The Past, Present, and Future of Proxy Voting Choice

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I. INTRODUCTION

In 2018, the *Journal of Corporation Law* published my job market paper, *The Case Against Passive Shareholder Voting*, in which I argued that passive funds—a term that includes index funds and ETFs—lacked a financial incentive to engage in informed stewardship of their portfolio companies.[1] Given the rising size and influence of passive funds in the U.S. equity market, this lack of informed stewardship could lead to negative consequences for the economy.[2] The Article concluded that lawmakers should consider restricting the voting power of passive funds by requiring pass-through voting for non-routine voting matters (or setting this rule as a default that could then be modified by investors).[3]

The reaction came hard and fast. Then-Vanguard CEO Bill McNabb published an op-ed in the Wall Street Journal calling my proposal "irresponsible and ill-informed."[4] The broader scholarly reception wasn't much better.[5]

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1. Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 495 (2018).

2. *Id.* at 506.

3. *Id.* at 530–31. The Article argued that that any fund using an indexing strategy would count as passive unless that presumption was rebutted. *Id.* at 528. For example, if the fund demonstrated that it had access to information from active fund managers with overlapping investments, or if it demonstrated that the fund engaged in meaningful amounts of research, the fund could keep its votes. *Id.* The passive fund could also retain its votes if it committed to mirror voting under all circumstances. *Id.*

4. Bill McNabb, *Proxy Votes Certainly Matter to Index Funds*, WALL ST. J. OPINION (July 5, 2017), https://www.wsj.com/articles/proxy-votes-certainly-matter-to-index-funds-1499289400 (on file with the *Journal of Corporation Law*).

5. *See, e.g.*, John C. Coates IV, *The Future of Corporate Governance Part I: The Problem of Twelve* 21 (Harv. John M. Olin Ctr. for L., Econ. & Bus., Discussion Paper No. 1001, 2019), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Coates_1001.pdf [https://perma.cc/YDX7-RL6V] (arguing that the

As debate continued about the incentives of passive funds in corporate governance,[6] scholars began to give critical attention to the sheer size and power of the asset managers that specialized in passive investment vehicles.[7] In particular, scholars focused on the so-called 'Big Three' of BlackRock, Vanguard, and State Street, noting that they had garnered record amounts of investor dollars, giving them massive investment stakes across the public market.[8] The enormous size of these asset managers had become a liability.

Skepticism about corporate power is a long-standing feature of the American political environment.[9] This iteration of the issue, with giant asset managers fueled by 401(k) accounts, was no different. As John Coates put it, "the rise of indexing presents a sharp, general, political challenge to corporate law. The prospect of twelve people even potentially controlling most of the economy poses a legitimacy and accountability issue of the first order—one might even call it a small 'c' constitutional challenge."[10]

As the political issue became elevated in the scholarly consciousness, asset managers began to flex their governance muscle. Take BlackRock, the world's largest asset manager and a heavy hitter in the world of passive investing,[11] as an illustrative example. In 2018, BlackRock CEO Larry Fink authored the first of a series of letters discussing the link between corporate profit and a "social purpose."[12] By 2020, Fink had further clarified his

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proposals made in Lund, *supra* note 1, "would have strange potential consequences," including "entrenching managers" or giving certain shareholders "effective control."); *But see* Sean J. Griffith, *Opt-In Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEX L. REV. 983, 993–95 (2020) (advocating for pass-through voting for large mutual funds on certain issues); Caleb N. Griffin, *We Three Kings: Disintermediating Voting at the Index Fund Giants*, 79 MD. L. REV. 954, 994–96 (2020) (proposing pass through voting to reduce the voting power of index fund managers, including the Big Three).

6. Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2046–57 (2019); Jill Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17, 25–37, 71 (2019); Marcel Kahan & Edward B. Rock, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders*, 100 B.U. L. REV. 1771, 1792–93, 1795–97 (2020).

7. *See, e.g.*, Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 724 (2019) (describing how the "average combined stake in S&P 500 companies held by the Big Three essentially quadrupled over the past two decades"); Dorothy S. Lund & Adriana Robertson, *Giant Asset Managers, the Big Three, and Index Investing* 20–26 (Univ. of S. Cal. Gould Sch. of L. Ctr. for L. & Soc. Sci., Rsch. Paper No. 23-13, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4406204 [https://perma.cc/93B4-THTD] (discussing the scholarly conversation that evaluates the rise of giant asset managers).

8. *See, e.g.*, Bebchuk & Hirst, *supra* note 7 ("[W]e estimate that the share of votes that the Big Three would cast at S&P 500 companies could well reach about 34% of votes in the next decade . . . if recent trends continue, the Big Three could be expected to become the "Giant Three.").

9. *See, e.g.*, MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 283 (1994).

10. Coates, *supra* note 5, at 2.

11. Alon Brav, Dorothy S. Lund & Lin Zhao, *Flows, Financing Decisions, and Institutional Ownership of the U.S. Equity Market* 26 (Eur. Corp. Governance Inst., Working Paper No. 749/2024, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4693837 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4693837]; Lund & Robertson, *supra* note 7, at 13–14.

12. Larry Fink, *Larry Fink's 2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK (2018), https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter [https:/perma.cc/98RC-NBL2] ("Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance but also show how it makes a positive contribution to society.").

view, focusing on climate change risk as a "defining factor in companies' long-term prospects" in his annual letter.[13] Accordingly, he pledged that BlackRock would engage with portfolio companies or divest with sustainability in mind.[14] In 2020, BlackRock joined Climate Action 100+, a group of asset managers committed to engaging companies on "improving climate change governance, cutting emissions and strengthening climate-related financial disclosures, in order to mitigate financial risk and to maximize long-term value of assets."[15] This action followed years of lobbying and protests by climate activists who argued that BlackRock's proxy voting on climate issues and overall support for management was inconsistent with its fiduciary duties to investors.[16]

By the 2021 proxy season, BlackRock was putting its (investors') money where its mouth was. In that year, the asset manager supported 35% of shareholder proposals, compared to 17% the previous year.[17] In particular, the investment giant supported 26 out of 28 "say-on-climate" proposals.[18] It also "voted against the election of 255 directors as a result of climate-related concerns, an increase from only 55 in the prior year."[19] And its support for Engine No. 1, an upstart activist hedge fund that waged a proxy contest at ExxonMobil on environmental grounds, led to a surprising victory for the dissidents.[20] Beyond voting, the asset manager reported that it had conducted more engagements on climate and natural capital strategy than on any other issue.[21]

13. Larry Fink, *Larry Fink's 2020 Letter to CEOs: A Fundamental Reshaping of Finance*, BLACKROCK (2020), https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter [https://perma.cc/94EF-B64G].

14. *Id.*

15. *About Climate Action 100+*, CLIMATE ACTION 100+, https://www.climateaction100.org/about/ [https://perma.cc/EX7W-MZ4Z]; Press Release, Climate Action 100+, BlackRock Joins Climate Action 100+ to Ensure Largest Corporate Emitters Act on Climate Crisis (Jan. 9, 2020), https://www.climateaction100.org/news/blackrock-joins-climate-action-100-to-ensure-largest-corporate-emitters-act-on-climate-crisis/ [https://perma.cc/NK85-AZ92].

16. Alex Fox, *World's Largest Investor BlackRock Joins Climate Action Investing Pact*, THE HILL (Jan. 13, 2020), https://thehill.com/changing-america/sustainability/climate-change/478005-worlds-largest-investor-blackrock-joins/ [https://perma.cc/P65J-VCCC]; Richard Henderson, *BlackRock Joins Climate Action Group After 'Greenwash' Criticism*, FIN. TIMES (Jan. 9, 2020), https://www.ft.com/content/16125442-32b4-11ea-a329-0bcf87a328f2 (on file with the *Journal of Corporation Law*).

17. Saijel Kishan, *BlackRock Voted Against 255 Directors for Climate Issues*, BLOOMBERG (July 20, 2021), https://www.bloomberg.com/news/articles/2021-07-20/blackrock-voted-against-255-directors-for-climate-related-issues (on file with the *Journal of Corporation Law*).

