PUBLIC COMPANY CORPORATE GOVERNANCE FEATURES IN THE TECHNOLOGY SECTOR

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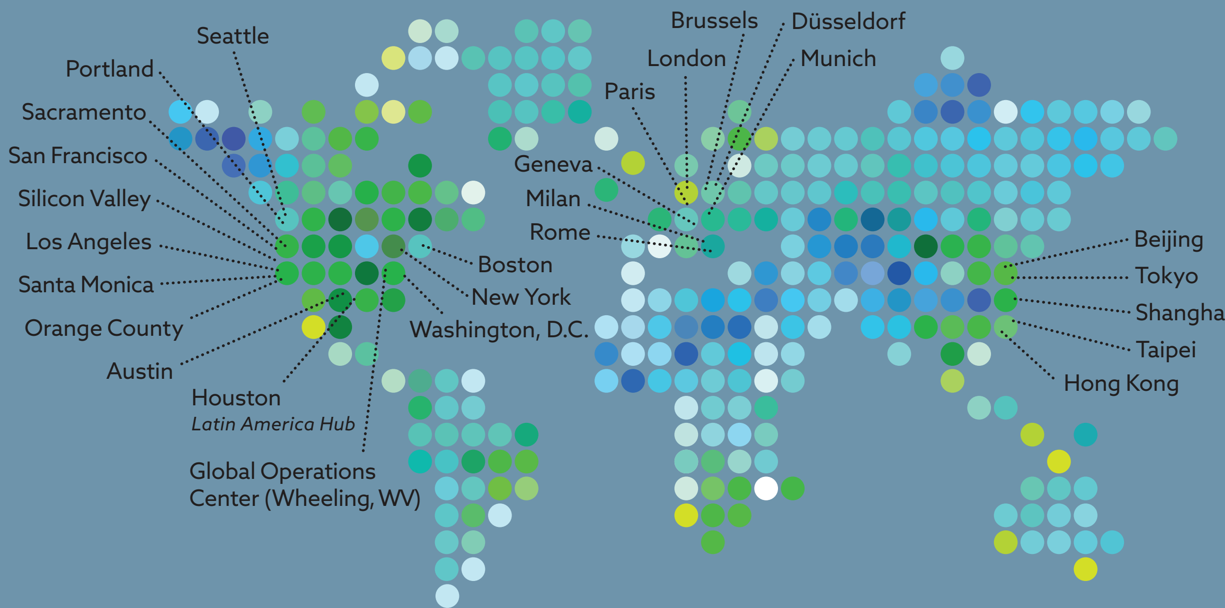

About Orrick

Orrick is passionate about innovation and shaping the long-term success of our clients. We advise public companies throughout the world on all aspects of their business, with a focus on the energy & infrastructure, technology, and financial services sectors. Leading strategic acquirers and financial sponsors alike turn to us for guidance and support in the deal environment—from cross-border combinations to serial platform acquisitions. With 1,250 lawyers based in 25+ offices and 12 countries worldwide—organized in one unified, true partnership focused on three sectors— our global presence allows us to flex to the needs of our clients wherever they do business.

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Acknowledgements

This study was the direct result of a large team effort at Orrick. Stephen Chao and Sara Gates took the laboring oar of coordinating data collection and analyzing results. We also greatly appreciate publication assistance from Brian Hicks, Dean Skibinski and Jolie Goldstein.

About the Authors

Ed Batts
Silicon Valley | +1 650 614 7473 | ed.batts@orrick.com

Ed is Global Chair of Orrick's M&A and Private Equity group, consisting of over 60 partners in Asia, Europe and North America dedicated to M&A and PE transactions. He regularly counsels publicly traded technology companies in mergers and acquisitions, corporate governance and crisis management / cybersecurity.

Stephen Chao
Silicon Valley | +1 650 289 7103 | schao@orrick.com

Stephen is an associate in Orrick's Silicon Valley office and a member of the firm's M&A and Private Equity group. His practice focuses on buy and sell-side M&A transactions.

Sara Gates
Silicon Valley | +1 650 614 7462 | sgates@orrick.com

Sara is an associate in Orrick's Silicon Valley office and a member of the firm's corporate group. She focuses primarily on corporate governance issues as well as mergers and acquisitions.

Corporate governance features have become increasingly prominent for public companies. This has accelerated as economic-oriented activist investors team with institutional investors to serve as catalysts for change.

We are often asked by clients in the course of our practice:

What do other companies do?

We thought it would be useful to compare the three primary governance documents—the certificate/articles of incorporation, bylaws and corporate governance guidelines—of publicly traded companies in the technology sector.

We focused on three general areas:

- *Board of Directors*
- *Stockholder Actions*
- *General Provisions*

Contents

Executive Summary

Proxy access
Has grown fast, as 40 percent of surveyed non-dual class companies have adopted provisions which in general allow groups of up to 20 stockholders, who combined have held at least 3 percent of a company's common stock for at least 3 years, to nominate candidates for up to 20 percent of the board of directors.

Exclusive forum provisions
Limit stockholder derivative class actions suits to a single legal jurisdiction—usually the state of incorporation, such as Delaware. Their adoption continues to surge. Just over one half of surveyed non-dual class companies have adopted these provisions, which originated only a few years ago.

Director age limits
One third of surveyed non-dual class companies have adopted some age limit, but director tenure limits are virtually non-existent notwithstanding increased proxy advisory scrutiny in this area.

Intent to serve bylaw formulations are rare
These clauses prevent substitution of a proxy slate after the nomination deadline and are in response to a specific maneuver by an activist. However, despite the potential vulnerability, only 3% of non-dual class companies have put them in place.

Staggered boards
Remain relatively popular. Around one third of surveyed non-dual class companies have a staggered board. However, this tends to be a feature of newer public companies.

Majority voting formulations
Continue to sweep. Over 80 percent of surveyed non-dual class companies have some variation of provisions requiring a director nominee to secure a majority of votes cast in an uncontested election. Almost all of these companies, however, allow the board to use their judgment to retain a director. In stark contrast, over 85 percent of dual class companies retain plurality voting.

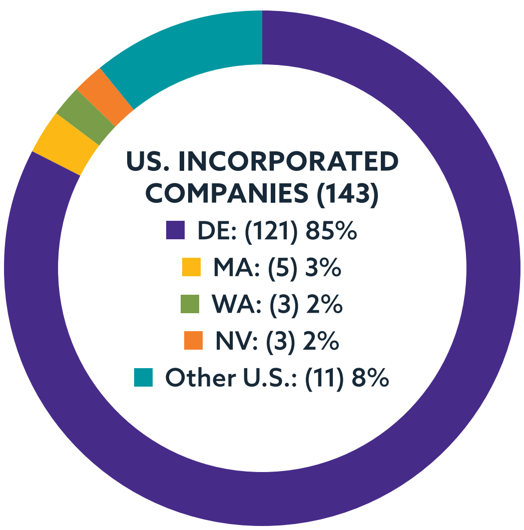
State of incorporation
Most but not all companies remain incorporated in Delaware. 143 of the 148 companies in the Dow Jones Technology Sector Index are incorporated in the U.S. Of these, 121 companies are incorporated in Delaware.

