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Preparing for the 2017 Proxy Season

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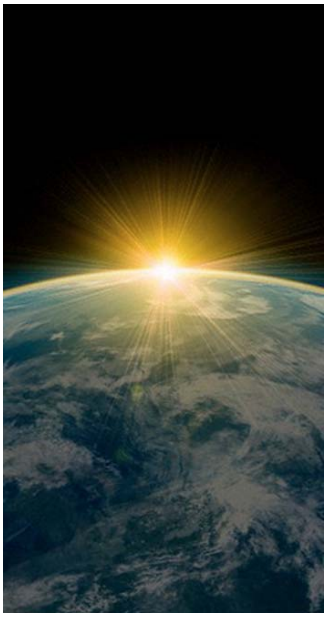

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Say-on-Frequency

- **Companies who held their first say-on-frequency vote in 2011 must hold another vote in 2017.**
- **Say-on-frequency votes must be held the first year that say-on-pay applies and at least once every six calendar years thereafter. The vote must allow shareholders to vote for one, two or three year periods between say-on-pay votes or to abstain from voting. (Rule 14a-21)**
- **Director compensation and compensation risk assessments are not subject to the vote.**
- **Briefly explain the general effect of the say-on-frequency vote, such as whether it is non-binding; the current frequency of the say-on-pay vote; and when the next such shareholder advisory vote is expected to occur. (Item 24 of Schedule 14A)**
- **Smaller reporting companies were not required to hold their first say-on-frequency vote until their 2013 meeting, and so their next vote will be held in 2019.**

Golden Leash Disclosure (NASDAQ)

- **Effective August 1, 2016, NASDAQ-listed companies must disclose so-called "golden leash" arrangements - agreements or arrangements by a third party to pay a director or director nominee in connection with his or her service on, or candidacy for, a company's board of directors, usually in connection with a proxy fight. (NASDAQ Listing Rule 5250(b)(3))**
- **Disclosures may be made in proxy statements or websites no later than the date on which the company files a definitive proxy or information statement in connection with its next shareholders' meeting at which directors are elected. Thereafter, the company will need to make the required disclosures at least annually until the earlier of the resignation of the applicable director and one year following the termination of the agreement or arrangement.**
- **A Company need not disclose arrangements:**
  - For reimbursement of expenses in connection with candidacy as a director;
  - That existed prior to the nominee's candidacy (including as an employee of the other person or entity) and the nominee's relationship with the third party has been publicly disclosed in a proxy or information statement or annual report (such as in the director or nominee's biography); or
  - That have been disclosed under Item 5(b) of Schedule 14A of the Act or Item 5.02(d)(2) of Form 8-K in the current fiscal year.

ISS 2017 Voting Policies

- **Overboarding:**

  CEOs of public companies may not sit on the boards of more than two public companies besides their own. For other directors, negative recommendations will be made for sitting on more than five public company boards.

- **Non-Employee Director (NED) Pay:**

  In addition to the SVT analysis, ISS will assess advisory proposals seeking shareholder approval of NED pay, and certain NED equity plan proposals that are determined to be relatively costly, considering additional qualitative factors including the relative magnitude of pay, problematic pay practices and whether there are meaningful limits.

- **Dividends and Minimum Vesting for Stock Awards:**

  ISS will award full points under EPSC if the equity plan expressly prohibits dividend payments for all award types before the vesting of the underlying award. Accrual of dividends payable upon vesting is acceptable. No points will be earned if this prohibition is absent or incomplete (i.e. not applicable to all award types).

  An equity plan must specify a minimum vesting period of one year for all award types under the plan in order to receive full points for this factor.

ISS 2017 Voting Policies

- **Restrictions on Shareholder Amendments to Bylaws:**

  ISS will make ongoing recommendations against governance committee members if the company's charter imposes undue restrictions on shareholders' ability to amend the bylaws. These restrictions include but are not limited to:

  - a prohibition on the submission of binding shareholder proposals or
  - ownership/holding requirements for such shareholder proposals that exceed those in the SEC's Rule 14a-8

- **IPOs with Multi-Class Shareholder Structures:**

  If prior to or in connection with a company's public offering, the company or its board adopted bylaw or charter provisions materially adverse to shareholder rights, or implemented a multi-class capital structure in which the classes have unequal voting rights, ISS will generally recommend withhold or against votes on directors individually, committee members, or the entire board (except new nominees, who should be considered case-by-case). Unless the adverse provision and/or problematic capital structure is reversed or removed, ISS will recommend a vote case-by-case on director nominees in subsequent years.

