

PROXY **M**ONITOR

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**An Annual Report on
Corporate Governance
and Shareholder Activism**

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2016

CONTENTS

Executive Summary.....	2
About Proxy Monitor.....	4
I. Introduction.....	5
II. Shareholder-Proposal Sponsors.....	6
III. Shareholder Proposals by Subject.....	10
IV. Shareholder-Proposal Resubmissions.....	22
V. Conclusion.....	25
Appendix.....	28
Endnotes.....	30
About the Authors.....	36

PROXY MONITOR 2016

An Annual Report on Corporate Governance and Shareholder Activism

EXECUTIVE SUMMARY

One way shareholders exert influence over corporations is by introducing proposals that appear on corporate proxy ballots.¹ To an unprecedented degree, a small subset of shareholders has been turning to this shareholder-proposal process to pursue social and political changes outside normal legislative and administrative channels. In 2016, a record percentage of shareholder proposals concerned social or policy issues, with, at most, an attenuated relationship to share value.

- **A small group of shareholders continues to dominate the shareholder-proposal process.** Six “corporate gadfly” investors²—individuals who repeatedly file multiple common shareholder proposals at a large number of companies—sponsored, along with their family members, one-third of all shareholder proposals in 2016. A plurality of all 2016 shareholder proposals (38%) were sponsored by institutional investors with an express social, religious, or policy orientation—including “socially responsible” investing funds³ that expressly concern themselves with more than just share-price maximization, policy-oriented foundations, and various retirement and investment vehicles associated with religious or public-policy organizations. Labor-affiliated institutional investors—such as funds affiliated with the American Federation of Labor–Congress of Industrial Organizations (AFL–CIO) and Teamsters’ Union and the public-employee pension funds for New York City and State—sponsored 21% of all shareholder proposals in 2016. *No* institutional investor without a social or policy orientation or a labor affiliation sponsored a shareholder proposal this year.
 - **Half of all shareholder proposals involve social or policy concerns.** The 50% of shareholder proposals involving social or policy issues is up from 42% in 2015 and 39% in the broader 2006–15 period. The absolute number of social- and policy-related shareholder proposals per company is up, year-over-year. As in 2014 and 2015, the two most common classes of shareholder proposals in 2016 were those relating to the environment or to corporate political spending or lobbying—and both types of shareholder proposal were somewhat more common in 2016 than in 2015.
- The 2016 incidence of shareholder proposals relating to employment rights doubled, and those relating to human rights trebled, relative to 2015.
- **Environmental-policy proposals have received more voting support in 2016; but most shareholders continue to vote against these proposals.** In 2016, five shareholder proposals relating to environmental issues received the support of at least 40% of shareholders, compared with only two total in all of 2006–15. The most common type of environment-related shareholder proposal—those concerning climate change or greenhouse gas emissions—on average received 26% shareholder voting support, up from 14% on average in 2006–15. A greater percentage of shareholders supported environmental-policy shareholder proposals in 2016 than in any other year dating back to 2006, though 79% of shareholders, on average, voted against environment-related shareholder proposals this year.
 - **For the first time, a shareholder proposal relating to increased disclosures of corporate political spending won majority support over board opposition; but the overall level of shareholder support for such proposals fell in 2016.** A shareholder proposal asking Fluor to increase its disclosure of corporate spending related to politics won the backing of 52% of the company’s shareholders—the first time such a proposal won the support of a majority of shareholders at a Fortune 250 company over board opposition, dating back to 2006. Overall, however, shareholder proposals related to corporate political spending or lobbying received the support of only 22% of shareholders, down marginally from 2015 (23%).
 - **Aside from shareholder proposals involving proxy access or seeking to implement shareholder majority voting rules, shareholder proposals remain very unlikely to win majority support.** Thirteen of 24 Fortune 250 companies that faced a shareholder proposal related to seeking “proxy access”—which would grant shareholders, given ownership and holding-period requirements, the power to nominate board directors on the company’s proxy statement—received

majority shareholder support. This understates the level of shareholder support for proxy access: 10 of the 11 companies at which a majority of shareholders failed to support the proposal introduced their own proxy-access rule, either adopted by the board or as a competing proposal on the ballot. Moreover, the New York City pension funds introduced a large number of proxy-access shareholder proposals, as in 2015, but most companies adopted their own proxy-access rule and negotiated with the funds to withdraw the proposal. Apart from proxy-access shareholder proposals, only 3% of shareholder proposals received majority shareholder support; most that did sought to empower shareholder voting majorities, either by changing company bylaws so that director nominees needed to win shareholder majority support to take their seats in uncontested elections or by eliminating supermajority voting provisions from company bylaws.

Although a political-spending-related shareholder proposal won majority support in 2016, and although the percentage of shareholders supporting certain environment-related shareholder proposals has increased, most shareholders continue to vote against these proposals. Since 2006, shareholders at Fortune 250 companies have voted on 445 board-opposed shareholder proposals relating to corporate political spending or lobbying and 439 board-opposed shareholder proposals relating to environmental policy. Only one of those 884 shareholder proposals has received majority shareholder support. Thus, increasing activity on the part of certain shareholders pursuing social and policy agendas should not be confused with broad shareholder support for these activists' pet issues.

Despite this broad shareholder opposition, shareholder activists with social or policy concerns have continued to introduce shareholder proposals with little to no chance of passage, year after year. The costs of such activity fall on the corporation—and hence other shareholders. One solution to this problem would be for the Securities and Exchange Commission (SEC) to revisit its 1976 rule forcing companies to include on their

proxy ballots most shareholder proposals that involve “substantial policy . . . considerations”—an approach publicly favored by this report's primary author.⁴ Another idea, suggested by Yale Law professor Roberta Romano, is to force shareholder-proposal sponsors to reimburse the corporation at least some portion of the direct costs of assessing, printing, distributing, and tabulating their proposals if any proposal fails to receive majority or threshold shareholder support.⁵ A third idea, suggested by the U.S. Chamber of Commerce and other business groups in a 2014 rulemaking petition submitted to the SEC,⁶ would be for the SEC to revise its rule permitting companies to exclude resubmitted shareholder proposals if they fail to garner minimum threshold shareholder support within the preceding five calendar years.⁷ This report develops evidence shedding light on this third proposal:

- Of the 3,392 shareholder proposals introduced on the proxy ballots of companies in the Proxy Monitor database between 2007 and 2016 (through August 31, 2016), 1,063—31% of all shareholder proposals—were resubmissions of a preceding proposal.
- A total of 608 proposals were resubmitted at least once, and 100 were resubmitted three or more times.
- A plurality of shareholder proposals resubmitted (39%) involved social or policy concerns, as were 36% of those resubmitted three or more times.
- Were the SEC to make its baseline threshold for shareholder support 10% rather than 3%, 149 of the 608 shareholder proposals to be resubmitted at least once would not have been eligible for resubmission over a five-year window.
- Were the SEC to adopt a 33% threshold as a threshold, 215 of the 608 resubmitted proposals would have been ineligible for resubmission.

We hope that the SEC will consider such evidence in light of its pending rulemaking petition.

ABOUT PROXY MONITOR

The Manhattan Institute's ProxyMonitor.org database, launched in 2011, is the first publicly available database cataloging shareholder proposals and Dodd-Frank-mandated executive-compensation advisory votes⁸ at America's largest companies. This is the sixth annual survey principally authored by Manhattan Institute director of legal policy 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.⁹

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 SEC are from the broader Fortune 300 group.

Because the *Fortune* list changes annually, some companies in the Proxy Monitor data set, while among the 250 largest companies in 2010, 2011, 2012, 2013, or 2014, fell out of the list in 2015, the baseline year for the 2016 proxy season.¹⁰ (Other 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.)¹¹ Although historical numbers will be consistent with those previously reported, these adjustments may marginally alter data reported in earlier findings for 2016.¹² Data for 2016 are current to August 31, at which time 231 companies had held their annual meetings.

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,¹³ 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. Even among the large companies constituting the Proxy Monitor data set, there are significant variations in market capitalization; the five largest companies in the Fortune 250 have a combined market capitalization almost 18 times as large as companies 246 through 250 on *Fortune's* list.¹⁴ Thus, 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.

I. INTRODUCTION

Under proxy rules promulgated by the SEC (the “Commission”), publicly traded 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 Under the SEC’s rules, sponsoring shareholders may hold very small stakes: a shareholder need only own \$2,000 of stock for one year to introduce a proposal.¹⁶

To an unprecedented degree, a small subset of shareholders has been turning to this shareholder-proposal process to pursue social and political changes outside normal legislative and administrative channels. Even though long-standing corporate-law doctrines seek to align the incentives of companies’ boards and managements exclusively with share value,¹⁷ the SEC specifically allows shareholders to introduce proposals focusing on social or political issues with an attenuated—if any—relationship to share value.¹⁸ In 2016, fully half of all shareholder proposals introduced at publicly traded Fortune 250 companies involved social or policy concerns.

The incidence of shareholder proposals related to the environment was higher in 2016 than in any of the 10 preceding years contained in the Manhattan Institute’s Proxy Monitor database. Shareholder support for such proposals reached an all-time high; five environment-related shareholder proposals received the support of at least 40% of shareholders, compared with only two total in the preceding decade. In addition, in 2016, a shareholder proposal asking a company (Fluor) to make additional disclosures of various types of political spending received majority shareholder support (52%) over board opposition—a first in the 11-year history covered in the Proxy Monitor database.

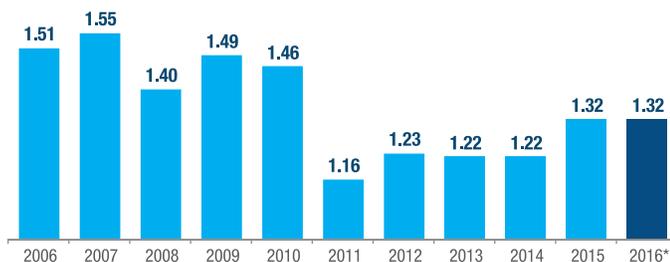
The uptick in incidence and support for environment-related shareholder proposals occurs against a backdrop of unprecedented agitation on climate change by political figures. In November 2015, New York state attorney general Eric Schneiderman issued ExxonMobil a subpoena under the state’s Martin Act securities law seeking documents that might establish that the oil company misled investors about climate-change risks.¹⁹ Other state attorneys general and the attorney general of the U.S. Virgin Islands followed suit with similar inquiries, including one involving a public-policy

think tank that has published materials on climate change-related policy issues.²⁰ Similarly, the first-ever passage of a shareholder proposal related to corporate political spending and lobbying happens against a backdrop in which key Democrats on the U.S. Senate Judiciary Committee have upbraided SEC chairman Mary Jo White (a Democratic appointee) over the Commission’s failure to promulgate a rule calling on companies to make additional disclosures on their expenditures related to political spending and lobbying.²¹ The senators have even held up two prospective SEC commissioner appointees—who were nominated by a president of their own party—leaving two of the five seats on the Commission vacant.²²

Despite the uptick in shareholder support for environment-related shareholder proposals, 79% of shareholders, on average, have voted against such proposals in each of the 11 years covered in the Proxy Monitor database. And although one shareholder proposal calling for greater disclosures of corporate political spending received majority shareholder support in 2016, the other 445 introduced over an 11-year period have failed to gain majority support over board opposition. Indeed, the *average* shareholder vote on shareholder proposals related to corporate political spending and lobbying *fell* in 2016, relative to 2015 (22% versus 23%). Thus, increasing activity on the part of certain shareholders pursuing social and policy agendas should not be confused with broad shareholder support for these activists’ pet issues.

This report explores these trends in social-issue shareholder-proposal activism alongside the overall shareholder-proposal process, both this proxy season and over the prior decade. In 2016, the average Fortune 250 company faced 1.32 shareholder proposals on its proxy ballot, the same shareholder-proposal incidence as in 2015 (**Figure 1**). The number of shareholder proposals on companies’ proxy ballots remains below that witnessed before 2011, when the average Fortune 250 company faced 1.40–1.55 proposals. The higher level of shareholder-proposal activity during 2006–10 is largely explained by shareholder proposals seeking shareholder advisory votes on executive compensation, which constituted 10% of all shareholder proposals introduced in that period. The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act²³ required such shareholder advisory votes on executive compensation beginning in 2011,²⁴ which obviated any need for further shareholder proposals on that topic.

Figure 1. Shareholder Proposals per Company



*In 2016, based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

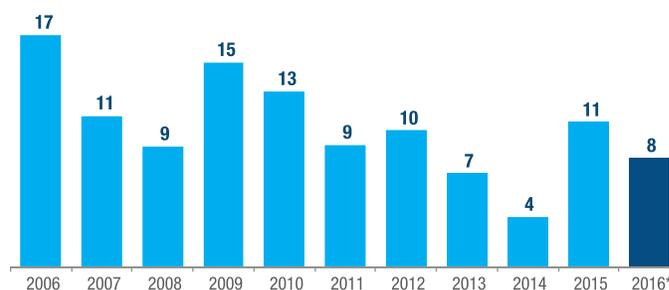
Beneath the aggregate number of shareholder proposals, however, lie variations in the types of proposals making ballots. Compared with 2015, far fewer shareholder proposals on companies' 2016 ballots sought "proxy access," which would grant shareholders, given ownership and holding-period requirements, the power to nominate board directors on the company's proxy statement. Last year, New York City comptroller Scott Stringer—first elected in fall 2013—launched a broad proxy-access campaign that achieved remarkable success in winning majority support from shareholders:²⁵ among 22 Fortune 250 companies facing a New York City fund-sponsored proxy-access proposal in 2015, 18 received majority shareholder support. Comptroller Stringer continued his campaign in 2016, but most companies facing a proxy-access proposal sponsored by the New York City funds adopted their own proxy-access rule and negotiated with the comptroller to withdraw the City funds' proposal;²⁶ only three 2016 proxy-access proposals sponsored by the New York City pension funds appeared on Fortune 250 companies' proxy ballots.

Although the incidence of proxy-access shareholder proposals on corporate proxy ballots fell in 2016, substantially more shareholder proposals involving social or policy concerns—such as climate change and other environmental issues, corporate political spending or lobbying, employment rights and diversity, or human rights—were placed on publicly traded companies' proxy ballots this year. Fully half of all shareholder proposals in 2016 involved social or policy concerns.

In total, 292 shareholder proposals came to shareholder votes at 231 Fortune 250 companies holding 2016 annual meetings by August 31; 8% of these received majority shareholder support—down somewhat from 2015 (11%) and below the broader 2006–15 trend (**Figure 2**).²⁷ Again,

however, these aggregate trends mask underlying variations depending on the types of proposals being introduced. Among the 22 shareholder proposals receiving majority shareholder votes, 13 sought proxy access. Among all other proposals, only 3% received majority shareholder support.

Figure 2. Percentage of Shareholder Proposals Winning Majority Support



*In 2016, based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

The rest of this report examines these and other trends in shareholder-proposal activism in greater detail.