Our Data Criteria

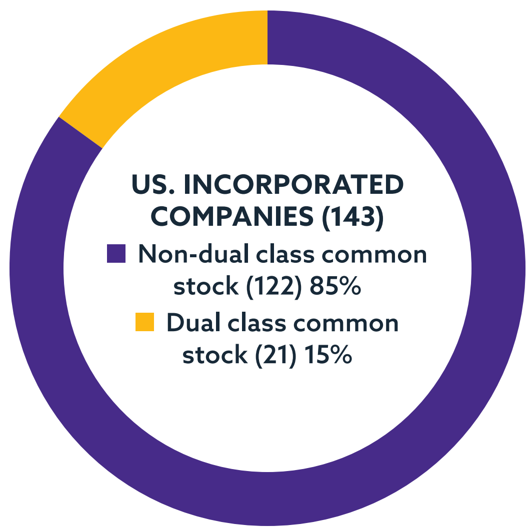
Our study encompassed the following:

- We looked at the 149 component companies of the Dow Jones Technology Sector Index (DJUSTC), a popular index used for exchange traded funds in the technology sector. A full list of the surveyed companies is at the back of this report.
- 5 of the 149 component companies are incorporated abroad and were excluded from our analysis given the lack of comparability between U.S. and non-U.S. systems. One company was excluded because it was purchased by another component company in 2018. This left a sample size of 143 U.S.-incorporated companies.
- Charters and bylaws must be filed on the SEC's website, EDGAR, although in a limited number of cases, the filings predated the advent of EDGAR. Corporate governance policies are generally available on a company's website. Where we noted inconsistencies between documents, we did not contact companies to resolve discrepancies.
- We further sorted component companies by sub-sector, including Hardware (40), Semiconductors (21), Software (44) and Services/Consumer (38). We sorted these primarily by Standard Industrial Classification (SIC) code, as filed with the SEC.
- **Dual Class Structures vs. Single Class Structures:** We further parsed the data by whether a company has a dual class common stock structure. 21 of the 143 companies had dual class structures. These structures customarily allocate 10 votes per share to a holder of a non-publicly traded class of shares (usually the founder(s)), while the publicly traded shares received one vote. We made this distinction because, as discussed further herein, companies with dual class common stock have very different governance profiles and a very different level of susceptibility to investor pressure than those that do not.

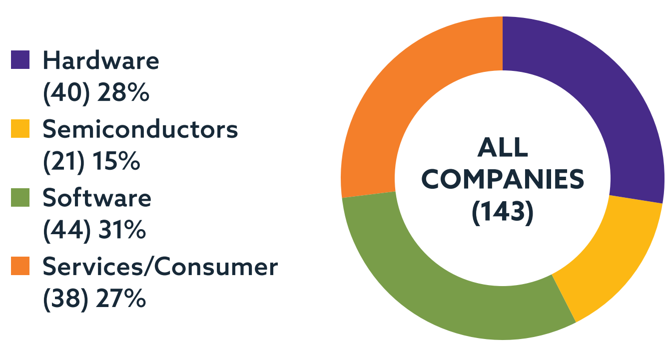
STATE OF INCORPORATION



U.S. INCORPORATED COMPANIES WITH DUAL CLASS VS. NON-DUAL CLASS COMMON STOCK



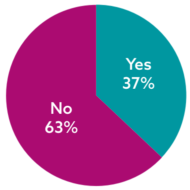
SUB-SECTORS (DUAL AND NON-DUAL CLASS)



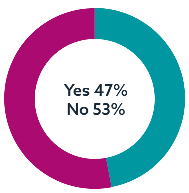
Does the company have a ***classified/staggered board***?

NON-DUAL CLASS

Total (122)



Hardware
(36)



Software
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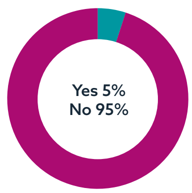
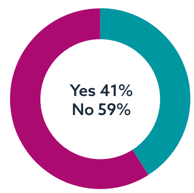


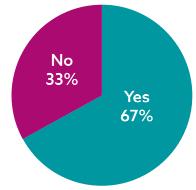
Semiconductors
(21)



Services/Consumer
(29)

DUAL CLASS

Total (21)



About 70 percent of surveyed non-dual class companies have boards elected in full every year. Staggered boards are more likely with newer public companies. However, those with staggered boards remain relatively varied by market capitalization and age of company.

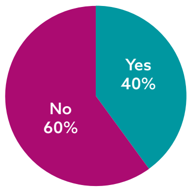
While proxy advisory firms have increased pressure on companies to eliminate classified boards, the concept remains very much alive in the energy sector.

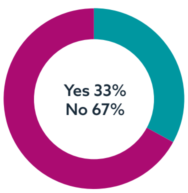
PROXY ADVISORY POLICIES: Both ISS and Glass Lewis do not support retention of classified boards.

Do bylaws contain ***proxy access*** for election of board members?

NON-DUAL CLASS

Total (122)





Hardware
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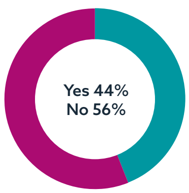

Software
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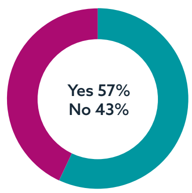
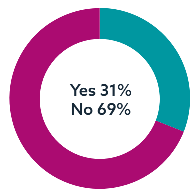


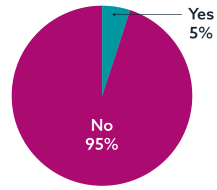
Semiconductors
(21)



Services/Consumer
(29)

DUAL CLASS

Total (21)



In their most common form, proxy access provisions allow groups of up to 20, 50 or an unlimited number of stockholders who have collectively held at least 3 percent of a company's shares for at least 3 years to nominate up to 20 percent of a company's board nominees to be included in the company's annual meeting proxy materials. While some governance activists have advocated a cap on board nominees at 25 percent of the board, the vast majority of adopting companies in our survey chose the 20 percent cap, which is the emerging de facto standard.

Several large mega-cap companies on the national stage initially adopted such proxy access provisions, either proactively or in the face of stockholder pressure, particularly from institutional governance activists' funds, such as the prominent efforts by New York pension plans.

