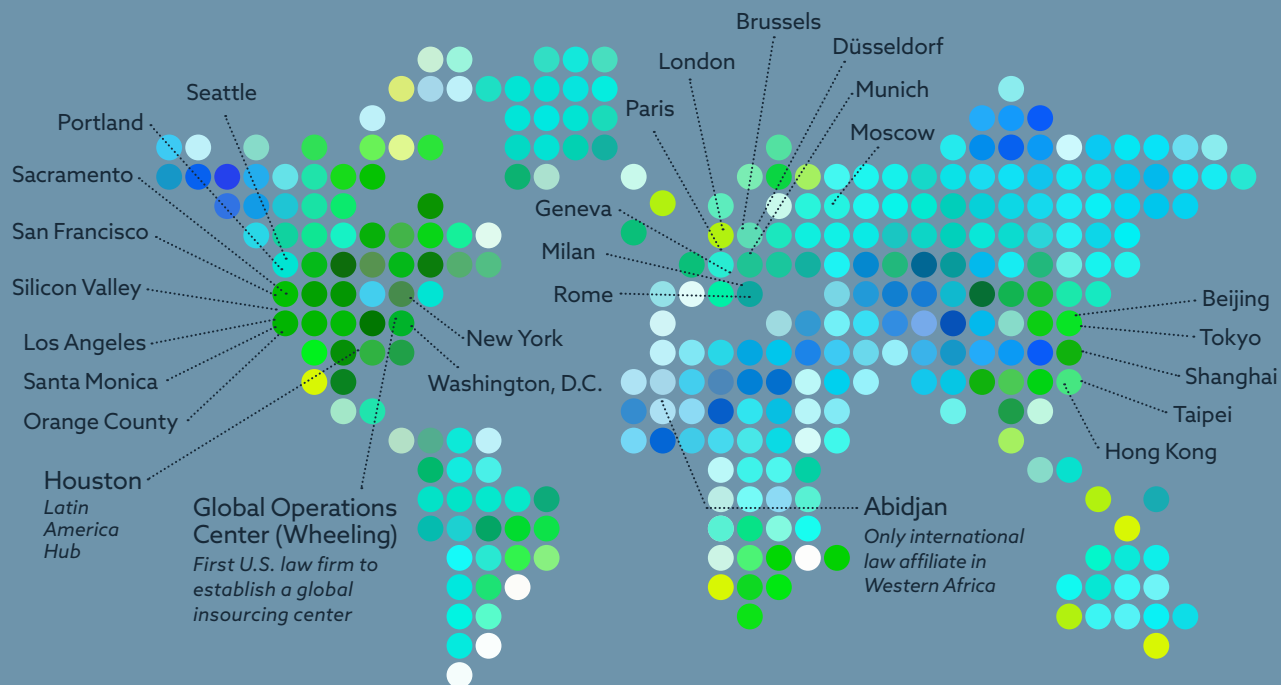


Public Company Corporate Governance Features in the Technology Sector

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Acknowledgements

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

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

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

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

What do other companies do?

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

We focused on three general areas:

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

Executive Summary

Board of Directors

Does the company have a classified/staggered board ?	4
What is required for the vote in board elections ?	5
Is removal of directors restricted to “for cause” only ?	6
Does the board have first and exclusive right to fill board vacancies ?	6
Has the company adopted director age limits ?	7
Has the company adopted director tenure limits ?	8

Shareholder Actions

Can stockholders call special meetings and, if so, what percentage of outstanding shares is required to do so?	9
Can stockholders take action by written consent ?	10
What percentage of vote of stockholders is required to amend bylaws ?	11
What percentage of vote of stockholders is required to amend the certificate of incorporation ?	12

General Provisions

Do bylaws contain proxy access for election of board members?	13
Do advance notice bylaws provisions require disclosure of derivative positions for nomination of director candidates?	14
Is “blank check” preferred stock authorized?	14
Is there an exclusive forum/venue provision?	15

Executive Summary

Dual class common stock

These structures, in which generally founders retain super-voting power, continue to be in the minority but with a significantly different corporate governance profile. 13 of 128 U.S. incorporated companies had dual class common stock.

Exclusive forum provisions

Limit stockholder derivative class actions suits to a single legal jurisdiction—usually the state of incorporation, such as Delaware. Their adoption continues to surge. Almost 40 percent of companies with non-dual class common stock structures have adopted these provisions, the concept of which only originated a few years ago.

Proxy access

Remains limited but growing fast, as just over 25 percent of non-dual class companies in the study have adopted provisions allowing groups of up to 20 stockholders who combined have held at least 3 percent of a company's common stock for at least 3 years to nominate directors for up to 20 percent of the board of directors.

Director age limits

40 percent of non-dual class companies have adopted some age limit, but director tenure limits are rare—at less than 5 percent.

Staggered boards

Remain surprisingly popular. Around 30 percent of both dual class and non-dual class technology companies still have some form of a staggered board, though these tend to be weighted somewhat towards recently public companies.

Majority voting formulations

Continue to sweep. 80 percent of non-dual class technology public companies have some variation of provisions requiring a director nominee to secure a majority of votes cast in an uncontested election. Almost all of these companies, however, allow the board to use their judgment to retain a director—which as a practical matter, has happened frequently in a failed vote.

State of incorporation

Almost all companies are incorporated in Delaware. 107 of 134 companies are incorporated in Delaware, 19 in other states and 6 overseas.

