increase the value of their holdings, to “socially responsible” investors whose objectives go beyond share-price maximization and encompass other normative goals.¹⁴

The Manhattan Institute’s Proxy Monitor project looks at a specific type of shareholder activism—namely, that launched through the process of introducing shareholder proposals on corporate proxy ballots. Under regulations promulgated by the Securities and Exchange Commission (SEC), through authority vested in the agency by the federal securities laws, companies must include shareholders’ proposals on their proxy ballots—to be voted on by all shareholders at corporate annual meetings—if such proposals conform to certain procedural and substantive requirements.¹⁵

Because these requirements permit very small, short-term shareholders to sponsor proposals (under SEC rules, a shareholder need only own \$2,000 of stock for one year to introduce a proposal) and because these requirements allow proposals focusing on social or political issues unrelated to share value, there is reason for concern that special-interest shareholders could be utilizing this process to advance their own idiosyncratic objectives, to the average shareholder’s detriment.¹⁶

Empirical evidence gathered from the ProxyMonitor.org database generally supports this concern. During the last ten years, a small subset of investors has dominated the shareholder-proposal process. A plurality of all shareholder proposals have been introduced by three small individual shareholders and their family members—“corporate gadflies” who repeatedly file substantially similar proposals across a broad set of companies.¹⁷ Most institutional investors almost never introduce shareholder proposals; in

recent years, a majority of all sponsoring institutions have had an express social-investing purpose or an affiliation with a religious or public-policy organization.

The third major class of shareholder-proposal sponsor, apart from corporate gadflies and social investors, is pension funds, particularly those affiliated with state and municipal workers. Most pension funds do not file shareholder proposals, but those that do argue that such engagement affords them an important corporate-governance mechanism to improve share value.¹⁸ Others have worried that labor-affiliated and public-pension funds may be motivated, at least in part, by concerns other than share value.¹⁹

By far, the public-employee pension funds that have been most active in sponsoring shareholder proposals have been those affiliated with New York City and State. The New York State Common Retirement Fund, which holds assets in trust for the New York State & Local Retirement System (NYSLRS), began introducing shareholder proposals in 2010, under the leadership of the state’s publicly elected comptroller, Democrat Thomas P. DiNapoli, who serves as the fund’s sole trustee. The New York State fund’s proposals have been overwhelmingly oriented toward social and political concerns and have met with little shareholder support: a 2015 proposal at Staples concerning executive compensation was the first New York State proposal to garner majority support from shareholders, among 57 introduced since 2010.

The NYC pension funds—five financially independent vehicles for New York City retirees that have separate boards but are each administratively overseen by the city’s elected comptroller—have long been active in filing shareholder proposals: during the last ten years, the NYC funds have sponsored more shareholder proposals than any other shareholder, save the two most active corporate gadflies.

The city’s funds have historically focused on social or policy concerns; but in 2015, New York City Comptroller Scott Stringer—first elected in fall 2013—launched a broad campaign for a corporate “proxy-access” rule, which would grant shareholders, given ownership and holding-period requirements, the power to nominate board directors on the company’s proxy statement.²⁰ Comptroller Stringer’s campaign has been remarkably successful in terms of winning majority support from shareholders: among 22 Fortune

250 companies facing a NYC fund-sponsored proxy-access proposal in 2015, 18 received majority shareholder support.

This report examines these and other 2015 trends in shareholder-proposal activism and places those trends in historical context.

Section I offers an overview of shareholder proposals introduced on corporate proxy ballots in 2015, as compared with earlier years. In addition to looking at the proposals that actually made it on to proxies, Section I examines proposals that shareholders introduced but that companies excluded from their ballots after receiving a no-action letter from the SEC stating that the agency would not pursue an enforcement action, were the company to exclude them—a point of legal and regulatory contention this proxy season.

Section II examines, in greater detail, the sponsors of shareholder proposals, in 2015 and historically.

Section III looks at the types of proposals that shareholders introduced in 2015, relative to historical trends.

Section IV assesses voting results for shareholder proposals, in 2015 and historically.

Section V scrutinizes shareholder activism by public-employee pension funds, historically and in 2015, with particular attention paid to the NYC pension funds' proxy-access campaign.

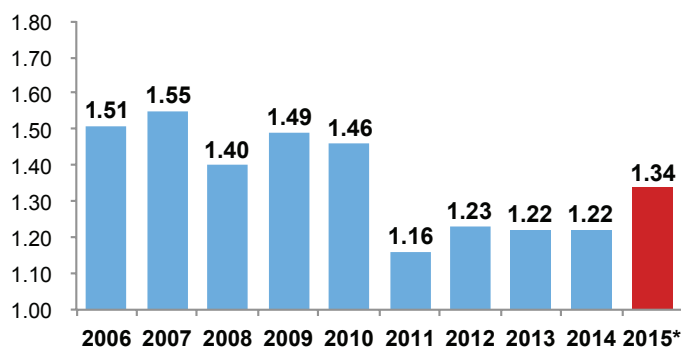
Appendix considers executive-compensation advisory-vote data for Fortune 250 companies, in 2015 and in each of the years holding such votes subsequent to such votes' mandate in Dodd-Frank (2011–15).

I. SHAREHOLDER-PROPOSAL INCIDENCE

In 2015, the average Fortune 250 company faced 1.34 shareholder proposals on its proxy statement, the highest level since 2010 (**Figure 1**). The increase in shareholder-proposal incidence was driven almost entirely by the proxy-access campaign: 36 shareholder proposals seeking proxy access were introduced in 2015, up from only ten in 2014. Notwithstanding this increase, the number of shareholder proposals introduced remains below that witnessed before 2011, when the average Fortune 250 company faced 1.40–1.55 proposals.

Much as the uptick in 2015 shareholder-proposal activity is explained by the proxy-access campaign, the higher level of activity during 2006–10 is largely explained by shareholder proposals seeking shareholder advisory votes on executive compensation, which constituted 10 percent of all shareholder proposals introduced in that period. The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act²¹ required such shareholder advisory votes on executive compensation beginning in 2011,²² which obviated any need for further shareholder proposals on that topic.

Figure 1. Shareholder Proposals per Company, Fortune 250, 2006–15*



*In 2015, based on 235 companies filing proxy statements by August 31
Source: ProxyMonitor.org

SPECIAL FOCUS: SHAREHOLDER-PROPOSAL EXCLUSIONS

We have consistently observed that “the universe of shareholder proposals actually listed on corporate proxy ballots paints an incomplete picture of shareholder-proposal activism”²³ because many shareholder proposals introduced never make it on to corporate proxy ballots. In part, this is because proposals are withdrawn—either because a shareholder neglects to follow up on the proposal or because the corporate leadership negotiates with the proposal’s sponsor and sufficiently assuages their concerns.

Proposals are commonly excluded from the proxy ballot by the corporations themselves—typically after receiving assurances from the SEC that the agency will take “no action” if the proposal is excluded because the proposal fails to comply with the agency’s rules.²⁴ In a limited number of cases, a company has filed suit and successfully persuaded a federal court to permit it to exclude a shareholder proposal.²⁵ A 2013 survey of Proxy Monitor companies conducted by the Society of Corporate Secretaries and Governance Professionals²⁶ suggested that, on average, large companies face 77 percent more shareholder proposals than actually appear on proxy ballots²⁷ (though this figure may vary from year to year).

The SEC issues no-action letters to petitioning companies if the agency’s staff determines that a shareholder proposal does not comply with SEC rules. Procedurally, the shareholder must establish his ownership in the company and meet filing deadlines.²⁸ Substantively—at least under the rules at the end of the 2014 proxy season—a company would be permitted to exclude a shareholder proposal that was too vague or indefinite to implement, that asked the company to do something that it had already done or lacks the power to implement, that conflicted with state law, that duplicated or conflicted with another ballot proposal, or that involved the company’s “ordinary business operations.” Companies are also permitted to exclude repeat proposals that failed to gain minimal shareholder support in earlier years.²⁹

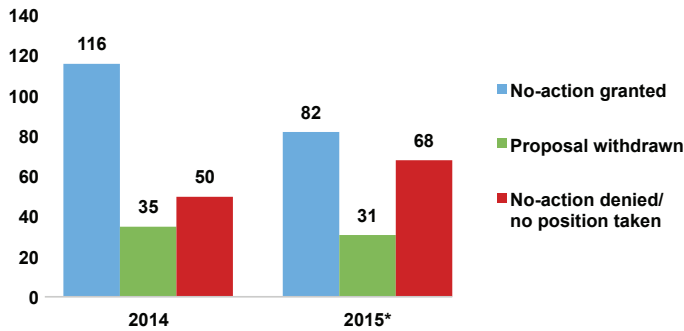
For the 2015 proxy season, the SEC suspended its “conflicting proposals” rule on the order of chairman Mary Jo White, who, on January 16, 2015, asked the staff to report back on the proper scope and application of the rule and had the agency’s Division of Corporation Finance announce that it would not be expressing any views on the

appropriateness of excluding conflicting proposals from proxy ballots in the interim.³⁰ Chairman White’s order was precipitated by investor outcry over a December 1, 2014, SEC staff no-action letter that had advised Whole Foods that the agency would take no action were the company to exclude a proxy-access proposal introduced by corporate gadfly James McRitchie, given the company’s stated intention to introduce its own proposal for proxy access with higher ownership and holding-period thresholds than those sought by McRitchie.³¹ McRitchie had appealed to the SEC commissioners to reverse this decision,³² prior to White’s announcement.

In addition to the conflicting-proposals rule, the SEC’s “ordinary business” exception was placed in considerable doubt up to the eve of the 2015 proxy season, after a November 26, 2014, order by Judge Leonard P. Stark of the federal district court in Delaware, which reversed the SEC’s determination that Wal-Mart could properly exclude a shareholder proposal by Trinity Wall Street church.³³ The church’s proposal had asked the board to amend the company’s charter and charge its board committees with new duties overseeing the company’s sale of certain products that “especially endanger . . . public safety and well-being.” Specifically, the proposal asked for a report on “whether or not the company should sell guns equipped with magazines holding more than ten rounds of ammunition.”³⁴ Judge Stark concluded that Trinity’s proposal involved matters of “significant social concern,” which the SEC has viewed as an exception to the ordinary-business-operations rule;³⁵ but on April 14, 2015, the Third Circuit Court of Appeals reversed³⁶—though the court’s ultimate decision, issued after the proxy season on July 6,³⁷ is hardly a matter of lucidity resolving such issues going forward.³⁸

In this environment of challenges to shareholder-proposal exclusion rules, the SEC staff was significantly less likely to issue no-action letters in the 2015 proxy season than in 2014. In 2015, the SEC issued 82 no-action letters to petitioning companies and denied or refused to take a position on 68; in 2014, the agency issued 116 no-action letters and denied only 50 (**Figure 2**). Twelve of the petitions that failed to receive a no-action letter in 2015 involved the agency not issuing an opinion on conflicting proposals. In 31 cases in 2015 and 35 cases in 2014, a proposal sponsor withdrew the proposal after the company petitioned the SEC.

Figure 2. SEC Responses to No-Action Petitions, Number of Decisions, Fortune 250, 2014–15*



*For 2015, based on 235 companies filing proxy statements by August 31
Source: Proxy Monitor data

The SEC’s changed response to no-action petitions in 2015 materially changes the overall shareholder-proposal picture. Including proposals excluded pursuant to a no-action letter in 2015, the average Fortune 250 company faced 1.82 proposals per company having filed—which is actually down from 1.88 proposals per company in 2014, notwithstanding this proxy season’s substantial increase in proposals seeking proxy access.

II. SHAREHOLDER-PROPOSAL SPONSORS

A small group of shareholders has dominated the process of introducing shareholder proposals for each of the last ten years tracked in the ProxyMonitor.org database. The year 2015 is no exception. These shareholder-proposal activists can roughly be divided into three groups:

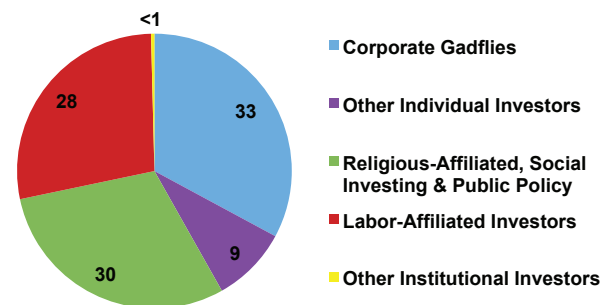
1. Labor-Affiliated Investors. Labor-affiliated pension funds—including corporate-specific pension plans, “multiemployer” plans affiliated with labor unions, and state and municipal pension plans—sponsored 28 percent of shareholder proposals introduced at Fortune 250 companies in 2015 (**Figure 3**). The percentage of shareholder proposals with labor-affiliated sponsors is up from 25 percent in 2014 (**Figure 4**), owing largely to the NYC funds’ proxy-access campaign; but it still remains below that seen over the broader period dating to 2006 (**Figure 5**)—32 percent—owing principally to less activity among private multiemployer pension plans affiliated with labor unions, such as the American Federation of Labor–Congress of Industrial Organizations (AFL-CIO) or American Federation of State, County, and Municipal Employees (AFSCME).