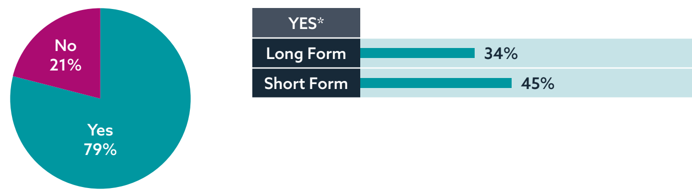
The adoption rate is growing—and rapidly so. Almost 40 percent of non-dual class surveyed companies have enacted proxy access, again the vast majority using the 3 years/3 percent/up to 20 percent of Board/up to 20 stockholders together formulation. One expects this number to rise significantly, both as other companies use initial adopters for comfort and with the continued focus on this area by governance activists.

PROXY ADVISORY POLICIES: ISS supports provisions allowing stockholders holding at least 3 percent for at least 3 years to nominate up to 25 percent of the board. Glass Lewis supports the concept generally but is non-committal regarding particulars.

Do advance notice bylaws provisions require ***disclosure of derivative positions*** for nomination of director candidates?

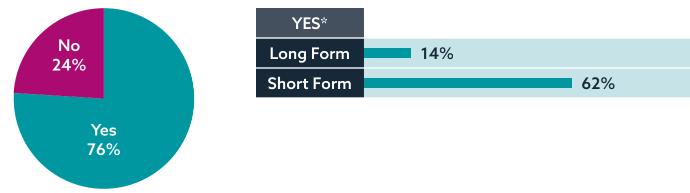
NON-DUAL CLASS

Total (122)



DUAL CLASS

Total (21)



* Percentages are of all surveyed companies, not just those in the "Yes" category.

These provisions explicitly require those who nominate director candidates (such as activists) to disclose any financial interest they have in the subject company that may not be in the form of actual stock ownership, such as derivative contracts that create synthetic economic ownership.

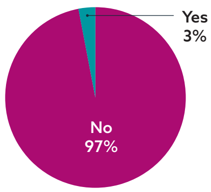
Only about one-fifth of non-dual class surveyed companies have not adopted these disclosure-only provisions. Of those that have, a substantial minority have conversely adopted very detailed requirements on what constitutes a derivative position (e.g. synthetic equity). The others have adopted provisions that briefly describe items that must be listed. Certainly there seems to be little downside to requiring short or even better, long form disclosure, and one wonders about the substantive reasons behind the lack of adoption by those that have not done so.

PROXY ADVISORY POLICIES: ISS and Glass Lewis have remained silent on this feature.

Is there ***intent to serve language***?

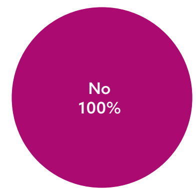
NON-DUAL CLASS

Total (122)



DUAL CLASS

Total (21)



The annual crunch time for an activist investor to exert maximum leverage against a company is the deadline date for nominating director candidates or introducing a stockholder proposal at an annual meeting, whether for inclusion in the company's proxy statement or alternately as a floor proposal. To put forward director nominees, an activist needs lead time to both secure candidates and vet them appropriately. In 2016, Corvex Management, led by Keith Meister, an Icahn protégé, nominated a full slate of 10 director candidates at The Williams Companies. All the candidates were Corvex insiders—but Corvex explicitly stated that the candidates were to be substituted out for substantive candidates after the deadline date. Before that concept could be fully tested, Williams named an additional two new outside board nominees and Corvex withdrew its slate.

In response to this clever attempted maneuver, some companies are amending their bylaws to require that a candidate evidence an 'intent to serve' a full term as director in order to force nominees to be bona fide candidates at the time of the nomination deadline. In contrast to other sectors, however, technology companies have been slower to adopt such protection. In fact, it is only found in 3 percent of non-dual class surveyed companies.

PROXY ADVISORY POLICIES: Both ISS and Glass Lewis have remained silent on this feature.

What is the ***voting standard in board elections***?

Uncontested Director Election Standards: A Jumbled Landscape

Until about a decade ago, director voting in **uncontested elections** was relatively uncomplicated with the then-almost universal plurality voting standard in effect for both contested and uncontested director elections:

- ***Plurality:*** The candidate with the highest number of 'for' votes wins election. It is a relative standard—not an absolute numerical threshold. There is thus no need of an 'against' vote (and it should not appear on a proxy card for plurality voting!). Instead, the 'withhold' vote is the only way to voice displeasure at a particular candidate. In uncontested elections where a single candidate stands for election (and most often, re-election) the 'highest' relative standard means an incumbent director standing for uncontested re-election need only secure one (yes, a mere single) vote for re-election. This is the case even if the candidate receives millions of 'withhold' votes.

Governance activists at large institutional investors—particularly organized labor-oriented investment funds and public pension funds—objected that a plurality standard in uncontested elections means re-election of incumbent directors is a foregone conclusion no matter how many stockholders object by submitting 'withhold' votes. These governance activists thus pushed for the introduction of so-called "majority voting." While adoption of majority voting spread virally in the US public company population, it did so in a couple of mutations—and frequently with a confusing overlay of disclosure.

The key in these formulations is the interplay between three documents for a given company, listed in descending order of enforceability: (a) bylaws, (b) board corporate governance guidelines and (c) disclosure in the proxy statement for an annual meeting of stockholders that presumably summarizes resolutions adopted by a board. The corporate governance guidelines are adopted by a board—and may be waived by a board—and contain things such as the board's policy on re-nominating board directors who exceed age or tenure limits. A company's proxy statement for an annual meeting of stockholders is not a truly legally binding document.

Two 'majority voting' paradigms ensued:

- ***Plurality 'Plus':*** The initial wave of 'majority voting' was actually a plurality bylaws standard superimposed with additional requirements outside of the bylaws, in the corporate governance guidelines—and occasionally just simply referenced in the proxy statement with no further explanation. The bylaws in these cases continue to state that a director is elected as long as he or she obtains the highest amount of "for" votes—no different from a conventional plurality standard. However, the corporate governance guidelines and/or annual meeting proxy statement state that all sitting directors shall in advance submit irrevocable resignations that are triggered if a director does not receive more "for" votes than "withhold" votes. Once the resignation is triggered, the remaining board then decides whether to accept or reject the pre-wired resignation. Governance activists are not generally proponents of this structure because the operative 'majority voting' provisions are usually in the governance guidelines—which is purely a board device and even more so than the board's customarily delegated authority with bylaws—or worse yet, simply documented in meeting minutes as a board policy and then summarized in an annual meeting proxy statement.
- ***'Modified' Majority of Votes Cast:*** A further evolution of 'majority voting' is to put the auto-resignation mechanism in the bylaws. The auto-resignation is an important feature to governance activists because it pre-empts the Delaware 'holdover rule'. In a much-vaunted 'failed election' under majority voting, insurgent directors who do not obtain the requisite majority are not elected. But, in a twist of irony, under the Delaware holdover rule, incumbent directors who fail to obtain the requisite majority vote continue in their duties indefinitely. The holdover rule on a stand alone basis rule summarily defeats the purpose of the majority voting provision and risks the ire of governance activists, who thus insist on an auto-resignation mechanism.

