Proxy Access Voting: Evaluating Proxy Access and the Recent Phenomenon of Corporations Adopting Shareholder Protective Policies

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I. INTRODUCTION

Shareholders hold a financial stake in a corporation, and therefore are often viewed as owners of the corporation and believed to be in control for all corporate actions.[1] However, their powers are circumscribed. Board of directors committees nominate directors to serve the corporation and these directors have the power to select the corporation's officers.[2] The committees provide shareholders a slate of proposed directors that are voted on and approved at the annual shareholder meeting.[3] Shareholders may also propose their own slate of directors, but this typically requires a proxy contest, which can be expensive due to the costs both associated with preparing and mailing documents and complying with legal requirements.[4]

Prior to the 1980s, a system of managerial capitalism existed where managers, consisting of directors and officers, mainly controlled United States ("U.S.") firms.[5] Shareholders were dispersed geographically and only owned small amounts of shares in a number of corporations.[6] Shareholders were mostly content with the system in place and voted in favor of directors proposed by the corporation's board.[7] However, as institutional investor

1. *See The Nominating Process and Corporate Governance Committees: Principles and Commentary*, BUS. ROUNDTABLE 1 (2004), http://businessroundtable.org/sites/default/files/Business%20Roundtable%20Nominating%20Committee%20Principles.pdf [https://perma.cc/B6FP-KR6L].

2. *See id.*

3. *See id.* at 5.

4. *See* Mark D. Gerstein et al., *Activists in Your Boardroom: Planning for and Managing the New Dynamic*, CORP. COUNS. (Aug. 21, 2016, 12:00 AM), http://www.corpcounsel.com/id=1202766413580/Activists-in-Your-Boardroom-Planning-for-and-Managing-the-New-Dynamic?slreturn=20170027185848 [https://perma.cc/T98V-5JYX].

5. *See* Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 267 (2012).

6. *See id.*

7. *See generally id.*

ownership increased, this system changed.[8] Institutional investors, primarily insurance companies, banks, mutual funds, and similar businesses, began increasingly investing in shares for the benefit of individuals who placed funds with them–the beneficiaries.[9] As a result, a small group of institutions soon acquired substantial portions of shares in public corporations.[10] Thus, a system of "investor capitalism" emerged with power gradually shifting from the managers to the institutional shareholders.[11]

Investor capitalism attained legitimacy from scholarly writings in the 1970s that argued corporations would become more efficient if they prioritized shareholders' interests.[12] These scholars viewed shareholders as the principals of the corporation and managers as their agents, a view referred to as "agency theory."[13] Accordingly, in an effort to provide shareholders more legal rights, shareholders and managers sought a new mechanism for electing directors onto the board.[14]

A. Background of Shareholder Nominating Practices

Shareholders in all U.S. publicly traded companies currently have the power to nominate candidates for the board of directors through two methods: (1) by nominating a candidate to the board committee, who then decides whether to include that candidate in the board's recommended slate, which is sent to the shareholders through the annual proxy statement; or (2) by initiating a proxy contest at the expense of the nominating shareholder.

In the U.S., the Securities and Exchange Commission ("SEC") requires publicly traded corporations to issue proxy materials to all shareholders prior to an annual shareholder meeting.[15] These proxy materials include information about shareholder proposals, persons nominated for election

8. Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 996 (2010).
9. *Id.* at 997.
10. *See id.*
11. *Id.* at 998.
12. *See* Dallas, *supra* note 5, at 352–53.
13. *See generally id.*
14. *See id.* at 352.
15. *See* REGULATION 14A: SOLICITATION OF PROXIES, EXCHANGE ACT ¶ 240.14a-101 (Jan. 26, 2017), http://www.ecfr.gov/cgi-bin/text-idx?SID=8e0ed509ccc65e983f9eca72ceb26753&node=17:4.0.1.1.1&rgn=div5#se17.4.240_114a_6101 [https://perma.cc/QUT8-WQJN].

to the board of directors, and any other relevant information on issues requiring vote by shareholders.[16] Shareholders receive this information prior to the meeting to allow sufficient time to access and review all proposals and nominees in order to make informed votes either at the meeting or in advance of the meeting through mail or an electronic ballot.[17]

Although the exact internal policy may vary from one corporation to another, nominations of directors are generally submitted to the board, or a designated nomination committee of the board, to review and evaluate.[18] The board or the nominating committee typically evaluate all nominated candidates[19] and request additional information from candidates to assist with the evaluation.[20] If approved, the nominated candidate is included in the company's proxy statement.[21] If denied, the nominated candidate is not included in the company's proxy statement and will not be available for nomination at the meeting.[22]

When a shareholder's candidate is excluded from the company's proxy materials because his or her nomination is denied, a shareholder may choose to bypass the board process by engaging in a proxy contest.[23] A proxy contest involves a shareholder distributing their own proxy statement, detailing the candidate they wish to nominate, at their own significant expense and without the opportunity for reimbursement.[24] The substantial expense and degree of difficulty associated with distributing individual proxy materials to each shareholder of the corporation deters shareholders from nominating candidates.[25] For example, proxy solicitation can cost

16. *Id.*

17. *Id.*

18. *See id.*

19. BUS. ROUNDTABLE, *supra* note 1.

20. *Id.* at 5.

21. *Best Practice Guidelines for the Appointment of Directors*, MAURITUS INSTIT. DIRECTORS 8 (2012), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0ahUKEwiJup6awuPRAhXDiVQKHUmjC3QQFgg4MAU&url=https%3A%2F%2Fwww.afcgn.org%2Fwp-content%2Fuploads%2F2013%2F11%2FBest-Practice-Guidelines-for-the-Appointment-of-Directors.pdf&usg=AFQjCNEovRLV1DNXGkq7uVuAX-1UCqmcqw&sig2=CJznU1sG0k1nQFSK37AZdA [https://perma.cc/VW6U-AEE3].

22. *See id.*

23. Gerstein et al., *supra* note 4.

24. *See* Michael Ide, *Proxy Fights Cost U.S. Companies $4.8 Million On Average*, VALUE WALK (Sept. 10, 2014, 12:26 PM), http://www.valuewalk.com/2014/09/proxy-fights-costs/ [https://perma.cc/XEY6-YHXQ].

25. John C. Coffee & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 570 (2016).

activist shareholders between $200,000 to $1,000,000 depending on the size of the corporation.[26]

An alternative mechanism, which is the focus of this Comment, enables shareholders to directly nominate candidates by including a candidate in the company's proxy materials. This mechanism is "proxy access." Proxy access changes shareholder-voting procedures by allowing minority shareholders a voice in nominating directors and thereby becoming more influential in the corporation.[27] Proxy access has the potential to provide power to shareholders that otherwise would have no voice. However, this increase in control raises concerns as to what may happen when shareholders with short-term interests, particularly activist investors, obtain increased control and influence in a corporation.[28]

Part I discusses the background of shareholder nominating practices and U.S. corporate law. Part II reviews the history of proxy access in the U.S. by discussing SEC Rule 14a-11. Part III defines the component parts of proxy access policies and varying requirements corporations are able to implement when adopting proxy access. Part IV explores how proxy access would look in application by reviewing shareholder ownership of the Coca Cola Company, a corporation that has recently adopted proxy access. Part V considers the stances of different entities and organizations regarding adopting proxy access. Part VI explores recent controversies and the future of proxy access in the U.S. Part VII compares shareholder nominating proposals in varying countries. Lastly, Part VIII provides a conclusion and the impact of proxy access in the future.

B. Background of U.S. Corporate Law

In order to understand the potential impact proxy access may have on U.S. corporations, the history of the U.S. corporate form must be considered. Shareholder activism in general rose significantly throughout the 20th century.[29] A shift occurred in the 1980s with the rise of institutional investors.[30] Corporate focus shifted from managerial methods that emphasized

26. Ide, *supra* note 24. The wide range in cost depends on multiple factors including the size of the organization and the number of shareholders. The smaller the company, the lower the cost, and the larger the company, the higher the cost.

27. *See id.*

28. *See id.*

29. *See* Dallas, *supra* note 5, at 267.