Our Data Criteria

Our study encompassed the following:

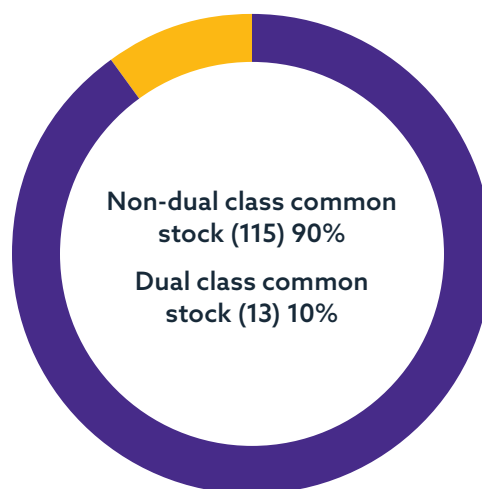
- We looked at the 134 component companies of the Dow Jones Technology Sector Index (DJUSTC), a popular index used for exchange traded funds on the technology sector. While all of these companies have their headquarters in the US, 6 of them are actually organized overseas and we excluded them from our analysis given the lack of comparability in various systems. A full list of the component companies is at the back of this report. Charters and bylaws must be filed on the SEC's website, EDGAR, although in a limited number of cases, the filings predated the advent of EDGAR. Corporate governance policies are generally available on a company's website. Where we noted inconsistencies between documents, we did not contact companies to resolve discrepancies.
- We further sorted component companies by sub-sector – with Hardware (38), Software (30), Services/Consumer (26) and Semiconductors (21). We did this primarily by Standard Industrial Classification (SIC) code, as filed with the SEC.
- **Dual Class Structures vs. Single Class Structures:** We further parsed the data by whether a company has a dual class common stock structure. 13 of 128 companies had dual class structures. These structures customarily allocate 10 votes per share to a holder of a nonpublicly traded class of shares (usually the founder(s)), while the publicly traded shares received one vote. We did this because, as discussed further herein, companies with dual class common stock have very different governance profiles and a very different level of susceptibility to investor pressure than those that do not.

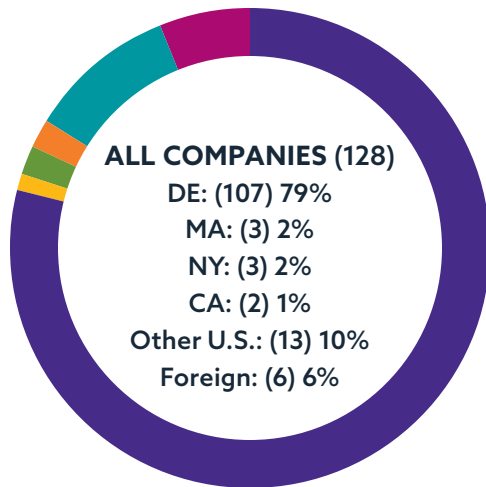
Managing Changes in Companies

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

- **Spin-Offs:** Several larger companies have split into two (or more) entities: eBay/PayPal, HP/HP Enterprise, and Symantec/Veritas, to name a few. Any resulting publicly traded entity is included in the data; however, parts of companies that are not publicly traded (e.g., Veritas Technology LLC, resulting from the split of Symantec) are not.
- **Consolidation:** The number of public companies is shrinking in the face of a robust M&A market – particularly in semiconductors – coupled with a slim IPO market. However, likely because of the sheer size of market capitalization of the largest companies, they were almost untouched from being a target (versus a buyer) in a consolidation.

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



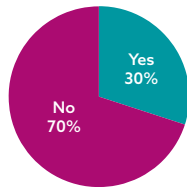


COMMENTARY: 8 out of 10 public companies in this survey are incorporated in Delaware.

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

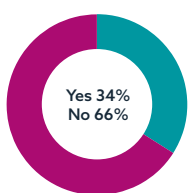
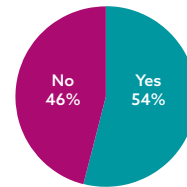
NON-DUAL CLASS

Total (115)

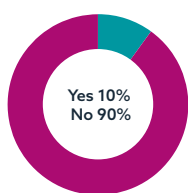


DUAL CLASS

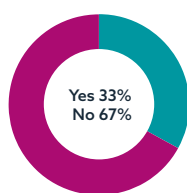
Total (13)



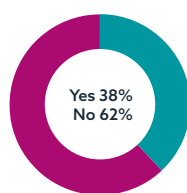
Hardware (38)



Semiconductors (21)



Software (30)



Services/Consumer (26)

70 percent of non-dual class companies have boards elected in full every year. While there was no strict pattern, many companies that retain staggered boards structures tend to be newer public companies, or if older, generally smaller in market capitalization.

Conversely, for dual class companies, over half of companies had classified boards.

COMMENTARY: Proxy advisory firms have increased pressure on companies to eliminate classified boards. The concept still remains alive in the technology sector.
PROXY ADVISORY POLICIES: Both ISS and Glass Lewis do not support retention of classified boards.

What is required for the *vote in board elections*?

Uncontested Director Election Standards: A Jumbled Landscape

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

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

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

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

Two 'majority voting' paradigms ensued:

- **Plurality 'Plus':** The initial wave of 'majority voting' was actually a plurality bylaws standard superimposed with additional requirements outside of the bylaws, in the corporate governance guidelines – and occasionally just simply referenced in the proxy statement with no further explanation. The bylaws in these cases continue to state that a director is elected as long as he or she obtains

the highest amount of "for" votes – no different from a conventional plurality standard. However, the corporate governance guidelines and/or annual meeting proxy statement state that all sitting directors shall in advance submit irrevocable resignations that are triggered if a director does not receive more "for" votes than "withhold" votes. Once the resignation is triggered, the remaining board then decides whether to accept or reject the pre-existing resignation. Governance activists are not generally proponents of this structure because the operative 'majority voting' provisions are usually in the governance guidelines – which is purely a board device and even more so than the board's customarily delegated authority with bylaws – or worse yet, simply documented in meeting minutes as a board policy, and then summarized in an annual meeting proxy statement.

