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# THE NEW EMPERORS: RESPONDING TO THE GROWING INFLUENCE OF THE BIG THREE ASSET MANAGERS

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PREPARED BY THE MINORITY STAFF OF THE  
U.S. SENATE COMMITTEE ON BANKING,  
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# The New Emperors: Responding to the Growing Influence of the Big Three Asset Managers

## I. EXECUTIVE SUMMARY

Berkshire Hathaway’s Charlie Munger observed earlier this year that “we have a new bunch of emperors, and they’re the people who vote the shares in index funds.”<sup>1</sup> The emperors in question—BlackRock, State Street, and Vanguard—are the “Big Three” asset managers that manage most of the largest of these index funds and around \$20 trillion in assets.

The Big Three are our new emperors due to quirks in the structure of the index fund market—at least as it is currently structured today. A retail investor who buys an index fund does not own the stocks in the fund. Those stocks instead are owned by the fund, which means that the fund’s manager may vote those shares. Even though they buy that voting power with other people’s money, that voting power gives asset managers like the Big Three enormous influence. Thanks to the tremendous scale of the savings entrusted with them, the Big Three together cast around one-quarter of all votes at shareholder meetings of most S&P 500 companies.<sup>2</sup>

Though eye-popping, the Big Three’s unprecedented stakes in America’s largest companies might not be objectionable if they were truly passive. The Big Three, however, are anything but. Each of these firms proudly uses the voting

power gained from their investors’ money to advance liberal social goals known as ESG (environmental, social, and governance) and DEI (diversity, equity, and inclusion). These once benign-sounding concepts are political movements unmoored from financial performance and, perhaps not coincidentally, also popular with corporate C-suites where managers can claim “success” on matters irrelevant to investor returns.

**“WE HAVE A NEW BUNCH OF EMPERORS, AND THEY’RE THE PEOPLE WHO VOTE THE SHARES IN INDEX FUNDS.” CHARLIE MUNGER**

Asset managers that manage investment funds, even passive ones, can and should be permitted to influence the businesses they own on behalf of their underlying shareholders—at least when the aim is to improve financial performance. But federal law requires large public company shareholders to publicly report on the exercise of that influence. Schedule 13D of the Securities Exchange Act of 1934 (the “Exchange Act”) requires shareholders that acquire significant equity

<sup>1</sup> Editorial board, *Calling Out ‘Emperor’ Larry Fink*, WALL ST. J. (Feb. 17, 2022), available at <https://archive.ph/8VnF1>.

<sup>2</sup> Lucian A. Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 BOSTON UNIV. L. REV. 721, 736 (2019) (“the average share of the votes cast at S&P 500 companies at the end of 2017 was 8.7% for BlackRock, 11.1% for Vanguard, and 5.6% for SSGA. . . . As a result, for S&P 500 companies, the proportion of the total votes that were cast by the Big Three was about 25.4% on average . . .”). BlackRock recently began to permit certain clients to participate in proxy voting decisions, and Vanguard announced that it will launch a similar pilot program in early 2023.

positions in public companies to disclose certain concessions and other arrangements extracted from management or negotiated with other shareholders, plans to change management or the board of directors, and plans to make other material changes to the business.

Relying on an exception meant for passive investors, the Big Three, however, almost exclusively file abbreviated forms on Schedule 13G that do not include these relevant disclosures.<sup>3</sup> The resulting lack of insight into the Big Three's intentions prevents the investing public from understanding the direction—which often does not maximize value—that the Big Three are pushing their portfolio companies. This secrecy also limits the ability of Congress and regulators to fully assess the policy implications of the Big Three's influence.

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*Each of these firms proudly uses the voting power gained from their investors' money to advance liberal social goals known as ESG (environmental, social, and governance) and DEI (diversity, equity, and inclusion) (pg. 1).*

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One such possible implication is that one or more of the Big Three firms has influenced at least one of the banking organizations in its respective investment funds to conform its lending activities to ESG principles or otherwise change corporate policies. The exercise of that influence could, at some point, rise to a level sufficient for a Big Three firm to be deemed to have a “controlling influence” over that banking organization within the meaning of the Bank Holding Company Act of 1956 (the “Bank Holding Company Act”). Significantly, the Big Three firm would then itself be a bank holding company. Such status would trigger restrictions on a Big Three firm's commercial activities and significant capital and liquidity requirements that would pose insurmountable problems to its business model. In fact, both BlackRock and Vanguard have sought assurances from the Board of Governors of the Federal Reserve System (the “Federal Reserve Board”) in the hopes of avoiding classification as a bank holding company.<sup>4</sup>

This report surveys the laws, corporate trends, and academic research relating to the opaque but significant influence the Big Three exercise over their portfolio companies. It concludes with seven recommendations to illuminate this regulatory blind spot and clarify the policy implications of the Big Three's influence:

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<sup>3</sup> Lucian A. Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2099 (2019). Registered management investment companies generally do provide disclosures about how they vote proxies relating to portfolio securities under Rule N-PX. These proxy disclosures do not disclose concessions and other arrangements extracted from management or negotiated with other shareholders, plans to change management or the board of directors of a portfolio company, or plans to make other material changes to the business, which would instead be disclosed on Schedule 13D.

<sup>4</sup> Letter from Mark E. Van Der Weide, General Counsel, Federal Reserve Board, to William J. Sweet, Jr., Retired Partner, Skadden, Arps, Slate, Meagher, and Flom LLP (Dec. 3, 2020), available at <https://archive.ph/o4906>; Letter from Mark E. Van Der Weide, General Counsel, Federal Reserve Board, to Anne E. Robinson, Managing Director, General Counsel, and Secretary, The Vanguard Group, Inc. (Nov. 26, 2019), available at <https://archive.ph/AjFGb>.

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## Recommendations

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Congress should consider investigations to develop a more complete understanding of the extent of the Big Three's influence over management and corporate policy of their portfolio companies.

Congress and the Securities and Exchange Commission (the "SEC") should review each of the Big Three's compliance with Section 13(d) of the Exchange Act and Rule 13d-1 thereunder, with a focus on instances in which short-form disclosures on Schedule 13G were filed despite the presence of a control purpose or effect.

Congress and the SEC should consider amending the short-form Schedule 13G disclosure to require disclosure of all concessions and arrangements extracted and negotiated by purportedly passive investors.

Congress and the SEC should consider updates to the Schedule 13D and Schedule 13G disclosure requirements to reflect recent developments in corporate governance (e.g., the shift to majority voting, proxy access, and "say on pay" votes).

