ENVIRONMENTAL & SOCIAL VOTING AT INDEX FUNDS

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ABSTRACT

How should index funds vote? This difficult, fact-dependent question is more important than ever due to index funds' growing dominance. By voting one-quarter of shares at large public companies, just three index funds increasingly control American corporate governance. Nowhere is this control more acute than in the case of environmental and social ("E&S") voting. The "Big Three" funds—Vanguard, BlackRock, and State Street—have the power to determine the fate of the bulk of E&S proposals.

This Article demonstrates that, despite a considerable marketing focus on their E&S efforts, overall support for E&S proposals is low for the Big Three. In the 2018-2019 proxy season, Vanguard's largest funds supported 7.5% of unique shareholder E&S proposals, while State Street's largest funds supported 22.7% of such proposals and BlackRock's largest funds supported 7.1% of such proposals. Other funds support E&S proposals at far higher rates (e.g., Deutsche Bank at 77.9%) and far lower rates (e.g., Dimensional at 0%). Given that funds have a fiduciary duty to vote in the "best interests" of their investors, which fund got it right? The surprising answer is that no one knows—not even the funds themselves. Only by blind luck could these funds, who seek no input from their investors and make no serious attempts to discern investor preferences, be accurately reflecting investors' interests with their voting behaviors.

Ultimately, this Article concludes that it is a convenient myth that index fund stewardship teams are even marginally constrained by the "best interests" standard when voting on E&S proposals, and likely other proposals as well. The truth is that these index funds, possessing the power to decide the fate of most E&S proposals, can do as they wish with that power. The status quo urgently needs change to ensure that index funds are truly acting in investors' best interests. This Article proposes that such constraint should come in the form of greater input from index fund investors.

I. INTRODUCTION

Three index fund providers may soon control the governance of nearly all public companies in America. BlackRock, Vanguard, and State Street—collectively known as the "Big Three"—currently own approximately one-fifth of large publicly-traded companies, and their ownership interest is projected to continue growing at a rapid rate.[1] As this realization has catapulted into public consciousness, academics and policymakers are beginning to grapple with the implications of this profound re-concentration of corporate ownership.[2]

The power of the Big Three derives from their ability to vote the shares they manage.[3] Current law provides that the index fund provider—not the investor—has the right to vote the shares purchased with the investor's money.[4] The only substantive constraint on the exercise of this voting power is that funds must vote in the "best interests" of their investors.[5] This Article empirically examines how the Big Three and their competitors interpret this "best interests" standard in the context of environmental and social ("E&S") proposals. Problematically, the results suggest that the "best interests" standard allows funds unbridled discretion to vote as they see fit on E&S issues, untethered from the actual views of their investors.[6] The Article posits that, since funds make no serious attempts to discern investor preferences, E&S voting is driven by factors other than investor preferences.

If investors' interests are not driving index funds' voting behaviors, then what is? Scholars are roughly divided into two schools of thought.[7] In the first group, scholars argue that index funds possess inadequate incentives for robust stewardship, and specifically highlight issues with

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[1]Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 724 (2019) [hereinafter Bebchuk & Hirst, *Specter of the Giant Three*].

[2]*See id.*

[3]*Id.*

[4]*See* Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, 68 Fed. Reg. 6564, 6565 (Feb. 7, 2003) (codified at 17 C.F.R. §§ 239, 249, 270, 274).

[5]*Id.* ("An investment adviser voting proxies on behalf of a fund . . . must do so in a manner consistent with the best interests of the fund and its shareholders.").

[6]*See infra* p. 9.

[7]*See* Lucian Bebchuk & Scott Hirst, I*ndex Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2030 (2019) [hereinafter Bebchuk & Hirst, *Index Funds and the Future of Corporate Governance*].

fund fee structures, collective action problems, and conflicts of interest.[8] These scholars posit that because index funds charge fees based on assets under management, rather than performance, they capture an insufficient piece of share price gains to incentivize value-enhancing stewardship activities.[9] Further, they note that individual funds face classic collective action problems that allow their competitors to free-ride on any stewardship activities in which they engage, leading them to underinvest in E&S.[10] Finally, they highlight the conflicts of interest for many index funds that desire to manage the retirement plans of portfolio companies and may therefore be hesitant to oppose management.[11] In the second school of thought, scholars largely concede that there exist numerous reasons why index funds might underinvest in E&S, but they argue that there are other, improper incentives for over-engaging in E&S activism, and that these factors predominate.[12] These scholars contend that index funds use E&S voting primarily as a marketing tool in an effort to differentiate what are essentially commoditized funds tracking identical indices.[13] Under this view, funds are driven less by the interests of current investors, to whom they owe fiduciary duties, and more by the interests of the potential future investors, whose capital they hope to acquire.[14]

It is the thesis of this Article that there is truth to both views: funds increasingly want to be *perceived by potential customers* as taking positive action on E&S issues, but they are also incentivized to avoid jeopardizing retirement management revenue by directly opposing managers and to keep fees low by spending as little as possible on stewardship activities. Moreover, because *current* investors have different views than younger, more progressive *future* investors on many hot-button E&S issues, funds may be wary of directly opposing the interests of their current investors and the attendant risk of liability for violating their fiduciary duties. If this thesis is true, then one would expect the following findings: (i) E&S initiatives at Big Three index funds would be highly-publicized, (ii) Big

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[8]*See id.* at 2133. *But see* Edward Rock & Marcel Kahn, *Index Funds and Corporate Governance: Let Shareholders be Shareholders* (N.Y.U. Law & Econ. Research Paper Series, Working Paper No. 18-39, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3295098 (arguing that large index funds, because of their scale, do possess sufficient financial incentives for value-increasing stewardship).

[9]*See* Bebchuk & Hirst, *Index Funds and the Future of Corporate Governance*, *supra* note 7, at 2050-51.

[10]*Id.* at 2047.

[11]*Id.* at 2059-62.

[12]*See* Michal Barzuza et al., *Shareholder Value(s): Index Fund Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. (forthcoming 2020).

[13]*Id.*

[14]*Id.*

Three voting guidelines would not commit the funds to any particular course of action on E&S matters, (iii) actual E&S voting at index funds would differ significantly from depictions of E&S in marketing materials, almost always in a pro-management direction, and (iv) index funds would favor non-transparent methods of influence, such as "engagements," to avoid accountability to either side. This Article finds support for all four of these hypotheses.

It is the contention of this Article that the typical index fund investor would be unsatisfied with the stewardship decisions made on their behalf if they possessed better information about index funds' voting behaviors. This Article seeks to provide such information. It organizes voting data from the most recent proxy season into meaningful categories, and it provides both the results from individual votes and the overall patterns within these categories. It then contextualizes the Big Three's voting behaviors by providing data from competitor index funds.

This paper proceeds as follows: Part II explores the rise of Big Three power over corporate E&S initiatives. It demonstrates that the Big Three have considerable influence on the fate of E&S proposals at issue in corporate elections, and it finds that the Big Three express general support for E&S initiatives without actually committing to any particular course of action. Part III provides data on the rates of support for E&S proposals that were at issue in the 2018-2019 proxy season, and it finds that the Big Three supported far fewer such proposals than some of their competitors and somewhat more proposals than other of their competitors. Part IV draws out the key implications of the data, most prominently that index funds are not meaningfully constrained to act in their investors' best interests and that index fund investors' interests likely do not determine voting decisions for the Big Three. Part V provides the overall conclusion that index funds should be required to solicit input from actual index fund investors when making their stewardship decisions, wherein funds would (1) permit voting rights to "pass through" to investors, who would be able to establish generalized "instructions" on how votes should be cast on common ballot items, (2) enable investors to opt to have the proxy votes corresponding to their ownership cast in line with the recommendations of their preferred representative (such as a proxy advisor or other mutual fund provider), (3) solicit information on investors' interests and values in the form of a survey, or, ideally, (4) allow investors to select their preferred method(s) of involvement from the prior three options.

II. THE BIG THREE & ENVIRONMENTAL & SOCIAL SHAREHOLDER PROPOSALS

This Part describes proxy voting at the Big Three index funds. Part II.A discusses the legal right of index funds to vote in corporate elections. Part II.B explores the rise of environmental and social (E&S) shareholder proposals. Part II.C reviews statements made by the Big Three about various E&S topics. Part II.D examines the Big Three's socially responsible investing (SRI) funds and their orientation towards E&S shareholder proposals.

A. *Proxy Voting at the Big Three Index Funds*

In a very short period of time, index funds have gone from nonentities to the kings of corporate governance. In particular, the three largest index fund providers, the "Big Three" triad of Vanguard, State Street, and BlackRock, have surged to dominance.[15] The Big Three's average combined stake in S&P 500 companies has nearly quadrupled in just two decades, going from 5.2% in 1998 to 20.5% as of 2017.[16] Their voting control is even larger due to absenteeism amongst other shareholders: as of 2019, the Big Three controlled 25% of voted shares for S&P 500 companies and 22% of vote shares for Russell 3000 companies.[17] The trio also now serves as the largest shareholder at nearly 90% of publicly-traded companies in the United States.[18]

The Big Three's rise to voting dominance represents a dramatic departure from the historical status quo. The separation of ownership and control has long been a central conceptual feature of corporations; under this framework, shareholder owners have minimal control despite their ownership of the corporation, while controlling managers have substantial control despite their relatively small ownership stakes.[19] This notion of separation of ownership and control was first advanced by Berle and Means in 1932,[20] and the concept has since become a fundamental tenet of corporate law. However, Berle and Means also articulated a key exception to the general rule: concentrated ownership of a substantial percentage of

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[15]*See* Bebchuk & Hirst, *Specter of the Giant Three*, *supra* note 1, at 723.

[16]*Id.* at 724.

[17]*Id.* At 736-37.

[18]Eric A. Posner et al., *A Proposal to Limit the Anticompetitive Power of Institutional Investors*, 81 ANTITRUST L. J. 669, 674 (2017).

[19]*See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 2-5 (1932).

[20]*Id.*

stocks could give those owners effective control over a corporation.[21] Berle and Means estimated 5% or less minority ownership constituted *management control*, 5-20% minority ownership constituted *joint management and minority control*, and 20-50% constituted *minority control*.[22] Under these estimates, the Big Three collectively have already upended the classical scenario of management control and are entering into a position where they have minority control at thousands of the world's largest corporations.

Of course, index funds do not "own" shares in the same way as an archetypal investor. Instead, index fund families, such as Vanguard, offer individual index funds, such as Vanguard's Total Stock Market Index Fund, to customers, generally individual human beings who invest a portion of their income to save for a large expense or to fund their retirement. In this way, the many millions of Big Three clients might appear to be the dispersed pool of "owners" envisioned by Berle and Means. However, index funds are structured so that the index fund directly holds shares in portfolio companies, while individual investors merely own shares in the index fund itself.[23] This structure means that the voting rights are held by the index fund rather than by individual fund investors.[24] As Vanguard states in the fine print of one fund document: "Each Vanguard fund advised by Vanguard retains the authority to vote proxies received with respect to the shares of equity securities held in a portfolio advised by Vanguard."[25] Although it is ultimately the money of individual investors that funds the purchase of the Big Three's colossal ownership stakes, these index funds have functionally assumed the position of "owner" for purposes of proxy voting.

Still, the Big Three's voting dominance was not always a certainty. Historically, index funds did not necessarily vote their shares in corporate elections.[26] However, in 2003, the U.S. Securities and Exchange Commission (SEC) issued a rule requiring index fund providers to disclose

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[21] *Id.* at 84-88.

[22] *Id.* at 109.

[23] *See* Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, 68 Fed. Reg. 6564, 6565 (Feb. 7, 2003) (codified at 17 C.F.R. §§ 239, 249, 270, 274).

[24] *Id.*

[25] THE VANGUARD GROUP, INC., VANGUARD WORLD FUND STATEMENT OF ADDITIONAL INFORMATION (PART B) 87, 111 (Dec. 20, 2019), https://personal.vanguard.com/pub/Pdf/sai023.pdf?2210159061 [hereinafter VANGUARD WORLD FUND STATEMENT].

[26] *See* Jill Fisch et al., *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17, 44 (2019).

how they voted their shares.[27] Although active voting was not explicitly required by that rule, index fund providers have since chosen to vote nearly all of their shares each year.[28]

Given the highly diversified nature of index fund portfolios, index funds vote on hundreds of thousands of ballot items annually. In 2018-2019, Vanguard voted on nearly 170,000 individual matters,[29] State Street voted on over 157,000 topics,[30] and BlackRock voted on 155,131 ballot items.[31] Voting decisions for these matters are primarily made by concentrated groups of a few dozen[32] index fund employees known as "stewardship teams."[33]

The astronomic growth of index funds has quickly brought these stewardship teams into positions of enormous influence, and scholars have expressed increasing concern about this concentration of power.[34] Professor John Coates refers to the Big Three's dominance over voting decisions as the "Problem of Twelve," an unprecedented situation where control of most public companies "will be controlled by a dozen or fewer people," a group which will include senior management of the Big Three, the management of the proxy advisory firms such as Institutional Shareholder Services (ISS) and Glass-Lewis, and the management of a few

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[27]*See* Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, 68 Fed. Reg. 6564 (Feb. 7, 2003) (codified at 17 C.F.R. §§ 239, 249, 270, 274).

[28]Fisch et al., *supra* note 26, at 44.

[29]*See* THE VANGUARD GROUP, INC., INVESTMENT STEWARDSHIP 2019 ANNUAL REPORT 7 (2019), https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2019_investment_stewardship_annual_report.pdf [hereinafter VANGUARD 2019 INVESTMENT STEWARDSHIP REPORT].

[30]*See* STATE STREET GLOBAL ADVISORS, STEWARDSHIP REPORT 2018-2019 9 (2019), https://www.ssga.com/investment-topics/environmental-social-governance/2019/09/annual-asset-stewardship-report-2018.pdf [hereinafter STATE STREET 2019 INVESTMENT STEWARDSHIP REPORT].

[31]*See* BLACKROCK, 2019 INVESTMENT STEWARDSHIP ANNUAL REPORT 24 (2019), https://www.blackrock.com/corporate/literature/publication/blk-annual-stewardship-report-2019.pdf [hereinafter BLACKROCK 2019 INVESTMENT STEWARDSHIP REPORT].

[32]*See* Hortense Bioy et al., *Passive Fund Providers and Investment Stewardship*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 21, 2017), https://corpgov.law.harvard.edu/2017/12/21/passive-fund-providers-and-investment-stewardship (noting that, as of 2017, Vanguard had twenty-one stewardship team employees, State Street had eleven, and BlackRock had thirty-three).

[33]*See* Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 478 n.85 (2014) (describing centralization of voting decisions at various index funds); *see also* STATE STREET 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 30, at 22 ("All voting and engagement activities are centralized within our Stewardship Team, irrespective of investment strategy or geographic region.").

