Hidden Agendas in Shareholder Voting

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Nothing in either corporate or securities law requires companies to notify investors what they will be voting on before the record date for a shareholder meeting. We show that, overwhelmingly, they do not. The result is "hidden agendas": for 88% of shareholder votes, investors cannot find out what they will be voting on before the record date. This poses an especially serious problem for investors who engage in securities lending: they must decide whether the expected benefit of voting exceeds the expected benefit of continuing to lend their shares (or making them available for lending) without knowing what they will be voting on. All investors who engage in share lending are affected, but the problem is particularly acute for large investment managers that have fiduciary duties related to voting. At present, they must discharge these duties in the dark.

We propose a straightforward solution: an amendment to the Securities and Exchange Commission's proxy rules requiring public companies to file proxy statements at least five days before the record date for the meeting. This simple change would give investors the information they need to make an informed decision about whether to retain the right to vote or not. If we believe that shareholder voting is important, and that investment managers and others should decide whether to vote, we should give them the information they need to do so.

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Introduction

Despite the centrality of shareholder voting to corporate governance, the rules and practices that hold them together can seem like a hodgepodge of corporate law rules, securities regulation, and market practices.[1] The intersection of these rules and practices can lead to peculiar outcomes.[2] This Article focuses on one such outcome. While companies are free to publish a meeting's agenda before its record date, there is no requirement that they do so. We find that, overwhelmingly, they do not. Our empirical analysis demonstrates that for 88% of shareholder votes, investors are unable to find out *what* questions they will be voting on in time to decide *whether* they wish to vote on them. We refer to these situations as "hidden agendas."[3]

Hidden agendas are not a problem for "buy-and-hold" investors who hold their shares for the long term. These investors will be entitled to vote because they own their shares on the "record date," typically about 55 days before the meeting.[4] If these investors decide that voting isn't worth the trouble, they can simply decline to do so when the time comes. But hidden agendas *do* impact investors that must transfer ownership of shares prior to the record date in order to vote. For the 88% of votes with hidden agendas, these investors must make their transfer decisions in the dark, without knowing what they will be voting on.

Much of the prior literature about ownership transfers for voting purposes has focused on investors that wish to acquire "empty votes" without an economic interest in the company. In this Article, we connect hidden agendas to a different group of investors: share lenders. This group includes some of the most important players in the corporate governance landscape. Share lenders range from the largest and most influential investment managers—with the greatest power to influence election outcomes—to the small retail investors that securities regulators take particular pains to protect.[5] Share lending also plays an important role in the capital markets. It both facilitates the settlement process and improves market pricing by enabling short selling.[6] Share lenders are, by and large, long

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1. For the canonical statement of the centrality of shareholder voting to corporate law, see *Blasius Ind., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. 1988) ("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."); 15 U.S.C. § 78n (2018). Some sense of this hodgepodge can be gleaned from the Securities and Exchange Commission's 2010 concept release on the issue. Concept Release on the U.S. Proxy System, Exchange Act Release No. 34-62495, 75 Fed. Reg. 42,982 (July 22, 2010).

2. For examinations of two such results, see Scott Hirst, *Frozen Charters*, 34 YALE J. ON REGUL. 91 (2017) and Scott Hirst, *Universal Proxies*, 35 YALE J. ON REGUL. 437 (2018).

3. By using the term "hidden agenda" we do not mean to suggest that these companies have an ulterior motive for not disclosing their agenda prior to the record date. We discuss the reasons why they might do so in Section I.D, *infra*.

4. See *infra* Table 1 (showing an illustrative 54 days between a company's record date and the relevant shareholder meeting).

5. *See, e.g.,* Matthew Goldstein, *New S.E.C. Chairman Pledges to Take Care of Ordinary Investors*, N.Y. TIMES (July 12, 2017), https://www.nytimes.com/2017/07/12/business/walter-clayton-sec-speech.html [https://perma.cc/B8M9-KS93].

6. *See* Ekkehart Boehmer & Juan (Julie) Wu, *Short Selling and the Price Discovery Process*, 26 REV. FIN. STUD. 287 (2013).

term investors in the underlying company; in contrast to empty voting, share lenders have a *bona fide* economic interest in the company. But despite this economic interest, they are not "owners" for the purposes of proxy voting. In order to vote, investors that have lent their shares must recall them before the record date.

Our data are consistent with prior evidence that share lenders value voting rights.[7] Using securities lending data from 2014 to 2020, we find that the number of shares available to lend falls sharply a week or two before record dates before jumping back up the day after the record date. Because of hidden agendas, the overwhelming majority of these recall or withdrawal decisions, and the concomitant decisions not to recall or withdraw, are currently being made in the dark. This is likely to lead to costly errors regarding which shares worth recalling or withdrawing to vote, and which are not.

Hidden agendas are a particularly vexing problem for investment managers that advise mutual funds and retirement plans. These investment managers not only engage in a significant amount of securities lending on behalf of their advisees, but they also have legal duties regarding their proxy voting decisions. Current rules do not require these investment managers to vote every proxy, but they do require them to evaluate whether voting would be in the interest of their clients.[8] Recent work has shown that lending behavior responds to Securities and Exchange Commission (SEC) rules regarding voting.[9] Not having access to the agenda means that these investors must decide whether or not to vote without the information that is most important for that evaluation. Hidden agendas are thus likely to lead to errors in recall or withdrawal decisions, resulting either in investment managers failing to vote on matters that might increase shareholder value, or unnecessarily reducing investor returns by foregoing lending revenue.

The effect of these errors is not that the potential votes attached to the lent (and not recalled) shares disappear, but that they are exercised by a different investor. Where shares are borrowed for the purposes of a short sale, the vote will reside with the person to whom the borrower sells the shares.[10] Hidden agendas will result in different voting outcomes to the

7. For an early discussion of such recall activity, see Susan E. K. Christoffersen, Christopher C. Geczy, David K. Musto & Adam V. Reed, *Vote Trading and Information Aggregation*, 62 J. FIN. 2897 (2007).

8. *See infra* Section I.B.

9. *See* Edwin Hu, Joshua Mitts & Haley Sylvester, *The Index-Fund Dilemma: An Empirical Study of the Lending-Voting Tradeoff*, (Columbia L. and Econ. Working Paper No. 647, 2020), https://ssrn.com/abstract=3673531 [https://perma.cc/A4NQ-7WWD].

10. Notwithstanding this, both the person that buys the shares and the share lender will have an interest in the future value of the share. Because the borrower does not have an obligation to return the *particular* share that was lent, the buyer will either continue to hold the share, or will sell it to someone else. And because the lender has a right to the return of the share, it effectively has a synthetic long interest in the value of the share (balancing the short interest of the borrower).

extent that this third-party borrower has different incentives, preferences, or information than the initial lender of the shares. It is possible that the buyer may be similar to the lender (indeed, they might even be the same investor), and therefore have very similar incentives, preferences and information. But it is also possible that they might differ substantially in one or more of those respects, and therefore also in how they vote.

Fortunately, there is a straightforward solution to this problem: The SEC should require that proxy statements be filed at least five days *before* the record date for the meeting to which they relate. We conclude that this would be superior to alternative approaches to eliminating hidden agendas through state corporate law rules or private ordering. We suggest three approaches that companies could take to comply with our proposed rule, allowing them to choose the one that is and best suited to, and least costly in light of, their particular circumstances.

We aim to make three contributions in this Article. First, we explore the legal and institutional features of shareholder voting that give rise to the potential for hidden agendas. Second, we quantify the extent of hidden agendas and show that they are pervasive. And finally, we propose a simple solution that eliminates hidden agendas at relatively low cost to issuer firms.

In doing so, we draw from and build upon several important strands of literature. Earlier legal scholarship has analyzed pathologies in shareholder voting that result from the complex interplay of corporate law and proxy rules known as "proxy plumbing." In their important and broad-ranging study of corporate voting, Marcel Kahan and Edward Rock described several pathologies, including what they called the "securities lending surprise."[11] Our Article zooms in on that particular problem, which we refer to as hidden agendas: We provide empirical evidence of the incidence of these hidden agendas, demonstrate the importance of the problem they pose for the capital markets, and propose a straightforward and practical solution.

Second, we contribute to a burgeoning literature on the implications of securities lending for corporate governance. Over a decade ago, Susan Christoffersen, Adam Reed, Christopher Geczy, and David Musto documented an active securities lending market around the record date.[12] Since that time, Shane Moser, Bonnie Van Ness, and Robert Van Ness examined the relation between empty voting and share lending, and Reena Aggarwal, Pedro Saffi, and Jason Sturgess examined lending recall decisions around record dates.[13] More

11. Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L. J. 1227, 1255-58 (2008).

12. Christoffersen et al., *supra* note 7.

13. Shane M. Moser, Bonnie F. Van Ness & Robert A. Van Ness, *Securities Lending Around Proxies: Is the Increase in Lending Due to Proxy Abuse or a Result of Dividends?*, 36 J. FIN. RSCH. 1 (2013); Reena Aggarwal, Pedro A.C. Saffi & Jason Sturgess, *The Role of Institutional Investors in Voting: Evidence from the Securities Lending Market*, 70 J. FIN. 2309 (2015).

recently, Edwin Hu, Joshua Mitts, and Haley Sylvester have shown that mutual funds adjust their lending behavior around record dates, and that they do so in response to SEC regulations.[14] Other work by Professor Mitts has explored the strategic use of securities lending in the context of mutual fund complexes with both active and index funds.[15] We contribute to this literature by highlighting how, because of hidden agendas, recall and withdrawal decisions by securities lenders are overwhelmingly made in the dark.

We also contribute to a growing literature analyzing the value of voting rights. A number of authors, most prominently Henry Hu and Bernard Black, have raised the issue of "empty voting," whereby investors acquire the right to vote while hedging (or negating) their economic exposure.[16] Avner Kalay, Oğuzhan Karakaş and Shagun Pant develop a novel method of isolating the value of the voting rights and use it to analyze that value around the record date for various types of meetings.[17] Doron Levit, Nadya Malenko, and Ernst Maug have explained why voting rights are valuable, even for voters who are not likely to be pivotal.[18] Most recently, a contemporaneous paper by Vyacheslav Fos and Clifford Holderness focuses on the related problem we refer to as "hidden record dates," analyzing the effects of the non-disclosure of record dates on share trading around those dates for various types of meetings.[19] Our analysis distinguishes the hidden agenda problem from the hidden record date problem, and focuses on recall and withdrawal decisions by long-term holders of the company's stock rather than trading decisions (such as those to acquire empty voting rights).[20] We also examine the institutional factors that lead to the hidden agenda problem, put forward a straightforward and practical solution to resolve them, and consider several important normative questions raised by hidden agendas.

Finally, we contribute to the substantial literature on proxy voting by institutional investors.[21] This includes recent work on the voting preferences of mutual fund complexes by Ryan Bubb and Emiliano Catan, and by Patrick

14. Hu et al., *supra* note 9.

15. Joshua Mitts, *Passive Exit*, (Columbia L. and Econ. Working Paper No. 639, 2020), https://ssrn.com/abstract=3716249 [https://perma.cc/4BHK-LNE5].

16. Henry T. C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811 (2006). Professors Kahan and Rock also analyze empty voting, and a number of related issues, as well as the link between these issues and securities lending. *See* Kahan & Rock, *supra* note 11 at 1258-63, 1265-67.

17. Avner Kalay, Oğuzhan Karakaş & Shagun Pant, *The Market Value of Corporate Votes: Theory and Evidence from Option Prices*, 69 J. FIN. 1235 (2013).

18. Doron Levit, Nadya Malenko & Ernst G. Maug, *The Voting Premium* (European Corp. Governance Inst. Working Paper No. 720/2021), https://ssrn.com/abstract=3759761 [https://perma.cc/JC3F-YWNK].

19. Vyacheslav Fos & Clifford G. Holderness, *The Distribution of Voting Rights to Shareholders*, (European Corp. Governance Inst. Working Paper No. 733/2021), https://ssrn.com/abstract=3778319 [https://perma.cc/ZD3T-2ZXB].

20. In the Appendix, we investigate the extent to which market participants can obtain information about record dates even when they appear to be "hidden."

21. For a thorough discussion of the conceptual issues relating to mutual fund voting, see Paul H. Edelman, Randall S. Thomas & Robert B. Thompson, *Shareholder Voting In An Age of Intermediary Capitalism*, 87 S. CAL. L. REV. 1359 (2014).

Bolton, Tao Li, Enrichetta Ravina, and Howard Rosenthal.[22] Even more broadly, the normative question of how mutual funds, and particularly large mutual fund complexes, *should* vote has received a great deal of attention. For example, Sean Griffith has argued that mutual funds should employ pass-through voting in many circumstances,[23] while Dorothy Lund has argued that large index funds should not be allowed to vote their shares at all.[24]

Our Article brings together key insights from each of these literatures to demonstrate the extent of the hidden agendas problem. To be sure, we do not contend that hidden agendas are the *most* important problem facing the U.S. capital markets. But our analysis shows how the laws and regulations that allow for hidden agendas sit uncomfortably with the SEC's emphasis on shareholder voting, and undermine the SEC's requirement that investment advisers make informed decisions whether or not to vote their shares.[25] Moreover, we show that the SEC could eliminate the problem of hidden agendas at very little cost.[26] As a way of improving shareholder voting, this is low-hanging fruit.

The remainder of this Article proceeds as follows. In Part I, we explain the legal, regulatory, and practical causes and effects of hidden agendas. In Part II, we present the core empirical findings of this Article and use them to discuss the incidence and importance of hidden agendas. In doing so, we discuss several categories of votes, ranging from proxy contests and close votes to the types of routine votes at annual meetings that many commentators perceive as being "unimportant." In Part III, we propose a simple and practical solution by which the SEC could eliminate hidden agendas at little cost. We explore a number of broader questions raised by our analysis in Part IV, including the social optimality of our solution, the nature of share lenders and buyers, and the importance of shareholder voting.

22. Ryan Bubb & Emiliano Catan, *The Party Structure of Mutual Funds*, (European Corp. Governance Inst. Working Paper No. 560/2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3124039 [https://perma.cc/6QVE-C8FC]; Patrick Bolton, Tao Li, Enrichetta Ravina & Howard Rosenthal, *Investor Ideology*, 137 J. FIN. ECON. 320 (2020).

23. Sean J. Griffith, *Opt-In Stewardship: Toward an Optimal Default Rule for Mutual Fund Voting*, 98 TEX. L. REV. 983 (2020). *But see* Scott Hirst, *Social Responsibility Resolutions*, 43 J. CORP. L. 217 (2018) (offering an alternative analysis and proposing a different approach).

24. Dorothy Shapiro Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493 (2018). *But see* Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029 (2019) (analyzing these claims). Of course, while not a primary part of our analysis, hidden agendas also affect retail investors who engage in securities lending (perhaps through their margin accounts). In this way, our paper also intersects with the literature on voting by retail investors, including recent work by Alon Brav, Matthew Cain, and Jonathon Zytnick. Alon Brav, Matthew Cain & Jonathon Zytnick, *Retail Shareholder Participation in the Proxy Process: Monitoring, Engagement, and Voting*, 144 J. Fin. 492 (2022).

25. *See infra* Section I.B.

26. *See infra* Section III.C.

I. The Causes and Effects of Hidden Agendas

We begin by describing the legal and regulatory causes and effects of hidden agendas. First, in Section I.A, we discuss how voting rights are affected by investors' decisions to buy, sell, or lend their shares, creating the problems of hidden agendas. We then discuss how specific features of the regulatory and institutional environment exacerbate this for institutional investors in Section I.B. Hidden agendas are made possible by a complex interaction of state corporate law and federal securities law, which we discuss in Section I.C. We then turn to practical realities and discuss the institutional practices behind hidden agendas in Section I.D. Finally, in Section I.E we provide evidence that the securities lending market is highly sensitive to record dates, which supports the anecdotal claim that voting rights are an important consideration in this market.

A. Voting, Buying, and Lending

A record date is like a voter registration deadline for a company's shareholder meeting. The shareholders entitled to vote at the meeting are those that own shares as of the record date.[27] Investors that wish to vote at the meeting but do not hold shares before the record date—either because they have not yet bought shares them, or, as we will explain, because they have lent their shares to someone else—must buy shares, or recall their lent shares, before that date.

Investors who own their shares for the long term and wish to vote them should be indifferent to hidden agendas (and, for that matter, to hidden record dates).[28] After all, these investors will know the agenda well in advance of the meeting. As a result, they will be able to consider the relevant material in casting their votes, and there is no action for them to take one way or another before that time. The hidden information, in other words, will be revealed before they need to make any decision.

