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SHAREHOLDER PROPOSALS

Stockholder Proposals: Law and Policy Considerations

*By Jill Fisch, Sarah Haan, Ann M. Lipton,
and Amelia Miazad*

An article forthcoming in the *Michigan Business & Entrepreneurial Law Review* claims that stockholders lack the inherent power to submit precatory proposals under Delaware law.¹ In a recent speech, Paul Atkins, the Chairman of the Securities and Exchange Commission, cited the unpublished draft and its claim approvingly.² On November 17, the SEC issued a statement announcing that it will no longer respond to most no-action requests, and an issuer that seeks to exclude a proposal from its proxy ballot must simply notify the Commission of its decision.³ The only exception noted in the statement is a request relating to Rule 14a-8(i)(1); presumably the SEC intends that exception to reflect its new-found interpretation that precatory proposals are improper under Delaware law.

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As longtime scholars of Delaware corporate law, we are skeptical of the strength of this claim—indeed, we argue that the article’s characterization of Delaware law has it backwards. Because DGCL § 141(a) vests legal authority over the corporation in the board of directors, stockholders may not introduce a resolution that requires the directors or officers to act, except on matters the DGCL formally commits to stockholder authority, such as amending the bylaws. As a result, most stockholder proposals are merely advisory. Indeed, when Congress mandated a stockholder Say-on-Pay vote in the Dodd Frank Act, it described it as “advisory.”

The SEC has long legitimized its proxy rules as creating a procedural vehicle for preserving the substantive rights that exist under corporate state law. Yet, by regulating proxy access, the SEC determines what matters are proper or improper for stockholder voting, often restricting stockholder rights beyond the contours of state law. For example, Rule 14a-8 imposes minimum ownership requirements, holding periods, and limits on successive proposals. No Delaware statute or judicial opinion imposes such restrictions. The latest attempt to restrict precatory stockholder proposals goes much further, threatening a significant disruption to the balance of power between directors and stockholders.

The Scope of Stockholders’ Authority

Any resolution the stockholders approve in a vote is an “act of the stockholders” and a formal expression of the stockholders’ will. This is true regardless of whether a resolution would, if approved, require management to act. The result of a stockholder vote must be recorded in the official minutes and, for some companies, publicly reported. Even “advisory” proposals, then, are “binding” on the corporation in this sense.

Stockholders have the statutory power to elect and remove the directors, as well as powers that are “incidental” to these, such as the power to communicate among themselves in advance

of a meeting, to nominate board candidates, and to present and vote on advisory resolutions. Stockholders’ incidental powers are expressly reserved in § 121 of the DGCL. When properly read together, §§ 121, 141(a), 141(k), 211, and 212 of the DGCL grant powers to the corporation within an authority structure that preserves stockholders’ power to advise the board as “necessary or convenient to the conduct, promotion or attainment of the business or purposes.”

Moreover, stockholders’ exercise of their incidental powers is a necessary component of corporate governance. For example, although the statute does not formally authorize stockholders to nominate director candidates, the absence of that power would frustrate stockholders’ power to elect directors, and so, Delaware courts have made clear that stockholders may nominate director candidates. *See, e.g., Moran v. Household Int’l, Inc.*, 500 A.2d 1346, 1355 (Del. 1985). Similarly, because the ability of a stockholder to run an effective proxy contest requires stockholders to communicate amongst themselves, directors cannot take action that would unduly inhibit stockholder communications, even though the DGCL does not contain any reference to inter-stockholder communication rights. *See The Williams Companies Stockholder Litigation*, 2021 WL 754593, *38 (Del. Ch. Feb. 26, 2021).

In previous eras, stockholders freely exercised the power to submit advisory resolutions, as well as resolutions to commit the stockholders, as an independent body, to action. Though the practice has lapsed, it was once common for stockholders to submit and vote on a resolution to form a “stockholders’ investigative committee,” tasked with examining a matter of stockholder concern independently from the board.

When Willard Saulsbury, Jr., a stockholder of the Delaware Railroad Company (and the son of the former Chancellor of Delaware), presented such a proposal to the company’s stockholders in 1902, no one suggested that stockholders lacked the power to bind *themselves* to such an investigation. *Saulsbury Causes Stir*, Wilmington Morning News, Jan. 10, 1902, at 1.

There are good reasons to recognize that stockholders' incidental powers encompass requests (as opposed to demands) for board action. For example, because only the board can initiate an amendment to the charter, if stockholders want to amend the charter, they must ask the board to initiate the amendment. The stockholders can only make such a request, as a body, by approving an advisory proposal.

The claim that stockholders may only take actions that formally compel corporate action presents a diminished view of stockholders' role in corporate governance and limits the ability of stockholders to communicate both with each other and the board.

The Longstanding Judicial View

Consistent with the view that stockholders possess such incidental powers, federal and state courts, including Delaware courts, have long validated advisory stockholder resolutions. Courts tend to ground the stockholder's power to submit an advisory proposal in other express powers guaranteed to stockholders by statutory law, as well as the congressional intent, reflected in section 14(a) of the Securities Exchange Act, "to require fair opportunity for the operation of corporate suffrage." *SEC v. Transamerica Corp.*, 163 F.2d 511, 571 (3d Cir. 1947).

Professor Louis Loss, the former associate General Counsel of the SEC, is credited for first conceptualizing the precatory proposal and explaining that proposals that fell outside of specific statutory rights were consistent with Delaware law when framed as requests rather than binding mandates.⁴ In 1976, the SEC formalized precatory proposals in guidance and explained that "recommendations or requests" were proper under Rule 14(a)-(8). Specifically, the SEC stated:

[P]roposals by security holders that dictate or direct the board to take certain action may constitute an unlawful intrusion on the board's discretionary authority under

the typical statute. On the other hand, however, proposals that merely recommend or request that the board take certain action would not appear to be contrary to the typical state statute, since such proposals are merely advisory in nature and would not be binding on the board even if adopted by a majority of the security holders. Exchange Act Release No. 34-12999 (Nov. 22, 1976).

As this suggests, the SEC assumed, consistent with judicial opinions, that stockholder proposals couched as requests to the board were uncontroversially lawful. Delaware experts agreed, with such noted figures as Frank Balotti stating at an SEC Roundtable, "I think precatory resolutions are authorized by [DGCL §] 211, which says that a stockholder can bring before a meeting that is proper for a stockholder to act on."⁵

Courts reached the same conclusion. In *Medical Committee for Human Rights v. SEC*, the U.S. Court of Appeals for the D.C. Circuit considered the exclusion of an advisory stockholder proposal by a Delaware corporation. Observing that the "overriding purpose" of Section 14(a) of the 1934 Act "is to assure to corporate shareholders the ability to exercise their right—some would say their duty—to control the important decisions which affect them in their capacity as stockholders and owners of the corporation," the court affirmed the stockholder's power to present the proposal, characterizing it as consistent with congressional intent not to "isolate such managerial decisions from shareholder control." 432 F.2d 659, 681 (D.C. Cir., 1970), *vacated as moot*, 404 U.S. 403 (1972).

In *Conservative Caucus Research, Analysis & Educ. Foundation, Inc. v. Chevron Corp.*, the Delaware Court of Chancery considered a demand for access to the stockholders' list. One of the stockholder's purposes was to communicate with the other stockholders about a proposal couched as a precatory request for board action. Chevron argued that the stockholder lacked a "proper purpose" to obtain the stockholders' list because the resolution was nonbinding, and thus of limited effect. The Chancery Court disagreed, reasoning that "[j]ust because

the resolution only *requests* the board to take certain action ... does not make it improper nor change its purpose: to influence the board to [take a particular action].” 525 A.2d 569, 572-73 (Del. Ch. 1987)(emphasis added).

