United States

Summary of Current Shareowner Rights

Percentages cited reflect information gathered by GMI Ratings about 1,755 companies in the United States as of 31 August 2012.

Considering that the United States is a developed market, shareowners in the United States have only moderate rights. No single body has regulatory oversight or enforces a national or uniform code of corporate law. Instead, corporate law is largely state based; therefore, corporations have wide latitude in setting shareowner rights. The result is significant variation from company to company and state to state. Some deficiencies in shareowner rights are being remedied, however, as more companies adopt majority voting provisions. A shareowners' advisory vote on executive compensation is also now mandatory at most companies.

Issue	Current Standard or Usual Practice	Level of Practice Adoption, Exceptions to Usual Practice, and Trends (if any)
What is the average percentage of independent board members on public company boards (% independent board members)?	76%	
What percentage of companies have fully independent audit committees?	88.4%	
What percentage of publicly traded companies have a controlling shareowner (e.g., family, government, majority block holder)?	8.4%	
Is voting by proxy permitted?	Yes	Always allowed
Must shares be deposited or blocked from trading in order to vote?	No	Never allowed
Are there share ownership limitations in this market?	Sometimes	Share ownership limitations are not common but do apply in sensitive industries, such as airlines. They are also commonly found with real estate investment trusts.
Are there (other) common restrictions on the rights of shareowners to vote in person or by proxy?	No	Proxy voting is generally unrestricted.

(continued)

Issue	Current Standard or Usual Practice	Level of Practice Adoption, Exceptions to Usual Practice, and Trends (if any)
Do companies adhere to a majority voting standard in the election of board members?	Varies	A standard of majority voting is becoming more common.
Do companies allow for cumulative voting in the election of board members?	Sometimes	Only a small minority of companies have cumulative voting.
Are shareowners able to affect a company's remuneration policy through shareowner approval (binding or nonbinding) of the remuneration committee report, the proxy's Compensation Discussion and Analysis section, or something comparable?	Yes	Shareowners were first given a right to a "say-on-pay" vote in 2011. SEC reporting companies with a float above USD75 million must provide their shareowners, at least once every three years, with a non-binding vote to approve compensation of named executive officers.
Are shareowners able to affect remuneration policy through binding shareowner approval of specific equity-based incentive plans or something comparable?	Yes	
Are shareowners permitted to introduce dissident resolutions (binding or nonbinding) at an annual meeting?	Yes	Most, if not all, companies allow the introduction of dissident resolutions, but such resolutions are almost never binding.
Do shareowners have a right to convene a general meeting of shareowners outside the annual meeting process (e.g., an extraordinary general meeting or special meeting) if only 10% or less of the shares are represented in the group requesting the meeting?	In some cases	This right is determined by the company.
What percentage of companies include golden shares in their capital structure?	0%	No U.S. companies have golden shares.
Are shareholder rights plans (poison pills) allowed in this market?	Yes	Such plans are a common anti-takeover mechanism in the U.S. market.
If shareholder rights plans are in use, do they have to be approved by shareowners?	No	Shareowner rights plans are rarely approved by shareowners.
Do all shareowners have the right to approve significant company transactions, such as mergers and acquisitions?	Yes	Almost all companies have this right, but some exceptions do exist.
Do companies require a supermajority vote to approve a merger?	In many cases	This practice is at the discretion of the company.

Issue	Current Standard or Usual Practice	Level of Practice Adoption, Exceptions to Usual Practice, and Trends (if any)
Are companies subject to a fair price provision, either under applicable law or as stated in company documents (such as the charter or bylaws)?	In many cases	This provision is usually at the discretion of the company but is sometimes covered by state law.
Are class action suits commonly used in this market?	Yes	Such suits are allowed for all companies and are commonly used by shareowners.
Are derivative suits commonly used in this market?	Yes	Such suits are allowed for all companies and are commonly used by shareowners.

