Statement to the House Committee on Financial Services
Subcommittee on Capital Markets and Government Sponsored Enterprises

Hearing on Corporate Governance:
Fostering a System that Promotes Capital Formation and Maximizes Shareholder Value

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SEC Rule 14a-8: Ripe for Reform

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The Manhattan Institute for Policy Research does not take institutional positions on legislation, rules, or regulations. Although my comments draw upon my long-running research on shareholder proposals and corporate governance as an Institute scholar, my statement before the subcommittee is solely my own, not my employer's.

About Mr. Copland

James R. Copland is a senior fellow at the Manhattan Institute, where he has served as director of legal policy since 2003.[1] He has authored many policy reports; book chapters; articles in academic journals including the *Harvard Business Law Review* and *Yale Journal on Regulation*; and opinion pieces in publications including the *Wall Street Journal*, *National Law Journal*, and *USA Today*. Mr. Copland has testified before Congress as well as state and municipal legislatures; speaks regularly on civil- and criminal-justice issues; has made hundreds of media appearances in such outlets as PBS, Fox News, MSNBC, CNBC, Fox Business, Bloomberg, C-Span, and NPR; and is frequently cited in news articles in periodicals including the *New York Times*, *Washington Post*, *The Economist*, and *Forbes*.

In 2011, Mr. Copland helped launch the Manhattan Institute's Proxy Monitor database,[2] a publicly available catalogue of shareholder proposals at the 250 largest publicly traded American companies, by revenues, as determined by *Fortune* magazine.[3] Mr. Copland has periodically authored or co-authored findings and reports on the shareholder-proposal process,[4] as well as writing on the subject in popular[5] and academic[6] journals. In 2011 and 2012, Mr. Copland was named to the National Association of Corporate Directors "Directorship 100" list, which designates the individuals most influential over U.S. corporate governance.[7]

Prior to joining the Manhattan Institute, Mr. Copland served as a management consultant with McKinsey and Company in New York and as a law clerk for Ralph K. Winter on the U.S. Court of Appeals for the Second Circuit. Mr. Copland has been a director of two privately held manufacturing companies since 1997 and has served on multiple government and nonprofit boards. He holds a J.D. and an M.B.A. from Yale University, where he was an Olin Fellow in Law and Economics and a Teaching Fellow in Macroeconomics and Game Theory; an M.Sc. in Politics of the World Economy from the London School of Economics and Political Science; and a B.A. in Economics, with highest distinction and highest honors, from the University of North Carolina at Chapel Hill, where he was a Morehead Scholar and was awarded the Honors Prize in Economics.

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[1] *See* James R. Copland, https://www.manhattan-institute.org/expert/james-r-copland. The Manhattan Institute is a non-profit, non-partisan think tank developing ideas that foster economic choice and individual responsibility. *See* About MI, https://www.manhattan-institute.org/about.

[2] *See* Proxy Monitor, http://www.proxymonitor.org/ ("ProxyMonitor.org is a unique, publicly available database that tracks shareholder proposals in real time.").

[3] *See* Fortune 500, http://beta.fortune.com/fortune500/ ("In total, Fortune 500 companies represent two-thirds of the U.S. GDP with $12 trillion in revenues, $840 billion in profits, $17 trillion in market value, and employ 27.9 million people worldwide."). Because several of the Fortune 250 companies are not publicly traded, some of the companies among the 250 largest that are subject to SEC proxy rules are from the broader Fortune 300 group.

[4] *See* Proxy Monitor, Reports and Findings, http://proxymonitor.org/Forms/reports_findings.aspx.

[5] *See, e.g.*, James R. Copland, *Getting The Politics out of Proxy Season*, WALL ST. J., Apr. 23, 2015, *available at* https://www.manhattan-institute.org/html/getting-politics-out-proxy-season-5461.html; Copland, *Politicized Proxy Advisers vs. Individual Investors*, WALL ST. J., Oct. 7, 2012, *available at* https://www.manhattan-institute.org/html/politicized-proxy-advisers-vs-individual-investors-3863.html.

[6] *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).

[7] *See* NACD 2012 Honorees, https://www.nacdonline.org/directorship100/2012honorees.cfm ("Each year, NACD Directorship identifies the most influential people in the boardroom community, including directors, corporate governance experts, journalists, regulators, academics and counselors.").

Written Statement

Chairman Garrett, Ranking Member Maloney, and members of the Subcommittee, my name is James R. Copland. Since 2003, I have been a senior fellow with and director of legal policy for the Manhattan Institute for Policy Research, a public-policy think tank in New York City. Although my comments draw upon my research conducted for the Manhattan Institute,[8] my statement before the subcommittee is solely my own, not my employer's.

I would like to thank you for the invitation to testify today. One of the topics of focus for today's hearing has constituted a significant focus in my recent research: the shareholder-proposal process governed by the Securities and Exchange Commission's Rule 14a-8. I will leave discussion of new disclosure rules under the FAST Act and Dodd-Frank Act to other witnesses, although I will share some of my specific research related to proposed additional disclosures of corporate political spending and lobbying, which are a matter of current controversy.

Summary of Argument

The SEC's Rule 14a-8 permits stockholders of publicly traded companies who have held shares valued at $2,000 or more for at least one year to introduce proposals for shareholders' consideration at corporate annual meetings.[9] The SEC's process is ripe for reform:

- The shareholder-proposal process has strayed far from the principal legal purpose authorizing the rule under the Securities Exchange Act—namely ensuring that shareholders obtain adequate, non-deceptive disclosures to inform their investment decisions.
- The shareholder-proposal process has been used almost exclusively by a small number of investors, with a focus potentially or actually centered on concerns other than maximizing share value—the principal state corporate law focus that defines directors' and managements' fiduciary duties.
- The shareholder-proposal process has actually operated to permit such minority shareholders to extract corporate rents or influence corporate behavior to the detriment of the average diversified shareholder.

Potential solutions to this problem include:

[8] Some language in this testimony may be identical to that in the author's previous publications. In addition, I have included the following Manhattan Institute reports as appendices, to be incorporated by reference: James R. Copland & Margaret M. O'Keefe, *Proxy Monitor: A Report on Corporate Governance and Shareholder Activism* (Manhattan Institute 2015), *available at* http://www.proxymonitor.org/Forms/pmr_11.aspx; Tracie Woidtke, *Public Pension Fund Activism and Firm Value* (Manhattan Institute 2015), *available at* https://www.manhattan-institute.org/html/public-pension-fund-activism-and-firm-value-7871.html. Some data and analysis in this testimony draw upon that developed for the Manhattan Institute's 2016 Proxy Monitor report, to be released later this fall, authored by myself with Ms. O'Keefe.

[9] *See* 17 C.F.R. § 240.14a-8 (2007) [hereinafter *14a-8*].

- Revisiting the SEC's 1976 rule forcing companies to include on their proxy ballots most shareholder proposals that involve "substantial policy . . . considerations"—an approach I have publicly favored.[10]
- 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 support—an idea suggested by Yale Law professor Roberta Romano.[11]
- 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[12]—an idea suggested by the U.S. Chamber of Commerce and other business groups in a 2014 rulemaking petition submitted to the SEC.[13]

I focus my testimony on the following subjects:

(1) the legal background surrounding Rule 14a-8;
(2) the principal sponsors of shareholder proposals;
(3) the principal subject matters of shareholder proposals;
(4) shareholder-proposal voting results;
(5) the role of proxy-advisory firms;
(6) shareholder-proposal resubmissions;
(7) the controversy surrounding corporate disclosure of political spending and lobbying; and
(8) the potential value-destroying impact of social-issue investing on public-employee pension funds.

1. Legal Background

Pursuant to its authority under the Securities Exchange Act of 1934,[14] the SEC first promulgated a "shareholder proposal rule"—the antecedent to the current Rule 14a-8—in 1942.[15] Then-SEC chairman Ganson Purcell explained the purpose of the rule to the House Interstate and Foreign Commerce Committee as follows:

> Once a shareholder could address a meeting[;] today he can only address the assembled proxies which are lying at the head of the table. The only opportunity that the stockholder has of expressing his judgment comes at the time when he considers the execution of the proxy form, and we believe, whether we are right and whether we are wrong—and I think

[10] *See* James R. Copland (2015), *supra* note 5.
[11] *See* Roberta Romano, *Less Is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. REG. 174, 229–49 (2001).
[12] *See* 14a-8, *supra* note 9, at 14a-8(i)(12).
[13] *See* Thomas Quaadman, Request for Rulemaking to Amend Rule 14a-8 under the Securities Exchange Act of 1934 Regarding Resubmission of Shareholder Proposals (Apr. 9, 2014).
[14] 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)).
[15] *See* Securities Exchange Act of 1934 Release No. 3347 (Dec. 18,1942), 7 Fed. Reg. 10,653 (1942).

> we are right—that that is the time he should have the full information before him and the ability to take action as he sees fit.
>
> The proxy solicitation is now in fact the only means by which a stockholder can act and can perform the functions which are his as owner of the corporation. It, therefore, seems clear to us that only by making the proxy a real instrument for the exercise of those functions can we obtain what the Congress and this committee called for in the form of "fair corporate suffrage."[16]

In a 1945 opinion release, the director of the SEC's division of corporate finance explained:

> Speaking generally, it is the purpose of [the shareholder proposal rule] to place stockholders in the position to bring before their fellow stockholders matters of concern to them as stockholders in such corporation; that is, such matters relating to the affairs of the company concerned as are proper subjects of stockholders' action under the laws of the state under which it was organized. It was not the intent of [the rule] to permit stockholders to obtain the consensus of other stockholders with respect to matters which are of a general political, social or economic nature. In short, [the rule] should operate so as to leave intact the primary substantive regulation which state law seeks to achieve.[17]

The opinion release was predicated on the well-founded understanding that the Securities Exchange Act's delegation of powers overseeing the proxy process to the SEC did not alter the substantive rights governing such measures, which would remain largely a question of state corporate law.[18] In 1952, the SEC again emphasized that companies could exclude shareholder proposals that were introduced "primarily for the purpose of promoting general economic, political, racial, religious, social, or similar causes."[19]

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[16] Hearings on H.R. 1498, H.R. 1821, and H.R. 2019, Before the House Committee on Interstate and Foreign Commerce, 78th Cong., 1st Sess., pt. 2, at 174-75 (1943).

[17] Securities Exchange Act Release No. 3638 (Jan. 3, 1945), 11 Fed. Reg. 10,995 (1946).

[18] As the Supreme Court emphasized in its 1987 decision in *CTS Corp. v. Dynamics Corp.*, "No 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")).

[19] Exchange Act Release No. 4775, 17 Fed. Reg. 11,431, 11,433 (1952).

That rule would exist until the early 1970s, when a decision by the D.C. Circuit Court of Appeals challenged the application of the rule by the SEC staff, which in April 1969 had issued a no-action letter to Dow Chemical permitting the company to exclude a shareholder proposal from the Medical Committee on Human Rights asking that the company cease manufacturing napalm.[20] The circuit court invoked the "philosophy of corporate democracy" in sharply questioning the rule as applied:

> No reason has been advanced in the present proceedings which leads to the conclusion that management may properly place obstacles in the path of shareholders who wish to present to their co-owners, in accord with applicable state law, the question of whether they wish to have their assets used in a manner which they believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy. . . . We think that there is a clear and compelling distinction between management's legitimate need for freedom to apply its expertise in matters of day-to-day business judgment, and management's patently illegitimate claim of power to treat modern corporations with their vast resources as personal satrapies implementing personal political or moral predilections. It could scarcely be argued that management is more qualified or more entitled to make these kinds of decisions than the shareholders who are the true beneficial owners of the corporation; and it seems equally implausible that an application of the proxy rules which permitted such a result could be harmonized with the philosophy of corporate democracy which Congress embodied in section 14(a) of the Securities Exchange Act of 1934.[21]

Technically, the court did not overturn the SEC's rule but rather remanded the case to the agency for reconsideration so that "the basis for (its) decision (may) appear clearly on the record, not in conclusory terms but in sufficient detail to permit prompt and effective review."[22] Dow decided to include the proposal on its proxy ballot, and the Supreme Court, on *certiorari*, vacated the lower court decision as moot.[23]

Although there certainly would have been a state-law basis for excluding proposals such as that faced by Dow,[24] the SEC decided instead in 1972 to narrow its rule.[25] Rather than the earlier

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[20] *See* Med. Comm. for Human Rights v. Sec. & Exch. Comm'n, 432 F.2d 659, 663 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972); *see also* 17 C.F.R. § 240.14a-8(c) (1970).
[21] Med. Comm. for Human Rights, 432 F.2d at 681.
[22] *Id.* at 682.
[23] 404 U.S. 403.
[24] *See* Guth v. Loft, 5 A2d 503, 510 (Del. 1939) ("Corporate officers and directors . . . . stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers."); *see also* 8 Del. C. § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."); *cf.* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.").
[25] *See* Exchange Act Release No. 9784, 37 Fed. Reg. 23,178, 23,180 (1972).

language intended to permit companies to exclude proposals motivated primarily by social, economic, or policy concerns, the new release merely permitted companies to exclude shareholder proposals "not significantly related to the business of the issuer or not within its control."[26] In 1976, the SEC issued an interpretive release stating that shareholder proposals related to the "ordinary business" of the corporation could only be invoked to exclude proposals that "involve business matters that are mundane in nature and do not involve any substantial policy or other considerations" [27]—essentially inverting the prior rule.

Today's Rule 14a-8 is written in a question-and-answer format setting forth the circumstances in which companies may exclude shareholder proposals. Companies wishing to exclude a shareholder proposal from the proxy ballot typically seek a "no action" letter from the SEC staff suggesting that the agency will take no action if the proposal is excluded.[28] The SEC issues no-action letters to petitioning companies if the agency's staff determines that a shareholder proposal does not comply with SEC rules. Procedurally, the shareholder must establish his ownership in the company and meet filing deadlines.[29] Substantively, a company would be permitted to exclude a shareholder proposal that was too vague or indefinite to implement, that asked the company to do something that it had already done or lacks the power to implement, that conflicted with state law, that duplicated or conflicted with another ballot proposal, or that involved the company's ordinary business operations.[30] Companies are also permitted to exclude repeat proposals that failed to gain minimal shareholder support in earlier years.[31]

2. Shareholder Proposal Sponsors

For each of the last eleven years tracked in the Manhattan Institute's Proxy Monitor database,[32] a small group of shareholders has dominated the process of introducing shareholder proposals:

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[26] *Id.*
[27] *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).
[28] *See No-Action Letters,* SEC, http://www.sec.gov/answers/noaction.htm.
[29] *See* 14a-8, *supra* note 9.
[30] *See id.*
[31] *See id.*
[32] As discussed in notes 2 and 3 and the accompanying text, the Proxy Monitor database contains all shareholder proposals for the 250 largest publicly traded companies by revenues, as listed by *Fortune* magazine. These companies constitute a substantial majority of the total stock market capitalization held by diversified investors. Notwithstanding this fact, some shareholder activists and their supporters have objected to Proxy Monitor data on the grounds that many companies that receive shareholder proposals are not included in the database. *See, e.g.*, Heidi Welsh, *Accuracy in Proxy Monitoring,* HLS Forum on Corporate Governance and Financial Regulation, Sept. 16, 2013, https://blogs.law.harvard.edu/corpgov/2013/09/16/accuracy-in-proxy-monitoring-2/. A broader dataset, however, risks obscuring the impact of shareholder-proposal rules on the average diversified investor, given the broad variance in market capitalization among companies. Even among the large companies comprising the Proxy Monitor dataset, 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. (The five largest companies by revenues in the 2015 Fortune 500 list—Walmart, Exxon Mobil, Chevron, Berkshire Hathaway, and Apple—had a combined market capitalization of more than $1.7 trillion on September 1, 2016, which constitutes 7.6% of the U.S. total stock market capitalization, based on the Wilshire 5000 Price Full Cap Index. 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. Overall, the S&P 100 alone contains more than 54% of the U.S. total market capitalization.) Thus,

A. A very small group of individuals and their family members—often referred to as "**corporate gadflies**"[33]**—**repeatedly file substantially similar proposals across a broad set of companies. Typically, these individuals own very small percentages of a company's stock. For instance, John Chevedden, the most-active sponsor of shareholder proposals dating back to 2006, has made substantially the same proposal at Ford Motor Company each of those years, individually or through a family trust. In its 2016 proxy statement, Ford disclosed that Mr. Chevedden owned 500 shares of the company's stock[34]—an investment valued at $6,750 at the close of trading on the company's March 16 record date—approximately 0.00001% of the company's market capitalization. All told, Mr. Chevedden and four individual gadfly investors and their family members sponsored 29% of all shareholder proposals from 2006–15 (**Figure 1**); six gadfly investors and their family members have sponsored one-third of all shareholder proposals to date in 2016 (**Figure 2**).[35]

B. Institutional investors focusing on "**socially responsible**" investing,[36] which expressly concern themselves with social or political issues apart from solely share-price maximization, are very active in sponsoring shareholder proposals. Such investors include special-purpose social-investing funds, as well as policy-oriented foundations and various retirement and investment vehicles associated with religious or public-policy organizations.[37] Such investors sponsored 27% of all shareholder proposals across the ten-year period from 2006 through 2015 and 38% of all shareholder proposals to date in 2016. Many of these investors, like corporate gadflies, sponsor shareholder proposals in companies in which they have very small investments. For instance, in 2016, a social

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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.

[33] *See* Charles M. Yablon, *Overcompensating: The Corporate Lawyer and Executive Pay*, 92 COLUM. L. REV. 1867, 1895 (1992); Jessica Holzer, *Firms Try New Tack against Gadflies*, WALL ST. J., June 6, 2011, http://online.wsj.com/article/SB10001424052702304906004576367133865305262.html.

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

[35] Jonathan Kalodimos, a professor and former SEC staffer, is a new corporate gadfly in 2016. *See* Jonathan Kalodimos, A Gadfly's Perspective on "Gadflies at the Gate," Sept. 2, 2016. Kalodimos introduced multiple proposals seeking to encourage companies to pursue share buybacks in lieu of paying cash dividends. 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.

[36] *See* Michael Chamberlain, *Socially Responsible Investing: What You Need to Know*, FORBES, Apr. 24, 2013, http://www.forbes.com/sites/feeonlyplanner/2013/04/24/socially-responsible-investing-what-you-need-to-know ("In general, socially responsible investors are looking to promote concepts and ideals that they feel strongly about"). 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 Corpora*tion, 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 . . . .").

[37] Religious organizations' pension plans are generally exempt from the fiduciary requirements of the Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1003(b).

investor known as Holy Land Principles, Inc. sponsored shareholder proposals, relating to employment practices in areas governed by Israel and the Palestinian Authority, on the ballots of seven of the 231 Fortune 250 companies to hold annual meetings by the end of August. In each case, its investment was a miniscule percentage of the company's outstanding market capitalization; in Pepsico, it owned a reported 55 shares,[38] worth $5,932.85 on the company's February 26 record date—approximately 0.000003% of the company's market capitalization.

C. Apart from investors with a social or policy orientation, the principal institutional investors involved with sponsoring shareholder proposals are **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), as well as state and municipal pension plans, particularly those representing New York City and State. Overall, labor-affiliated investors sponsored 32% of all shareholder proposals from 2006–15 and 21% to date in 2016.[39] Typically, these plans have substantial investment stakes in the companies at which they file shareholder proposals, though the private labor unions have been known to file such proposals from investment vehicles with small holdings. For example, in 2016, the AFL-CIO sponsored a human-rights-related proposal at Mondelez International, but reportedly held only 925 shares,[40] valued at $38,803.75 on the March 9 record date, approximately 0.00006% of the company's outstanding market capitalization.[41]

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

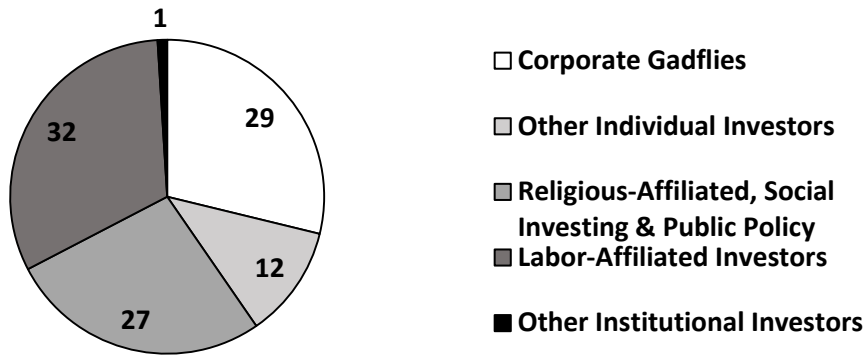
[39] The low sponsorship numbers in 2016 are somewhat deceptive, in that the most-active labor-affiliated shareholder proponent over the last eleven years, the New York City pension funds, withdrew a large fraction of its shareholder proposals. Most of the shareholder proposals sponsored by the New York 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. 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), http://www.corporatesecretary.com/articles/proxy-voting/12000/proxy-access-debate-far-over/. In 2015, most of the New York City funds' proxy-access proposals received majority shareholder backing, and 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 rule, prompting the sponsor to withdraw the proposal.

[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] Labor unions may choose to engage in socially oriented shareholder activism through small-investment vehicles rather than multiemployer private pension plans to avoid fiduciary strictures of ERISA, which govern their investment approaches, unlike state and municipal plans or religious plans. *See* 29 U.S.C. § 1003(b). This approach may or may not shift going forward, given the Department of Labor's Interpretive Bulletin 2015-01, an October 2015 rule broadening the fiduciary scope for private pension plans' investments in "economically targeted investments." *See* Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, https://www.federalregister.gov/articles/2015/10/26/2015-27146/interpretiv.e-bulletin-relating-to-the-fiduciary-standard-under-erisa-in-considering-economically.

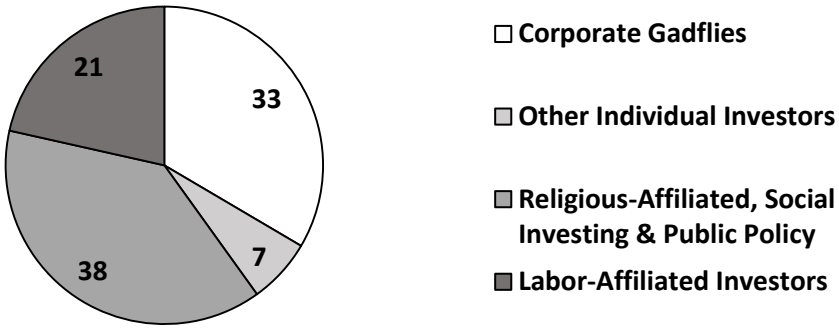
Only 1% of shareholder proposals introduced in the decade between 2006 and 2015 involved institutional investors without a labor affiliation or social, religious, or policy focus. No institutional investor without such an affiliation or focus has sponsored a shareholder proposal in 2016.

Figure 1. Percentage of Shareholder Proposals, by Proponent Type, 2006–15



Source: ProxyMonitor.org

Figure 2. Percentage of Shareholder Proposals, by Proponent Type, 2016*



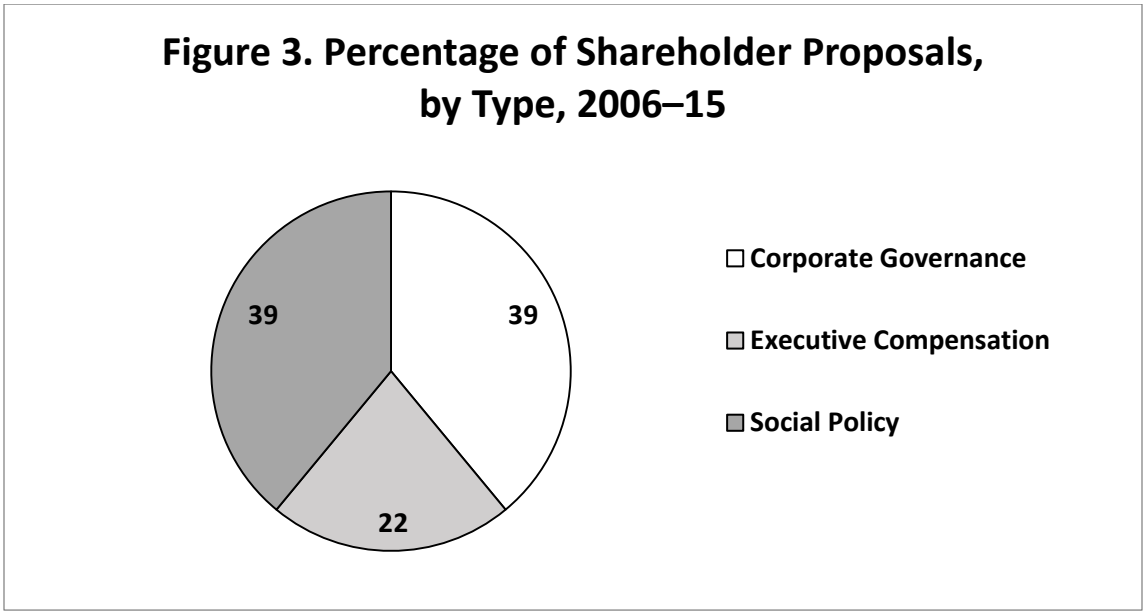
*Based on 231 companies holding annual meetings by August 31
Source: ProxyMonitor.org

3. Shareholder Proposal Subjects

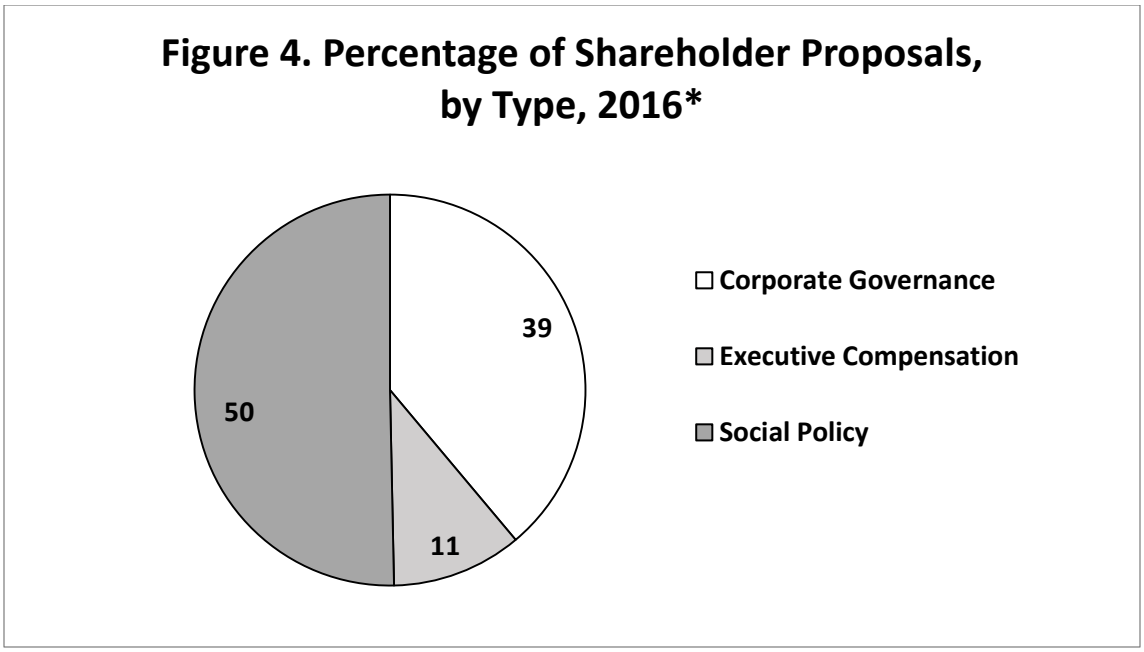
Shareholder proposals tend be broadly divided among:

- **A.** Proposals that seek to modify the process by which the 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; and
- **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.

