Corporate Governance Features

for Silicon Valley and San Francisco Bay Area Public Companies

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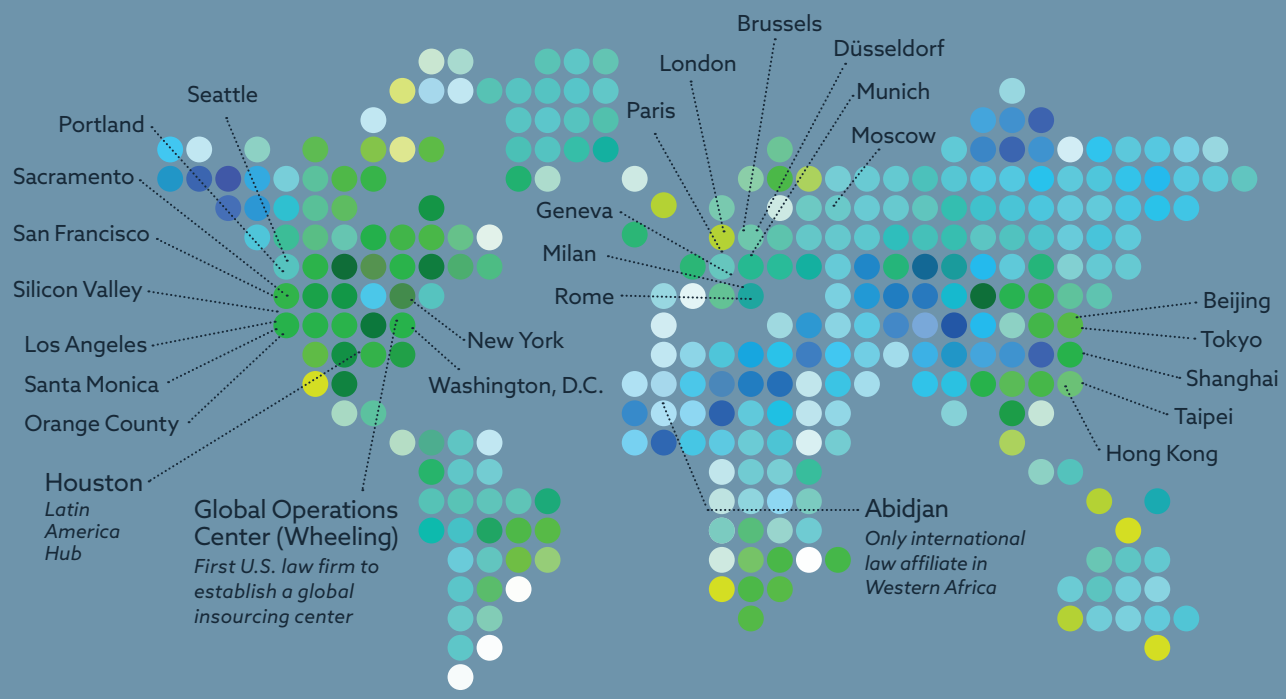

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Acknowledgements

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Ed Batts is Global Chair of Orrick's M&A and Private Equity group, consisting of over 50 partners in Asia, Europe and North America dedicated to M&A and PE transactions. Resident in the firm's Silicon Valley office, Ed regularly counsels publicly traded technology companies in mergers and acquisitions, corporate governance and cybersecurity, including the following:

- **M&A:** Fiduciary duty counseling of public boards, cross-border transactions, tender offers and going private transactions.
- **Corporate Governance:** Board matters and public reporting obligations, including activist investor situations, stockholder proposals and accounting related issues.
- **Cyber:** Crisis management of significant cybersecurity incidents as well as advice on regulators, plaintiffs and law enforcement.

Ed maintains a blog on public company matters, accessible at **accruedknowledge.com**

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 – certificate/articles of incorporation, bylaws and corporate governance guidelines – of Silicon Valley and San Francisco Bay Area publicly traded companies.

We focused on three general areas:

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

Executive Summary

Dual class common stock

These structures, in which generally founders retain super-voting power, continue to be in the minority but with a significantly different corporate governance profile. 16 of 105 Technology Companies, none of 16 Life Sciences companies and 6 of 32 companies in other sectors had dual class common stock.

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. Almost 50% of companies with non-dual class common stock structures have adopted these provisions, the concept of which only originated a few years ago.

