Public versus Private Provision of Governance: The Case of Proxy Access

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Abstract

We use a unique setting to study the tradeoffs between universal regulatory mandates and private contracting in the field of corporate governance. Events surrounding the legal challenge of a 2010 proxy access rule allow us to benchmark the market's expectation of the benefits of universally mandated proxy access even though this rule never came into effect. At the same time, a 2010 rule amendment facilitating shareholder proposals for proxy access opened a new channel for proxy access through "private ordering." We document that this private channel has been active, spawning about 160 proxy access proposals, and use the unexpected announcement of a major private ordering initiative to identify a 0.5 percent increase in shareholder value for the targeted firms. However, our findings also underscore that private ordering may lead to a second best outcome. We find that proponents do not selectively target those firms that were expected to benefit the most from universally mandated proxy access, and that tailoring of proposal terms is limited. Moreover, management is more likely to challenge proposals at firms that stand to benefit more. Overall, we find that private ordering creates value, but it may not efficiently deliver proxy access at the firms that need it most.

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1. Introduction

The power to nominate and elect directors is the most direct tool that can compel corporations to be governed in accordance with the views of their ultimate owners: the shareholders. One aspect of this process that has been highly debated is whether it would be beneficial to facilitate "proxy access": the ability of shareholders to nominate their own candidates for director positions on a company's proxy voting card, together with the nominees of the current board. Such proxy access could be prescribed universally by the government or could be instituted on a case-by-case basis through the initiative of boards or shareholders.

In August 2010, the SEC pursued a combination of these approaches by adopting rules that mandated universal[1] proxy access with a set of standardized terms of access, but that also facilitated shareholder proposals to seek expanded terms of access at any given firm. However, the universal proxy access rule was subject to a judicial challenge and later invalidated by a federal appellate court. Becker, Bergstresser, and Subramanian (2013) and Jochem (2012) examine the events surrounding the challenge and conclude that the market expected mandated proxy access under the terms of the rule to generally be value increasing. Notably, the complementary amendment that would have facilitated the pursuit of expanded proxy access was not challenged.

This amendment, which became effective in September 2011, removed the ability of firms to rely on a particular provision of the proxy rules to exclude all shareholder proposals regarding proxy access. In the absence of mandated proxy access, this amendment has made it newly possible to institute proxy access at individual companies through shareholder initiatives, a process known as "private ordering." Since the private ordering of proxy access was made possible, this channel has become increasingly active, allowing us to examine how this market-based approach is functioning and how it compares to the alternative of universal public provision.

The tradeoffs between universal regulation and market-based solutions are often unclear. These tradeoffs may be particularly complex in the realm of corporate governance, since agency problems may impede market forces. As Coase (1960) suggests, consideration of how best to balance public and private approaches may require "a detailed investigation of the actual results of handling the problem in different ways." While such an investigation is often not possible, the recent developments in the proxy access space provide a setting in which the public and private

[1] We use the term "universal" throughout to represent the broad application of the rule to all companies subject to the SEC's proxy rules, including, for example, all domestic exchange-listed public companies.

provision of a particular mechanism of governance can be meaningfully compared. In effect, we study the same set of firms exposed to events related to each of the two alternative approaches: (a) the eventually invalidated rules that would have mandated universal proxy access and (b) the newly-available private ordering of proxy access, which facilitates the case-by-case adoption of proxy access based on private market forces. We can therefore study the private ordering process in light of the expected value impact of mandated proxy access at different firms, based on the market response to the universal proxy access rule. This setting is unique because other major waves of shareholder proposals, such as proposals to institute majority voting or to destagger boards, have not been accompanied by regulatory events that would provide a universal mandate benchmark.

The two approaches to implementing a mechanism of governance, which we will broadly refer to as the public and private approaches, may have relative strengths and weaknesses. On the one hand, public provision could institute proxy access in a quick and cost effective manner. A public mandate for universal proxy access would institute such access even in cases where entrenched boards and management might impede its adoption based on shareholder initiatives.[2] It would also eliminate reliance on shareholder proponents, whose interests may not be perfectly aligned with those of other shareholders and who thus might not target the firms at which shareholders collectively feel that proxy access would be most value-enhancing. Moreover, this approach would bypass collective action problems that are typically associated with private solutions because it does not ask a small group of shareholders to bear the brunt of the cost of the process while receiving only some of the benefits, and it does not require dispersed shareholders to coordinate via the voting process to pressure boards. However, the regulator would face the challenge of determining appropriate terms to be applied to all firms.

On the other hand, private ordering could have significant advantages over a blanket, one-size-fits-all approach. Private ordering provides the flexibility for shareholders to pursue initiatives for proxy access, and for boards to implement such access, only at those firms and in those situations where proxy access is expected to be value-enhancing.[3] Further, private ordering allows more variability in the terms and conditions of proxy access provisions, so such provisions can be tailored to maximize value-enhancement based on the situations of individual firms.[4]

[2]See Bebchuk and Hirst (2010) for a discussion of these dynamics in the context of private ordering of proxy access.

[3]See, e.g, Coles, Daniel, and Naveen (2008) for a discussion of whether one size fits all in the case of boards of directors, a different governance context.

[4]These potential benefits of private ordering over a universal mandate were cited in comment letters received by the SEC regarding the proxy access rulemaking. See, e.g., letters from the Business Roundtable and from a

Overall, if the governance outcomes of private ordering are the result of value-maximizing contracts between all shareholders and management, then a private ordering process could give market participants the ability to reach a better outcome than the public alternative. However, the motivations of the shareholder sponsoring a proxy access proposal may not be directly aligned with those of other shareholders, and managerial discretion may affect the outcomes of private ordering, introducing potential frictions into this approach.

This paper thus seeks to answer the following questions: Does the private ordering process for proxy access provide an effective alternative to the public approach? In particular, do shareholder proponents target primarily those firms that the market believes would benefit most from proxy access? Does private ordering allow for extra flexibility in the proxy access mechanism that might increase the value of proxy access? Or is the private process constrained by the power of incumbent boards and the interests of shareholder proponents?

The fundamental question is whether private market forces, through the shareholder proposal process, would be able to realize (and perhaps surpass) the enhancements in shareholder value that could result from universally-mandated proxy access. To answer this question, we study the rich dynamics surrounding the roughly 160 proxy access proposals submitted since the rule change. To obtain a summary measure of the market's expectations as to the value of these proposals, net of the effect of frictions in the process, we would like to measure stock price reactions to shareholder proposals for proxy access. This presents an empirical challenge because, for most proposals, the date at which the market first became aware of such targeting is unclear. Further, the terms of a particular proposal often differ from the terms specified in the 2010 proxy access rule, which complicates comparisons of the value of private initiatives with the value of mandated proxy access.

However, in November 2014, the NYC Comptrollers office announced the Boardroom Accountability Project ("BAP"), an initiative under which it targeted 75 firms with shareholder proposals for proxy access. The fact that the NYC Comptroller's office made a prominent and unexpected public announcement about their proposals allows us to estimate the market expectation of the impact of these proposals. These 75 proposals have terms that are consistent with the terms of the vacated 2010 proxy access rule, allowing us to use events surrounding this rule to benchmark the expected value of the same proposals if they had been mandated. For

group of seven law firms, both dated Aug. 17, 2009, available at http://www.sec.gov/comments/s7-10-09/s71009-267.pdf and http://www.sec.gov/comments/s7-10-09/s71009-212.pdf respectively.

the purpose of this benchmark, we rely on returns upon the SEC's announcement that it was staying the effectiveness of the proxy access rules, including the universal mandate as well as the private ordering amendment, pending resolution of the judicial challenge.[5] Firms that the market believed would benefit more than others from mandated proxy access would be expected to have a lower return upon the announcement of the stay.

We find that the BAP announcement led to a positive, statistically significant, 53 basis point abnormal return for the average targeted firm. Further, among the targeted firms, we find that those firms that the market expected to benefit more than others from mandated proxy access are the firms that are expected to benefit more from being targeted for private ordering. That is, the market does not expect potential frictions in the private ordering process after the targeting stage to vary in such a way that this ordering changes drastically. This is consistent with the private process acting as a valid substitute for a public mandate for proxy access.

However, in the absence of a universal mandate, the private ordering process may provide either a more or less efficient solution. Thus, we return to the full sample of proposals and document the nature and evolution of the private ordering process in order to better understand the efficiency and potential frictions of this alternative governance process. Our results demonstrate that the private ordering process has been active, with about 160 proxy access proposals over the last four proxy seasons. Interestingly, we find that shareholder proponents are increasingly converging to a proxy access solution that is closely aligned with the requirements of the 2010 proxy access rule: proxy access would be available to shareholders or groups of shareholders that held at least three percent of the company's stock for the past three years. Moreover, we show that proponents do not target primarily those firms that the market believes would have benefited the most from mandated proxy access, based on returns to the staying of the 2010 proxy access rules. The dearth of tailored proposals and the lack of correlation between being targeted and the expected benefit of mandated proxy access suggest that the private process falls short exactly where it has the potential to deliver its biggest benefits over the universal mandate.

Finally, we examine the efficiency of the private ordering process after the initial, targeting

[5] It is important for our purpose that the stay was applied to all parts of the adopted rules, so the market reaction provides us with a benchmark for the value of mandated proxy access that is not offset by the potential to instead obtain proxy access via private ordering. We provide evidence in Subsection 2.2 that the stay was a surprise and that it was the first event to garner significant attention regarding a significant delay for both mandated proxy access as well as private ordering.

stage. We consider actions taken by management in response to being targeted and voting outcomes for those proposals that make it to a vote. Among the actions available to managers is the ability to request “no-action” relief from the SEC staff to exclude a proposal from their proxy materials on various specified grounds. The success of such action, however, generally hinges on proposal drafting choices or procedural deficiencies, so choosing to pursue no-action relief generally does not represent a clean measure of the strength of management opposition. In 2014, however, an alternative style of no-action request which did not rely on the technical details of the proposals was submitted by one company facing a proxy access proposal. After the SEC staff provided no-action relief in that case, this style of proposal became very popular for a short time (until the SEC later reconsidered its decision). Interestingly, we find that these arguably fully discretionary requests are more likely to be made by targeted firms that, based on their market reaction to the stay announcement, were expected to benefit more from proxy access. That is, managers and boards appear to impede private ordering when it is most valuable, reducing the efficiency of the private approach. However, we present event study evidence consistent with the market not expecting these strategies to be effective in the long run. Separately, we find that proposals that have reached the voting stage to date have received significant shareholder support, particularly those that have terms similar to the three percent for three years ownership threshold used in the previously vacated rule.

Our paper contributes to an extensive literature that has explored the wealth effects of the regulatory provision of proxy access. Most directly related to our paper are Becker et al. (2013) and Jochem (2012), who use the unexpected staying of the 2010 proxy access rules and the vacating of the part of this rulemaking that mandated proxy access to identify how the financial markets value shareholder proxy access. Both papers find positive wealth effects of proxy access at firms that are more likely to be affected by the rule. Similarly, Campbell, Campbell, Sirmon, Bierman and Tuggle (2012) and Cohn, Gillan, and Hartzell (2014) examine other events associated with the 2010 proxy access rule and find that it was expected to be value-enhancing, particularly at firms with weak governance characteristics or poor performance. However, Stratmann and Verret (2012) find that the 2010 rules had negative wealth effects on firms with less than $75 million in market capitalization. Also, Larcker, Ormazabal, and Taylor (2011) and Akyol, Lim, and Verwijmeren (2012) study a large number of events related to the consideration of proxy access regulations over time and find that proxy access might be value-decreasing because of the risk of exploitation by large institutional investors. We add to this literature by contrasting the effects of uniform regulation with the efficiencies and frictions associated with private ordering of proxy access.

We also contribute to the literature on shareholder activism. Several papers highlight the increasing role of shareholder interventions in corporate governance (e.g., Gillan and Starks (2007), Denes, Karpoff, and McWilliams (2015)), particularly through hedge fund activism and proxy fights.[6] Bebchuk (2007) and Gantchev (2013) show that such interventions can be quite expensive, and Bebchuk (2005) advocates for expanding the ability of shareholders to intervene via the less burdensome shareholder proposal process. However, the impact of activism through shareholder proposals is highly debated. Historically, these proposals have not been associated with a positive stock impact (e.g., Karpoff, Malatesta, and Walkling (1996), Smith (1996), Wahal (1996), Strickland, Wiles, and Zenner (1996), Del Guercio and Hawkins (1999), Gillan and Starks (2000), Prevost and Rao (2000), Del Guercio, Seery, and Woidtke (2008), Cai and Walkling (2011)). On the other hand, several studies have found that more recent shareholder proposals are associated with positive valuation effects and that they have become more effective over time, achieving higher voting support and higher likelihoods of implementation (e.g., Thomas and Cotter (2007), Ertimur, Ferri, and Stubben (2010), Ertimur, Ferri, and Muslu (2011), Renneboog and Szilagyi (2011). We add to this literature by identifying a positive value impact of shareholder proposals in the area of proxy access but also by providing direct evidence of some of the frictions that reduce the effectiveness of this governance channel.

