

Shareholder Proposal Developments

During the 2016 Proxy Season

June 28, 2016

This client alert provides an overview of shareholder proposals submitted to public companies for 2016 shareholder meetings, including statistics, notable decisions from the staff of the Securities and Exchange Commission on no-action requests, and information about litigation regarding shareholder proposals.

If you would like more details, please contact the Gibson Dunn lawyer with whom you usually work, or any of the following Gibson Dunn Securities Regulation and Corporate Governance partners in the firm's Washington, D.C. and New York offices.

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Thanks to Julia Lapitskaya, Sarah Fortt, Kasey Robinson, Jacob Steele and Dustin McKenzie for their contributions to this alert.

- Gibson, Dunn & Crutcher LLP assisted companies in submitting the shareholder proposal no-action requests discussed in this alert that are marked with an asterisk (*).
- For the purposes of reporting statistics regarding no-action requests in this alert, references to the “2016 proxy season” refer to the period between October 1, 2015 and June 1, 2016. Data regarding no-action letter requests was derived from the information available on the Securities and Exchange Commission’s (“SEC’s”) website. Unless otherwise noted, all data in this alert on shareholder proposals submitted, withdrawn, and voted on is derived from the Institutional Shareholder Services (“ISS”) publications and the ISS shareholder proposals and voting analytics databases, and includes proposals submitted and made available through these ISS databases at any time prior to June 1, 2016 for annual meetings of shareholders at Russell 3000 companies held at any time in 2016 (“2016 meetings”). Voting results are reported on a votes cast basis (votes for or against) and do not address the impact of abstentions. Other data was derived from no-action letters posted on the SEC’s website. Where statistics are provided for prior years, the data is for a comparable period in those years.

Shareholder Proposals Statistics & Voting Results

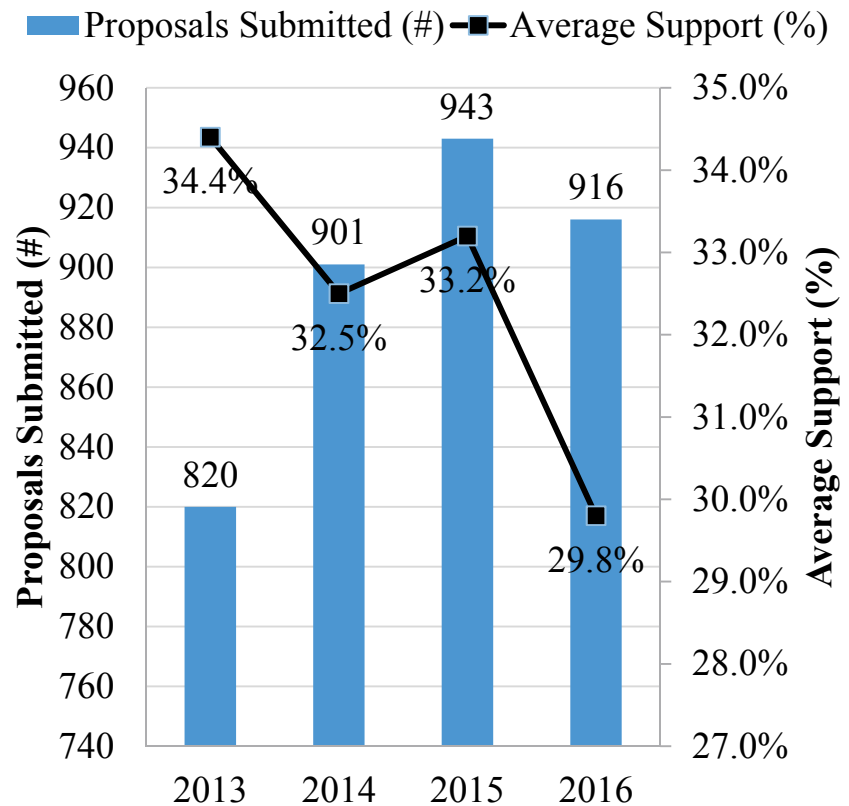
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Submitted Shareholder Proposals

Overview

- **Fewer Proposals Submitted:** According to ISS data, shareholders have submitted fewer shareholder proposals for 2016 meetings than they did for 2015 meetings.
 - However, the number of proposals submitted for 2016 meetings is still higher than the approximate number of proposals submitted for 2014 and 2013 meetings.
- **Support Declined:** Average support for shareholder proposals is at its lowest in four years.¹
 - Only 14.5% of proposals (61 proposals) voted on at 2016 meetings received support from a majority of votes cast, compared to 16.7% of proposals (75 proposals) at 2015 meetings.

Shareholder Proposals (2013 – 2016)



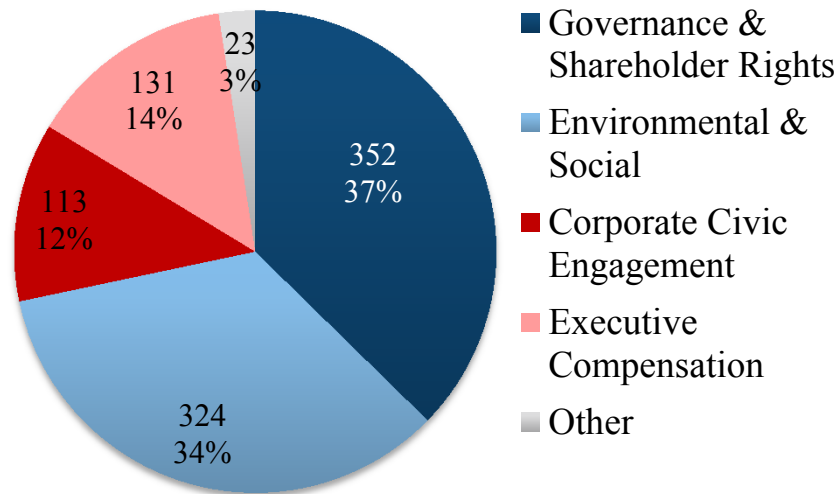
^[1] As of June 1, 2016, voting results were available through the ISS databases for a total of 422 proposals. As a matter of practice, the vast majority of shareholder proposals submitted to companies for shareholder meetings are submitted under Rule 14a-8 rather than pursuant to companies' advance notice bylaws. However, because the ISS data does not indicate whether a shareholder proposal has been submitted under Rule 14a-8 or under a company's advance notice bylaws, it is possible that the ISS data includes voting results for shareholder proposals not submitted pursuant to Rule 14a-8. This discrepancy is likely to account for only a very small number of proposals.

Submitted Shareholder Proposals

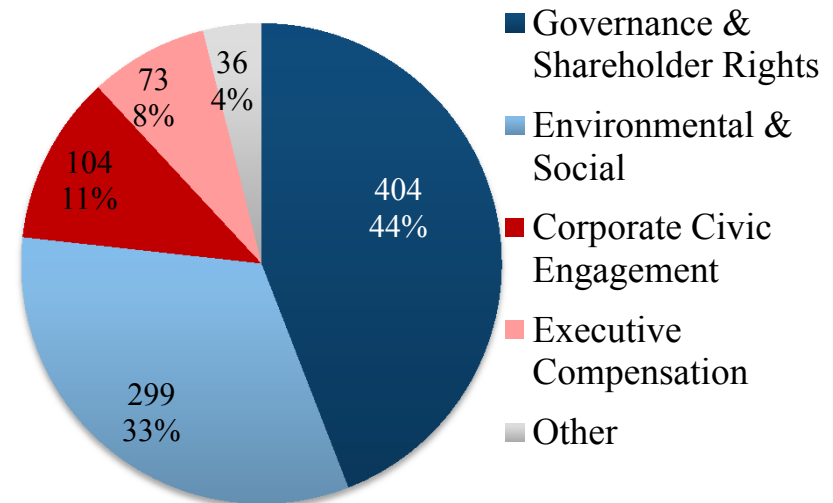
Focus Remains on Governance

- Across five broad categories of shareholder proposals, the approximate number of proposals submitted for 2016 meetings (as compared to 2015 meetings) was as follows:

2015 Proposals



2016 Proposals

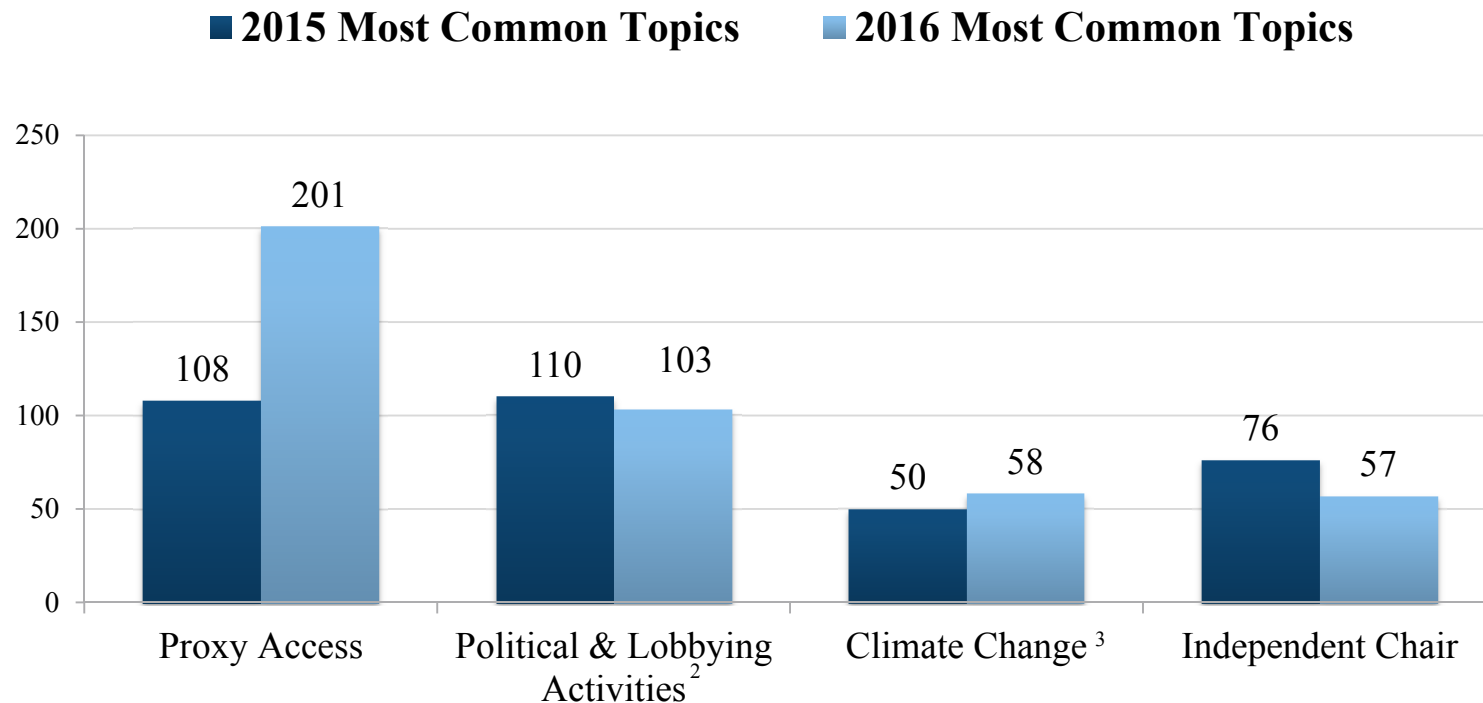


- For the second year in a row, ***governance & shareholder rights*** proposals were the most frequently submitted proposals, largely due to the yet again ***unprecedented number of proxy access*** shareholder proposals submitted (201 proposals (or 21.9% of all proposals) submitted for 2016 meetings versus 108 proposals submitted for 2015 meetings).

Most Common Shareholder Proposals

Proxy Access Proposals Continue to Dominate

- The most common 2016 shareholder proposal topics, along with the approximate numbers of proposals submitted and as compared to the most common 2015 shareholder proposal topics, were:



^[2] Includes all corporate civic engagement proposals, except proposals relating to charitable contributions (one submitted as of June 1, 2016 for 2016 meetings).

^[3] Includes proposals relating to (i) reports on climate change; (ii) greenhouse gas emissions; and (iii) climate change action (i.e., proposals requesting increasing return of capital to shareholders in light of climate change risks). Note that climate change is a subtopic of the environmental and social category of proposals.

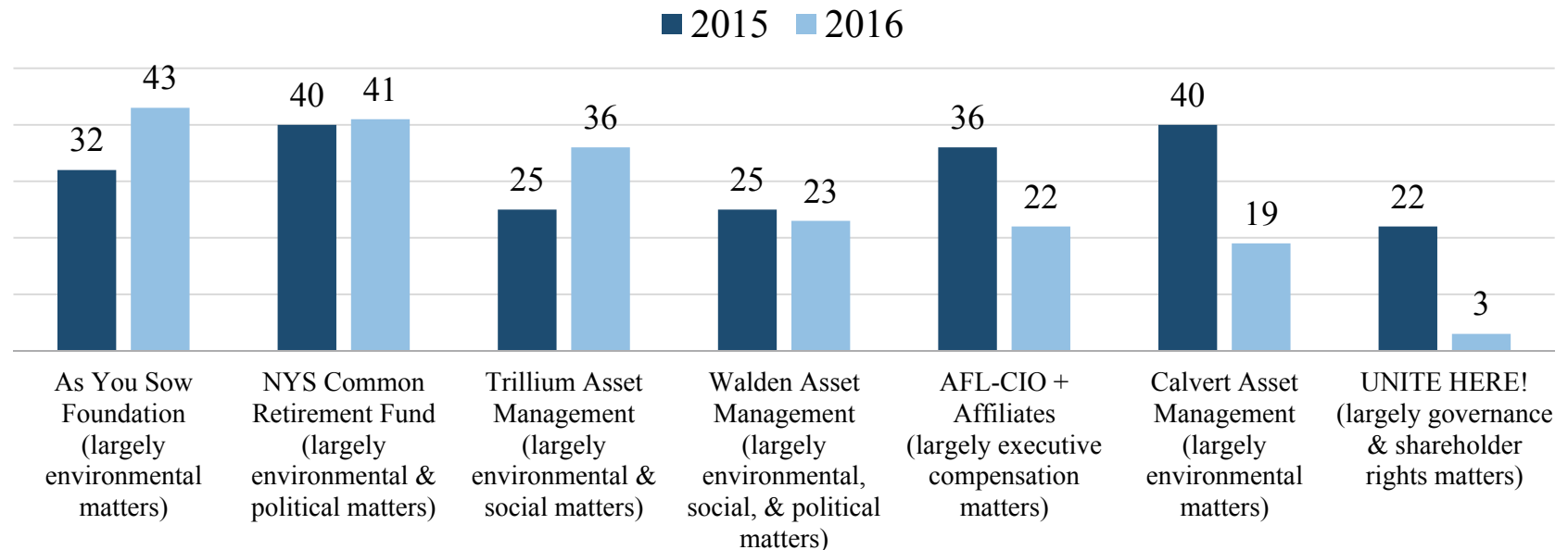
Most Active Proponents

- **Chevedden & Co.:** As is typically the case, John Chevedden and shareholders associated with him (including James McRitchie) submitted by far the greatest number of shareholder proposals—approximately 227 for 2016 meetings.
 - Most of these proposals (66.6%) have either been voted on or are pending. Twenty-three percent have been omitted after obtaining relief through the SEC no-action process; another 7% have ultimately not been included in proxy statements or have not been properly presented at the meeting; and only 3.1% of these proposals have been withdrawn.
 - By way of comparison, shareholder proponents withdrew approximately 19.2% of the proposals submitted for 2016 meetings, up from approximately 17% of the proposals withdrawn for 2015 meetings.
- **NYC Pension Funds:** This season once again saw a large number of proposals submitted by the New York City Comptroller on behalf of five New York City pension funds, which submitted or co-filed at least 79 proposals (as compared to 86 proposals submitted for 2015 meetings), including approximately 72 proxy access proposals,⁴ as part of the Comptroller’s continuation of its “Boardroom Accountability Project” for 2016.
 - Only 34.6% of these proposals have either been voted on or are pending; most (55.6%) of these proposals have been withdrawn. The remainder (9.8%) have been omitted or not otherwise included in proxy statements.

^[4] See NYC Comptroller, Boardroom Accountability Project, available at <http://comptroller.nyc.gov/boardroom-accountability/> (last visited June 1, 2016).

Other Proponents

- **Some of the Same Players (But Not Everyone Returned in 2016):** As was true for 2015 meetings, with the exception of Calvert Asset Management and UNITE HERE!, several of the same proponents that were reported to have submitted or co-filed at least 20 proposals each for 2015 meetings, did so again for 2016 meetings:



- **Same Subject Areas:** As reflected in the chart above, the focus of these proponents remained largely consistent with their focus for 2015 meetings.

Other Proponents (cont.)

- **Public Pension Funds:** In addition to the New York City and New York State pension funds, several other state pension funds submitted shareholder proposals as well:
 - California State Teachers' Retirement System (18 proposals, largely focused on governance matters and climate change);
 - Connecticut Retirement Plans and Trust Funds (14 proposals, largely focused on governance, social, and political matters);
 - City of Philadelphia Public Employees Retirement System (10 proposals, largely focused on political and lobbying matters);
 - North Carolina Retirement Systems (two board diversity proposals);
 - California Public Employees' Retirement System (one proxy access proposal); and
 - Firefighters' Pension System of Kansas City, Missouri (one majority voting in director elections proposal).

Shareholder Proposal Voting Results

Majority Voting in Director Elections Receives the Highest Support

The following are the principal topics addressed in proposals that received high shareholder support at a number of companies' 2016 meetings:

- **Majority Voting in Uncontested Director Elections:** Ten proposals voted on averaged 74.2% of votes cast, compared to 76.6% in 2015;
- **Amendment of Bylaws or Articles to Remove Antitakeover Provisions:** Two proposals voted on averaged 70.6% of votes cast, compared to 79% in 2015;
- **Board Declassification:** Three proposals voted on averaged 64.5% of votes cast, compared to 72.6% in 2015;
- **Elimination of Supermajority Vote Requirements:** Thirteen proposals voted on averaged 59.6% of votes cast, compared to 53.0% in 2015;
- **Proxy Access:** Fifty-eight proposals voted on averaged 48.7% of votes cast, compared to 54.6% in 2015;
- **Shareholder Ability to Call Special Meetings:** Sixteen proposals voted on averaged 39.6% of votes cast, compared to 44.4% in 2015; and
- **Written Consent:** Thirteen proposals voted on averaged 43.4% of votes cast, compared to 39.4% in 2015.