2. Corporate Gadflies. Three individual investors and their family members—John Chevedden, William Steiner (and son Kenneth), and James McRitchie (and wife, Myra K. Young)—sponsored one-third of shareholder proposals in 2015, up from 31 percent in 2014 and 28 percent (including formerly active corporate gadflies Evelyn Davis and Emil Rossi and his family) across the broader ten-year period.

3. Social Investors. Institutional investors, focusing on “socially responsible” investing,³⁹ as well as various retirement and investment vehicles associated with religious or public-policy organizations,⁴⁰ sponsored 30 percent of shareholder proposals in 2015, up from 29 percent in 2014 and 27 percent across the broader ten-year period.

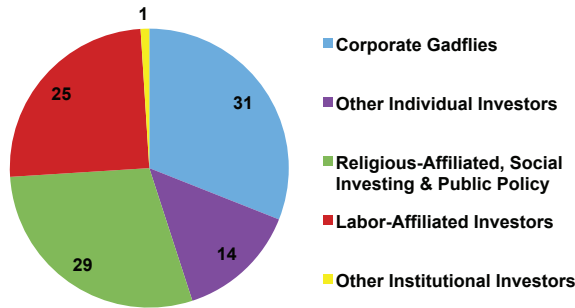
Aside from the three principal corporate gadflies, individual investors sponsored only 9 percent of shareholder proposals introduced in 2015, down from 14 percent in 2014, and 12 percent in the 2006–14 period. (One-third of these “other” individual-sponsored shareholder proposals were introduced by two other individuals who might best be deemed gadflies, Gerald Armstrong and John Harrington.) Apart from labor-affiliated and social investors, only one institutional investor sponsored a shareholder proposal in 2015: Trian Fund Management—a hedge fund led by activist investor Nathan Peltz—introduced a proposal at DuPont related to the fund’s ultimately unsuccessful effort to take four board seats and break up the company.⁴¹

Figure 3. Percentage of Shareholder Proposals by Proponent Type, Fortune 250, 2015*



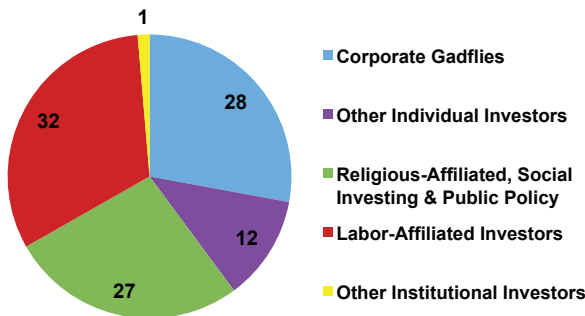
*Based on 235 companies filing proxy statements by August 31
Source: ProxyMonitor.org

Figure 4. Percentage of Shareholder Proposals by Proponent Type, Fortune 250, 2014



Source: ProxyMonitor.org

Figure 5. Percentage of Shareholder Proposals by Proponent Type, Fortune 250, 2006–14



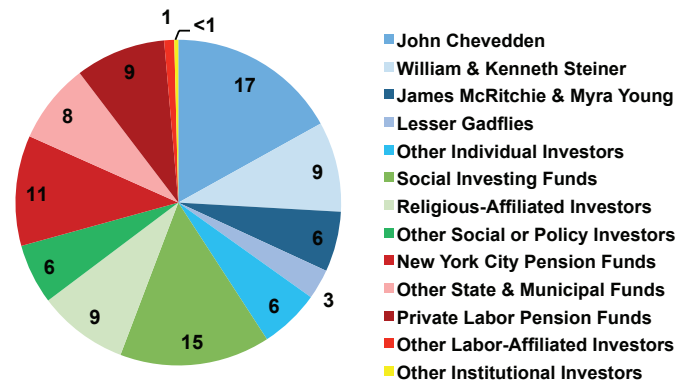
Source: ProxyMonitor.org

Examining the sponsors of shareholder proposals more granularly, the outsize role played by the most active corporate gadflies, as well as the NYC pension funds, becomes clearer. In 2015, corporate gadfly John Chevedden sponsored one in six shareholder proposals, the NYC funds sponsored one in nine, gadflies William and Kenneth Steiner sponsored one in 11, and gadflies McRitchie and Young sponsored one in 15 (**Figure 6**). Apart from these principal gadflies and the NYC funds, not a single shareholder sponsored more than eight shareholder proposals in 2015 (**Figure 7**).

Nevertheless, a large number of social-investing funds were active, such that, overall, these vehicles sponsored 15 percent of all shareholder proposals in 2015. (Social-investing funds As You Sow, Trillium Asset Management, and Walden Asset Management each sponsored five or more shareholder proposals, as did the policy-oriented Investor Voice and the Catholic-affiliated Mercy Investment Program.) Labor-affiliated funds—other than the NYC funds—sponsored

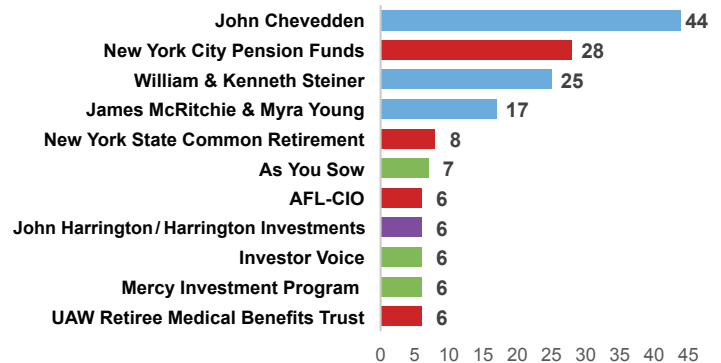
18 percent of all proposals, led by the New York State Common Retirement Fund (eight proposals), AFL-CIO (six proposals), United Autoworkers Retiree Medical Benefits Trust (six proposals), and International Brotherhood of Electrical Workers (five proposals).

Figure 6. Percentage of Shareholder Proposals by Proponent Subtype, Fortune 250, 2015*



*Based on 235 companies filing proxy statements by August 31
Source: ProxyMonitor.org

Figure 7. Number of Shareholder Proposals by Sponsor, Fortune 250, 2015*



*Based on 235 companies filing proxy statements by August 31
Source: ProxyMonitor.org

III. SHAREHOLDER PROPOSALS BY SUBJECT

Shareholder proposals can be broadly divided into three categories:

- 1. Corporate Governance.** Process-based proposals that seek to modify the rules governing board structure or shareholder-board interactions. Proposals commonly seek to:
 - Modify **voting rules** for director elections or shareholder actions
 - Modify the periods during which investors are elected (e.g., through “**board declassification**” proposals that seek to elect all directors annually rather than over staggered terms)⁴²
 - Empower shareholders to call **special meetings** or to act outside annual meetings by **written consent**
 - Separate the company’s **chairman and chief executive** roles
 - Grant shareholders the right to nominate their own directors on corporate proxy ballots (i.e., **proxy access**)
- 2. Executive Compensation.** Substance-based proposals that seek to better align management’s incentives with shareholders’ interests through executive-compensation plans. Proposals commonly seek to:
 - Modify the terms or vesting periods of **equity-compensation plans**
 - Limit or change **accelerated payments** or other payouts to executives in the event of a change-of-control transaction, the executive’s entry into government service, or death (called “golden parachutes” and “golden coffins” by critics)
 - **Claw back** previously paid executive compensation in the event that the company has faced an adverse criminal or civil government action
- 3. Social Policy.** Substance-based proposals that seek to reorient a company’s approach to align with a social or policy goal that may not be related—or at least has an attenuated relationship—to share value. Proposals commonly address:

- **Animal rights** concerns
- **Human rights** issues
- **Employment rights**, including corporate discrimination policies and diversity
- **Environmental** issues, including sustainability and greenhouse-gas emissions
- **Lobbying and political spending**, including calls for increased disclosure, increased shareholder input on corporate political engagement, and outright limits on corporate political spending or lobbying

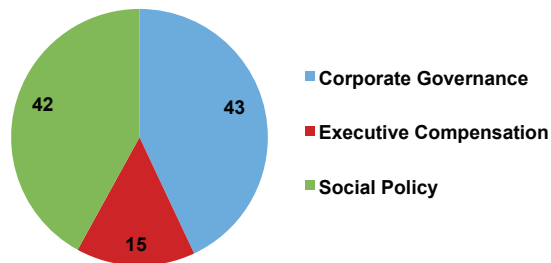
In 2015, 43 percent of shareholder proposals involved corporate-governance concerns, up from 36 percent in 2014 and 39 percent during the broader 2006–14 period (**Figure 8**, **Figure 9**, and **Figure 10**). This increase was principally due to the NYC pension funds’ proxy-access campaign: overall, proxy-access proposals constituted 11 percent of 2015 shareholder proposals, versus only 4 percent in 2014 and just 1 percent in the entire 2006–14 period (**Figure 11**, **Figure 12**, and **Figure 13**). Proposals to separate a company’s chairman and CEO positions and to empower shareholders to call special meetings or act through written consent were also up marginally from previous years.

In 2015, 42 percent of shareholder proposals involved social or policy concerns, down from 47 percent in 2014 but up from 39 percent during the 2006–14 period. Although the percentage of environmental proposals was marginally higher—19 percent in 2015, up from 18 percent in 2014 and 11 percent since 2006—the percentage of proposals involving corporate spending or lobbying dropped five percentage points, year over year, from 22 percent to 17 percent. Other social or policy concerns, apart from the environment and political spending, were less likely to be introduced than in earlier years.

Proposals related to executive compensation were somewhat less common in 2015 (15 percent of proposals introduced) than in 2014 (17 percent). Executive-compensation-related proposals remain less frequently introduced than in the 2006–10 period, when a significant percentage of shareholder proposals sought shareholder advisory votes on executive compensation (now mandatory for all publicly traded companies under the 2010 Dodd-Frank financial reform law). The year 2015 did see an increase in the percentage of proposals (8 percent, up from 4 percent in

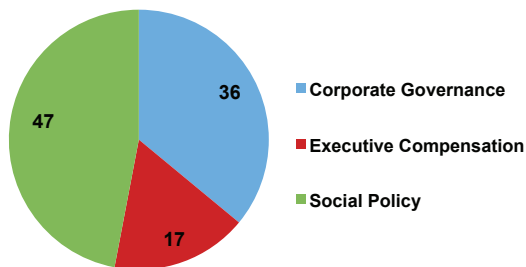
2014) seeking to limit change-of-control or other accelerated benefits to executives (e.g., upon taking a government job). The year 2015 also saw a substantially higher number of proposals seeking to claw back executive pay following an adverse criminal or civil action by the government against the company.

Figure 8. Percentage of Shareholder Proposals by Type, Fortune 250, 2015*



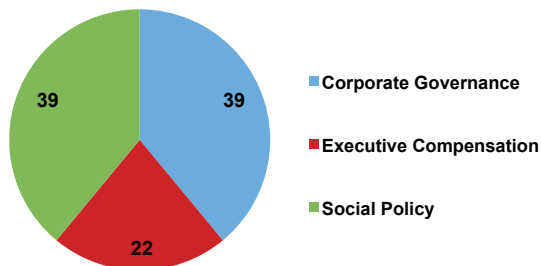
*Based on 235 companies filing 2015 proxy statements by August 31
Source: ProxyMonitor.org

Figure 9. Percentage of Shareholder Proposals by Type, Fortune 250, 2014



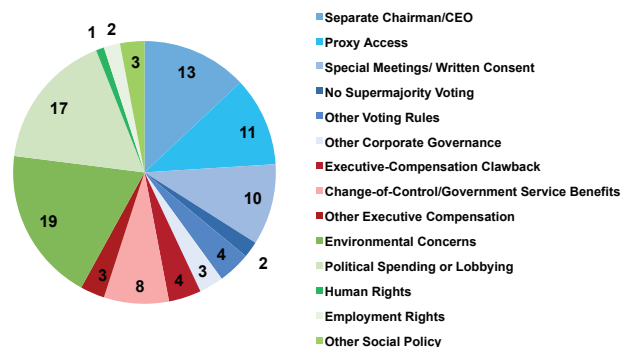
Source: ProxyMonitor.org

Figure 10. Percentage of Shareholder Proposals by Type, Fortune 250, 2006–14



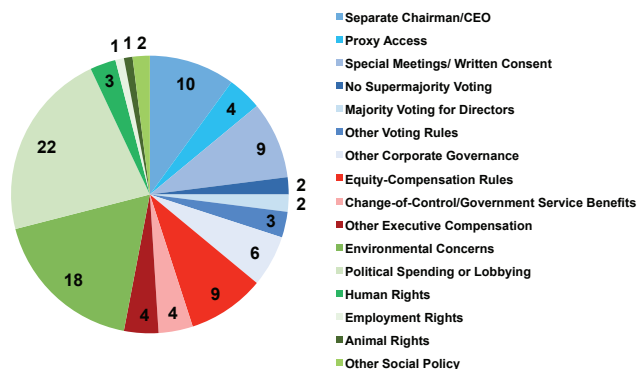
Source: ProxyMonitor.org

Figure 11. Percentage of Shareholder Proposals by Subtype, Fortune 250, 2015*



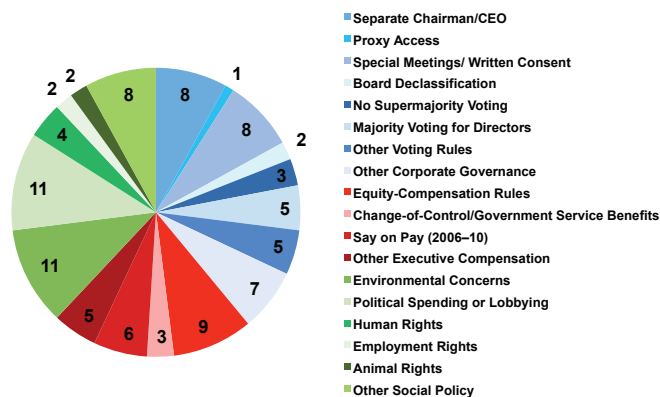
*Based on 235 companies filing 2015 proxy statements by August 31
Source: ProxyMonitor.org