18. Cydney Posner, *BlackRock Flexes Its Muscles During the 2020-21 Proxy Period*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 16, 2021), https://corpgov.law.harvard.edu/2021/08/16/blackrock-flexes-its-muscles-during-the-2020-21-proxy-period/ [https://perma.cc/Z2PF-MNR8].

19. *Id.*

20. Matt Phillips, *Exxon's Board Defeat Signals the Rise of Social-Good Activists*, N.Y. TIMES (June 9, 2021), https://www.nytimes.com/2021/06/09/business/exxon-mobil-engine-no1-activist.html (on file with the *Journal of Corporation Law*); Jeff Sommer, *Millions of Fund Investors Are Getting a Voice*, N.Y. TIMES (Feb. 23, 2024), https://www.nytimes.com/2024/02/23/business/vanguard-blackrock-state-street-investing-voting.html (on file with the *Journal of Corporation Law*).

21. Posner, *supra* note 18.

Simply put, by 2021, the theoretical prospect of largely passive asset managers impacting the corporate governance landscape became a reality. Thanks to BlackRock's support, ESG shareholder proposals were achieving record levels of support.[22] And shortly thereafter, the asset manager became the target of attention across both sides of the political aisle. Republican congressmen began probing the company's business dealings and seeking penalties.[23] Red-state governors directed state pension funds to divest from BlackRock.[24] The accusation was that BlackRock was putting identity politics ahead of profits and unfairly excluding the energy sector as a result.[25] Meanwhile, democratic governors and politicians joined environmental activists in arguing that BlackRock wasn't doing enough to avert climate change, in the interest of long-term value and risk mitigation.[26]

Suddenly, the concept of pass-through voting seemed like a good idea. In May of 2022, a group of conservative senators introduced the INDEX Act, which would have forced asset managers to pass through the votes to their beneficial owner investors.[27] The bill went nowhere, but BlackRock had taken the hint. That same year, the asset manager announced that it would be expanding its voting choice program to encompass a broader set of institutional investors and even retail shareholders.[28] Vanguard and State Street—who had been dealing with a similar political dynamic after increasing support for ESG issues in parallel with BlackRock—made similar moves shortly thereafter.[29]

We are now almost three years into a world of expanded pass-through voting via voluntarily undertaken voting choice programs and we are only beginning to understand the

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22. Lamar Johnson, *Support for ESG Proposals Fell by a Third Since 2021 Record*, ESG DIVE (Mar. 15, 2024), https://www.esgdive.com/news/2024-proxy-preview-esg-proposal-support-down-a-third-since-2021-as-you-sow-si2-impact/710460/ [https://perma.cc/E4BR-B8K4] (noting that "pro-ESG proposals reached a record-high average support of 33.3% in 2021.").

23. Steven T. Dennis, *House Republicans Probe BlackRock, Vanguard on Their ESG Policies*, BLOOMBERG (July 7, 2023), https://www.bloomberg.com/news/articles/2023-07-07/house-republicans-probe-blackrock-vanguard-on-their-esg-policies?embedded-checkout=true (on file with the *Journal of Corporation Law*).

24. *Id.*

25. Cheyenne Ligon, *BlackRock Voted Against a Record 91% of All Shareholder Proposals in 2023 Proxy Season*, PENSIONS & INVS. (Aug. 23, 2023), https://www.pionline.com/esg/blackrock-voted-against-record-91-shareholder-proposals-2023-proxy-season [https://perma.cc/M6G4-]; Dennis, *supra* note 23; Allison Prang & Jordan Wolman, *GOP Is Taking a Drop Out of BlackRock's Bucket*, POLITICO (Nov. 10, 2022), https://www.politico.com/newsletters/the-long-game/2022/11/10/gop-is-taking-a-drop-out-of-blackrocks-bucket-00066194 [https://perma.cc/HS9P-9NPU].

26. Ligon, *supra* note 25.

27. INvestor Democracy is EXpected Act, S. 4241, 117th Cong. (2022).

28. Joud Abdel Majeid & Rachel Aguirre, *BlackRock has Expanded Proxy Voting Choice to Millions of U.S. Retail Shareholder Accounts*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 1, 2024), https://corpgov.law.harvard.edu/2024/04/01/blackrock-has-expanded-proxy-voting-choice-to-millions-of-u-s-retail-shareholder-accounts/ [https://perma.cc/E475-ESBK].

29. *Vanguard to Expand Proxy Voting Choice to Additional Funds in 2024*, VANGUARD (Dec. 5, 2023), https://corporate.vanguard.com/content/corporatesite/us/en/corp/articles/expanding-proxy-voting-choice.html [https://perma.cc/9N64-GTSP]; Press Release, State St. Glob. Advisors, State Street Global Advisors to Extend Proxy Voting Choice to ETFs and Mutual Funds (May 22, 2023), https://investors.statestreet.com/investor-news-events/press-releases/news-details/2023/State-Street-Global-Advisors-to-Extend-Proxy-Voting-Choice-to-ETFs-and-Mutual-Funds/default.aspx [https://perma.cc/TGJ9-CVQS].

effects. Given the limitations in observing passed-through votes (limitations that will continue even after reforms to Form NPX[30] go into place), it is difficult to ascertain the impact. Moreover, the asset managers that have implemented voting choice programs refuse to disclose much data about the uptake rate and the votes that were cast. As such, theoretical work (aided by empirical studies on the impact of proxy voting advice[31] and retail shareholder voting[32]) must be the starting point.[33]

This article provides an early attempt at understanding what voluntary pass-through voting could mean for the marketplace. I first provide an overview of my argument in my 2018 *Journal of Corporation Law* article and the events that followed. I then survey pass-through voting initiatives that have taken hold at three asset managers—BlackRock, Vanguard, and State Street. I then conclude with some preliminary observations about how voting choice is likely to affect the proxy voting landscape and outline open questions.

II. The Case Against Passive Shareholder Voting

The past fifty years have brought about a dramatic transformation of U.S. capital markets. Once characterized by diffuse investor ownership, the U.S. stock market has become concentrated in the hands of institutional asset managers. That concentration has occurred even though more Americans invest in the stock market than ever before because they now do so via mutual funds managed by a professional asset manager.[34] And the individual investors delegate their governance right to the intermediary as a condition of investing. As a result, institutional intermediaries are a fundamental part of the U.S. investing and corporate governance landscape.

The turn of the millennium saw another important development: mutual fund investors began to prefer passive investment vehicles rather than active. Passive funds are a subset of mutual funds that automatically select company stocks to track a market index.[35] Although a passive fund portfolio manager may initially exercise judgment by setting the

30. Press Release, SEC, SEC Adopts Rules to Enhance Proxy Voting Disclosure by Registered Investment Funds and Require Disclosure of "Say-on-Pay" Votes for Institutional Investment Managers (Nov. 2, 2022), https://www.sec.gov/newsroom/press-releases/2022-198 [https://perma.cc/V2DM-KBW2].

31. *See, e.g.*, Edwin Hu, Nadya Malenko & Jonathon Zytnick, *Custom Proxy Voting Advice* 2–3 (Eur. Corp. Governance Inst., Working Paper No. 975/2024, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4770971 [https://perma.cc/M283-TLJ8] (studying institutional investors' use of custom proxy voting policies).

32. *See, e.g.*, Alon Brav, Matthew Cain & Jonathon Zytnick, *Retail Shareholder Participation in the Proxy Process: Monitoring, Engagement, and Voting*, 144 J. FIN. ECON. 492, 493 (2022) (studying "retail shareholder turnout and voting decisions").

33. In a clever study, a group of researchers examined a "novel setting in which decentralized proxy votes are observable. In 2019, Vanguard decentralized voting authority from its stewardship group to its external fund managers. While fund managers are just one type of potential decentralized voter, their voting choices provide insights into the voting of shareholders receiving voting authority from centralized stewardship groups via pass-through voting programs." The researchers determined that the 2019 policy adoption changed Vanguard's voting patterns by introducing greater voting disagreement between internally and externally managed funds. Nathan D. Hermann et al., Decentralizing Proxy Voting Power (Dec. 16, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5007107 [https://perma.cc/T2Z7-UL8M].