- **'Modified' Majority of Votes Cast:** A further evolution of 'majority voting' is to put the auto-resignation mechanism in the bylaws. The auto-resignation is an important feature to governance activists because it pre-empts the Delaware 'holdover rule'. In a much-vaunted 'failed election under majority voting,' insurgent directors are not elected – but, ironically, under the Delaware "holdover rule" incumbent directors who fail to obtain the vote continue in their duties indefinitely. This rule summarily defeats the purpose of the majority voting provision and risks the ire of governance activists, who thus insist on an auto-resignation mechanism. Note that in California, the 'holdover' provision is limited to 90 days post-failed election, forcing the director to leave thereafter. Accordingly, California's automatic statutory ouster pre-empts the need for an auto-resignation policy. The vote standard in a 'modified' majority system is expressed in the bylaws as a candidate is elected if the "for" votes exceed "against" votes. This is the favored route of governance activists – and where most companies have gone: over two thirds of non-dual class companies have this standard. Given the bylaws codification, it makes sense to switch the term "withhold" votes to truly "against" votes – so that directors receive "for" and "against" votes.

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

- **Majority of Votes Cast:** The bylaws requires a majority of votes cast - under Delaware law, abstentions and broker non-votes thus are not in either the numerator or denominator – with no resignation policy set forth. Very few companies – only 3 percent non-dual class companies

in our survey have adopted this standard, since the absence of a resignation policy creates a ‘failed election’. Then, under Delaware law, if a company has a majority of votes cast standard without an auto-resignation policy, the effect is to make it more difficult for an insurgent director to be nominated, while having no practical impact on incumbent director nominees, who in a failed election will continue to serve on the board.

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

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

- **Majority of Shares Outstanding:** Both abstentions and broker non-votes are counted as “withhold/against” votes. Again, no company in our survey has been this aggressive.

The Practical Effects of Auto-Resignations and “Failed” Elections

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

Contested Director Election Standards: The Necessity of Plurality Voting

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

The Confused State of Vote Standards and Proxy Statements

We reviewed proxy statements that appeared to inaccurately state either the voting standards and/or associated vote count procedures for things such as abstentions and broker non-votes – a not uncommon defect that has been noted with concern by senior staff at the SEC. Combine 5 director vote standard formulations (plurality, plurality plus, modified majority, majority of votes cast and majority of votes present and entitled to vote) and add 4 technical votes (“for”, “withhold” – for plurality – and “against” for all others, abstentions and broker non-votes) and one has a challenging disclosure obligation to summarize.

For clarity on one item that seems to create confusion in particular: Abstentions under Delaware law are not “votes cast” but are “votes present and entitled to vote” – accordingly, they count the same as “against” votes in majority of votes present and entitled to vote elections. Conversely, broker non-votes in Delaware are not considered eligible for voting – and so count neither as a vote cast or as a vote present and entitled to vote. We summarize these Delaware vote standards in the chart below:

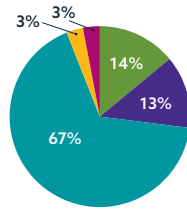
	Plurality	Majority of Votes Cast	Majority of Votes Present and Entitled to Vote	Majority of Outstanding Shares
For	√	√	√	√
Withhold	√			
Against		√	√	√
Abstain		Not Counted	Counted as ‘Against’	Counted as ‘Against’
Broker Non-Vote	Not Counted	Not Counted	Not Counted	Counted as ‘Against’

Under Delaware law, broker non-votes are not deemed as present and entitled to vote. However, broker non-votes are counted towards a quorum so long as a “routine” matter (e.g. approval of independent public accounting firm) appears on the ballot.

The rules are slightly different for NYSE listed companies, where (notwithstanding state law) broker non-votes cannot count as present for quorum purposes. And, to add to complexity, but separate from director elections, for NYSE listed companies that seek shareholder approval of certain matters, such as approval of equity plan changes, stock issuances or a change of control, abstentions are treated as votes cast and therefore in practice have the same effect as a vote against the proposal.

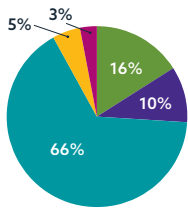
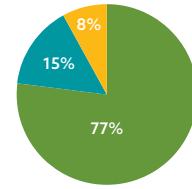
NON-DUAL CLASS

Total (115)

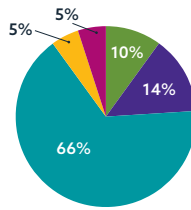


DUAL CLASS

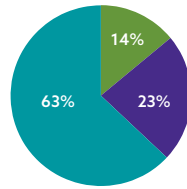
Total (13)



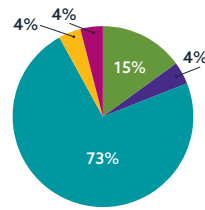
Hardware
(38)



Semiconductors
(21)



Software
(30)



Services/Consumer
(26)

Over 95 percent of companies have policies in place triggering resignations of incumbent directors who fail to receive more "for" votes than "withhold" (plurality plus) or "against" (modified majority) votes. This shows the dramatic expansion of majority voting formulations in the past decade.

We have included California corporations in the 'modified' majority category because of California's statutory provisions create the same end result; other states statutory provisions have analogues of the Delaware holdover rule.