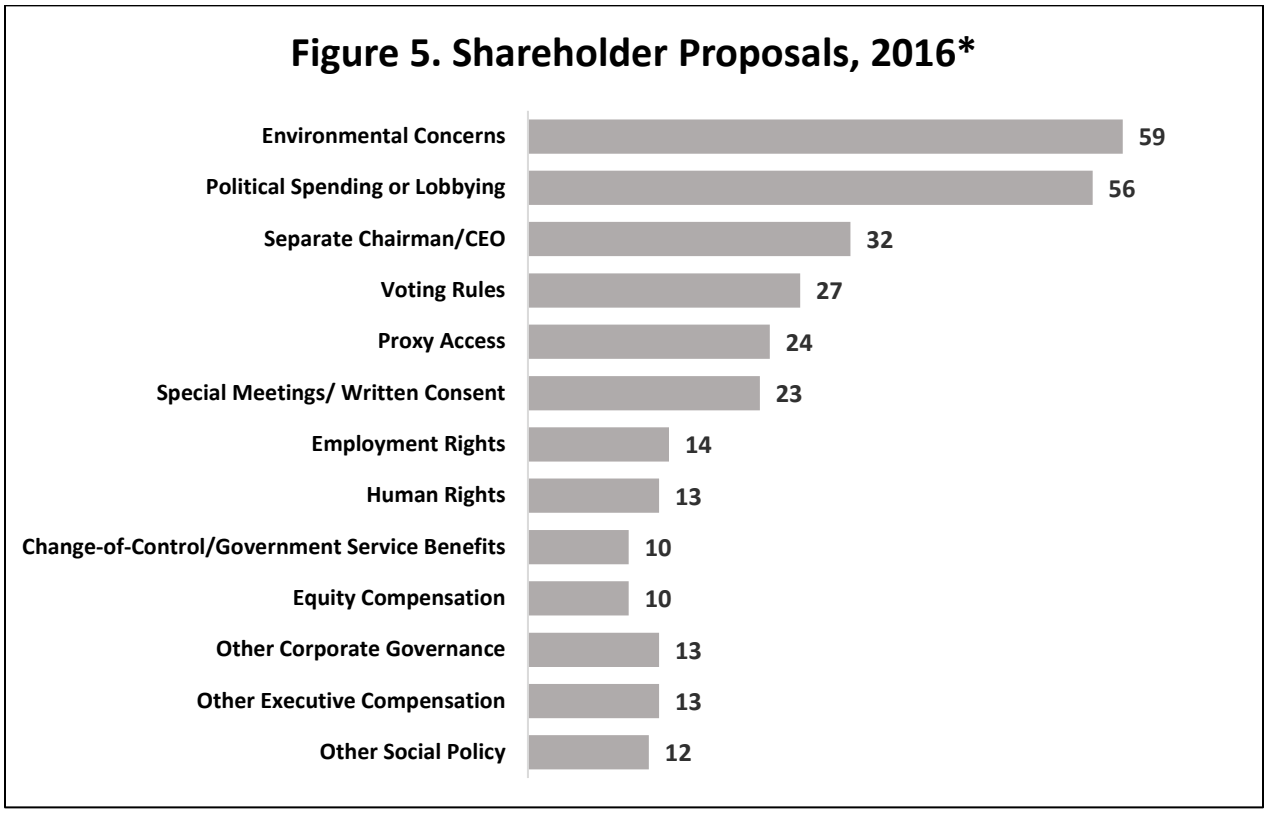
Over the ten-year period from 2006 through 2015, most shareholder proposals related to corporate governance or to social/policy concerns—39% apiece, with 22% of shareholder proposals relating to executive compensation (**Figure 3**). In 2016, to date, **half** of shareholder proposals have related to a social or policy issue (**Figure 4**). The most commonly introduced proposals, in each year from 2014 through 2016, have been those involving environmental issues or the company's political spending or lobbying (**Figure 5**).



Source: ProxyMonitor.org



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



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

4. Shareholder Proposal Voting

Shareholder proposals are commonly introduced at large publicly traded companies, but they very rarely garner majority shareholder support (**Figure 6**).[42] Proposals that have been relatively likely to pass have involved altering rules on director elections—by requiring that shareholders be permitted to vote on all directors annually, rather than in "staggered" board terms (like the U.S. Senate); by requiring that companies refuse to seat directors who receive less than majority shareholder support in an uncontested election; or, most recently, by granting shareholders above a certain ownership threshold and holding period "proxy access" to place some of their own director nominees on the company ballot.

In contrast to some shareholder-proposal activism related to corporate governance, shareholder proposals related to social or policy concerns have consistently failed to garner broad shareholder support. Among the companies in the Fortune 250, not a single shareholder proposal involving social or policy concerns won majority shareholder support over board opposition over

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

Although shareholder-proposal activists prefer to exclude abstentions consistently in tabulating vote totals, without regard to corporate bylaws—which necessarily inflates apparent support for their proposals—such a methodology is inconsistent with federal law. The SEC's Schedule 14A specifies that for "each matter which is to be submitted to a vote of security holders," corporate proxy statements must "[d]isclose the method by which votes will be counted, including the treatment and effect of abstentions and broker non-votes under applicable state law as well as registrant charter and bylaw provisions"—clearly indicating that corporations can adopt varying counting methodologies in assessing shareholder votes and that state substantive law governs the parameters of vote calculation. Schedule 14A, Item 21. Voting Procedures, http://taft.law.uc.edu/CCL/34ActRls/rule14a-101.html (last visited August 16, 2013).

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

The SEC staff has adopted a rule that for the very limited purpose of determining whether a proposal has met the "resubmission threshold" to qualify for inclusion on the next year's corporate ballot—a permissive standard requiring merely a minimum 3%, 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)—"[o]nly votes for and against a proposal are included in the calculation of the shareholder vote of that proposal," ignoring abstentions. SEC Staff Legal Bulletin No. 14, F.4., July 13, 2001, http://www.sec.gov/interps/legal/cfslb14.htm (last visited August 16, 2013). Because this is a staff rule not voted on by the Commission; because it exists for a limited purpose (with multiple rationales, including reducing workload in processing 14a-8 no-action petitions and adopting a permissive standard for ballot inclusion); and because it contravenes clear and longstanding deference to substantive state law in the field of corporate governance, the notion that this limited SEC staff vote-counting rule should dictate counting methodology, irrespective of state law and governing corporate bylaws, is untenable.

the entire 2006–15 period. In 2016, one of 155 shareholder proposals with a social or policy purpose won majority (52%) shareholder backing: a politics-related proposal at Fluor Corporation that 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.[43] The Fluor proposal is certainly anomalous:[44] 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;[45] and it is the only shareholder proposal of 1,444 related to social policy concerns to receive majority shareholder support at any Fortune 250 company from 2006–16.[46]

[43] Fluor Corp., Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934, proposal no. 4 (Mar. 10, 2016).

[44] As a major construction company, Fluor is heavily involved in government-contracting work, which may make shareholders particularly sensitive to its political engagement. Moreover, the company's market capitalization fell more than 43% from the record date for its 2014 annual meeting and its 2016 annual meeting, when it missed its earning target. 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.

[45] In 2006, a shareholder proposal at Amgen related to political-spending disclosure received 67 percent shareholder support, with the board of the company supporting the proposal.

[46] Note that this statement holds true for the current Fortune 250, but a shareholder proposal at KBR, Inc. did receive 55% shareholder support over board opposition in 2011, when the company was in the Fortune 250 list. (KBR is currently ranked number 501.) That proposal, sponsored by the New York City pension funds, encouraged the board to amend the company's equal-employment opportunity policy to prohibit discrimination based on sexual orientation. Also, in addition to the political-spending-related proposal at Amgen, four other shareholder proposals received majority shareholder support with the board of directors backing the proposal, including one in 2016—an animal-rights-related proposal introduced at Kellogg that applauded the company for switching to eggs produced by cage-free chickens.

Figure 6. 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
**A fourth shareholder received majority support but failed because it was presented as an amendment to the company's certificate of incorporation, requiring unanimous support.
***The shareholder proposal winning majority support was supported by board of directors.
Source: ProxyMonitor.org

5. The Role of Proxy Advisory Firms

Prior to the 1980s, institutional investors had generally paid little attention to shareholder voting matters, but the wave of hostile takeover actions in that decade forced institutional investors to take at least occasional notice. Some institutional investors' broader need to assess shareholder voting issues, including proxy proposals, took on added significance in the late 1980s when the U.S. Department of Labor required retirement benefit funds governed by the Employee Retirement Income Security Act (ERISA) to vote their shares according to a "prudent man" standard.[47] In 2003, the SEC clarified that similar fiduciary duties attach to mutual funds and other registered investment companies.[48] These requirements place significant burdens on institutional investors: according to a 2010 report by the Investment Company Institute, Russell 3000 companies faced more than 20,000 proxy ballot items annually[49]—even before Dodd-Frank-required executive compensation voting.[50]

Concurrent with these trends, institutional investors have managed an increasing percentage of U.S. equity market holdings: from 1997 through 2009, the equity percentage of the 1,000 largest U.S. publicly traded companies by assets held by institutional investors increased from 60% to 73%.[51] In 2009, the SEC approved amendments to the New York Stock Exchange rules that eliminated stockbrokers' ability to vote discretionarily the shares of their individual investors for director elections;[52] and in 2012, the NYSE applied the limitation to a broader array of issues.[53] In essence, this combination of trends has substantially increased the relative power of institutional investors in proxy voting matters, even as such matters have multiplied in complexity.

To manage their proxy voting, institutional investors rely heavily on a pair of proxy advisory firms, Institutional Shareholder Services, or ISS, which is today owned by private-equity firm Vestal Capital Partners;[54] and Glass, Lewis & Co., a subsidiary of the Ontario Teachers' Pension

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[47] *See* Letter from U.S. Dep't of Labor to Helmuth Fandl, Chairman of Retirement Board, Avon Products, Inc. (Feb. 23, 1988); *see also* 73 Fed. Reg. 61731 (Oct. 17, 2008).
[48] *See* 68 Fed. Reg. 6585 (Feb. 7, 2003) ("The duty of care requires an adviser with proxy voting authority to monitor corporate events and to vote the proxies. To satisfy its duty of loyalty, the adviser must cast the proxy votes in a manner consistent with the best interest of its client and must not subrogate client interests to its own." (internal citations omitted)).
[49] *See* Investment Company Institute, Trends in Proxy Voting by Registered Investment Companies, 2007–09, 16 Research Perspective 4 (Nov. 2010), http://www.ici.org/pdf/per16-01.pdf.
[50] 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).
[51] *See* Matteo Tonello & Stephan R. Rabimov, The 2010 Institutional Investment Report: Trends in Asset Allocation and Portfolio Composition, The Conference Board Research Report, No. R-1468-10-RR, 27, 2010, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707512.
[52] *See* SEC Rel. No. 34-60215, http://www.sec.gov/rules/sro/nyse/2009/34-60215.pdf.
[53] *See* NYSE, Information Memo No. 12-4, Application of Rule 452 to Certain Types of Corporate Governance Proposals (Jan. 25, 2012), *available at* http://www.nyse.com/nysenotices/nyse/rulechanges/pdf?memo_id=12-4.
[54] *See* Press Release, Vestal Capital Partners Completes Acquisition of Institutional Shareholder Services, http://www.issgovernance.com/vestar-capital-partners-completes-acquisition-of-institutional-shareholder-services (last visited Sept. 3, 2014).

Plan Board.[55] Together, these two proxy advisors control approximately 97% of the market for proxy advisory services, with ISS alone having about a 61% share.[56] By its own estimation, ISS helps more than 1,600 clients execute nearly 8.5 million ballots representing more than 2 trillion shares.[57]

These proxy advisory firms' power over shareholder voting is vast. A 2012 analysis I lead authored for the Manhattan Institute found that an ISS recommendation "for" a given shareholder proposal—controlling for other factors including company size, industry, proponent type, proposal type, and year—was associated with a 15-percentage-point increase in the shareholder vote for any given proposal.[58] Thus, in the shareholder-proposal context, ISS acts like a 15% owner of the largest publicly traded companies in terms of its influence over the voting market. As Leo Strine, a former chancellor on the Delaware Court of Chancery, observed: "Powerful CEOs come on bended knee to Rockville, Maryland, where ISS resides, to persuade the managers of ISS of the merits of their views about issues."[59]

Notwithstanding its influence, ISS is a relatively small operation. Prior to its 2014 acquisition by Vestal, ISS was owned by MSCI, a publicly traded company; at that time, the world's largest proxy advisor had fewer than 700 employees and just over $15 million in profits on $122 million in revenues.[60] A significant fraction of those revenues came not from sales to the institutional-investment community itself but rather from the company's "Corporate Sales" division, which offers governance and proxy advice to corporations—in essence, the very companies on whose proxies ISS advises institutional investors on how to vote. In 2013, ISS's Corporate Sales group generated 29% of its revenues, up from 21% two years earlier.[61]

The probable reason for the disconnect between ISS's cash flows and influence is that institutional investors simply do not place a very large economic value on the services it offers. In almost all situations, there is little competitive advantage to be gained from being a "better voter" on proxy items, at least those proposed by shareholders through the 14a-8 process.[62]

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[55] *See* Robyn Bew & Richard Fields, Voting Decisions at US Mutual Funds: How Investors Really Use Proxy Advisers 6 (Tapestry Networks, Inc. & Investment Research Center Institute, June 2012), http://www.tapestrynetworks.com/issues/corporate-governance/upload/Voting-Decisions-at-US-Mutual-Funds-June-2012.pdf.

[56] *See* James K. Glassman and J. W. Verret, How to Fix Our Broken Proxy Advisory System 8 (Mercatus Center, George Mason Univ., 2013), *available at* http://mercatus.org/sites/default/files/Glassman_ProxyAdvisorySystem_04152013.pdf.

[57] Institutional Shareholder Services, About ISS, http://www.issgovernance.com/about/about-iss.

[58] James R. Copland et al., Proxy Monitor 2012: A Report on Corporate Governance and Shareholder Activism 22–23 (Manhattan Inst. for Pol'y Res., Fall 2012), *available at* http://www.proxymonitor.org/Forms/pmr_04.aspx.

[59] Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 688 (2005).

[60] *See* MSCI 2013 Annual Report 70, "Summary of Operations," "Governance," *available at* http://files.shareholder.com/downloads/MSCI/3458217323x0x739303/DAB046E7-737E-43C7-9114-040465AD560E/2013_Annual_Report.pdf

[61] *Compare id.* at 10 *with* MSCI 2011 Annual Report 9, *available at* http://files.shareholder.com/downloads/MSCI/2008427917x0x554571/96AD1F8D-CC19-4BFD-9E47-6EFD2079886C/264713_007_MSCI_BMK_AR.pdf.

[62] *Cf.* BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER (2007). Institutional investors compete aggressively for investor dollars, and they gain competitive advantages largely through higher returns and lower fees. Investing in proxy-voting information raises institutional investors' costs while giving no competitive advantage in increasing

Large institutional investors, like Fidelity or Vanguard, with sufficient resources to make their own proxy voting decisions and not lose appreciable cost advantage to competitors surely find ISS's analytical tools useful but rely little on their proxy voting guidelines; smaller funds wanting to minimize their investment in voting find hiring ISS a useful way to discharge fiduciary voting obligations at low cost. But the very fact that the cost is low—less than $80 million in annual revenues[63] in the context of $26 trillion in assets—shows that ISS's services are not that highly valued by institutional investors, which also helps explain the lack of significant competitors and dearth of new entrants into the proxy advisory space.

Such forces enable ISS (and Glass Lewis) to support ballot items that are generally rejected by most investors, without fear of reprisal. My research shows that ISS has, historically, been almost eight times as likely as the median shareholder to support a shareholder proposal.[64] ISS's current policy guidelines continue to reflect this disconnect. Among the class of most-introduced shareholder proposals involving corporate governance issues that ISS is "generally for,"[65] shareholder reaction varies significantly:

- Proposals to declassify boards of directors, to grant shareholders proxy access to nominate directors under the terms of the prior SEC rule, or to eliminate supermajority voting provisions are more likely than not to pass;
- Proposals calling for majority votes to elect directors, or for shareholder power to call special meetings, or act through written consent, gain occasional support; and
- Proposals calling for separating the company's chairman and CEO roles, or enabling cumulative voting for director nominees, almost always fail.

Beyond corporate-governance proposals, the disconnect between ISS and the median shareholder is even starker. My research reveals that ISS supported shareholder proposals related to a company's equity compensation plan 75% of the time;[66] but only two of 275 such proposals introduced at Fortune 250 companies from 2006 through 2016 have received the support of a majority of shareholders. Among shareholder proposals involving social or policy concerns, as previously discussed, only one proposal of 1,444 coming to a vote at a Fortune 250 company over the last 11 years has received support from a majority of shareholders, over board opposition. In contrast, ISS is "generally for" certain classes of animal rights, employment rights, human rights, environmental, and political-spending-related shareholder proposals; against others; and decides others on a "case by case" basis.[67] Historically, ISS has backed some 70% of shareholder proposals related to political spending, 45% of those related to employment rights,

investment returns, at least for smaller, diversified investors who have low ownership shares—and whose individual votes on proxy ballot items are therefore unlikely to be dispositive. For a fuller discussion of these dynamics, see James K. Glassman & Hester Peirce, How Proxy Advisory Services Became So Powerful (Mercatus Ctr., June 18, 2014), http://mercatus.org/publication/how-proxy-advisory-services-became-so-powerful.

[63] At least as of 2013, just over $79 million of ISS's revenues come from its advisory services business, as opposed to corporate contracts. *See* MSCI 2013, *supra* note 61, at 9–10.

[64] *See* Copland et al., *supra* note 58, at 23.

[65] *See generally* ISS, United States Summary Proxy Voting Guidelines: 2016 Benchmark Policy Recommendations 19–29 (Dec. 18, 2015), https://www.issgovernance.com/file/policy/2016-us-summary-voting-guidelines-dec-2015.pdf.

[66] *See* Copland et al., *supra* note 58, at 23.

[67] *See* ISS, *supra* note 65, at 57–66.

and 35% of those related to human rights or the environment[68]—a sharp contrast to the dearth of average shareholder support for these proposal classes.

Although the gap between ISS recommendations and the median shareholder could be explained by simple disagreement, it is worth noting that an increase in shareholder voting support for various proposals also increases the incentive for public companies to enter into consulting contracts with ISS to mitigate such costs. In addition, the absence of market constraints on ISS means that it may be subject to capture by some of its clients who do place more emphasis on shareholder ballot items than do other institutional investors and most individual investors—namely, labor pension funds and social-investing funds, each of which are very active in sponsoring proposals. Even if ISS support is generally unlikely to tip the balance of shareholder support in favor of a given proposal—and the evidence suggests that it is not, at least for social and policy proposals—the 15-percentage-point bump that an ISS "for" recommendation tends to generate will ensure that with ISS support, shareholder-proposal activists' preferred issues remain on the proxy ballot as long as their proponents wish them to remain there, under current SEC resubmission standards.

6. Shareholder Proposal Resubmissions

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, over a five-year period, companies can only exclude a shareholder proposal if it received less than 3% shareholder support in a preceding year, 6% if introduced for a second year, or 10% if introduced at least three times previously.[69] 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 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;[70] 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:

[68] *See* Copland et al., *supra* note 58, at 22–23.
[69] *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).
[70] *See* Amendments to Rules on Shareholder Proposals, 17 C.F.R. 240 (1998) (Release No. 34-40,018) (describing 80 firms reporting on proposal inclusion determination costs and 67 reporting on printing and other direct costs).

> 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.[71]

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."[72] I have argued that the SEC should consider just this approach.[73]

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.[74] 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.

[71] Copland et al., *supra* note 58, at 9 (citations omitted).
[72] Adoption of Amendments Relating to Proposals by Security Holders, *supra* note 27.
[73] *See* Copland (2015), *supra* note 5.
[74] *See* Romano, *supra* note 11, at 229–49.

A third idea, suggested by the U.S. Chamber of Commerce and other business groups in a 2014 rulemaking with the SEC,[75] 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.[76] 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.

Empirical Overview

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, 2016), 1,063—31% of all shareholder proposals—were resubmissions of a preceding year's proposal. Of shareholder proposals introduced between 2006 and 2013, 100 were resubmitted three or more times. A plurality of shareholder proposals resubmitted (39%) involved social or policy concerns, and 36% of shareholder proposals resubmitted three or more times were social- or policy-related (slightly below the 41% that involved corporate-governance issues).

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 2015 (**Figure 7**). 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.

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.[77]

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 previously noted, the sponsor of the Ford proposal, corporate gadfly John Chevedden, owns approximately 0.00001% of the company's outstanding shares.

[75] *See* Thomas Quaadman, *supra* note 13.
[76] *See* 14a-8, *supra* note 9, at 14a-8(i)(12).
[77] *See* Chris Johnson, *Exxon Mobil Adopts LGBT-Inclusive Non-Discrimination Policy*, WASHINGTON BLADE, Jan. 30, 2015.

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.[78]

Figure 7. 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
Exxon Mobil	Amend EEO Policy	9	2006	2014	20	40
Exxon Mobil	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

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 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.[79] The proposal has since remained on the ballot every year except 2010; 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% of shareholders voted against the proposal. ISS supports these ballot initiatives.[80]

[78] *See* Romano, *supra* note 11, 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 proposa1.").
[79] *See* Domini Social Investments, Key Proxy Advisor Recommends Vote Against AT&T Management on Political Contributions Disclosure, Apr. 21, 2008.
[80] *See* ISS, *supra* note 65, at 61.

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;[81] 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 95%. 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

[81] *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.

perpetually introduce a ballot item that two-thirds of shareholders reject is questionable, at best.[82]

7. Corporate Political Spending and Lobbying Disclosures

Ever since the Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*[83]—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 much debated.[84] The decision drew a rebuke from President Obama in his

[82] 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.

[83] 558 U.S. 310 (2010).

[84] For the purposes of this statement, I take no position on the constitutional issues underlying the Supreme Court's controversial decision in *Citizens United*. Indeed, under *Citizens United*, Congress may be able to regulate certain further disclosures of political spending, corporate or otherwise, without running afoul of the First Amendment. *See id.* at 366–67 (citing McConnell v. FEC, 540 U.S. 93, 198 (2003)) (rejecting facial and as-applied challenges to disclosure requirement).

That said, many proponents of a government-mandated disclosure regime in this area have too casually assume the constitutionality such proposals, without giving careful consideration to the distinction between facial and as-applied constitutional challenges and the Supreme Court's focus, in the *Citizens United* decision itself, on the potential harassment of speakers, including corporations. *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 954–55 (2013) (arguing that it is "clear" that "that the Constitution leaves ample room for disclosure rules of this kind") (citing Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 107–11 (2010) (asserting that "the constitutional permissibility of the disclosure requirements that [they] propose is straightforward")).

Political spending disclosure requirements do not necessarily or easily pass constitutional muster. Rather, the Supreme Court "has subjected these requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." Citizens United, 558 U.S. at 366–67 (citing Buckley v. Valeo, 424 U.S. 1, 64 66 (1976)).