Majority Votes on Shareholder Proposals

The table below shows the principal topics addressed in proposals that received a majority of votes cast at a number of companies:

Proposal	2015 Majority Votes	2016 Majority Votes
Proxy access	38	27
Majority voting in uncontested director elections	7	8
Board declassification	6	2
Elimination of supermajority vote requirements	6	8
Shareholders' ability to call special meetings	4	2
Removal of antitakeover provisions	2	2
Shareholder approval of shareholder rights plan	2	1
Written consent	2	1
Independent Chair	2	0
Political and lobbying activities	0	2

Shareholder Proposal No-Action Requests Summary

The total number of no-action requests submitted declined, but the number the SEC Staff (the “Staff”) responded to remained about the same:

	2015 Proxy Season ⁵	2016 Proxy Season ⁶
Total no-action requests submitted	318	245
Total Staff responses issued⁷	268	239
No-action requests withdrawn	55	28
Responses granting or denying exclusion	213	211
<i>Exclusions granted</i>	130 (61%)	143 (67.8%)
<i>Exclusions denied</i>	83 (39%)	68 (32.2%)
No-action requests for which Staff did not issue a response due to review of Rule 14a-8(i)(9) interpretations⁸	48	N/A

^[5] As of June 1, 2015, two no-action requests were pending.

^[6] As of June 1, 2016, six no-action requests were pending.

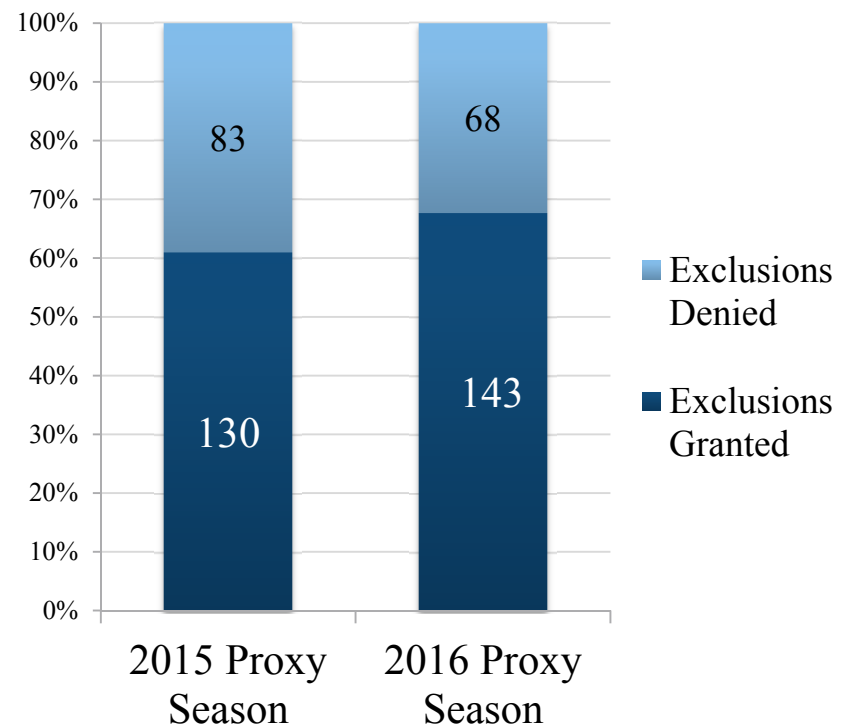
^[7] Includes Staff-issued responses in order to either grant or deny exclusion of a proposal, or following withdrawal of a no-action request, usually in response to a proponent’s withdrawal of a proposal.

^[8] See slide 22 regarding the Staff’s January 2015 decision to no longer express views on Rule 14a-8(i)(9) during the 2015 proxy season.

Shareholder Proposal No-Action Requests Summary (cont.)

- **Lower Percentage of Exclusions:** During the 2016 proxy season, the percentage of no-action letters for which relief was denied by the Staff fell to 32.2%, compared to 39% in 2015.
 - The 2015 percentage of no-action letters that were denied by the Staff represented the highest level in four years.
 - The 2016 percentage is more in line with years prior to the 2015 proxy season (the Staff denied approximately 29% and 35% of the no-action requests for which the Staff issued decisions during the 2014 and 2013 proxy seasons, respectively).

Granted vs. Denied Requests

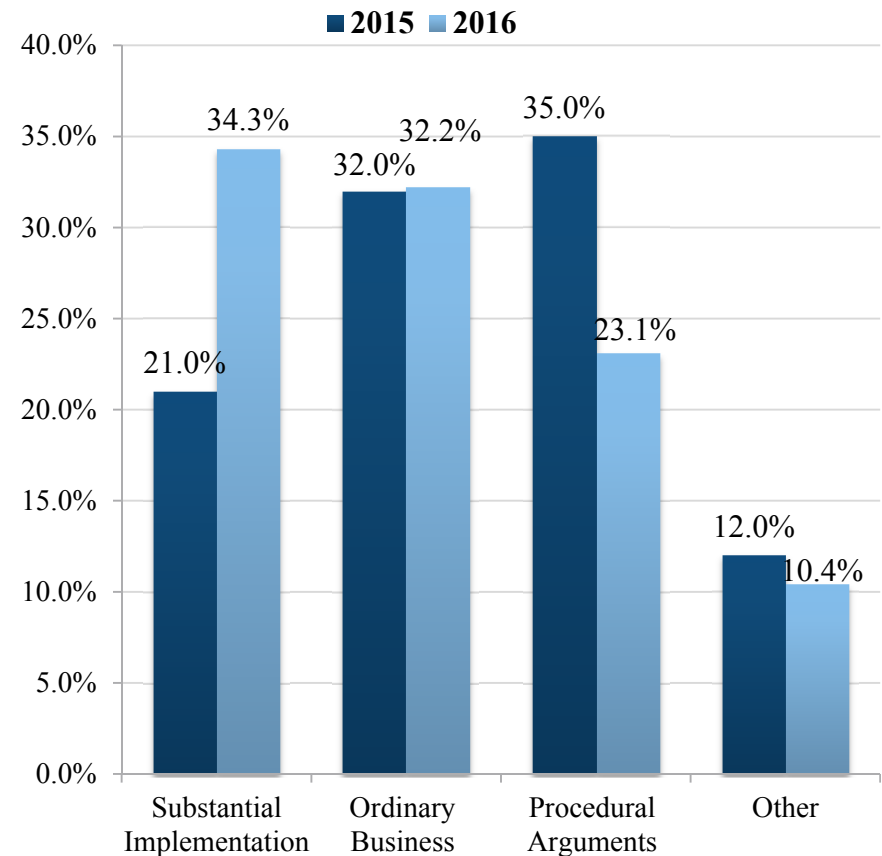


No-Action Request Letter Wins

Principal Reasons for Granting Relief

- **Substantial Implementation (Rule 14a-8(i)(10)):**
The number of no-action requests granted on this basis during the 2016 proxy season nearly doubled, as compared to the 2015 proxy season.
 - Out of a total of 49 no-action requests granted on this basis, 38 no-action requests (or 77.6%) related to proxy access proposals.
 - Rule 14a-8(i)(10) became the “go to” argument for many companies following the issuance of SLB 14H (which restricted the use of Rule 14a-8(i)(9)).
- **Ordinary Business (Rule 14a-8(i)(7)):** After doubling during the 2015 proxy season, the percentage of wins on this basis held steady.
- **Procedural Arguments** (e.g., timeliness or defects in the proponent’s proof of ownership): For the first time in four years, these were *not* the most common reasons for exclusion.

Principal Reasons for Granting Relief[†]



^[†] All percentages are based on the number of no-action requests for which relief was granted.

No-Action Request Letter Wins

Notable Developments

- **Only One Proposal Excluded for Being Vague and Misleading (Rule 14a-8(i)(3)):** The Staff concurred in only one instance (0.7% of all successful no-action requests) that the proposal was vague and misleading. *See Alaska Air Group, Inc.* (avail. Mar. 10, 2016). This is consistent with the dramatic drop in Rule 14a-8(i)(3) exclusions in 2015 (2% during the 2015 proxy season down from 18% in 2014).
- **Only One Proposal Excluded for Conflicting With a Company Proposal (Rule 14a-8(i)(9)):** In addition, only one company (0.7% of all successful no-action requests) won a no-action request on the basis of Rule 14a-8(i)(9).
 - In *Illumina, Inc.* (avail. Mar. 18, 2016), the proposal requested that the board take the steps necessary so that each voting requirement in the company's charter and bylaws that calls for a greater than simple majority vote be replaced with a majority of votes cast standard (or a simple majority). A company proposal seeking ratification of the company's supermajority provisions was being proposed at the same meeting. The Staff concluded that the shareholder proposal was excludable because "a reasonable shareholder could not logically vote in favor of both proposals."

