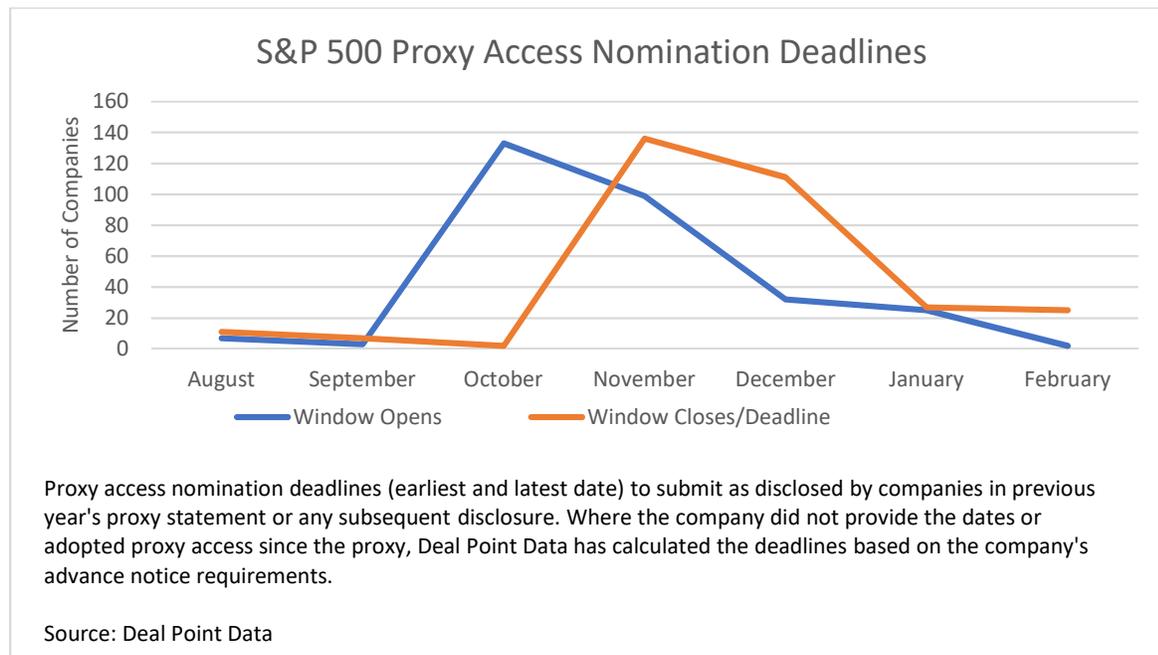


## Peak Proxy Access Nomination Season

October 31, 2018



Governance activists waged a hard-fought battle to establish proxy access at public companies and ultimately succeeded as proxy access has been widely adopted. It is therefore rather surprising that we have yet to have a proxy access nomination go to an actual vote. If it is going to happen in the 2019 proxy season, we're likely to know soon as we've entered the part of the calendar where proxy access notice windows are opening. Proxy access allows stockholders to include stockholder-nominated director candidates in the company's proxy materials (proxy statement and proxy card) if certain qualifying conditions are met. Absent proxy access, a stockholder would have to wage a traditional proxy fight which includes the expense of producing its own proxy materials and soliciting proxies in order to nominate director candidates and have a realistic chance of getting them elected. The first and only use of a proxy access bylaw was by GAMCO Asset Management Inc. which submitted a proxy access nomination at National Fuel Gas Company (NFG) in November 2016. However, NFG did not include the nominee in its proxy materials for its 2017 annual meeting because GAMCO had not complied with the terms and conditions of the company's proxy access bylaw (i.e., the stockholder making the nomination acquired the required shares in the ordinary course of business and not with the intent to change or influence control of the company). Proxy access bylaws (a few companies have implemented proxy access in their charter) include timeliness requirements to submit nominations and the most common requirement is 120 to 150 days prior to the anniversary of the mailing of the prior year's proxy statement. Companies that follow a fiscal year end of December 31 and hold annual meetings in the spring will typically release their proxy statements in March and April. This timing results in a cluster of October/November window opening and November/December window closings. Proxy access has been adopted by 351 (70%) of the companies in the S&P 500. Of the 351 companies, a qualifying stockholder could submit a proxy access nomination at 147 of those companies today (we're in the window at 133 companies and 14 other companies have a deadline only (no earliest date) that has yet to pass). SEC Rule 14a-18 requires a stockholder using proxy access to provide notice of its intent to do so on a Schedule 14N so we won't have to wait until next year's proxy statements to find out when it happens.

Advance notice provisions typically establish a submission "window" based on the latest date (i.e., the deadline) and earliest date a proposal, nomination, or proxy access nomination must be received by the company in order for it to be voted on at an annual meeting. Most companies establish a window and not just a deadline to limit the time they may receive proposals and nominations or they could be receiving them throughout the year (only 4% of S&P 500 companies with proxy access have adopted a deadline only, no window approach). To establish a deadline or window, advance notice provisions will specify an event to be used as a reference point (what we refer to as the "key off event") from which the minimum and maximum number of days should be applied. With few exceptions, there are three types of key off events: the anniversary of preceding annual meeting date, the upcoming annual meeting date, and the previous proxy date. Basing timeliness on the previous year's proxy statement is most commonly associated with proxy access nominations (proxy fight nominations are typically keyed off the previous annual meeting date). Most companies use the window established under the SEC's now defunct proxy access rule (Rule 14a-11 vacated in 2011) of 120 to 150 days prior to the anniversary of the mailing of the prior year's proxy statement. When companies use the previous year's proxy statement as the key off event they will also include a secondary event (what we refer to as the "sub key off event") as a reference point to determine the deadlines (e.g., date of the proxy statement, filing date, mail date, release date). These specific details matter as we have observed examples where there is a difference of weeks between the date the proxy statement was filed with the SEC and the sub key off event (e.g., mail date) used to determine advance notice timeliness (e.g., Delta Air Lines, Inc. 21 days, PG&E Corporation 15 days).

<b>S&amp;P 500 Proxy Access Timeliness Requirements</b>	
<b>Adopted Proxy Access</b>	351 companies
<b>Key Off Event</b>	
Anniversary of Preceding AGM	54
Upcoming AGM Date	1
Previous Proxy Date	296
<b>Previous Proxy Date - Sub Key Off Event Text</b>	
Mailed	113
Released	73
Distributed	33
Sent	32
Issued	21
Date of proxy statement	10
Filed / Filing Date	8
Made available	4
Delivered	2
Source: Deal Point Data	