Congress and the SEC should consider legislation or rulemakings to define "control" with more particularity for purposes of Section 13(d) and other securities laws.

Congress and the Federal Reserve Board should assess whether any of the Big Three control any banking organizations for purposes of the Bank Holding Company Act or the other banking laws.

Congress should consider Senator Dan Sullivan (R-Alaska) and Senate Banking Committee Ranking Member Pat Toomey's (R-Pa.) INvestor Democracy is EXpected Act ("INDEX Act") (S. 4241), or similar legislation, to ensure that public companies' shares held by passive funds are voted consistent with the values and instructions of the actual underlying investors in those companies, not the liberal views of the Big Three.

## II. THE BIG THREE'S GROWING INFLUENCE

Index funds offer investors a modest, but historically successful bargain. Instead of trying to outperform broad-based market measures like the S&P 500 Index—which can be difficult for asset managers to do on a consistent basis<sup>5</sup>—index funds try to replicate those indices' compositions and mirror their performance. The low costs and solid returns that these index funds offer have made them extremely popular, growing from just four percent of total equity mutual fund assets in 1995 to 34 percent by 2015.<sup>6</sup> By 2019, index funds passed active funds in total assets.<sup>7</sup> Today, just three firms—BlackRock, State Street, and Vanguard—manage almost all of the assets in index funds.<sup>8</sup> Not for nothing have they come to be known as the Big Three.

### Examples of the Big Three's Influence

The sustained success and growth of the index fund industry has yielded the funds managed by the Big Three unprecedented stakes in America's largest corporations. As a result of these significant positions, the Big Three together cast on average more than 25 percent of all votes at S&P 500 companies' shareholder meetings—with that voting power projected to reach perhaps 40 percent in the next two decades.<sup>9</sup>

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*The Big Three indirectly leverage ... their huge positions in portfolio companies to create opportunities for opaque, backroom engagements with management aimed at changing corporate policy (pg. 6).*

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The Big Three are not shy about using this voting power both directly and indirectly. On the pretext of “investment stewardship,”<sup>10</sup> each of the Big Three strategically votes on directors and shareholder proposals, often with an aim of driving change.<sup>11</sup> Regardless of whether these changes are ultimately good or bad, these campaigns are inconsistent with a passive investment strategy. Consider just a handful of examples:

- **Greenhouse gas emissions.** In early 2021, the Big Three joined the Net Zero Asset Managers Initiative, which is an international group of asset managers committed to

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<sup>5</sup> Murray Coleman, *SPIVA: 2021 Year-End Active vs. Passive Scorecard* (updated March 28, 2022), available at <https://archive.ph/i1Qc7>.

<sup>6</sup> Bebchuk & Hirst, *supra* note 2, at 727.

<sup>7</sup> John Gittelsohn, *End of Era: Passive Equity Funds Surpass Active in Epic Shift* (Sep. 11, 2019), available at <https://archive.ph/7p7mB>.

<sup>8</sup> The Big Three manage all but five of the fifty largest index funds, and these other managers manage less than seven percent of the assets in the largest fifty index funds. *See* Bebchuk & Hirst, *supra* note 2, at 730.

<sup>9</sup> *Id.* at 736, 739.

<sup>10</sup> *See* BLACKROCK INVESTMENT STEWARDSHIP: ENGAGEMENT PRIORITIES (Feb. 2022); Vanguard, INVESTMENT STEWARDSHIP: ABOUT OUR PROGRAM (2021); State Street Global Advisors, STEWARDSHIP REPORT 2021.

<sup>11</sup> BlackRock recently began to permit certain clients, mostly institutional investors, to participate in proxy voting decisions, and Vanguard announced that it will launch a similar pilot program in early 2023.



supporting the goal of net zero greenhouse gas emissions by 2050 or sooner.<sup>12</sup> As part of that membership, each committed to push its portfolio companies [in its actively managed funds] to achieve this same objective, including by “implement[ing] a stewardship and engagement strategy, with a clear escalation and voting policy, that is consistent with our ambition for all assets under management to achieve net zero emissions by 2050 or sooner.”<sup>13</sup> A few months later, the Big Three leveraged their combined 21 percent stake in Exxon Mobil (“Exxon”) to elect several dissident directors who had been nominated by an activist investor known for urging reductions in companies’ carbon footprints.<sup>14</sup> Predictably, Exxon soon reduced its oil production targets.<sup>15</sup>

- **Racial equity audits.** In March 2022, BlackRock and State Street voted over Apple management’s opposition in favor of a shareholder’s proposal that the company’s board oversee a company-wide racial equity audit. The proposal passed, and the board subsequently agreed to conduct the audit. Following widespread press attention of the Apple vote, JPMorgan Chase, Pfizer, Verizon, and Amazon each settled similar shareholder proposals to avoid the embarrassment of potentially losing the vote.
- **Gender and race-based pay data.** Also in March 2022, BlackRock and State Street voted over Walt Disney management’s opposition in favor of a shareholder’s proposal that the company’s board report on gender and racial pay gaps. After the proposal passed, Chipotle, Home Depot, and Target subsequently agreed to publish the requested data in exchange for the withdrawal of similar proposals made by the same activist investor.
- **Board diversity.** BlackRock’s 2022 voting guidelines state “we believe boards should aspire to 30% diversity of membership and encourage companies to have at least two directors on their board who identify as female and at least one who identifies as a member of an underrepresented group.”<sup>16</sup> Insufficient board diversity was one of the main reasons BlackRock opposed the election of directors in 2021.<sup>17</sup> Similarly, Vanguard’s 2022 voting guidelines provide “[a] fund will generally vote against the nominating and/or governance committee chair (or other director if needed) if a company’s board is making insufficient progress in its diversity composition and/or in addressing its board diversity-related disclosures.”<sup>18</sup> State Street also states “[i]f a company in the S&P 500 or FTSE 100 does not have at least one director from an

<sup>12</sup> Press release, *The Net Zero Asset Managers initiative grows to 87 investors managing \$37 trillion, with the world’s three largest asset managers now committing to net zero goal* (April 20, 2021), available at <https://archive.ph/O2Voy>.

<sup>13</sup> The Net Zero Asset Managers Commitment, available at <https://archive.ph/urFNt>.

<sup>14</sup> BlackRock supported three dissident candidates, while State Street and Vanguard supported two.

<sup>15</sup> Kevin Crowley, *Engine No. 1’s Grancio Says Drop in Exxon Output is “Meaningful”*, Bloomberg (Oct. 4, 2021), available at <https://archive.ph/4KxV5>.