The rest of this paper is organized as follows. Section 2 presents more detail on the institutional setting of our study. Section 3 describes the data and our empirical approach. Section 4 explores whether the private ordering of proxy access is beneficial. Section 5 presents more detailed empirical evidence on the nature and evolution of proxy access proposals and the proponents' choice of targets. Section 6 provides an analysis of no-action requests and shareholder voting outcomes. Section 7 concludes.

[6] With respect to hedge fund activism, see, e.g., Kahan and Rock (2007), Clifford (2008), Brav, Jiang, Partnoy, and Thomas (2008), Klein and Zur (2009, 2011), Greenwood and Schor (2009), Boyson and Mooradian (2011), Brav, Kim, and Jiang (2015), Brav, Jiang, Ma, and Tian (2014), and Bebchuk, Brav, and Jiang (2015). With respect to proxy fights, see, e.g., Bebchuk (2007), Alexander, Chen, Seppi, and Spatt (2010), Becker and Subramanian (2013), and Fos and Tsoutsoura (2014).

2. Setting

Federal regulations do not require public companies in the U.S. to provide a mechanism whereby shareholders can nominate directors on the company's proxy materials.[7] In this study, we rely on key changes from the status quo that allow us to explore the effectiveness of different approaches to providing proxy access, and study the value placed by the market on proxy access at different companies.[8] In particular, the 2010 proxy access rules removed the ability for companies to exclude shareholder proposals regarding proxy access,[9] allowing us to study the private ordering of proxy access. In addition, events surrounding the legal challenge to the part of the 2010 rulemaking that mandated proxy access at all affected firms allow us to benchmark the public provision of universal proxy access as an alternative to private ordering. In the next two sub-sections we present the institutional details behind these two developments.

2.1. Private provision of proxy access

A shareholder proposal can be excluded from a company's proxy materials, and thus not receive a vote, if the shareholder proponent does not meet certain eligibility and procedural requirements or the proposal is excludable under certain criteria set forth by the SEC.[10] Since 1998, the SEC staff interpreted one of these criteria — contained in Rule 14a-8(i)(8) — to allow the exclusion of any proxy access proposal. Following a legal challenge to this interpretation, which prevented the exclusion of a handful of proxy access proposals, the SEC amended the rule to more clearly make such proposals excludable.[11] Thus, shareholders generally did not have access to a formal

[7]The absence of a requirement does not prevent a board from adopting (or management from proposing, for shareholder approval) a bylaw amendment that allows proxy access at an individual firm. For example, Comverse Technology unilaterally adopted a proxy access bylaw in 2007. However, our understanding is that this has been a very rare occurrence in the absence of shareholder proposals requesting proxy access.

[8]While shareholders have access to other channels through which to nominate directors — including proxy fights, private negotiation, candidates proposed for the consideration of the board's nominating committee, and nominations from the floor at shareholder meetings — we do not believe that any of these alternatives are perfect substitutes for proxy access or that access to these alternatives has meaningfully changed in the time period we focus on.

[9]See amended Exchange Act Rule 14a-8(i)(8). The rule was effective as of September 2011, as specified in *Facilitating Shareholder Director Nominations*, Securities Act Release No. 9259, Exchange Act Release No. 65343 (Sept. 15, 2011).

[10]Exchange Act Rule 14a-8 dictates the eligibility and procedural requirements for a shareholder proposal. Also, a proposal is excludable if it falls under one of the rule's substantive bases for exclusion (Rule 14a-8(i)(1) through 14a-8(i)(13)).

[11]The Second Circuit court held in 2006 that a proxy access proposal by AFSCME could not be excluded by AIG despite the SEC's then-customary position, based on an older interpretation of the language of the rule by the SEC. See *AFSCME v. AIG*, 462 F.3d 121 (2d Cir. 2006). Following this decision, in the 2007 proxy season, proxy access proposals were voted on at Hewlett-Packard, the UnitedHealth Group and Cryo-Cell International. The SEC amendment to Rule 14a-8(i)(8) that clarified the excludability of proxy access proposals became effective on January 10, 2008.

channel through which to propose proxy access from the late 1990s until 2012.

In 2010, the SEC adopted an amendment to the rules governing shareholder proposals which removed the blanket ability to exclude proxy access proposals from proxy materials. While this amendment was adopted together with the universal proxy access rule that was later invalidated, it was not a subject of the judicial challenge. The amendment became effective in September 2011, clearing the way for shareholders to propose proxy access at individual companies beginning in the 2012 proxy season. We study the roughly 160 proxy access proposals submitted since then. The 2015 proxy season is of particular interest because a broad wave of shareholder proposals for proxy access was submitted in this year, perhaps marking a watershed moment for proxy access. The recent wave of proposals, in addition to being large, also reflects learning from the previous proxy seasons, in that the proposals avoid content or language choices that led previous proposals to be excluded from proxy statements. This wave of proposals includes 75 proposals by the NYC Comptroller's office under their Boardroom Accountability Project which are well-suited for empirical analysis because of their standardized terms and identifiable announcement date.

It is important to acknowledge that even if a shareholder proposal for proxy access reaches a vote and is approved by shareholders, the ability of shareholders to make nominations on the company's proxy materials may still not be guaranteed. Moreover, even if this ability is achieved, it may come with a significant delay. Specifically, the passage of a binding resolution to amend a company's bylaws in one year would generally mean that qualifying shareholders could begin to have the directors they nominate included in the company proxy materials in the next year's proxy season. However, binding proxy access proposals have thus far been rare relative to non-binding or "precatory" proposals. Potential reasons for this include the fact that binding proposals directly amend a company's bylaws and may thus require more careful and tailored drafting (which could be further complicated by the 500 word limit for shareholder proposals), and that binding proposals may be subject to stricter requirements.[12]

A precatory proposal, on the other hand, is advisory and does not require board action.[13] Thus, such a proposal could pass for multiple years in a row before resulting in implementation, or not be implemented at all. For example, proxy access proposals received a majority vote at

[12]For example, some companies may require a supermajority vote by shareholders in order for such a binding proposal to pass.

[13]While precatory proposals do not legally require boards to act, there is some pressure to respond to a proposal that passes because failure to act may result in, for example, proxy advisor recommendations to vote against directors or in increased shareholder activism.

Nabors Industries Ltd. in 2012 and 2013. In 2014, Nabors adopted a policy to permit limited proxy access under terms substantially more restrictive than what had been proposed, followed by another majority vote in favor of the same, less restrictive shareholder proposal in the 2014 proxy season.[14] Ertimur et al. (2010) found that 40 percent of precatory proposals that received a majority vote between 1997 and 2004 resulted in actual implementation by boards, and that the likelihood of implementation generally increases with the number of consecutive years that the same proposal received a majority vote.

If the implementation of precatory proposals is pursued, shareholders may be required to approve a resulting bylaw amendment, delaying actual proxy access for at least one more year. For example, shareholder resolutions for proxy access at CenturyLink, Inc., and Verizon Communications, Inc., were submitted in 2012, passed in 2013, and were followed by management proposals in 2014 to amend the bylaws accordingly. These also passed, meaning that qualifying shareholders of these companies can seek to include their director nominees in the company proxy materials as of the 2015 proxy season.

In addition to the management discretion and delays in the implementation of shareholder proposals, proposals (whether binding or precatory) may be excluded from proxy materials in certain cases. One reason for such exclusion would be a withdrawal by the proponent based on private negotiations. For example, a 2012 proxy access proposal at Pioneer Natural Resources Co. and a 2014 proxy access proposal at Walt Disney Corp. were both withdrawn in exchange for unrelated governance changes. Often, though, proposals are excluded because they do not meet the requirements, or the proposal falls under one of the listed exclusion criteria, of Rule 14a-8. Companies must alert the SEC of their intentions to exclude proposals for such reasons, and, if asked for its view, the SEC staff provides no-action letters in cases in which there appears to be a basis for the company's claim of excludability. As discussed above, early proxy access proposals were often excluded because of their wording or content. For example, some of these early proposals were excludable because they defined eligibility for proxy access by referring to the eligibility requirements of the rules for shareholder proposals rather than explicitly defining these requirements, which was deemed to make these proposals vague and indefinite.[15]

If a proposal meets all of the basic requirements and is not voluntarily withdrawn, it will

[14] Nabors did not classify the 2012, 2013, or 2014 votes, in which more shares voted for the proposals than against them, as passing because it included broker non-votes and abstentions as "against" votes in the final voting tally.

[15] See, e.g., SEC No-Action Letter to Dell, Inc., March 30, 2012, available at http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/jamesmcritchie033012-14a8.pdf.

generally proceed to a vote, though management nearly always recommends against the proposal and provides a rebuttal to the proposal in the proxy materials. The scope for no-action relief with respect to a proxy access proposal is generally limited because excludability is usually a function of defects in proposal drafting and the meeting of eligibility and procedural requirements by the proponent. For a short period in the 2015 proxy season, however, managers had reason to believe that they could rely on an alternative basis for no-action relief that could be successfully applied irrespective of the technical details of a proposal. We will discuss requests of this type in more detail in our empirical analysis.

2.2. Public provision of proxy access

In contrast to the private, market-based solution, regulations mandating uniform proxy access would result in a standardized level of proxy access whether or not the market believes such access to be value-increasing at a given firm and regardless of whether the shareholders or managers desire proxy access at that firm. Requirements for proxy access have not been implemented in the U.S., though they exist in other jurisdictions such as the U.K., Canada and Australia.

The SEC considered proxy access requirements at least six times in the past 60 years, beginning as early as 1942.[16] A 2003 proposal was met with over 13,000 comments and was not pursued further by the SEC. A 2007 proposal related to proxy access was also not adopted in that form. Section 971 of the Dodd-Frank Act explicitly authorized, but did not require, the SEC to adopt rules requiring proxy access. In 2009, the SEC proposed and in August 2010 adopted, a rule requiring a specified minimum level of proxy access and amendments to an existing rule which would allow the private ordering of expanded proxy access at individual companies.[17]

In particular, Rule 14a-11 mandated that proxy access would be available to shareholders or groups of shareholders holding at least three percent of the voting power of a company's securities, and who have held their shares for at least three years. The rule specified that nominees advanced through proxy access could represent up to 25 percent of the board. Separately, existing Rule 14a-8(i)(8) was amended to eliminate the excludability of shareholder proposals

[16]For a discussion of four occasions on which SEC considered proxy access through 2003, see SEC Staff Report, Review of the Proxy Process Regarding the Nomination and Election of Directors, Division of Corporation Finance, U.S. Securities and Exchange Commission (July 15, 2003).

[17]For the release corresponding to adoption of the rules, see *Facilitating Shareholder Director Nominations*, Securities Act Release No. 9136, Exchange Act Release No. 62764 (Nov. 15, 2010).

for proxy access under this section of the rule (except in certain limited cases primarily related to potential impacts on the election of directors in the same proxy year).[18] These amendments were intended to complement the universal proxy access rule by allowing shareholders to seek expanded access at individual companies, beyond what was mandated by the rule. Rule 14a-11, the universal proxy access rule, was the subject of a lawsuit by the Business Roundtable and the U.S. Chamber of Commerce filed on August 29, 2010. The SEC stayed the effectiveness of universal proxy access as well as the amendments with respect to shareholder proposals on October 4, 2010. In July 2011, the DC Circuit Court of Appeals held in favor of the plaintiffs and vacated the universal proxy access rule. The amendments that allowed for the private provision of proxy access were not a subject of the litigation, and went into effect in September 2011.[19]

In our tests, we use the market reaction to the stay of the proxy access rules as a basis for evaluating the value relevance of proxy access for a given firm. As documented by Becker et al. (2013), news accounts noted that the stay was a surprise.[20] This paper also provided intra-day trading evidence demonstrating that the market reacted just after the announcement, providing further evidence that the stay was unexpected as well as support for the assertion that the measured returns could be attributed to the stay. A motion to stay the universal proxy access rule was filed with the SEC and publicly announced on the date that the lawsuit was filed, but there was no motion to stay the private ordering amendments. One may therefore be concerned that the stay date returns reflect only a surprise that the private ordering amendments would also be stayed, rather than a surprise that proxy access, both in terms of the universal mandate and with respect to shareholder proposals, would be delayed for at least a year. However, news accounts did not highlight the stay of the private ordering amendments as a particular surprise relative to the stay of the universal proxy access rule.[21] On the other hand, there is evidence

[18] As amended, a proxy access proposal would no longer be excludable under Rule 14a-8(i)(8) unless the proposal would disqualify a nominee standing for election; would remove a director before his/her term expired; questions the competence, business judgment, or character of one or more nominees or directors; seeks to include a specific individual in the company's proxy materials for election to the board of directors; or otherwise could affect the outcome of the upcoming election of directors.

[19] These events are also documented extensively in Becker et al. (2013) and Jochem (2012).