Unfortunately, a large and important group of investors that are, for practical purposes, long term "buy-and-hold" investors, do not fall into this category. These are investors that make their shares available for lending. This problem arises because share "lending" is a misnomer. In fact, share "lending" involves an absolute transfer of ownership of the shares from the lender to the borrower, which also results in the lender giving up the right to vote.[29] The transfer of ownership is coupled with a "recall" right, which allows the lender to require the borrower to return the shares on demand, for any reason.[30] Lenders that wish to exercise their right to vote must therefore recall their shares far enough in advance of the record date for them to be returned to them by that date, typically at least two or three trading days in advance.[31] If the

27. *See, e.g.*, DEL. CODE ANN., tit 8, § 213(a).

28. Conversely, hidden agendas would also not be a problem for investors that do not hold shares in the company prior to the record date and have no interest in voting them.

29. *See generally* MARK C. FAULKNER, AN INTRODUCTION TO SECURITIES LENDING 13 (1st Canadian ed. 2008) ("[T]he transaction is in fact an absolute transfer of title.").

30. *Id.* at 65 (describing the right to recall).

31. *Id.*

agenda for a shareholder meeting has not been released by this date, lenders must make this decision in the dark, not knowing whether it will be important for them to vote at the meeting.

A closely related problem arises for investors that may not have actually lent their shares, but have made their shares available to lend. Share lending takes place through an intermediary, a lending agent, to whom lenders delegate lending power. In the period immediately prior to the record date, lenders wishing to ensure that they can vote must withdraw the lending agent's power to lend their shares until after the record date, making the shares unavailable for lending. By making the shares unavailable for lending until after the record date, potential lenders ensure that they can vote the shares, but forgo the revenue they would receive if the shares had been lent.[32]

Hidden agendas are also a problem for market participants that do not own shares of the company prior to the record date but would like to exercise voting rights.[33] A much-discussed subset of these potential buyers are so-called "empty voters," those that wish to exercise voting power without holding an economic interest in the company.[34] One way for them to do so is to buy shares immediately before the record date and sell them immediately afterwards, thereby avoiding any further exposure to any changes in value in the company.[35] Because any investor buying shares before the record date must buy from a current shareholder, hidden agendas will also be a problem for investors that wish to sell their shares to such buyers before the record date.

From the point of view of the market as a whole, share lending does not destroy votes; rather, it simply changes which investor has the right to vote. Shareholders that do not lend their shares continue to have the right to vote. If they lend the shares and do not recall them in time, the right to vote will pass instead to whoever does own them on the record date. While in theory this could be the share borrower, in practice the borrower of a share isn't likely to hold onto it for very long. This is because the primary purpose of share lending (apart from settlement and a few other highly technical applications) is to facilitate short selling. Borrowers of shares, in other words, typically turn around and sell the borrowed shares on the open market. As a result, the ultimate holder—and therefore voter—of lent

32. This can be understood as a "probabilistic" version of the issue with respect to recalling lent shares. Here, instead of the shares actually having been lent, there is some probability that they will be lent before the record date. Restricting them from lending reduces that probability to zero.

33. Since market participants buying shares to acquire voting rights may increase the price of the shares, it is also possible that some other market participants may buy shares in anticipation of such a price increase (and existing shareholders would sell to those investors).

34. For the most prominent treatment of this issue, see Hu & Black, *supra* note 16.

35. *See id.* at 832-35 (describing "record date capture"). Another way to accomplish empty voting would be to buy the shares and hold them through the date of the meeting, or longer, but hedge the economic exposure from doing so by entering into derivative contracts. *Id.*

shares is generally the marginal buyer in the market. The effect of securities lending is therefore to transfer the right to vote from the lender to the marginal buyer. If the lender recalls the shares, the borrower must return to the open market, buy shares, and return them to the lender. In doing so, the borrower will be buying shares from the marginal seller in the market. The effect of the recall decision is therefore to change the potential vote from the marginal seller to the lender. The effects of the recall decision on vote outcomes therefore depends on the differences between the lender and the marginal seller in the market. If they are similar (for instance, because both the lender and the marginal seller are index mutual funds) then there will likely be little difference in voting behavior. The issue arises where the two have different incentives and information.

B. Hidden Agendas and Institutional Investors

Hidden agendas pose a particular problem for institutional investors. Not only do they engage in a substantial amount of securities lending,[36] but many institutional investors also have particular duties around voting. This is particularly true for mutual funds, more formally known as investment companies registered under the Investment Company Act of 1940.[37] For present purposes, the relevant regulatory framework is the regulation of investment advisers, which flows from both the Investment Company Act and the Investment Advisers Act of 1940.[38] We therefore begin with a discussion of investment advisers' duties in this context.

Investment advisers, including investment managers like BlackRock, Inc., State Street Global Advisors, The Vanguard Group, and Fidelity Investments Inc. that sponsor and advise mutual funds, have fiduciary duties of care and loyalty to act in the best interests of their clients.[39] The SEC has interpreted the adviser's duty of care to "require an adviser with proxy voting authority to monitor corporate events and to vote the proxies."[40] The adviser's duty of loyalty requires it to "cast the proxy votes in a manner consistent with the best interest of its client and must not subrogate client interests to its own."[41] This does not require advisers to always vote their proxies. The SEC explicitly recognizes that the adviser may "determine[] that the cost of voting the proxy exceeds the expected benefit to the client."[42] This makes clear that the SEC understands the scope of

36. For instance, in 2020, BlackRock earned revenue of $652 million from securities lending. BlackRock, Inc., Annual Report (Form 10-K), at 46 (Feb. 25, 2021).

37. 15 U.S.C. §§ 80a-1-80a-64 (2018).

38. 15 U.S.C. §§ 80b-1-80b-21 (2018).

39. *See* SEC v. Capital Gains Rsch. Bureau, Inc., 375 U.S. 180, 194 (1963) (interpreting 15 U.S.C. § 80b-6 (2018)).

40. Proxy Voting by Investment Advisers, Release No. IA-2106, 68 Fed. Reg. 6,585, 6,586 (2003) (adopting 17 C.F.R. 275.206(4)–206(6) (2020)).

41. *Id.*

42. *Id.* at 6,587. The SEC gives the example of "casting a vote on a foreign security [which] may involve additional costs such as hiring a translator or traveling to the foreign country to vote the security in person." *Id.* at 6,587 n.18

advisers' duties as including making informed decisions about whether to vote, based on the costs and benefits of voting or not voting.

This analysis—determining whether the benefits of voting exceed the costs of doing so—is hampered by hidden agendas. Through no fault of their own, almost 90% of the time, advisers simply don't have the information available at the time of the record date to determine whether voting at that *particular* meeting is cost-justified, nor do they have any means of obtaining it.[43] We emphasize that nothing in this analysis should be taken to suggest that these advisers are failing to discharge their fiduciary duties: after all, fiduciaries are not required to make decisions that are ex post optimal, nor are they required to consider information that was not available at the time of the decision. Rather, our point here is that hidden agendas leave advisers with no choice but to make a probabilistic evaluation of the costs and benefits, effectively *guessing* what will be on the agenda and then deciding whether voting on those matters would be cost justified. In other words, they must make their recall and withdrawal decisions in the dark.

Investment advisers that act as fiduciaries for private-sector employee benefit plans have more stringent duties pursuant to the Employee Retirement Income Security Act of 1974 (ERISA) that require them to consider whether to vote proxies for their shares. This is important because ERISA plans hold approximately $1.7 trillion in stock value.[44] In addition, a substantial proportion of the assets managed by large investment managers come from ERISA plans, and rather than having different approaches to voting shares held by ERISA plans and other shares, some or all of those asset managers may choose to adopt a single set of procedures that satisfies the more stringent ERISA requirements.[45]

The duties of fiduciaries to vote shares held by ERISA plans were first recognized in an interpretation letter issued by the Department of Labor (DOL) in 1988.[46] The DOL codified these duties in 1994, stating that "plan fiduciaries have a responsibility to vote proxies on issues that may affect the value of the shares in the plan's portfolio."[47] This requires the fiduciary to "take into account the effect that the plan's vote, either by itself or together with other votes, is

43. *See infra* Section II.A.

44. *See Fiduciary Duties Regarding Proxy Voting and Shareholder Rights*, 85 Fed. Reg. 81,658, 81,681 (Dec. 16, 2020) (amending 29 C.F.R. §§ 2509, 2550 (2020)).

45. *See, e.g.*, *BlackRock Investment Stewardship: Proxy Voting Guidelines for U.S. Securities*, BLACKROCK (Jan. 2022), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf [https://perma.cc/3WA6-FUSJ].

46. Letter from Alan D. Lebowitz, Deputy Assistant Sec'y, Pension & Welfare Benefits Admin. of the U.S. Dep't of Labor, to Helmuth Fandl, Chair of the Retirement Bd., Avon Products, Inc., 1988 WL 897696 (Feb. 1988) (providing that "the fiduciary act of managing plan assets which are shares of corporate stock would include the voting of proxies appurtenant to those shares of stock"). This was later incorporated into Department of Labor Interpretative Bulletin 94-2, 94 Fed. Reg. 18,198 (July 29, 1994), codified at 29 C.F.R. § 2509.94-2 (1997).

47. Department of Labor Interpretative Bulletin 94-2, 94 Fed. Reg. 18,198 (July 29, 1994). This statement was an expression of the general principles that apply to shareholder voting, indicating that these principles also with respect to voting of foreign shares.

expected to have on the value of the plan's investment and whether this expected effect would outweigh the cost of voting."[48]

Subsequent statements by the DOL have repeatedly reinterpreted whether these duties permit plan fiduciaries to consider nonpecuniary factors such as environmental, social, and governance (ESG) issues in connection with their proxy voting.[49] While those interpretations have gone back and forth on their approach to ESG matters, they have consistently maintained the necessity of weighing the costs and benefits of voting in making voting decisions.[50] The most recent development with respect to voting by plan fiduciaries came in December 2020, when the DOL amended ERISA regulations to include provisions that directly address the calculus of plan fiduciaries with respect to proxy voting.[51] These new regulations codify the understanding that fiduciaries are not required to exercise every voting right, and that instead their duties require them to consider the costs and benefits for the plan of voting.[52] As part of this, the fiduciaries must "evaluate material facts that form the basis for any particular proxy vote."[53]

As a result, hidden agendas have a similar impact in the context of ERISA as they do in the context of the regulation of advisers. ERISA fiduciaries' analyses of the costs and benefits of voting is similarly hampered, and they are similarly unable to make a particularized evaluation in the context of almost 90% of meetings. Again, nothing in this analysis implies that they are failing to discharge their fiduciary duties; rather, it means that the current proxy voting regime is set up in a way that leaves them with very little information available at the time of this presumptively important decision.

The duty to prudently vote shares also arises in the context of other institutional investors, as most other institutional investors that manage large pools of assets have some form of fiduciary duty to manage those assets

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48. *Id.*

49. *See* Employee Benefits Security Administration, Interpretive Bulletin Relating to Exercise of Shareholder Rights (IB 2008-2), 73 Fed. Reg. 61,731 (Oct. 17, 2008); Employee Benefits Security Administration, Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments (IB 2015-1), 80 Fed. Reg. 65,135 (Oct. 26, 2015); Employee Benefits Security Administration, Interpretive Bulletin Relating to the Exercise of Shareholder Rights and Written Statements of Investment Policy, Including Proxy Voting Policies or Guidelines (IB 2016-1), 81 Fed. Reg. 95,879 (Dec. 29, 2016); Employee Benefits Security Administration, Field Assistance Bulletin 2018-01, https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01 [https://perma.cc/Z6Y9-3U3D]; Employee Benefits Security Administration, Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81,658 (Dec. 16, 2020).

50. *Id.*

51. Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81,658 (Dec. 16, 2020) (amending 29 C.F.R. §§ 2509, 2550 (2020)).

52. 29 C.F.R. § 2550.404a-1(e)(2)(ii) (requiring that when deciding whether to exercise shareholder rights and when exercising shareholder rights, plan fiduciaries must [*inter alia*]: (A) Act solely in accordance with the economic interest of the plan and its participants and beneficiaries; [and] (B) Consider any costs involved. . . ."). We note that this could be modified by future rulemaking.

53. 29 C.F.R. § 2550.404a-1(e)(2)(ii)(D).

prudently. This includes public pension funds, foundations, endowments, and trusts. While all are governed by rules that vary by state,[54] some commentators have suggested that DOL rules nevertheless provide strong guidance for the actions of trustees of these other organizations.[55]

C. Legal and Regulatory Explanations for Hidden Agendas

Hidden agendas arise where the record date occurs before the agenda is made available to market participants. This Section describes how two different sets of legal rules give boards of directors broad discretion to set the record date and to determine when the agenda is disclosed. Together, these rules create the possibility of hidden agendas.

As with other features of shareholder meetings, record dates are primarily governed by state corporate law. While the details of the rules vary from state to state, all of them permit the board of directors to set the record date.[56] State corporate laws set a maximum and a minimum number of days between the record date and the meeting date. Many states, including Delaware, New York, and California, require record dates to be no more than 60 days—and no less than 10 days—in advance of the meeting.[57] Some states allow for record dates to be even earlier.[58] Within these bounds, directors have discretion to choose the record date.

The second set of rules that comes into play are those governing notice of the matters to be voted on at the meeting—the agenda. From a practical perspective, the binding requirements to provide an agenda derive from the

54. For example, forty-nine states and the District of Columbia have adopted the Uniform Prudent Management of Institutional Funds Act (UPMIFA), which applies to foundations and endowments, and forty-four states have adopted the Uniform Prudent Investor Act (UPIA), which applies to trusts. *Prudent Management of Institutional Funds Act: Enactment History*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=043b9067-bc2c-46b7-8436-07c9054064a3 [https://perma.cc/5PED-55V6]; *Prudent Investor Act: Enactment History*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=58f87d0a-3617-4635-a2af-9a4d02d119c9 [https://perma.cc/96WU-W2XK].

55. *Updated Regulatory Guidance on Proxy Voting and Sustainable Investment*, INT'L ENDOWMENTS NETWORK 2, (Feb. 2017), https://d3n8a8pro7vhmx.cloudfront.net/intentionalendowments/pages/51/attachments/original/1487962886/Updated_Regulatory_Guidance_on_Proxy_Voting_and_Sustainable_Investment.pdf?1487962886 [https://perma.cc/526Y-FJGH] ("[W]hile not controlling authority for endowments and foundations, the DOL interpretation of proxy voting standards applicable to ERISA fiduciaries provides compelling authority for the same responsibilities of fiduciaries of endowments and foundations.").

56. *See, e.g.*, DEL. CODE ANN., tit 8, § 213(a). These provisions also generally provide that if directors do not set a record date, the record date shall be the date immediately prior to the date on which notice of the meeting is given.

57. *See, e.g.*, CAL. CORP. CODE § 701; N.Y. BUS. CORP. LAW § 604(a) (each requiring record dates no more than 60 days, and no less than 10 days, before meetings); *see also* MODEL BUS. CORP. ACT § 7.07 (requiring record dates no more than 70 days in advance of meetings); CRAIG M. GARNER, CHRIS G. GEISSINGER, & JEFFREY T. WOODLEY, ANNUAL MEETING HANDBOOK A-4 (Donnelly Financial Solutions 2019) (summarizing record date requirements for major jurisdictions of incorporation).

58. *See, e.g.*, MD. CORP. & ASS'NS CODE, § 2-511(b) (2017) (requiring the record date to be between 90 days and 10 days prior to the meeting).

federal securities laws. Federal proxy rules govern solicitation of proxies for shareholder meetings.[59] Like the state corporate law rules relating to record dates, however, the federal proxy rules also give boards considerable flexibility in the timing of the relevant disclosures, and create the possibility for hidden agendas by allowing for the possibility that these can occur *after* the record date.

For each shareholder meeting, Rule 14a-6 requires companies to distribute to shareholders definitive proxy statements containing the information set out in Schedule 14A.[60] Companies must also file any materials sent to or made available to investors with the SEC, through its Electronic Data Gathering, Analysis, and Retrieval system (EDGAR).[61] These materials become publicly available to—and searchable by—all market participants minutes after they are filed on EDGAR.[62] Among the many things required to be disclosed in Schedule 14A are the date and time of the meeting, the record date, and a detailed description of the matters to be voted upon at the meeting.[63]

Since the information that must be provided in the proxy statement includes all the information required for notice of meetings under state law, as a practical matter proxy statements also serve to give such notice. In addition to definitive proxy statements, where shareholder meetings involve votes on matters other than those matters that are routinely voted upon, the corporation must also file a preliminary proxy statement with the SEC at least 10 days before the definitive proxy statement is filed.[64]

There are two additional sets of rules that affect the timing of proxy filings. First, as a practical matter, most companies are required to file their proxy statement no more than 120 days after the end of their fiscal year. Companies must disclose a substantial amount of information in both their Form 10-K annual reports and in their proxy statements, including information regarding directors, executives, corporate governance, and executive compensation.[65] Rather than

59. 15 U.S.C. § 78n(a) (2018) (prohibiting proxy solicitations by issuers registered pursuant to Section 12 of the Securities Exchange Act in contravention of the SEC's proxy rules); 17 C.F.R. §§ 240.14a-1 to 240.14a-21 (2020) (setting out those rules).