No-Action Request Letter Denials

The Staff rejected exclusion arguments under the ordinary business and vague/misleading rules more than any other arguments:

- **Ordinary Business (Rule 14a-8(i)(7)):** 55.9% during the 2016 proxy season, compared to 24% during the 2015 proxy season;
- **Vague or False/Misleading (Rule 14a-8(i)(3)):** 51.5% during the 2016 proxy season, compared to 58% during the 2015 proxy season:
 - While the percentage of denials remained high, confirming that the SEC Staff applies a very high threshold when determining that a proposal is vague or false/misleading, for the first time in three years Rule 14a-8(i)(3) arguments were *not* the most frequently rejected arguments during the 2016 proxy season (unlike during the 2015 and 2014 proxy seasons);
 - The continuing high incidence of rejecting Rule 14a-8(i)(3) arguments during the 2015 proxy season led to a slight reduction in the number of times the argument was raised during the 2016 proxy season (approximately 14.7% of no-action requests in 2016 contained Rule 14a-8(i)(3) arguments, compared to 16.4% in 2015);
- **Substantial Implementation (Rule 14a-8(i)(10)):** 30.9% during the 2016 proxy season, compared to 28% during the 2015 proxy season;
- **Procedural Arguments:** 16.2% during the 2016 proxy season, compared to 14% during the 2015 proxy season; and
- **Absence of Power/Authority (Rule 14a-8(i)(6)):** 10.3% during the 2016 proxy season, compared to 8.3% during the 2015 proxy season.¹⁰

^[10] The total exceeds 100% because many no-action requests assert more than one argument for exclusion. All percentages are based on the number of no-action requests for which relief was denied.

Rule 14a-8 Developments & Emerging Trends

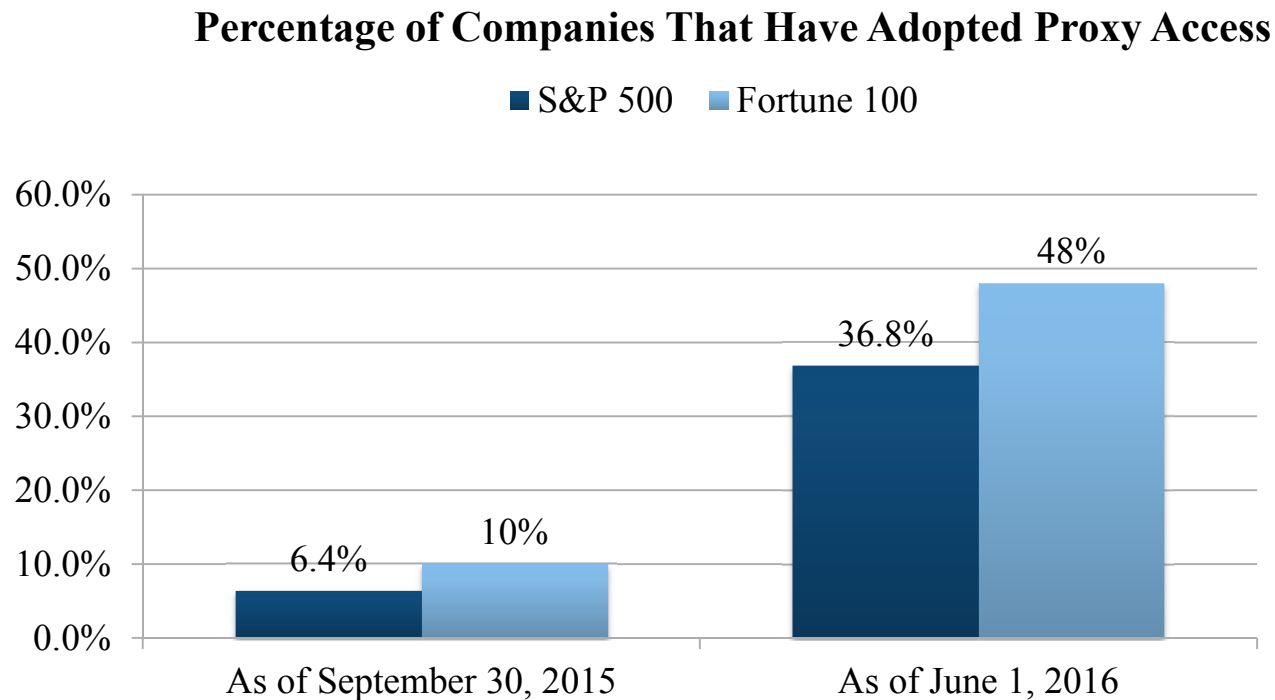
- Proxy Access Proposal Trends and Statistics
- Rule 14a-8 Procedural Developments
- Governance & Shareholder Rights Proposal Trends
- Corporate Civic Engagement Proposal Trends
- Environmental & Social Proposal Trends
- Executive Compensation Proposal Trends

Proxy Access Proposal Trends & Statistics

- **Proxy Access Aplenty:** Proxy access proposals dominated the 2016 proxy season, with over 201 proposals submitted for 2016 meetings, nearly doubling the 108 proposals submitted for 2015 meetings.
 - “Proxy access” refers to providing shareholders the ability to include in a company’s proxy statement and on the company’s proxy card one or more shareholder-nominated candidates for election to the board of directors.
 - Proxy access provides shareholders an alternative to the traditional process of running an election contest to elect a dissident slate of directors to a company’s board, and significantly reduces the costs and procedural difficulties of running a proxy contest.
- Proxy access proposals during the 2016 season typically requested that boards allow an individual shareholder or a group of shareholders collectively holding 3% of a company’s outstanding common stock for three years to nominate up to 25% of the board positions, with some proponents also requesting a minimum of two proxy access nominations.

Proxy Access Proposal Trends & Statistics (cont.)

The vast majority of companies adopting proxy access provisions effected their adoptions during the 2016 proxy season.



Proxy Access Proposal Trends & Statistics (cont.)

- **Substantial Implementation:** Among the proposals submitted that request that companies adopt proxy access, 38 were excluded under Rule 14a-8(i)(10) (substantial implementation)¹¹ and four were excluded on Rule 14a-8 procedural grounds (Expeditors International of Washington, Inc., ITC Holdings Corp., Scripps Networks Interactive, Inc., and Symantec Corp.).
 - Where proposals requested that unlimited shareholders be allowed to aggregate their shares to reach the ownership threshold, the Staff allowed exclusion even if the company's proxy access provision included a 20-shareholder limit on shareholder aggregation.
 - Where proposals requested that no more than the greater of two nominees or 25% of board positions, the Staff allowed exclusion even if the company's proxy access provision allowed proxy access nominations for 20% of board positions, or, alternatively, the greater of two nominees or 20% of board positions.
 - The Staff denied each of the three no-action requests where the company's proxy access provision contained a 5% ownership threshold and the shareholder proposal requested a 3% ownership threshold.

^[11] See, e.g., *Capital One Financial Corp.* (avail. Feb. 12, 2016)*; *Time Warner Inc.* (avail. Feb. 12, 2016)*.

Proxy Access Proposal Trends & Statistics (cont.)

- **Withdrawals:** Approximately 53 proxy access proposals submitted for 2016 meetings have been withdrawn.
- **Lower Average Support:** Approximately 58 proxy access proposals submitted for 2016 meetings have been voted on, with average support of 48.7% of votes cast (down from 54.6% in 2015). Approximately 27 proposals received a majority of votes cast. Average support among proxy access shareholder proposals where:
 - The company had previously adopted some form of proxy access was 38.4%.
 - The company had not previously adopted some form of proxy access was 56.0%.
- **Most Frequent Proponents:** John Chevedden and shareholders associated with him submitted approximately 102 of the 2016 proxy access proposals; New York City pension funds submitted 72 of the proxy access proposals.
- **“Fix Proxy Access” Proposals:** At least eight companies received “fix proxy access” proposals requesting that companies make certain changes to existing proxy access provisions. The New York City pension funds submitted at least five of these proposals and shareholders associated with John Chevedden submitted at least three such proposals. Two no-action request letters are pending (one arguing substantial implementation and one making a procedural argument).

Rule 14a-8 Procedural Developments: Rule 14a-8(i)(9)

- **“Death” of Conflicting Proposal Arguments Under Rule 14a-8(i)(9):**
 - In 2015, the Staff reversed its position on a no-action request submitted by Whole Foods, which argued that a proxy access shareholder proposal conflicted with a company proposal where the terms the company had adopted were significantly more restrictive than the shareholder proposal. After initially concurring with exclusion, the Staff reversed its position and subsequently announced that it would no longer express views on Rule 14a-8(i)(9) during the 2015 proxy season. As a result, the Staff declined to issue responses to a total of 48 no-action requests, or 15% of the 318 no-action requests submitted during the 2015 proxy season. For details, *see* Section II.A of our 2015 shareholder proposals alert “*Shareholder Proposal Developments During the 2015 Proxy Season*,” which is available [here](#).
 - Subsequently, the Staff published Staff Legal Bulletin No. 14H (“SLB 14H”), which sets forth the Staff’s new approach to when a shareholder proposal conflicts with a company proposal for purposes of Rule 14a-8(i)(9). Reversing decades of Staff interpretations of Rule 14a-8(i)(9), the Staff’s new position is that a direct conflict exists for purposes of Rule 14a-8(i)(9) only if “a reasonable shareholder could not logically vote in favor of both proposals, i.e., a vote for one proposal is tantamount to a vote against the other proposal” because “they are, in essence, mutually exclusive proposals.” For details, *see* our client alert “*SEC Staff Reverses Longstanding Precedent on Exclusion of Conflicting Shareholder Proposals Rule; Affirms Business as Usual on Ordinary Business Rule*,” which is available [here](#).

Rule 14a-8 Procedural Developments: RIAs

- ***Baker Hughes Inc. (avail. Feb. 22, 2016):*** Baker Hughes argued that it could exclude a shareholder proposal submitted by Newground Social Investment, a registered investment advisor (“RIA”), on behalf of The Equality Network Foundation. Baker Hughes argued:
 - *No proof of authorization from shareholder:* Newground’s assertion that, as an RIA, it was authorized by its client, the Foundation, to submit the proposal was insufficient to establish that Newground was authorized to act on behalf of the Foundation; and
 - *No statement of intent from shareholder:* The Foundation failed to provide its own statement of intent to continue to hold Baker Hughes shares through the date of the annual meeting, and Newground’s statement on behalf of the shareholder was insufficient.