In *Auer v. Dressler*, a corporation’s president refused to call a special stockholders’ meeting, as the bylaws required him to do, in part because the stockholders sought a vote on an advisory resolution. While expressly acknowledging that stockholder approval of the resolution would not have required management to do anything, the New York Court of Appeals nonetheless concluded that the resolution was proper, noting its validity for the stockholders to “express[] themselves” and put “on notice the directors who will stand for election at the annual meeting.” 306 N.Y. 427, 118 N.E.2d 590 (1954).

In 2015, the Sixth Circuit interpreted Michigan law, which mandates that stockholders receive notice of stockholder proposals, to require notice of a resolution that merely requested the board to act. Though the company vigorously opposed the resolution, neither the company nor the court suggested that the resolution was invalid because it was nonbinding. *Gwyn R. Hartman Revocable Living Trust UAD 111693 v. Southern Michigan Bancorp, Inc.*, 780 F.3d 724, 727 (6th Cir. 2015).

In sum, courts in Delaware and beyond have consistently refused to treat a shareholder resolution differently simply because it was advisory or precatory.

The Value of Stockholders’ Advisory Proposals

The elimination of precatory proposals would impair the effectiveness of corporate governance. They enable the company’s own investors to generate ideas and solutions for the corporation’s business. That proposals add value is evidenced by the frequency with which boards settle, or voluntarily agree to do some or all of what a proposal requests rather than submitting

the proposal to a vote. The frequency of these settlements suggests that boards view many advisory proposals promoting objectives that are in the corporation’s best interest.

Advisory proposals not only show respect for the board’s managerial authority, but they are also practical: a stockholder might present a good idea but lack the operational sophistication to draft the optimal bylaw provision to make it happen. Similarly, the board may be better positioned than a stockholder to navigate potential conflicts between the proposed bylaw and other aspects of the corporation’s governing documents. The advisory nature of such proposals, then, encourages collaboration between the stockholders and the board.

If advisory proposals were eliminated, certain stockholders, perhaps those with large shareholdings or personal relationships with board members, would still have access to the board, but through informal and opaque channels that exclude other stockholders. Informal channels not only fail to convey the will of the stockholders as a body, thus potentially distorting the board’s understanding of stockholders’ views, but can also generate agency costs and present fiduciary duty challenges that lead to litigation.

Moreover, opponents of mandatory disclosure have often pointed to precatory shareholder proposals as facilitating private ordering, which can serve as a more efficient alternative than mandatory one-size-fits-all regulation. For example, during the protracted debate over the SEC’s climate risk disclosure rule, opponents of the rule argued that “The shareholder proposals process is a recognized method through which shareholders register their voice,” that “the evidence suggests that shareholders and managers are working hard together to determine which companies ought to disclose what additional information” and that “the [shareholder proposal] system is handling the intervention of political activism tolerably well”. Cunningham, L.A. (2022). Comment letter on SEC climate proposal by 22 law and finance professors.⁶ Precatory proposals facilitate private ordering, and eliminating stockholders’ and managers’

ability to collaborate on firm-specific disclosure regimes could strengthen the need for mandatory disclosure.

Ultimately, boards should not expect their stockholders to go quietly into the night if their power to vote on advisory proposals is lost. Stockholders may respond by amending the bylaws to permit precatory proposals. They may seek greater constraints by proposing mandatory and potentially ill-conceived bylaw amendments. Prevented from expressing nuanced disagreement with the board's position on a particular policy issue, stockholders may be forced to implement more aggressive tools such as withdrawing voting support from director candidates; waging proxy contests; removing directors; and opposing executive compensation. We may see the revival of old-fashioned procedures, such as stockholder investigative committees. In short, the elimination of precatory proposals

seems short-sighted if its objective is to improve stockholder-board relations or reduce pressures on directors.

Notes

1. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5418534.
2. <https://www.sec.gov/newsroom/speeches-statements/atkins-10092025-keynote-address-john-l-weinberg-center-corporate-governances-25th-anniversary-gala>.
3. <https://www.sec.gov/newsroom/speeches-statements/statement-regarding-division-corporation-finances-role-exchange-act-rule-14a-8-process-current-proxy-season>.
4. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2288&context=faculty_scholarship.
5. <https://www.sec.gov/spotlight/proxyprocess/proxy-transcript050707.pdf>.
6. https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2851&context=faculty_publications.

The Future of Shareholder Proposals: ‘We Will Get By, We Will Survive’

By Brad Goldberg and Michael Mencher

Recent remarks by Securities and Exchange Commission (SEC) Chairman Paul Atkins suggest that Delaware-incorporated companies may be able to exclude precatory (nonbinding) shareholder proposals under Rule 14a-8(i)(1) of the Securities Exchange Act of 1934 – provided they submit a no-action request to the SEC accompanied by a Delaware law opinion stating that such proposals are not a proper subject for shareholder action under Delaware law, and, in the event of a conflicting opinion, this interpretation is upheld by the Delaware Supreme Court.

In addition, the SEC also announced that for the 2026 proxy season, it would only provide substantive no-action letters under Rule 14a-8(i)(1), potentially further encouraging companies to pursue the Delaware opinion approach. In the short term, the SEC’s new approach to Rule 14a-8 no-action letters may cloud the strategic landscape as both proponents and companies wait to see whether it becomes common for companies to exclude proposals (other than for straightforward procedural deficiencies) in the absence of no-action relief.

Should the Delaware opinion approach be upheld by the Delaware Supreme Court, this could open the floodgates to precatory proposal exclusions and quickly radically change the shareholder proposal landscape, especially if companies otherwise prove reluctant to exclude proposals in the absence of no-action letters. In the last three years, nearly 3,000 shareholder proposals were submitted to Russell 3000 companies, and fewer than 20 were binding proposals.

This raises the question of how shareholder proposal proponents would react if companies were able to exclude precatory proposals under

Rule 14a-8(i)(1). It is likely overly optimistic to assume that serial shareholder proposal proponents will pack up their bags and admit defeat – rather, they are likely to explore new avenues to pressure companies.

If precatory proposals are not a guaranteed option, proponents could look to submit binding shareholder proposals under Rule 14a-8 as an alternative, which in practice means binding bylaw proposals that would have direct binding effect on companies. Binding bylaw proposals, which would directly amend a company’s bylaws upon receiving requisite shareholder support, historically have been extremely rare. 2024 was a recent high-water mark, when at least 15 binding bylaw proposals were submitted, including 13 proposals developed by Michael Levin of The Activist Investor and submitted by John Chevedden, which aimed to directly amend

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company bylaws to require annual binding shareholder votes to approve director compensation.

Where these proposals went to a vote, they uniformly received low support. While proponents might hope that shareholders would be more receptive to binding proposals in a world where precatory proposals are no longer an option, simply converting all precatory proposals to binding bylaw proposals is likely not a panacea for proponents.

Even if Delaware 14a-8(i)(1) letters are successful, Rule 14a-8 would not automatically bar proponents from submitting precatory proposals, and companies would retain discretion over whether to seek exclusion. Some companies may continue including certain precatory proposals in their proxy materials on the theory that a nonbinding vote is less disruptive than a binding bylaw proposal, a withhold campaign or a proxy contest. This decision would be a company-specific judgment considering, among other things, potential proxy advisory firm responses, investor reactions and the risk of more aggressive tactics discussed above.

Limits on environmental, social and governance (ESG) as a subject for binding bylaws

Although Delaware law remains unsettled in this area, environmental and social topics that have constituted approximately two-thirds of recent precatory proposals do not readily translate into binding bylaw provisions. Delaware law draws a distinction between bylaws that regulate the process of corporate governance and those that encroach upon the board's authority to manage the business and affairs of the corporation.

Bylaws that mandate specific operational or strategic actions – such as requiring the publication of sustainability reports, compelling greenhouse gas emissions disclosures or reductions, or dictating supply-chain human rights due diligence – risk being viewed as impermissible intrusions into the board's managerial prerogatives

under Section 141(a) of the Delaware General Corporation Law.