  .

Other ISS Developments

Pay-for-Performance Methodology Updated

- ISS will present relative evaluations of return on equity, return on assets, return on invested capital, revenue growth, EBITDA growth, and cash flow (from operations) growth.
- The additional financial measures are information only, and will supplement ISS' legacy (and continued) use of total shareholder return (TSR) as a key metric for assessing corporate performance in the context of evaluating executive compensation.
- A new standardized comparison of CEO pay and financial performance ranking relative to the ISS-defined peer group will be added. Financial performance will be measured by a weighted average of multiple financial metrics including return on equity, return on assets, return on invested capital, revenue growth, EBITDA growth, and cash flow (from operations) growth.
- Relative Degree of Alignment (RDA) assessment will only be considered in the overall quantitative concern level when the subject company has a minimum of two years of pay and TSR data. Companies that only have one year of data will receive an N/A (not applicable) concern for their RDA test.

Other ISS Developments

QuickScore Re-Branded to QualityScore

- Like QuickScore, QualityScore uses a numeric, decile-based score that indicates a company's governance risk relative to their index or region, and companies receive an overall QualityScore and a score for each of four pillars: Board Structure, Compensation/ Remuneration, Shareholder Rights, and Audit & Risk Oversight.
- Unlike QuickScore, QualityScores will be refreshed daily.
- New and updated factors address issues such as proxy access terms, board diversity metrics, exclusive forum provisions and fee shifting provisions.

Glass Lewis 2017 Voting Policies

- **Issuer Data Report (IDR) Program:**

  On November 17, 2016, Glass Lewis opened enrollment for its 2017 IDR Program. This program will cover companies on a first-come, first-served basis. Space is limited, so the enrollment will close on the earlier of January 6, 2017, or as soon as the annual limit for each of the markets is reached.

- **Overboarding :**

  Glass Lewis will generally recommend voting against a director who serves as an executive officer of any public company while serving on a total of more than two public company boards and any other director who serves on a total of more than five public company boards.

- **Governance following an IPO or spin-off:**

  The new guidelines outline which specific areas of governance Glass Lewis reviews to determine whether shareholder rights are being "severely restricted" from the outset, in which event it will consider recommending a vote against the governance committee members or the directors that served when the governing documents were adopted - depending on the severity of the concern.

- **Board evaluation and refreshment:**

  Glass Lewis generally believes that a robust board evaluation process focused on the assessment and alignment of director skills with company strategy is more effective than solely relying on age or tenure limits.

Posting Annual Reports

- **Companies may now post annual reports on their websites instead of mailing them to the SEC. The reports must remain accessible for one year.**
- **Companies were previously required to mail seven or four copies of the annual report to the SEC. (Rule 14a-3(c) and Rule 14c-3(b); Form 10-K for certain Section 15(d) registrants)**
- **For NYSE companies, three copies of the proxy materials (including the proxy card) still must be filed with the NYSE no later than the date on which the materials are released to shareholders. Informally, the NYSE has not expected hard copies of the annual report.**
- **NASDAQ companies are not subject to a similar requirement.**

Universal Ballots

- **The SEC has proposed amendments to the proxy rules to require parties in a contested election to use universal proxy cards that would include the names of all nominees.**
- **The rules would apply to all non-exempt solicitations for contested elections other than those involving registered investment companies and business development companies.**
- **The proposed rules would:**
  - give shareholders the ability to vote by proxy for their preferred combination of board candidates, similar to voting in person;
  - Require an "against" voting option where it would have legal effect, and an "abstain" voting option where majority voting applies;
  - require proxy contestants to provide shareholders with a proxy card that includes the names of both management and dissident director nominees;
  - require management and dissidents to provide each other with notice of the names of their nominees;
  - establish a filing deadline and a minimum solicitation requirement for dissidents; and
  - prescribe presentation and formatting requirements for universal proxy cards.