[34]*See infra* notes 35-37.

other funds.[35] Professors Lucian Bebchuk and Scott Hirst warn that the concentration of power may be in the hands of an even smaller group—the Big Three alone.[36] Even the founder of Vanguard, the late John Bogle, expressed concern about index funds' growing dominance: "If historical trends continue, a handful of giant institutional investors will one day hold voting control of virtually every large U.S. corporation."[37]

Fears about the rising concentration of power in the hands of a few stewardship team employees are augmented by the meager constraints on how stewardship teams choose to vote with the shares under their control. There are two basic constraints on index fund voting.[38] The first constraint is disclosure—index funds are required to disclose the policies and procedures guiding their voting decisions and their actual voting record.[39] However, the nature of these disclosures does not naturally facilitate efforts to compare funds voting behavior or hold funds accountable for voting behaviors.[40] Voluminous voting records for various funds are released months after votes have been cast in large documents that can be difficult to access and burdensome to parse through.[41] Voting guidelines do not contain clear indications of the funds' positions on dozens of controversial topics,[42] and summary statistics of voting practices, when provided, are often stated in very general terms that leave interested investors without a sense of which particular initiatives have been supported or opposed.[43]

Additionally, whatever disclosure is made, index fund investors have unique structural limitations on exit and voting rights that severely

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[35]John C. Coates, *The Future of Corporate Governance Part I: The Problem of Twelve* 14 (Harvard Law Sch., Working Paper No.1, 2018).

[36]Bebchuk & Hirst, *Specter of the Giant Three*, *supra* note 1, at 724.

[37]John C. Bogle, *Bogle Sounds a Warning on Index Funds*, WALL ST. J. (Nov. 29, 2018, 10:15 AM), https://www.wsj.com/articles/bogle-sounds-a-warning-on-index-funds-1543504551.

[38]*See infra* notes 39, 59.

[39]*See* Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, 68 Fed. Reg. 6564, 6566 (Feb. 7, 2003) (codified at 17 C.F.R. §§ 239, 240, 270, 274).

[40]*See infra* notes 41-43.

[41]*See, e.g.*, STATE STREET 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 30, at 9 (containing the State Street's annual vote summary for 2018); *see also infra* Section III.C.

[42]*See infra* Section III.C.

[43]*See, e.g.,* VANGUARD 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 29, at 29 (stating that Vanguard funds voted in favor of 7% "environmental/social" proposals, without context as to the nature of which proposals were supported or opposed); *see also* STATE STREET 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 30, at 9 (noting that State Street voted "with management" on 89% of shareholder proposals without providing details on what the proposals entailed).

restrict their ability to shape funds' behaviors through these channels.[44] For most equity investors dissatisfied with a particular investment, their best recourse is the "Wall Street Rule"—exiting the investment and moving on to another.[45] However, there are important considerations that bear on an investor's ability to switch to a comparable index fund from a different provider. The first is the payment of capital gains taxes charged to investors upon the sale of their shares.[46] Investors are incentivized to stay in the fund as long as the cost of bad voting does not exceed the cost of capital gains taxes because they are ultimately repurchasing the same underlying assets.[47] While this is also true regarding ordinary company stock, switching between funds designed to produce identical returns by tracking similar indices differs from selling one company's stock to invest in another enterprise.[48] While the latter is an investment decision driven by considerations including risk, return, and governance rights, the former merely changes how the same investment is voted. Given the low probability that any one investor's shares will change the outcome of a proxy vote, rational investors will not want to incur costs in the form of capital gains taxes at rates of fifteen to twenty percent just to correct proxy voting misalignment in the absence of meaningful differences in risk and return. The second exit limitation involves the structure of tax-deferred retirement accounts.[49] 401(k) and 403(b) plans commonly have a limited menu of options available, frequently from only a single fund provider.[50] In such retirement plans, switching to a fund provider that better aligns with one's preferences is simply impossible. Thus, index fund investors

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[44]*See* John Morley & Quinn Curtis, *Taking Exit Rights Seriously: Why Governance and Fee Litigation Don't Work in Mutual Funds*, 120 YALE L.J. 84, 121-23 (2010).

[45]*See* Strine, *supra* note 33, at 502.

[46]*See* Morley & Curtis, *supra* note 44, at 113.

[47]Some commentators have minimized capital gains tax considerations by noting that mutual funds are required to make annual distributions of capital gains and ordinary income to investors, which reduces the tax burden of a sale when exiting a fund. *See, e.g.*, *id.* at 89-90. However, because of the low turnover inherent in passively managed index funds, this effect is less pronounced relative to their actively managed counterparts. Moreover, while this does reduce the impact of capital gains taxes, it does not eliminate it. For instance, the Vanguard Total Stock Market Index Fund had unrealized gains representing 42.53% of NAV as of January 31, 2020. Thus, while an investor in that fund would not realize capital gains taxes on the full NAV upon a sale of such a fund, this cost is still likely a meaningful deterrent to switching investments purely for proxy voting purposes. Moreover, utilizing an ETF structure means that certain funds are able to be still more tax efficient due to exemptions on recognizing gain for certain transactions involving the sale of appreciated property. *See generally* Jeffrey M. Colon, *The Great ETF Tax Swindle: The Taxation of In-kind Redemptions*, 122 PENN ST. L. REV. 1, 3-7 (2017).

[48]*See* Morley & Curtis, *supra* note 44, at 112-14.

[49]*See id.* at 112-13.

[50]*See id.* at 113.

have unique considerations regarding exit rights in both taxable and tax-deferred investment accounts.

Further, those investors that remain in the fund must face important limitations on their ability to influence fund managers through voting. First, the unique structure of index funds and other mutual funds means that investors often have inadequate incentives to engage in beneficial activism.[51] Mutual fund shares are not sold like ordinary shares, but instead are "redeemed" at a fixed net asset value (NAV) determined by the pro-rata price of the fund's underlying assets.[52] NAV is, counterintuitively, unaffected by governance changes that affect only the fund itself, such as changes in fees.[53] Rather, NAV is affected only when governance changes impact the underlying portfolio companies.[54] Even if fund-level governance changes succeed (e.g., fund managers agree to change portfolio composition in the future in a way that will generate higher returns), increased *future* returns to the fund are not reflected in the *current* NAV because NAV is unaffected by fund-level returns. Thus, the nature of mutual fund redemptions delays returns from beneficial activism and disincentivizes such activities at index funds and other mutual funds relative to ordinary companies.[55] Because NAV does not increase in direct response to beneficial governance changes at the fund level, such as increased responsiveness to investor preferences in voting on E&S issues, such activism becomes less appealing.[56] Second, the "voice" of index fund investors is relatively weak because boards of directors at index funds are generally much less responsive to shareholders relative to boards at ordinary companies. For instance, mutual funds are not required to hold annual shareholder meetings, and most do not do so voluntarily.[57] Initial directors, which the fund can effectively appoint, can serve indefinitely without reelection and may (without any vote of the shareholders) appoint their own successors.[58] Thus, even if investors have a clear preference regarding proxy voting policies, they are unlikely to influence management and, in any event, they will not be rewarded immediately (or perhaps ever) for positive changes in fund governance by an increase in NAV. Overall, disclosure requirements do little to constrain index funds'

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[51] *See id.* at 89.
[52] *See* Morley & Curtis, *supra* note 44, at 102.
[53] *See id.* at 89, 102-04.
[54] *See id.*
[55] *See id.* at 89, 108-04
[56] *See* Morley & Curtis, *supra* note 44, at 89-90.
[57] *See id.* at 93.
[58] *See id.* at 93-94.

behavior because exit and voting rights offer only limited recourse for index fund investors.

In addition to disclosure requirements, the second constraint on fund voting behavior is that index funds must vote "in a manner consistent with the best interests" of index fund investors.[59] Despite this requirement, index funds are not required to make any effort to discern the actual preferences of index fund investors nor do they make any serious efforts to do so.[60] Additionally, index funds routinely vote in opposite ways on controversial issues, despite all funds allegedly voting in a manner consistent with their investors' best interests.[61] Indeed, it is difficult to identify even a single instance in which index funds were constrained to vote in a certain manner by the "best interests" standard, highlighting the inability of the "best interests" standard to serve as a meaningful limit on funds' voting behaviors. Overall, it is highly unlikely that the votes cast by the Big Three reflect the way individual investors would choose to vote, given that voting decisions are not based upon input from actual investors. In practice, index fund managers have discretion to vote proxies as they deem appropriate, without any input from managers.

In these ways, the "best interest" standard and disclosure requirements are weak constraints on index fund managers' considerable power. Disclosure requirements do not provide index fund investors with much in the way of easily accessible information about fund voting behaviors, and structural and financial constraints prevent or disincentivize index fund investors from seeking an index fund provider with superior stewardship practices. Likewise, the "best interests" standard is of little utility in holding index fund providers accountable to their investors. Ultimately, under the status quo, individual index fund investors are unable to ensure that their fiduciaries actually pursue their best interests.

B. *The Rise of E&S Shareholder Resolutions*

At the same time that the Big Three index funds have surged to positions of proxy voting prominence, proxy voting itself has undergone a transformation, shifting from a venue to settle divergent views on financial

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[59]Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, 68 Fed. Reg. 6564, 6565 (Feb. 7, 2003) (codified at 17 C.F.R. §§ 239, 240, 270, 274) ("An investment adviser voting proxies on behalf of a fund . . . must do so in a manner consistent with the best interests of the fund and its shareholders.").

[60]*See* Caleb N. Griffin, *We Three Kings: Disintermediating Voting at the Index Fund Giants*, MD. L. REV. (forthcoming 2020).

[61]*See infra* Part IV.

policies to a battleground for some of the most salient political and social questions of our time. This transformation has largely been carried out through shareholder proposals.

Under 17 C.F.R. § 240.14a-8, any shareholder that has held more than $2,000 in stock or a 1% ownership stake for at least one year has the right to submit a shareholder proposal in which he or she advocates for the company to undertake a specific course of action.[62] Unless the SEC provides the company with permission to exclude the item from consideration, the company must add the shareholder proposal to the agenda for voting at the next annual or special meeting of shareholders.[63]

Shareholder resolutions were rarely seen before the 1980s, but the use of such proposals has grown rapidly in recent decades.[64] In particular, the rise of shareholder resolutions on environmental, social, and governance (ESG) topics has been significant, and ESG-related proposals now account for 40% of all shareholder proposals.[65] Not only has the volume of shareholder proposals grown rapidly, so too has their popularity among shareholders: support for ESG proposals nearly tripled between 1999 and 2013, rising from 8% to 21%.[66] Although most proposals still fail to win majority support, evidence shows that significant minority support for an ESG proposal often prompts boards to act on the matter in question.[67] Thus, even a small increase in support for a losing proposal can result in a meaningful impact on company policy.

Shareholder proposals are among the most controversial ballot items at issue in corporate elections. In the 2017-2018 proxy season, nearly one-quarter of shareholder resolutions at Russell 3000 companies were decided by a margin of 10% or less, while six-tenths were within a 20% margin and two-thirds were within a 30% margin.[68] Such proposals frequently have a political dimension, as political activists have increasingly turned to shareholder activism to promote various causes.[69] As a striking example of this phenomenon, Bernie Sanders attended

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[62] 17 C.F.R. § 240.14a-8 (2013).

[63] *Id.*

[64] *See* Jonathan M. Gilligan, *Carrots and Sticks in Private Climate Governance*, 6 TEX. A&M L. REV. 179, 191-92 (2018).

[65] *Id.*

[66] *See* Virginia Harper Ho, *Nonfinancial Risk Disclosure and the Costs of Private Ordering*, 55 AM. BUS. L.J. 407, 420 (2018).

[67] *Id.*

[68] *See* Barbara Novick, *Proxy Voting Outcomes: By the Numbers*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jul. 24, 2019), https://corpgov.law.harvard.edu/2019/07/24/proxy-voting-outcomes-by-the-numbers/.

[69] *See* Sarah C. Haan, *Civil Rights and Shareholder Activism: SEC v. Medical Committee for Human Rights*, 76 WASH. & LEE L. REV. 1167, 1224-25 (2019).

Walmart's annual meeting and introduced a proposal to put workers on the company's board and to raise the minimum wage in the midst of his campaign for the presidency.[70]

The controversial nature of shareholder proposals is of particular importance given the voting stakes of the Big Three. Vanguard alone already casts more than 10% of the votes at S&P 500 companies, while BlackRock casts a similar share of votes at Russell 3000 companies.[71] As a result, a handful of employees at each of these companies has the power to unilaterally determine approximately 25% of all shareholder E&S resolutions. Collectively, the Big Three controlled 25% of votes in S&P 500 corporate elections as of 2019, and 22% of votes at Russell 3000 companies, meaning that the trio has the power to decide the fate of the majority (60%) of *all* shareholder resolutions.[72] Moreover, even where their votes do not determine the outcome of a given election, the Big Three are decidedly in a position to sway management towards their preferred course of action via other channels of influence, such as engagements. In this way, the trio has indisputably assumed the role of arbiter of controversial shareholder E&S resolutions.

C. *Stewardship Promises on Environmental & Social Shareholder Proposals*

Given the ability of Big Three companies to determine the fate of most E&S proposals, how do these companies characterize their positions on E&S topics? This section analyzes statements made by the Big Three with regard to E&S efforts and initiatives. It identifies a general trend at the Big Three in which promotional materials suggest a far stronger degree of support for various E&S initiatives and causes, while actual voting guidelines make far weaker claims.

1. Vanguard's E&S Promises

Vanguard's promotional materials frequently depict Vanguard as a supporter of various E&S initiatives and causes. For example, Vanguard has made strong statements in support of board diversity. In its 2019 Investment Stewardship Report, a document issued to summarize the

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[70]*See* Gregory Krieg, *Bernie Sanders confronts Walmart leaders at annual shareholders meeting*, CNN: POLITICS (June 5, 2019), https://www.cnn.com/2019/06/05/politics/bernie-sanders-walmart-meeting/index.html.

[71]Bebchuk & Hirst, *The Specter of the Giant Three*, *supra* note 1, at 736.

[72]*Id.* At 736-37.

efforts of the investment stewardship team in the 2018-2019 proxy season, Vanguard states its belief that board effectiveness hinges on diversity: "An effective board should be independent and reflect both diversity of personal characteristics (such as gender, race, and ethnicity) and diversity of skill, experience, and opinion."[73] In that same document, Vanguard also expresses an explicit desire for board diversity disclosures: "We want companies to disclose the diversity makeup of their boards on dimensions such as gender, age, race, ethnicity, and national origin, at least on an aggregate basis."[74]

Vanguard has also made statements supportive of environmental and social disclosures: "The evaluation and disclosure of significant risks to a business arising from various potential factors, including environmental and social concerns, result in a more accurate valuation of the company."[75] It has also asserted that environmental and social matters may fall within the board's mandate: "A board's mandate encompasses a wide range of opportunities and risks—from financial and operational to environmental and social matters—that may affect a company's long-term value,"[76] and it has pledged to act "on material environmental, social, and governance (ESG) opportunities or risks in our investments."[77] In particular, Vanguard has indicated its support for climate risk disclosures, and it has stated that many portfolio companies "remain far behind on this journey and have room to improve their disclosure and better educate their boards on climate-risk-related topics."[78]

Vanguard has also pledged action on human rights matters: "We have established a formal procedure to identify and monitor portfolio companies whose direct involvement in crimes against humanity or patterns of egregious abuses of human rights would warrant engagement or potential divestment."[79] Vanguard has also clearly indicated its belief in a fiduciary responsibility to act on human rights violations and other social risks: "If a company's business practices or products put people's health, safety, or dignity at risk, they present long-term financial risks to investors, too."[80]

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[73]VANGUARD 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 29, at 14.

[74]*Id.* at 18.

[75]*Id.* at 4.

[76]*Id*. at 12.

[77]THE VANGUARD GROUP, INC., INVESTMENT STEWARDSHIP: PRINCIPLES AND POLICIES, https://about.vanguard.com/investment-stewardship/principles-policies/ [hereinafter INVESTMENT STEWARDSHIP: PRINCIPLES AND POLICIES].