Section II looks at the sponsors of shareholder proposals, in 2016 and historically. **Section III** reviews the subject matter of shareholder proposals, in 2016 and historically, including detailed analysis of shareholder proposals related to environmental concerns, corporate political spending and lobbying, and proxy access. **Section IV** evaluates the rates of shareholder-proposal resubmission (placing back on the ballot a proposal after it failed to garner majority shareholder support), the subject of a pending rulemaking petition with the SEC.²⁸

II. SHAREHOLDER-PROPOSAL SPONSORS

For each of the last 11 years tracked in the Manhattan Institute's Proxy Monitor database, a limited group of shareholders has dominated the process of introducing shareholder proposals:

- A.** Certain individual investors—often referred to as “**corporate gadflies**”²⁹—repeatedly file substantially similar proposals across a broad set of companies, in which they typically hold relatively small amounts of stock.
- B.** Institutional investors focused on **social or policy** issues are very active in sponsoring shareholder proposals, including “socially responsible” investing funds³⁰ that expressly concern themselves with more than just share-

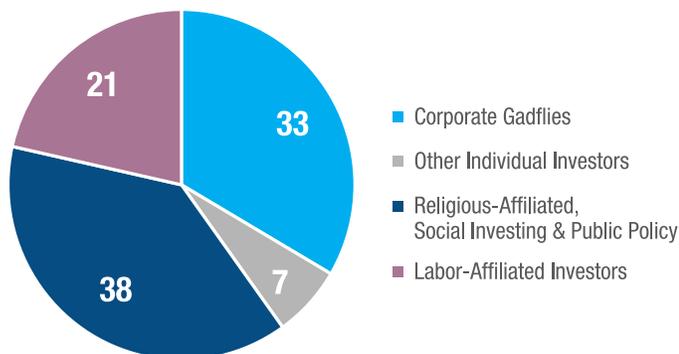
price maximization, as well as policy-oriented foundations and various retirement and investment vehicles associated with religious or public-policy organizations.

C. Historically, the most active sponsors of shareholder proposals have been **labor-affiliated pension funds**, including “multiemployer” 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); and state and municipal pension plans, particularly those representing New York City and State.

Corporate Gadflies

In 2016, six corporate gadflies and their family members sponsored one-third of all shareholder proposals (Figure 3). These gadfly investors are John Chevedden; William Steiner (and son Kenneth); James McRitchie (and wife, Myra Young); John Harrington (who also introduces proposals through his social-investing fund, Harrington Investments); Gerald Armstrong; and Jonathan Kalodimos. Kalodimos—a professor and former SEC staffer who in the latter role helped develop the Commission’s case for proxy access—is a new gadfly in 2016,³¹ who introduced multiple proposals seeking to encourage companies to pursue share buybacks in lieu of paying cash dividends.³²

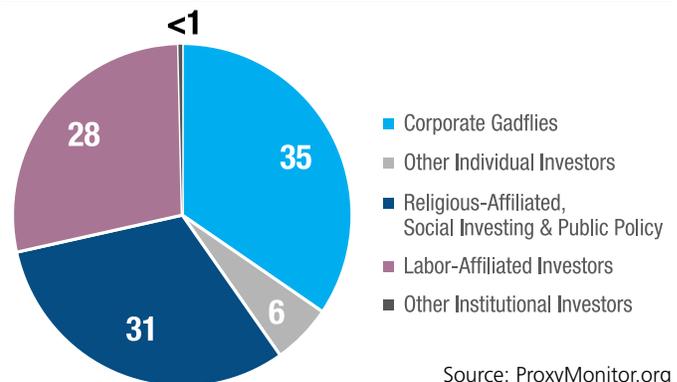
Figure 3. Percentage of Shareholder Proposals, by Proponent Type, 2016*



*Based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

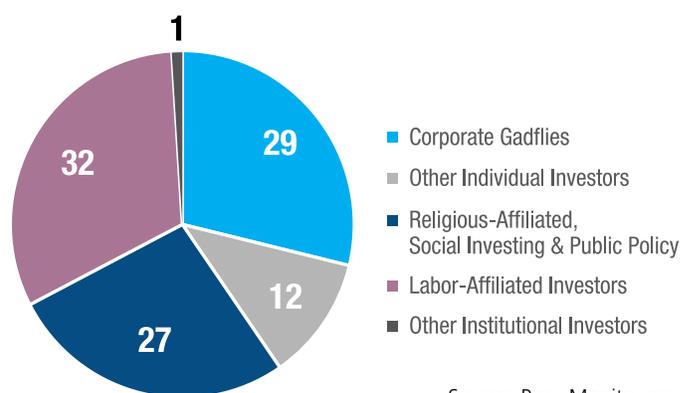
The other five gadfly investors have been active for several years; last year, they introduced 35% of all shareholder proposals (Figure 4). From 2006 through 2015, the group of gadfly investors—which, in earlier years, included Evelyn Davis and Emil Rossi (now in their eighties and nineties, respectively)—sponsored 29% of all shareholder proposals (Figure 5). Chevedden, the Steiners, and McRitchie/Young were, respectively, the three most active sponsors of shareholder proposals this year (Figure 6). In 2015, they were three of the four most active sponsors of shareholder proposals; and last year, each was somewhat more active than in 2016 (Figure 7). Chevedden is the most active sponsor of shareholder proposals dating back to 2006.

Figure 4. Percentage of Shareholder Proposals, by Proponent Type, 2015



Source: ProxyMonitor.org

Figure 5. Percentage of Shareholder Proposals, by Proponent Type, 2006–15



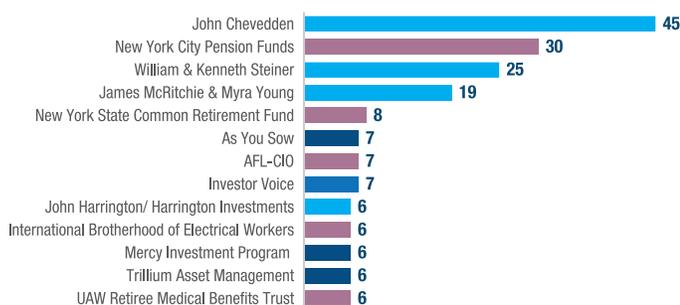
Source: ProxyMonitor.org

Figure 6. Shareholder Proposals by Sponsor, 2016*



*Based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

Figure 7. Shareholder Proposals by Sponsor, 2015



Source: ProxyMonitor.org

For all their activity, corporate gadflies tend to own fairly small amounts of stock holdings in the companies they target. For instance, John Chevedden has made substantially the same proposal at Ford Motor Company each year from 2006 through 2016, individually or through a family trust. In its 2016 proxy statement, Ford disclosed that Chevedden owned 500 shares of the company’s stock,³³ an investment valued at \$6,750 at the close of trading on the company’s March 16 record date. This holding constitutes approximately 0.00001% of the company’s total market capitalization.

Social- and Policy-Oriented Investors

Social- and policy-focused institutional investors have become more active in the shareholder-proposal process over time. In 2016, social-investing funds, public-policy-oriented organizations and foundations, and religious-affiliated pension funds and investors sponsored 38% of all shareholder proposals—more than any other class of investor. That share is up from 31% in 2015 and 27% over the 2006–15 period.

Among major new sponsors in this class are Newground Social Investment and Holy Land Principles, Inc. Newground invests its clients’ money in outside funds in a social-oriented manner;³⁴ only the three principal corporate gadflies sponsored more shareholder proposals than Newground in 2016. Newground sponsored proposals relating to political spending and the environment; but most of its proposals have focused on trying to push companies to modify bylaw rules that tabulate the percentage vote for shareholder proposals. Under Newground’s preferred vote-counting rule, the number of shareholder votes “for” a proposal should be divided by the number of votes “for” or “against” to calculate percentage support; many companies instead calculate voting support based on Delaware’s default rule, which divides votes “for” by all voting proxies, including abstentions.³⁵ (Of course, Newground’s preferred vote-counting rule would increase the apparent shareholder support for social-oriented, and other, shareholder proposals.)

Holy Land Principles is a newly formed nonprofit entity seeking to push companies to develop a code of conduct for employment practices in areas governed by Israel and the Palestinian Authority.³⁶ The group’s shareholder proposals have been exclusively focused on this topic.

Many social- and policy-focused investors, like corporate gadflies, sponsor shareholder proposals in companies in which they have very small investments. Holy Land Principles tends to hold investments that are a minuscule percentage of the company’s outstanding market capitalization. For example, the group sponsored one of its 2016 proposals in Pepsico, in which it owned a reported 55 shares.³⁷ That investment was valued at \$5,932.85 on the company’s February 26 record date, approximately 0.000003% of the company’s market capitalization.

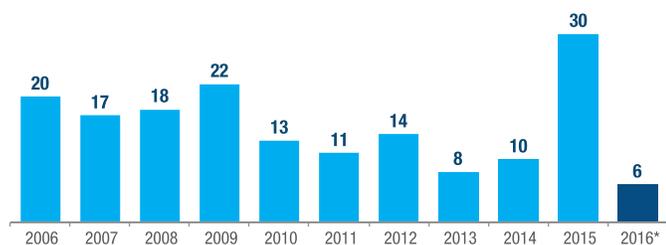
Labor-Affiliated Investors

Labor-affiliated investors sponsored just 21% of all shareholder proposals on company proxy ballots in 2016, down from 28% last year and 32% across the full 2006–15 period. Labor funds’ low sponsorship numbers in 2016 are somewhat deceptive, however, in that the most active labor-affiliated shareholder proponent over the last 11 years, the New York City pension funds, withdrew a large fraction of its shareholder proposals. Most of the shareholder proposals sponsored by the New York City pension funds in 2015 and 2016 involved “proxy access,” the idea that shareholders

should have the right to place their own nominees for director on corporate proxy ballots to compete with boards' own director nominees.³⁸

Under New York City comptroller Scott Stringer's "boardroom accountability project," the City's pension funds targeted 75 total companies in 2015 and 72 in 2016 with shareholder proposals asking the company to adopt a proxy-access rule.³⁹ In 2015, most of the New York City funds' proxy-access proposals received majority shareholder backing; perhaps unsurprisingly, in 2016, most of the companies in the Fortune 250 that faced a New York City-sponsored shareholder proposal involving proxy access reached an agreement to adopt a form of proxy access, prompting the City funds to withdraw the proposal. Thus, although the New York City pension funds remained an active sponsor of shareholder proposals in 2016, the number of its proposals appearing on Fortune 250 companies' ballots plunged to six, down from 30 last year (**Figure 8**).

Figure 8. Shareholder Proposals Sponsored by New York City Pension Funds



*In 2016, based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

Large public-employee pension plans like New York City's typically have substantial investment stakes in the companies at which they file shareholder proposals. Private labor unions' pension funds have large investment holdings, too; but unions have been known to file such proposals from investment vehicles with small holdings. For example, the AFL-CIO is traditionally an active sponsor of shareholder proposals: the union sponsored 10 at Fortune 250 companies in 2016—the same number as Newground Social Investment, behind only the three major corporate gadflies. Among the AFL-CIO's 2016 proposals was a human rights-related proposal at Mondelez International, at which the union reportedly held only 925 shares.⁴⁰ That

investment was valued at \$38,803.75 on the March 9 record date and constituted approximately 0.00006% of the company's outstanding market capitalization.

Labor unions may choose to engage in socially oriented shareholder activism through small-investment vehicles rather than multiemployer private pension plans to avoid the fiduciary strictures of the Employee Retirement Income Security Act (ERISA), which govern private pension funds' investment approaches, unlike state and municipal plans or religious plans.⁴¹ The Department of Labor, which interprets and enforces ERISA, has interpreted the statute to mean that in "creating an investment policy, [an ERISA] fiduciary shall consider only factors that relate to the economic interest of participants and their beneficiaries in plan assets, and shall not use an investment policy to promote myriad public policy preferences."⁴² The Department of Labor specifically clarified this for the AFL-CIO.⁴³

This approach may shift going forward, given the Department of Labor's October 2015 interpretive bulletin that broadened the fiduciary scope for private pension plans' investments in "economically targeted investments" (ETIs).⁴⁴

Although the Department of Labor's broad prohibition against using "investment policy to promote myriad public policy preferences" remains intact, the department's fall 2015 interpretation emphasized, in an adjacent portion of the Code of Federal Regulations, that ERISA should not be read to prevent "fiduciaries from (1) pursuing investment strategies that consider environmental, social, and governance [ESG] factors, even where they are used solely to evaluate the economic benefits of investments and identify economically superior investments, and (2) investing in ETIs even where economically equivalent."⁴⁵ The department further clarified that it "does not believe ERISA prohibits a fiduciary from addressing ETIs or incorporating ESG factors in investment policy statements."⁴⁶

Thus, private labor unions may have significantly more breathing room to engage in social- or policy-oriented investment strategies under the new guidance—though they may still, out of caution, tend to engage in shareholder-proposal activism through investment vehicles outside their main pension plans that remain subject to ERISA.

(The Lack of) Other Investors

Apart from the corporate-gadfly investors, a relatively small number of individual investors file shareholder proposals. Non-gadfly individual investors sponsored just 7% of shareholder proposals in 2016 and 6% last year.

In 2016, not a single institutional investor without a labor affiliation or social, religious, or policy focus has sponsored a shareholder proposal. Institutional investors without such focus sponsored less than 1% of shareholder proposals last year and 1% over the 2006–15 period.

III. SHAREHOLDER PROPOSALS BY SUBJECT

Shareholder proposals cover a wide array of topics but can be categorized according to three broad types:

- A. Proposals that seek to modify the process by which companies allocate powers between the board and shareholders (“**corporate governance**” proposals)
- B. Proposals that seek to influence corporate management by altering **executive compensation**, purportedly to better align management’s incentives with shareholders’ interests
- C. 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

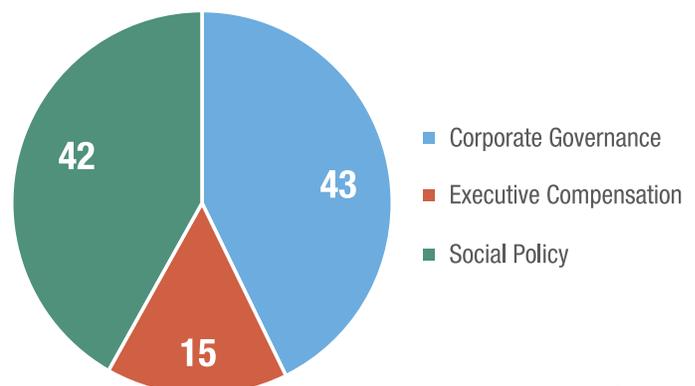
In 2016, to date, half of all shareholder proposals have been of the third type, those related to a social or policy issue (**Figure 9**), up from 42% last year (**Figure 10**) and 39% over the 2006–15 period (**Figure 11**).