34. For a detailed description of this history, see Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 874–86 (2013); Coates, *supra* note 5, at 8–13.

35. Lund, *supra* note 1, at 506.

philosophy of the fund and determining how to track the index, the fund's trading decisions are largely automated. This automation leads to the passive fund's chief benefit— it can charge much lower fees because the fund can eschew portfolio managers and analysts that conduct company research. And given the difficulty of generating alpha (or excess returns) in highly efficient markets, the decision to secure broad diversification cheaply became a sensible choice for working Americans investing their retirement dollars.

This investor preference for index funds led to two developments. The first was a large influx of money out of active funds and into passive funds.[36] The second and related development was that the asset managers that specialized in passive funds began to grow faster than their rivals. Soon, the Big Three of BlackRock, Vanguard, and State Street achieved huge sizes, with massive investment stakes across the public market.[37]

This development led to scholarly concern and attention across disciplines.[38] My focus in *The Case Against Passive Shareholder Voting* was on the governance implications of the rise of passive investing. Specifically, I argued that the aspects of passive funds that made them so appealing to investors also made them likely to underinvest in stewardship and monitoring for three main reasons. First, passive fund portfolios are generally highly diversified, with investments in many more companies than the typical actively managed fund. This means that any investment in improving governance at one of the passive fund's portfolio companies would be even less likely to impact the fund's overall performance.

Second and relatedly, passive funds face an acute collective action problem. This is because any investment in stewardship will drive up their costs while benefitting their competitors. Unlike actively managed funds, which modify the weight of their portfolio companies based on their expected performance and can therefore out-compete rival funds with strategic investments in governance, passive funds hold stock in proportion to the company's weight on a market index. A passive fund that invests in governance, therefore, would improve the performance of all rival tracker funds in equal measures. The intervention could also benefit active funds, which could overweigh the target company upon learning about the intervention. In other words, any investment in governance would benefit competitor funds and drive up the passive fund's costs, harming its relative performance.[39]

Third, because of its index tracking strategy, a passive fund does not routinely monitor the fundamentals of companies in its broad portfolio. As a result, stewardship is especially costly for passive funds because it requires the fund to identify underperformers and calibrate the stewardship intervention accordingly. Compare this reality to that of an active fund, which generates information about portfolio companies as a byproduct of trading. Unlike active funds, passive funds would need to incur substantial resources to engage effectively in governance—expenses that would likely drive fee-sensitive investors to competitor funds.[40]

In sum, I argued that passive investing exacerbated agency and collective action problems associated with intermediated finance. And as passive funds continued to expand their ownership of the market, I predicted that two things would happen: first, that corporate

36. *Id.* at 507.

37. Brav, Lund & Zhao, *supra* note 11, at 8–9.

38. Dorothy S. Lund, *Passive Investing and Corporate Governance: A Law and Economics Analysis*, *in* 11 ENCYCLOPEDIA OF LAW AND ECONOMICS 60, 61 (Gerrit De Geest ed., 2d ed. 2020).

39. Lund, *supra* note 1, at 511.

40. *Id.* at 511–12.

managers would experience a power vacuum because a growing share of corporate owners would have substantially weakened incentives to monitor and discipline management; and second, that passive fund voting would lead to distortions in voting, because the largest shareholders would have the worst incentives to generate knowledge about portfolio companies and intervene when problems arose.[41] I argued that these issues could warrant regulatory invention, including a mandatory pass-through voting regime for "non-routine" voting matters.[42]

Of course, in the months and years following the publication of my article, the largest U.S. asset managers departed from their passive stance, in ways that were both consistent and inconsistent with my theory. As the introduction revealed, the largest asset managers began to oppose management and focus on issues such as climate change and board diversity in their voting practices. On the one hand, this was consistent with my prediction that they would choose to intervene on issues when doing so could be done with little firm-specific information, in a one-size-fits-all way.[43] Consider a voting policy that specified that the asset manager will vote against nominating directors of all male boards, or companies that refuse to provide climate disclosure. It doesn't take much information to determine whether a company has complied with this rule.[44] But of all the low-cost rules to adopt, why did they choose policies on these issues?

The answer revealed something that I missed in my initial analysis. I had assumed that index funds would mostly be uninformed, unless they were privy to spillover information from active funds within the same fund family.[45] I hadn't considered the influence of mutual fund *clients*. As I argued in a later paper, *Asset Managers as Regulators*, mutual fund clients push asset managers to adopt certain policies and stances in governance, and these clients include not just individual investors, but pension funds and sovereign wealth funds as well.[46] Indeed, these latter groups arguably exercise the most influence, as they are especially informed and vocal about key votes and policies.[47] Because asset managers rely on these clients to make a profit, they bend to their wishes, subject to a separate constraint of avoiding government backlash and regulation. This dynamic, I argued, explained why we saw asset manager action on climate disclosure and board diversity (and not so many other issues)—this is what the asset manager's largest and most vocal clients wanted.[48]

Subsequent events confirmed that client (and government) pressure was an important driver of asset manager stewardship. As discussed, red-state politicians began exercising

41. *Id.*

42. *Id.* at 512–14, 524–25, 530. As discussed, my 2018 paper argued that active funds within the same institutional umbrella could provide information about votes that might ameliorate some of the governance concerns and proposed an exception for funds that have a substantial overlap with active funds. *Id.* at 514, 529, 528 n.179.

43. *Id.* at 511–12.

44. Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. 77, 86 n.43 (2023).

45. *Id.* at 87.

46. *Id.* at 83–84.

47. *Id.* at 102, 110–11.

48. *Id.* at 110–11, 119–23, 127.

their client muscle by threatening to withhold state pension fund assets from asset managers whose policies they opposed.[49] These politicians also began investigating the Big Three and clamoring for regulatory policies and penalties that would have fundamentally challenged their business.[50] In response to this pressure, the Big Three made dramatic changes. BlackRock stopped using the term ESG[51] and minimized its involvement with Climate Action 100+, while State Street withdrew entirely. Vanguard had never joined the group in the first place, but pulled out of a related industry-initiative—Net Zero Asset Managers—in December 2022.[52] The Big Threes' support for ESG proposals fell precipitously in 2023 and 2024.[53] Perhaps most important, in 2023, each asset manager announced that they would expand 'voting choice' programs that would give their beneficial owner investors the power to direct their proxy votes. The next Part describes the current state of these programs.

III. VOTING CHOICE

This Part briefly surveys voting choice programs across the U.S. asset management industry, relying on publicly available information. It focuses particular attention on voting choice programs at BlackRock, State Street, and Vanguard, and concludes with a brief survey of other developments on the horizon.

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49. Will Schmitt, *US Investment Funds Pull $13.3bn from BlackRock in Anti-ESG Campaign*, FIN. TIMES (Mar. 24, 2024), https://www.ft.com/content/9306c8f2-530d-45ca-a830-4d26e5a90509 (on file with the *Journal of Corporation Law*).

50. *See, e.g.*, Dennis, *supra* note 23; Stephen Neukam, *Republican States Move to Block Giant Asset Manager's ESG Push for Utility Companies*, THE HILL (May 10, 2023), https://thehill.com/policy/energy-environment/3998234-republican-states-move-to-block-giant-asset-managers-esg-push-for-utility-companies/ [https://perma.cc/Y7T4-MGN8] (explaining how a group of states sought to block BlackRock from pushing ESG priorities on utility companies); Ross Kerber, *US Republicans Challenge More Fund Managers on ESG*, REUTERS (Mar. 31, 2023), https://www.reuters.com/business/sustainable-business/us-republicans-widen-challenge-fund-managers-esg-2023-03-31/ (on file with the *Journal of Corporation Law*) (discussing a letter to BlackRock from Republican AGs challenging ESG investments).

51. Isla Binnie, *BlackRock's Fink Says He's Stopped Using 'Weaponised' Term ESG*, REUTERS (June 26, 2023), https://www.reuters.com/business/environment/blackrocks-fink-says-hes-stopped-using-weaponised-term-esg-2023-06-26/ (on file with the *Journal of Corporation Law*).