While careful drafting may frame some environmental or social-related bylaws as procedural (for example, establishing a board committee or setting meeting procedures), many of the most common requests would direct substantive management action and therefore sit on uncertain footing for validity as binding bylaws.

Governance topics: What can and cannot be done by bylaw

Many traditional governance reforms raised through precatory proposals also do not map neatly to binding bylaws because they require amendments to the certificate of incorporation. Proposals to eliminate classified boards, remove supermajority voting provisions, allow special meetings of stockholders or action by written consent will typically require charter amendments and cannot be implemented through binding bylaw amendments. On the other hand, several commonly requested governance changes are conventionally addressed in bylaws and are thus plausible targets for binding proposals.

These include implementing majority voting for uncontested director elections, creating or amending shareholder special meeting rights where currently established by bylaw, proxy access mechanics and advance notice procedures. Even within these categories, validity and effectiveness will depend on how a particular company's charter and bylaws allocate authority, and whether the proposed bylaw regulates procedures rather than dictating substantive board decisions.

Executive compensation as a potential focus

Executive and director compensation may present another area for binding bylaw

experimentation. Delaware law expressly permits the board to set director compensation unless the bylaws provide otherwise, which has encouraged proponents to test bylaw frameworks requiring shareholder approval for director pay.

The above-discussed case of proposals seeking annual binding votes on director compensation is an example of this approach. Similar concepts could be adapted to executive compensation in limited respects – for instance, by adopting bylaws that condition certain pay practices on shareholder approval. For example, in the 2025 proxy season, 29 precatory “golden parachute” proposals were submitted requesting that companies adopt a policy for submitting certain severance arrangements to a shareholder vote. When voted on, these precatory proposals performed relatively well, with 28 proposals receiving an average support of 34%.

Although none passed in 2025, several similar proposals passed in recent years. Proponents may be tempted to turn this or similar proposals into binding bylaws. Although Delaware law is not clearly established on the point, the validity of any such bylaw would likely turn on whether it regulates the process by which compensation decisions are made rather than dictating specific pay outcomes, and whether it avoids unduly restricting the board’s statutory authority to manage compensation arrangements in the ordinary course.

The ‘Trojan Horse’ dynamic

Binding bylaw proposals could become both ends and means. Given the narrow range of viable binding bylaws, proponents may also use binding bylaw proposals tactically to create leverage for negotiation on other issues, such as environmental and social topics or governance-related charter amendment requests that previously formed the subject matter of most precatory proposals.

This would mirror the “Trojan Horse” tactic seen among some anti-ESG proponents, who

often submit facially neutral governance proposals with broad investor appeal as a vehicle to engage companies on more politically charged topics. In the binding bylaw context, proposals targeting executive or director compensation policies may be particularly potent given the sensitivity of these subjects and the risk (even if remote) of a binding constraint on pay-setting authority. Proponents could leverage the specter of an unfavorable binding compensation bylaw to prompt discussions and obtain concessions on adjacent priorities, such as board declassification, special meeting thresholds or ESG reporting.

Practical implications

Bylaw defenses

Companies should review and, depending on future developments, revisit the voting standards governing bylaw amendments. While most shareholder rights advocates endorse a “simple majority” of votes cast bylaw amendment standard, such a threshold would make it materially easier to pass binding bylaw amendments – especially in contested or low-turnout meetings.

Companies will have a stronger rationale to retain or adopt higher voting thresholds, such as a majority of the outstanding shares entitled to vote or other supermajority provisions permitted by Delaware law for shareholder-initiated bylaw changes. Any change to these standards should be evaluated holistically in light of the company’s existing charter/bylaw framework, investor expectations and proxy advisor policies.

In his October 9 remarks, Atkins also suggested that companies could adopt bylaws that impose procedural requirements for Rule 14a-8 shareholder proposals, such as heightened ownership or holding period thresholds, in excess of Rule 14a-8. If the application of such “shareholder proposal access” bylaws to binding bylaw proposals is permitted under applicable state law, then this approach could also provide significant protection against attempts to include

binding (or precatory) proposals in company proxy statements.

Undoubtedly, proxy advisors and some institutional investors would pressure companies against adopting overly restrictive access bylaws, and highly motivated proponents could also circumvent such limits by conducting their own solicitation, as done at Warrior Met Coal in 2024.

Inevitability of pressure tactics

Regardless of whether binding bylaws become a staple of the toolkit, activists and gadflies will innovate. If precatory avenues narrow, companies should also expect a mix of alternative

pressure tactics, including amplified public campaigns, short-slate contests or full proxy fights, “vote no” or withhold campaigns against directors, and coordinated engagement with large institutions. Companies should be prepared for a more hard-edged engagement environment in which the negotiation leverage once mediated through precatory proposals reappears in other forms.

The potential to end precatory proposals will not end shareholder activism – it will only change its form. Companies should respond by stress-testing their bylaw architecture, sharpening their engagement playbooks, and planning for both the direct risk of binding bylaw initiatives and the indirect leverage they may be used to create.

President Trump Issues Executive Order Addressing Proxy Advisors and Shareholder Proposals

By Elizabeth Ising, Mellissa Duru, Julia Lapitskaya, Ronald Mueller, Aaron Briggs, and Nathan Marak

On December 11, 2025, President Trump signed an Executive Order¹ directing the Securities and Exchange Commission (SEC), Federal Trade Commission (FTC) and Department of Labor (DoL) to take various actions “to end the outsized influence of proxy advisors that prioritize radical political agendas over investor returns.”² The Executive Order specifically calls out Institutional Shareholder Services (ISS) and Glass, Lewis & Co. (Glass Lewis) and alleges that they “control more than 90 percent of the proxy advisor market.”

Rationale for the Executive Order

The Executive Order’s stated aims are to “increase oversight of and take action to restore public confidence in the proxy advisor industry, including by promoting accountability, transparency, and competition.” The cited reasons for increasing oversight include that ISS and Glass Lewis are both “foreign-owned,” have “enormous influence over corporate governance matters” and “regularly use their substantial power to advance and prioritize radical politically-motivated agendas.” The Executive Order also notes that the practices of ISS and Glass Lewis “raise significant concerns about conflicts of interest and the quality of their recommendations.”

Actions Directed by the Executive Order

The Executive Order directs the SEC to take the following actions with respect to proxy

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advisors: (a) review all rules, regulations, guidance, bulletins, and memoranda relating to proxy advisors and consider revising or rescinding any that are inconsistent with the purpose of the Executive Order, especially to the extent that they implicate diversity, equity and inclusion (DEI) or environmental, social and governance (ESG) policies; (b) enforce the Federal securities laws’ antifraud provisions with respect to material misstatements or omissions contained in proxy advisors’ proxy voting recommendations; (c) assess whether to require proxy advisors whose activities fall within the scope of the Investment Advisers Act of 1940 (IAA) to register as Registered Investment Advisers;³ (d) consider requiring proxy advisors to provide increased transparency on their recommendations, methodology, and conflicts of interest, especially regarding DEI and ESG factors; and (e) analyze whether and when a proxy advisor serves as a vehicle for investment advisers to coordinate and augment their voting decisions with respect to a company’s securities such that they form a group for purposes of Sections 13(d)(3) and 13(g)(3) of the Securities Exchange Act of 1934 (the “Exchange Act”).

The Executive Order also directs the SEC to: (a) consider revising or rescinding all rules, regulations, guidance, bulletins, and memoranda relating to shareholder proposals, including SEC Rule 14a-8, that are inconsistent with the purpose of the Executive Order; and (b) examine whether the practice of Registered Investment Advisers engaging proxy advisors to advise on (and following the recommendations of such proxy advisors with respect to) non-pecuniary factors in investing, including DEI and ESG factors, is inconsistent with their fiduciary duties.