Figure 9. Percentage of Shareholder Proposals, by Type, 2016*



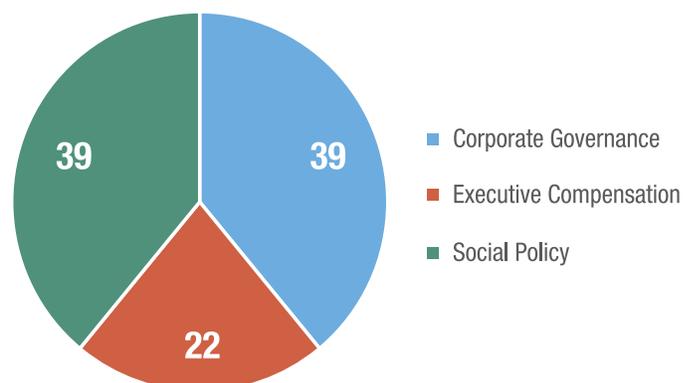
*Based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

Figure 10. Percentage of Shareholder Proposals, by Type, 2015



Source: ProxyMonitor.org

Figure 11. Percentage of Shareholder Proposals, by Type, 2006–15



Source: ProxyMonitor.org

Within these three broad categories, most shareholder proposals tend to cluster into a small collection of subject matters. Common corporate-governance shareholder proposals in recent years include:

- Proposals to modify **voting rules** for director elections or shareholder actions
- Proposals to empower shareholders to call **special meetings** or to act outside annual meetings by **written consent**
- Proposals to separate the company’s **chairman and chief executive** roles
- Proposals to grant shareholders the right to nominate their own directors on corporate proxy ballots (i.e., **proxy access**)

Recently common shareholder proposals relating to executive compensation include:

- Proposals to modify the terms or vesting periods of **equity-compensation plans**
- Proposals to 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)
- Proposals to **claw back** previously paid executive compensation in the event that the company has faced an adverse criminal or civil government action

Social- and policy-related proposals tend to focus on:

- **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 2016, as in 2015, a plurality of shareholder proposals focused on environmental issues, with almost as many shareholder proposals concerning corporate political spending and lobbying (**Figure 12** and **Figure 13**). Controlling for the number of companies in the sample—because only 231 of 250 companies had held 2016 meetings by August 31—the incidence of both environmental and politics-related shareholder proposals is up marginally to date (**Figure 14**). Proposals related to voting rights were 50% more common in 2016 than in 2015, in part owing to Newground Social Investment’s proposals seeking to modify company bylaws governing vote tallies for all shareholder proposals.

Figure 12. Shareholder Proposals, 2016*



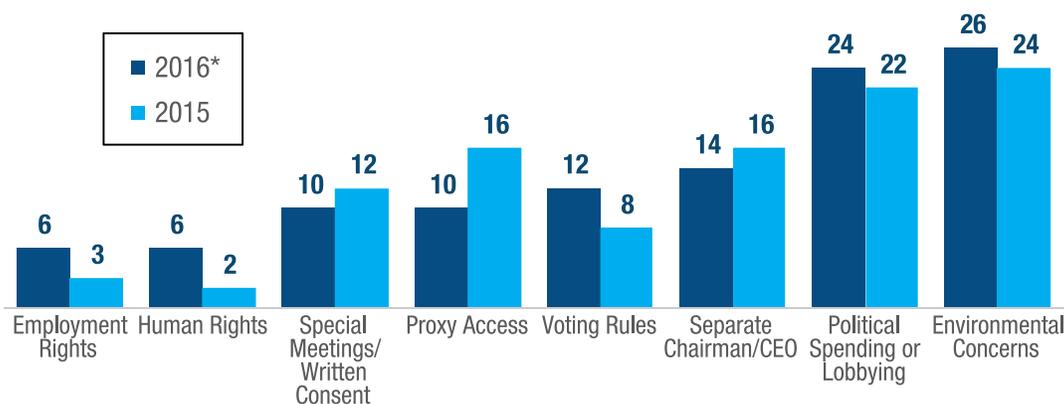
*Based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

Figure 13. Shareholder Proposals, 2015



Source: ProxyMonitor.org

Figure 14. Shareholder Proposals per 100 Companies



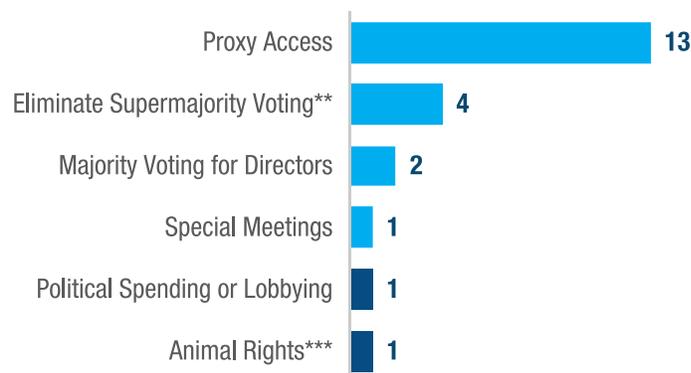
*In 2016, based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

In percentage terms, two classes of shareholder proposals increased most significantly from 2015 to 2016: proposals related to employment rights, the incidence of which doubled; and proposals related to human rights, the incidence of which trebled. The incidence of proposals seeking to separate a company’s chairman and chief executive roles, as well as those seeking to empower shareholders to call special meetings or take action outside meetings by written consent, is down somewhat. The biggest drop in shareholder-proposal incidence between 2015 and 2016 is in proposals seeking proxy access—though, as previously discussed, that decline is deceptive, in that it is largely a function of most companies adopting a proxy-access rule when targeted by the New York City pension funds on the issue, leading the sponsor to withdraw the proposal.

Shareholder Proposal Voting by Proposal Type

Although 8% of shareholder proposals received majority shareholder support in 2016, that figure is skewed by proxy-access proposals, easily the most likely class of shareholder proposal to garner shareholder majority votes. Thirteen of 24 proxy-access shareholder proposals coming to a vote were supported by a majority of shareholders—compared with only nine of 283 among all other types of proposal (3%) (Figure 15). Among those nine successful proposals, one—an animal rights–related proposal introduced at Kellogg that applauded the company for switching to eggs produced by cage-free chickens—was supported by the company’s board of directors.

Figure 15. Shareholder Proposals Receiving Majority Shareholder Support, 2016*



*Based on 231 companies holding annual meetings by August 31
**Although four shareholder proposals seeking to eliminate supermajority proposals in company bylaws received majority support, one of these four failed because it was presented as an amendment to the company’s certificate of incorporation, requiring unanimous support.
***Shareholder proposal supported by board of directors
Source: ProxyMonitor.org

Shareholders remain relatively likely to support shareholder proposals that seek to empower shareholder majorities, either by calling for changes to the company bylaws to eliminate supermajority voting provisions (thought to hinder valuable merger proposals, among other things) or by requiring the company not to seat directors who receive less than majority support from shareholders in uncontested elections (thought to increase director accountability to shareholders) (Figure 16). But apart from these ideas and proxy access, shareholders have been very unlikely to support shareholder proposals opposed by the board of directors.

Figure 16. Shareholder Support by Proposal Class, 2016*

Proposal Class	Proposals Introduced	Proposals Defeated	Proposals Winning Majority Support
Corporate Governance	119	100	19
Separate Chairman and CEO	32	32	0
Proxy Access**	24	11	13
Shareholder Action by Written Consent	12	12	0
Shareholder Power to Call Special Meetings	11	10	1
Eliminate Supermajority Provisions in Bylaws***	8	5	3
Change Vote-Counting Standard	8	8	0
Change Stock Classes or Voting Rights	6	6	0
Majority Voting for Directors	4	2	2
Other	14	14	0
Executive Compensation	33	33	0
Change-of-Control/Government Service Benefits	10	10	0
Equity-Compensation Rules	10	10	0
Other	13	13	0
Social Policy	155	153	2
Environmental Issues	59	59	0
Political Spending or Lobbying	56	55	1
Employment Rights	14	14	0
Human Rights	13	13	0
Other****	13	12	1

*Based on 231 companies holding annual meetings by August 31

**Among the 11 proxy-access proposals that failed to receive majority shareholder support in 2016, in 10 instances, the company either adopted its own proxy-access proposal through board action or offered a competing board-sponsored proxy-access proposal on the ballot, with somewhat different terms from the shareholder proposal.

***A fourth shareholder proposal received majority support but failed because it was presented as an amendment to the company's certificate of incorporation, requiring unanimous support.

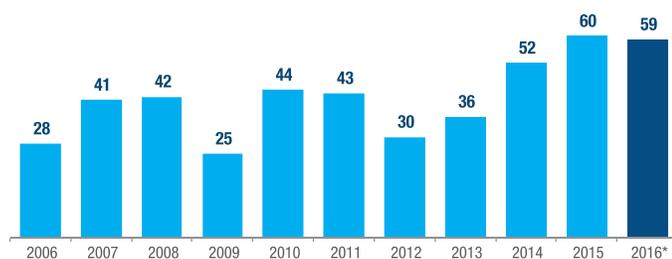
****Shareholder proposal winning majority support supported by board of directors

Source: ProxyMonitor.org

Special Focus: Environmental Policy Proposals

Shareholder proposals related to environmental concerns have been commonly introduced since 2006, the first year covered in the Proxy Monitor database, but have been more commonly introduced in the last two years (**Figure 17**). Controlling for the number of companies reporting—with 19 more scheduled to meet in the last four months of this year—the number of environment-related shareholder proposals introduced on companies’ proxy ballots in 2016 is higher than any year on record.

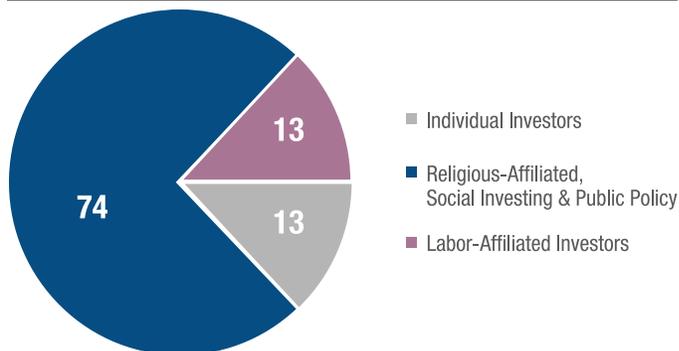
Figure 17. Environment-Related Shareholder Proposals



*In 2016, based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

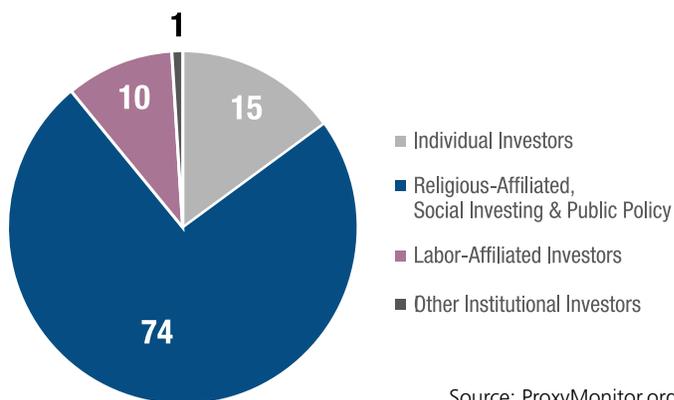
In 2016, the vast majority of shareholder proposals involving the environment (74%) have been sponsored by shareholders with a social, religious, or environmental purpose (**Figure 18**)—consistent with the percentage observed in the preceding decade (**Figure 19**). Social-investing funds have sponsored 38% of environment-related shareholder proposals over the past decade, religious-affiliated investors have sponsored 22%, and investment vehicles affiliated with public-policy organizations have sponsored 9%. The most active sponsor—both in 2016 and in the preceding decade—has been the umbrella social-investment nonprofit As You Sow, which explicitly focuses on shareholder-proposal activism (**Figure 20** and **Figure 21**).⁴⁷

Figure 18. Percentage of Environment-Related Shareholder Proposals, by Proponent Type, 2016*



*Based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

Figure 19. Percentage of Environment-Related Shareholder Proposals, by Proponent Type, 2006–15



Source: ProxyMonitor.org

Figure 20. Environment-Related Shareholder Proposals, by Sponsor, 2016*



*Based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

Figure 21. Environment-Related Shareholder Proposals, by Sponsor, 2006–15

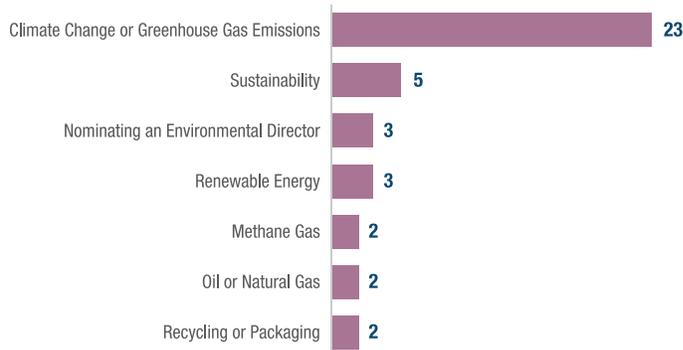


Source: ProxyMonitor.org

Other major sponsors of environment-related shareholder proposals have been the social-investing funds Green Century Capital Management and Trillium Asset Management; the Catholic order Sisters of St. Dominic; the Free Enterprise Action Fund, a policy-oriented investment vehicle organized by free-market-advocate Tom Borelli; John Harrington, a “corporate gadfly” individual investor who also has a social-investing fund; and the New York State Common Retirement Fund, which holds assets in trust for the New York shareholder State & Local Retirement System. The New York State fund was the second-most common sponsor of environment-related shareholder proposals in 2016.

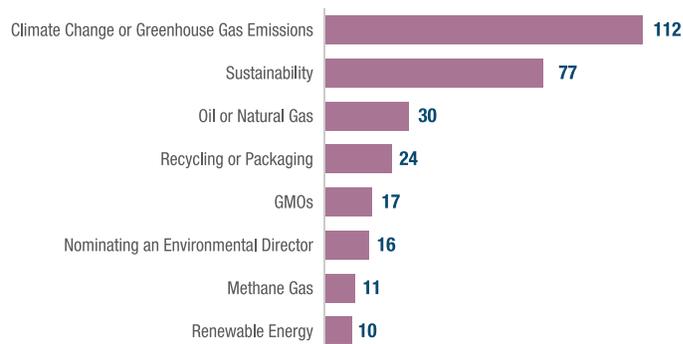
In 2016 and in the preceding decade, a plurality of all environment-related shareholder proposals concerned climate change, global warming, or greenhouse gas emissions (**Figure 22** and **Figure 23**). Typically, these proposals have called on the board of directors to promulgate a report on global warming or climate change, including related financial risks to the company; or to set targets for reducing greenhouse gas emissions. The second-most introduced class of environment-related shareholder proposal, both in 2016 and in the prior decade, has looked more generally at “sustainability,” a vague environmental concept described as “creat[ing] and maintain[ing] the conditions under which humans and nature can exist in productive harmony to support present and future generations.”⁴⁸

Figure 22. Environment-Related Shareholder Proposals, by Subtype, 2016*



*Based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

Figure 23. Environment-Related Shareholder Proposals, by Subtype, 2006–15



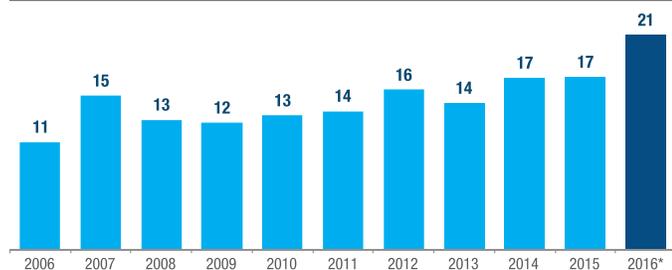
Source: ProxyMonitor.org

These types of reports have most often called on the board to issue a report on sustainability or to set up a board committee governing the subject. Dating back to the first year of the Proxy Monitor database (2006), climate change or sustainability has been the focus of 47% of all shareholder proposals related to the environment.