<sup>16</sup> BLACKROCK INVESTMENT STEWARDSHIP: PROXY VOTING GUIDELINES FOR U.S. SECURITIES (2022) at 6-7

<sup>17</sup> BlackRock, 2022 VOTING SPOTLIGHT SUMMARY at 19.

<sup>18</sup> Vanguard, PROXY VOTING POLICY FOR U.S. PORTFOLIO COMPANIES (2022) at 7.

underrepresented racial or ethnic community, we will vote against the Chair of the Nominating Committee.”<sup>19</sup>

The Big Three indirectly leverage their stakes in undemocratic ways, too. Their huge positions in portfolio companies create opportunities for opaque, backroom engagements with management aimed at changing corporate policy. From July 1, 2021 to June 30, 2022, BlackRock had more than 3,693 “engagements” with 2,464 companies in the U.S. and abroad, voted to “signal concerns about climate action or disclosure” at 234 companies, voted against 176 director candidates “due to climate-related concerns,” and voted against 936 director candidates due to diversity concerns.<sup>20</sup> As Senator Bill Hagerty (R-Tenn.) recounted at the Senate Banking Committee’s September 22, 2022 hearing on “Annual Oversight of the Nation’s Largest Banks”:

JUST LAST WEEK, I SPOKE WITH THE CEO OF A PUBLICLY TRADED COMPANY WHO WAS GIVEN MARCHING ORDERS BY A YOUNG MAN FROM THE SHAREHOLDER STEWARDSHIP DEPARTMENT OF A LARGE INDEX FUND PROVIDER. THIS YOUNG MAN WAS TWO YEARS REMOVED FROM COLLEGE. IN FACT, THE YOUNG MAN ADVISED THE CEO TO DIVEST HIS CORE BUSINESS IN THE NAME OF ESG.

WHY DID THIS KID FEEL EMBOLDENED TO DO SO? WELL, BECAUSE AS AN ASSET MANAGER, HE CONTROLLED A SIGNIFICANT PORTION OF HIS COMPANY’S SHARES, VOTING RIGHTS THAT WERE ESSENTIALLY ROBBED FROM AMERICAN SHAREHOLDERS. SEN. HAGERTY (R-TENN.)

### Evidence of the Big Three’s Influence

A growing body of academic research has sought to measure the Big Three’s influence over their portfolio companies. A 2021 paper found that “a one standard deviation increase in Big Three holdings in a given firm is associated with a reduction of approximately 2% in corporate CO<sub>2</sub> emissions.”<sup>21</sup> Using innovative methods, including changes in Big Three equity stakes arising from the annual reconstitution of the Russell 1000 and Russell 2000 indexes,<sup>22</sup> the researchers

<sup>19</sup> State Street, GUIDANCE ON DIVERSITY DISCLOSURES AND PRACTICES (2022) at 2.

<sup>20</sup> BlackRock, 2022 VOTING SPOTLIGHT SUMMARY.

<sup>21</sup> Jose Azar, et al., *The Big Three and Corporate Carbon Emissions Around the World*, 142 J. OF FIN. ECON. 674, 675 (2021).

<sup>22</sup> “For companies that are around the 1000/2000 cutoff, the final assignment to the index is relatively random in the sense that it can be determined by random variations in market value. . . . Therefore, for each dollar invested in a passive fund using the Russell 1000 as a benchmark, very little of that dollar will be invested in stocks at the bottom of that index; while for each dollar invested in a passive fund using the Russell 2000 as a benchmark, a large proportion of that dollar will be invested in stocks at the top of the index. To the extent that the Big Three invest heavily in funds tracking the Russell indexes, the shift from Russell 1000 to Russell 2000 likely increases Big Three ownership in the firm.” *Id.* at 690

developed compelling evidence that this reduction was caused by, and not merely correlated with, the Big Three's investments.<sup>23</sup> Drawing from the Big Three's disclosures about their engagements with individual firms, these researchers also established that "firms with higher CO<sub>2</sub> emissions are more likely to be the target of Big Three engagements."<sup>24</sup> A subsequent 2022 paper affirmed these findings for institutional owners more generally.<sup>25</sup>

The Big Three's influence pushes other aspects of progressive ESG and DEI agendas as well. A 2020 paper found that "the Big Three's campaigns [in 2017 to increase general diversity] are responsible for a large portion of the recent increase in female directors."<sup>26</sup> Specifically, "one standard deviation greater 2016 Big Three ownership is associated with a 76% increase in the net flow of new female board members and an 11% increase in the overall proportion of female directors."<sup>27</sup> Here again the researchers established that increases in Big Three ownership actually caused, and were not merely correlated with, these changes.<sup>28</sup>

Another study showed that BlackRock's portfolio companies tend to respond to the annual letter to CEOs written by BlackRock CEO Laurence Fink by promptly revising their public disclosures—and even changing their lobbying and other public policy advocacy—to align with BlackRock's recommendations.<sup>29</sup> If an annual letter can have such far-reaching influence, it is hard to avoid the inference that there is a lot more going on behind the scenes involving these purportedly passive investors.

Similarly, a 2019 paper found that "greater institutional ownership is associated with higher firm-level E&S [environmental & social] scores."<sup>30</sup> To support a causal interpretation, the researchers established that:

- The Big Three and other institutional investors' "selecting into good E&S firms or selling bad E&S firms is not a driver of E&S performance change."<sup>31</sup>

<sup>23</sup> *Id.* at 676 ("We find that the changes in Big Three ownership driven by the inclusion in this [Russell 2000] index are followed by lower subsequent CO<sub>2</sub> emissions.").

<sup>24</sup> *Id.* at 675.

<sup>25</sup> Mohammed Benlemlih, et al., *Institutional Ownership and Greenhouse Gas Emissions: A Comparative Study of the UK and the USA*, BRITISH J. OF MGMT. 1, 4 (2022).

<sup>26</sup> Todd Gormley, et al., *The Big Three and Board Gender Diversity: The Effectiveness of Shareholder Voice*, ECGI Working Paper No. 714/2020, at 21.

<sup>27</sup> *Id.* at 2.

<sup>28</sup> *Id.* at 2 ("For example, the timing of the increase corresponds to the timing of each asset manager's campaign: the share of a firm's equity held by State Street predicts increases in gender diversity starting in 2017 while the ownership stakes of Vanguard and BlackRock, which started their campaigns only after most companies had held their 2017 director elections, begin predicting more female directors only in 2018.").

