



ACC SF Bay Area

Corporate and Securities Committee

Getting Ready for Your Annual Shareholder Meeting:

What Public and Private Company Counsel Should be Doing to Prepare

**March 25, 2015 (Palo Alto)
March 27, 2015 (San Francisco)**

presented by

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Louis Lehot, Partner, Cooley

Regan MacPherson, Deputy General Counsel, Seagate Technology

Pat McHugh, Okapi Partners

Darren Novak, Houlihan Lokey

Mike Tenta, Partner, Cooley

**Kimberly Woolley, Assistant General Counsel &
Assistant Secretary, Oracle**

Agenda

- Panelists
- What happened in 2014 – some data points
- What shareholders are asking for
- What's new at the SEC?
- What are the tough disclosure issues
- What the proxy advisors are asking for
- Who are the activists and what are the triggers?
- What's the game-plan for 2015?
- What can you do now to get ready for IPO
- Frequently asked questions
- Panelists' thoughts and audience questions

Panelists



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What happened in 2014 – some data points

Panelists

What happened in 2014 – some data points

What shareholders are asking for

What's new at the SEC?

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Who are the activists...

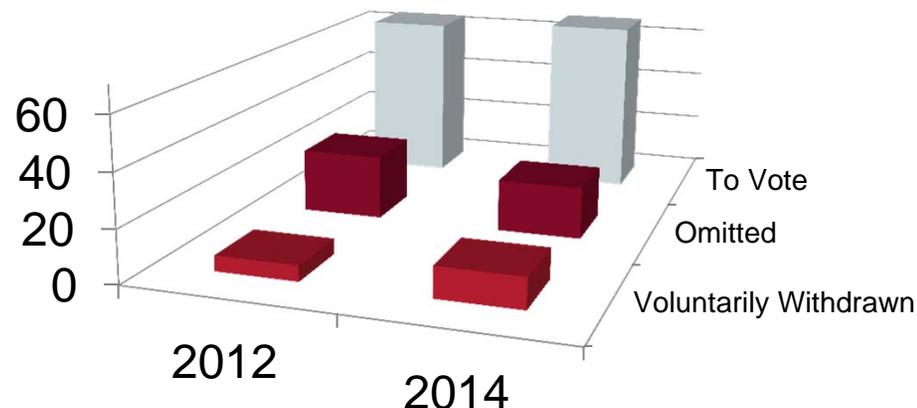
What's the game-plan for 2015?

What can you do now to get ready for IPO

Frequently asked questions

Panelists' thoughts and audience questions

1. Number of shareholder proposals filed in 2014 at Russell 3000 companies – 752 (flat from 2013 at 763)
2. Higher proportion of proposals went to a vote (67.2% vs. 64.5%) reflecting a continuing trend of fewer proposals being omitted under SEC no action process
3. Percentage of omitted proposals has declined from 24.5% in 2012 to 19.8% in 2014
4. Percentage of voluntarily withdrawn proposals increased, indicating company success in negotiating with proponents
5. In 2014, 11.6% of submitted proposals were voluntarily withdrawn, up from 5.9% in 2012
6. Identity of proponents is gradually shifting toward institutions/hedge funds



Source: Proxy Voting Fact Sheet (July 2014)

What happened in 2014 – some data points (no action responses)

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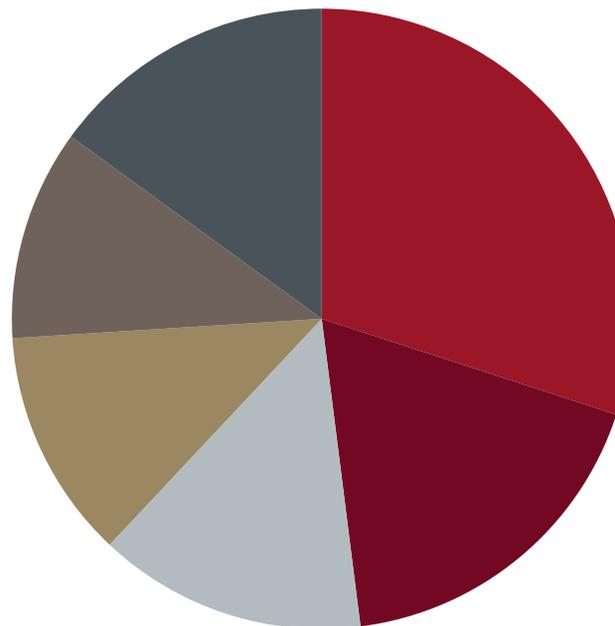
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Of the 286 no-action responses this season, 60 no-action requests were withdrawn, leaving 226 in which the SEC staff either granted or denied no-action relief. Of those 226, approximately 70 percent were granted relief. The most common bases for relief were as follows:



- exclusion on procedural grounds (30%)
- vague or false and misleading (18%)
- deals with ordinary business operations (14%)
- substantially implemented (12%)
- conflicts with the company's proposal (11%)
- other (15%)

Source: Thompson Reuters

What are shareholders asking for?