30. *See generally id.* Institutional entities, rather than individuals, increasingly own corporate shares–institutional owners increased ownership from 19% corporate shares in

firm growth to focusing on appeasing shareholder interests.[31] Shareholders began shifting away from a corporate form focused on director primacy when shareholders started taking control of corporations.[32] Activist investors began urging managers to engage in short-termism that by focusing on increasing stock prices in the short term, rather than increasing the long-term fundamental value of the corporation.[33] Giving increased power to shareholders resulted in giving power not only to some, but to all shareholders. Institutional investors can be classified into categories based on the stability of their ownership and the size of stake they own in the company.[34] These categories include long-term, dedicated, investors and short-term, transient or quasi-index, investors.[35] The importance of shareholder primacy came to light in the aftermath of the 2001 Enron scandal, which further exemplified the importance of vesting power in shareholders, rather than giving sole discretion to directors.[36] From one standpoint, Enron illustrated the risks of deregulation through the unprecedented rise and fall of the corporation.[37] The eventual response was Enron filing Chapter 11 bankruptcy.[38] When the dust settled, nothing was left of Enron.[39] Many shareholders were left with nothing to show of their investments–life savings, 401Ks, and pension funds were all gone.[40]

1970, 37% in 1990, and 50% in 2008. Kahan & Rock, *supra* note 8, at 996. In turn, corporations are composed of mutual funds, pension funds, insurance companies, funds and endowments, banks, and individual owners. *Id.* The rise of institutional owners thereby places an intermediary barrier between the actual owners and the corporation. *Id.* at 997. This added barrier creates greater management accountability, as institutional investors are more sophisticated. *See* Christopher Takeshi Napier, *Student Note: Resurrecting Rule 14a-11: A Renewed Call for Federal Proxy Access Reform, Justifications and Suggested Revisions*, 67 RUTGERS U. L. REV. 843, 896 (2015). In turn, increases in institutional ownership have led to greater day-to-day market trading as short-term investors increasingly acquired larger portions of corporations. *Id.* Short-term investors began dominating corporations with their concerns over stock prices, but remained uninterested in finding long-term solutions. *See* Lynne L. Dallas & Jordan M. Barry, *Long-Term Shareholders and Time-Phased Voting*, 40 DEL. J. CORP. L. 541, 562 (2016). Conflicts thereby arose between the management of companies and the shareholder beneficiaries. *See id.*

31. *See generally* Dallas, *supra* note 5, at 267.
32. *See id.* at 267–68.
33. *See* Michael K. Molitor, *The Crucial Role of the Nominating Committee: Re-Inventing Nominating Committees in the Aftermath of Shareholder Access to the Proxy*, 11 U.C. DAVIS BUS. L.J. 97, 99 (2010).
34. Dallas, *supra* note 5, at 303.
35. *Id.* at 303–04.
36. *See id.*
37. *See* William W. Bratton, *Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?: Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1299 (2002).
38. *Id.*
39. *Id.* at 1282.
40. *Id.*

Enron did not only affect shareholders, but it also alerted the entire country to the potential risks of relaxed regulations.[41] In response, Congress passed the Sarbanes-Oxley Act in an effort to place greater safeguards. Sarbanes-Oxley prevents executives from potentially defrauding shareholders.[42] Following the Enron scandal, corporations placed directors under stricter review, allowing shareholder activism to flourish.[43]

The true consequences of shareholder activism became recognizable seven years after the Enron scandal in the largest financial crisis the U.S., and arguably the world, has seen since the Great Depression.[44] The consistent short-termism practices visible in the high risk-taking behavior throughout Wall Street came to a halt when the housing bubble burst and the financial market crashed.[45] Unlike in the Enron scandal, shareholders in the 2008 financial crisis were no longer the victims[46] Instead, shareholders, specifically institutional investors, were responsible for directing the market's focus to obtaining quick profits in any manner possible.[47] Not all shareholders were at fault as the problem was not the long-term shareholders, but rather the short-term shareholders.[48] These shareholders, often referred to as transient institutional owners, exhibited short-termism interests.[49] Short-term shareholders furthered these interests by seeking out firms with internal control weakness, encouraging financial misreporting, and cutting Research and Development and other discretionary expenses in order to meet earning targets.[50] In the aftermath of the financial crisis, shareholders were not held fully accountable for their actions as many institutional owners and shareholders were also hurt.[51] These shareholders shifted the blame claiming their misfortune was a result of bad decisions made by the board as a result of limited director accountability and what seemed to be limited shareholder rights.[52] Again, Congress acted, but this time responded by permitting the

41. *Id.* at 1277.
42. Michael A. Perino, *Symposium: Enron and Ots Aftermath: Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN'S L. REV. 671, 671–72 (2002).
43. *See id*.
44. Dallas, *supra* note 5, at 267.
45. *Id.*
46. *See id.* at 316.
47. *Id.*
48. Dallas & Barry, *supra* note 30, at 563.
49. *See id.*
50. Coffee & Palia, *supra* note 25, at 573.
51. *See* Dallas, *supra* note 5, at 316–20.
52. *See id*.

SEC to provide greater shareholder voting power on issues related to the board.[53]

No federal regulation currently mandates public companies to provide shareholders with proxy access. The SEC attempted to promulgate a proxy access policy for all public companies in SEC Rule 14a-11. However, the rule was abandoned after the District of Columbia Circuit Court ruled it invalid. Today, the only government regulation regarding proxy access is through state action by North Dakota and Delaware.[54] Each state has enacted laws that permit companies to adopt proxy access provisions to their bylaws.

II. HISTORY OF PROXY ACCESS

A. The Debate Over Proxy Access

In recent years, U.S. publicly traded companies have increasingly began adopting proxy access policies.[55] Accordingly, a visible increase in similar corporate governance policies also is prevalent internationally as many countries have begun adopting policies that provide minority shareholders greater input into the direct nomination and selection process of board members.[56]

B. SEC Rule 14a-11

In the U.S., the financial crisis of 2008 led to requests for significant changes to corporate governance regulations.[57] In response, the U.S. Congress passed the Dodd-Frank Act, which amended sections of the Securities Exchange Act of 1934.[58] The Dodd-Frank Act permitted the SEC to establish rules requiring publicly traded companies to allow shareholders proxy access.[59] The Act also allowed the SEC the discretion

53. *See id.* at 352.

54. N.D. CENT. CODE § 10-35-08; DEL. CODE ANN. TIT. 8, § 112.

55. *See* James R. Copland & Margaret M. O'Keefe, *2016 Finding 1*, PROXY MONITOR, http://www.proxymonitor.org/Forms/2016Finding1.aspx [https:// perma.cc/2A4M-CHSM] (last visited Feb. 19, 2018).

56. *Shareholder Involvement in the Director Nomination Process: Enhanced Engagement and Proxy Access*, CAN. COAL. FOR CORP. GOVERNANCE (2015), http://www.ccgg.ca/site/ccgg/assets/pdf/proxy_access_finalv.35.docx_630.pdf [https://perma.cc/9XDK-QTVV].

57. *See* Scott L. Landau et al., *Dodd-Frank Act Reforms Executive Compensation and Corporate Governance for All Public Companies*, PILLSBURY L. (July 15, 2010), http://www.pillsburylaw.com/siteFiles/Publications/CorpSec_CorpSec-Tech_ECB_Alert6_07-15-2010.pdf [https://perma.cc/4VME-2W8U].

58. *Id.*

59. *Id.* at 4.

to exempt certain companies from proxy access requirements.[60] In its 2010 Final Rule: Facilitating Shareholder Director Nominations, the SEC focused on countering the lack of transparency in the voting process, the level of communication between shareholders and directors, and the relationship between shareholder interest and the company's economic interests.[61] The SEC enabled proxy access for shareholders to nominate up to 25% of the board through a company's proxy statement so long as the shareholder owned at least 3% of the company's outstanding shares for a three-year period and ensure they are not attempting a hostile takeover of the company.[62]

In 2011, Rule 14a-11 was challenged in court decision between the U.S. Chamber of Commerce and the Business Roundtable.[63] The U.S. Court of Appeal for the District of Columbia Circuit invalidated the SEC's regulations.[64] The Court stated that the SEC failed to adequately analyze the costs and benefits associated with implementing the regulation.[65] Following the Court's decision, the SEC has not implemented any similar proxy access regulations or conducted a cost-benefit analysis noted in the opinion by the court.[66] Instead, the SEC has allowed corporations to self-determine their own proxy access policies to adopt.[67] Thus, corporations have regained power to individually determine whether or not to permit proxy access in voting procedures.[68]

III. CONSTRUCTING PROXY ACCESS BYLAWS

In general, proxy access allows shareholders the ability to significantly influence the nomination process of board members.[69] Shareholder power, over the board of directors, derives from either direct influence over the nomination process or through influence over nominees.[70] When granted

60. *See id.*
61. *Id.*
62. CAN. COAL. FOR CORP. GOVERNANCE, *supra* note 56. *Id.*
63. Business Roundtable v. SEC, 647 F.3d 1144, 1149 (2011).
64. *Id.* at 1147, 1148–49, 1150, 1156.
65. *Id.* at 1148–49.
66. *See* Copland & O'Keefe, *supra* note 55.
67. *See id.*
68. *See* CAN. COAL. FOR CORP. GOVERNANCE, *supra* note 56.
69. *Id*.
70. *Proxy Access*, COUNSEL OF INSTITUTIONAL INVESTORS, http://www.cii.org/proxy_access [https://perma.cc/Z7WY-MEL8] (last visited Sept. 23, 2016).