<sup>29</sup> Andrea Pawliczek, et al., *A New Take on Voice: The Influence of BlackRock's 'Dear CEO' Letters*, 26 REV. OF ACCOUNT. STUD. 1088, 1090 (2021) ("we find that 8-Ks filed 30 days after the letter by firms with significant BlackRock ownership exhibit relatively more similar language (to that contained in the BlackRock letter), relative to firms with less BlackRock ownership."), 1093.

<sup>30</sup> Alexander Dyck, et al., *Do Institutional Investors Drive Corporate Social Responsibility? International Evidence*, 131 J. OF FIN. ECON. 693, 694 (2019).

<sup>31</sup> *Id.*



- Firms with greater institutional ownership at the time of the 2010 BP Deepwater Horizon oil spill improved their environmental performance more than other companies following the spill.<sup>32</sup>
- “Public engagement through shareholder proposals, given their scarcity, are unlikely to be the dominant mechanism that investors use to drive firms’ E&S performance.”<sup>33</sup>
- Informal, “*private* engagement is the most likely channel through which investors push firms for stronger E&S performance.”<sup>34</sup> (emphasis added)

The Big Three’s influence extends beyond ESG and DEI to other core corporate governance issues. A 2016 study, for instance, found that passive investors influence firms’ governance choices, resulting in more independent directors, removal of takeover defenses, and more equal voting rights governance.<sup>35</sup> While some of these governance choices might have a strong business justification, their adoption at all is further evidence that the Big Three sometimes have a control purpose or effect.

### Recent Developments Amplifying the Big Three’s Influence

Several recent developments in corporate practice and regulation have amplified the ability of institutional shareholders like the Big Three to use their voting power to influence the management and corporate policy of public companies.

- **Majority voting.** State corporation laws generally provide by default for plurality voting, but a corporation may elect to instead use majority voting.<sup>36</sup> Pressure from large institutional shareholders has led to a significant increase in the number of public companies that permit majority voting.<sup>37</sup> This is an important change because votes against a director nominee are more consequential under majority voting. In particular, majority voting opens the door to “just say no” campaigns in which dissident shareholders aim to influence management and corporate policy by urging other shareholders to vote against management’s director candidates.
- **Proxy access.** Beginning in 2015, the Big Three and other institutional shareholders pressured public companies to expand shareholders’ access to the companies’ proxy

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 703.

<sup>34</sup> *Id.*

<sup>35</sup> Ian Appel, et al., *Passive Investors, Not Passive Owners*, 121 J. OF FIN. ECON. 111, 113-114 (2016).

<sup>36</sup> Under plurality voting, a candidate needs only to get more votes than a competing candidate, while under majority voting, a candidate needs a majority of the shares present at the meeting.

<sup>37</sup> Stuart Welburn and Branwen Buckley, *The Rise of Majority Voting* (Dec. 14, 2012), available at <https://archive.ph/064wt>.

cards.<sup>38</sup> Many public companies did so to permit shareholders in certain circumstances to nominate dissident director candidates for inclusion in the company’s proxy materials.<sup>39</sup> In November 2021, the SEC issued a rule requiring public companies to generally use a universal proxy card for contested director elections.<sup>40</sup> A universal proxy card includes all the nominated director candidates, not just management’s candidates, which then enables shareholders to vote for a mix of dissident and management nominees. These changes reduce the cost of, and otherwise facilitate efforts by, the Big Three and other shareholders to oppose management’s director nominees.

- **“Say on pay”.** The 2010 Dodd-Frank Act requires public companies to hold a nonbinding shareholder vote on executive compensation at least every three years, with many companies holding such votes annually.<sup>41</sup> Boards and management are sensitive to these votes, which give asset managers like the Big Three more leverage to extract concessions in exchange for their support.
- **Limits on discretionary broker voting.** The Dodd-Frank Act requires national securities exchanges to prohibit their broker members from voting shares on behalf of a beneficial owner in a contested director election, a vote on executive compensation, or any other significant matter without instructions from the beneficial owner.<sup>42</sup> Discretionary broker votes tend to support management’s director candidates and positions on shareholder proposals, such that this development has tended to empower dissident shareholders. Perhaps related to this, an asset manager who manages an index fund is able to vote the shares in that fund only because the fund’s investors have entrusted that manager with their savings.

The Big Three and other large shareholders might not frequently exercise these recently acquired rights, but the mere possibility (or threat) gives them added leverage to extract concessions from management.

More recently, the Big Three have explored ways to transfer some voting power back to investors. In January 2022, BlackRock permitted certain institutional investors to participate in proxy voting decisions “where legally and operationally viable.”<sup>43</sup> As of September 30, 2022, about a quarter of eligible assets (\$1.8 trillion) had committed to voting their own preferences through BlackRock Voting Choice, with varying degrees of client control possible depending on

<sup>38</sup> Holly J. Gregory, et al., *The Latest on Proxy Access*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG (Feb. 1, 2019) (“Pressure from large institutional investors, including public and private pension funds, and other shareholders has led to the widespread adoption of proxy access by large U.S. public companies in the past few years.”), available at <https://archive.ph/FW7ef>.

<sup>39</sup> *Id.* (“Proxy access is now a mainstream bylaw provision at S&P 500 companies—71% at the end of 2018 compared to less than 1% in 2014—and it is extending significantly into the Russell 1000.”).

<sup>40</sup> SEC Release No. 34-93596, 63 Fed. Reg. 2,854 (Jan. 16, 1998).

<sup>41</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 951, 124 Stat. 1376, 2142 (2010) (codified at 15 U.S.C. § 78n-1).

<sup>42</sup> *Id.* § 957 (codified at 15 U.S.C. § 78f(b)(10)).

<sup>43</sup> BlackRock, *Working to Expand Proxy Voting Choice for Our Clients* (Oct. 31, 2021), available at <https://archive.ph/nES1R>.

the investment vehicle.<sup>44</sup> In November 2022, Vanguard announced it would launch a pilot program in early 2023 to give retail investors in some index funds several voting options, including an option that their shares be voted pursuant to the recommendations of a portfolio company’s management.<sup>45</sup>

While welcome developments, further steps are necessary. The efforts to date are pilot programs or limited in scope (*e.g.*, limited to certain institutional investors or funds). All investors in all passive investment funds should have the ability to vote their shares, including an option to vote those shares consistent with management’s recommendations.

However, even if these programs were extended on a permanent basis to all investors, the Big Three would still retain significant voting power with respect to the shares of those investors who either do not provide instructions or elect for their shares to be voted at the Big Three’s discretion. The Big Three will therefore retain significant voting power and other sources of influence that they can continue to leverage to extract concessions from management—many of which concessions will never become public, as otherwise contemplated by the Section 13(d) disclosure regime.