Even in cases in which a disclosure statute passes constitutional muster on its face, it may fail an "as applied" challenge when there exists "a 'reasonable probability' that disclosure of its contributors' names 'will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" *Id.* (citing McConnell, 540 U.S. at 198 (quoting Buckley, 424 U.S. at 74)). In *Citizens United*, the Court reaffirmed this principle, *see id.* at 916 (observing that a disclosure statute "would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed"), but noted that "Citizens United . . . ha[d] offered no evidence that its members may face similar threats or reprisals. . . . [and indeed] ha[d] been disclosing its donors for years and ha[d] identified no instance of harassment or retaliation." *Id.*

In contrast to the dearth of evidence demonstrating that disclosure of donors to Citizens United raised the risk of harassment or retaliation, ample evidence exists that companies would be subject to reprisals for donating to some of the very trade associations and business groups specifically targeted by the proponents of corporate political spending disclosure. *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), *available at* http://www.sec.gov/rules/petitions/2011/petn4-

2010 State of the Union address, with many of the Supreme Court justices in front of him.[85] In 2011, several U.S. senators, including 2016 Democratic presidential candidate Bernie Sanders of Vermont, proposed amending the First Amendment in response.[86] Also 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.[87] 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;[88] and some of these same senators have even seized on the issue to block President Obama's new appointees to the SEC.[89]

Although agitation with the SEC over corporate political spending traces largely to *Citizens United*, efforts to inject the issue into the 14a-8 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." [90] 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 8**). 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.

637.pdf [hereinafter the Petition] (asserting that disclosure of "contributions to intermediaries that spend a large fraction of their funds on politics . . . seems warranted," and singling out the U.S. Chamber of Commerce). Both social-investing funds, such as Walden Asset Management, and government agents managing public-employee pension funds, such as the New York City Comptroller, have harassed and implicitly threatened reprisals against companies known to be affiliated with the U.S. Chamber. *See* Press Release, Walden Asset Mgmt., Investors Call on Companies Sitting on The U.S. Chamber of Commerce Board to Evaluate Their Role (Jan. 31, 2011), *available at* http://climate.bna.com/climate/document.aspx?ID=153882; Press Release, N.Y. City Comptroller, Comptroller Liu Calls on Siemens AG To Cut Ties to U.S. Chamber of Commerce (Jan. 24, 2011), *available at* http://comptroller.nyc.gov/press/2011_releases/pr11-01-007.shtm. In addition, the activist group Color of Change harassed companies known to be affiliated with the American Legislative Exchange Council, causing several such companies to drop their membership. *See* Press Release, Color of Change, Color of Change Applauds Procter & Gamble's Decision to End its Membership in ALEC: More Than a Dozen Companies Have Left the American Legislative Exchange Council (Apr. 23, 2012), *available at* http://www.colorofchange.org/press/releases/2012/4/23/colorofchange-applauds-procter-gamblesdecision-en/.

[85] *See* Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES, Jan. 28, 2010, http://www.nytimes.com/2010/01/29/us/politics/29scotus.html?_r=0.

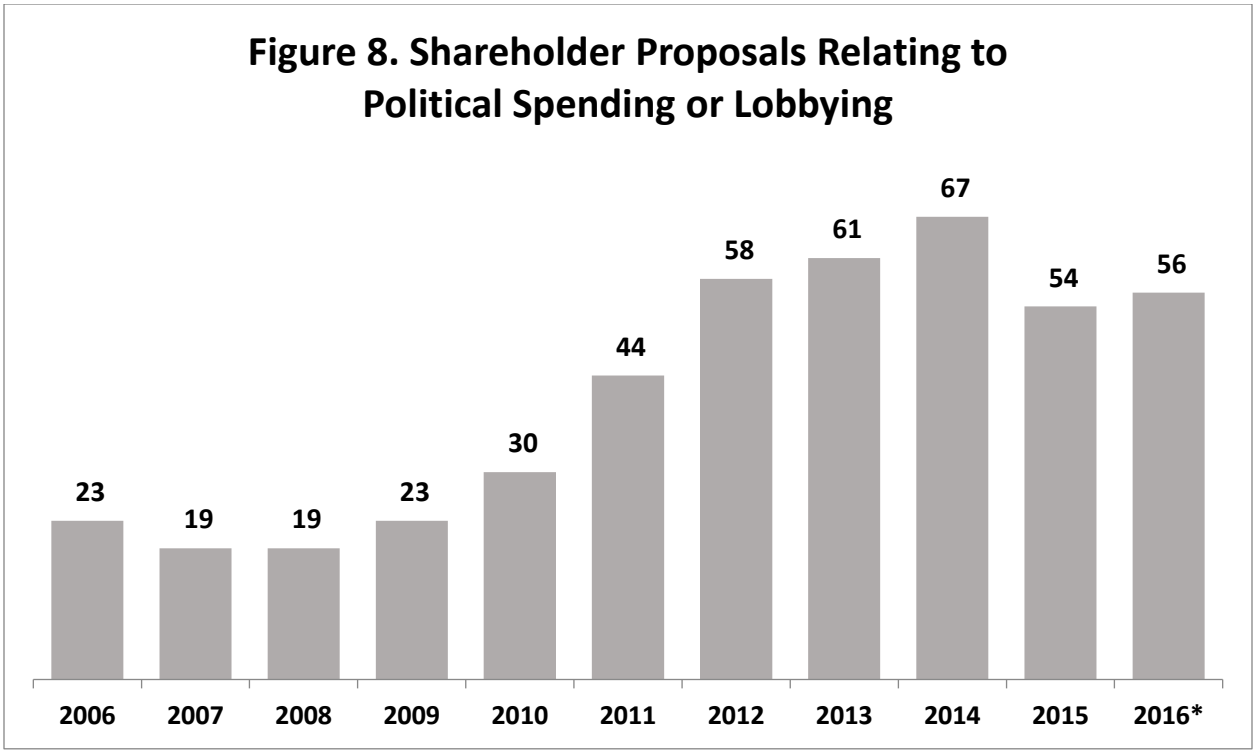
[86] *See* Pete Kasperowicz, *Sanders Proposes Amendment to the Constitution That Would Limit Free Speech*, THE HILL, Dec. 9, 2011, http://thehill.com/blogs/floor-action/senate/198343-sanders-offers-constitutional-amendment-to-strip-corporations-of-first-amendment-rights.

[87] *See* Petition, *supra* note 84. For a fuller response, see James R. Copland, *supra* note 6.

[88] *See* Francine McKenna, *Schumer Says SEC's White Is 'Poisoning' Politics*, MARKETWATCH, Jun. 15, 2016, http://www.marketwatch.com/story/schumer-says-secs-white-is-poisoning-politics-2016-06-14.

[89] Andrew Taylor & Marcy Gordon, *Democrats Block SEC Nominees*, U.S. NEWS & WORLD RPT., Apr. 7, 2016, http://www.usnews.com/news/business/articles/2016-04-07/democrats-block-sec-nominees-over-political-money-fight. I should disclose that I went to law school with one of the stalled nominees, Hester Peirce, whom I consider a friend.

[90] Center for Political Accountability, About the CPA, http://politicalaccountability.net/about/about-us.



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

As previously noted, the submission of shareholder proposals on this topic has not translated into majority shareholder support. From 2006 through 2016, companies in the Proxy Monitor database have faced votes on 446 board-opposed shareholder proposals that relate to corporate political spending or lobbying; 445 have failed to garner majority shareholder support. These actual shareholder votes held in recent years on the numerous shareholder proposals introduced on corporate political spending clearly show that a majority of shareholders believe that increased disclosure of corporate political spending as called for in shareholder proposals and in the professors' rulemaking petition with the SEC is not in their interests as shareholders.

It is not hard to understand why. As a threshold matter, the amount of money that publicly traded corporations spend on politics—including through trade associations and other intermediaries—is not material by any reasonable standard. Among the political committees organized under Section 527 of the Internal Revenue Code, are, after *Citizens United*, political action committees that can, independently of candidate campaigns, spend money for political purposes (so-called "Super PACs"); contributions to and expenditures by such organizations must be fully disclosed. In the 2012 political cycle, such PACs raised over $838 million and spent over $631 million[91]—significant sums, to be sure, but a pittance in comparison with overall public-company budgets: the combined revenues of the 200 largest U.S. companies in 2012 exceeded $9.4 *trillion*.[92]

[91] *See* Super PACs, CTR. FOR RESPONSIVE POL., http://www.opensecrets.org/pacs/superpacs.php?cycle=2012.
[92] *See* Fortune 500, CNN MONEY (May 21, 2012), http://money.cnn.com/magazines/fortune/fortune500/2012/full_list/ (listing top 500 U.S. companies by revenues). Note that certain of the Fortune 200 companies are not publicly held. That said, the 42 largest companies on the

Moreover, contributions to these Super PACs from publicly traded companies have proved virtually nonexistent.[93]

Of course, the clamor for increased disclosures of corporate political spending would not rest on disclosed dollars given to Super PACs but rather non-disclosed groups including social-welfare organizations and trade associations organized respectively under sections 501(c)(4) and 501(c)(6) of the Internal Revenue Code, which can make political expenditures but do not have to publicly disclose their donors.[94] But the total amount spent by all outside groups in the 2012 election—including Super PACs, 527 committees, and 501(c) organizations (not only social-welfare organizations and trade associations but also labor unions)—was just over $1 billion (drawn from all sources, corporate or not). [95] That's equivalent to 0.011% of the Fortune 200 companies' 2012 budgets—less than the development cost of a single biotechnology product,[96] and less than the amount that automobile manufacturers and dealers spent on television advertising spots with local broadcasting stations in the third quarter of 2012.[97] It is impossible

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2012 Fortune 200 list, with a combined revenues exceeding $5 trillion, are publicly traded (Fannie Mae and Freddie Mac, however, were delisted upon entering government receivership). The two largest American private companies, Cargill and Koch Industries do not show up on the *Fortune* list, presumably due to data limitations. *See* Andrea Murphy & Scott DeCarlo, *America's Largest Private Companies*, FORBES (Nov. 28, 2012), http://www.forbes.com/largest-private-companies/. The largest company on the 2012 Fortune list that is not a public C corporation is State Farm, a mutual insurer, at 43rd. While the presence of such companies marginally inflates the revenues of the Fortune 200 attributable to public companies, it is also of course the case that many companies, beyond the 200 largest, make money, are publicly listed, and may be involved directly or indirectly in political spending.

[93] *See, e.g.*, Anna Palmer & Annie Phillip, *Corporations Don't Pony Up for Super PACs*, POLITICO (Mar. 8, 2012), http://www.politico.com/news/stories/0312/73804.html ("When super PACs emerged two years ago, critics howled that corporations would take advantage of a newfound tool to flex their muscle in politics. But so far this campaign season, publicly traded companies have shied away from the outside groups—giving less than one half of a percent of all the contributions raised by the most active super PACs."). As I noted in my article in the *Harvard Business Law Review*:

> Five [Super] PACs spent over $20 million in the 2012 campaign: the pro-Romney Restore Our Future, the pro-Obama Priorities USA Action, Karl Rove's American Crossroads, and Super PACs supporting Senate and House Democrats; all told, these five PACs raised and spent a majority of all Super PAC dollars in the campaign (raising and spending $428 million and $380 million, respectively). Only one publicly traded corporation was among the top fifty organizational donors to any of these Super PACs: the small-cap, family-controlled but Nasdaq-listed Clayton Williams Energy, which contributed $1 million to American Crossroads. And the top-fifty donor list comprised most of each Super PAC's funding, in total over $314 million of the $428 million these five political committees raised.

Copland, *supra* note 6, at 388 (citations omitted).

[94] *Cf.* NAACP v. Alabama, 357 U.S. 449 (1958) (holding that organization's freedom of association rights prevented Alabama from requiring disclosure of its contributor lists).

[95] *See* 2012 Outside Spending, by Group, CTR. FOR RESPONSIVE POL., http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&type=p& disp=O.

[96] *See* Joseph A. DiMasi & Henry G. Grabowski, *The Cost of Biopharmaceutical R&D: Is Biotech Different?*, 28 MANAGERIAL & DEC'N ECON. 469–79 (2007) (estimating the total development cost of a biotechnology product at $1.2 billion).

[97] *See* Top 25 Local Broadcast TV Categories, Spot TV Q3, TVB Local Media Marketing Solutions, http://www.tvb.org/trends/4705 (citing Kantar Media) (showing local spot TV "automotive" spend of $925 million and "car and truck dealers" of $273 million in the third quarter of 2012).

to conclude that political spending, on its own, is material to investors' pecuniary interests as shareholders.[98]

Rather than involving a financial interest for investors, shareholder proposals filed seeking additional political spending or lobbying disclosures appear to be premised on a *political* goal: namely, to chill corporate political speech. Across the 2006–16 period, fully 53% of shareholder proposals related to corporate political spending have been sponsored by labor-affiliated pension funds (**Figure 9**)—representing interests that themselves spend heavily on the political process, often in opposition to corporations. State and municipal pension funds—including the two most-active sponsors of these types of proposals, the funds for public employees in New York City and State—are often wholly or significantly controlled by partisan elected officials whose political interests may be adverse to corporations' interests. Indeed, my prior research has shown that labor-affiliated pension funds' sponsorship of such shareholder proposals has tended to target companies whose executives and political action committees gave disproportionately to Republicans.[99] Aside from labor-affiliated investors, most political-spending-related shareholder proposals have been sponsored by social-investing funds, which by definition are not oriented solely around share value and may have social or policy goals opposed to the corporations they are targeting.

The public record amply demonstrates that many of the same sponsors of shareholder proposals seeking additional corporate disclosures of political spending also seek to influence corporations to disassociate from trade associations or to dissuade such groups from taking positions contrary to the special-interest sponsors' particular political preferences. For instance, in January 2011, leaders of the AFL-CIO Office of Investment, Domini Social Investments, Green Century Capital Management, the Nathan Cummings Foundation, and Trillium Asset Management—each

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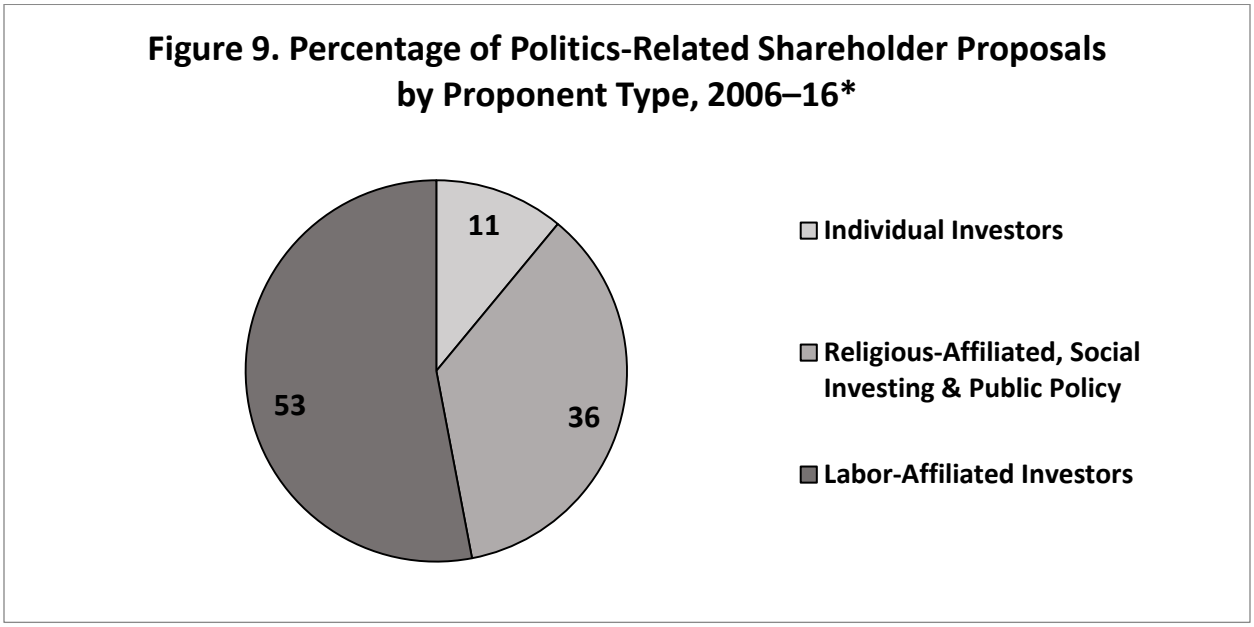
I am not the first to make this sort of comparison. In a 2010 blog post, UCLA's Stephen Bainbridge compared total 2008 political spending to Procter & Gamble's 2008 advertising on soap and toilet paper. *See* Is Citizens United the death of democracy, PROFESSORBAINBRIDGE.COM (Oct. 19, 2010), http://www.professorbainbridge.com/professorbainbridgecom/2010/10/is-citizens-united-the-death-of-democracy.html.

[98] Auditors typically assume that for publicly traded companies, an item is not material if it is "not greater than 5 percent of net income before income taxes." Audit Manual Excerpt: Materiality Guidelines, Williams & Adams, CPAs, http://highered.mcgraw-hill.com/sites/dl/free/0078025435/928516/WA_Materiality_Guidelines_8e.pdf. Consistent with this general principle, under SEC rules, shareholder proposals are deemed not relevant and excludable from a publicly traded corporation's proxy statement "[i]f the proposal relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year . . . ." 17 C.F.R. § 240.14a-8(i)(5) (2008). (Shareholder proposals involving corporate political spending, like other cases involving "political and moral predilections," can appear on proxy ballots under an exception to this rule discussed in section 1, *infra*.) Similarly, under Regulation S-K, the SEC deems that legal proceedings are not material "if the amount involved, exclusive of interest and costs, does not exceed 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis." 17 C.F.R. § 229.103(2) (2008).

[99] *See* James R. Copland & Margaret M. O'Keefe, *Proxy Monitor: A Report on Corporate Governance and Shareholder Activism* 2 (Manhattan Institute 2014) ("The 43 Fortune 250 companies facing shareholder proposals sponsored by labor-affiliated investors in 2014 were twice as likely to orient their political efforts to support Republicans than was the average Fortune 250 company. A majority of shareholder proposals sponsored by labor-affiliated investors in 2014 have involved corporate political spending or lobbying, and only one company targeted by these proposals gave more money to Democrats than Republicans."), *available at* http://www.proxymonitor.org/Forms/pmr_09.aspx.

a regular sponsor of political-spending-disclosure shareholder proposals—all co-signed a letter sent to 35 companies serving on the board of the U.S. Chamber of Commerce urging the companies "to evaluate" their role with the trade association and objecting to the Chamber's "education and lobbying efforts to defeat legislative [sic] and regulation related to climate change, consumer protection, and financial reform."[100] Former New York City Comptroller John Liu, who manages the city's five pension funds for retired public employees, sent a similar letter to at least one company in which the funds invested.[101] Bruce Freed's CPA has both led and joined coalition letters pressuring companies to vocalize disagreement with trade association political positions.[102] It is hard to escape the conclusion that the highly politicized push for greater corporate disclosures surrounding political spending and lobbying is about political rather than financial goals.



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

8. The Costs of Pension Funds' Social-Issue Activism

For sound policy reasons—most notably federalism and comity shown to the states—federal law governing pension plans exempts state and municipal plans for public employees.[103] Nevertheless, the operation and solvency of plans is a matter of significant public-policy concern: public pension funds for state and municipal workers in the United States have accumulated, by most recent estimates, approximately $4 trillion in obligations—roughly one-

[100] Press Release, Walden Asset Mgmt., *supra* note 84.
[101] *See* Press Release, N.Y. City Comptroller, *supra* note 84.
[102] *See* CPA Leads Effort to Press Companies on Climate-Change Misalignment; Company Cuts Chamber Dues, CTR. FOR POL. ACCOUNTABILITY NEWSLETTER (Nov. 2009), http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/2663.
[103] *See* 29 U.S.C. § 1003(b).

fourth of U.S. GDP and almost 130 percent of state and local governments' annual budgets—to fund government workers' retirements.[104] Actual assets available to fund these obligations, however, total only about $3 trillion, leaving a $1 trillion shortfall that threatens to jeopardize public employees' retirement security and/or burden the public fisc—potentially squeezing out vital spending on health, education, and infrastructure.[105] I and many of my Manhattan Institute colleagues have written about at some length;[106] so I wanted to bring to the attention of Congress some of the research we have sponsored that relates to the impact of such pension funds' social-investing activism on share value.

The ultimate test of whether shareholder proposals are an effective tool—at least from the standpoint of the average diversified investor—is not whether they win majority shareholder support but whether they enhance share value.[107] Individual investors might, of course, have different priorities, and certain institutional investors are designed to have different priorities. But precisely because most investors inherently disagree about many issues of public concern, corporate governance has tended to assume that shareholder value is the orienting concern for equity investors; such concerns are implicit in the fiduciary duties that pension funds owe to retirees.[108]

To study the relationship between public-employee pension funds' shareholder activism and share value, the Manhattan Institute commissioned an econometric study by Tracie Woidtke, a professor at the Haslam College of Business at the University of Tennessee.[109] Building on a

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[104] Pew Charitable Trusts and Laura and John Arnold Foundation, *State Public Pension Investments Shift over Last 30 Years* 1 (June 2014), http://www.pewtrusts.org/en/research-and-analysis/reports/2014/06/03/state-public-pension-investments-shift-over-past-30-years. GDP data are available at http://www.bea.gov/national/an1.htm. State and local budget data are available at http://www.census.gov/govs/local.

[105] *See* Pew Charitable Trusts, *supra* note 104.

[106] For a fuller discussion, see James R. Copland & Steven Malanga, *Safeguarding Public-Pension Systems: A Governance-Based Approach* (Manhattan Institute 2016), *available at* http://www.manhattan-institute.org/html/safeguarding-public-pension-systems-governance-based-approach-8595.html.

[107] Traditionally, corporate law has oriented corporate boards and managers' fiduciary duties around a single variable, share value, *see* Dodge v. Ford Motor Co., 170 N.W. 668. (Mich. 1919) (holding that corporate fiduciary duties flowed to shareholders, not employees or other interests), which avoids the ownership costs—chiefly conflicts of interest that arise among various owners—that are inherent in non-corporate ownership forms. See generally HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 35–49 (1996) (arguing that the costs of collective decision-making best explain the predominance of the corporate equity-ownership form in large-scale for-profit enterprise); *see also* Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601 (2006) (arguing that increasing shareholder power imposes significant costs in reduced managerial authority). Since shortly after *Dodge v. Ford* was decided, an academic debate has proliferated between those arguing for a social responsibility for corporations, *see* E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932) (arguing for the view that "the business corporation as an economic institution which has a social service as well as a profit-making function"), and those supporting the traditional rule centered on share value, *see* Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932).

[108] 29 C.F.R. § 2509.08-2(1) (2008) (requiring pension plan managers to "consider only those factors that relate to the economic value of the plan's investment" and not to "subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives"). These fiduciary duties under ERISA do not apply to pension plans for state and municipal employees or for those affiliated with religious institutions. *See* 29 U.S.C. § 1003(b).

[109] *See The* University of Tennessee Knoxville: Tracie Woidtke, http://finance.bus.utk.edu/Faculty/TWoidtke.asp.

research methodology initially developed for her doctoral dissertation, Woidtke examined the valuation effects associated with pension fund influence, measured through ownership, on Fortune 250 companies, during 2001–13.[110] Firm value was assessed through industry-adjusted Tobin's Q, with various controls added to the analysis, including firm leverage, research and development expenses, advertising expenses, index membership, assets, positive income, stock transaction costs, insider ownership, and year fixed effects.

Woidtke finds that "public pension funds' ownership is associated with lower firm value" and, more particularly, that "social-issue shareholder-proposal activism appears to be negatively related to firm value."[111] As such, public employee pension funds' use of the shareholder-proposal process in an effort to affect corporate behavior in pursuit of social or policy goals may be harming the financial interests of plan beneficiaries—and ultimately state and local taxpayers—as well as, by inference, the average diversified investor.

Conclusion

In sum, it is hard to argue that the 14a-8 shareholder-proposal process is functioning well. A small group of shareholders dominates the process—including idiosyncratic individual "corporate gadflies" and institutional investors whose interests diverge from the ordinary diversified investor, namely labor-affiliated pension funds and social-investing funds. Increasingly, the 14a-8 process has tilted toward social and political concerns with little relationship to share value, market efficiency, or capital formation. By co-opting proxy advisory funds with substantial power over voting outcomes but limited resources, these activists are able to finance their agendas at other shareholders' expense—even when most shareholders vote down the activists' ideas repeatedly. At least some shareholder-proposal activism appears to be depressing share value.

Rule 14a-8 is a long-standing rule that has some utility, but activists have seized upon the SEC's outdated and overly permissive standards to push policy agendas—and chill political speech—in an effective end-run around Congress. Congress has a vested interest in addressing this situation and reorienting the SEC around its statutory obligation to "promote efficiency, competition, and capital formation."[112]

[110] *See* Woidtke, *supra* note 8, at 3.
[111] *See id.* at 16.
[112] 15 U.S.C. § 78c(f).