Voting Standards

- **Check the description of voting requirements, particularly relating to the election of directors**
- **Continued focus on accurate and clear descriptions of voting standards**
  - CII submitted a rulemaking petition in June 2015
  - SEC proposed rules in October 2016
    - amendments to the form of proxy relating to election of directors
      - mandate the inclusion of an "against" voting option in lieu of a "withhold authority to vote" option where there is a legal effect to such a vote, such as majority vote standard
      - provide shareholders with option to "abstain" (rather than "withhold authority to vote") in election governed by a majority voting standard
    - disclosure requirements with respect to voting options and voting standards that would apply to all director elections

Voting Standards

- **Quick reminder of the three primary standards**
  - "Plurality"
    - Nominee receiving the highest number of votes for a given seat is elected
    - Only voting options should be "for" and "withhold"
  - "Plurality plus"
    - Requires a nominee who receives more votes "withheld" than votes "for" to tender his or her resignation for consideration by the board
    - Only voting options should be "for" and "withhold"
  - "Majority"
    - Nominee must receive affirmative votes from: (i) a majority of the votes cast; or (ii) a majority of shares present and entitled to vote (depending on the standard used by the issuer)
    - Voting options should "for", "against" and "abstain"
- **Don't forget to describe the impact of broker non-votes, abstentions and withheld votes**
- **Broker non-votes – stock exchange rules prevent brokers from casting votes on "non-routine" matters without instruction from beneficial holders**
  - Most matters other than ratification of the appointment of auditors are non-routine
  - If unsure whether a proposal is routine or non-routine, check with your stock exchange

Auditor Disclosure and Independence

- **Update for Audit Committee Report: AS No. 16 reorganized as AS No. 1301 effective at year-end (Communications with Audit Committees)**
- **July 2015: SEC issues Concept Release on Possible Revisions to Audit Committee Disclosure**
- **Voluntary disclosure trends in 2016 :**
  - 50% of Fortune 100 disclosed factors considered by audit committee when assessing auditor qualifications and work quality (17% in 2012)
  - 31% provided reasons for changes in fees paid to the auditor (9% in 2012)
  - 53% of companies disclosed that the audit committee considered the impact of changing auditors (3% in 2012)
  - 73% disclosed audit committee's involvement in selecting the lead audit partner (1% in 2012)

  (EY's Audit Committee Reporting to Shareholders in 2016 (Sept. 2016))

Auditor Disclosure and Independence

- **The United Brotherhood of Carpenters' Pension Fund intends to send letters to 75 companies, asking for enhanced auditor independence-related disclosures in proxy statements. This is the 5th year for the Carpenters Union campaign in this area:**
  - Audit committee is directly responsible for the appointment compensation, retention and oversight of the independent external audit firm (The audit committee is also asked to disclose the firm it hired and year it did so.)
  - Tenure of the current audit firm
  - Audit committee is responsible for the audit fee negotiations associated with the retention of this firm
  - Audit committee periodically considers whether there should be a regular rotation of the independent external audit firm
  - Audit committee and its chair are directly involved in the selection of the audit firm's new lead engagement partner
  - Members of the audit committee and the board believe that the continued retention of the audit firm as the company's independent external auditor is in the best interests of the company and its investors

Auditor Disclosure and Independence

- **SEC brings two enforcement actions for auditor independence failures at E&Y:**
  - E&Y asked partner to improve relationship at "troubled account;" after extensive entertainment and personal contacts, he had an inappropriately close personal friendship w/CFO and son.
  - E&Y audit team member engaged in romantic relationship with financial executive at client.
- **In both cases, E&Y knew of circumstances, but did not follow up.**
- **SEC noted that E&Y's procedures did not "specifically inquire about non-familial close personal relationships that could impair the firm's independence."**
- **Penalties totaled $9.3MM paid by E&Y; individuals at E&Y suspended from practicing as accountants before SEC for at least 3 years (and paid minor fines).**
- **Cases raise questions not only about internal monitoring at auditor, but also about audit committee oversight of auditor independence.**