Proxy access

Remains limited but growing fast, as less than 20% of companies in the study have adopted provisions allowing groups of up to 20 stockholders who combined have held at least 3% of a company's common stock for at least 3 years to nominate directors for up to 20% of the board of directors.

Director age limits

Remain a minority—with less than 25% of companies having adopted some age limit, and director tenure limits are an even smaller fraction—at less than 5% generally.

Staggered boards

Remain surprisingly popular. Around 40% of dual class and non-dual class technology companies alike still have some form of a staggered board, though these tend to be weighted somewhat towards recently public companies.

Majority voting formulations

Continue to sweep. Over 70% of non-dual class technology public 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—which as a practical matter, has happened frequently in a failed vote.

State of incorporation

Almost all companies (other than relatively arcane Real Estate Investment Trust (REITs)) are incorporated in Delaware. Excluding REITs, 138 of 149 companies are incorporated in Delaware, 10 in California and 1 overseas.

Our Data Criteria

Our study encompassed the following:

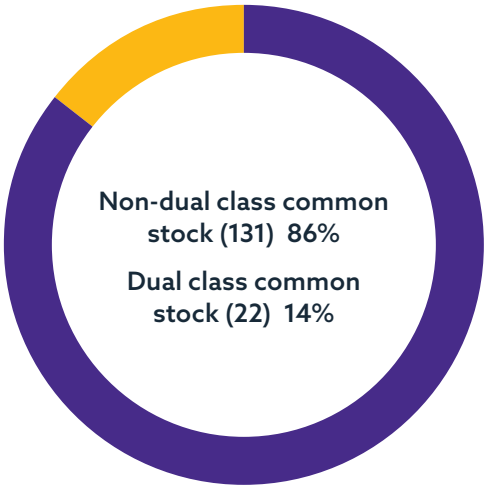
- **Bay Area Mid Cap and Large Cap Publicly Traded Companies:** We exercised a discretionary cutoff of $750 million in market capitalization (as of approximately Oct. 1, 2016) in an effort both to have a manageable amount of data and to exclude idiosyncrasies that can occur in smaller capitalization companies. We thus reviewed the features of 153 publicly traded 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.
- **Tech, Life Sciences and Others:** We further sorted our lists into Technology (105 companies), Life Sciences (16 companies) and Other (34 companies), primarily by Standard Industrial Classification (SIC) code, as filed by a company with the SEC. By the inherent nature of the SF Bay Area economy, the overwhelming majority of these companies are in the Technology space. SIC codes generally (but not always) were the best proxy. The companies in Other were spread across a variety of the financial institution, retail, transportation and other sectors.
- **Dual Class Structures vs. Single Class Structures:** We further parsed the data by whether a company has a dual class common stock structure. 16 of the 105 Technology companies, none of the 16 Life Sciences companies and 6 of the 32 companies in Other sectors had dual class structures. These structures customarily allocate 10 votes per share to a holder of a nonpublicly traded class of shares (usually the founder(s)), while the publicly traded shares received one vote. We did this 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.

Managing Changes in Companies

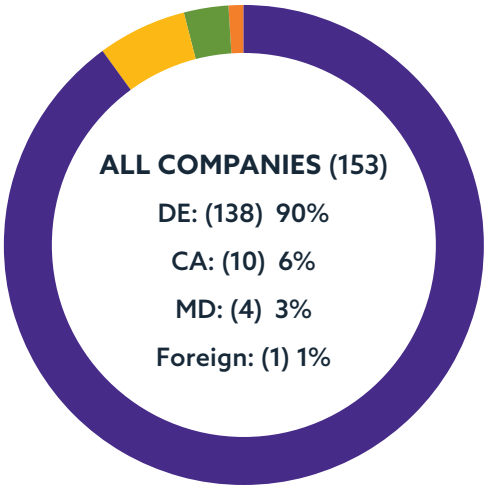
The past 24 months have seen significant ebbs and flows in the population size of the companies described above, influenced by two phenomena:

- **Spin-Offs:** Several larger companies have split into two (or more) entities: Agilent/Keysight Technologies, eBay/PayPal, HP/HP Enterprise, JDSU into Viavi Solutions and Lumentum Holdings, and Symantec/Veritas, to name a few. Any resulting publicly traded entity above our market capitalization cutoff is included in the data; however, parts of companies that are not publicly traded (e.g., Veritas Technology LLC, resulting from the split of Symantec) are not.
- **Consolidation:** The number of public companies is shrinking in the face of a robust M&A market – particularly in semiconductors – coupled with a slim IPO market. While we included companies that were under contract to be acquired as of Oct. 1 (LinkedIn, NetSuite, Silicon Graphics, Solar City and Yahoo!), the following companies were excluded because they have been acquired: Affymetrix, Atmel, Fairchild Semiconductor, Leapfrog Wireless, Marketo, OmniVision Technologies, PMC-Sierra, Ruckus Wireless, SanDisk and Tivo.