Current Engagement Practices and Shareowner Rights Developments

In the United States, the shareowner engagement process is widespread and driven by multiple constituencies with diverse interests. Shareowner activism, which once was primarily the domain of pension funds, has extended to include other large shareowner groups, such as buyout firms, hedge funds, and, to a lesser extent, mutual funds. Engagement may take the form of proxy battles, threatened takeovers, shareowner resolutions/board member removal, publicity campaigns, litigation, and negotiation with management or the board.

Among the most prominent entities involved in engagement are the large public pension funds located in heavily populated states, such as California (e.g., the California Public Employees' Retirement System [CalPERS] and the California State Teachers' Retirement System). Additionally, national organizations that represent large investment interests, such as the Teachers Insurance and Annuity Association - College Retirement Equities Fund (generally known as TIAA-CREF), have been notable in engagement. The Council of Institutional Investors (CII), a not-for-profit association of public, union, and corporate pension funds, also has been a key force in engagement. Other activist funds, such as Relational Investors and Pershing Square Capital Management, often build stakes in companies with the goal of implementing corporate governance changes to spur growth. Some hedge funds and buyout firms (e.g., those run by famed corporate raider Carl Icahn) have reinvented themselves as shareowner activists, and they have the clout to exert heavy pressure on companies.

With the exception of antitrust concerns and certain sensitive industries, takeover rules in the United States are not a major deterrent to takeover bids, although they do serve to keep pressure on companies to perform. Companies are free to institute a number of unilateral anti-takeover mechanisms. Chief among them is the shareowner rights plan (poison pill), which essentially allows a company to block unwanted takeover attempts through a dilution-triggering event. Compounding this issue is the fact that the adoption of poison pills is rarely put to a shareowner vote. In some cases, boards have full power to decide whether to accept a takeover offer, even if any such action is contrary to the interests of the company's shareowners.

Traditionally, removing board members from companies in the United States has been quite difficult. Historically, terms of many company boards were staggered over a three-year rotation period, although that system is changing. Today, only a minority of S&P 500 Index companies have staggered boards; a number of companies have moved to declassify their boards (all board members must stand for election every year) and have board members stand for election annually. Cumulative voting, even though it is used only at a small percentage of U.S companies, is a means for shareowners to remove board members. Majority voting also has gained traction in the U.S. market. Although the specifics vary by company, a majority voting standard in the United States generally dictates that a board member nominee who fails to win a majority of the votes cast must tender his or her resignation. However, if board members fail to gain majority support, they do not always step down from the board. In 2011, more than 40 directors at more than 30 companies in the Russell 3000 Index failed to win a majority of the votes cast, yet nearly all kept their board seats, according to Institutional Shareholder Services (ISS). In 2010, 106 "failed" directors at 59 companies remained on boards. Currently, about 80% of S&P 500 companies require some form of majority voting in uncontested board elections. Smaller companies are less likely to offer majority voting in director elections. With the exception of proxy contests for full or partial control, for a board member nominee to fail to win election or re-election under a plurality voting standard was exceedingly uncommon until recently.

"Proxy access" is an issue that has entered public discussion in recent years. Currently, there are significant obstacles to nominating dissident board members—and subsequently placing these nominees on proxy ballots—and proxy access refers to reform measures that would allow larger investors, particularly institutional investors, greater participation in the board member nomination process. A U.S. Securities and Exchange Commission (SEC) rule to allow shareowner proxy access was struck down by a federal appeals court, and as of this writing, there are no immediate plans to introduce a proxy access standard. In its place, investors and companies are turning to "private ordering," whereby an activist investor or sometimes companies themselves propose corporate bylaw changes that would allow shareowners that meet certain conditions (usually a percentage ownership threshold and a length of ownership hurdle) to nominate directors to the proxy. The SEC is not expected to take up the cause of proxy access in the immediate future, so *private ordering*, or shareowners (and in some cases companies) asking that proxy access be added to a company's bylaws, has become the only proxy access tool available to U.S. shareowners. In 2012, a handful of shareowner-sponsored proxy access proposals won majority support at U.S. companies. Some companies have offered their own proxy access plans as a compromise with shareowners.