The average shareholder vote for environment-related proposals is up somewhat in 2016, to 21%, from 17% in 2015 (and 15% across the full 2006–16 period) (**Figure 24**). In general, shareholder votes on environment-related proposals have ticked upward across proposal subcategories (**Figure 25**). In some cases, these subcategory increases are partly explained by a shift in the proposal mix within the category. For example, proposals related to climate change or sustainability that call for the

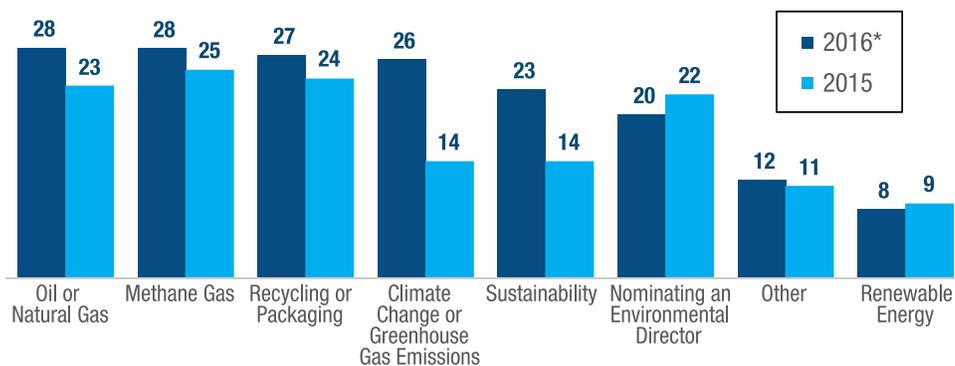
company's board of directors to promulgate a report typically are supported by the leading proxy-advisory firm ISS,⁴⁹ and they tend to receive significantly more shareholder support than more esoteric proposals focused on the same subject that rarely win proxy-advisory firms' backing. Shareholder activists are aware of proxy-advisory firms' positions and prior shareholder voting behavior, and at least some of them adjust their proposal mix over time in response.

Figure 24. Average Percentage Vote for Environment-Related Shareholder Proposals



*In 2016, based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

Figure 25. Average Percentage Vote for Environment-Related Shareholder Proposals, by Subtype



*In 2016, based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

Although the percentage of shareholders supporting many environment-related proposals ranges between 15% and 30%, not a single shareholder proposal has received majority shareholder support over board opposition, dating to 2006. Moreover, the level of shareholder support received by shareholder proposals receiving 20%–30% of shareholder votes is less robust than it might appear. As

explored in a 2012 Manhattan Institute Proxy Monitor report, an ISS recommendation that shareholders vote “for” a given shareholder proposal tends to correspond with a 15-percentage-point increase in the shareholder vote for the proposal, controlling for other factors.⁵⁰ Support from other proxy-advisory firms, including Glass Lewis, doubtless leads to additional increases in the shareholder vote.

Notwithstanding this broader systemic shareholder voting bias created by ISS, the proxy-advisory firm's recommendations cannot explain the 2016 uptick in support for environment-related proposals: the proxy-advisory firm has not recently modified its guidelines for these proposal classes.⁵¹ Moreover, although the uptick in support for environmental proposals has been modest overall, substantially more environment-related shareholder proposals in 2016 have received at least 40% shareholder support over board opposition: five in total, compared with only two in all of 2006–15.

Four of those five proposals involved climate change or greenhouse gas emissions: two sponsored by the New York State Common Retirement Fund at Fluor Corporation and PPL Corporation, seeking reports on how to lower greenhouse gas emissions; and two by the pension fund for the United Methodist Church at Chevron and Occidental Petroleum, seeking a report discussing the companies' climate-change policies and assessing the “short- and long-term financial risks of a lower carbon economy.”

The increase in shareholder support for these proposals may be related to the extraordinary politicization of these issues by state attorneys general and other activists. In November 2015, New York attorney general Eric Schneiderman announced an investigation of

ExxonMobil over alleged fraud related to its pronouncements on climate change.⁵² Over time, other state attorneys general followed suit, as well as Virgin Islands attorney general Claude E. Walker (though many later backed off).⁵³ Some of these attorneys general also sought documents from various nonprofit groups that had published research and opinion on climate change.

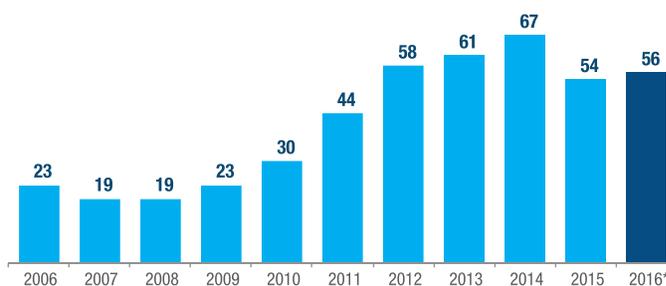
On January 8, 2016, various environmental activists and members of the Rockefeller family attended a closed-door meeting in Manhattan with the stated goal of “establish[ing] in the public’s mind that Exxon is a corrupt institution,” “delegitimiz[ing] [Exxon] as a political actor,” and “driv[ing] Exxon & climate into [the] center of [the] 2016 election.”⁵⁴ Whether the 2016 uptick in shareholder support for shareholder proposals related to climate change is related to these events, environment-related shareholder proposals should be watched carefully going forward.

Special Focus: Political Spending and Lobbying Proposals

Ever since the Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission*⁵⁵—which determined that independent political expenditures were speech protected by the First Amendment, even if funded by for-profit corporations—corporate political engagement has been subjected to intense public scrutiny and debate.⁵⁶ In 2011, several professors of corporate and securities law petitioned the SEC seeking to have the agency establish rules for publicly traded companies to disclose fully their political spending, direct and indirect.⁵⁷ The rulemaking petition has become increasingly politicized in 2016, as U.S. senators have openly clashed with the chairman of the SEC, Mary Jo White, over the agency’s failure to respond to the petition;⁵⁸ some of these same senators have even seized on the issue to block President Obama’s new appointees to the SEC.⁵⁹

Although agitation with the SEC over corporate political spending traces largely to *Citizens United*, efforts to inject the issue into the shareholder-proposal process predate the controversial court decision. In 2003, Bruce Freed, a former Democratic congressional staffer, founded an organization, the Center for Political Accountability (CPA), exclusively to “campaign for corporate political disclosure and accountability.”⁶⁰ Dating back to 2006, the first year covered in the Proxy Monitor database, at least 19 shareholder proposals on companies’ political engagements have been placed on Fortune 250 corporations’ proxy ballots each year (Figure 26). The number of such proposals started to increase after *Citizens United*, peaking at 67 in 2014, before falling somewhat in 2015 and 2016. Nevertheless, as was the case last year, proposals related to corporate political spending or lobbying were the second-most common class of shareholder proposals introduced in 2016.

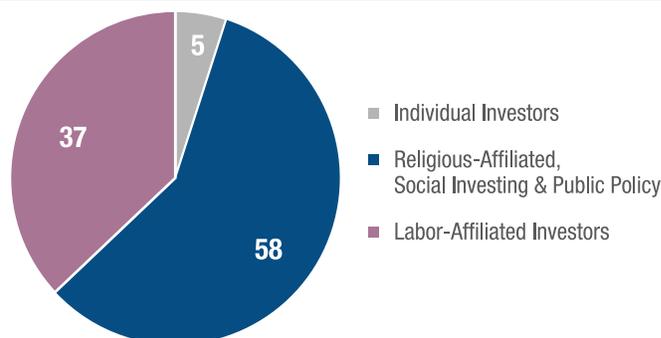
Figure 26. Shareholder Proposals Relating to Political Spending or Lobbying



*In 2016, based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

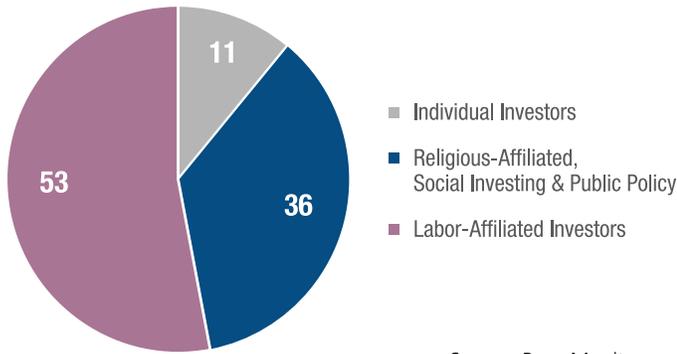
In 2016, institutional investors with a social, policy, or religious orientation sponsored a majority (58%) of all politics-related shareholder proposals (Figure 27). Although such investors have always been active in sponsoring proposals related to corporate political spending or lobbying, this represents a shift: historically, the most active sponsors of politics-related shareholder proposals have been labor-affiliated institutional investors, which sponsored a majority (53%) of such shareholder proposals over the 2006–15 period (Figure 28). In 2016, major labor unions that historically had been very active in sponsoring this class of proposal—the AFL-CIO and AFSCME—did not sponsor any politics-related shareholder proposal; and the New York City pension funds, historically the second-most common sponsor of such proposals, sponsored only one (Figure 29 and Figure 30).

Figure 27. Percentage of Politics-Related Shareholder Proposals, by Proponent Type, 2016*



*Based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

Figure 28. Percentage of Politics-Related Shareholder Proposals, by Proponent



Source: ProxyMonitor.org

Figure 29. Politics-Related Shareholder Proposals, by Sponsor, 2016*

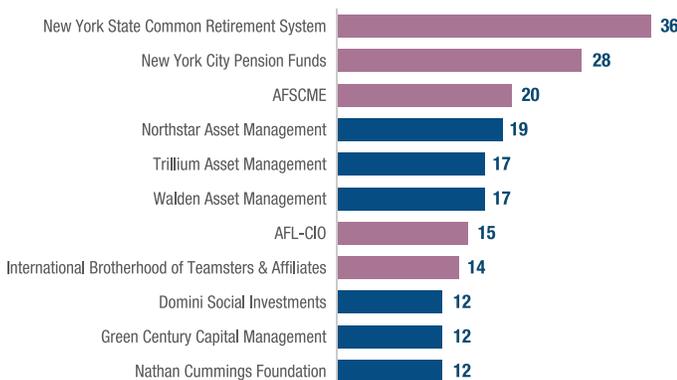


*Based on 231 companies holding annual meetings by August 31

**Includes a proposal by Amy Ridenour, the center's president

Source: ProxyMonitor.org

Figure 30. Politics-Related Shareholder Proposals by Sponsor, 2006–15



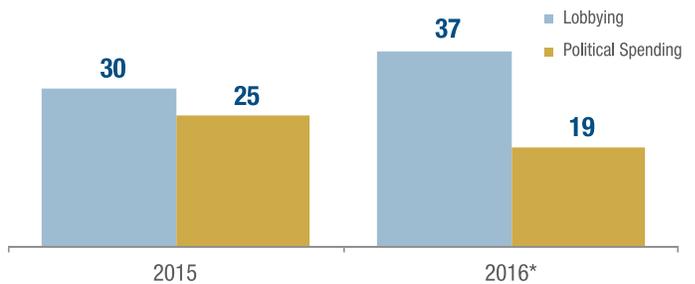
Source: ProxyMonitor.org

In 2016 and over the longer run, the New York State Common Retirement Fund has sponsored the most shareholder proposals related to corporate political spending or lobbying, dating back to 2010, when New York State comptroller Thomas DiNapoli launched an aggressive campaign on this issue. Social-investing funds such as Northstar Asset Management, Trillium Asset Management, Walden Asset Management, Domini Social Investments, and Green Century Capital Management have also been regular sponsors of shareholder proposals related to political spending or lobbying.

The types of politics-related shareholder proposals have shifted over time. In earlier years, most shareholder proposals followed a template developed by the CPA that asks companies to disclose political-spending guidelines, all payments to trade associations and other tax-exempt organizations that are used for political purposes, the amounts contributed, and the identities of corporate officers involved in the expenditure decisions. In recent years, sponsors of shareholder proposals have more commonly sought to target corporate payments to groups involved in lobbying activities, including “direct and indirect lobbying” and “grassroots lobbying communications,” at the local, state, and federal levels.⁶¹

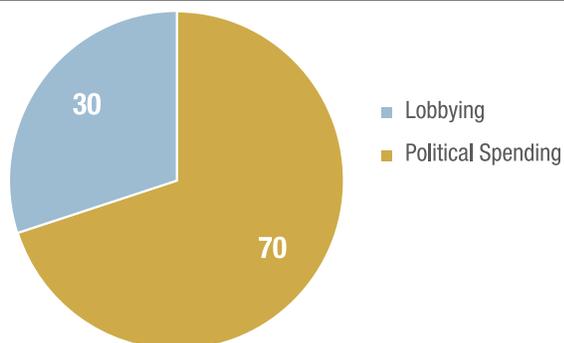
In 2015, such lobbying-related proposals outnumbered those focused on political spending, and in 2016, almost twice as many lobbying-related proposals were on Fortune 250 companies’ proxy ballots (Figure 31). This is a significant shift from earlier years; from 2006 through 2015, 70% of all politics-related shareholder proposals involved corporate political spending but not lobbying (Figure 32).

Figure 31. Politics-Related Shareholder Proposals, by Subtype



*In 2016, based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

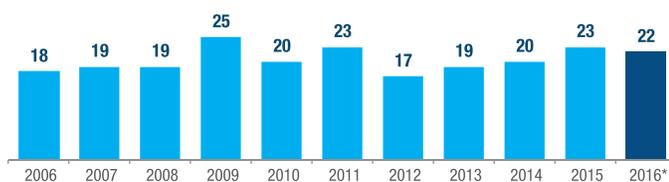
Figure 32. Percentage of Politics-Related Shareholder Proposals, by Subtype, 2006–15



Source: ProxyMonitor.org

Although shareholder votes for politics-related shareholder proposals have crept upward since *Citizens United*, at least 75% of shareholders have voted against these proposals, on average, in each of the last 11 years (Figure 33). Some of the slight shifts in average shareholder support from year to year are due to variations in the mix of proposal types: in earlier years, certain proposals were commonly introduced that received low-single-digit support—such as those seeking a 75% shareholder vote to authorize corporate political spending or to prohibit such spending outright—but these types of proposals have been less commonly filed in recent years, either because they failed to meet minimum shareholder support thresholds or because their sponsors decided not to introduce such proposals again for other reasons.