SEC Disclosure Effectiveness Initiative

- **Initiative mandated by JOBS and FAST Acts to update disclosure regime to promote timely, material disclosure by public companies and facilitate investor access**
- **April 2016: Regulation S-K concept release seeks comment on and outlines three broad areas of potential reform:**
  - overall disclosure framework (principles-based versus prescriptive disclosure requirements and the fundamental level of materiality)
  - existing and potential disclosure requirements (core company business information; company performance, financial information and future prospects; risk and risk management, including risks associated with cybersecurity, climate change and arctic drilling; registrant's securities; exhibits; industry guides; public policy and sustainability; scaled disclosure requirements; and frequency of interim reporting), and
  - presentation and delivery (cross-referencing, incorporation by reference, hyperlinks, company websites, standardized formatting, layered disclosure, structured data)
- **June 2016: SEC proposed revisions to property disclosure requirements for mining registrants**
- **July 2016: SEC proposes amendments to eliminate duplicative requirements in Regulations S-K and S-X**

SEC Disclosure Effectiveness Initiative

- **August 2016: SEC proposes requiring hyperlinking exhibits required under Item 601 of Regulation S-K**
- **November 2016: SEC issues study on modernizing and simplifying Regulation S-K, pursuant to FAST Act requirements, to be followed by rulemaking within a year, includes the following recommendations:**
  - Consolidate rules on incorporation by reference and allow prospectus disclosure requirements to be satisfied by incorporation by reference to financial statements,
  - Clarify that only a period-to-period comparison for two most recent fiscal years is needed in the MD&A, with a hyperlink to prior year's annual report for earlier period-to-period comparison,
  - Eliminate table of contractual obligations and instead require a hyperlink to relevant financial statement notes,
  - Relocate "Risk Factors" from Item 503(c) to a new, separate item (Item 105),
  - Eliminate the Item 512(d), (e), and (f) undertakings, and
  - Permit omission of attachments and schedules filed with exhibits, unless they contain information that is material to an investment decision that has not been disclosed otherwise.

Trump and the SEC

2016: Mary Jo White has announced that she is stepping down. Next SEC Chair?

- **Michael Piwowar, current Republican commissioner**
- **Paul Atkins, former Republican commissioner**
  - Transition team member charged with recommending policies on financial regulation
  - Opposed big fines on companies that settle fraud charges (saying that fines punish shareholders); focus on culpable individuals
  - Opposed regulations on "best price" stock-trading and hedge funds
  - Urged SEC to require whistleblowers to report internally first
  - Supported JOBS Act provisions for capital formation
- **SEC has five Commissioners appointed by the President with the advice and consent of the Senate. Their terms last five years and are staggered so that one Commissioner's term ends on June 5 of each year. Current commissioners besides Chair White are Kara Stein (2017) and Michael Piwowar. (2018). Full slate of commissioners not expected to be in place until later in 2017.**
- **Further rulemaking may be suspended until then, though there can be a quorum of two**

Trump and Dodd-Frank

- **The transition team's blueprint states that the Trump team "will be working to dismantle the Dodd-Frank Act and replace it with new policies to encourage economic growth and job creation."**
- **Transition team is focused on rescinding or scaling back the individual provisions Republicans find most objectionable:**
  - the Financial Stability Oversight Council's authority to designate large nonbanks systemically important and thus subject to tougher regulation from the Federal Reserve
  - Overhauling of Dodd-Frank, Title II, that gives financial regulators the authority to take over a failing financial firm and liquidate it
  - Revising or repealing the Volcker rule, which prohibits a bank or institution that owns a bank from engaging in proprietary trading, and from owning or investing in a hedge fund or private equity fund, and also limits the liabilities that the largest banks can hold

(WSJ 11.11.16 and 12.1.16)

- **Incoming Senate Minority Leader Chuck Schumer says he has the votes to stop repeal of the Dodd-Frank Act and predicted that the Senate's Democratic minority would get help from Republicans in any such fight. "We have 60 votes to block him," Schumer said in an interview on NBC's "Meet the Press."**