### III. PUBLIC POLICY AND REGULATORY ISSUES

#### Disclosures of Concessions and Arrangements

In 1968, the Williams Act added Section 13(d) to the Exchange Act to address perceived risks to shareholders arising out of a wave of hostile takeover attempts by “corporate raiders” using cash tender offers.<sup>46</sup> At the time, a takeover of a public company via a proxy solicitation or exchange offer was subject to SEC disclosure requirements that provided shareholders with information about the potential acquirer and its plans for the company. However, a gap in the regulatory framework meant that large open-market purchases were not subject to similar disclosure requirements.<sup>47</sup> According to the law’s eponymous sponsor, Senator Harrison Williams (D-N.J.), “[t]he essential problem in transfers of control resulting from cash tender offers or open market

<sup>44</sup> BlackRock, *Empowering Investors through BlackRock Voting Choice*, available at <https://archive.ph/AYY8q>. In November 2022, BlackRock further expanded the voting policies that institutional clients may elect. *Id.*

<sup>45</sup> Silla Brush, *Vanguard to Test Giving Retail Investors More Voting Power*, Bloomberg (Nov. 2, 2022), available at <https://archive.ph/5wTwT>.

<sup>46</sup> See generally Andrew E. Nagel et al., *The Williams Act: A Truly “Modern” Assessment*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG (Oct. 22, 2011) (summarizing the history of the Williams Act), available at <https://archive.ph/ZGn18>. In a typical cash tender offer, “newspaper advertisements [were] published inviting current shareholders to tender their stock to the offeror and announcing the offer at a price which include[d] a certain premium above the current market price. The offeror’s obligation to purchase (take up) tendered shares [was] typically conditioned on the tender of a set minimum number of securities.” Note, *Cash Tender Offers*, 83 HARV. L. REV. 377, 377-378 (1969).

<sup>47</sup> “[T]he law [did] not even require that [a cash tender offeror] disclose his identity, the source of his funds, who his associates are, or what he intends to do if he gains control of the corporation. As a practical matter, . . . the investor [was] severely limited in obtaining all of the facts on which to base a decision whether to accept or reject the tender offer.” S. Rep. No. 90-550, at 72 (1967). As the Supreme Court has explained, the Williams Act “was the congressional response to the increased use of cash tender offers in corporate acquisitions, a device that had removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws. The Williams Act filled this regulatory gap.” *Edgar v. MITE Corp.*, 457 U.S. 624, 632 (1982) (internal quotation marks omitted).

or privately negotiated purchases is that persons seeking control in these ways are able to operate in almost complete secrecy concerning their intentions, their commitments and even their identities.”<sup>48</sup>

Section 13(d) closed this regulatory gap by requiring an investor to disclose relevant information when it acquires a position of just five percent or more in any class of equity securities of a public company.<sup>49</sup> Each of the Big Three beneficially owns five percent or more of many public companies.<sup>50</sup>

A five percent investor must file a Schedule 13D that describes its efforts to change or influence control of the company. However, the SEC has used authority granted by amendments to Section 13 to provide for an abbreviated disclosure on Schedule 13G in cases where the “securities . . . were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer.”<sup>51</sup> In 1998, just as the index fund revolution was taking off, the SEC made certain large passive investors eligible for this abbreviated Schedule 13G disclosure.<sup>52</sup> Now each of the Big Three almost exclusively files a short-form disclosure on Schedule 13G, almost never the full disclosure on Schedule 13D.<sup>53</sup>

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*The Big Three's failures to file Schedule 13D disclosures also result in real gaps in the investing public's understanding of the Big Three firms (pg. 12).*

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However, the extent of the Big Three’s influence over their portfolio companies’ management and corporate policy suggests that each of the Big Three has a control purpose or effect with respect to at least some of its investments that should preclude use of Schedule 13G for those investments. The Exxon and Apple episodes, the academic research pointing to behind-the-scenes corporate policymaking, and even the Big Three’s own public statements about their commitment to ESG and DEI make clear the Big Three’s intent to influence certain aspects of their portfolio companies. Notably, at least one circuit court has held that a “desire to influence

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<sup>48</sup> 113 Cong. Rec. 855 (1967).

<sup>49</sup> Specifically, “[a]ny person who” acquires “the beneficial ownership of more than 5 per centum” of any class of equity securities of a U.S. public company “shall within ten days after such acquisition . . . file with the [SEC], a statement containing such of the following information, and such additional information, as the [SEC] may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors.” 15 U.S.C. § 78m(d)(1).

<sup>50</sup> Bebchuk & Hirst, *supra* note 2, at 735.

<sup>51</sup> Pub. L. No. 91-567, § 2, 84 Stat. 1497, 1497 (1970) (codified at 15 U.S.C. § 78m(d)(5)); Pub. L. No. 95-213, § 203, 91 Stat. 1494, 1499 (1977) (codified at 15 U.S.C. § 78m(g)).

<sup>52</sup> SEC Release No. 34-93596.

<sup>53</sup> Bebchuk & Hirst, *supra* note 3, at 2099 (“[N]either Vanguard nor SSGA made a single Schedule 13D filing from 2007 through 2018. BlackRock made only nine Schedule 13D filings during this twelve-year period, during which it had an average of more than 1,000 positions of 5% or more per year. And a majority of those filings (seven out of nine) were related to acquisitions by BlackRock of fund managers that had previously filed Schedule 13Ds, or going-private transactions that a BlackRock-affiliated private equity fund manager was party to.”).

substantially the policies, management and actions of [an issuer] amounts to a purpose to control [the issuer]” for purposes of Section 13(d).<sup>54</sup>

The Big Three’s failures to file Schedule 13D disclosures might be actionable in court. Courts generally recognize that target companies and perhaps other injured parties may seek injunctive relief in some cases—for example to prevent additional acquisitions of shares—to prevent violations of Section 13(d).<sup>55</sup> The SEC also may bring enforcement actions for violations of Section 13(d).