COMPANIES WITH DUAL CLASS VS. NON-DUAL CLASS COMMON STOCK



STATE OF INCORPORATION

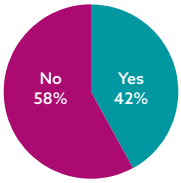


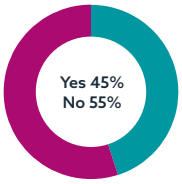
COMMENTARY: 9 out of 10 public companies in this survey are incorporated in Delaware. A small number have remained as California corporations, while four real estate investment trusts (REITs) have taken advantage of Maryland's preeminence in its REIT corporate statutes.

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

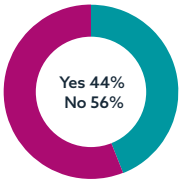
NON-DUAL CLASS

Total (131)

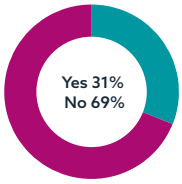




Tech (89)



Life Sciences (16)

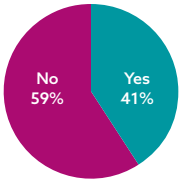


Other (26)

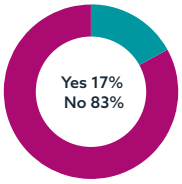
Technology and Life Science companies were pretty evenly split (45 percent Yes) on classified boards. Only about one-third of Other companies – many of which have been around for much longer – had classified boards.

DUAL CLASS

Total (22)



Tech (16)



Other (6)

Conversely, for dual class companies, over two-thirds of Technology companies had classified boards, while over 80 percent of Other companies did not.

COMMENTARY: As proxy advisory firms have increased pressure on companies to eliminate classified boards, one would have imagined a lower rate of classified boards among non-dual class stock companies. The concept remains very much alive in the Bay Area – and specifically the Technology sector – though to some degree this may be because recently public companies that do not have dual class common stock are more likely to retain a staggered board and be under less pressure to eliminate it for the first few years they are publicly traded.

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

What is required for the ***vote 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!). 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 election need only secure one (yes, a mere single) vote for re-election. This is the case even if the candidate may have received 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 much stockholders may 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. 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 legally binding document – and is usually drafted by a company lawyer.

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-existing 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,' insurgent directors are not elected – but, ironically, under the Delaware "holdover rule" incumbent directors who fail to obtain the vote continue in their duties indefinitely. This Delaware-specific 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. Note that in California, the 'holdover' rule is limited to 90 days post-failed election, forcing the director to leave thereafter. Accordingly, California's automatic statutory ouster pre-empts the need for an auto-resignation policy. 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. For example, almost 60% of 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 requires 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 2 out of 131 non-dual class companies in our survey (and we are unsure those 2 were intentional) – have adopted this standard, since the absence of a resignation policy creates a 'failed election'. Then, 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 no 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, which 4 non-dual class companies and 2 dual class companies in our survey have adopted.

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 "withhold/against" votes. 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 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 several 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 defective condition that has been noted with concern by senior staff at 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 4 technical votes ("for", "withhold" – for plurality – and "against" for all others, abstentions and broker non-votes) and one has a challenging disclosure obligation to summarize.