Trump and Financial CHOICE

- **Financial CHOICE Act of 2016 approved by HFSC:**
  - Repeals CEO pay ratio disclosure (median annual employee compensation versus CEO compensation)
  - Reduces frequency of say-on-pay votes to when there is a material change in executive compensation from the prior year
  - Narrows clawback to current or former executive officers who had control or authority over the financial reporting that resulted in the accounting restatement
  - Repeals disclosure hedging policies
  - Weakens CFPB
  - Enhances Congressional oversight of SEC rulemaking: If the agency classified a rule as "major," the rule would require a joint resolution of Congress to go into effect, unless the President finds that an emergency requires that it be effective (for 90 days). Congress would also have the right to disapprove certain non-major rules.
- **Authorizes SEC to impose bigger penalties on big banks, while releasing smaller banks and credit unions from Dodd-Frank regulations**

Reminder on CEO Pay-Ratio

- **In August 2015, the SEC adopted final rules requiring companies to disclose the pay ratio between the CEO and the median employee**
- **The rules are effective for fiscal years beginning on or after January 1, 2017. As a result, the CEO pay ratio will be disclosed for most companies for the first time in 2018.**
- **Disclosure includes:**
  - The median of the annual total compensation of all employees, excluding the CEO;
  - The annual total compensation of the CEO; and
  - The ratio of these two totals.
- **A company may identify its median employee once every three years unless there has been a change in its employee population or employee compensation arrangements that it reasonably believes would result in a significant change to its pay ratio disclosure**
- **All employees – U.S. and non-U.S., full-time, part-time, temporary and seasonal – employed by the company or any of its consolidated subsidiaries are included. Employees of unaffiliated third parties or independent contractors would not be considered to be employees.**

Reminder on CEO Pay-Ratio

- **Key methodology decisions include:**
  - Choosing consistently applied compensation measure(s) (CACMs) to determine the median employee,
  - Deciding whether or not to use statistical sampling and/or cost of living adjustments,
  - Choosing a date within the last three months of the last completed fiscal year on which to determine the employee population for purposes of identifying the median employee,
  - Whether to exclude up to five percent of total employees who are non-U.S. employees, including any non-U.S. employees excluded using the data privacy exemption. If a company excludes any non-U.S. employee in a particular jurisdiction, it must exclude all non-U.S. employees in that jurisdiction.
- **Briefly describe the methodology used to identify the median employee, and any material assumptions, adjustments**

Reminder on CEO Pay-Ratio

- **The SEC issued five C&DIs on the CEO pay ratio rule:**
  - A CACM must "reasonably reflect the annual compensation of employees." For example, if all employees are paid an annual cash incentive, using base salary and wages as a CACM might not be representative of employees' annual pay.
  - Hourly or annual pay rates alone are not appropriate CACMs, without taking into account the number of hours actually worked.
  - There is significant flexibility for the timing of the CACM calculation, including the use of partial year data, a rolling 12 month period or the prior fiscal year's compensation data. It does not need to include the date used to determine the median employee.
  - Clarifications on treatment of furloughed employees and independent contractors

Virtual/Hybrid Annual Meetings

- **The number of virtual-only meetings has increased from just 27 in 2012 to 136 meetings in 2016 to date.**

  (Broadridge, 2016 Proxy Season Key Statistics & Performance Rating)

- **Pros of a Virtual Meeting:**
  - May improve shareholder access,
  - Reduces time and cost spent on annual meeting, and
  - Increased board/management control over Q&A
- **Cons of a Virtual Meeting:**
  - May reduce effectiveness of shareholder engagement,
  - Allows too much control over Q&A,
  - Increases uncertainty in voting, and
  - May require that shareholder lists be made available online
- **CalPERS, CII and CalSTRS support hybrid meetings, but not strictly virtual meetings.**
- **ISS may make negative vote recommendations if a virtual meeting is used to impede shareholder discussion.**

Virtual/Hybrid Annual Meeting

- **Virtual/hybrid annual meetings are governed by state law**
  - Twenty two states (including DE and MN) permit virtual meetings. Some states, such as California allow virtual-only meetings, but impose unrealistic conditions (e.g., California requires unrevoked shareholder consent).
  - Seventeen states and DC do not permit virtual meetings but do permit hybrid meetings.
  - Eleven states require a physical meeting but permit remote participation.
- **SEC and stock exchanges have not restricted virtual meetings.**
- **For DE and MN corporations, the company must implement "reasonable measures" to confirm that each person voting is a shareholder or proxy holder, and to provide them with an opportunity to participate in the meeting and to vote. The company must also maintain a record of votes and other actions taken at the meeting.**
- **Companies should also confirm that they have met other statutory requirements for the meeting (eg, notice of meeting and provision of shareholder records), and that their certificate and bylaws permit virtual or hybrid meetings**

