

Material Restrictions on Shareholders' Ability to Amend the Bylaws

A Review of Impacted Maryland Real Estate Companies

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In November 2016, Institutional Shareholder Services (ISS) introduced a new policy that targeted companies that prohibit shareholders from amending the bylaws or place material restrictions on the right. While the new policy impacted a variety of companies, Maryland real estate companies were the most heavily impacted. This report assesses the first proxy season under this policy; we describe how ISS applied its policy, how affected companies acted in response to the policy, and how investors reacted to these companies' decisions.

ISS Corporate Solutions (ICS) is a subsidiary of ISS; this paper was written without input from members of the ISS Research team.

BACKGROUND

The November 2016 ISS policy announcement, which went into effect February 1, 2017, focused broadly on material restrictions on shareholders' ability to amend the bylaws. The scope of the new policy includes any bylaw provisions more onerous than those under SEC Rule 14a-8, which permits shareholders that have held shares valued at \$2,000 or more for one year to submit shareholder proposals. While some companies do have more onerous restrictions (*e.g.*, longer holding periods or larger holding requirements²), the most common bylaw restriction provides the board the exclusive right to amend the bylaws. In adopting its policy, ISS concluded that limiting or eliminating shareholders' ability to amend the bylaws denied shareholders a fundamental right. Accordingly, ISS stated that it would issue negative recommendations on governance committee members at companies that maintained any of these material restrictions.

This policy impacted companies incorporated in several states, including Maryland, Indiana, and Texas. While the total number of companies impacted within the Russell 3000 was relatively small—ISS cited fewer than 300 U.S. companies—the impact was more significant in the real estate sector, which features a high concentration of REITs incorporated in Maryland.

¹ Bruce Kistler and Leah Rozin work with public company clients in the real estate sector. They provide support on the design and disclosure of a broad range of corporate governance matters such as bylaw amendments, executive compensation, equity plans, and other traditional corporate governance practices.

² Pebblebrook Hotel Trust has more onerous restrictions. It is discussed in more detail in *Cases of Interest*.

KEY POLICY CONSIDERATIONS

The ISS policy contains several important nuances, which we list below. In addition to helping define which companies would be impacted by the ISS policy, these nuances provide important context when reviewing the actions taken by said companies. For example, the fact that the 26 out of 29 companies that did amend their bylaws moved to a simple majority opposed to a supermajority can likely be explained by item three.

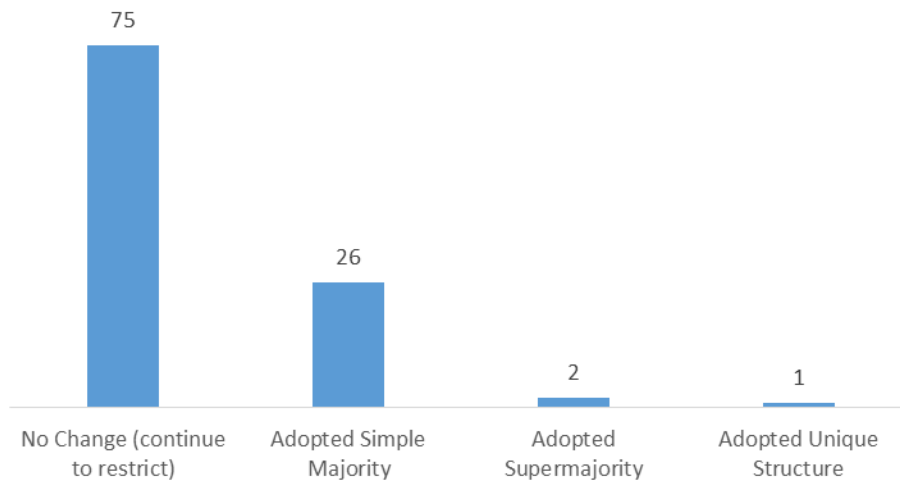
1. Companies that did not provide shareholders the right to amend the bylaws before 2/1/2017 or materially restricted shareholders would be impacted by the new ISS policy.
 - If a company provided the right prior to 2/1/2017, even at a supermajority, that company would not be impacted by the new ISS policy.
2. Companies that moved from no right to a supermajority vote standard *after* 2/1/2017 would still receive a negative ISS recommendation.
 - Said another way, only the move to a simple majority vote to amend the bylaws would avoid a negative vote recommendation from ISS.
3. Companies that did not adopt a simple majority vote standard should expect to continue to receive adverse vote recommendations on their governance committee members year after year.
 - Depending on the vote support of the directors, this issue can snowball into concerns around board responsiveness.
4. Companies that placed a management-supported proposal on the ballot calling for a simple majority amendment standard would avoid adverse vote recommendations from ISS.
5. This policy only relates to the bylaws. It does not consider the required vote support to amend the charter, declaration of trust, or articles of incorporation.
 - Unrelated to the ISS voting policy, QualityScore will look at the highest vote requirement. If the charter still requires a supermajority, a company would be classified as requiring a supermajority in its bylaws or charter; this will not result in full credit.

