

**2016**

PROXY SEASON

# Corporate Governance Practices and Trends

A Comparison of Large Public Companies and  
Silicon Valley Companies

Fenwick  
FENWICK & WEST LLP

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Silicon Valley Companies

## Overview

Corporate governance practices vary significantly among public companies. This is a reflection of many factors, including:

- Differences in the stage of development of companies, including the relative importance placed on various values (for example, focus on growth and scaling operations may be given more importance);
- Differences in the investor base for different types of companies;
- Differences in expectations of board members and advisors to companies and their boards, which can vary by size, age of company, stage of development, geography, industry and other factors; and
- The reality that corporate governance practices that are appropriate for large, long-established public companies can be meaningfully different from those for newer, smaller companies.

Since the passage of the Sarbanes-Oxley Act of 2002, which signaled the initial wave of corporate governance reforms among public companies, Fenwick & West has surveyed the corporate governance practices of the companies included in the Standard & Poor's 100 Index (S&P 100) and the technology and life sciences companies included in the Silicon Valley 150 Index (SV 150) each year.

In this report, we present statistical information for a subset of the data we have collected over the years, updating for the 2016 proxy season. These include size and number of meetings for boards and their primary committees, the number of insider directors, board leadership makeup, majority voting, board classification and use of a dual-class voting structure, as well as the frequency and number of stockholder proposals. We have also included data covering the number of women on boards of directors, stock ownership guidelines for executive officers and directors and additional information about committees beyond the primary committees. In each case, we present comparative data for the S&P 100 companies and for the technology and life sciences companies included in the SV 150, as well as trend information.

**Overview** *(continued)*

Governance practices and trends (or perceived trends) among the largest companies are generally presented as normative for all public companies. Fenwick & West collects information regarding public company governance practices to enable boards and companies in Silicon Valley to understand the actual corporate governance practices among their peers and neighbors, and understand how those practices contrast with practices among large companies nationally.

In the 2016 proxy season, there were approximately 250 public technology and life sciences companies<sup>1</sup> in “Silicon Valley,” of which the SV 150 captures those that are the largest by one measure — revenues.<sup>2</sup> The 2016 constituent companies of the SV 150 range from Apple and Hewlett-Packard (HP) with revenue of approximately \$200B and \$110B, respectively, to Ultratech and Marketo with revenue of approximately \$151M and \$150M, respectively, in each case for the four quarters ended on or about December 31, 2015. HP went public in 1957, Apple in 1980, Ultratech in 1993 and Marketo in 2013. Apple and HP’s peers clearly include companies in the S&P 100, of which they are also constituent members (eight companies were constituents of both indices for the survey in the 2016 proxy season), where market capitalization averages approximately \$118B.<sup>3</sup> Ultratech and Marketo’s peers are smaller technology companies that went public more recently and have market capitalizations well under \$5B. In terms of number of employees, the SV 150 averages 9,535 employees (with a median of 1,803 employees), ranging from Hewlett Packard Enterprise with 240,000 employees spread around the world in dozens of countries to companies such as Five Prime Therapeutics with 154 employees all in the United States, as of the end of their respective fiscal years 2015. The S&P 100 averages 135,000 employees and includes Wal-Mart with 2.3 million employees in more than two dozen countries at its most recent fiscal year end. Compared to the S&P 100, SV 150 companies are on average much smaller and younger, have lower revenue and are concentrated in the technology and life sciences industries. As the graphs on pages 4 through 7 illustrate, SV 150 companies also tend to have significantly greater ownership by the board and management than S&P 100 companies (whether measured by equity ownership or voting power).

- 1 The number fluctuates constantly as some companies complete initial public offerings and others are acquired. As of November 20, 2015, Hoover’s includes 423 public companies in Silicon Valley (defined by the *San Jose Mercury News* as Alameda, Contra Costa, San Francisco, San Mateo and Santa Clara counties). Of the 423 public companies in Silicon Valley, we consider more than 275 of them technology or life sciences companies based on their “Line of Business” description from Hoover’s as well as their initial sources of funding. The number of Silicon Valley public companies is down from a high of 417 reached in 2000 during the dot-com era. See “Vanishing Public Companies Lead To The Incredible Shrinking Silicon Valley” (*SiliconBeat* February 17, 2010) and “Outside Silicon Valley, IPO Market Still in Drought” (*Seeking Alpha* May 14, 2011).
- 2 See the “Methodology—Group Makeup” section below for a more detailed discussion of the makeup of the SV 150 and the geography of Silicon Valley for its purposes, including footnote 18.
- 3 The average market capitalization of the SV 150 at the time of announcement of the current index list (see footnote 18) was approximately \$19.6B, ranging from Aviat Networks at approximately \$45M to Apple at approximately \$604.3B with a median of \$2.3B. The median revenue of the SV 150 for the four quarters ending on or about December 31, 2015 was approximately \$602M. It is also worth noting that this year 30 SV 150 companies are also constituents of the S&P 500.

**Overview** *(continued)*

While not specifically studied in this report, it is worth noting that the broad range of companies in the SV 150 (whether measured in terms of size, age or revenue) is associated with a corresponding range of governance practices. Comparison of governance practice statistics and trends for the top 15<sup>4</sup>, top 50<sup>5</sup>, middle 50<sup>6</sup> and bottom 50<sup>7</sup> companies of the SV 150 (in terms of revenue) bears this out.<sup>8</sup> A few examples of such comparisons are included in this report. Additional comparison information of the top 15, top 50, middle 50 and bottom 50 companies of the SV 150 (as well as other data not presented in this report<sup>9</sup>) may be obtained by consulting your Fenwick & West Securities Partner.

- 4 The top 15 includes companies, eight of which are included in the S&P 100 (see footnote 28), with revenue of approximately \$6.7B or more and market capitalizations averaging \$152.3B, ranging from Synnex at approximately \$3.7B to Apple at approximately \$604.3B at the time of announcement of the current index list (see footnote 18).
- 5 The top 50 includes companies with revenue of approximately \$1.6B or more and market capitalizations averaging \$54.4B, ranging from Super Micro at approximately \$1.6B to Apple at approximately \$604.3B at the time of announcement of the current index list (see footnote 18).
- 6 The middle 50 includes companies with revenue of at least approximately \$400M but less than approximately \$1.5B and market capitalizations averaging \$3.3B, ranging from Rocket Fuel at approximately \$137M to Workday at approximately \$3.9B at the time of announcement of the current index list (see footnote 18).
- 7 The bottom 50 includes companies with revenue of at least approximately \$181M but less than \$400M and market capitalizations averaging \$979M, ranging from Aviat Networks at approximately \$45M to Guidance Software at approximately \$3.9B at the time of announcement of the current index list (see footnote 18).
- 8 Contrasting the top 15 or top 20 SV 150 companies (in the latter case, companies with revenue of approximately \$5.6B or more and market capitalizations averaging \$117.2B at the time of announcement of the current index list) against the remaining SV 150 companies is similarly enlightening (see footnote 18). In 2015, the SV 150 included 22 life sciences companies (broadly defined) and 128 technology companies. There are also some differences between technology and life sciences companies as groups within the SV 150.
- 9 Such as comparisons of the top 15 or top 20 SV 150 companies against the remaining SV 150 companies, comparisons of technology and life sciences companies as separate groups within the SV 150, or other details related to the topics covered in this report.

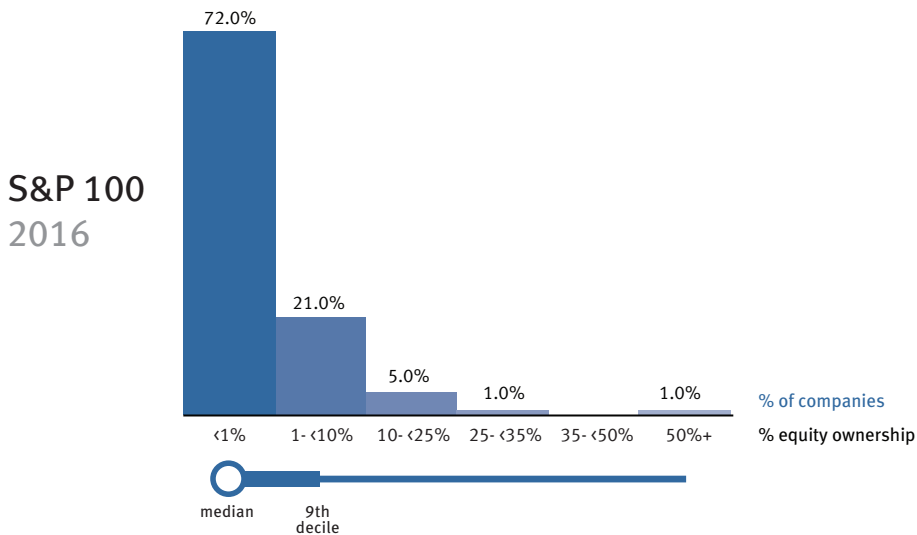
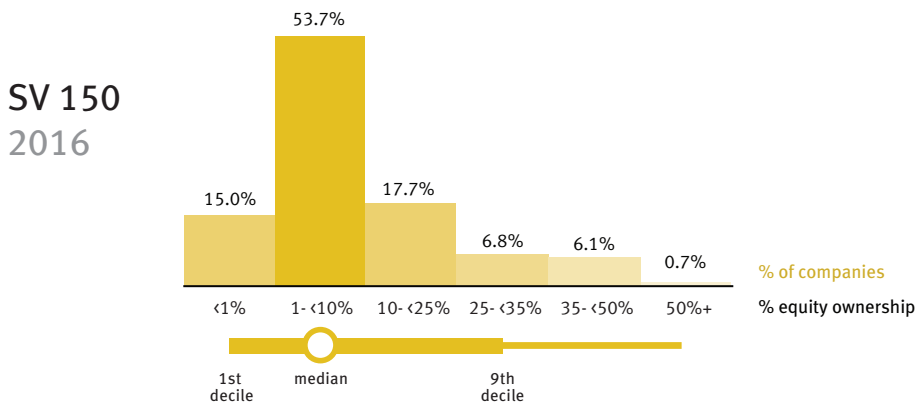
Overview (continued)

**Equity Ownership by Executives and Directors**

The distribution of simple equity ownership skews higher among the technology and life sciences companies in the SV 150 (average 10.3%) than among S&P 100 companies (average 2.8%).

*The graphs below show the distribution of the percentage of simple equity ownership of the directors and executive officers of the companies in each of the SV 150 and the S&P 100 for the 2016 proxy season.*

EXECUTIVE AND DIRECTOR EQUITY OWNERSHIP — DISTRIBUTIONS



Overview (continued)

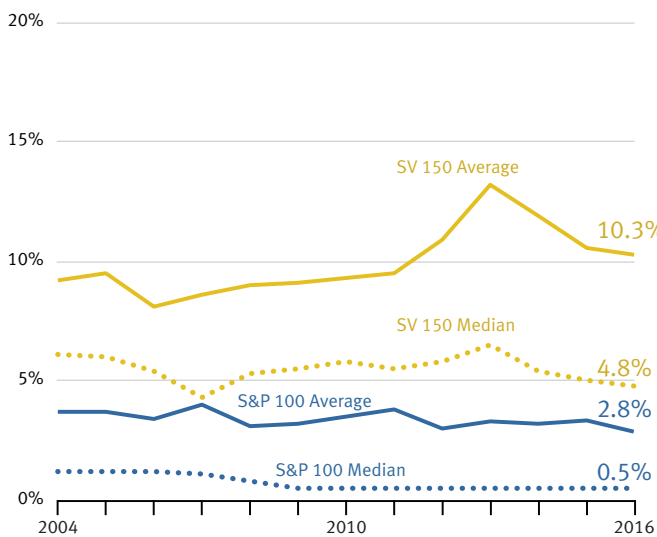
Equity Ownership by Executives and Directors (continued)

As noted above, the distribution of simple equity ownership skews higher among the technology and life sciences companies in the SV 150, and that difference has held fairly steady over time — increasing in recent years.