[20] For example, as noted by Becker et al. (2013), Wachtell, Lipton, Rosen & Katz published a memorandum on October 4, 2010, referring to the stay as an "unexpected development."

[21] A Factiva search for "proxy access" on October 4, 2010, results in two articles from major news publications (the online edition of the Wall Street Journal and the Dow Jones Newswires), each of which does not specifically mention the private ordering amendments. Among more specialized news sources, the private ordering amendments were sometimes mentioned in brief, but we did not come across any articles indicating particular surprise at the decision to stay the private ordering amendments. For example, on October 5, 2010, Lexology (an online news provider that works in cooperation with the Association of Corporate Counsel) reported, "On Monday, the Securities and Exchange Commission (the SEC) unexpectedly granted a stay delaying the effectiveness of newly

that the announcement of the stay, rather than the filing of the lawsuit and the associated motion to stay the rule, was the first event to garner significant attention regarding a significant delay for both mandated proxy access as well as private ordering. For example, it is not clear that the market associated the motion to stay with a significant likelihood that the universal proxy access rule would be stayed. In particular, one news source reported that it was rare for the SEC to grant such a motion.[22] Also, upon announcement that the stay would be granted, but not around the motion to stay, law firm alerts[23] and Google search volume[24] demonstrated a spike of interest in proxy access.

A further concern may be that, on the stay date, the reaction of the market related only to a delay in proxy access rather than being a response reflecting the full value of proxy access. For this reason, we use returns on the stay date only as a proxy for the sign and relative magnitude of the value effect of proxy access across firms. The date on which the rule was invalidated may seem like an attractive alternative to consider because the vacating of the rule may also have been somewhat unexpected and may have represented a longer-term impact. However, the invalidation of the rule was not a ban on future proxy access regulation and it was widely accepted that an eventual re-proposal of a proxy access rule could follow.

More importantly, the stay of the effectiveness of the rules was applied to all parts of the adopted rules and thus represented a delay of at least one proxy season for both universal proxy access and the availability of the private ordering process. In contrast, the vacating of the universal proxy access rule represented at least one more proxy season in which universal proxy access would not be mandated, but did not preclude the availability of private ordering in the following proxy season. When the universal proxy access rule was vacated, it may have been anticipated that this would be followed by a removal of the stay on the private ordering amendments.[25] As such, when considering the returns on the date on which the rule was

adopted Rule 14a-11 and associated amendments, including the amendment to Rule 14a-8."

[22]Reporting on the stay, Jessica Holzer stated that "It is rare for the SEC to agree to a delay when its rules have been challenged in court." See "SEC To Delay Proxy Access Rule While Court Considers It" published in the Dow Jones Corporate Governance Newsletter on October 6, 2010. We note that several other recent motions to stay SEC rules, including rules related to mutual fund governance, conflict minerals, resource extraction, and securities issuance under Regulation A, were denied.

[23]On October 5, 2010, a day after the SEC stayed the rule, Broc Romanek of TheCorporateCounsel.net discussed the stay and wrote: "Interestingly, dozens of law firms already have sent out emails regarding this development but these firms had remained silent when the lawsuit was filed last week." See "Proxy Access: SEC Stays Ahead of Court Review Dead for 2011," by Broc Romanek, posted on October 5, 2010. As per this assertion, we were not able to find, for example, a Wachtell, Lipton, Rosen & Katz memorandum regarding proxy access on September 29, 2010, though they did publish a memorandum on October 4th as mentioned above.

[24]A Google Trends analysis demonstrates that there were 45 percent more searches for "proxy access" in the week of the stay announcement than the week of the lawsuit and motion to stay the rule, when such searches were slightly below average for the second half of 2010.

[25]On July 22, 2011, the day that the rule was vacated, the SEC released a brief statement expressing its

vacated, the value of proxy access and the likelihood of private ordering may confound each other and complicate interpretation of the event returns. For example, the returns to the companies that might have benefited the most from proxy access could have been attenuated on the day that the mandatory access rule was invalidated if they were also the most likely targets of successful shareholder proposals to institute proxy access. For these reasons we instead evaluate the variation in the value of proxy access to firms based on their returns to the unexpected announcement of the stay of the proxy access rules, with the understanding that the absolute level of the value effect of proxy access could be greater than what we measure upon the announcement of this delay.

3. Data Description

We hand collect a sample of firms that received proxy access proposals beginning in the 2012 proxy season based on text searches for the term "proxy access" in definitive proxy materials on Schedule 14A filed on EDGAR and no-action requests posted online by the SEC's Division of Corporation Finance. Our sample therefore does not include proxy access proposals that were submitted to firms but were not the subject of a no-action request and were withdrawn before the final proxy statement was filed.[26] We read each proxy access proposal and classify the relevant characteristics of the proposal, such as whether it is a binding or precatory proposal and what requirements the proposal sets forth for eligibility for proxy access. For each proposal that reached a vote, we collect the voting outcome from the Form 8-K filed after the annual meeting of shareholders.

We then match the sample of targeted firms to the CRSP, Compustat, Thomson Reuters 13F, and ISS governance databases.[27] We also collect information from these databases for untargeted firms. However, we exclude foreign private issuers (identified based on their EDGAR filings) from this control sample because they are not subject to the U.S. proxy rules. In tests involving returns upon the stay of the universal proxy access rule and private ordering amendments, we further restrict the sample to exclude smaller reporting companies because they

disappointment and stating further that, "We note that our rule allowing shareholders to submit proposals for proxy access at their companies, which we adopted at the same time, is unaffected by the court's decision." Six weeks later, on September 6th, an SEC press release stated affirmatively that the stay on private ordering would expire later that month, absent further Commission action.

[26]Such proposals might not become known to the public, so it would not be possible to capture all such proposals. However, some such proposals may be publicized. For example, we mention above two known proxy access proposals which were both withdrawn in exchange for unrelated governance changes.

[27]Further details about the timing and alignment of the relevant variables can be found in Appendix B.

may have been differentially affected by this event. In particular, the adopted rule provided a 3 year delay in the effectiveness of universal proxy access for smaller reporting companies. As in the case of foreign private issuers, we identify smaller reporting companies based on their EDGAR filings.

Our full sample of firms, including those that have not received proxy access proposals, is a total of 3,722 firms that have accounting, returns, institutional ownership, and governance data available in our sample period. Table 1 reports summary statistics for the set of firm-years that we study. Given the data requirements, our full sample reflects relatively large firms with an average market capitalization of $5 billion and an average level of institutional ownership of 56 percent. The firms experienced 16 percent annual returns on average over the sample period covering annual meetings from 2012 to 2015.

Our tests focus on the firms that were targeted with shareholder proposals for proxy access. In total we analyze 158 proxy access proposals at 133 firms in four proxy seasons, including 75 proposals that were part of the NYC Comptroller's 2015 initiative (i.e., the BAP sample) and 83 other proposals in years 2012 through 2015 (i.e., the non-BAP sample). Fewer firm-events may be included in particular tests or comparisons based on the availability of the required data. In some of our tests we further distinguish between the non-BAP firm-events and BAP firm-events. Table 2 presents univariate analysis for these two groups of firms. In Panel A we document that firms that were targeted demonstrate significant underperformance in the trailing twelve months associated with the targeting decision: their return over this year is 7 percentage points lower than that of untargeted firms, with the difference being statistically significant at the one percent level.

This univariate finding is consistent with the notion that shareholder proponents view obtaining proxy access as a corrective action that can be taken in response to poor firm performance. Further, Cohn et al. (2014) find that poorly performing firms were expected to benefit more from proxy access. We explore stock performance further below and find that it continues to have predictive power in a multivariate setting when considering the targeting decision, though we find overall that the targeted sample was not expected to benefit more from proxy access on average than the untargeted firms.

We find that relatively fewer shareholder proposals are sent to firms with classified boards, firms with fewer independent directors, and firms with combined Chairman and CEO roles, even though firms with a higher risk of entrenchment could benefit more from proxy access. While the predictive power of governance characteristics is less consistent in a multivariate setting, this finding may represent anticipation by shareholder proponents of a lower probability of proposal success and implementation when management is relatively entrenched. We also document that targeted firms are different from the average firm in terms of firm size and financial policies with respect to leverage and dividends. Hence, we will control for these important characteristics when presenting models that aim to explain the targeting behavior of shareholders and related outcomes.

Panel B of Table 2 demonstrates that the firms targeted in the BAP initiative were also larger and had higher institutional ownership than the full sample of firms. Interestingly, the firms targeted by the NYC Comptroller did not exhibit statistically significant stock market underperformance relative to the control group. This is consistent with the Comptroller's explanation that these firms were selected based on well-defined criteria that focused on carbon intensity, board diversity, and say-on-pay voting results. When considering observable characteristics, we find that the broad set of BAP targets is more representative of the average public firm in the U.S. than the firms targeted outside of BAP, enhancing the external validity of the results for this subsample.

Finally, Table 3 presents the industry distribution of our targeted firms based on the 30 industry Fama-French classification. We document that the non-BAP subsample has a higher relative concentration of firms in the financial industry. This may be due to the fact that this industry has underperformed and performance seems to be a factor in the targeting decision outside of the BAP sample. In contrast, the BAP sample is concentrated in the petroleum and natural gas industry. This is consistent with one of the targeting criteria used by the NYC Comptroller: carbon intensity. Beyond this concentration, the BAP sample represents a fairly diverse set of over 20 industries. We control for industry in all of our tests.

In summary, we build a sample of firms that have received shareholder proposals for proxy access since the rule change, as well as a sample of untargeted firms. Examining the characteristics, actions and outcomes of the targeted firms in our sample allows us to provide evidence on the effectiveness of the private provision of proxy process as contrasted with the value of universal public provision.

4. Are Proxy Access Proposals Value-Enhancing?

Shareholder proposals for proxy access will have significant value implications if proxy access is expected to increase shareholder value and if shareholder proposals are likely to result in proxy access being implemented.[28] Proxy access may be value-enhancing if it provides an effective governance mechanism (through the use or the threat of use of such access) for which other available disciplinary devices are not perfect substitutes. However, proxy access might be value neutral or even value destroying if it primarily serves the private benefits of minority shareholders or if it impedes the efficient workings of corporate boards. The value impact of proxy access is likely to vary across firms, as demonstrated in prior research. The value of proxy access *proposals* may vary further based on variation in the likelihood of achieving implementation. Therefore, the value implications of shareholder proxy access proposals are ultimately an empirical question.

The ideal setting for testing the causal effect of proxy access proposals on shareholder value would involve unanticipated public announcements of proxy access proposals across a random and large group of firms. However, such ideal circumstances are hard to come by. In general, the date that the submission of a shareholder proposal is known to the public is vague or coincides with the release of a company's preliminary proxy, so it can be hard to gauge the reaction of the market to a proxy access proposal. Moreover, firms are generally not randomly targeted, as demonstrated in the previous section. The terms for proxy access also vary across proposals, further complicating comparisons.

Fortunately for our study, something close to the desired experimental conditions occurred in 2015 with the Boardroom Accountability Project of the NYC Comptroller. The proposals under BAP share the unique feature of being unexpectedly announced to the public on a well-defined date, making it possible to study the market reaction to these proposals. Further, these proposals put forth standardized requirements for proxy access that substantially mirror the overturned regulation. As in the case of the 2010 proxy access rule, the key terms of these proposals are a three percent for three years ownership requirement to be a qualified shareholder or group of shareholders, and a 25 percent limit on the percent of the board that nominees advanced through proxy access could represent. The standardization makes cross-firm compar-

[28]While the proxy access process might have implications for the value of corporate liabilities, we do not explore that angle in this study, which focuses instead on the differential effects of private and universal public provision on shareholder value.

isons meaningful, and the consistency with the previously vacated rule facilitates comparisons with the alternative of public, universal provision of proxy access. The Comptroller's office also followed a structured, disclosed targeting process, allowing us to better understand some of the factors involved in the targeting decision.

As shown in Tables 2 and 3, the BAP sample represents a large number of different industries and is more similar to the average untargeted firm than the non-BAP sample. Therefore, this sample is relatively more representative of the full distribution of public firms and could provide a reasonable measure of the anticipated net benefits of private targeting for proxy access. While we cannot rule out the possibility that the market already incorporated some expectation of firms being targeted with such proposals, a much smaller number of firms was targeted in previous seasons, which may limit the targeting probabilities assumed by the market in advance of the 2015 proxy season. Indeed, the evidence in Figure 2 shows that even in the year with the highest volume of proxy access proposals prior to the BAP announcement, less than one percent of firms were targeted (27 out of the 2014 cross-section of 3,529 firms); also, only five of the 75 BAP targets represent repeat targets.

To analyze the expected benefit of targeting for private ordering we therefore perform an event study around the announcement of the NYC Comptroller's office targeting of 75 firms with proxy access proposals. The Comptroller's office issued a press release on November 6, 2014 that outlined the project. The announcement also included a copy of the proxy access proposal, the targeting criteria, and a list of targeted firms indicating the criteria which led to each being targeted.[29] This confluence of events results in a well-defined announcement date on which all of the key information about the project was made public, and on which this information was made public in a prominent way.