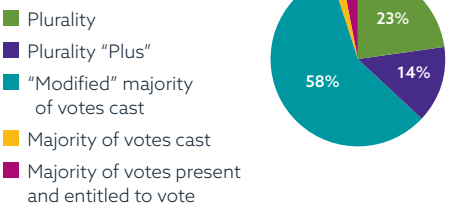
For clarity on one item that seems to create confusion in particular: Abstentions are "votes cast" and "votes present and entitled to vote" – accordingly, they count the same as "against" votes in majority of votes case or majority of votes present and entitled to vote elections. Conversely, broker non-votes 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. We summarize these Delaware vote standards in the chart below:

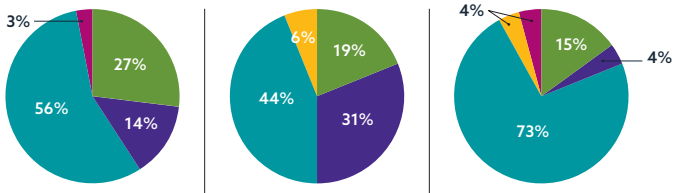
	Plurality	Majority of Votes Cast	Majority of Votes Present and Entitled to Vote	Majority of Outstanding Shares
For	√	√	√	√
Withhold	√			
Against		√	√	√
Abstain		Not Counted	Counted as 'Against'	Counted as 'Against'
Broker Non-Vote	Not Counted	Not Counted	Not Counted	Counted as 'Against'

Under Delaware law, broker non-votes are not deemed as 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.

NON-DUAL CLASS

Total (131)





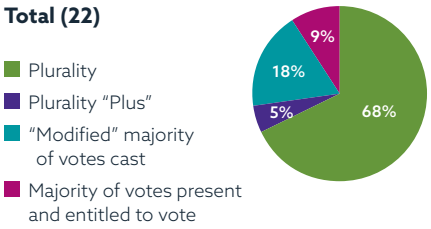
Tech (89) | Life Sciences (16) | Other (26)

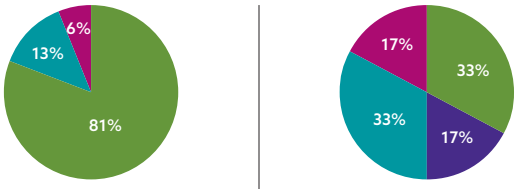
Over 70% of companies have policies in place triggering resignations of incumbent directors who fail to receive more "for" votes than "withhold" (plurality plus) or "against" (modified majority) votes. This shows the dramatic expansion of majority voting formulations in the past decade.

We have included California corporations in the 'modified' majority category because of California's statutory provisions create the same end result.

DUAL CLASS

Total (22)





Tech (16) | Other (6)

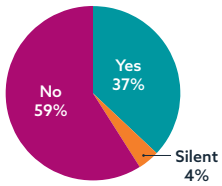
Not surprisingly, it is the inverse for dual class companies, with over 70% still relying on conventional plurality voting standards, as it is largely futile for governance activists to mount campaigns against plurality in a controlled voting set-up.

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***?

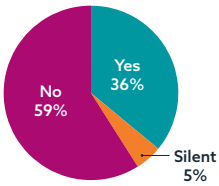
NON-DUAL CLASS

Total (131)



DUAL CLASS

Total (22)



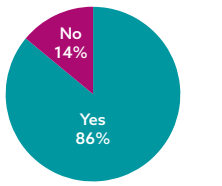
COMMENTARY: Just over 35 percent of all companies restrict the ability of stockholders to remove directors to "for cause" only – meaning that these companies do not allow for directors to be removed merely for performance issues, even if a supermajority of stockholders initiate a removal effort.

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?***

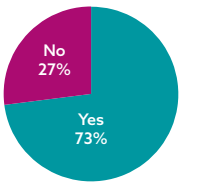
NON-DUAL CLASS

Total (131)



DUAL CLASS

Total (22)



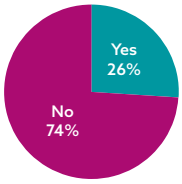
COMMENTARY: The vast majority (86 percent of non-dual class companies, 81 percent of Technology dual-class companies and 50 percent of dual class non-Technology companies) give the board the sole right to fill board vacancies. Non-Technology dual class companies generally are older than their Technology dual class counterparts and so have more idiosyncratic governance landscapes.