Figure 12. Percentage of Shareholder Proposals by Subtype, Fortune 250, 2014



Source: ProxyMonitor.org

Figure 13. Percentage of Shareholder Proposals by Subtype, Fortune 250, 2006–14

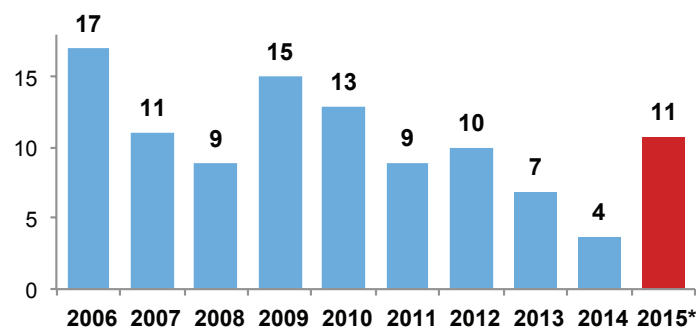


Source: ProxyMonitor.org

IV. SHAREHOLDER-PROPOSAL VOTING

In 2015, 11 percent of shareholder proposals received the support of a majority of shareholders—up markedly from 2014 (4 percent) and the highest percentage since 2010 (Figure 14).⁴³ This increase in support, however, is wholly attributable to support for the proxy-access campaign launched by the NYC pension funds. Almost two-thirds of 35 shareholder proposals seeking proxy access at Fortune 250 companies received majority shareholder support; but only 4 percent (ten proposals) of all other shareholder proposals, excluding proxy access, were supported by a majority of shareholders (Figure 15).

Figure 14. Percentage of Shareholder Proposals Winning Majority Support, Fortune 250, 2006–15*



*In 2015, based on 229 companies holding annual meetings by August 31
Source: ProxyMonitor.org

Figure 15. Shareholder Support by Proposal Class, Fortune 250, 2015*

Proposal Class	Number of Shareholder Proposals Introduced	Number Defeated	Number Winning Majority Support
Corporate Governance	135	104	31
Separate Chairman and CEO	40	39	1
Proxy Access	35	12	23
Shareholder Action by Written Consent	21	21	0
Shareholder Power to Call Special Meetings	11	8	3
Eliminate Supermajority Provisions in Bylaws	5	3	2
Change Stock Classes or Voting Rights	5	5	0
Change Vote-Counting Standard	5	5	0
Other	13	11	2
Executive Compensation	47	45	2
Change-of-Control/Government Service Benefits	25	23	2
Executive-Compensation Clawbacks	12	12	0
Other	10	10	0
Social Policy	133	133	0
Environmental Issues	59	59	0
Political Spending or Lobbying	51	51	0
Employment Rights	7	7	0
Human Rights	5	5	0
Health Care	3	3	0
Other	8	3	0

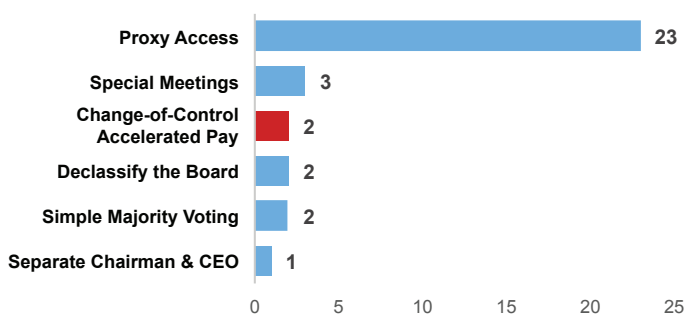
*Based on 229 companies holding annual meetings by August 31
Source: ProxyMonitor.org

In 2015, the ten shareholder proposals, apart from proxy access, that received majority shareholder support to date all involved corporate-governance questions (eight proposals) or executive compensation (two) (**Figure 16**). As has been the case in each of the last ten years,⁴⁴ not a single shareholder proposal involving social or policy concerns was supported by a majority of shareholders at a Fortune 250 company. In addition, as Figure 15 indicates, apart from proxy access, most shareholders rejected most shareholder proposals even among those classes of proposal that received majority support on occasion:

- Eight of 11 proposals seeking shareholder rights to call special meetings failed to receive majority support
- 23 of 25 proposals seeking to limit accelerated payments to executives in the event of a corporate change in control or other special situation were voted down
- Three of five proposals seeking to eliminate supermajority voting provisions from corporate bylaws failed to pass
- 39 of 40 proposals seeking to separate the company’s chairman and CEO position were defeated

The one category of proposal to buck that trend, other than proxy access, comprised those that sought to declassify boards (i.e., to elect all directors annually rather than in staggered terms): two of two board-declassification proposals received majority support, in keeping with historical norms.⁴⁵

Figure 16. Number of Shareholder Proposals Receiving Majority Shareholder Support by Subtype, Fortune 250, 2015*



*In 2015, based on 229 companies holding annual meetings by August 31
Source: ProxyMonitor.org

As noted in earlier reports,⁴⁶ the percentage of shareholder proposals to win majority support tends to be highly

dependent on the number of likely-to-pass proposals that are introduced. Certain proposals usually receive majority shareholder support (e.g., board declassification, proxy access), and a small number of others do with some regularity (e.g., eliminating supermajority provisions in bylaws, requiring directors to win a majority rather than plurality of votes to be elected).

Overall voting trends can reflect the fact that many of these more popular proposals have been adopted at many large companies and are therefore less commonly introduced than in earlier years.⁴⁷ Companies tend to adapt as they better come to understand the likelihood of proposals’ passage and shareholder sentiment on contested issues; when a company determines that a shareholder proposal is likely to garner majority voting support, it is “more likely to negotiate with the shareholder activists proposing them—either by voluntarily adopting the activists’ preferred rules on their own or by taking other actions convincing the activists to withdraw their proposal.”⁴⁸

Investor sentiment on certain types of proposals may also change over time, after further research, analysis, and communication among stakeholders. When corporate gadflies first introduced proposals to permit shareholder action by written consent in 2010, ten of 14 proposals of that type won majority shareholder support; in 2014 and 2015, in contrast, a total of 41 such proposals have been introduced, and none has passed.

The SEC’s decision not to enforce its competing-proposals rule during the 2015 proxy season created an interesting wrinkle in this year’s proxy voting: some companies introduced management proposals that covered the same issue, while offering different particulars from similar shareholder proposals on the ballot. Among those in the Fortune 250:

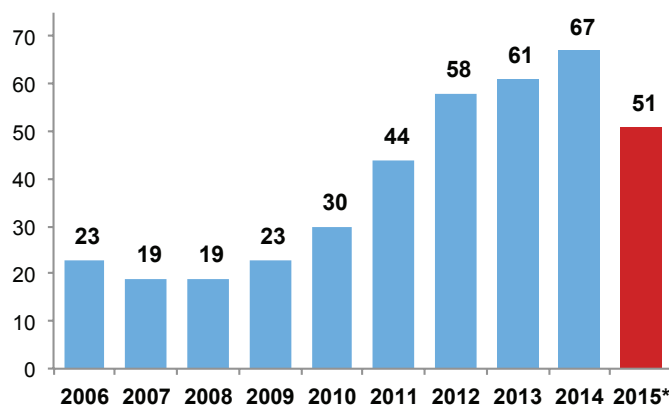
- On April 13, Goodyear’s proxy ballot included a shareholder proposal introduced by John Chevedden that called on the company to eliminate all supermajority provisions from its bylaws, as well as a management proposal to require only majority shareholder support for change-of-control transactions (as opposed to the two-thirds default requirement under Ohio law). A total of 56 percent of shareholders voted against Chevedden’s proposal, while management’s competing proposal passed overwhelmingly.

SPECIAL FOCUS: PROPOSALS RELATED TO POLITICAL SPENDING OR LOBBYING

- On April 23, shareholders of AES Corp. faced two competing proposals on their ballot. Competing with the NYC pension funds' proxy-access proposal, the AES board introduced its own proxy-access proposal that raised the ownership threshold for nominating directors on the corporate proxy ballot to 5 percent (compared with 3 percent on the NYC pension fund proposal), reduced the percentage of the board that could be nominated to 20 percent (compared with 25 percent on the NYC pension fund proposal), and required that all shares be "long" rather than borrowed "short" (short-sellers were not necessarily excluded in the NYC pension fund proposal and would have interests adverse to other shareholders).
- Further, to compete with a shareholder proposal introduced by John Chevedden concerning shareholder rights to call special meetings, AES proposed its own proposal with higher threshold requirements. AES received a split decision: 66 percent of shareholders supported the NYC pension fund proposal, and only 36 percent supported the management proposal regarding proxy access; but 70 percent of shareholders backed the AES board's proposal on special meetings, while only 36 percent supported Chevedden's.
- On April 28, Exelon introduced its own proxy-access proposal competing with that of the NYC pension funds. Although the particulars of Exelon's proposal were substantially the same as those in AES's, the shareholder vote came out differently: only 43 percent of shareholders supported the NYC pension fund's proposal, while 52 percent supported the management proposal. In its proxy response to the NYC proposal, the Exelon board emphasized its other corporate-governance rules and emphasized that it had consulted with shareholders (holding 39 percent of outstanding shares) in reaching its recommendation, which represented a compromise among competing concerns.⁴⁹
- On April 30, Capital One introduced its own special-meeting proposal with a higher voting threshold than that included in a shareholder proposal sponsored by John Chevedden. Management's proposal passed, while Chevedden's—with 49 percent support—narrowly missed a majority.

The incidence of shareholder proposals involving corporate political spending or lobbying declined in 2015 (**Figure 17**). Shareholder proposals on this subject have been common in each of the last ten years, but the number of such proposals started to increase after the Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*,⁵⁰ which determined that independent political expenditures were speech protected by the First Amendment to the United States Constitution—regardless of whether such speech was funded by for-profit corporations. The number of shareholder proposals introduced at Fortune 250 companies that involved corporate political spending or lobbying peaked at 67 in 2014, before falling 24 percent in 2015.

Figure 17. Number of Shareholder Proposals Relating to Political Spending or Lobbying, Fortune 250, 2006–15*



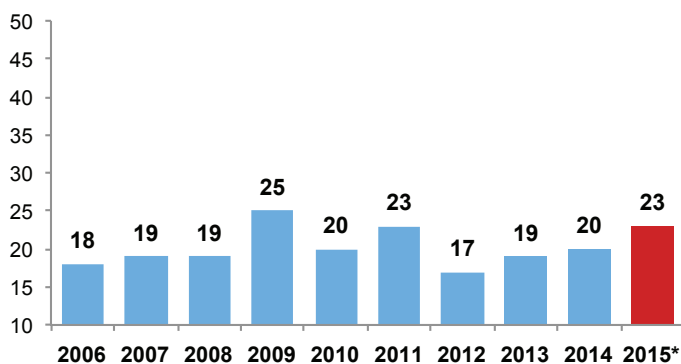
*For 2015, based on 235 companies filing proxy statements by August 31
Source: ProxyMonitor.org

Shareholder proposals related to a company's political spending or lobbying are no exception to the rule that proposals related to social or political concerns essentially never receive majority shareholder support over board opposition:⁵¹ shareholder support for these proposals has vacillated between 18 percent and 25 percent, on average, during the last ten years (**Figure 18**). Though no shareholder proposals have won majority support in 2015, the average shareholder vote for such proposals is up marginally, compared with the last three years.

This variation, however, is largely attributable to a different mix of proposal types and sponsors and does not signify an overall shift in shareholder support. Certain proposals were commonly introduced in recent years that received low-single-digit support—such as those seeking a 75 percent shareholder vote to authorize corporate political spending or to prohibit such spending outright, which constituted six of 67 political-spending-related shareholder proposals in 2014—but were not in the mix of proposals in 2015, presumably because they failed to meet minimum shareholder support thresholds or because their sponsors moved on to other ideas.