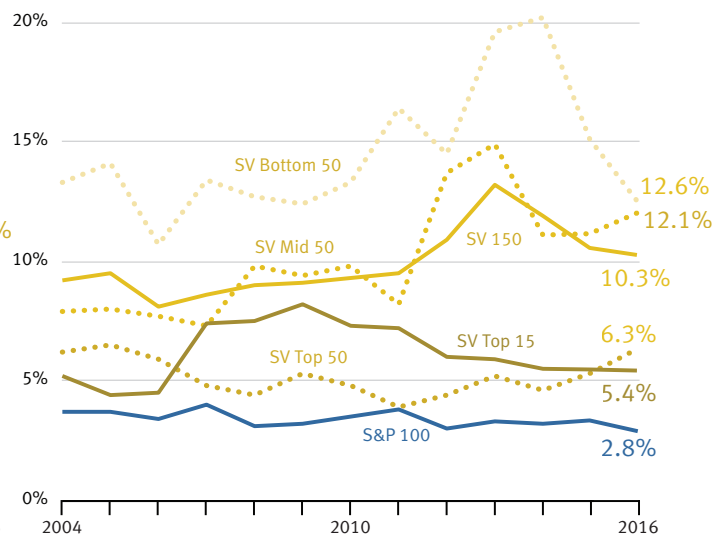
The graphs below show the average percentages of simple equity ownership of the directors and executive officers of the companies in each of the SV 150 and the S&P 100 as a group from the 2004 through 2016 proxy seasons as well as the percentages of average equity ownership for the SV 150 broken down by the top 15, top 50, middle 50 and bottom 50 companies.

EXECUTIVE AND DIRECTOR EQUITY OWNERSHIP — TRENDS OVER TIME

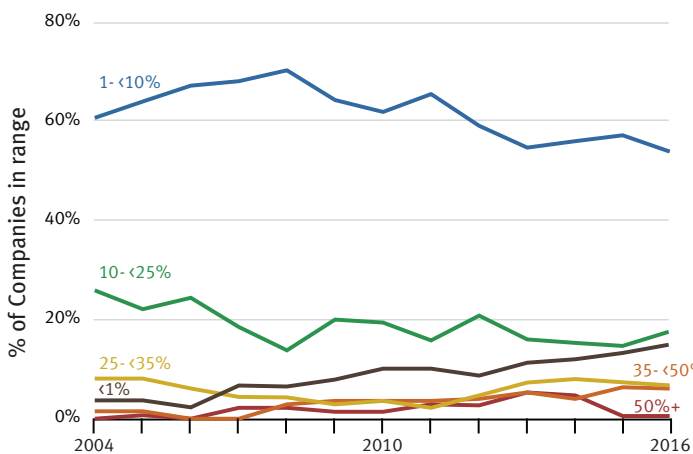
Average & Median Comparison



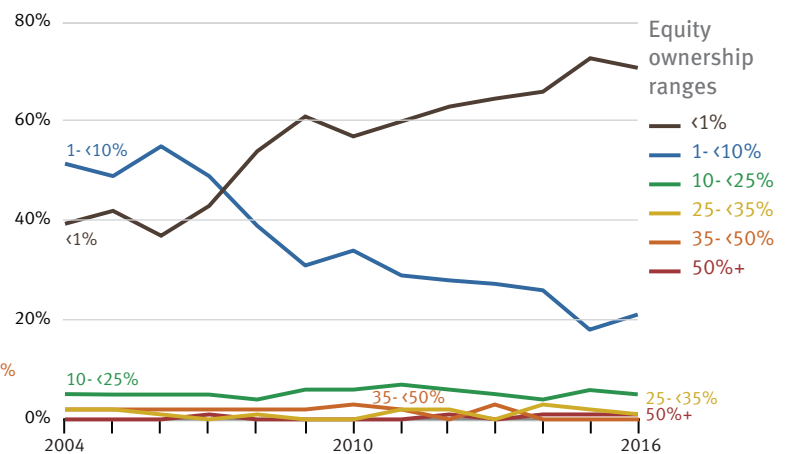
SV 150 Breakdown – Average Equity Ownership



SV 150



S&P 100



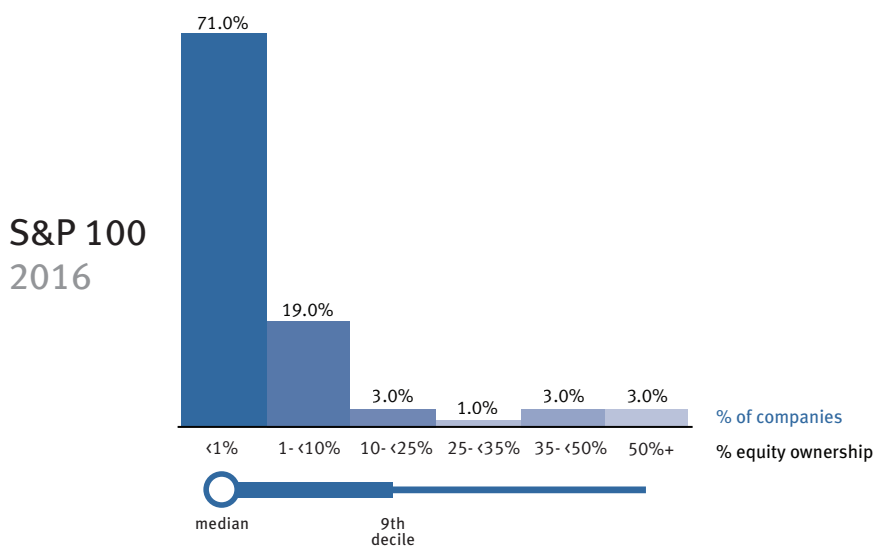
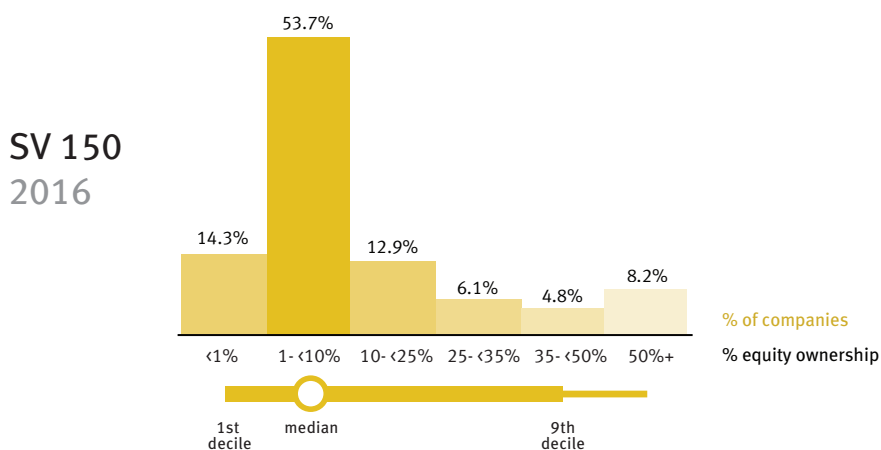
Overview (continued)

**Voting Power Ownership by Executives and Directors**

The distribution of voting power ownership skews higher among the technology and life sciences companies in the SV 150 (average 14.2%) than among S&P 100 companies (average 4.8%).

*The graphs below show the distribution of the percentage ownership of total voting power of the directors and executive officers of the companies in each of the SV 150 and the S&P 100 for the 2016 proxy season.*

EXECUTIVE AND DIRECTOR VOTING OWNERSHIP — DISTRIBUTIONS





Overview (continued)

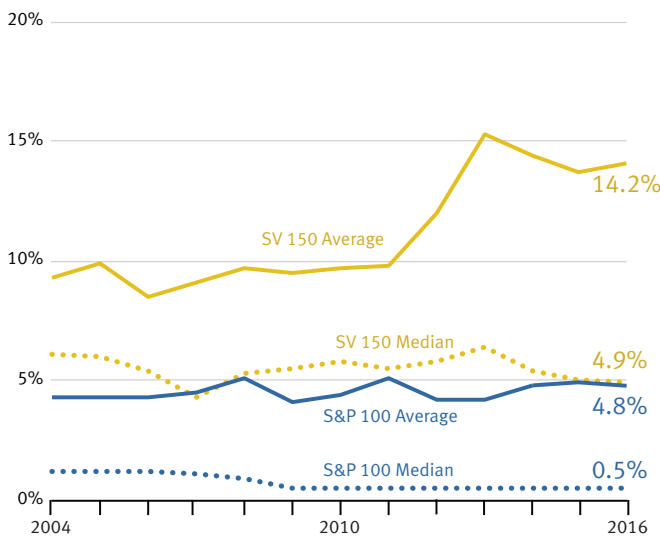
Voting Power Ownership by Executives and Directors (continued)

As noted above, the distribution of voting power ownership skews higher among the technology and life sciences companies in the SV 150, and that difference has held fairly steady over time — increasing in recent years.

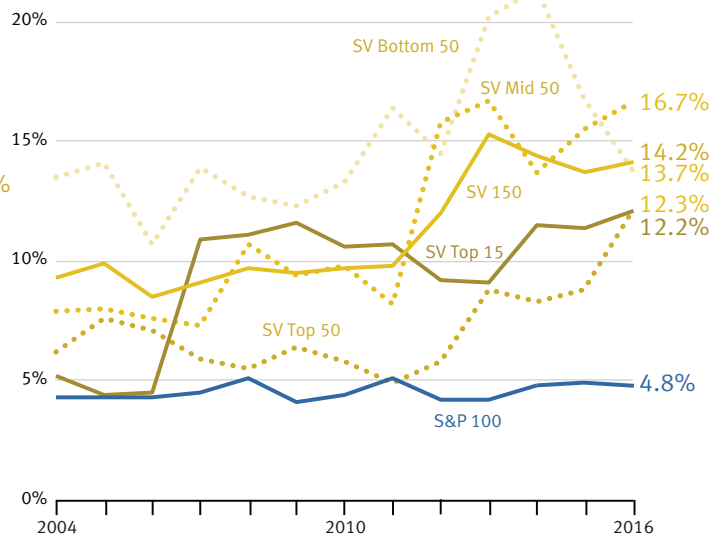
The graphs below show the average percentages of ownership of total voting power of the directors and executive officers of the companies in each of the SV 150 and the S&P 100 as a group from the 2004 through 2016 proxy seasons, as well as the percentages of average voting ownership for the SV 150 broken down by the top 15, top 50, middle 50, and bottom 50 companies.