The vote standard in a 'modified' majority system is expressed in the bylaws as a candidate is elected if the "for" votes exceed "against" votes. This is the favored route of governance activists—and where most companies have gone: 60 percent of surveyed non-dual class companies have this standard. Given the bylaws codification, it makes sense to switch the term "withhold" votes to truly "against" votes—so that directors receive "for" and "against" votes.

There are three further potential vote formulations, each of which is stricter than 'majority voting' and its director resignation mechanism with the board—but extremely few companies have adopted any of them:

- ***Majority of Votes Cast:*** The bylaws require a majority of votes cast—under Delaware law, abstentions and broker non-votes thus are not in either the numerator or denominator—with no resignation policy set forth. Very few companies—only 7 percent of non-dual class companies in our survey—have adopted this standard, since the absence of a resignation policy creates the possibility of a 'failed election.' Again, under Delaware law, if a company has a majority of votes cast standard without an auto-resignation policy, the effect is to make it more difficult for an insurgent director to be nominated, while having little practical impact on incumbent director nominees, who in a failed election will continue to serve on the board.

- ***Majority of Votes Present and Entitled to Vote:*** In this formulation, abstentions are counted as "against" votes and broker non-votes are not counted at all. It is a rigorous standard, and only 3 percent of non-dual class companies in our survey have adopted it.

The most strict hypothetical formulation is below—but no company in our survey has adopted it:

- ***Majority of Shares Outstanding:*** Both abstentions and broker non-votes are counted as "against" votes. Given the exclusion of broker non-votes, it in practice is an unrealistic standard, and therefore is unsurprising that no company in our survey has been this aggressive.

The Practical Effects of Auto-Resignations and "Failed" Elections

Interestingly, in the relatively few elections where incumbents have failed to secure more "for" votes than "withhold/against" votes, boards in reviewing whether to accept or reject the auto-resignation have almost always found reasons to retain the defeated incumbent as a director given his or her purported unique skills and/or experience to serve on a given board. Consequently, as currently implemented and executed today, 'majority voting' is arguably less-than-substantive from the perspective of governance activists and a potential point of increased friction in the future.

Contested Director Election Standards: The Necessity of Plurality Voting

Note that for **contested elections** it is critical to have a plurality voting standard remain because often in proxy contests, no nominee will reach a majority of votes cast. If no nominee reaches that majority and the vote standard is a majority of votes cast, then a failed election would occur where the incumbent director of a Delaware corporation would continue to serve under the 'holdover rule.' Even if the incumbent director were to resign out of embarrassment, the insurgent would still not be elected and the remaining board would have discretion to appoint a replacement—either the insurgent or someone entirely different and potentially more sympathetic to the incumbent board. This all can happen even though the insurgent may secure more votes than the incumbent, but not enough to reach a majority of votes cast.

The Confused State of Vote Standards and Proxy Statements

We reviewed proxy statements that appeared to inaccurately state either the voting standards and/or associated vote count procedures for things such as abstentions and broker non-votes—a not uncommon defect that has been noted with concern by the SEC. Combine 5 director vote standard formulations (plurality, plurality plus, modified majority, majority of votes cast and majority of votes present and entitled to vote) and add another 5 types of votes ("for", "withhold"—for plurality—and "against" for all others, abstentions and broker non-votes) and one has a challenging disclosure obligation to summarize.

For clarity on one item that seems to create confusion in particular: Abstentions under Delaware law are not "votes cast" but are "votes present and entitled to vote" –accordingly, they count the same as "against" votes in majority of votes present and entitled to vote elections. Conversely, broker non-votes in Delaware are not considered eligible for voting—and so count neither as a vote cast or as a vote present and entitled to vote. However, broker non-votes are counted towards a quorum so long as a "routine" matter (e.g. approval of independent public accounting firm) appears on the ballot.

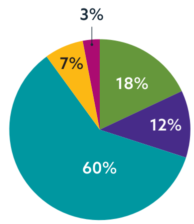
We summarize these Delaware vote standards below:

	Plurality	Majority of Votes Cast	Majority of Votes Present and Entitled to Vote	Majority of Outstanding Shares
For	√	√	√	√
Withhold	√			
Against		√	√	√
Abstain	Not Counted	Not Counted	Counted as 'Against'	Counted as 'Against'
Broker Non-Vote	Not Counted	Not Counted	Not Counted	Counted as 'Against'

To add to complexity, but separate from director elections, for NYSE listed companies that seek stockholder approval of certain matters, such as approval of equity plan changes, stock issuances or a change of control, abstentions are treated as votes cast and therefore in practice have the same effect as a vote against the proposal.

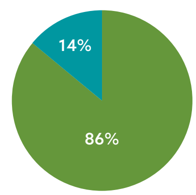
NON-DUAL CLASS

Total (122)



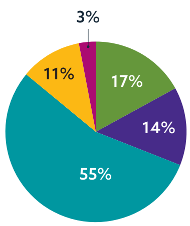
DUAL CLASS

Total (21)

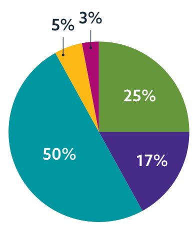


Key

- Plurality
- Plurality "Plus"
- "Modified" majority of votes cast
- Majority of votes cast
- Majority of votes present and entitled to vote



Hardware
(36)



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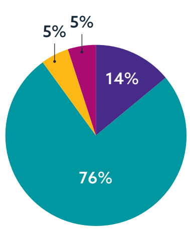
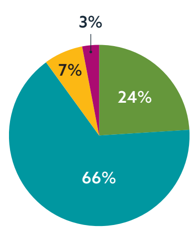


Semiconductors
(21)



Services/Consumer
(29)

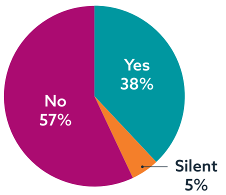
Almost 75 percent of non-dual class surveyed companies have policies in place triggering resignations of incumbent directors who fail to receive more "for" votes than "withhold" (plurality plus) or "against" (modified majority) votes. This shows the dramatic expansion of majority voting formulations in the past decade.