The Staff did not concur with exclusion on these bases.

- ***Baker Hughes: What Does It Mean?*** *Baker Hughes* raises several points worth noting:
 - Newground argued that the fact it produced a broker’s verification letter on behalf of the shareholder, together with its status as an RIA, should be sufficient to demonstrate that it is authorized to act on the shareholder’s behalf, and that state agency law controls what proof of authority is required.
 - The Staff’s response appears to put the burden on companies to demonstrate whether an RIA is authorized to submit proposals on behalf of its clients, notwithstanding the fact that the RIA (and not the companies) possesses all of the relevant facts.
 - While both sides cited precedent to support their positions, the letters demonstrate the ambiguity around standing to submit a proposal. Absent further guidance from the Staff, companies and shareholders can expect further no-action letter submissions attempting to determine what standards apply.

Rule 14a-8 Procedural Developments: Meeting Attendance

- ***Sonoco Products Co.* (avail. Jan. 13, 2016):** Sonoco contested John Chevedden’s common practice of designating an agent to present a proposal at the company’s annual meeting. The company argued that it could exclude a 2016 shareholder proposal received from John Chevedden on behalf of William Steiner because (1) Sonoco’s bylaws permitted a resolution to be considered at a shareholder meeting only if proposed by the board or “by a shareholder of record”; (2) John Chevedden, on behalf of William Steiner, submitted a proposal for Sonoco’s 2015 meeting; and (3) neither Chevedden nor Steiner was a record holder or held a proxy from the record holder, and, therefore, neither was qualified to present the 2015 proposal at the meeting or appoint a designee to do so. The Staff did not concur with exclusion on this basis.
- ***Sonoco Products Co.: What Does It Mean?*** The technical issue raised in *Sonoco* was who is authorized to present a proposal at an annual meeting. However, it was presented in the context of whether a proposal could be excluded for failure of a proponent or a qualified representative to appear at the prior year’s meeting and present a proposal or whether there was “good cause” for failure to do so under Rule 14a-8(h)(3).¹²
 - The situation in *Sonoco* was muddled by the fact that the company had allowed a representative designated by Chevedden to present the proposal at the prior year’s meeting “as a courtesy,” although the company took the position that the proposal was not “properly” presented. In addition, the bylaw provision relied upon by the company addressed only who could “propose” a matter for consideration at a shareholder meeting, not who could present a proposal.
 - *Sonoco* appears limited to the specific facts and, given the arguments asserted and the absence of any explanation in the Staff’s response, does not definitively resolve issues around the proper presentation of shareholder proposals or the interaction of Rule 14a-8 and state law. State law continues to govern the requirements for admission to a shareholder meeting.

^[12] Rule 14a-8(h)(3) requires that either the shareholder proponent or a “representative who is qualified under state law to present the proposal on [his/her] behalf” attend the meeting to present the proposal. Otherwise, absent “good cause,” the company may exclude all proposals from that shareholder for meetings in the following two years.

† All shareholder proposal data in this client alert is as of June 1, 2016 unless otherwise indicated.

Rule 14a-8 Procedural Developments: Images

- **Emerging Trend:** Several shareholder proposals containing images were submitted for 2016 meetings; given the Staff’s response denying exclusion, a variety of shareholders may seek to include graphics in shareholder proposals.
- **Rule 14a-8(d):** Under Rule 14a-8(d), shareholder proposals “may not exceed 500 words.”
- **Staff Does Not View Images As Per Se Prohibited:** In *General Electric Co.* (avail. Feb. 23, 2016)* the shareholder proposal at issue consisted of text accompanied by a simplistic graphic image.¹³
 - GE received several other proposals containing images, including images that contained emojis and an image of a burning building (*see General Electric Co.* (avail. Mar. 3, 2016)*, *General Electric Co.* (avail. Jan. 29, 2016)*, *General Electric Co.* (avail. Jan. 15, 2016)*). These proposals had been revised to omit the images when the company notified the proponents that the proposals did not satisfy the 500-word limitation under Rule 14a-8.
 - GE argued that, pursuant to Rule 14a-8(d), (1) allowing the inclusion of an image in a shareholder proposal would circumvent the 500-word limitation in Rule 14a-8(d), and (2) Rule 14a-8(d) allows only words and does not authorize the use of images. The Staff did not concur that the shareholder proposal could be excluded.
- **Scope of Issue Unsettled:** While the Staff appears to have made a policy determination on whether the 500-word limitation applies to graphs, absent further guidance from the Staff it is unclear what types of images may be permissible or excludable.

^[13] Specifically, the proposal contained a full-page “image” consisting of a two-lined graph with no labels or units on its axes.

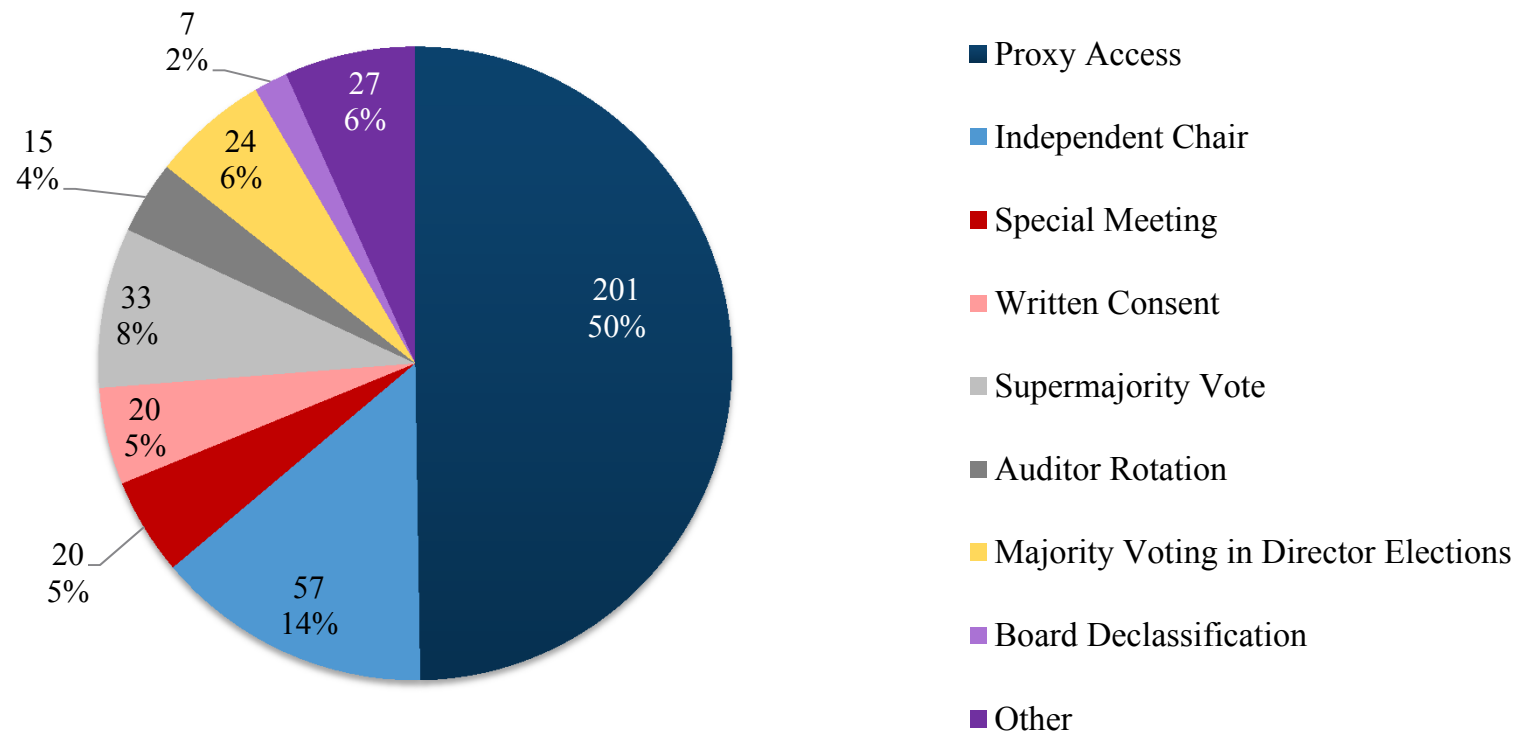
Rule 14a-8 Procedural Developments: Images (cont.)

- ***General Electric Co.: What Does It Mean?***

- A shareholder proposal may not be excludable solely on the basis that it includes an image.
- Going forward, it remains to be seen where the Staff will draw the line with respect to the use of images (e.g., false and misleading or offensive images; multicolor or complex images or photographs; multiple images or oversized images; copyright issues with respect to use of images).
- The Staff's position and the uncertainty with respect to its parameters is likely to encourage the proliferation of shareholder proposals containing images.
- Companies should be prepared to address proposals containing a variety of images and consider challenging the proposal.

Governance & Shareholder Rights Proposal Trends

**Main Types of
Governance & Shareholder Rights Proposals
(Total of 404 Submitted for 2016 Meetings)**



Governance & Shareholder Rights Proposal Trends

Independent Chair Proposals

- **Fewer Proposals Submitted:** Although the number of independent chair shareholder proposals remained high in 2016, the number decreased compared to 2015 meetings:
 - Fifty-seven independent chair shareholder proposals have been submitted for 2016 meetings, down from 76 proposals for 2015 meetings.
- **Support Declined:** The 41 independent chair proposals voted on at 2016 meetings averaged 29.3% of the votes cast, compared to 29.8% for 2015 meetings.
 - No independent chair proposal has received a majority vote at 2016 meetings, compared to two proposals at 2015 meetings.