[78]VANGUARD 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 29, at 22.

[79]INVESTMENT STEWARDSHIP: PRINCIPLES AND POLICIES, *supra* note 77.

[80]THE VANGUARD GROUP, INC., INVESTMENT STEWARDSHIP: VANGUARD'S VOICE ON SOCIETAL RISKS, https://about.vanguard.com/investment-stewardship/perspectives-and-

However, Vanguard's voting guidelines make far weaker claims with regards to E&S activism. In fact, Vanguard's voting guidelines only state: "The funds will evaluate each [environmental or social] proposal on its merits and may support those where we believe there is a logically demonstrable linkage between the specific proposal and long-term shareholder value of the company."[81] This statement promises only that Vanguard *may* vote in favor of proposals it deems meritorious, and its standards are so vague that investors could not hold Vanguard accountable for voting (or not voting) in any particular way on a given proposal. In fact, this policy is far more vague than its policies towards other common ballot items, such as classified boards, proxy access, cumulative voting, or supermajority vote requirements.[82] The guidelines do, however, give some indication that Vanguard is likely to defer to the board's judgment on E&S matters: "The funds will evaluate these resolutions in the context of our view that a company's board has ultimate responsibility for providing effective ongoing oversight of relevant sector- and company-specific risks, including those related to environmental and social matters."[83] The statements from Vanguard's actual proxy voting guidelines are far weaker than those made in other documents and do little to commit Vanguard to any course of action.

2. State Street's E&S Promises

Throughout marketing documents and other promotional materials, State Street makes bold statements about its commitment to environmental and social causes. First, State Street expresses strong support for E&S in general. For example, State Street pledges: "We've committed to doing more to help solve environmental, social and governance (ESG) challenges."[84] Second, State Street expresses a particular focus on certain E&S issues, most prominently on promoting gender diversity, mitigating climate risk, and increasing climate reporting.[85]

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commentary/voice-on-societal-risks.html [hereinafter VANGUARD'S VOICE ON SOCIETAL RISKS].

[81]THE VANGUARD GROUP, INC., INVESTMENT STEWARDSHIP: POLICIES AND GUIDELINES, https://web.archive.org/web/20181106154012/https://about.vanguard.com/investment-stewardship/policies-and-guidelines [hereinafter VANGUARD'S POLICIES AND GUIDELINES].

[82]*Id.*

[83]*Id.*

[84]STATE STREET CORP., ESG INVESTING, http://www.statestreet.com/solutions/by-capability/esg.html.

[85]STATE STREET 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 30, at 16.

On gender diversity, State Street has expressed concern with board leadership, including a desire for "a diversity of views" and "gender diversity on boards."[86] State Street has focused on its "Fearless Girl" campaign, which aims to have at least one woman on each company's board.[87] On climate issues, State Street indicates that it has called on companies to provide information on governance, board oversight of climate risk, and long-term greenhouse gas (GHG) emissions goals.[88] State Street has called for leadership on climate matters: "At a minimum, we expect companies, particularly in high-impact sectors, to address how the board or its committees oversee climate risks. As best practice, we have seen certain companies ensure that directors have some knowledge, expertise or training on material sustainability or climate risks facing the company."[89] In addition, State Street indicates support for GHG emissions targets: "We view establishing company-specific GHG emissions targets as one of the most important steps in managing climate risk."[90]

Additionally, State Street has indicated support for a number of other E&S topics, including waste and water management, air quality, energy management, supply chain management, labor standards, and human rights.[91] Looking forward, State Street has identified several issues as the next frontier of E&S: gender diversity, pay equality, wage strategies, sexual harassment in the workplace, and worker training.[92] State Street pledges that its stewardship team will focus on these social issues in the coming years.[93]

State Street's commitments to E&S in its actual voting guidelines are far weaker than statements found elsewhere. Indeed, State Street only promises to "fundamentally consider whether the adoption of a shareholder [environmental or social] proposal addressing a material

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[86]STATE STREET GLOBAL ADVISORS, STATE STREET GLOBAL ADVISORS' GUIDANCE ON ENHANCING GENDER DIVERSITY ON BOARDS 1 (May 2019), https://www.ssga.com/investment-topics/environmental-social-governance/2019/05/guidance-on-enhancing-gender-diversity-on-boards.pdf [hereinafter SSGA'S GUIDANCE ON ENHANCING GENDER DIVERSITY ON BOARDS].

[87]*See id.*; *see also* STATE STREET 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 30, at 16.

[88]STATE STREET GLOBAL ADVISORS, SSGA'S PERSPECTIVES ON EFFECTIVE CLIMATE CHANGE DISCLOSURE 1 (Aug. 7, 2017), https://www.ssga.com/investment-topics/environmental-social-governance/2017/perspectives-on-effective-climate-change-disclosure.pdf [hereinafter SSGA'S PERSPECTIVES ON EFFECTIVE CLIMATE CHANGE DISCLOSURE].

[89]*Id.* at 2.

[90]*Id.*

[91]*See* STATE STREET 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 30, at 25.

[92]*Id.* at 3.

[93]*Id.*

sustainability issue would promote long-term shareholder value in the context of the company's existing practices and disclosures as well as existing market practice."[94] Such a vague statement is unlike its statements on other common ballot items, which are generally far more specific.[95] The only E&S topic where State Street makes a more specific commitment is gender diversity on boards, where it expresses the expectation that "boards of Russell 3000 and TSX listed companies [have] at least one female board member."[96] Outside of this gender diversity commitment, it would be difficult to hold State Street accountable on any other E&S matter.

3. BlackRock's E&S Promises

Like its fellow Big Three members, BlackRock also makes numerous statements in support of E&S initiatives and goals. For example, BlackRock states that its fiduciary duties to its clients require "taking into account environmental, social and governance issues."[97] Likewise, BlackRock has stressed that it has integrated consideration of environmental and social risks and opportunities into its investment processes across its platform.[98] E&S issues also comprise one of BlackRock's six stewardship themes, suggesting its importance to their overall stewardship efforts.[99]

BlackRock has also made specific statements in support of particular E&S initiatives and goals. In the realm of diversity and equality,

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[94]STATE STREET GLOBAL ADVISORS, PROXY VOTING AND ENGAGEMENT GUIDELINES NORTH AMERICA (UNITED STATES & CANADA) 8 (Mar. 2019), https://www.ssga.com/library-content/pdfs/ic/15918-inst-2019-proxy-voting-and-engagement-guidelines-us-canada-v5-sv.pdf [hereinafter SSGA'S PROXY VOTING AND ENGAGEMENT GUIDELINES (UNITED STATES & CANADA)].

[95]*See id.* at 5 (For example, State Street makes the following statement on stock issuance: "In general, we support share increases for general corporate purposes up to 100% of current authorized stock." It provides a similarly specific position on unequal stock: "We will not support proposals authorizing the creation of new classes of common stock with superior voting rights and will vote against new classes of preferred stock with unspecified voting, conversion, dividend distribution, and other rights.").

[96]*Id.* at 2.

[97]BLACKROCK, SUSTAINABLE INVESTING, https://www.blackrock.com/ch/individual/en/themes/sustainable-investing [hereinafter SUSTAINABLE INVESTING].

[98]*See* BLACKROCK, BLACKROCK MISSION STATEMENT ON SUSTAINABILITY 1, https://www.blackrock.com/corporate/literature/publication/blk-sustainability-mission-statement-web.pdf.

[99]*See* BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP: GLOBAL CORPORATE GOVERNANCE & ENGAGEMENT PRINCIPLES 4, 7 (Jan. 2020),

https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-engprinciples-global.pdf.

BlackRock has expressed support for both board diversity[100] and workforce diversity.[101] Further, BlackRock has called attention to its use of proxy votes to support proposals concerned with gender pay disparities.[102]

Regarding social and environmental disclosures, BlackRock has also stated that it expects boards to make environmental and social disclosures on material topics.[103] For instance, BlackRock has shared its expectation that boards make disclosures about climate risk.[104]

On the topic of political transparency, BlackRock has expressed modest support for initiatives that seek additional reporting on political activities in the event that existing disclosures are insufficient.[105] However, such support was qualified with BlackRock's overall position that it is the responsibility of the board of directors to determine the appropriate level of disclosures for such activities.[106]

On the environmental front, BlackRock has expressed concern about operational sustainability (including waste, water, energy efficiency, and packaging sustainability),[107] as well as about environmental harms associated with palm oil extraction.[108] BlackRock has also celebrated its proxy votes in favor of climate risk management, recycling, and addressing community environmental impacts.[109]

Despite the considerable attention to E&S in its promotional materials and other documents, BlackRock's voting guidelines make few firm commitments. This document indicates only two specific expectations for boards in the realm of environmental and social issues: (1) that boards "identify and report on the material, business-specific E&S risks and opportunities and to explain how these are managed" and (2) that "investee companies [are] to comply, at a minimum, with the laws and regulations of the jurisdictions in which they operate."[110] Outside of these

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[100]*See* BLACKROCK 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 31, at 9.

[101]*Id.*

[102]*Id.* at 19.

[103]*See* BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP'S APPROACH TO ENGAGEMENT WITH THE PALM OIL INDUSTRY 1 (May 2019), https://www.blackrock.com/corporate/literature/publication/blk-commentary-engaging-on-palm-oil.pdf [hereinafter BLACKROCK INVESTMENT APPROACH TO THE PALM OIL INDUSTRY].

[104]*See* BLACKROCK 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 31, at 16-17.

[105]*Id.* at 9, 14.

[106]*Id.* at 9.

[107]*Id.* at 16.

[108]*See* BLACKROCK INVESTMENT APPROACH TO THE PALM OIL INDUSTRY, *supra* note 103, at 1.

[109]*See* BLACKROCK 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 31, at 19.

[110]BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP: CORPORATE GOVERNANCE AND PROXY VOTING GUIDELINES FOR U.S. SECURITIES 14 (Jan. 2020),

expectations, the latter of which is essentially meaningless, BlackRock only promises that it "may vote against the election of directors where we have concerns that a company might not be dealing with E&S factors appropriately" and that it may support a shareholder proposal on E&S topics "where there seems to be either a significant potential threat or realized harm to shareholders' interests caused by poor management of material E&S factors."[111] Like Vanguard and State Street, BlackRock's claims of support for E&S issues do not necessarily translate to the proxy ballot arena.

D. *Engagements*

What bridges the gap between the Big Three's bolder claims in favor of its E&S efforts and their far weaker proxy voting promises? Vanguard, State Street, and BlackRock repeatedly indicate that "engagements" (direct communications between stewardship teams and company management) are preferred over proxy voting. For example, Vanguard describes its approach to stewardship as "quiet diplomacy."[112] Likewise, State Street indicates that it resorts to voting action when companies fail to respond to its engagement efforts.[113] For its part, BlackRock refers to its approach to stewardship as an "engagement-first" approach.[114]

The inherent problem with "quiet diplomacy" or an "engagement-first" approach is that it is non-transparent. Investors have no way to know what has been discussed at these engagements, and, therefore, no way to hold management accountable for action (or inaction) on E&S matters. Indeed, engagement "disclosures" made by Vanguard generally contain anecdotal stories about some engagements (which are hand-picked by Vanguard staff) and summary charts and statistics that merely reveal the names of companies at which engagements occurred and the general topics under discussion.[115] State Street's engagement disclosures are more robust, but are similar to Vanguard's in that they mainly provide summaries of engagement behaviors and anecdotes about a small subset of

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https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf [hereinafter PROXY VOTING GUIDELINES FOR U.S. SECURITIES].

[111] *Id.* at 13.

[112] VANGUARD'S VOICE ON SOCIETAL RISKS, *supra* note 80.

[113] STATE STREET 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 30, at 25.

[114] BLACKROCK INVESTMENT APPROACH TO THE PALM OIL INDUSTRY, *supra* note 103, at 2.

[115] *See* VANGUARD 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 29, at 36-59.

engagements.[116] Likewise, BlackRock's engagement disclosures contain only a list of names of companies involved in engagements, high-level summary statistics, and case studies on certain, BlackRock-selected engagements.[117]

At the end of the day, the Big Three themselves choose how to portray their engagements and what information to share (and not to share) with their clients. Without full disclosure of the written transcripts or recordings from engagements, investors will never truly know what was discussed behind closed doors and what outcomes those discussions produced. Indeed, while the Big Three seem to take pride in their engagement-focused approach, it is peculiar for a fiduciary to treat those activities for which it is least accountable as a source of pride. Such secrecy might be appropriate for an investor controlling his or her own money but is questionable for a steward allegedly acting on behalf of others. If the underlying purpose of requiring disclosure of proxy votes and proxy voting policies is to promote transparency and accountability of index fund fiduciaries, the Big Three's engagement-first approach is fundamentally at odds with this purpose, severely undermining the effectiveness of their current disclosures. Ultimately, an opaque engagement-first approach to stewardship enables the Big Three to try to be all things to all people, without being held accountable for actions taken or not taken.

E. *Socially Responsible Investing at the Big Three*

In addition to traditional index funds, each of the Big Three also offers SRI-focused that seek both to promote social, environmental, and/or governance outcomes and to generate a financial return.[118] SRI investors represent a growing subset of the U.S. equity market, and they now control, by some estimates, as much as 20% of all assets under management in the United States.[119] Vanguard offers four SRI funds,[120]

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[116]*See* STATE STREET 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 30, at 24-26, 89-149.

[117]*See* BLACKROCK 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 31, at 10-34.

[118]*See* Ho, *supra* note 66, at 420.

[119]*Id.*

[120]*See generally* THE VANGUARD GROUP, INC., ESG INVESTING: WHERE YOUR MONEY CAN REFLECT WHAT MATTERS TO YOU, https://investor.vanguard.com/investing/esg/ [hereinafter ESG INVESTING: WHERE YOUR MONEY CAN REFLECT WHAT MATTERS TO YOU].

while State Street offers six SRI funds[121] and BlackRock has fifteen SRI funds.[122]

Problematically, these funds are not always transparent about whether and to what extent a fund's SRI orientation will manifest itself in the proxy voting arena. For example, Vanguard's overview for its ESG U.S. Stock ETF contains no indication of how proxy voting will be conducted for this fund,[123] nor does its summary of its FTSE Social Index Fund.[124] It is only deep in its "Statement of Additional Information" that any mention of proxy voting on E&S matters can be found, and even there investors are only promised that each E&S proposal will be "evaluated on its merits and supported when there is a logically demonstrable linkage between the specific proposal and long-term shareholder value of the company."[125] Such a statement gives investors no indication of how votes will actually be cast on such issues, and it notably does not specify whether such votes will be cast differently for traditional and SRI funds.

An investor or potential investor could easily take Vanguard's marketing materials for its SRI funds as an indication that such funds will vote in support of environmental and social proposals. For example, Vanguard's summary of its SRI investment vehicles refers to SRI investment with the tagline "where your money can reflect what matters to you."[126] Although such a statement does not commit Vanguard to any voting certain behaviors, a reasonable investor might think that this focus on non-financial values would translate into the proxy voting arena. Similarly, the Vanguard webpage promoting its FTSE Social Index Fund refers to the fund's "socially conscious approach," a statement which could lead an investor to believe that socially conscious values would also shape proxy voting decisions.[127]

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[121]*See generally* STATE STREET GLOBAL ADVISORS, FUND FINDER, https://www.ssga.com/us/en/individual/etfs/fund-finder.