EXECUTIVE AND DIRECTOR VOTING OWNERSHIP — TRENDS OVER TIME

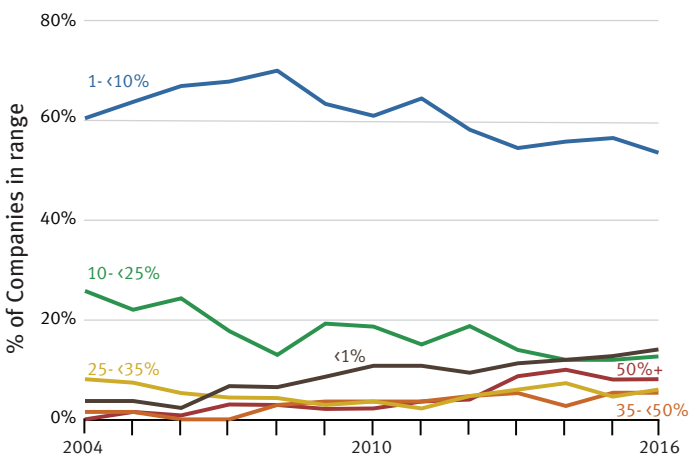
Average & Median Comparison



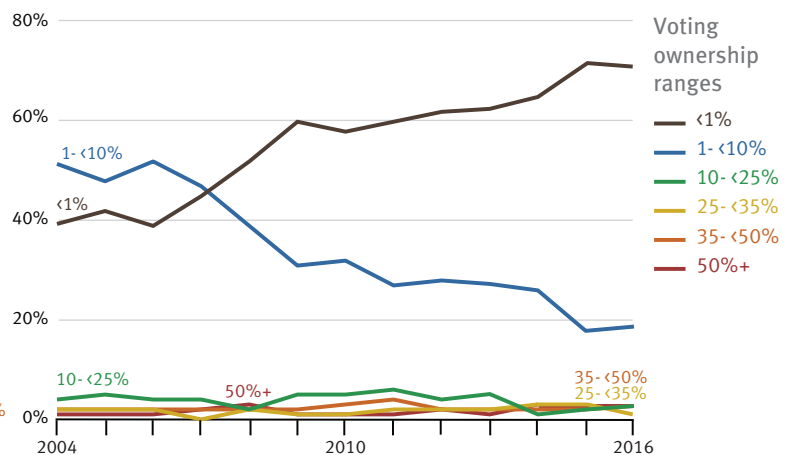
SV 150 Breakdown – Average Voting Ownership



SV 150



S&P 100

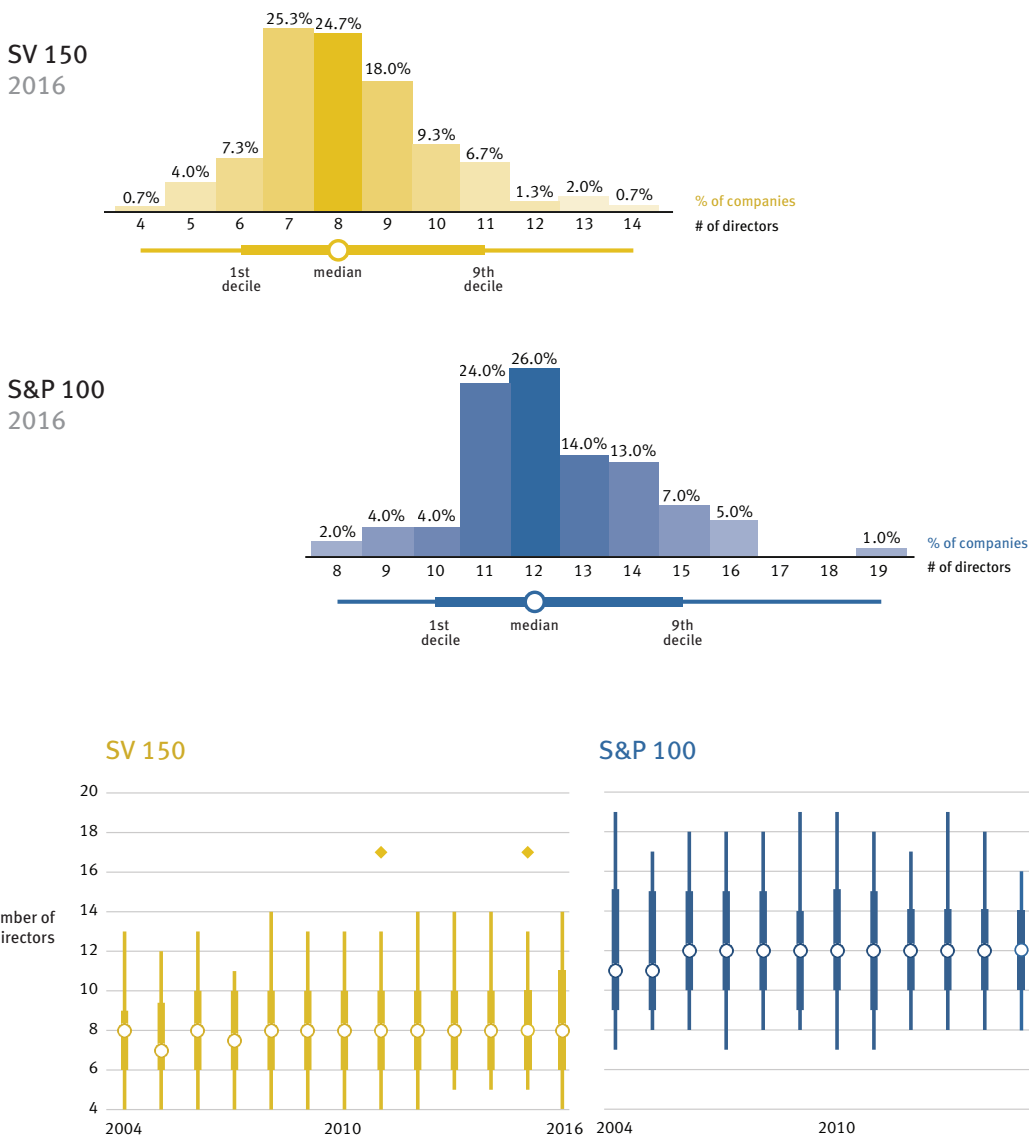


## Board Size and Meeting Frequency

The number of directors tends to be substantially lower among the technology and life sciences companies in the SV 150 (average = 8.2 directors) than among S&P 100 companies (average = 12.4 directors).

*The following graphs show the distribution by number of directors among the two groups during the 2016 proxy season, as well as the trend over the period from the 2004 through 2016 proxy seasons (showing both the median number and the cutoffs for the deciles with the most and fewest directors).*

### SIZE OF BOARD OF DIRECTORS — DISTRIBUTION AND TRENDS OVER TIME

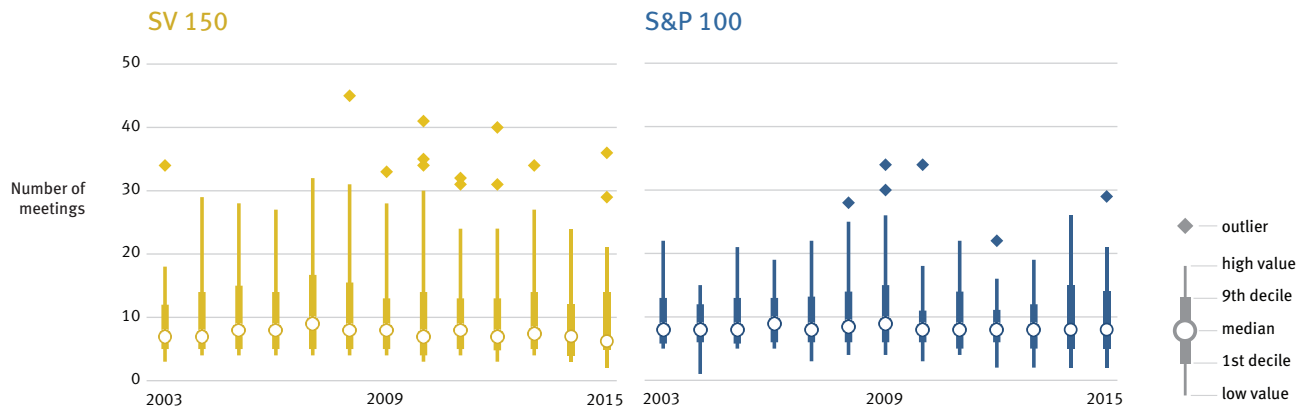
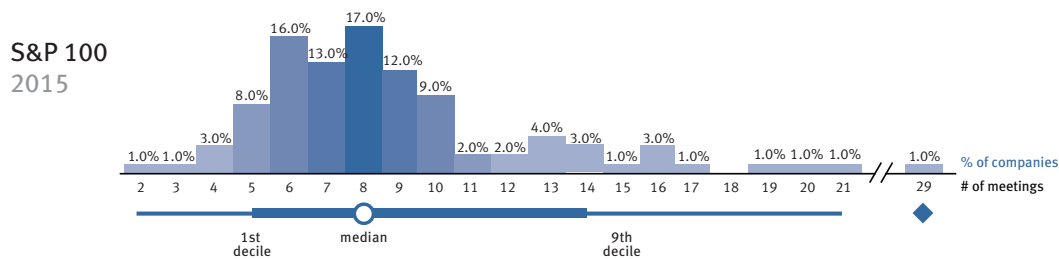
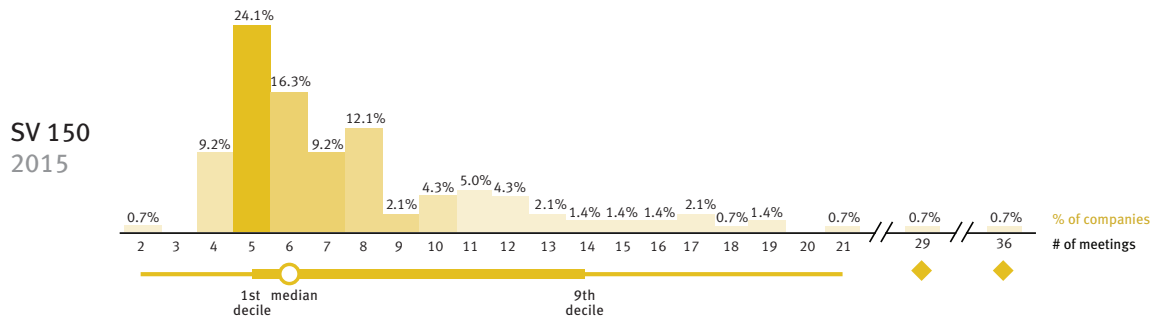


Board Size and Meeting Frequency (continued)

The technology and life sciences companies in the SV 150 held board meetings more often in 2016 (average = 8.1 in 2015 compared to 7.8 in 2014), while S&P 100 companies decreased meeting frequency (average = 8.9 in 2015 compared to 9.1 in 2014). Although, SV 150 companies continued to skew noticeably toward fewer meetings compared to the S&P 100.

The following graphs show the distribution by number of board meetings among the two groups in 2015 as reported during the 2016 proxy season, as well as the trend over the period from 2003 through 2015 (showing both the median number and the cutoffs for the deciles with the most and fewest meetings), as reported in the 2004 through 2016 proxy seasons.

NUMBER OF BOARD OF DIRECTORS MEETINGS — DISTRIBUTION AND TRENDS OVER TIME

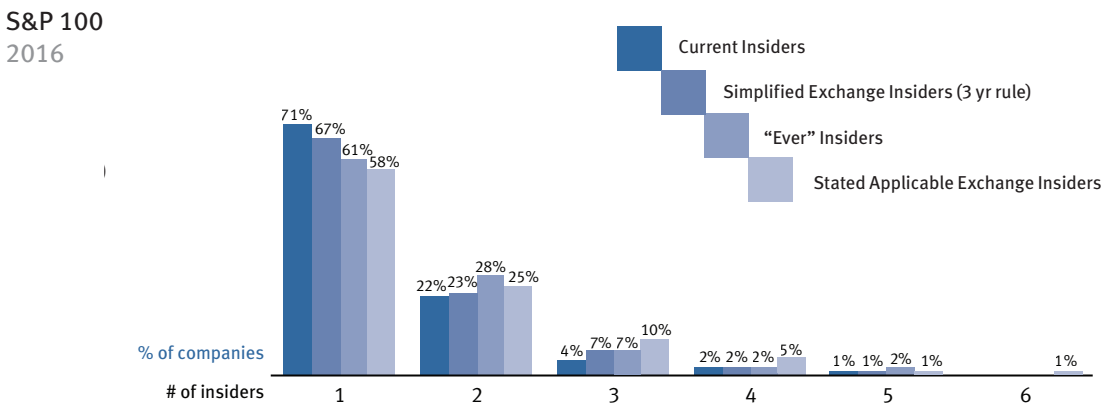
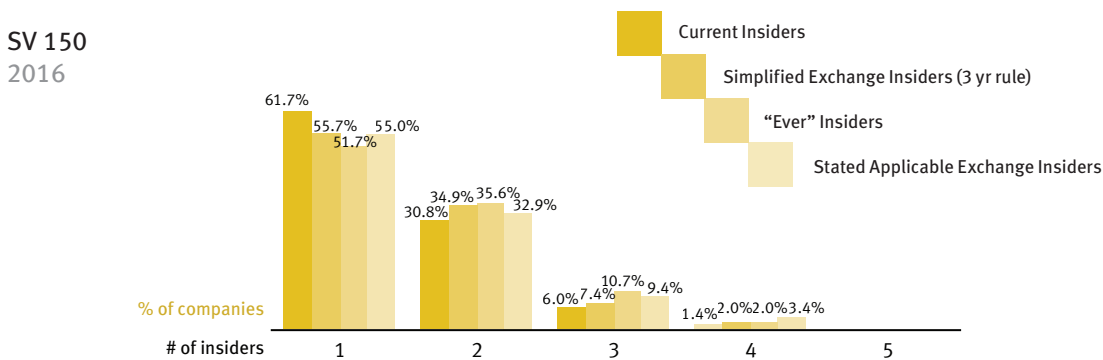


## Insider Directors

Insider directors are more common among members of the boards of the technology and life sciences companies included in the SV 150 than among board members at S&P 100 companies. While generally their prevalence has declined over time in both groups, the SV 150 has not reached the level of the S&P 100 at the start of the period covered by the survey. This is largely a function of the relative size of the boards in the two groups rather than the absolute number of insider directors per board.