Developments in Shareholder Proposals: Incorporation of Websites and Graphics

- **Do websites count against a proposal's word limit?**

  No, a reference to a website address counts as one word, but may be excluded under Rule 14a-8(i)(3) "if the information contained on the website is materially false or misleading, irrelevant to the subject matter of the proposal or otherwise in contravention of the proxy rules, including Rule 14a-9."(SLB 14G)

- **Do graphics count against a proposal's word limit?**

  No, shareholders are entitled to use graphics without having them applied against the 500-word limit, but the Staff of the SEC's Division of Corporation Finance (the "Staff") will look at graphics on a case by case basis, and may prohibit them on the basis that they are false and misleading, irrelevant or impugn character. (Staff's June 30, 2016 Rule 14a-8 Stakeholder Meeting)

Developments in Shareholder Proposals: Description on Proxy Cards

- **The form of proxy must "identify clearly and impartially each separate matter intended to be acted upon." (Rule 14a-4(a)(3))**
- **This same principle applies to both management and shareholder proposals.**
- **For example, it would not be appropriate to describe a management proposal to amend a company's articles of incorporation to increase the number of authorized shares of common stock as "a proposal to amend our articles of incorporation."**
- **Similarly, it would not be appropriate to describe a shareholder proposal to amend a company's bylaws to allow shareholders holding 10% of the company's common stock to call a special meeting as "a shareholder proposal on special meetings."**
- **The following descriptions of shareholder proposals also would not satisfy Rule 14a-4(a)(3):**
  - A shareholder proposal on executive compensation;
  - A shareholder proposal on the environment;
  - A shareholder proposal, if properly presented; and
  - Shareholder proposal #3.

Developments in Shareholder Proposals: Business Roundtable Proposal

The Business Roundtable contends that the current shareholder proposal process is dominated by a few individuals with special interests and little stake in the companies where they submit proposals. The Roundtable has proposed the following reforms:

- **Use stricter eligibility requirements and increase the length of the holding requirement**
  - Currently, a shareholder must have continuously held at least $2,000 in market value or 1% of the company's stock for at least one year as of the date the shareholder submits the proposals.
  - The Roundtable proposes a holding requirement based on the percentage of stock owned, similar to proxy access rights, with required ownership set at .15% for proposals submitted to the largest companies and 1% for proposals sent to smaller companies. If the proposal was being submitted by a designated proxy on behalf of a shareholder, the ownership threshold should be increased to 3%. Proponents should be required to hold for three years, instead of one year.
- **Raise resubmission thresholds.**
  - Currently, if a proposal has been previously included in a company's proxy statement within the preceding five years, a company may exclude it for any meeting held within 3 years of the last time it was included if the proposal received (a) less than 3% of the vote if proposed once during the preceding 5 years, (b) less than 6% of the vote if proposed twice during the preceding 5 years, or (c) less than 10% of the vote if proposed three times or more during the preceding 5 years.
  - At the very least, however, the thresholds should be updated to implement the increases proposed by the SEC in 1997: 6 percent on the first submission, 15 percent on the second and 30 percent on the third.

Developments in Shareholder Proposals: Business Roundtable Proposal

- **Require more disclosure on proponents.**
  - Currently, proponents must disclose name, address and number of voting securities.
  - Proponents owning less than 5 percent of the company and proponents by proxy would have to disclose their motivations, goals, economic interests and holding in the company's securities and any similar proposals they have submitted at other companies (as well as the results of those proposals).
- **Prohibit or set reasonable limitations on the use of images.** Exclude proposals including images that are, among other things, false or misleading, offensive, protected by copyright, oversized, or otherwise aimed at circumventing the parameters with respect to supporting statements set forth in Rule 14a-8(d).
- **Better define criteria for applying the ordinary business exclusion.** The Roundtable wants more definite criteria for applying the ordinary business exclusion, in particular for proposals that raise social policy issues which transcend ordinary business, in order to prevent "whimsical changes in direction."