HIGH LEVEL REVIEW OF IMPACTED COMPANIES

At the start of the 2017 proxy season, ICS had tracked over 110 Russell 3000 real estate companies incorporated in Maryland with provisions that were likely to result in adverse vote recommendations from ISS. This included companies within the GICS 6010 (Real Estate) and the GICS 40204010 (Mortgage REITS). 104 of these companies have had their 2017 annual meetings by June 30.

As we show below, the vast majority of these companies made no change to their bylaws. 75 companies stood firm, and ISS generally issued negative recommendations on these companies' governance committee members.

Maryland Real Estate Company Bylaws



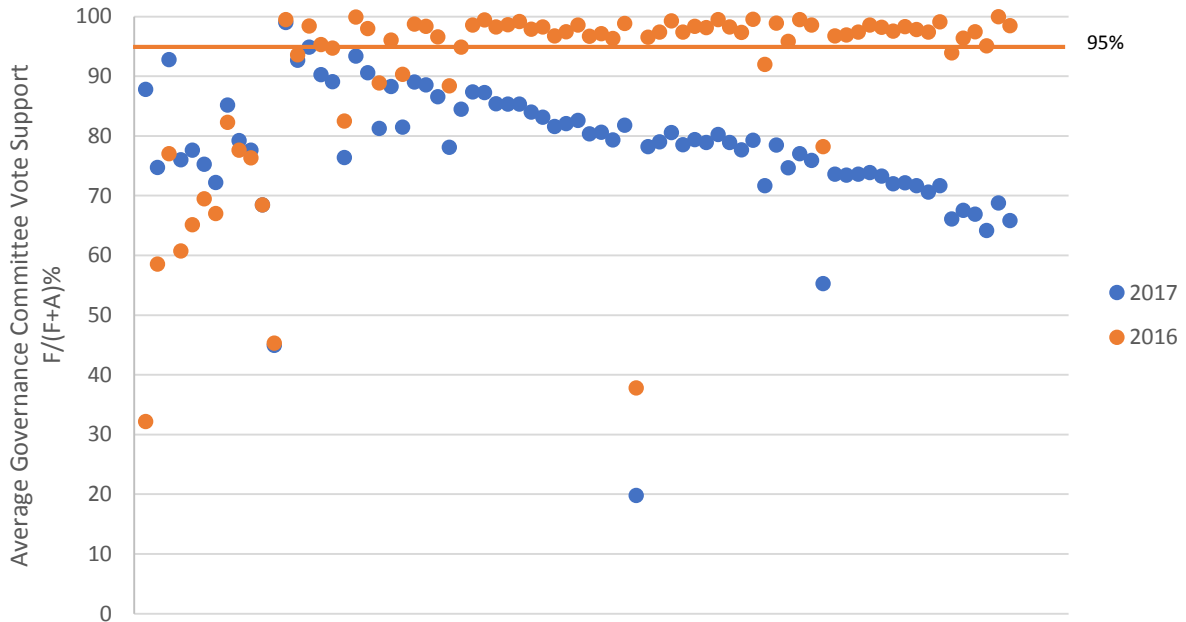
Of the 29 that made changes, five were made after filing a definitive proxy. We discuss one unique response (Pebblebrook Hotel Trust) below in the *Cases of Interest* section. The appendix contains a complete breakdown of the companies that amended their bylaws to provide the right to amend the bylaws.