proxy access, minority shareholders who meet certain threshold requirements may place their own nominees in the company's proxy statement and proxy voting ballot.[71] This placement is at no cost to the shareholder, saving the shareholders from distributing their own proxy information, which can be an expensive and complicated process.[72] Additionally, this policy also allows shareholders to bypass board approval when nominating candidates.[73]

Companies may choose to *sua sponte* adopt policies enabling shareholder proxy access; however, common practice indicates most companies adopt policies only after shareholders request or propose adopting the procedure.[74] In recent years, the trend has changed. Publicly traded companies have increasingly started to adopt proxy access bylaws; some even voluntarily adopted proxy access prior to receiving shareholder proposals.[75] The rationale behind this adoption falls into two categories: (1) either the adopting company wishes to be proactive and promote shareholder rights, or (2) the adoption is merely seeking to get ahead of the debate and adopt policies that fit the company's best interests.[76] The Coca-Cola Company is an example of one of the recent companies that adopted proxy access without a shareholder proposal on the issue.[77] Following the September 2015 proxy access bylaw adoption, Coca-Cola's 2016 Proxy Statement stated, "The Board adopted the proxy access bylaw following several months of thoughtful discussions with shareowners. We learned there was broad agreement among our shareowners about the desire for proxy access and that many of our shareowners consider proxy access to be a fundamental right."[78]

Not all companies adopt proxy access bylaws or even support shareholder proposals for proxy access;[79] some companies remain opposed to proxy access.[80] For example, the Starbucks Coffee Company openly opposed a recent shareholder proposal regarding proxy access in its 2016 Proxy Statement.[81] The Starbucks Board recommended that shareholders vote

71. Andrew Bor et al., *Proxy Access Update—Preparing for the 2016 Proxy Season*, JD SURPA BUSINESS ADVISOR (Nov. 18, 2015), http://www.jdsupra.com/legalnews/proxy-access-update-preparing-for-the-92187/ [https://perma.cc/JAQ8-G9TH].

72. *Id.*

73. *See id.*

74. *Id.*

75. Tim Human, *Proxy access: what happens next?*, IR MAG. (June 9, 2015), https://www.irmagazine.com/articles/proxy-voting-annual-meetings/20813/proxy-access-what-happens-next/# [https://perma.cc/84LK-GP66].

76. *Id.*

77. *See* COCA-COLA CO., 2016 PROXY STATEMENT 2 (2016).

78. *Id.*

79. *See generally* STARBUCKS COFFEE CO., NOTICE OF 2015 MEETING OF SHAREHOLDERS AND PROXY STATEMENT 49–52 (2015).

80. *See id.*

81. *Id.*

against the proposal, asserting that the proposed proxy access bylaw was not beneficial to the company.[82] The proposal would have allowed an unlimited number of shareholders to aggregate together to meet the 3% ownership threshold requirement for three years.[83] The Board merely stated that the inconsistent support of proxy access and particularities of procedures among Starbucks shareholders led to the Board's recommendation against voting for the recent proposal, without further elaboration or explanation.[84] The Board also noted that Starbucks's robust shareholder outreach program continues to provide a sufficient voice to shareholders, so proxy access was not necessary.[85] Therefore, until a proposal is made in the best interest of shareholders and the company, the Board asserts that it believes it is unnecessary to adopt a proposal prematurely.[86]

A. Proxy Access Provisions in General

For a shareholder to engage in proxy access, the shareholder must meet the requirements set forth in the company's adopted proxy access policy.[87] These requirements vary but may include meeting an ownership threshold or an ownership holding period.[88] Additionally, proxy access policies typically limit the total percentage or maximum number of board members that shareholders may elect through proxy access nominations.[89] Moreover, proxy access policies generally permit shareholders to aggregate together to meet the threshold requirements.[90] Furthermore, many proxy access policies restrict renomination of candidates nominated through proxy access procedures who fail to be elected to the board.[91]

82. *Id.*
83. *Id.* at 53.
84. *Id.* at 54.
85. *Id.*
86. *Id.*
87. *See* SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, *Key Takeaways: Proxy Access–Latest Developments*, JD SURPA (Oct. 7, 2015), http://www.jdsupra.com/legalnews/key-takeaways-proxy-access-latest-69510/ [http://perma.cc/8F8F-NARZ].
88. *See id.*
89. *See id.*
90. *See id.*
91. Bor et al., *supra* note 71.

B. Ownership Threshold

An ownership threshold requires shareholders to own a certain percentage of shares to qualify to participate in proxy access voting.[92] This percentage threshold varies depending on the individual corporation's bylaws, but typically, require either a 3%, 5%, or 20% holding of the company's current outstanding shares.[93] In the 2015 proxy season, a 3% threshold was the most common requirement for shareholder proposals.[94] While thresholds higher than 3% occur, they are less common because they are criticized as troublesome for corporations since few shareholders meet the heightened thresholds.[95]

C. Aggregation of Shareholders

In an effort to meet the ownership threshold requirements, under most proxy policies, shareholders may aggregate together.[96] Some company bylaw provisions limit the number of shareholders that can form a nominating group.[97] Most often, the limit on the number of shareholders that may aggregate together is capped at twenty shareholders.[98] In turn, corporate boards and shareholder groups conflict over group aggregation rules.[99] Shareholders prefer no restrictions, whereas boards generally prefer to limit aggregation numbers.[100] This dispute is centered around the idea that the higher the aggregation ceiling, the more likely shareholders who may otherwise not have been able to engage in proxy access are able to do so.[101]

D. Ownership Holding Period

In addition to an ownership threshold, a corporation's bylaw provisions may require a nominating shareholder to own a certain amount of shares for a certain period of time to qualify to participate in nominating through proxy access.[102] Some corporations may require one, two, or three years

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92. *See Key Provisions of Proxy Access Mechanisms–Covington & Burling*, COUNSEL OF INSTITUTIONAL INVESTORS, http://www.cii.org/files/issues_and_advocacy/board_accountability/Proxy%20Access/Proxy%20Access%20Regimes%204%201%2016.xls [http://perma.cc/T65W-GA7U] (last updated Apr. 7, 2016).
93. *See id.*
94. Bor et al., *supra* note 71.
95. *Id.*
96. *See* SKADDEN, *supra* note 87.
97. *See id.*
98. *See id.*
99. *Id.*
100. *See id.*
101. *Id.*
102. *See Key Provisions of Proxy Access Mechanisms–Covington & Burling*, *supra* note 92.

of ownership; others may not require an ownership period at all.[103] Overall, the most common ownership period is three years.[104] This is evidenced by the fact that all shareholder proposals during the 2015 proxy season had a three-year holding period requirement.[105]

E. Caps on Number of Nominees

Statutes and company bylaws commonly place caps on the total number or percentage of the board that shareholders may elect through proxy access.[106] Generally, these limits exist as 20%, 25%, or 33%,[107] with 20% being the most common nominee cap.[108] In most publicly traded companies, this percentage usually translates to shareholders having two proxy access nominees.[109] As such, a growing trend is for corporations to allow shareholders to nominate up to 20% of the board, or at most two proxy access nominees.[110] The purpose of placing caps on the number of shareholder nominees is to avoid shareholders gaining control of the company through their nominees in successive years and subsequent elections.[111]

F. Renomination Restrictions

Finally, the majority of corporate bylaws enabling proxy access state that if a candidate is nominated through proxy access procedures and does not receive at least 25% of the total votes cast, the nominee is precluded from renomination for a set period of time.[112] The period of time varies, but is typically two years; however, some organizations, such as the Council of Institutional Investors, advocate against any restrictions on renomination.[113]

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103. *Id.*
104. *See* SKADDEN, *supra* note 87.
105. *Id.* A proxy season is the time period that companies released proxy materials during 2015. *See id.*
106. *See Key Provisions of Proxy Access Mechanisms–Covington & Burling*, *supra* note 92.
107. *Id.*
108. SKADDEN, *supra* note 87.
109. *Id.*
110. *See id.*
111. *Id.*
112. Bor et al., *supra* note 71.
113. *Id.*

IV. AN EXAMPLE OF PROXY ACCESS IN APPLICATION

To illustrate proxy access in application, this section reviews the Coca-Cola Company's recently adopted proxy access bylaw provisions. In 2015, Coca-Cola adopted a proxy access bylaw provision that permits:

> [A] shareowner, or a group of up to 20 shareowners, owning 3% or more of the Company's outstanding Common Stock continuously for at least three years to nominate and include in the Company's proxy materials director nominees constituting up to two individuals or 20% of the Board (whichever is greater).[114]