Perhaps more importantly, the Big Three’s failures to file Schedule 13D disclosures also result in real gaps in the investing public’s understanding of the Big Three firms’ real role in their portfolio companies and the direction—which often does not maximize value—that the Big Three are pushing these companies. Unlike Schedule 13G, Schedule 13D requires an investor to disclose:

- “any contracts, arrangements, understandings or relationships (legal or otherwise) . . . with respect to any securities of the issuer, including . . . the giving or withholding of proxies”;<sup>56</sup>
- any plans for “any change in the present board of directors or management of the issuer”;<sup>57</sup> and
- any plans for “any other material change in the issuer’s business.”<sup>58</sup>

There likely are many behind-the-scenes concessions and other arrangements and understandings among management, activist investors, and Big Three firms that would qualify as “arrangements, understandings or relationships with respect to any securities of the issuer,” some of which would be disclosed were the Big Three to file Schedule 13D disclosures. Similarly, some of these arrangements and plans likely relate to “the giving or withholding of proxies,” a “change in the present board of directors or management,” or a “material change in the [] business” that would be disclosed were the Big Three firm to file a Schedule 13D. Each of the Big Three has,

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<sup>54</sup> *Chromalloy Am. Corp. v. Sun Chem. Corp.*, 611 F.2d 240, 246 (8th Cir. 1979). According to the SEC staff, “[g]enerally, engagement with an issuer’s management on executive compensation and social or public interest issues (such as environmental policies), without more, would not preclude a shareholder from filing on Schedule 13G so long as such engagement is not undertaken with the purpose or effect of changing or influencing control of the issuer and the shareholder is otherwise eligible to file on Schedule 13G.” Compliance and Disclosure Interpretations, Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting, Question 103.11 (July 14, 2016). “By contrast, Schedule 13G would be unavailable if a shareholder engages with the issuer’s management on matters that specifically call for the sale of the issuer to another company, the sale of a significant amount of the issuer’s assets, the restructuring of the issuer, or a contested election of directors.” *Id.* (emphasis added). See also Release No. 34-39538, 63 Fed. Reg. 2,854 (Jan. 16, 1998).

<sup>55</sup> Thomas Lee Hazen, TREATISE ON THE LAW OF SECURITIES REGULATION § 11:54; Ronald J. Colombo, LAW OF CORPORATE OFFICERS AND DIRECTORS: RIGHTS, DUTIES AND LIABILITIES § 18:5.

<sup>56</sup> 17 C.F.R. § 240.13d-101, Item 6.

<sup>57</sup> *Id.*, Item 4(d).

<sup>58</sup> *Id.*, Item 4(f).

for example, been quite explicit about its plans to use its voting power to promote board diversity.

Just as in 1968, the “essential problem” is that the Big Three are either exploiting a regulatory gap or failing to comply with their Section 13(d) obligations to, as Senator Williams (D-N.J.) said, “operate in almost complete secrecy concerning their intentions [and] their commitments.”<sup>59</sup> And just as in 1968, this leaves other shareholders with little information about the direction in which their companies are being pushed and with little information to consider other strategic options (*e.g.*, taking the company private to end the influence of the Big Three).

Regardless of the moral, political, or economic merits of the Big Three’s DEI and ESG agendas, the Big Three are not merely passive. And policymakers are taking notice. Nineteen state attorneys general recently wrote to BlackRock CEO Laurence Fink reminding him of his firm’s fiduciary responsibility to maximize his funds’ returns, not leverage proxy shares to push a political agenda. Senate Banking Committee Ranking Member Pat Toomey (R-Pa.) also raised the issue at the Senate Banking Committee’s September 22, 2022 hearing on “Annual Oversight of the Nation’s Largest Banks,” observing:

HERE’S THE PROBLEM. THESE LARGE ASSET MANAGERS HAVE ENORMOUS SWAY BY VIRTUE OF THE VOLUME OF VOTES THEY CAN CAST EVEN THOUGH THEY DON’T EVEN REALLY OWN MANY OF THOSE SHARES. AND, OF COURSE, . . . IF THAT SWAY GOES TO THE LEVEL OF CONTROL, THEN THERE ARE SIGNIFICANT RAMIFICATIONS, LEGAL AND REGULATORY, ESPECIALLY IF THAT CONTROL IS EXERCISED OVER FINANCIAL INSTITUTIONS. SEN. TOOMEY (R-PA.)

## Other Regulatory Implications of the Big Three's Influence

### Securities Laws

Section 13(d) compliance is not the end of the story. Control by a Big Three firm over any of its portfolio companies could compound its regulatory obligations and potential liabilities under other statutes administered by the SEC.

- **Control securities.** Securities held by a person that controls an issuer are known as control securities. Even if the initial sale was registered, a secondary distribution of

<sup>59</sup> 113 Cong. Rec. 855 (1967).



control securities must be registered under the Securities Act of 1933.<sup>60</sup> As a result, a Big Three firm would incur restrictions on its ability to resell securities of any controlled portfolio company.

- **Control person liability.** A Big Three firm also could be jointly and severally liable for any Exchange Act violations of any of the public companies that it controls (*e.g.*, liability for material misstatements or omissions in the public company’s disclosures).<sup>61</sup>
- **Required disclosures.** The SEC’s registration and reporting forms often require disclosures with respect to an issuer or reporting company’s parents, subsidiaries, affiliates, and control persons. Control is central to defining these terms.<sup>62</sup> A Big Three firm’s control of a portfolio company could require additional periodic and episodic disclosures by itself and by the portfolio company.

The absence of Schedule 13D disclosures by the Big Three precludes an assessment of the extent to which these other securities laws pose an issue for a Big Three firm, but future inquiries should assess these issues.

## Banking Laws

Control is also a “foundational concept” under the Bank Holding Company Act.<sup>63</sup> If one of the Big Three controls any of the banking organizations in its portfolio, that Big Three firm would be a bank holding company itself. This results in significant restrictions on the firm’s commercial activities, capital and liquidity requirements, an obligation to serve as a source of strength to its controlled banks, and restrictions on affiliate transactions, among many other things. The capital and liquidity requirements alone would pose insurmountable problems for the Big Three firm’s business model.

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<sup>60</sup> The registration requirements of the Securities Act “shall not apply to . . . transactions by any person other than an issuer, underwriter, or dealer.” 15 U.S.C. § 77d(a)(1). “The term ‘underwriter’ means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking . . . . *As used in this paragraph the term ‘issuer’ shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.*” *Id.* § 77b(a)(11) (emphasis added) As a result a distribution of securities purchased from a control person is a transaction involving an underwriter that must be registered unless another exemption applies.

<sup>61</sup> *Id.* § 78t.

<sup>62</sup> An “affiliate” is “a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.” “Parent” and “subsidiary,” are then defined as controlling and controlled affiliates, respectively. 17 C.F.R. § 230.405.

<sup>63</sup> Final Rule, Control and Divestiture Proceedings, 85 Fed. Reg. 12,398, 12,399 (Mar. 2, 2020).