VOTE OUTCOMES

In an effort to assess the impact of ISS' new policy, we've taken a look at the average vote support for the governance committee members on ballot that did not amend their bylaws. In four cases, there were no governance committee members on the ballot due to classified board structures. The average of all nominees on ballot were taken in these cases. All vote support is expressed as votes for out of votes cast for and against/withhold (F/[F+A]).

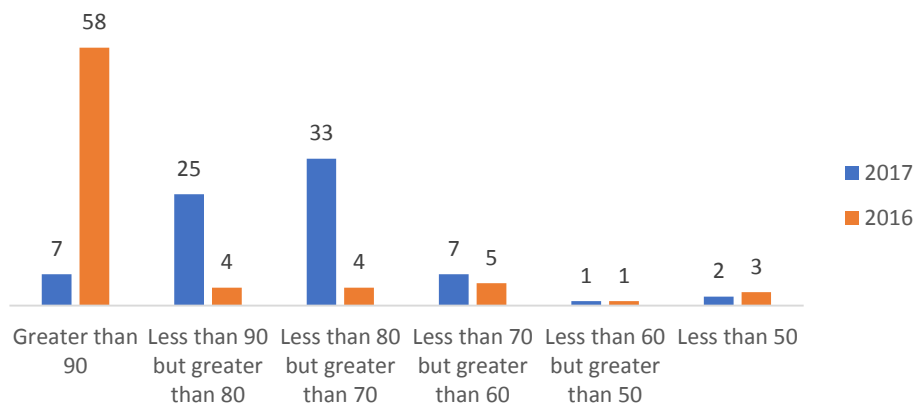
The average of the average vote support at the 75 companies that did not amend their bylaws and received an adverse vote recommendation from ISS was 78.2%. For context, the average of the full board at Russell 3000 companies was 95% over the same period. An average support level of 80% or below would put a company in the bottom 5% of the Russell 3000. The vote distribution of these 75 companies for 2017 and 2016 are reflected in the charts below.

2017 and 2016 Average Governance Committee Vote Support at Affected Companies



The data above is arranged by largest to smallest (*i.e.*, more negative) change in the average governance committee vote support from 2016 to 2017. The far left data points show companies that actually saw an improvement in their vote support from 2016 to 2017 (*i.e.*, the 2016 orange marker is below the 2017 blue marker). The far right represent companies that saw the most significant decrease in average governance committee vote support from 2016 to 2017.

2017 and 2016 Average Governance Committee Vote Support at Affected Companies



As seen in the above, there was a significant change in the vote support distribution for affected companies. In some cases, there was actually a positive change between 2016 and 2017. However, the median change for affected companies was -16.0 percentage points.

Vote support below 80% positions directors as significant outliers relative to the larger Russell 3000.³ Impacted companies will likely want to discuss this topic with their shareholders as part of their regular shareholder engagement, especially since investors' views and voting policies on this topic may continue to evolve as it garners more attention. And, of course, there may have been reasons unrelated to the bylaws for the low vote outcomes at some of these companies.

SHAREHOLDER PROPOSALS

Two non-binding shareholder proposals requesting shareholders have the right to amend the bylaws have been submitted to Russell 3000 Maryland REITs in 2017. These proposals may provide additional insight into shareholders' perspectives on this issue. The proposals were filed at Equity Residential (EQC) and iStar Inc. (STAR) by Trowel Trades S&P 500 Index Fund and UNITE HERE! International Union, respectively. The support for these proposals stands in stark contrast to the support for governance committee members. At, EQC, the shareholder proposal garnered 80.0% support, even though no director received less than 78.3% support. Similarly, the proposal at STAR received 76.1% support, despite no director getting less than 89.0% support. These outcomes suggest that, in 2017, shareholders heavily favored having the right to amend the bylaws but did not believe the lack of a right warranted withhold or voting against directors.

CASES OF INTEREST

Spirit Realty Capital Inc (SRC) – Diversified REIT – 6/28/2017 Meeting

SRC filed an 8-K on May 11, 2017, indicating that the board had amended the bylaws to allow shareholders to amend the bylaws by the affirmative vote of two-thirds of shares outstanding. ISS did not change its previously published negative recommendation on governance committee members because, per the ISS Research proxy advisory report, "...the imposition of a super-majority vote requirement in lieu of the prohibition is not deemed to sufficiently restore a fundamental shareholder right."