*The following graphs show the distribution by number of insider directors among the two groups during the 2016 proxy season. In these graphs, we have shown “insider” status determined in various ways. See the discussion under “Insider / Independent” in the Methodology section at the end of this report for a description of the different methods of determining whether a director is an insider.*

### INSIDER DIRECTOR — DISTRIBUTION OF NUMBERS OF INSIDERS

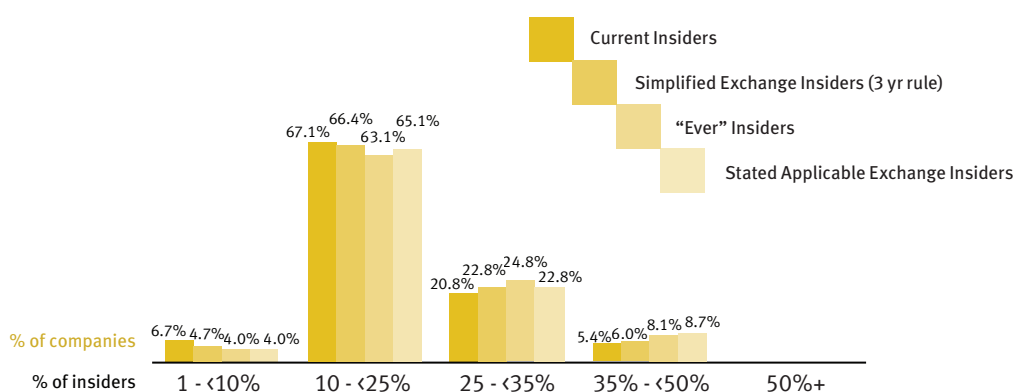


Insider Director (continued)

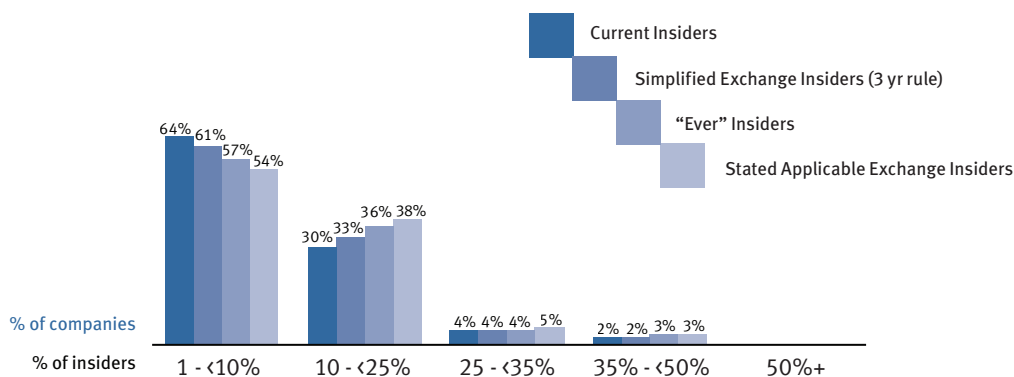
The following graphs show the distribution by percentage of insider directors among the two groups during the 2016 proxy season. In these graphs, we have shown “insider” status determined in various ways. See the discussion under “Insider / Independent” in the Methodology section at the end of this report for a description of the different methods of determining whether a director is an insider.

INSIDER DIRECTOR — DISTRIBUTION OF PERCENTAGES OF INSIDERS

SV 150  
2016



S&P 100  
2016



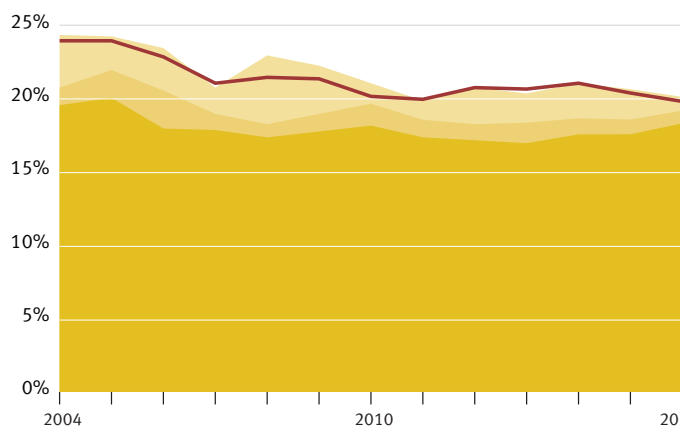
Insider Directors (continued)

The following graphs show the trend of the average as a percentage of the full board that are insiders for each group. In these graphs, we have shown “insider” status determined in various ways over the period from the 2004 through 2016 proxy seasons.

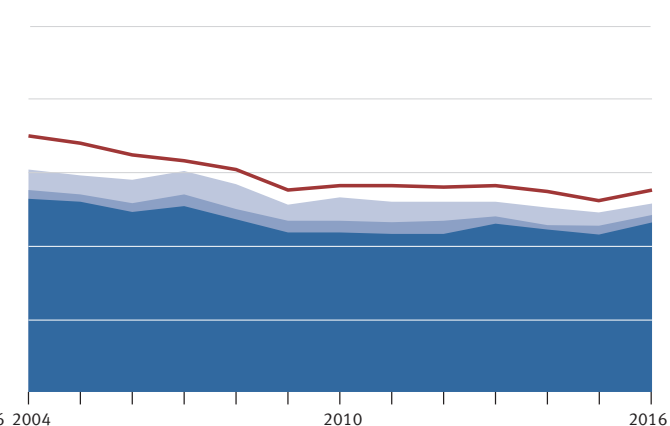
INSIDER DIRECTOR — TRENDS OVER TIME

- % Stated Applicable Exchange Insiders
- ■ % “Ever” Insiders
- ■ % Simplified Exchange Insiders (3 yr rule)
- ■ % Current Insiders

SV 150



S&P 100

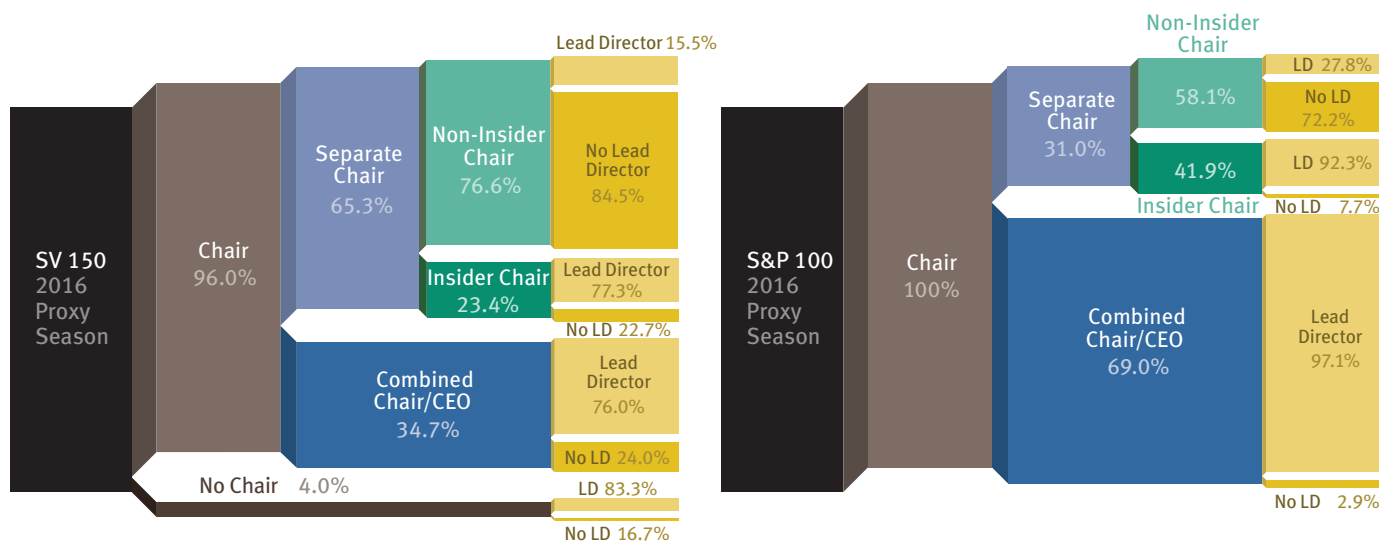


## Board Leadership

During the period covered by this survey, insider dominance of board leadership started lower and declined more rapidly among the technology and life sciences companies in the SV 150 than among S&P 100 companies. By the 2011 proxy season, almost half of SV 150 companies did not have a chair who was an insider (whether measured as a current insider or under the applicable exchange listing standard) — though that trend has largely stalled since then (52% in the 2016 proxy season, compared to only 18% in the S&P 100 for not having a current insider chair, and 47.3% under the applicable exchange listing standard, compared to only 14% in the S&P 100). In the 2016 proxy season, combined chair/CEOs existed at about one third of companies in the SV 150, while combined chair/CEOs exist at about 69% of S&P 100 companies (albeit with lead directors also present at about 84% of all S&P 100 companies).

*These graphs show the percentage of companies during the 2016 proxy season with a board chair, then of those with a chair, the percentage with a separate chair (rather than a combined chair/CEO), and then of those with a separate chair, the percentage with a chair who is not an insider (under the applicable exchange standard). In addition, for each branch, the graphic shows the percentage with some form of lead director (separate from any chair).*

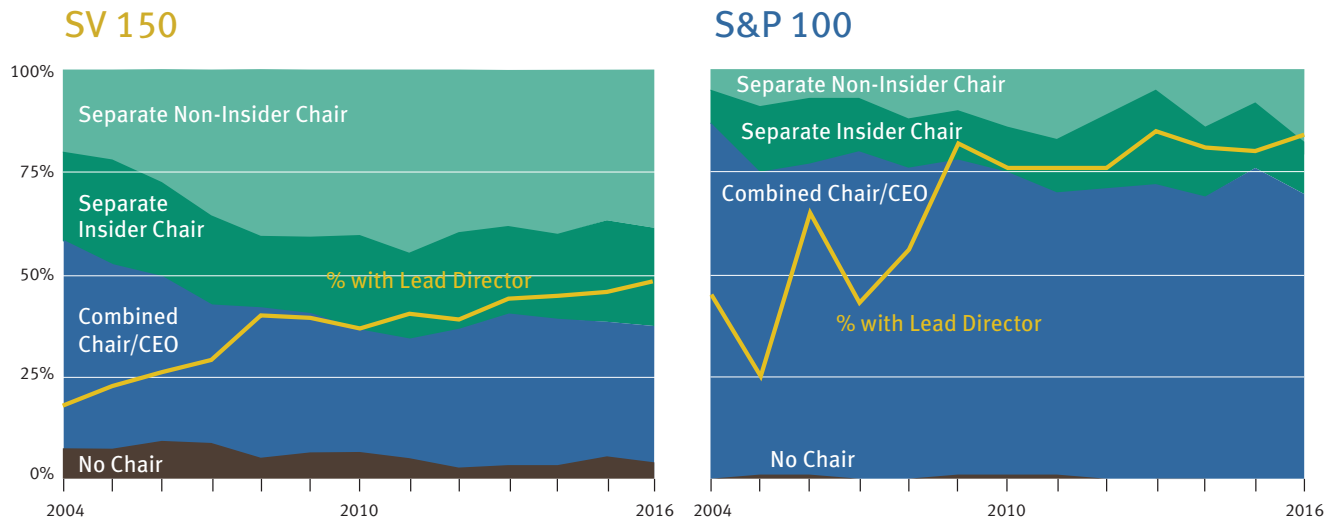
### BOARD LEADERSHIP — BRANCHING PERCENTAGES



Board Leadership (continued)

The graphs below track, from the 2004 through 2016 proxy seasons, the percentage of all companies with no chair, a combined chair/CEO, a separate but insider chair and a separate and non-insider chair (under the applicable exchange standard), as well as the percentage of all companies with some form of lead director.