We perform an event study on the abnormal returns of the targeted firms on the event day, November 6, using a seemingly unrelated regression (SUR) framework to account for any cross-correlation in the affected firms.[30] This is implemented by regressing the previous 180 days of returns plus the event day (181 days total) on the three Fama-French factors, the Carhart

[29]The New York Times released a digital article describing the Boardroom Accountability Project late in the evening of November 5, 2014, which was subsequently followed by an article in the print edition on November 6th. This publicity concurrent with the announcement by the NYC Comptroller increases the likelihood that the market was aware of the event on the event date and could incorporate the information in a timely fashion.

[30]The SUR methodology for event studies was proposed by Schipper and Thompson (1985), and used, for example, in the event study of the effect of Exchange Act Rule 12h-6 in Fernandes, Lel, and Miller (2010). It has the advantage of allowing firm-specific risk loadings while controlling for time-series cross-correlation of the error terms. Our results are qualitatively similar if we rely on a more parsimonious portfolio approach.

momentum factor, and a factor representing the average return for all firms in the same Fama-French 30 industry that were not selected for inclusion in BAP.[31] We include the industry factor because with our small sample unrelated industry news may result in erroneous inferences. As shown in Panel A of Table 4, we find that on average the targeted firms experienced a 53 basis point abnormal return on the event date.[32]

As part of BAP, the NYC Comptroller's office stated the criteria that resulted in each firm being targeted. We break down the full BAP sample by stated targeting reason. In all four subsamples we estimate a positive effect, though it is not statistically significant in two out of the four subsamples. We find that the abnormal returns are largest for the set of firms for which the NYC Comptroller's office indicated that one of the reasons for targeting a firm was because of "other governance" reasons, though this was not defined or highlighted as a primary targeting criteria.

Overall, our results suggest that proxy access proposals are deemed to be value-enhancing: the market expects that these proposals will lead to positive changes in the firms. While we document a positive market reaction to the BAP announcement, the estimated reaction is a function of both the value of proxy access and the probability that BAP will achieve proxy access. Unlike mandated proxy access, the private provision of proxy access is not certain, with many factors affecting the probability of proxy access being implemented. These include: (1) management may find grounds to exclude the proposal from the proxy statement, (2) management may negotiate an alternative solution with the shareholders, (3) even if the proposal is put to a vote, the proposal may not garner majority support,[33] and (4) even if the proposal does garner majority support, management may not implement proxy access or may delay implementation. Also, as discussed above, the market may already have incorporated some likelihood of receiving proxy access proposals. Our results suggest that even after considering the additional impediments in the private market process, the average return from initiating a proxy access proposal is positive.

We document a statistically significant and economically meaningful positive abnormal re-

[31]In the case of energy firms, the BAP project targeted those energy firms with the largest carbon reserves still in the ground. For this reason, the targeted firms may be more sensitive to energy commodity prices than their peers. In unreported robustness tests, we include a factor for commodity prices and our results are substantially similar.

[32]Five firms made earnings announcements on the event day, which confounds the estimation of the effect of proxy access. As such we remove them from the sample for these tests.

[33]While not passing may seem to suggest that proxy access is not deemed to be value enhancing at that firm, the voting population is not the same as the full set of shareholders or market participants. Thus, this could also result if the median voter disagrees with the market. See Listokin (2009) for evidence in this regard.

turn for the average targeted firm upon the introduction of the BAP initiative. However, the value of such initiatives may vary across firms. In Figure 1 we partition the BAP sample into quintiles based on their raw return on the date that the SEC announced a stay of the universal proxy access rule and private ordering amendments.[34] Returns on the announcement of the stay provide a benchmark for the relative value impact that the market expected universal proxy access to have on different firms. That is, if the value of proxy access varies across firms, the firms that were expected to benefit most from mandated proxy access would likely have the lowest returns on the stay date, reflecting the loss of proxy access in at least the near term. We find that the BAP announcement return varies strikingly with returns to the stay announcement: among the targeted firms, the firms that the market expected to benefit more from universal proxy access have higher returns to being targeted with a proxy access proposal.

We test this relation more formally in Panel B of Table 4, using an above and below median partition rather than quintiles in order to increase the power of the test given the size of the targeted sample. Consistent with the evidence in Figure 1, we find that the targeted firms that had lower returns on the stay date have higher returns than the other targets on the announcement of being targeted for proxy access by the NYC Comptroller's office. Targets that had a return on the stay date below the BAP sample median return had, on average, a 94 basis point abnormal return on the announcement of being targeted, while targets that had an above median stay date return had a 15 basis point abnormal return which was not statistically significant at conventional levels.[35] This evidence indicates that, conditional on being targeted, the private proxy access process is deemed to be most value-enhancing in the same firms that were expected to benefit most from the public provision of proxy access, suggesting that the two mechanisms can, to some extent, be substitutes for each other.

In Panel C of Table 4 we examine whether some firms had a differential reaction based on their characteristics. We do this by classifying a firm as above or below the median for a particular firm characteristic and testing whether the average abnormal return on the event day, as estimated using SUR, is different from zero for a particular subsample. We also test whether the mean difference between the two resulting subsamples is statistically significant. Using this

[34]Direct comparisons of the size of the BAP announcement return to the magnitude of the stay date returns are not possible because the latter provide us with only a proxy for the sign and relative magnitude of the value of proxy access.

[35]In a univariate regression of the BAP announcement return on the stay date return we find a negative relationship, though it is not statistically significant at conventional levels. In an untabulated robustness test of the regression approach we remove one firm that announced a shelf registration two days after the stay date. Removing that one point results in a statistically significant negative relationship with a p-value of 0.011.

methodology we do not find any statistically significant differences between the subsamples, though firms with high institutional ownership, low board independence, firms with classified boards, and firms with a dual CEO-Chair all have higher abnormal returns on the event day. Thus, consistent with the prior literature on universal proxy access, our findings suggest that the net effect of private proxy access proposals may be more positive at firms with shareholders that may be able to use proxy access and with relatively weaker governance. However, we may be relying on too small of a sample to detect significant differences.

While these results demonstrate that the private process may be a viable substitute for universal public provision, various frictions as well as advantages may impact the efficiency of the private process. In the following two sections, we therefore provide more detail on the private ordering market and assess the factors unique to the private process and their impact on the effectiveness of the private provision of proxy access.

5. The Rise of Proxy Access Proposals

In this section we study the frequency and type of proxy access proposals after the effectiveness of the amendment that removed the ability of companies to rely on a provision of Rule 14a-8 to exclude all such proposals from proxy materials. We also evaluate the determinants of being targeted with a proxy access proposal and how such targeting relates to the expected benefits of mandated proxy access.

5.1. The Frequency of Proposals

If the process for the private provision of proxy access is effective, we expect shareholders to submit proxy access proposals at all firms at which they believe proxy access would be value-increasing. However, several factors may limit the submission of proxy access proposals. First, an individual shareholder (or a small group of shareholders) is likely to incur the full cost of submitting and presenting a proposal, perhaps responding to challenges to the submission, and, if deemed appropriate, taking additional steps (such as communicating with other shareholders or engaging proxy solicitors)[36] to steward it through the proxy process, while only receiving a fraction of the benefits. Also, beyond the nominal costs, a proxy access proposal may damage the shareholder proponent's relationship with the targeted firm's management or management

[36]For example, exempt solicitations (reported on Form PX14A6G) were mailed to shareholders of numerous firms in order to convince shareholders to vote "For" on the BAP proxy access proposals.

at other firms, further increasing the total cost of submitting a proxy access proposal.

Second, shareholders might not submit such proposals if the expected benefits are limited because the likelihood of passing or of implementation is low, or because implementation may be delayed by many years. It may be difficult to garner substantial voting support in a firm with dispersed ownership. This may be exacerbated by the fact that management can oppose the proposal, both formally via the management's rebuttal in the proxy statement and informally by negotiating with the remaining shareholders to form a coalition to prevent the proposal from receiving majority support. Even if a proposal passes, because these proposals are generally non-binding, it might not be implemented. Finally, if a non-binding proposal does lead to eventual implementation, then, as discussed above, there will often be at least a two year period – if not longer – between the first submission of a proposal and the ability to actually nominate directors. The costs of such proposals in terms of resources as well as reputation, balanced against limitations on the potential benefits of the proposals, may reduce the incentives for shareholders to pursue private ordering.

Despite these potential constraints, our evidence demonstrates that the private ordering process has been active. Proxy access proposals were submitted to at least 24 firms in 2012, growing to over 100 in 2015.[37] As illustrated in Figure 2, the 2015 proxy season (and particularly the BAP initiative) is accountable for much of this increase, but proxy access proposals were gaining momentum even before 2015. In particular, with each proxy season, an increasing number of proxy access proposals have made it into the actual ballots and have received majority support from shareholders. In 2012, 12 proposals were voted on and 2 of these received greater than 50 percent shareholder support. By 2014, these numbers grew to 17 proposals voted on, of which 6 received majority support. The evidence in Panel A of Figure 2 is consistent with private ordering being an active effort that is gaining momentum.

The trend of increased support for proxy access proposals may be in part due to the convergence in proposal terms. Next, we discuss this development.

[37]Totals reported here include proposals that made it to a vote, were the subject of a no-action request, or were publicly reported. These counts include proposals that are not included in our later tests, and additional proxy access proposals beyond these may have been submitted and later withdrawn, perhaps based on private negotiations with management. See Figure 2 for further detail on the sample of proposals for which we have sufficient information for analysis, which are fewer than the numbers reported here.

5.2. Variation in shareholder proposals for proxy access

The proxy access proposals vary in their details, such as the ownership threshold and number of years of ownership required for a shareholder to qualify to nominate directors on the company's ballot, whether a group of shareholders can collectively meet such thresholds in order to make nominations, and limits on how many directors can be nominated through shareholder proxy access in a given year. Interestingly, proposal terms seem to be converging rather than becoming increasingly tailored over time. The terms that are emerging as a standard are similar to those that would have been required as a minimum by the vacated 2010 proxy access rule.

Proposals in 2012 and 2013 included ownership thresholds of one, two, or three percent, and holding period requirements of one, two, or three years. Some proposals included maximum ownership thresholds, such that shareholders holding greater than, say, five percent of the company would not be able to nominate directors through the proxy access provision. Also, in some cases, ownership thresholds and holding period requirements differed for individual shareholders as compared to coalitions of shareholders. In contrast, for the 2015 proxy season nearly all of the publicly-disclosed proxy access proposals have required a 3 percent ownership threshold with a holding period requirement of 3 years for either individual shareholder proponents or coalitions. The consistency in proposal terms in 2015 is not just a function of the dominance of the BAP sample; in fact, the proposals with this standard ownership threshold were put forth by at least 7 distinct shareholder proponents.

Panel B of Figure 2 demonstrates the convergence in proposal terms over time. The fraction of shareholder proposals presenting an ownership threshold of 3 percent for 3 years has grown steadily from less than 10 percent in 2012 to nearly 100 percent in 2015. Convergence in proposal terms suggests that private provision is not leading towards greater tailoring of proxy access relative to the public approach. Such convergence may result because the optimal terms for proxy access do not differ across firms, or it could be a result of proponents pursuing standardization in an attempt to lower the costs of private ordering. In particular, standardization may reduce the costs of developing and submitting proposals as well as the costs of individual shareholders analyzing and voting on proposals at different firms. In essence, the costs of coordination may be shared across many firms, mitigating the collective action problem at the expense of more tailored solutions.

Panel C of Figure 2 plots the evolution across time of shareholder support for the different types of proxy access proposals. In the 2012 and 2013 proxy seasons the majority of shareholders proposals had ownership thresholds other than 3 percent for 3 years. These proposals generally garnered low support in terms of votes cast for the proposal. Notably, in these years the proposals that presented the ownership threshold of 3 percent for 3 years generally received greater support than proposals with other thresholds. In the 2014 proxy season the majority of proposals presented ownership thresholds of 3 percent for 3 years and these proposals garnered substantially more support than proposals that presented other ownership thresholds. The generally low support in terms of votes cast for proposals with ownership thresholds other than 3 percent for 3 years in the previous proxy seasons may be the driving force behind almost all of the proposals in the 2015 proxy season containing ownership thresholds of 3 percent for 3 years, which once again are generally garnering more support in terms of votes cast than the proposals with other ownership thresholds that were presented in previous proxy seasons.

It is possible that shareholders have coalesced around the 3 percent for 3 years approach as the value-maximizing choice relative to other alternative ownership requirements. They may have considered the academic literature on proxy access at these terms, or the economic analysis with respect to this threshold contained in the SEC rule release. Alternatively, the 2010 proxy access rule may have served as a focal point solution that proponents used in the absence of information about an optimal standard. In any case, the current data does not support the idea that the private proxy access process delivers a superior equilibrium through tailored proxy access provisions.