Governance & Shareholder Rights Proposal Trends

Special Meeting Proposals

- **Fewer Proposals Submitted:** Twenty special meeting proposals have been submitted for 2016 meetings, compared to 27 for 2015 meetings.
- **Support Declined:** Sixteen special meeting shareholder proposals have been voted on at 2016 meetings, averaging 39.6% of the votes cast, compared with 44.4% of the votes cast at 2015 meetings:
 - Special meetings proposals have received majority votes at two companies' 2016 meetings, down from four at 2015 meetings.
 - Three proposals requested adoption of a special meeting right (34.3% average support).
 - Thirteen proposals sought to lower the threshold for an existing special meeting right (40.8% average support).

Governance & Shareholder Rights Proposal Trends

Written Consent Proposals

- **Fewer Proposals Submitted:** Twenty written consent proposals have been submitted for 2016 meetings, compared to 41 for 2015 meetings.
- **Support Increased:** The 13 written consent proposals that have been voted on averaged 43.4% of the votes cast, compared to 39.4% for 2015 meetings.
 - Written consent proposals have received majority votes at one company's 2016 meeting, down from two at 2015 meetings.

Governance & Shareholder Rights Proposal Trends

Supermajority Vote Proposals

- **More Proposals Submitted:** Thirty-three supermajority vote proposals have been submitted for 2016 meetings, compared to 23 proposals for 2015 meetings.
 - One of these proposals (submitted by John Chevedden) was phrased as a request to “resubmit revised versions” of the company’s previously voted on charter amendments to implement simple majority vote.¹⁴
 - At least eight of these proposals (in each case, submitted by John Chevedden and affiliated shareholders), including the “resubmission” proposal discussed above, also included a request that the company commit to spend at least \$10,000 on proxy solicitation to obtain the supermajority vote required for the company proposal to pass.
- **Support Increased:** Thirteen proposals that have been voted on averaged 59.6% of votes cast, compared to 53% of votes cast at 2015 meetings.
 - Supermajority vote proposals have received majority votes at eight companies, up from six companies at 2015 meetings.

^[14] This proposal was excluded under Rule 14a-8(i)(10) as “substantially implemented.” See *The Southern Co.* (avail. Feb. 26, 2016).*

Governance & Shareholder Rights Proposal Trends

Emerging Trend: Proposals Addressing Audit Rotation

- **Proponent:** Canadian investment management firm Qube Investment Management Inc. (“Qube”) submitted 15 shareholder proposals during the 2016 proxy season requesting that the audit committee solicit proposals for outside auditors every eight years.¹⁵
 - These proposals follow the PCAOB 2014 decision not to pursue mandatory audit firm rotation in the United States.
- **All 15 Proposals Were Excluded in No-Action Letters:** Qube’s proposals are a new variation on a familiar type of proposal, also excludable under Rule 14a-8(i)(7), relating to auditor rotations and auditor independence (e.g., requests for information about the company’s policies or practices of periodically considering audit firm rotation, seeking bids from other accounting firms, assessing risks of long-tenured relationships with audit firms, etc.).
 - Eleven were excluded under Rule 14a-8(i)(7) as relating to “ordinary business operations” (“management of the independent auditor’s engagement”);¹⁶ and
 - Four were excluded on procedural grounds.¹⁷

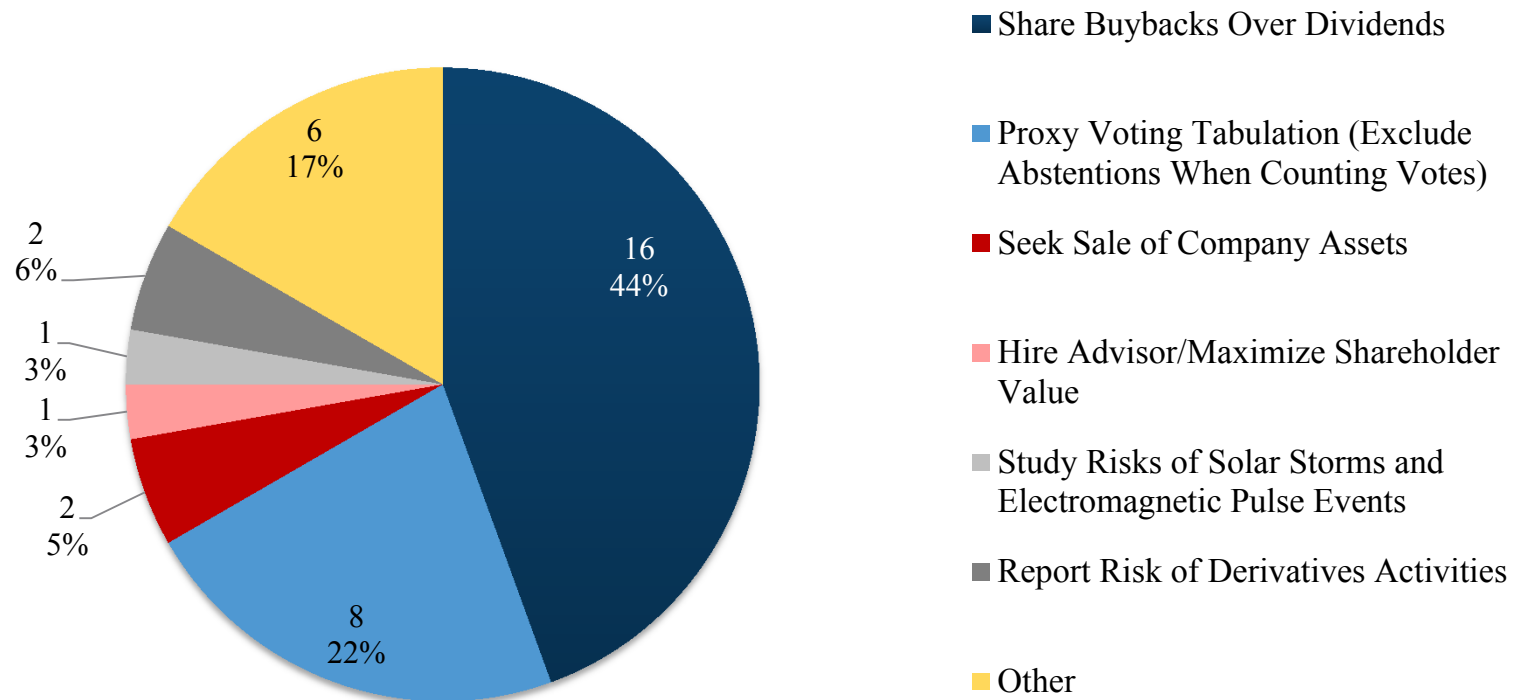
^[15] See, e.g., *PepsiCo, Inc.* (avail. Jan. 27, 2016).*

^[16] See, e.g., *Intel Corp.* (avail. Jan. 21, 2016).*

^[17] See, e.g., *Exxon Mobil Corp.* (avail. Jan. 28, 2016).*

Other Proposal Trends

**Main Types of Other Proposals
(Total of 36 Submitted for 2016 Meetings)**



Other Proposal Trends

Emerging Trend: Proposals Addressing Share Repurchases/Dividends

- **Total Submissions:** Sixteen proposals submitted for 2016 meetings requested adoption of a payout policy giving preference to share buybacks over dividends as a method to return capital to shareholders.
 - At least 14 of these proposals were submitted by Jonathan Kalodimos, Ph.D., who is an assistant professor of finance at the Oregon State University College of Business. Dr. Kalodimos was previously a financial economist at the SEC, where he was the lead economist on Dodd-Frank Act Section 954, which deals with executive compensation clawbacks.
- **No-Action Requests:** Seven proposals were challenged, and six were denied no-action relief. One proposal was excluded under Rule 14-8(e)(2) for being submitted after the applicable deadline.
- **Voting Results:** Fourteen proposals have been voted on, but have received low shareholder support, averaging only 1.6% of votes cast.