[122]*See generally* BLACKROCK, SUSTAINABLE INVESTMENT SOLUTIONS, https://www.blackrock.com/us/individual/investment-ideas/sustainable-investing/sustainable-solutions#equity [hereinafter SUSTAINABLE INVESTMENT SOLUTIONS].

[123]*See, e.g.*, THE VANGUARD GROUP, INC., VANGUARD ESG U.S. STOCK ETF, https://investor.vanguard.com/etf/profile/overview/esgv (providing no information on whether the funds' focus on ESG factors will shape decision on proxy votes).

[124]*See, e.g.*, THE VANGUARD GROUP, INC., VANGUARD FTSE SOCIAL INDEX FUND INVESTOR SHARES, https://investor.vanguard.com/mutual-funds/profile/VFTSX (providing no information on whether the funds' focus on ESG factors will shape decision on proxy votes) [hereinafter VANGUARD FTSE SOCIAL INDEX].

[125]VANGUARD WORLD FUND STATEMENT, *supra* note 25, at B-113.

[126]ESG INVESTING: WHERE YOUR MONEY CAN REFLECT WHAT MATTERS TO YOU, *supra* note 120.

[127]VANGUARD FTSE SOCIAL INDEX, *supra* note 124.

State Street SRI funds also provide limited information about how proxy voting on SRI matters will be conducted. For example, State Street's SPDR S&P 500 Fossil Fuel Reserves Free ETF pledges that it "seeks to allow climate change-conscious investors to align the core of their investment strategy with their values by eliminating companies that own fossil fuel reserves from the S&P 500," but promotional materials make no comment on whether or not this climate-conscious focus will inform proxy voting.[128] Likewise, Kristi Mitchem, executive vice president of State Street, promoted its SPDR SSGA Gender Diversity ETF (SHE) by stating, "SHE seeks to help address gender inequality in corporate America by offering investors an opportunity to create change with capital and seek a return on gender diversity," a statement which could lead investors to believe that the fund would vote in favor of gender diversity proposals.[129] As is the case with Vanguard, it is difficult to find information on whether SRI orientation will impact proxy voting for these specialized SRI investment vehicles at State Street.

Finally, BlackRock indicates that some of its SRI funds will use an approach aimed at advancing E&S causes, but it does not specify whether and when proxy voting will be used as a tool to advance E&S aims.[130] For example, BlackRock's iShares MSCI USA ESG Select ETF is billed as a tool "to invest based on your personal values," but documents and materials related to that fund do not specify how proxy votes controlled by the fund will be cast.[131] Marketing materials make similar promises about iShares MSCI KLD 400 Social ETF, which is also billed as a way to invest while promoting personal values, but again it is unclear as to whether and how the fund's SRI status impacts proxy voting.[132]

III. VOTING PATTERNS ON E&S SHAREHOLDER PROPOSALS

This Part presents this Article's findings concerning the votes cast by the Big Three index funds and their competitors on environmental and social shareholder proposals during the 2018-2019 proxy season.

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[128]STATE STREET GLOBAL ADVISORS, SPDR S&P 500 FOSSIL FUEL RESERVES FREE ETF, https://www.ssga.com/us/en/individual/etfs/funds/spdr-sp-500-fossil-fuel-reserves-free-etf-spyx.

[129]Press Release, State Street, State Street Global Advisors Launches Gender Diversity ETF to Help Investors Seek a Return on Gender Diversity (Mar. 7, 2016, 8:58 AM), https://newsroom.statestreet.com/press-release/corporate/state-street-global-advisors-launches-gender-diversity-etf-help-investors-se.

[130]*See* SUSTAINABLE INVESTMENT SOLUTIONS, *supra* note 122.

[131]BLACKROCK, ISHARES MSCI USA ESG SELECT ETF, https://www.ishares.com/us/products/239692/ishares-msci-usa-esg-select-etf.

[132]*See id.*

Specifically, it provides data on the voting records for (1) Vanguard's ten largest index funds and ETFs (excluding international and non-equity funds),[133] (2) Vanguard's specialized SRI funds (excluding international and non-equity funds),[134] (3) State Street's eleven[135] largest index funds and ETFS (excluding international, non-equity, and "mirror voting"[136] funds),[137] (4) State Street's SRI index funds and ETFs (excluding international and non-equity funds),[138] (5) BlackRock's ten largest index funds and ETFs (excluding international and non-equity funds),[139] (6)

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[133]These ten funds include: (1) Vanguard Total Stock Market Index Fund; (2) Vanguard 500 Index Fund; (3) Vanguard Institutional Index Fund; (4) Vanguard Mid-Cap Index Fund; (5) Vanguard Growth Index Fund; (6) Vanguard Small-Cap Index Fund; (7) Vanguard Value Index Fund; (8) Vanguard Extended Market Index Fund; (9) Vanguard Real Estate Index Fund; and (10) Vanguard PRIMECAP Fund.

[134]Those funds are: (1) Vanguard ESG U.S. Stock ETF; and (2) Vanguard FTSE Social Index Fund.

[135]Data was collected for eleven, rather than ten, State Street funds because of the nature of State Street's popular "SPDR" funds, which often hold shares at a smaller set of companies concentrated in a single market sector. An eleventh fund, the SPDR Portfolio S&P 500 Growth ETF, was added to gain a greater sample size and a more comprehensive picture of State Street's voting patterns. *See* discussion of mirror voting *infra*; *see also supra* note 118 and accompanying text.

[136]A number of State Street's largest ETFs are structured as a Unit Investment Trust, including SPDR S&P 500 ETF Trust, SPDR Dow Jones Industrial Average ETF Trust, and SPDR S&P MIDCAP 400 ETF Trust, which cast votes in a manner known as "mirror voting" because actual proxy voting would be considered a form of management. Mirror voting strives to allow the funds to vote exactly in proportion with votes cast by the remaining set of voters, permitting these funds to "vote" without affecting the outcome. Such funds were excluded from this study. *See* STATE STREET GLOBAL ADVISORS, SPDR S&P 500 ETF TRUST, SUPPLEMENT TO THE PROSPECTUS DATED JANUARY 16, 2020 87 (Mar. 25, 2020) ("The Trustee has the exclusive right to vote all of the voting stocks in the Trust. The Trustee votes the voting stocks of each issuer in the same proportionate relationship that all other shares of each such issuer are voted (known as "mirror voting") to the extent permissible and, if not permitted, abstains from voting.").

[137]The eleven largest such funds are: (1) the Technology Select Sector SPDR Fund; (2) the Financial Select Sector SPDR Fund; (3) the Health Care Select Sector SPDR Fund; (4) the SPDR S&P Dividend ETF; (5) the Consumer Discretionary Select Sector SPDR Fund; (6) the Consumer Staples Select Sector SPDR Fund; (7) the Industrial Select Sector SPDR Fund; (8) the Utilities Select Sector SPDR Fund; (9) the Energy Select Sector SPDR Fund; (10) the Communication Services Select Sector SPDR Fund; and (11) the SPDR Portfolio S&P 500 Growth ETF.

[138]Those funds are SPDR S&P 500 Fossil Fuel Reserves Free ETF and SPDR SSGA Gender Diversity Index ETF.

[139]These ten funds are: (1) iShares Core S&P 500 ETF; (2) iShares Core S&P Mid-Cap ETF; (3) iShares Russell 1000 Growth ETF; (4) iShares Core S&P Small-Cap ETF; (5) iShares Russell 2000 ETF; (6) iShares Russell 1000 Value ETF; (7) iShares Edge MSCI Min Vol USA ETF; (8) iShares S&P 500 Growth ETF; (9) iShares Core S&P Total U.S. Stock Market ETF; and (10) iShares Russell 1000 ETF.

BlackRock's SRI funds (excluding international and non-equity funds),[140] (7) Deutsche Bank's DWS Equity 500 Index Portfolio, (8) Nuveen's TIAA-CREF S&P 500 Index Fund, (9) Guggenheim S&P 500 Fund, and (10) Dimensional's U.S. Large Company. These fund groups are respectively referred to as: (1) Vanguard Top 10, (2) Vanguard SRI, (3) State Street Top 11, (4) State Street SRI, (5) BlackRock Top 10, (6) BlackRock SRI, (7) Deutsche S&P 500, (8) TIAA S&P 500, (9) Guggenheim S&P 500, and (10) Dimensional S&P 500.

Part III.A provides information on support for diversity and equality resolutions, including support for gender pay gap disclosures, employee diversity reporting, the establishment of board diversity policies, board diversity reporting, and anti-discrimination efforts. Part III.B provides information on support for proposals related to human rights, including support for human rights reporting, human rights responsibility efforts, and human rights leadership initiatives. Part III.C provides data on support for worker welfare proposals, including sexual harassment reporting, pay disparity disclosures, changes to employment practices, and proposals related to prison labor. Part III.D provides data on rates of support for privacy and content governance proposals. Part III.E provides data on support for political transparency proposals, including political contribution disclosures and lobbying disclosures. Part III.F provides data on support for other social proposals, including social leadership, public health, animal welfare, and gun violence reporting. Part III.G provides data on support for environmental proposals, including general environmental reporting, initiatives related to climate change and GHG, environmental leadership, pesticide reporting, sustainability, efforts to reduce or monitor pollution, and efforts to reduce or monitor deforestation. Finally, Part III.H provides summary statistics regarding overall support of E&S shareholder proposals and trends that can be observed at the funds and fund families studied.

A. *Support for Diversity & Equality Proposals*

In the 2018-2019 proxy season, the index funds analyzed in this study considered up to thirty-five proposals related to diversity and equality. Table 1 below reveals that there was little consensus on diversity and equality initiatives. Index fund stewardship teams believed that investors' best interests were served by as many as 72.4% of such

[140]Four funds met these criteria: (1) iShares ESG MSCI USA ETF; (2) iShares MSCI KLD 400 Social ETF; (3) iShares MSCI USA ESG Select ETF; and (4) iShares ESG MSCI USA Small-Cap ETF.

proposals and as few as 0% of such proposals. As a general matter, gender pay gap, employee diversity reporting, and anti-discrimination proposals were most likely to receive support, while board diversity policy and board diversity reporting proposals were least likely to receive support. The Big Three tended to support fewer diversity and equality proposals than their competitors, with overall rates of 10.5% for Vanguard Top 10, 25.9% for State Street Top 11, and 4.1% for BlackRock Top 10. The number of unique proposals supported was similarly low for the Big Three: Vanguard Top 10 supported four unique proposals while State Street Top 11 supported seven unique proposals and BlackRock Top 10 supported only one unique proposal. BlackRock SRI funds were the only SRI funds to vote differently than their traditional counterparts, and these SRI funds voted in favor of four unique proposals that had not been supported by BlackRock's traditional funds. Vanguard and State Street SRI funds acted in lockstep with their traditional counterparts. Finally, for the Big Three's traditional funds, there was no internal disagreement observed: Vanguard Top 10 voted consistently, as did State Street Top 11 and BlackRock Top 10.

Support for diversity and equality proposals varied by the type of proposal under consideration and by index fund provider. Such divergence can be seen amongst the Big Three. Vanguard's funds were most likely to support proposals related to board diversity policies, while State Street and BlackRock's funds rarely supported these types of proposals. In contrast, State Street supported a majority of proposals related to employee diversity reporting while such proposals received little support from either Vanguard or BlackRock. Outside of the Big Three, several competitor funds frequently voted to support gender pay gap proposals, employee diversity reporting proposals, and anti-discrimination proposals, while these proposals received far less support within the Big Three. Amongst all funds, proposals related to board diversity reporting received the lowest rates of support, while proposals related to the gender pay gap and employee diversity reporting received higher rates of support.

Table 1: Support for Diversity & Equality Proposals

This Table summarizes index funds' support for diversity and equality proposals. It expresses the support for these proposals in the form of "X of Y," where X is the total number of votes in favor of that proposal and Y is the total number of opportunities that fund or group of funds had to vote on the proposal in question. It also provides data on the number and percentage of unique diversity and equality proposals that were supported, again expressed in the form "X of Y."

Diversity & Equality	*Vanguard Top 10*	*Vanguard SRI*	*State Street Top 11*	*State Street SRI*	*BlackRock Top 10*	*BlackRock SRI*	*Deutsche S&P 500*	*TIAA S&P 500*	*Guggenheim S&P 500*	*Dimensional S&P 500*
Support for Gender Pay Gap Proposals	0 of 63 (0%)	0 of 25 (0%)	6 of 25 (24%)	3 of 18 (16.7%)	7 of 73 (9.6%)	3 of 26 (11.5%)	13 of 14 (92.9%)	10 of 13 (76.9%)	12 of 13 (92.3%)	0 of 14 (0%)
Support for Employee Diversity Reporting Proposals	5 of 28 (17.9%)	2 of 14 (14.3%)	8 of 14 (57.1%)	4 of 8 (50%)	0 of 39 (0%)	3 of 17 (17.6%)	6 of 7 (85.7%)	6 of 7 (85.7%)	6 of 7 (85.7%)	0 of 6 (0%)
Support for Board Diversity Policy Proposals	9 of 14 (64.3%)	1 of 3 (33.3%)	0 of 2 (0%)	0 of 2 (0%)	0 of 16 (0%)	2 of 5 (40%)	0 of 1 (0%)	0 of 1 (0%)	0 of 1 (0%)	0 of 1 (0%)
Support for Board Diversity Reporting Proposals	0 of 23 (0%)	0 of 10 (0%)	0 of 11 (0%)	0 of 6 (0%)	0 of 31 (0%)	0 of 11 (0%)	1 of 6 (16.7%)	1 of 6 (16.7%)	1 of 6 (16.7%)	0 of 6 (0%)
Support for Anti-Discrimination Proposals	0 of 5 (0%)	0 of 3 (0%)	0 of 2 (0%)	0 of 2 (0%)	0 of 10 (0%)	1 of 1 (100%)	1 of 1 (100%)	1 of 1 (100%)	1 of 1 (100%)	0 of 1 (0%)
Overall Support for Diversity & Equality Proposals	14 of 133 (10.5%)	3 of 55 (5.5%)	14 of 54 (25.9%)	7 of 36 (19.4%)	7 of 169 (4.1%)	9 of 60 (15%)	21 of 29 (72.4%)	18 of 28 (64.3%)	20 of 28 (71.4%)	0 of 28 (0%)
Unique Diversity & Equality Proposals Supported	4 of 35 (11.4%)	2 of 30 (6.7%)	7 of 29 (24.1%)	7 of 30 (23.3%)	1 of 34 (2.9%)	5 of 29 (17.2%)	21 of 29 (72.4%)	18 of 28 (64.3%)	20 of 28 (71.4%)	0 of 28 (0%)

B. *Support for Human Rights Proposals*

Fifteen unique proposals were related to human rights efforts in the 2018-2019 proxy season, including proposals seeking human rights reporting and those seeking increased responsibilities for human rights matters. Table 2 below reveals considerable variation in overall support for human rights proposals. Funds supported as few as 0% and as many as 80% of such proposals. For their part, the Big Three had consistently low rates of support for human rights proposals, with such support ranging from 0% to 9.5%. In all, four of the Big Three's fund groups (Vanguard Top 10, State Street Top 11, State Street SRI, and BlackRock Top 10) supported only one unique proposal while the remaining two (Vanguard SRI and BlackRock SRI) supported no such proposals. Notably, no internal disagreement was observed within the Big Three's traditional funds or between the Big Three's traditional funds and their SRI counterparts.