Not surprisingly, it is the inverse for dual class companies, with over 75 percent still relying on conventional plurality voting standards, as it is largely futile for governance activists to mount campaigns against plurality in a controlled voting set-up.

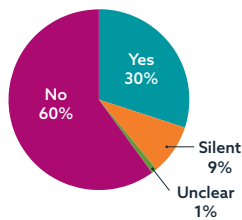
■ Plurality
 ■ Plurality "Plus"
 ■ "Modified" majority of votes cast
 ■ Majority of votes cast
 ■ Majority of votes present and entitled to vote

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

Is removal of directors restricted to **“for cause” only**?

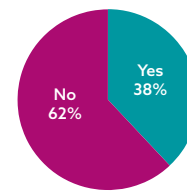
NON-DUAL CLASS

Total (115)



DUAL CLASS

Total (13)



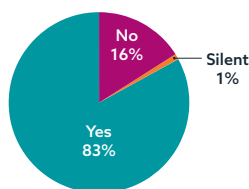
COMMENTARY: Around one third of all companies restrict the ability of stockholders to remove directors to “for cause” only – meaning that these companies do not allow for directors to be removed merely for performance issues, even if a supermajority of stockholders initiate a removal effort.

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

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

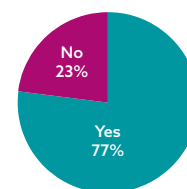
NON-DUAL CLASS

Total (115)



DUAL CLASS

Total (13)



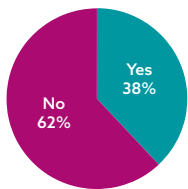
COMMENTARY: Well over 75 percent of companies give the board the sole right to fill board vacancies.

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

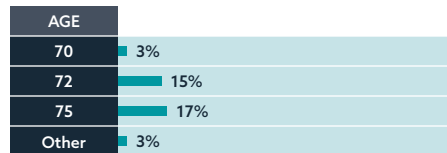
Has the company adopted director *age limits*?

NON-DUAL CLASS

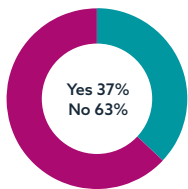
Total (115)



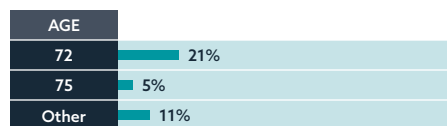
Yes: Age limit of director in years



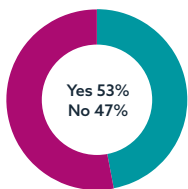
Hardware (38)



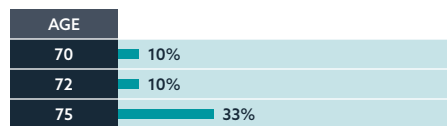
Yes: Age limit of director in years



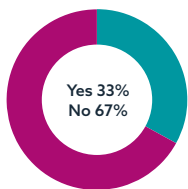
Semiconductors (21)



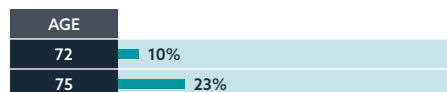
Yes: Age limit of director in years



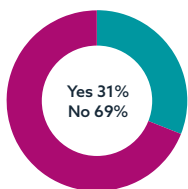
Software (30)



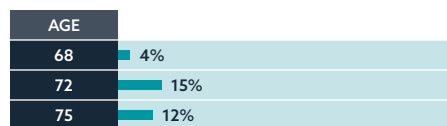
Yes: Age limit of director in years



Services/Consumer (26)

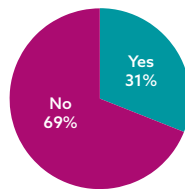


Yes: Age limit of director in years

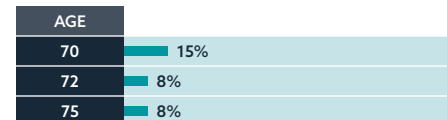


DUAL CLASS

Total (13)



Yes: Age limit of director in years



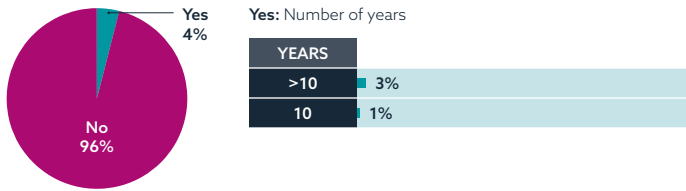
COMMENTARY: Interestingly, semiconductor companies have a significantly higher adoption rate of age limits – at about 20% greater than the other sub-sectors. One theory for this is that many semiconductor companies are more mature and likely to thus have directors who have been with the companies for a longer tenure, meaning greater in age, and such companies may perceive themselves as under more pressure to rotate board members by using a quantitative (if somewhat arbitrary) metric.

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

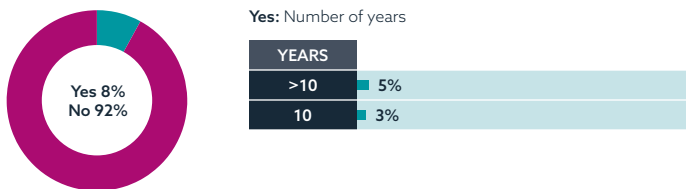
Has the company adopted director *tenure limits*?