PROXY MONITOR

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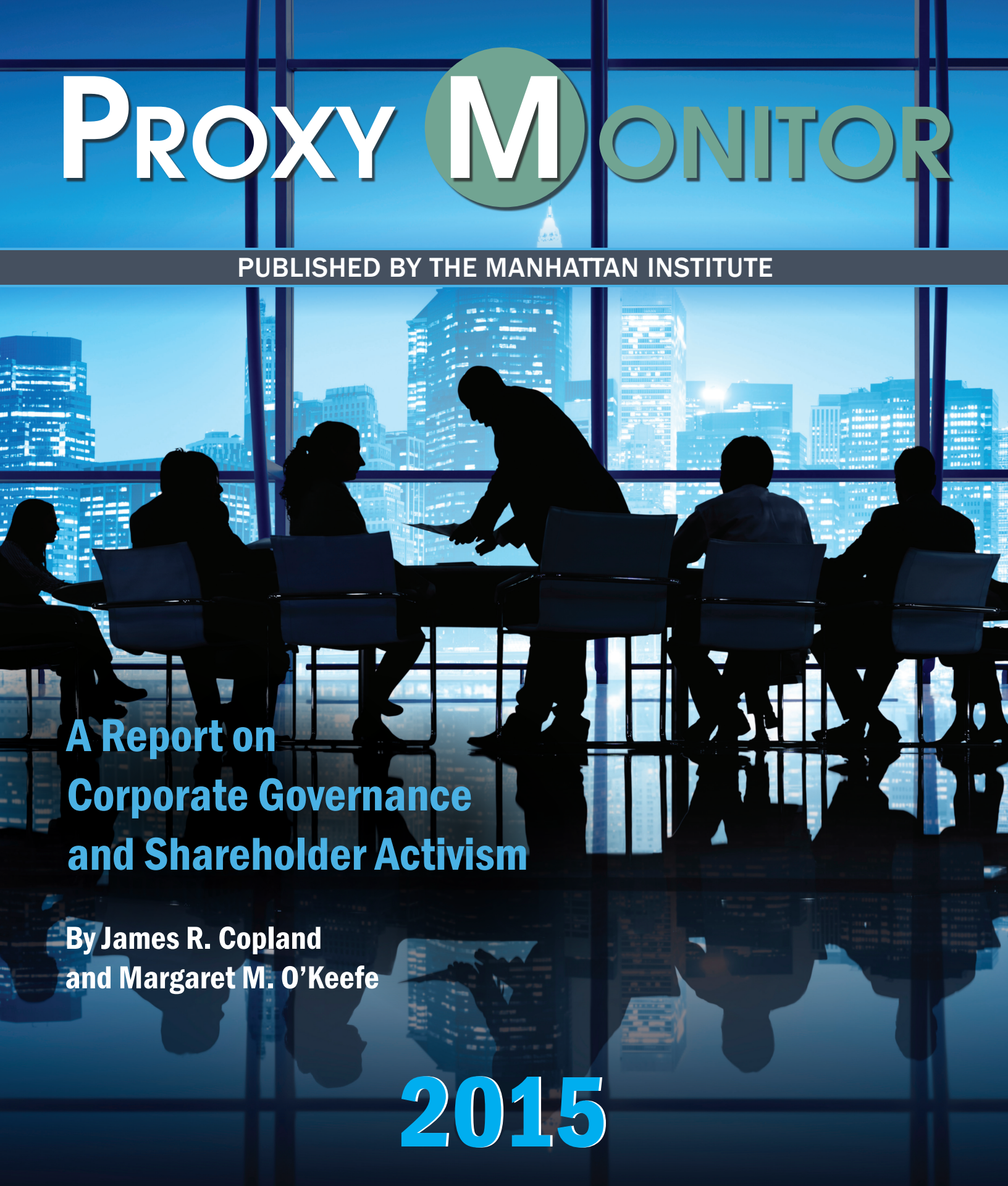

A Report on Corporate Governance and Shareholder Activism

By James R. Copland
and Margaret M. O'Keefe

2015

PROXY MONITOR 2015

A Report on Corporate Governance and Shareholder Activism

EXECUTIVE SUMMARY

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

- **The number of shareholder proposals is up.** The average large company faced 1.34 shareholder proposals in 2015, up from 1.22 in 2014. This is the highest level of shareholder-proposal activity since 2010. The increase in 2015 has been driven largely by the New York City pension funds' push for "proxy access," which would give large, long-term shareholders the right to nominate their own candidates for director on corporate proxy ballots.
- **The Securities and Exchange Commission has been more lenient in allowing shareholder proposals on the ballot.** Another reason for the uptick in shareholder-proposal activity in 2015 is a more permissive stance adopted by the SEC in assessing shareholder proposals' appropriateness for proxy ballots. In January 2015, the agency suspended the application of its "conflicting proposals" rule—and several companies this year faced shareholder proposals that conflicted with management proposals on the ballot. In 2015, the SEC issued 82 letters assuring companies that it would take no action if they excluded a shareholder proposal from their proxy ballot, down from 116 in 2014; the agency declined to issue no-action letters on 68 petitions in 2015, up from 50 in 2014.
- **A small group of shareholders dominates the shareholder-proposal process.** As in 2014, one-third of all shareholder proposals in 2015 were sponsored by just three individuals and their family members: John Chevedden, the father-son team of William and Kenneth Steiner, and the husband-wife team of James McRitchie and Myra Young. The NYC pension funds sponsored 11 percent of all proposals in 2015, but the overall percentage of shareholder proposals sponsored by labor-affiliated pension funds—28 percent—is below historical norms because private labor unions' pension funds have been less active. Institutional investors without a labor affiliation or a social, religious, or policy orientation sponsored only one proposal.
- **A plurality of shareholder proposals involve corporate-governance issues.** Forty-three percent of 2015 shareholder proposals involved corporate-governance concerns—including 11 percent that sought proxy access. Forty-two percent involved social or policy issues, including 19 percent that focused on the environment. Although shareholder proposals focusing on corporate political spending or lobbying remained common—17 percent of all proposals—the overall number of such proposals fell to 51, down from 67 in 2014.
- **The percentage of shareholder proposals receiving majority shareholder support is up.** Eleven percent of shareholder proposals were supported by a majority of shareholders in 2015, up from just 4 percent in 2014. This uptick was due to substantial support for proposals seeking proxy access: 23 of 35 proxy-access proposals won majority shareholder backing. Aside from proxy-access proposals, only 4 percent of shareholder proposals—ten in total—received majority shareholder votes. Among the companies in the Fortune 250, not a single shareholder proposal involving social or policy concerns won majority shareholder support over board opposition—as has been the case for the past ten years.

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

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

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

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

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

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ABOUT PROXY MONITOR

The Manhattan Institute's ProxyMonitor.org database, launched in 2011, is the first publicly available database cataloging shareholder proposals[1] and Dodd-Frank-mandated executive-compensation advisory votes[2] at America's largest companies. This is the fifth annual survey and 35th publication in a series of findings and reports by Manhattan Institute Center for Legal Policy director James R. Copland, each drawing upon information in the database to examine shareholder activism in which investors attempt to influence corporate management through the shareholder voting process.[3]

DATA

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

Because the Fortune list changes annually, some companies in the Proxy Monitor data set, while among the 250 largest companies in 2010, 2011, 2012, or 2013, fell out of the list in 2014, the baseline year for the 2015 proxy season. Eleven companies whose annual-meeting shareholder-vote results appear in the ProxyMonitor.org database are excluded from this analysis for 2015 because their 2014 revenues placed them outside the 250 largest companies.[5] Eleven companies not listed in the database for previous years are among the largest 250 companies for the 2014 base year and are included in the 2015 analysis—to the extent that they have filed materials for annual meetings.[6] (Another 13 companies listed in the ProxyMonitor.org database for previous years no longer existed as independent U.S.-based publicly traded companies for the 2015 proxy season, due to going private, change-of-control, or relocation actions.)[7] Although historical numbers will be consistent with those previously reported, these adjustments may marginally alter data reported in earlier findings for 2015.[8] Data for 2015 are current to August 31, at which time 229 companies had held their annual meetings and 235 had filed proxy documents.

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

INTRODUCTION

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

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

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

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

Empirical evidence gathered from the ProxyMonitor.org database generally supports this concern. During the last ten years, a small subset of investors has dominated the shareholder-proposal process. A plurality of all shareholder proposals have been introduced by three small individual shareholders and their family members—"corporate gadflies" who repeatedly file substantially similar proposals across a broad set of companies.[17] Most institutional investors almost never introduce shareholder proposals; in recent years, a majority of all sponsoring institutions have had an express social-investing purpose or an affiliation with a religious or public-policy organization.

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

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

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

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

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

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

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

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

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

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

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

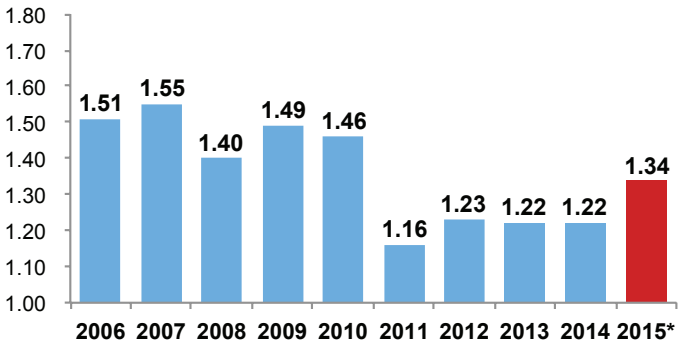
Appendix considers executive-compensation advisory-vote data for Fortune 250 companies, in 2015 and in each of the years holding such votes subsequent to such votes' mandate in Dodd-Frank (2011–15).

I. SHAREHOLDER-PROPOSAL INCIDENCE

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

Much as the uptick in 2015 shareholder-proposal activity is explained by the proxy-access campaign, the higher level of activity during 2006–10 is largely explained by shareholder proposals seeking shareholder advisory votes on executive compensation, which constituted 10 percent of all shareholder proposals introduced in that period. The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act[21] required such shareholder advisory votes on executive compensation beginning in 2011,[22] which obviated any need for further shareholder proposals on that topic.

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



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

SPECIAL FOCUS: SHAREHOLDER-PROPOSAL EXCLUSIONS

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

Proposals are commonly excluded from the proxy ballot by the corporations themselves—typically after receiving assurances from the SEC that the agency will take "no action" if the proposal is excluded because the proposal fails to comply with the agency's rules.[24] In a limited number of cases, a company has filed suit and successfully persuaded a federal court to permit it to exclude a shareholder proposal.[25] A 2013 survey of Proxy Monitor companies conducted by the Society of Corporate Secretaries and Governance Professionals[26] suggested that, on average, large companies face 77 percent more shareholder proposals than actually appear on proxy ballots[27] (though this figure may vary from year to year).

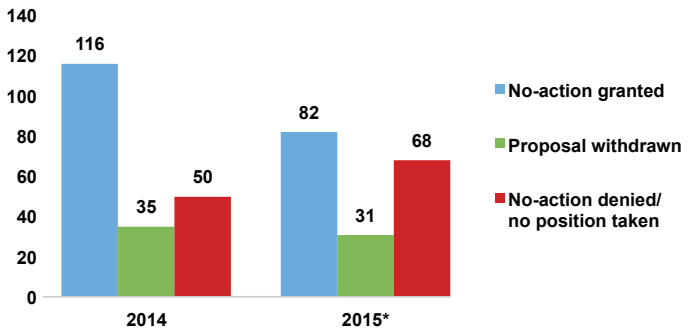
The SEC issues no-action letters to petitioning companies if the agency's staff determines that a shareholder proposal does not comply with SEC rules. Procedurally, the shareholder must establish his ownership in the company and meet filing deadlines.[28] Substantively—at least under the rules at the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

For the 2015 proxy season, the SEC suspended its "conflicting proposals" rule on the order of chairman Mary Jo White, who, on January 16, 2015, asked the staff to report back on the proper scope and application of the rule and had the agency's Division of Corporation Finance announce that it would not be expressing any views on the appropriateness of excluding conflicting proposals from proxy ballots in the interim.[30] Chairman White's order was precipitated by investor outcry over a December 1, 2014, SEC staff no-action letter that had advised Whole Foods that the agency would take no action were the company to exclude a proxy-access proposal introduced by corporate gadfly James McRitchie, given the company's stated intention to introduce its own proposal for proxy access with higher ownership and holding-period thresholds than those sought by McRitchie.[31] McRitchie had appealed to the SEC commissioners to reverse this decision,[32] prior to White's announcement.

In addition to the conflicting-proposals rule, the SEC's "ordinary business" exception was placed in considerable doubt up to the eve of the 2015 proxy season, after a November 26, 2014, order by Judge Leonard P. Stark of the federal district court in Delaware, which reversed the SEC's determination that Wal-Mart could properly exclude a shareholder proposal by Trinity Wall Street church.[33] The church's proposal had asked the board to amend the company's charter and charge its board committees with new duties overseeing the company's sale of certain products that "especially endanger . . . public safety and well-being." Specifically, the proposal asked for a report on "whether or not the company should sell guns equipped with magazines holding more than ten rounds of ammunition."[34] Judge Stark concluded that Trinity's proposal involved matters of "significant social concern," which the SEC has viewed as an exception to the ordinary-business-operations rule;[35] but on April 14, 2015, the Third Circuit Court of Appeals reversed[36]—though the court's ultimate decision, issued after the proxy season on July 6,[37] is hardly a matter of lucidity resolving such issues going forward.[38]

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

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



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

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

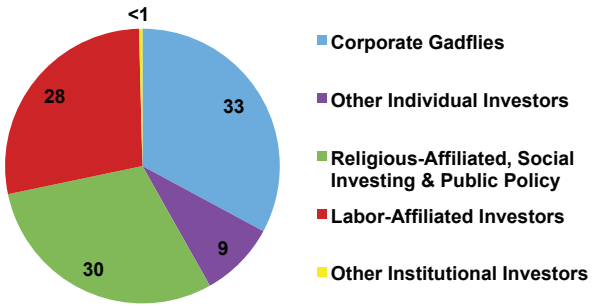
II. SHAREHOLDER-PROPOSAL SPONSORS

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

1. **Labor-Affiliated Investors.** Labor-affiliated pension funds—including corporate-specific pension plans, "multiemployer" plans affiliated with labor unions, and state and municipal pension plans—sponsored 28 percent of shareholder proposals introduced at Fortune 250 companies in 2015 (**Figure 3**). The percentage of shareholder proposals with labor-affiliated sponsors is up from 25 percent in 2014 (**Figure 4**), owing largely to the NYC funds' proxy-access campaign; but it still remains below that seen over the broader period dating to 2006 (**Figure 5**)—32 percent—owing principally to less activity among private multiemployer pension plans affiliated with labor unions, such as the American Federation of Labor–Congress of Industrial Organizations (AFL-CIO) or American Federation of State, County, and Municipal Employees (AFSCME).
2. **Corporate Gadflies.** Three individual investors and their family members—John Chevedden, William Steiner (and son Kenneth), and James McRitchie (and wife, Myra K. Young)—sponsored one-third of shareholder proposals in 2015, up from 31 percent in 2014 and 28 percent (including formerly active corporate gadflies Evelyn Davis and Emil Rossi and his family) across the broader ten-year period.
3. **Social Investors.** Institutional investors, focusing on "socially responsible" investing,[39] as well as various retirement and investment vehicles associated with religious or public-policy organizations,[40] sponsored 30 percent of shareholder proposals in 2015, up from 29 percent in 2014 and 27 percent across the broader ten-year period.

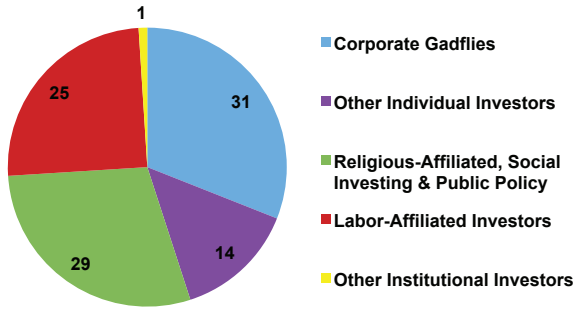
Aside from the three principal corporate gadflies, individual investors sponsored only 9 percent of shareholder proposals introduced in 2015, down from 14 percent in 2014, and 12 percent in the 2006–14 period. (One-third of these "other" individual-sponsored shareholder proposals were introduced by two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

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



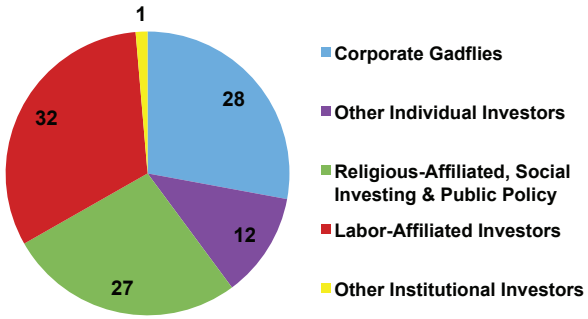
*Based on 235 companies filing proxy statements by August 31
Source: ProxyMonitor.org

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



Source: ProxyMonitor.org

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

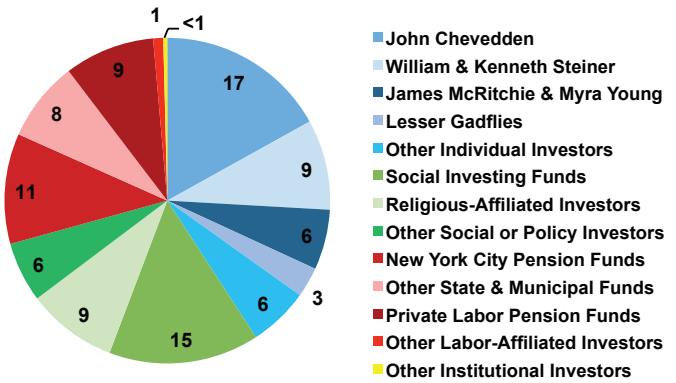


Source: ProxyMonitor.org

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

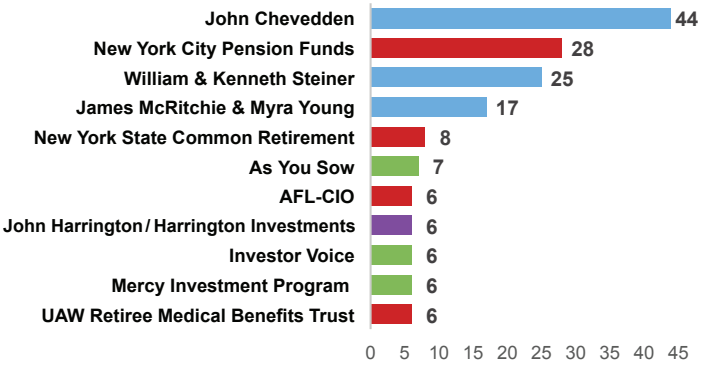
Nevertheless, a large number of social-investing funds were active, such that, overall, these vehicles sponsored 15 percent of all shareholder proposals in 2015. (Social-investing funds As You Sow, Trillium Asset Management, and Walden Asset Management each sponsored five or more shareholder proposals, as did the policy-oriented Investor Voice and the Catholic-affiliated Mercy Investment Program.) Labor-affiliated funds—other than the NYC funds—sponsored 18 percent of all proposals, led by the New York State Common Retirement Fund (eight proposals), AFL-CIO (six proposals), United Autoworkers Retiree Medical Benefits Trust (six proposals), and International Brotherhood of Electrical Workers (five proposals).

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



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

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



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

III. SHAREHOLDER PROPOSALS BY SUBJECT

Shareholder proposals can be broadly divided into three categories:

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

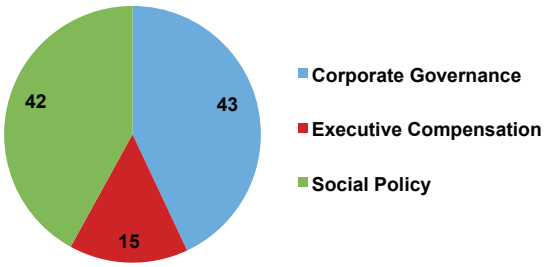
In 2015, 43 percent of shareholder proposals involved corporate-governance concerns, up from 36 percent in 2014 and 39 percent during the broader 2006–14 period (**Figure 8**, **Figure 9**, and **Figure 10**). This increase was principally due to the NYC pension funds' proxy-access campaign: overall,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

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

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

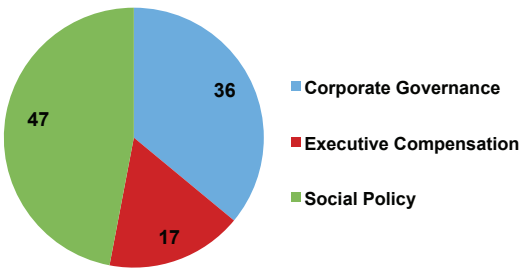
2014) seeking to limit change-of-control or other accelerated benefits to executives (e.g., upon taking a government job). The year 2015 also saw a substantially higher number of proposals seeking to claw back executive pay following an adverse criminal or civil action by the government against the company.

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



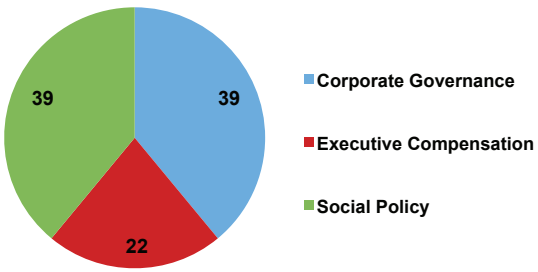
*Based on 235 companies filing 2015 proxy statements by August 31
Source: ProxyMonitor.org

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



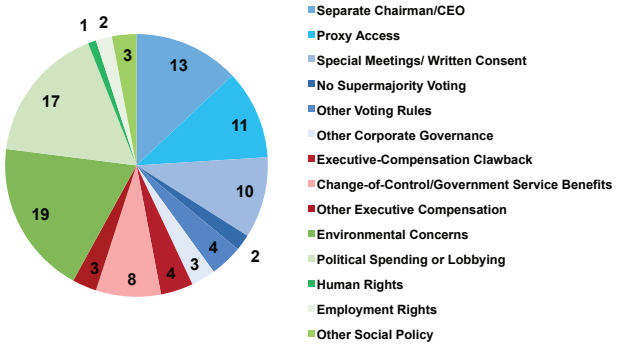
Source: ProxyMonitor.org

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



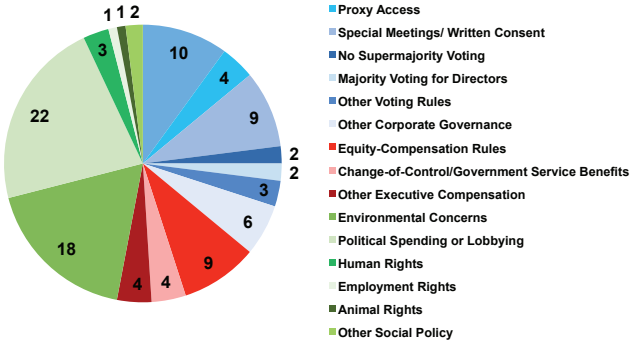
Source: ProxyMonitor.org

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



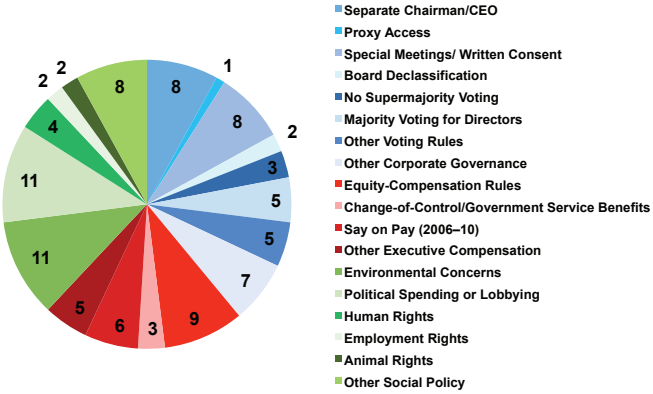
*Based on 235 companies filing 2015 proxy statements by August 31
Source: ProxyMonitor.org

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



Source: ProxyMonitor.org

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

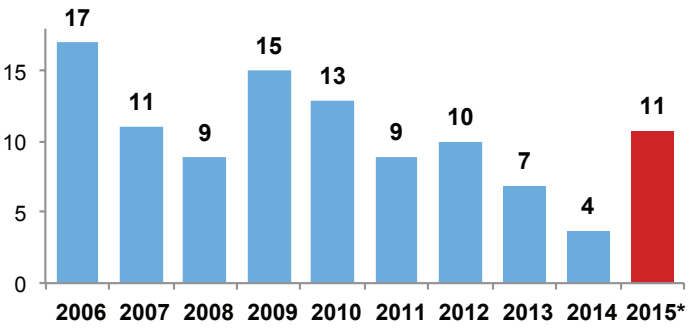


Source: ProxyMonitor.org

IV. SHAREHOLDER-PROPOSAL VOTING

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

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



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

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

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

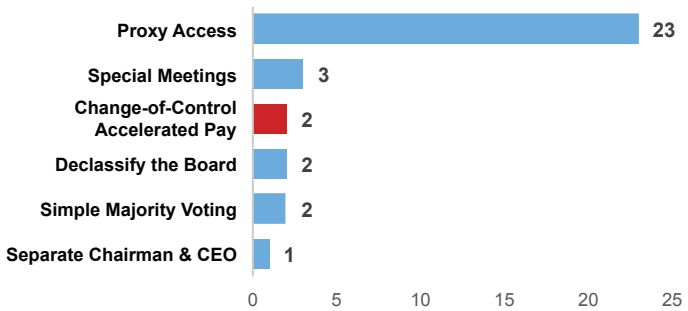
*Based on 229 companies holding annual meetings by August 31
Source: ProxyMonitor.org

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

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

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

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



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

As noted in earlier reports,[46] the percentage of shareholder proposals to win majority support tends to be highly dependent on the number of likely-to-pass proposals that are introduced. Certain proposals usually receive majority shareholder support (e.g., board declassification, proxy access), and a small number of others do with some regularity (e.g., eliminating supermajority provisions in bylaws, requiring directors to win a majority rather than plurality of votes to be elected).