The Executive Order directs the FTC, in consultation with the Attorney General, to: (a) review ongoing state antitrust investigations

into proxy advisors and determine if there is a probable link between conduct underlying those investigations and violations of Federal antitrust law; and (b) investigate whether proxy advisors engage in unfair methods of competition or unfair or deceptive acts or practices that harm U.S. consumers.⁴

The Executive Order directs the DoL to take appropriate actions to: (a) revise its regulations and guidance regarding the fiduciary status of individuals who manage, or (like proxy advisors) advise those who manage, the rights appurtenant to shares held by plans covered under the Employee Retirement Income Security Act of 1974 (ERISA), including proxy votes and corporate engagement, consistent with the policy of the Executive Order; (b) act to strengthen the fiduciary standards of pension and retirement plans covered under ERISA, including by assessing whether proxy advisors act solely in the financial interests of plan participants and the extent to which any of their practices undermine the pecuniary value of the assets of ERISA plans; and (c) enhance transparency concerning the use of proxy advisors, particularly regarding DEI and ESG investment practices.

The Executive Order is the Latest Salvo Aimed at Proxy Advisors

The Executive Order is the latest in a series of regulatory, legislative and legal initiatives directed at the policies and practices of proxy advisory firms. Other recent examples include:

- Texas legislation seeking to impose certain requirements on proxy advisory firms, which legislation is subject to ongoing litigation;⁵
- Florida's attorney general filing a lawsuit against ISS and Glass Lewis alleging that both firms misled Florida consumers, abused their dominance over the shareholder-voting market, and "weaponized" their influence to impose an ideological agenda on American

companies and Florida retirees in violation of Florida's consumer protection and anti-trust laws.⁶

- Congressional action, including proposed legislation seeking to regulate proxy advisors⁷ and institutional investors' use of the proxy advisors' services,⁸ as well as hearings in the U.S. House of Representatives titled "Exposing the Proxy Advisory Cartel: How ISS and Glass Lewis Influence Markets"⁹ and "The Proxy Advisor Duopoly's Anticompetitive Conduct",¹⁰
- Several state attorneys general sending letters to ISS and Glass Lewis requesting information regarding the firms' priorities relating to climate and DEI, and accusing the firms of prioritizing nonpecuniary goals over companies' financial performance;¹¹
- Several state attorneys general subsequently announcing investigations into whether ISS and Glass Lewis violated various states' consumer protection statutes by making misleading representations regarding their consideration of ESG and DEI factors;¹² and
- The FTC investigating whether ISS and Glass Lewis violated antitrust laws through their business of guiding shareholder votes on contentious topics.¹³

Proxy Advisor Responses

Responses by proxy advisors to the rising tide of federal and state-level scrutiny and actions provide insight into how they will likely address the impacts of the Executive Order. For example, proxy advisors challenged a new Texas state law that subjects the firms to extensive public and directed disclosure obligations when their recommendations or services are deemed to be based on alleged non-financial factors.¹⁴ The proxy advisors may adopt a similar posture in response to regulatory actions that emerge from the Executive Order.

Additionally, in response to the enhanced scrutiny they are facing, proxy advisors recently announced changes to their benchmark policies and proxy voting recommendations. For example, Glass Lewis is moving away from its standard voting guidelines to instead offer more customized voting frameworks for its institutional clients. Similarly, ISS updated its proxy voting guidelines for meetings after February 1, 2026, to (among other changes) move away from generally recommending votes “for” environmental and social shareholder proposals to a case-by-case assessment and recommendation. It is likely that proxy advisors will continue to strategically and preemptively evolve their business models in response to the rulemaking actions that emerge from the Executive Order.

What’s Next?

While having no immediate impact on ISS and Glass Lewis, the Executive Order heightens the regulatory scrutiny of and pressure on their practices and on the actions of their clients. Although rule amendments and enforcement investigations will take time before having any impact and face other hurdles,¹⁵ the Executive Order’s call for agencies to revise or rescind guidance, bulletins, and other interpretations that are inconsistent with the rationale and objectives of the Executive Order opens the possibility for additional near-term pronouncements that could further scramble what already will be a unique proxy season.

Among other things, we expect the SEC staff to revisit the guidance in Staff Legal Bulletin No. 20,¹⁶ which provides Staff guidance about investment advisers’ responsibilities in voting client proxies and retaining proxy advisory firms and the availability and requirements of two exemptions to the federal proxy rules for proxy advisory firms. Similarly, much of the practice around shareholder proposals under Rule 14a-8 is founded on Commission and Staff interpretive guidance and, as Commissioner Uyeda recently observed, internal Staff memorandum.¹⁷

There may also be near-term effects on proxy advisors’ clients, which could impact public companies’ shareholder engagement strategies during the 2026 proxy season. While most large institutional investors do not rely on the proxy advisors’ voting recommendations (whether or not they subscribe to the firms’ analyses), and instead operate under their own voting policy guidelines, these firms increasingly are passing voting decisions through to the beneficial owners, and remain cautious while engaging with portfolio companies in order to protect their Schedule 13G passive investor status. Other institutional investors that follow or rely heavily on the proxy advisors’ voting recommendations may alter their voting practices out of concern of being viewed as part of a Section 13(d) group.¹⁸

Those institutional investors might change their voting practices, at least to the extent that in the past they automatically or by default voted in line with a proxy advisor’s recommendation promptly after the recommendation was issued, and some may be less inclined to follow a proxy advisor’s voting recommendation, particularly in the context of “vote no” campaigns or proxy contests that target incumbent directors. As a result, public companies may be less able to forecast voting outcomes, placing a greater premium on companies clearly and concisely communicating their perspective on matters being put to a vote, both through their proxy statements and through ongoing shareholder engagement.

Notes

1. The White House, Protecting American Investors from Foreign-Owned and Politically-Motivated Proxy Advisors (Dec. 11, 2025).
2. The White House, Fact Sheet: President Donald J. Trump Protects American Investors from Foreign-Owned and Politically-Motivated Proxy Advisors.
3. ISS is currently registered as an investment adviser, and Glass Lewis recently announced its intention to also register. See Glass Lewis, A Personal Commitment to Change Proxy Voting Practices (Nov. 25, 2025).
4. Such acts or practices include “(i) conspiring or colluding, explicitly or implicitly, to diminish the value of

consumer investments (including pensions and retirement accounts); (ii) failing to adequately disclose conflicts of interest; (iii) providing misleading or inaccurate information; (iv) undermining the ability of consumers to make informed choices; or (v) otherwise engaging in conduct that violates the antitrust laws.”

5. See Gibson Dunn, Texas Court Blocks Enforcement of New Texas Proxy Advisor Law Against ISS and Glass Lewis (Aug. 30, 2025) (August 2025 Alert).

6. See Office of the Attorney General, State of Florida, Attorney General James Uthmeier Sues Proxy Advisory Giants for Deceiving Investors and Manipulating Corporate Governance (Nov. 20, 2025).

7. See H.R. 4098, the Stopping Proxy Advisor Racketeering Act, which would prohibit proxy advisors from providing proxy voting advice while facing a “conflict of interest.”

8. See H.R. 3402, which would require “institutional investment managers” that use proxy advisors to disclose the percentage of their votes on shareholder proposals that are consistent with proxy advisors’ recommendations and explain how they consider such recommendations in making voting decisions. For institutional investment managers with at least \$100 billion in assets under management, the bill would also require an economic analysis of each shareholder proposal on which they cast votes inconsistent with the recommendations of boards composed of a majority of independent directors.

9. Hearing held by the U.S. House Committee on Financial Services, Subcommittee on Capital Markets on April 29, 2025. See, e.g., Testimony of Elizabeth Ising Before the U.S. House Committee on Financial Services, Subcommittee on Capital Markets.