In 2017, Coca-Cola had 4.3 billion outstanding common stock shares.[115] Therefore, any shareholder with less than 120,000,000 shares could not unilaterally gain proxy access because of the 3% threshold.[116]

Coca-Cola's financial records reveal that institutional investors own significantly more shares than any insiders.[117] Thus, insiders likely will not individually qualify for proxy access voting as their overall share percentages are far below the threshold requirements of proxy access. In this context, insiders within Coca-Cola own between 550,075 shares and 89,709 shares.[118] The number of shares owned by even the highest insider is substantially below many institutional holders.[119] The current CEO of Coca-Cola, Kent Ahmet Muhtar, owns 550,075 shares of the company, which is more shares than any other insider, yet, still substantially less than any of the top institutional investors.[120]

In contrast, institutional investors and mutual funds own 63.2% of Coca-Cola.[121] The following chart illustrates the ownership amount of the top institutional investors of Coca Cola and their ownership translated into ownership percentage of the company:

114. COCA-COLA CO., 2016 PROXY STATEMENT, *supra* note 77, at 101.

115. *Coca-Cola Company (The) Stock Report*, NASDAQ, http://www.nasdaq.com/ symbol/ ko/stock-report [http://perma.cc/35QG-EGZN] (last visited Feb. 25, 2017). The figures utilized in this Comment reflect ownership of the Coca-Cola Company as of February 2017. Although the figures have changed since then, they remain useful to illustrate the application of proxy access policies to a distribution of shareholder ownership within a company that has enacted such policies. Any changes in the figures have not altered the illustration.

116. *See id.*

117. *The Coca-Cola Company (KO): Major Holders*, YAHOO FINANCE, https://finance.yahoo. com/quote/KO/holders?p=KO [https://perma.cc/9EFZ-F7U9] (last visited Dec. 1, 2016).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

Institutional Investors	Number of Shares	Ownership Percentage
Berkshire Hathaway, Inc.	399,910,000[122]	9.27%[123]
Capital World Investors	131,556,918[124]	3.05%[125]
BlackRock Institutional Trust Company	84,654,789 [126]	1.96%[127]
Capital Research Global Investors	65,716,545[128]	1.52%[129]
BlackRock Fund Advisors	63,170,942[130]	1.46%[131]
State Street Corporation	21,389,192[132]	0.49%[133]

122. *See* Berkshire Hathaway Inc., Annual Report (Information Table of Form 13F-HR) (Feb. 14, 2017).

123. This percentage was calculated by comparing the number of shares Berkshire Hathaway reported ownership with sole voting power over and the current number of outstanding Coca-Cola shares. *See generally id.*; *Coca-Cola Company (The) Stock Report*, *supra* note 115.

124. *See* Capital World Investors, Annual Report (Information Table of Form 13F-HR) (Feb. 15, 2017).

125. This percentage was calculated by comparing the number of shares Capital World Investors reported ownership with sole voting power over and the current number of outstanding Coca-Cola shares. *See generally id.*; *Coca-Cola Company (The) Stock Report*, *supra* note 115.

126. *See* BlackRock Institutional Trust Company N A, Annual Report (Information Table of Form 13F-HR) (Feb. 10, 2017).

127. This percentage was calculated by comparing the number of shares BlackRock Institutional Trust Company reported ownership with sole voting power over and the current number of outstanding Coca-Cola shares. *See generally id.*; *Coca-Cola Company (The) Stock Report*, *supra* note 115.

128. *See* Capital Research Global Investors, Annual Report (Information Table of Form 13F-HR) (Feb. 15, 2017).

129. This percentage was calculated by comparing the number of shares Capital Research Global Investors reported ownership with sole voting power over and the current number of outstanding Coca-Cola shares. *See generally id.*; *Coca-Cola Company (The) Stock Report*, *supra* note 115.

130. *See* BlackRock Fund Advisors, Annual Report (Information Table of Form 13F-HR) (Feb. 10, 2017).

131. This percentage was calculated by comparing the number of shares BlackRock Fund Advisors reported ownership with sole voting power over and the current number of outstanding Coca-Cola shares. *See generally id.*; *Coca-Cola Company (The) Stock Report*, *supra* note 115.

132. *See* State Street Corp., Annual Report (Information Table of Form 13F-HR) (Feb. 9, 2017).

133. This percentage was calculated by comparing the number of shares State Street Corporation reported ownership with sole voting power over and the current number of

Bank of America Corporation	12,530,563[134]	0.29%[135]
FMR, LLC	8,653,401[136]	0.2%[137]
Vanguard Group, Inc.	6,152,146[138]	0.14%[139]

In accordance with the above institutional investor statistics, only Berkshire Hathaway, Inc. and Capital World Investors would unilaterally meet the ownership threshold requirements.[140]

Coca-Cola bylaws permit up to twenty shareholders to aggregate together to meet the requirement.[141] Thus, under the current Coca-Cola policy, although only the top two institutional investors individually meet the ownership threshold, the remaining top institutional investors may join together with other shareholders to meet the threshold requirement.[142]

Finally, Coca-Cola's bylaws set forth a three-year ownership requirement in order for shareholders to qualify for proxy access.[143] Unfortunately, however, publicly available statistics do not indicate ownership longevity so it is unclear how many of Coca-Cola's top institutional investors are actually eligible to utilize proxy access.[144]

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outstanding Coca-Cola shares. *See generally id.*; *Coca-Cola Company (The) Stock Report*, *supra* note 115.

134. *See* Bank of America Corp DE, Annual Report (Information Table of Form 13F-HR) (Feb. 14, 2017).

135. This percentage was calculated by comparing the number of shares Bank of America Corporation reported ownership with sole voting power over and the current number of outstanding Coca-Cola shares. *See generally id.*; Coca-Cola Company (The) Stock Report, *supra* note 115.

136. *See* FMR LLC, Annual Report (Information Table of Form 13F-HR) (Feb. 10, 2017).

137. This percentage was calculated by comparing the number of shares FMR, LLC reported ownership with sole voting power over and the current number of outstanding Coca-Cola shares. *See generally id.*; Coca-Cola Company (The) Stock Report, *supra* note 115.

138. *See* Vanguard Group Inc., Annual Report (Information Table of Form 13F-HR) (Feb. 14, 2017).

139. This percentage was calculated by comparing the number of shares Vanguard Group Inc. reported ownership with sole voting power over and the current number of outstanding Coca-Cola shares. *See generally id.*; Coca-Cola Company (The) Stock Report, *supra* note 115.

140. *See supra* notes 126–35 and accompanying text; *see* COCA-COLA CO., 2016 PROXY STATEMENT, *supra* note 77, at 101.

141. COCA-COLA CO., 2016 PROXY STATEMENT, *supra* note 77, at 101.

142. *See The Coca-Cola Company (KO): Major Holders*, *supra* note 117. This also assumes, however, that the shareholder also meets the holding period requirement. *See* discussion *supra* III.B.

143. COCA-COLA CO., 2016 PROXY STATEMENT, *supra* note 77, at 101.

144. *See, e.g.*, *The Coca-Cola Company (KO): Major Holders*, *supra* note 117.

V. PROXY ACCESS PROPOSALS GAIN SUPPORT

A. States Entering the Fray

Following the Court of Appeal's decision overturning the SEC's Rule 14a-11, several states including North Dakota and Delaware enacted proxy access statutes to fill in the gap in the absence of additional federal regulations.[145]

1. North Dakota

North Dakota Century Code Section 10-35, enacted in 2007, gives shareholders greater power to elect individuals to the board of directors in publicly traded corporations.[146] All new corporations within the state are subject to the requirements of the law and all corporations incorporated before the 2007 enactment may elect to incorporate into their bylaws or articles that the corporation is thereby subject to the statute.[147] Additionally, the statute holds that the corporation may not change the size of the board when either (1) there is notice that a contested election of board members is going to occur, or (2) when shareholders cannot nominate board members at the next regular shareholder meeting.[148]

The purpose of the statute is to allow shareholders, who own at least 5% of the corporation's outstanding shares, the ability to nominate directors through the corporation's proxy statements.[149] As stated by the North Dakota Corporate Governance Council during codification, the statute "provides a governance structure for publicly traded corporations that gives shareholders greater rights than they currently have under other state laws. It has been designed to reflect the best thinking of institutional investors and governance experts and addresses each of the current hot topics in corporate governance."[150] After a shareholder provides notice of their intent to nominate an individual through the corporation's proxy materials, a company must include the name