Figure 33. Average Percentage Vote for Politics-Related Shareholder Proposals

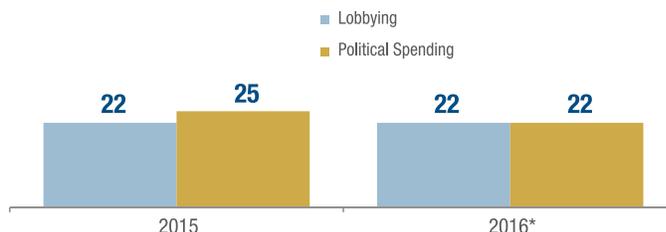


*In 2016, based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

Average shareholder support for politics-related shareholder proposals in 2016 (22%) is down slightly, relative to 2015 (23%). Although shareholder support for proposals related to company lobbying remained flat year-over-year, at 22%, average support for shareholder proposals that related to

political spending but not lobbying fell slightly, from 25% to 22% (Figure 34).⁶²

Figure 34. Average Percentage Vote for Politics-Related Shareholder Proposals, by Subtype



*In 2016, based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

Although average shareholder support for shareholder proposals related to political spending or lobbying fell slightly in 2016, one proposal, at Fluor, received majority shareholder support (52%)—the first politics-related shareholder proposal to receive majority support over board opposition in the 11-year history tracked in the Proxy Monitor database.

The Fluor proposal, tracking the general CPA language, sought disclosure of “[p]olicies and procedures for making, with corporate funds or assets, contributions and expenditures (direct or indirect) to (a) participate or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office, or (b) influence the general public, or any segment thereof, with respect to an election or referendum,” as well as disclosure of amounts given to each identified recipient and the corporate officer responsible for decision making.⁶³ (The same proposal sponsor, the Philadelphia Public Employee Retirement System, sponsored the same proposal in 2015, when it received 31% shareholder support.)

The 2016 results at Fluor may be idiosyncratic to the company and year. As a major construction company, Fluor is heavily involved in government-contracting work,⁶⁴ which may make shareholders particularly sensitive to its political engagement.⁶⁵ Moreover, the company’s market capitalization fell more than 43% between the record date for its 2014 annual meeting and its 2016 annual meeting, when it missed its earning target.⁶⁶ A proposal by the New York State Common Retirement Fund on greenhouse gas emissions also received more than 40% support at Fluor, suggesting broader shareholder dissatisfaction with the company in 2016 or an idiosyncratic

shareholder base. The Fluor proposal is anomalous: among 446 shareholder proposals related to corporate political spending or lobbying in the Proxy Monitor database, it is the only shareholder proposal, opposed by management, to receive majority shareholder support.⁶⁷

Special Focus: Proxy-Access Proposals

In August 2010, the SEC released Rule 14a-11, which would have mandated that publicly traded companies list shareholders’ nominees for director on their corporate proxy ballots, as long as the nominating shareholder had held at least 3% of a company’s stock for a minimum of three years.⁶⁸ Companies were not required to list a number of nominees totaling more than 25% of their board.⁶⁹

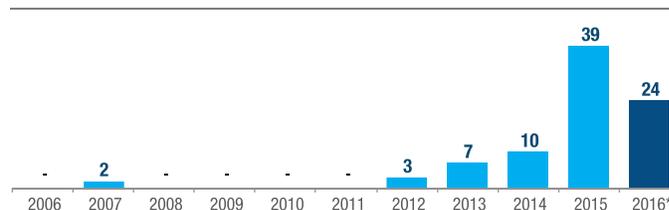
The Business Roundtable and other corporate trade associations challenged the rule, and the U.S. Court of Appeals for the D.C. Circuit rejected the rule in July 2011 as “arbitrary and capricious.” The court noted that “investors with a special interest, such as unions and state and local governments 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.”⁷⁰ The SEC did not appeal the decision but instead approved amendments to Rule 14a-8—the rule for shareholder proposals—to allow shareholders to introduce proxy-access rules on their own.⁷¹ (Proxy-access shareholder proposals had been foreclosed since 2007, as the SEC considered a mandatory proxy-access rule.)

Although some proxy-access proposals were introduced in 2012, 2013, and 2014, the 2015 proxy season saw the first concerted push to utilize the amended Rule 14a-8. In November 2014, the office of New York City comptroller Scott Stringer—an elected official who oversees the pension-fund assets that underlie retirement benefits for the city’s employees⁷²—announced a new “Boardroom Accountability Project” purportedly designed “to ensure that companies are truly managed for the long-term.”⁷³ Proxy access was to be the initial focus of the project. In 2015, the New York City pension funds introduced shareholder proposals seeking proxy access—with rules paralleling the SEC’s voided Rule 14a-11—at 75 companies.⁷⁴

In its initial year, comptroller Stringer’s program met with significant success, in terms of currying shareholder support. Eighteen of New York City’s 22 shareholder proposals seeking proxy access at Fortune 250 companies received majority shareholder support in 2015, as did two-thirds of all such shareholder proposals, compared with 3.5% of all other shareholder proposals. By the end of 2015, 109 companies had adopted proxy-access rules, according to the comptroller’s office.⁷⁵ (To date, no investors have yet exercised a proxy-access rule, though they have been adopted by more than 100 publicly traded companies.)⁷⁶

In 2016, fewer shareholder proposals seeking proxy access were on proxy ballots than in 2015—24 to date, versus 39 in all of 2015 (Figure 35). This is not because the New York City pension funds reduced their focus on the issue. In January 2016, the comptroller’s office announced that it had introduced, or would be introducing, shareholder proposals at 72 companies, only three fewer than in 2015. These included 36 proposals at companies that it had targeted the previous year that had not yet adopted proxy-access rules satisfactory to the comptroller’s office, as well as 36 newly identified companies.⁷⁷

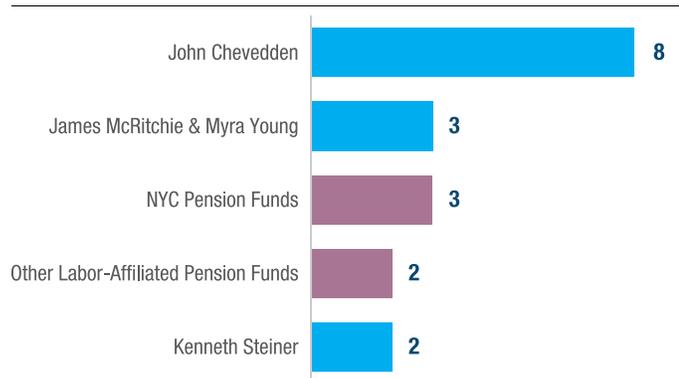
Figure 35. Shareholder Proposals Seeking Proxy Access



*In 2016, based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

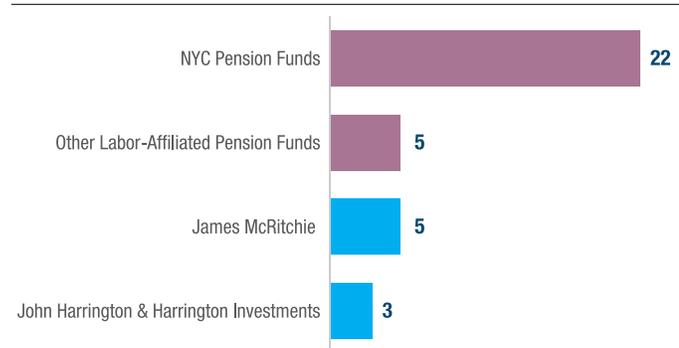
But only three of the New York City funds’ proposals were on proxy ballots of Fortune 250 companies, among the 231 with annual meetings scheduled through the end of August—compared with 22 in all of 2015 (Figure 36 and Figure 37). Many more companies appear to have negotiated with the funds—adopting their own proxy-access rules—probably owing to the 2015 shareholder response. The New York City pension funds have withdrawn proxy-access proposals at 50 of the 72 companies to which they submitted them, according to their own reported figures.⁷⁸

Figure 36. Proxy-Access Proposals by Sponsor, 2016*



*Based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

Figure 37. Proxy-Access Proposals by Sponsor, 2015

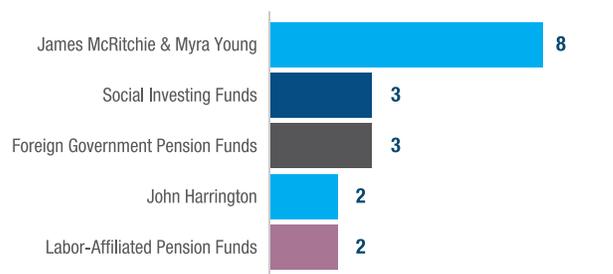


Source: ProxyMonitor.org

In the wake of the New York City funds' 2015 success with proxy access, however, there has been a spate of proxy-access proposals introduced this year by corporate gadflies, led by John Chevedden, who has sponsored eight proxy-access proposals to date in 2016, more than any other investor. Chevedden had never sponsored a proxy-access proposal at any Fortune 250 company prior to 2016, dating back to 2006 (the first year covered in the Proxy Monitor database), suggesting that his enthusiasm for the issue in 2016 may be a result of the ballot item's success last year. (The second-most common gadfly sponsor of proxy-access shareholder proposals in 2016, James McRitchie, also was a frequent sponsor of shareholder proposals in earlier years [Figure 38].) Overall, corporate gadflies have sponsored almost 74% of all proxy-access shareholder proposals to make ballots this year, although that percentage is greatly inflated because New York City-backed proposals have

generally been negotiated off ballots by companies that adopted their own proxy-access rules.

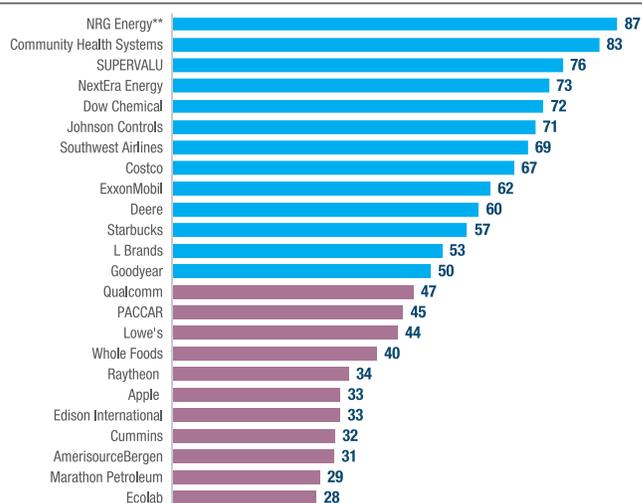
Figure 38. Proxy-Access Proposals by Sponsor, 2012–14



Source: ProxyMonitor.org

Thirteen of 24 proxy-access proposals presented at 2016 annual meetings of Fortune 250 companies through August 31 received majority shareholder support (Figure 39).⁷⁹ The average shareholder support for a proxy-access proposal in 2016 has been 51%. Both figures, however, understate the level of shareholder support for proxy access. Although the percentage of companies receiving majority shareholder support for proxy-access shareholder proposals fell year-over-year, the large number of companies that negotiated with the New York City funds not to introduce a proposal—introducing their own proxy-access rule—skews the voting totals.

Figure 39. Shareholder Percentage Vote for Proxy-Access Proposals, 2016*



*Based on 231 companies holding annual meetings by August 31
**Shareholder proposal was not opposed by board of directors
Source: ProxyMonitor.org

Moreover, 10 of the 11 companies at which a majority of shareholders failed to support the proposal introduced their own proxy-access rule, either adopted by the board or as a competing proposal on the ballot. These alternative rules typically specified that no more than 20 shareholders could aggregate their shares to reach the 3% proxy-access ownership threshold—a requirement not typically included on corporate gadflies’ proposals. In addition, nine of the 10 alternative proxy-access rules allowed shareholders to nominate only 20% of outstanding board seats, as opposed to 25% in the shareholder proposal and former SEC Rule 14a-11.⁸⁰

IV. SHAREHOLDER-PROPOSAL RESUBMISSIONS

Background

The success of proxy-access shareholder proposals shows that the SEC’s process under Rule 14a-8 permitting shareholder proposals can serve as a mechanism to empower shareholders to voice their opinions to management. To be sure, reasonable minds can vary on the *merits* of proxy access,⁸¹ and there are problems with shareholder voting—as exemplified by the extraordinary power of proxy-advisory firms in determining shareholder voting results⁸²—that cast doubt on whether an affirmative shareholder vote represents an accurate reflection of shareholder sentiment about the economic merits of a shareholder proposal. But the proxy-access case—like earlier pushes to de-stagger boards of directors (electing each director annually) and to require that director nominees receive a majority of shareholder votes even in uncontested elections—is one in which shareholder votes expressed on shareholder proposals have prompted a large number of companies to alter corporate-governance rules.

In many more cases, however, shareholders are able to continue to place proposals on company proxy ballots, year after year, even when substantial majorities of shareholders continue to reject the proposals. The social- and policy-oriented shareholder proposals—now at an all-time high—are a clear counter-case: from 2006 through 2016, a total of 1,444 shareholder proposals on social or policy concerns have come to a shareholder vote over board opposition to the proposal, and 1,443 have not received a shareholder majority (the lone exception being the vote at Fluor on a political-spending disclosure proposal this year).

The ability of shareholders to continue to place items up for a vote without winning sizable shareholder support matters. Submission of shareholder proposals is not cost-free to the company and to other shareholders; a 1998 analysis by the SEC determined that it cost the average company \$37,000 to decide whether to place a shareholder proposal on the ballot and another \$50,000 in costs to print, distribute, and tabulate the proposal;⁸³ aside from printing and distributing, such costs have doubtless risen over time. At least one individual shareholder, former corporate gadfly Evelyn Davis, displayed a profound ability to manipulate the shareholder-proposal process to extract corporate rents:

Davis . . . publishe[d] a yearly investor newsletter, *Highlights and Lowlights*, which earn[ed] her an estimated \$600,000 annual income. According to one media account, Davis [sold] the \$495, 20-page newsletter in part by “cajol[ing] the nation’s business titans into subscribing . . . with a minimum order of two copies.” Company executives also regularly shower[ed] largesse on Davis to stay in her good graces. According to one report in the 1990s, executives of all three major American car companies offered to deliver any car she purchased to her. Lee Iacocca reportedly said that he would do so in person.⁸⁴

Among the 153 shareholder proposals that Davis submitted to the companies in the Proxy Monitor database since 2006, only one received majority shareholder support: a 2006 proposal at Bank of New York Mellon seeking cumulative voting (allowing shareholders to aggregate their ballots for directors into a single candidate), which received 51% of the shareholder vote. (The bank decided not to act on the narrow vote, and Davis continued to submit the proposal each year through 2012, when she “retired” from shareholder activism. The proposal never again received more than 38% shareholder support.)

Though Davis is an extreme case of a single shareholder being able to profit from other shareholders through the shareholder-proposal process, other shareholder activists obviously find merit in continuing to place items on company ballots that do not garner shareholder majorities, year after year. Indeed, the social-investing funds and religious orders that regularly place losing proposals on proxy ballots are predicated upon just this idea. At a minimum, such efforts use the proxy process to gain attention to their cause. In other cases, these social-issue activists may be able to prompt

changes in corporate behavior along their desired lines, even when shareholders vote down their proposals—much as Davis’s efforts encouraged companies to spend money out of corporate coffers to placate her.