52. Simon Jessop & Ross Kerber, *JPMorgan, State Street Quit Climate Group, BlackRock Steps Back*, REUTERS (Feb. 15, 2024), https://www.reuters.com/sustainability/sustainable-finance-reporting/jpmorgan-fund-arm-quits-climate-action-100-investor-group-2024-02-15/ (on file with the *Journal of Corporation Law*); Ross Kerber & Noor Zainab Hussain, *Vanguard Quits Net Zero Climate Effort, Citing Need for Independence*, REUTERS (Dec. 7, 2022), https://www.reuters.com/business/sustainable-business/vanguard-quits-net-zero-climate-alliance-2022-12-07/ (on file with the *Journal of Corporation Law*).

53. Lindsey Stewart, *New Proxy-Voting Options for IVV and Other Index Funds from BlackRock, State Street, and Vanguard*, MORNINGSTAR (Dec. 13, 2023), https://www.morningstar.com/funds/new-proxy-voting-options-ivv-other-index-funds-blackrock-state-street-vanguard [https://perma.cc/U4YF-GDHJ]; Lamar Johnson, *Vanguard Joins BlackRock in Pouring Cold Water on ESG Proposals*, CFO DIVE (Sept. 1, 2023), https://www.cfodive.com/news/vanguard-blackrock-esg-proposal-support-dips/692527/ [https://perma.cc/HX4G-ENH6]; Lamar Johnson, *BlackRock's Support for E+S Proposals Whittles Away in 2024 Proxy Season*, ESG DIVE (Aug. 22, 2024), https://www.esgdive.com/news/blackrock-2024-investment-stewardship-report-declining-environmental-social-support/725010/ [https://perma.cc/72XY-8BS9].

A. BlackRock

In 2022, BlackRock launched its "Voting Choice" program, which was an expanded version of a program it had been offering certain institutional clients for years.[54] Voting Choice is now available to any institutional investor with a separately managed account or those that invest in pooled funds that use either "equity index investment strategies" or "systematic active equity strategies."[55] Notably, "registered funds, including '40 Act funds in the U.S. and retail funds in the United Kingdom and Europe are not eligible for Voting Choice."[56] In total, over 650 funds spanning the United States, the United Kingdom, Ireland, and Canada—for a total of $2.8 trillion in managed assets[57]—are eligible for Voting Choice.[58] A smaller Voting Choice pilot program was also available to retail investors that invest in BlackRock's iShares Core S&P 500 ETF (and it concluded in December 2024).[59] These eligible retail investors totaled "more than three million"[60] and represented around $200 billion in assets.[61]

Both institutional and retail investors must opt into Voting Choice.[62] Institutional investors can do so by amending their investment management agreement;[63] eligible retail investors can complete a survey to enroll in the program.[64] Those who do not opt in to the program will continue to have their shares voted according to BlackRock's policy.[65]

Retail investors participating in the pilot can select one of seven third-party voting policies or follow Blackrock's own Investment Stewardship Policy.[66] The seven third-

54. Majeid & Aguirre, *supra* note 28; *Empowering Investors Through BlackRock Voting Choice*, BLACKROCK (2024), https://www.blackrock.com/corporate/about-us/investment-stewardship/blackrock-voting-choice [https://perma.cc/KNP3-ZFTH].

55. BLACKROCK, VOTING CHOICE FAQS 5 (2024), https://www.blackrock.com/corporate/document/literature/publication/voting-choice-faqs.pdf [https://perma.cc/XV6R-5MSB].

56. *Id.*

57. Total index equity is $7.75 trillion. *Index Investing*, BLACKROCK (2024), https://www.blackrock.com/institutions/en-us/strategies/index-investing. These statistics are from Q2 2024. BLACKROCK, *supra* note 55. They include $140 billion in "[Systematic Active Equity] institutional pooled funds and separate accounts" that are eligible for Voting Choice. *Id.*

58. BLACKROCK, *supra* note 55, at 5.

59. Majeid & Aguirre, *supra* note 28; Press Release, BlackRock, BlackRock Expands Voting Choice to Millions of U.S. Retail Shareholder Accounts (Feb. 13, 2024), https://www.ishares.com/us/literature/press-release/blackrock-expands-voting-choice-february.pdf [https://perma.cc/4HZP-JRJG]; BLACKROCK, U.S. PILOT PROGRAM FAQS 2 (2024), https://www.blackrock.com/corporate/literature/publication/voting-choice-uspilot-programfaqs.pdf (last visited Oct. 12, 2024).

60. Majeid & Aguirre, *supra* note 28.

61. Emile Hallez, *BlackRock Opens Its Biggest ETF to Proxy Voting Choice*, INVESTMENTNEWS (Feb. 13, 2024), https://www.investmentnews.com/esg/news/blackrock-opens-its-biggest-etf-to-proxy-voting-choice-249380 [https://perma.cc/E5L6-MAU4].

62. BLACKROCK, *supra* note 55, at 5–6; Hallez, *supra* note 61.

63. BLACKROCK, *supra* note 55 at 5–6.

64. *Id.* at 3.

65. Hallez, *supra* note 61; Caleb N. Griffin, Open Proxy 18, 20, 22 (July 12, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4887974 [https://perma.cc/TC82-YXSX].

66. BLACKROCK, *supra* note 55, at 2; BLACKROCK, PROXY VOTING POLICY 1 (2025), https://www.blackrock.com/us/individual/literature/policies/ishares-core-s-and-p-500-etf-proxy-voting-policy.pdf [https://perma.cc/AW8E-4HRQ]; BLACKROCK, VOTING CHOICE - VOTING POLICY COMPARISON 2

party voting policies include three offered by Institutional Shareholder Services (ISS)—the Socially Responsible Investment Policy, the Catholic Faith-Based Policy, and the Global Board-Aligned Policy; three offered by Glass Lewis–the Benchmark Policy, the Climate Policy, and the Corporate-Governance Focused Policy; and one offered by Egan-Jones—the Wealth Focused Policy.[67] Once a retail investor selects a voting policy, BlackRock then applies the policy at "the annual general shareholder meetings of companies held in the U.S. Pilot Fund . . . based on investors' proportional ownership of the [fund]."[68]

Institutional investors have more flexibility: They may select a predetermined voting policy offered by a third-party, formulate their own policy, or, if they have a separately managed account, directly vote their shares on specific issues.[69] Regarding these predetermined voting policies, institutional investors can choose between sixteen different options: seven are offered by ISS, seven are offered by Glass Lewis, and two are offered by Egan-Jones.[70] Based on the client's selected policy, BlackRock casts votes in proportion to the client's ownership in the pooled fund.[71]

The second option is formulating a bespoke voting policy. Clients may develop these policies using an inhouse team or a third-party proxy advisor. As before, these custom policies apply "to shares in the pooled fund reflecting the client's proportional ownership of that fund."[72] The third option is "mak[ing] specific voting decisions on the topics or at

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(2024), https://www.blackrock.com/corporate/literature/publication/voting-choice-voting-policy-comparison.pdf [https://perma.cc/9WJ9-M8GB] [hereinafter BLACKROCK, VOTING POLICY COMPARISON]. Five priorities underlie this policy: board quality and effectiveness; strategy, purpose, and financial resilience; compensation and financial incentives aligned with value creation; material climate-related risks and opportunities; and a company's impact on people. BLACKROCK, INVESTMENT STEWARDSHIP 2 (2025), https://www.blackrock.com/corporate/insights/investment-stewardship [https://perma.cc/P89M-K5AH]. For a comprehensive summary of this policy, see generally BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP: PROXY VOTING GUIDELINES FOR BENCHMARK POLICIES—U.S. SECURITIES (2025), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf [https://perma.cc/TV48-LBD6].

67. BLACKROCK, *supra* note 55, at 3.

68. *Id.* at 2.