60. 17 C.F.R. §§ 240.14a-101 (2020) (setting out the information required to be included in the proxy statement).

61. 17 C.F.R. §§ 240.14a-6(b) (2020). Companies must also file these materials with the securities exchange on which they are listed.

62. *See Webmaster Frequently Asked Questions*, SEC. & EXCH. COMM'N https://www.sec.gov/os/webmaster-faq [https://perma.cc/VWA6-VWN9] (indicating that filings are publicly available "within 1-3 minutes of the EDGAR system timestamp," though that may increase "at times of high server load").

63. 17 C.F.R. §§ 240.14a-101 (2020), Item 1 (date and time of the meeting); Item 6(b) (record date); and Item 20 (requiring disclosure regarding all other actions proposed to be voted on).

64. 17 C.F.R. § 240.14a-6 (requiring preliminary proxy statements to be filed, except where the only matters to be acted on at the meeting are (1) the election of directors; (2) the election, approval or ratification of accountants; (3) shareholder proposals pursuant to Rule 14a-8; (4) election of a shareholder nominee pursuant to a proxy access provision; (5) approval of executive compensation plans; or (6) advisory votes on executive compensation, including required say-on-pay proposals).

65. *See* Form 10-K, Items 10-11, 17 C.F.R. § 249.310 (2020); Schedule 14A, Items 8-9, 17 C.F.R. §§ 240.14a-101 (2020).

preparing and disclosing this information twice, many choose to disclose it in their proxy statement, and incorporate that disclosure into their Form 10-K by reference.[66] Where a corporation does so, it must file its proxy statement no later than 120 days after the end of the fiscal year to which its Form 10-K relates.[67] Of course, this requirement does not mean that the proxy statement must be filed before the record date, because directors' broad discretion to set the record date can be used to set it before the 120 days elapses.[68]

Second, companies must file a proxy statement in advance of the meeting to which it relates. Specifically, they must file the proxy statement on or before the date that it is first sent to investors.[69] The precise requirements governing when companies must send their proxy statements to investors depend on how they choose to do so. Companies may either mail the proxy statement—and other documents required to accompany it—to shareholders (known as "full-set delivery"), or may instead mail a short notice indicating where the proxy materials can be found on the internet (known as "notice and access").[70] A recent study by Choonsik Lee and Matthew Souther showed that in 2016, 67% of companies used notice and access either alone or as part of a hybrid approach.[71] Companies using notice and access must provide such notice and access at least 40 calendar days before the meeting.[72] Those that do not are not subject to the 40-day requirement and can mail their proxy materials even later.[73] Because record dates can be set as early as 60 days prior to the meeting, there is a substantial window—as much as 20 days for companies using notice and access, and longer for those that do not—in which the record date can be set *prior* to the distribution of the proxy statement.

The upshot is that companies have the power to disclose their proxy statements after the record date has already passed (or conversely, to choose record dates before the proxy statement is distributed), thereby creating the possibility of hidden agendas.[74]

66. Form 10-K permits this incorporation by reference. SEC, FORM 10K, at item G(3).

67. *Id.* If the corporation does not so it must file the same information as an amendment to its Form 10-K. *Id.*

68. *Id*. (allowing certain items required to be disclosed in the Form 10-K to be incorporated by reference from a definitive proxy statement filed no later than 120 days after the end of the fiscal year covered by the Form 10-K).

69. 17 C.F.R. §§ 240.14a-6 (2020).

70. 17 C.F.R. §§ 240.14a-16 (2020). For a discussion of the choice of notice and access or full-set delivery and practical implications, see *Annual Meeting Guidebook*, BROADRIDGE (2019), https://www.broadridge.com/_assets/pdf/broadridge-cp-guidebook-2019.pdf [https://perma.cc/65EN-N7K2].

71. Choonsik Lee & Matthew E. Souther, *Managerial Reliance on the Retail Shareholder Vote: Evidence from Proxy Delivery Methods*, 66 MGMT. SCI. 1717, 1723, tbl.1 (2019).

72. 17 C.F.R. §§ 240.14a-16(a)(1) (2020).

73. 17 C.F.R. §§ 240.14a-16(n)(3) (2020). However, for practical reasons, they must mail their proxy statements sufficiently early so that investors receive notice prior to the time required by state law, and so that they can vote their proxy cards prior to the meeting.

74. We note that there is also no obligation to disclose the record date itself in any filing or notice to shareholders until after the record date has already passed. State law rules require the record date for meetings to be disclosed in the notice given to shareholders for the meeting. *See* DEL. CODE ANN., tit. 8, § 222(a). But, as discussed above, there is no requirement that such notice

D. Practical Explanations for Hidden Agendas

While the rules discussed in the previous Section create the *possibility* of hidden agendas, they do not make them a regulatory or logical *necessity*. Why would a company choose to file its proxy statements after the record date for the meeting? In this Section we offer an explanation, based on the typical process for a typical annual meeting.

The simplistic reason for a company to set the record date for a meeting prior to distributing the proxy statement is because they need to know where to send the proxy statement (and notice of the meeting) before they mail it. For most companies, the investors that are entitled to receive the proxy statement, and the notice of the meeting, are those that own shares on the record date. It is therefore a logical necessity to set the record date before *mailing* the proxy statement (or notice of the meeting). But nothing stops the company from *filing* its proxy statement on EDGAR prior to the record date and then waiting until after the record date to *mail* the proxy statement. And the relatively recent introduction of "bifurcated" record dates in many states permits most companies to establish an earlier record date for determining which shareholders are entitled to notice, then mail their proxies to these shareholders, and have a later record date for determining which shareholders are entitled to vote at the meeting.[75] These two possibilities create avenues for solving the hidden agendas problem, which we discuss in Part III. For now, we consider the practical reasons why companies would choose not to do so, thereby creating hidden agendas.

In order to examine these reasons, Table 1 summarizes an illustrative timeline of the relevant dates or date ranges for the main steps in the leadup to an annual meeting, as well as its timing relative to the company's meeting.[76]

be given *before* the record date. The record date must be disclosed in the proxy statement, but, as discussed, this may also be filed and mailed after the record date has already passed. While this creates the possibility of hidden record dates, our analysis indicates that other institutional features greatly attenuate the practical significance of hidden record dates. *See* Appendix.

75. *See, e.g.*, DEL. CODE ANN., tit 8, § 222(a) (allowing the board to set a different date for determining the shareholders entitled to vote at the meeting). For the equivalent provision in the Model Business Corporation Act (MBCA), see § 7.07(e) (allowing the board of directors, at the same time as it fixes the record date for notice, to fix a later record date for voting). *See also infra* notes 145-146 and accompanying text.

76. Table 1 is based on our discussions with a number of current and former company secretaries of public companies, as well as memos from legal advisors suggesting best practices for the process. *See, e.g.*, *Public Company Annual Timetable 2020-2021*, GOODWIN (Nov. 2020) https://www.goodwinlaw.com/-/media/files/toolkit/2020/public-company-annual-timetable-2021.pdf?la=en [https://perma.cc/A39Z-X2PE].

Table 1: Illustrative Timeline for Annual Meeting Preparation (December Fiscal Year End)

	Date	*Days before meeting*
Company secretary determines proposed annual meeting date, record date, and proxy filing date[77]	Dec. 1 - Jan. 15	120-165
Deadline for submissions of shareholder proposals under Rule 14a-8[78]	Dec. 6	160
Board approves meeting date and record date[79]	Jan. 15-21	114-120
Board nominates directors[80]	Jan. 21-31	104-114
Company communicates record date and meeting date to NYSE and service providers[81]	Jan. 21-31	104-114
NYSE publishes record date and meeting date on its Proxy Rulings website	Jan. 21-Mar. 12	64-114
Transfer agent informs depositories of record date and meeting date, starting broker search[82]	Jan. 21-31	104-114
Board approves proxy statement, Form 10-K, and related matters[83]	Feb. 1-28	76-103
Transfer agent sends broker search cards[84]	Feb. 7	97
Deadline for nomination of dissident directors	Feb. 15	89
Company Files Form 10-K	Feb. 25	79
Deadline for sending broker search cards[85]	Mar. 1	75
Deadline for notifying NYSE of Record Date[86]	Mar. 12	64
Earliest possible record date[87]	Mar. 16	60
Company record date	Mar. 22	54
Deadline for filing proxy statement filing if using notice and access	Apr. 5	40
Company files definitive proxy statement[88]	Apr. 5	40
Practical deadline for notice record date[89]	Apr. 15	30
Annual Meeting[90]	May 15	0

This table presents an illustrative timeline for a company with a May 15 annual meeting, a March 22 record date, and an April 5 proxy filing date.

77. *Public Company Annual Timetable 2018-2019*, GOODWIN 5 (Nov. 2018) https://www.goodwinlaw.com/-/media/files/toolkit/2018/public-company-annual-timetable-2019-(3).pdf?la=en [https://perma.cc/8XSV-N46E].

78. 17 C.F.R. § 240.14a-8(e)(2) (2020).

79. GOODWIN, *supra* note 77, at 10.

80. *Id.* at 11.

The first thing to note regarding the timeline illustrated in Table 1 is that it involves both a hidden agenda and a hidden record date. The record date for the company's meeting is Friday, March 22, 14 days before the company filed its proxy statement. This results from the company setting its record date almost as early as it can, and filing its proxy statement as late as it can.

The timeline in Table 1 also makes clear that the company's management knows what will be on the agenda long before the agenda is made public. While annual meetings generally occur four to six months after the end of the company's fiscal year, the preparations begin months earlier.[91] For a company with a December fiscal year end, like the one in Table 1, senior company managers will review matters that they expect to include in their proxy statements some time in December or January.[92] Many of these either recur every year,[93] occur at predictable intervals,[94] or are likely to have been planned well in advance of the meeting.[95] Even shareholder proposals are known well in advance.[96] Companies that permit director nominations using proxy access typically have similarly early deadlines.[97] Even the later deadline for nominations by dissidents as part of a proxy contest (for which the dissident will prepare its own proxy

81. *Id.*

82. *Id.* at 12.

83. *Id.* at 14.

84. *Id*. at 12.

85. 17 C.F.R. §§ 240.14a-13 (2020).

86. N.Y. STOCK EXCH., INC., NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 401.02 (2021).

87. DEL. CODE ANN., tit. 8, § 213.

88. 17 C.F.R. §§ 240.14a-16 (2020).

89. N.Y. STOCK EXCH., INC., NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 401.03 (2021).

90. *Id.*

91. *See, e.g.*, Goodwin, *supra* note 76, at 4-10.

92. *See, e.g.*, *id.* at 6-8.

93. These include say-on-pay proposals, ratification of auditors, and election of directors. *See, e.g.*, 17 C.F.R. §§ 240.14a-21(a) (2020) (requiring say-on-pay votes).

94. For example, say-on-frequency proposals must occur every six years. *See* 17 C.F.R. §§ 240.14a-21(b) (2020).

95. These include proposals to amend compensation schemes or to approve charter or bylaw amendments.

96. Proposals submitted pursuant to Rule 14a-8 must be submitted to the company at least 120 days before the first anniversary of the company's last proxy statement. 17 C.F.R. §§ 240.14a-8(e)(2) (2020). For a company like the one in the timeline with a December fiscal year end, this deadline is likely to fall in or before December.

97. *See Proxy Access: A Five-Year Review*, SIDLEY AUSTIN 9 (Jan. 16, 2020) https://www.sidley.com/en/insights/newsupdates/2020/01/proxy-access-a-five-year-review, [https://perma.cc/P5XY-UWZV] (presenting evidence that of 644 proxy access provisions reviewed, 506 required nominations to be submitted 120-150 days prior to the first anniversary of the company's proxy statement filing for its previous annual meeting, and 88 required nominations 90-120 or 120-150 days prior to the anniversary of its last annual meeting).

statement) are still between 60 and 120 days before the meeting, which would require such nominations by mid-March for most companies.[98]

The timeline in Table 1 also makes clear that the board is likely to have reviewed and approved a draft of the proxy statement at least three weeks before the record date. And, of course, the company must have already decided upon the record date well before announcing it. Clearly then, all of these matters could have been disclosed well before the record date with very little cost or disruption.

While the key information is known well in advance, setting the record date early gives the company as much time as possible between the record date and the mailing of proxy statements. This, in turn, maximizes the time it has for determining which investors (and how many) need to receive proxy statements. It is not clear whether this much time is necessary for that task, and the company could likely make the record date later if it wanted to. But since setting the record date so early comes at very little cost for the company, there is no reason for the company not to do so.

Just as an early record date increases the time available to determine who is entitled to notice, filing the proxy statement as late as possible maximizes the amount of time available for the company to prepare it. Again, it is not clear that all of this time is necessary—by the time the company in Table 1 filed its proxy statement, it had been planning and preparing its proxy statement for more than three months. The Form 10-K, also based on information from the prior fiscal year, would have been filed more than a month before. This suggests that it would be possible to move the filing forward by two or three weeks, even if it might put some modest additional stress on the company's legal staff.

The explanation in this Section suggests that many of the mechanical reasons for hidden agendas arise from the need to determine who is entitled to notice of the meeting, rather than who will ultimately vote at the meeting. For most companies, a unitary record date serves both functions. Indeed, where a company has a unitary record date, setting the record date before giving notice to investors is a logical necessity: the company cannot determine which shareholders are entitled to notice until after the record date has passed. However, many states have amended their corporation laws to allow "bifurcated" record dates, permitting a company to establish an earlier record date for determining which shareholders are entitled to notice, and a later record date for determining which are entitled to vote at

98. *See generally* Daniel Wolf & Shaun Mathew, *Advanced Notice Bylaws—Advantage Confirmed* 1, KIRKLAND & ELLIS (Apr. 2018) https://www.kirkland.com/siteFiles/Publications/Advance_Notice_Bylaws_Advantage_Confirmed.pdf [https://perma.cc/Y3SY-8NVV] (describing advance nomination bylaw deadlines as "usually between 60 and 120 days before an upcoming stockholder meeting").

the meeting.[99] Moreover, there is no reason companies need to know who is entitled to individualized notice before providing notice to all the world by way of a filing on EDGAR. These two features of corporate and securities law practice form key parts of our proposed solution, which we return to in Part IV.

E. Securities Lending and Voting Rights

The focus of this Article is on the decisions of share lenders regarding whether or not to recall (or withdraw) their shares from lending around companies' record dates. In this Section, we conduct a simple empirical analysis of the changes in the lending market around record dates to determine the extent to which investors currently recall and withdraw their shares from lending around record dates. Of course, many investors may not even be aware of the record date. And even if they are, hidden agendas mean that these investors currently have limited information to go on. But even with these limitations, we find evidence that some investors do recall or withdraw their shares. We also observe an increase in borrowing immediately before the record date. These results are consistent with those described both by Professors Aggarwal, Saffi and Sturgess, and by Professors Christoffersen, Geczy, Musto, and Reed,[100] confirming that the pattern they document continues to hold in our more recent time period using a different data source.

Our securities lending data come from FIS Global, which we obtain through Quandl.[101] Our data cover the period from the beginning of 2014 through the end of 2020. We merge this with the voting data (which includes record dates) using 8-digit CUSIPs. This yields a total of 19,556 meetings, covering 165,667 votes and 4,150 CUSIPs for which we have lending data.[102] For each record date, we arrange the lending and availability data in event time and compute the percentage change (i.e., the growth rate) since the prior day. Because there are sometimes extremely large changes in the number of shares lent from one day to the next, we winsorize the percentage change at the 5% level in the figure above, but all of our findings are robust to winsorizing at 1% or 2%.[103]

While our data do not permit us to identify which market participants are lending and which are borrowing, the fact that we can distinguish the number of shares that have been lent as of any point in time from the

99. *See, e.g.,* DEL. CODE ANN., tit. 8, § 222(a) (allowing the board to set a different date for determining the shareholders entitled to vote at the meeting). This provision was introduced in 2009. Del. L. Ch. 14 (H.B. 19), § 5.

100. *See* Aggarwal et al., *supra* note 13; Christoffersen et al., *supra* note 7.