Control determinations typically turn on whether a company has a “controlling influence over the management or policies of the other company.”<sup>64</sup> Supplementing the bright-line control thresholds based on ownership of voting power and ability to elect a majority of directors, the “controlling influence” test “address[es] concerns that a company could structure an investment in a bank below the two bright-line thresholds of control while still having the ‘power directly or indirectly to direct or cause the direction of the management or policies of any bank.’”<sup>65</sup>

Moreover, the definition of “company” under the Bank Holding Company Act includes any “association” or “similar organization”<sup>66</sup> such that investors acting with concerted or other associated effort can “result in the attribution to an investor of other investors’ shares.”<sup>67</sup> Agreements between the Big Three and other activist shareholders, such as the commitments made as part of the Net Zero Asset Managers Initiative, could support a finding of concerted or other associated effort that could be deemed “control” by an “association” or “similar organization” for purposes of the Bank Holding Company Act. Similarly, coordination of voting by or through proxy advisory services like ISS and Glass Lewis could support a similar finding. Related to this, the Big Three have significant cross-holdings in one another (other than Vanguard, which is owned by its managed funds) and in other institutional shareholders that own the Big Three’s equity. Vanguard and BlackRock, for example, together beneficially own around 17 percent of State Street, while Vanguard and State Street together beneficially own around 12 percent of BlackRock. These cross-holdings could further support a finding of “control” by an “association” or “similar organization.” At least two of the Big Three—BlackRock and Vanguard—have sought and received assurances that Federal Reserve Board staff would not recommend that the Federal Reserve Board find that it controls a banking organization for purposes of the Bank Holding Company Act, provided its acquisitions of equity securities are made within certain parameters (*e.g.*, no more than 25 percent of any class of voting securities of a bank holding company) and subject to certain conditions.<sup>68</sup>

One condition is that, when BlackRock or Vanguard own 10 percent or more of a class of voting securities of a banking organization, they “will not . . . take any action to control [that banking organization] within the meaning of the [Bank Holding Company Act].”<sup>69</sup> This condition arguably renders the assurances tautological, with the inquiry still whether the Big Three firm

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<sup>64</sup> A company controls another company for purposes of the Bank Holding Company Act if the first company (i) directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities of the other company; (ii) controls in any manner the election of a majority of the directors or trustees of the other company; or (iii) directly or indirectly exercises a controlling influence over the management or policies of the other company. 12 U.S.C. § 1841(a)(2); 12 C.F.R. § 225.2(e).

<sup>65</sup> 85 Fed. Reg at 12,399.

<sup>66</sup> 12 U.S.C. § 1841.

<sup>67</sup> Davis Polk, *Structuring Private Equity Investments in FDIC “Problem” Institutions* (Mar. 29, 2010), available at <https://archive.ph/1ioaA>.

<sup>68</sup> Letter from Mark E. Van Der Weide, General Counsel, Federal Reserve Board, to William J. Sweet, Jr., Retired Partner, Skadden, Arps, Slate, Meagher, and Flom LLP (Dec. 3, 2020), available at <https://archive.ph/o4906>; Letter from Mark E. Van Der Weide, General Counsel, Federal Reserve Board, to Anne E. Robinson, Managing Director, General Counsel, and Secretary, The Vanguard Group, Inc. (Nov. 26, 2019), available at <https://archive.ph/AjFGb>.

<sup>69</sup> *Id.*

has control. It is unclear whether the Federal Reserve Board periodically takes any steps beyond receipt of a periodic self-certification by the asset managers to monitor compliance with the condition that they not “take any action to control” a banking organization.

This condition also appears to recognize that there are non-quantitative ways for the asset manager to control a banking organization (*i.e.*, the asset manager can exercise control even without owning a proscribed number of shares or voting such shares in a specified manner). The Federal Reserve Board staff has said that, in providing assurances of this sort to asset managers, it generally would require commitments that “impose stricter limits on the asset management company’s relationships with a regulated company than would apply under the regulatory presumptions of control.”<sup>70</sup> However, the Federal Reserve Board staff has apparently not conditioned its assurances on an asset manager limiting their business relationships with any portfolio company, which is one of the factors relevant under the Federal Reserve Board’s control framework.

Two additional aspects of these assurances are also noteworthy:

- This was not the first time that Vanguard obtained assurances to this effect. In 2013, the Federal Reserve Board staff determined that Vanguard could acquire up to 15 percent of any class of voting securities of a banking organization under certain circumstances without triggering control for purposes of the banking laws.<sup>71</sup> Notably, the 2013 assurances included a mirror voting condition pursuant to which Vanguard committed that “shares in excess of 10 percent of any class or series of voting securities of a Bank (‘excess shares’) will be voted in portion to the vote taken on all shares that are not excess shares . . . .” It is unclear why the Federal Reserve Board staff is now willing to increase Vanguard’s control threshold from 15 percent to 25 percent, particularly in light of the absence of the 2013 mirror voting condition.
- Each of BlackRock and Vanguard also commits not to “attempt to influence the . . . loan, credit, or investment decisions or policies” of a banking organization. Each also commits not to “attempt to influence . . . personnel decisions.” These commitments are in tension with, or even conflict with, each asset manager’s commitments made as part of the Net Zero Asset Managers Initiative and its investment stewardship programs.

Although the Federal Reserve Board has said that it seeks to “balance normal shareholder activities with controlling influence concerns,”<sup>72</sup> it is unclear whether the expansive and still-growing activities of the Big Three firms always constitute “normal shareholder activities.” Here again, due to the absence of Schedule 13D disclosures by the Big Three, further investigation could shed light on the implications under the Bank Holding Company Act of each of the Big Three influencing management and corporate policy of bank holding companies within their

<sup>70</sup> Federal Reserve Board, Legal Interpretations, *Frequently Asked Questions about Regulation Y*, Q2, available at <https://archive.ph/KgpvA>.

<sup>71</sup> Letter from Scott G. Alzare, General Counsel, Federal Reserve Board, to Satish M. Kini (April 11, 2013), available at <https://archive.ph/EqKrJ>.

<sup>72</sup> Proposed Rule, Control and Divestiture Proceedings, 84 Fed. Reg. 21,634, 21,638 (May 14, 2019).

portfolios. BlackRock and Vanguard, for example, own between 13 percent and 17 percent of the four largest U.S. banking organizations' common stock. Not unexpectedly, these same banking organizations have adopted ESG policies that are strikingly similar to those of the Big Three, including by joining the Net Zero Banking Alliance, the bank counterpart to the Net Zero Asset Managers Initiative.