Developments in Shareholder Proposals: Business Roundtable Proposal

- **Reinstate the conflicting proposal exclusion.** The SEC should reinstate the previous standard rather than following the 2015 Staff legal bulletin that "dramatically limits" the availability of this exclusion.
- **Reevaluate the standard for excluding proposals that are contrary to proxy rules.** The staff should reevaluate the deferential standard it is using to exclude proposals contrary to proxy rules and exclude all proposals that contain materially false or misleading information or are overly vague.
- **Revise the no-action letter process.** To make the guidance process more consistent, the SEC could convert the no-action letter process into an SEC advisory opinion process, whereby the SEC issues opinions on major policy issues rather than issuing no-action letters. Alternatively, if the current no-action letter process is maintained, the SEC should establish enhanced review and oversight mechanisms to achieve greater consistency.

Proxy Access 2.0: Overview

- **Proxy access was the dominant corporate governance proposal in 2015 and 2016.**
- **39% of S&P 500 companies have now adopted proxy access procedures since 2013.**

	2016	2015	2014
Proposals voted on	105	103	21
Passed (% of those voted on)	56 (53.3%)	62 (59.1%)	9 (40.9%)
Failed (% of those voted on)	44 (41.9%)	41 (39.1%)	12 (54.5%)
Avg. % Votes cast in favor (excluding abstentions)	57.2%	55.1%	44.4%

- **Second wave of "fix-it" proposals request that companies adopt "essential elements" of proxy access: eg, that companies allow shareholders to nominate up to 25% of the board, or at least 2 directors; no shareholder aggregation limit; no renomination limit; and no 3-day deadline to recall loaned shares.**

Proxy Access 2.0: Overview

- **SEC Staff has denied no-action relief on proposals to amend existing proxy access bylaws to reflect these terms in at least seven instances (*Apple, H&R Block, Microsoft, SBA, Walgreens Boots Alliance*, *Walt Disney, Whole Foods*), with the Staff unable to conclude that a company's policies have compared favorably with the proposal's guidelines.**
- **No-action relief has been limited to companies that reduced required ownership thresholds from 5% to 3%, along with other changes (*Oshkosh* and *NVR*).**
- **Among six proposals that have been voted on:**
  - Two have been approved at New York Community Bancorp and SBA Communications; in both cases, the companies had 5% ownership thresholds.
  - Four received substantial votes cast in favor (30-39%).

Proxy Access 2.0: ISS Minimum Terms

- **ISS adopted a voting policy on proxy access provisions adopted in response to a shareholder proposal with majority support**
- **Proxy access restrictions beyond the following minimum thresholds may lead to negative vote recommendations:**
  - Ownership thresholds above 3%;
  - Ownership duration longer than three years;
  - Aggregation limits below 20 shareholders; or
  - Cap on nominees below 20 percent of the board.
- **Where the cap or aggregation limit differs from the shareholder proposal, lack of disclosure by the company regarding shareholder outreach efforts and engagement may also warrant negative vote recommendations.**

Proxy Access 2.0: ISS Problematic Practices

- **If an implemented proxy access policy or management proxy access proposal contains restrictions or conditions on proxy access nominees, ISS will review the implementation and restrictions on a case-by-case basis. Certain restrictions viewed as potentially problematic especially when used in combination include, but are not limited to:**
  - Prohibitions on resubmission of failed access nominees.
  - Restrictions on third-party compensation of access nominees.
  - Restrictions on the use of proxy access and proxy contest procedures for the same meeting.
  - How long and under what terms an elected access nominee will count towards the permitted number of access candidates.
  - When the access right will be fully implemented and accessible to qualifying shareholders.
- **Two types of restrictions will be considered especially problematic because they are so restrictive as to effectively nullify the proxy access right:**
  - Counting individual funds within a mutual fund family as separate shareholders for purposes of an aggregation limit.
  - The imposition of post-meeting shareholding requirements for nominating shareholders.