5.3. Who gets targeted with a proxy access proposal

Shareholder proponents may face time and resource constraints that limit the number of firms that can be targeted in a given proxy season. From the average investor's perspective, it would likely be most efficient if the firms that would benefit most from proxy access were targeted first. However, efficient targeting might be constrained by anticipated managerial opposition, other frictions in achieving implementation, and individual shareholder interests. For example, managers at firms with weak governance may derive more private benefits from control and/or may be more entrenched. If so, the expected benefits of proxy access proposals at such firms could be lower because the proposals may have a reduced chance of passing due to more aggressive management opposition as well as a reduced chance of being implemented should they pass. Alternatively, shareholder proponents may target firms because of their own interests, which may differ from the interests of other shareholders.

In our tests of the determinants of target selection we are interested in whether shareholders target the firms where proxy access is expected to be most beneficial, which would support the case that the private provision of governance could represent an effective alternative to a blanket public mandate. Alternatively, the data could suggest that proponent incentives and frictions result in proxy access proposals being targeted at a group of firms that differs from those where the market views proxy access to be most beneficial, which would support the case for the universal public provision of governance.

5.3.1. Private proxy access targeting and the distribution of returns at stay date

Stock returns on the date on which the SEC unexpectedly announced that it would voluntarily stay the 2010 universal proxy access rule and private ordering amendments provide a useful benchmark for the expected value of proxy access at different firms. If shareholder proponents prioritize their target selection based on where proxy access would be most value-enhancing, we expect that they would target firms that had a more negative response to the stay of the proxy access and private ordering rules than the average response. We therefore start our tests regarding the targeting decision by comparing the returns of the targeted firms on the date of the surprise announcement of the stay to the returns of all firms (in total, a cross-section of 3,014 firms with available data) on that date. As discussed above, we focus on this announcement rather than the later announcement of the vacating of the proxy access rule because, among other things, the invalidation of the rule may have been accompanied by anticipation that the stay on private ordering would be removed, potentially confounding the event returns on this alternative date.

In these tests we study the firms that received proxy access proposals over the four proxy seasons after the effectiveness of the amendment to Rule 14a-8 that made such proposals more viable. Figure 3 demonstrates how these targeted firms are distributed relative to the distribution of returns of all firms on the announcement of the stay. In particular, subfigure (a) presents the distribution of the stay date return across all public firms (excluding smaller reporting companies, as discussed above), by quintiles. Subfigure (b) demonstrates how targeting varies with these quintiles. We do not find that the firms with the lowest stay date returns are targeted disproportionately, suggesting that shareholder proponents have not primarily targeted firms at which proxy access was expected to be most beneficial. However, because this chart focuses on rates of return without regard for firm size, it is possible that it does not fully account for the targeting of firms with the largest expected dollar value enhancement from proxy access. It is possible that shareholder target selection based on dollar value enhancement explains why the firms targeted tend to be larger, as evidenced in our univariate analysis in Table 2. Thus, in subfigure (c), we restrict the sample to large firms. We reach a similar conclusion based on this subfigure as for those that preceded it: there is little variation in targeting across stay date return quintiles for this subsample, suggesting that the targeted sample does not reflect those firms that were expected to have the largest dollar value benefit from proxy access.

Table 5 presents a more formal analysis to determine whether firms that were eventually targeted for proxy access had lower returns on the stay date than the average public firm in the U.S. In the tabulated results, we also distinguish between the BAP sample and the non-BAP sample. The non-BAP sample has the advantage of being selected by a range of market participants. Therefore, the choice of targeted firms might provide broad evidence regarding shareholders' targeting decisions. However, the terms of these proxy access proposals, and potentially the motivations of the proponents, are varied. On the other hand, the BAP proposals put forth by the NYC Comptroller's Office were uniform with respect to the proposal terms, potentially increasing the comparability across this sub-sample. Moreover, the BAP initiative represents a broad targeting effort with published targeting considerations, potentially reducing the impact of targeting factors idiosyncratic to individual firm-shareholder relationships, and which resulted in a relatively more representative sample of firms, as demonstrated above. The fact that the BAP proposals are consistent with the terms of the vacated rule also allows for cleaner comparisons to the public alternative.

In Panel A of Table 5 we examine the difference in the mean stay date return for those targeted and those not targeted. We do not find that the mean return is lower on the stay date for those that were eventually targeted for proxy access, and if anything, the stay date return may be slightly higher. In Panels B and C of Table 5 we separately examine those firms targeted outside the BAP initiative and those targeted as part of the BAP initiative. The results in each subsample are similar and consistent with the analysis of the full sample, in that we do not find evidence that the returns on the stay date are lower for those firms eventually targeted for proxy access relative to those firms that were not targeted.

As mentioned above, one concern may be that we have not fully accounted for the targeting of firms with the largest expected dollar value enhancement from proxy access, particularly given that we know that larger firms were more likely to be targeted. Also, per the industry distribution results presented in Table 3, the firms targeted do not span all Fama-French 30 industries. We address these concerns in the additional rows in each panel of Table 5, which are matched sample tests. In each case, we consider the average difference between the return on the stay date of a firm that was eventually targeted for proxy access and a matched sample that was not targeted for proxy access. In the second row of each panel, we match targeted firms to untargeted firms based on the market capitalization prior to the SEC staying the effectiveness of the proxy access rule. In the third row, we match on market capitalization as well as Fama-French 30 industry. Even in these more focused analyses we do not find evidence that those firms that were eventually targeted for proxy access had a lower return on the stay date. A further concern may be that the stay date returns are subject to noise, and so we do not have the power to detect differences in the expected value of proxy access based on these returns. However, the results in Figure 1 and Panel B of Table 4 indicate that returns of the BAP targeted firms on the stay date are significantly related to their returns upon the announcement of BAP, providing evidence that the stay date returns do provide a benchmark for the expected value of proxy access despite potential noise.

Overall, we do not find evidence that shareholder proponents target the firms expected to benefit most from proxy access. This is visually apparent in Figure 3, and more formally tested in the differences in means and matched sample analysis we perform in Table 5. We interpret this evidence as demonstrating an inefficiency of private ordering: it does not single out the firms that are expected to have the highest potential benefits from proxy access.

5.3.2. The determinants of a proponent's decision to target a firm

Because target selection does not seem to be prioritized based on where proxy access would most enhance shareholder value, we are interested in understanding what other factors may drive a proponent's decision to target a particular firm. Table 6 examines these determinants in a multivariate setting and presents the results of regressing a dummy variable for whether or not a firm was targeted for proxy access in a given year on firm characteristics.[38] The first two columns in the table report results for the full sample of targeted firms including the BAP sub-sample.

We find that shareholders are more likely to submit proposals at large firms with fewer growth opportunities. As noted above, we do not find that proponents are maximizing their

[38]Our results are similar if we use a non-linear conditional logit model.

market impact by targeting those firms with the largest expected dollar value enhancement from proxy access. However, targeting large firms may increase attention on proponent interests and/or build publicity and momentum with respect to proxy access. Moreover, diversified investors hold larger dollar stakes in larger firms, and the condition of eligibility to submit shareholder proposals that would usually be availed of is a dollar value holdings threshold (there is also a percentage threshold that is generally more difficult to achieve), so shareholder proponents may also be more likely to be eligible to submit proposals to large companies as compared to small companies.[39] We also find that percent institutional ownership is a negative predictor of being targeted. However, institutional ownership is strongly correlated with size, and we find that the sign of the coefficient changes when size is excluded from the regression, so it is difficult to separately interpret this result.

Interestingly, we do not find a consistent relationship between common measures of corporate governance and being targeted for proxy access. While weak governance may increase the benefits of proxy access, it may also make the implementation of proxy access more challenging if entrenched managers more aggressively oppose and impede the implementation of shareholder proposals. Finally, we document that market participants are very likely to repeat their attempts to propose proxy access. As discussed above, getting traction on a proxy access proposal may be a multi-year effort. We find that being targeted in a previous year increases the chance of a new proposal by 31 percent, conditional on the other control variables.

Columns (3) and (4) report the results of estimating the selection model on just the non-BAP sub-sample.[40] In this sub-sample, based on a broad group of shareholder proponents, we find similar results to the overall sample. However, we also find that firms with poor performance, as measured by the previous 12 months of returns after industry adjustment, are significantly more likely to be targeted with a shareholder proposal. This may support the notion that proxy access is viewed as a disciplinary mechanism to improve poor performance as well as Cohn et al. (2014)'s finding that poorly performing firms were expected to benefit more from proxy access. However, the economic magnitude of the predictive power of performance on targeting is quite small, consistent with the stay date tests that demonstrate that targeted

[39] To be eligible, a shareholder must have continuously held at least $2,000 in market value, or 1 percent, of the company's voting securities for at least one year as of the date of submission, and intend to continue to hold the securities through the date of the shareholder meeting. The 1 percent threshold would only bind if the voting securities of the company had a market value of less than $200,000.

[40] At the time of this study we can not be certain that we have all the companies that will be targeted in proxy season 2015, but because the proxy season is highly concentrated in the first half of the year, we expect that we have captured the majority of proxy access proposals that will be submitted in 2015.

sample was not expected to benefit more from proxy access on average than the untargeted firms.

Columns (5) and (6) report the results of estimating the selection model on just the BAP sub-sample during proxy season 2015. As part of BAP, the NYC Comptroller's office disclosed specific criteria for why the chosen firms were targeted. The primary criteria were disclosed to be carbon intensity, limited board diversity, and significant opposition in the 2014 say-on-pay vote. The public list of targets also identified some of the targets as being chosen for other, unspecified governance reasons. Our results support the notion that the BAP targets are not significantly associated with poor recent stock performance of the firm or the growth opportunities of the firm, in contrast to the results for the non-BAP targets. The criteria applied in the BAP initiative therefore appear different in nature than the targeting criteria used by proponents outside of this initiative. Altogether, our results in Table 6 suggest that the targeting decision in either subsample is not driven by weak governance or poor performance.

Overall, we document that shareholders are actively pursuing private ordering of proxy access. Shareholder proponents target relatively larger firms and repeat the process where necessary. However, we do not find that shareholders disproportionately target firms at which proxy access is expected to be most value-enhancing, even amongst larger firms, or target the firms that we observe to have weaker corporate governance. Other factors may also impact the efficiency of the private process. For example, as discussed above, the initial market reaction to being targeted (and the selection of targets for proxy access) may reflect not only the benefit from achieving an effective proxy access at a particular firm, but also the probability that the company will not resist the proposal or the expectation that the shareholders will pass such a resolution if it comes to a vote. We empirically explore these aspects of the private process in the next section.

6. The Proxy Access Process: No Action Letters and Shareholder Votes

6.1. Corporate response to proxy access proposals

Management can choose from a number of reactions to a proxy access proposal. For example, it may consider requesting no-action relief and/or negotiating with the proponent to prevent the proposal from coming to a vote. For proposals that come to a vote, management may include a rebuttal and may engage in outreach to shareholders either directly or via proxy solicitors.

While it has been rare, management can also recommend that shareholders vote in support of a proposal or, in some cases, boards can change the bylaws and implement proxy access without a vote. In making these decisions, managers may weigh the value of proxy access of the proposed form at their particular firm. They may also consider their own, private incentives. As discussed above, such interactions of agency problems with private market forces are a key feature of the private provision of governance.

Shareholder proposals may be excluded from proxy materials if they do not meet the requirements, or if they fall under one of the listed exclusions, of Rule 14a-8. Firms alert the SEC of their intentions to exclude proposals for such reasons and may request no-action relief. If asked for its view, the SEC staff provides no-action letters in cases in which it deems there to be a basis for the company's claim of excludability. In our sample of private proxy access proposals, we find that firms requested no-action relief on 34 of the 83 non-BAP proposals (41 percent) in our sample, among which the SEC staff granted no-action relief for 35 percent. Success in requests for no-action relief, however, generally hinges on failure to comply with the procedural requirements or particular drafting choices in the proposals, so such requests do not represent a clean measure of the strength of management opposition. To study the incentives behind management's decision to prevent proxy access proposals from reaching the proxy statement, we would need a type of no-action request that could reasonably be used by management irrespective of the technical details of the proxy access proposal.

In the 2015 proxy season, managers facing proxy access proposals began seeking such relief under an alternative basis for excludability that provided such a test case, for at least a short period of time. In particular, one targeted company requested no-action relief on the grounds that management planned to present its own proxy access proposal, and that the shareholder proposal would pose a conflict with management's proposal and therefore be excludable.[41] The planned management proposal in this case was much more restrictive than the shareholder proposal the company was seeking to exclude, allowing any single shareholder that owned nine percent or more of the company's stock for five years to nominate one candidate (or up to 10% of the board, if larger) on the proxy statement. The ownership threshold in the shareholder proposal being challenged was three percent for three years, and it would have allowed a group of shareholders to come together to meet the threshold and to nominate up to two candidates (or up to 20% of the board, if larger) on the corporate proxy. The proponent responded with a

[41]The company relied on Rule 14a-8(i)(9) regarding conflicting proposals in making this argument.

letter stating that "If the SEC grants a no-action request in this instance, staff will be signaling that boards can exclude proposals by shareowners simply by substituting any proposal on the same general subject, even a proposal that would clearly be highly improbable to achieve or would have no impact if passed."