This determination is consistent with ISS' FAQs on the topic, published in early 2017. SRC will be a company to watch through the 2018 proxy season, as it is possible that ISS will continue to recommend against directors unless they make further bylaw modifications.

Chimera Investment Corporation (CIM) – Mortgage REIT – 6/1/2017 Meeting

Chimera Investment Corporation is notable not because it was impacted by the new policy but because of the lack of impact. While not explicitly explained in the ISS research report, CIM received favorable recommendations despite moving to a supermajority vote requirement, because CIM made the change on January 9, 2017, prior the policy becoming effective on February 1, 2017. Thus, CIM was not seen as a company that materially restricted shareholders' access to the bylaws when the new policy came into effect.

³ A director receiving 80% support would be at approximately the 3rd percentile of all Russell 3000 director vote results disclosed to date in 2017.

CIM should not be construed as any kind of precedent for other companies affected by this policy, given the unique timing issues at play.

Pebblebrook Hotel Trust (PEB) – Hotel & Resorts REITs – 6/30/2017 Meeting

PEB showed some creativity by amending its bylaws to allow shareholders to submit binding proposals if certain requirements, similar to those seen in proxy access provisions, were met. Specifically, a group of up to 20 shareholders that collectively own at least 3% and have held those shares for at least 3 years may propose binding amendments to the bylaws. In 2016, PEB had actually received a shareholder proposal from UNITE HERE! requesting shareholders have the right to amend by the bylaws by a simple majority vote. The proposal, which only garnered 30.1% support, was cited as a reason for moving to this more unique structure.

Ultimately, ISS took the stance that the proxy access style requirements were still more onerous than the basic 14a-8 shareholder proposal requirements, and recommended withhold votes on governance committee members.

ADDITIONAL INFORMATION

The appendix on the following pages provides the full list of impacted Maryland real estate companies, the average vote support of the governance committee nominees at these companies, and other key data points. We've broken the data into two groups: companies that amended their bylaws and those that did not. To obtain further data and insights on this topic, please contact your account executive or email support@isscorporatesolutions.com.

APPENDIX

Companies that proactively amended the bylaws

Company Name	Ticker	GICS	GICS Name	Meeting Date	Bylaws Changed	Bylaw Vote Standard	Charter / Articles of Incorporate / Declaration of Trust	ISS Vote Rec	Average Governance Committee Nominee Support F/(F+A) %
AG Mortgage Investment Trust Inc.	MITT	40204010	Mortgage REITs	5/3/2017	Yes via proposal	Simple	Supermajority	For	96.7
American Campus Communities Inc.	ACC	60101060	Residential REITs	5/4/2017	Yes after filing DEF 14A	Simple	Simple	For	99.3
Chesapeake Lodging Trust	CHSP	60101030	Hotel & Resort REITs	5/17/2017	Yes via proposal	Simple	Simple	For	99.5
Chimera Investment Corporation	CIM	40204010	Mortgage REITs	6/1/2017	Yes	Supermajority	Supermajority	For	95.1
Colony NorthStar, Inc.	CLNS	60101010	Diversified REITs	5/4/2017	Yes	Simple	Supermajority	For	97.3
Columbia Property Trust, Inc	CXP	60101040	Office REITs	5/2/2017	Yes via proposal	Simple	Simple	For	98.7
CoreSite Realty Corporation	COR	60101080	Specialized REITs	5/24/2017	Yes	Simple	Simple	For	97.6
Corporate Office Properties Trust	OFC	60101040	Office REITs	5/11/2017	Yes via proposal	Simple	Supermajority	For	99.4
CubeSmart	CUBE	60101080	Specialized REITs	5/31/2017	Yes via proposal	Simple	Simple	For	99.0
CyrusOne Inc.	CONE	60101080	Specialized REITs	4/28/2017	Yes	Simple	Simple	For	94.7
DCT Industrial Trust Inc.	DCT	60101020	Industrial REITs	5/3/2017	Yes via proposal	Simple	Supermajority	For	95.9
DuPont Fabros Technology Inc.	DFT	60101080	Specialized REITs	6/12/2017	Yes via proposal	Simple	Supermajority	For	99.7
EPR Properties	EPR	60101080	Specialized REITs	5/31/2017	Yes	Simple	Simple	For	98.8
Equity Commonwealth	EQC	60101040	Office REITs	6/20/2017	Yes	Simple	Simple	For	99.2
First Potomac Realty Trust	FPO	60101010	Diversified REITs	5/23/2017	Yes via proposal	Simple	Supermajority	For	96.8
Gramercy Property Trust	GPT	60101010	Diversified REITs	6/15/2017	Yes	Simple	Simple	For	97.3
Invesco Mortgage Capital Inc.	IVR	40204010	Mortgage REITs	5/3/2017	Yes	Simple	Supermajority	For	98.9
Liberty Property Trust	LPT	60101010	Diversified REITs	5/18/2017	Yes	Simple	Supermajority	For	95.3
MTGE Investment Corp.	MTGE	40204010	Mortgage REITs	5/2/2017	Yes	Simple	Supermajority	For	99.2
Pebblebrook Hotel Trust	PEB	60101030	Hotel & Resort REITs	6/30/2017	Yes after filing DEF 14A	Unique	Supermajority	Gov	80.1
Physicians Realty Trust	DOC	60101050	Health Care REITs	5/3/2017	Yes	Simple	Supermajority	For	94.2