NON-DUAL CLASS

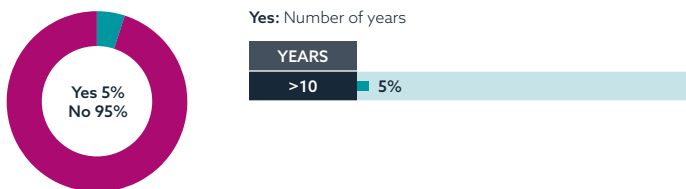
Total (115)



Hardware (38)



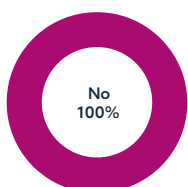
Semiconductors (21)



Software (30)

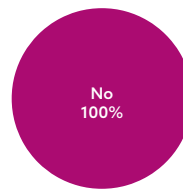


Services/Consumer (26)



DUAL CLASS

Total (13)



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

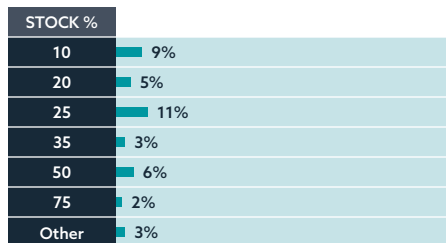
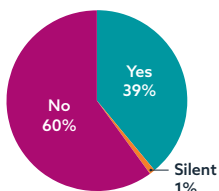
PROXY ADVISORY POLICIES: ISS does not support age limits, but does scrutinize any board where the average tenure of outside directors exceeds 15 years. Glass Lewis rejects both age and tenure limits outright.

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

NON-DUAL CLASS

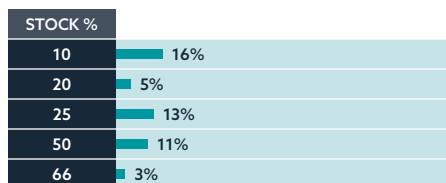
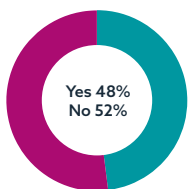
Total (115)

Yes: Percentage of stock required to call special meetings



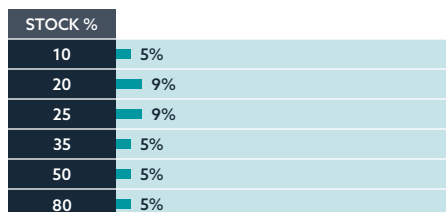
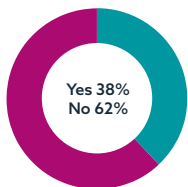
Hardware (38)

Yes: Percentage of stock required to call special meetings



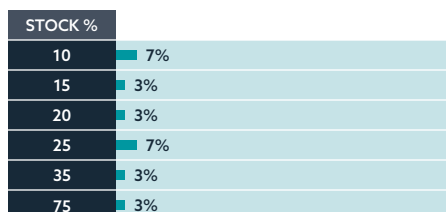
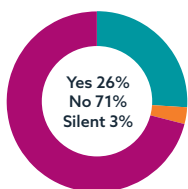
Semiconductors (21)

Yes: Percentage of stock required to call special meetings



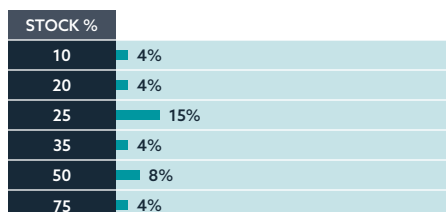
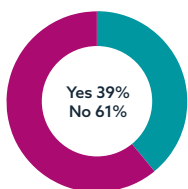
Software (30)

Yes: Percentage of stock required to call special meetings



Services/Consumer (26)

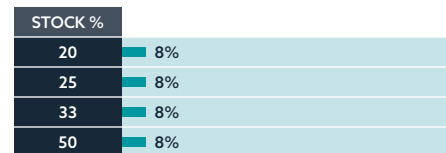
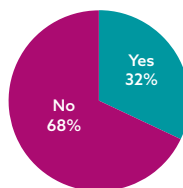
Yes: Percentage of stock required to call special meetings



DUAL CLASS

Total (13)

Yes: Percentage of stock required to call special meetings



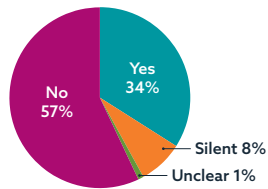
COMMENTARY: Roughly two-thirds of companies do not allow stockholders to call a special meeting. Of those that do, the percentage of shares required to call a meeting varies widely (and somewhat evenly) across non-dual class and dual class companies alike.

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

Can stockholders take *action by written consent*?

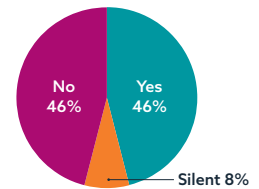
NON-DUAL CLASS

Total (115)



DUAL CLASS

Total (13)



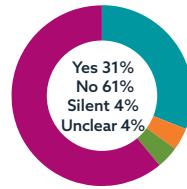
Hardware
(38)



Semiconductors
(21)



Software
(30)



Services/Consumer
(26)

Approximately 60 percent do not allow action by written consent.

It is more evenly split for dual class companies - where 46 percent in fact permit action by written consent.