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

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

NON-DUAL CLASS

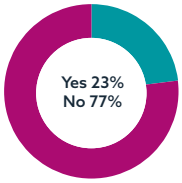
Total (131)



Yes: Age limit of director in years

Age	
70	2%
72	9%
75	13%
Other	2%

Tech (89)



Yes: Age limit of director in years

Age	
70	3%
72	7%
75	10%
Other	3%

Life Sciences (16)

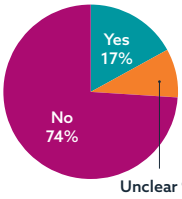
Other (26)

Yes: Age limit of director in years

Age	
70	0%
72	23%
75	31%
Other	0%

DUAL CLASS

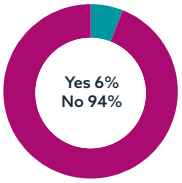
Total (22)



Yes: Age limit of director in years

Age	
70	4%
72	4%
75	9%
Other	0%

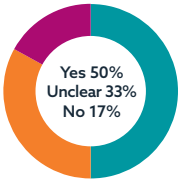
Tech (16)



Yes: Age limit of director in years

Age	
70	6%
72	0%
75	0%
Other	0%

Other (6)



Yes: Age limit of director in years

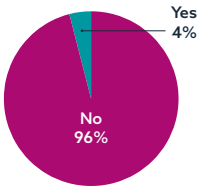
Age	
70	0%
72	17%
75	33%
Other	0%

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 rejects both age and tenure limits outright.

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

NON-DUAL CLASS

Total (131)



Yes: Number of years

Years	
>10	2%
10	1%
Other	1%

Tech (89)

Yes: Number of years

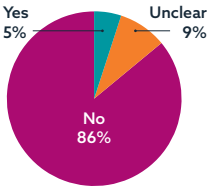
Years	
>10	2%
10	1%
Other	1%

Life Sciences (16)

Other (26)

DUAL CLASS

Total (22)

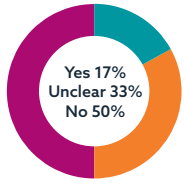


Yes: Number of years

Years	
>10	0%
10	5%

Tech (16)

Other (6)



Yes: Number of years

Years	
>10	0%
10	17%

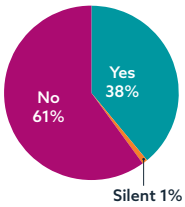
COMMENTARY: Very few companies (5 percent or less of all categories) have specified board tenure limits. This is another area of increased attention from governance activists and thus may evolve over the medium term.

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 rejects both age and tenure limits outright.

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

NON-DUAL CLASS

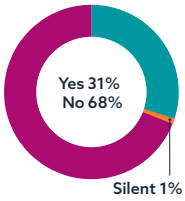
Total (131)



Yes: Percentage of stock required to call special meetings

Stock %	
10	15%
20	4%
25	8%
30	0%
50	8%
Other	3%

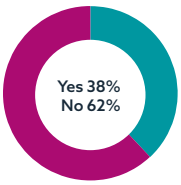
Tech (89)



Yes: Percentage of stock required to call special meetings

Stock %	
10	12%
20	6%
25	8%
30	0%
50	3%
Other	2%

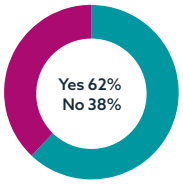
Life Sciences (16)



Yes: Percentage of stock required to call special meetings

Stock %	
10	13%
20	6%
25	0%
30	6%
50	13%
Other	0%

Other (26)

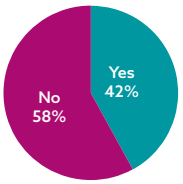


Yes: Percentage of stock required to call special meetings

Stock %	
10	27%
20	0%
25	4%
30	0%
50	12%
Other	19%

DUAL CLASS

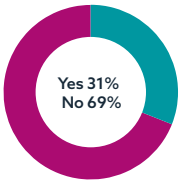
Total (22)



Yes: Percentage of stock required to call special meetings

Stock %	
10	18%
20	5%
25	5%
30	5%
50	9%
Other	0%

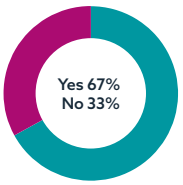
Tech (16)



Yes: Percentage of stock required to call special meetings

Stock %	
10	13%
20	6%
25	6%
30	0%
50	6%
Other	0%

Other (6)



Yes: Percentage of stock required to call special meetings

Stock %	
10	33%
20	0%
25	0%
30	17%
50	17%
Other	0%

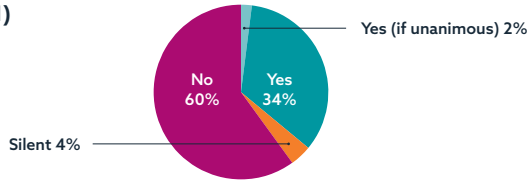
Roughly two-thirds of companies (from 38 percent of non-dual class Other companies to 70 percent of dual class Technology companies) do not allow stockholders to call a special meeting. At the other end of the spectrum, some 15 percent or so allow 10 percent or greater stockholders to call a special meeting – a relatively small group given proxy advisory firms' support for this concept. In between lies a range of 20, 25, 30, 35 and 50 percent thresholds.