Company Name	Ticker	GICS	GICS Name	Meeting Date	Bylaws Changed	Bylaw Vote Standard	Charter / Articles of Incorporate / Declaration of Trust	ISS Vote Rec	Average Governance Committee Nominee Support F/(F+A) %
Piedmont Office Realty Trust Inc.	PDM	60101040	Office REITs	5/18/2017	Yes after filing DEF 14A	Simple	Simple	For	98.3
QTS Realty Trust Inc.	QTS	60101080	Specialized REITs	5/4/2017	Yes	Simple	Supermajority	For	99.5
Sabra Health Care REIT Inc.	SBRA	60101050	Health Care REITs	6/20/2017	Yes	Simple	Simple	For	92.3
Spirit Realty Capital Inc.	SRC	60101010	Diversified REITs	6/28/2017	Yes after filing DEF 14A	Supermajority	Supermajority	Gov	67.1
Sun Communities Inc.	SUI	60101060	Residential REITs	5/18/2017	Yes after filing DEF 14A	Simple	Supermajority	Gov	76.2
Two Harbors Investment Corp.	TWO	40204010	Mortgage REITs	5/17/2017	Yes	Simple	Supermajority	For	93.7
W. P. Carey Inc.	WPC	60101010	Diversified REITs	6/15/2017	Yes via proposal	Simple	Supermajority	For	99.3
Washington Real Estate Investment Trust	WRE	60101010	Diversified REITs	6/1/2017	Yes via proposal	Simple	Simple	For-Class	99.23

*Gov = Against or withhold on governance committee members on ballot

*For-Class = ISS issued a For recommendation, but, due to the classified board structure, no governance committee members were on ballot. The full board was used for average vote support.