Shareowner resolutions, although not binding in the United States, are becoming an increasingly effective means for shareowners to communicate dissatisfaction to management. The negative publicity associated with companies' rejection of majority-approved shareowner resolutions can increase pressure on companies.

A mandatory say-on-pay vote at all but the smallest companies has given shareowners another potential forum for engagement.

Legal and Regulatory Framework

No single body in the United States oversees all the legal and regulatory issues affecting shareowner rights. The SEC is the main enforcer of the nation's securities laws—both directly and indirectly through its oversight of the Financial Industry Regulatory Authority (FINRA, formerly the NASD), the New York Stock Exchange (NYSE), and other stock exchanges. Pursuant to the Securities Exchange Act of 1934, the SEC has jurisdiction over financial and proxy disclosure and, by extension, a number of (but not all) issues that affect shareowner engagement. The SEC also has enforcement power, but only for matters detailed under relevant legislation, such as the Securities Exchange Act of 1934, the Sarbanes–Oxley Act of 2002, and the Dodd–Frank Act of 2010.

In April 2012, the JOBS (Jumpstart Our Business Startups) Act was signed into law. The law rolls back restrictions on the way start-up companies can raise money. According to the law, emerging growth companies (i.e., those with less than USD1 billion in annual revenue) may conduct initial public offerings without having to undertake certain financial disclosure and governance requirements for up to five years. These companies may also raise money by "crowd funding," selling small amounts of stock to many individuals without being required to register the shares with the SEC.

U.S. corporate law is largely state based, so some shareowner rights issues are influenced by regulations at the state level. Each state has its own securities regulatory body, typically known as the state securities commission. Generally, key shareowner rights are contained in each state's body of corporate law, and they filter down into a company's bylaws and articles of incorporation. Because of its business-friendly laws, Delaware is the most popular state in which to incorporate U.S. companies.

The one share, one vote system, although prevalent for most U.S. companies, is not an absolute requirement for companies incorporated in Delaware. State law generally provides corporations considerable flexibility with respect to allocation of voting rights. Virtually all state corporate codes adopt one vote per common share as the default rule but allow corporations to depart from the norm by adopting appropriate provisions in their organizing documents; Delaware is no exception.

All U.S. corporations also have the discretion to grant or withhold specific shareowner-friendly mechanisms, such as majority or cumulative voting in the election of board members.

By default, Delaware law allows shareowners representing 50% of shares to call a special meeting, with the same requirement for action by written consent. Additionally, any board member or the entire board of directors may be removed at any time, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of board members. Corporations do, however, have the discretion to amend or eliminate these rights. Thus, the possibility of shareowner engagement by these means varies considerably from company to company.

Shareowners in the United States have access to legal remedies via both class action and derivative lawsuits. Class action lawsuits may be brought in federal court if the claim arises under federal law. Most, but not all, states provide for some form of class action as well, but procedures vary greatly from state to state. Derivative suits are brought at the state level. However, the most frequently used states for corporate charter (Delaware, New York, and California) have instituted a number of barriers to derivative suits.

Large shareowners may engage companies by virtue of a threat of takeover. Most companies have free rein in how they structure their charter and bylaws, so they can thwart a takeover attempt without consent from shareowners. No national or general regulation directs companies on how to structure their takeover defenses, but shareowners are generally unrestricted in takeover attempts, except in cases where antitrust issues arise or sensitive industries are involved.

Key organizations with information relevant to shareowner rights in the United States include the following:

Securities and Exchange Commission (www.sec.gov)

New York Stock Exchange (www.nyse.com)

NASDAQ Stock Exchange (www.nasdaq.com)

Council of Institutional Investors (www.cii.org)

CalPERS (www.calpers.ca.gov)

National Association of Corporate Directors (www.nacdonline.org)

Society of Corporate Secretaries & Governance Professionals (www.ascs.org)

National Investor Relations Institute (www.niri.org)

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