Support was far higher for human rights reporting proposals than for proposals seeking to have firms take responsibility for certain human rights issues. Only one of the funds studied (Deutsche S&P 500) supported any proposals related to human rights responsibilities. Support for human rights reporting proposals was greatest outside of the Big Three, with several funds supporting more than 70% of such proposals. Within the Big Three, support for human rights reporting proposals ranged from 0% to 15.4%, depending upon the fund group; however, all six Big Three fund groups were united in low support for such proposals.

Table 2: Support for Human Rights Proposals

This Table summarizes index funds' support for human rights proposals. It expresses the support for these proposals in the form of "X of Y," where X is the total number of votes in favor of that proposal and Y is the total number of opportunities that fund or group of funds had to vote on the proposal in question. It also provides data on the number and percentage of unique human rights proposals that were supported, again expressed in the form "X of Y."

Human Rights	*Vanguard Top 10*	*Vanguard SRI*	*State Street Top 11*	*State Street SRI*	*BlackRock Top 10*	*BlackRock SRI*	*Deutsche S&P 500*	*TIAA S&P 500*	*Guggenheim S&P 500*	*Dimensional S&P 500*

Support for Human Rights Reporting Proposals	4 of 41 (9.8%)	0 of 11 (0%)	2 of 13 (15.4%)	1 of 10 (10%)	2 of 48 (4.2%)	0 of 4 (0%)	5 of 7 (71.4%)	6 of 7 (85.7%)	5 of 7 (71.4%)	0 of 7 (0%)
Support for Human Rights Responsibility Proposals	0 of 18 (0%)	0 of 5 (0%)	0 of 8 (0%)	0 of 6 (0%)	0 of 21 (0%)	0 of 9 (0%)	2 of 3 (66.6%)	0 of 4 (0%)	0 of 3 (0%)	0 of 3 (0%)
Overall Support for Human Rights Proposals	4 of 59 (6.8%)	0 of 16 (0%)	2 of 21 (9.5%)	1 of 16 (6.3%)	2 of 69 (2.9%)	0 of 13 (0%)	8 of 10 (80%)	6 of 11 (54.5%)	5 of 10 (50%)	0 of 10 (0%)
Unique Human Rights Proposals Supported	1 of 15 (6.3%)	0 of 10 (0%)	1 of 11 (8.3%)	1 of 11 (8.3%)	1 of 15 (6.3%)	0 of 6 (0%)	8 of 10 (80%)	6 of 11 (54.5%)	5 of 10 (50%)	0 of 10 (0%)

C. *Support for Worker Welfare Proposals*

This study identified seventeen shareholder proposals related to worker welfare, which fell into four categories: (1) sexual harassment reporting, (2) pay disparity reporting, (3) employment practices reporting, and (4) prison labor. Table 3 reveals that there was substantial variation in support for worker welfare proposals. Rates of support ranged from a low of 0% to a high of 60%. The highest rates of support were observed outside of the Big Three, with Guggenheim S&P 500 fund supporting 60% of all worker welfare proposals and Deutsche S&P 500 fund supporting 54.5% of the same. Within the Big Three, five of six funds failed to support any worker welfare proposals, while BlackRock SRI fund alone supported such proposals at a rate of 28%. BlackRock SRI funds were thus the only SRI funds studied to vote differently than their non-SRI counterparts. Internal disagreement was thus nonexistent amongst all Vanguard funds, all State Street funds, and all BlackRock Top 10 funds.

Variations can be seen when looking at particular categories of proposals. BlackRock's SRI funds only supported proposals in two of four categories: sexual harassment reporting and prison labor proposals. BlackRock's SRI funds did not support proposals related to the pay disparity between executives and other employees or proposals seeking

reform to employment practices. Outside of the Big Three, no funds supported pay disparity proposals, while greater support was observed for prison labor proposals, proposals related to employment practices, and sexual harassment reporting proposals.

Table 3: Support for Worker Welfare Proposals

This Table summarizes index funds' support for worker welfare proposals. It expresses the support for these proposals in the form of "X of Y," where X is the total number of votes in favor of that proposal and Y is the total number of opportunities that fund or group of funds had to vote on the proposal in question. It also provides data on the number and percentage of unique worker welfare proposals that were supported, again expressed in the form "X of Y."

Worker Welfare	*Vanguard Top 10*	*Vanguard SRI*	*State Street Top 11*	*State Street SRI*	*BlackRock Top 10*	*BlackRock SRI*	*Deutsche S&P 500*	*TIAA S&P 500*	*Guggenheim S&P 500*	*Dimensional S&P 500*
Support for Sexual Harassment Reporting Proposals	0 of 32 (0%)	0 of 8 (0%)	0 of 6 (0%)	0 of 4 (0%)	0 of 28 (0%)	3 of 7 (42.9%)	3 of 3 (100%)	2 of 3 (66.6%)	2 of 2 (0%)	0 of 3 (0%)
Support for Pay Disparity Proposals	0 of 13 (0%)	0 of 3 (0%)	0 of 4 (0%)	0 of 4 (0%)	0 of 17 (0%)	0 of 7 (0%)	0 of 3 (0%)	0 of 3 (0%)	0 of 3 (0%)	0 of 3 (0%)
Support for Employment Practices Proposals	0 of 10 (0%)	0 of 4 (0%)	0 of 4 (0%)	0 of 1 (0%)	0 of 10 (0%)	0 of 6 (0%)	1 of 2 (50%)	1 of 2 (50%)	1 of 2 (50%)	0 of 2 (0%)
Support for Prison Labor Proposals	0 of 11 (0%)	0 of 5 (0%)	0 of 6 (0%)	0 of 5 (0%)	0 of 17 (0%)	4 of 5 (80%)	3 of 3 (100%)	1 of 3 (33.3%)	3 of 3 (100%)	0 of 3 (0%)

Overall Support for Worker Welfare Proposals	0 of 66 (0%)	0 of 20 (0%)	0 of 20 (0%)	0 of 14 (0%)	0 of 72 (0%)	7 of 25 (28%)	7 of 11 (54.5%)	4 of 11 (36.4%)	6 of 10 (60%)	0 of 11 (0%)
Unique Worker Welfare Proposals Supported	0 of 17 (0%)	0 of 14 (0%)	0 of 10 (0%)	0 of 12 (0%)	0 of 17 (0%)	3 of 14 (21.4%)	7 of 11 (54.5%)	4 of 11 (36.4%)	6 of 10 (60%)	0 of 11 (0%)

D. *Support for Privacy & Content Governance Proposals*

The index funds analyzed in this study considered up to eight unique proposals related to privacy and content governance in the 2018-2019 proxy season. Table 4 summarizes overall support for privacy and content governance proposals and reveals that such support ranged from a low of 0% to a high of 50%. The highest rates of support for such proposals generally occurred outside of the Big Three, with Deutsche and Guggenheim's S&P 500 funds both voting in favor of 50% of such proposals. However, BlackRock SRI-focused funds also had high rates of support for such proposals, with 44.4% of all votes on such proposals cast in favor and 50% of all unique proposals supported. BlackRock's support of such proposals was mainly observed for content governance proposals while Deutsche and Guggenheim's rates of support were far greater for privacy-related proposals. Overall, internal disagreement did not exist within the Big Three, with the exception of BlackRock SRI funds, which frequently voted differently than their traditional counterparts.

For those funds that supported some privacy and content governance proposals, support varied by the type of proposal under consideration. BlackRock's SRI funds supported just 9.1% of privacy-related proposals but all content governance proposals. In contrast, both Deutsche and Guggenheim's S&P 500 funds supported privacy proposals nearly twice as frequently as privacy-related proposals. In contrast, TIAA's S&P 500 funds were slightly more supportive of content governance proposals than privacy proposals.

Table 4: Support for Privacy & Content Governance Proposals

This Table summarizes index funds' overall support for privacy and content governance proposals. It expresses the support for these proposals

in the form of "X of Y," where X is the total number of votes in favor of that proposal and Y is the total number of opportunities that fund or group of funds had to vote on the proposal in question. It also provides data on the number and percentage of privacy & content governance proposals that were supported, again expressed in the form "X of Y."

Privacy & Content Governance	*Vanguard Top 10*	*Vanguard SRI*	*State Street Top 11*	*State Street SRI*	*BlackRock Top 10*	*BlackRock SRI*	*Deutsche S&P 500*	*TIAA S&P 500*	*Guggenheim S&P 500*	*Dimensional S&P 500*
Support for Privacy Proposals	0 of 18 (0%)	0 of 6 (0%)	0 of 10 (0%)	0 of 5 (0%)	0 of 29 (0%)	1 of 11 (9.1%)	3 of 5 (60%)	1 of 5 (20%)	3 of 5 (60%)	0 of 5 (0%)
Support for Content Governance Proposals	0 of 12 (0%)	0 of 6 (0%)	0 of 5 (0%)	0 of 4 (0%)	0 of 16 (0%)	7 of 7 (100%)	1 of 3 (33.3%)	1 of 3 (33.3%)	1 of 3 (33.3%)	0 of 3 (0%)
Overall Support for Privacy & Content Governance Proposals	0 of 30 (0%)	0 of 12 (0%)	0 of 15 (0%)	0 of 9 (0%)	0 of 45 (0%)	8 of 18 (44.4%)	4 of 8 (50%)	2 of 8 (25%)	4 of 8 (50%)	0 of 8 (0%)
Unique Worker Privacy & Content Governance Proposals Supported	0 of 8 (0%)	0 of 8 (0%)	0 of 8 (0%)	0 of 8 (0%)	0 of 8 (0%)	4 of 8 (50%)	4 of 8 (50%)	2 of 8 (25%)	4 of 8 (50%)	0 of 8 (0%)

E. *Support for Political Transparency Proposals*

In the 2018-2019 proxy season, the index funds studied herein had the opportunity to consider up to sixty-five unique proposals seeking increased transparency for (1) political contributions and (2) lobbying efforts. Table 5 reveals wide divergence in support of political transparency proposals. On the low end, three fund groups supported 0%

of such proposals— Vanguard Top 10, Vanguard SRI, and Dimensional S&P 500. On the high end, two funds each supported 95% of such proposals: Deutsche S&P 500 index fund and Guggenheim S&P 500 index fund. Support was more muted for the Big Three. Amongst those funds, support ranged from 0% for Vanguard's funds to roughly 35% for State Street's funds. BlackRock SRI funds were the only specially designated SRI fund to deviate from its counterparts' voting pattern: those SRI funds supported 6 more unique proposals than their traditional counterparts.

Generally speaking, funds were more likely to support political contribution disclosures than lobbying disclosures. Four fund groups supported more than half of political contribution proposals while only two fund groups supported more than half of lobbying transparency proposals. Absolute maximums were comparable amongst proposal types, with Deutsche and Guggenheim's S&P 500 funds supporting nearly all political transparency proposals. Amongst the Big Three, State Street favored political contribution proposals, supporting nearly half of such proposals but only a handful of lobbying transparency proposals. In contrast, Vanguard supported no political transparency proposals of any type while BlackRock had roughly equivalent support for both categories of proposals.

Table 5: Support for Political Transparency Proposals

This Table summarizes index funds' overall support for political transparency proposals. It expresses the support for these proposals in the form of "X of Y," where X is the total number of votes in favor of that proposal and Y is the total number of opportunities that fund or group of funds had to vote on the proposal in question. It also provides data on the number and percentage of unique proposals that were supported, again expressed in the form "X of Y."

Political Transparency	*Vanguard Top 10*	*Vanguard SRI*	*State Street Top 11*	*State Street SRI*	*BlackRock Top 10*	*BlackRock SRI*	*Deutsche S&P 500*	*TIAA S&P 500*	*Guggenheim S&P 500*	*Dimensional S&P 500*
Support for Political Contribution Proposal	0 of 157 (0%)	0 of 56 (0%)	29 of 61 (47.5%)	18 of 36 (50%)	6 of 205 (2.9%)	9 of 55 (16.4%)	34 of 36 (94.4%)	29 of 37 (78.4%)	34 of 36 (94.4%)	0 of 32 (0%)

Support for Lobbying Transparency Proposals	0 of 103 (0%)	0 of 35 (0%)	4 of 41 (17.1%)	3 of 24 (12.5%)	10 of 132 (7.6%)	6 of 35 (17.1%)	23 of 24 (95.8%)	0 of 25 (0%)	23 of 24 (95.8%)	0 of 24 (0%)
Overall Support for Political Transparency Proposals	0 of 260 (0%)	0 of 91 (0%)	33 of 102 (35.3%)	21 of 60 (35%)	16 of 337 (4.7%)	15 of 90 (16.7%)	57 of 60 (95%)	29 of 62 (46.8%)	57 of 60 (95%)	0 of 56 (0%)
Unique Political Transparency Proposals Supported	0 of 65 (0%)	0 of 51 (0%)	20 of 61 (37.8%)	19 of 55 (34.5%)	3 of 65 (4.6%)	9 of 48 (18.8%)	57 of 60 (95%)	29 of 62 (46.8%)	57 of 60 (95%)	0 of 56 (0%)

F. *Support for Other Social Proposals*

The index funds analyzed in this study considered up to ten unique proposals related to other social initiatives. These proposals fell into four categories: (1) social leadership (e.g., establishing a board committee to address social topics), (2) public health, (3) animal welfare, and (4) gun violence. As Table 6 demonstrates, overall rates of support for other social proposals varied substantially from a low of 0% at Dimensional S&P 500 to a high of 66.7% for Deutsche S&P 500. The highest rates support for other social proposals were observed outside of the Big Three at Deutsche S&P 500 and Guggenheim S&P 500. Amongst the Big Three, BlackRock SRI funds supported both the greatest percentage of other social proposals (28.6%) and the highest percentage of unique proposals (50%). The remaining Big Three funds supported only one or two unique proposals, most commonly those related to public health initiatives. Internal disagreement between the Big Three's traditional and SRI funds was once again low, with the exception of the divergent votes cast on two proposals by BlackRock's traditional funds and BlackRock's SRI-focused funds.

Of other social proposals, public health proposals were the most frequently supported, with 90% of fund groups supporting at least some public health proposals. In contrast, gun violence proposals and animal welfare proposals were each only supported by one fund group, although few funds had the opportunity to consider gun violence reporting proposals. Social leadership proposals were also infrequently supported, with only two funds supporting any social leadership proposals.

Table 6: Support for Other Social Proposals

This Table summarizes index funds' overall support for other social proposals. It expresses the support for these proposals in the form of "X of Y," where X is the total number of votes in favor of that proposal and Y is the total number of opportunities that fund or group of funds had to vote on the proposal in question. It also provides data on the number and percentage of unique proposals that were supported, again expressed in the form "X of Y."