PROXY ADVISORY POLICIES: Both ISS and Glass Lewis support the 'modified majority' variant for director elections.

Is ***removal of directors*** restricted to "for cause" only?

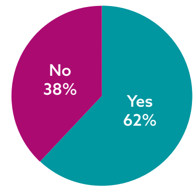
NON-DUAL CLASS

Total (122)



DUAL CLASS

Total (21)



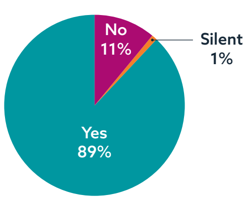
Approximately 40 percent of non-dual class surveyed companies restrict the ability of stockholders to remove directors to "for cause" only—meaning that these companies do not allow for directors to be removed merely for performance issues, even if a supermajority of stockholders initiate a removal effort. Since the Delaware statutory default is that directors may be removed with or without cause, silence in the bylaws is the same as explicitly stating that directors can be removed with or without cause. Accordingly, when the 'silent' and 'no' buckets are combined, over 60 percent of the non-dual class surveyed companies allow director removal with or without cause.

PROXY ADVISORY POLICIES: Neither ISS nor Glass Lewis support restricting the removal of directors to "for cause" only.

Does the board have first and exclusive right to ***fill board vacancies?***

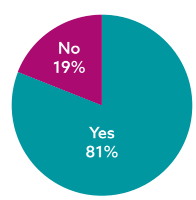
NON-DUAL CLASS

Total (122)



DUAL CLASS

Total (21)



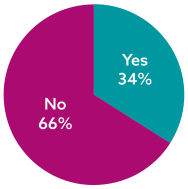
Almost 90 percent of non-dual class surveyed companies give the board the sole right to fill board vacancies.

PROXY ADVISORY POLICIES: ISS does not explicitly support allowing incumbent directors the exclusive right to fill board vacancies. Glass Lewis does not support this feature implicitly (through guidance against the adoption of policies purportedly designed to restrict stockholder rights).

Has the company adopted director ***age limits***?

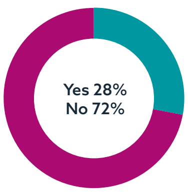
NON-DUAL CLASS

Total (122)



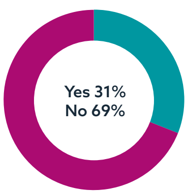
AGE LIMIT*	
70	4%
72	11%
75	16%
Other	2%

Hardware (36)



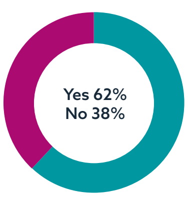
AGE LIMIT*	
70	6%
72	14%
75	6%
Other	3%

Software (36)



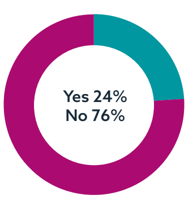
AGE LIMIT*	
70	3%
72	11%
75	14%
Other	3%

Semiconductors (21)



AGE LIMIT*	
70	9%
72	5%
75	43%
Other	5%

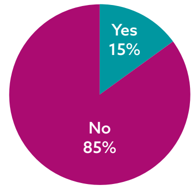
Services/Consumer (29)



AGE LIMIT*	
70	0%
72	10%
75	14%
Other	0%

DUAL CLASS

Total (21)



AGE LIMIT*	
70	5%
72	5%
75	5%

* Percentages are of all surveyed companies, not just those in the "Yes" category.

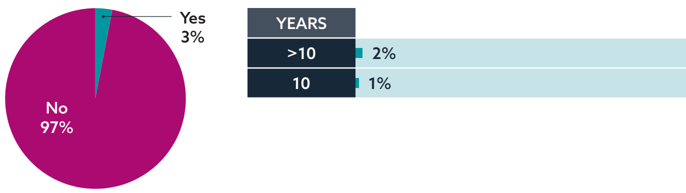
So the saying goes, "72 is the new 70. And 75 is the new 72." One-third of non-dual class surveyed companies have enacted formal director age limits. Most of those companies are split at pegging that age at either 72 or 75.

PROXY ADVISORY POLICIES: ISS does not support age limits, but does scrutinize any board where the average tenure of outside directors exceeds 15 years. Glass Lewis iconoclastically rejects both age and tenure limits outright.

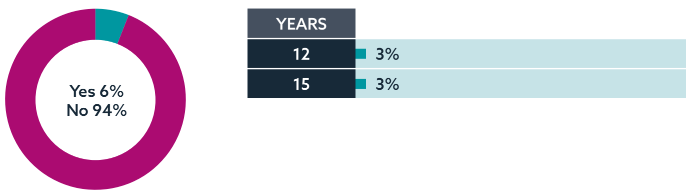
Has the company adopted director ***tenure limits***?

NON-DUAL CLASS

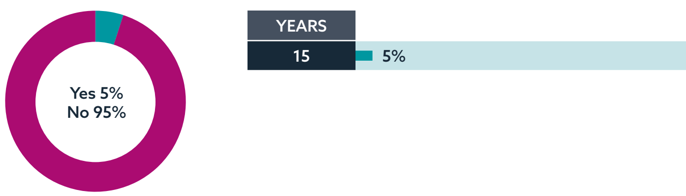
Total (122)



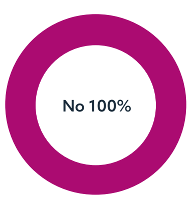
Hardware (36)



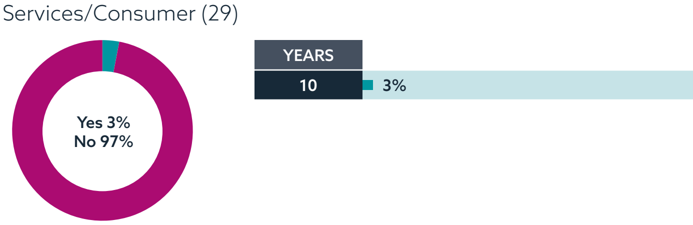
Semiconductors (21)



Software (36)



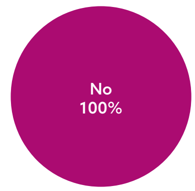
Services/Consumer (29)



* Percentages are of all surveyed companies, not just those in the "Yes" category.

DUAL CLASS

Total (21)



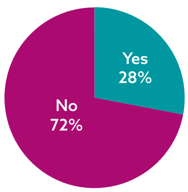
Very few companies in the U.S. have specified board tenure limits, and nearly all of the companies in our survey have yet to do so. This is another area of increased attention from governance activists and thus may evolve over the medium term.