Companies that did not amended the bylaws

Company Name	Ticker	GICS	GICS Name	Meeting Date	Bylaws Changed	Bylaw Vote Standard	ISS Vote Rec*	Average Governance Committee Nominee Support F/(F+A) %
The RMR Group Inc.	RMR	60102010	Diversified Real Estate Activities	3/29/2017	No	N/A	Gov	99.0
Retail Opportunity Investments Corp.	ROIC	60101070	Retail REITs	4/25/2017	No	N/A	Gov	78.5
Seritage Growth Properties	SRG	60101070	Retail REITs	4/25/2017	No	N/A	Gov-Class	93.4
Public Storage	PSA	60101080	Specialized REITs	4/26/2017	No	N/A	Gov	79.0
CareTrust REIT Inc.	CTRE	60101050	Health Care REITs	4/26/2017	No	N/A	Gov-Class	79.35
Cedar Realty Trust Inc.	CDR	60101070	Retail REITs	5/2/2017	No	N/A	Gov	83.2
Equity LifeStyle Properties Inc.	ELS	60101060	Residential REITs	5/2/2017	No	N/A	Gov	78.1
TIER REIT Inc.	TIER	60101040	Office REITs	5/3/2017	No	N/A	Gov	88.3
Farmland Partners Inc.	FPI	60101080	Specialized REITs	5/3/2017	No	N/A	Gov	78.2
Starwood Property Trust Inc.	STWD	40204010	Mortgage REITs	5/4/2017	No	N/A	Gov	81.6
Getty Realty Corp.	GTY	60101070	Retail REITs	5/4/2017	No	N/A	Gov	82.1
LaSalle Hotel Properties	LHO	60101030	Hotel & Resort REITs	5/4/2017	No	N/A	Gov	72.0
Preferred Apartment Communities Inc.	APTS	60101060	Residential REITs	5/4/2017	No	N/A	Gov	71.7
Digital Realty Trust Inc.	DLR	60101080	Specialized REITs	5/8/2017	No	N/A	Gov	80.2
Alexandria Real Estate Equities Inc.	ARE	60101040	Office REITs	5/9/2017	No	N/A	Gov	77.7
Acadia Realty Trust	AKR	60101070	Retail REITs	5/10/2017	No	N/A	Gov	85.4
Urban Edge Properties	UE	60101070	Retail REITs	5/10/2017	No	N/A	Gov	85.3
Kite Realty Group Trust	KRG	60101070	Retail REITs	5/10/2017	No	N/A	Gov	77.1
New York Mortgage Trust Inc.	NYMT	40204010	Mortgage REITs	5/11/2017	No	N/A	Gov	90.3
Uniti Group Inc.	UNIT	60101080	Specialized REITs	5/11/2017	No	N/A	Gov	94.9
Empire State Realty Trust Inc.	ESRT	60101010	Diversified REITs	5/11/2017	No	N/A	Gov	87.4
UDR Inc.	UDR	60101060	Residential REITs	5/11/2017	No	N/A	Gov	85.3
CoreCivic Inc.	CXW	60101080	Specialized REITs	5/11/2017	No	N/A	Gov	87.3
Apollo Commercial Real Estate Finance Inc.	ARI	40204010	Mortgage REITs	5/11/2017	No	N/A	Gov	74.7
Whitestone REIT	WSR	60101070	Retail REITs	5/11/2017	No	N/A	Gov	79.2
CYS Investments Inc.	CYS	40204010	Mortgage REITs	5/12/2017	No	N/A	Gov	70.6
Colony Starwood Homes	SFR	60101060	Residential REITs	5/15/2017	No	N/A	Gov	73.3
Essex Property Trust Inc.	ESS	60101060	Residential REITs	5/16/2017	No	N/A	Gov	71.7
iStar Inc.	STAR	60101010	Diversified REITs	5/16/2017	No	N/A	Gov	90.6
Independence Realty Trust Inc.	IRT	60101060	Residential REITs	5/16/2017	No	N/A	Gov	78.9
Realty Income Corporation	O	60101070	Retail REITs	5/16/2017	No	N/A	Gov	81.8
Government Properties Income Trust	GOV	60101040	Office REITs	5/17/2017	No	N/A	Gov	72.2