Also, there have been no individual-backed shareholder proposals relating to political spending or lobbying introduced at a Fortune 250 company in 2015, compared with seven in 2014: because individuals are less equipped than institutional investors to solicit support for their proposals, the change in sponsor mix can be expected to affect voting results.⁵²

Figure 18. Average Shareholder Vote per Shareholder Proposal Related to Political Spending or Lobbying, Fortune 250, 2006–15*



*For 2015, based on 229 companies holding annual meetings by August 31
Source: ProxyMonitor.org

V. ASSESSING PUBLIC-PENSION FUND SHAREHOLDER ACTIVISM

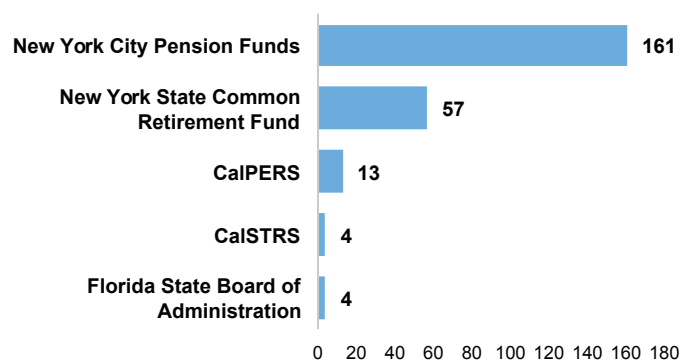
In 2015, almost one-fifth of all shareholder proposals were sponsored by pension plans for public employees. Overall, public-employee pension funds dominate the space for defined-benefit retirement assets⁵³ in the United States: these

plans hold two-thirds of the 200 largest such plans' total assets (\$3.2 trillion of \$4.8 trillion).⁵⁴ The largest public-employee fund—the Federal Retirement Thrift Savings Plan, which serves federal government employees⁵⁵—has not been involved in shareholder-proposal activism, but the next five largest public-employee pension plans have been involved:

- California Public Employees' Retirement System (CalPERS), with \$297 billion in assets
- California State Teachers' Retirement System (CalSTRS) (\$187 billion)
- New York State Common Retirement Fund (\$178 billion)
- New York City Retirement Systems (\$159 billion)
- Florida State Board of Administration (\$155 billion)⁵⁶

Although each of these large public-pension funds has sponsored shareholder proposals, their level of activity—as well as their approaches to shareholder activism more broadly⁵⁷—varies markedly (**Figure 19**). The pension funds for New York City and State sponsor, far and away, the most shareholder proposals. Most public-employee pension funds file no shareholder proposals, but six other state-employee funds filed at least one shareholder proposal at a Fortune 250 company in the last ten years,⁵⁸ in addition to three other municipal funds.⁵⁹

Figure 19. Number of Shareholder Proposals Introduced by Five Large Pension Funds, Fortune 250, 2006–15*



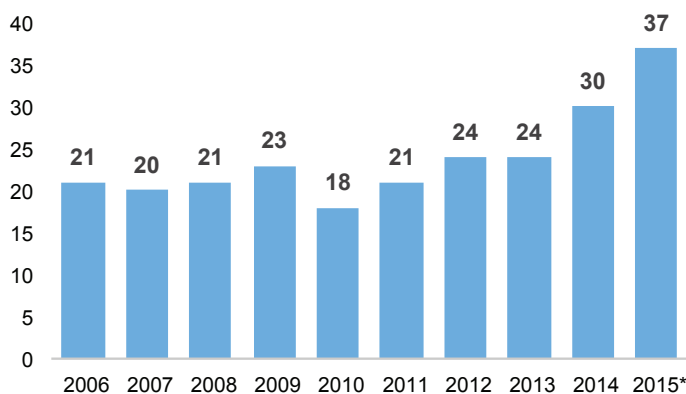
*For 2015, based on 235 companies filing proxy statements by August 31
Source: ProxyMonitor.org

Although public-employee pension funds have sponsored shareholder proposals throughout the past decade—led by the New York funds—their activity has increased notably in 2014 and 2015 (Figure 20). The increase was led by the New York State and City funds, respectively, in each year (Figure 21).

The New York State Common Retirement Fund sponsored no shareholder proposals at Fortune 250 companies during 2006–09 but, following Thomas DiNapoli’s initial appointment as state comptroller in 2007, initiated a shareholder-proposal campaign: the number of proposals sponsored by the fund increased each year through 2014, when it sponsored 20 proposals.

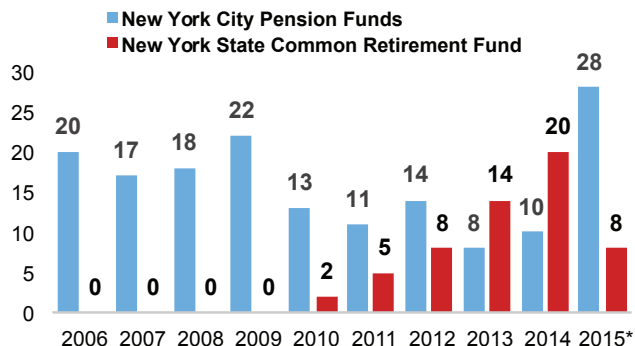
In 2015, the fund was less active—it has sponsored only eight proposals at Fortune 250 companies to date—but the NYC funds picked up the slack: in 2015, Comptroller Stringer’s first full proxy season since assuming office, the NYC funds sponsored 28 shareholder proposals at Fortune 250 companies, a record high for an institutional investor dating to 2006. Of the 28 proposals, 22 sought proxy access (of 75 such proposals that the NYC funds sponsored at companies across the broader stock market).⁶⁰

Figure 20. Number of Shareholder Proposals Introduced by Five Large Pension Funds, By Year, Fortune 250



*For 2015, based on 235 companies filing proxy statements by August 31
Source: ProxyMonitor.org

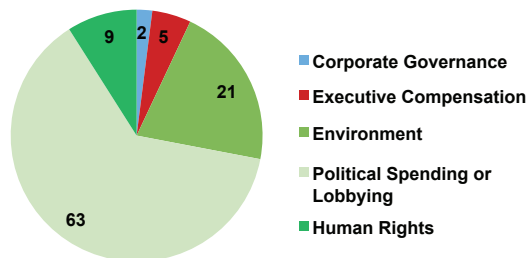
Figure 21. Number of Shareholder Proposals Introduced by New York Pension Funds, By Year, Fortune 250



*For 2015, based on 235 companies filing proxy statements by August 31
Source: ProxyMonitor.org

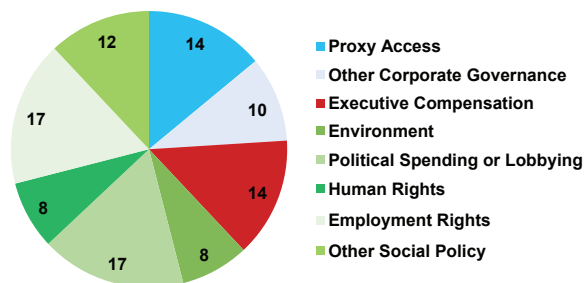
Comptroller DiNapoli’s shareholder-proposal activism has focused on social and policy concerns: 63 percent of the New York State Common Retirement Fund’s shareholder proposals have involved corporate political spending or lobbying, 21 percent have involved environmental issues, and 9 percent have involved employment rights, such as sexual orientation and gender-identity discrimination (Figure 22). Conversely, the NYC pension funds’ shareholder-proposal activism—which, during the ten years in the ProxyMonitor.org database, spans the tenures of three comptrollers, Bill Thompson, John Liu, and Stringer—has involved a broader panoply of concerns, though 62 percent involved various social or policy issues (Figure 23), a figure that would be higher but for Comptroller Stringer’s proxy-access push in 2015.

Figure 22. Subject Matters of Shareholder Proposals Sponsored by New York State Common Retirement Fund, Fortune 250, 2006–15*



*For 2015, based on 235 companies filing proxy statements by August 31
Source: ProxyMonitor.org

Figure 23. Subject Matters of Shareholder Proposals Sponsored by New York City Pension Funds, Fortune 250, 2006–15*, Percent

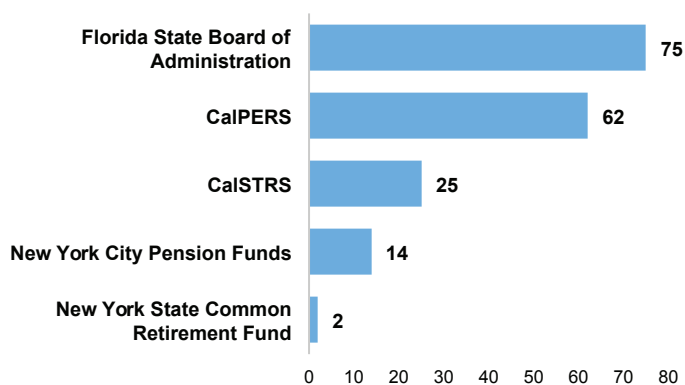


*For 2015, based on 235 companies filing proxy statements by August 31
Source: ProxyMonitor.org

Among less active public-employee funds, the focus of shareholder activism has varied. Some funds, such as CalSTRS, have focused their limited shareholder-proposal activism on social issues. Others have focused broadly on corporate-governance concerns in sponsoring shareholder proposals, even if they engage in a social-investing approach using other tactics: 11 of the 13 shareholder proposals introduced by CalPERS have involved corporate-governance issues—most frequently, voting rules; and several state-employee pension funds, among them the Florida State Board of Administration, participated in a coordinated campaign seeking to declassify corporate boards (an effort spearheaded by Harvard law professor Lucian Bebchuk).⁶¹

Unsurprisingly, the pension funds that have focused on corporate-governance issues have been far more successful at winning majority support for their proposals than those that have focused on social or policy issues (Figure 24). Only one of the 57 shareholder proposals sponsored by the New York State Common Retirement Fund received majority support (a 2015 proposal at Staples requiring boards to seek shareholder approval when executives' severance agreements exceeded a certain threshold). Twenty-three of the 161 proposals sponsored by the NYC pension funds received majority support, but 18 of these sought proxy access.

Figure 24. Percentage of Shareholder Proposals Receiving Majority Support, By Fund, Fortune 250, 2006–15*



*In 2015, based on 229 companies holding annual meetings by August 31
Source: ProxyMonitor.org

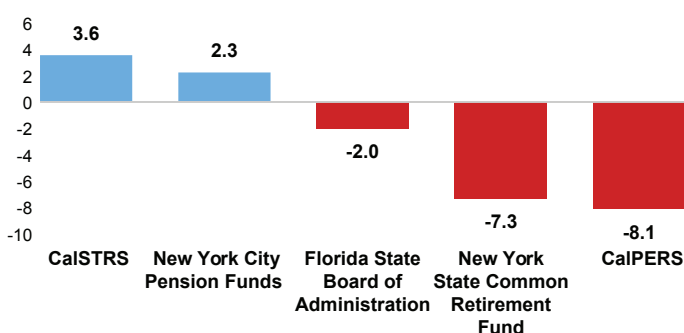
Share-Value Analysis of Public-Pension Funds' Shareholder-Proposal Campaigns, 2006–14

The ultimate test of whether shareholder proposals are an effective tool—at least from the standpoint of the average diversified investor—is not whether they win majority shareholder support but whether they enhance share value.⁶² Individual investors might, of course, have different priorities, and certain institutional investors are designed to have different priorities. But precisely because most investors inherently disagree about many issues of public concern, corporate governance has tended to assume that shareholder value is the orienting concern for equity investors; such concerns are implicit in the fiduciary duties that pension funds owe to retirees or taxpayers.⁶³

To test the relationship between public-pension funds' shareholder-proposal activism and share value, we initially compared the share-price reactions of the Fortune 250 companies targeted by shareholder proposals by the five largest state and municipal pension funds during 2006–14. On average, these companies saw their share price underperform the broader S&P 500 index by 0.9 percent in the year following the shareholder vote.⁶⁴ Because pension funds' strategies and levels of activity varied so broadly, we disaggregated by pension fund (Figure 25).

The sample sizes for CalSTRS, CalPERS, and the Florida fund are probably too small to be meaningful, but the stock-price reactions of the companies targeted by the New York State Common Retirement Fund and NYC pension funds have opposite effects: the companies targeted by the state fund saw their share price drop by 7.3 percent, relative to the broader market, in the year following a proposal's introduction; the companies targeted by the city funds saw their share price outperform the market by 2.3 percent.⁶⁵

Figure 25. Average Percentage Stock Price Change Relative to S&P 500, Year After Shareholder Proposal Introduced, By Fund, Fortune 250, 2006–14



Source: ProxyMonitor.org

The overall observed negative relationship between public-pension funds' shareholder proposals and share value could be explained by several factors not accounted for by this basic analysis, including broad variations in company or industry unrelated to shareholder-proposal activism. To study this question in greater detail, the Manhattan Institute's Center for Legal Policy and its Proxy Monitor team commissioned an econometric study by Tracie Woidtke, a professor at the Haslam College of Business at the University of Tennessee.⁶⁶

Building on a research methodology initially developed for her doctoral dissertation, Woidtke examined the valuation effects associated with pension fund influence, measured through ownership, on Fortune 250 companies, during 2001–13.⁶⁷ Firm value was assessed through industry-adjusted Tobin's Q, with various controls added to the analysis, including firm leverage, research and development expenses, advertising expenses, index membership, assets, positive income, stock transaction costs, insider ownership, and year fixed effects.