PROXY ADVISORY POLICIES: ISS does not support age limits, but does scrutinize any board where the average tenure of outside directors exceeds 15 years. Glass Lewis again rejects both age and tenure limits outright.

Is there a ***combined CEO/Chairman role***, or, conversely, a policy against such a combination?

NON-DUAL CLASS

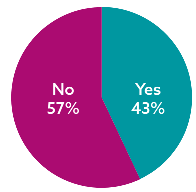
Total (122)



NO*	
Discretion	51%
Policy	4%
Silent	17%

DUAL CLASS

Total (21)



NO*	
Discretion	43%
Policy	0%
Silent	14%

* Percentages are of all surveyed companies, not just those in the "No" category.

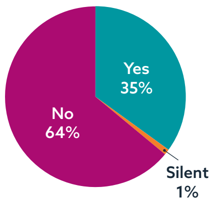
The separation of the Chairman and CEO roles has been a hot topic in recent years—particularly as separation pressure gained significant momentum with high profile stockholder proposals to do so in the financial services industry. In response, many boards with combined roles have created lead independent director roles that in many respects mirror functions of a chair, without necessarily agenda setting, or of course, title. However, whether a company has an independent chair remains subject to wide variation, oftentimes dependent on the CEO's history and personal inclination, as well as the company's general performance. For non-dual class companies in our survey, just under 30% already have a combined CEO/Chairman role. Only 4% of surveyed non-dual class companies do not have a combined role and have a specific policy prohibiting the combination of the roles. The remaining roughly 2/3 of companies do not have a combined role and either explicitly leave whether to combine the roles to the discretion of the board or remain silent.

PROXY ADVISORY POLICIES: ISS recommends generally a vote for stockholder proposals to separate the two positions, but their position is subject to individual evaluation with a focus on a fully functioning lead independent director position as well as financial and governance performance of the company. Glass Lewis also supports separation proposals but does so with a more stern avoidance of exceptions to this policy.

Can stockholders call ***special meetings*** and, if so, what percentage of outstanding shares is required to do so?

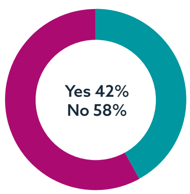
NON-DUAL CLASS

Total (122)



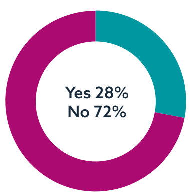
STOCK %*	
10	9%
20	5%
25	9%
35	2%
50	3%
75	2%
Other	5%

Hardware (36)



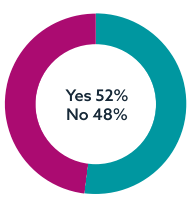
STOCK %*	
10	17%
20	5%
25	14%
50	3%
66	3%

Software (36)



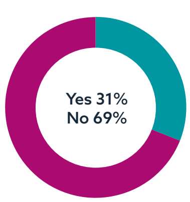
STOCK %*	
10	6%
15	8%
20	3%
35	3%
75	3%
Silent	3%
Other	3%

Semiconductors (21)



STOCK %*	
10	9%
20	9%
25	19%
35	5%
50	5%
80	5%

Services/Consumer (29)

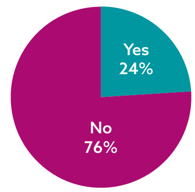


STOCK %*	
10	3%
20	3%
25	11%
50	8%
75	3%
Other	3%

* Percentages are of all surveyed companies, not just those in the "Yes" category.

DUAL CLASS

Total (21)



STOCK %*	
20	5%
25	5%
33	5%
50	9%

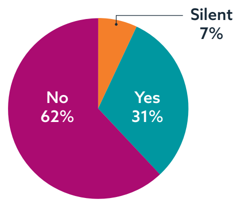
Roughly two-thirds of non-dual class surveyed companies do not allow stockholders to call a special meeting. Of the one-third that do, the percentage of shares required to call a meeting varies widely.

PROXY ADVISORY POLICIES: ISS supports a stockholder threshold of 10 percent to call a special meeting. Glass Lewis supports the right to call special meetings, without reference to specific percentage levels of stockholder support necessary to do so.

Can stockholders take ***action by written consent***?

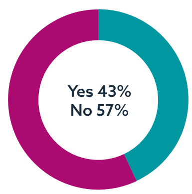
NON-DUAL CLASS

Total (122)

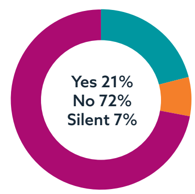


Hardware
(36)

Software
(36)



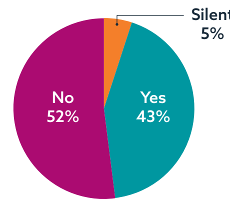
Semiconductors
(21)



Services/Consumer
(29)

DUAL CLASS

Total (21)



Over 60 percent of non-dual class surveyed companies do not allow action by written consent.

Mature companies without other ostensible blocking mechanisms for activists generally prohibit action by written consent in order to restrict fundamental corporate changes to actual meetings of stockholders. For those that do, voting requirements almost always mirror what would otherwise be required for a similar action at a meeting of stockholders.

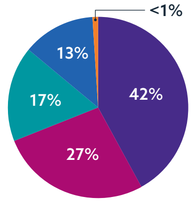
PROXY ADVISORY POLICIES: Both ISS and Glass Lewis generally do not support eliminating stockholders' right to act by written consent.

What percentage of vote of stockholders is required to ***amend bylaws***?

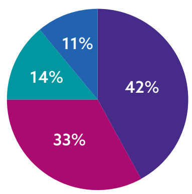
Key
- 75% or 80% of outstanding
- 66% of outstanding
- 50% of outstanding
- 50% of present and entitled to vote
- Other

NON-DUAL CLASS

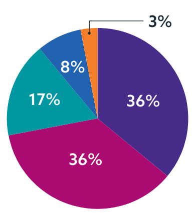
Total (122) STOCK %*



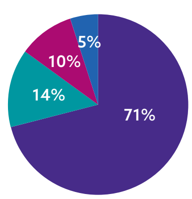
Hardware (36)



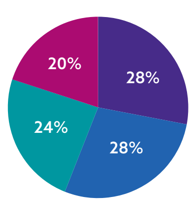
Software (36)



Semiconductors (21)



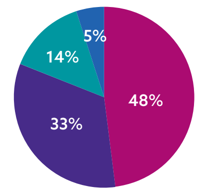
Services/Consumer (29)



* Percentages are of all surveyed companies, not just those in the "Yes" category.

DUAL CLASS

Total (21)



Delaware law specifically vests stockholders the power to amend bylaws. But Delaware law also allows stockholders to permit boards of directors to so as well—and in practice almost all companies afford boards this discretion.