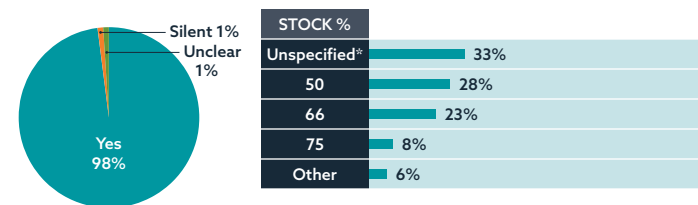
COMMENTARY: Mature companies without other ostensible blocking mechanisms for activists generally prohibit action by written consent in order to restrict fundamental corporate changes to actual meetings of stockholders. The dichotomy with dual class companies is likely because incumbent founder stockholders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

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

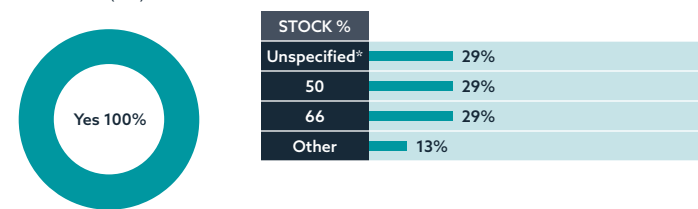
What percentage of vote of stockholders is required to **amend bylaws**?

NON-DUAL CLASS

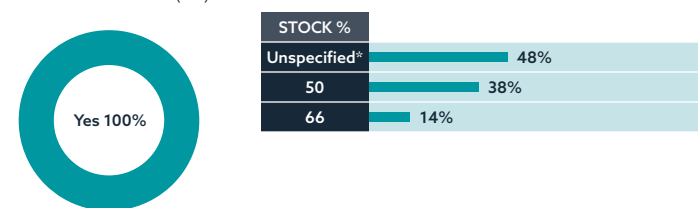
Total (115)



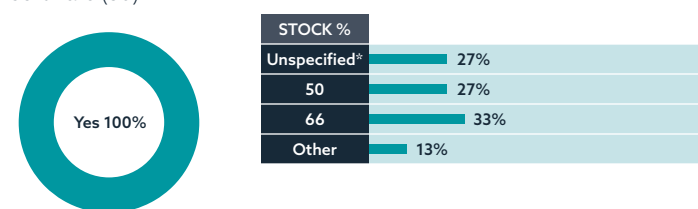
Hardware (38)



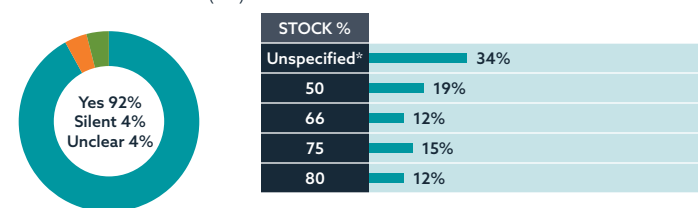
Semiconductors (21)



Software (30)

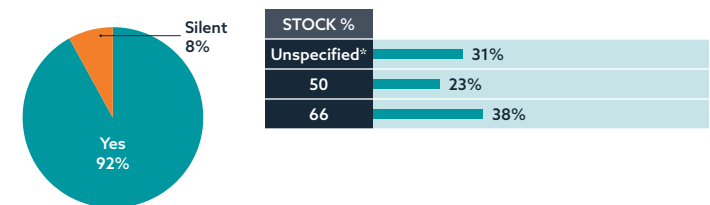


Services/Consumer (26)



DUAL CLASS

Total (13)



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

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

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

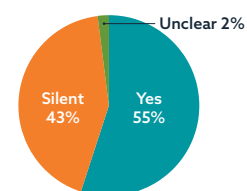
Conversely, the vast majority of companies require a vote threshold that is (a) drawn from all outstanding shares (not just the majority voting at a meeting), and (b) often, greater than 50 percent of such outstanding shares. In a small number of cases (included under the dataset "Yes-Other"), the greater vote is limited to matters concerning board size and removal (the provisions most useful in a proxy fight), while in the rest of these companies, the majority of outstanding - or supermajority of outstanding - requirement applies to the bylaws in their entirety.

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

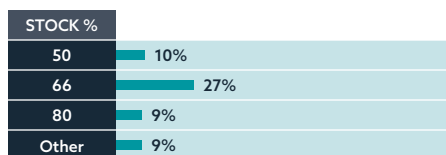
What percentage of vote of stockholders is required to amend the certificate of incorporation?

NON-DUAL CLASS

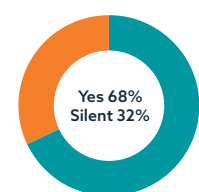
Total (115)



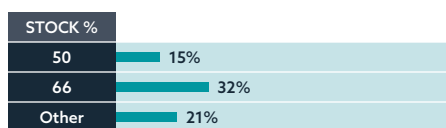
Yes: Percentage of vote required to amend the certificate of incorporation



Hardware (38)



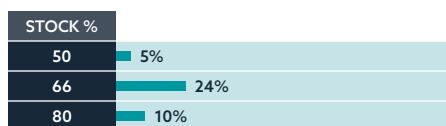
Yes: Percentage of vote required to amend the certificate of incorporation



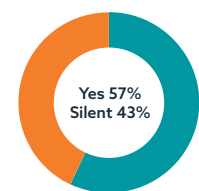
Semiconductors (21)



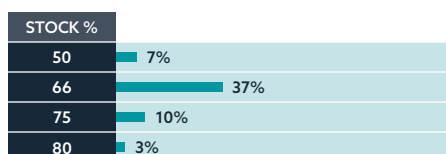
Yes: Percentage of vote required to amend the certificate of incorporation



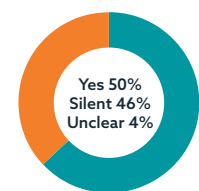
Software (30)



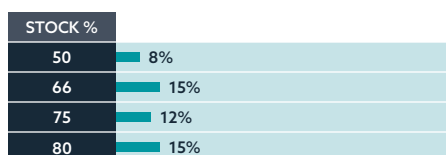
Yes: Percentage of vote required to amend the certificate of incorporation