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

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

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

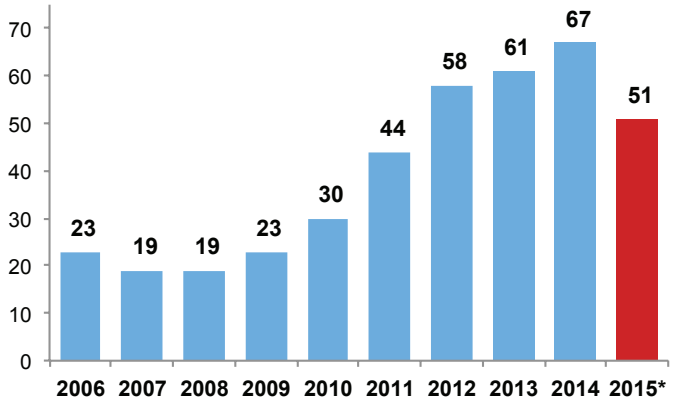
- On April 13, Goodyear's proxy ballot included a shareholder proposal introduced by John Chevedden that called on the company to eliminate all supermajority provisions from its bylaws, as well as a management proposal to require only majority shareholder support for change-of-control transactions (as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

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

SPECIAL FOCUS: PROPOSALS RELATED TO POLITICAL SPENDING OR LOBBYING

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

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



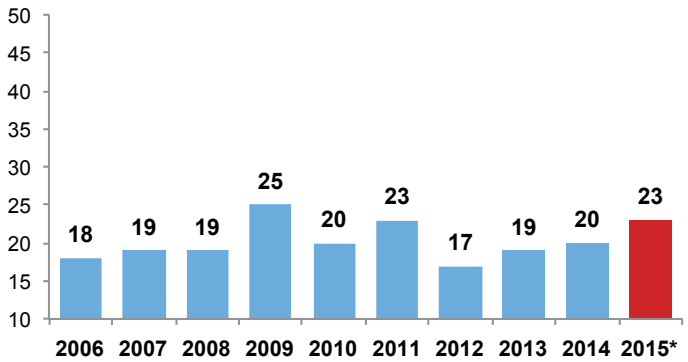
*For 2015, based on 235 companies filing proxy statements by August 31
Source: ProxyMonitor.org

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

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

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

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



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

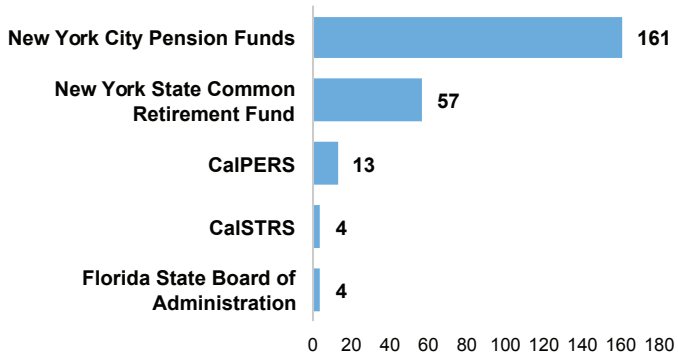
V. ASSESSING PUBLIC-PENSION FUND SHAREHOLDER ACTIVISM

In 2015, almost one-fifth of all shareholder proposals were sponsored by pension plans for public employees. Overall, public-employee pension funds dominate the space for defined-benefit retirement assets[53] in the United States: these plans hold two-thirds of the 200 largest such plans' total assets ($3.2 trillion of $4.8 trillion).[54] The largest public-employee fund—the Federal Retirement Thrift Savings Plan, which serves federal government employees[55]—has not been involved in shareholder-proposal activism, but the next five largest public-employee pension plans have been involved:

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

Although each of these large public-pension funds has sponsored shareholder proposals, their level of activity—as well as their approaches to shareholder activism more broadly[57]—varies markedly (**Figure 19**). The pension funds for New York City and State sponsor, far and away, the most shareholder proposals. Most public-employee pension funds file no shareholder proposals, but six other state-employee funds filed at least one shareholder proposal at a Fortune 250 company in the last ten years,[58] in addition to three other municipal funds.[59]

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



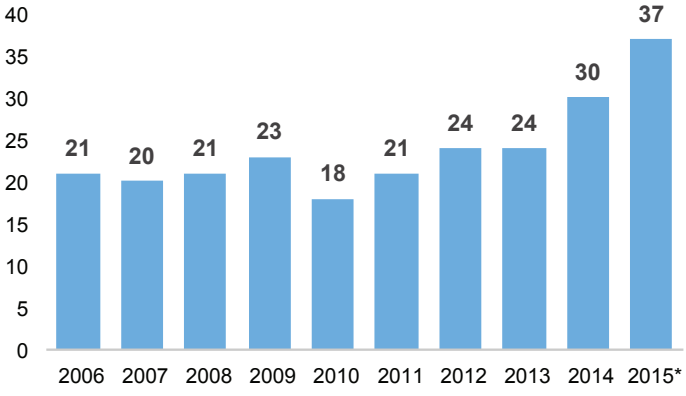
*For 2015, based on 235 companies filing proxy statements by August 31
Source: ProxyMonitor.org

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

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

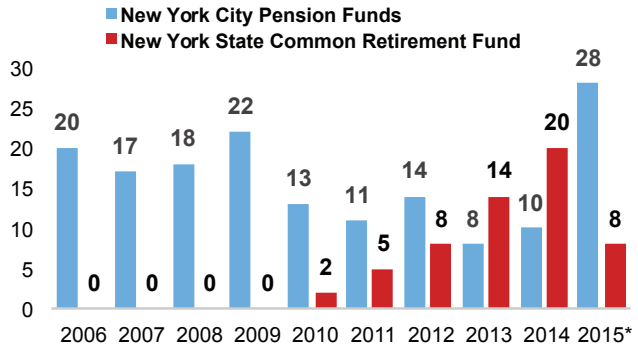
In 2015, the fund was less active—it has sponsored only eight proposals at Fortune 250 companies to date—but the NYC funds picked up the slack: in 2015, Comptroller Stringer's first full proxy season since assuming office, the NYC funds sponsored 28 shareholder proposals at Fortune 250 companies, a record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

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



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

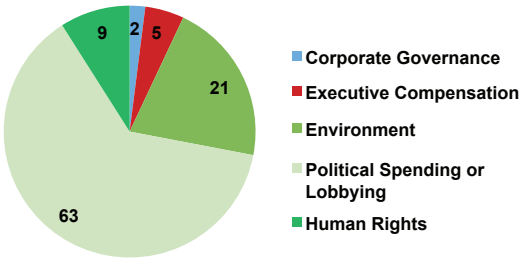
Figure 21. Number of Shareholder Proposals Introduced by New York Pension Funds, By Year, Fortune 250



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

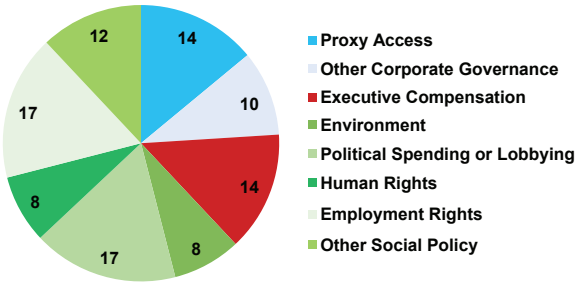
Comptroller DiNapoli's shareholder-proposal activism has focused on social and policy concerns: 63 percent of the New York State Common Retirement Fund's shareholder proposals have involved corporate political spending or lobbying, 21 percent have involved environmental issues, and 9 percent have involved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

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



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

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

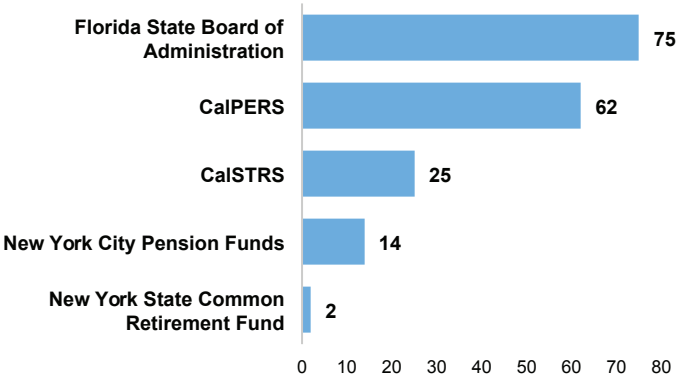


*For 2015, based on 235 companies filing proxy statements by August 31
Source: ProxyMonitor.org

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

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

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



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

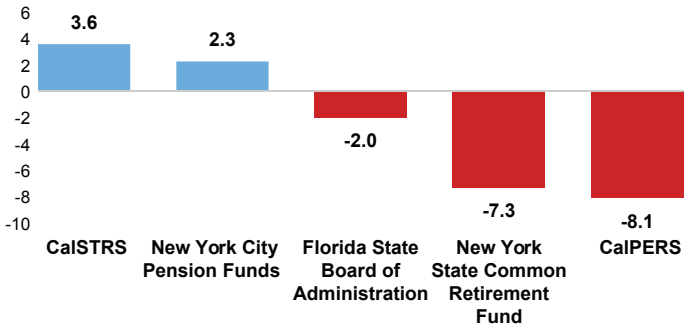
Share-Value Analysis of Public-Pension Funds' Shareholder-Proposal Campaigns, 2006–14

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

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

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

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



Source: ProxyMonitor.org

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

Building on a research methodology initially developed for her doctoral dissertation, Woidtke examined the valuation effects associated with pension fund influence, measured through ownership, on Fortune 250 companies, during 2001–13.[67] Firm value was assessed through industry-adjusted Tobin's Q, with various controls added to the analysis, including firm leverage, research and development expenses, advertising expenses, index membership, assets, positive income, stock transaction costs, insider ownership, and year fixed effects.

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

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

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

2015 Proxy-Access Campaign: Assessment

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

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

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

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

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

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

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

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

Proxy Access: Share-Price Analysis

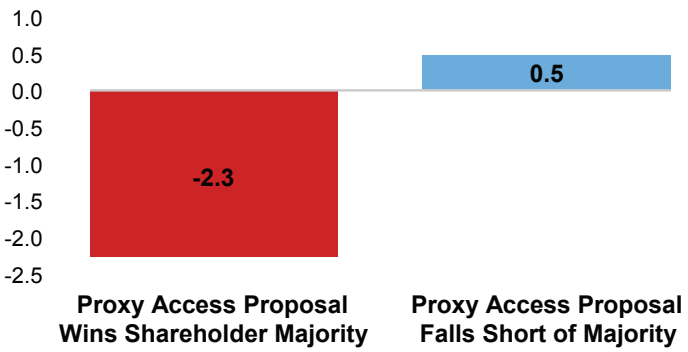
Although majority shareholder support is a gauge of median shareholder sentiment—assuming that voting mechanisms accurately capture shareholder sentiment, an assumption that may not be borne out in practice[85]—it does not necessarily reflect accurately the expected share-value effects of a given course of action. In contrast, share-price effects—which are driven by marginal buyers and sellers of security—are

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

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

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

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



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

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

Nevertheless, the results hold when Kohl's is excluded from the sample and when oil and gas companies are indexed against an energy exchange-traded fund[89] rather than the S&P. (The observed negative share-price effect is -1.7 percent, excluding Kohl's; and -1.5 percent, indexing oil and gas companies by sector. Combining both of these adjustments, the negative price effect is -0.9 percent—and 15 of the remaining 20 companies continue to underperform in the days after their annual meetings.)

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

CONCLUSION

The 2015 proxy season was marked by legal and regulatory uncertainty, an increase in shareholder-proposal sponsorship, and a broad, successful campaign by the NYC pension funds pushing publicly traded companies to establish proxy-access rules for director elections. The SEC chairman's January 2015 decision[91] not to enforce its conflicting-proposals rule led to several companies facing competing management and shareholder proposals.

Overall, the agency's staff was significantly less likely to issue companies no-action letters, which led to an increase in the number of shareholder proposals on proxy ballots. Though the Third Circuit Court of Appeals reversed a lower-court decision that would have significantly eroded the SEC's ordinary business-operations rule for excluding shareholder proposals, its decision[92] generated significant ambiguity about how that rule should be properly applied.

After the close of the proxy season, other legal and regulatory decisions highlighted the changing landscape that companies and investors face. On August 18, the D.C. Circuit Court of Appeals vacated the SEC's "conflict minerals" disclosure rule on First Amendment grounds[93]—the latest legal rebuff to an agency increasingly given to requiring disclosures that seem far afield from its statutory mission to promote "efficiency, competition, and capital formation."[94]

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

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

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

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

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

APPENDIX: Shareholder Advisory Votes on Executive Compensation

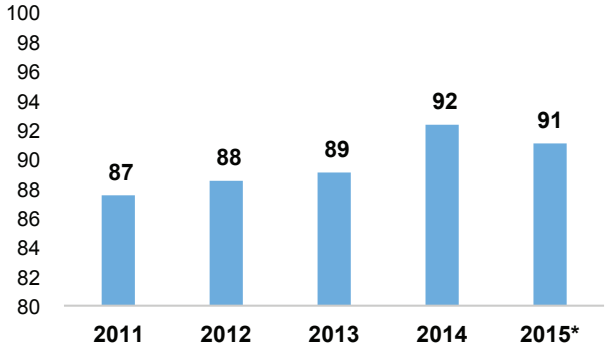
The ProxyMonitor.org database tracks not only shareholder proposals but also shareholder advisory votes on executive compensation, which have been mandatory under federal law—annually, biennially, or triennially—since 2011. Shareholders at most companies have opted to hold such votes annually. In 2015,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

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

After rising marginally each year since 2011, average shareholder support for executive compensation fell slightly in 2015, to 91 percent from 92 percent last year—a level still above that in 2011, 2012, or 2013 (**Figure 27**). The percentage of companies getting the support of 90 percent or more of shareholders also fell slightly, from 79 percent in 2014 to 74 percent in 2015; again, 2015 support is higher than any other year since say-on-pay became mandatory (**Figure 28**). Likewise, the percentage of companies failing to get 70 percent support for their executive compensation—the threshold level deemed significant by the proxy advisory firm ISS[98]—rose marginally, from 4 percent in 2014 to 5 percent in 2015, though again falling below that witnessed in any earlier year (**Figure 29**).

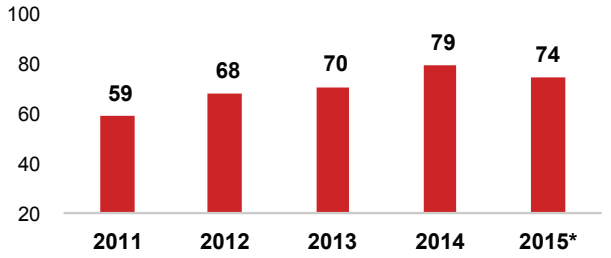
It will be worth watching to see if the modest drop in support for executive compensation, year-over-year, represents a trend or whether 2014 was an outlier. Overall, companies continue to win very broad support for their executive-compensation packages and seem more likely than ever to win majority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

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



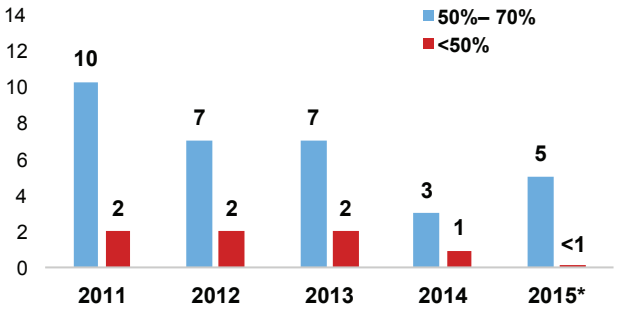
*For 2015, based on 216 companies holding shareholder advisory votes on executive compensation by August 31
Source: ProxyMonitor.org

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



Source: ProxyMonitor.org

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



Source: ProxyMonitor.org

ENDNOTES

[1] Stockholders of publicly traded companies who have held shares valued at $2,000 or more for at least one year can introduce proposals for shareholders' consideration at corporate annual meetings. See 17 C.F.R. § 240.14a-8 (2007) [hereinafter 14a-8]. The federal Securities and Exchange Commission determines the procedural appropriateness of a shareholder proposal for inclusion on a corporation's proxy ballot, pursuant to the Securities Exchange Act of 1934, Pub. L. No. 73-291, Ch. 404, 48 Stat. 881 (1934) (codified at 15 U.S.C. §§ 78a–78oo (2006 & Supp. II 2009)), at §§ 78m, 78n & 78u; 15 U.S.C. §§ 80a-1 to 80a-64 (2000) (pursuant to Investment Company Act of 1940, Pub. L. No. 76-768, 54 Stat. 841(1940)); but the substantive rights governing such measures and how they can force boards to act remain largely a question of state corporate law; cf. Del. Code Ann., tit. 8, § 211(b) (2009) (noting that in addition to the election of directors, "any other proper business may be transacted at the annual meeting").

[2] Under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, publicly traded companies must hold shareholder advisory votes on executive compensation annually, biennially, or triennially, at shareholders' discretion. See Pub. L. No. 111-203, 124 Stat. 1376, §951 (2010) [hereinafter Dodd-Frank].

[3] See Proxy Monitor, Reports and Findings, http://proxymonitor.org/Forms/reports_findings.aspx (last visited Aug. 30, 2015).

[4] The following companies are listed in the 2014 Fortune 250 but are not independent publicly traded corporations in 2015: Fannie Mae, Freddie Mac, State Farm Insurance, Energy Transfer Equity, Enterprise Products Partners, CHS, Plains GP Holdings, Liberty Mutual Holding Company, HCA Holdings, New York Life Insurance, Nationwide Mutual Insurance, TIAA-CREF, Massachusetts Mutual Life Insurance, Publix Super Markets, Northwestern Mutual Life Insurance, U.S. Foods, United States Automobile Association, Icahn Enterprises, Global Partners, Land O'Lakes, Aramark Holdings, Smithfield Foods, Toys "R" Us, Peter Kiewit Sons', H.J. Heinz, and Guardian Life Insurance Company of America.

[5] Those companies are: Applied Materials, Ashland, Coca-Cola Enterprises, GameStop, ITT, KBR, Motorola Solutions, Oshkosh, Principal Financial Group, Public Service Enterprise Group, and the Williams Companies.

[6] Those companies are: AbbVie, Bed Bath & Beyond, CDW, Centene, CST Brands, DaVita HealthCare Partners, Family Dollar Stores, Gilead Sciences, Hertz Global Holdings, NRG Energy, and Ross Stores.

[7] Those companies are: AMR, Aon, Constellation Energy, Coventry Health Care, Dell, Eaton, Hillshire Brands, H.J. Heinz, Medco, Smithfield Foods, Sunoco, URS, and US Airways.

[8] The adjustments noted in endnotes 5 and 6 mean that the dataset of companies compared between 2014 and 2015 is marginally different. Nevertheless, because the companies added and deleted are among the smallest in the Fortune 250, they are generally less likely to receive shareholder proposals than others, so overall filing and voting results should not differ materially. Among the nine new companies in the dataset for 2015, which appeared in the 2014 but not 2013 Fortune 250, seven faced no shareholder proposals. Gilead Sciences faced four proposals (two from corporate gadflies John Chevedden and James McRitchie, and one each from social-investing and labor funds), while DaVita HealthCare received a proxy access proposal from the United Autoworkers Retiree Medical Trust.

[9] See Heidi Welsh, Accuracy in Proxy Monitoring, HLS Forum on Corporate Governance and Financial Regulation (Sept. 16, 2013), https://blogs.law.harvard.edu/corpgov/2013/09/16/accuracy-in-proxy-monitoring-2/ (critiquing Proxy Monitor dataset).

[10] See, e.g., Paul Rose, Common Agency and the Public Corporation, 63 Vand. L. Rev. 1355, 1356 (2010) (observing that "general trends have supported increased shareholder power and influence within public companies in recent years").

[11] See Barry Burr, Institutional Investors Increase Ownership of U.S. Companies to All-Time High, Pensions & Investments (Sept. 5, 2008, 12:01 AM), http://www.pionline.com/article/20080905/ONLINE/809049969/institutional-investors-increase-ownership-of-us-companies-to-all-time-high#; see also Carolyn Kay Brancato & Stephan Rabimov, The 2008 Institutional Investment Report: Trends in Institutional Investor Assets and Equity Ownership of U.S. Corporations (Sept. 2008).

[12] In particular, two major federal laws have altered the balance: the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), enacted in the wake of the collapse of Enron and the bursting Internet stock bubble; and the 2010 Dodd-Frank Act, supra note 2, enacted in the wake of the 2008 financial crisis. In addition, the SEC has reinforced these trends through a series of new rules, including one that limits brokers' ability to vote individual stockholders' shares. See SEC Rel. No. 34-60215 (July 1, 2009), http://www.sec.gov/rules/sro/nyse/2009/34-60215.pdf.

[13] Shareholder Activist Definition, Investopedia.com, http://www.investopedia.com/terms/s/shareholderactivist.asp (last visited Sept. 10, 2015) ("A person who attempts to use his or her rights as a shareholder of a publicly-traded corporation to bring about social change. Some of the issues most often addressed by shareholder activists are related to the environment, investments in politically sensitive parts of the world and workers' rights (sweatshops). The term can also refer to investors who believe that a company's management is doing a bad job and who attempt to gain control of the company and replace management for the good of the shareholders.").

[14] See Michael Chamberlain, Socially Responsible Investing: What You Need to Know, Forbes (Apr. 24, 2013), http://www.forbes.com/sites/feeonlyplanner/2013/04/24/socially-responsible-investing-what-you-

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

[15] See 14a-8, supra note 1.

[16] See, e.g., Bus. Roundtable v. S.E.C., 647 F.3d 1144, 1152 (D.C. Cir. 2011) (citing proposition that "investors with a special interest, such as unions and state and local governments whose interests in jobs may well be greater than their interest in share value, can be expected to pursue self-interested objectives rather than the goal of maximizing shareholder value"); see also Dep't of Labor, Office of the Inspector General, Proxy-Voting May Not Be Solely for the Economic Benefit of Retirement Plans (Mar. 31, 2011), http://www.oig.dol.gov/public/reports/oa/2011/09-11-001-12-121.pdf (questioning whether labor pension funds are using "plan assets to support or pursue proxy proposals for personal, social, legislative, regulatory, or public policy agendas"); James R. Copland & Margaret M. O'Keefe, Proxy Monitor 2014: A Report on Corporate Governance and Shareholder Activism 14 (Manhattan Inst. for Pol'y Res., Fall 2014), http://www.proxymonitor.org/Forms/pmr_09.aspx#notes (showing linkage between labor-affiliated shareholder activism and corporate political spending) [hereinafter Copland & O'Keefe Fall 2014].

[17] "Corporate gadflies," as commonly used in Charles M. Yablon, Overcompensating: The Corporate Lawyer and Executive Pay, 92 Colum. L. Rev. 1867, 1895 (1992); and Jessica Holzer, Firms Try New Tack against Gadflies, Wall St. J. (June 6, 2011), http://online.wsj.com/article/SB10001424052702304906004576367133865305262.html.

[18] See New York City Comptroller, Boardroom Accountability Project, http://comptroller.nyc.gov/boardroom-accountability/ (last visited Sept. 11, 2015) [hereinafter Boardroom Accountability Project] (citing objective "to ensure that companies are truly managed for the long-term" and contrasting "short-term investors" that allegedly may "manipulate corporate governance at the expense of those seeking long-term value").

[19] See, e.g., Bus. Roundtable, 647 F.3d at1152 ("[I]nvestors with a special interest, such as unions and state and local governments whose interests in jobs may well be greater than their interest in share value, can be expected to pursue self-interested objectives rather than the goal of maximizing shareholder value"); Dep't of Labor, supra note 16; Copland & O'Keefe Fall 2014, supra note 16, at 14.

[20] See Boardroom Accountability Project, supra note 18; see also Press Release, Comptroller Stringer, NYC Pensions Funds Launch National Campaign To Give Shareowners A True Voice In How Corporate Boards Are Elected: New York City Pension Funds File 75 Proxy Access Shareowner Proposals to Kick Off the Boardroom Accountability Project, http://comptroller.nyc.gov/newsroom/comptroller-stringer-nyc-pension-funds-launch-national-campaign-to-give-shareowners-a-true-voice-in-how-corporate-boards-are-elected/ [hereinafter Stringer Press Release].

[21] See Dodd-Frank Act, supra note 2.

[22] See id.

[23] Copland & O'Keefe Fall 2014, supra note 16, at 6 (citing Copland, Proxy Monitor 2013: Political Spending, Say on Pay, and Other Key Issues to Watch in the 2013 Proxy Season (Manhattan Inst. for Pol'y Res., Winter 2013), http://proxymonitor.org/Forms/pmr_05.aspx [hereinafter Copland Winter 2013]; see also Copland & O'Keefe, Proxy Monitor 2013: Corporate Governance and Shareholder Activism (Manhattan Inst. for Pol'y Res., Fall 2013), available athttp://proxymonitor.org/Forms/pmr_06.aspx [hereinafter Copland & O'Keefe Fall 2013]; Copland, Proxy Monitor 2014: Companies Fight Back Against Chevedden; Unions and Social Investors Ramp Up Push on Corporate Political Spending (Manhattan Inst. for Pol'y Res., Winter 2014), http://proxymonitor.org/Forms/pmr_07.aspx [hereinafter Copland Winter 2014].

[24] See No-Action Letters, SEC, http://www.sec.gov/answers/noaction.htm (last visited Sept. 11, 2015).