10. Hearing held by the U.S. House Committee on the Judiciary, Subcommittee on the Administrative State, Regulatory Reform, and Antitrust on June 25, 2025.

11. Sean D. Reyes, Utah Att’y Gen., et al., Letter to Gary Retelny, President & Chief Exec. Officer, ISS, and Kevin Cameron, Exec. Chairman, Glass, Lewis & Co. (Jan. 17, 2023).

12. See, e.g., Office of the Attorney General, State of Texas, Attorney General Ken Paxton Investigates Proxy Advisors Glass Lewis and ISS for Misleading Public Companies to Push Radical Agenda (Sept. 16, 2025).

13. See Wall Street Journal, Proxy Advisers ISS and Glass Lewis Are Facing Antitrust Probes (Nov. 12, 2025).

14. See August 2025 Alert.

15. Of note is the need to consider the ability of the SEC to regulate proxy advisors under the Exchange Act in light of the July 1, 2025, ruling by the U.S. Court of Appeals for the D.C. Circuit that proxy voting advice issued by proxy advisory firms does not constitute a “solicitation” under the Exchange Act. *ISS v. SEC*, 142 F.4th 757 (D.C. Cir. 2025), available at <https://media.cadc.uscourts.gov/opinions/docs/2025/07/24-5105-2123183.pdf>.

16. Staff Legal Bulletin No. 20, Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms (June 30, 2014).

17. Comm’r. Mark T. Uyeda, Remarks at the 2025 Institute for Corporate Counsel (Dec. 3, 2025).

18. *Id.* (stating that “funds and asset managers using [proxy voting advisory businesses] for voting decisions may have formed a group for purposes of Section 13(d)(3) or Section 13(g)(3) of the Securities Exchange Act”).

Using AI in the Boardroom: New Opportunities and Challenges

By Paul DeNicola, Barbara Berlin and Ariel Smilowitz

All boards are different, but there are three critical assets that great boards possess to contribute to their effectiveness. First, they have deep and varied experiences that enhance their business judgment. Second, they take a long-term, enterprise-wide approach to evaluating the success of the business. Third, they work closely with management, but they maintain their oversight role and one-step separation from the daily operations of the business so they can provide perspective and ask challenging questions about strategy.

AI can significantly enhance those critical functions of the board by addressing the longstanding issue of information asymmetry between boards and management. At the same time, AI capabilities offer opportunities for boards, the technology can raise new risks that boards and management should anticipate and address together.

The agency problem potentially disrupted by AI

Today, the board receives nearly all of its information from the management team. While most management teams are diligent in providing data and promptly responding to board inquiries, at times the information may lack certain context or alternative perspectives, which can limit the board's ability to access the full picture for decision-making. These arrangements inherently create an agency problem as the board depends on its information from the very management team it is tasked with overseeing, potentially compromising its ability to exercise independent judgment and oversight.

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AI has the potential to fundamentally change this dynamic. Directors can use AI to more easily and quickly benchmark public disclosures and query market data, providing an independent baseline to compare against what management presents. They can also apply AI to analyze the company's own historical, management-curated data that has been provided to the board in board packages or other communications, enabling longitudinal views of performance that might not otherwise be synthesized for the board.

More advanced applications of AI could allow directors to pressure-test strategy, blending both public and private information to evaluate assumptions or identify risks. As we look ahead, AI could be a catalyst to empower directors to request and analyze new datasets not previously shared by management—running benchmarking exercises, scenario plans, or hypothetical analyses that extend beyond the traditional board pack. Together, the capabilities of AI suggest an opportunity and future in which the board can more easily obtain information to formulate better questions and engage in more robust discussions with their management teams.

AI in board governance—potential opportunities and applications¹

- **Acting as a strategic thought partner:** AI can read and summarize board packages to surface relevant insights, highlight missing information, and draft probing questions aligned to each agenda item. AI can also be used during board and committee meetings for similar purposes to enhance discussions with management and improve board decision-making. It should be noted that summarizing board packages to elicit insights and highlight

information is not a substitute for a board member's review of all board materials.

- **Leveraging external research:** Management teams are already using AI to produce improved board materials that can include insights from AI analyses of company data as well as comb through external filings, analyst reports, news articles, and market datasets to generate research on competitors, industry trends, and emerging risks, including citations. Directors can use AI to support their reviews of board materials and to further explore the data for fresh, independent, and data-driven evidence to assess or challenge management's assumptions before approving strategic decisions during board deliberations.
- **Assessing board performance:** AI can apply statistical benchmarking to a board's own governance documents (e.g., agendas, committee charters, skills matrices) and to a large external reference set of peer disclosures and governance codes. The result may provide directors with a more holistic view of how the board is spending its time and how it stacks up to leading practices and peers.
- **Enabling predictive scenario planning:** AI can blend a large amount of external macroeconomic indicators with a company's own KPIs to create baseline, best-case, and worst-case forecasts. The result could equip directors to test 'what-if' scenarios for capital allocation, governance vulnerabilities, or other actions during boardroom deliberations.

AI use, while beneficial, brings new risks

As board members begin to expand their use of AI in the boardroom to perform their fiduciary responsibilities, they will likely have questions about how to responsibly use AI as well as the related legal and other risks. Management teams should develop new ways to address the changed information flow between the board and them. And legal advisors should facilitate these discussions and develop procedures that

both support strategic AI use in the boardroom, while mitigating legal liability. All of these changes will have implications for board culture, process, and trust, and should be approached thoughtfully.

Here are some key risks that are important to keep in mind:

- **Board overreach:** Using AI to more easily summarize and analyze independent information could invite boards to step over the oversight boundary and engage in functions that should be driven by management.
- **AI hallucinations:** AI-generated outputs may contain errors or biases that appear credible, underscoring the need for directors to verify information and use human judgment before relying on them in decision-making.
- **Data security:** Making sure directors only use AI within secure, company-approved environments for board work, or they risk exposing sensitive data and undermining proper recordkeeping of board activities.
- **AI creates a written record:** Free-flowing inquiry by board members using AI can lead to dead-end paths on the way to insight. Managing how the written record from AI prompts is created and retained will be important to prevent regulators, activists, or plaintiffs' lawyers from cherry-picking the record and applying hindsight to create false narratives.

Since directors are already starting to make use of AI in various ways—35% of directors are saying their boards have incorporated AI and GenAI into their oversight roles—these risks need to be addressed. While it is unwise for any company to dive headlong into a highly AI-enabled board process, the right questions to ask are about how fast to move and the impact on board processes. Doing nothing—or moving too slow—may bring more risk than a smart introduction of AI, phased in over time.

Boards are starting to explore the use of AI in the boardroom

35% of directors say their boards have incorporated AI and GenAI into their oversight roles, per PwC's 2025 Annual Corporate Directors Survey (October 2025). Here are the ways they are using it:

- Staying informed on emerging trends
- Researching or benchmarking peer practices
- Evaluating company performance metrics
- Enhancing governance processes (e.g., meeting preparation and agenda-setting)
- Pressure testing corporate strategy (e.g., scenario modeling)

A proactive governance approach for board use of AI

To responsibly integrate AI into board processes and workflows, the board should consider adopting a proactive governance framework developed collaboratively with the CEO and management that guides its use and drives alignment with the board's oversight responsibilities. The framework should also be informed by key stakeholders, including the general counsel, corporate secretary, and other legal and risk advisors.

Augmenting board processes through AI is a big change. It needs to be done in a way that the CEO and senior leadership team, as well as the board, support. Establishing clear protocols as to how and when AI is used by the board—and how its outputs will be interpreted and documented—will help mitigate potential risks, while helping the board to realize the full benefits of this transformative technology.

According to a recent survey of public company corporate directors, 60% say their general

counsel provides minimal to no support to the board on AI matters.² This highlights a potential opportunity for greater collaboration between legal counsel and the board.