Where companies allow the board to amend bylaws, stockholders may still amend the bylaws upon a proper vote threshold. In Delaware, that default standard is majority of votes present and entitled to vote, and thus abstentions count as "against" and broker non-votes are not factored. However, the Delaware default position is the minority for companies generally. In fact, less than 20 percent of non-dual class surveyed companies have the default.

Approximately 40 percent of non-dual class surveyed companies retain the 'majority' (50 percent) numerical threshold but change the vote standard to majority of outstanding shares. This means both abstentions and broker non-votes count as "against." The change in the denominator/vote standard to shares outstanding and thus the counting of broker non-votes as "against," in addition to abstentions, in practice creates a difficult standard to meet.

Almost 30 percent of non-dual class surveyed companies increase the shares outstanding standard to a numerical vote threshold of 66 percent. And a further more than 10 percent of non-dual class surveyed companies increase the percent of outstanding shares required to either 75% or 80%, which as a practical matter essentially voids stockholder direct influence over the bylaws.

In some cases, the greater vote requirement/standard is limited to matters concerning board size and removal (the matters most useful in a proxy fight), while for the rest of companies, the majority of outstanding—or super-majority of outstanding as it may be—requirement applies to the bylaws in their entirety.

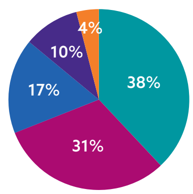
PROXY ADVISORY POLICIES: ISS will not support the re-election of director nominees who vote in favor of proposals to require supermajority voting to amend bylaws. Glass Lewis is less specific in its guidelines, but its general guidance means not supporting supermajority provisions.

What percentage of vote of stockholders is required to ***amend the certificate of incorporation***?

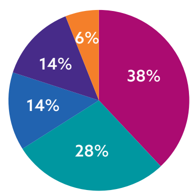
Key
- 75% or 80% of outstanding
- 66% of outstanding
- 50% of outstanding
- 50% of present and entitled to vote
- Other

NON-DUAL CLASS

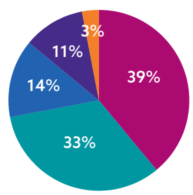
Total (122)



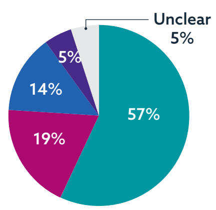
Hardware (36)



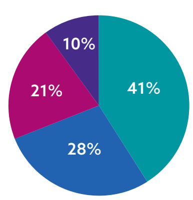
Software (36)



Semiconductors (21)



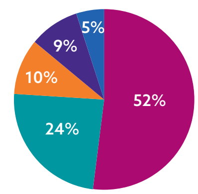
Services/Consumer (29)



* Percentages are of all surveyed companies, not just those in the "Yes" category.

DUAL CLASS

Total (21)



For Delaware companies, Section 242 prevents stockholders from unilaterally amending the certificate of incorporation without initiation from the board of directors. Once the board recommends amending the certificate of incorporation, the Delaware default is that a majority of shares present and entitled to vote at a meeting can approve such an amendment and so abstentions count as "against" and broker non-votes are not counted as having voted.

Approximately 40 percent of the non-dual class surveyed companies follow the Delaware default by simply remaining silent on the subject. Conversely, over 60 percent of non-dual class surveyed companies have enhanced standards that require a percentage of the outstanding shares to vote in favor of the amendment—in these formulations, as is common with stockholder bylaw amendment provisions, both abstentions and also broker non-votes thus count the same as "no" votes. Almost 20 percent of non-dual class surveyed companies require 75 or 80 percent of outstanding shares and another 30 percent require at least 66 percent of outstanding shares. 10 percent of non-dual class surveyed companies keep the Delaware numerical default of 50 percent but change the vote standard from Delaware's majority of votes present and entitled to vote to the more stringent majority of shares outstanding.

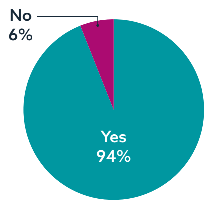
In practice, a substantial portion of votes from brokerage account holders in "street name", whether on behalf of institutions or retail investors, still take the form of broker non-votes, which again count the same as "no" votes in formulations requiring the vote of outstanding shares. For bylaws, a board can, so long as it has been delegated such authority (which most boards have), unilaterally amend the bylaws. However, a board cannot unilaterally amend the certificate of incorporation. Obtaining the affirmative vote of at least 75 or 80 percent of the outstanding shares to amend the certificate of incorporation—even when a board has recommended the amendment—means that certificates of incorporation for such supermajority voting-standard companies are at significant risk not to change, even if the board has recommended doing so. This is sometimes referred to as the "zombie" effect.

PROXY ADVISORY POLICIES: While neither ISS nor Glass Lewis promulgates specific recommended thresholds for this issue, they are generally unsupportive of any matters requiring supermajority stockholder voting thresholds.

Is ***"blank check" preferred stock*** authorized?

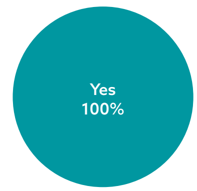
NON-DUAL CLASS

Total (122)



DUAL CLASS

Total (21)



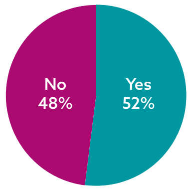
Unsurprisingly, almost all companies continue to allow boards to issue preferred stock at their discretion, or "blank check preferred." While some governance activists decry this ability, it is particularly crucial for the adoption of stockholder rights plans (aka "poison pills") and also in certain issuances to "white knights"—third parties who seek to disrupt hostile tender offers.

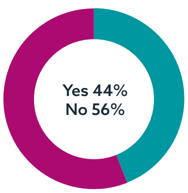
PROXY ADVISORY POLICIES: ISS examines on a case-by-case basis but in practice does not appear supportive. Glass Lewis is explicitly against authorized stock where the primary purpose is an anti-takeover defense.

Is there an ***exclusive forum/venue*** provision?

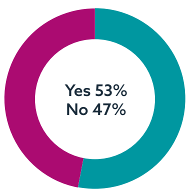
NON-DUAL CLASS

Total (122)

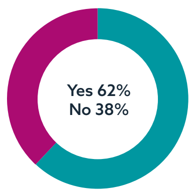




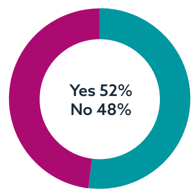
Hardware
(36)



Software
(36)



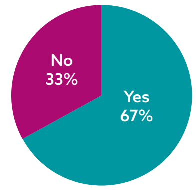
Semiconductors
(21)



Services/Consumer
(29)

DUAL CLASS

Total (21)



Over one half of non-dual class surveyed companies have adopted exclusive forum bylaws, which restrict stockholder litigation to a single litigation forum/venue—almost always Delaware, as the favorite state of incorporation. Importantly, companies can elect to waive these provisions if they ultimately believe that a settlement outside Delaware will be a better outcome—so the "exclusive" nature is really an option in the company's favor. Although slightly less than one half of non-dual class surveyed companies thus have not adopted the provisions, the incidence rate still represents the feature having spread rapidly, since the provisions have only gained significant attention in the past few years.