[25] See, e.g., Andrew Ackerman, Corporations Take Swats at a Gadfly, Wall St. J. (Mar. 12, 2014), http://online.wsj.com/news/articles/SB10001424052702303546204579435512380561526?mod=vocus; Ning Chiu, Fifth Circuit Upholds Decision Against Chevedden as More Companies Seek 14a-8 Relief from Courts, Davis Polk & Wardwell LLP (Feb. 18, 2014), http://www.davispolk.com/briefing/corporategovernance/fifth-circuit-upholds-decision-against-chevedden-more-companies-seek; Waste Connections, Inc. v. Chevedden, No. 4:13-CV-00176 (S.D. Tex. June 3, 2013), aff'd, No. 13-20336, 2014 WL 554566 (5th Cir. Feb. 13, 2014), http://www.gpo.gov/fdsys/pkg/USCOURTS-ca5-13-20336/pdf/USCOURTS-ca5-13-20336-0.pdf.

[26] Society of Corporate Secretaries and Governance Professionals, http://www.ascs.org (last visited Sept. 11, 2015).

[27] See Copland Winter 2013, supra note 23.

[28] See 14a-8, supra note 1.

[29] See id.

[30] See Statement from Chair White Directing Staff to Review Commission Rule for Excluding Conflicting Proxy Proposals, SEC (Jan. 16, 2015), http://www.sec.gov/news/statement/statement-on-conflicting-proxy-proposals.html#.VST9b_nF_Wt [hereinafter White Statement].

[31] See No-Action Letter Re: Wal-Mart Stores, Inc., SEC, https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2014/trinitychurch032014-14a8.pdf [hereinafter "Wal-Mart No-Action Letter"] (stating "[W]e will not recommend enforcement action to the Commission if Walmart omits the proposal from its proxy materials in reliance on rule 14a-8(i)(7).") (last visited Sept. 11, 2015); see also 14a-8, supra note 1 at subsection (i)(7) (indicating that when a "proposal deals with a matter relating to the company's ordinary business operations," a company may rely on that as a basis for excluding the proposal).

[32] Letter from James McRitchie to Office of Chief Counsel, Division

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

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

[34] Id. at 622.

[35] Id. at 630.

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

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

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

[39] See Chamberlain, supra note 14 (defining "socially responsible investing").

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

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

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

[43] In determining shareholder support for shareholder proposals, the Manhattan Institute counts votes consistent with the practice dictated in a company's bylaws, consistent with state law. Some companies measure shareholder support by dividing the number of votes for a proposal by the total number of shares present and voting, ignoring abstentions. Other companies measure shareholder support by dividing the number of favorable votes by the number of shares present and entitled to vote—thus including abstentions in the denominator of the tally. Neither practice necessarily skews shareholder votes in management's favor: whereas the latter method makes it relatively more difficult for shareholder resolutions to obtain majority support, it also makes it more difficult for management to win shareholder backing for its own proposals, such as equity compensation plans. Although shareholder-proposal activists prefer to exclude abstentions consistently in tabulating vote totals, without regard to corporate bylaws—which necessarily inflates apparent support for their proposals—such a methodology is inconsistent with federal law. The SEC's Schedule 14A specifies that for "each matter which is to be submitted to a vote of security holders," corporate proxy statements must "[d]isclose the method by which votes will be counted, including the treatment and effect of abstentions and broker non-votes under applicable state law as well as registrant charter and bylaw provisions"—clearly indicating that corporations can adopt varying counting methodologies in assessing shareholder votes and that state substantive law governs the parameters of vote calculation. See Item 21, Voting Procedures, 17 C.F.R. § 240.14a-101, available at http://www.sec.gov/about/sched14a.pdf (last visited Sept. 11, 2015).

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

The SEC staff has adopted a rule that for the very limited purpose of determining whether a proposal has met the "resubmission threshold" to qualify for inclusion on the next year's corporate ballot—a permissive standard requiring merely a minimum 3 percent, 6 percent, or 10 percent vote, respectively, in successive years, see Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 40,018; 63 Fed. Reg. 29,106, 29,108 (May 28, 1998) (codified at 17 C.F.R. pt. 240)—"[o]nly votes for and against a proposal are included in the calculation of the shareholder vote of that proposal," ignoring abstentions. SEC Staff Legal Bulletin No. 14, F.4., July 13, 2001, http://www.sec.gov/interps/legal/cfslb14.htm (last visited Sept. 11, 2015). Because this is a staff rule not voted on by the Commission; because it exists for a limited purpose (with multiple rationales, including reducing workload in processing 14a-8 no-action petitions and adopting a permissive standard for ballot inclusion); and because it contravenes clear and longstanding deference to substantive state law in the field of corporate governance, the notion that this limited SEC staff vote-counting rule should dictate counting methodology, irrespective of state law and governing corporate bylaws, is untenable. Indeed, in 2014 and 2015, various shareholder proponents have introduced proposals seeking to modify companies' bylaws to treat abstentions as non-votes; such proposals have received less than 10 percent shareholder support.

[44] See Copland & O'Keefe Fall 2014, supra note 16, at 2 ("From 2006 through 2014, among 1,141 shareholder proposals at Fortune 250 companies that involved social or policy concerns, not a single proposal has won the support of a majority of shareholders over board opposition."); James R. Copland, Getting the Politics Out of Proxy Season, Wall St. J., Apr. 23, 2015, available at http://www.wsj.com/articles/getting-the-politics-out-of-proxy-season-1429744795. Note that this statement holds true for the current Fortune 250, but a shareholder proposal at KBR, Inc. did receive 55 percent shareholder support over board opposition in 2011, when the company was in the Fortune 250 list. That proposal, sponsored by the New York City pension funds, encouraged the board to amend the company's equal-employment opportunity policy to prohibit discrimination based on sexual orientation.

[45] Although there were only two shareholder proposals at Fortune 250 companies in 2015 that sought to declassify corporate boards, the year did involve a significant dispute about the empirical data justifying the idea. As discussed in earlier Proxy Monitor reports, see Copland Winter 2014, supra note 23, text accompanying notes 12–15, early academic studies showed that staggered boards reduced share value, see, e.g., Lucian A. Bebchuk, Alma Cohen & Charles C.Y. Wang, Staggered Boards and the Wealth of Shareholders: Evidence from Two Natural Experiments (Nat'l Bureau of Econ. Research, Working Paper No. 17127, June 2011), available at http://www.nber.org/papers/w17127; but subsequent research has thrown these findings into question, see, e.g., Martijn Cremers, Lubomir P. Litov, and Simone M. Sepe, Staggered Boards and Firm Value, Revisited, Social Science Research Network, Dec. 19, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2364165. In December 2014, SEC Commissioner Daniel Gallagher and Stanford professor Joseph Grundfest released a provocative paper summarizing this dispute, Daniel M. Gallagher & Joseph Grundfest, Did Harvard Violate Federal Securities Law? The Campaign against Classified Boards of Directors, Social Science Research Network, Dec. 10, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2536586. Gallagher and Grundfest's paper asserted that the Harvard Shareholder Rights Project, see supra note 42, violated federal securities law by inadequately characterizing the current state of the research in shareholder proposals it helped funds to introduce, which prompted an aggressive pushback from academics, see, e.g., Statement of Thirty-Four Senior Corporate and Securities Law Professors Urging Commissioner Gallagher and Professor Grundfest to Withdraw Their Allegations against Harvard and the SRP, HLS Forum on Corporate Governance and Financial Regulation (Jan. 15, 2015), http://corpgov.law.harvard.edu/2015/01/15/statement-of-thirty-four-senior-corporate-and-securities-law-professors-urging-commissioner-gallagher-and-professor-grundfest-to-withdraw-their-allegations-against-harvard-and-the-srp/, though this furious academic response did not challenge the paper's characterization of the academic evidence but rather objected to its allegations against Harvard University and its academic-led clinical law program.

[46] See, e.g., Copland & O'Keefe Fall 2014, supra note 16, at 9 & tbl.1.

[47] For example, according to the Harvard Shareholder Rights Project, a clinical program that advocated for the proposal to declassify staggered boards, two-thirds of the S&P 500 companies that had classified boards as of 2012 had changed their practice by 2014. See Harvard Shareholder Rights Project, 121 Companies Agreeing to Move toward Annual Director Elections, http://srp.law.harvard.edu/companies-entering-into-agreements.shtml (last visited Sept. 11, 2015).

[48] See Copland & O'Keefe Fall 2014, supra note 16, at 5. (For example, among companies facing board-declassification proposals introduced through efforts of the Harvard Shareholder Rights Project, 56 percent agreed to declassify their boards in 2012, 68 percent in 2013, and 76 percent in 2014. See Harvard Shareholder Rights Project, supra note 47.).

[49] See Exelon Corp., Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934, proposals no. 5, 6 (Mar. 19, 2015), http://www.sec.gov/Archives/edgar/data/1109357/000119312515098237/d876808ddef14a.htm#rom876808_18.

[50] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[51] A 2006 spending-disclosure proposal introduced at Amgen did receive majority-shareholder support (67 percent) after the proposal was supported by management. Also, as noted in footnote 44, supra, KBR, Inc. did receive 55 percent shareholder support for a shareholder proposal related to sexual-orientation employee discrimination, over board opposition, in 2011, when the company was in the Fortune 250 list.

[52] See James R. Copland et al., Proxy Monitor 2012: A Report on Corporate Governance and Shareholder Activism 20–22 & tech. app. (Manhattan Inst. for Pol'y Res., Fall 2012), http://proxymonitor.org/Forms/pmr_04.aspx (showing significant variation in shareholder votes based on proposal type).

[53] Defined-benefit pension plans have a fixed payment at retirement, paid by a guarantor, typically one's employer. See Choosing a Retirement Plan: Defined Benefit Plans, Internal Revenue Service, available at http://www.irs.gov/Retirement-Plans/Choosing-a-Retirement-Plan:-Defined-Benefit-Plan (last visited Sept. 11, 2015). In contrast, defined-contribution plans, such as those under section 401(k) of the Internal Revenue Code, are portable retirement plans with variable outlays, and investments under the control of the retiree.

[54] Rob Kozlowski, Retirement Plan Assets Rise 8.5%, Pass $9 Trillion, Pensions & Investments (Feb.9 2015), http://www.pionline.com/article/20150209/PRINT/302099984/retirement-plan-assets-rise-85-pass-9-trillion.

[55] The Thrift Savings Plan (TSP) is a tax-deferred retirement savings and investment plan that offers federal employees the same type of savings and tax benefits that many private corporations offer their employees under 401(k) plans. By participating in the TSP, federal employees have the opportunity to save part of their income for retirement, receive

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

[56] See Kozlowski, supra note 54.

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

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

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

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

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

[62] Traditionally, corporate law has oriented corporate boards and managers' fiduciary duties around a single variable, share value, see Dodge v. Ford Motor Company, 170 N.W. 668. (Mich. 1919) (holding that corporate fiduciary duties flowed to shareholders, not employees or other interests), which avoids the ownership costs—chiefly conflicts of interest that arise among various owners—that are inherent in non-corporate ownership forms. See generally Henry Hansmann, The Ownership of Enterprise 35–49 (1996) (arguing that the costs of collective decision-making best explain the predominance of the corporate equity-ownership form in large-scale for-profit enterprise); see also Stephen M. Bainbridge, The Case for Limited Shareholder Voting Rights, 53 UCLA L. Rev. 601 (2006) (arguing that increasing shareholder power imposes significant costs in reduced managerial authority). Since shortly after Dodge v. Ford was decided, an academic debate has proliferated between those arguing for a social responsibility for corporations, see E. Merrick Dodd, Jr., For Whom are Corporate Managers Trustees?, 45 Harv. L. Rev. 1145, 1148 (1932) (arguing for the view that "the business corporation as an economic institution which has a social service as well as a profit-making function"), and those supporting the traditional rule centered on share value, see Adolf A. Berle, Jr., For Whom Corporate Managers Are Trustees: A Note, 45 Harv. L. Rev. 1365, 1367 (1932). The modern push for "corporate social responsibility" generally traces to a pair of 1970s books, Where the Law Ends, by Christopher Stone (1975), and Taming the Giant Corporation, by Ralph Nader, Mark Green, and Joel Seligman (1976). For a critique of the early concept of corporate social responsibility advocated by these authors, see David L. Engel, An Approach to Corporate Social Responsibility, 32 Stan. L. Rev. 1, 1 (1979) ("Any mandatory governance reforms intended to spur more corporate altruism are almost sure to have general institutional costs within the corporate system itself. . . . But the proponents of "more" corporate social responsibility have never bothered to analyze or examine, from any clearly defined starting point, even just the benefits they anticipate from reform . . . .").

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

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

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

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

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

[68] Id. at 3.

[69] Id.

[70] Id. at 3–4.

[71] See Stringer Press Release, supra note 60.

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

[73] See Gretchen Morgenson, Mutual Fund Giants Vote to Keep the Insiders In, N.Y. Times, May 31, 2015, at BU1, available at http://www.nytimes.com/2015/05/31/business/fund-giants-resist-proxy-access-board-shake-ups.html (last visited Sept. 11, 2015).

[74] Bus. Roundtable v. S.E.C., 647 F.3d 1144, 1152 (D.C. Cir. 2011).

[75] See Stringer Press Release, supra note 60.

[76] See generally Lucian A. Bebchuk et al., Managerial Power and Rent Extraction in the Design of Executive Compensation, 69 U. Chi. L. Rev. 751, 788–89 (2002) (discussing the "camouflaging" of managerial rent extraction); Lucian A. Bebchuk & Christine Jolls, Managerial Value Diversion and Shareholder Wealth, 15 J.L. Econ. & Org. 487, 501 (1999) (showing that "within the standard principal-agent framework, permitting value-diversion imposes a cost on shareholders that may reduce ex ante share value").

[77] Board diversity has become a hot topic in academic corporate-governance circles, see, e.g., The Faulty Lounge, http://www.thefacultylounge.org/board-diversity/(last visited July 8, 2015), but empirical scholarship supporting the notion that board diversity matters for shareholder value is mixed at best, with several studies showing that gender diversity is negatively associated with share value, particularly when required or pressed by government mandate, see Kimberly D. Krawiec, What Does Corporate Boardroom Diversity Accomplish?, N.Y. Times (Room for Debate, Apr. 1, 2015), http://www.nytimes.com/roomfordebate/2015/04/01/the-effect-of-women-on-corporate-boards/what-does-corporate-boardroom-diversity-accomplish (citing studies); Stephen Bainbridge, Professorbainbridge.com (May 14, 2015), http://www.professorbainbridge.com/professorbainbridgecom/2015/05/gender-diversity-in-the-boardroom.html (citing studies). Although energy companies may face peculiar regulatory risks from government action to tackle climate change, such risks are rather obvious for energy and utility companies and their investors—and already disclosed, see Commission Guidance Regarding Disclosure Related to Climate Change, Exchange Act Release No. 34-61469, 75 Fed. Reg. 6290, 6291, 6296; John M. Broder, S.E.C. Adds Climate Risk to Disclosure List, N.Y. Times, Jan. 27, 2010, at B1. The risks that climate change itself may place on such companies' business models are too far in the future—and thus too discounted to present—to concern shareholders focused solely on share price.

[78] See Press Release, National Nurses United, U.S. Court of Appeals Issues Scathing Judgment against Big Hospital Chain, Ordering CHS to Repay Union Costs for "Willful" Failure to Bargain with RNs, http://www.commondreams.org/newswire/2015/05/11/us-court-appeals-issues-scathing-judgment-against-big-hospital-chain-ordering (last visited Sept. 11, 2015).

[79] See Kohl's Refuses to Hear from Workers Who Keep Its Stores Clean, Union Advocate (May 14, 2015), http://advocate.stpaulunions.org/2015/05/14/kohls-refuses-to-hear-from-workers-who-keep-its-stores-clean/ (last visited Sept. 11, 2015).

[80] See Andrew Edwards, Pension Costs Lead San Bernardino's Debt, [San Bernardino] Sun News (Aug. 10, 2012), available at http://www.sbsun.com/general-news/20120810/pension-costs-lead-san-bernardinos-debts (last visited Sept. 11, 2015).

[81] See id.

[82] See Steven Church & Romy Varghese, Calpers' Pension Hammer Forces "Unfair" Bond Ruling by Judge, Bloomberg Business (May 12, 2015), available at http://www.bloomberg.com/news/articles/2015-05-12/calpers-pension-hammer-forces-unfair-bond-ruling-by-judge (last visited Sept. 11, 2015).

[83] See Fight for $15, http://fightfor15.org/latest-news/ (last visited Sept. 11, 2015).

[84] See Nandita Bose, After Target Wage Hike, Labor Groups Turn to Drugstore Chains, Philly Voice (Mar. 21, 2015), available at http://www.phillyvoice.com/after-target-wage-hike-labor-groups-eye-drugstores/ (last visited Sept. 11, 2015).

[85] See Copland & O'Keefe Fall 2014, supra note 16, at 17–19 (discussing inefficiencies in shareholder-proposal voting market in context of proxy advisory firms' influence).

[86] Although markets are not perfectly efficient, they are sufficiently so that the Supreme Court has relied on the "efficient market hypothesis" in handling class action standards in federal securities litigation. See Basic v. Levinson, 485 U.S. 224 (1988).

[87] We selected a five-day window because some companies announce voting results on shareholder proposals on the date of their annual meeting, and others wait until they have filed a Form 8-K with the SEC days later.

[88] Two companies—Apache and Citigroup—were excluded from the analysis because their boards of directors recommended a vote for the proxy access shareholder proposal, thus eliminating any element of surprise at the annual meeting.

[89] The iShares Global Equity ETF, see https://www.ishares.com/us/products/239741/ishares-global-energy-etf (last visited Sept. 11, 2015).

[90] See CFA Institute, supra note 72.

[91] See White Statement, supra note 30.

[92] See Trinity Wall St., 792 F.3d 323.

[93] See Jonathan H. Adler, D.C. Circuit Voids SEC "Conflict Minerals" Policy on First Amendment Grounds (Again), Washington Post (Aug. 18, 2015), available at www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/18/d-c-circuit-voids-sec-conflict-minerals-policy-on-first-amendment-grounds-again/ (last visited Sept. 11, 2015).

[94] See Securities Exchange Act of 1934, supra note 1 at § 78c(f) ("Whenever pursuant to this title the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to

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

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

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

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

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

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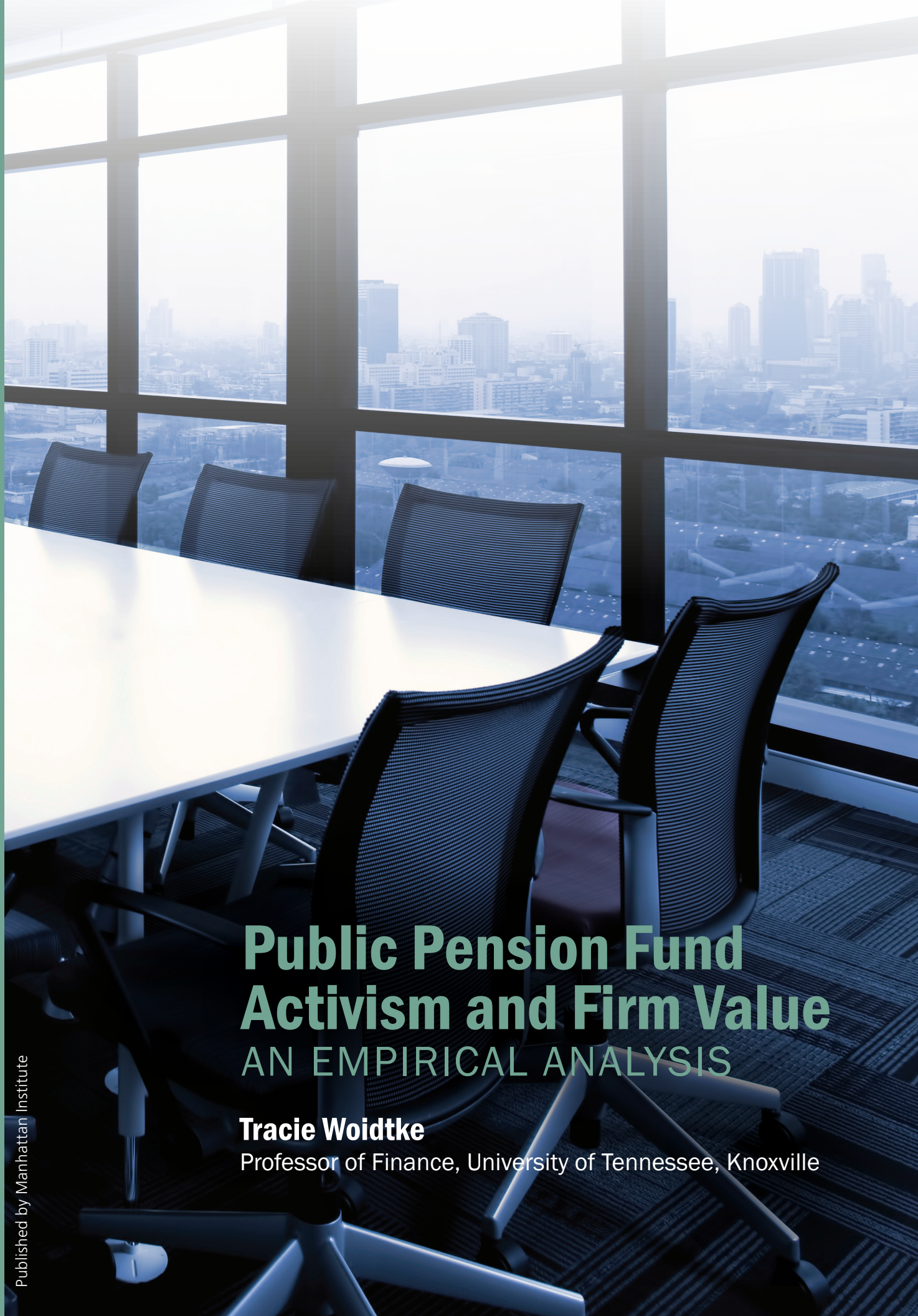

Public Pension Fund Activism and Firm Value

AN EMPIRICAL ANALYSIS

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Public Pension Fund Activism and Firm Value

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EXECUTIVE SUMMARY

This paper examines the relationship between public pension funds engaged in shareholder activism—specifically, that involving corporate-governance rules or social/policy concerns—and firm value during 2001–13: consistent with the author's previous research, the paper finds that public pension fund ownership is associated with lower firm value, as measured by Tobin's Q and industry-adjusted Q.

The paper further explores this relationship across two time subsets, 2001–07 and 2008–13; it examines two data samples, the Fortune 250 and S&P 500; and looks separately at the major state pension funds engaged in such activism—principally the California Public Employees Retirement System (CalPERS), California State Teachers Retirement System (CalSTRS), New York State Common Retirement System (NYSCR), and Florida State Board of Administration (FSBA). Key findings include:

1. **Ownership by public pension funds engaged in social-issue shareholder-proposal activism is negatively related to firm value.** This relationship is significant for the 2008–13 period—when the two large funds focused on social-issue activism, CalSTRS and the NYSCR, were engaged in shareholder-proposal activism—in both the Fortune 250 and S&P 500 samples.
2. **Ownership by NYSCR is negatively related to firm value during the period in which the fund was actively engaged in sponsoring shareholder proposals related to social issues.** This relationship is significant for 2008–13, at the 1 percent level, for both the Fortune 250 and S&P 500 firm samples, as well as for the overall 2001–13 period for the broader S&P 500 sample. There is no statistically significant relationship between NYSCR ownership and firm value in the earlier 2001–07 period, when the fund was not as active in sponsoring shareholder proposals. Overall, S&P 500 firms targeted by NYSCR with social-issue shareholder proposals subsequently had a 21 percent lower Tobin's Q and a 91 percent lower industry-adjusted Q than all other firm-years in the sample.
3. **There is no significant relationship between public pension fund ownership and firm value for funds engaging in shareholder-proposal activism focused on corporate governance rules.** For the full 2001–13 period, 2001–07 period, and 2008–13 period, there is no statistically significant relationship between firm value and ownership by public pension funds engaged in corporate-governance-related shareholder-proposal activism, in either the Fortune 250 or S&P 500 sample. Certain funds engaged in such activism—notably the FSBA and the Ohio pension funds—show significant positive relationships between their ownership and firm value for certain periods or samples.

These findings suggest that public pension funds' shareholder activism influences companies but that such influence is not generally associated with positive valuation effects; when influence is associated with social-issue activism, valuation effects tend to be negative. In contrast, private pension fund ownership—driven by the Teachers Insurance and Annuity Association–College Retirement Equities Fund (TIAA–CREF), which engages in strategies designed to influence corporate behavior in its portfolio—is associated with higher firm value, at least in some sample study periods.

These findings are also consistent with the hypothesis that performance-based compensation for administrators of private pension funds generally results in a convergence of their interests with other shareholders', whereas public pension fund administrators' actions may be motivated more by political or social influences than by firm performance, leading to a conflict of interest. Policymakers overseeing state and municipal pension plans need to consider carefully the shareholder-activism strategies employed by their funds.

INTRODUCTION

Many credit the increase in institutional shareholder activism during the 1990s, at least in part, to intense lobbying efforts by institutional investors to allow greater shareholder involvement in the proxy voting process (e.g., Eisenhofer and Bany 2013). For example, the U.S. Securities and Exchange Commission (SEC) initiated a comprehensive reexamination of the federal proxy regulations, which culminated in the 1992 proxy-rule amendments, after receiving a series of letters from some of the most activist institutional investors, spearheaded by the California Public Employees Retirement System (CalPERS) (Fisch 1994).

The aim of the expansive reforms was to increase the ability of investors to communicate with one another on how to respond to a proxy-issue proposal. Among others, the 1992 proxy reforms enabled activist investors to broadcast their voting positions on a website (CalPERS began to broadcast its voting positions on a new website), potentially enhancing their influence over shareholder voting and company management.