Corporate Civic Engagement Proposal Trends

Political Contributions & Lobbying Proposals

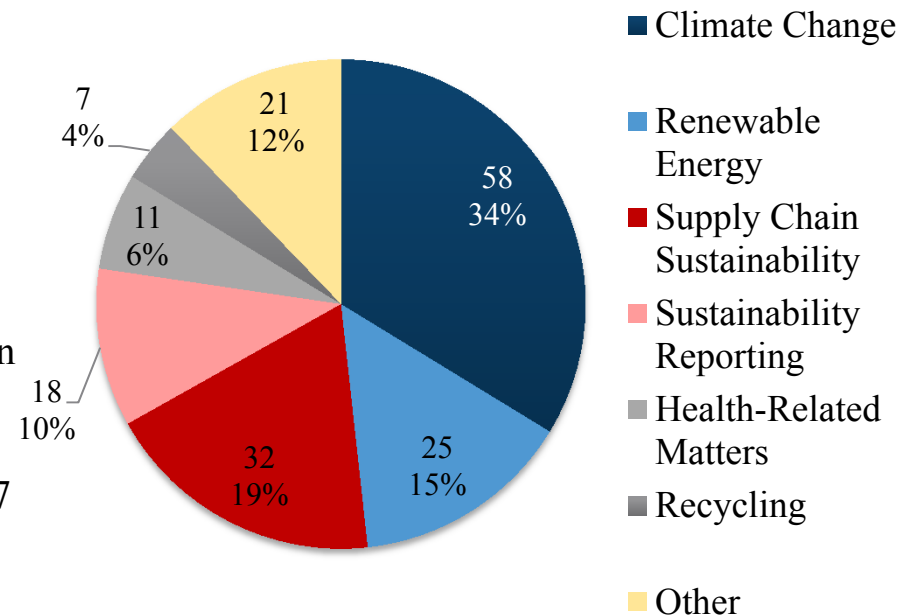
- **Fewer Proposals Submitted:** The number of political contributions and lobbying proposals decreased for another year, with shareholders submitting 103 proposals in 2016, compared to 110 proposals in 2015, and 126 proposals in 2014.
- **Relatively Steady Low Support:** The 61 political contributions and lobbying proposals that have been voted on averaged support of 26.1% of votes cast, compared to 27.6% of votes cast in 2015.
 - Two proposals have received majority support. No such proposals received majority support during the same period in 2015.
- **Consistency Between Corporate Values and Political Activities and/or Contributions:** As in 2015, the corporate civic engagement proposals included proposals requesting reports on the consistency between corporate values and political activities and/or contributions:
 - Seven proposals were submitted for 2016 meetings, compared to three for 2015 meetings.
 - Five proposals that have been voted on averaged support of 3.5%, compared to 6.7% at 2015 meetings.
 - None of the proposals received majority support (consistent with 2015).

Environmental & Social Proposal Trends

Most Frequent Proposals But For Proxy Access

- **Second Most Common Category of Proposals:** Proposals concerning environmental and social matters remained a frequent shareholder proposal topic in 2016, with approximately 299 proposals submitted for 2016 meetings.
 - Ninety-one of these proposals have been withdrawn, and 125 of these proposals have been voted on, averaging support of 20.7% of votes cast.
 - The most frequent proponents of these proposals included As You Sow Foundation (31 proposals), New York State Common Retirement Fund and related groups (29 proposals), Trillium Asset Management (27 proposals), Arjuna Capital (17 proposals), and Calvert Asset Management (15 proposals). Various religious orders also submitted approximately 20 proposals.

**Main Types of Environmental Proposals
(Total of 172 Submitted for
2016 Meetings)**



Environmental & Social Proposal Trends

Majority Support Is Rare Among E&S Proposals Submitted for 2016 Meetings

Only six environmental and social proposals have received a majority of votes cast at 2016 meetings:

- A proposal requesting a report on methane emissions submitted to WPX Energy, Inc. received 50.8% of votes cast;
- A proposal requesting a report on gender pay equity submitted to eBay Inc. received 51.2% of votes cast;
- A proposal requesting adoption of a policy to enhance board diversity submitted to Joy Global Inc. received 52.4% of votes cast;
- A proposal requesting amendments to the EEOC policy to prohibit discrimination based on sexual orientation and gender identity submitted to J.B. Hunt Transport Services, Inc. received 54.7% of votes cast;
- A proposal requesting a sustainability report submitted to CLARCOR Inc. received 60.8% of votes cast; and
- A proposal commending Kellogg Co. for animal welfare improvements in its supply chain (which the company recommended voting “for”) received 98.2% of votes cast.

Environmental & Social Proposal Trends

Climate Change

- **Most Prevalent of Environmental Proposals:** Consistent with prior years, proposals pertaining to climate change remained the most prevalent of the environmental proposals, with approximately 58 proposals submitted for 2016 meetings, up from approximately 50 proposals submitted for 2015 meetings.
 - Climate change proposals in 2016, as in prior years, continued to primarily focus on emissions reduction and reporting and disclosure of the company's exposure to risks relating to climate change, and received averaged support of 24.2% of votes cast. Frequent proponents were As You Sow Foundation and California State Teachers' Retirement System.
 - Consistent with prior years, the majority of climate change proposals pertained to greenhouse gas emissions (approximately 30 proposals), which averaged support of 20.4% of votes cast.
 - New this year were approximately seven proposals requesting that companies conduct an annual assessment or issue a report regarding the impact on the company of the Paris climate conference (COP21) goal to keep a global temperature rise this century below two degrees Celsius. These proposals averaged support of 36.4% of votes cast.

Environmental & Social Proposal Trends

Climate Change (cont.)

- **Emerging Trend: Proposals Addressing Stranded Assets:** This past shareholder proposal season, As You Sow Foundation continued to push energy companies to report on potential financial losses associated with so-called “stranded assets,” submitting six proposals compared to three for 2015 meetings.
 - The proposal was withdrawn at two companies (American Electric Power Co., Inc. and Great Plains Energy Inc.) and was voted on at four companies (Anadarko Petroleum Corp., FirstEnergy Corp., Hess Corp., and The Southern Co.), where it received average support of 32.8% of votes cast.
 - In addition to the As You Sow Foundation proposal, two companies received proposals from Arjuna Capital requesting that the company commit to increasing the total amount authorized for capital distributions to shareholders in light of the climate change-related risks of stranded assets. These proposals received support of 3.5% of votes cast at Chevron Corp. and 4.1% of votes cast at Exxon Mobil Corp.

Environmental & Social Proposal Trends

Other Environmental Proposals

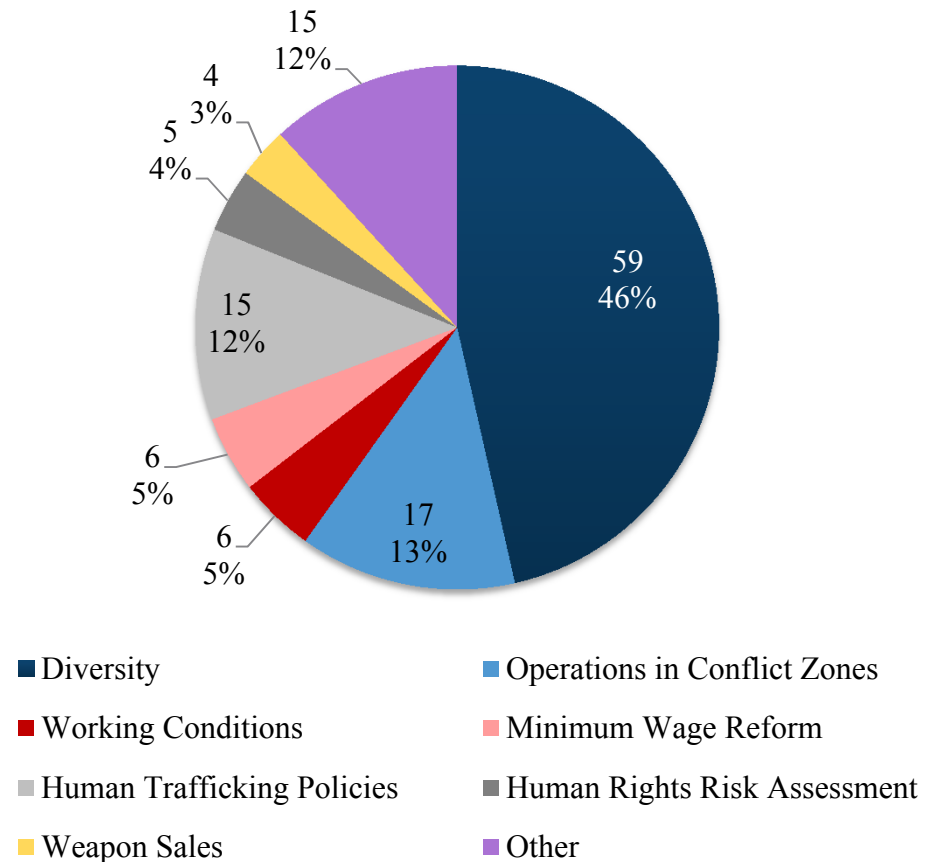
- **Supply Chain Sustainability:** There also were approximately 32 proposals requesting that the company adopt goals or issue a report on matters pertaining to the company's supply chain. These proposals touched on a range of issues, such as the use of GMOs, antibiotics, or nanomaterials in end products, the use of gestation crates, recycling, and supply chain impacts on deforestation. These proposals averaged support of 13.5% of votes cast. There was a broad range of proponents who submitted these proposals.
- **Emerging Trend: Proposals Addressing Renewable Energy:** Proposals requesting that the company adopt renewable energy goals or issue a report on renewable energy efforts also represented a significant portion of total environmental and social proposals, rising to approximately 25 proposals submitted, compared to only seven proposals submitted for 2015 meetings. These proposals averaged support of 23.6% of votes cast at 2016 meetings. Most of these proposals were submitted by New York State Common Retirement Fund (eight proposals), As You Sow Foundation (five proposals), and Trillium Asset Management (five proposals).

Environmental & Social Proposal Trends

Social Policy & Human Rights-Related Proposals

- **Generally:** Approximately 127 proposals pertaining to social policy and human rights matters were submitted for 2016 meetings.
 - These proposals ranged from proposals requesting reports on addressing diversity (59 proposals) (which include proposals requesting that companies issue a report on the gender pay gap (13 proposals)), to proposals requesting reports or assessments on human rights risks or violations (approximately 26 proposals).
 - Approximately 36 of the social policy and human rights proposals have been withdrawn, including a number of proposals submitted by Arjuna Capital and Trillium Asset Management. Thirty-eight of these proposals have been voted on, averaging 13.6% of votes cast.