Woidtke's results, formally released in conjunction with this report, broadly confirm the baseline stock-price story. Woidtke finds that firm value "is negatively related to public pension fund ownership and positively related to private pension fund ownership during 2001–13."⁶⁸ As with our basic analysis, however, this overall relationship does not hold true for each public-pension fund, and "interesting differences arise when we examine different activist strategies and how these strategies vary over time."⁶⁹ Specifically:

The negative valuation effect in the more recent period (2008–13) is driven by ownership of public funds who sponsor social issue funds, especially the New York State Common Retirement System (NYSCR), and coincides with active sponsoring of social issue proposals during this time period. Ownership by these funds is not associated with negative valuation effects during the earlier period (2001–07) when they were not sponsoring social issue proposals. Consistent with social issue activism having negative valuation effects, Tobin's Q is 22 percent lower (1.42 versus 1.83) and industry-adjusted Tobin's Q is 141 percent lower (-0.12 versus 0.29) for companies targeted by NYSCR with a social issue proposal than for other companies in our sample.⁷⁰

Although alternative explanations could be advanced to explain Woidtke's results, her analysis suggests strongly that some types of shareholder-proposal activism on the part of public-employee pension funds are associated with lower share value—and that the New York State Common Retirement Fund's campaigns under Comptroller Thomas DiNapoli may not have enhanced share value for the respective securities held by the fund.

2015 Proxy-Access Campaign: Assessment

In terms of shareholder voting results, NYC comptroller Scott Stringer's campaign for proxy access in 2015 was an unqualified success: 18 of 22 proxy-access proposals sponsored by the NYC pension funds at Fortune 250 companies received majority shareholder support, and none of the other four proposals received less than 42 percent shareholder backing. Comptroller Stringer's proxy-access effort notably reorients the city funds' traditional social-policy focus in shareholder-proposal activism toward a corporate-governance focus with significant shareholder support.

Will the proxy-access campaign's shareholder-voting success translate into share value? Comptroller Stringer's press release touting the effort claims that the proposed rule could "raise the market cap of publicly held companies in the United States by up to \$140 billion, or 1.1 percent,"⁷¹ citing research by the CFA Institute.⁷² Others assessing the proposed proxy-access rule have been skeptical. Even as a majority of shareholders at most companies have lined up with Stringer's effort, a substantial fraction of shareholders (25 percent–68 percent) have opposed each of these proposals, unless supported by the companies' boards of directors. Included among the investors not supporting the proxy-access proposals are the large mutual-fund groups Fidelity and Vanguard.⁷³

Because no one knows precisely how the proxy-access rules will be utilized in practice, it is impossible to know whether they will enhance share value. In theory, lowering the barriers to entry for large, diversified shareholders to nominate directors competing with those tapped by board nominating committees could enhance share value, assuming that those shareholders have expertise in director selection or corporate management that boards lack. On the other hand, when the U.S. Court of Appeals for the D.C. Circuit threw out the SEC's promulgated mandatory proxy-access rule in 2011, it worried that "unions and state and local governments whose interests in jobs may well be greater than their interest in share value, can be expected to pursue self-interested objectives rather than the goal of maximizing shareholder value."⁷⁴

In that regard, the NYC funds' express methodology in determining which companies to target suggests concerns other than share value. The funds expressly targeted companies based on three criteria: "climate change, board diversity and excessive CEO pay."⁷⁵ Though executive pay is plausibly related to share value (excessive pay may dilute share ownership and otherwise serve as a proxy for agency costs—the costs of ownership that prevent alignment of management and shareholder interests),⁷⁶ climate change and board diversity have attenuated, if any, connections to share value.⁷⁷

The NYC pension funds' campaign does, however, have the virtues of clearly defined criteria and transparency, and there is no evidence that Comptroller Stringer was targeting particular companies with self-interested objectives beyond the three priority issues that the campaign publicly identified.

In contrast, other labor-affiliated investors sponsoring proxy-access proposals in 2015 have targeted specific companies that have been in the crosshairs of ongoing wage and union-organizing campaigns:

- Community Health Systems faced a proxy-access shareholder proposal sponsored by the Connecticut Retirement Plans and Trust Funds. The largest non-urban provider of hospital health care, Community Health has been involved in contentious litigation with labor over efforts to unionize registered nurses.⁷⁸
- Retailer Kohl's, targeted by CalPERS with a proxy-access proposal, has been facing specific union agitation over wages and labor conditions, including at the company's annual meeting.⁷⁹ In addition, CalPERS is the principal creditor in the bankruptcy of Golden State municipality San Bernardino,⁸⁰ and Kohl's is San Bernardino's largest outside creditor, owed \$29.4 million at the time of the city's bankruptcy.⁸¹ In litigation over that bankruptcy, CalPERS has been aggressively pursuing its interests at the expense of other bondholders.⁸²
- McDonald's, targeted by the UAW Retiree Medical Benefits Trust, has been the principal target of union organizers' "Fight for 15" campaign, aimed at substantially increasing fast-food workers' wages.⁸³
- Walgreens Boots Alliance was targeted with a proxy-access proposal by the labor-affiliated group Change to Win. The nation's largest drug retailer, Walgreens has emerged as a principal target of labor wage campaigns, which were previously successful in pressuring retailers like Wal-Mart and Target to increase pay scales.⁸⁴

These four labor-affiliated funds may have targeted these four particular companies for objectively neutral reasons, but the fact that targeted companies were so central to union campaigns—and, in CalPERS's case, the sponsor's own self-interest—at least raises a red flag.

Proxy Access: Share-Price Analysis

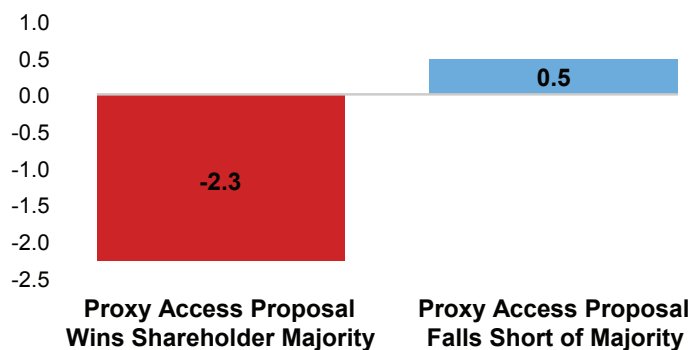
Although majority shareholder support is a gauge of median shareholder sentiment—assuming that voting mechanisms accurately capture shareholder sentiment, an assumption that may not be borne out in practice⁸⁵—it does not necessarily reflect accurately the expected share-value effects of a given course of action. In contrast, share-price effects—which are driven by marginal buyers and sellers of security—are

broadly regarded as implicitly assessing market expectations about share value.⁸⁶

To assess the market’s reaction to proxy-access proposals in the 2015 proxy season, we measured the share-price effects of the release of information about shareholder votes on proxy-access shareholder proposals introduced at Fortune 250 companies. From a baseline date of one business day before a company’s annual meeting, we measured the change in stock price—relative to the S&P 500 index—until a date five business days after the annual meeting.⁸⁷ We separated results into two groups: companies in which a majority of shareholders voted against the proxy-access proposal (12 total companies); and companies in which a majority of shareholders voted for the proxy-access proposal over board opposition (21 total companies).⁸⁸

The results of this analysis suggest that the market may have negatively assessed proxy access in terms of share value. Among companies in which shareholders rejected the proposal, the corporate stock price increased by 0.5 percent relative to the broader market (**Figure 26**). Six companies outperformed the market, and six underperformed. In contrast, among companies in which shareholders voted for proxy access, the corporate stock price declined by 2.3 percent. Four companies outperformed the market, and 17 underperformed.

Figure 26. Average Percentage Stock Price Change Relative to S&P 500, After Shareholder Proxy Access Vote, Fortune 250, 2015*



*In 2015, based on 229 companies holding annual meetings by August 31
Source: ProxyMonitor.org

The negative stock-price effect—if it represents an actual relationship and not merely statistical noise—is probably less pronounced than these data initially suggest. The biggest downward mover among the pool of companies passing proxy access, Kohl’s, undoubtedly saw its stock price pummeled, primarily owing to missing earnings expectations. The concentration of energy companies in the sample—a necessary consequence of the NYC pension funds’ focus on climate change in identifying its pool of target companies—undoubtedly introduces confounding industry effects.

Nevertheless, the results hold when Kohl’s is excluded from the sample and when oil and gas companies are indexed against an energy exchange-traded fund⁸⁹ rather than the S&P. (The observed negative share-price effect is -1.7 percent, excluding Kohl’s; and -1.5 percent, indexing oil and gas companies by sector. Combining both of these adjustments, the negative price effect is -0.9 percent—and 15 of the remaining 20 companies continue to underperform in the days after their annual meetings.)

These preliminary results should be retested with a broader data set and the types of controls that Woitke uses in her broader public-pension study; but as a preliminary analysis, they tend to run opposite the findings synthesized by CFA that examined stock-price effects of the proxy-access rule when the SEC was advancing the idea.⁹⁰ Although the observed stock-price effects may be subject to alternative explanations or flow from confounding, unexplained variables, these preliminary observations at least throw into question the assumption that profit-maximizing investors see the proposed proxy-access rule as enhancing share value. Whether such a market assessment is accurate depends on whether and how shareholders choose to utilize the new rules, assuming that they are adopted.

CONCLUSION

The 2015 proxy season was marked by legal and regulatory uncertainty, an increase in shareholder-proposal sponsorship, and a broad, successful campaign by the NYC pension funds pushing publicly traded companies to establish proxy-access rules for director elections. The SEC chairman's January 2015 decision⁹¹ not to enforce its conflicting-proposals rule led to several companies facing competing management and shareholder proposals.

Overall, the agency's staff was significantly less likely to issue companies no-action letters, which led to an increase in the number of shareholder proposals on proxy ballots. Though the Third Circuit Court of Appeals reversed a lower-court decision that would have significantly eroded the SEC's ordinary business-operations rule for excluding shareholder proposals, its decision⁹² generated significant ambiguity about how that rule should be properly applied.

After the close of the proxy season, other legal and regulatory decisions highlighted the changing landscape that companies and investors face. On August 18, the D.C. Circuit Court of Appeals vacated the SEC's "conflict minerals" disclosure rule on First Amendment grounds⁹³—the latest legal rebuff to an agency increasingly given to requiring disclosures that seem far afield from its statutory mission to promote "efficiency, competition, and capital formation."⁹⁴

On August 5, in the most recent example of this agency trend, the SEC formally adopted its proposed rule requiring companies to disclose the ratio of their chief executive's pay to that of their median worker.⁹⁵ Although this agency action, like the conflict-minerals rule, was prompted by Congress,⁹⁶ it is in significant tension with the agency's increased deference paid to the shareholder-proposal process: over the last decade, Fortune 250 companies have faced 11 shareholder proposals regarding the CEO-worker pay ratio, and shareholder opposition to those proposals ranged from 88 percent to 97 percent.

Against this legal and regulatory backdrop, the NYC pension funds' successful campaign for proxy access in 2015 highlights the role that shareholders are increasingly playing in reshaping corporate governance. Although a majority of shareholders supported most proxy-access proposals, whether these rules will achieve their stated objective of increasing share value remains in doubt.

During the nine years through 2014, public-employee pension funds' shareholder activism is associated with abnormally low share-price performance. Econometric analysis confirms a negative relationship between public-pension fund firm ownership and firm value and confirms that this overall relationship is significantly explained by social-issue shareholder-proposal activism. The NYC pension funds' proxy-access campaign is notable, however, in that it is centered on a corporate-governance rule, not a social or policy concern, even if screening criteria used to select which companies to target are social-policy-oriented.

Short-term share-price effects in the wake of shareholder votes supporting or rejecting a proxy-access rule in 2015 suggest market skepticism of the claim that the proposed rule will enhance share value, though fuller analysis is necessary to confirm those results and to assess whether the campaign will meet its stated goal to improve share value over the longer term.

Overall, the finding that public-pension funds' shareholder-proposal activism does not add to share value for the average diversified investor—and is actually associated with lower value—suggests that states should reexamine their public-employee pension funds' approaches to this issue. Unlike private pension plans, public-pension funds are exempt from the federal Employee Retirement Income Security Act (ERISA)⁹⁷ and bound only by state law obligations. Yet these funds collectively hold trillions of dollars in assets, providing for trillions of dollars of pension obligations for workers and retirees, with trillions of dollars of potential taxpayer liabilities. State policymakers should consider adopting appropriate guidelines to mitigate risks.

APPENDIX: Shareholder Advisory Votes on Executive Compensation

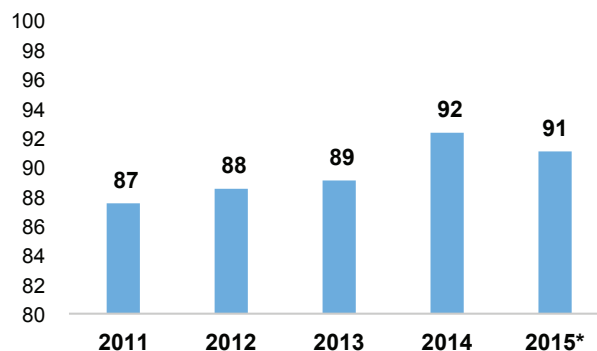
The ProxyMonitor.org database tracks not only shareholder proposals but also shareholder advisory votes on executive compensation, which have been mandatory under federal law—annually, biennially, or triennially—since 2011. Shareholders at most companies have opted to hold such votes annually. In 2015, 216 companies in the Fortune 250 have held such votes to date, among 229 to hold annual meetings.

The likelihood that shareholders vote against management’s executive-compensation packages remains low. Indeed, in 2015, a majority of the shareholders of only one Fortune 250 company, Bed Bath & Beyond, have voted against executive pay—fewer than in any previous year since votes were mandated under Dodd-Frank. (A total of 35 percent of Bed Bath & Beyond shareholders voted for the company’s compensation package.)