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1. Corporate governance proposals continue to dominate shareholder proposals in the Russell 3000 (291 proposals brought, 206 voted on)
 - Independent chair
 - shareholder rights (majority voting in uncontested direction elections in lieu of plurality voting; ability to act by majority written consent; ability to call special meetings; reduce supermajority provisions)
 - board declassification
 - adoption of proxy access
2. Social and environmental issues (288 proposals brought, 194 voted on) (e.g., prohibitions on discrimination, disclosure of political spending and lobbying activity, promotion of diversity initiatives)
3. Executive compensation shareholder proposals have become a smaller proportion of shareholder proposals in the wake of say-on-pay
 - still seeing some action relating to requiring equity retention periods
 - severance agreement limitations
4. Management say-on-pay proposals largely passing without contest

Source: Proxy Voting Fact Sheet (July 2014)

What's new at the SEC?

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1. Say-on-pay update

2. SEC comment letters (at least once every three years)

- CD&A should focus on how and why the issuer arrived at comp decisions and policies
- Disclosure of incentive plan performance targets, individual performance goals, benchmarking
- goodwill impairment charges
- loss contingency charges
- liquidity and debt covenants
- disclosure controls and procedures
- cyber-security risks
- restatements, segment disclosure
- exhibits

3. Interpretive guidance

- non-GAAP measures
- liquidity and funding risks in MD&A
- cybersecurity risks
- European sovereign debt exposures
- 13r disclosure (Iran and Syria sanctions)
- unbundling of proxy matters

What are the tough disclosure issues?

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1. Pay vs. Performance
2. CEO pay vs. median employee pay
3. Employee or director hedging policies
4. Say-on-pay; say-on-frequency
5. Board risk oversight
6. Summary comp tables and director comp tables
7. Comp consultant conflicts
8. Director and nominee qualifications
9. Leadership structures
10. Anticipating proxy statement litigation

What the proxy advisors are asking for

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1. ISS

- Independent board chairs (holistic approach)
- Unilateral bylaw/charter amendments
- Equity plan proposals (ISS "Equity Plan Scorecard")
- Political contributions
- Greenhouse gas emissions

2. Glass-Lewis

- Reduction or removal of shareholder rights without approval
- director independent and material transactions
- independent chairman proposals
- board responsiveness to majority-approved shareholder proposals
- exclusive forum and anti-takeover provisions following an IPO
- one-off awards
- ESPP
- Claw-backs

Who are the activists and what are the triggers?

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1. Hedge funds

- Elliot Management
- Jana Partners
- Starboard Value
- Pershing Square Capital Management
- Third Point Management
- Carl Icahn
- Nelson Peltz

2. Pension funds

- Comptroller of the City of New York campaign against 75 issuers targeted for boardroom accountability

3. Triggers

- poor stock price performance
- ineffective or inefficient capital deployment
- poor corporate governance
- CEO pay
- Board diversity
- Climate change

What's the game-plan for 2015?

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1. What went well/what didn't last year
2. What requires action
3. Identifying key stakeholders, and building institutional shareholder and stakeholder relationships
4. Monitoring developments
5. Benchmarking your peers
6. Managing your compensation programs
7. Articulating the rationale for all
8. Overseeing communication and engagement efforts
9. Positioning your board's composition and new candidates (assuming you can't influence)
10. Tune-up your governance documents

For pre-public companies, what to do now?



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1. Consider board composition

- Lead independent director or non-exec chairman
- Who can run the audit committee
- Avoid the temptation to load up on CEO or other celebrities
- Look for directors who will roll-up their sleeves and do the work to help the company

2. Consider policies on director age and term limits

3. Consider whether or not to load up on or be selective about including antitakeover and other protective provisions in your charter and bylaws