101. For a comprehensive discussion of the FIS Global data, see Hu et al., *supra* note 9; and Mitts, *supra* note 15.

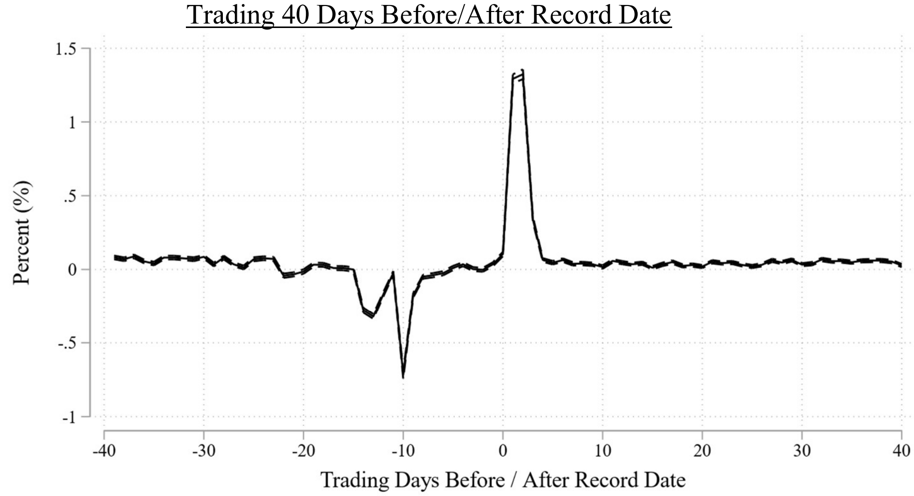
102. Because of small differences between the data on shares lent and shares available to lend, these figures are 19,463 meetings, 164,989 votes and 4,117 CUSIPs for shares available.

103. Winsorizing ensures that the results are not driven by a small number of extreme outliers.

number of shares that are available for lending at that time is a major benefit of our data. Our data also make it clear that hidden record dates are not a material problem for market participants: the fact that borrowers and lenders are changing their behavior sharply right before and after these dates indicates that they can identify the record date in advance quite precisely.

Figure 1 demonstrates that the number of shares available for lending drops by over 0.7% 10 trading days (2 weeks) before the record date. This drop is not cumulative—the drop occurs on that day, with additional drops of over 0.15 percentage points per day three times during the week preceding it. The number of shares available then jumps by almost 1.3% the day after the record date, with a second jump of over 1.3% the following day. Very quickly, the pattern returns to normal.

Figure 1: Percentage Change in Numbers of Shares Available, by Day Trading 40 Days Before/After Record Date

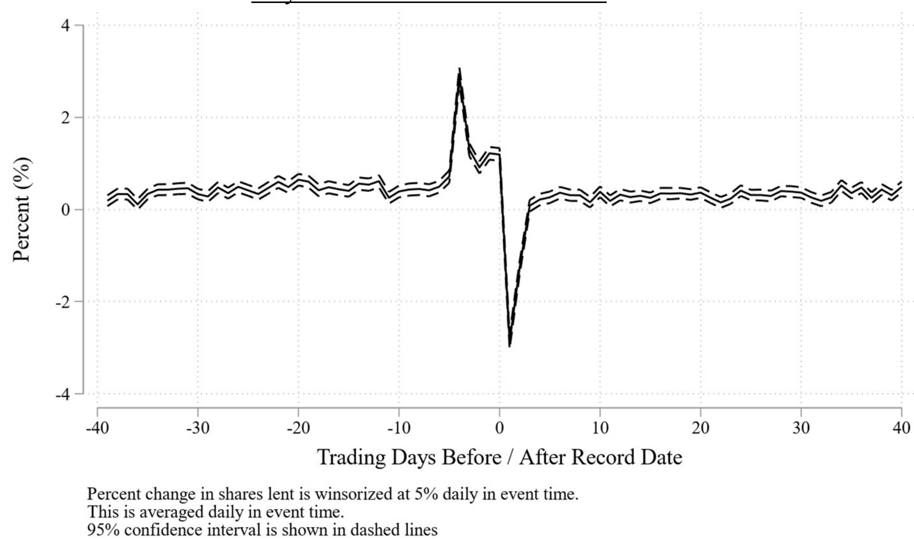


Percent change in shares available is winsorized at 5% daily in event time.
This is averaged daily in event time.
95% confidence interval is shown in dashed lines

In contrast, the number of shares *lent* jumps in the week preceding the record date, with the first jump—of almost 3%—appearing four trading days before the record date. The number of shares lent then plunges by almost 2.9% the day after the record date, before returning to its normal pattern two days later. This pattern is displayed in Figure 2.

We present these results as figures because they make clear how stark the changes around the record date are relative to the period immediately before or after it. We also include 95% confidence intervals around the means for ease of interpretation. Given how tight the confidence intervals are, there is little doubt that these spikes (both positive and negative) are "real," and not just statistical anomalies.

Figure 2: Percent Change in Number of Shares Lent, by Day Trading 40 Days Before/After Record Date



Next, we investigate to what extent these patterns differ by whether or not the meeting has a hidden agenda (Figure 3) and the type of meeting (Figure 4). Figures 3 and 4 show that the same pattern holds, regardless of meeting type (Figure 4) or whether the meeting at a hidden agenda (Figure 3). In Figure 3, the with- and without-hidden-agenda lines track each other very closely and have confidence intervals that overlap almost every day in event time. In Figure 4, we omit the confidence intervals for clarity, but we again see similar patterns across the three meeting types. In all cases, the number of shares available drops two weeks before the record date, before jumping back up sharply the day after the record date. The initial drop is less pronounced for proxy contests and special meetings than it is for annual meetings (Figure 4), but the jump the day after the record date is of similar magnitude. A similar pattern occurs with respect to shares lent. Here, as in Figure 2, all five lines in Figures 3 and 4 behave in similar ways: all show a jump four days before the record date, although this is less pronounced for special meetings than it is for annual meetings or proxy contests. All five lines then show a sharp drop *the day after* the record date, although again the magnitude of this drop appears to be slightly smaller for special meetings.

Figure 3: Securities Lending Behavior Around Record Dates By Whether There Was a Hidden Agenda

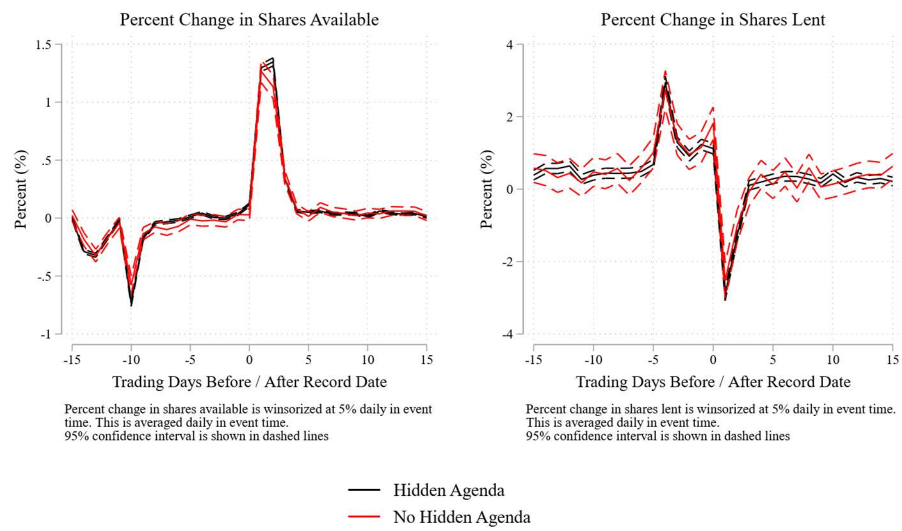
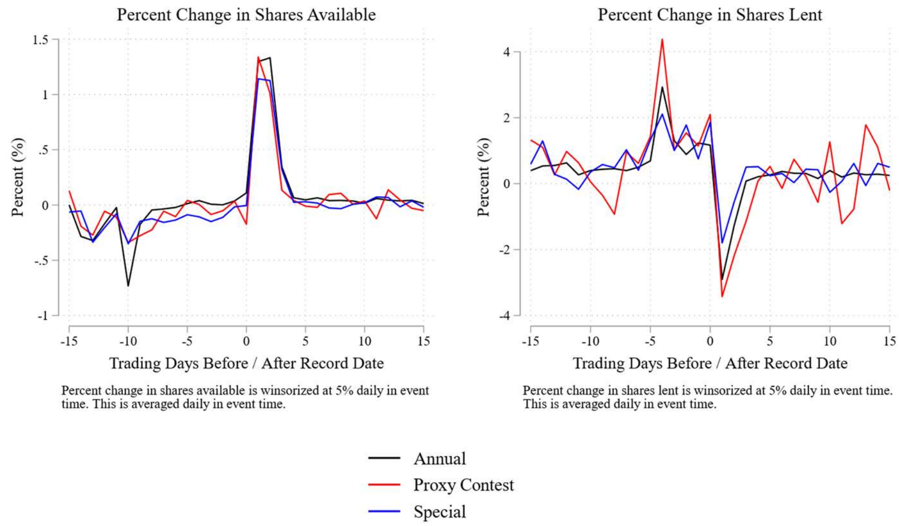


Figure 4: Securities Lending Behavior Around Record Dates



We make several observations based on this analysis. First, the abruptness of the peaks and troughs in Figures 1-4 is hard to reconcile with the idea that the record dates associated with these meetings are meaningfully hidden. This includes, of course, meetings with hidden agendas, shown separately in Figure 3.[104]

Second, these results make it clear that market participants are borrowing, lending, and withdrawing shares even when the agendas are hidden. Those participants are, in other words, making decisions with incomplete information. Rather than being able to evaluate the agenda, they must make a probabilistic assessment of whether the benefit of voting will outweigh its cost (for example, in terms of foregone lending income). They are doing this either on their own behalf, or, in the case of asset managers, on behalf of others. Even if market participants are acting optimally, there will almost certainly be error costs associated with their decisions—they will forgo voting at meetings they would have preferred to have voted at, and will retain the right to vote at meetings at which they value voting less than the benefits from lending that they gave up.

This pattern of probabilistic recall behavior is entirely consistent with the patterns we observe in Figure 3—that the hidden-agenda and no-hidden-agenda lines overlap. What this demonstrates is that the *average* withdrawal and lending behavior in the two groups is the same. It does not tell us anything about whether any specific decision was correct ex post. This is, of course, completely consistent with a rational expectations framework of decision-making under

104. We interpret these figures as demonstrating that partial notice of record dates is effective for informing at least a substantial number of participants in this market of the record date. This is consistent with our discussion of partial advanced notice of record dates described in the Appendix, and raises doubts regarding recent claims that market participants are unaware of the record date. *See* Fos et al., *supra* note 18.

uncertainty. While rational ex ante decision-making implies that decisions are ex post correct on average, it does not mean that they are correct in each instance. As a result, even if the *average* behavior didn't change with additional information, the error costs could still decline substantially.

There is, however, a third interpretation: that market participants don't care much one way of the other about the agenda when making their withdrawal and lending decisions. In this case, solving the problem of hidden agendas might make no material difference. We return to this possibility in Part IV. For now, we simply note that these patterns reflect the status quo—they do not reflect what *would* happen in an equilibrium without hidden agendas.

II. The Prevalence, and Importance, of Hidden Agendas

The rules described in Part I create the possibility for companies to create hidden agendas by disclosing meeting agendas after their record dates. In this Part we examine the realities of hidden agendas. Section II.A provides empirical evidence showing the incidence of hidden agendas for shareholder meetings. Section II.B examines the importance of hidden agendas in light of this evidence.

A. The Prevalence of Hidden Agendas

The fact that firms are not required to disclose their agendas prior to the record date would not be a practical problem if most of them did so anyway. We therefore turn to investigating the prevalence of hidden agendas, and conclude that the overwhelming majority of meetings have hidden agendas. This is particularly true of annual meetings. While these meetings are typically much less dramatic than proxy contests or special meetings, they represent the overwhelming majority of shareholder meetings and are the foundation of corporate governance.[105]

We combine data from several sources in our empirical analysis. We first obtain proxy material filing dates from the SEC's EDGAR database, indicating the date on which shareholders received notice of the meeting agenda. These are found in the master index file for each quarter, which contain the file type for each file posted on EDGAR, along with the timestamp associated with that filing. We extract records for each type of EDGAR form associated with proxy soliciting materials and preliminary or definitive proxy statements, erring on the side of over inclusiveness for the sake of conservatism.[106]

105. *See supra* note 1 and accompanying text.

106. Specifically, we include the following form types for filing proxy statements pursuant to 15 U.S.C. § 78n(a) and information statements pursuant to 15 U.S.C. § 78n(c): PRE 14A, PRE 14C, PREC14A, PREM14A, PREM14C, PREN14A, PRER14A, PRER14C, PRRN14A, DEF 14A, DEF 14C, DEFC14A, DEFM14A, DEFN14A, DEFM14C. We also include the following form types for filing other proxy soliciting materials under those provisions: DEFA14A, DEFA14C, DEFR14A, DEFR14C, DFAN14A.

We obtain data regarding company meetings and their outcomes from the Institutional Shareholder Services (ISS) Voting Analytics database. This dataset includes comprehensive information at both the meeting and vote level for shareholder votes—including the record date—as well as detailed information on the agenda items and the outcome of each vote. We obtain information about the underlying shares, including share type and primary exchange, from the Center for Research in Securities Prices (CRSP).

We merge the meeting data with the filing data from EDGAR to compare the record dates and agenda dates for each meeting.[107] We assume that any proxy materials filed any time during the six-month period prior to a meeting relates to that meeting. This approach is inexact. But our focus is on whether proxy materials are filed before or after the record date, which must be no earlier than two months before the meeting. We examine a six-month period, since this will capture all filings *after* the record date, and any filings at least four months *before* the record date. We choose this range to minimize the chance of missing a filing, which in turn minimizes the risk that we will erroneously classify an agenda as hidden when it is not. The downside is that this approach is likely to be over-inclusive where filings for two different meetings overlap, attributing some proxy filings to a meeting that are actually related to a different meeting. As a result, our results are likely to underestimate, rather than overestimate, the true number of hidden agendas.

Because the ISS Voting Analytics data is available starting in the first quarter of 2003, our sample begins in 2003 and extends through the end of 2020.[108] Our final dataset consists of 353,405 shareholder votes at 45,647 meetings, representing a total of 6,046 different CUSIPs over the 17-year period from 2003 through 2020. For each of the proposals voted on, and each meeting at which they were voted on, we determine whether there was any proxy statement or other proxy filing materials prior to the record date; if there was not, we classify the vote, and the meeting, as having a hidden agenda. We note that this choice of dates makes our approach hyper-conservative. Trades do not settle immediately—the standard settlement period for securities is two days after the trade date (so-called

107. We merge the two data sets by their 8-digit CUSIP numbers (or simply, CUSIPs). This exercise is made more difficult because EDGAR filings do not have a unique identifier for the meeting to which they relate. While some of these filings could be matched to a meeting by the meeting date, many of them—including preliminary proxy statements, and additional soliciting materials—do not contain the meeting date.

108. We discard duplicate observations, as well as observations related to any meeting for which we are not able to identify any proxy filings in EDGAR within the six-month period preceding the meeting. We exclude shares that are not coded as common shares. This allows us to focus on U.S. operating companies by excluding issuers like mutual funds, closed-end funds, and ADRs. For a description of the ISS Voting Analytics database and its coverage, see *Voting Analytics*, INSTITUTIONAL S'HOLDER SERVS., https://www.issgovernance.com/esg/governance-data/voting-analytics/ [https://perma.cc/AB4K-KH3T].

"T+2 settlement").[109] And even notice provided two days before the record date will often be insufficient, for the simple reason that it will often be impossible to determine the value of voting on a particular agenda item instantaneously. For these reasons, our proposed solution, discussed in more detail in Part III, would require notice at least 5 business days before the record date to give investors three business days to assess the information and relay their decision to their lending agent prior to the record date. We also investigate this when we manually check a subset of the hidden agendas in the Appendix. In the meantime, we simply note that this empirical choice is another reason why the results in Table 2 will understate the extent of the hidden agendas problem.

Table 2 summarizes the incidence of hidden agendas across a variety of meeting and vote types.[110] The first column presents this information at the vote level, while the second presents it at the meeting level. Accordingly, the first column represents the percentage of, for example, shareholder proposals, for which the agenda of the meeting was publicly available on EDGAR by the record date. The second column relates to the percentage of meeting which included, for example, a shareholder proposal. As Panel A of Table 2 shows, 88% of votes, and 88% of meetings, have hidden agendas.

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109. *See* Investor.gov, *Settling Securities Transactions, T+2*, SEC. & EXCH. COMM'N, https://www.investor.gov/introduction-investing/investing-basics/glossary/settling-securities-transactions-t2 [https://perma.cc/4SEF-35G3] (describing T+2 settlement and noting that it "applies to most security transactions").