BOARD LEADERSHIP—TRENDS OVER TIME



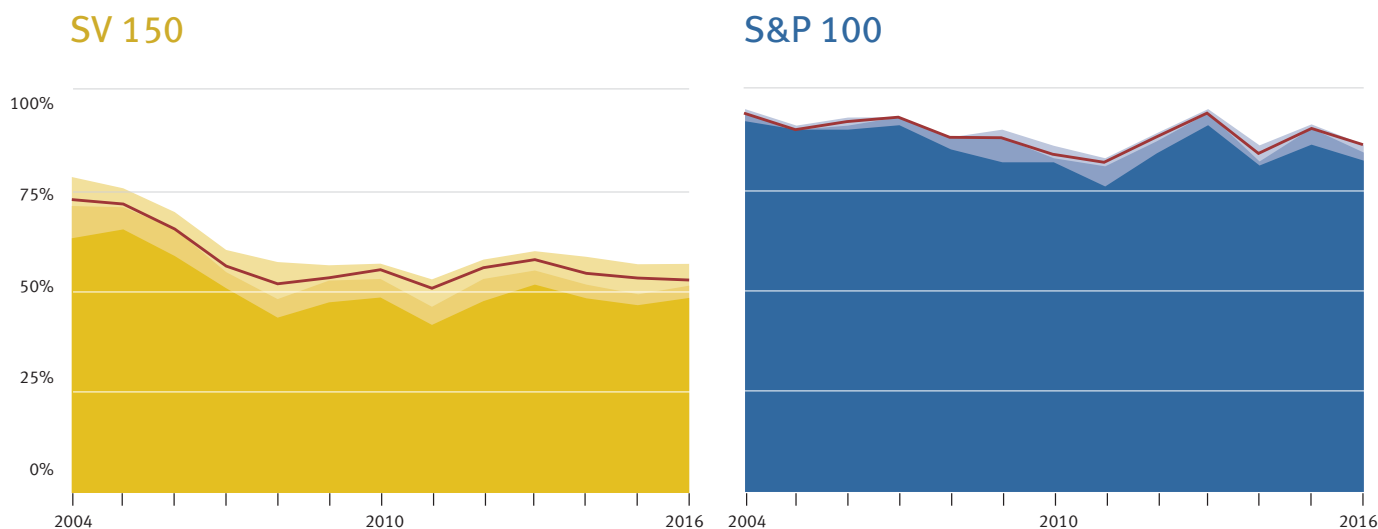


Board Leadership (continued)

These following graphs show the trend over time of the percentage of boards with chairs that are insiders for each group. In these graphs, we have shown “insider” status determined in various ways. See the discussion under “Insider / Independent” in the Methodology section at the end of this report for a description of the different methods of determining whether a chair is an insider.

INSIDER BOARD CHAIR — TRENDS OVER TIME

- % Stated Applicable Exchange Insiders
- ■ % “Ever” Insiders
- ■ % Simplified Exchange Insiders (3 yr rule)
- ■ % Current Insiders



## Board Diversity<sup>10</sup>

Under applicable SEC disclosure rules, companies are required to disclose whether they consider diversity in identifying nominees to the board of directors. However, companies have the flexibility to define diversity for themselves, and such definitions typically include a wide range of factors, not simply traditional diversity factors such as gender, race and ethnicity.<sup>11</sup> Consequently, it is fairly difficult to measure board diversity in a systematic way when relying primarily on the information in public filings.<sup>12</sup>

We have elected to track gender as a measure of board diversity for the technology and life sciences companies in the SV 150 and S&P 100 companies because gender can be more readily measured in public filings than other traditional diversity factors.

- <sup>10</sup> See *Gender Diversity in Silicon Valley: A Comparison of Silicon Valley Public Companies and Large Public Companies (2014 Proxy Season)* for a substantially more detailed review of gender diversity on the board of directors, as well as among the management teams, of SV 150 and S&P 100 companies. That report, a supplement to this survey that covers data from the 1996 through 2014 proxy seasons and includes a discussion of factors underlying the statistics as well as references to additional materials on the subject, is being published concurrently with this report. To be placed on an email list for future editions of the gender diversity survey when published, visit the [fenwick.com/Pages/Subscription-GD-Survey.aspx](http://fenwick.com/Pages/Subscription-GD-Survey.aspx).
- <sup>11</sup> See current Item 407(c)(2)(vi) of Regulation S-K (“Describe... whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy.”) and SEC Release No. 33-9089 (“We recognize that companies may define diversity in various ways, reflecting different perspectives. For instance, some companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin. We believe that for purposes of this disclosure requirement, companies should be allowed to define diversity in ways that they consider appropriate. As a result we have not defined diversity in the amendments.”). Companies typically include factors such as diversity of business experience, viewpoints, personal background (sometimes specifying race and gender) and relevant knowledge, skills or experience in technology, government, finance, accounting, international business, marketing and other areas (if they provide even this level of definition in their disclosures) when describing how their boards consider diversity when making nomination decisions. They do not typically describe how each sitting director or nominee measures against each of those factors (to the extent they enumerate them at all as part of the definition). See also “Corporate Reporting under the U.S. Securities and Exchange Commission’s Diversity Disclosure Rule: A Mixed-Methods Content Analysis” by Aaron A. Dhir (2015), which studied the diversity disclosures of the S&P 100 (as constituted as of December 16, 2010) during the four years subsequent to the enactment of the SEC’s diversity disclosure rule and found that only half of the companies defined diversity to include traditional factors such as gender, race and ethnicity while over 80% used a definition of diversity that referenced a director’s prior professional experience or other nonidentity-based factors. The author notes that to the extent the disclosure rule was intended to produce more diversity on boards along socio-demographic lines, it would be more effective to require companies to include disclosure about identity-based diversity factors such as gender, race and ethnicity rather than allowing companies to define diversity for themselves. In March 2015, a group of public pension funds petitioned the SEC to require detailed disclosure of directors’ gender, race and ethnicity. See “Public Pension Funds Petition SEC for More Disclosure on Board Diversity,” in *Bloomberg BNA*.
- <sup>12</sup> However, for a report on traditional diversity factors, see “Missing Pieces: Women and Minorities on Fortune 500 Boards — 2012 Alliance for Board Diversity Census” (August 15, 2013), which “conducted extensive research to confirm the gender, race and ethnicity of directors” and found that white men made up 73.3% of the Fortune 500 board seats in 2012, with white women, minority men and minority women making up 13.4%, 10.1% and 3.2%, respectively.

**Board Diversity** *(continued)*

A review of our data suggests that board size may be a significant factor affecting the number of women directors and to some degree that is a function of the relatively small size of many SV 150 companies.<sup>13</sup> For example, while S&P 100 companies tend to have more women directors than SV 150 companies when measured in absolute numbers (S&P 100 average = 2.9 and SV 150 average = 1.2 women in the 2016 proxy season), the difference (while significant) is less pronounced when measured as a percentage of the total number of directors (S&P 100 average = 23.1% of directors and SV 150 average = 14.1% of directors in the 2016 proxy season). In addition, the data for the top 15 of the SV 150 is closer to that of the S&P 100 than to the SV 150 generally (top 15 average = 2.4 in the 2016 proxy season, up from average = 1.9 in the 2011 proxy season), despite having a smaller average board size (top 15 of SV 150 average = 10.5; S&P 100 average = 12.4). When measured as a percentage of the total number of directors, the top 15 of the SV 150 are now very similar to their S&P 100 peers (top 15 average = 22.2% women directors in the 2016 proxy season; up from average = 16.7% in the 2011 proxy season).<sup>14</sup>

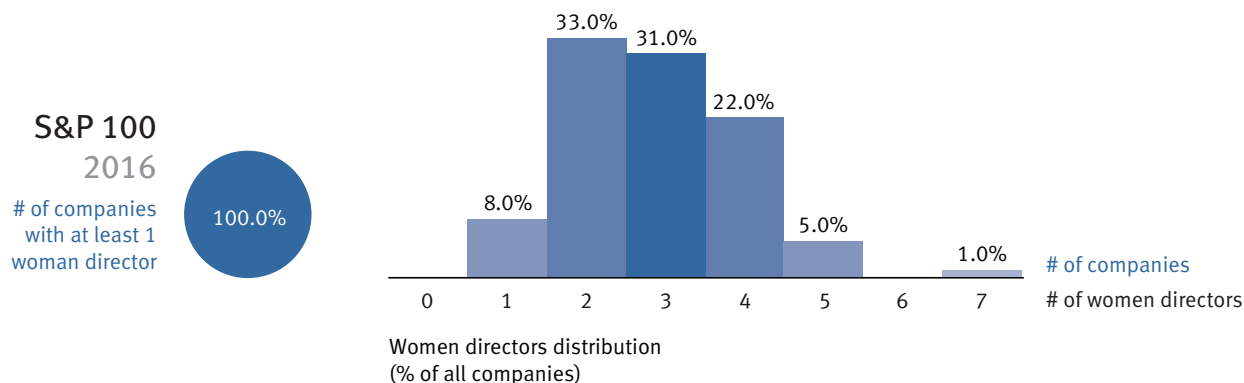
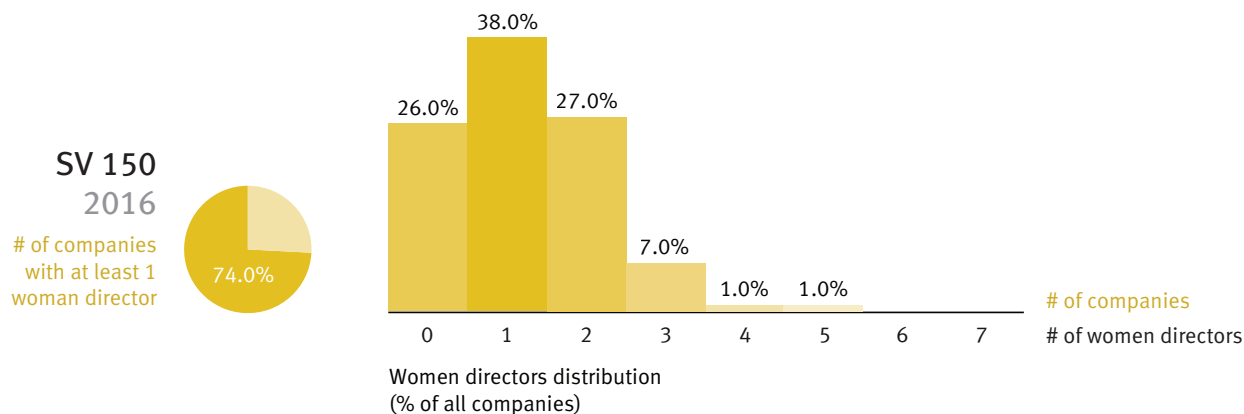
Further, significantly affecting the average in the SV 150 are the 39 companies without any women directors (26% of SV 150 companies, down from 82% in 1996 and 52% as recently as 2011), of which 24 are companies with 7 or fewer total board members (and only 1 of which has more than 9 directors). Overall, 2016 continued the long-term trend in the SV 150 of increasing numbers of women directors (both in absolute numbers and as a percentage of board members) and declining numbers of boards without women members. The rate of increase in women directors for the SV 150 continues to be higher than among S&P 100 companies.