4. Consider more robust advance notice mechanisms and conditions for shareholder nominations

5. Consider bylaws relating to director qualifications

Frequently Asked Questions



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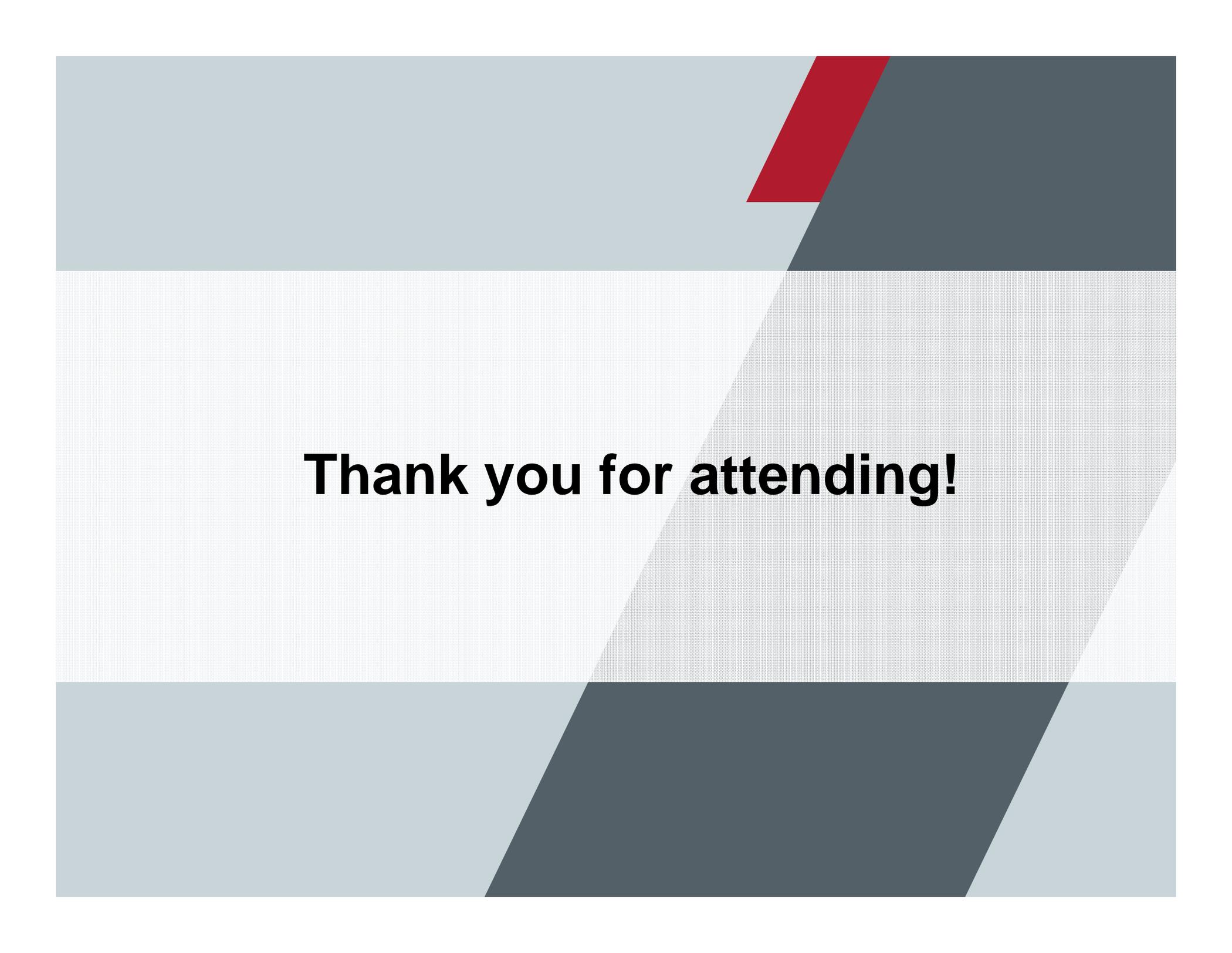
Frequently asked questions

Panelists' thoughts and audience questions

1. What is the status of proxy access?
 - a. Low-hanging fruit this year
2. What is the status of pay vs. performance?
3. Who are we seeing pushing for change?
 - a. TIAA – CREFF: > 100 proxy access letters
 - b. Many institutions looking for diversity on boards; skillsets
4. You get a proposal – do you have to include it? Substance and procedure requirements?
5. Can you get a no-action letter to exclude?
6. What is the deadline – when are you “in the clear”?
7. You have settled with the activist – can you withdraw the proposal?
8. Virtual annual meetings (virtual only or optional)
9. Rules of procedure



Panelists' Thoughts and Audience Questions



Thank you for attending!

Appendix – Rules of Conduct and Procedure



- Create rules of conduct (e.g., Roberts Rules of Order is common, but no federal or state law applies) that cover
 - meeting room admission requirements
 - prohibiting use of AV / cameras
 - Order of business to follow agenda
 - limit speakers to shareholders of record and proxies and when recognized by the chair
 - prescribe how to be recognized by chair (raise hand, submit paper request)
 - limit to # of questions/participant
 - no interruptions
 - limit speaking time
 - no “out of order” topics
 - prohibit firearms or other dangerous items
 - prohibit distribution of materials by anyone other than the company in the meeting
 - number each / use “easy-to-follow” formatting / reasonableness / board should approve in advance
- Create brief meeting agenda and distribute to all attendees with the rules
 - Hand them out
 - Make sure the chair has a copy
 - prepare a script
 - address rule enforcement in advance – who does it