Several pension funds continue to be among the most active institutional investors by broadcasting their stance on proxy voting for certain issues, publishing focus lists, sponsoring proxy proposals, and supporting reforms that increase shareholders' power to influence company management (e.g., proxy access and say on pay). Even though public pension funds do not tend to face the same potential conflicts of interests stemming from either short-term investment horizons or business ties with their portfolio companies as other types of institutions do, they are frequently criticized for being influenced more by social and political issues than by shareholder wealth.

In its July 22, 2011 decision invalidating the SEC's proposed mandatory proxy-access rule, the U.S. Court of Appeals declared: "By ducking serious evaluation of the costs that could be imposed upon companies from use of the [proxy access] rule by shareholders representing special interests, particularly union and government pension funds, we think the [Securities and Exchange] Commission acted arbitrarily."

In an earlier study (Woidtke 2002), this author examined the potential influence that different institutional investors' incentive structures had over their portfolio companies during the early onset of institutional-investor activism (1989–93) by studying the valuation effects associated with the different incentive structures of public and private pension funds for a sample of Fortune 500 firms. In particular, the author tested whether other shareholders in a firm benefit from the relationship between a firm's management and certain institutional investors, when ownership in a firm by the group of institutions is used as a proxy for the institutions' influence with management.

The author found that firm value is positively related to ownership by private pension funds and negatively related to ownership by activist public pension funds after controlling for other determinants of ownership. However, the results suggested that not all public pension fund activism is associated with negative valuation effects. Instead, the results suggested that the actions of public pension funds that focus on social or "poor" corporate governance issues were associated with negative valuation effects during 1989–93.

The author concluded that the positive effect associated with private pension fund ownership is consistent with the larger, more performance-based compensation for administrators of private pension funds, resulting in a convergence of interests with other shareholders. The negative effect associated with the ownership of public pension funds that focus on social or "poor" corporate governance issues is consistent with the argument that these administrators' actions may be motivated more by political or social influences than by firm performance, leading to a conflict of interest.

This paper examines the valuation effects associated with the different incentive structures of public and private pension funds for a sample of firms, in both the Fortune 250 and S&P 500 Index, during a more recent period (2001–13). The study aims to see if the valuation effects associated with pension fund influence, measured through ownership, have altered as the regulatory environment has changed and institutional investor activism has evolved. This paper also takes a more granular look at specific shareholder-proposal activist strategies, drawn from the Manhattan Institute's ProxyMonitor.org database and other available information, as associated with sponsoring public pension funds.

Following Woidtke (2002), the paper uses a firm's industry-adjusted Tobin's Q—the ratio of the market value of a firm's assets to the book value of its assets—to measure the expected valuation effects from observable and unobservable

aspects of the relationships between pension funds and their portfolio firms. As with Woidtke (2002), the paper finds that industry-adjusted Q is negatively related to public pension fund ownership and positively related to private pension fund ownership during 2001–13.

However, interesting differences arise when different activist strategies—and how such strategies vary over time—are examined. The positive valuation effect for private pension fund ownership is driven by the ownership of TIAA–CREF, the most well-known private pension fund activist throughout the sample period. In contrast, the valuation effect for public pension fund ownership is not confined to a particular public pension fund during the entire period. Instead, the relation varies with public pension fund strategy over time.

The negative valuation effect in the more recent period (2008–13) is driven by ownership of public funds that sponsor social-issue proposals, especially the New York State Common Retirement System (NYSCR), and coincides with active sponsoring of social-issue proposals during this period. Ownership by these funds is not associated with negative valuation effects during the earlier period (2001–07) when they were not as active in sponsoring social–issue proposals.

Consistent with social–issue activism having negative valuation effects, Tobin's Q is 22 percent lower (1.42 vs. 1.83) and industry-adjusted Tobin's Q is 141 percent lower (-0.12 vs. 0.29) for companies targeted by NYSCR with a social-issue proposal than for other companies in the Fortune 250. These results are robust for companies in a larger dataset, the S&P 500, for which Tobin's Q is 21 percent lower (1.59 vs. 2.02) and industry-adjusted Tobin's Q is 91 percent lower (0.04 vs. 0.45) for companies targeted by NYSCR with a social-issue proposal than for other companies.

The negative valuation effect for public-pension fund ownership during the earlier period (2001–07) is less clear. Across the narrower Fortune 250 sample, the effect appears to be driven by the State of Wisconsin Investor Board (SWIB), which, despite being considered among the most active public pension funds in earlier studies, did not sponsor proxy proposals during this paper's sample period. However, SWIB's negative valuation effect is not statistically significant in the broader S&P 500 sample.

Conversely, the California State Teachers Retirement System (CalSTRS), which focuses its shareholder-proposal activism on social issues, has a directionally negative but statistically insignificant relationship with firm value in the narrower Fortune 250 sample—but a negative, significant relationship with firm value for the entire period of the broader S&P 500 sample. That negative relationship is only significant for the earlier period, when the fund was not sponsoring shareholder proposals.

There is no significant evidence of a negative valuation effect overall for ownership by public pension funds that sponsor corporate governance proposals (CalPERS and the Florida State Board of Administration (FSBA)). Overall, the results suggest that pension funds continue to influence companies, but pension fund influence is not always associated with positive valuation effects. In particular, negative valuation effects are found when influence is associated with social-issue activism.

I. RELATIVE FIRM VALUE

Assuming that financial markets are efficient and that a firm's market value is an unbiased estimate of the present value of its future cash flows, Tobin's Q is a measure of the contribution of the firm's intangible assets to its market value. Management's actions directly affect the value of intangible assets. Tobin's Q should therefore include any adjustments that the market has made to incorporate expected valuation effects associated with the relationship between institutional shareholders and their portfolio firms.[1]

In particular, a positive valuation effect would be incorporated if the market perceives that the objective function of an institution's administrator will result in a relationship that aligns management's incentives with those of other shareholders. On the other hand, if the objective function of an institution's administrator is perceived to result in a relationship that does not align incentives between managers and other shareholders, a negative valuation effect would be incorporated. Thus, a firm's Q less the median Q for its industry (industry-adjusted Q) provides a measure of the influence of private and public pension funds on the shareholder wealth of a firm, relative to its industry.

This measure avoids the problems of pinpointing when new information is released and of introducing a possible sample-selection bias from studying only firms that have been publicly targeted. Industry-adjusted Q will capture all valuation effects that are expected to result when pension funds are present in a firm's ownership structure. Industry-

adjusted Q is calculated as a firm's Q, less the median Q for firms with the same two-digit SIC code. Financial data are obtained from Compustat.

II. PENSION FUND OWNERSHIP

To measure the influence of pension fund ownership on industry-adjusted Q, this paper uses lagged pension fund ownership—calculated as the number of shares held by a pension fund, as a proportion of shares outstanding at the end of the quarter before industry-adjusted Q is calculated. The numbers of shares owned in a firm by pension funds are collected from Thomson 13f ownership data.[2]

One data limitation is that ownership data are not available for all pension funds. For example, pension funds managing less than $100 million in assets and pension funds delegating investment decisions to outside money managers are not required to disclose their holdings. However, to the extent that pension funds with 13f filings are the largest pension funds that are most likely to monitor corporate behavior, most of the pension funds most likely to affect shareholder value are included in this paper.

Likewise, ownership data are available for most of the pension funds that have been documented as having relations with portfolio firms' valuations in earlier studies on pension fund activism—public (CalPERS, CalSTRS, FSBA, NYSCR, and SWIB) and private (CREF).[3] One notable group of public pension funds not included in this paper are those associated with New York City public employees, which are among the most-active sponsors of shareholder proposals and collectively among the five-largest state or municipal pension plans. Because these funds do not file 13f reports, their ownership data are unavailable.

Average ownership in this paper's sample by the group of pension funds with 13f filings is 3.75 percent for the Fortune 250 and 3.98 percent for the S&P 500. When classifying pension fund ownership according to whether funds are private or public, average ownership is 1.27 percent for private pension funds and 2.48 percent for public pension funds for the Fortune 250; and 1.45 percent for private pension funds and 2.53 percent for public pension funds for the S&P 500. Average ownership by TIAA–CREF represents approximately 60 percent of private pension fund ownership for the Fortune 250 and 53 percent of private pension fund ownership for the S&P 500.

Average ownership by public pension funds that sponsor proxy proposals during this paper's sample period is approximately 44 percent of public pension fund ownership for the Fortune 250 and 43 percent of private pension fund ownership for the S&P 500. CalPERS (average ownership: 0.35 percent for the Fortune 250 sample; 0.34 percent for the S&P 500 sample) was the only public fund to actively sponsor corporate-governance proxy proposals throughout the 2001–13 period.

FSBA (average ownership: 0.23 percent for both the Fortune 250 and S&P 500 samples) also sponsored corporate-governance proxy proposals, but their sponsorship was confined to the latter half of the 2001–13 period. CalSTRS (average ownership: 0.12 percent for the Fortune 250 sample; 0.11 percent for the S&P 500 sample) and NYSCR (average ownership: 0.38 percent for the Fortune 250 sample; 0.40 percent for the S&P 500 sample) were not active sponsors during the first half of the 2001–13 period, but became active sponsoring social issue proposals during the second half of the period.

SWIB (average ownership: 0.09 percent for the Fortune 250 sample; 0.10 percent for the S&P 500 sample) was not active sponsoring proxy proposals at any point during the 2001–13 period, though it was during earlier periods. Finally, Ohio only sponsored a corporate governance proposal during the latter part of the period, and only for the S&P 500 sample.

III. EMPIRICAL ANALYSIS

To measure the valuation effects of pension fund influence, this paper regresses Tobin's Q and industry-adjusted Q on lagged ownership by public pension funds and private pension funds, controlling for other factors found to influence industry-adjusted Q in Woidtke (2002). The paper uses robust standard errors clustered at the firm level to compute statistical significance. Specifications (1) and (4) present results for the full sample period; specifications (2) and (5) present results for the 2001–07 early period; and specifications (3) and (6) present results for the 2008–13 later period (**Figure 1** and **Figure 2**).

Figure 1. Pooled Regression Analysis of Tobin's Q and Industry-Adjusted Q on Lagged Ownership by U.S. Public Pension Funds and Private Pension Funds: Fortune 250*

Sample Period:	2001–2013	2001–2007	2008–2013	2001–13	2001–07	2008–13
	Tobin's Q	Tobin's Q	Tobin's Q	Industry-Adjusted Q	Industry-Adjusted Q	Industry-Adjusted Q
Constant	6.16*** (0.000)	7.06*** (0.000)	4.96*** (0.000)	3.97*** (0.000)	4.65*** (0.000)	3.03*** (0.000)
Lagged Ownership by U.S. Public Pension Funds	-13.51*** (0.009)	-13.13* (0.061)	-13.12** (0.015)	-12.91** (0.025)	-14.66** (0.046)	-8.73 (0.193)
Lagged Ownership by Private Pension Funds	19.77*** (0.001)	16.90** (0.012)	20.38*** (0.004)	12.40** (0.026)	11.31* (0.063)	11.34 (0.112)
Lagged Ownership by Other Institutions	-1.41*** (0.000)	-1.56*** (0.000)	-1.22*** (0.000)	-1.03*** (0.003)	-1.15*** (0.009)	-0.86*** (0.006)
Leverage	-0.98*** (0.004)	-1.62*** (0.000)	-0.34 (0.388)	-1.40*** (0.000)	-1.90*** (0.000)	-0.97** (0.014)
R&D Expense Scaled by Assets	11.32*** (0.000)	13.47*** (0.000)	7.19*** (0.000)	7.20*** (0.000)	9.63*** (0.000)	2.26 (0.310)
Missing R&D Indicator Variable	-0.07 (0.353)	-0.14 (0.113)	-0.03 (0.782)	0.19** (0.033)	0.14 (0.146)	0.19* (0.061)
Advertising Expense Scaled by Assets	8.10*** (0.001)	9.59*** (0.002)	6.10** (0.034)	6.27*** (0.005)	8.33*** (0.007)	3.80 (0.120)
Missing Advertising Indicator Variable	-0.20* (0.060)	-0.19 (0.157)	-0.23** (0.029)	-0.23** (0.050)	-0.22 (0.141)	-0.24** (0.026)
Member of S&P 500 Index	0.16 (0.234)	0.10 (0.587)	0.29* (0.053)	0.18 (0.297)	0.07 (0.744)	0.39** (0.034)
Natural Log of Assets	-0.31*** (0.000)	-0.37*** (0.000)	-0.27*** (0.000)	-0.25*** (0.000)	-0.29*** (0.000)	-0.22*** (0.000)
Prior Year Positive Income Indicator Variable	0.04 (0.606)	0.00 (0.990)	0.09 (0.142)	0.03 (0.748)	-0.02 (0.909)	0.09 (0.221)
Estimated Stock Transaction Costs	-0.71*** (0.000)	-1.01*** (0.000)	-0.57*** (0.000)	-0.47*** (0.000)	-0.65*** (0.009)	-0.38*** (0.001)
Insider Ownership	0.03* (0.091)	0.04* (0.086)	0.02 (0.243)	0.03** (0.037)	0.05** (0.037)	0.03 (0.130)
Insider Ownership Squared	-0.00** (0.026)	-0.00** (0.041)	-0.00* (0.082)	-0.00** (0.013)	-0.00** (0.016)	-0.00* (0.070)
Year Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes
Observations	2326	1153	1173	2326	1153	1173
Adjusted R-squared	0.50	0.54	0.44	0.33	0.40	0.25

*The sample contains 2,326 observations for a sample of Fortune 250 firms during 2001–13. Tobin's Q proxies for firm value and is equal to a firm's market value of assets scaled by its book value of assets, where market value of assets equal book value of assets less book value of equity plus market value of equity. Book values are taken at fiscal year-end and market values are taken at calendar year-end. Industry-adjusted Q controls proxies for relative firm value in a given year and is equal to a firm's Tobin's Q less the median Tobin's Q for all firms in the same two-digit SIC code. Lagged ownership by U.S. public pension funds equal the aggregate number of shares held by U.S. public pension funds which file 13f reports, divided by the total number of shares outstanding—all measured for the most recent quarter with data available prior to the calendar year-end. Lagged ownership by private pension funds equal the aggregate number of shares held by CREF and corporate pension funds which file 13f reports, divided by the total number of shares outstanding—all measured for the most recent quarter with data available prior to the calendar year-end. Robust standard errors are clustered at the firm level. The corresponding p-values are given in parentheses. Statistical significance at the 1 percent, 5 percent, and 10 percent level is indicated by ***, **, and *, respectively.

A negative valuation effect is found for public pension fund ownership and a positive valuation effect is found for private pension fund ownership. The negative valuation effect for public pension fund ownership is statistically significant for the entire sample period and early sample period, for Tobin's Q and industry-adjusted Q—and for both the Fortune 250 and the S&P 500 samples. However, the results are only statistically significant for Tobin's Q in the later period. The positive valuation for private pension fund ownership is only statistically significant for both samples for the 2001-07 early period.

The paper next measures valuation effects associated with public pension fund ownership based on whether the public

Figure 2. Pooled Regression Analysis of Tobin's Q and Industry-Adjusted Q on Lagged Ownership by U.S. Public Pension Funds and Private Pension Funds: S&P 500*

Sample Period:	2001–2013	2001–2007	2008–2013	2001–13	2001–07	2008–13
	Tobin's Q	Tobin's Q	Tobin's Q	Industry-Adjusted Q	Industry-Adjusted Q	Industry-Adjusted Q
Constant	6.59*** (0.000)	8.02*** (0.000)	5.23*** (0.000)	4.30*** (0.000)	5.64*** (0.000)	3.23*** (0.000)
Lagged Ownership by U.S. Public Pension Funds	-16.02*** (0.005)	-18.93*** (0.006)	-15.38** (0.024)	-10.10* (0.072)	-13.24* (0.053)	-9.62 (0.162)
Lagged Ownership by Private Pension Funds	1.03 (0.548)	9.83** (0.021)	-0.01 (0.987)	1.62 (0.421)	10.03*** (0.010)	0.69 (0.548)
Lagged Ownership by Other Institutions	-0.30 (0.199)	-0.77** (0.011)	-0.02 (0.944)	-0.22 (0.330)	-0.76** (0.013)	0.13 (0.590)
Leverage	-0.85*** (0.003)	-1.66*** (0.000)	-0.37 (0.253)	-0.93*** (0.001)	-1.62*** (0.000)	-0.53* (0.086)
R&D Expense Scaled by Assets	7.87*** (0.000)	9.76*** (0.000)	5.92*** (0.000)	5.13*** (0.000)	6.75*** (0.000)	3.45** (0.013)
Missing R&D Indicator Variable	-0.02 (0.850)	0.01 (0.944)	-0.02 (0.774)	0.23*** (0.006)	0.28** (0.041)	0.21*** (0.009)
Advertising Expense Scaled by Assets	5.67*** (0.002)	4.23** (0.021)	6.99*** (0.001)	3.33* (0.057)	2.01 (0.239)	4.57** (0.038)
Missing Advertising Indicator Variable	-0.20** (0.016)	-0.17* (0.077)	-0.20** (0.027)	-0.27*** (0.001)	-0.28*** (0.005)	-0.25*** (0.005)
Natural Log of Assets	-0.40*** (0.000)	-0.49*** (0.000)	-0.34*** (0.000)	-0.33*** (0.000)	-0.42*** (0.000)	-0.28*** (0.000)
Prior Year Positive Income Indicator Variable	0.24*** (0.000)	0.19* (0.079)	0.21*** (0.003)	0.21*** (0.001)	0.20** (0.042)	0.15** (0.021)
Estimated Stock Transaction Costs	-0.65*** (0.000)	-1.09*** (0.000)	-0.50*** (0.000)	-0.49*** (0.000)	-0.85*** (0.000)	-0.36*** (0.001)
Insider Ownership	-0.34 (0.624)	-0.80 (0.380)	-0.28 (0.737)	0.28 (0.699)	-0.29 (0.738)	0.47 (0.608)
Insider Ownership Squared	0.16 (0.763)	0.53 (0.392)	0.18 (0.799)	-0.36 (0.535)	-0.01 (0.984)	-0.39 (0.633)
Year Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes
Observations	4672	2045	2627	4672	2045	2627
Adjusted R-squared	0.40	0.42	0.41	0.28	0.31	0.27

*The sample contains 4,672 observations for a sample of S&P 500 firms during 2001–13. Tobin's Q proxies for firm value and is equal to a firm's market value of assets scaled by its book value of assets, where market value of assets equal book value of assets less book value of equity plus market value of equity. Book values are taken at fiscal year-end and market values are taken at calendar year-end. Industry-adjusted Q controls proxies for relative firm value in a given year and is equal to a firm's Tobin's Q less the median Tobin's Q for all firms in the same two-digit SIC code. Lagged ownership by U.S. public pension funds equal the aggregate number of shares held by U.S. public pension funds who file 13f reports, divided by the total number of shares outstanding—all measured for the most recent quarter with data available prior to the calendar year-end. Lagged ownership by private pension funds equal the aggregate number of shares held by CREF and corporate pension funds who file 13f reports, divided by the total number of shares outstanding—all measured for the most recent quarter with data available prior to the calendar year-end. Robust standard errors are clustered at the firm level. The corresponding p-values are given in parentheses. Statistical significance at the 1 percent, 5 percent, and 10 percent level is indicated by ***, **, and *, respectively.

pension fund sponsors a proxy proposal during 2001–13 and whether it tends to sponsor proposals on corporate governance or social issues. CalPERS and FSBA sponsor proposals principally or only on corporate governance issues. CalSTRS and NYSCR sponsor proposals mostly on social issues.

The first three specifications in **Figure 3** and **Figure 4** present results for ownership by public funds, based on corporate governance proposal sponsorship; the last three specifications present results for ownership by public funds based on social issue proposal sponsorship—for the Fortune 250 and S&P 500. No significant valuation effect is found for ownership by public pension funds that sponsor corporate governance proposals during any period.

Figure 3. Pooled Regression Analysis of Industry-Adjusted Q on Lagged Ownership by U.S. Public Pension Funds According to Focus of Proxy Proposal Sponsorship and Private Pension Funds: Fortune 250*

Public Fund Activism Focus	Corporate Governance Focus			Social Issues Focus		
Sample Period:	**2001–2013**	**2001–2007**	**2008–2013**	**2001–13**	**2001–07**	**2008–13**
	Industry-Adjusted Q	Industry-Adjusted Q	Industry-Adjusted Q	Industry-Adjusted Q	Industry-Adjusted Q	Industry-Adjusted Q
Constant	3.87*** (0.000)	4.52*** (0.000)	3.04*** (0.000)	3.99*** (0.000)	4.77*** (0.000)	3.14*** (0.000)
Lagged Ownership By Public Pension Fund Corporate Governance Proposal Sponsors	22.79 (0.351)	26.84 (0.346)	-13.30 (0.738)			
Lagged Ownership by Public Pension Fund Non-Corporate Governance Proposal Sponsors	-16.54** (0.012)	-18.73** (0.023)	-8.18 (0.303)			
Lagged Ownership by Public Pension Fund Social Issue Proposal Sponsors				-0.24 (0.982)	20.86 (0.104)	-80.79** (0.010)
Lagged Ownership by Public Pension Fund Non-Social Issue Sponsors				-16.72** (0.017)	-28.13*** (0.003)	1.09 (0.888)
Lagged Ownership by Private Pension Funds	11.82** (0.035)	10.37* (0.090)	11.33 (0.112)	12.76** (0.023)	12.41** (0.045)	10.72 (0.129)
Lagged Ownership by Other Institutions	-1.05*** (0.002)	-1.16*** (0.008)	-0.86*** (0.007)	-1.05*** (0.002)	-1.19*** (0.007)	-0.78** (0.012)
Leverage	-1.39*** (0.000)	-1.88*** (0.000)	-0.98** (0.014)	-1.41*** (0.000)	-1.94*** (0.000)	-0.97** (0.014)
R&D Expense Scaled by Assets	7.21*** (0.000)	9.60*** (0.000)	2.25 (0.312)	7.23*** (0.000)	9.76*** (0.000)	2.24 (0.314)
Missing R&D Indicator Variable	0.18** (0.036)	0.13 (0.159)	0.19* (0.060)	0.19** (0.033)	0.14 (0.119)	0.20** (0.047)
Advertising Expense Scaled by Assets	6.11*** (0.007)	8.11*** (0.009)	3.81 (0.120)	6.33*** (0.005)	8.41*** (0.006)	3.55 (0.153)
Missing Advertising Indicator Variable	-0.23* (0.051)	-0.21 (0.154)	-0.24** (0.026)	-0.23* (0.050)	-0.22 (0.140)	-0.24** (0.024)
Member of S&P 500 Index	0.15 (0.384)	0.03 (0.897)	0.39** (0.032)	0.18 (0.292)	0.06 (0.758)	0.38** (0.032)
Natural Log of Assets	-0.26*** (0.000)	-0.29*** (0.000)	-0.22*** (0.000)	-0.25*** (0.000)	-0.29*** (0.000)	-0.22*** (0.000)
Prior Year Positive Income Indicator Variable	0.02 (0.774)	-0.02 (0.865)	0.09 (0.224)	0.02 (0.766)	-0.02 (0.881)	0.10 (0.165)
Estimated Stock Transaction Costs	-0.49*** (0.000)	-0.66*** (0.009)	-0.37*** (0.001)	-0.47*** (0.000)	-0.70*** (0.006)	-0.37*** (0.001)
Insider Ownership	0.04** (0.032)	0.05** (0.031)	0.03 (0.130)	0.03** (0.036)	0.05** (0.034)	0.03 (0.140)
Insider Ownership Squared	-0.00** (0.011)	-0.00** (0.013)	-0.00* (0.070)	-0.00** (0.013)	-0.00** (0.014)	-0.00* (0.068)
Year Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes
Observations	2326	1153	1173	2326	1153	1173
Adjusted R-squared	0.33	0.40	0.25	0.33	0.40	0.25

*The sample contains 2,326 observations for a sample of Fortune 250 firms during 2001–13. Tobin's Q proxies for firm value and is equal to a firm's market value of assets scaled by its book value of assets, where market value of assets equal book value of assets less book value of equity plus market value of equity. Book values are taken at fiscal year-end and market values are taken at calendar year-end. Industry-adjusted Q controls proxies for relative firm value in a given year and is equal to a firm's Tobin's Q less the median Tobin's Q for all firms in the same two-digit SIC code. Lagged ownership by U.S. public pension funds equal the aggregate number of shares held by U.S. public pension funds which file 13f reports, divided by the total number of shares outstanding—all measured for the most recent quarter with data available prior to the calendar year-end. Public pension fund Corporate Governance proposal sponsors are defined as public funds that only sponsor corporate governance proposals at a sample firm during 2001–13 and include CalPERS and FSBA. Public pension fund Social Issue proposal sponsors are defined as public funds that primarily sponsor social issue proposals at a sample firm during 2001–13 and include CalSTRS and NYSCR. Lagged ownership by private pension funds equal the aggregate number of shares held by CREF and corporate pension funds which file 13f reports, divided by the total number of shares outstanding—all measured for the most recent quarter with data available prior to the calendar year-end. Robust standard errors are clustered at the firm level. The corresponding p-values are given in parentheses. Statistical significance at the 1 percent, 5 percent, and 10 percent level is indicated by ***, **, and *, respectively.