69. BLACKROCK, *supra* note 55, at 3–4.

70. BLACKROCK, *supra* note 55; BLACKROCK, VOTING POLICY COMPARISON, *supra* note 66, at 2, 4, 6. The seven ISS policies are the Socially Responsible Investment Policy, the Catholic Faith-Based Policy, the Global Board-Aligned Policy, the Benchmark Policy, the Sustainability Policy, the Public Fund Policy, and the Taft-Hartley Policy. BLACKROCK, VOTING POLICY COMPARISON, *supra* note 66, at 2. The seven Glass Lewis policies are the Benchmark Policy, the Climate Policy, the Corporate Governance Focused Policy, the ESG Policy, the Catholic Policy, the Public Pension Policy, and the Taft-Hartley Policy. *Id.* at 4. The two Egan-Jones policies are the Wealth-Focused Policy and the Standard Policy. *Id.* at 6. The Egan-Jones policies are recent additions. According to BlackRock, these policies "[a]im[] to balance financial outcomes with governance and . . . environmental stewardship" to strike "a compromise between pure financial focus and ESG considerations." *Id.* Although the plan is generally more open to ESG-related shareholder proposals than the Wealth-Focused Policy, it will only vote for these proposals when a company scores poorly on ESG metrics. *See* EGAN-JONES PROXY SERVS., STANDARD PROXY VOTING PRINCIPLES AND GUIDELINES 27–39 (2024), https://irp.cdn-website.com/283ddce3/files/uploaded/Egan-JonesSTANDARDProxyVotingPrinciplesandGuidelines_2024.pdf [https://perma.cc/B34S-4E8R]. For example, the policy will vote for "[s]hareholder proposals requesting a report on climate change and business model[s]" if the company "receives one of the lowest two [overall Governance Scores]," but will otherwise vote against the proposal. *Id.* at 29.

71. BLACKROCK, *supra* note 55, at 4.

72. *Id.* at 3. SMA clients also have the option of working directly with BlackRock to design and implement a bespoke voting policy. *Id.* at 3, 4 n.4. BlackRock does not appear to offer this service to clients in pooled funds.

the companies that matter most to [a client] after a voting policy is applied."[73] This option, however, is "limited to [separately managed accounts] who have selected the BlackRock Benchmark Voting Policy or policies offered through [ISS]."[74]

Regardless of the investor's identity and choice of policy, Blackrock "vets all proxy voting policies to ensure their use is consistent with its . . . responsibilities" as a fiduciary.[75] This means that in some cases, it may override the proxy choice if necessary to adhere to its fiduciary duties—adding another layer of oversight for the asset manager.

BlackRock has not provided much information about the popularity of the program, aside from noting that institutional clients holding $646 billion have opted into the program as of Q2 2024 (with a participation rate of 23%).[76] About half of that amount—$284 billion—is "[n]ewly committed to Voting Choice."[77] Participation rates for the retail investor pilot are not yet available.[78]

B. State Street

In December 2022, State Street announced that it would follow BlackRock and offer an expanded "Proxy Voting Choice" program.[79] Eligible investors fall into two categories. The first category comprises certain pooled funds "that employ an equity index strategy."[80] Both institutional and retail investors in these funds may participate in the Proxy Voting Choice Program.[81] The eligible funds include "all US institutional index equity funds and a broad range of US index equity SPDR ETFs and mutual funds," which together total $2.3 trillion in index equity assets and 81% of all index equity assets under State Street's management.[82] While "some of State Street's largest index portfolios are not [currently] eligible for proxy-voting choice,"[83] State Street intends to "includ[e] all eligible index equity funds managed by the firm in the proxy voting program by the end of 2024."[84] The second

73. *Id.* at 4.

74. *Id.* at 4 n.5.

75. BLACKROCK, *supra* note 55, at 3. BlackRock explains, "As an example, if a client writes into policy that they would vote against all mergers and acquisitions, we could question whether the client's policy requires consideration of material facts and circumstances specific to each voting decision, and if it is not, whether such a policy follows a fiduciary process that leads to votes that consider acting in the interests of the fund." *Id.* at 5.

76. BLACKROCK, *supra* note 54.

77. *Id.*

78. BLACKROCK, *supra* note 57, at 2.

79. Press Release, State St. Glob. Advisors, *supra* note 29.

80. SSGA Funds, Registration Statement (Form N-1A) 58 (Dec. 29, 2023), https://www.sec.gov/Archives/edgar/data/826686/000119312523297704/d556288d485bpos.htm [https://perma.cc/VD86-NK4U].

81. *Id.* at 58–59; *see also* Griffin, *supra* note 65, at 23 (noting that institutional investors in pooled funds are eligible for the program); STATE STREET, 2023 ANNUAL REPORT 52 (2023), https://www.statestreet.com/web/about/our-story/annual-report/documents/ssc-annual-report-2023.pdf [https://perma.cc/3EJP-7FN9] ("Investors in U.S.- and U.K.-based equity index institutional funds, as well as U.S.-based equity index ETFs and mutual funds, now have the same power as institutional investors to direct the proxy votes of the shares they own in these funds.").

82. *Proxy Voting Choice Empowers Investors*, STATE ST. GLOB. ADVISORS, https://www.ssga.com/uk/en_gb/about-us/what-we-do/asset-stewardship/proxy-voting-choice [https://perma.cc/XCM6-R9D2].

83. Stewart, *supra* note 53.

84. STATE STREET, *supra* note 81, at 52.

category covers "clients in eligible segregated mandates," who may also participate and choose one of the program's policies, rather than directly vote the proxies.[85]

Like BlackRock's program, investors must opt into Proxy Voting Choice.[86] Eligible retail investors are identified by a third-party service and "receive a communication that will invite such shareholders to participate in the Program by selecting a Program Proxy Voting Policy on the Program's website."[87] Institutional investors who want to participate in the program are instructed to "contact their State Street representative."[88] If the investor does not opt in, State Street will "vote the shares held by the funds or segregated accounts in which they are invested in accordance with [State Street's] proxy voting policy."[89] Further, investors with "eligible segregated accounts [who] have not delegated proxy voting to [State Street]," but who have refrained from participating in the Proxy Voting Choice Program, remain free to directly vote their proxies.[90]

Those investors who participate in proxy voting choice may choose to have their shares voted according to one of eight policies, seven of which are offered by ISS, or defer to State Street's policy.[91] The non-ISS policy always votes in accordance with the recommendation of the portfolio company's board.[92] The fund will then use the investor's chosen policy to vote the shares "corresponding to the percentage of the Eligible Fund owned by the [investor]."[93]

Notably, in "unusual case[s]," State Street may override a vote made pursuant to a policy offered by the program.[94] Potential examples include the following:

> [I]f [State Street] becomes aware that ISS is planning to vote in a way that creates material concerns related to a conflict of interest with ISS; if [State Street] believes that the voting position, if successful, might have a material impact on an Eligible Fund's ability to trade the security; if [State Street] determines that sanctions affecting a company or an individual prevent such a vote; if issuer specific documentation or market confirmation is required; or if [State Street] determines that custodial restrictions or expenses make voting in accordance with the policy inadvisable or impracticable.[95]

As with BlackRock, there is not much information about the uptake rate for State Street's program. As of the first quarter of 2024, roughly $250 million of eligible fund

85. *Proxy Voting Choice Empowers Investors*, *supra* note 82; Press Release, State St. Glob. Advisors, *supra* note 29.

86. *Id.*

87. SSGA Funds, *supra* note 80, at 59.

88. *Proxy Voting Choice Empowers Investors*, *supra* note 82.

89. *Id.*

90. *Id.*

91. *Id.* The seven ISS policies are the Socially Responsible Investment Policy, the Catholic Faith-Based Policy, the Global Board Aligned Policy, the Benchmark Policy, the Sustainability Policy, the Public Pension Fund Policy, and the Taft-Hartley Policy. *Id.*

92. *Proxy Voting Choice Empowers Investors*, *supra* note 82. Where the board has not made a recommendation, an "abstain" vote will be cast. *Id.*

93. SSGA Funds, *supra* note 80, at 58.

94. *Id.* at 59.