110. To confirm the validity of our empirical approach in this section, we investigate all of the special meetings and proxy contests for which this approach yields a hidden agenda in detail to determine what filings, if any, were available on EDGAR in the period leading up to the meeting. We also hand-check a random sample of annual meetings. In that random sample, the only errors that we identify are instances where we mistakenly classified a meeting as *not* having a hidden agenda, leading to an under count of the true prevalence of hidden agendas. The results of both of these analyses are described further in the Appendix.

Table 2: Proportion of Votes and Meetings with Hidden Agendas

		Vote Level	*Meeting Level*
Panel A: All Meetings			
All Meetings	Percentage	88.4%	88.4%
	Std. error	(0.054)	(0.15)
	N	353,405	45,647
Panel B: By Meeting Type			
Annual Meetings		89.7%	90.8%
		(0.052)	(0.138)
		347,087	44,060
Proxy Contests		14.2%	16.4%
		(0.659)	(2.435)
		2,798	232
Special Meetings		20.0%	20.7%
		(0.674)	(1.1)
		3,520	1,355
Panel C: Among Annual Meetings			
Close Vote	Yes	83.6%	83.6%
		(0.443)	(0.547)
	No	89.8%	91.7%
		(0.052)	(0.139)
Management Lost	Yes	77.8%	79.8%
		(0.733)	(0.77)
	No	89.8%	91.5%
		(0.052)	(0.137)
ISS Recommendation Lost	Yes	87.3%	88.1%
		(0.163)	(0.243)
	No	90.0%	92.7%
		(0.054)	(0.161)
Shareholder Proposal	Yes	88.0%	88.8%
		(0.368)	(0.483)
	No	89.7%	91.0%
		(0.052)	(0.143)

This table presents the proportion of votes and meetings for which there was a hidden agenda. The column labeled "Vote Level" reports the proportion of votes in the relevant category, while the column labeled "Meeting Level" reports the proportion of meetings with at least one vote of the relevant type. Standard errors are presented in parentheses. Panels A and B also report the number of observations within the category.

But not all agendas are equally likely to be hidden. Panel B of Table 2 compares hidden agendas for different types of meetings. It shows that hidden agendas are overwhelmingly common in the context of annual meetings: a shocking 91% of annual meetings (representing 90% of votes at annual meetings) have hidden agendas. Hidden agendas are much less common for proxy contests and special meetings (many of which relate to mergers) and occur in 14% and 20% of votes at these types of meetings, respectively. Moreover, in the case of both proxy contests and mergers, shareholders are likely to have been informed about the matter through other means prior to the record date, something that we investigate further below.

Because annual meetings represent the overwhelming majority of meetings, and because investors are less likely to have other means of learning about the agenda at such meetings, we drill down further within annual meetings in Panel C and explore the incidence of hidden agendas by various meeting characteristics. One of these—the existence of a shareholder proposal—would have been known to management long before the record date.[111] The other three are ex post measures of how contentious the meeting was—whether any management proposals failed, whether the outcome of any proposal went against that recommended by ISS, and whether there was a "close" vote (defined as an agenda item that passed or failed by 10 percentage points or less)—are of course only knowable after the meeting and were therefore not available at the record date.[112] We return to these close votes in Section II.B.

Panel C demonstrates that hidden agendas are not confined to "unimportant" annual meetings. Eighty-four percent of annual meetings at which there was a close vote, and 80% of meetings at which at least one management proposal failed, had hidden agendas. Hidden agendas were also present at nearly 89% of annual meetings with at least one shareholder

111. Shareholder proposals submitted pursuant to Rule 14a-8 are required to be submitted to the company at least 120 days before the first anniversary of the company's last proxy statement *See* 17 C.F.R. §§ 240.14a-8(e)(2) (2020).

112. In many cases, management are likely to have had a sense of what matters might be controversial in advance. *See, e.g.*, Yair Listokin, *Management Always Wins the Close Ones*, 10 AM. L. & ECON. REV. 159 (2008).

proposal.[113] In all of these cases, investors might reasonably have valued knowing the agenda at the record date.

Of course, the fact that proxy materials are not filed before the record date does not matter nearly as much if investors have access to meeting agendas through other means. In some cases, they will. For example, for meetings to approve mergers, or where there is a proxy contest, there is likely to be considerable disclosure in other types of SEC filings that relate to the vote well in advance of the meeting.[114] While this is likely to provide partial information, our research indicates that these filings generally do not provide all the information that an investor would expect to receive on the formal agenda. We therefore refer to these meetings as having "partially hidden agendas." Moreover, even when information is disclosed, the fact that it is disclosed in a variety of different places (rather than all being conveniently disclosed in the proxy filings) makes it harder and more costly for investors to identify the agenda information. Finally, while information disclosed in other filings might indicate that a transaction or contest *is planned*, the fact that such a transaction or contest might be called off means that the investor cannot completely rely on these filings to make recall and lending decisions.

To determine the extent to which partially hidden agendas might provide another avenue for investors to learn about the information that would otherwise be contained on the hidden agenda, we conduct an in-depth review of other filings prior to the record date.[115] We find that for 49% of special meetings with hidden agendas, a maximally diligent investor could gather all of the information that she needs to piece together the agenda by carefully scrutinizing EDGAR.[116] The overwhelming majority

113. The proportions are nearly identical if we look at the vote level rather than the meeting level.

114. For mergers, Securities Exchange Act Rules 13a-11 and 15d-11 require disclosure of certain events on Form 8-K within 4 business days of the event, including entry into a material definitive agreement. 17 C.F.R. § 240.13a-11 (2020); 17 C.F.R. § 240.15d-11 (2020). If shareholders will be voting on a merger, the merger agreement will almost always be material to the company, and the company will therefore be required to disclose it on a Form 8-K. Form 8-K Item 1.01, 17 C.F.R. § 249.308 (2020) (requiring disclosure of entry into material definitive agreements). The inevitable delay between the announcement of a merger and the shareholder meeting to approve it means that this Form 8-K will generally be filed considerably in advance of the record date. *See, e.g.*, Matteo Gatti, *Reconsidering the Merger Process: Approval Patterns, Timeline, and Shareholders' Role*, 69 HASTINGS L.J. 835, 868-72 (2018).

115. We divide this analysis into two parts. First we investigate proxy contests and special meetings. Then we turn to annual meetings. Our analyses of these two sets of meetings are described in detail in Sections B and C of the Appendix, respectively.

116. In the course of our review, we also identified meetings for which the partial information was provided less than five business days before the record date. We consider this to be "ineffective" notice, since it will often not provide sufficient time for an investor to identify the information and make a recall or withdrawal decision prior to the record date.

of the special meetings in this group (82%) involved business combinations, where the information was provided in a Form 8-K (and in some cases also in additional filings). However, while these filings all mentioned the need for a special meeting, they generally did not provide all relevant details about that meeting. The ability to derive full agenda information from filings other than proxy materials was much less common for proxy contests. In only 4 of the 38 proxy contests (11%) that we classified as having hidden agendas could a maximally diligent investor have determined, based on EDGAR filings made prior to the record date, that a proxy contest would be voted on at the meeting. In the sample of annual meetings we reviewed, we did not find *any* situations where full information about an agenda could be determined from other EDGAR filings. Additional data and findings from this analysis are included in the Appendix.

This analysis focused on the possibility of divining agenda items from EDGAR filings in advance of the record date. Obviously, investors may be able to predict agenda items even without the help of such filings. Especially in the context of uncontested annual meetings, many agenda items are at least somewhat predictable. Shareholders vote to ratify the appointment of company auditors each year. Companies put forward "say-on-pay" proposals regarding executive compensation at regular intervals, and the interval is determined well in advance following a "say-on-frequency" vote.[117] Investors can also determine from previous proxy statements which directors have terms expiring the upcoming annual meeting.[118] While investors won't know for certain whether these directors will be re-nominated, they can at least take a guess.[119]

While investors may be able to predict the agenda items with some amount of confidence in each of these cases, they often won't have enough information to determine how controversial the vote will be, and therefore the value of retaining the right to vote on the matter. Gathering that information requires reading the company's proxy statement, something that is not possible when there is a hidden agenda.

117. *See* 17 C.F.R. § 240.14a-21(a) (2020) (requiring say-on-pay votes); 17 C.F.R. § 240.14a-21(b) (2020) (requiring say-on-frequency votes).

118. *See* 17 C.F.R. § 240.14a-101 Item 7 (2020) (instructing companies to furnish information about director elections); 17 C.F.R. § 229.401(a) (2020) (same).

119. In the event that a sitting director is not re-nominated, predicting the identity of the proposed replacement may be much more challenging.

B. The Importance of Hidden Agendas

So far, we have argued that hidden agendas matter for a variety of reasons. We have shown that the current legal regime creates the possibility that long-term investors who lend their shares won't know what they could be voting on at a shareholder meeting until it's too late for them to recall their shares to vote. We have shown that this problem is not just theoretical: the evidence we have presented in Section II.A demonstrates that shareholder meetings overwhelmingly have hidden agendas.

But just because hidden agendas are common does not necessarily mean that they are important. After all, the great majority of hidden agendas occur at uncontested annual meetings, most of which are "snoozefests."[120] At such meetings, managers and investors can predict with virtual certainty, well in advance of the meeting, what the agenda will be. Only a tiny fraction involve contested director elections; at the overwhelming majority, incumbent directors are reelected by substantial margins. And only a very small number involve close votes on shareholder proposals or management proposals.[121] As a result, the odds that lent or recalled shares could affect the outcomes of any of these votes are vanishingly small. And yet we believe that hidden agendas do still matter, for three sets of reasons.

1. Close Votes

First, and most obviously, there are instances where hidden agendas might have actually changed the outcome of a shareholder vote. In an ideal world, we would evaluate this by measuring the number of shareholder votes that would have had different results in a world without hidden agendas. As we discuss below, this question is unanswerable, since it depends on an alternative, counterfactual state of the market. However, our data do allow us to shed some light on the question of how securities lending and hidden agendas interact in the context of voting outcomes. For example, we can ask the question: given the *current* state of the market, how often does the number of shares lent on the record date exceed the winning margin for an agenda item at that election? And among these votes, what percentage of the lent shares would have to have been voted differently to change the outcome of the vote? The answers to these questions show that securities lending, and recall or withdrawal decisions, can have an impact on the outcome of shareholder votes.

To answer these questions, we first compute the "winning margin" for each vote in our voting dataset. For votes with a majority or a supermajority threshold, we simply ask "how many shares would have had to switch from

120. We are indebted to a workshop participant for coining this term of art.

121. We discuss close votes in more detail in Section II.B.1, *infra*.

the winning side to the losing side for the result to have changed?" For simplicity, we ignore director elections with plurality voting standards in this analysis.[122] This reduces the number of votes for which we can compute this measure to 101,314, of which 90,606 have hidden agendas. Then, we compare this number to the number of shares lent on the record date if there was a hidden agenda.

As before, we categorize votes into votes at annual meetings, proxy contests, and special meetings. The results are summarized in Table 3. The number of shares lent at meetings with hidden agendas exceeded the winning margin at a total of 3,664 votes over the 7-year period. The overwhelming majority of these (3,641) were at annual meetings.

Table 3. Shares Lent Relative to Winning Margin at Votes with Hidden Agendas

	Number of Votes
Panel A: Annual Meetings	
Votes with margins less than 100% of shares lent	3,641
Votes with margins less than 50% of shares lent	1,805
Votes with margins less than 33% of shares lent	1,249
Votes with margins less than 25% of shares lent	920
Votes with margins less than 20% of shares lent	734
Panel B: Proxy Contests	
Votes with margins less than 100% of shares lent	9
Votes with margins less than 50% of shares lent	3
Votes with margins less than 33% of shares lent	2
Votes with margins less than 25% of shares lent	1
Votes with margins less than 20% of shares lent	1
Panel C: Special Meetings	
Votes with margins less than 100% of shares lent	14
Votes with margins less than 50% of shares lent	6
Votes with margins less than 33% of shares lent	4
Votes with margins less than 25% of shares lent	3
Votes with margins less than 20% of shares lent	3

This table presents the number of votes with hidden agendas in our sample period where the vote margin exceeded various percentages of the number of shares lent.

122. We do so because it is unclear what the appropriate measure for a vote margin is in an uncontested director election with a plurality voting rule.

Naturally, this exercise is more than a little artificial. The idea that *all* lent shares would be voted differently had they not been lent is implausible. As an additional exercise, we break votes down by the ratio of lent shares to winning margin. This helps us answer the question of "what proportion of lent shares *would have had to have* switched from the winning side to the losing side to change the result?" We summarize the results of this exercise in Table 3. So, for example, we find that at 1,805 votes at annual meetings with hidden agendas, if half of the lent shares had switched from the winning side to the losing side, it would have been enough to change the result. For 920 of these votes, a quarter of the lent shares would have been enough to change the result. To be clear, this 920 is a subset of the 1,805, since if a quarter of lent shares are enough to change the result, then half of such shares would also be enough.

With many fewer proxy contests and special meetings with hidden agendas, there are fewer instances where the number of shares lent at the record date would have been enough to change the result. Moreover, as discussed above, shareholders are likely to have received partial notice of these votes through other means, so these agendas are less "hidden" than those of annual meetings.

While we think this exercise is informative, the conclusions that can be drawn from it are limited for two reasons. First, the influence of an investor's (or investment manager's) vote is not limited to situations in which that vote is pivotal—i.e., where it would change the outcome of the vote. As Professors Levit, Malenko, and Maug have recently explained, a non-pivotal investor's vote is also important because it influences which *other* voter will be pivotal.[123] For instance, an investor who votes in favor of a proposal but is not pivotal nonetheless increases the likelihood of a change in the pivotal voter, such that the voter that *is* pivotal is more likely to be in favor of the proposal than the voter that would have been pivotal if the investor had not voted.

Second, this analysis is not a prediction of what would happen in a world without hidden agendas. These results reflect the behavior of parties—most significantly, managers and shareholders—in the current equilibrium. This, of course, is an equilibrium in which 88% of meetings have hidden agendas, making particularized recall or withdrawal decisions (particularly for annual meetings) impractical. When it is impossible to know what will be on the ballot the overwhelming majority of the time, a reasonable strategy for an investor might be to use a consistent approach to all votes. In other words, it might not be worth having one standard strategy for the overwhelming majority of votes for which the agenda is hidden, and a second, particularized, strategy for votes where the agenda is available at the record date. Given how infrequently the latter strategy

123. Levit et al., *supra* note 18.

would be employed, it may be easier to simply treat all record dates the same way for the purposes of the recall decision.

While this makes sense in the *current* equilibrium, there is little reason to expect it to continue in a world without hidden agendas. If no agendas are hidden, the most logical thing for an investor engaged in securities lending to do is to perform a preliminary review of all agendas before the relevant record date. Investors could then make a determination as to whether the right to vote on these matters is more valuable than the expected income from continuing to lend their shares (continuing to make their shares available to lend). If done sensibly, this strategy would be unlikely to materially increase the time and effort involved in reviewing proxies, while simultaneously affording shareholders more actionable information.

At the same time, of course, managers would also act differently in a new equilibrium. As Professor Listokin has shown, in the context of close votes, management is extremely effective at obtaining *just* enough votes to win.[124] It stands to reason, then, that in a counterfactual world in which enough of the lent shares were going to be voted so as to change the result, management might respond accordingly, leaving the final vote result unchanged.

Both of these are a version of the so-called "Lucas critique."[125] While often formulated in the context of macroeconomic policy, the critique applies more generally to counterfactual statements about what *would happen* under a different policy regime.[126] Specifically, the critique highlights the fact that the equilibrium under any given regime reflects the behavior of all agents in that regime, and that it is a mistake to assume that their behavior would remain the same under a different policy regime.[127] We return to this issue in Section IV.C.

2. Influential Votes

Section II.B.1 focused on votes where recall and withdrawal decisions could prove pivotal. But recall and withdrawal decisions can still influence corporate outcomes even when they don't affect enough shares to change

124. Listokin, *supra* note 112.

125. For a review of the Lucas critique, see Neil R. Ericsson & John S. Irons, *The Lucas Critique in Practice*, *in* MACROECONOMETRICS: DEVELOPMENTS, TENSIONS, AND PROSPECTS 263 (Kevin D. Hoover ed., Springer Netherlands 1995).

126. For Professor Lucas's initial applications of the critique to monetary policy, see Robert E. Lucas, *Econometric Policy Evaluation: A Critique*, 1 CARNEGIE-ROCHESTER CONFERENCE SERIES ON PUBLIC POLICY 19 (1976) (critiquing the relationship between inflation and unemployment).