145. *See* Copland & O'Keefe, *supra* note 55.
146. *See* N.D. CENT. CODE § 10-35-06.
147. Larry Ribstein, *The North Dakota Experiment*, HARVARD L. SCH. FORUM ON CORP. GOV. & FIN. REG. (Apr. 23, 2007), https://corpgov.law.harvard.edu/2007/04/23/the-north-dakota-experiment/ [http://perma.cc/NAG5-C56S].
148. N.D. CENT. CODE § 10-35-06(3).
149. *See id.* § 10-35-08.
150. Ribstein, *supra* note 147.

of the nominee and a statement no longer than five-hundred words in support of each nominee in the corporation's proxy statement.[151]

The statute also requires corporations include a provision that requires each shareholder to vote on each nominee listed on the proxy statement.[152] Furthermore, the corporation may not require the nominating shareholder to include in the notice more than their name, a statement assuring they satisfy the shareholder requirements, a statement that the nominator is not violating any state or federal laws by making the nomination, the information required for inclusion in the proxy statement, and consent from the nominee to be nominated.[153]

2. Delaware

In contrast to North Dakota law, which allows proxy access in publicly traded corporations, Delaware law merely permits corporations to adopt proxy access provisions in the corporation's bylaws.[154] Delaware General Corporation Law ("DGCL") Section 112, enacted in 2009, states that a corporation may allow shareholders access to nominating directors through including the nominees in the company's proxy materials.[155] A corporation choosing to enable shareholder proxy access may allow shareholders the ability to include nominations of one or more individuals on the company's proxy statement to appear alongside nominations made by the board.[156]

Additionally, a corporation's bylaws may provide other requirements. First, a corporation may require shareholders wishing to vote through proxy access to meet a minimum share ownership requirement for a specified period of time.[157] Second, a corporation may also require the nominating shareholder to submit information regarding their ownership and their nominee.[158] Third, a corporation may require a provision to condition eligibility of a shareholder to nominate on a comparison of the total number of nominees nominated by shareholders with the total number of nominees nominated by the board.[159] Additionally, whether the shareholder previously nominated through the company's proxy materials may be taken into

151. N.D. CENT. CODE § 10-35-08(1)(a).
152. *Id.* § 10-35-08(1)(b).
153. *Id.* § 10-35-08(2).
154. C. Kent Carlson et al., *New Provision of Delaware Corporate Law Addresses Bylaw for Proxy Access*, K&L GATES LLP (Apr. 24, 2009), http://www.klgates.com/new-provision-of-delaware-corporate-law-addresses-bylaw-for-proxy-access-04-24-2009/ [http://perma.cc/BDP3-KPV6].
155. DEL. CODE ANN. tit. 8, § 112.
156. *Id*.
157. *Id.* at § 112(1).
158. *Id.* at § 112(2).
159. *Id.* at § 112(3).

account.[160] Fourth, a corporation may permissibly provide a provision that excludes a shareholder from nominating individuals when the shareholder previously acquired or publicly proposed acquiring a percentage of the company in order to take control of the company.[161] Fifth, a provision requiring the shareholder to indemnify the corporation for any loss that result from false or misleading statements in their nomination is authorized.[162] Lastly, sixth, the statute permits a corporation to include any lawful provisions or conditions to limit shareholder access to proxy materials.[163]

B. Increases in Private Ordering

Following the enactment of 14a-11, and as mentioned earlier, the Court of Appeal overturned the rule finding the SEC was "arbitrary and capricious" in creating the rule.[164] Although the Court of Appeal's decision overturned rule 14a-11, the decision left the SEC amendments to rule 14a-8 intact, which authorizes shareholders to submit proposals to permit proxy access procedures.[165] This resulted in the private ordering of proxy access through shareholder proposals.[166] During the 2015 proxy access season, over one hundred shareholder proxy access proposals contained the exact language of the SEC's vacated rule 14a-11.[167] Current statistics by the Institution of Shareholder Services reveal that of the Standard & Poor's 500 ("S&P 500") companies,[168] over 50% had adopted proxy access bylaws.[169]

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160. *Id.*
161. *Id.* at § 112(4).
162. *Id.* at § 112(5).
163. *Id.* at § 112(6).
164. Avrohom J. Kess et al., *Proxy Access Proposals*, HARV. L. SCH. F. ON CORP. GOV. & FIN. REG. (Aug. 10, 2015), https://corpgov.law.harvard.edu/2015/08/10/proxy-access-proposals/ [https://perma.cc/6KTG-XGQZ].
165. *Id.*
166. *Id.*
167. Bor et al., *supra* note 71.
168. S&P 500 companies are 500 large publicly traded companies that list stock on the New York Stock Exchange (NYSE) or the Nasdaq Stock Market (NASDAQ). *See Standard & Poor's 500 Index—S&P 500*, Investopedia, http://www.investopedia.com/terms/s/sp500.asp [http://perma.cc/NSY5-P7SN] (last visited Sept. 23, 2016).
169. *Proxy Access Reaches the Tipping Point: Adopted by Just Over 50% (251) of S&P 500 Companies as of December 31, 2016*, SIDLEY 1 (Jan. 3, 2017), http://www.sidley.com/~/media/update-pdfs/2016/12/proxy-access-corporate-governance-report-december-2016.pdf [http://perma.cc/6WQK-VAR7]. It is important to note that this statistic includes the percentage of all adopted proxy access policies. Therefore, the statistic is not limited just to companies that have adopted proxy access through shareholder proposals.

Based on the influx of shareholder proposals, many company boards requested no-action letters from the SEC in an effort to obtain an opinion on whether the proxy access proposals put forth by the shareholders or by management should be voted on.[170] The SEC responded in 2015 with establishing a no-action rule, declining to offer opinions on competing proxy access proposals. In turn, shareholders can vote on the two proposals, the shareholder proposed proposal and the board proposed proposal.[171]

C. New York Comptroller Boardroom Initiative

In 2015, New York Comptroller, Scott M. Stinger, first launched the Boardroom Accountability Project.[172] The purpose of the project was to break through proxy access barriers by obtaining greater access for shareholders while still holding board members accountable.[173] The project incentivized targeted companies to adopt proxy access procedures.[174] The companies targeted were selected based on three categories: "carbon-intensive coal, oil & gas and utility companies; companies with little or no board diversity, including gender diversity; and companies that received strong opposition to their non-binding say-on-pay votes in 2014."[175] In turn, the New York City Pension Funds, which are under the direction of the comptroller, filed 75 shareholder resolutions requesting companies adopt proxy access bylaws allowing shareholders with 3% ownership for three years to nominate directors through a company's proxy materials.[176] Two thirds of the requests received majority support when taken to vote and 37 of the companies soon after agreed to implement appropriate proxy access bylaws.[177]

Instead, the statistic includes companies that choose to amend the bylaws and adopt proxy access policies prior to receiving a proxy access proposal or a vote regarding proxy access occurring.

170. Human, *supra* note 75. An SEC no-action letter is a letter written by the SEC indicating the SEC staff will not take action against a corporation if it chooses to engage in the course of action it sought guidance on.

171. Human, *supra* note 75.

172. Press Release, Office of the New York City Comptroller, Comptroller Stringer, New York City Funds, Announce Expansion of Boardroom Accountability Project (Jan. 11, 2016), http://comptroller.nyc.gov/newsroom/comptroller-stringer-new-york-city-funds-announce-expansion-of-boardroom-accountability-project/ [https://perma.cc/JC7D-2ZSS].

173. *Id.*

174. *Id.*

175. Human, *supra* note 75.

176. Press Release, Office of the New York City Comptroller, *supra* note 172.

177. *Id.* At the time this Comment was written, 109 companies have either enacted proxy access bylaws by resolution request or elected to enact policies on their own since the project's launch. *Id.*

D. Investment Funds

Several investment funds have begun leading efforts to increase shareholder rights through more protective proxy policies.[178]

The Council of Institutional Investors ("CII") is composed of corporate public and employee benefit funds and endowments.[179] The association is "a leading voice for effective corporate governance, strong shareowner rights and vibrant, transparent and fair capital markets."[180] Seven proxy access provisions, disclosed by the CII, negatively limited shareholder access.[181] These provisions included:

> An ownership requirement of 5% . . . .; . . . less than two proxy access candidates; Any limits on aggregation for a shareholder nominating group; The exclusion of loaned shares; Requirements that the nominating shareholder hold the shares after the annual meeting; Restrictions on renominations of proxy access nominees who fail to receive a specific minimum percentage of votes; Prohibitions on third-[182]

Many of these provisions reoccur in most current proposals. The major balance between shareholder rights and the board retaining control is implicated. Essentially, these seamless provisions enable shareholders power without giving them unlimited restraint; yet, institutions such as the CII believe these provisions are too restrictive and do not provide shareholders with the resources they should have through proxy access.[183]

Similarly, the Institutional Shareholder Services ("ISS") influences shareholder voting by making recommendations to institutional investors on shareholder power.[184] In 2015, the ISS recommended a shareholder proposal that allowed proxy access to nominate up to 25% of the board to shareholders who own 3% of the company's outstanding shares for three or more years.[185] This recommendation did not restrict the aggregate number

178. *See generally About Us*, COUNCIL OF INSTITUTIONAL INV., http://www.cii.org/about_us [https://perma.cc/93MZ-3CGT] (last visited Feb. 16, 2018).