This no-action request was initially granted by the staff, and 26 additional firms challenged proxy access proposals submitted by shareholders in 2015 in this way. The no-action relief in question was later reconsidered and the SEC staff stated instead that it would express no view on the excludability of proposals on such grounds in the 2015 proxy season.[42] Regardless, because the no-action requests of this style that were submitted before the SEC staff reconsidered its decision were not a function of defects in the proposals themselves, they more cleanly reflect management discretion. That is, because the application of discretion in these cases was not biased by considerations of how the technical details of the proposals would affect the likelihood of success, these requests provide rare insight into the decision of managers to challenge proposals.

Of the 26 firms that requested a no-action letter with respect to proxy access proposals under the conflicting proposal exclusion, 18 were proposals submitted by the NYC Comptroller's office. Panel A of Table 7 tabulates the firms that requested no-action relief using a conflicting proposal approach. We restrict the sample to the same 70 firms that we used in the event study to facilitate comparison. This results in 16 shareholder proposals, or a little over 23 percent, challenged in this particular way. We find that fossil fuel firms were the most likely to take this route, with 35 percent of the firms requesting no-action relief. Notably, firms that were targeted because they had a governance weakness (Say on Pay or unspecified failure) were significantly less likely to request a no action letter.

Next, we consider the decision to challenge a proposal in light of the market expectations of the value of proxy access at a given firm. Panel B of Table 7 splits the firms that challenged proposals by the anticipated value impact of proxy access at each firm, as proxied for by the return on the day in 2010 when the SEC announced it would stay the universal proxy access rule. Firms that had the highest relative returns upon this announcement may be those at which managers would oppose proxy access proposals on the basis that proxy access would not

[42] See Statement from Chair White Directing Staff to Review Commission Rule for Excluding Conflicting Proxy Proposals and Announcement of the Division of Corporation Finance Related to Exchange Act Rule 14a-8(i)(9) for Current Proxy Season, Jan. 16, 2015, available at http://www.sec.gov/news/statement/statement-on-conflicting-proxy-proposals.html.

be value-enhancing given their particular circumstances. Firms that had the lowest returns upon the stay announcement may be those where managers are most entrenched and therefore where a new governance tool could be most likely to create value. However, such entrenched managers may also be the most likely to try to protect their private benefits by proposing a more restrictive management proxy access proposal and therefore reducing the likelihood of it having an effect. Consistent with the latter hypothesis, we find that the targets with below median returns on the stay date had a 29 percent frequency of requesting no-action relief in this particular manner, compared to 18 percent of those above the median. While the difference in means is not statistically significant at conventional levels, we do find statistical significance in a linear specification, where we regress an indicator for a no-action request of this style on the stay date return.[43]

We extend this test to use the returns on the announcement of the NYC Comptroller's proxy access proposals. The results could differ in this setting given that the returns to being targeted may have been attenuated in cases where effective management opposition was expected. However, we find similar results here as well: 34 percent of the firms with above median abnormal returns on the BAP announcement pursued such a challenge, while only 11 percent of those below the median did so. This difference is statistically significant. When we regress an indicator of whether a company requested no-action relief of this style on the BAP announcement return, the results of the linear regression are also statistically significant and confirm the simple above or below median test.

The consistency of the results using the stay date return or the BAP announcement return supports our previous finding that the frictions and incentives inherent to the private ordering process do not seem to significantly change the rank ordering of expected benefits from private ordering versus mandated proxy access. In untabulated results, we also consider returns on the announcement that the SEC staff was reconsidering its decision and concluded that it would, in fact, express no view on the excludability of conflicting proposals in the 2015 proxy season. We do not detect a statistically significant abnormal return for the affected firms upon this announcement. It is therefore possible that managerial opposition of this form was not expected to be successful at hindering the proposals in the long run, which may help to explain the consistency of the ordering of the BAP announcement returns with the stay date returns. However, the frictions generated by managerial opposition could still create inefficiencies in the

[43]Inferences and statistical significance levels are unchanged if we use a non-linear model.

private ordering process in the short run.

Overall, the results in Panel B of Table 7 support the notion that the private provision of governance may be more likely to be challenged exactly where it is expected to be most valuable. Panel C of Table 7 breaks down the challenges by above or below sample medians based on firm characteristics. We do not detect significant differences across a wide range of observable characteristics, potentially because of the very small sample size. However, we document some striking economic magnitudes: for example, firms with above median institutional ownership were less likely to challenge the proposals. We also find that firms that were previously targeted for proxy access were less likely to challenge new proposals.

6.2. Shareholder Votes and Implementation

The next step in the process of the private ordering of proxy access is the actual voting on the proposals. We analyze voting outcomes in Table 8.[44] Voting results may reflect average investors' views, but may also be biased by differences in the population of voters versus market participants, by the degree of inside ownership, by the nature of communication and outreach, and by other frictions in the voting process.

We find that shareholders provide higher voting support for proxy access in firms with weaker performance as measured by ROA, lending some support to the notion that shareholders believe that access is more valuable in cases where the firm faces operational challenges. Interestingly, we do not find that shareholders provide higher voting support at firms with poor recent performance as measured by the previous 12 months of industry-adjusted returns. We also find that higher institutional ownership is associated with higher voting support for proxy access proposals. This result is consistent with other papers that have found that retail investors seem more likely to vote with management in general.[45] Alternatively, it may reflect the divergence in views among shareholders, as institutional investors may be more likely to benefit directly from proxy access. Finally, consistent with the visual evidence in Figure 2, we find substantially higher voting support for standard proposals that follow the three year, three percent holding requirement of the 2010 proxy access rule.

[44] We note that at the time of this study there are a number of shareholder proposals for proxy access in the 2015 proxy season that have not yet been voted on.

[45] For example, Li and Yermack (2014) find that there is more support for management-sponsored proposals at companies with levels of institutional ownership below the median than those with institutional ownership above the median. Similarly, Cai, Garner, and Walkling (2009) find that the rate of "for" votes in director elections is negatively related to institutional ownership, and Alexander et al. (2010) show that the likelihood of the dissident winning a proxy contest is higher when institutional ownership is higher.

Relative to previous proxy seasons, there has been significant attention given to proxy access proposals in 2015. This increase in attention may have allowed voting shareholders to become more informed about proxy access as a governance mechanism and may have changed their decision making process in determining whether to vote for or against a proxy access proposal. To explore this possibility we separately analyze the voting results of the 2015 proxy season in Column (2) of Table 8. In general we draw the same inferences in this sub-sample as we do in the full sample.

In Column (3) of Table 8 we separately consider the BAP proposals. As discussed above, the BAP firms may reflect a relatively more representative sample of firms, increasing the external validity of tests on this sub-sample. Also, the BAP proposals were uniform, increasing comparability across this sub-sample. However, in this sub-sample as with the sample of all 2015 proposals, we find generally the same results as in the full sample.

While we have less data with respect to actual implementation decisions, there have been many interesting recent developments in the proxy access space. In early 2015, two large companies voluntarily adopted proxy access bylaw amendments consistent with the three percent for three years ownership requirements around which shareholders seem to be converging, though other terms of the proposals differ. One of these firms was targeted outside of the BAP sample; we are unaware of a proxy access proposal targeting the other. Media reports indicate that a total of 24 companies have adopted proxy access provisions to date, though these may differ significantly in their terms. For example, at least two firms targeted in the BAP initiative have adopted proxy access bylaws that impose an ownership requirement of five percent for three years. In another BAP target, management has agreed to recommend support for the shareholder proposal, after negotiating some changes in the terms (but retaining the three percent for three years threshold). A continued monitoring of these events may provide further evidence regarding the effectiveness of private provision of governance.

7. Conclusion

In this study we provide the first systematic academic analysis of the usage and effectiveness of the private ordering process for proxy access in the U.S. The efficacy of such a market-driven approach to delivering a governance mechanism cannot be taken for granted, particularly because of the role that various agency problems may play in the private provision of governance.

Our unique setting allows us to directly study the frictions that affect the private process and to compare it with the alternative of a universal mandate.

We document the emergence of numerous cases of privately initiated proxy access proposals, with a marked increase in the cases and success of this type of engagement over time. However, we find that shareholders do not target disproportionately those firms that, as measured by their returns on the announcement of the stay of the 2010 proxy access rules, were expected to benefit most from proxy access. We also find that management is more likely to resist proposals in firms that stand to benefit more from proxy access, providing further evidence that the private ordering process may struggle to deliver proxy access where the market believes it to be most valuable. Finally, we find that the proposals have been converging to standard terms, particularly the three percent for three years ownership requirement of the invalidated 2010 proxy access rule, which suggests that the private ordering process is not tending towards the delivery of customized, firm-specific solutions, as may have been expected.

Overall, we document that the private ordering process provides a functioning, albeit imperfect, channel for the implementation of a governance mechanism, providing hope for the market-driven institution of governance tools more broadly. Notably, this channel lacks some of the theoretical strengths of a market-driven solution. It remains to be seen if the increased engagement by key institutional shareholders will usher in a new era of proxy access.

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Figure 1: Return to Proxy Access Proposal vs. Return to Universal Proxy Access

This figure presents the average abnormal return to the targeted firms upon the announcement of the BAP initiative for each quintile of the distribution of returns of these firms on the date the SEC announced a stay of the universial proxy access rule and private ordering amendments. Abnormal returns upon the announcement of BAP are calculated as the average coefficient estimates for the event parameter ($\hat{\gamma}_i$) estimated from the SUR system discussed in Table 4.

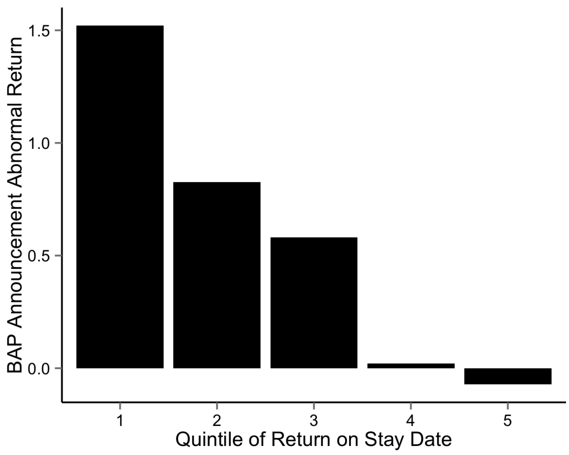
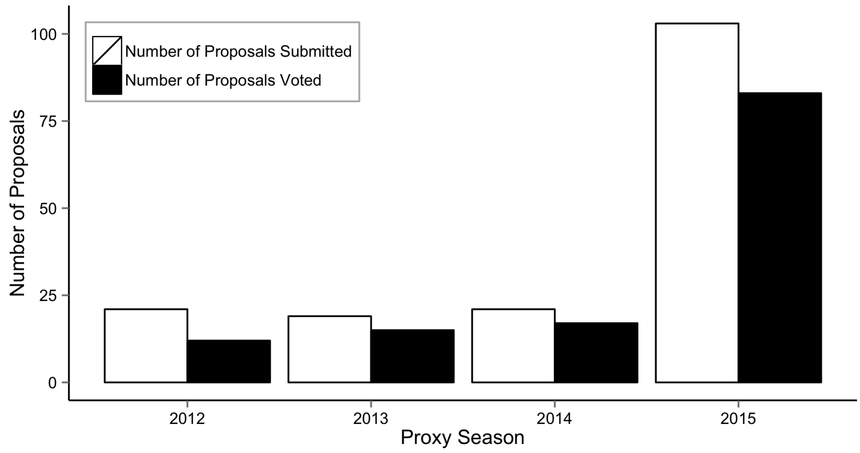


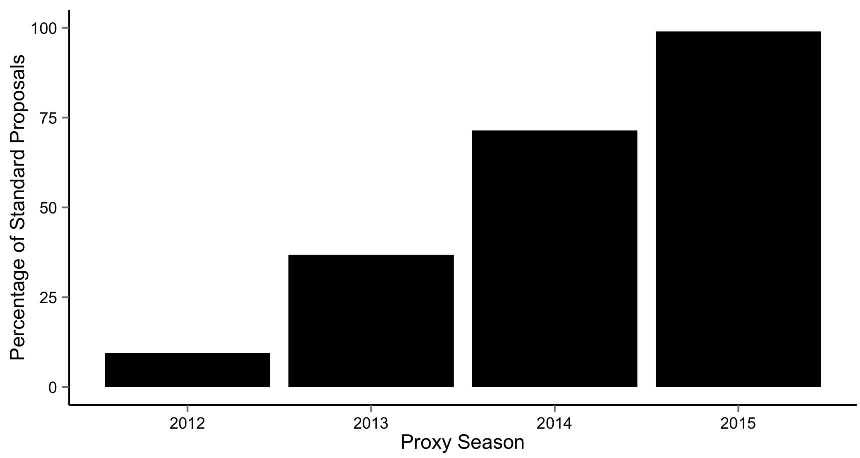
Figure 2: Standard and Non-Standard Proposals

In this figure we present the frequency of proposals submitted and voted, the percentage of proposals that apply an ownership threshold of three percent held for three years, as in the vacated SEC rule, and the shareholder support for shareholder proposals for proxy access that apply an ownership threshold of three percent held for three years relative to other shareholder proxy access proposals.