- 13 While our data focuses on a limited number of public companies in Silicon Valley and large public companies nationally, this observation appears to be true among the largest companies as well. See the Missing Pieces report discussed in footnote 12, which includes data for Fortune 100 and Fortune 500 companies and shows the larger Fortune 100 companies to be more gender diverse, with white men holding 67.9% of Fortune 100 board seats and 73.3% of Fortune 500 board seats in 2012, while white women, minority men and minority women held 15.9%, 12.4% and 3.9% of Fortune 100 seats and 13.4%, 10.1% and 3.2% of Fortune 500 seats, respectively. Fortune 100 companies had a mean board size of 12.1 compared with a mean of 11.0 for Fortune 500 companies. See also “The Gender Diversity Index” by 2020 Women on Boards (2011-2013), which found that the percentage of board seats held by women in the Fortune 501-1000 (14.8% in 2013) was lower than that held in the larger companies of the Fortune 1-500 (18% in 2013). A similar conclusion was reached by the “2015-16 UC Davis Study of California Women Business Leaders – A Census of Women Directors and Highest-Paid Executives,” a review of the 400 largest public companies in California finding (as specifically noted in prior years) that the representation of women on boards of directors is strongly correlated with company size. Overall, the largest companies have more than twice the proportional representation of women on the board as the smallest companies (20.4% versus 8.5%). Similarly, The Boston Club’s “THE PUBLIC SECTOR WEIGHS IN - The 2015 Census of Women Directors and Executive Officers of Massachusetts Public Companies,” a review of the 100 largest public companies in Massachusetts shows that women make up 17.9% of directors at companies with revenue of \$5B or more, but only 9.1% of directors at companies with \$500M to \$999M of revenue). See also “Uneven Progress: Female Directors in the Russell 3000” by Annalisa Barrett of The Corporate Library (2010), which reached a similar conclusion (“gender diversity is much less prevalent in the universe beyond the largest and highest-profile companies” and while the “vast majority (89 percent) of the companies in the S&P 500 have at least one female director,... only 60 percent of companies comprising the Russell 3000 as a whole, and only half of Russell 2000 companies [all smaller companies], have at least one female director”). The “Annual Update of Women Board Directors and Executive Officers in the Regions 2016” by ION reports 68% of companies comprising the Russell 3000 having at least one female director. See also the “Compensation & Governance Outlook 2016” (“[I]n 2012, 79 percent of companies in the S&P 1500 had one or more female board members”). Compare “GMI Ratings’ 2013 Women on Boards Survey” by Kimberly Gladman and Michelle Lamb (April 2013) (“In general, larger companies have more diverse boards: currently 16.9% of S&P 500 directors are women, compared to 13.5% of directors in the S&P Midcap Index and 11.3% in the S&P Smallcaps. The S&P 1500, which is made up of the preceding three indices combined, has 14.0% women on its boards; the Russell 1000 (comprised of the 1000 largest companies in the US) has 14.7%, and the small-cap Russell 2000 has only 10.0%.”).
- 14 As many companies add board seats, their boards generally expand the mix of skills and experiences that they seek to have represented, often into areas where women are more represented than they are in the mix in effect for smaller boards or companies at earlier stages of development.

Board Diversity (continued)

The following graphs show the percentage of companies with at least one woman director and the distributions by number of women directors among the boards of companies in each group during the 2016 proxy season.

WOMEN DIRECTORS — 2016 PROXY SEASON DISTRIBUTION

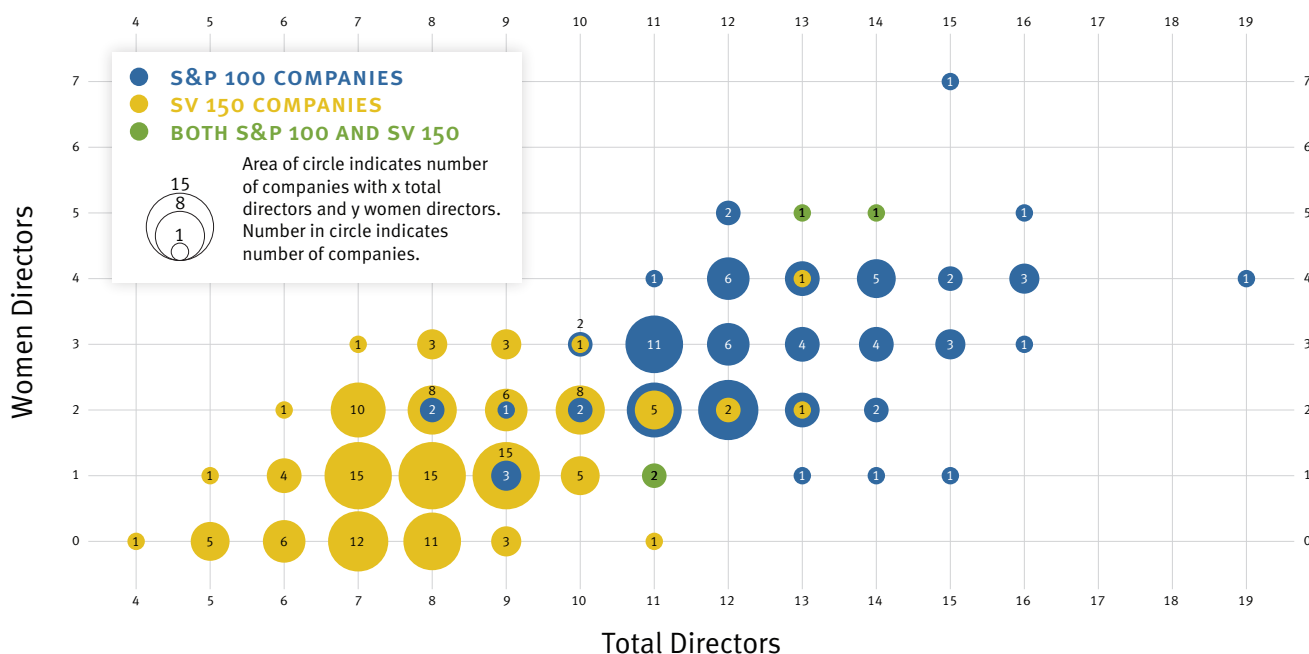


Board Diversity (continued)

The following graph shows the distribution of women directors by number of women directors at each board size among the boards of companies in each group during the 2016 proxy season.

DISTRIBUTIONS BY BOARD SIZE vs. NUMBER OF WOMEN DIRECTORS

S&P 100 (100 COMPANIES) vs. SV 150 (150 COMPANIES) — 2016 PROXY SEASON



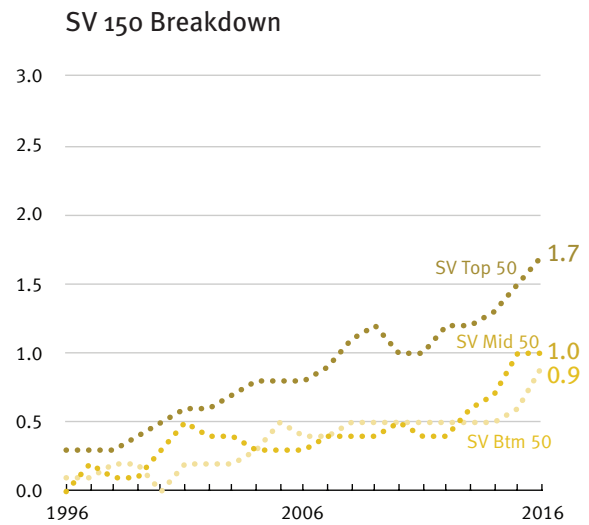
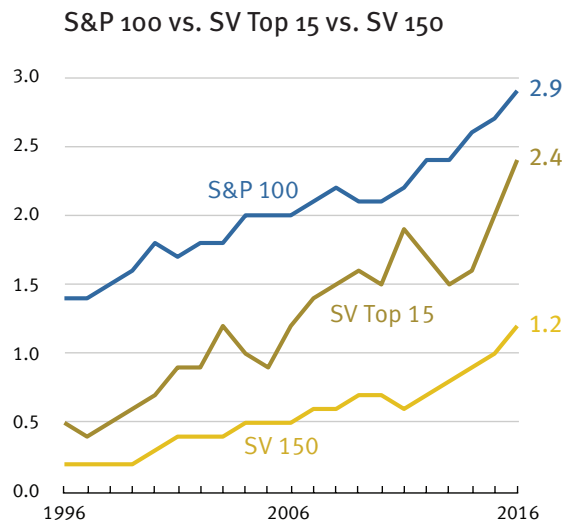
During the period covered by the survey, there has been a general upward trend in both groups of companies in the average percentage of board members that are women (SV 150 average = 2.1% in 1996 and 14.1% in the 2016 proxy season; top 15 of the SV 150 average 5.7% in 1996 and 22.2% in the 2016 proxy season; S&P 100 average = 10.9% in 1996 and 23.1% in the 2016 proxy season), though there was a period of relative stagnation from the 2008 through 2011 proxy seasons. However, while there has been a distinct downward trend in the percentage of SV 150 companies with no women directors (82.3% in 1996; 26% in the 2016 proxy season), there were no such companies in the S&P 100 in the 2016 proxy season (10.6% in 1996).<sup>15</sup> Our data shows that within the SV 150, this fairly closely tracks with the size of company (measured by revenue), which also correlates with board size, with 40% of the bottom 50 companies having no women directors in the 2016 proxy season but that being true for none of the top 15 companies of the SV 150. Overall, 2016 continued the long-term trend in the SV 150 of increasing numbers of women directors (both in absolute numbers and as a percentage of board members) and declining numbers of boards without women members. The rate of increase for the SV 150 continues to be higher than among S&P 100 companies.

<sup>15</sup> During the period of the survey (the 1996 to 2015 proxy season), the top 15 of the SV 150 moved from 50.0% of companies with no women serving as directors in 1996 to none in the 2015 proxy season. In fact, the number of companies with no women serving as directors fell meaningfully at all levels of the SV 150.

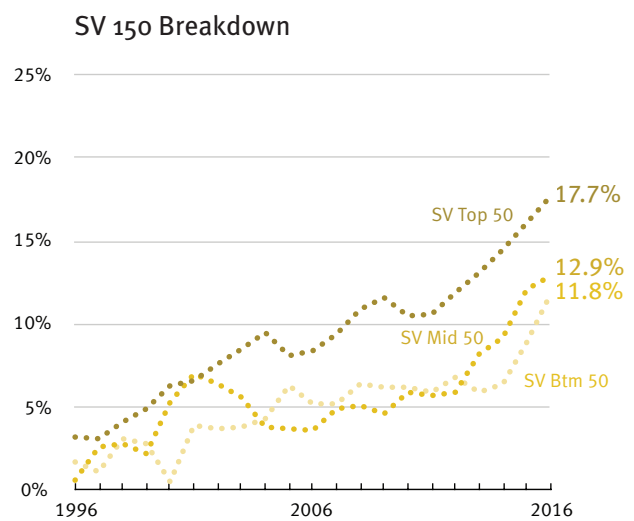
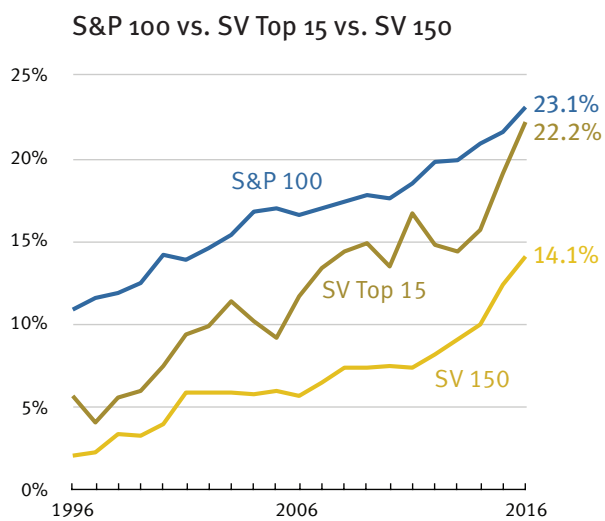
Board Diversity (continued)

The following graphs show the average number and the average percentage of women directors for each of the SV 150, the top 15 of the SV 150 and the S&P 100 (and with the SV 150 broken down by the top 50, middle 50 and bottom 50 companies), over the period from the 1996 through 2016 proxy seasons.