127. For a recent application of the Lucas critique in the context of public health measures taken to combat Covid-19, see Ayse Ercumena, Raymond Guiteras & Dean Spears, *Biology, Behavior and Policy, or, Dr. Fauci, Sen. Paul and Prof. Lucas Walk into a Pandemic* , 31 ECLINICALMEDICINE 1 (2021).

the formal result of a vote. First, even when directors are reelected, differences in the level of support that they receive can affect which actions they later pursue. Higher levels of withhold votes are associated with more turnover of directors or managers, and with more implementation of actions desired by investors.[128] Because recall decisions by investors can affect these levels of support, they can also be expected to affect corporate outcomes.

Second, recent theoretical research has demonstrated that the decisions of blockholders to vote or not vote can affect outcomes even when those blockholders do not control enough votes to be pivotal.[129] This is because the blockholder's decision affects the likelihood that the pivotal voter will be one that supports the proposal, or one that does not.[130] While that research focused on decisions to buy shares in order to vote, the rationale applies equally to the decision whether to recall (or withdraw) shares from lending in order to vote. To the extent that hidden agendas affect that decision, they can influence corporate outcomes through this channel even when they are not pivotal.

3. Hidden Agendas at Annual Meetings

Hidden agendas matter even when recall decisions aren't pivotal and don't change the incentives of directors for four reasons. First, even when a vote is not close, its outcomes can still have impact. Substantial withhold votes against directors, or low results on say-on-pay proposals, are widely interpreted as votes of no-confidence in directors, or in executive pay-packages, respectively, and may therefore lead to changes in those things. Similarly, shareholder proposals that receive substantial support—even if not enough to pass the majority threshold—are often voluntarily implemented by directors. As a result, to the extent that hidden agendas affect any of these vote levels, they could have a material effect on corporate outcomes.

Second, hidden agendas can cause investors to "mistakenly" recall their shares. These investors may recall their shares because of a belief that a meeting will (or could) have a consequential vote. If these investors knew that the meeting would be a bona fide snoozefest, they would not have recalled their shares, and would have benefited from receiving lending

128. *See* Yonca Ertimur, Fabrizio Ferri & David Oesch, *Understanding Uncontested Director Elections*, 64 MGMT. SCI. 3400, 3410-11 (June 2017) (providing empirical evidence of the determinants of firm responsiveness).

129. *See generally* Levit et al., *supra* note 18.

130. *Id.* at 3 (discussing how "the voting premium does not emerge from exercising control, but from influencing who exercises control").

income.[131] Not having the information to accurately decide not to recall their shares is therefore costly to these investors and their clients.

Third, preventing investors from being able to determine whether to vote runs counter to fundamental norms of shareholder voting, many of which underlie trends and regulatory rules. Hidden agendas make the decision whether to vote more difficult and more error-prone. This is inconsistent with the central role that shareholder voting is purported play in corporate governance.[132] It is also inconsistent with the increasing emphasis that investment managers have placed on shareholder voting and investor stewardship. For example, BlackRock, the world's largest investment manager, recently began to allow some of its clients to exercise their own "pass-through" votes.[133] This demonstrates the importance of shareholder voting of shares held by investment companies, and may exacerbate the problem of hidden agendas. Making voting easier and less-error prone would be consistent with these trends, as well as with the substantial literature that has recognized the expressive function of voting.

Finally, the SEC has a deep and abiding commitment to the importance of shareholder voting, which is enshrined in the legislation governing the SEC and reflected in its frequent statements.[134] It is also found in SEC rules requiring investment advisers to consider whether to vote shares they hold on behalf of their own investors. Permitting practices that making the decision whether or not to vote more difficult is inconsistent with this commitment. For the SEC to ignore ways in which its rules result in many investment advisers being unable to timely determine whether to recall their shares to vote is inconsistent with all of these. Fortunately, Part III presents a straightforward method for the SEC to resolve this inconsistency.[135]

III. Fixing Hidden Agendas

We propose a simple solution to the problem of hidden agendas: the company can simply make the proxy statement public in advance of the

131. Alternatively, investors that erroneously withdrew their shares from lending in wrongful expectation of a consequential vote would have foregone some *probability* of receiving lending income.

132. *See supra* note 1 and accompanying text.

133. Dawn Lim, *BlackRock Gives Big Investors Ability to Vote on Shareholder Proposals*, WALL ST. J. (Oct. 7, 2021), https://www.wsj.com/articles/blackrock-gives-big-investors-ability-to-vote-on-shareholder-proposals-11633617321 [https://perma.cc/67X2-7D4H].

134. *See generally* 15 U.S.C. § 78c (2022) (including more than 300 provisions permitting the SEC to make rules for the "protection of investors").

135. The other way in which the SEC could resolve this inconsistency is by relinquishing its emphasis on the importance of investor voting. Quite apart from the question of whether this would be advisable, we do not seriously consider this possibility here, as it would constitute a monumental shift in the approach of the SEC, and would require a fundamental rewriting of the SEC's proxy rules, as well as many other SEC regulations.

record date. Of course, companies are free do this already, and choose not to. Hidden agendas are therefore unlikely to disappear without some action by policymakers. We discuss several ways that hidden agendas could be fixed using private ordering (in Section III.A) or by state law (in Section III.B), and consider their shortcomings. We describe our preferred solution in Section III.C: amending the federal proxy rules to require proxy statements to be filed prior to the record date. We also describe what we consider to be a second-best solution in Section III.D, stock exchange rules that would require disclosure of agendas in advance of the record date.

A. Private Ordering Solutions to Hidden Agendas

One way of avoiding the need for share lenders to recall or withdraw their shares in order to vote is for the share lending agreement to allow the lender to determine how the shares are voted, even though they are not the beneficial owner of the shares at the record date. This should not raise any issues under state corporate law. In most cases even investors that don't lend their shares are not the record owner of the shares, since they generally hold shares through a custodian or a broker (known as holding in "street name"). The same chain of beneficial ownership by which lenders would control the shares if they recalled them could be extended to the borrower, and to the buyer of the shares.

The challenge with this approach is that it would become very difficult for the borrower of such shares—encumbered by this obligation—to then sell them. The fact that the voting rights attached to the shares are subject to this agreement would require the borrower to notify the potential buyer, disrupting the borrower's ability to sell the shares through a typical market transaction. The borrower would also need to convey voting instructions to the buyer, and there would be some uncertainty regarding the enforcement of the arrangement against the third party. From a practical perspective, the difficulties in overcoming these issues make this solution unworkable.[136]

A second private ordering alternative would be for private parties to voluntarily disclose agenda items in advance of the record date. This could either be done by investors, by companies, or both. For votes initiated by investors, the investors submitting the proposals could disclose that information to the market in advance of the record date. As discussed in Section II.A, most proxy contests already involve filings that do this. It would be straightforward for investors to make such filings in the other

136. One possibility would be to accomplish the same arrangement through a multilateral agreement among the members of the Depositary Trust Company (DTC). Through its nominee, Cede & Co., the DTC is the ultimate record holder of most shares held in street name, and the custodians and brokers whose clients have the beneficial interest in those shares are members of the DTC. DTC members could agree that they would recognize the voting rights of share lenders, rather than share buyers. While this would provide a mechanism for resolving the contracting arrangements in a multilateral fashion, many of the same issues would remain.

cases. For shareholder proposals, investors can file Notices of Exempt Solicitation on Form PX14A6G, which then appear in EDGAR searches for the company. In both cases, these actions would alert other investors to the likely appearance of these proposals at the company's meeting, and enable investors to determine whether or not to recall (or withdraw) their shares in order to vote on those proposals.

Unfortunately, this solution is unlikely to be comprehensive. It is costly for investors to make such disclosures: In the absence of a rule requiring them, or a financial incentive to do so, this makes it unlikely that they will do so universally. And of course, these disclosures would not cover proposals put forward by the company itself.

An obvious solution would be for the company to announce the items on its agenda in advance of the record date—including both its own proposals and those put forward by investors. While this could be done through the company's website, this might lead to discrepancies in how and where the information is disclosed. Combined with the fact that investors cannot be expected to be checking the websites of all of the companies in their portfolio regularly, this is likely to reduce the extent to which investors find out about the information in time to make recall or withdrawal decisions. A better solution would be for companies to file their expected agenda as additional solicitation material on Schedule 14A.[137]

Directors generally have the power to implement such changes. The problem with this solution is that they may not choose to do so on their own. Even if most directors did comply, it's unlikely that all of them will. Of course, investors could take steps to encourage directors to make such changes. In recent years, companies have implemented a variety of corporate governance changes as a result of investor pressure (particularly pressure from large investors), as expressed through private engagement, votes on shareholder proposals, and withholding votes from directors that fail to undertake desired corporate governance changes. A similar approach could be used to apply pressure to directors to fix hidden agendas. However, even longstanding and sustained pressure from investors has failed to bring about changes at all companies. As a result, efforts by investors may have limited success in bringing systematic changes across the market as a whole. The considerable effort by investors that would be required, distributed across many different investors, with ensuing coordination and collective action problems, makes this solution inferior to centralized action by the SEC.

137. One issue is that companies may not know whether the SEC will grant no-action relief to permit the company to exclude a shareholder proposal until after the record date. However, this could be overcome by informing investors that the proposal is subject to a no-action request, and the company expects that it will not be included in the proxy statement (or voted on) if the request is granted.

B. State Law Avenues for Fixing Hidden Agendas

The key shortcoming of private ordering could be avoided through state law regulatory action to eliminate hidden agendas. Because hidden agendas result from the intersection of state corporate law rules governing record dates and federal securities rules governing proxy filing dates, they could be solved by either body of law.[138] In this Section, we consider avenues for fixing hidden agendas under state law. This could be done by amending state corporation laws to require that record dates occur after notice of the meeting is given to investors.

While fixing hidden agendas through state law rules is possible, these approaches have significant drawbacks. As we have discussed, state law typically only requires a very limited form of notice, which does not include the agenda or the additional information in the proxy statement that would allow investors to evaluate the salience of the matters on the agenda.[139] In addition, state laws only apply to the record owners of shares, and not to beneficial owners.[140] Any state law solution would need to either substantially revise these concepts, or alternatively, be written to import concepts (such as proxy statements) from the federal proxy rules. While these concepts make sense in the context of publicly traded companies, they are an uncomfortable fit in the context of state corporate law, which governs both public companies and closely held companies that are not subject to the federal proxy rules. These solutions are therefore inferior to solutions implemented through the federal proxy rules themselves.

These shortcomings make another avenue for fixing hidden agendas more promising—SEC action revising federal proxy rules to require that companies file their proxy statements before the record date for the meeting. We now turn to this solution, and how it could be implemented.

C. Our Proposed Solution

The federal proxy rules provide a straightforward and effective way to eliminate hidden agendas. In this Section, we propose a minor amendment to the federal proxy rules that would do just that. We also describe the tradeoffs that the amendment would create, and how companies could minimize costs from the change by choosing the least costly of three alternative approaches.

As discussed in Section III.B, a major advantage of solving hidden agendas through the proxy rules rather than state corporate law is that the proxy rules make reference not only to the company's proxy statement, but

138. Another avenue for fixing hidden agendas is through exchange listing rules, which could also require that proxy statements be filed prior to the record date. This would require consistent rule changes by all major exchanges. And since changes to exchange listing rules would, in any case, require SEC approval, we consider this solution to be inferior to the SEC simply amending its own rules that apply to all public companies.

139. *See infra* Section I.C.

140. *See, e.g.*, DEL. CODE ANN., tit. 8, § 213.

also to its record date.[141] Accordingly, we propose that the SEC amend Rule 14a-6(b), which currently requires that definitive proxy statements be filed "no later than the date they are first sent or given to security holders," to additionally require that the definitive proxy statements be filed:

> no later than the date they are first sent or given to security holders*, or the date that is five business days prior to the record date for voting at the meeting to which the solicitation relates, whichever is earlier*.

Because settlement of share transfers could require up to two business days, requiring that definitive proxy statements be filed at least five business before the record date would give investors that have lent shares (or made their shares available for lending) three business days to determine whether or not to recall their shares.[142]

Our proposal is designed to minimize the costs that it would impose on companies while drastically reducing the prevalence of hidden agendas. It would not require companies to mail their proxy statements to investors prior to the record date, or even to give notice and access prior to that time. Since SEC filings are made available on EDGAR almost immediately, this would give all market participants access to the information in a timely manner. The SEC provides data feeds (in RSS format) that allow for updates of filings posted on EDGAR, which can be used in conjunction with common tools to alert investors to filings, thereby increasing the effectiveness of this notice.[143] Third-party providers also offer similar services.[144] Most of the sophisticated investors that engage in lending can easily take advantage of these services. Of course, one shortcoming of our proposal is that investors who are not monitoring EDGAR—such as unsophisticated retail investors—will not be informed of the agenda or the record date before the record date occurs. However, overcoming this issue would require a separate notice to be mailed to those investors, which would be logistically impractical. And our proposal leaves these investors no worse off than the status quo.

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141. *See* 17 C.F.R. §§ 240.14a-6 (2020) (describing filing requirements for proxy statements); 17 C.F.R. §§ 240.14a-13 (2020) (requiring broker searches to be distributed at least 20 days prior to the record date of the meeting of security holders).

142. A potential objection to our solution is that share lenders may not be entitled to notice, or to receive a proxy statement, because they are not beneficial owners at the record date for notice. This issue could be resolved by amending state corporate laws and/or securities regulations to require notice to share lenders. We do not propose this approach because we do not believe it to be necessary, for two reasons. First, as described below, if the agenda is filed publicly on EDGAR, lenders will be able to inform themselves of its content. Second, lenders who wish to retain their right to receive notice and a proxy statement can refrain from lending a token number of their shares, thereby remaining record or beneficial owners entitled to notice.

143. For a description of RSS feeds on EDGAR, see *RSS Feeds*, SEC. & EXCH. COMM'N, https://www.sec.gov/about/secrss.shtml [https://perma.cc/482Q-BJ2Y].

144. For instance, SEC Report provides free email updates. *See SEC Edgar Filing Tracker*, SEC. & EXCH. COMM'N, https://sec.report/.

Our proposed solution therefore represents a compromise. While we acknowledge that it is likely to impose some costs on companies, for most companies, the upper bound on these costs would be low. One reason for this is that there are three alternative methods for a company to comply with it. One option is for the company to continue to take the same amount of time to prepare its proxy statement as before, but to move its record date closer to the meeting date. The company could then file its proxy statement on the date that it would historically have been ready to send it to the printer, provided that the record date is set at least five days after that time. It would then mail the proxy statement after the record date. Under this approach, the time available for the company to *prepare* its proxy statement would not change, but the mailing of the proxy statement would occur much later.

A second option is for the company to use the same timetable for *mailing* the proxy as it does at present, but to accelerate the timetable for *preparing* the proxy statement. According to our data, the median gap between record dates and proxy filing dates is currently about 12 days. So even if companies kept their record dates the same, our proposal would only require them to file their proxy statement about three weeks earlier than they currently do. In our sample, the median proxy statement is filed 13 to 14 weeks after the company's fiscal year end. This three-week acceleration is therefore not insubstantial, but nor is it likely to be prohibitively costly.

Recent amendments to state corporate laws that allow for bifurcated record dates give companies a third option. For example, in 2009, Delaware amended its General Corporation Law to allow companies to have two separate record dates: one for determining which investors are entitled to notice of the meeting (which we refer to as the "notice record date") and a second for determining which investors are entitled to vote at the annual meeting (which we refer to as the "voting record date").[145] Of the ten states with the largest number of public company incorporations, nine now permit bifurcated record dates.[146] A company in a state permitting bifurcated record dates could comply with our proposed rule by setting its *notice* record date at the same time as its current (unitary) record date, but could set its *voting* record date 35 days (or fewer) before the meeting. This would allow the company to both file and mail its proxy statement at least 40 days

145. DEL. CODE ANN., tit. 8, § 222(a), amended by 2009 Del. L. Ch. 14 (H.B. 19), § 5. The equivalent provision in the MBCA, § 7.07(e), was adopted in 2010; *see* Herbert S. Wander, *Changes in the Model Business Corporation Act - Proposed Amendments to Shareholder Voting Provisions Authorizing Remote Participation in Shareholder Meetings and Bifurcated Record Dates Report*, 65 BUS. LAW. 153 (2009).

146. *See* DEL. CODE ANN., tit. 8, § 213(a) (2020); MD. CODE ANN., CORPS. & ASS'NS § 2-511 (LexisNexis 2019); N.Y. BUS. CORP. LAW § 604 (Consol. 2020); FLA. STAT. § 607.0707 (2020); CAL. CORPS. CODE § 701 (West 2020); TEX. CODE ANN. § 6.101 (2019); 15 PA. CONS. STAT. § 1763 (2019); OHIO REV. CODE ANN. § 1701.45 (LexisNexis 2019); N.C. GEN. STAT. § 55-7-07 (2019). Nevada does not currently permit bifurcated record dates. *See* NEV. REV. STAT. § 78.350 (2020).

prior to the meeting, thereby avoiding any gap between filing and mailing, while also allowing the company to maintain its current timetable for preparing, filing, and mailing its proxy statement.[147]

By allowing companies the flexibility to choose from among these approaches, our proposed rule should be relatively low cost. Each company can choose the approach that is least burdensome to it, taking into account all its individual needs and circumstances.