**Main Types of
Social Policy & Human Rights-Related Proposals
(Total of 127 Submitted for 2016 Meetings)**



Environmental & Social Proposal Trends

Social Policy & Human Rights-Related Proposals (cont.)

- **Diversity:** Approximately 59 proposals requested reports on plans to address diversity concerns, compared to 29 proposals for 2015 meetings.
 - There were primarily two types of proposals: proposals requesting a report or policy on increasing board diversity (approximately 28 proposals), and proposals requesting a report on employee-level diversity (approximately 31 proposals).
 - Among the proposals requesting a report on employee-level diversity were 13 proposals requesting that companies issue a report on the gender pay gap, or demonstrate that no gender pay gap exists, the majority of which were withdrawn (seven proposals, mostly submitted by Arjuna Capital).
 - A total of 21 diversity proposals have been withdrawn, including five of the nine proposals submitted by Arjuna Capital (primarily pertaining to a report on the gender pay gap, as mentioned above) and five of the six proposals submitted by Trillium Asset Management (covering a range of diversity-related requests).
 - The 20 proposals that have been voted on have averaged 15.9% of votes cast.

Environmental & Social Proposal Trends

Emerging Trend: Proposals Regarding Operations in Conflict Zones

The 2016 proxy season saw a number of proposals requesting that companies address concerns regarding operations in conflict zones. Of the approximately 17 proposals focused on this issue, 11 have been voted on, averaging only 3.3% of votes cast.

- **Holy Land Principles, Inc.** submitted eight proposals requesting that companies adopt a set of enumerated principles to serve as guidelines for operating in Palestine-Israel. The proposal has been voted on at seven companies, where it has received average support of 4.1% of votes cast.
- **Heartland Initiative** submitted a similar proposal requesting that companies establish a board committee to review operations in Israeli settlements at four companies. The proposal was successfully excluded on procedural grounds by Intel Corp.,* was withdrawn at Mohawk Industries, Inc. and went to a vote at two companies (RE/MAX Holdings, Inc. and Genie Energy Ltd.) where it received average support of 2.5% of votes cast. The proposals are part of a slowly growing trend toward proposals that seek to bring attention to conflict zones.
- **Burma Report:** Of particular interest this year was the Staff's response in *Chevron Corp* (avail. Mar. 21, 2016),* in which the Staff concurred with exclusion on the grounds of Rule 14a-8(i)(10) of a proposal submitted by the International Brotherhood of Teamsters that requested that the board of directors make available a report outlining the U.S. State Department's *Reporting Requirements on Responsible Investment in Burma* on the company's operations in Burma. The Staff concurred with exclusion based on Chevron's commitment that the full report substantially implementing the proposal would be published before the annual meeting.

Environmental & Social Proposal Trends

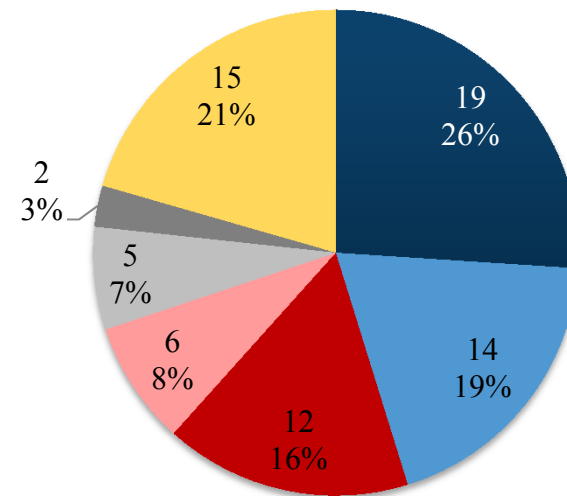
Emerging Trend: Minimum Wage Reform

- **Proponents of Minimum Wage Reform Proposals:** Six proposals were submitted by Trillium Asset Management and several religious orders requesting that companies adopt principles regarding minimum wage reform.
- **Proposal:** While the proposal's request was phrased as a general request regarding the minimum standard of living necessary for a sustainable economy, a portion of the supporting statement clearly addressed the wage practices of each company that received the proposal.
- **Successful No-Action Requests:**
 - Five of the proposals were successfully challenged under Rule 14a-8(i)(7) as relating to the companies' ordinary business operations (specifically, general compensation matters). *See, e.g., The TJX Companies, Inc.* (avail. Mar. 8, 2016)*.
 - One proposal was withdrawn (Panera Bread Co.).

Executive Compensation Proposal Trends

- **Fewer Proposals Submitted:** The number of proposals addressing executive compensation matters dropped to 73 proposals submitted for 2016 meetings, compared to approximately 131 proposals submitted for 2015 meetings. Consistent with prior years, the most frequent proponents were the AFL-CIO (12 proposals) and John Chevedden (in his own capacity and on behalf of others, seven proposals).
- **Support Declined:** Executive compensation proposals averaged support of 18.0% of votes cast at 2016 meetings, compared to 26.7% of votes cast at 2015 meetings.
 - No executive compensation proposal received majority support at 2016 meetings, down from three at 2015 meetings.

**Main Types of
Executive Compensation Proposals
(Total of 73 Submitted for 2016 Meetings)**



- No Accelerated Equity Vesting
- Executive Pay Linked to Social Criteria
- Stock Retention/Holding Period
- Clawback
- Adjust for Share Buybacks
- Pay Ratio
- Other

Executive Compensation Proposal Trends (cont.)

- **Most Frequent Executive Compensation Proposals:** The most frequently submitted proposals for 2016 meetings were:
 - *Proposals requesting no accelerated equity vesting.* Nineteen proposals requesting no accelerated equity vesting, 13 of which have been voted on, averaged support of 26.5% of votes cast. AFL-CIO was also the most frequent proponent of these proposals.
 - *Proposals requesting that executive pay be linked to social criteria.* Fourteen proposals requesting that executive pay be linked to social criteria, only six of which have been voted on, averaged support of 8.8% of votes cast. As You Sow Foundation, Northstar Asset Management, and Clean Yield Asset Management were the most frequent proponents of these proposals.
 - *Proposals requesting that the company adopt a stock retention/holding period.* Twelve proposals requesting that the company adopt a stock retention/holding period, nine of which have been voted on, averaged support of 16.9% of votes cast. Various union pension funds submitted the majority of these proposals.

Executive Compensation Proposal Trends (cont.)

- **Clawback Proposals:** There were only six proposals seeking adoption or disclosure of clawback policies submitted for 2016 meetings, in contrast to 22 proposals submitted for 2015 meetings. Clawback proposals averaged support of 15.5% of votes cast. Five of the six proposals were submitted by John Chevedden or shareholders associated with him, and one was submitted by an Amalgamated Bank Fund.
- **Pay Ratio Proposals:** Following the SEC's adoption of final pay ratio rules, the number of proposals seeking reports on the ratio between the compensation paid to the chief executive officer and the median employee fell to only two (submitted by Zevin Asset Management and the Priests of the Sacred Heart), down from 15 in 2015. The two proposals, submitted to The TJX Companies, Inc. and CVS Health Corp., received support of 5.3% of votes cast and 7.3% of votes cast, respectively. SEC rulemaking may have caused a decline in other proposal topics as well, such as clawbacks.
- **Executive Compensation Metrics:** New this year were proposals requesting that executive compensation metrics be adjusted for share buybacks.
 - Approximately five were submitted for 2016 meetings by AFL-CIO, an Amalgamated Bank Fund, and Domini Social Investments.
 - Three of these proposals have been voted on, averaging support of 18.9% of votes cast.

Shareholder Proposal Litigation Update

- ***Trinity Wall Street v. Wal-Mart***: As discussed in our 2015 shareholder proposal client alert in more detail, the 2014 and 2015 proxy seasons were marked by litigation surrounding the shareholder proposal submitted by Trinity Wall Street, a religious organization, for consideration at Wal-Mart's 2014 annual meeting.¹⁸
- **Recent Developments**: Following the April 2015 unanimous decision by a three-judge panel of the U.S. Court of Appeals for the Third Circuit that a shareholder proposal submitted to Wal-Mart was excludable under Rule 14a-8 (reversing a December 2014 judgment by the U.S. District Court for the District of Delaware), Trinity Wall Street filed a petition in September 2015 seeking the United States Supreme Court's review of the Third Circuit's opinion. On November 12, 2015, Trinity Wall Street's petition was dismissed. A similar shareholder proposal was submitted to Cabela's Inc., a retailer of hunting, fishing, camping, shooting, and related outdoor recreation merchandise, for consideration at their 2016 annual meeting, but was also excluded under Rule 14a-8(i)(7) in a no-action letter (*Cabela's Inc.* (avail. Apr. 7, 2016)).
- In SLB 14H, the Staff stated that the Third Circuit majority opinion applied an "approach [that] differs from the Commission's statements on the ordinary business exclusion and Division practice," noting that the concurring judge's analysis was "consistent with the approach articulated by the Commission and applied by the Division, including in Wal-Mart's no-action request." Going forward, the Staff will apply the concurring opinion.
- There have been no other significant shareholder proposal-related litigation developments during the 2016 proxy season.

^[18] The proposal sought to amend Wal-Mart's Compensation, Nominating and Governance Committee's charter to provide for "oversight" concerning the "formulation and implementation" of "policies and standards that determine whether or not the Company should sell" certain products. The proposal's supporting statement stated that under the proposal, the Committee's role would include determining whether to sell "guns equipped with magazines holding more than ten rounds of ammunition."

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