Services/Consumer (26)

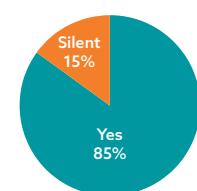


Yes: Percentage of vote required to amend the certificate of incorporation

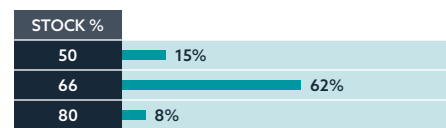


DUAL CLASS

Total (13)



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



For Delaware companies, Section 242 prevents stockholders from unilaterally amending the certificate of incorporation without initiation from the board of directors. Once the board recommends amending the certificate of incorporation, the Delaware default is that a majority of shares voting at a meeting can approve such an amendment (again, abstentions and broker non-votes are not counted as having voted).

For non-dual class companies (where stockholder vote percentages are the most at issue because of the lack of a supervoting alternate class of common stock), approximately 40 percent of the companies follow the Delaware default by simply remaining silent on the subject. Conversely, over half of these non-dual class companies have enhanced standards that require a percentage of the outstanding shares to vote in favor of the amendment – in these formulations, abstentions and broker non-votes thus count the same as “no” votes. 27 percent of non-dual class companies require 66 2/3 percent of outstanding shares and another 10 percent require at least 50.1 percent of outstanding shares.

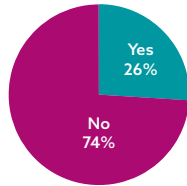
In practice, a substantial portion of votes from brokerage account holders (in “street name”), whether on behalf of institutions or retail investors, still take the form of broker non-votes, which again count the same as “no” votes in formulations requiring the vote of outstanding shares. For bylaws, a board can, so long as it has been delegated such authority (which most boards have), unilaterally amend the bylaws. However, a board cannot unilaterally amend the certificate of incorporation – and thus obtaining the affirmative vote of at least 66 2/3 percent of the outstanding shares to amend the certificate of incorporation (even when a board has recommended the amendment) means that certificates of incorporation for such supermajority voting-standard companies are at significant risk not to change, even if the board has recommended doing so.

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

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

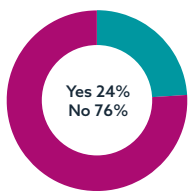
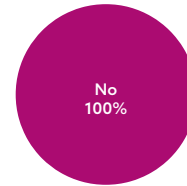
NON-DUAL CLASS

Total (115)

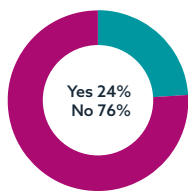


DUAL CLASS

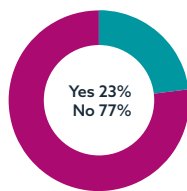
Total (13)



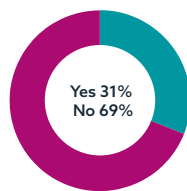
Hardware
(38)



Semiconductors
(21)



Software
(30)



Services/Consumer
(26)

In their most common form, proxy access provisions allow groups of up to 20, 50 or an unlimited number of stockholders who have collectively held at least 3 percent of a company's shares for at least 3 years to nominate up to 20 of a company's board nominees to be included in the company's annual meeting proxy materials. Some governance activists have advocated a cap on board nominees at 25 percent of the board, but almost without exception adopting companies in our survey chose the 20 percent cap, which is the emerging de facto standard.

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

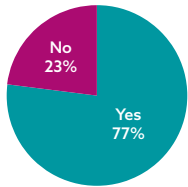
The adoption rate is growing – and rapidly so. Over 25 percent of non-dual class companies have enacted proxy access, again almost uniformly using the 3 years/3 percent/up to 20 percent of Board/up to 20 stockholders together formulation. One expects this number to rise significantly, both as other companies use initial adopters for comfort and with the continued focus on this area by governance activists.

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

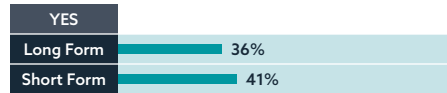
Do advance notice bylaws provisions require **disclosure of derivative positions** for nomination of director candidates?

NON-DUAL CLASS

Total (115)

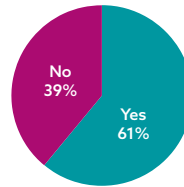


Yes: Relative length of "derivative position" explanation

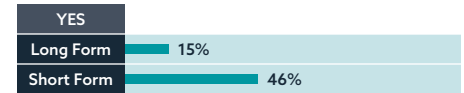


DUAL CLASS

Total (13)



Yes: Relative length of "derivative position" explanation



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

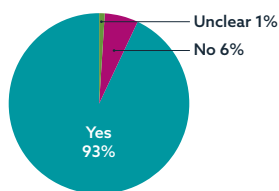
Less than 25 percent of non-dual class companies have not adopted these disclosure-only provisions. Of those that have, around one-half have conversely adopted very detailed requirements on what constitutes a derivative position (e.g., synthetic equity). The other half have adopted provisions that briefly describe items that must be listed. Certainly there seems to be little downside to requiring short (or even better, long) form disclosure, and one wonders about the substantive reasons behind the lack of adoption by the 25 percent that have not done so.

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

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

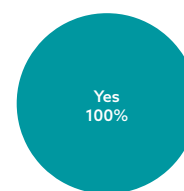
NON-DUAL CLASS

Total (115)



DUAL CLASS

Total (13)



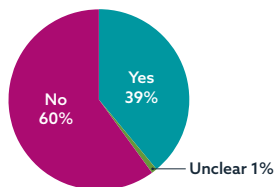
COMMENTARY: Unsurprisingly, over 90 percent of all companies, depending on category, continue to allow boards to issue preferred stock at their discretion, or "blank check preferred." While some governance activists decry this ability, it is particularly crucial for the adoption of stockholder rights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

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

Is there an *exclusive forum/venue* provision?