PROXY ADVISORY POLICIES: Notwithstanding Glass Lewis' opposition and ISS' somewhat ambiguous purported "case-by-case" analysis positions, as some risk-adverse boards see increasing numbers of their peers adopt these provisions, one would expect the adoption rate to steadily increase in the next couple of years.

SURVEY COMPONENTS

Name	Ticker
2U, Inc.	TWOU
ACI Worldwide, Inc.	ACIW
Adobe Systems Inc.	ADBE
Advanced Micro Devices, Inc.	AMD
Akamai Technologies, Inc.	AKAM
Allscripts Healthcare Solutions, Inc.	MDRX
Alphabet Inc.	GOOG
Analog Devices, Inc.	ADI
ANSYS, Inc.	ANSS
Apple Inc.	AAPL
Applied Materials, Inc.	AMAT
Arista Networks, Inc.	ANET
Aspen Technology, Inc.	AZPN
athenahealth, Inc.	ATHN
Autodesk, Inc.	ADSK
Blackbaud, Inc.	BLKB
Booz Allen Hamilton Holding Corp.	BAH
Broadcom Inc.	AVGO
CACI International Inc.	CACI
Cadence Design Systems, Inc.	CDNS
CarGurus, Inc.	CARG
Cars.com Inc.	CARS
CDK Global, Inc.	CDK
CDW Corp.	CDW
CenturyLink, Inc.	CTL
Ceridian HCM Holding Inc.	CDAY
Cerner Corp.	CERN
Ciena Corp.	CIEN
Cirrus Logic, Inc.	CRUS
Cisco Systems, Inc.	CSCO
Citrix Systems, Inc.	CTXS
Cognizant Technology Solutions Corp.	CTSH
CommScope Holding Company, Inc.	COMM
Commvault Systems, Inc.	CVLT
Cree, Inc.	CREE
Cypress Semiconductor Corp.	CY
Dell Technologies Inc.	DVMT
Docusign, Inc.	DOCU
DXC Technology Company	DXC
eBay Inc.	EBAY
EchoStar Holding Corp.	SATS
Ellie Mae, Inc.	ELLI
Entegris, Inc.	ENTG
EPAM Systems, Inc.	EPAM
Etsy, Inc.	ETSY
F5 Networks, Inc.	FFIV
Facebook, Inc.	FB
Fair Isaac Corp. (FICO)	FICO

Name	Ticker
Finisar Corp.	FNSR
FireEye, Inc.	FEYE
Fortinet, Inc.	FTNT
Gartner, Inc.	IT
GoDaddy Inc.	GDDY
GrubHub Inc.	GRUB
Guidewire Software, Inc.	GWRE
Hewlett Packard Enterprise Company	HPE
HP Inc.	HPQ
HubSpot, Inc.	HUBS
IAC/InterActiveCorp.	IAC
Integrated Device Technology, Inc.	IDTI
Intel Corp.	INTC
InterDigital, Inc.	IDCC
International Business Machines Corp. (IBM)	IBM
Intuit Inc.	INTU
j2 Global, Inc.	JCOM
Juniper Networks, Inc.	JNPR
KLA-Tencor Corp.	KLAC
Lam Research Corp.	LRCX
Leidos Holdings, Inc.	LDOS
LogMeIn, Inc.	LOGM
Lumentum Holdings Inc.	LITE
Manhattan Associates, Inc.	MANH
Maxim Integrated Products, Inc.	MXIM
Medidata Solutions, Inc.	MDSO
Microchip Technology Inc.	MCHP
Micron Technology, Inc.	MU
Microsoft Corp.	MSFT
MKS Instruments, Inc.	MKSI
Monolithic Power Systems, Inc.	MPWR
Motorola Solutions, Inc.	MSI
NCR Corp.	NCR
NetApp, Inc.	NTAP
NetScout Systems, Inc.	NTCT
New Relic, Inc.	NEWR
Nuance Communications, Inc.	NUAN
Nutanix, Inc.	NTNX
Nvidia Corp.	NVDA
Okta, Inc.	OKTA
ON Semiconductor Corp.	ON
Oracle Corp.	ORCL
Palo Alto Networks, Inc.	PANW
Pandora Media, Inc.	P
Paycom Software, Inc.	PAYC
Pegasystems Inc.	PEGA
Perspecta Inc.	PRSP
Plantronics, Inc.	PLT

Name	Ticker
Proofpoint, Inc.	PFPT
PTC Inc.	PTC
Pure Storage, Inc.	PSTG
Qorvo, Inc.	QRVO
Qualcomm Inc.	QCOM
RealPage, Inc.	RP
RingCentral, Inc.	RNG
Salesforce.com, Inc.	CRM
Science Applications International Corp. (SAIC)	SAIC
Semtech Corp.	SMTC
ServiceNow, Inc.	NOW
Silicon Laboratories, Inc.	SLAB
Skyworks Solutions, Inc.	SWKS
Snap Inc.	SNAP
Splunk Inc.	SPLK
SS&C Technologies Holdings, Inc.	SSNC
Stamps.com Inc.	STMP
Symantec Corp.	SYMC
Synaptics Inc.	SYNA
Synnex Corp.	SNX
Synopsys, Inc.	SNPS
Tableau Software, Inc.	DATA
Tech Data Corp.	TECD
Teradata Corp.	TDC
Teradyne, Inc.	TER
Texas Instruments Inc.	TXN
Twilio Inc.	TWLO
Twitter, Inc.	TWTR
Tyler Technologies, Inc.	TYL
Ubiquiti Networks, Inc.	UBNT
The Ultimate Software Group, Inc.	ULTI
Universal Display Corp.	OLED
Veeva Systems Inc.	VEEV
Verint Systems Inc.	VRNT
VeriSign, Inc.	VRSN
Versum Materials, Inc.	VSM
ViaSat, Inc.	VSAT
Viavi Solutions Inc.	VIAV
Vmware, Inc.	VMW
Western Digital Corp.	WDC
Workday, Inc.	WDAY
Xerox Corp.	XRX
Xilinx, Inc.	XLNX
Zayo Group Holdings, Inc.	ZAYO
Zendesk, Inc.	ZEN
Zillow Group, Inc.	ZG
Zscaler, Inc.	ZS