After rising marginally each year since 2011, average shareholder support for executive compensation fell slightly in 2015, to 91 percent from 92 percent last year—a level still above that in 2011, 2012, or 2013 (Figure 27). The percentage of companies getting the support of 90 percent or more of shareholders also fell slightly, from 79 percent in 2014 to 74 percent in 2015; again, 2015 support is higher than any other year since say-on-pay became mandatory (Figure 28). Likewise, the percentage of companies failing to get 70 percent support for their executive compensation—the threshold level deemed significant by the proxy advisory firm ISS⁹⁸—rose marginally, from 4 percent in 2014 to 5 percent in 2015, though again falling below that witnessed in any earlier year (Figure 29).

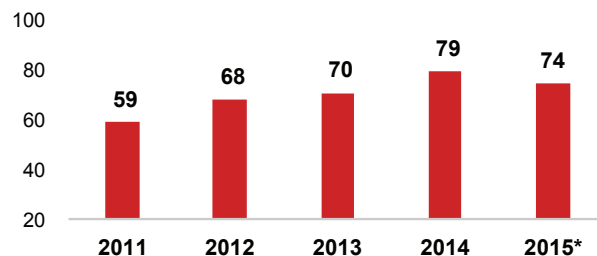
It will be worth watching to see if the modest drop in support for executive compensation, year-over-year, represents a trend or whether 2014 was an outlier. Overall, companies continue to win very broad support for their executive-compensation packages and seem more likely than ever to win majority shareholder support.

Figure 27. Average Shareholder Advisory Vote on Executive Compensation, %, Fortune 250, 2011–15*



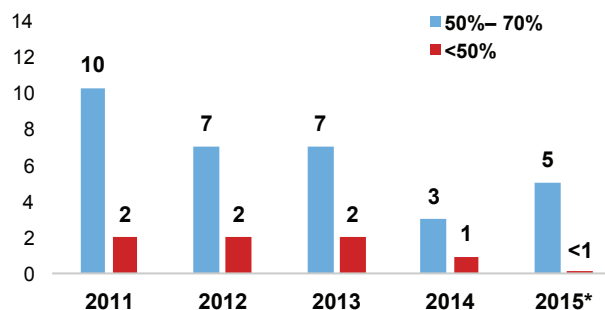
*For 2015, based on 216 companies holding shareholder advisory votes on executive compensation by August 31
Source: ProxyMonitor.org

Figure 28. Percentage of Fortune 250 Companies with at Least 90+% of Shareholders Supporting Executive Compensation, 2011–15*



Source: ProxyMonitor.org

Figure 29. Percentage of Fortune 250 Companies Receiving 50%–70%, or Below 50%, Shareholder Support for Executive Compensation, 2011–15*



Source: ProxyMonitor.org

ENDNOTES

- ¹ Stockholders of publicly traded companies who have held shares valued at \$2,000 or more for at least one year can introduce proposals for shareholders' consideration at corporate annual meetings. See 17 C.F.R. § 240.14a-8 (2007) [hereinafter 14a-8]. The federal Securities and Exchange Commission determines the procedural appropriateness of a shareholder proposal for inclusion on a corporation's proxy ballot, pursuant to the Securities Exchange Act of 1934, Pub. L. No. 73-291, Ch. 404, 48 Stat. 881 (1934) (codified at 15 U.S.C. §§ 78a-78oo (2006 & Supp. II 2009)), at §§ 78m, 78n & 78u; 15 U.S.C. §§ 80a-1 to 80a-64 (2000) (pursuant to Investment Company Act of 1940, Pub. L. No. 76-768, 54 Stat. 841(1940)); but the substantive rights governing such measures and how they can force boards to act remain largely a question of state corporate law; cf. Del. Code Ann., tit. 8, § 211(b) (2009) (noting that in addition to the election of directors, "any other proper business may be transacted at the annual meeting").
- ² Under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, publicly traded companies must hold shareholder advisory votes on executive compensation annually, biennially, or triennially, at shareholders' discretion. See Pub. L. No. 111-203, 124 Stat. 1376, §951 (2010) [hereinafter Dodd-Frank].
- ³ See Proxy Monitor, Reports and Findings, http://proxymonitor.org/Forms/reports_findings.aspx (last visited Aug. 30, 2015).
- ⁴ The following companies are listed in the 2014 Fortune 250 but are not independent publicly traded corporations in 2015: Fannie Mae, Freddie Mac, State Farm Insurance, Energy Transfer Equity, Enterprise Products Partners, CHS, Plains GP Holdings, Liberty Mutual Holding Company, HCA Holdings, New York Life Insurance, Nationwide Mutual Insurance, TIAA-CREF, Massachusetts Mutual Life Insurance, Publix Super Markets, Northwestern Mutual Life Insurance, U.S. Foods, United States Automobile Association, Icahn Enterprises, Global Partners, Land O'Lakes, Aramark Holdings, Smithfield Foods, Toys "R" Us, Peter Kiewit Sons', H.J. Heinz, and Guardian Life Insurance Company of America.
- ⁵ Those companies are: Applied Materials, Ashland, Coca-Cola Enterprises, GameStop, ITT, KBR, Motorola Solutions, Oshkosh, Principal Financial Group, Public Service Enterprise Group, and the Williams Companies.
- ⁶ Those companies are: AbbVie, Bed Bath & Beyond, CDW, Centene, CST Brands, DaVita HealthCare Partners, Family Dollar Stores, Gilead Sciences, Hertz Global Holdings, NRG Energy, and Ross Stores.
- ⁷ Those companies are: AMR, Aon, Constellation Energy, Coventry Health Care, Dell, Eaton, Hillshire Brands, H.J. Heinz, Medco, Smithfield Foods, Sunoco, URS, and US Airways.
- ⁸ The adjustments noted in endnotes 5 and 6 mean that the dataset of companies compared between 2014 and 2015 is marginally different. Nevertheless, because the companies added and deleted are among the smallest in the Fortune 250, they are generally less likely to receive shareholder proposals than others, so overall filing and voting results should not differ materially. Among the nine new companies in the dataset for 2015, which appeared in the 2014 but not 2013 Fortune 250, seven faced no shareholder proposals. Gilead Sciences faced four proposals (two from corporate gadflies John Chevedden and James McRitchie, and one each from social-investing and labor funds), while DaVita HealthCare received a proxy access proposal from the United Autoworkers Retiree Medical Trust.
- ⁹ See Heidi Welsh, Accuracy in Proxy Monitoring, HLS Forum on Corporate Governance and Financial Regulation (Sept. 16, 2013), <https://blogs.law.harvard.edu/corpgov/2013/09/16/accuracy-in-proxy-monitoring-2/> (critiquing Proxy Monitor dataset).
- ¹⁰ See, e.g., Paul Rose, Common Agency and the Public Corporation, 63 Vand. L. Rev. 1355, 1356 (2010) (observing that "general trends have supported increased shareholder power and influence within public companies in recent years").
- ¹¹ See Barry Burr, Institutional Investors Increase Ownership of U.S. Companies to All-Time High, Pensions & Investments (Sept. 5, 2008, 12:01 AM), <http://www.pionline.com/article/20080905/ONLINE/809049969/institutional-investors-increase-ownership-of-us-companies-to-all-time-high#>; see also Carolyn Kay Brancato & Stephan Rabimov, The 2008 Institutional Investment Report: Trends in Institutional Investor Assets and Equity Ownership of U.S. Corporations (Sept. 2008).
- ¹² In particular, two major federal laws have altered the balance: the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), enacted in the wake of the collapse of Enron and the bursting Internet stock bubble; and the 2010 Dodd-Frank Act, supra note 2, enacted in the wake of the 2008 financial crisis. In addition, the SEC has reinforced these trends through a series of new rules, including one that limits brokers' ability to vote individual stockholders' shares. See SEC Rel. No. 34-60215 (July 1, 2009), <http://www.sec.gov/rules/sro/nyse/2009/34-60215.pdf>.
- ¹³ Shareholder Activist Definition, Investopedia.com, <http://www.investopedia.com/terms/s/shareholderactivist.asp> (last visited Sept. 10, 2015) ("A person who attempts to use his or her rights as a shareholder of a publicly-traded corporation to bring about social change. Some of the issues most often addressed by shareholder activists are related to the environment, investments in politically sensitive parts of the world and workers' rights (sweatshops). The term can also refer to investors who believe that a company's management is doing a bad job and who attempt to gain control of the company and replace management for the good of the shareholders.").
- ¹⁴ See Michael Chamberlain, Socially Responsible Investing: What You Need to Know, Forbes (Apr. 24, 2013), <http://www.forbes.com/sites/feonlyplanner/2013/04/24/socially-responsible-investing-what-you>

need-to-know (“In general, socially responsible investors are looking to promote concepts and ideals that they feel strongly about”).

- ¹⁵ See 14a-8, *supra* note 1.
- ¹⁶ See, e.g., *Bus. Roundtable v. S.E.C.*, 647 F.3d 1144, 1152 (D.C. Cir. 2011) (citing proposition that “investors with a special interest, such as unions and state and local governments whose interests in jobs may well be greater than their interest in share value, can be expected to pursue self-interested objectives rather than the goal of maximizing shareholder value”); see also Dep’t of Labor, Office of the Inspector General, *Proxy-Voting May Not Be Solely for the Economic Benefit of Retirement Plans* (Mar. 31, 2011), <http://www.oig.dol.gov/public/reports/oa/2011/09-11-001-12-121.pdf> (questioning whether labor pension funds are using “plan assets to support or pursue proxy proposals for personal, social, legislative, regulatory, or public policy agendas”); James R. Copland & Margaret M. O’Keefe, *Proxy Monitor 2014: A Report on Corporate Governance and Shareholder Activism 14* (Manhattan Inst. for Pol’y Res., Fall 2014), http://www.proxymonitor.org/Forms/pmr_09.aspx#notes (showing linkage between labor-affiliated shareholder activism and corporate political spending) [hereinafter Copland & O’Keefe Fall 2014].
- ¹⁷ “Corporate gadflies,” as commonly used in Charles M. Yablon, *Overcompensating: The Corporate Lawyer and Executive Pay*, 92 *Colum. L. Rev.* 1867, 1895 (1992); and Jessica Holzer, *Firms Try New Tack against Gadflies*, *Wall St. J.* (June 6, 2011), <http://online.wsj.com/article/SB10001424052702304906004576367133865305262.html>.
- ¹⁸ See New York City Comptroller, *Boardroom Accountability Project*, <http://comptroller.nyc.gov/boardroom-accountability/> (last visited Sept. 11, 2015) [hereinafter Boardroom Accountability Project] (citing objective “to ensure that companies are truly managed for the long-term” and contrasting “short-term investors” that allegedly may “manipulate corporate governance at the expense of those seeking long-term value”).
- ¹⁹ See, e.g., *Bus. Roundtable*, 647 F.3d at 1152 (“[I]nvestors with a special interest, such as unions and state and local governments whose interests in jobs may well be greater than their interest in share value, can be expected to pursue self-interested objectives rather than the goal of maximizing shareholder value”); Dep’t of Labor, *supra* note 16; Copland & O’Keefe Fall 2014, *supra* note 16, at 14.
- ²⁰ See Boardroom Accountability Project, *supra* note 18; see also Press Release, Comptroller Stringer, NYC Pensions Funds Launch National Campaign To Give Shareowners A True Voice In How Corporate Boards Are Elected: New York City Pension Funds File 75 Proxy Access Shareowner Proposals to Kick Off the Boardroom Accountability Project, <http://comptroller.nyc.gov/newsroom/comptroller-stringer-nyc-pension-funds-launch-national-campaign-to-give-shareowners-a-true-voice-in-how-corporate-boards-are-elected/> [hereinafter Stringer Press Release].
- ²¹ See Dodd-Frank Act, *supra* note 2.
- ²² See *id.*
- ²³ Copland & O’Keefe Fall 2014, *supra* note 16, at 6 (citing Copland, *Proxy Monitor 2013: Political Spending, Say on Pay, and Other Key Issues to Watch in the 2013 Proxy Season* (Manhattan Inst. for Pol’y Res., Winter 2013), http://proxymonitor.org/Forms/pmr_05.aspx [hereinafter Copland Winter 2013]; see also Copland & O’Keefe, *Proxy Monitor 2013: Corporate Governance and Shareholder Activism* (Manhattan Inst. for Pol’y Res., Fall 2013), available at http://proxymonitor.org/Forms/pmr_06.aspx [hereinafter Copland & O’Keefe Fall 2013]; Copland, *Proxy Monitor 2014: Companies Fight Back Against Chevedden; Unions and Social Investors Ramp Up Push on Corporate Political Spending* (Manhattan Inst. for Pol’y Res., Winter 2014), http://proxymonitor.org/Forms/pmr_07.aspx [hereinafter Copland Winter 2014].
- ²⁴ See No-Action Letters, SEC, <http://www.sec.gov/answers/noaction.htm> (last visited Sept. 11, 2015).
- ²⁵ See, e.g., Andrew Ackerman, *Corporations Take Swats at a Gadfly*, *Wall St. J.* (Mar. 12, 2014), <http://online.wsj.com/news/articles/SB10001424052702303546204579435512380561526?mod=vocus>; Ning Chiu, *Fifth Circuit Upholds Decision Against Chevedden as More Companies Seek 14a-8 Relief from Courts*, *Davis Polk & Wardwell LLP* (Feb. 18, 2014), <http://www.davispolk.com/briefing/corporategovernance/fifth-circuit-upholds-decision-against-chevedden-more-companies-seek>; *Waste Connections, Inc. v. Chevedden*, No. 4:13-CV-00176 (S.D. Tex. June 3, 2013), *aff’d*, No. 13-20336, 2014 WL 554566 (5th Cir. Feb. 13, 2014), <http://www.gpo.gov/fdsys/pkg/USCOURTS-ca5-13-20336/pdf/USCOURTS-ca5-13-20336-0.pdf>.
- ²⁶ Society of Corporate Secretaries and Governance Professionals, <http://www.ascs.org> (last visited Sept. 11, 2015).
- ²⁷ See Copland Winter 2013, *supra* note 23.
- ²⁸ See 14a-8, *supra* note 1.
- ²⁹ See *id.*
- ³⁰ See Statement from Chair White Directing Staff to Review Commission Rule for Excluding Conflicting Proxy Proposals, SEC (Jan. 16, 2015), http://www.sec.gov/news/statement/statement-on-conflicting-proxy-proposals.html#_VST9b_nF_Wt [hereinafter White Statement].
- ³¹ See No-Action Letter Re: Wal-Mart Stores, Inc., SEC, <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2014/trinitychurch032014-14a8.pdf> [hereinafter “Wal-Mart No-Action Letter”] (stating “[W]e will not recommend enforcement action to the Commission if Walmart omits the proposal from its proxy materials in reliance on rule 14a-8(i)(7).”) (last visited Sept. 11, 2015); see also 14a-8, *supra* note 1 at subsection (i)(7) (indicating that when a “proposal deals with a matter relating to the company’s ordinary business operations,” a company may rely on that as a basis for excluding the proposal).
- ³² Letter from James McRitchie to Office of Chief Counsel, Division