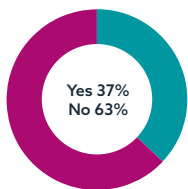
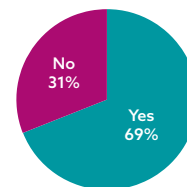
NON-DUAL CLASS

Total (115)

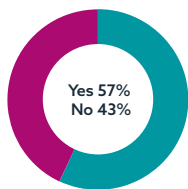


DUAL CLASS

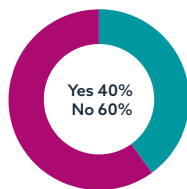
Total (13)



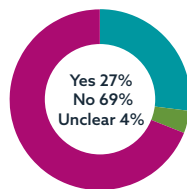
Hardware
(38)



Semiconductors
(21)



Software
(30)



Services/Consumer
(26)

Approximately 40 percent of companies have adopted exclusive forum bylaws, which restrict stockholder litigation to a single litigation forum/venue—almost always Delaware, as the favorite state of incorporation. Importantly, companies can elect to waive these provisions if they ultimately believe that a settlement outside Delaware will be a better outcome—so the “exclusive” nature is really an option in the company’s favor. Although 60 percent of companies thus have not adopted the provisions, the incidence rate still represents the feature spreading like wildfire, since the provisions have only gained significant attention in the past few years.

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

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

SURVEY COMPONENTS

Name	Ticker
3D Systems Corp.	DDD
ACI Worldwide	ACIW
Adobe Systems	ADBE
Advanced Micro Devices	AMD
Akamai Technologies	AKAM
Allscripts - MISYS	MDRX
Alphabet	GOOG
Amdocs	DOX
Analog Devices	ADI
ANSYS	ANSS
Apple	AAPL
Applied Materials	AMAT
Arista Networks	ARIS
Arris Group	ARRS
Aspen Tech	AZPN
athenahealth	ATHN
Autodesk, Inc.	ADSK
Blackbaud	BLKB
Broadcom	AVGO
Brocade Communications	BRCD
CA	CA
CACI	CACI
Cadence Design Systems	CDNS
Cavium	CAVM
CDK Global	CDK
CDW	CDW
Cerner	CERN
Ciena	CIEN
Cirrus Logic	CRUS
Cisco Systems	CSCO
Citrix Systems	CTXS
Cognizant Tech Solution	CTSH
CommScope	COMM
CommVault Systems	CVLT
Corning	GLW
Cree	CREE
CSRA	CSRA
Cypress Semiconductor	CY
Dell	DVMT
Diebold	DBD
DST Systems	DST
DXC Technology	DXC
Dycom	DY
eBay	EBAY
EchoStar	SATS

Name	Ticker
Electronics for Imaging	EFII
Ellie Mae, Inc.	ELLI
EPAM Systems	EPAM
F5 Networks	FFIV
Facebook	FB
Fair Isaac	FICO
Finisar	FNSR
FireEye	FEYE
Fortinet	FTNT
Garmin	GRMN
Gartner	IT
GrubHub	GRUB
Guidewire Software	GWRE
Harris	HRS
Hewlett Packard Enterprise	HPE
HP	HPQ
IAC/InteractiveCorp	IAC
IBM	IBM
Integrated Device Tech.	IDTI
Intel	INTC
InterDigital	IDCC
Intuit	INTU
J2 Global Communications	JCOM
Juniper Networks	JNPR
KLA-Tencor	KLAC
Lam Research	LRCX
Leidos	LDOS
Lumentum Holdings	LITE
Manhattan Associates	MANH
Marvell Tech	MRVL
Maxim Integrated Products	MXIM
Medidata Solutions	MDSO
Microchip Tech	MCHP
Micron Tech	MU
Microsemi	MSCC
Microsoft	MSFT
Motorola Solutions	MSI
NCR	NCR
NetApp	NTAP
NetScout	NTCT
Nuance Communications	NUAN
Nvidia	NVDA
ON Semiconductor	ON
Oracle	ORCL
Palo Alto Networks	PANW

Name	Ticker
Pandora Media	P
Pitney Bowes	PBI
Plantronics, Inc.	PLT
Proofpoint	PFPT
PTC	PTC
Qorvo	QRVO
Qualcomm	QCOM
Red Hat	RHT
SAIC	SAIC
Salesforce.com	CRM
Seagate Tech	STX
Semtech	SMTC
ServiceNow	NOW
Silicon Laboratories	SLAB
Skyworks Solutions	SWKS
Splunk	SPLK
SS&C Technologies	SSNC
Symantec	SYMC
Synaptics	SYNA
Synnex	SNX
Synopsys	SNPS
Tableau Software	DATA
Tech Data	TECD
Teradata	TDC
Teradyne	TER
Texas Instruments	TXN
Twitter	TWTR
Tyler Technologies	TYL
Ultimate Software	ULTI
Vantiv	VNTV
Veeva Systems	VEEV
Verint	VRNT
VeriSign	VRSN
Versum Materials	VSM
ViaSat	VSAT
Viavi Solutions	VIAV
Vmware	VMW
Western Digital	WDC
Workday	WDAY
Xerox	XRX
Xilinx	XLNX
Yahoo	YHOO
Zayo	ZAYO
Zillow	ZG

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