From a regulatory point of view, our proposed change would be straightforward. All that it would require is for the SEC to amend Rule 14a-6 to add the 26 words proposed above.[148] This would require the SEC to undertake the notice-and-comment process required by the Administrative Procedure Act, along with the concomitant economic analysis.[149] Without downplaying the significant effort that this would entail, we believe that the benefits clearly outweigh the costs. This is particularly true in light of the fact that the status quo directly undermines the type of individualized analysis that the SEC requires of mutual fund managers. At an absolute minimum, implementing our proposal would eliminate that. The simplicity of the change, coupled with the clear reasons for it and the alternatives we have outlined for companies to minimize the cost, should make cost-benefit analysis relatively straightforward.

D. A Second Best Solution

One unknown with respect to our proposal is how much it would cost to issuers to prepare their proxy statements earlier, or how costly it would be for the organizations involved in the administration of voting to adopt bifurcated record dates. While it's impossible to know for sure, we believe that these costs are likely to be limited. However, to account for the possibility that we might be significantly underestimating these costs, we outline what we consider to be a second-best solution for eliminating hidden agendas: requiring disclosure of agendas before the record date.

A version of this proposal already exists. Each company listed on the NYSE is required to disclose its record date at least ten days before it

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147. Two implications of a bifurcated record date are that investors who buy shares between the notice record date and the voting record date are entitled to vote without being entitled to receive individualized notice, and investors that sell their shares between the two dates receive mailings even though they are not entitled to vote. We do not believe that either would result in any major burden to investors or to the company. The former group can access the proxy statement online; the latter group can simply ignore the filings they receive.

148. If the SEC chose to recognize bifurcated record dates, as we propose, it might also choose to clarify Rule 14a-13 to make clear whether the record date referred to there is the notice record date, the voting record date, or the earlier of the two. This raises the interesting question of whether the proxy rules are intended to ensure proxy materials are delivered to those entitled to notice, or to those entitled to vote. At present, the answer to this question is unclear.

149. *See* 5 U.S.C. § 553 (2018) (requiring notice-and-comment for rulemaking); Business Roundtable v. SEC, 647 F. 3d 1144, 1148 (D.C. Cir. 2011). For an analysis of the practical implications of these requirements for SEC rulemaking, see Scott Hirst, *The Case for Investor Ordering*, 8 HARV. BUS. L. REV. 227, 261-73 (2018).

occurs, which is then published on the NYSE's Proxy Rulings website.[150] We propose that companies listed on either the NYSE (or its affiliates, NYSE American and NYSE Arca) or on Nasdaq be required to disclose not only their record date, but also the agenda that the company then expects to follow, to their respective exchange by the same deadline. The exchanges, in turn, would make this information public. This could be accomplished through an amendment to the listing rules of the exchanges, which the SEC could require the exchanges to adopt. Since this information would be publicly disclosed by the exchanges, it would fall within the definition of additional soliciting materials that the companies are required to file with the SEC under Rule 14a-6. It would therefore also appear on EDGAR and be easy for investors to find.

Compliance with these provisions would involve little cost for companies, since they are likely to already have a clear idea of their expected agenda by this time.[151] However, since the disclosure would not include the full proxy statement, it might not contain enough information for investors to determine whether a particular proposal is important enough (or likely to be close enough) to vote on. This is especially likely to be true for proposals involving the re-election of directors, or executive compensation, two instances where much of the relevant information is disclosed on the proxy statement. Accordingly, we regard this as a second-best solution to requiring that proxy statements be published prior to the record date.

The second-best solution may nevertheless be a useful interim step. It would be an even-lower-cost method to reduce hidden agendas. If it were implemented, the ease with which companies could comply with it might serve to illustrate the ease with which companies could also conform to our preferred solution. It might also demonstrate to investors that the information provided in the agenda is insufficient in some cases to decide whether to vote, leading to investor pressure on the SEC and issuers to implement our preferred solution.

IV. The Broader Implications of Hidden Agendas

Before concluding, we discuss several broader implications of hidden agendas, and of our proposed solution. In Section IV.A we consider whether there may be hidden benefits to the status quo which justify retaining hidden agendas. In Section IV.B we discuss what we call the "ouroboros problem": the possibility that shares lent by an investor may have been sold to the very same investor. In Section IV.C, we discuss the impact of our proposed solution on share voting more broadly. Finally, in

150. *See infra* note 163 and accompanying text.

151. *See supra* Section I.D.

Section IV.D, we consider the implications of our analysis for our current system of providing notice to investors.

A. Hidden Benefits of Hidden Agendas?

Hidden agendas did not arise by design, but perhaps they have unintended benefits that justify their retention. In particular, if there are significant problems that arise from share lending, or from voting by investors lending shares, and if hidden agendas reduce share lending, or voting by lenders, they may be beneficial. We consider three such arguments in favor of hidden agendas. We ultimately conclude none of them provides a compelling reason not to eliminate hidden agendas.

One such argument is that hidden agendas make it harder for market participants to engage in empty voting. Our proposal presumes that making it easier for long term investors engaged in securities lending to make informed decisions about whether or not to vote their shares would be a good thing. But one side effect is that it would also facilitate empty voting.

We acknowledge that there is a tradeoff—anything that facilitates voting by investors who lend securities also facilitates empty voting. However, to the extent that empty voting by some market participants is a pressing problem,[152] we believe that it should be addressed directly, rather than by limiting the information available to all investors prior to the record date. We note that there has been considerable discussion of other solutions aimed at addressing empty voting that do not depend on agendas being hidden.[153]

A second argument against solving hidden agendas focuses on the idea that allowing lenders and potential lenders to make better decisions around the record date may be harmful because securities lending is itself harmful. This may follow, for instance, from a belief that short-selling—which is facilitated by share lending—is harmful, or that securities lending increases systemic risk in the financial system.[154] To the extent that these are problems, making securities lending easier by eliminating hidden agendas might make those problems worse.

Our response here is similar. Without commenting on the merits of any of these underlying arguments, we suggest that if regulators believe that securities lending poses a substantial problem, then they have much more direct means at their disposal to regulate it. Continuing to require

152. *But see* Kahan & Rock, *supra* note 11 (expressing doubt regarding the extent of the empty voting problem).

153. *See, e.g.*, Henry T. C. Hu & Bernard Black, *Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications, and Reforms*, 61 BUS. LAWYER 1011, 1047-69 (2006); Henry T. C. Hu & Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions*, 156 U. PA. L. REV. 625, 682-721 (2008).

154. For a review of recent regulatory opposition to short selling, see Erik R. Sirri, *Regulatory Politics and Short Selling*, 71 U. PITT. L. REV. 517, 531-36 (2010).

share lenders to guess about the content of meeting agendas is an odd and ineffective way to reduce the level of securities lending in the market.

A final, related, argument relates to proxy voting by the institutions that conduct the largest volume of share lending. For example, some commentators have argued that voting by index funds is harmful for the capital markets.[155] These funds are among the largest securities lenders.[156] To the extent that their votes are harmful for the capital markets, making it easier for them to recall their shares and to vote will also be harmful.

Once again, accepting this position *arguendo*, our response is similar: If policymakers believe that organizations of this kind should not be voting, they could much more effectively address that problem directly. Hiding agendas, and forcing market participants to predict their content if they wish to vote, is a costly and ineffective method of stripping certain investors of their voting rights. If the premise of these arguments against institutional investor voting is indeed correct, addressing the issue directly would have the additional benefit of forcing an important public debate on whether current voting rules are indeed sound, and how they comport with other current regulations. We note that limiting the ability of mutual funds to vote would represent an almost complete reversal from the status quo: the current regulatory regime not only permits voting by mutual funds; in many cases, it effectively requires them to do so.[157] As long as that regulatory regime remains in place, we believe it is valuable for the SEC to make minor adjustments to eliminate hidden agendas and thus make it easier for lenders to comply with current regulatory requirements.

B. The Ouroboros Problem: Are Share Lenders Different from Share Buyers?

A second set of issues that we consider focuses on the question of which investors are currently voting lent shares. Hidden agendas mean that lenders might be making mistakes in deciding whether or not to recall and vote their shares. But this doesn't mean that no one is voting the shares that they decline to recall, or that shares that they do (suboptimally) recall would otherwise not have been voted. After all, the unrecalled shares are owned by someone else on the record date, who can therefore also vote those shares. That other owner is very unlikely to be the borrower, since a major reason to borrow shares is to sell them on the open market. The owner is therefore likely to be simply whichever investor happened to purchase the shares on the open market from the borrower.

In the most extreme version of this phenomenon, it is possible that the buyer is the same mutual fund that lent the shares in the first place. Suppose, for example, that a large index fund is lending some of its shares of a particular portfolio company, which we will refer to as company X. If

155. *See, e.g.*, Lund, *supra* note 24.
156. *See* Hu et al., *supra* note 9; Mitts, *supra* note 15.
157. *See supra* Section I.B.

the fund receives an inflow of investor money while the loan is outstanding, the fund will buy shares in X on the open market to maintain the relative weights of the companies in its portfolio. If the borrower has offered the lent shares on the market at the same time, the lending fund may buy them from the borrower who is shorting company X. If this is the case, the transaction has resulted in the fund transferring its interest in the company to itself.[158] This resembles the ancient ouroboros symbol of the serpent eating its own tail.

Even if this occurs, recalling those shares won't unwind that transaction. The recall would only affect the borrower, not an investor who has bought the share from the borrower. Because the shares of X are fungible, the borrower can satisfy its obligations by returning any shares of company X, and need not return the same shares (now owned by the buyer). In practice, the borrower would satisfy its obligation by buying shares on the open market, from whoever happens to be selling them on that day, and returning those shares. A parallel situation arises if a prospective lender decides not to make its shares eligible for lending. In this case, the counterfactual is that, had the prospective lender not withdrawn the shares, they might have been borrowed, and then sold on the open market to whoever happened to be buying them on that day.

Most of the time, of course, the lender and the seller are not the same entity. But they may well be the same *type* of investor—for example, two large mutual funds. In the case of mutual funds, they may even receive advice from the same proxy advisor, or otherwise exhibit very similar voting behavior.[159]

While this will almost certainly happen to some extent, it is highly unlikely that it will completely eliminate the effect of hidden agendas on voting. Lenders tend to be, on average, more sophisticated than the typical investor, and are more likely to be long-term shareholders. In practice then, if removing hidden agendas means that long-term investors who lend their shares are, at the margin, more likely to recall their shares when it comes to high value shareholder meetings, this will tend to reallocate votes from the marginal seller on the open market to these long-term sophisticated investors. Similarly, to the extent that they are more likely to withdraw their shares under such circumstances, this will tend to reallocate votes from the marginal buyer (who would have bought the share on the open market from the borrower had the share been made available for lending) to the same long-term sophisticated investors. Alternatively, to the extent that eliminating hidden agendas might cause these long-term sophisticated investors to *decline* to recall or withdraw their shares in advance of votes

158. Since all publicly traded shares are fungible with other shares in their share class, it doesn't matter whether the shares that are purchased are actually the same shares as the ones lent.

159. *See generally* Bubb & Catan, *supra* note 22 (using machine learning to classify mutual fund voting into three "parties" based on their voting behavior and finding that the main axes upon which voting differs correspond to the recommendations of the leading proxy advisors).

they consider to be insignificant, this will tend to reallocate votes at those meetings away from long-term investors, to the marginal buyers and sellers.

We raise this point for two reasons. First, to the extent that long-term investors are considered to have better (or worse) incentives, it illustrates the policy implications of hidden agendas. Second, it illustrates an important analytical insight into share lending. When a shareholder engages in securities lending, her transaction with the borrower has the effect of creating synthetic shares. Before the initiation of the lending agreement, only the investor (the soon-to-be-lender) has an economic interest in the company. After the loan is initiated, the lender retains her *economic* interest in the company while foregoing some of the legal rights (like voting) that come from legal ownership of the shares.[160] In most cases, the borrower then sells the shares on the market to a buyer. The buyer is now the legal owner of the shares, and therefore possesses all legal rights, as well as full economic interest in the company. In fact, the buyer is likely to be oblivious to the existence of the loan by which they came to own those particular shares. In any case, from the buyer's perspective the lending arrangement is completely irrelevant, as the eventual recall by the lender won't affect the buyer at all. The result is that the lender and the buyer *both* have an economic interest in the company, even though only the buyer has the full legal rights of a shareholder. In order for the lender to restore *her* rights as a shareholder, she must exercise her contractual right to require the borrower to return equivalent shares. The borrower returns shares to the lender, presumably by buying them on the open market. The lender's synthetic share is replaced by the actual shares purchased from the seller, and the match between the economic interest in the shares and their legal ownership is restored.

C. The Impact on Shareholder Voting

How would shareholder voting be affected if hidden agendas were eliminated? A potential objection to our proposed solution is the argument that eliminating hidden agendas would not result in any substantive changes. After all, there is presently little difference between lending behavior around meetings *with* hidden agendas and lending behavior at meetings *without* hidden agendas. Given that, what difference would it make if *no* meeting had a hidden agenda?

We alluded to our response to this objection in Section II.B.1, when we discussed the Lucas critique. The logical flaw in this argument is that it falsely assumes that under a very different policy environment, behavior would be the same. More specifically, it assumes that the behavior of

160. The lender's economic interest in the company arises because the shares will be recalled or returned at some point in the future pursuant to the lending agreement. At that time, the lender will once again own the shares and have an economic interest in their value; in the meanwhile, the lender has an expectation of receiving that value.

investors in a world where 0% of agendas are hidden would be the same as their behavior in a world where 90% of agendas are hidden. But for the reasons discussed in Section II.B.1, there is no particular reason to expect this to be the case. To be clear, this does not necessarily mean that behavior *will* change if hidden agendas are eliminated, only that evidence from the current policy environment is not particularly informative about behavior in a totally new policy environment.

Moreover, even if the aggregate levels of recall (and voting) by share lenders were to remain largely unchanged with the elimination of hidden agendas, this wouldn't necessarily mean that the change had no effect. As we discussed above, if we assume that lenders and potential lenders are making unbiased recall and withdrawal decisions given the current information environment, then we would expect that *on average*, the lending behavior around record dates is about right. If this is the case, the *average* behavior might not change much in a new information environment, with agendas disclosed in time to inform recall and withdrawal decisions. What may well change, however, is *which* meetings the investors recall their shares for, and which they don't.

Even if the aggregate level of recall (and voting) by share lenders remained the same after eliminating hidden agendas, that doesn't necessarily mean there would be no benefit from eliminating hidden agendas. Voting isn't free: investors who recall or withdraw their shares in order to vote them forego the opportunity to earn revenue on lent shares. From our perspective, guessing wrongly *in either direction* is an error—recalling shares for a meeting that turns out to only have low-value agenda items is just as much of an error as declining to recall shares in time to vote at a meeting with high-value agenda items. Eliminating hidden agendas would reduce both of these error costs. Giving investors access to better information will allow them to make better decisions. This, we believe, would be beneficial for those investors, for the companies in which they invest, and for the capital markets in general.

D. Notice in the Twenty-First Century

In some ways, our proposal sits uncomfortably within the current securities regulatory regime. After all, if a publicly-available filing is "good enough" notice for market participants, why should the securities laws require companies to send individualized notice to investors? Alternatively, if it's an inferior kind of notice, then perhaps our solution doesn't go far enough.

Our proposal does nothing to eliminate, or even reduce, the current notice requirements. It simply reflects the fact that individualized notice is not a realistic solution to the problem of hidden agendas. In order for a company to mail proxies, it has to know who to mail them to, something that it does not know before the record date. Even bifurcated record dates do not completely solve this problem, since the investors who purchase shares after the notice record date and before the voting record date will fall through the cracks. And share lenders—precisely the group of investors that we are concerned about—are not entitled to individualized notice at all, since they are not the legal owners of the shares on the record date.[161] However, this discussion raises an important issue that lies at the heart of hidden agendas, but also has broader implications—whether the current approach to notice in state corporate law rules and the federal securities laws is appropriate given twenty-first century realities.

Conclusion

Hidden agendas are overwhelmingly common in proxy voting: for almost 90% of votes, shareholders do not know what they will be voting on by the record date. This poses a major problem for investors who engage in securities lending: these shareholders must decide whether the expected benefit of voting exceeds the expected benefit of continuing to lend their shares, or making them available for lending, *without knowing what they will be voting on*. While this is problematic for all investors, it poses a particular challenge for mutual fund managers and other investors who manage other people's money. They have a responsibility to decide whether to vote (and therefore recall) lent shares and, as we show, are unable to effectively make that decision because of hidden agendas.