of Corporation Finance, SEC (Dec. 23, 2014), available at <http://corp.gov.net/wp-content/uploads/2014/12/McRitchieAppealNo-action12-23-2014.pdf> (last visited Sept. 11, 2015).

³³ *Trinity Wall Street v. Wal-Mart Stores, Inc.*, 75 F. Supp. 3d 617 (D. Del. 2014), rev'd sub nom. *Trinity Wall St. v. Wal-Mart Stores, Inc.*, No. 14-4764, 2015 WL 1905766 (3rd Cir., Apr. 14, 2015) (available online at <http://law.justia.com/cases/federal/district-courts/delaware/dedce/1:2014cv00405/54554/65/>).

³⁴ *Id.* at 622.

³⁵ *Id.* at 630.

³⁶ See *Trinity Wall Street v. Wal-Mart Stores, Inc.*, No. 14-4764, 2015 WL 1905766 (3rd Cir., Apr. 14, 2015) (available online at <http://www.arkansasbusiness.com/public/wmt-trinity.pdf>).

³⁷ *Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323 (3d Cir. 2015).

³⁸ See Stephen M. Bainbridge, *Two Cheers for Trinity Wall Street v. Wal-Mart: The Awkward New Test For Ordinary Business Exclusion*, Legal Backgrounder, Washington Legal Foundation, available at http://www.wlf.org/upload/legalstudies/legalbackgrounder/082115LB_Bainbridge2.pdf (last visited Sept. 11, 2015).

³⁹ See Chamberlain, *supra* note 14 (defining “socially responsible investing”).

⁴⁰ Pension plans are generally bound as fiduciaries under the Employee Retirement Income Security Act (ERISA) to maximize share value in their pension management. See 29 C.F.R. § 2509.08-2(1) (2008). However, those affiliated with religious organizations are exempt from this requirement. See 29 U.S.C. § 1003(b).

⁴¹ See Liz Hoffman & Timothy W. Martin, *Largest U.S. Pensions Divided on Activism*, *Wall St. J.*, May 19, 2015, <http://www.wsj.com/articles/largest-u-s-pensions-divided-on-activism-1432075445>.

⁴² Board-declassification proposals were introduced at many publicly traded companies from 2012 through 2014 by various public-employee pension funds affiliated with Harvard's Shareholder Rights Project, see *The President and Fellows of Harvard College, Shareholder Rights Project*, <http://srp.law.harvard.edu/>.

⁴³ In determining shareholder support for shareholder proposals, the Manhattan Institute counts votes consistent with the practice dictated in a company's bylaws, consistent with state law. Some companies measure shareholder support by dividing the number of votes for a proposal by the total number of shares present and voting, ignoring abstentions. Other companies measure shareholder support by dividing the number of favorable votes by the number of shares present and entitled to vote—thus including abstentions in the denominator of the tally. Neither practice necessarily skews shareholder votes in management's favor: whereas the latter method makes it relatively more difficult for shareholder resolutions to obtain majority support, it also makes it more difficult for management to win shareholder backing for its own proposals, such as equity compensation plans.

Although shareholder-proposal activists prefer to exclude abstentions consistently in tabulating vote totals, without regard to corporate bylaws—which necessarily inflates apparent support for their proposals—such a methodology is inconsistent with federal law. The SEC's Schedule 14A specifies that for “each matter which is to be submitted to a vote of security holders,” corporate proxy statements must “[d]isclose the method by which votes will be counted, including the treatment and effect of abstentions and broker non-votes under applicable state law as well as registrant charter and bylaw provisions”—clearly indicating that corporations can adopt varying counting methodologies in assessing shareholder votes and that state substantive law governs the parameters of vote calculation. See Item 21, *Voting Procedures*, 17 C.F.R. § 240.14a-101, available at <http://www.sec.gov/about/sched14a.pdf> (last visited Sept. 11, 2015).

Under the state law of Delaware, in which most large public corporations are chartered, “the certificate of incorporation or bylaws of any corporation authorized to issue stock may specify the number of shares and/or the amount of other securities having voting power the holders of which shall be present or represented by proxy at any meeting in order to constitute a quorum for, and the votes that shall be necessary for, the transaction of any business.” *Del. Gen. Corp. L.* § 216, available at <http://delcode.delaware.gov/title8/c001/sc07/> (last visited Sept. 11, 2015). As a default rule, absent a bylaw specification, Delaware law specifies that “in all matters other than the election of directors,” companies should count “the affirmative vote of the majority of shares of such class or series or classes or series present in person or represented by proxy at the meeting,” *id.* at 216(4)—the precise inverse of shareholder-proposal activists' preferred counting rule.

The SEC staff has adopted a rule that for the very limited purpose of determining whether a proposal has met the “resubmission threshold” to qualify for inclusion on the next year's corporate ballot—a permissive standard requiring merely a minimum 3 percent, 6 percent, or 10 percent vote, respectively, in successive years, see *Amendments to Rules on Shareholder Proposals*, Exchange Act Release No. 40,018; 63 Fed. Reg. 29,106, 29,108 (May 28, 1998) (codified at 17 C.F.R. pt. 240)—“[o]nly votes for and against a proposal are included in the calculation of the shareholder vote of that proposal,” ignoring abstentions. SEC Staff Legal Bulletin No. 14, F.4., July 13, 2001, <http://www.sec.gov/interp/legal/cfs14.htm> (last visited Sept. 11, 2015). Because this is a staff rule not voted on by the Commission; because it exists for a limited purpose (with multiple rationales, including reducing workload in processing 14a-8 no-action petitions and adopting a permissive standard for ballot inclusion); and because it contravenes clear and longstanding deference to substantive state law in the field of corporate governance, the notion that this limited SEC staff vote-counting rule should dictate counting methodology, irrespective of state law and governing corporate bylaws, is untenable. Indeed, in 2014 and 2015, various shareholder proponents have introduced proposals seeking to modify companies' bylaws to treat abstentions as non-votes; such proposals have received less than 10 percent shareholder support.

- ⁴⁴ See Copland & O’Keefe Fall 2014, *supra* note 16, at 2 (“From 2006 through 2014, among 1,141 shareholder proposals at Fortune 250 companies that involved social or policy concerns, not a single proposal has won the support of a majority of shareholders over board opposition.”); James R. Copland, *Getting the Politics Out of Proxy Season*, *Wall St. J.*, Apr. 23, 2015, available at <http://www.wsj.com/articles/getting-the-politics-out-of-proxy-season-1429744795>. Note that this statement holds true for the current Fortune 250, but a shareholder proposal at KBR, Inc. did receive 55 percent shareholder support over board opposition in 2011, when the company was in the Fortune 250 list. That proposal, sponsored by the New York City pension funds, encouraged the board to amend the company’s equal-employment opportunity policy to prohibit discrimination based on sexual orientation.
- ⁴⁵ Although there were only two shareholder proposals at Fortune 250 companies in 2015 that sought to declassify corporate boards, the year did involve a significant dispute about the empirical data justifying the idea. As discussed in earlier Proxy Monitor reports, see Copland Winter 2014, *supra* note 23, text accompanying notes 12–15, early academic studies showed that staggered boards reduced share value, see, e.g., Lucian A. Bebchuk, Alma Cohen & Charles C.Y. Wang, *Staggered Boards and the Wealth of Shareholders: Evidence from Two Natural Experiments* (Nat’l Bureau of Econ. Research, Working Paper No. 17127, June 2011), available at <http://www.nber.org/papers/w17127>; but subsequent research has thrown these findings into question, see, e.g., Martijn Cremers, Lubomir P. Litov, and Simone M. Sepe, *Staggered Boards and Firm Value, Revisited*, *Social Science Research Network*, Dec. 19, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2364165. In December 2014, SEC Commissioner Daniel Gallagher and Stanford professor Joseph Grundfest released a provocative paper summarizing this dispute, Daniel M. Gallagher & Joseph Grundfest, *Did Harvard Violate Federal Securities Law? The Campaign against Classified Boards of Directors*, *Social Science Research Network*, Dec. 10, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2536586. Gallagher and Grundfest’s paper asserted that the Harvard Shareholder Rights Project, see *supra* note 42, violated federal securities law by inadequately characterizing the current state of the research in shareholder proposals it helped funds to introduce, which prompted an aggressive pushback from academics, see, e.g., *Statement of Thirty-Four Senior Corporate and Securities Law Professors Urging Commissioner Gallagher and Professor Grundfest to Withdraw Their Allegations against Harvard and the SRP*, *HLS Forum on Corporate Governance and Financial Regulation* (Jan. 15, 2015), <http://corpgov.law.harvard.edu/2015/01/15/statement-of-thirty-four-senior-corporate-and-securities-law-professors-urging-commissioner-gallagher-and-professor-grundfest-to-withdraw-their-allegations-against-harvard-and-the-srp/>, though this furious academic response did not challenge the paper’s characterization of the academic evidence but rather objected to its allegations against Harvard University and its academic-led clinical law program.
- ⁴⁶ See, e.g., Copland & O’Keefe Fall 2014, *supra* note 16, at 9 & tbl.1.
- ⁴⁷ For example, according to the Harvard Shareholder Rights Project, a clinical program that advocated for the proposal to declassify staggered boards, two-thirds of the S&P 500 companies that had classified boards as of 2012 had changed their practice by 2014. See Harvard Shareholder Rights Project, *121 Companies Agreeing to Move toward Annual Director Elections*, <http://srp.law.harvard.edu/companies-entering-into-agreements.shtml> (last visited Sept. 11, 2015).
- ⁴⁸ See Copland & O’Keefe Fall 2014, *supra* note 16, at 5. (For example, among companies facing board-declassification proposals introduced through efforts of the Harvard Shareholder Rights Project, 56 percent agreed to declassify their boards in 2012, 68 percent in 2013, and 76 percent in 2014. See Harvard Shareholder Rights Project, *supra* note 47.).
- ⁴⁹ See Exelon Corp., *Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934*, proposals no. 5, 6 (Mar. 19, 2015), http://www.sec.gov/Archives/edgar/data/1109357/000119312515098237/d876808ddef14a.htm#rom876808_18.
- ⁵⁰ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).
- ⁵¹ A 2006 spending-disclosure proposal introduced at Amgen did receive majority-shareholder support (67 percent) after the proposal was supported by management. Also, as noted in footnote 44, *supra*, KBR, Inc. did receive 55 percent shareholder support for a shareholder proposal related to sexual-orientation employee discrimination, over board opposition, in 2011, when the company was in the Fortune 250 list.
- ⁵² See James R. Copland et al., *Proxy Monitor 2012: A Report on Corporate Governance and Shareholder Activism 20–22 & tech. app.* (Manhattan Inst. for Pol’y Res., Fall 2012), http://proxymonitor.org/Forms/pmr_04.aspx (showing significant variation in shareholder votes based on proposal type).
- ⁵³ Defined-benefit pension plans have a fixed payment at retirement, paid by a guarantor, typically one’s employer. See *Choosing a Retirement Plan: Defined Benefit Plans*, Internal Revenue Service, available at <http://www.irs.gov/Retirement-Plans/Choosing-a-Retirement-Plan:-Defined-Benefit-Plan> (last visited Sept. 11, 2015). In contrast, defined-contribution plans, such as those under section 401(k) of the Internal Revenue Code, are portable retirement plans with variable outlays, and investments under the control of the retiree.
- ⁵⁴ Rob Kozlowski, *Retirement Plan Assets Rise 8.5%, Pass \$9 Trillion*, *Pensions & Investments* (Feb. 9 2015), <http://www.pionline.com/article/20150209/PRINT/302099984/retirement-plan-assets-rise-85-pass-9-trillion>.
- ⁵⁵ The Thrift Savings Plan (TSP) is a tax-deferred retirement savings and investment plan that offers federal employees the same type of savings and tax benefits that many private corporations offer their employees under 401(k) plans. By participating in the TSP, federal employees have the opportunity to save part of their income for retirement, receive

matching agency contributions, and reduce their current taxes. See Thrift Savings Plan, <https://www.tsp.gov/index.shtml> (last visited Sept. 11, 2015).