Panel A: Number of proposals submitted and number of proposals voted.



Panel B: Percentage of proposals with three percent for three years ownership thresholds.



Panel C: Shareholder votes in support of proposals.

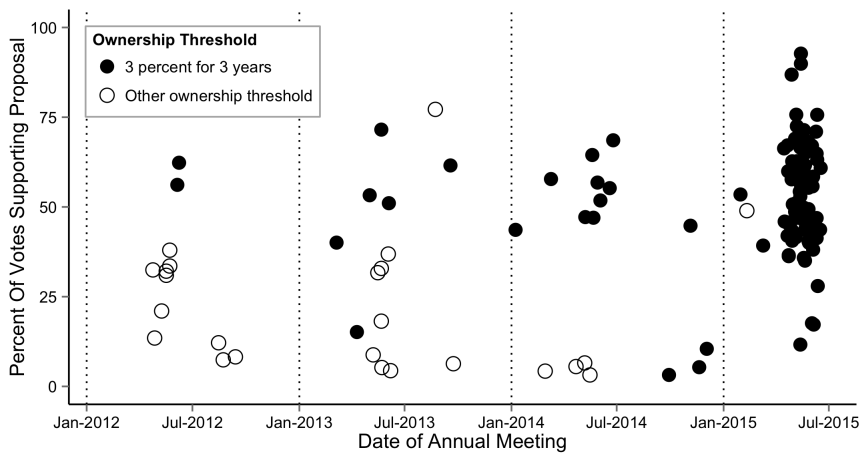
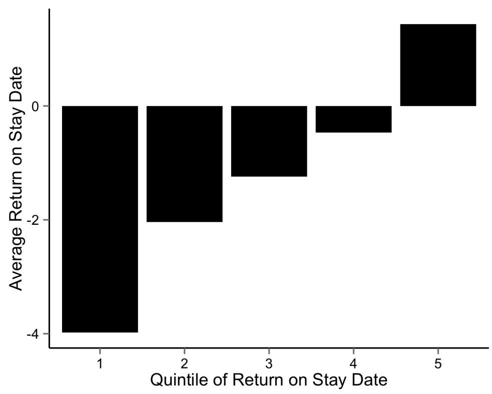


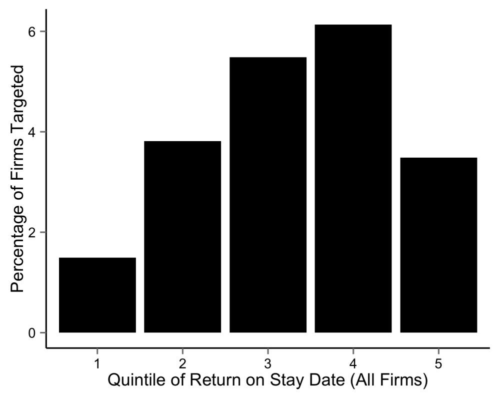
Figure 3: Targeting versus Return to Universal Proxy Access

In this figure we present the distribution of returns at the SEC announcement of the stay on the universal proxy access rule and private ordering amendments as well as the distribution of firms subsequently targeted for proxy access. In subfigure (a) we present the average return on the stay date for each quintile of the stay date distribution. In subfigure (b) we present the percentage of firms targeted in each quintile of the stay date return distribution. In subfigure (c) we restrict our analysis to the largest twenty percent of firms and repeat the analysis presented in subfigure (b).

(a) Average Return on Stay Date



(b) Percentage of Firms Targeted (All Firms)



(c) Percentage of Firms Targeted (Large Firms)

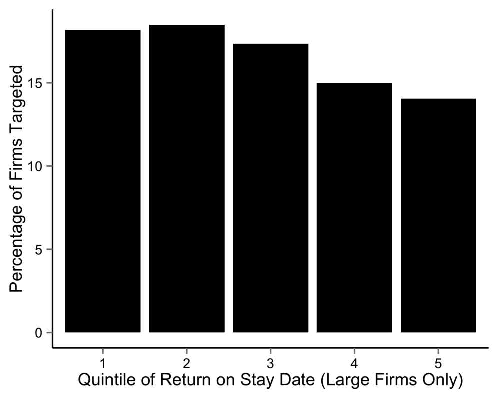


Table 1: Summary Statistics

This table presents summary statistics the full sample of firms. The full sample spans the years 2012 through 2015. All variables are defined in Appendix A.

	N	Mean	Median
Returns	13,856	16.56	11.62
Industry Adjusted Returns	13,856	-0.00	-4.05
ROA	13,888	-0.45	2.46
Book-to-Market	13,893	0.67	0.58
Classified Board	13,862	45.87	0
Board Independence	13,862	74.69	77.78
Separate Chairmain-CEO	13,862	53.88	100
Institutional Ownership	13,223	56.61	62.40
Market Cap	13,893	4,807	636
Cash	13,893	18.96	10.54
Leverage	13,893	54.78	54.35
Dividend Payer	13,893	44.62	0

Table 2: Univariate Analysis

This table presents univariate analysis of the sub-samples of firms targeted with proxy access proposals. Panel A presents a comparison of firms that were targeted outside of the BAP initiative and those that were not targeted. Panel B is restricted to the 2015 proxy season and presents a comparison of firms that were targeted by the BAP initiative and those that were not targeted in 2015. All variables are defined in Appendix A. p-values are in parentheses and are clustered at the firm level for tests of a difference in means, or tested with a Wilcoxon rank-sum test for tests of a difference in medians. * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Panel A: Non-BAP Targeted versus Not Targeted

	Targeted			Not Targeted			Differences in	
	N	Mean	Median	N	Mean	Median	Means	Medians
Returns	83	5.28	5.75	13,698	16.65	11.68	-11.37***	-5.93*
$\text{Returns}_{Ind.Adj.}$	83	-11.97	-12.49	13,698	0.01	-4.08	-11.98***	-8.41**
ROA	83	5.03	4.18	13,730	-0.51	2.44	5.53***	1.74***
Book-to-Market	83	0.69	0.54	13,735	0.67	0.58	0.02	-0.04
Classified Board	83	26.51	0	13,704	46.02	0	-19.52***	0***
Board Independence	83	80.64	80	13,704	74.62	77.78	6.01***	2.22***
Separate Chairman-CEO	83	44.58	0	13,704	53.03	100	-9.45	-100*
Institutional Ownership	77	63.41	67.04	13,077	56.49	62.22	6.91**	4.82**
Market Cap	83	57,180	16,041	13,735	4,371	620	52,808***	15,421***
Cash	83	16.11	10.31	13,735	19.01	10.56	-2.90	-0.25
Leverage	83	62.97	59.50	13,735	54.73	54.30	8.24***	5.20***
Dividend Payer	83	72.29	100	13,735	44.35	0	27.94***	100***

Panel B: BAP Targeted versus Not Targeted

	Targeted			Not Targeted			Differences in	
	N	Mean	Median	N	Mean	Median	Means	Medians
Returns	75	12.64	7.13	3,163	9.14	7.82	3.50	-0.69
$\text{Returns}_{Ind.Adj.}$	75	10.90	8.10	3,163	-0.28	-2.15	11.18***	10.25***
ROA	75	4.25	4.14	3,169	-1.20	2.32	5.45***	1.82***
Book-to-Market	75	0.56	0.51	3,169	0.56	0.49	0.01	0.02
Classified Board	75	38.67	0	3,164	46.21	0	-7.54	0
Board Independence	75	81.45	84.62	3,164	74.80	77.78	6.64***	6.84***
Separate Chairmain-CEO	75	37.33	0	3,164	55.66	100	-18.32***	-100***
Institutional Ownership	69	71.44	74.64	3,021	54.73	60.33	16.71***	14.31***
Market Cap	75	26,628	13,546	3,169	5,245	873	21,383***	12,673***
Cash	75	12.77	5.62	3,169	18.76	10.37	-5.99***	-4.75***
Leverage	75	55.85	53.24	3,169	55.41	55.17	0.44	-1.93
Dividend Payer	75	62.67	100	3,169	48.06	0	14.61**	100**

Table 3: Industry Distributions

This table presents the distribution of proxy access shareholder proposal events across the 30 Fama-French industries. Columns two and three tabulate the industry distributions of the firms that were targeted outside of the BAP initiative (Non-BAP) and the firms targeted as part of the BAP initiative (BAP).

	All Proposals	Non-BAP	BAP
Food Products	4	2	2
Recreation	6	4	2
Consumer Goods	1	0	1
Healthcare, Medical Equipment, Pharmaceutical Products	13	8	5
Chemicals	3	2	1
Construction and Construction Materials	1	0	1
Steel Works Etc	1	0	1
Fabricated Products and Machinery	1	1	0
Automobiles and Trucks	3	0	3
Aircraft, ships, and railroad equipment	1	1	0
Precious Metals, Non-Metallic, and Industrial Metal Mining	1	0	1
Coal	6	0	6
Petroleum and Natural Gas	26	6	20
Utilities	9	0	9
Communication	5	3	2
Personal and Business Services	11	6	5
Business Equipment	9	8	1
Transportation	3	2	1
Wholesale	2	2	0
Retail	15	11	4
Restaurants, Hotels, Motels	5	4	1
Banking, Insurance, Real Estate, Trading	29	23	6
Everything Else	3	0	3
Total	158	83	75

Table 4: BAP Announcement Returns

This table presents the joint test results for coefficient estimates for the event parameter ($\hat{\gamma_i}$) estimated from the following SUR system:

$R_{i,t} = \alpha_i + \beta_i RMRF_t + \lambda_i^1 HML_t + \lambda_i^2 SMB_t + \lambda_i^3 UMD_t + \lambda_i^4 R_t^{Ind.} + \gamma_i D_t + \epsilon_{i,t}$

where D_t is an event day dummy and $R_t^{Ind.}$ is the equally weighted average return for all non-BAP firms within a BAP firm's Fama-French 30 industry classification. ROA and Book-to-Market are industry adjusted using Fama-French 30 industry classifications. Variable definitions are provided in Appendix A. Firms can be targeted for multiple reasons and therefore the sum of the subsamples in Panel A is greater than the full sample. p values are in parentheses. * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Panel A: Mean $\hat{\gamma_i}$ by Targeting Reason

	N	Mean $\hat{\gamma_i}$
Full Sample	70	0.529**
		(0.038)
Targeted: Governance	6	1.378*
		(0.083)
Targeted: Fossil Fuel	31	0.901*
		(0.054)
Targeted: Diversity	21	0.507
		(0.124)
Targeted: Say on Pay	25	0.197
		(0.604)

Panel B: Mean $\hat{\gamma_i}$ by Announcement Return

Announcement Return Is:	Above Median	Below Median		
	Mean $\hat{\gamma_i}$	Mean $\hat{\gamma_i}$	Difference	Univar. Reg.
Stay Announcement Return	0.145	0.940**	-0.795*	-0.222
	(0.626)	(0.012)	(0.078)	(0.154)

Panel C: Mean $\hat{\gamma_i}$ by Firm Characteristics

Characteristic Is:	Above Median		Below Median		
	N	Mean $\hat{\gamma_i}$	N	Mean $\hat{\gamma_i}$	Difference
Institutional Ownership	33	0.636*	33	0.530*	0.105
		(0.054)		(0.096)	(0.790)
Board Independence	35	0.409	35	0.648**	-0.239
		(0.162)		(0.036)	(0.452)
Classified Board	27	0.609	43	0.479*	0.130
		(0.110)		(0.093)	(0.754)
Separate Chair-CEO	26	0.517	44	0.536*	-0.019
		(0.108)		(0.081)	(0.959)
Size	35	0.517*	35	0.541	-0.024
		(0.065)		(0.166)	(0.958)
ROA	35	0.585**	35	0.473	0.112
		(0.037)		(0.149)	(0.738)
Book-to-Market	35	0.442	35	0.616**	-0.174
		(0.160)		(0.043)	(0.620)
Previously Targeted	5	0.882	65	0.501*	0.381
		(0.344)		(0.069)	(0.140)

Table 5: Stay Date Returns Analysis

This table presents the results of a comparison of the stay date returns of firms that were eventually targeted for proxy access with the returns of firms that were not targeted for proxy access. Panel A presents the results of this comparison for all firms targeted. The first row tabulates the mean return on the stay date for all firms eventually targeted and compares it to the mean return of the full sample of untargeted firms. The second and third rows present the same comparison but with a matched sample of untargeted firms. In the second row the matched sample is created by matching a targeted firm to the three firms nearest to its market capitalization. Similarly, in the third row the matched sample is created by matching a targeted firm to the three firms nearest in market capitalization within the targeted firm's Fama-French 30 industry. Panels B and C perform similar analysis but restrict the sample of targeted firms to either the firms targeted outside the BAP initiative (Panel B) or as part of the BAP initiative (Panel C). p-values are in parentheses and are clustered at the Fama-French 30 industry level for tests of a difference in means. p-values are calculated using Abadie-Imbens standard errors for the matched sample analysis. * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Panel A: Targeted vs Not Targeted