- **Put AI use in the boardroom on the agenda:** Boards should formally include AI use as an agenda item to facilitate thoughtful discussion about how directors are currently leveraging AI to support their fiduciary responsibilities—and how they envision its use evolving over time. This discussion might include whether AI will be used for generating queries, performing scenario modeling, drafting minutes, or even serving as a virtual observer during meetings.

It is important for senior management and the board to align on both the intended use cases and the pace of adoption. Boards can also consider adopting a formal AI policy that aligns with the company's broader AI policies but is tailored to reflect the board's unique responsibilities and oversight role. Additionally, regularly sharing how individual directors are engaging with AI, and what types of insights they are receiving promotes transparency and consistency. Some directors may be early adopters of AI tools, while others may prefer to observe initial usage and adopt at a slower pace.

- **Commit to upskilling:** Directors should proactively enhance their AI literacy to more effectively use and oversee AI-related matters. This includes participating in targeted education sessions, understanding the company's specific AI policies, and addressing AI risks and opportunities.
- **Enable secure AI use:** Any board-related use of AI should occur within a secure, company-approved environment. Directors should not put board packages and company information into public or personal AI platforms, as these may expose sensitive data to unnecessary risk. Use of personal or public platforms can also create significant issues in the tracking and documentation of the board's activities.

-
- **Maintain human oversight:** AI-generated insights can be valuable, but they should be subject to critical human review. Outputs from AI carry the risk of inaccuracies or ‘hallucinations,’ or outputs that sound plausible but lack factual basis. There should always be ‘humans in the loop,’ meaning a human should review for more accuracy and offer appropriate critique and perspective on AI outputs. Decision-making should consistently remain with directors and the members of the senior leadership team, who also have fiduciary obligations to the company.
 - **Have a plan to address discrepancies between AI-generated information and management information:** There could be times when directors have identified information or analysis generated by AI that differs from what management has provided. It is important to have a proactive process in place to address these differences, ideally in advance of board meetings.

The process can include establishing protocols for when and how board members share AI-derived insights with a designated management contact responsible for coordinating internal follow-up as well as guidance for when to escalate the discussion to the board chair or relevant committee chair. The goal is to realize the value of AI in board processes and workflows, while making sure AI remains a technology tool, and that the central relationship for strategy remains between the board and management.

- **Recognize that board prompts and AI-generated outputs may be retained:** Prompts and AI-generated outputs should remain behind the company’s data firewalls. General counsel and legal advisors should consider whether—and to what extent—AI use and prompts by directors should be reviewed by management

and aligned with the appropriate record retention policy.

- **Prepare for investor transparency:** As AI becomes a more prominent tool in board decision-making, investors may begin to ask how it is being used in governance processes. The board should be prepared to articulate its approach, including how AI informs oversight.
- **Evolve the board’s AI approach over time:** AI integration should not be static. Boards should periodically revisit their AI practices, and adjust as technology, risks, and opportunities evolve. Continuous improvement—including identifying new, responsible ways to leverage AI—will help make sure the board’s approach remains relevant and effective.

In conclusion

There is no one-size-fits-all approach to integrating AI into board governance. But boards and management teams should begin the conversation now—before a pressing issue demands it. Establishing clear, collaborative processes for how AI will support board oversight can enhance effectiveness. By thoughtfully addressing the agency problem and enabling more informed, independent board dialogue, AI has the potential to strengthen governance and reinforce the partnership between boards and management.

Notes

1. While AI is being used in real-world applications, human judgment is essential for managing, reviewing, and overseeing AI systems and their outcomes.
2. Corporate Board Member and Diligent, “New Survey Reveals What Keeps GCs Up at Night,” Corporate Board Member, accessed October 27, 2025.

Nevada Business Court Rules Transfer Agent Stockholder List Conclusively Determines Stockholders of a Corporation

By Sean Donahue

In *Ameriguard Security Services, Inc. & Garcia v. Anderson, et al.*, Judge Maria Gall of Nevada's Eighth Judicial District's Business Court found that, absent fraud or manifest error, the certified stockholder list maintained by a company's transfer agent conclusively determines the stockholders of a corporation.

This ruling is another example of Nevada Business Courts adhering to the statutory text in adjudicating business disputes. NRS 78.105(c) provides that "[a]bsent manifest error or actual fraud, the stock ledger of the corporation, as maintained by the corporation or its designated transfer agent, shall conclusively determine the stockholders of record of the corporation." Defendants did not demonstrate manifest error or actual fraud sufficient to overcome the statutory presumption of NRS 78.105(c) such that the court found that the stockholder list providing that the plaintiff, Ameriguard CEO Lawrence Garcia, held more than 80% of the stock permitted him to take certain corporate actions.

Overview of the Court's Decision

This litigation arose from an internal corporate dispute at a publicly traded company with a three-member board. It started when two of the three board members took action to remove the third board member, Garcia, as CEO. Following his removal, Garcia, in his capacity as a stockholder, acted by written consent to remove the two remaining directors and replace them with his two handpicked directors. NRS 78.335(1) provides that a stockholder holding two-thirds of the voting power of the issued and

outstanding stock of a company may remove a director. The company's bylaws provided the same.

According to the certified stockholder list from the company's transfer agent, Garcia was a greater-than-80% stockholder of the company. Even though a portion of the stock attributed to Garcia on the stockholder list was subject to certain pledging arrangements, the court found that the stockholder list maintained by the company's transfer agent conclusively determines the stockholders of a corporation. As such, the court found Garcia was entitled to take action to remove the two directors from the board.

While not discussed at length in the court's order, Garcia also acted lawfully in his capacity as the sole remaining director in filling the two vacancies on the board that resulted from his removal of the other two directors. NRS 78.335(5) provides that all vacancies, including those caused by an increase in the number of directors, may be filled by a majority of the remaining directors, though less than a quorum, unless it is otherwise provided in the articles of incorporation. The company's articles were silent on the issue and the bylaws largely tracked the statute. As such, Garcia as the sole remaining director acted lawfully in filling the two vacancies on the board.

After filling the two vacancies, the reconstituted three-member board reinstated Garcia as CEO. While not discussed at length in the court's order, this action was also lawful. NRS 78.130(3) provides that "[a]ll officers ... must be chosen in such manner, hold their offices for such terms and have such powers and duties as may be prescribed by the bylaws or determined by the board of directors". The company's bylaws provided that the board shall have the right to remove officers and to fill any office that

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becomes vacant. As such, the board's action to remove the CEO who had been appointed to replace Garcia and reinstate him as CEO was valid.

The defendants also alleged that Garcia breached his fiduciary duties as an officer and director of the company. The court noted that he removed the two directors in his capacity as an 80%-plus stockholder and not as an officer or director. The court found that any purported breach of fiduciary duty by Garcia in his role as an officer or director is not relevant to his right to remove and replace directors in his capacity as a stockholder. This reasoning is consistent with rulings in other jurisdictions, including Delaware, where courts look at a person's capacity in the corporate law context by analyzing them through the capacity in which

they are then acting, such as an officer, director or shareholder.

Key Takeaways

This ruling is another example of Nevada Business Court judges adhering to the statutory text in adjudicating business disputes. Nevada corporations or companies considering reincorporating in Nevada should take notice of this and other rulings indicating that Nevada corporate law is heavily reliant on statute. While judges will interpret the Nevada statute when necessary, the plain text of the statute will control. This statutory approach to corporate law helps with both transaction planning and assessing litigation risk.

The Board's Role in CEO and Director Compensation: Examining Leading Practices and Trade-offs

By Kyle Eastman and Grace Tan

Executive and non-employee director compensation are two of the most visible and scrutinized responsibilities of the board. Yet, even among the largest companies, governance practices diverge on two fundamental questions: Who approves CEO pay – the compensation committee or the full board – and who oversees director pay – the compensation committee or the nominating/governance committee?