Other Social	*Vanguard Top 10*	*Vanguard SRI*	*State Street Top 11*	*State Street SRI*	*BlackRock Top 10*	*BlackRock SRI*	*Deutsche S&P 500*	*TIAA S&P 500*	*Guggenheim S&P 500*	*Dimensional S&P 500*
Support for Social Leadership Proposals	0 of 7 (0%)	0 of 4 (0%)	0 of 2 (0%)	0 of 1 (0%)	0 of 9 (0%)	0 of 6 (0%)	1 of 1 (100%)	0 of 1 (0%)	1 of 1 (100%)	0 of 1 (0%)
Support for Public Health Proposals	3 of 21 (14.3%)	1 of 4 (25%)	2 of 8 (25%)	1 of 5 (20%)	6 of 27 (22.2%)	3 of 7 (42.9%)	3 of 4 (75%)	2 of 4 (50%)	2 of 4 (50%)	0 of 4 (0%)
Support for Animal Welfare Proposals	0 of 5 (0%)	0 of 2 (0%)	0 of 1 (0%)	0 of 1 (0%)	0 of 4 (0%)	1 of 1 (100%)	0 of 1 (0%)	0 of 1 (0%)	0 of 1 (0%)	0 of 1 (0%)
Support for Gun Violence Reporting Proposals	3 of 3 (100%)	0 of 0 (No Data)	0 of 0 (No Data)	0 of 0 (No Data)	0 of 2 (0%)	0 of 0 (No Data)	0 of 0 (No Data)	0 of 0 (No Data)	0 of 0 (No Data)	0 of 0 (No Data)
Overall Support for Social Proposals	6 of 36 (16.7%)	1 of 10 (10%)	2 of 11 (18.2%)	1 of 7 (14.3%)	6 of 42 (14.3%)	4 of 14 (28.6%)	4 of 6 (66.7%)	2 of 6 (33.3%)	3 of 6 (50%)	0 of 6 (0%)

Unique Worker Social Proposals Supported	2 of 10 (20%)	1 of 7 (14.3%)	1 of 6 (16.7%)	1 of 6 (16.7%)	2 of 10 (20%)	4 of 8 (50%)	4 of 6 (66.7%)	2 of 6 (33.3%)	3 of 6 (50%)	0 of 6 (0%)

G. *Support for Environmental Proposals*

In the 2018-2019 proxy season, shareholder proposals related to the environment were fairly common. The index funds included in this study considered 37 proposals related to the environment. As shown in Table 7, overall support for environmental proposals ranged from a low of 0% (for Dimensional S&P 500) to a high of 66.6% (for Deutsche S&P 500). Within the Big Three, support ranged from a low of 8.3% (for Vanguard SRI funds) to a high of 54.1% (for BlackRock SRI funds). When looking at the number of unique proposals supported, the Big Three ranged from two to thirteen, with Vanguard SRI funds supporting the smallest number of environmental proposals and BlackRock SRI funds supporting the highest. BlackRock remained the only fund family in the Big Three where votes were cast differently for its traditional index funds and its SRI funds, while Vanguard and State Street had no internal disagreement between or among their traditional and SRI funds.

The index funds studied were most likely to support proposals related to climate change and greenhouse gas emissions, as well as general sustainability. Four funds or fund groups supported 90% or more climate change and greenhouse gas proposals, while eight supported 25% or more of such proposals. Likewise, three funds supported all sustainability proposals under their consideration while nine-tenths of funds supported at least some sustainability proposals. Proposals in other categories were less likely to receive support. General environmental proposals received no support from any of the funds studied, while only two funds supported any deforestation proposals and only three funds supported any environmental leadership (e.g., establishing a board committee to oversee environmental issues or assessing feasibility of utilizing sustainability as a metric for executive compensation) proposals and only four funds supported.

Table 7: Support for Environmental Proposals

This Table summarizes index funds' overall support for environmental proposals. It expresses the support for these proposals in

the form of "X of Y," where X is the total number of votes in favor of that proposal and Y is the total number of opportunities that fund or group of funds had to vote on the proposal in question. It also provides data on the number and percentage of unique proposals that were supported, again expressed in the form "X of Y."

Environmental	*Vanguard Top 10*	*Vanguard SRI*	*State Street Top 11*	*State Street SRI*	*BlackRock Top 10*	*BlackRock SRI*	*Deutsche S&P 500*	*TIAA S&P 500*	*Guggenheim S&P 500*	*Dimensional S&P 500*
Support for General Environmental Reporting Proposals	0 of 7 (0%)	0 of 0 (No Data)	0 of 2 (0%)	0 of 1 (0%)	0 of 9 (0%)	0 of 1 (0%)	0 of 2 (0%)	0 of 2 (0%)	0 of 2 (0%)	0 of 2 (0%)
Support for Climate Change & GHG Proposals	15 of 50 (30%)	1 of 10 (10%)	9 of 22 (40.9%)	4 of 9 (44.4%)	19 of 64 (29.7%)	9 of 10 (90%)	11 of 11 (100%)	10 of 11 (90.9%)	11 of 11 (100%)	0 of 11 (0%)
Support for Environmental Leadership Proposals	0 of 19 (0%)	0 of 5 (0%)	0 of 10 (0%)	0 of 3 (0%)	0 of 27 (0%)	1 of 8 (12.5%)	2 of 5 (40%)	0 of 5 (0%)	2 of 5 (40%)	0 of 5 (0%)
Support for Pesticide Reporting Proposals	0 of 6 (0%)	0 of 2 (0%)	0 of 5 (0%)	0 of 3 (0%)	0 of 13 (0%)	3 of 5 (60%)	1 of 2 (50%)	1 of 2 (50%)	1 of 2 (50%)	0 of 2 (0%)
Support for Sustainability Proposals	9 of 24 (37.5%)	1 of 4 (25%)	2 of 9 (22.2%)	1 of 7 (14.3%)	6 of 30 (20%)	6 of 8 (75%)	5 of 5 (100%)	5 of 5 (100%)	5 of 5 (100%)	0 of 5 (0%)
Support for Pollution Proposals	3 of 19 (15.8%)	0 of 1 (0%)	0 of 3 (0%)	0 of 2 (0%)	6 of 20 (30%)	1 of 3 (33.3%)	0 of 3 (0%)	1 of 3 (33.3%)	0 of 3 (0%)	0 of 3 (0%)

Support for Deforestation Proposals	0 of 7 (0%)	0 of 2 (0%)	0 of 4 (0%)	0 of 2 (0%)	0 of 12 (0%)	0 of 2 (0%)	1 of 2 (50%)	1 of 2 (50%)	0 of 2 (0%)	0 of 2 (0%)
Overall Support for Environmental Proposals	27 of 132 (20.5%)	2 of 24 (8.3%)	11 of 55 (20%)	5 of 27 (18.5%)	31 of 175 (17.7%)	20 of 37 (54.1%)	20 of 30 (66.6%)	18 of 30 (60%)	19 of 30 (63.3%)	0 of 30 (0%)
Unique Environmental Proposals Supported	7 of 37 (18.9%)	2 of 17 (11.8%)	6 of 29 (20.7%)	5 of 23 (21.7%)	6 of 35 (17.1%)	13 of 24 (54.2%)	20 of 30 (66.6%)	18 of 30 (60%)	19 of 30 (63.3%)	0 of 30 (0%)

H. *Overall Support for Shareholder Environmental & Social Proposals*

In all, the index funds in this study had the opportunity to consider up to 187 unique shareholder proposals related to E&S topics. The general theme amongst the index funds studied was inconsistency. Despite the purported constraint of the "best interests" standard, index funds were not bound to any particular course of action. As Table 8 reveals, support for unique E&S proposals ranged from a low of 0% (for Dimensional S&P 500) to a high of 77.9% (for Deutsche S&P 500). In numerical terms, funds ranged from supporting 0 to 120 unique proposals, demonstrating that this divergence occurred over a substantial pool of ballot items. In fact, unanimity only occurred for 17% of all proposals considered by at least half of the index funds studied, and near unanimity (defined as only one fund group deviating from a general pattern) only occurred on 25% of all proposals. Thus, even when considering the votes of just seven different index fund families, divergence is far more common than consensus or near consensus. These patterns suggest that the "best interests" standard permits wide latitude in voting, making it a weak constraint on funds' behaviors.

Amongst the Big Three, overall support for shareholder E&S proposals was relatively low. Support for unique shareholder E&S proposals ranged from a low of 3.6% for Vanguard SRI funds to a high of 27.7% for BlackRock SRI funds. At both Vanguard and State Street, no cases of internal disagreement were identified. All Vanguard Top 10 funds acted in concert, and Vanguard SRI funds always voted identically to Vanguard Top 10 on all ballot items that both groups had the opportunity

to consider. Likewise, State Street Top 11 never voted differently from one another nor did they vote differently from their SRI counterparts. Internal disagreement was identified at BlackRock alone. Although BlackRock Top 10 always voted in lockstep, BlackRock SRI funds frequently voted differently than their traditional counterparts. This can be seen clearly in the data: BlackRock SRI funds supported nearly three times as many unique proposals than their traditional counterparts, even though the traditional index funds considered more overall unique proposals.

Table 8: Overall Support for Shareholder E&S Proposals

This Table summarizes index funds' overall support for E&S proposals for all categories and subcategories of proposals. It expresses the support for these proposals in the form of "X of Y," where X is the total number of votes in favor of that proposal and Y is the total number of opportunities that fund or group of funds had to vote on the proposal in question. It also provides data on the number and percentage of unique proposals that were supported, again expressed in the form "X of Y."

Support for E&S Proposals	*Vanguard Top 10*	*Vanguard SRI*	*State Street Top 11*	*State Street SRI*	*BlackRock Top 10*	*BlackRock SRI*	*Deutsche S&P 500*	*TIAA S&P 500*	*Guggenheim S&P 500*	*Dimensional S&P 500*
Support for Diversity & Equality Proposals	14 of 133 (10.5%)	3 of 55 (5.5%)	14 of 54 (25.9%)	7 of 36 (19.4%)	7 of 169 (4.1%)	9 of 60 (15%)	21 of 29 (72.4%)	18 of 28 (64.3%)	20 of 28 (71.4%)	0 of 28 (0%)
Unique Diversity & Equality Proposals Supported	4 of 35 (11.4%)	2 of 30 (6.7%)	7 of 29 (24.1%)	7 of 30 (23.3%)	1 of 34 (2.9%)	5 of 29 (17.2%)	21 of 29 (72.4%)	18 of 28 (64.3%)	20 of 28 (71.4%)	0 of 28 (0%)
Support for Human Rights Proposals	4 of 59 (6.8%)	0 of 16 (0%)	2 of 21 (9.5%)	1 of 16 (6.3%)	2 of 69 (2.9%)	0 of 13 (0%)	8 of 10 (80%)	6 of 11 (54.5%)	5 of 10 (50%)	0 of 10 (0%)
Unique Human Rights	1 of 15	0 of 10	1 of 11	1 of 11	1 of 15	0 of 6	8 of 10	6 of 11	5 of 10	0 of 10

Proposals Supported	(6.3%)	(0%)	(8.3%)	(8.3%)	(6.3%)	(0%)	(80%)	(54.5%)	(50%)	(0%)
Support for Worker Welfare Proposals	0 of 66 (0%)	0 of 20 (0%)	0 of 20 (0%)	0 of 14 (0%)	0 of 72 (0%)	7 of 25 (28%)	7 of 11 (54.5%)	4 of 11 (36.4%)	6 of 10 (60%)	0 of 11 (0%)
Unique Worker Welfare Proposals Supported	0 of 17 (0%)	0 of 14 (0%)	0 of 10 (0%)	0 of 12 (0%)	0 of 17 (0%)	3 of 14 (21.4%)	7 of 11 (54.5%)	4 of 11 (36.4%)	6 of 10 (60%)	0 of 11 (0%)
Support for Privacy & Content Governance Proposals	0 of 30 (0%)	0 of 12 (0%)	0 of 15 (0%)	0 of 9 (0%)	0 of 45 (0%)	8 of 18 (44.4%)	4 of 8 (50%)	2 of 8 (25%)	4 of 8 (50%)	0 of 8 (0%)
Unique Privacy & Content Governance Proposals Supported	0 of 8 (0%)	0 of 8 (0%)	0 of 8 (0%)	0 of 8 (0%)	0 of 8 (0%)	4 of 8 (50%)	4 of 8 (50%)	2 of 8 (25%)	4 of 8 (50%)	0 of 8 (0%)
Support for Other Social Proposals	6 of 36 (16.7%)	1 of 10 (10%)	2 of 11 (18.2%)	1 of 7 (14.3%)	6 of 42 (14.3%)	4 of 14 (28.6%)	4 of 6 (66.7%)	2 of 6 (33.3%)	3 of 6 (50%)	0 of 6 (0%)
Unique Other Social Proposals Supported	2 of 10 (20%)	1 of 7 (14.3%)	1 of 6 (16.7%)	1 of 6 (16.7%)	2 of 10 (20%)	4 of 8 (50%)	4 of 6 (66.7%)	2 of 6 (33.3%)	3 of 6 (50%)	0 of 6 (0%)
Support for Political Transparency Proposals	0 of 260 (0%)	0 of 91 (0%)	33 of 102 (32.4%)	21 of 60 (35%)	16 of 337 (4.7%)	15 of 90 (16.7%)	57 of 60 (95%)	29 of 62 (46.8%)	57 of 60 (95%)	0 of 56 (0%)
Unique Political Transparency	0 of 65 (0%)	0 of 51 (0%)	20 of 61 (37.8%)	19 of 55 (34.5%)	3 of 65 (4.6%)	9 of 48 (18.8%)	57 of 60 (95%)	29 of 62 (46.8%)	57 of 60 (95%)	0 of 56 (0%)

Proposals Supported										
Support for Environmental Proposals	27 of 132 (20.5%)	2 of 24 (8.3%)	11 of 55 (20%)	5 of 27 (18.5%)	31 of 175 (17.7%)	20 of 37 (54.1%)	20 of 30 (66.6%)	18 of 30 (60%)	19 of 30 (63.3%)	0 of 30 (0%)
Unique Environmental Proposals Supported	7 of 37 (18.9%)	2 of 17 (11.8%)	6 of 29 (20.7%)	5 of 23 (21.7%)	6 of 35 (17.1%)	13 of 24 (54.2%)	20 of 30 (66.6%)	18 of 30 (60%)	19 of 30 (63.3%)	0 of 30 (0%)
Overall Support for E&S Proposals	**51 of 716 (7.1%)**	**5 of 228 (2.2%)**	**62 of 278 (22.3%)**	**35 of 169 (20.7%)**	**62 of 909 (6.8%)**	**63 of 257 (24.5%)**	**120 of 154 (77.9%)**	**79 of 156 (50.6%)**	**114 of 152 (74.5%)**	**0 of 149 (0%)**
Unique E&S Proposals Supported	**14 of 187 (7.5%)**	**5 of 137 (3.6%)**	**35 of 154 (22.7%)**	**33 of 145 (22.8%)**	**13 of 184 (7.1%)**	**38 of 137 (27.7%)**	**120 of 154 (77.9%)**	**79 of 156 (50.6%)**	**114 of 153 (74.5%)**	**0 of 149 (0%)**

IV. Implications

The detailed examination of the voting behaviors provided in Part III reveals a number of important findings. This Part discusses these findings. Part IV.A analyzes the impact that the Big Three have on E&S shareholder proposals. Part IV.B examines the extreme variance in index funds' approach to E&S matters. Part IV.C analyzes the "best interests" standard and concludes that it is a weak constraint on index funds' voting behaviors. Part IV.D argues that the voting behaviors of the Big Three index funds are unlikely to match investors' preferences, meaning that a non-trivial percentage of Big Three votes do not serve investors' best interests. Part IV.E argues that the Big Three's marketing materials have the potential to mislead investors as to how the Big Three will vote their proxies. Part IV.F analyzes the accessibility of index funds' voting records and finds that such information is difficult for investors to access. Part

IV.G contends that, given the foregoing, index funds ought to solicit investor input on proxy voting and other stewardship decisions.