95. *Id.*

assets held by retail investors, and around 10% of institutional assets, "[we]re being voted according to six different policies."[96]

C. *Vanguard*

Vanguard has taken the most tentative steps of the Big Three with its "Investor Choice" program. So far, retail and institutional investors[97] in eight Vanguard index funds are eligible to participate on an opt-in basis.[98] Together, these funds encompass "nearly four million investors, their advisors, and retirement plan sponsors across nearly $250 billion in assets under management."[99] The 2022 pilot program announcement represented an expansion of Vanguard's existing proxy choice program, which gave institutional clients with separately managed accounts the option to cast their own votes as a matter of course.[100] Vanguard has not released statistics on investor participation in the program.

Participants in Vanguard's Investor Choice program may choose from among five "different proxy voting policies through which they may direct how their pro-rata ownership interest in the Pilot Fund will vote."[101] The first policy is the "Company Board-

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96. Sommer, *supra* note 20.

97. While Vanguard has encouraged retail investors to participate in the pilot, it has not been entirely clear about whether the pilot extends to institutional investors. The marketing materials appeal specifically to individual investors. *See, e.g.*, VANGUARD, *supra* note 29 ("Expanding proxy voting choices to more investors is a continuation of Vanguard's effort to give *individuals* the information and the options they need to help ensure that their investment portfolios reflect their investment goals and preferences." (emphasis added)); *Vanguard Puts Everyday Investors at the Center of All We Do*, VANGUARD, https://corporate.vanguard.com/content/corporatesite/us/en/corp/vanguards-focus.html (on file with the *Journal of Corporation Law*) ("In early 2023, we began piloting ways to empower *individual investors* to make their voices heard in the proxy voting process." (emphasis added)); VANGUARD, YOUR MONEY, YOUR VOICE: HOW VANGUARD IS PILOTING PROXY VOTING OPTIONS FOR EVERYDAY INVESTORS 2 (2023), https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/perspectives-and-commentary/your_money_your_voice.pdf [https://web.archive.org/web/20230212143229/https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/perspectives-and-commentary/your_money_your_voice.pdf] ("Vanguard's proxy voting choice pilot program will help us to assess options and to understand how and to what degree *individual investors* want to participate more directly in the proxy voting process." (emphasis added)). However, Vanguard's SEC filings do not appear to distinguish between retail and institutional investors for purposes of eligibility in the pilot. Vanguard, Supplement Dated February 9, 2024, to the Statement of Additional Information (Form N-1A) (Feb. 9, 2024), https://www.sec.gov/Archives/edgar/data/734383/000168386324000530/f37548d1.htm [https://perma.cc/9YX8-L8VU] [hereinafter Vanguard, Supplement]. At least one scholar has concluded that the pilot is available to institutional investors. Griffin, *supra* note 65, at 23.

98. These participating funds are the Vanguard S&P 500 Growth Index Fund, the Vanguard Russell 1000 Index Fund, the Vanguard ESG U.S. Stock ETF, the Vanguard Mega Cap Index Fund, the Vanguard Dividend Appreciation Index Fund, the Vanguard High Dividend Yield Index Fund, the Vanguard Tax-Managed Capital Appreciation Fund, and the Vanguard Tax-Managed Small-Cap Fund. *Vanguard Nearly Doubles Eligible Assets in Investor Choice Program with Three New Funds*, VANGUARD (Nov. 18, 2024), https://corporate.vanguard.com/content/corporatesite/us/en/corp/who-we-are/pressroom/press-release-vanguard-nearly-doubles-eligible-assets-in-investor-choice-program-with-three-new-funds-111824.html?utm_source=chatgpt.com [https://perma.cc/LP8U-8UQT]; VANGUARD, *supra* note 29. If the investor does not participate, Vanguard "will vote that shareholder's pro-rata ownership interest [in the relevant fund] in accordance with the Vanguard-Advised Funds Proxy Voting Policy." Vanguard, Supplement, *supra* note 97.

99. *Vanguard Nearly Doubles Eligible Assets in Investor Choice Program with Three New Funds*, *supra* note 96; VANGUARD, *supra* note 29.

100. Griffin, *supra* note 65, at 15–16, 21 n.155.

101. Vanguard, Supplement, *supra* note 97.

Aligned policy," which votes pursuant to the recommendation of portfolio companies' boards.[102] The second is the "Egan-Jones Wealth-Focused Policy," which votes "in accordance with the proxy voting recommendations from Egan-Jones Proxy Services."[103] This policy "by rule rejects proposals based on environmental, social, or political considerations unless they directly contribute to revenue generation at the company receiving the proposal."[104] The third is the "Glass Lewis ESG Policy."[105] Generally, this policy votes according to the principle that "investment returns can be enhanced through a focus on disclosing and mitigating risks related to environmental, social, and governance issues."[106] The third is Vanguard's own voting policy, which specifies regionally tailored governance solutions, but with many commonalities, including protecting shareholder rights and ensuring an effective board.[107] The fourth is the "Mirror Voting Policy," which votes "in approximately the same proportions as votes cast by other shareholders."[108] The fifth policy is the "Vanguard-Advised Funds Policy," as administered by Vanguard's Investment Stewardship group. The fifth option instructs shares to be "voted in accordance with the proxy voting policy recommendations that have been adopted by the Fund's Board of Trustees."[109]

D. Beyond the Big Three

Other asset managers have been developing voting choice programs in conjunction with third-party proxy aggregators and fintech companies that help the asset manager identify eligible shareholders and de-aggregate individual positions to determine the votes corresponding to each investor.[110] These steps can be difficult, and significant computational infrastructure is necessary to disaggregate investor data at a large index fund.[111] Further,

102. *Id.*

103. *Empowering Everyday Investors Through Voting Choice*, VANGUARD, https://corporate.vanguard.com/content/corporatesite/us/en/corp/how-we-advocate/investment-stewardship/investor-choice.html#tabs-98ec1ab3e3-item-ccfba23d3f-tab [https://perma.cc/5LUV-5DWV].

104. *Id.*

105. Vanguard, Supplement, *supra* note 97.

106. *Id.*

107. *Id.*; VANGUARD, GLOBAL PROXY VOTING POLICY FOR VANGUARD-ADVISED FUNDS 5, 7, 9, 11 (2024), https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/policies-and-reports/global_proxy_voting_policy_2024.pdf [https://perma.cc/T9UB-7E5T]. The "four pillars" of Vanguard's standard policy are "[b]oard composition and effectiveness," "[b]oard oversight of strategy and risk," "[e]xecutive pay," and "[s]hareholder rights." *Id.* at 2–3; *see also Our Commitment to Disclosure*, VANGUARD, https://corporate.vanguard.com/content/corporatesite/us/en/corp/how-we-advocate/investment-stewardship/reports-and-policies.html [https://perma.cc/3QFL-2UUT].

108. *Vanguard Nearly Doubles Eligible Assets in Investor Choice Program with Three New Funds*, *supra* note 98.

109. *Empowering Everyday Investors Through Voting Choice*, *supra* note 103.

110. Elizabeth Kantrowitz & Meghan Orifici, *Technology Advances Facilitate Pass-Through Voting*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 24, 2024), https://corpgov.law.harvard.edu/2024/02/24/technology-advances-facilitate-pass-through-voting/ [https://perma.cc/38S2-E6TY].

111. *Id.* ("Historically, several market impediments, including technological limitations, cost prohibitions, and, most importantly, infrastructure constraints, hindered the ability of investment managers to provide for so-called 'pass-through' voting.").

information concerning an investor's stake in an index fund may be dispersed among various intermediaries, custodians, and transfer agents.[112] Once the necessary information has been obtained, the fund must reaggregate this information and ensure that the votes are actually voted according to investors' preferences.