Figure 4. Pooled Regression Analysis of Industry-Adjusted Q on Lagged Ownership by U.S. Public Pension Funds According to Focus of Proxy Proposal Sponsorship and Private Pension Funds: S&P 500*

Public Fund Activism Focus	Corporate Governance Focus			Social Issues Focus		
Sample Period:	**2001–2013**	**2001–2007**	**2008–2013**	**2001–13**	**2001–07**	**2008–13**
	Industry-Adjusted Q	Industry-Adjusted Q	Industry-Adjusted Q	Industry-Adjusted Q	Industry-Adjusted Q	Industry-Adjusted Q
Constant	4.19*** (0.000)	5.42*** (0.000)	3.30*** (0.000)	4.32*** (0.000)	5.63*** (0.000)	3.32*** (0.000)
Lagged Ownership By Public Pension Fund Corporate Governance Proposal Sponsors	16.62 (0.399)	32.40 (0.186)	-39.17 (0.210)			
Lagged Ownership by Public Pension Fund Non-Corporate Governance Proposal Sponsors	-13.83** (0.033)	-20.82** (0.015)	-6.47 (0.369)			
Lagged Ownership by Public Pension Fund Social Issue Proposal Sponsors				-45.51*** (0.005)	-18.27 (0.310)	-92.05*** (0.000)
Lagged Ownership by Public Pension Fund Non-Social Issue Sponsors				-4.03 (0.468)	-12.07 (0.105)	-0.38 (0.957)
Lagged Ownership by Private Pension Funds	1.74 (0.399)	10.85*** (0.005)	0.61 (0.594)	1.49 (0.437)	9.99** (0.010)	0.43 (0.664)
Lagged Ownership by Other Institutions	-0.23 (0.314)	-0.74** (0.015)	0.16 (0.524)	-0.17 (0.476)	-0.75** (0.016)	0.27 (0.282)
Leverage	-0.92*** (0.001)	-1.55*** (0.000)	-0.53* (0.082)	-0.96*** (0.000)	-1.62*** (0.000)	-0.57* (0.061)
R&D Expense Scaled by Assets	5.13*** (0.000)	6.69*** (0.000)	3.41** (0.014)	5.17*** (0.000)	6.76*** (0.000)	3.50** (0.011)
Missing R&D Indicator Variable	0.23*** (0.007)	0.27** (0.044)	0.21*** (0.009)	0.24*** (0.005)	0.28** (0.041)	0.23*** (0.005)
Advertising Expense Scaled by Assets	3.17* (0.075)	1.51 (0.407)	4.66** (0.032)	3.36* (0.053)	2.01 (0.238)	4.60** (0.031)
Missing Advertising Indicator Variable	-0.27*** (0.001)	-0.28*** (0.005)	-0.25*** (0.005)	-0.27*** (0.001)	-0.28*** (0.005)	-0.25*** (0.004)
Natural Log of Assets	-0.33*** (0.000)	-0.42*** (0.000)	-0.28*** (0.000)	-0.34*** (0.000)	-0.42*** (0.000)	-0.28*** (0.000)
Prior Year Positive Income Indicator Variable	0.21*** (0.001)	0.19** (0.050)	0.15** (0.023)	0.21*** (0.000)	0.20** (0.042)	0.17*** (0.010)
Estimated Stock Transaction Costs	-0.49*** (0.000)	-0.84*** (0.000)	-0.36*** (0.001)	-0.47*** (0.000)	-0.84*** (0.000)	-0.35*** (0.001)
Insider Ownership	0.32 (0.658)	-0.18 (0.831)	0.43 (0.638)	0.20 (0.779)	-0.30 (0.734)	0.20 (0.833)
Insider Ownership Squared	-0.38 (0.518)	-0.07 (0.910)	-0.38 (0.647)	-0.33 (0.581)	-0.02 (0.978)	-0.18 (0.825)
Year Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes
Observations	4672	2045	2627	4672	2045	2627
Adjusted R-squared	0.28	0.31	0.27	0.28	0.31	0.27

*The sample contains 4,672 observations for a sample of S&P 500 firms during 2001–13. Tobin's Q proxies for firm value and is equal to a firm's market value of assets scaled by its book value of assets, where market value of assets equal book value of assets less book value of equity plus market value of equity. Book values are taken at fiscal year-end and market values are taken at calendar year-end. Industry-adjusted Q controls proxies for relative firm value in a given year and is equal to a firm's Tobin's Q less the median Tobin's Q for all firms in the same two-digit SIC code. Lagged ownership by U.S. public pension funds equal the aggregate number of shares held by U.S. public pension funds who file 13f reports, divided by the total number of shares outstanding—all measured for the most recent quarter with data available prior to the calendar year-end. Public pension fund Corporate Governance proposal sponsors are defined as public funds that only sponsor corporate governance proposals at a sample firm during 2001–13 and include CalPERS and FSBA. Public pension fund Social Issue proposal sponsors are defined as public funds that primarily sponsor social issue proposals at a sample firm during 2001–13 and include CalSTRS and NYSCR. Lagged ownership by private pension funds equal the aggregate number of shares held by CREF and corporate pension funds who file 13f reports, divided by the total number of shares outstanding—all measured for the most recent quarter with data available prior to the calendar year-end. Robust standard errors are clustered at the firm level. The corresponding p-values are given in parentheses. Statistical significance at the 1 percent, 5 percent, and 10 percent level is indicated by ***, **, and *, respectively.

For the narrower Fortune 250 sample, ownership by public pension funds that sponsor social–issue proposals has a negative valuation effect only during the later sample period (2008–13), when CalSTRS and NYSCR actively engaged in sponsoring social issue proposals. In the broader S&P 500 sample, ownership by public pension funds that sponsor social-issue proposals has a negative valuation effect during the entire sample period and the later period—significant at the 1 percent level.

No significant valuation effect is found for aggregate ownership by these funds during the early period when they are not actively engaged in sponsoring social issue proposals. The insignificant valuation effects for ownership by public pension funds that sponsor corporate governance or social issue proposals during the early period indicates that the significant negative valuation effect during this period is driven by ownership of public pension funds that do not sponsor a proxy proposal.

The paper further breaks down ownership for individual pension funds that have been classified as activist funds, whether through sponsoring proxy proposals or some other form of activism, in previous research (**Figure 5** and **Figure 6**). When examining ownership at the individual fund level, the paper continues to find no significant valuation effect for ownership by CalPERS, but finds some evidence of a positive valuation effect for ownership by FSBA. The paper finds no significant effect for ownership by CalSTRS in the Fortune 250 sample, but a significant negative valuation for CalSTRS in the broader S&P 500 sample—for the overall sample period and for the earlier period when CalSTRS did not actively sponsor shareholder proposals.

Figure 5. Pooled Regression Analysis of Industry-Adjusted Q on Lagged Ownership by Individual Activist U.S. Pension Funds and Corporate Pension Funds: Fortune 250*

Sample Period:	**2001–2013**	**2001–2007**	**2008–2013**
	Industry-Adjusted Q	Industry-Adjusted Q	Industry-Adjusted Q
Constant	3.69*** (0.000)	4.35*** (0.000)	2.87*** (0.000)
Public Funds – Corporate Governance Focus			
Lagged Ownership by CalPERS	-13.38 (0.628)	-25.84 (0.424)	-4.70 (0.905)
Lagged Ownership by FSBA	145.39* (0.080)	144.96* (0.097)	171.90 (0.247)
Public Funds – Social Issues Focus			
Lagged Ownership by CalSTRS	-10.21 (0.432)	-6.39 (0.631)	-221.16 (0.307)
Lagged Ownership by NYSCR	-18.99 (0.307)	10.83 (0.614)	-104.28*** (0.007)
Public Funds – Other Focus			
Lagged Ownership by SWIB	-48.71** (0.027)	-70.36*** (0.005)	-5.61 (0.912)
Private Funds			
Lagged Ownership by CREF	16.82** (0.021)	13.58 (0.130)	21.95** (0.014)
Lagged Ownership by Corporate Pension Funds	3.67 (0.653)	3.66 (0.701)	0.57 (0.954)
Lagged Ownership by Other Institutions	-1.15*** (0.002)	-1.41*** (0.003)	-0.79** (0.011)
Leverage	-1.41*** (0.000)	-1.90*** (0.000)	-0.99** (0.012)
R&D Expense Scaled by Assets	7.23*** (0.000)	9.80*** (0.000)	2.30 (0.300)
Missing R&D Indicator Variable	0.17* (0.052)	0.11 (0.230)	0.20** (0.045)
Advertising Expense Scaled by Assets	6.37*** (0.006)	8.86*** (0.006)	3.67 (0.132)
Missing Advertising Indicator Variable	-0.22* (0.056)	-0.19 (0.195)	-0.23** (0.029)
Member of S&P 500 Index	0.19 (0.267)	0.11 (0.572)	0.33** (0.046)
Natural Log of Assets	-0.26*** (0.000)	-0.30*** (0.000)	-0.22*** (0.000)
Prior Year Positive Income Indicator Variable	0.03 (0.693)	-0.01 (0.971)	0.10 (0.141)
Estimated Stock Transaction Costs	-0.46*** (0.001)	-0.67*** (0.009)	-0.36*** (0.002)
Insider Ownership	0.04** (0.028)	0.05** (0.024)	0.03 (0.127)
Insider Ownership Squared	-0.00** (0.014)	-0.00*** (0.010)	-0.00* (0.080)
Year Fixed Effects	Yes	Yes	Yes
Observations Adjusted R-squared	2326 0.33	1153 0.40	1173 0.26

Figure 6. Pooled Regression Analysis of Industry-Adjusted Q on Lagged Ownership by Individual Activist U.S. Pension Funds and Corporate Pension Funds: S&P 500*

Sample Period:	2001–2013	2001–2007	2008–2013	2001–13	2001–07	2008–13
	Industry-Adjusted Q	Industry-Adjusted Q	Industry-Adjusted Q	Industry-Adjusted Q	Industry-Adjusted Q	Industry-Adjusted Q
Constant	4.22*** (0.000)	5.45*** (0.000)	3.24*** (0.000)	4.22*** (0.000)	5.42*** (0.000)	3.28*** (0.000)
Public Funds – Corporate Governance Focus						
Lagged Ownership by CalPERS	-7.48 (0.733)	-16.39 (0.562)	-49.69 (0.116)	-5.73 (0.794)	-11.58 (0.683)	-51.92 (0.101)
Lagged Ownership by FSBA	108.98** (0.030)	98.10** (0.042)	157.71 (0.116)	90.72* (0.072)	78.48 (0.114)	141.02 (0.160)
Lagged Ownership by Ohio				25.10** (0.043)	27.32 (0.258)	24.18** (0.046)
Public Funds – Social Issues Focus						
Lagged Ownership by CalSTRS	-52.98*** (0.004)	-49.01** (0.017)	-60.75 (0.662)	-55.43*** (0.003)	-52.08** (0.013)	-55.38 (0.693)
Lagged Ownership by NYSCR	-68.07*** (0.003)	-26.15 (0.381)	-109.51*** (0.000)	-71.71*** (0.002)	-29.62 (0.318)	-113.96*** (0.000)
Public Funds – Other Focus						
Lagged Ownership by SWIB	-22.24 (0.304)	-31.72 (0.382)	-8.22 (0.752)	-22.21 (0.305)	-31.84 (0.379)	-7.97 (0.760)
Private Funds						
Lagged Ownership by CREF	20.03*** (0.001)	30.23*** (0.001)	10.36 (0.156)	19.06*** (0.002)	29.62*** (0.001)	9.17 (0.203)
Lagged Ownership by Corporate Pension Funds	0.43 (0.689)	2.28 (0.552)	0.20 (0.782)	0.12 (0.895)	1.12 (0.776)	-0.04 (0.941)
Lagged Ownership by Other Institutions	-0.34 (0.145)	-0.93*** (0.003)	0.15 (0.559)	-0.37 (0.116)	-0.96*** (0.002)	0.12 (0.642)
Leverage	-0.97*** (0.000)	-1.56*** (0.000)	-0.60** (0.046)	-0.98*** (0.000)	-1.56*** (0.000)	-0.61** (0.043)
R&D Expense Scaled by Assets	5.02*** (0.000)	6.57*** (0.000)	3.29** (0.018)	5.05*** (0.000)	6.54*** (0.000)	3.35** (0.016)
Missing R&D Indicator Variable	0.25*** (0.004)	0.28* (0.051)	0.22*** (0.004)	0.26*** (0.003)	0.28** (0.050)	0.24*** (0.002)
Advertising Expense Scaled by Assets	3.04* (0.096)	1.66 (0.370)	4.40** (0.043)	3.09* (0.089)	1.64 (0.377)	4.46** (0.038)
Missing Advertising Indicator Variable	-0.27*** (0.001)	-0.27*** (0.006)	-0.25*** (0.004)	-0.27*** (0.001)	-0.27*** (0.006)	-0.25*** (0.003)
Natural Log of Assets	-0.35*** (0.000)	-0.44*** (0.000)	-0.29*** (0.000)	-0.35*** (0.000)	-0.44*** (0.000)	-0.29*** (0.000)
Prior Year Positive Income Indicator Variable	0.20*** (0.001)	0.19** (0.048)	0.16** (0.016)	0.20*** (0.001)	0.19* (0.051)	0.16** (0.015)
Estimated Stock Transaction Costs	-0.48*** (0.000)	-0.85*** (0.000)	-0.34*** (0.001)	-0.48*** (0.000)	-0.85*** (0.000)	-0.34*** (0.001)
Insider Ownership	0.44 (0.533)	0.02 (0.978)	0.44 (0.634)	0.37 (0.600)	0.01 (0.994)	0.34 (0.712)
Insider Ownership Squared	-0.54 (0.365)	-0.38 (0.531)	-0.35 (0.667)	-0.49 (0.415)	-0.36 (0.554)	-0.28 (0.733)
Year Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes
Observations	4672	2045	2627	4672	2045	2627
Adjusted R-squared	0.28	0.31	0.28	0.28	0.31	0.28

Figure 5. Footnote

*The sample contains 2,326 observations for a sample of Fortune 250 firms during 2001–13 period. Tobin's Q proxies for firm value and is equal to a firm's market value of assets scaled by its book value of assets, where market value of assets equal book value of assets less book value of equity plus market value of equity. Book values are taken at fiscal year-end and market values are taken at calendar year-end. Industry-adjusted Q controls proxies for relative firm value in a given year and is equal to a firm's Tobin's Q less the median Tobin's Q for all firms in the same two-digit SIC code. Lagged ownership by U.S. public pension funds equal the aggregate number of shares held by U.S. public pension funds which file 13f reports, divided by the total number of shares outstanding—all measured for the most recent quarter with data available prior to the calendar year-end. Lagged ownership by private pension funds equal the aggregate number of shares held by CREF and corporate pension funds which file 13f reports divided by the total number of shares outstanding—all measured for the most recent quarter with data available prior to the calendar year-end. Robust standard errors are clustered at the firm level. The corresponding p-values are given in parentheses. Statistical significance at the 1 percent, 5 percent, and 10 percent level is indicated by ***, **, and *, respectively.

Figure 6. Footnote

*The sample contains 4,672 observations for a sample of S&P 500 firms during 2001–13. Tobin's Q proxies for firm value and is equal to a firm's market value of assets scaled by its book value of assets, where market value of assets equal book value of assets less book value of equity plus market value of equity. Book values are taken at fiscal year-end and market values are taken at calendar year-end. Industry-adjusted Q controls proxies for relative firm value in a given year and is equal to a firm's Tobin's Q less the median Tobin's Q for all firms in the same two-digit SIC code. Lagged ownership by U.S. public pension funds equal the aggregate number of shares held by U.S. public pension funds which file 13f reports, divided by the total number of shares outstanding—all measured for the most recent quarter with data available prior to the calendar year-end. Lagged ownership by private pension funds equal the aggregate number of shares held by CREF and corporate pension funds which file 13f reports, divided by the total number of shares outstanding—all measured for the most recent quarter with data available prior to the calendar year-end. Robust standard errors are clustered at the firm level. The corresponding p-values are given in parentheses. Statistical significance at the 1 percent, 5 percent, and 10 percent level is indicated by ***, **, and *, respectively.

Ownership by NYSCR had a significantly negative valuation effect only in the later period for the Fortune 250 sample, a significantly negative effect overall, and for the later period in the broader S&P 500 sample. We find a negative valuation effect for ownership by SWIB during the early period, but only in the narrower Fortune 250 sample (this result is not confirmed in the broader S&P 500 sample). SWIB does not sponsor proxy proposals in our sample. However, according to its website, SWIB actively administers its own proxy votes on corporate governance and social issues. The website also discusses guidelines used by SWIB to consider other actions, such as sponsoring a proposal or participating in shareholder litigation.

In the broader S&P 500 sample, the Ohio pension funds, which are relatively new in sponsoring shareholder proposals oriented around corporate governance, are associated with higher firm valuations—overall and for the latter period, when those funds sponsored proposals. When examining ownership separately for TIAA–CREF, which is known to hold private communications with portfolio firms and sponsor shareholder proposals when necessary, the paper finds a significantly positive valuation effect for TIAA–CREF ownership. There is no observed significant effect for ownership by corporate pension funds.

Next, this paper compares proxies for firm value and relative firm value—between sample firms at the end of the year in which they are targeted by a public pension fund in the paper's sample—with a corporate governance (social issue) proposal and all firm-year observations in which a firm is not targeted by a public pension fund in the paper's sample with a corporate governance (social issue) proposal. Next, the paper presents a comparison of ownership, in terms of percentage of outstanding shares and market value of the ownership stake by the public pension fund sponsor.

Figure 7 and **Figure 8** show that CalPERS targets ten firms in the Fortune 250 sample with a corporate-governance proposal, and 14 firms in the S&P 500 sample. FSBA targets three sample firms in the Fortune 250 sample and 6 sample firms in the S&P 500 sample. CalSTRS targets four firms in the Fortune 250 sample and 11 firms in the S&P 500 sample. NYSCR targets 27 firms and 42 firms in the S&P 500 sample.

Firms targeted by CalPERS do not vary consistently from other firms: in the Fortune 250 sample, such firms have a *higher* Tobin's Q (industry-adjusted Q)—2.04 (0.44), compared with 1.82 (0.29) for all other firm-year observations. But CalPERS-targeted firms have *lower* Q's in the broader S&P 500 sample—1.78 (0.23)—compared with 2.02 (0.45) for all other firm-year observations. However, FSBA-targeted firms have higher Tobin's Q in both samples—2.00 for the Fortune 250 and 2.16 for the S&P 500—and higher industry-adjusted Q in the Fortune 250 sample (0.47). (For the S&P 500 sample, industry-adjusted Q for firms targeted by FSBA is the same as for other firm-year observations.)

In contrast, for the Fortune 250 sample, Tobin's Q (industry-adjusted Q) averages 1.17 (-0.34) for firms after being targeted by CalSTRS and 1.42 (-0.12) for firms after being targeted by NYSCR with a social issue proposal—much lower when compared with 1.83 (0.29) for all other firm-year observations. These results hold true for the broader S&P 500 sample, when firms targeted by CalSTRS have Tobin's Q (industry-adjusted Q) averaging

Figure 7. Summary Statistics According to Types of Public Pension Fund Activism: Fortune 250

Panel A. Comparison Between Firms Targeted with a Corporate Governance Proposal Sponsored by and Those Not Targeted by CalPERS or FSBA

	Targeted by CalPERS	Not Targeted by CalPERS	Targeted by FSBA	Not Targeted by FSBA
	Mean (N=10)	Mean (N=2571)	Mean (N=3)	Mean (N=2578)
Value measures				
Tobin's Q	2.04	1.82	2.00	1.82
Industry-Adjusted Tobin's Q	0.44	0.29	0.47	0.29
% Shares Owned by				
U.S. Public Pension Funds	2.40	2.49	2.12	2.49
CalPERS	0.33	0.36	0.32	0.36
FSBA	0.22	0.24	0.18	0.24
CalSTRS	0.00	0.14	0.00	0.14
NYSCR	0.40	0.38	0.37	0.38
Market Value of Shares Owned by ($M)				
CalPERS	313.42	140.12	120.83	140.81
FSBA	214.87	95.52	77.62	96.01

Panel B. Comparison Between Firms Targeted with a Social Issue Proposal Sponsored by and Those Not Targeted by CalSTRS or NYSCR

	Targeted by CalSTRS	Not Targeted by CalSTRS	Targeted by NYSCR	Not Targeted by NYSCR
	Mean (N=4)	Mean (N=2577)	Mean (N=27)	Mean (N=2554)
Value measures				
Tobin's Q	1.17	1.82	1.42	1.83
Industry-Adjusted Tobin's Q	-0.34	0.29	-0.12	0.29
% Shares Owned by				
U.S. Public Pension Funds	2.39	2.49	1.72	2.50
CalPERS	0.30	0.36	0.29	0.36
FSBA	0.22	0.24	0.16	0.24
CalSTRS	0.05	0.13	0.08	0.14
NYSCR	0.48	0.38	0.31	0.38
Market Value of Shares Owned by ($M)				
CalSTRS	17.84	45.00	51.45	44.89
NYSCR	143.94	145.76	287.66	144.26

Figure 8. Summary Statistics According to Types of Public Pension Fund Activism: S&P 500

Panel A. Comparison Between Firms Targeted with a Corporate Governance Proposal Sponsored by and Those Not Targeted by CalPERS or FSBA

	Targeted by CalPERS	Not Targeted by CalPERS	Targeted by Florida	Not Targeted by Florida
	Mean (N=14)	Mean (N=4669)	Mean (N=6)	Mean (N=4677)
Value measures				
Tobin's Q	1.78	2.02	2.16	2.02
Industry-Adjusted Tobin's Q	0.23	0.45	0.45	0.45
% Shares Owned by				
U.S. Public Pension Funds	2.39	2.45	2.03	2.45
CalPERS	0.35	0.35	0.28	0.35
FSBA	0.23	0.24	0.18	0.24
CalSTRS	0.06	0.12	0.00	0.12
NYSCR	0.38	0.39	0.39	0.39
Market Value of Shares Owned by ($M)				
CalPERS	348.93	91.16	74.40	91.96
FSBA	247.05	63.10	49.49	63.67

Panel B. Comparison Between Firms Targeted with a Social Issue Proposal Sponsored by and Those Not Targeted by CalSTRS or NYSCR

	Targeted by CalSTRS	Not Targeted by CalSTRS	Targeted by NYSCR	Not Targeted by NYSCR
	Mean (N=11)	Mean (N=4672)	Mean (N=42)	Mean (N=4641)
Value measures				
Tobin's Q	1.86	2.02	1.59	2.02
Industry-Adjusted Tobin's Q	0.26	0.45	0.04	0.45
% Shares Owned by				
U.S. Public Pension Funds	1.93	2.45	1.99	2.46
CalPERS	0.26	0.35	0.31	0.35
FSBA	0.18	0.24	0.19	0.24
CalSTRS	0.04	0.12	0.15	0.12
NYSCR	0.39	0.39	0.35	0.39
Market Value of Shares Owned by ($M)				
CalSTRS	10.12	30.67	66.53	30.30
NYSCR	76.40	98.43	211.54	97.36

1.86 (0.26) and firms targeted by NYSCR average 1.59 (0.04)—compared with 2.02 (0.45) for all other firm-year observations. The comparison is similar when the comparison sample is restricted to the same period when the shareholder proposals are filed.

When comparing ownership stakes across groups, the average percentage ownership by sponsor funds in target firms tends to be slightly lower; but the market value of the ownership stake by the public pension fund sponsor tends to be much higher in firms they target for CalPERS ($313.42M vs. $140.12M) and NYSCR ($287.66M vs. $144.26M).

For the less active sponsors FSBA and CalSTRS, average percentage ownership in the firm and average market value of their ownership stake are lower. For example, the market value of the ownership stake by CalSTRS averages $17.84M in targets, compared with $45M in non-targets. The market value of the ownership stake by FSBA averages $77.62M in targets, compared with $96.01M in non-targets.

CONCLUSION

This paper, consistent with earlier research, finds that public pension funds' ownership is associated with lower firm value, as measured by Tobin's Q and industry-adjusted Q. The negative valuation effect for public pension fund ownership is not, however, confined to a particular public pension fund during the entire period scrutinized. Instead, this effect varies, depending on whether funds are engaged in shareholder activism and on whether their activism is focused on corporate-governance concerns or social issues.

Social-issue shareholder-proposal activism appears to be negatively related to firm value. In this paper, the negative relationship between public pension fund ownership and firm value is significant for firms targeted by public pension funds engaging in social-issue activism—across two different firm samples—in 2008–13, when the two large funds focused on social-issue activism, CalSTRS and the NYSCR, were engaged in shareholder-proposal activism. For S&P 500 firms, the negative relationship between pension-fund ownership and firm value is significant at the 1 percent level, both for ownership by all social-issue shareholder-proposal sponsoring pension funds and for the NYSCR in particular—in the full 2001–13 period and in the more recent period, but not for the earlier 2001–07 period, when neither CalSTRS nor NYSCR actively sponsored shareholder proposals.

State and municipal pension plans are among the largest institutional owners in the U.S. stock market. The largest such plans manage more than $3 trillion in assets, and the four public pension funds principally studied in this paper—CalPERS, CalSTRS, NYSCR, and FSBA—collectively manage more than $800 billion (Kozlowski 2015). Such plans' management, and shareholder activism, is thus of significant public-policy relevance.

ENDNOTES

1 Several studies use Tobin's Q as a proxy for firm value. For example, Woidtke (2002) uses industry-adjusted Q to measure the relationship between relative firm value and pension fund ownership. Morck, Shleifer, and Vishny (1988) use Q to measure the relationship between firm value and insider ownership. McConnell and Servaes (1990) use Q to measure the relationship between firm value and institutional ownership. Lang and Stulz (1994) use Q to measure the relation between firm value and corporate diversification.

2 Institutions managing at least $100 million in investments must disclose their holdings through 13f filings.

3 See, for example, Carlton, Nelson, and Weisbach (1998), Del Guercio and Hawkins (1999), Wahal (1996), and Woidtke (2002).

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