	Targeted	Not Targeted	Difference
Mean Return	-0.91	-1.28	0.37***
			(0.01)
Mean Return (Size Matched)	-0.91	-0.93	0.02
			(0.98)
Mean Return (Size and Industry Matched)	-0.91	-1.11	0.20
			(0.15)

Panel B: Non-BAP Targeted vs Not Targeted

	Non-BAP Targeted	Not Targeted	Difference
Mean Return	-1.00	-1.28	0.28**
			(0.02)
Mean Return (Size Matched)	-1.00	-0.93	-0.07
			(0.69)
Mean Return (Size and Industry Matched)	-1.00	-0.94	-0.06
			(0.89)

Panel C: BAP Targeted vs Not Targeted

	BAP Targeted	Not Targeted	Difference
Mean Return	-0.84	-1.28	0.44**
			(0.04)
Mean Return (Size Matched)	-0.84	-0.89	0.05
			(0.78)
Mean Return (Size and Industry Matched)	-0.84	-1.16	0.32
			(0.10)

Table 6: Determinants of Company Selection

This table presents the coefficient estimates of a linear probability model where an indicator for whether or not a company received a proxy access proposal is regressed on firm characteristics. Columns (1) and (2) use the full sample of proposals; columns (3) and (4) use just non-BAP proposals; columns (5) and (6) use just the BAP proposals received in proxy season 2015. Coefficients are multiplied by 100 in order to be interpreted as percentages. ROA, Book-to-Market, and Returns (Previous 12 Months) are industry adjusted using Fama-French 30 industry classifications. Variable definitions are provided in Appendix A. p-values are in parentheses and are clustered by industry. * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

	(1)	(2)	(3)	(4)	(5)	(6)
ROA	-0.002	-0.000	0.003	0.002	-0.030	-0.023
	(0.826)	(0.993)	(0.487)	(0.577)	(0.227)	(0.319)
Book-to-Market	0.517**	0.482**	0.344**	0.354**	0.751	0.536
	(0.012)	(0.012)	(0.028)	(0.026)	(0.206)	(0.279)
Returns (Previous 12 Months)	-0.001	-0.002	-0.004***	-0.004***	0.011*	0.010*
	(0.386)	(0.351)	(0.003)	(0.003)	(0.078)	(0.065)
Classified Board	-0.187	-0.145	-0.234*	-0.210	0.240	0.398
	(0.147)	(0.204)	(0.074)	(0.101)	(0.520)	(0.233)
Board Independence	0.009	0.009	0.002	0.004	0.025	0.018
	(0.102)	(0.119)	(0.616)	(0.407)	(0.170)	(0.330)
Separate Chairman-CEO	-0.356	-0.318	-0.109	-0.128	-1.075*	-0.840*
	(0.239)	(0.259)	(0.568)	(0.506)	(0.061)	(0.073)
Institutional Ownership	-0.021***	-0.020***	-0.013***	-0.014***	-0.023	-0.016
	(0.000)	(0.000)	(0.000)	(0.000)	(0.142)	(0.224)
Size	0.893***	0.832***	0.453***	0.468***	1.792**	1.537**
	(0.000)	(0.000)	(0.000)	(0.000)	(0.018)	(0.014)
Cash	0.004	0.005	0.006*	0.006*	-0.015	-0.013
	(0.400)	(0.318)	(0.079)	(0.086)	(0.342)	(0.362)
Leverage	0.003	0.003	0.008***	0.007***	-0.021	-0.021
	(0.539)	(0.523)	(0.003)	(0.004)	(0.137)	(0.130)
Dividend Payer	-0.269*	-0.075	-0.018	0.070	-1.024**	-0.537
	(0.070)	(0.743)	(0.865)	(0.442)	(0.037)	(0.614)
Previously Targeted	32.375***	32.386***	28.910***	28.770***	14.217	15.139
	(0.000)	(0.000)	(0.000)	(0.000)	(0.303)	(0.277)
Year FE	Y	Y	Y	Y	-	-
Industry FE	N	Y	N	Y	N	Y
Observations	12,812	12,812	12,743	12,743	3,079	3,079
R^2	0.082	0.094	0.080	0.083	0.057	0.157

Table 7: BAP Challenged Proposals

This table presents an analysis of which companies targeted as part of the BAP initiative requested a no-action letter from the SEC on the basis of a conflicting proposal. The sample is the firms targeted as part of the BAP initiative minus the five firms that had confounding events on the BAP initiative announcement day. Univar. Reg. is a univariate regression of an indicator for such a no-action request on the BAP announcement return or universal proxy access rule stay announcement return. ROA and Book-to-Market are industry adjusted using Fama-French 30 industry classifications. Variable definitions are provided in Appendix A. Firms can be targeted for multiple reasons and therefore the sum of the subsamples in Panel A is greater than the full sample. p-values in parentheses. * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Panel A: Percent of Proposals Challenged

	N. Firms	N. Challenged	% Challenged
Full Sample	70	16	23
Targeted: Governance	6	0	0
Targeted: Fossil Fuel	31	11	35
Targeted: Diversity	16	5	24
Targeted: Say on Pay	25	3	12

Panel B: Percent of Proposals Challenged by Announcement Returns

Announcement Return Is:	Above Median	Below Median		
	% Challenged	% Challenged	Difference	Univar. Reg.
Stay Announcement Return	18.18	29.41	-11.23	-6.74*
			(0.267)	(0.100)
BAP Announcement Return	34.29	11.43	22.86**	6.45*
			(0.047)	(0.079)

Panel C: Percent of Proposals Challenged by Firm Characteristics

Characteristic Is:	Above Median	Below Median	
	% Challenged	% Challenged	Difference
Institutional Ownership	15.15	30.30	-15.15
			(0.136)
Board Independence	28.57	17.14	11.43
			(0.396)
Classified Board	25.93	22.73	5.00
			(0.489)
Separate Chair	23.08	22.73	0.35
			(0.982)
Size	25.71	20.00	5.71
			(0.632)
ROA	22.85	22.85	0.00
			(1.000)
Book-to-Market	28.57	17.14	11.43
			(0.299)
Targeted Previously	0.00	24.62	-24.62***
			(0.001)

Table 8: Determinants of Voting Outcome

This table presents the coefficient estimates of a linear regression where the percent of "for" votes out of all votes cast with respect to a shareholder proposal for proxy access is regressed on firm characteristics. Column (1) uses all proposals, while columns (2) and (3) restricts the sample to the 2015 proxy season and the BAP proposals, respectively. We note that there were no binding proposals and only one non-standard proposal submitted in the 2015 proxy season. ROA, Book-to-Market, and Returns (Previous 12 Months) are industry adjusted using Fama-French 30 industry classifications. Variable definitions are available in Appendix A. p-values are in parentheses and are clustered at the Fama-French 30 industry level. * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

	For Votes as Percent of Cast Votes		
	(1)	(2)	(3)
ROA	-0.596***	-0.440**	-0.618**
	(0.002)	(0.016)	(0.031)
Book-to-Market	5.690**	7.880**	5.673*
	(0.023)	(0.027)	(0.078)
Returns (Previous 12 Months)	-0.064	0.005	0.021
	(0.388)	(0.949)	(0.753)
Classified Board	-0.629	0.763	-1.420
	(0.744)	(0.763)	(0.692)
Board Independence	0.170	0.263	0.217
	(0.298)	(0.103)	(0.195)
Separate Chairman-CEO	6.164**	3.011	4.539
	(0.025)	(0.270)	(0.218)
Institutional Ownership	0.252*	0.368***	0.262**
	(0.087)	(0.006)	(0.012)
Size (Log Market Cap)	-1.460	0.140	1.554*
	(0.262)	(0.902)	(0.096)
Cash	-0.242*	-0.058	-0.153
	(0.082)	(0.713)	(0.564)
Leverage	-0.057	0.002	-0.070
	(0.415)	(0.986)	(0.621)
Dividend Payer	3.837	4.530	2.469
	(0.172)	(0.326)	(0.664)
Previously Targeted	-0.322	1.723	13.994
	(0.949)	(0.794)	(0.203)
Binding Proposal	25.022***	-	-
	(0.010)		
Standard Proposal	31.388***	-1.929	-
	(0.000)	(0.855)	
Conflicting Mgmt Proposal	-9.055	-8.882	-7.987
	(0.202)	(0.218)	(0.311)
Year FE	Y	-	-
Observations	111	73	57
R^2	0.667	0.411	0.367

Appendices

A. Variable Definitions.

Variable	Source	Description
Return at Stay Date	CRSP	Raw return on Oct 4th, 2011 when the SEC unexpectedly stayed 14a-11.
Size	Compustat	Log of market capitalization: Size = log(PRCC_F * CSHO)
ROA	Compustat	Return on Assets: ROA = Net Income / Total Assets
Book to Market	Compustat	Book to Market = (CEQ + TXDB) / (PRCC_F * CSHO)
Cash	Compustat	Cash = CHE / AT
Leverage	Compustat	Leverage = LT / AT
Dividend Payer	Compustat	Equals 1 if DVPSX_F >0
Classified Board	ISS	An indicator if the board has a classified or staggered structure.
Board Independence	ISS	The percentage of the board of directors that qualifies as independent.
Separate Chairman-CEO	ISS	An indicator if the Chairman and the CEO are not held by the same person.
Previously Targeted	DEF 14A	An indicator if the firm was previously targeted for proxy access.
Binding Proposal	DEF 14A	An indicator if the shareholder proposal is binding.
Standard Proposal	DEF 14A	An indicator if the shareholder proposal requires a nominator to hold three percent of the firm for three years.
Conflicting Mgmt Proposal	DEF 14A	An indicator if both a shareholder and a management proxy access proposal was presented on the firm's annual proxy statement.
No Action Targeted	No Action Letters	An indicator if the shareholder proposal was challenged through the No Action Process.
Vote Outcome	8-K	The percentage of votes for the proposal relative to the total votes cast.
Institutional Ownership	Thomson Reuters 13-F	The percentage of shares held by institutional owners which file 13-Fs, measured in quarter preceding the targeting or voting outcome.
BAP Targeted	NYC Comptroller	An indicator if the firm was targeted as part of the Boardroom Accountability Project (BAP)
Targeted Reason	NYC Comptroller	The stated reason the firm was targeted.

B. Variable Timing Details.

The control variables in each of our tests are based on different time frames depending on the event to which the test relates. In particular, the proponent's targeting decision occurs before the fiscal year leading up to a shareholder meeting is complete, while the voting decision happens after the end of the fiscal year. For example, for a December fiscal year-end firm with a May 2013 annual meeting, the definitive proxy statement would usually be filed in March 2013. Proponents would generally need to submit any shareholder proposals for the 2013 meeting of such a firm by November 2012 in order to meet the procedural requirements.[46] Thus, when considering the proponent's decision to target the firm for proxy access, we use the trailing twelve month return as of seven months prior to the annual shareholder meeting. In contrast, when considering shareholders' voting decisions, we use the trailing return ending three months prior to the annual shareholder meeting. We require this three month buffer in order to collect a measure of stock performance leading up to the voting decision that is less likely to be skewed by any potential stock price impact of the news that a proxy access proposal is included in the proxy statement. For example, for a typical December fiscal year firm with May 2013 annual meeting we use the cumulative return for the period from November 2011 to October 2012 for analysis of the proponent's targeting decision and from March 2012 to February 2013 for the analysis of the shareholders' voting decisions.

Because of these timing considerations, we also measure the relevant firm accounting characteristics prior to each decision. When considering targeting decisions, we use the accounting variables as of the fiscal year-end prior to the fiscal year discussed in the annual meeting. For example, for a December fiscal year-end firm with a May 2013 annual meeting, the 2012 fiscal year financial statements would not have been available at the time a shareholder would have targeted a firm. We therefore use accounting information from the previous fiscal year, in this case fiscal year 2011, when considering the determinants of the proponent's targeting decision. For the analysis of shareholders' voting decisions we use the current year's accounting information, in this case for fiscal year 2012, because it would have been publicly available to the shareholders at the time they made their voting decisions. For the same reasons, when considering governance characteristics such as board independence, we use the prior year's governance characteristics for analysis of the proponent's targeting decision and the current year's governance characteristics with respect to shareholders' voting decisions.[47]

[46] More precisely, Rule 14a-8(e)(2) requires that proposals for a regularly scheduled annual meeting be received at the company's principal executive offices by a date not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting.

[47] We do not currently have updated ISS governance data for 2014 and as such we assume that the governance characteristics in 2014 are the same as they are in 2013.