One approach that the SEC could take to discourage the continued submission of shareholder proposals unrelated to share value is to revise its 1976 rule limiting companies’ ability to exclude from proxy ballots only those “ordinary business” issues “that are mundane in nature and do not involve any substantial policy or other considerations.”⁸⁵ (This report’s primary author has argued that the SEC should consider just this approach.)⁸⁶

Another idea, suggested by Yale Law professor Roberta Romano, would be to force shareholders who place on corporate proxy ballots proposals that fail to receive majority shareholder support to reimburse the company at least some portion of the direct costs of assessing, printing, distributing, and tabulating their unsuccessful proposals.⁸⁷ Such a rule would make it cost-prohibitive for corporate gadflies such as Davis to utilize the shareholder-proposal process to extract corporate rents and would force social-issue activists to internalize the costs of their efforts rather than have them subsidized by other shareholders.

A third idea, suggested by the U.S. Chamber of Commerce and other business groups in a 2014 rulemaking with the SEC,⁸⁸ would be for the SEC to revise its rule permitting companies to exclude resubmitted shareholder proposals if they fail to garner minimum threshold shareholder support within the preceding five calendar years.⁸⁹ The SEC’s current rules stipulate that companies cannot exclude identical shareholder proposals filed year after year, even if vast majorities of shareholders vote against them repeatedly. Under the SEC’s permissive standard, companies can exclude a shareholder proposal if it received less than 3% shareholder support in one of the five preceding years; 6% in its most recent submission if proposed twice in the five preceding years; or 10% in its most recent submission if proposed three or more times in the five preceding years.⁹⁰

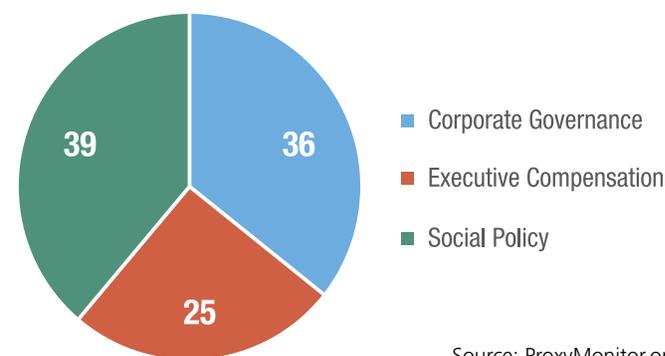
Given the empirical evidence that a recommendation by the proxy-advisory firm ISS that shareholders vote “for” a given shareholder proposal is associated with a 15-percentage-point boost in the proposal’s shareholder vote, all else being equal, the current SEC rule means that ISS (and probably Glass Lewis, its principal competitor) effectively serves as the

gatekeeper for shareholder-proposal resubmissions: if ISS supports a proposal, it can remain indefinitely on the ballot. The remainder of this section examines empirical evidence shedding light on the impact of the SEC’s resubmission rule and the Chamber’s pending rulemaking petition.

Evidence

Overall, of the 3,392 shareholder proposals introduced on the proxy ballots of companies in the Proxy Monitor database between 2007 and 2016 (through August 31), 1,063—31% of all shareholder proposals—were resubmissions of a preceding proposal.⁹¹ A total of 608 proposals were resubmitted at least once, and 100 were resubmitted three or more times. A plurality of shareholder proposals resubmitted (39%) involved social or policy concerns (**Figure 40**). Among those proposals resubmitted three or more times, 41% involved corporate-governance issues, followed by 36% that were social- or policy-related (**Figure 41**).

Figure 40. Percentage of Shareholder Proposals Resubmitted One Plus Times, by Type, 2006–15



Source: ProxyMonitor.org

Figure 41. Percentage of Shareholder Proposals Resubmitted Three Plus Times, by Type, 2006–15



Source: ProxyMonitor.org

ExxonMobil was, by a significant margin, on the receiving end of the greatest number of resubmissions, with 26 different proposals being resubmitted and two proposals submitted nine times over the 11-year span from 2006 through 2016 (Figure 42). Both of Exxon’s nine-time proposals involved social or policy concerns. One of these, sponsored by the Catholic order the Sisters of St. Dominic, has called on the company to set and disclose greenhouse gas emission goals. That ballot item appeared on ExxonMobil’s ballot every year from 2007 through 2015, and at least 69% of shareholders voted against the proposal each time; presumably, the proposal was not on the ballot in 2016 only because in 2015 it fell below the SEC’s meager 10% threshold for a third-time submission.

Exxon does not, however, hold the record for the most resubmitted proposals over the last decade: Ford Motor Company and Wells Fargo faced the same corporate governance–related shareholder proposal each year from 2006 through 2016. Each year, 62% or more shareholders voted against the proposals. As noted, the sponsor of the Ford proposal, corporate gadfly John Chevedden, owns approximately 0.00001% of the company’s outstanding shares. The value of Chevedden’s holdings, \$6,750 as of the 2016 annual-meeting record date, is substantially less than both the average and the median company cost to print, distribute, and tabulate a shareholder proposal, and substantially less than the average and median company cost to determine whether to include a proposal on the ballot.⁹³

Figure 42. Most Frequently Resubmitted Shareholder Proposals, 2006–16*

Company	Proposal	Total Number	First Year	Last Year	Min. Vote, %	Max. Vote, %
Ford Motor	One Share—One Vote	11	2006	2016	19	37
Wells Fargo	Separate Chairman & CEO	11	2006	2016	16	38
AT&T	Political Spending	10	2006	2016	13	39
General Electric	Cumulative Voting	10	2006	2016	11	35
Home Depot	Employment Diversity Report	10	2006	2016	22	36
ExxonMobil	Amend EEO Policy	9	2006	2014	20	40
ExxonMobil	Greenhouse Gas Emission Goals	9	2007	2015	10	31
Ford Motor	Special Meetings	9	2007	2016	10	26
Nucor	Majority Voting for Directors	9	2006	2014	34	46

*In 2016, based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

The other nine-time ballot item for ExxonMobil was sponsored by the New York City or State pension funds each year from 2006 through 2014; it called on the oil company to formally amend its equal-employment-opportunity (EEO) policy to include sexual orientation and gender identity. (The company repeatedly maintained in its own proxy statements that it did not discriminate on those grounds and that it included sexual-orientation harassment as an example in its training manuals.) The proposal never received more than 40% shareholder support; but the company changed its EEO policy in 2015, following an Obama administration executive order requiring companies to include sexual orientation and gender identity in formal equal-employment-opportunity policies to receive federal government contracts.⁹²

19-percentage-point increase from 2007 and 17 percentage points more than in 2006—after the proxy-advisory firm ISS changed its position and began recommending a vote “for” the proposal.⁹⁴ The proposal has since remained on the ballot every year except 2010, when, for some reason, it was omitted; shareholder support has varied between 24% and 39%.

Home Depot also faced an identical social-policy proposal in 10 of the last 11 years: a proposal asking the company to prepare a “report on employment diversity,” sponsored alternatively by the social-investing funds Trillium Asset Management and Walden Asset Management and the Benedictine orders the Sisters of Mt. Angel and the Sisters of Boerne. (For some reason, the proposal did not appear on the company’s 2015 proxy ballot.) In each year, 64%–77%

AT&T faced an identical social-policy shareholder proposal in 10 of the last 11 years: a political-spending disclosure proposal sponsored by the social-investing fund Domini Social Investments. In 2006 and 2007, the proposal received only 15% and 13% of the vote, respectively. It was nevertheless placed again on the ballot in 2008, when it received almost 32% shareholder support—a

of shareholders voted against the proposal. ISS supports these ballot initiatives.⁹⁵

Nucor, a Charlotte-based steel company, faced an identical corporate-governance proposal from the pension fund for the United Brotherhood of Carpenters each year from 2006 through 2014. The proposal sought a bylaw change such that director nominees who failed to garner majority shareholder support in uncontested directors elections would not be seated on the board. The proposal received the backing of 33%–47% of shareholders each year, and 41% in the last year it was introduced (2014). Notwithstanding that a majority of shareholders had voted against the shareholder proposal for nine consecutive years, the company ultimately decided to adopt the majority voting rule; in its 2016 proxy statement, Nucor sought an amendment to its certificate of incorporation adopting a majority voting rule for seating directors—concurrent with a repeal of its previously existing cumulative voting rule;⁹⁶ this board proposal passed overwhelmingly.

Analysis of Hypothetical Changes to the Rule

Were the SEC to adopt a modest reform that significantly raised resubmission thresholds, it would block low-support shareholder proposals from being submitted repeatedly on the ballot without blocking shareholders' ability to continue proposing ideas that garnered at least some shareholder support from appearing essentially every year. For example, were the SEC to make its baseline threshold for shareholder support 10% rather than 3%, 149 of the 608 shareholder proposals to be resubmitted at least once would not have been eligible for resubmission over a five-year window.

Consider the case of animal rights–related shareholder proposals, which the proxy-advisory firms generally oppose. From 2006 through 2016, 67 animal rights–related proposals appeared on company proxy ballots. Two of these were “laudatory” or “complimentary” resolutions praising a company action that the board approved, and which won broad shareholder support. Among the other 65 proposals, more than 90% of shareholders voted against 63 of them, and shareholder opposition averaged 94.5%. Yet 49 of the 63 overwhelmingly rejected proposals were eligible for resubmission, and 14 of them were actually resubmitted proposals. It is hard to see how allowing a shareholder proposal rejected by 95% of shareholders is in the median shareholder's interest.

Were the SEC to adopt a 33% threshold as an intermediate (or even ultimate) floor for multiple shareholder-proposal resubmissions (a level sufficiently high that it would require at least some shareholder voting support beyond votes that merely follow proxy-advisory firms' guidance), 215 of the 608 resubmitted proposals would have been ineligible for resubmission—an only modestly higher number than those rejected under a baseline 10% rule. Conversely, 393 of 608 proposals that were resubmitted at least once would have been eligible for essentially perpetual resubmission. Thus, even a 33% threshold would be rather generous, only weeding out 35% of currently resubmitted proposals. Of course, the SEC may wish to adopt an even higher ultimate threshold—at or near 50%—since the propriety of permitting a minority of shareholders to perpetually introduce a ballot item that two-thirds of shareholders reject is questionable, at best.⁹⁷

V. CONCLUSION

In 2016, as in the prior decade, the shareholder-proposal process has been used almost exclusively by a small number of investors. More so than in any previous year, 2016 shareholder proposals focused on concerns other than maximizing share value: fully half of all shareholder proposals submitted to large companies this year have involved general social or policy issues.

A small number of these social- and policy-oriented shareholder proposals received more support in 2016 than previously. A slight majority of shareholders supported a proposal at Fluor calling on the company to increase certain disclosures relating to political spending. This is the first time such a proposal has won the support of a majority of shareholders at a Fortune 250 company over board opposition, dating back to 2006. In addition, five environmental-policy proposals received at least 40% shareholder support—as compared to only two in the entire decade from 2006 through 2015.

Nevertheless, shareholders continue on the whole to reject overwhelmingly proposals relating to social or policy concerns. Shareholder support for political-spending-related proposals is down slightly from 2015; on average, 78% of shareholders voted against such proposals. Shareholder support for environmental-policy proposals is modestly above historical norms, but on average 79% of shareholders voted against these proposals. The percentage of shareholder

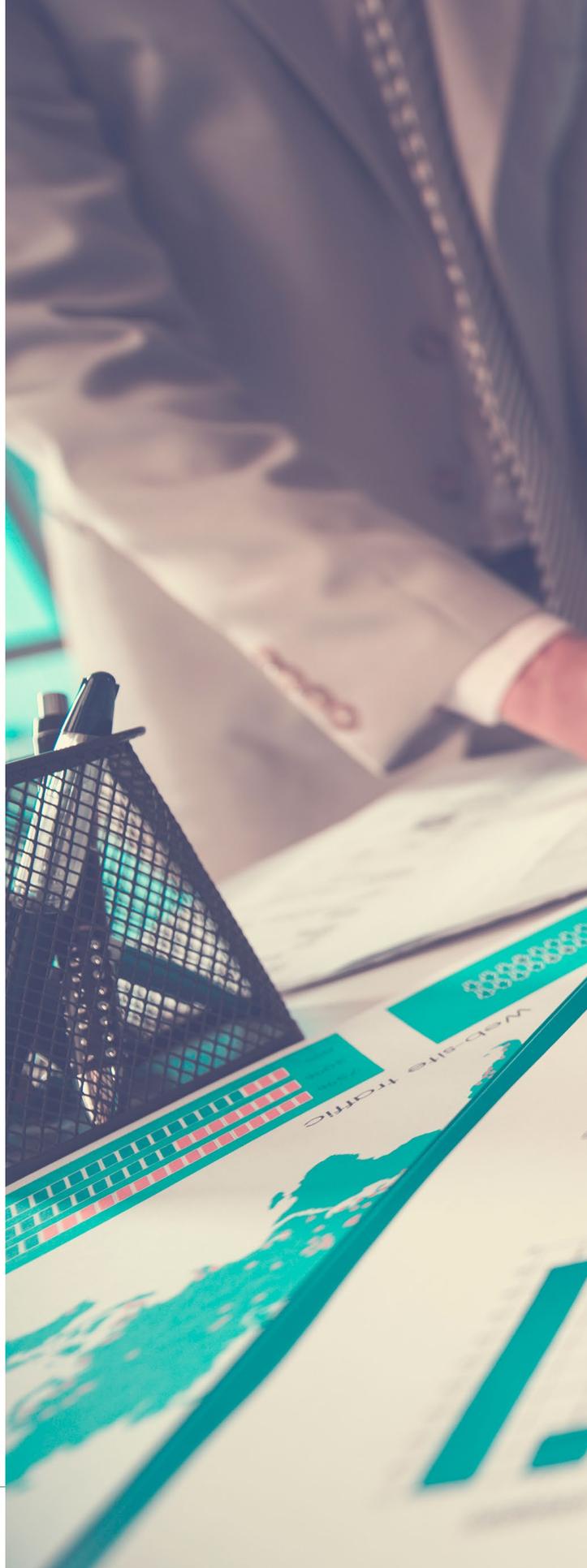
support for such proposals is even lower than such numbers suggest, given that proxy advisory firms are much more likely to support such proposals than the median shareholder, and a sizable fraction of institutional shareholders follow such firms' recommendations.⁹⁸

Notwithstanding that social- and policy-related shareholder proposals are unlikely to win sizable shareholder support, they can influence corporate behavior—and otherwise offer shareholders with these interests a public platform for these views. Cases such as Evelyn Davis's—in which the corporate gadfly leveraged the shareholder-proposal process to generate \$600,000 in annual income from companies⁹⁹—are extreme. But empirical evidence we discussed in last year's *Proxy Monitor Report* also shows that shareholder-proposal activism centered on social issues is negatively associated with firm value, at least for public-employee pension funds.¹⁰⁰

That the shareholder-proposal process has actually operated to permit such minority shareholders to extract corporate rents or to influence corporate behavior to the detriment of the average diversified shareholder suggests that the process is ripe for reform.¹⁰¹ Potential solutions include:

- Revisiting the SEC's 1976 rule forcing companies to include on their proxy ballots most shareholder proposals that involve “substantial policy . . . considerations”¹⁰²
- Forcing shareholder-proposal sponsors to reimburse the corporation at least some portion of the direct costs of assessing, printing, distributing, and tabulating their proposals if any proposal fails to receive majority or threshold shareholder support¹⁰³
- Revising the SEC's rule permitting companies to exclude resubmitted shareholder proposals if they fail to garner minimum threshold shareholder support within the preceding five calendar years.¹⁰⁴

This report adds to the debate over the third idea and shows that were the SEC to raise its resubmission threshold to 10%, almost one-fourth of resubmitted shareholder proposals could be excluded from companies' ballots. Were the SEC to implement a 33% resubmission threshold, more than 35% of resubmitted shareholder proposals could be excluded. We hope that the SEC will consider such evidence in light of its pending rulemaking petition on this issue.