AVERAGE NUMBER OF WOMEN DIRECTORS — 1996–2016



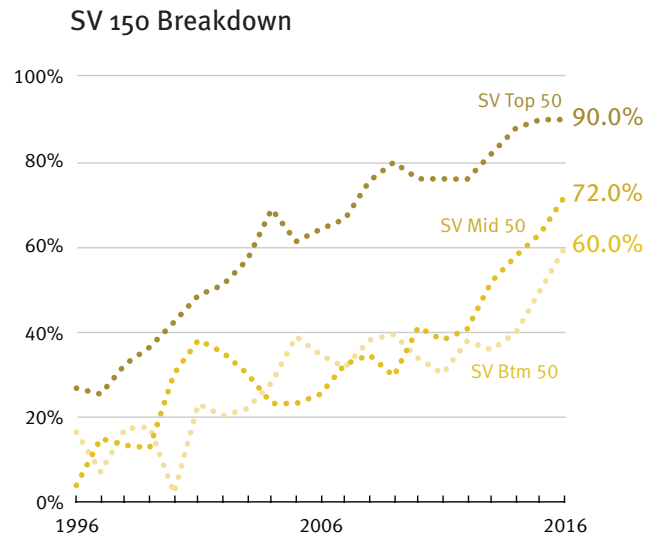
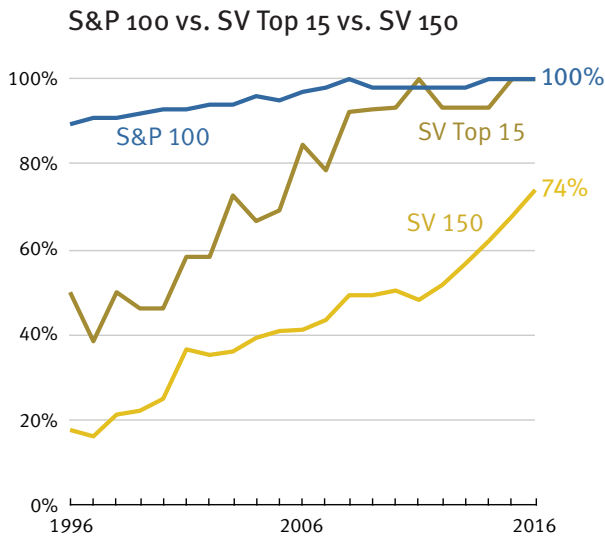
AVERAGE PERCENTAGE OF WOMEN DIRECTORS — 1996–2016



Board Diversity (continued)

The following graphs show the percentage of companies with at least one woman director in each of the SV 150, the top 15 of the SV 150 and the S&P 100 (and with the SV 150 broken down by the top 50, middle 50 and bottom 50 companies) over the period from the 1996 through 2016 proxy seasons.

PERCENTAGE OF COMPANIES WITH AT LEAST ONE WOMEN DIRECTOR — 1996–2016



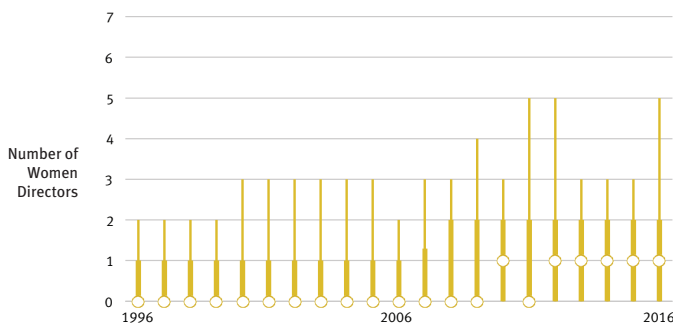
Board Diversity (continued)

The following graphs show the trend in the distribution by number and percentage of women directors in each group (showing both the median number or percentage and the cutoffs for the deciles with the most women directors) over the period from the 1996 through 2016 proxy seasons.

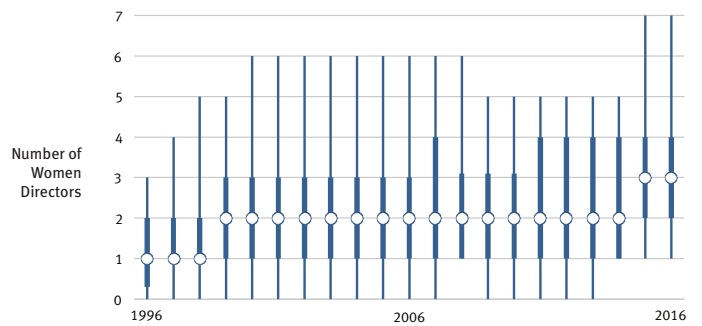
DISTRIBUTION OF NUMBER AND PERCENTAGE OF WOMEN DIRECTORS — 1996–2016

Women Directors: Numbers  
1996-2016

SV 150

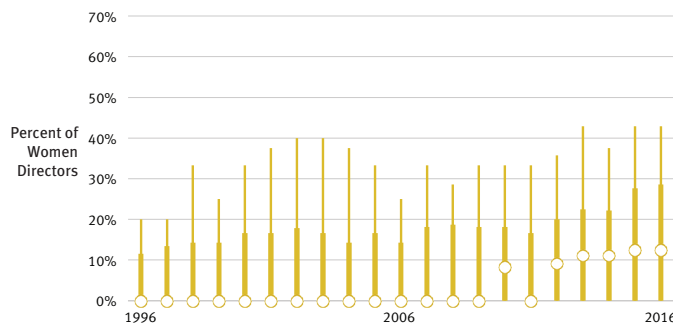


S&P 100

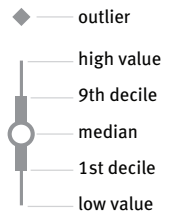
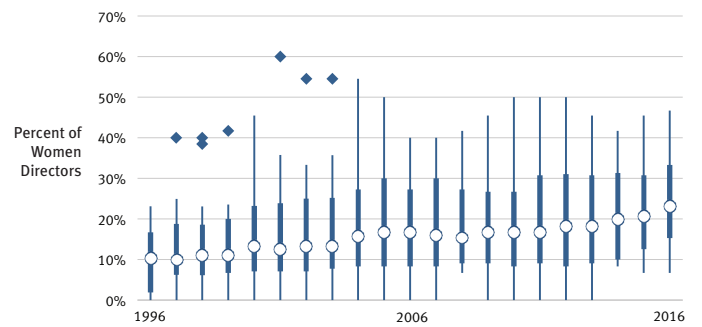


Women Directors: Percentages  
1996-2016

SV 150



S&P 100



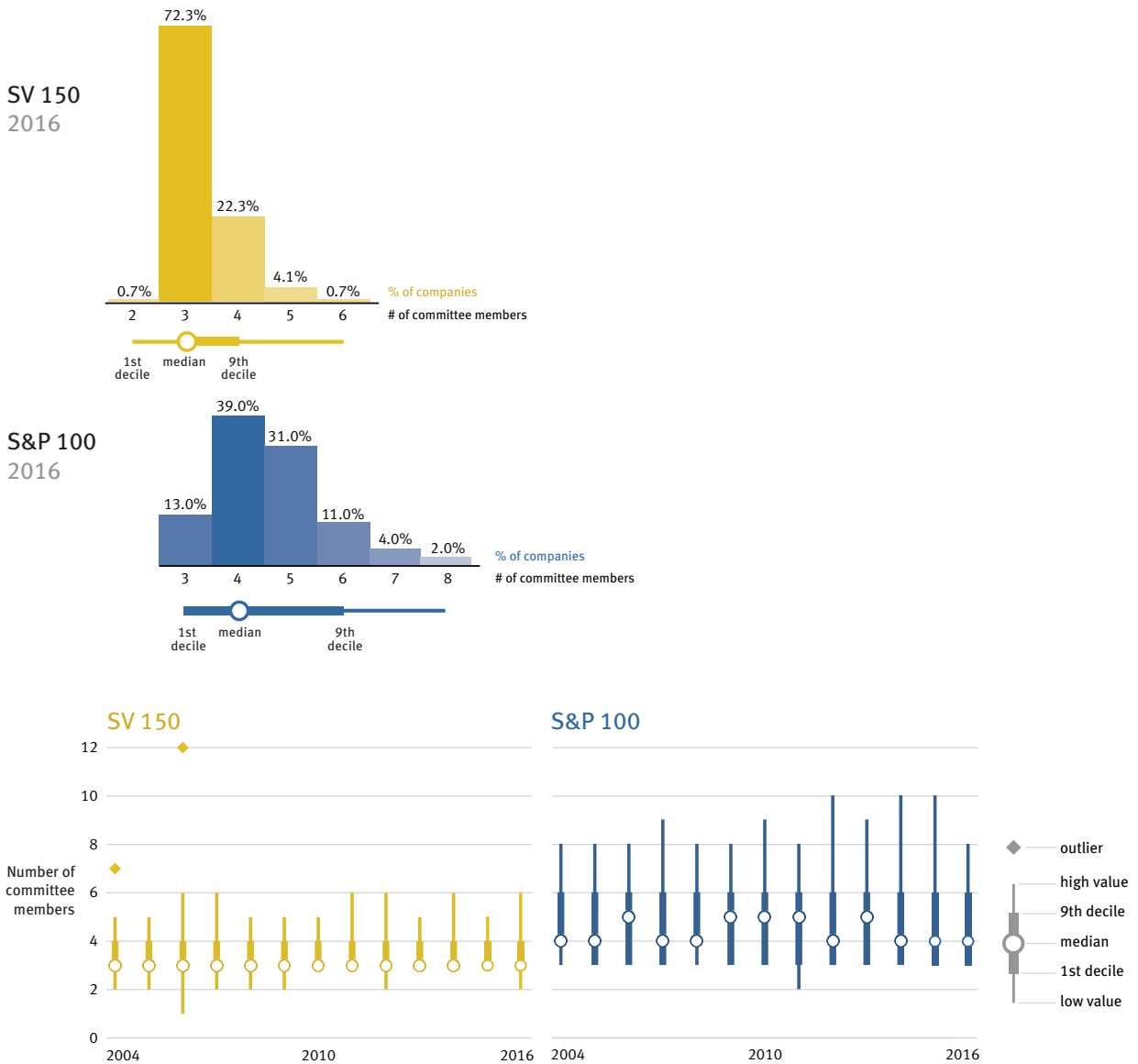


## Audit Committee Size and Meeting Frequency

Audit committees tend to be smaller among the technology and life sciences companies in the SV 150 (average = 3.3 directors) than among S&P 100 companies (average = 4.6 directors).