### Corporate Governance in the Age of the Big Three

Corporation law rests on a separation of ownership and control.<sup>73</sup> Shareholders, who are the owners of the firm, have little power to control its operations. Control is instead vested in the board of directors. The separation of ownership and control is critical to the efficiency and workability of the corporation. Shareholders are a diverse group with widely divergent interests and access to varying degrees of information. Empowering shareholders to control the corporation through frequent shareholder votes would be paralyzingly inefficient and lead to widely varying, even inconsistent, mandates to the corporation's managers.

The rise of the Big Three threaten to undermine this basic, highly successful governance model. The Big Three derive their voting power and influence from the funds entrusted with them by ordinary investors. These investors generally sought low-cost passively managed index funds, not actively managed funds with an agenda other than financial gain. Instead of prioritizing the investment returns of fund investors, the Big Three use their voting power and influence to actively advance ESG and other controversial policies that lack the support of many of the investors in their funds.

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There is nothing wrong with activist investing—buying shares in companies with the purpose of changing the way they do business. But doing so with publicly traded companies carries with it legal obligations to inform the investing public about one's plans when they are a significant shareholder.

The Big Three appear to be omitting significant details in defiance of the spirit and letter of securities law. They simultaneously market their index funds as passive investments, avail themselves of passive shareholders' abbreviated disclosure burdens, and then direct the operations of their portfolio businesses behind a veil of secrecy. If true—and both anecdotal evidence and academic research indicates it is—the Big Three would not only be subject to heightened Schedule 13D disclosure requirements, but, potentially, regulatory restrictions under the Bank Holding Company Act.

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<sup>73</sup> See generally Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VANDERBILT L. REV. 1, 12 (2002).

## IV. RECOMMENDATIONS

### Continue to Develop an Understanding of the Big Three's Influence

As discussed above, there are compelling examples and a growing body of academic research establishing that BlackRock, State Street, and Vanguard each has significant influence over its portfolio companies. Concessions extracted from management, and perhaps even arrangements negotiated with activist investors and advocacy groups, must have been necessary behind the scenes to achieve this influence. Given the lack of transparency as to these backroom concessions and arrangements and the important policy questions raised by the Big Three's influence, Congress should consider investigations to develop a more complete understanding of the extent of the Big Three's influence over management and corporate policy of their portfolio companies.

### Scrutinize the Big Three's Section 13(d) Compliance

Each of the Big Three almost exclusively files short-form disclosures on Schedule 13G instead of the standard disclosure on Schedule 13D. As discussed above, there is good reason to think that each of the Big Three sometimes has a control purpose or effect with respect to some of its portfolio companies that would preclude use of Schedule 13G for those investments. If a Schedule 13D were filed instead, the Big Three firms would be required to disclose many of the concessions and arrangements they have extracted or negotiated, including those that relate to “the giving or withholding of proxies,” “[a] change in the present board of directors,” or “[a] material change in the issuer’s business.”<sup>74</sup> As part of investigations into the Big Three's influence, Congress and the SEC should review each of the Big Three's compliance with Section 13(d), with a focus on instances in which short-form disclosures were filed despite the presence of a control purpose or effect. These investigations also could consider whether any of the Big Three sometimes acts as a group with other activist investors or proxy advisory firms such that their holdings and activities should be attributed to each other.

### Amend Schedule 13G to Require Disclosure of Concessions and Arrangements

Even where a Big Three firm does not have a control purpose or effect, there would be relatively little burden in requiring the Big Three to make the same disclosures mandated under Schedule 13D with respect to concessions and arrangements relating to their positions. Those disclosures also would significantly improve the investing public's understanding of the direction that the Big Three are leading their portfolio companies and Congress and regulators' understanding of the policy implications of that influence. Congress and the SEC should consider amending the Schedule 13G short-form disclosures to require disclosure of the concessions and arrangements extracted and negotiated by purportedly passive asset managers.

### Update Section 13(d) to Reflect Recent Developments in Corporate Governance

The Big Three's informal engagements are directed at management teams well aware that a Big Three firm could determine the outcome of director elections or votes on shareholder

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<sup>74</sup> 17 C.F.R. § 240.13d-101, Item 4(d), 4(f), 6.

proposals—possibilities made much more real by the recent developments in majority voting, proxy access, and “say on pay” votes. With the Big Three’s influence expected to increase further—potentially accounting for 40 percent of the votes in many public companies in the next two decades—Congress and the SEC should consider changes to the Section 13(d) disclosure requirements to reflect these recent developments. For example, the SEC could consider rulemaking on the nature and extent of an investor’s engagement with management that would preclude an investor from filing a Schedule 13G short-form disclosure.

### Define “Control” for Purposes of Section 13(d) and the Other Securities Laws

Control over a U.S. public company results in a significant increase in its regulatory obligations and potential liabilities under the various statutes administered by the SEC. Despite its centrality to the securities laws, “control” is not defined under the securities laws with particularity. Instead, the SEC has defined control by rule for certain purposes at a relatively high level as “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.”<sup>75</sup> This generic definition opens the door to different approaches, even double standards, for the Big Three and other investors. Congress should consider legislation to define “control” with more particularity. Alternatively, the SEC could provide by rule additional detail and transparency as to how control determinations should be made. Related to this, control is also a central concept under the Banking Holding Company Act, and the Federal Reserve Board has developed a considerably more nuanced and detailed framework for making control determinations that might help inform any congressional or SEC effort to refine the definition of “control” for purposes of the securities laws.<sup>76</sup>

### Assess the Implications of Big Three’s Influence under the Banking Laws

As discussed above, the Big Three’s influence might have implications under other statutes and regulations besides Section 13(d). In particular, Congress and the Federal Reserve Board should assess whether any of the Big Three control any bank holding companies for purpose of the Bank Holding Company Act or the other banking laws.

### Enact Legislative Reforms to Return Voting Power to True Investors

In May 2022, Senator Dan Sullivan (R-Alaska), along with Senate Banking Committee Ranking Member Toomey (R-Pa.) and other Senate Banking Committee Republicans, introduced the INDEX Act (S. 4241) to address the problems associated with large asset managers voting other people’s shares. The INDEX Act generally requires any asset manager of a passive index fund with more than 1% of a company’s voting shares to vote those shares in accordance with the instructions of the fund’s investors, not at the discretion of the asset manager. Congress should consider the INDEX Act or similar legislation to ensure that public companies’ shares are voted consistent with the values and instructions of the actual investors in those companies, not the views of the Big Three.

<sup>75</sup> 17 C.F.R. § 203.405 (for purposes of the registration requirements of the Securities Act); *id.* § 240.12b-2 (for purposes of the Exchange Act).

<sup>76</sup> Final Rule, Control and Divestiture Proceedings, 85 Fed. Reg. 12,398 (Mar. 2, 2020).