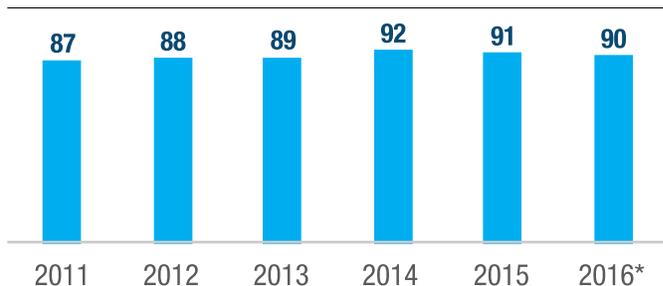
APPENDIX. SHAREHOLDER ADVISORY VOTES ON EXECUTIVE COMPENSATION

Since 2011, federal law has mandated that shareholders hold advisory votes on executive compensation annually, biennially, or triennially.¹⁰⁵ Shareholders at most companies have opted to hold such votes annually. In 2016, to date, 210 companies in the Fortune 250 have held such votes, among 231 to hold annual meetings.

For most large companies, management’s executive-compensation packages remain very likely to garner majority shareholder support in advisory votes. To date in 2016, among 210 Fortune 250 companies holding advisory votes on executive compensation, a majority of shareholders have voted against management at only three companies: Bed Bath & Beyond (23% shareholder support), Community Health Systems (25%), and Exelon (38%). Bed Bath & Beyond was also one of two companies in the Fortune 250 that failed to win majority support in 2015 shareholder advisory votes on executive compensation.

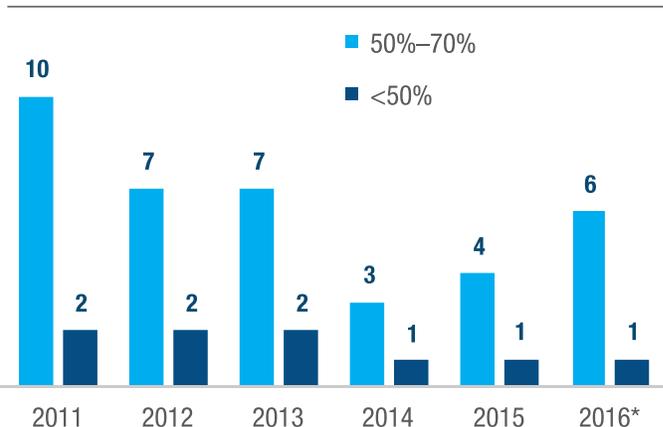
Overall, the average shareholder support for executive compensation fell to 90% in 2016, down slightly from 91% in 2015 and 92% in 2014; average support remains slightly above that seen in 2011, 2012, or 2013 (Figure 43). The percentage of companies receiving between 50% and 70% support in shareholder advisory votes increased 50%, albeit from a very small base: the total number of companies falling in this category rose from 4% in 2015 to 6% in 2016 and remains below the level seen in 2011, 2012, or 2013 (Figure 44). (ISS uses 70% support level as a minimum cutoff for determining companies that will warrant a closer look in the following year.)¹⁰⁶ Similarly, there was a slight drop in the percentage of companies garnering more than 90% support in shareholder advisory votes on executive compensation—72% in 2016, down from 75% last year and 79% in 2014—though the fraction of companies getting such overwhelming support from shareholders is also above that in the first few years in which shareholder advisory votes on executive compensation were held (Figure 45).

Figure 43. Average Shareholder Advisory Vote on Executive Compensation, %



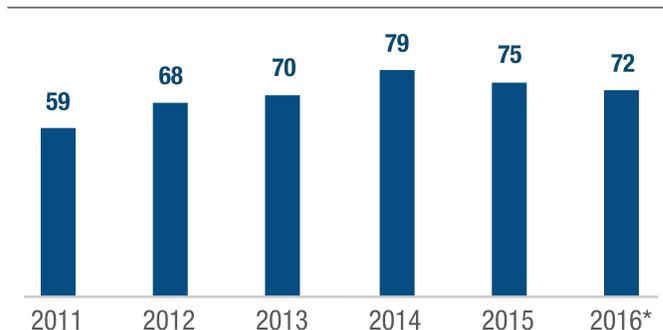
*In 2016, for 210 companies holding executive compensation advisory votes by August 31. Source: ProxyMonitor.org

Figure 44. Companies Receiving 50%–70%, or Below 50%, Shareholder Support for Executive Compensation, %



*In 2016, for 210 companies holding executive compensation advisory votes by August 31. Source: ProxyMonitor.org

Figure 45. Companies with 90+% Shareholder Support for Executive Compensation, %



*In 2016, for 210 companies holding executive compensation advisory votes by August 31. Source: ProxyMonitor.org

Companies that failed to receive majority shareholder support

Bed Bath & Beyond. As noted, 2016 is the second year in a row Bed Bath & Beyond has failed to receive majority support in its shareholder advisory vote on executive compensation. Moreover, the percentage support fell from 35% in 2015 to 23% this year. Scott Stringer, the elected comptroller of New York City who is the managing fiduciary of the city's public-employee pension funds, argued in an exempt solicitation filing that that Bed Bath & Beyond chief executive Steven M. Temares's "total 2015 cash and equity compensation of \$19.7 million is clearly excessive by virtually any objective measure, including in absolute terms and relative to the company's performance."¹⁰⁷ Stringer also noted that the city's pension funds would withhold voting support for directors on the company's compensation committee. The California Public Employees Retirement System (CalPERS) voiced similar opinions in a separate exempt solicitation to shareholders.¹⁰⁸ Bed Bath & Beyond's share price was also down almost 36% year-over-year.

Community Health Systems. Community Health System's chief executive Wayne Smith's total compensation was down in 2015 relative to the prior year, but the company nevertheless failed to get the support of more than 25% of shareholders in its executive compensation advisory vote. Shareholders may have been, in part, expressing unhappiness with the company's stock price performance: the company's stock had dropped almost 68% year-over-year.

Exelon. The leading proxy advisory firm, ISS, complained that Exelon's "stock performance [had] lagged many of its peers over the last three- to five-year periods" and that chief executive Christopher Crane's long and short performance targets were "based on nearly flat or lowered performance goals".¹⁰⁹ CEO Crane's, total compensation package was just under \$16 million in 2015. The company's share price declined 27% in the prior year.

Companies receiving less than 70% shareholder support

Among the 13 companies that received more than 50% but less than 70% shareholder support in executive compensation advisory votes, 10 had declines in their stock price over the preceding year. Three companies—Anadarko Petroleum, Chesapeake Energy, and Freeport McMoRan—lost more than 40% of their share value from 2015 to 2016. In addition to two companies with modest gains in their stock price (Honeywell and Rite Aid), insurance company Chubb Limited only received the support of 59% of shareholders in its advisory vote on executive compensation, notwithstanding a 17.5% increase in its stock price year-over-year from 2015. Chubb's 2015 pay to executives, however, included "one-time supplemental awards for outstanding performance and substantial additional work associated with the Chubb Corp. acquisition," the company's January 2016 merger with ACE Limited.¹¹⁰ This supplemental payment triggered proxy advisory firms' recommendation to institutional shareholders to cast advisory votes against the company's pay package; the company argued that the gains to shareholders from the change-in-control transaction warranted the one-time award.¹¹¹

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: as the Supreme Court emphasized in its 1987 decision in *CTS Corp. v. Dynamics Corp.*, “[n]o principle of corporation law and practice is more firmly established than a State’s authority to regulate domestic corporations, including the authority to define the voting rights of shareholders.” 481 U.S. 69, 89. The section of the Securities Exchange Act upon which Rule 14a-8 is promulgated, § 14(a), is principally designed to ensure corporate disclosures to shareholders to afford investment information and prevent deception. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964) (“The purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation.”). In its 1990 *Business Roundtable* decision, the D.C. Circuit Court of Appeals explained further:

That proxy regulation bears almost exclusively on disclosure stems as a matter of necessity from the nature of proxies. Proxy solicitations are, after all, only communications with potential absentee voters. The goal of federal proxy regulation was to improve those communications and thereby to enable proxy voters to control the corporation as effectively as they might have by attending a shareholder meeting.

Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990) (“While the House Report indeed speaks of fair corporate suffrage, it also plainly identifies Congress’s target—the solicitation of proxies by well informed insiders ‘without fairly informing the stockholders of the purposes for which the proxies are to be used.’” (citing H.R.Rep. No. 1383, 73d Cong., 2d Sess. 14 (1934))). See also S.Rep. No. 792, 73d Cong., 2d Sess. 12 (1934) (characterizing purpose of proxy protections as ensuring stockholders’ “adequate knowledge” about the “financial condition of the corporation”).

² “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.

³ See Michael Chamberlain, *Socially Responsible Investing: What You Need to Know*, FORBES, Apr. 24, 2013 (“In general, socially responsible investors are looking to promote concepts and ideals that they feel

strongly about.”) 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.”)

⁴ See James R. Copland, *Getting the Politics Out of Proxy Season*, WALL ST. J., Apr. 22, 2015.

⁵ See Roberta Romano, *Less Is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. REG. 174, 229–49 (2001).

⁶ See Thomas Quadman, *Request for Rulemaking to Amend Rule 14a-8 Under the Securities Exchange Act of 1934 Regarding Resubmission of Shareholder Proposals* (Apr. 9, 2014).

⁷ See 14a-8, *supra* note 1, at 14a-8(i)(12).

⁸ 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 Act*].

⁹ See Proxy Monitor, Reports and Findings.

¹⁰ Those companies are: Applied Materials, Ashland, Avon, Coca-Cola Enterprises, Dean Foods, GameStop, Genworth Financial, HCA Holdings, ITT, KBR, Motorola Solutions, Oshkosh, Principal Financial Group, and Public Service Enterprise Group.

¹¹ Those companies include AMR, Aon, Constellation Energy, Coventry Health Care, Dell, Eaton, Hillshire Brands, H. J. Heinz, Medco, Smithfield Foods, Sunoco, URS, and US Airways.

¹² The adjustments noted in endnotes 10 and 11 mean that the data set of companies compared across years is marginally different. Nevertheless, because the companies added and deleted are typically 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.

¹³ See Heidi Welsh, *Accuracy in Proxy Monitoring*, HLS Forum on Corporate Governance and Financial Regulation, Sept. 16, 2013 (critiquing Proxy Monitor data set).

¹⁴ The five largest companies by revenues in the 2015 Fortune 500 list—Walmart, ExxonMobil, Chevron, Berkshire Hathaway, and Apple—had a combined market capitalization of more than \$1.7 trillion on Sept. 1, 2016, which constitutes 7.6% of the U.S. total stock-market

capitalization, based on the Wilshire 5000 Price Full Cap Index. (The S&P 100 contains more than 54% of the U.S. total market capitalization.) The companies listed as 246 through 250 on the list—DTE Energy, Ameriprise Financial, VF, Praxair, and J. C. Penney—had a combined market capitalization of \$96 billion, or 0.4% of the U.S. total stock-market capitalization.

¹⁵ See 14a-8, *supra* note 1.

¹⁶ See *id.*

¹⁷ 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—inherent in noncorporate 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).

¹⁸ In 1976, the SEC issued an interpretive release stating that companies could invoke the “ordinary business exclusion” rule to exclude shareholder proposals only if these proposals “involve business matters that are mundane in nature and do not involve any substantial policy or other considerations.” See *Adoption of Amendments Relating to Proposals by Security Holders*, Exchange Act Release No. 12,999, 41 Fed. Reg. 52,994, 52,997–98 (1976).

¹⁹ See Justin Gillis & Clifford Krauss, *Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. TIMES, Nov. 5, 2015, at A1.

²⁰ See John Schwartz, *State Officials Investigated Over Their Inquiry into Exxon Mobil's Climate Change Research*, N.Y. TIMES, May 19, 2016.

²¹ See Francine McKenna, *Schumer Says SEC's White Is 'Poisoning' Politics*, MARKETWATCH, June 15, 2016.

²² See Andrew Taylor & Marcy Gordon, *Democrats Block SEC Nominees*, U.S. NEWS & WORLD RPT., Apr. 7, 2016. This report's principal author, James Copland, went to law school with one of the stalled nominees, Hester Peirce, whom he considers a friend.

²³ See Dodd-Frank Act, *supra* note 8.

²⁴ See *id.*

²⁵ See New York City Comptroller, Boardroom Accountability Project [hereinafter *Boardroom Accountability Project*]; 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.

²⁶ See Boardroom Accountability Project 2016 Company Focus List.

²⁷ 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.

Shareholder-proposal activists prefer to exclude abstentions consistently in tabulating vote totals, without regard to corporate bylaws; see Heidi Welsh, *Accuracy in Proxy Monitoring*, HLS Forum on Corporate Governance and Financial Regulation (Sept. 16, 2013) (critiquing the Proxy Monitor data set), which necessarily inflates apparent support for their proposals. But such a methodology is inconsistent with state and 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. Under the state law of Delaware, where 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. 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 permissive standard that “[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; but only 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 minimum 3%, 6%, or 10% 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) [hereinafter *1998 Amendments*]. 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 long-standing 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.

²⁸ See Quaadman, *supra* note 6.

²⁹ See Yablon, *supra* note 2; Holzer, *supra* note 2.

³⁰ See Chamberlain, *supra* note 3.

³¹ See Jonathan Kalodimos, A Gadfly’s Perspective on “Gadflies at the Gate,” Sept. 2, 2016.

³² Kalodimos’s prior experience with the SEC did not help him to draft a shareholder proposal that garnered widespread shareholder support. Indeed, more than 97% of shareholders voted against each of his proposals, meaning that none will be eligible for resubmission for five years.

³³ See Ford Motor Co., *Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934*, proposal no. 5 (Apr. 1, 2016).

³⁴ See Newground Social Investment: About Us/What We Do.

³⁵ See Del. Gen. Corp. L. § 216(4).

³⁶ See Holy Land Principles, Inc.: About Holy Land Principles.