179. *Id.*

180. *Id.*

181. Bor et al., *supra* note 71.

182. *Id*.

183. *See id.*

184. James R. Copland et al., *A Report on Corporate Governance and Shareholder Activism*, PROXY MONITOR (Fall 2012), http://www.proxymonitor.org/Forms/pmr_04.aspx [https://perma.cc/C7SN-8GM2].

185. Bor et al., *supra* note 71.

of shareholders forming a nominating group.[186] ISS also recommended companies reasonably review all shareholder proxy access proposals.[187] Furthermore, the ISS called for "recommendations against directors of a company that unilaterally omits a shareholder proposal unless the company has taken steps to implement proxy access on terms consistent with the shareholder proposal."[188] In accordance with the CII, the ISS also provides stringent standards to maximize shareholder power without providing a compromising alternative.[189]

In contrast to the above mentioned investment funds, Glass Lewis, an institutional investor, introduced the Glass Lewis proxy access policies that reveal an alternate approach to reviewing proxy proposals.[190] Glass Lewis reviewed proposals and director responses on a case-by-case basis.[191] Glass Lewis considered factors such as: "Company size; Board independence; Diversity of skills; Experience, background and tenure; Shareholder proponent and rationale for the proposal; Proposal's ownership and holding period thresholds (although the policy does not specify a preferred percentage)."[192] This request is the most well founded as it provides an opportunity to evaluate policy options in accordance with the costs and benefits to a specific corporation.

On its face, proxy access appears to give a necessary voice to minority shareholders. Ideally, the threshold ownership and holding period requirements enable only long-term shareholders with a significant stake in the corporation to engage in proxy access voting.[193] Unfortunately, the recommendations by the ISS and CII show us that this is not the case. The opportunity to aggregate potentially runs the risk of allowing shareholders with short-term interests, who merely hold shares in their portfolios for the given period, to pool together and meet the percentage requirements.[194] Pooling together enables the short-term shareholders to obtain a significant voice in the company.[195] Thus, investment funds illustrate that one of the most significant considerations of proxy access revolves around which particular shareholders will be affected by adopting proxy access policies.

186. *Id.*
187. *Id.*
188. *Id.*
189. *See generally id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *See id.* at 353.
194. *See generally id.* at 303–04.
195. *See generally id.*

E. Institutional Investors

Institutional investors are classified based on the stability of their ownership, such as longevity of ownership, and the size of stake they own in the company.[196] In turn, certain classes of institutional investors are unable to engage in proxy access voting because they do not meet both the ownership threshold amount and the holding period requirements.[197] In general, dedicated institutions are more likely than transient and quasi-indexer institutions to qualify to participate in proxy access voting because of the length of their holding and the amount they hold; however, dedicated institutions make up the lowest amount of all institutional shareholders.[198] Therefore, it is likely that proposed changes by dedicated investors would likely benefit the corporation as dedicated investors act in the corporation's best interests.[199] An issue arises when other investors, such as transient institutions and possibly quasi-indexer institutions, may meet proxy access requirements.[200] In most instances, quasi-indexer institutions likely would not meet the ownership threshold, even though

196. Dallas, *supra* note 5, at 303.

197. *Id.* at 303–04. As defined by Professor Bushee, three classes of institutional investors exist: transient investors, quasi-indexer investors, and dedicated investors. Brian J. Bushee, *The Influence of Institutional Investors on Myopic R&D Investment Behavior*, 73 ACCT. REV. 305, 310 (1998). "To account for the possibility that there can be substantive differences in trading and governance behavior within types of institutions, I classify institutional investors into groups using the specific characteristics of institutional investor behavior that have been argued to increase the pressure on managers to manipulate earnings. This approach classifies institutions into three groups-transient, dedicated and quasi-indexer-based on their past investment patterns in the areas of port- folio turnover, diversification, and trading momentum." *Id.* "This classification method does not proxy for classifications based on type, investment styles, or institutional size. Institutions in the transient, quasi-indexer and dedicated groups all exhibit significant heterogeneity across these other possible classification scheme." *Id.* at n.5.

198. *See* Dallas, *supra* note 5, at 304. Transient institutional investors are investors that only hold 25% of their portfolio for over two years, while they turn over roughly 70% of their portfolio every quarter as a result of aggressive trading strategies. *Id.* at 303–04. Quasi-indexer institutional investors have high diversification in their portfolios as they own small stakes in many companies, but they trade infrequently. *Id.* at 304. Dedicated institutional investors have substantial investments in a smaller amount of companies and they hold about 75% of stock for two years and have low quarterly turnovers. *Id.* During the years 1983 to 2002, dedicated institutions comprised only 8% of all institutional investors; transient institutions comprised 31% of institutions; and quasi-indexer institutions comprised 61% of institutions. *Id.*

199. *See* Dallas & Barry, *supra* note 30, at 564.

200. Dallas, *supra* note 5, at 304.

they would likely meet the holding period.[201] However, it is far more likely for transient institutions to meet proxy access requirements through the 25% of shares they retain for more than two years.[202] Transient institutions may not meet the requirements on their own.[203] Instead, it is more likely that they will be able to aggregate their shares with other transient institutions to meet the threshold requirements.[204] Coupled with the fact that transient institutions make up a significant portion of all institutional shareholders, the potential impact of these institutions using proxy access increases.[205]

In the 2015 proxy access season, 61% of institutional investors favored proxy access proposals.[206] Some of the major institutional investors include Vanguard, BlackRock, Fidelity State Street Global Advisors, California Public Employees' Retirement System ("CalPERS"), California State Teachers' Retirement System ("CalSTRS"), and T. Rowe Price.[207]

Vanguard and BlackRock typically review proposals on a case-by-case basis. Each only slightly differs in their position. Vanguard supports proxy access for shareholders owning 5% of outstanding shares for three years to nominate 20% of the board.[208] BlackRock generally approves proposals so long as they do not allow short-term investors to abuse the procedure.[209] This means that BlackRock supports proposals for shareholders owning 3% of outstanding shares for three years to nominate 20% of the board.[210]

Conversely, Fidelity generally opposes proxy access proposals by shareholders and management.[211]

State Street Global Advisors considers additional factors outside the general proxy access items. The additional factors include the performance of the company, the company's governance structure, the rights of shareholders, and the performance of the board.[212] However, in the end, State Street Global Advisors adopted a bylaw common among organizations; the bylaw allows up to twenty shareholders to create a nominating group and set threshold ownership at 3% for a holding period of three years to nominate 20% of the board.[213]

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201. *See id.*
202. *See id.*
203. *See id.*
204. *See id.*
205. *See id.*
206. Bor et al., *supra* note 71.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*

CalPERS has already supported proxy access proposals at 100 of its companies; usually supporting proposals for access to shareholders with 3% ownership for three years.[214]

CalSTRS supports investors owning 3% of the voting stock for three years to nominate a minority of the board.[215]

T. Rowe Price also supports proposals for 3% ownership for a two or three year holding period and does not prohibit aggregate nomination groups.[216]

VI. RECENT CONTROVERSIES AND THE FUTURE OF PROXY ACCESS

Provided this information, it may appear that proxy access proposals are an acceptable practice in the corporate world. However, this is not the case. Instead, although some shareholders have succeeded in obtaining these policies, the policies have not been utilized.