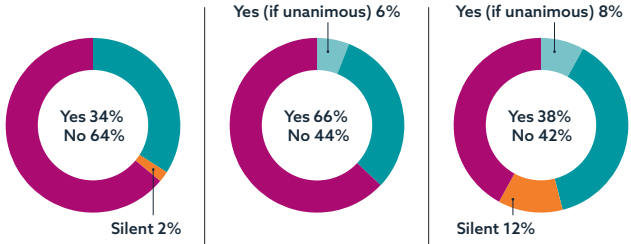
PROXY ADVISORY POLICIES: ISS supports a stockholder threshold of 10 percent to call a special meeting. Glass Lewis simply supports the right to call special meetings, without reference to specific percentage levels of stockholder support necessary to do so.

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

NON-DUAL CLASS

Total (131)



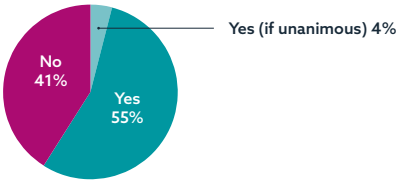


Tech (89) | Life Sciences (16) | Other (26)

Approximately 60 percent do not allow action by written consent.

DUAL CLASS

Total (22)



Tech (16) | Other (6)

It flips for dual class companies – where approximately 60 percent in fact permit action by written consent.

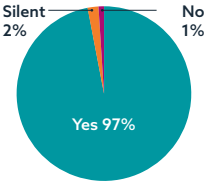
COMMENTARY: Mature companies without other ostensible blocking mechanisms for activists generally prohibit action by written consent in order to restrict fundamental corporate changes to actual meetings of stockholders. The dichotomy with dual class companies is likely because incumbent founder stockholders have majority voting power.

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***?

NON-DUAL CLASS

Total (131)



Yes: Percentage of vote required to amend bylaws

Stock %	
Unspecified*	28%
50	23%
66	35%
80	0%
Other	11%

**Default to state's (DE) corporate law – no specific percentage*

Tech (89)

Yes: Percentage of vote required to amend bylaws

Stock %	
Unspecified*	33%
50	18%
66	35%
80	0%
Other	12%

**Default to state's (DE) corporate law – no specific percentage*

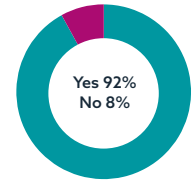
Life Sciences (16)

Yes: Percentage of vote required to amend bylaws

Stock %	
Unspecified*	25%
50	13%
66	50%
80	6%
Other	0%

**Default to state's (DE) corporate law – no specific percentage*

Other (26)



Yes: Percentage of vote required to amend bylaws

Stock %	
Unspecified*	15%
50	46%
66	23%
80	0%
Other	8%

**Default to state's (DE) corporate law – no specific percentage*

DUAL CLASS

Total (22)

Yes: Percentage of vote required to amend bylaws

Stock %	
Unspecified*	28%
50	18%
66	36%
80	0%
Other	18%

**Default to state's (DE) corporate law – no specific percentage*

Tech (16)

Yes: Percentage of vote required to amend bylaws

Stock %	
Unspecified*	13%
50	13%
66	50%
80	0%
Other	24%

**Default to state's (DE) corporate law – no specific percentage*

Other (6)

Yes: Percentage of vote required to amend bylaws

Stock %	
Unspecified*	67%
50	33%
66	0%
80	0%
Other	0%

**Default to state's (DE) corporate law – no specific percentage*

By default under Delaware law, stockholders have the power to amend bylaws but certificates of incorporation may, and in practice almost always do, permit boards of directors to do so as well. Where companies allow the board to amend bylaws, stockholders may still amend the bylaws upon a proper vote threshold – by default in Delaware, a majority of shares voting at a special meeting (thus, abstentions and broker non-votes are not factored, since neither "cast" a ballot). Generally, a board will be limited to reversing any stockholder changes related to board size and terms.