³⁷ See Pepsico, *Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934*, proposal no. 7 (Mar. 18, 2016).

³⁸ These proposals mirrored the SEC’s previously released Rule 14a-11, which would have mandated that publicly traded companies list shareholders’ nominees for director on their corporate proxy ballots, as long as the nominating shareholder had held at least 3% of a company’s stock for a minimum of three years. The SEC promulgated the rule in August 2010, but the D.C. Circuit rejected it as “arbitrary and capricious” in July 2011. See *Business Roundtable v. SEC*, 647 F.3d 1144, 1152 (D.C. Cir. 2011). The SEC did not appeal the decision but instead approved amendments to Rule 14a-8—the rule for shareholder proposals—to allow shareholders to introduce proxy-access rules on their own. See Abigail Caplovitz Field, *Proxy Access Debate Far from Over*, CORPORATESECRETARY.COM (Sept. 9, 2011).

³⁹ See Boardroom Accountability Project, *supra* note 25.

⁴⁰ See Mondelez International, Inc., *Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934*, proposal no. 6 (Mar. 28, 2016).

⁴¹ See 29 U.S.C. § 1003(b).

⁴² See 29 CFR 2509.08-02(3) (2008); Advisory Opinion No. 2008-05A (June 27, 2008).

⁴³ Letter from Department of Labor to Jonathan P. Hiatt, General Counsel, AFL-CIO (May 3, 2005).

⁴⁴ See Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 80 Fed. Reg. 65,135, 65,135–65,137 (2016).

⁴⁵ *Id.* at 65,136.

⁴⁶ *Id.*

⁴⁷ See As You Sow, Engaging Corporations. Protecting People and Planet.

⁴⁸ U.S. Environmental Protection Agency, Learn About Sustainability.

⁴⁹ See ISS, 2016 United States Summary Proxy Voting Guidelines 60 (Dec. 18, 2015).

⁵⁰ See James R. Copland et al., *Proxy Monitor 2012: A Report on Corporate Governance and Shareholder Activism 20–23* (Manhattan Inst. for Pol’y Res., Fall 2012).

⁵¹ Compare ISS, *supra* note 49, with ISS, 2012 SRI U.S. Proxy Voting Guidelines (Jan. 2012).

⁵² See, e.g., Amy Harder et al., *Exxon Fires Back at Climate-Change Probe*, WALL ST. J., Apr. 13, 2016.

⁵³ See Schwartz, *supra* note 20.

⁵⁴ See Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund*, WASH. FREE BEACON, Apr. 14, 2016.

⁵⁵ 558 U.S. 310 (2010).

⁵⁶ The *Citizens United* decision drew a rebuke from President Obama in his 2010 State of the Union address, with many of the Supreme Court justices in front of him. See Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES, Jan. 28, 2010. In 2011, several U.S. senators, including 2016 Democratic presidential candidate Bernie Sanders of Vermont, proposed amending the First Amendment in response. See Pete Kasperowicz, *Sanders Proposes Amendment to the Constitution That Would Limit Free Speech*, THE HILL, Dec. 9, 2011.

⁵⁷ See Letter from Comm. on Disclosure of Corp. Pol. Spending, to Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n 10 n. 29 (Aug. 3, 2011). For a full response, see James R. Copland, *Against an SEC-Mandated Rule on Political Spending Disclosure: A Reply to Bebchuk and Jackson*, 3 HARV. BUS. L. REV. 381 (2013).

⁵⁸ See McKenna, *supra* note 21.

- ⁵⁹ See Taylor & Gordon, *supra* note 22.
- ⁶⁰ Center for Political Accountability, About the CPA.
- ⁶¹ See, e.g., Devon Energy Corp., Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934, proposal no. 6 (Apr. 27, 2016).
- ⁶² Narrowing down the class of shareholder proposals to those tracking the CPA's model disclosure language on political spending, the 13 shareholder proposals coming to a vote in 2016 averaged 31% shareholder support, up marginally from 30% in 2015; this difference is wholly attributable to the 52% support received by the successful proposal at Fluor.
- ⁶³ Fluor Corp., Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934, proposal no. 4 (Mar. 10, 2016).
- ⁶⁴ See More than 70 Years of Government Project Experience—Fluor.
- ⁶⁵ See Kathryn Gansler, Center for Political Accountability, Corporate Political Spending Transparency and Accountability Report, Mar. 30, 2016.
- ⁶⁶ See Zachs Equity Research, Fluor (FLR): Q1 Earnings Miss, Revenues Beat; Outlook Cut, May 6, 2016.
- ⁶⁷ In 2006, a shareholder proposal at Amgen related to political-spending disclosure received 67% shareholder support, with the board of the company supporting the proposal.
- ⁶⁸ See Facilitating Shareholder Director Nominations, SEC Rel. No. 34-62764 (Aug. 25, 2010); see also 17 C.F.R. § 240.14a-11 (2011).
- ⁶⁹ See *id.*
- ⁷⁰ *Business Roundtable v. SEC*, 647 F.3d 1144, 1152 (D.C. Cir. 2011).
- ⁷¹ See Field, *supra* note 38.
- ⁷² See Office of the State Comptroller, Fiduciary Responsibilities of the Comptroller. Full fiduciary authority over the funds rests with various boards composed of political and union delegates. For example, the board of the \$43 billion New York City Employees' Retirement System (NYCERS) includes the comptroller, the public advocate, a mayoral representative, each of the five New York City borough presidents, and three union delegates. See NYCERS, Board of Trustees.
- ⁷³ Boardroom Accountability Project, *supra* note 25; see also Press Release, *supra* note 25.
- ⁷⁴ See *id.*
- ⁷⁵ Press Release, Comptroller Stringer, New York City Funds, Announce Expansion of Boardroom Accountability Project, Jan. 11, 2016.
- ⁷⁶ See Korn Ferry Inst., Proxy Access: Impact, TBD (Aug. 15, 2016).
- ⁷⁷ New companies were selected based on executive compensation, board diversity, carbon emissions, and the percentage of the New York City pension funds' portfolio. See Boardroom Accountability Project 2016 Company Focus List, *supra* note 26.
- ⁷⁸ See *id.*
- ⁷⁹ As discussed in an earlier finding, two additional companies in the Proxy Monitor database also received shareholder proposals relating to proxy access in 2016: Applied Materials and Oshkosh. See James R. Copland & Margaret M. O'Keefe, Proxy Monitor 2016 Finding 1: Proxy Access (June 2016). Both companies had already adopted their own proxy-access rules with somewhat differing terms from those called for in the shareholder proposal, and both the Applied Materials and Oshkosh proxy-access shareholder proposals failed to receive a majority of shareholder voting support. These two companies are excluded from this analysis because they are no longer in the Fortune 250.
- ⁸⁰ The exception is Cummin, which limited the number of shareholders who could aggregate ownership shares to nominate a director to 20 but adopted a proxy-access rule that would allow shareholders to sponsor directors constituting 25% of board seats.
- ⁸¹ As noted by the D.C. Circuit in *Business Roundtable*, 647 F.3d at 1152, a proxy-access rule might empower "investors with a special interest, such as unions and state and local governments . . . to pursue self-interested objectives rather than the goal of maximizing shareholder value." The fact that the New York City comptroller screened companies for proxy access using criteria with a limited, if any, relationship to share value suggests that the SEC's concern may not be merely hypothetical. See Press Release, *supra* note 25 (showing that two of three Boardroom Accountability Project screening criteria involve companies' contribution to climate change and the race and sex composition of their boards). Indeed, a fall 2015 study by economists at the SEC who helped develop the case for the Commission's since-vacated mandatory proxy-access rule showed that there was no difference between companies targeted with proxy-access shareholder proposals by the New York City funds, unlike those targeted by other shareholders (chiefly corporate gadflies), in the preceding 12 months' share-price performance. See Tara Bhandari et al., *Public versus Private Provision of Governance: The Case of Proxy Access*, SEC Working Paper (July 24, 2015), at 28 ("Our results support the notion that the [Boardroom Accountability Project] targets are not significantly associated with poor recent stock performance of the firm or the growth opportunities of the firm, in contrast to the results for the non-[Boardroom Accountability Project] targets.")
- Bhandari et al. do find a significant and positive share-price reaction to the *announcement* of the Boardroom Accountability Project, in an econometric event study. See *id.* at 17–18 ("We perform an event study on the abnormal returns of the targeted firms on the event day, November 6. . . . [W]e find that on average the targeted firms experienced a 53 basis point abnormal return on the event date."). The Bhandari et al. study adds useful information to the debate over proxy access but may suffer from common event-study problems such as selection bias, omitted variable bias, or non-stationarity. See Bernard Sharfman, *What Does the Empirical Evidence Tell Us About the Value of Proxy Access Proposals?*, Working Paper (July 7, 2016), at 3–8 (on file with author). Bhandari et al. test their results against the date the SEC announced that it would stay their mandatory proxy-access rule,

when they found a negative share-price reaction; but not against other dates of interest, including when the SEC announced its rule, when the lawsuit challenging it was filed, or when the D.C. Circuit decision vacating the rule was announced. In addition, the Bhandari et al. paper does not assess the market reaction to the shareholder votes on proxy access. In the 2015 Proxy Monitor report, two of this report's coauthors found that in terms of voting results on proxy-access proposals, "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. . . . In contrast, among companies in which shareholders voted for proxy access, the corporate stock price declined by 2.3 percent." James R. Copland & Margaret M. O'Keefe, *Proxy Monitor 2015: A Report on Corporate Governance and Shareholder Activism 19* (Manhattan Inst. for Pol'y Res., Fall 2015).

⁸² See, e.g., James R. Copland et al., *supra* note 50, at 20–23 (showing 15-percentage-point increase in shareholder vote, *ceteris paribus*, when the proxy-advisory firm ISS recommends a vote "for" a given shareholder proposal); Copland & Margaret M. O'Keefe, *Proxy Monitor 2014: A Report on Corporate Governance and Shareholder Activism 17–19* (Manhattan Inst. for Pol'y Res., Fall 2014) ("ISS has, historically, been almost eight times as likely as the median shareholder to support a shareholder proposal. ISS's current policy guidelines continue to reflect this disconnect.").

⁸³ See 1998 Amendments, *supra* note 27 (describing 80 firms reporting on proposal determination costs and 67 reporting on printing and other direct costs).

⁸⁴ Copland et al., *supra* note 50, at 9 (citations omitted).

⁸⁵ Adoption of Amendments Relating to Proposals by Security Holders, *supra* note 18.

⁸⁶ See Copland, *supra* note 4.

⁸⁷ See Romano, *supra* note 5, at 229–49.

⁸⁸ See Thomas Quadman, *supra* note 6.

⁸⁹ See 14a-8, *supra* note 1, at 14a-8(i)(12).

⁹⁰ See *id.*; 1998 Amendments, *supra* note 27.

⁹¹ In analyzing shareholder-proposal resubmissions, we have departed from the practice in the rest of this report and included 100% of the companies in the Proxy Monitor database, regardless of whether they are in the 2015 Fortune 250. Of course, some companies that were included in previous years but ceased operations as an independent publicly traded entity—e.g., due to a merger or due to a going-private transaction—may have had shareholder-proposal resubmissions had they continued in the database. Similarly, new entrants to the Fortune 250 that were not publicly traded companies in earlier years—most often due to a company spin-off—may have had more shareholder proposals resubmitted had they been publicly traded companies in those years. Thus, the percentage of shareholder proposals that we

are counting as resubmitted is likely an *underestimate* of the rate of resubmission at Fortune 250 companies.

⁹² See Chris Johnson, *Exxon Mobil Adopts LGBT-Inclusive Non-Discrimination Policy*, WASH. BLADE, Jan. 30, 2015.

⁹³ See Romano, *supra* note 5, at 241 ("In a 1998 release regarding proposed reforms of the proxy proposal rule, the SEC indicated that respondents to a 1997 agency-administered questionnaire reported an average (median) expenditure of approximately \$50,000 (\$10,000) on printing, distribution and tabulation costs for including a shareholder proposal, and \$37,000 (\$10,000) on the determination whether to include a proposal.").

⁹⁴ See Domini Social Investments, Key Proxy Advisor Recommends Vote Against AT&T Management on Political Contributions Disclosure, Apr. 21, 2008.

⁹⁵ See ISS, *supra* note 49, at 61.

⁹⁶ See Nucor Corp., *Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934*, proposal no. 3 (Mar. 21, 2016). A cumulative voting rule, which Nucor previously had, allowed shareholders to aggregate all their votes for directors up for election on a single preferred candidate. The company had long maintained, in response to the Carpenters Fund proposal, that the board could not adopt the fund's preferred rule for not seating any director not receiving a majority of votes in an uncontested election in light of the company's cumulative voting mechanism.

⁹⁷ By way of comparison, it is worth noting that many states with initiative ballot processes prevent reintroduction of the same or substantially similar ballot item when a voter-sponsored initiative fails to receive 50% support. See NCSL: Restrictions on Repeat Measures. For example, in Massachusetts, when an initiative is proposed on a ballot, then voted on and ultimately rejected, the law provides: "A measure cannot be substantially the same as any measure that has been qualified for submission or appeared on the ballot at either of the two preceding biennial state elections." *I.e.*, there is a six-year ban on any resubmission. Rules such as Massachusetts's both put a stay on unpopular resubmission attempts for an extended period and anticipate the submission of similar "new" submissions in an effort to get around the rule, hence the "substantially the same" language. Of course, state-law initiatives would tend to be binding, not merely precatory; so the SEC would probably prefer to permit any shareholder proposal that receives 50% support just once to be resubmitted multiple times, if not acted upon, for a number of years—regardless of subsequent shareholder votes.

⁹⁸ See Copland et al., *supra* note 50, at 20–23.

⁹⁹ See *id.*, at 9.

¹⁰⁰ See Copland & O'Keefe, *supra* note 81, at 17–18; Tracie Woidtke, *Public Pension Fund Activism and Firm Value 3* (Manhattan Inst. For Pol'y Res., Sept. 2015) ("Ownership by public pension funds engaged in social-issue shareholder-proposal activism is negatively related to firm value.").

¹⁰¹ See generally James R. Copland, SEC Rule 14a-8: Ripe for Reform, Statement to the House Committee on Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises, Sept. 21, 2016.

¹⁰² See Copland, *supra* note 4.

¹⁰³ See Romano, *supra* note 5.

¹⁰⁴ See 14a-8, *supra* note 1 at 14a-8(i)(12); Quaadman, *supra* note 6.

¹⁰⁵ See Dodd-Frank Act, *supra* note 8, at § 951.

¹⁰⁶ If a company falls below 70% 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 ISS, *supra* note 49, at 39.

¹⁰⁷ Scott M. Stringer, Letter to Bed Bath & Beyond Shareholders, June 15, 2016.

¹⁰⁸ See CalPERS, Shareowner Alert, June 27, 2016.

¹⁰⁹ Steve Daniels, *Exelon, You're Paying the CEO Too Much: Shareholders*, CRAIN'S, May 2, 2016.

¹¹⁰ Chubb Limited, Schedule 14A Definitive Additional Materials, May 6, 2016.

¹¹¹ See *id.*

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