A. *Stewardship Teams are the Arbiters of Shareholder E&S Proposals*

The Big Three have a pivotal role in shaping corporate behavior, and their influence can perhaps most clearly be seen in the context of shareholder E&S proposals. These proposals are often the most controversial topics under consideration in corporate elections. Within the Russell 3000, nearly a quarter of shareholder proposals are decided by a margin of 10% or less, six-tenths were decided by a margin of 20% or less, and two-thirds were decided by a margin of 30% or less.[141] In that set of funds, BlackRock alone casts an average of 10% of the votes, making it the decider of a considerable proportion of corporate elections for this wider set of companies.[142] The Big Three's combined influence exceeds 20%, meaning that together the trio could determine the outcomes of the majority of shareholder proposals.[143]

The Big Three are also dominant within the S&P 500. Vanguard alone already casts an average of 10% of votes in annual corporate elections for S&P 500 companies, meaning that Vanguard alone could decide the fate of a considerable portion of shareholder E&S proposals for this set of large public companies.[144] Its fellows in the Big Three, State Street and BlackRock, also are heavy-hitters, and the trio together cast an average of 25% of votes in the S&P 500 as of 2019.[145]

Several phenomena extend the reach of the Big Three's power. First, as noted above, internal disagreement amongst the Big Three's index funds is very low for shareholder E&S proposals (with the occasional exception of BlackRock SRI funds), meaning that each of the Big Three consistently votes as a block.[146] By voting substantially all shares in concert, each member of the Big Three maximizes its power.[147]

Second, winning a majority in a shareholder vote is often not necessary to achieve a desired outcome: even a substantial minority vote has been shown to influence corporate behavior.[148] The Big Three alone may be enough of a "substantial minority" to prompt management action

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[141] *See* Novick, *supra* note 68.
[142] *Id.*
[143] *Id.*
[144] *See* Bebchuk & Hirst, *Specter of the Giant Three*, *supra* note 1, at 724.
[145] *Id.*
[146] *See supra* Part III.
[147] *See supra* Part III.
[148] *See* Ho, *supra* note 66, at 420.

(or, more likely, inaction) on a given topic.[149] Thus, the Big Three may be able to influence management towards a desired outcome in a greater number of situations than it would otherwise appear, including in votes with margins that superficially appear beyond their influence.

Finally, even where a minority vote does not prompt a board to action on a topic, rates of support for a failed shareholder proposal affect the timeline for resubmission of that proposal. Under current rules, a company may exclude a shareholder proposal that "deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials within the preceding 5 calendar years" if the matter was voted on at least once in the last three calendar years and did not receive at least 3% of the vote if previously voted on once, 6% of the vote if previously voted on twice, or 10% of the vote if previously voted on three or more times.[150] However, the SEC has proposed changes to these thresholds: if the changes come into effect, a proposal could be excluded if the most recent vote occurred within the preceding three calendar years and did not receive at least 5% of the votes cast if previously voted on once, 15% of the votes cast if previously voted on twice, and 25% of the votes cast if previously voted on three or more times.[151] Under either rule, the Big Three's control of such a substantial proportion of votes means that the trio has the power to determine whether or not a proposal may be reconsidered in future years.

Thus, the Big Three have the power to determine the fate of a substantial proportion of shareholder proposals on E&S. Even where their vote alone is not sufficient to determine the outcome, their vote can still impact whether a company will act in response to a particular proposal and whether that proposal can be resubmitted in the near future. Ultimately, the Big Three have become the arbiters of some of the most controversial E&S ballot items.

B. *Support for E&S Varies Considerably*

Given that the Big Three are now arbiters of corporate E&S issues, a key question becomes: how do they use that influence? Based upon the in-depth analysis of the votes cast in the 2018-2019 proxy season, the answer is that the Big Three tend not to support shareholder E&S

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[149] *Id.*

[150] 17 C.F.R. § 240.14a-8 (2013).

[151] *See* Procedural Requirements & Resubmission Thresholds under Exchange Act Rule 14a-8, Release No. 34-87458, File No. S7-23-19 (Nov. 5, 2019).

proposals. Although total rates of Big Three support for unique shareholder proposals on E&S vary between 3.6% (for Vanguard SRI funds) and 27.7% (for BlackRock SRI funds), the clear trend is that Big Three funds are unlikely to vote in favor of shareholder E&S proposals, even at funds specifically designated as SRI investment vehicles.[152]

An analysis of the voting patterns for competitor funds gives context to these rates of support. Outside of the Big Three, a wide range of support can be seen, from a low of 0% (at Dimensional S&P 500) to a high of 77.95% (at Deutsche S&P 500).[153] This Article does not imply that any one rate of support is necessarily "right" or "wrong." Rather, it demonstrates that an extremely wide range of support is *possible* for index fund stewardship teams. It is not the case that the bulk of proposals under consideration are so infeasible, unnecessary, or undesirable that they are impossible to support, given that some funds support over three-quarters of such proposals. Likewise, no proposal appears so uncontroversial as to require support, given that at least some funds voted against every proposal under consideration. The typical E&S proposal is controversial, and rational minds demonstrably disagree on the desirability of the vast majority of such proposals.

Given the wide range of support for shareholder E&S proposals, it is possible to situate the orientation of Big Three index funds: The Big Three opt to support considerably fewer shareholder proposals than some of their competitors. Additionally, they choose to support somewhat more shareholder proposals than other of their competitors. Their rates of support are not inherent or required, but the product of a choice that could be made differently by a rational competitor or a rational index fund investor.

C. *"Best Interests" Standard is a Weak Constraint*

The highly divergent rates of support for shareholder E&S proposals suggest that the "best interests" standard is a weak constraint. The substantial heterogeneity of voting behaviors at various fund families is not paired with any demonstrated heterogeneity of investor preferences. Given the lack of attention paid to investors' preferences, there is an insufficient basis for believing that the investors at one index fund family or another would be more or less likely to desire or benefit from any given E&S initiatives. The notable exception is SRI-designated funds where investors have selected a fund at least in part for its SRI orientation;

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[152] *See supra* Part III.
[153] *See supra* Part III.

however, such funds often vote for E&S proposals at the same or even *lower* rates than competitor funds (often because certain stocks are screened out of SRI funds). Such behavior undercuts the notion that their voting patterns are explainable by their investors' expressed preferences.

Because index funds' E&S voting behaviors vary so significantly[154] without any input from investors or indication that such voting is desirable or beneficial, it is clear that this voting behavior is not driven by investors.[155] Instead, such voting is likely driven by investors' agents.[156] Stewardship teams at various index funds are responsible for voting decisions, and it is these agents that make the wildly variable decisions about which E&S initiatives to support.[157] What is less clear is the *source* of that divergence: differing skill levels, personal bias, improper financial motives, paternalism, rational disagreement, uncertainty, or some combination of the above.[158] Regardless, the "best interests" standard fails to constrain the behavior of index funds in any significant manner concerning E&S, meaning that index fund agents have considerable latitude to pursue ends not necessarily in line with their investors' interests or preferences.[159]

D. *Voting Patterns are Very Unlikely to Match Investors' Preferences*

The wide divergence in voting patterns without demonstrated heterogeneity of investor preferences underscores a related point: the likelihood that voting patterns observed at the Big Three index funds match investors' preferences is very low.[160] Indeed, given that index funds undertake no serious efforts to discern the opinions of investors on E&S issues and that index funds vary wildly in rates of support for these proposals, not all index funds match or even closely approximate the preferences of their investors.[161] Such convergence would necessarily be the product of random chance alone and not any effort to solicit or act upon investors' preferences.

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[154] *See supra* Part III.

[155] *See* Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1913-16 (2017) (noting that index fund investors "get no independent thinking at all or any separate voice" and that index fund agents' ties to their human investors are limited).

[156] *Id.* at 1916.

[157] *Id.* at 1914–15.

[158] *Id.* at 1907.

[159] *See* Strine, *supra* note 155, at 1873.

[160] *See* discussion *supra* Part II.E.

[161] *See* discussion *supra* Part III.

The best counterargument is that investors have self-sorted into index funds that share their views. However, this is unlikely for several reasons. First, proxy voting behavior is unlikely to be the most salient factor for investors deciding between index funds. One possible exception is for decisions involving SRI funds, but these funds generally focus more on investment screening than proxy voting and, in any event, their voting is often identical to their non-SRI counterparts.[162] Second, many of the materials on which a prospective investor might rely, such as marketing materials and promotional statements, often fail to give an accurate impression of a fund's actual voting patterns.[163] Third, for a given investor, bad proxy voting of their shares will cost less than higher fees.[164] This is true because, except in the very rare case where a vote is decided by a margin less than or equal to a given investor's ownership interest, that investor will not influence the outcome of a vote. Thus, it is rational for individuals to invest in whatever index fund has the lowest fees and hope to free-ride on the good corporate governance of other investors. [165] Fourth, even assuming an investor was interested in choosing an index fund based on a comparison of multiple funds' proxy voting patterns on controversial issues, such information is often hard to find, complicated to parse, and extremely burdensome to assemble into a format that facilitates meaningful comparison. [166] Finally, many individuals invest in index funds through workplace retirement accounts, such as 401(k) and 403(b) accounts.[167] Such accounts have a very limited choice, or frequently no choice at all, as to the fund families in which individuals may invest, meaning that such investors are highly constrained in their ability to seek out an investment vehicle that approximates their voting preferences.[168] The foregoing reasons, alone or in combination, largely prohibit index fund investors from accurately self-sorting based on funds' proxy voting characteristics.

E. *The Big Three's Marketing Materials on E&S Have the Potential to Mislead Investors*

Given the low rates of support for E&S shareholder proposals, especially in comparison to the rates of support of some competitor funds,

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[162]*See supra* Part II.E.
[163]*See infra* Part IV.E.
[164]*See* discussion *supra* Part II.A.
[165]*See* discussion *supra* Part II.A.
[166]*See supra* Part III.C.
[167]*See* Strine, *supra* note 155, at 1872, 1877-78.
[168]*Id.* at 1878.

it is possible that the Big Three's marketing materials and even their stewardship reports could be misleading to investors. These materials often include statements that indicate support for E&S initiatives and ideas, and an investor might be led to expect that shareholder proposals on such initiatives are supported at high rates.

Discrepancies between marketing statements and voting policies can be observed at Vanguard. For example, Vanguard's profession that "[a]n effective board should be independent and reflect both diversity of personal characteristics (such as gender, race, and ethnicity) and diversity of skill, experience, and opinion" might lead a reasonable investor to believe that Vanguard would be likely to support proxy ballot items requesting that companies adopt a board diversity policy or those seeking increased reporting of board diversity.[169] Such assumptions would be somewhat inaccurate for the 2018-2019 proxy season, as Vanguard's largest index funds voted in favor of only 64.3% of proposals seeking a policy on board diversity and 0% of proposals seeking board diversity reporting.[170] Similarly, Vanguard's statements in support of climate risk disclosures and in criticism of boards' lack of action on climate disclosures[171] might seem to imply that Vanguard would support more than the 30% of proposals related to climate change and GHG emissions that Vanguard actually supported.[172] Additionally, Vanguard's assertion that "[i]f a company's business practices or products put people's health, safety, or dignity at risk, they present long-term financial risks to investors, too"[173] could lead an investor expect Vanguard to support more than 6.3% of unique shareholder proposals related to human rights.[174] At a more general level, Vanguard's indications that it will "act[] on material environmental, social, and governance (ESG) opportunities or risks in our investments"[175] might lead an investor or potential investor to expect a rate of support of unique E&S proposals greater than the 7.5% observed for Vanguard's largest index funds.[176]

Of course, none of Vanguard's statements in support of E&S commit it to any course of action, and Vanguard's voting guidelines are clear that all decisions on E&S proposals will be made on a case-by-case

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[169]VANGUARD 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 29, at 14.
[170]*See supra* Table 1.
[171]VANGUARD 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 29, at 22.
[172]*See supra* Table 7.
[173]VANGUARD'S VOICE ON SOCIETAL RISKS, *supra* note 80.
[174]*See supra* Table 2.
[175]INVESTMENT STEWARDSHIP: PRINCIPLES AND POLICIES, *supra* note 77.
[176]*See supra* Table 8.

basis.[177] It is possible that Vanguard's stewardship team earnestly believed that only 7.5% of proposals were meritorious and that their rational judgments on these matters explain the voting behaviors observed for Vanguard's funds. However, it is also *unlikely* that all of Vanguard's investors, or even a majority of those investors, would make equivalent judgments on the proxy ballot items in question given their controversial nature and the wide divergence exhibited by index fund stewardship teams. Thus, Vanguard's statements in support of E&S ought to be accompanied by clear and succinct information on how votes have and will be cast on these controversial topics.

Similarly, State Street's investors and potential investors would likely be surprised at the actual voting decisions made by State Street's stewardship team. For example, given State Street's statements in support of gender diversity[178] and "diversity of views"[179] on boards, investors and potential investors might expect strong support for diversity initiatives, particularly those related to gender diversity. These expectations do not necessarily match State Street's 2018-2019 track record, where rates of support for State Street's eleven largest funds on gender pay gap disclosures, board diversity reporting, and board diversity policy proposals were 24%, 0%, and 0%, respectively.[180] Likewise, State Street's verbal support of increased climate reporting[181] and GHG emissions targets[182] might lead investors to expect greater support for climate change and GHG proposals than the 40.9% observed for State Street's largest funds.[183]Additionally, State Street's posture towards supply chain management and human rights in its marketing materials[184] might lead investors to be surprised by the fact that State Street's largest funds supported only 8.3% of unique human rights proposals.[185]

It is true, however, that State Street has broken no explicit promises with its voting behaviors, as its overall policy towards E&S proposals is to make an individual analysis of each such proposal and to support only those that would "promote long-term shareholder value in the context of the company's existing practices and disclosures as well as existing market

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[177]VANGUARD'S POLICIES AND GUIDELINES, *supra* note 81, at 10.

[178]*See* STATE STREET 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 29, at 16.

[179]SSGA'S GUIDANCE ON ENHANCING GENDER DIVERSITY ON BOARDS, *supra* note 86, at 1.

[180]*See supra* Table 1.

[181]*See* SSGA'S PERSPECTIVES ON EFFECTIVE CLIMATE CHANGE DISCLOSURE, *supra* note 88, at 1.

[182]*Id.*

[183]*See supra* Table 7.

[184]*See* STATE STREET 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 30, at 25.

[185]*See supra* Table 2.

practice."[186] Nonetheless, some of its statements have the potential to mislead investors, especially given that these ballot items are controversial even for the limited universe of seven index fund stewardship teams, let alone society as a whole.

For its part, BlackRock's claims regarding E&S also have the potential to mislead investors and potential investors. For example, BlackRock's expressions of support for both board diversity[187] and workforce diversity[188] might lead investors to believe that its largest index funds would support more than 0% of proposals seeking board diversity disclosures, more than 0% of proposals requesting that boards establish a policy on board diversity, and more than 0% of proposals attempting to have companies disclose information on diversity in their workforce.[189] Similarly, BlackRock's spotlight on votes cast in favor of gender pay disparity proposals in their marketing materials[190] might give an investor the impression that BlackRock's largest funds supported more than 9.6% of such proposals.[191] Relatedly, BlackRock's indications that it expects boards to make disclosures on climate risk[192] might lead investors to be surprised that BlackRock opted not to support four shareholder proposals related to climate reporting, and its evident concern for sustainability[193] might lead investors to be surprised that BlackRock's largest funds supported only 20% of proposals related to sustainability.[194] More generally, BlackRock's inclusion of E&S topics in its stewardship themes and its statement that fiduciary duties require taking into account E&S issues[195] might lead an investor to expect BlackRock Top 10 funds to support more than 7.1% of unique shareholder E&S proposals.[196]

Still, BlackRock's voting patterns are consistent with its stated proxy voting policy, in which BlackRock only promises that it *may* support a shareholder proposal on E&S topics "where there seems to be either a significant potential threat or realized harm to shareholders' interests caused by poor management of material E&S factors."[197] Such a

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[186]SSGA'S PROXY VOTING AND ENGAGEMENT GUIDELINES (UNITED STATES & CANADA), *supra* note 94, at 8.