Luckily, there is a simple solution that would eliminate hidden agendas. We urge the SEC to amend its proxy rules to require public companies to file proxy statements at least five days before the record date for the meeting. The SEC's stated view is that shareholder voting is important, and that investment managers and others should decide whether to vote. Its rules should give investors the information they need to do so.

161. Naturally, if an investor has lent only some of its shares, it will be entitled to notice on account of the shares it did not lend.

Appendix

Below we detail additional empirical analysis we performed regarding hidden agendas. Section A analyzes the related problem of hidden record dates. Sections B and C analyze *how hidden* hidden agendas actually are, with Section B focusing on special meetings and proxy contests and Section C focusing on annual meetings.

A. Hidden Record Dates

Hidden record dates are generally much less hidden than hidden agendas. In this Section, we discuss three distinct ways in which investors can determine the record date for a meeting in advance, without a formal proxy filing.

The most straightforward way to determine the record date for many large companies is to look at the Proxy Rulings website of the New York Stock Exchange (NYSE). Companies listed on the NYSE and the NYSE American exchanges are required to notify the NYSE at least 10 calendar days in advance of the record date.[162] Shortly afterwards, and well in advance, the NYSE makes the record date (and other information regarding the meeting) publicly available on its Proxy Rulings website.[163] The NYSE also sells a data feed that includes this information to subscribers.[164]

Of course, these requirements are contained in listing rules that apply only to NYSE- and NYSE-American-listed firms. These firms account for 45% of the meetings in our sample (and almost 40% of companies). While these firms represent a substantial portion of the market (at least on a market capitalization-weighted basis), many large and important firms are listed on the Nasdaq, and thus are not subject to such a rule.[165] At least for companies listed on the NYSE and NYSE American, however, investors that are aware of the Proxy Rulings website, or that pay for the NYSE's data feed, will have advanced notice of the record date. That being said,

162. NYSE Listed Company Manual, § 401.02; NYSE American LLC Company Guide § 703. This rule also requires the company to notify the NYSE of any change in the record date.

163. The NYSE Listed Company Manual indicates that it makes this information available in its "Weekly Bulletin or in special circulars." NYSE Listed Company Manual, § 402.03. While the Weekly Bulletin publication does not appear to be publicly available, a list of meetings, including record dates, is publicly available at https://www.nyse.com/proxy-rulings. Record dates appear to be initially published when they are received, with those record subsequently overwritten with new records including additional "Summary" information and "Release Notes."

164. *See Intercontinental Exch., Inc. Corporate Actions for NYSE Group Listings*, ICE DATA SERVS., https://www.theice.com/market-data/corporate-actions-nyse-group-listings [https://perma.cc/SP4W-NSBY].

165. Companies listed on the Nasdaq are required to provide a copy of the company's proxy statement to Nasdaq after it is filed. *See* NASDAQ, INC, NASDAQ STOCK MARKET RULES § 5620(b) (2019). Regulation § 5250 requires considerable disclosure of other corporate information, including the record dates for dividends and stock distributions. NASDAQ, INC, NASDAQ STOCK MARKET RULES § 5250(e)(6) (2018).

representatives of some sophisticated institutional investors that we spoke with in researching this Article were not aware of the Proxy Rulings website.

The "broker search" requirements in the federal proxy rules provide a second way for some investors to ascertain the record date well in advance.[166] These rules establish the mechanism by which companies can provide beneficial investors with proxy statements, via capital market intermediaries. In doing so, they allow those intermediaries to obtain advanced notice of the record date. To ensure that investors that hold their shares through brokers or intermediaries (known as holding "in street name") receive proxy statements, federal proxy rules require companies to conduct a "broker search."[167] A request for certain information is sent to brokers, custodians, and other intermediaries.[168] Critically, this request must include the record date of the meeting,[169] and it must be distributed to brokers and other intermediaries at least 20 business days before the record date of the meeting.[170] It therefore provides a mechanism for brokers, custodians, and other intermediaries to learn of the record date for substantially all meetings well in advance. Investment advisers have close relations with their custodians and brokers, many of whom also serve as lending agents. This provides a clear path for record date information to be disseminated to key investors in advance.[171]

If an investor does not have advanced access to the record date for an annual meeting in either of these two ways, she has a third option—she can predict the record date from the prior annual meeting's record date. As with other types of partial notice, predicting the record date is not a substitute for actual disclosure; it requires some analysis and involves some uncertainty. But the easier it is for market participants to predict record dates, and the more accurately they are able to predict it, the less of a practical problem a hidden record date becomes, especially for sophisticated market participants.

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166. 17 C.F.R. § 240.14a-13(a) (2020).

167. 17 C.F.R. § 240.14a-13(a) (2020). For a detailed discussion of the system of "share immobilization" that led to most retail investors holding in street name, see Kahan & Rock, *supra* note 11, at 1237-40.

168. 17 C.F.R. §§ 240.14a-13(a)(1)(i) (2020).

169. 17 C.F.R. §§ 240.14a-13(a)(1)(ii) (2020).

170. 17 C.F.R. §§ 240.14a-13(a)(3) (2020). In the case of special meetings or consent solicitations, if it is impracticable to make the inquiry 20 business days in advance of the record date, it may be made as many days before the record date "as is practicable." 17 C.F.R. §§ 240.14a-13(a)(3)(i) (2020). National securities exchanges may also allow for later distribution of such inquiries "for good cause." *See* 17 C.F.R. §§ 240.14a-13(a)(3)(iii) (2020).

171. This mechanism might be hindered if brokers and other intermediaries receiving broker search forms are required to keep these confidential, including if disclosure of record dates could be construed as potentially breaching their fiduciary duties.

We perform a simple exercise to investigate the ease and accuracy with which investors can predict record dates for annual meetings. For every annual meeting in our sample, we try to predict its record date using only the record date from the company's previous annual meeting. In other words, if the record date for ABC Corp.'s 2015 annual meeting was March 31, we try to predict the record date for ABC Corp's 2016 annual meeting using only this information. We do so with the simplest and most naïve approach we can think of: we simply take the record date from the prior annual meeting and add 365 days. We can then assess the accuracy of our predictions by evaluating the proportion of our predictions that fall within 1 day (or 3 days, or 7 days, or any other number of days) of the actual record date. Table 4 presents our results.[172]

Table 4. Predicting Record Dates Based on the Prior Record Date

Window (in days)	*Percentage of Predicted Record Dates within the Window*
1	47.4%
3	59.7%
5	67.2%
7	77.2%
10	83.3%
14	87.6%

This table presents the percentage of record dates that are within each indicated window of the predicted record date. The predicted record date is the record date of the company's annual meeting for the prior year, plus 365 days.

Table 4 shows that even this embarrassingly simple approach predicts the record date to within 1 day 47% of the time. Sixty percent of the time, this approach gives a prediction within 3 days of the actual record date, and more than two-thirds of the time it is within 5 days. Seventy-seven percent of the time, the actual record date is within a week of this prediction, and less than 13% of predictions are more than two weeks away from the actual record date. It is not difficult to imagine more sophisticated algorithms that can predict the record date with even greater accuracy.[173] The success of our very simple approach makes clear that it is often easy to accurately identify record dates, even in cases when they are not formally disclosed.

172. For the purposes of this analysis, we omit a small number of record dates for which the prediction is off by 350 days or more, since this almost certainly indicates that our data does not contain a meeting for that company in a particular year.

173. For instance, such mechanisms could separately identify and apply consistent patterns in meeting dates, and in how far in advance companies set their record date, and could also take into account days of the week.

B. How Hidden Are Agendas at Special Meetings and Proxy Contests?

To understand how often partial information about agendas is available for special meetings and proxy contests, we hand check every special meeting and proxy contest for which no formal proxy materials were filed before the record date. This exercise also serves to validate our categorization of hidden agendas in Section II.A, since in doing so, we can also manually confirm that our automated categorization did not overlook any relevant proxy materials. Fortunately, these meetings represent a tiny subset of our overall dataset—288 special meetings and 38 meetings with proxy contests, out of 40,330 total meetings with hidden agendas (0.7%). At the same time, these are situations where we were surprised that there were *any* hidden agendas, and where we believe investors are most likely to have had partial information of the meeting before the record date.

We therefore hand check all of these companies' disclosures filed with the SEC in the lead-up to each of these meetings to determine whether there was information about the agenda in a form that our automated categorization—which relied solely on proxy materials—did not pick up. To do so, we first identified all EDGAR filings that related to those meetings in the six months leading up to the record date of those meeting. We then reviewed each filing to determine if it disclosed any of the matters to be voted on at the meeting.[174] We further categorized each meeting by the extent of the information that was available regarding the agenda of the meeting in advance of the record date—full information, partial information, or no information[175] Table 5 presents this categorization for the special meetings and proxy contests that we had previously identified as having hidden agendas.

Table 5. Level of Information Prior to Record Dates at Special Meetings and Proxy Contests with Hidden Agendas

	Special Meetings		*Proxy Contests*		*Total*	
Full Information	140	(49%)	4	(11%)	144	(44%)
Partial Information	36	(13%)	17	(45%)	53	(16%)
No Information	112	(39%)	17	(45%)	129	(40%)
Total	288	(100%)	38	(100%)	326	(100%)

This table presents the number and proportion of special meetings and proxy contests classified as having hidden agendas where non-proxy filings provided full information,

174. This includes both filings by the company, and, in the case of proxy contests, filings by dissidents in the proxy contest.

175. For two of the meetings that we classify as having "full information," our algorithm missed at least one proxy-related filing. In both cases, notice was also provided through some other form (one on a Form 8-K, the other on a Schedule 13D). This represents an error rate of under 1% of the meetings in question.

partial information, and no information about the meeting agenda, and the same for proxy contests.

Beginning with special meetings, Table 5 shows that for almost half of the meetings we reviewed (140 of 288 meetings), a maximally diligent investor can gather all of the information that she needs to piece together the agenda by carefully scrutinizing EDGAR.[176] The overwhelming majority of the special meetings in this group (115 of 140, or 82%) involved business combinations, and the information was provided in a Form 8-K (and in some cases also in additional filings). While these filings all mentioned the need for a special meeting, they generally did not provide all relevant details about that meeting. In this sense then, categorizing these as having "full information" is generous.

The ability to derive full agenda information from filings other than proxy materials was much less common for proxy contests. In only 4 of the 38 proxy contests (11%) that we classified as having hidden agendas could a maximally diligent investor have determined, based on EDGAR filings made prior to the record date, that a proxy contest would be voted on at the meeting.

For other meetings, companies' filings on EDGAR provided some—but not all—of the relevant information to piece together the agenda. This occurred for a small number of the special meetings (36 of 288, or 13%) but almost half of proxy contests (17 of 38, or 45%). In the case of special meetings, filings on Form 8-K, Form 10-K, or Form 10-Q generally mentioned a transaction that was later approved at the meeting, or some other matter to be voted on. In the case of proxy contests, the partial information overwhelmingly came from filings on Schedule 13D, which indicated that the dissident had nominated directors for election at the upcoming meeting, or intended to do so.[177]

The partial information given for this small subset of contests shows that not all hidden agendas are equal. Rather, the amount of information available to the market about what will be voted on at the meeting can vary widely. Some of the relevant information may be available prior to the meeting, even if all of it is not. In some cases—such as with business combinations—the relevant information may be obvious to market participants who are following the company closely. But in many other cases, such as where the information is mentioned only briefly in a very long Form 10-K, the information may take some effort to identify. Our own

176. In the course of our review, we also identified meetings for which the partial information was provided less than five business days before the record date. We consider this to be "ineffective" notice, since it will often not provide sufficient time for an investor to identify the information and make a recall or withdrawal decision prior to the record date.

177. 15 of the 17 proxy contests with partial information (88%) involved filings on Schedule 13D; the remaining two contests were referenced prior to the record date in SEC no action letters.

efforts to identify this information benefited from 20/20 hindsight regarding the matters that were actually voted upon. At the time the information is disclosed, it is often unclear which proposals will actually go to a vote.[178] All of these factors mean that there are likely to be many investors for whom even the "full information" we identify will not be sufficient to alert them to the content of agendas of meetings. And, of course, for many agendas, our manual search uncovered no notice at all.

C. How Hidden are Agendas at Annual Meetings?

The sheer number of annual meetings (over 40,000) makes it impractical to review each of them by hand. We therefore selected a stratified random sample, with 50 meetings randomly selected from the largest 500 companies in our dataset that year (by market capitalization) and 50 randomly selected from the remaining companies in our dataset. For each of the meetings, we reviewed all of the company's filings in the six months leading up to the meeting. Table 6 shows a breakdown of each of these two categories by the type of information that we were able to obtain, and the proportion of meetings in that category (hidden agenda or no hidden agenda) with that level of information.

Table 6. Level of Information Prior to Record Dates at at Annual Meetings

	Hidden Agenda		*No Hidden Agenda*		*Total*	
Full Information from Proxy Materials	0	(0%)	19	(73%)	19	(19%)
Full Information from Other Filing(s)	0	(0%)	0	(0%)	0	(0%)
Partial Information	44	(59%)	4	(15%)	48	(51%)
No Information	30	(41%)	3	(12%)	33	(33%)
Total	74	(100%)	26	(100%)	100	(100%)

This table presents the number and proportion of meetings (out of a random sample of 100 annual meetings) where proxy filings provided full information about the meeting agenda, and other filings provided full information, partial information, and no information about the meeting agenda.

In addition to providing more granular information about how hidden the meeting agendas really are, this exercise also serves to validate our analysis in Section II.A. The analysis in Section II.A indicated that 74 of these meetings involved hidden agendas and 26 did not. Of the 26 meetings

178. For instance, some dissidents considering a proxy contest may disclose their nomination of directors (or their intention to do so), but the contest could be settled or withdrawn before it goes to a vote.

that we had identified as *not* having a hidden agenda, only 19 (73%) *actually* provided full information about the agenda,[179] and not a single company in our sample provided full information about the meeting in non-proxy filings. The remaining seven were partially hidden. This illustrates the (deliberate) conservatism of our approach to categorizing hidden agendas: some of the proxy filings we identified as giving notice did not actually provide full information about the meeting.[180]

For all 74 of the meetings we had identified as having hidden agendas, our review indicated that this categorization was accurate—not only did we confirm that none of them had filed proxy materials prior to the record date, none of their *other* filings provided full information about the agenda. However, for a majority of these companies (44 of 74, or 59%), other filings did provide some very limited information about the upcoming meeting. Of those, 34 (46%) disclosed the date of the meeting or a date range, 14 (19%) disclosed directors that would be nominated for election, and only 5 (7%) provided any information regarding the agenda for the meeting. Typically, this partial information could be gleaned from a close reading of annual reports on Form 10-K, although sometimes we found tidbits in a Form 8-K. Occasionally, other filing types provided information about the meeting. For example, we were able to identify the presence of a shareholder proposal in the sample through the presence of a no-action letter.[181]

To be clear, in all cases, this information was partial at best, and usually very partial. Not only was it not disclosed where a reasonably diligent investor might expect to look for it, it would not even have been enough for even a maximally prudent investor to make a decision about the value of voting at the upcoming meeting. These agendas were thus at least partially hidden, and often very well hidden.

The existence of these filings also has another important implication. It confirms our conjecture in Section I.D that the company has already made most of the key decisions about the meeting well in advance of the

179. Of the 19 meetings that actually provided full notice, 3 meetings had proxy statements filed only one day before the record date. So while our algorithm correctly identified these meetings as ones without hidden agendas, the agenda was revealed too late for investors to act on the information.

180. Because we deliberately chose a very broad window of time, our algorithm picked up proxy filings related to a *previous* meeting (often a special meeting). In all seven cases, our manual review of the company's filings either providing no notice (3 meetings), or only partial information about the meeting (4 meetings).

181. Companies may request no-action relief from the SEC seeking permission to exclude a shareholder proposal from their proxy for an upcoming annual meeting. These filings are publicly available, and the filing deadlines are generally well before the record dates for the meeting. For the SEC's no-action letters, and its reference materials relating to those letters, see Div. of Corp. Fin., *Shareholder Proposal No-Action Responses Issued Under Exchange Act Rule 14a-8*, SEC. & EXCH. COMM'N (Dec. 22, 2021), https://www.sec.gov/corpfin/shareholder-proposals-no-action [https://perma.cc/G5NN-DVBZ]. Such a filing will therefore indicate to investors the *possibility* that the proposal will be voted on at the meeting (if the no-action relief is not granted). 17 C.F.R § 240.14a-8(j) (2020).

record date. This also suggests that the cost of providing full notice of meeting agendas in advance of the record date is likely to be relatively low.