To better understand prevailing practices, CAP examined governance disclosures among the 110 largest companies in the S&P 500 (the ten largest by market capitalization in each GICS sector). Our findings confirm that board practice is far from uniform. This article presents CAP's findings and explores the trade-offs between the various approaches.

Who Approves CEO Pay?

Among CAP's sample, 26% require the full board to approve CEO compensation, typically upon recommendation from the compensation committee, and 72% give final approval authority to the compensation committee itself, with the board informed through committee reporting and disclosure. Both approaches carry advantages and drawbacks, which help explain why practice remains split.

Reserving approval of CEO compensation for the full board emphasizes accountability and legitimacy. CEO pay is one of the most visible expressions of governance, and when every director votes, the board signals to shareholders that the decision reflects collective judgment.

This practice also ensures that directors outside the compensation committee can contribute their broader strategic perspectives to the discussion, aligning pay decisions with long-term company direction. Yet this approach is not without its challenges. Full board approval can be cumbersome, particularly when compensation structures are complex or when pay adjustments are needed quickly. Directors who are not steeped in compensation issues may feel less prepared to engage, which in turn risks either diluting the quality of debate or reducing the exercise to a perfunctory endorsement of committee work.

By contrast, companies that empower the compensation committee to approve CEO compensation often cite efficiency and expertise. Concentrating decision-making in a smaller group allows for more focused deliberation, drawing on directors with compensation experience and consultant relationships. Committees can act more swiftly, which can be valuable in competitive talent markets. Moreover, when controversies arise, there is clarity about accountability: the compensation committee made the call.

The trade-off, however, is one of optics and inclusiveness. Investors sometimes perceive committee-only approval as insulating the board from responsibility for its most important pay decision. Other directors may feel less invested in the design of the CEO's incentives and, by extension, less aligned around the performance expectations those incentives are meant to drive. Concentrating authority in three to five directors also magnifies reputational and liability risks for those individuals.

A small fraction of companies (2% of CAP's sample) utilizes a hybrid approach, where the full board, guided by the compensation committee's recommendation, approves the CEO's salary, while the compensation committee approves all

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other elements of pay. This approach is uncommon due to potential drawbacks, including the risk of misalignment among compensation elements and increased inefficiency from involving multiple decision-making groups.

Who Approves CEO Pay? <i>% of CAP's Sample</i>		
Compensation Committee	Full Board	Other
72%	26%	2%

Who Oversees Director Pay?

If CEO pay approval highlights the balance between accountability and efficiency, the allocation of responsibility for director pay approval highlights the balance between expertise and optics. Our analysis found that companies are split between assigning this role to the compensation committee (57% of CAP's sample) and assigning it to the nominating/governance committee (41%), though in both models, the full board almost always retains final approval (97% of CAP's sample).

When the compensation committee is tasked with reviewing director compensation, companies benefit from the committee's technical expertise. These directors are already familiar with compensation benchmarking, market practices, and regulatory standards, and are often supported by external consultants. Housing both executive and director pay under one umbrella can create coherence in the company's compensation philosophy, ensuring that principles such as competitiveness, fairness, and risk mitigation are applied consistently.

At the same time, this consolidation is not without drawbacks. Because directors are, in effect, evaluating their own pay, concentrating oversight in the same committee that reviews executive pay can heighten concerns about conflicts of interest. Compensation committees also may face crowded agendas — from say-on-pay to pay-versus-performance disclosures — and may struggle to devote sufficient attention to director pay issues.

The alternative — placing responsibility with the nominating/governance committee — has its own logic. Director compensation is ultimately a governance matter, touching on independence, fairness, and shareholder trust, and therefore fits comfortably within that committee's remit.

In addition, the nominating/governance committee typically has a nuanced understanding of the board's structure, roles, and responsibilities, including the added time and leadership demands placed on committee chairs, the lead director, and other board leaders. This perspective enables the committee to calibrate compensation more appropriately to reflect workload and responsibility. Because the committee also oversees board refreshment, competitive director pay is an important tool in recruiting and retaining qualified candidates.

Separating director pay oversight from executive pay decisions can further mitigate optics-related concerns by signaling that directors' compensation is not determined by the same group that negotiates management's incentives. Distributing responsibilities across committees can also help manage workload, particularly when the compensation committee faces heavy agendas. Still, this model is not without limitations.

Nominating/governance committees may lack the specialized expertise or consultant relationships of compensation committees, leaving them less well-equipped to scrutinize benchmarking or plan design. Splitting responsibilities can also risk inconsistency between how the board approaches executive pay and how it approaches its own compensation. Finally, governance committees also juggle critical responsibilities such as board succession and governance disclosures, and director pay may compete for limited agenda time.

One company in CAP's sample (1%) has a combined compensation and nominating/governance committee that oversees director pay.

Who Oversees Director Pay? <i>% of CAP's Sample</i>		
Compensation Committee	Nominating/ Governance Committee	Other
58%	41%	1%

Practical Considerations for Boards

In deciding which approach to use, boards should weigh several practical considerations. Investor expectations remain paramount: proxy advisors and institutional shareholders value transparency and want to see clear board-level accountability for compensation decisions.

Equally important is board composition and expertise. A board with several directors who have deep compensation backgrounds may feel comfortable with committee-only approval, while a board with fewer specialists may prefer to involve all directors. Workload is another factor; allocating responsibilities across committees is not only a matter of optics but also of sustaining effective governance.

Conclusion

CAP's review of the 110 largest companies in the S&P 500 shows that there are no "right" answers to the questions of who approves CEO pay and who oversees director pay. Practices vary widely — and for good reason. Each approach carries benefits and trade-offs in terms of accountability, expertise, efficiency, and optics.

For boards, the most important step is not to follow prevailing practice but to adopt a structure that reflects their governance philosophy, addresses investor expectations, and empowers directors to exercise informed, independent judgment. Clear disclosure of both process and rationale reinforces stakeholder trust.

As compensation and governance issues continue to evolve, boards that periodically re-examine their committee structures — and openly communicate their reasoning — will be best positioned to demonstrate strong stewardship and adapt to changing expectations.