To help with this task, various third-party services now exist. For example, iconik offers services to asset managers that facilitate pass-through voting, allowing managers to customize their voting policies and enabling vote execution (and after-the-fact reporting).[113] Likewise, Tumelo offers a comprehensive pass-through voting program that retail and institutional investors can use to communicate their preferences to fund managers.[114] Through the Tumelo platform, investors "have access to all proposals as soon as they become available," "detailed reports on the votes placed," and "information from custodians, platforms and brokers."[115] Investors can then vote in accordance with "a voting policy from leading proxy advisors," "vote on individual proposals," or "do a combination of both."[116] These fintech providers supplement services offered by ISS and Broadridge and will enable the greater diffusion of pass-through voting policies across the broader market.[117]

IV. IMPLICATIONS AND OPEN QUESTIONS

As the previous Part discussed, pass-through voting is now available to a large set of retail and institutional investors at three of the largest U.S. asset managers, with more asset managers now contemplating their own programs. Although it is too early to determine the impact of these programs on the corporate governance landscape, two aspects are worth highlighting: first, these programs increase the importance of proxy advisors, and second, these programs diffuse the voting power of the Big Three to some degree.[118]

First, these programs enhance the power of third-party proxy voting services in our corporate governance infrastructure.[119] Although there are several providers of voting guidelines and differences within options offered by each proxy advisor, at the end of the day, the current iteration of voting choice empowers proxy advisor firms and not individual investors. To some degree, this is an essential step. If rational apathy is a problem for retail shareholders, it would be debilitating for mutual fund investors, who indirectly hold tiny stakes across hundreds of different firms in their broad portfolios.

112. TUMELO, A DEEP DIVE INTO PASS-THROUGH VOTING 35–36 (2023) (on file with author).

113. *See Fund Voting for the 21st Century*, ICONIK, https://www.iconikapp.com/funds [https://perma.cc/7HK7-RUSL] (describing the services provided by Iconik).

114. *Pass-Through Voting*, TUMELO, https://www.tumelo.com/pass-through-voting [https://perma.cc/V2YA-XQP5]

115. *Id.*

116. *Id.*

117. *See* Press Release, Tumelo, Tumelo Powers Pass-Through Voting for £2bn Camden Pension Fund (Sept. 18, 2023), https://www.tumelo.com/insights/tumelo-powers-new-landmark-pass-through-voting-solution-for-2bn-camden-pension-fund [https://perma.cc/TCF9-3R4L] (announcing the creation of pass-through voting); *ONEFUND*, ICONICK, https://www.iconikapp.com/onefund [https://perma.cc/3YY6-3RVR] ("INDEX shareholders now have exclusive access to iconik's breakthrough voting technology.").

118. *See* Hermann et al., *supra* note 33, at 6 (offering evidence from a study of a 2019 Vanguard voting policy change that suggests that pass-through voting will disaggregate Vanguard's voting power).

119. *See* Griffin, *supra* note 65, at 6–7 (observing that voting choice plans available to retail investors exclusively rely upon the existing proxy advisor duopoly of Glass Lewis and ISS).

But the reality of investor rational apathy also complicates the delegation of votes to proxy advisors. It means that investors are not likely to monitor and ensure that proxy advisor guidelines live up to what is promised, and that the votes cast meet their expectations. Perhaps the asset manager can adequately supervise the process by reviewing guidelines *ex ante* and vote *ex post* (which they claim to do). But difficult questions surely arise.

Suppose, for example, the voting choice solicitation reveals that a particular fund's beneficiaries have selected the ISS Sustainability policy. Now imagine that there is a shareholder proposal that seeks environmental disclosure from the issuer, but ISS believes that it is not well thought out. Or perhaps ISS believes the proposal doesn't go far enough on the issue. Would a vote against the proposal be consistent with the investors' preferences? It's hard to know without asking the individual investors or at least disclosing the votes and soliciting their feedback after the fact, which does not happen. Moreover, although the asset managers purportedly police the process,[120] this additional task only increases the workload on the thinly staffed stewardship group, which is already charged with developing its own in-house policies and casting votes for thousands of companies and hundreds of thousands of votes each year.[121] In sum, the combination of investor and intermediary rational apathy leaves third-party proxy advisors with ample power and discretion in this setting.

A related issue involves tailoring. A chief justification for voting choice is that it will allow investor preferences and values to influence votes. But can these guidelines really reflect investor preferences across a wide variety of issues? Consider, for example, the ISS SRI policy that purports to promote "sustainable economic returns . . . good corporate governance . . . the ethical behavior of corporations," and the production of positive "social and environmental impact[s]" by corporations.[122] As such, the salient fact to investors choosing this policy is that votes involving ESG issues will be cast in a way that promotes pro-social and ethical corporate behavior. What about all other votes that occur each year? Although the SRI policy offers detailed guidelines on non-ESG issues as well, it is doubtful that investors are paying much attention to these policies. As such, rather than allowing investors to drive voting choice, these wide-ranging policies leave much discretion to proxy advisors to vote as they would like.

The second major change worth noting at this early stage is that voting choice will diffuse—to some extent—the voting impact of the Big Three. That is because the voting

120. *See, e.g.*, BLACKROCK, *supra* note 55, at 5 (discussing the asset manager's review of client proposals for "consisten[cy] with fiduciary standards and pooled fund investment objectives and policies").

121. *See, e.g.*, BLACKROCK, 2024 GLOBAL VOTING SPOTLIGHT 11–12 (2024), https://www.blackrock.com/corporate/literature/publication/2024-investment-stewardship-voting-spotlight.pdf [https://perma.cc/JD8L-PYWR] (noting that BIS had over "3,500 engagements with 2,400+ unique companies" and cast votes at "18,300 shareholder meetings on more than 169,200 management and shareholder proposals.").

122. INSTITUTIONAL S'HOLDER SERVS., UNITED STATES SRI PROXY VOTING GUIDELINES 9 (2024), https://www.issgovernance.com/file/policy/active/specialty/SRI-US-Voting-Guidelines.pdf [https://perma.cc/XH5J-N36K].

policies offered bypass-through voting programs allow the asset manager to vote in opposite directions[123]—something that they have been reluctant to do.[124] To give an example of how pass-through voting could therefore dilute an asset manager's influence, consider recent trends for ESG proposals. As discussed, in the past two proxy seasons, large asset managers have voted more conservatively on ESG than proxy advisors. During the 2022 proxy season, "ISS and Glass Lewis recommended voting in favor of 75% (ISS) and 41% (Glass Lewis) of all environmental and social shareholder resolutions," while "the percentages by which the four largest asset managers supported such resolutions were well below 30%."[125] Therefore, we would expect proxy advisor policies to generate different votes than BlackRock's policies—a trend that has so far been borne out. Consider how in 2023, BlackRock's Benchmark policy recommended against management on E&S proposals 4% of the time at S&P 500 companies; in comparison, ISS's Benchmark policy recommended against these same proposals 37% of the time, and ISS's Sustainability policy opposed management 73% of the time.[126]

All in all, if large numbers of investors participate in pass-through voting programs and select policies other than those generated by the asset manager, then the asset manager's voting impact will be lessened, especially for issues where asset managers' preferences diverge from the policies of proxy advisors. Is the substitution of proxy advisor influence for asset manager influence a good thing for the market? Although asset managers suffer from conflicts of interest and collective action problems, they do have some financial stake in the outcome of the vote and a fiduciary duty to exercise their votes in the best interests of investors.[127] By contrast, proxy advisors typically earn money from the companies they review, leading to a pronounced conflict of interest.[128] Moreover, proxy advisors are not bound by any fiduciary duty, nor do they benefit from creating voting guidelines that create economic value, unless that value allows them to compete more effectively in the market for advice. Of course, that competition depends on asset managers and investors being able to determine when a vote creates value—something that is difficult to do without disclosure about voting.

Nonetheless, proxy advisor voting may offer certain benefits relative to that of the Big Three. For one, proxy advisors can offer guidelines that take bold stances on issues, stances that are unlikely to appeal to asset managers that need to avoid political blowback and cater to the broadest number of clients.[129] Consider the events of the past years as an example.

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123. *E.g.*, Sommer, *supra* note 20 (noting how, on a proposal "asking Exxon Mobil to report how workers and communities with plant closings are affected by the transition from fossil fuel . . . BlackRock's own policymakers and the Board Aligned policy all opposed the resolution . . . [b]ut the Catholic Faith-Based Policy, the socially responsible investing policy and the Glass Lewis benchmark policy all supported it").