However, the default Delaware position is in the minority for companies generally. For non-dual class companies (where such provisions matter the most given the absence of supervoting rights for certain common stockholders), only 28 percent of companies have the default.

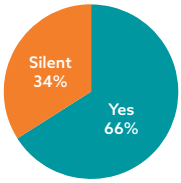
Conversely, the vast majority of companies require a vote threshold that is (a) drawn from all outstanding shares (not just the majority voting at a meeting), and (b) often, greater than 50 percent of such outstanding shares. In a small number of cases (included under the dataset "Yes-Other"), the greater vote is limited to matters concerning board size and removal (the provisions most useful in a proxy fight), while in the rest of these companies, the majority of outstanding – or supermajority of outstanding – requirement applies to the bylaws in their entirety. Of all non-dual class companies, 23 percent required at least 50 percent of outstanding shares, 35 percent required at least 66 2/3 percent of outstanding shares and 11 percent had other variations at or above 50 percent of outstanding shares.

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***?

NON-DUAL CLASS

Total (131)



Yes: Percentage of vote required to amend the certificate of incorporation

Stock %	
50	11%
66	42%
75	4%
80	6%
Other	3%

Tech (89)

Yes: Percentage of vote required to amend the certificate of incorporation

Stock %	
50	11%
66	44%
75	4%
80	6%
Other	3%

Life Sciences (16)

Yes: Percentage of vote required to amend the certificate of incorporation

Stock %	
50	13%
66	50%
75	0%
80	6%
Other	0%

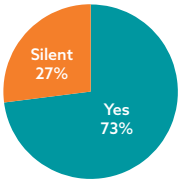
Other (26)

Yes: Percentage of vote required to amend the certificate of incorporation

Stock %	
50	11%
66	31%
75	4%
80	8%
Other	0%

DUAL CLASS

Total (22)



Yes: Percentage of vote required to amend the certificate of incorporation

Stock %	
50	14%
66	54%
75	0%
80	5%
Other	0%

Tech (16)

Yes: Percentage of vote required to amend the certificate of incorporation

Stock %	
50	0%
66	75%
75	0%
80	6%
Other	0%

Other (6)

Yes: Percentage of vote required to amend the certificate of incorporation

Stock %	
50	50%
66	0%
75	0%
80	0%
Other	0%

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 voting at a meeting can approve such an amendment (again, abstentions and broker non-votes are not counted as having voted).

For non-dual class companies (where stockholder vote percentages are the most at issue because of the lack of a supervoting alternate class of common stock), approximately one-third of the companies follow the Delaware default by simply remaining silent on the subject. Conversely, over half of these non-dual class companies have enhanced standards that require a percentage of the outstanding shares to vote in favor of the amendment – in these formulations, abstentions and broker non-votes thus count the same as "no" votes. Forty-two percent of non-dual class companies require 66 2/3 percent of outstanding shares and another 11 percent require at least 50.1 percent of outstanding shares.

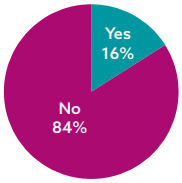
In practice, a substantial portion of votes from brokerage account holders (in "street name"), whether on behalf of institutions or retail investors, still take the form of broker non-votes, which again count the same as "no" votes in formulations requiring the vote of outstanding shares. For bylaws, 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 – and thus obtaining the affirmative vote of at least 66 2/3 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.

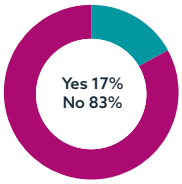
PROXY ADVISORY POLICIES: While neither ISS nor Glass Lewis promulgates specific recommended thresholds for this issue, they are generally unsupportive of any matters requiring supermajority stockholder voting thresholds.

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

NON-DUAL CLASS

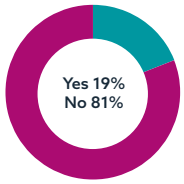
Total (131)





Tech
(89)

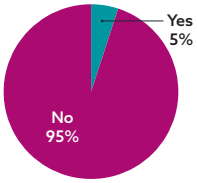
Life Sciences
(16)



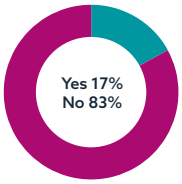
Other
(26)

DUAL CLASS

Total (22)



Tech
(16)



Other
(6)

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 of a company's board nominees to be included in the company's annual meeting proxy materials. Some governance activists have advocated a cap on board nominees at 25% of the board, but the vast majority of adopting companies in our survey chose the 20% cap, which is the emerging de facto standard.