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CorEnergy Infrastructure Trust Inc.	CORR	60101080	Specialized REITs	5/17/2017	No	N/A	Gov	68.5
InfraREIT Inc.	HIFR	60101080	Specialized REITs	5/17/2017	No	N/A	Gov-Class	76.4
Paramount Group Inc.	PGRE	60101040	Office REITs	5/18/2017	No	N/A	Gov	86.6
Avalonbay communities, inc	AVB	60101060	Residential REITs	5/18/2017	No	N/A	Gov	73.5
Brandywine Realty Trust	BDN	60101040	Office REITs	5/18/2017	No	N/A	Gov	73.6
Extra Space Storage Inc.	EXR	60101080	Specialized REITs	5/18/2017	No	N/A	Gov	78.9
Chatham Lodging Trust	CLDT	60101030	Hotel & Resort REITs	5/18/2017	No	N/A	Gov	65.9
Gladstone Land Corp	LAND	60101080	Specialized REITs	5/18/2017	No	N/A	Gov	82.6
Summit Hotel Properties Inc.	INN	60101030	Hotel & Resort REITs	5/18/2017	No	N/A	Gov	78.5
Senior Housing Properties Trust	SNH	60101050	Health Care REITs	5/18/2017	No	N/A	Gov	44.9
Vornado Realty Trust	VNO	60101040	Office REITs	5/18/2017	No	N/A	Gov	75.3
Monmouth Real Estate Investment Corporation	MNR	60101020	Industrial REITs	5/18/2017	No	N/A	Gov	77.6
Urstadt Biddle Properties Inc.	UBA	60101070	Retail REITs	5/22/2017	No	N/A	Gov	92.7
Rexford Industrial Realty Inc.	REXR	60101020	Industrial REITs	5/23/2017	No	N/A	Gov	71.7
Select Income REIT	SIR	60101010	Diversified REITs	5/23/2017	No	N/A	Gov	77.6
Altisource Residential Corporation	RESI	60101060	Residential REITs	5/23/2017	No	N/A	Gov	92.8
Hudson Pacific Properties Inc.	HPP	60101040	Office REITs	5/24/2017	No	N/A	Gov	80.6
National Storage Affiliates Trust	NSA	60101080	Specialized REITs	5/25/2017	No	N/A	Gov	64.2
PennyMac Mortgage Investment Trust	PMT	40204010	Mortgage REITs	5/25/2017	No	N/A	Gov	72.2
Global Net Lease Inc.	GNL	60101010	Diversified REITs	5/31/2017	No	N/A	Gov	88.6
STORE Capital Corporation	STOR	60101010	Diversified REITs	6/1/2017	No	N/A	Gov	81.5
Resource Capital Corp.	RSO	40204010	Mortgage REITs	6/1/2017	No	N/A	Gov	74.7
SL Green Realty Corp.	SLG	60101040	Office REITs	6/1/2017	No	N/A	Gov	67.6
The Macerich Company	MAC	60101070	Retail REITs	6/1/2017	No	N/A	Gov	84.0
Douglas Emmett Inc.	DEI	60101040	Office REITs	6/1/2017	No	N/A	Gov	79.3
Hannon Armstrong Sustainable Infrastructure Capital Inc.	HASI	40204010	Mortgage REITs	6/1/2017	No	N/A	Gov	81.3
Ares Commercial Real Estate Corporation	ACRE	40204010	Mortgage REITs	6/7/2017	No	N/A	Gov	73.9
New York REIT Inc.	NYRT	60101040	Office REITs	6/8/2017	No	N/A	Gov	68.8
Mack-Cali Realty Corporation	CLI	60101040	Office REITs	6/9/2017	No	N/A	Gov	85.2
Ashford Hospitality Prime Inc.	AHP	60101030	Hotel & Resort REITs	6/9/2017	No	N/A	Gov	87.8
Outfront Media Inc.	OUT	60101080	Specialized REITs	6/12/2017	No	N/A	Gov	80.6
American Assets Trust Inc.	AAT	60101010	Diversified REITs	6/13/2017	No	N/A	Gov	55.3
Orchid Island Capital Inc.	ORC	40204010	Mortgage REITs	6/13/2017	No	N/A	Gov	89.1

Company Name	Ticker	GICS	GICS Name	Meeting Date	Bylaws Changed	Bylaw Vote Standard	ISS Vote Rec*	Average Governance Committee Nominee Support F/(F+A) %
ARMOUR Residential REIT, Inc.	ARR	40204010	Mortgage REITs	6/14/2017	No	N/A	Gov	84.5
Armada Hoffer Properties Inc.	AHH	60101010	Diversified REITs	6/14/2017	No	N/A	Gov	75.9
Hospitality Properties Trust	HPT	60101030	Hotel & Resort REITs	6/15/2017	No	N/A	Gov	19.8
NexPoint Residential Trust Inc.	NXRT	60101060	Residential REITs	6/15/2017	No	N/A	Gov	73.6
Equity Residential	EQR	60101060	Residential REITs	6/15/2017	No	N/A	Gov	79.4
UMH Properties Inc.	UMH	60101060	Residential REITs	6/15/2017	No	N/A	Gov-Class	76.0
Blackstone Mortgage Trust inc	BXMT	40204010	Mortgage REITs	6/21/2017	No	N/A	Gov	66.1
RAIT Financial Trust	RAS	60101010	Diversified REITs	6/22/2017	No	N/A	Gov	80.4
CatchMark Timber Trust Inc.	CTT	60101080	Specialized REITs	6/23/2017	No	N/A	Gov	66.9
Monogram Residential Trust Inc.	MORE	60101060	Residential REITs	6/29/2017	No	N/A	Gov	89.1

*Gov = Against or withhold on the governance committee members on ballot

*Gov-Class = No governance committee members on ballot, so ISS issued adverse vote recommendations on the full board (generally excludes new nominees). The full board was used for average vote support.

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