124. *See* Lund, *supra* note 1, at 125 (showing a high degree of uniformity in asset manager voting).

125. Louise Van Marcke, *'Direct' Voting by Institutional Investors: A Trojan Horse?*, OXFORD BUS. L. BLOG (Mar. 13, 2023), https://blogs.law.ox.ac.uk/oblb/blog-post/2023/03/direct-voting-institutional-investors-trojan-horse [https://perma.cc/WH5S-JRGD]. For a potential explanation for this high level of management support, *see* Sean J. Griffith & Dorothy S. Lund, *Conflicted Mutual Fund Voting in Corporate Law*, 99 B.U. L. REV. 1151 (2019).

126. BLACKROCK, VOTING POLICY COMPARISON, *supra* note 66, at 3.

127. Griffin, *supra* note 5, at 1003–04.

128. Tao Li, *Outsourcing Corporate Governance: Conflicts of Interest Within the Proxy Advisor Industry*, 64 MGMT. SCI. 2951, 2951–52 (2018).

129. Lund, *supra* note 44, at 83–84.

When the Big Three took tepid stances on climate and board diversity that led to increased support for ESG proposals, market players and regulators argued they had gone too far. As a result, the Big Three pared their language and votes back, refusing to support environmental proposals except for egregious cases. These stances are not likely to reflect what all (or most) of their investors would like; as such, the ability to select from various options created by third-party advisors may lead to voting outcomes that better reflect investor preferences, at least for certain highly salient issues.[130] In time, perhaps eventually, other third parties will supply voting guidelines,[131] leading to heightened competition, greater guidelines diversity, and better voting outcomes produced by the wisdom of the crowd.

How will pass-through voting affect the Big Three's incentives to be informed and engaged? The scholars who argue that the Big Three have adequate incentives to exercise informed votes focus on the fact that the largest asset managers tend to be pivotal.[132] Therefore, because the vote can have a large impact on the company, there is a heightened financial incentive to get it right.[133] What happens if the asset manager no longer believes that their vote will be pivotal because so many clients have elected to cast their own vote? In that case, the expected return from investing in information about any given vote would be much smaller. And therefore, pass-through voting could eventually undermine informed and engaged asset manager voting.[134] This effect is exacerbated by the fact that the asset manager's most vocal and informed clients are most likely to ask for their votes to be passed through.[135] If those clients no longer exert pressure on the asset manager's stewardship group because they control their own votes, this may cut off important sources of information that improve the asset manager's voting choices.

Not only that, as discussed, the proper supervision of voting choice programs requires a tremendous amount of effort—the stewardship group must review guidelines *ex ante* and then also consider whether the votes reflect them, as well as create any fiduciary obligations for the issuer. It must do this work for thousands of companies and votes, in addition to the existing work of creating its own guidelines and applying them. This is a heavy lift for

130. *See* Jonathon Zytnick, *Do Mutual Funds Represent Individual Investors?* 3–4 (N.Y.U. L. & Econ. Rsch., Rsch. Paper No. 21-04, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3803690 [https://perma.cc/N67U-LQ49] (finding that although individual investors are polarized and ideological, there is generally no relationship between how a fund votes and the preferences of its individual investors).

131. Already, additional guidelines providers are in the works from organizations like As You Sow. *Proxy Voting Guidelines 2024*, AS YOU SOW (Apr. 1, 2024), https://www.asyousow.org/reports/proxy-voting-guidelines-2024 [https://perma.cc/QQC2-4FHD].

132. Kahan & Rock, *supra* note 6, at 1785–86; *cf.* Brav, Cain & Zytnick, *supra* note 32, at 493 (finding that governance participation among retail shareholders increases with ownership and expected benefits from winning).

133. Kahan & Rock, *supra* note 6, at 1785–86. Kahan and Rock discuss Trian's 2017 proxy fight at P&G as an example. *Id.* at 1785. In 2017, Vanguard had approximately $17 billion invested in P&G. *Id.* They assume that the right voting outcome would cause P&G's stock to rise 1%, which would increase the value of Vanguard's positions by $170 million, and therefore, increase Vanguard's take home fees by about $109,000. *Id.* Not only that, Kahan and Rock point out that Vanguard might expect to earn higher fees not just for this year, but also for many years into the future, which raises the total expected return from getting the vote right to approximately $1 million. *Id.* at 1786.

134. *See* Jill Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma*, 102 TEX. L. REV. 1, 44–47 (2023) (arguing that pass-through voting may weaken corporate governance).

135. S*ee* Hermann et al., *supra* note 33, at 4 (showing that pass-through voting programs are typically available to institutional clients).

stewardship groups that are already stretched thin and further suggests that pass-through voting could exacerbate concerns about rote and one-size-fits-all asset manager voting.[136]

The diffusion of asset manager votes is likely to impact the market in another way—by affecting hedge fund activism.[137] Hedge fund activists are the prototypical informed and engaged investors: they purchase stakes in underperforming companies and use their governance rights to exercise discipline.[138] The existence of market blockholders can make their job easier because the activist can focus on a small number of key investors to make their case, rather than trying to influence thousands of diffuse investors across the marketplace.[139] But if these blockholders are no longer capable of marshaling votes in their direction, the hedge fund activist's job will become harder and more expensive. At best, the hedge funds will need to cater to the proxy advisors even more than they already do. At worst, the hedge fund activists will struggle to influence and even predict the outcomes of votes, leading to greater numbers of settlements behind the scenes or failed campaigns. And given the important role that hedge fund activists play in the corporate governance landscape; these additional costs should not be ignored.

All in all, it is difficult to say whether the proliferation of pass-through voting will benefit the market and investors. Once we have a sense of the uptake rate and the policies that are chosen (and the divergence between votes cast by proxy advisors and asset managers), as well as the competitive environment for proxy advisor advice, scholars will be better able to quantify the impact and evaluate the benefits and costs. But in the meantime, serious questions loom about the design of these programs and the overall effect on the market for corporate influence. In light of these concerns, other asset managers considering whether to offer pass-through voting might well consider whether other options—including mirror voting, in which the asset manager commits to vote proportionately based on the other shareholders' voting decisions,[140] or "informed intermediation," which would require asset managers to seek input from investors on key issues but ultimately keep the vote[141]—would achieve a better balance.

136. *See id.* at 7 (discussing how pass-through voting may make companies less responsive to investors); Griffin, *supra* note 5, at 983 (arguing that pass-through voting lacks a mechanism for investors to consolidate their voting power).

137. Kahan & Rock, *supra* note 6, at 1777–78.

138. Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1028–31 (2007). Critics of hedge fund activism argue that this influence can be in service of short-term gain, rather than long-term value. *Id.*

139. Fisch & Schwartz, *supra* note 134, at 15.

140. "Notably, some of State Street's largest index portfolios are not eligible for proxy-voting choice, including the USD 440 billion SPDR S&P 500 ETF Trust SPY and the USD 30 billion SPDR Dow Jones Industrial Average ETF Trust DIA. These funds employ a 'mirror voting' policy under which the funds' trustees vote in a manner proportionately reflecting the voting decisions of other shareholders in the companies it holds." Stewart, *supra* note 51.

141. *See* Fisch & Schwartz, *supra* note 134, at 48 ("Our solution is a system by which fund managers ascertain the preferences of their beneficiaries and incorporate those preferences into their voting and engagement practices, a system we term informed intermediation."); *see also* Griffin, *supra* note 65, at 36 ("This Article proposes that large index fund providers be required to move from the current closed proxy system to an open one . . . . [A]n open proxy policy would enable investors to select voting plans provided by *any* bona fide proxy advisor meeting certain minimum requirements.").

V. CONCLUSION

This article has shown how criticism of giant asset managers has led to voluntary disintermediation that will change the balance of power in corporate governance in unexpected ways. Thus far, the existence of voting choice has empowered proxy advisors and diminished the voting power of large asset managers to some degree, although the impact of these programs remains yet to be seen. But given the importance of mutual fund blockholders to the corporate governance landscape, researchers would be wise to follow these developments closely.