⁵⁶ See Kozlowski, *supra* note 54.

⁵⁷ For example, the two large California public-employee pension funds, CalPERS and CalSTRS, differ dramatically on how they respond to activist hedge funds' efforts to influence corporate management, as witnessed by their being on opposite sides of Trian Fund Management's effort to break up DuPont. See Hoffman & Martin, *supra* note 41.

⁵⁸ States whose funds were involved in at least some shareholder-proposal activism since 2006 are Connecticut (eight proposals), Indiana (two proposals), Illinois (two proposals), Massachusetts (four proposals), Minnesota (one proposal), and North Carolina (nine proposals).

⁵⁹ These funds are the Philadelphia Public Employee Retirement System (14 proposals) and the firefighters' pensions for Kansas City (15 proposals) and Miami (six proposals).

⁶⁰ See Press Release, Comptroller Stringer, NYC Pensions Funds Launch National Campaign To Give Shareowners A True Voice In How Corporate Boards Are Elected: New York City Pension Funds File 75 Proxy Access Shareowner Proposals to Kick Off the Boardroom Accountability Project, <https://comptroller.nyc.gov/newsroom/comptroller-stringer-nyc-pension-funds-launch-national-campaign-to-give-shareowners-a-true-voice-in-how-corporate-boards-are-elected/> [hereinafter "Stringer Press Release"] (last visited Sept. 11, 2015).

⁶¹ See Shareholder Rights Project, Investors Working with the SRP Clinic, available at <http://srp.law.harvard.edu/clients.shtml> (last visited Sept. 11, 2015).

⁶² Traditionally, corporate law has oriented corporate boards and managers' fiduciary duties around a single variable, share value, see *Dodge v. Ford Motor Company*, 170 N.W. 668. (Mich. 1919) (holding that corporate fiduciary duties flowed to shareholders, not employees or other interests), which avoids the ownership costs—chiefly conflicts of interest that arise among various owners—that are inherent in non-corporate ownership forms. See generally Henry Hansmann, *The Ownership of Enterprise* 35–49 (1996) (arguing that the costs of collective decision-making best explain the predominance of the corporate equity-ownership form in large-scale for-profit enterprise); see also Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 *UCLA L. Rev.* 601 (2006) (arguing that increasing shareholder power imposes significant costs in reduced managerial authority). Since shortly after *Dodge v. Ford* was decided, an academic debate has proliferated between those arguing for a social responsibility for corporations, see E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 *Harv. L. Rev.* 1145, 1148 (1932) (arguing for the view that "the business corporation as an economic institution which has a social service as well as a profit-making function"), and those supporting the traditional rule centered on share value, see Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45

Harv. L. Rev. 1365, 1367 (1932). The modern push for "corporate social responsibility" generally traces to a pair of 1970s books, *Where the Law Ends*, by Christopher Stone (1975), and *Taming the Giant Corporation*, by Ralph Nader, Mark Green, and Joel Seligman (1976). For a critique of the early concept of corporate social responsibility advocated by these authors, see David L. Engel, *An Approach to Corporate Social Responsibility*, 32 *Stan. L. Rev.* 1, 1 (1979) ("Any mandatory governance reforms intended to spur more corporate altruism are almost sure to have general institutional costs within the corporate system itself. . . . But the proponents of "more" corporate social responsibility have never bothered to analyze or examine, from any clearly defined starting point, even just the benefits they anticipate from reform . . .").

⁶³ See Employee Retirement Income Security Act (ERISA), Pub. L. No. 93-406, § 514, 88 Stat. 829, 897 (1974) (codified at 29 U.S.C. §§ 1001-1461 (2006)); 29 C.F.R. § 2509.08-2(1) (2008) (requiring pension plan managers to "consider only those factors that relate to the economic value of the plan's investment" and not to "subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives"). These fiduciary duties under ERISA do not apply to pension plans for state and municipal employees or for those affiliated with religious institutions. See 29 U.S.C. § 1003(b).

⁶⁴ Sample size was 193 proposals, which includes all shareholder proposals available in the Proxy Monitor database from the five largest public-employee pension funds, excluding 2015 proposals and 2014 proposals with a record date after May 2014, and excluding any company that underwent a significant change of control within one year of the record date for the proposal at issue. Share prices were adjusted for stock splits.

⁶⁵ For further discussion of these findings, see James R. Copland, *Special Report: Public Pension Funds' Shareholder-Proposal Activism* (Manhattan Inst. for Pol'y Res., Finding 3 2015), <http://proxymonitor.org/Forms/2015Finding3.aspx>.

⁶⁶ See The University of Tennessee Knoxville: Tracie Woidtke, <http://finance.bus.utk.edu/Faculty/TWoidtke.asp>.

⁶⁷ See Tracie Woidtke, *Pension Fund Activism and Firm Value* (forthcoming 2015) (on file with author).

⁶⁸ *Id.* at 3.

⁶⁹ *Id.*

⁷⁰ *Id.* at 3–4.

⁷¹ See Stringer Press Release, *supra* note 60.

⁷² See CFA Institute, *Proxy Access in the United States: Revisiting the Proposed SEC Rule* (Aug. 2014), available at <http://www.cfapubs.org/doi/pdf/10.2469/ccb.v2014.n9.1> (last visited Sept. 11, 2015). The CFA Institute is a global association of chartered financial analysts. See generally CFA Institute, <https://www.cfainstitute.org/pages/index.aspx> (last visited Sept. 11, 2015).

- ⁷³ See Gretchen Morgenson, Mutual Fund Giants Vote to Keep the Insiders In, N.Y. Times, May 31, 2015, at BU1, available at <http://www.nytimes.com/2015/05/31/business/fund-giants-resist-proxy-access-board-shake-ups.html> (last visited Sept. 11, 2015).
- ⁷⁴ Bus. Roundtable v. S.E.C., 647 F.3d 1144, 1152 (D.C. Cir. 2011).
- ⁷⁵ See Stringer Press Release, *supra* note 60.
- ⁷⁶ See generally Lucian A. Bebchuk et al., Managerial Power and Rent Extraction in the Design of Executive Compensation, 69 U. Chi. L. Rev. 751, 788–89 (2002) (discussing the “camouflaging” of managerial rent extraction); Lucian A. Bebchuk & Christine Jolls, Managerial Value Diversion and Shareholder Wealth, 15 J.L. Econ. & Org. 487, 501 (1999) (showing that “within the standard principal-agent framework, permitting value-diversion imposes a cost on shareholders that may reduce ex ante share value”).
- ⁷⁷ Board diversity has become a hot topic in academic corporate-governance circles, see, e.g., The Faculty Lounge, <http://www.thefacultyounge.org/board-diversity/> (last visited July 8, 2015), but empirical scholarship supporting the notion that board diversity matters for shareholder value is mixed at best, with several studies showing that gender diversity is negatively associated with share value, particularly when required or pressed by government mandate, see Kimberly D. Krawiec, What Does Corporate Boardroom Diversity Accomplish?, N.Y. Times (Room for Debate, Apr. 1, 2015), <http://www.nytimes.com/roomfordebate/2015/04/01/the-effect-of-women-on-corporate-boards/what-does-corporate-boardroom-diversity-accomplish> (citing studies); Stephen Bainbridge, www.professorbainbridge.com (May 14, 2015), <http://www.professorbainbridge.com/professorbainbridge.com/2015/05/gender-diversity-in-the-boardroom.html> (citing studies). Although energy companies may face peculiar regulatory risks from government action to tackle climate change, such risks are rather obvious for energy and utility companies and their investors—and already disclosed, see Commission Guidance Regarding Disclosure Related to Climate Change, Exchange Act Release No. 34-61469, 75 Fed. Reg. 6290, 6291, 6296; John M. Broder, S.E.C. Adds Climate Risk to Disclosure List, N.Y. Times, Jan. 27, 2010, at B1. The risks that climate change itself may place on such companies’ business models are too far in the future—and thus too discounted to present—to concern shareholders focused solely on share price.
- ⁷⁸ See Press Release, National Nurses United, U.S. Court of Appeals Issues Scathing Judgment against Big Hospital Chain, Ordering CHS to Repay Union Costs for “Willful” Failure to Bargain with RNs, <http://www.commondreams.org/newswire/2015/05/11/us-court-appeals-issues-scathing-judgment-against-big-hospital-chain-ordering> (last visited Sept. 11, 2015).
- ⁷⁹ See Kohl’s Refuses to Hear from Workers Who Keep Its Stores Clean, Union Advocate (May 14, 2015), <http://advocate.stpaulunions.org/2015/05/14/kohls-refuses-to-hear-from-workers-who-keep-its-stores-clean/> (last visited Sept. 11, 2015).
- ⁸⁰ See Andrew Edwards, Pension Costs Lead San Bernardino’s Debt, [San Bernardino] Sun News (Aug. 10, 2012), available at <http://www.sbsun.com/general-news/20120810/pension-costs-lead-san-bernardinoss-debts> (last visited Sept. 11, 2015).
- ⁸¹ See *id.*
- ⁸² See Steven Church & Romy Varghese, Calpers’ Pension Hammer Forces “Unfair” Bond Ruling by Judge, Bloomberg Business (May 12, 2015), available at <http://www.bloomberg.com/news/articles/2015-05-12/calpers-pension-hammer-forces-unfair-bond-ruling-by-judge> (last visited Sept. 11, 2015).
- ⁸³ See Fight for \$15, <http://fightfor15.org/latest-news/> (last visited Sept. 11, 2015).
- ⁸⁴ See Nandita Bose, After Target Wage Hike, Labor Groups Turn to Drugstore Chains, Philly Voice (Mar. 21, 2015), available at <http://www.phillyvoice.com/after-target-wage-hike-labor-groups-eye-drugstores/> (last visited Sept. 11, 2015).
- ⁸⁵ See Copland & O’Keefe Fall 2014, *supra* note 16, at 17–19 (discussing inefficiencies in shareholder-proposal voting market in context of proxy advisory firms’ influence).
- ⁸⁶ Although markets are not perfectly efficient, they are sufficiently so that the Supreme Court has relied on the “efficient market hypothesis” in handling class action standards in federal securities litigation. See *Basic v. Levinson*, 485 U.S. 224 (1988).
- ⁸⁷ We selected a five-day window because some companies announce voting results on shareholder proposals on the date of their annual meeting, and others wait until they have filed a Form 8-K with the SEC days later.
- ⁸⁸ Two companies—Apache and Citigroup—were excluded from the analysis because their boards of directors recommended a vote for the proxy access shareholder proposal, thus eliminating any element of surprise at the annual meeting.
- ⁸⁹ The iShares Global Equity ETF, see <https://www.ishares.com/us/products/239741/ishares-global-energy-etf> (last visited Sept. 11, 2015).
- ⁹⁰ See CFA Institute, *supra* note 72.
- ⁹¹ See White Statement, *supra* note 30.
- ⁹² See *Trinity Wall St.*, 792 F.3d 323.
- ⁹³ See Jonathan H. Adler, D.C. Circuit Voids SEC “Conflict Minerals” Policy on First Amendment Grounds (Again), Washington Post (Aug. 18, 2015), available at www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/18/d-c-circuit-voids-sec-conflict-minerals-policy-on-first-amendment-grounds-again/ (last visited Sept. 11, 2015).
- ⁹⁴ See Securities Exchange Act of 1934, *supra* note 1 at § 78c(f) (“Whenever pursuant to this title the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to

the protection of investors, whether the action will promote efficiency, competition, and capital formation.”).

⁹⁵ See SEC Press Release, SEC Adopts Rule for Pay Ratio Disclosure: Rule Implements Dodd-Frank Mandate While Providing Companies with Flexibility to Calculate Pay Ratio, <http://www.sec.gov/news/pressrelease/2015-160.html> (last visited Sept. 11, 2015).

⁹⁶ See Dodd-Frank, *supra* note 2, Section 1502.

⁹⁷ Under the Employee Retirement Income Security Act of 1974 (ERISA), fiduciary duties governing employee benefit plan investment portfolios require that “in voting proxies. . . the responsible fiduciary shall consider only those factors that relate to the economic value of the plan’s investment and shall not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives.” 29 C.F.R. § 2509.08-2(1) (2008). State and municipal public employee plans are exempt from this requirement. See 29 U.S.C. § 1003(b).

⁹⁸ If a company falls below 70 percent support, then ISS expects its board to respond to investors’ concerns and, if insufficiently satisfied, the proxy advisor will punish the company in future say-on-pay vote recommendations as well as, potentially, by withholding support for the company’s nominees for director. See See ISS, 2015 U.S. Proxy Voting Summary Guidelines 13 (Mar. 5, 2015), http://www.issgovernance.com/file/policy/1_2015-us-summary-voting-guidelines-updated.pdf.

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