Several large mega-cap companies on the national stage have 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.

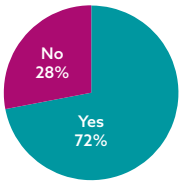
The adoption rate in the Silicon Valley and SF Bay Area through 2016 was small – only around 15 of non-dual class (and dual class non-Technology) companies have enacted proxy access, with all but one using the 3 years/3 percent/up to 20 percent of Board/up to 20 stockholders together formulation. That said, 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 three years to nominate up to 25 percent of the board. Glass Lewis supports the concept generally but is non-committal regarding particulars.

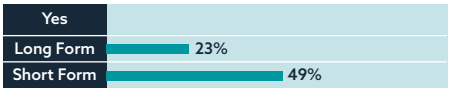
Do advance notice bylaws provisions require ***disclosure of derivative positions*** for nomination of director candidates?

NON-DUAL CLASS

Total (131)

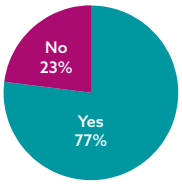


Yes: Relative length of "derivative position" explanation

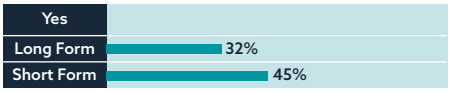


DUAL CLASS

Total (22)



Yes: Relative length of "derivative position" explanation



These provisions explicitly require those who nominate director nominees (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 effects.

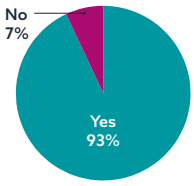
Only 25 percent of companies across categories have not adopted these disclosure-only provisions. Another roughly 25 percent have conversely adopted very detailed requirements on what constitutes a derivative position (e.g., synthetic equity). Approximately 50 percent of companies have adopted provisions that briefly describe items that must be listed. Certainly there seems to be little downside to requiring short (or even long) form disclosure, and one wonders about the substantive reasons behind back the lack of adoption by the 25 percent that have not done so.

PROXY ADVISORY POLICIES: ISS and Glass Lewis do not take positions on this item.

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

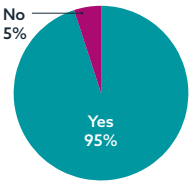
NON-DUAL CLASS

Total (131)



DUAL CLASS

Total (22)



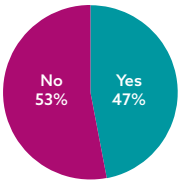
COMMENTARY: Unsurprisingly, over 90 percent of all companies, depending on category, continue to allow boards to issue preferred stock at their discretion, or "blank check preferred." While some governance activists decry this ability, it is particularly crucial for the adoption of stockholder rights plans (aka "poison pills") and also in certain issuances to "white knights" (third parties who seek to disrupt a hostile tender offer).

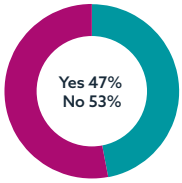
PROXY ADVISORY POLICIES: ISS examines on a case-by-case basis, but in practice does not appear supportive. Glass Lewis is explicitly against authorized stock where the primary purpose is an anti-takeover defense.

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

NON-DUAL CLASS

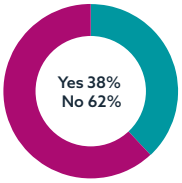
Total (131)





Tech
(89)

Life Sciences
(16)

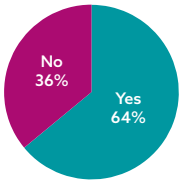


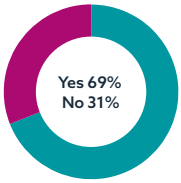
Other
(26)

A little under one-half of 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). Although more than 50 percent of companies thus have not adopted the provisions, the incidence rate still represents the feature spreading like wildfire, since the provisions have only gained significant attention in the past few years.

DUAL CLASS

Total (22)





Tech
(16)

Other
(6)

Almost 70 percent of Technology companies have adopted these provisions, showing how these companies view avoiding multiforum stockholder litigation as a benefit.

COMMENTARY: 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.

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