Appendix

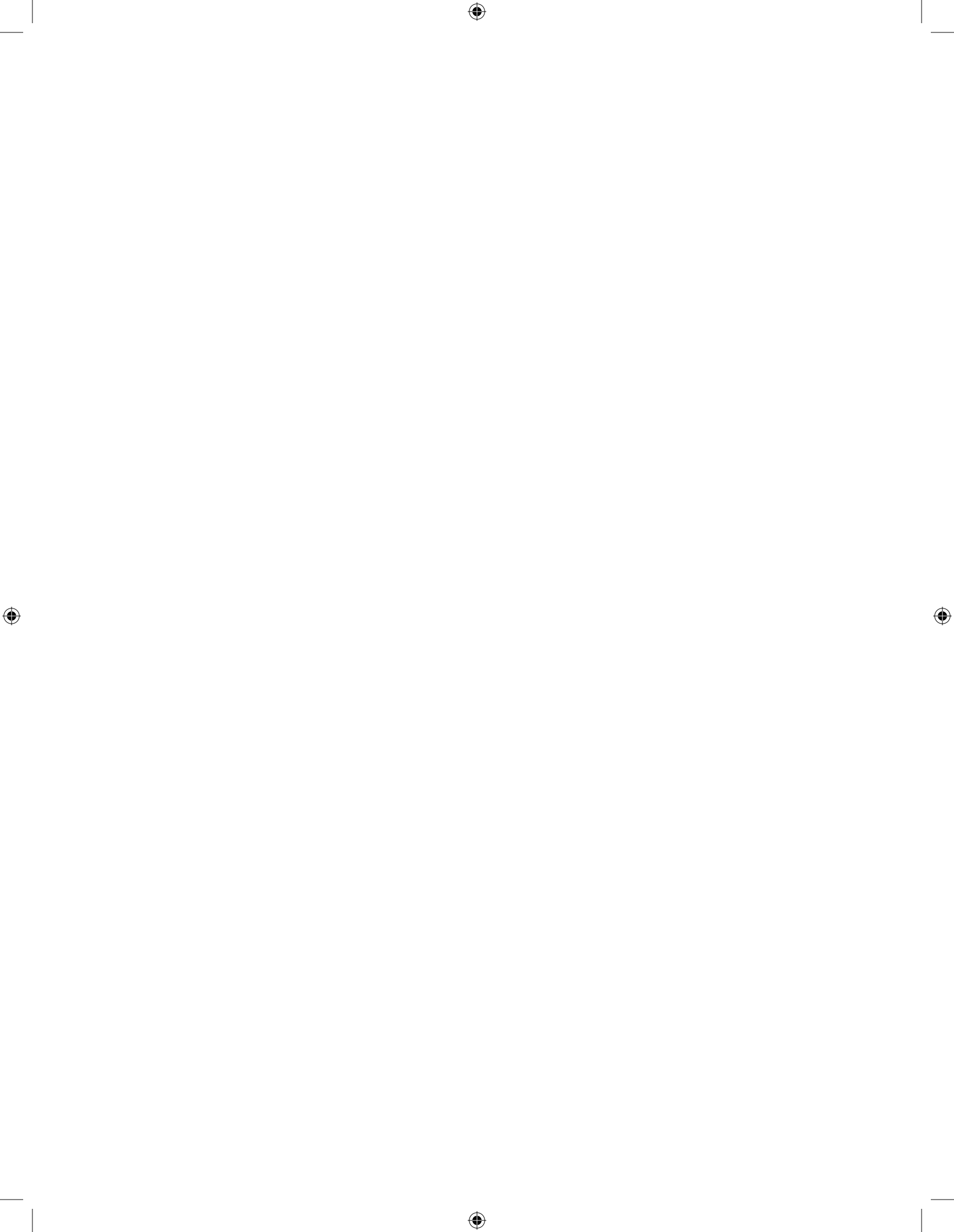
CAP's Sample

GICS Sector	Companies		
Energy	<ul style="list-style-type: none"> • Chevron Corporation • ConocoPhillips • Diamondback Energy, Inc. • EOG Resources, Inc. 	<ul style="list-style-type: none"> • Exxon Mobil Corporation • Kinder Morgan, Inc. • ONEOK, Inc. 	<ul style="list-style-type: none"> • Phillips 66 • Schlumberger Limited • The Williams Companies, Inc.
Materials	<ul style="list-style-type: none"> • Air Products and Chemicals, Inc. • Corteva, Inc. • DuPont de Nemours, Inc. • Ecolab Inc. 	<ul style="list-style-type: none"> • Freeport-McMoRan Inc. • Linde plc • Martin Marietta Materials, Inc. 	<ul style="list-style-type: none"> • Newmont Corporation • The Sherwin-Williams Company • Vulcan Materials Company
Industrials	<ul style="list-style-type: none"> • Automatic Data Processing • The Boeing Company • Caterpillar Inc. • Eaton Corporation plc 	<ul style="list-style-type: none"> • General Electric Company • Honeywell International Inc. • Lockheed Martin Corporation 	<ul style="list-style-type: none"> • RTX Corporation • Uber Technologies, Inc. • Union Pacific Corporation
Consumer Discretionary	<ul style="list-style-type: none"> • Amazon.com, Inc. • Booking Holdings Inc. • Chipotle Mexican Grill, Inc. • The Home Depot, Inc. 	<ul style="list-style-type: none"> • Lowe's Companies, Inc. • McDonald's Corporation • NIKE, Inc. 	<ul style="list-style-type: none"> • Starbucks Corporation • Tesla, Inc. • The TJX Companies, Inc.
Consumer Staples	<ul style="list-style-type: none"> • Altria Group, Inc. • The Coca-Cola Company • Colgate-Palmolive Company • Costco Wholesale Corporation 	<ul style="list-style-type: none"> • Mondelez International, Inc • PepsiCo, Inc. • Philip Morris International Inc. 	<ul style="list-style-type: none"> • The Procter & Gamble Company • Target Corporation • Walmart Inc.
Health Care	<ul style="list-style-type: none"> • Abbott Laboratories • AbbVie Inc. • Danaher Corporation • Eli Lilly and Company 	<ul style="list-style-type: none"> • Intuitive Surgical, Inc. • Johnson & Johnson • Merck & Co., Inc. • Pfizer Inc. 	<ul style="list-style-type: none"> • Thermo Fischer Scientific Inc. • UnitedHealth Group Incorporated
Financials	<ul style="list-style-type: none"> • American Express Company • Bank of America Corporation • BlackRock, Inc. 	<ul style="list-style-type: none"> • The Goldman Sachs Group, Inc. • JPMorgan Chase & Co. • Mastercard Incorporated • Morgan Stanley 	<ul style="list-style-type: none"> • S&P Global Inc. • Visa Inc. • Wells Fargo & Company
Information Technology	<ul style="list-style-type: none"> • Accenture plc • Apple Inc. • Broadcom Inc. • Cisco Systems, Inc. 	<ul style="list-style-type: none"> • International Business Machines Corporation • Microsoft Corporation • NVIDIA Corporation 	<ul style="list-style-type: none"> • Oracle Corporation • Salesforce, Inc. • ServiceNow, Inc.
Communications Services	<ul style="list-style-type: none"> • Alphabet Inc. • AT&T Inc. • Charter Communications, Inc. 	<ul style="list-style-type: none"> • Comcast Corporation • Electronic Arts Inc. • Meta Platforms, Inc. • Netflix, Inc. 	<ul style="list-style-type: none"> • T-Mobile US, Inc. • Verizon Communications Inc. • The Walt Disney Company
Utilities	<ul style="list-style-type: none"> • American Electric Power Company, Inc. • Constellation Energy Corporation • Dominion Energy, Inc. 	<ul style="list-style-type: none"> • Duke Energy Corporation • NextEra Energy, Inc. • PG&E Corporation • Public Service Enterprise Group Incorporated 	<ul style="list-style-type: none"> • Sempra • The Southern Company • Vistra Corp.
Real Estate	<ul style="list-style-type: none"> • American Tower Corporation • CBRE Group, Inc. • Crown Castle Inc. 	<ul style="list-style-type: none"> • Digital Realty Trust, Inc. • Equinix Inc. • Prologis, Inc. • Public Storage 	<ul style="list-style-type: none"> • Realty Income Corporation • Simon Property Group, Inc. • Welltower Inc.

Results by Sector

GICS Sector	Who Approves CEO Pay? <i>% of CAP's Sample</i>		
	Compensation Committee	Full Board	Other
All GICS Sectors	72%	26%	2%
Energy	70%	30%	0%
Materials	80%	20%	0%
Industrials	70%	30%	0%
Consumer Discretionary	90%	10%	0%
Consumer Staples	80%	20%	0%
Health Care	60%	20%	20%
Financials	70%	30%	0%
Information Technology	60%	40%	0%
Communications Services	70%	30%	0%
Utilities	50%	50%	0%
Real Estate	90%	10%	0%

GICS Sector	Who Oversees Director Pay? <i>% of CAP's Sample</i>		
	Compensation Committee	Nominating/Governance Committee	Other
All GICS Sectors	58%	41%	1%
Energy	60%	40%	0%
Materials	70%	30%	0%
Industrials	20%	80%	0%
Consumer Discretionary	60%	40%	0%
Consumer Staples	56%	44%	0%
Health Care	60%	40%	0%
Financials	40%	60%	0%
Information Technology	70%	30%	0%
Communications Services	70%	20%	10%
Utilities	60%	40%	0%
Real Estate	70%	30%	0%









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