A. First Shareholder Use of Proxy Access

As previously stated, over 50% of the S&P 500 companies have adopted proxy access bylaws; yet no one is using it.[217] This raises the question of whether the policies are too new or if there are other issues associated to the recently adopted policies that have not been addressed.[218] In November, 2016, GMACO Investors, shareholders of Natural Fuel and Gas ("NFG"), filed a schedule 13D, thereby implementing the first use of proxy access in the U.S., and nominated an individual to the board.[219] Unfortunately, NFG rejected the nomination claiming that GMACO Investors did not have the right intent to enable them to utilize proxy access as they violated the take-over policies.[220] In response, GMACO Investors withdrew their nomination thereby concluding the first attempt at implementing proxy access.[221] In turn, it is currently unclear what course of action those trying to utilize proxy access must take to be

214. *Id.*
215. *Id.*
216. *Id.*
217. *Proxy Access Reaches the Tipping Point*, *supra* note 169.
218. *See generally id.* at 3.
219. *Id.* A Schedule 13D is an SEC filing that shareholder of a publicly traded company must file within 10 days of acquiring a beneficial ownership–ownership greater than 5%.
220. *Id.*
221. *Id.*

successful; there are no federal procedures or policies currently in place.[222]

B. SEC Universal Proxy Ballot Proposal

Although the SEC has not proposed a universal proxy access policy following the revoked rule 14a-11, the SEC has since proposed a universal proxy ballot. The universal ballot combats confusion arising from nominees presented in separate annual proxy materials. Therefore, in accordance with the universal ballot proposal, a shareholder nominee and the management nominee would be represented on the same proxy ballot. This 243-page proposal is most similar to the Canadian Coalition for Good Governance Proposal.[223] The SEC proposal seeks to increase the frequency of shareholders using proxy access policies to nominate candidates to the board.[224] The deadline to make comments to the proposal was on January 9, 2017.[225]

C. Anticipated Issues From the New Administration

The SEC universal ballot proposal has met opposition from Republicans. The sole Republican SEC commissioner Michael Piwowar voted against the proposal commenting that the proposal "has been pushed for years by special interest groups and it would increase the likelihood of proxy fights at public companies, thereby distracting management and employees from carrying out their core mission."[226] Therefore, as Chairman Mary Jo White planned to step down during the new Trump administration, Trump was expected to likely fill her vacancy with a Republican commissioners, which he did.[227] A new commissioner who shares Piwowar's view on the matter can help eliminate the possibility of a universal proxy ballot.[228] However, at this time, the SEC has yet to approve the proposal.[229]

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222. *See id.*
223. *See* Steve Wolosky et al., *'Universal' proxy proposal: The view from Olshan*, IR MAGAZINE (Jan. 12, 2017), https://www.irmagazine.com/articles/sustainability/21803/universal-proxy-proposal-view-olshan [https://perma.cc/43FJ-2JUB]. For more information, see the discussion *infra*.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*

VII. INTERNATIONAL SHAREHOLDER NOMINATION APPROACHES AND CONSIDERATIONS

Proxy access is still very new to many U.S. corporations; therefore, the potential use of proxy access is still unclear.[230] In order to anticipate the future of proxy access in the U.S., one may look to proxy access and similar policies in other countries.[231] Several countries have adopted policies enabling greater influence to minority shareholders through various means.[232] Each of these policies gives shareholders greater or lesser rights than that of other policies in accordance with the specific corporate governance structure of the particular nation.[233] Some of the policies do not enable proxy access, while others influence through similar means to allow shareholders a greater voice in nominating directors.[234] Evidence from each country suggests that even with policies in place, proxy access is infrequently utilized.[235] Additionally, even in countries where proxy access has been used more frequently, the success rate is still very low.[236] The Chartered Financial Analyst ("CFA") Institute, a global association of investors, released data reporting that:

> [P]roxy access is a rarely used shareowner right that is typically used only when other outlets for shareowner concerns about a company or its board—such as engagement between shareholders and companies—have been exhausted or have otherwise proved unfruitful.[237]

A. Limited Proxy Access

The current popular practice in Canada involves selecting nominees through an independent nominating committee of the board.[238] This practice most similarly mirrors the current nominating practice in most U.S. companies that have not yet adopted proxy access policies.[239] The slate of candidates provided through these independent committees typically reflect the board's network of connections and does not reflect the shareholder

230. *See* Human, *supra* note 75.
231. *Id.*
232. *See id.*
233. *See id.*
234. *See id.*; *see* CAN. COAL. FOR CORP. GOVERNANCE, *supra* note 56, at 3.
235. Human, *supra* note 75.
236. *Id.*
237. *Id.*
238. CAN. COAL. FOR CORP. GOVERNANCE, *supra* note 56, at 1.
239. *See id.* at 5.

interest.[240] In contrast to the U.S., Canadian law currently affords shareholders limited power of proxy access.[241] A shareholder who owns 5% of a company's shares may either propose a meeting for shareholders to elect directors, or submit a proposal to include a specific nominee in the company's proxy circular (essentially the proxy materials distributed annually to shareholders).[242] The main issue with the current law is that the treatment of nominees in the company's proxy circular remains inconsistent with the treatment of nominees by the board or by an independent committee.[243] The law itself explicitly allows companies to treat shareholder nominated nominees differently and essentially poorer than nominees made by the board.

> [T]here is no statutory requirement for the corporation to include information about the shareholder's nominee in the circular in an equitable manner in the same location as the company's nominees with the same prominence; there is no requirement to use a fair universal proxy form; and the shareholder proponent is restricted to a 500-word statement in support of the proposal, whereas the length of management's response is unrestricted.[244]

As a result, shareholders nominate only a limited number of candidates compared to the board or independent committees.[245] Currently, proxy access in Canada has been utilized only once in three years.[246]

In response to the inequalities shareholders face in the nominating process, the Canadian Coalition for Good Governance ("CCGG") proposed a reform in 2015. The CCGG promotes good governance practices in corporations owned by its members, commonly corporations that trade in the S&P 500 or the Toronto Stock Exchange ("TSX").[247] In May 2015, the CCGG proposed corporations permit shareholders with a "meaningful percentage" of shares the ability to nominate directors through a corporation's proxy materials.[248] The proposal significantly mirrors revoked SEC rule 14a-11, as the proposal suggests setting a threshold requirement of owning a "meaningful percentage"–5% of outstanding shares in a corporation with a "market capitalization of less than $1 billion" and 3% of outstanding shares in a corporation with a "market capitalization of $1 billion or more."[249]

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240. *Id.*
241. *Id.*
242. *Id.*
243. *See generally id.*
244. *Id.* at 5–6
245. *Id.* at 6.
246. Human, *supra* note 75.
247. *About CCGG*, CANADIAN COALITION FOR GOOD GOVERNANCE, http://www.ccgg.ca/index.cfm?pagepath=About_CCGG&id=17564 [https://perma.cc/ R4U2-7KKR] (last visited Sept. 23, 2016).
248. CAN. COAL. FOR CORP. GOVERNANCE, *supra* note 56, at 13.
249. *Id.*

The CCGG seeks to use this threshold to provide shareholders with a mechanism to influence the nomination of the board while avoiding the risk of giving shareholders too much power.[250] Additionally, much like the U.S., the proposal permits shareholders to aggregate their ownership in order to meet the threshold requirements.[251] Furthermore, the proposal requires shareholders to continue to own the required shares until the time of the meeting when nominees will be considered.[252] Overall, the proposal highlights many of the threshold procedures that enable shareholders to utilize their rights; yet, the proposal fails to address the risks associated with increased shareholder power given to investors with short-term interests.[253]

B. No Ownership Threshold for Nominations

Other countries have adopted more protective policies through means different than proxy access that still accomplish similar goals.[254] One of the main reasons proxy access policies in the U.S. contain ownership thresholds and ownership periods is to avoid frivolous nominations by shareholders with an unsubstantial interest in the company.[255] These perceived risks are not necessarily mirrored in other countries though.[256] Instead, countries such as Germany and Australia provide shareholders with significantly larger amounts of authority than policies in the U.S. afford shareholders.[257]

Germany has one of the most shareholder protective policies, as a shareholder that owns any number of shares has the ability to nominate a director by providing a statement no longer than 500 words in support of the candidate.[258]

In Australia, the articles of incorporation of each individual company dictates the policy governing board nominations.[259] Typically, in most public companies, each shareholder owning one share of the company is thereby

250. *Id.*
251. *Id.*
252. *Id.*
253. *See generally id.*
254. *See id.* at 7–8.
255. *See generally id.*
256. *See id.* at 20.
257. *Id.* at 7.
258. *Id.*
259. *Id.*

able to nominate one board candidate through proxy access procedures.[260] Proxy access has been used eleven times in 2016, but has only been used successfully once.[261]

C. Nominations by Minority Shareholder(s) Committees

Another example of favorable shareholder policies is Sweden. Sweden does not implement proxy access procedures, but instead creates a nominating committee that is responsible for nominating candidates that the shareholders then vote on to elect.[262] The nominating committee consists of four or five of the company's largest shareholders and the chair of the board.[263] Together, the committee also recommends criteria for selecting members of the nominating committee for the following year.[264]

D. Line or Slate Voting

Italy and Brazil present an intermediary system profoundly different from proxy access in the U.S. but share the same underlying goal of granting a voice to minority shareholders.[265]

Italy has implemented a list voting system that allows minority shareholders to present a list of candidates for the election of the board.[266] The Italian legislature first introduced list voting in 1998, but the legislature limited shareholder influence to only the board of statutory auditors–a body separate from the board.[267] In 2005, the legislature extended list voting to enable shareholder appointment of directors.[268]

In general, a list voting system allows shareholders, often owning around 1.5% of the company, to nominate directors of the board.[269] Although the exact procedures of this system vary significantly from proxy access, the goal of increasing minority shareholder influence remains consistent.[270] In listed corporations, all shareholders who control a certain number of

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260. *Id.*
261. Human, *supra* note 75.
262. *Id.*
263. *Id.*
264. *Id.*
265. *See* Marco Ventoruzzo et al., *Italian Boards and The Strange Case of the Minority Becoming Majority*, HARVARD L. SCH. FORUM ON CORP. GOV. & FIN. REG. (May 23, 2016), https://corpgov.law.harvard.edu/2016/05/23/italian-boards-and-the-strange-case-of-the-minority-becoming-majority/ [https://perma.cc/3Z7U-XFD2].
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*

shares can nominate board members through a list of nominees.[271] As required by statute, shareholders may present a list of board nominees; the lists are then voted on and the nominees on the list that receives the highest votes are elected.[272] Additionally, at least one nominee from the other list that receives the second highest votes is elected.[273] These committees vary from the nominating committees in the U.S. comprised of board members as instead these committees place power in the hands of the shareholders, even if merely the largest, yet still minority, shareholders.