Proxy Access 2.0: What's Next

- **More proposals to <u>adopt</u> proxy access bylaws, including at mid- and small-cap companies.**
- **Proposals to <u>amend</u> proxy access bylaw provisions:**
  - Reducing ownership thresholds to 3%.
  - Limiting/eliminating shareholder aggregation.
  - Increasing board cap to greater of two or 25%.
  - Eliminating/reducing renomination limits.
  - Eliminating continued ownership requirements.
  - Expanding inclusion of loaned shares in ownership threshold.
  - Eliminating restrictions on proxy access and proxy contests at the same meeting.
  - Eliminating provisions reducing the maximum number of proxy access candidates by elected nominees.
  - Eliminating third-party compensation disclosure and restrictions.
- **Proxy access candidates submitted by pension funds at companies with problematic governance practices, lack of diversity and/or certain industries**

Proxy Access 2.0: What's Next

- **November 10, 2016: GAMCO Investors, Inc. nominated a proxy access candidate at National Fuel Gas Company, but the candidate subsequently withdrew when the company challenged GAMCO's eligibility.**
- **Only stockholders that acquire their shares "in the ordinary course of business and not with the intent to change or influence control" of the company are eligible to nominate a proxy access candidate under the company's bylaws.**

Proxy Priorities for 2017

- **Modernizing the proxy without busting the budget**
- **Reorganizing proxy, updating compensation philosophy, and using new and improved filings software**
- **Mind the "GAAP" in pay-for-performance disclosure**

Presentation of Non-GAAP Financial Results

- **The SEC Staff updated its C&DIs on disclosure of non-GAAP financial measures in May**
- **Since then, the Staff has issued over 150 comment letters. The most common comments:**
  - Present most directly comparable GAAP financial measure "with equal or greater prominence"
  - Explain why the company believes its non-GAAP measures provide useful information to investors regarding the company's financial condition and results of operations
  - Label non-GAAP measures properly as such
  - Do not make misleading adjustments
  - Provide additional detail on reconciliations
  - Reconcile non-GAAP financial guidance that is "available without an unreasonable effort"

10-K Disclosure

- **June 2016: SEC allows Form 10-K filers to provide a summary of business and financial information contained in the annual report, implementing a FAST Act provision. The interim final rule provides that those opting to provide it must include hyperlinks to the related, more detailed disclosure in the Form 10-K.**
- **S&P 500 improvements to 10-K disclosure have focused on:**
  - MD&A: layered disclosure (executive summary), bullets/tables for key info, cross-referencing, charts/graphs for financial measures
  - Business section: eliminating redundancies with MD&A, cross-referencing, alignment with other public disclosure
  - Risk factors: categorized by theme/topic, elimination of generic/irrelevant factors, charts to present risk/risk management

(EY/FERF's Disclosure Effectiveness in Action (2016))

Resource Extraction Issuers

- **U.S. Reporting Issuers are subject to the new disclosure rules.**
- **Disclosure at the project level is required for the following types of payments:**
  - Made to further the commercial development of oil, natural gas, or minerals,
  - Not de minimis (any payment or series of related payments, ≥ US$100,000 during the same fiscal year), and
  - Covers payments for taxes, royalties, fees (including license fees), production entitlements, bonuses, dividends, payments for infrastructure improvements, and, if required by law or contract, community and social responsibility payments.

Resource Extraction Issuers

- **Issuer may use a report prepared in accordance with other reporting regimes, such as**
  - Canada's Extractive Sector Transparency Measures Act
  - U.S. Extractive Industries Transparency Initiative (USEITI)
- **Two general exemptions provided:**
  - Issuer that acquires a company not previously subject to such payment reporting (under US or foreign regime) will not be required to report payment information for the acquired company until the filing of a Form SD for the first fiscal year following the acquisition
  - A one-year delay in reporting payments related to exploratory activities

Resource Extraction Issuers

- **Disclosure will be made on a Form SD filed no later than 150 days after the end of its fiscal year**
  - Report filed as an exhibit to Form SD
  - XBRL tagging required
  - Need not be audited
- **Compliance begins starting with an issuer's fiscal year ending on or after September 30, 2018**
  - For companies with a December 31 year end, the first filing deadline would be May 30, 2019
  - However, if an issuer is filing a report prepared in accordance with an approved alternate reporting regime, that regime's due date will apply
    - must submit a notice on Form SD-N on or before the due date of Form SD indicating intent to submit the alternative report using the alternative jurisdiction's deadline

Thank You and Happy Holidays!