[187]*See* BLACKROCK 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 31, at 9.

[188]*Id.*

[189]*See supra* Table 1.

[190]*See* BLACKROCK 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 31, at 19.

[191]*See supra* Table 1.

[192]*See* BLACKROCK 2019 INVESTMENT STEWARDSHIP REPORT, *supra* note 31, at 15.

[193]*Id.* at 16.

[194]*See supra* Table 7.

[195]*See* SUSTAINABLE INVESTING, *supra* note 97.

[196]*See supra* Table 8.

[197]PROXY VOTING GUIDELINES FOR U.S. SECURITIES, *supra* note 110, at 13.

statement commits BlackRock to no particular course of action, meaning that its voting pattern from 2018-2019 is not a violation of its proxy voting policy. However, given its other statements in support of E&S, an investor might be surprised by the actual voting pattern if he or she had access to an easily accessible, comprehensive summary of such votes.

In a similar vein, individuals who have opted to place their savings in SRI investment vehicles might be surprised to learn the rates at which those funds support E&S proposals. Based upon the E&S focus of SRI funds, investors at Vanguard and State Street may expect these funds to be at least somewhat more supportive of E&S proposals than their traditional counterparts, and they may be surprised to learn that these funds vote identically.[198] Additionally, individuals who have chosen to invest in SRI funds at any of the Big Three might be surprised to learn that some competitors' traditional S&P 500 index funds support shareholder E&S proposals from two to twenty times more frequently than the Big Three's SRI funds.[199] Although the Big Three's SRI funds do not commit to any particular voting behaviors, it is likely that at least some investors would find the voting behaviors of the Big Three's SRI funds surprising.

F. *Proxy Voting Records are Unmanageable and Difficult to Access*

All proxy voting data analyzed in this study was collected from publicly available documents known as the "Annual Report of Proxy Voting Record" or "Form N-PX." Although this data is theoretically accessible by any member of the public, a number of difficulties in accessing these files could discourage an investor or potential investor from accessing and meaningfully reviewing these voting records.

Vanguard, perhaps the most accessible of the Big Three in terms of voting records, does provide a comprehensive list of voting summaries on its website.[200] However, these documents are quite long: the N-PX forms for Vanguard Top 10 index funds range from 57 to 1,399 pages in length and average 415 pages in length.[201] Additionally, they contain data on the

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[198] *See supra* Part III.

[199] *See supra* Part III.

[200] *See* VANGUARD INVESTMENT GROUP, SEE HOW OUR FUNDS VOTED (2019), https://about.vanguard.com/investment-stewardship/how-our-funds-voted/ [hereinafter HOW OUR FUNDS VOTED].

[201] The report for Vanguard's Total Stock Market Fund is 1,399 pages. VANGUARD TOTAL STOCK MARKET FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for Vanguard's 500 Index Fund is 262 pages. VANGUARD 500 INDEX FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for Vanguard's Institutional Index Fund is 262 pages. VANGUARD INSTITUTIONAL INDEX FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for Vanguard's Mid-Cap Index Fund is 171 pages. VANGUARD MID-

votes cast for thousands of ballot items, which are sorted only by the name of the portfolio company at which the vote took place. There is no summary of all votes cast, and there is no data on votes cast for any subcategory of ballot items, such as environmental initiatives or requests to disclose political contributions. An individual seeking to gain information on how an individual fund voted faces an onerous task, while someone seeking to compare voting patterns between funds would have to expend considerable effort to make any true comparisons. Finally, this data is only released after the entire proxy season has come to a close, meaning investors do not have any real-time data on votes cast.[202]

State Street's N-PX forms are also available on its website, although they are placed on each specific fund's webpage and not in one consolidated location.[203] An investor seeking out such information might be confused by the fact that there is information on the webpages for some funds while none for others, since the subject is ignored on the webpages of certain funds (e.g., those that utilize mirror voting).[204] The reports for State Streets funds are shorter than Vanguard's reports, which is unsurprising given the relatively concentrated holdings typical of State Street's SPDR-style funds. The reports for State Street Top 11 funds range from 15 to 208 pages and average 56 pages.[205] Like Vanguard's voting

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CAP INDEX FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for Vanguard's Growth Index Fund is 57 pages. VANGUARD GROWTH INDEX FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for Vanguard's Small-Cap Index Fund is 555 pages. VANGUARD SMALL-CAP INDEX FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for Vanguard's Value Index Fund is 79 pages. VANGUARD VALUE INDEX FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for Vanguard's Extended Market Index Fund is 1,205 pages. VANGUARD EXTENDED MARKET INDEX FUND, ANNUAL REPORT OF PROXY VOTING Record (2019). The report for Vanguard's Real Estate Index Fund is 82 pages. VANGUARD REAL ESTATE INDEX FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for Vanguard's PRIMECAP Fund is 82 pages. VANGUARD PRIMECAP FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019).

[202]*See* HOW OUR FUNDS VOTED, *supra* note 200.

[203]*See, e.g.*, STATE STREET GLOBAL ADVISORS, THE TECHNOLOGY SELECT SECTOR SPDR FUND: DOCUMENT (2019), https://www.ssga.com/us/en/institutional/etfs/funds/the-technology-select-sector-spdr-fund-xlk.

[204]For example, State Street's largest index fund, SPDR S&P 500 ETF Trust which has its votes cast in mirror voting lacks any information on the "Document" tab about voting records or policies. *See* STATE STREET GLOBAL ADVISORS, SPDR S&P 500 ETF TRUST: DOCUMENT (2019), https://www.ssga.com/us/en/institutional/etfs/funds/spdr-sp-500-etf-trust-spy.

[205]The report for the Technology Select Sector SPDR Fund is 52 pages. THE TECHNOLOGY SELECT SECTOR SPDR FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for the Financial Select Sector SPDR Fund is 54 pages. THE FINANCIAL SELECT SECTOR SPDR FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for the Health Care Select Sector SPDR Fund is 46 pages. THE HEALTH CARE SELECT SECTOR SPDR FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for SPDR S&P Dividend ETF is 75 pages. SPDR S&P DIVIDEND ETF, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for the Consumer Discretionary Select Sector SPDR Fund is 50

records, these documents contain hundreds to thousands of ballot items in a single document with no overview or summary by issue category, and they are released several months after most votes have already been cast. An investor interested in making comparisons between State Street's funds, including between traditional funds and SRI funds, or between State Street's funds and a competitor's funds, faces a considerable burden in doing so.

BlackRock's voting records are the most difficult to access. Multiple BlackRock-issued documents indicate that BlackRock's voting record for the most recent period can be found on BlackRock's website; however, the links provided do not lead to voting record documents.[206] Additionally, searches of the BlackRock website for common terms like "voting record," "proxy voting," and "N-PX" do not yield any results containing voting records. Despite the challenges in accessing these files, BlackRock's voting record is available on its website, but each individual *company* at each BlackRock fund must be opened as an individual, separate document, making it almost comically difficult and time-consuming to get a comprehensive view of votes cast for any one fund, let alone to use this data to make comparisons or investment decisions.[207] In addition to this multi-file format, BlackRock's record can also be accessed via the Security and Exchange Commission (SEC) website "EDGAR" (as can the voting record for all index funds).[208] However, this document is also difficult to access and review, as the voting records for approximately 300 of BlackRock's funds, including all BlackRock Top 10 funds and all BlackRock SRI funds, are compiled in a single document so large that it

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pages. THE CONSUMER DISCRETIONARY SELECT SECTOR SPDR FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for the Consumer Staples Select Sector SPDR Fund is 23 pages. THE CONSUMER STAPLES SELECT SECTOR SPDR FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for the Industrial Select Sector SPDR Fund is 31 pages. THE INDUSTRIAL SELECT SECTOR SPDR FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for the Energy Select Sector SPDR Fund is 22 pages. THE ENERGY SELECT SECTOR SPDR FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for the Utilities Select Sector SPDR Fund is 23 pages. THE UTILITIES SELECT SECTOR SPDR FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for the Communication Services Select Sector SPDR Fund is 15 pages. THE COMMUNICATION SERVICES SELECT SECTOR SPDR FUND, ANNUAL REPORT OF PROXY VOTING RECORD (2019). The report for SPDR Portfolio S&P 500 Growth ETF is 208 pages. SPDR PORTFOLIO S&P 500 GROWTH ETF, ANNUAL REPORT OF PROXY VOTING RECORD (2019).

[206] *See, e.g.*, BLACKROCK, 2019 ANNUAL ENGAGEMENT AND VOTING STATISTICS 2 (2019), https://www.blackrock.com/corporate/literature/publication/blk-voting-and-engagment-statistics-annual-report-2019.pdf.

[207] *See* BLACKROCK, PROXY VOTING SEARCH, http://vds.issproxy.com/SearchPage.php?CustomerID=228.

[208] *See* iShares Trust, Annual Report of Proxy Voting Record of Registered Management Investment Company (Form N-PX) (AUG. 29, 2019).

could not be loaded on several different computers.[209] The document could (eventually) be loaded on a newer (2019) computer, but even this computer repeatedly issued warning messages while the document was in use, such as "This webpage is using significant energy. Closing it may improve the responsiveness of your computer." This filling was under the name of a BlackRock subsidiary, iShares Trust, making it even more difficult for an average investor to find.

Overall, it is difficult to find and access information on proxy votes cast by the Big Three index funds, despite this information being publicly-available by law.[210] Despite the SEC's belief that "[i]nvestors in mutual funds have a fundamental right to know how the fund casts proxy votes on shareholders' behalf," the way that disclosures are made in practice makes it difficult and burdensome for investors and potential investors to access that information.[211] Indeed, these voting records are of only limited utility to an investor wishing to make comparisons between funds or to compare the Big Three's claims regarding stewardship activities to their actual voting behaviors.

G. *Index Funds Should Solicit Investor Input on Proxy Voting*

As this Article has demonstrated, it is a myth that index funds are meaningfully constrained by the "best interest" standard. Currently, index funds have so little incentive to adhere to their investors' preferences that they do not even seek to discern what those preferences are, let alone act on them. Instead, index funds' current behaviors can more readily be explained by their competing incentives to appeal to potential clients, to under-invest in beneficial stewardship activities, to be overly deferential to management, and to maintain their own power. Given the enormous power in the hands of index fund agents, particularly at the Big Three, change to the status quo is vital.

The most efficient way to increase accountability and responsiveness to actual investors is to solicit investors' input on voting and other stewardship decisions. As outlined elsewhere, investor

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[209]The EDGAR website lists the size for this file as "97779897," without any units. *See* U.S. SEC, EDGAR, https://www.sec.gov/Archives/edgar/data/1100663/000119312519233631/0001193125-19-233631-index.htm.

[210]See Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, 68 Fed. Reg. 6564, 6565 (Feb. 7, 2003) (codified at 17 C.F.R. §§ 239, 249, 270, 274).

[211]*Id.*

involvement could take a variety of forms.[212] The first is "pass-through voting instructions," in which index fund investors would be able to issue their own general guidelines as to how shares should be voted. Stewardship teams would then use the investor-generated guidelines in place of the fund-generated guidelines, voting proportionally in accordance with the actual preference of their investors. Pass-through voting instructions would work particularly well with many of the high-salience E&S issues discussed herein; for instance, an investor could create a guideline that said, "Vote *yes* on all proposals to disclose political spending." At every company with such a proposal, the fund would vote the investor's shares accordingly.

The second proposal is "indirect democracy," wherein index fund investors could choose to have the votes corresponding to their ownership cast in line with an individual or entity of their choosing. For example, an investor may choose to defer to the index fund provider's recommendations, to vote according to certain proxy advisor's recommendations, to follow the board's recommendations, to vote proportionally in line with other investors in the fund, or to abstain from voting all together. Potentially, a policy of indirect democracy could spur additional innovation in the proxy advisory sector and lead to the emergence of more numerous and more diverse proxy advisors.

The third proposal is an investor survey in which index funds would deliberately seek out information about their investors' preferences and values. For example, investors could provide funds with information about their preferences on environmental and social topics, as well as their time horizon for investment and risk tolerance. In order to fulfill the "best interests" standard, index funds would be obligated to consider the expressed interests of their investors when casting proxy votes and engaging in other forms of stewardship.

Ideally, these proposals would be implemented in tandem, so that investors could select the method of involvement that would best suit their situation. For example, an environmentalist with little governance expertise might opt to create pass-through voting instructions in favor of sustainability proposals while deferring to the board on governance matters. Similarly, a very involved investor may wish to create several pass-through voting instructions on key topics, while a less-involved investor may prefer to simply answer a brief survey provided by the fund.

Regardless of the mechanism(s) chosen, involving individual investors in the decision-making process would entail numerous benefits. First, individual investors best know their own interests and preferences,

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[212] *See* Griffin, *supra* note 60, at 31-35.

and soliciting input would facilitate acting on those interests. Second, individual investors are numerous, and spreading decision-making power across millions of individuals would decrease the concentrated power currently in the hands of a few index fund employees. Third, involving actual investors would increase the accountability of index funds, since it would be far easier to demonstrate whether and to what extent an index fund's behavior was in line with investors' expressed preferences. Fourth, funds' support for E&S proposals would more accurately match investors' preferences, and this increased alignment with investors' wishes would better fulfill the aims of shareholder democracy.

Many of the problems associated with the rise of index funds are a product of the current legal structure which empowers index fund agents at the expense of index fund investors. Restoring the power of index fund investors, while simultaneously reducing the power of their agents, would ensure that proxy votes are used to truly advance investors' preferences and not those of their stewards. Reuniting economic rights with voting rights would ensure that shareholder democracy serves the interests of the many rather than the interests of a few.

V. CONCLUSION

Under the status quo, the Big Three have the power to decide the fate of a substantial proportion of shareholder E&S proposals, and, even in circumstances where they cannot determine the outcome outright, they have the power to influence corporate behavior and to determine whether a shareholder proposal may be reconsidered in the near future. They use this power to support both fewer and more proposals than some of their competitors, and overall there is extreme variation in which E&S proposals index funds are willing to support. Such variance cannot be explained by deference to the actual investors of index funds, as index fund management seeks no input from such investors on proxy voting decisions. It is thus clear that index fund stewardship teams are not constrained by the "best interests" standard (or any other regulation) to pursue the actual best interests of their individual investors.

If stewardship teams are not constrained by the "best interests" standard, then the most powerful corporate actors in the world are beholden to no one. The incredible aggregation of capital in the hands of the Big Three can be voted by a handful of index fund employees with total discretion on E&S issues, and likely many other issues as well. Index fund agents can "engage" with portfolio company management with less accountability still. Currently, the Big Three each have the power to unilaterally decide substantial numbers of E&S proposals; acting in

concert, they likely control the majority of such proposals. As index funds continue their relentless growth, their power over all shareholder voting will resemble their power over E&S issues today.

This Article submits that such a future is not desirable. It is, however, avoidable. Index fund power can be contained, and individual power can be increased with a single stroke: through greater input from the individuals who invest in index funds. The significant environmental and social issues facing our corporations, and our society, are too important to leave to the unaccountable.

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