Through this system, institutional investors are able to obtain a voice since institutional investors receive significant support for the lists they present at the shareholders' annual general meeting.[274] Accordingly institutional investors are often able to obtain votes from minority investors.[275]

Similarly, in Brazil, directors are elected as part of slates presented by management or a nominating committee.[276] An aggregated group of shareholders representing 15% of the company's common shares may petition to nominate one candidate in a separate election.[277] There is no individual threshold requirement of shareholders to petition for a separate election, instead, the aggregate of shareholders must meet the 15% requirement.[278]

E. Comparing International Policies to the U.S.

A noticeable shift exists indicating many nations favor adopting countrywide standards regarding shareholder protective policies.[279] The variety of policies among countries can be attributed to factors such as the type of companies affected, the makeup of shareholders within publicly traded companies, and the popular corporate governance structure within that country.[280] Although each adopted policy may contain similar provisions

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271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Proxy Paper Guidelines 2015 Proxy Season Brazil*, GLASS LEWIS 9 (2015) http://www.glasslewis.com/assets/uploads/2013/12/2015_GUIDELINES_Brazil.pdf [https://perma.cc/44Q3-TV74].
277. *Id.*
278. *Id.*
279. *See id.*
280. *See generally id.*

to policies of other nations, each is very distinct.[281] Policies with no qualification requirements for shareholders, list/slate voting systems, or nominating committee systems each differ to meet the country's view of shareholder rights and the cultural makeup of the nation.[282]

Generally, enforcement of a uniform policy throughout a country creates stability and cohesion between corporations within the country.[283] Without a uniform policy, companies are left to follow corporate governance trends without really understanding the impact policies might have on a corporation's long-term health.[284] The corporate trends cause companies to adopt varying policies as each corporation chooses policies it determines are most beneficial.[285] In the U.S., many corporations have adopted policies similar to the SEC's revoked rule 14a-11; however, some corporations have chosen to adopt policies that only roughly reflect the rule by lowering threshold requirements and removing aggregation limits.[286] Following the DC Circuit revoking rule 14a-11, the SEC is likely to continue to refrain from establishing any proxy access mandates.[287] Although a universal policy may establish consistency within U.S. corporations, it is unlikely to be promulgated.[288] Therefore, companies are left to determine individually whether proxy access is beneficial or not.

VIII. CONCLUSION

This section will address the current state of proxy access in the U.S. and the potential solutions to solve perceived issues with proxy access. Specifically, this section will evaluate the debate over proxy access by looking specifically to which shareholders qualify for proxy access and the consequences of giving these shareholders more power within companies.

Proponents of proxy access believe that increasing shareholder participation in selection of the board benefits the corporation and is necessary to maintain shareholder democracy.[289] In contrast, opponents often view increased shareholder influence as a means to facilitate hostile take-overs–essentially, allowing shareholders to take over control of the board.[290] In turn, obtaining an accurate balance between enabling shareholder

281. *See id.*
282. *See id.*
283. *See id.*
284. *See generally id.*
285. Copland & O'Keefe, *supra* note 55.
286. *See id.*
287. *See generally id.*
288. *See generally id.*
289. *Id.*
290. *Id.*

power while maintaining board control is one of the major difficulties facing proxy access policies.[291] Thus, before adopting proxy access bylaws, companies should evaluate on a case-by-case basis the specific provisions of proxy access proposals to determine if the proposed policies are in-line with the company's interests.[292]

There is little worry that institutions will use proxy access policies to obtain short-term return because of the longevity of the holding periods that most proxy access proposals require.[293] But it is still something that should be considered. A variety of institutional investors may qualify for proxy access, including some investors that may not benefit the long-term interests of the corporation.[294] Thus, the specific investors able to engage in proxy access voting are relevant to evaluating the costs and benefits of enabling proxy access.[295] Not all institutional investors may positively impact corporations when given greater voices.[296] Specifically, institutions aimed at obtaining short-term gains, like transient investors, may influence the corporation to engage in short-term behavior through first altering the board.[297] Similarly, managers may also engage in short-term behavior in an effort to preempt shareholders from using proxy access voting to replace members of the board.[298]

It is suggested that shorter-term investors could attempt to use proxy access by finding like-minded shareholders that are eligible for using proxy access.[299] In an age of social media, the threat of shareholders grouping

291. *See* Human, *supra* note 75.
292. *See* Copland & O'Keefe, *supra* note 55.
293. Human, *supra* note 75.
294. *See id.*
295. *See* Dallas, *supra* note 5, at 304–05. For example, one of Coca-Cola's top investors Berkshire Hathaway would likely provide substantial benefit to a corporation if given a greater voice in the corporation. *See generally* Lawrence A. Cunningham, *Berkshire's Disintermediation: A Managerial Model For The Next Generation*, 50 WAKE FOREST L. REV. 509, 509–11 (2015). Berkshire Hathaway, Warren Buffet's corporation, has a prominent reputation for implementing positive measure in many of the corporations in which it owns shares. *Id.* at 510. "Berkshire's formal governance is headed by Buffett's handpicked board of directors—his friends and family, who pride themselves more for being just like shareholders than on serving as monitors of management for them. Berkshire's shareholder body embraces the company's unusual approach to corporate governance and concurs with Buffett's aversion to intermediaries." *Id.*
296. *See* Dallas & Barry, *supra* note 30, at 563.
297. *See id.*
298. *See* Bushee *supra* note 197, at 307.
299. Human, *supra* note 75.

together is possible, but it is also very unlikely.[300] Putting caps on the amount of shareholders that may aggregate together easily solves this issue.[301] Therefore, shareholders interested in utilizing proxy access must still own a reasonable amount of shares as only roughly twenty shareholders may typically group together.[302]

Overall, the general view is that proxy access will be infrequently used.[303] Not many shareholders will meet the requirements; therefore utilizing proxy access will take considerable work on the part of the interested shareholders to find other shareholders to support their nomination.[304] This is partially due to the fact that proxy access is not actually useful unless the nominating shareholder can actually win the vote to get their candidate on the board.[305] Proxy access is therefore more of a last resort option that certain shareholders may utilize when it is necessary.[306]

Thus, although establishing a universal proxy access policy is possible, there is no need to do so. Instead, recent activity indicates that the best approach is to allow companies to shape proxy access proposals on a case-by-case basis to meet their own specific interests.[307] Moreover, when activists and managers have dueling proposals, the proposal in the company's best interests is likely to be selected.[308] Furthermore, although the SEC could potentially establish a baseline proxy access policy, such a policy is also unnecessary.[309] Given the issues presented by the revoked SEC rule 14a-11, it is likely not an easy solution.[310] A subsequent rule might also too be overturned. Instead, the best option is to allow corporations to continue engaging in proxy access policy adoption at their own pace and under their own consideration of factors.[311]

Accordingly, it is in the best interest of companies to proactively adopt policies that meet their goals rather than wait for shareholders to propose a policy. In contrast, from the perspective of shareholders, shareholders who are among like-minded shareholders should propose a policy that meets their aggregated group's goals. As previously stated, proxy access is only useful for shareholders who unilaterally meet the requirements or

300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *See id.*
307. *Proxy Access Reaches the Tipping Point*, *supra* note 169, at 18.
308. *See generally id.*
309. *See generally id.*
310. *See generally id.*
311. *See generally id.*

those who can aggregate together. Therefore, it is vital for long term investors and pension funds to be among like-minded shareholders to not only aggregate together, but also to succeed in implementing meaningful change in the company.