*The following graphs show the distribution by number of audit committee members among the companies in each group during the 2016 proxy season, as well as the trend over the period from the 2004 through 2016 proxy seasons (showing both the median number and the cutoffs for the deciles with the most and fewest directors).*

### AUDIT COMMITTEE SIZE — DISTRIBUTIONS AND TRENDS OVER TIME

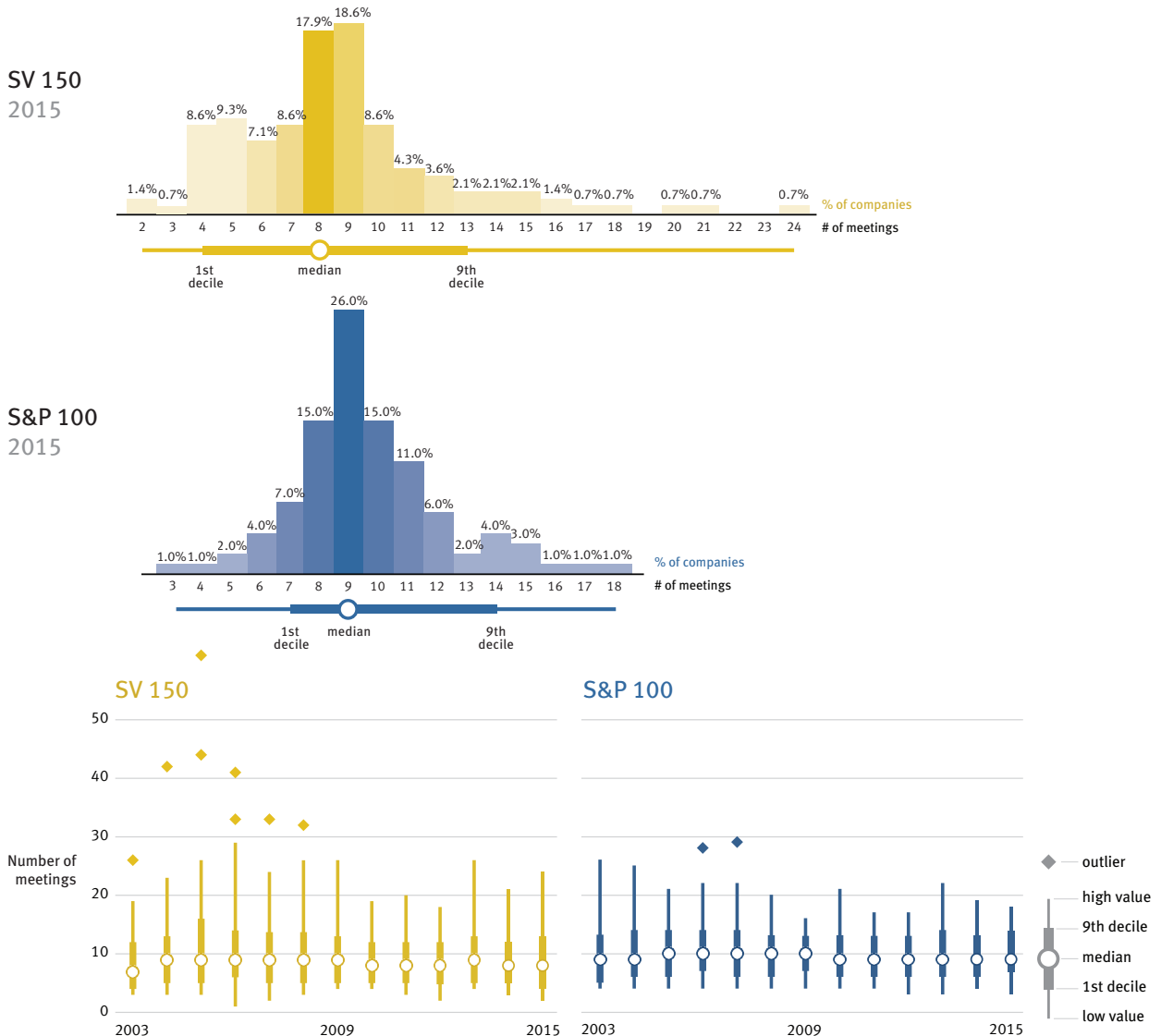


**Audit Committee Size and Meeting Frequency** *(continued)*

In both groups, after peaking in 2007 largely driven by a surge of internal investigations (such as for stock option backdating issues), the number of audit committee meetings appears to have stabilized at levels similar to those found in the first year following the adoption of the Sarbanes-Oxley Act of 2002 (SV 150 average = 8.6 meetings; S&P 100 average = 9.7 meetings).

*The following graphs show the distribution by number of audit committee meetings among the members of each group in 2015 as reported during the 2016 proxy season, as well as the trend over the period from 2003 through 2015 (showing both the median number and the cutoffs for the deciles with the most and fewest meetings), as reported in the 2004 through 2016 proxy seasons.*

**NUMBER OF AUDIT COMMITTEE MEETINGS — DISTRIBUTIONS AND TRENDS OVER TIME**

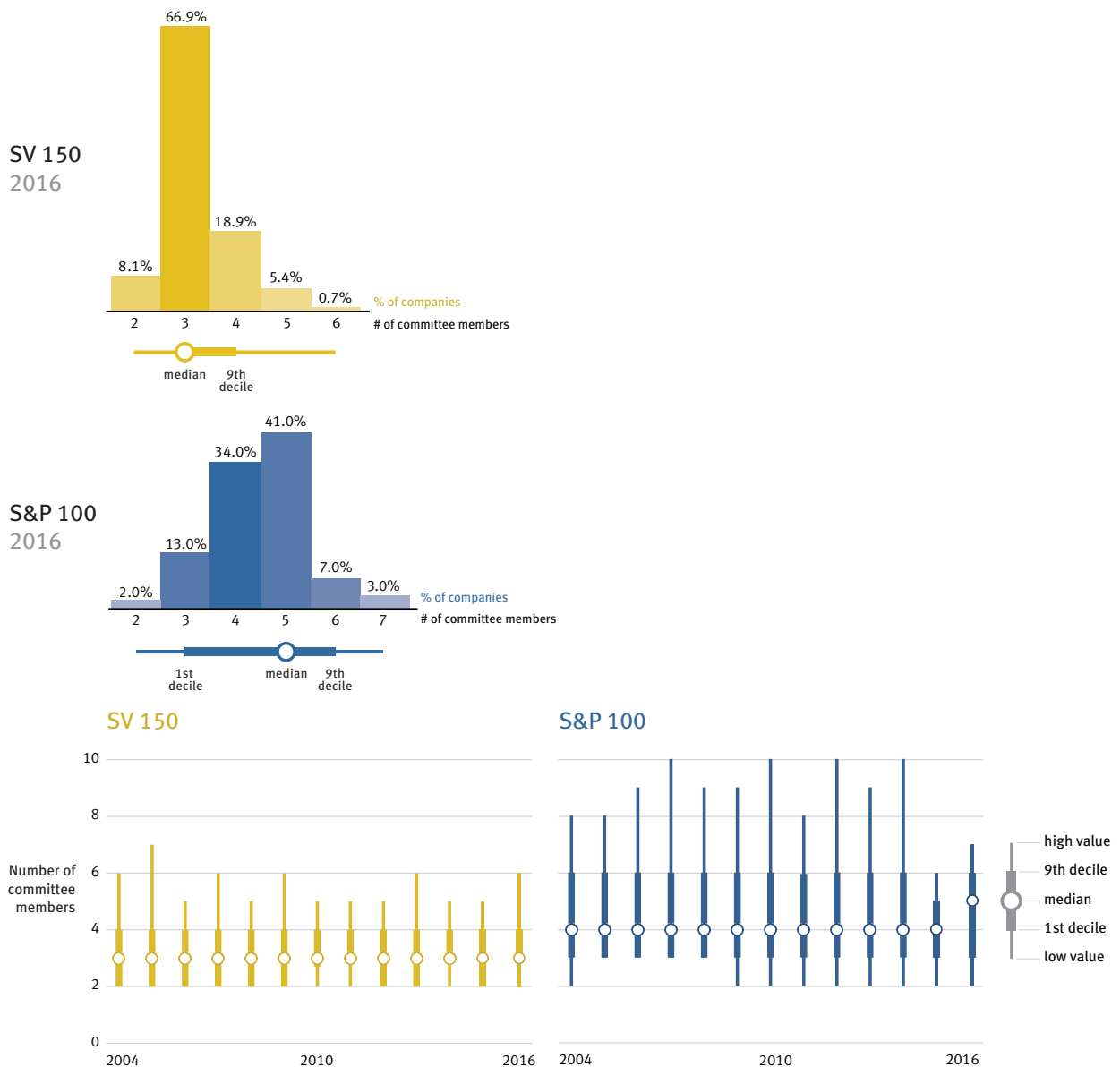


## Compensation Committee Size and Meeting Frequency

Compensation committees tend to be larger among S&P 100 companies (average = 4.5 directors) than among the technology and life sciences companies in the SV 150 (average = 3.2 directors).

*The following graphs show the distribution by number of compensation committee members among companies in each group during the 2016 proxy season, as well as the trend over the period from the 2004 through 2016 proxy seasons (showing both the median number and the cutoffs for the deciles with the most and fewest directors).*

### COMPENSATION COMMITTEE SIZE — DISTRIBUTIONS AND TRENDS OVER TIME

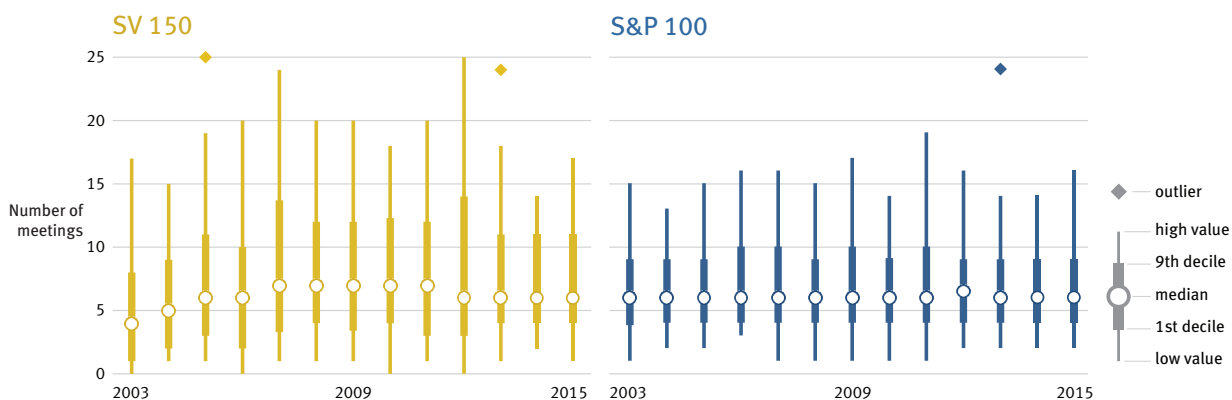
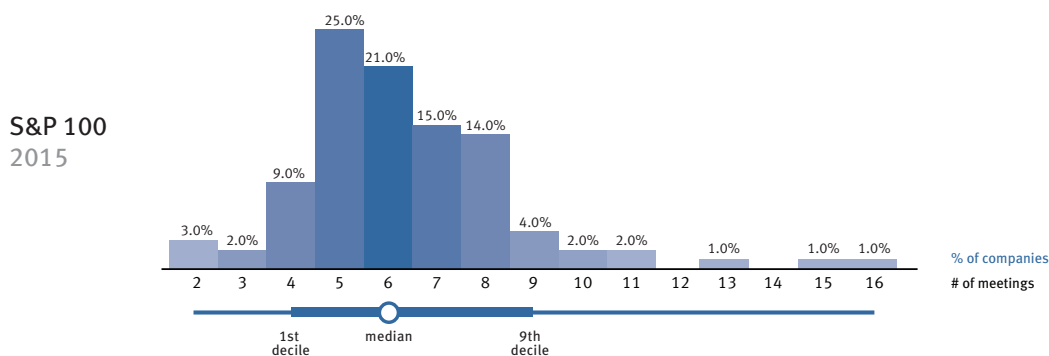
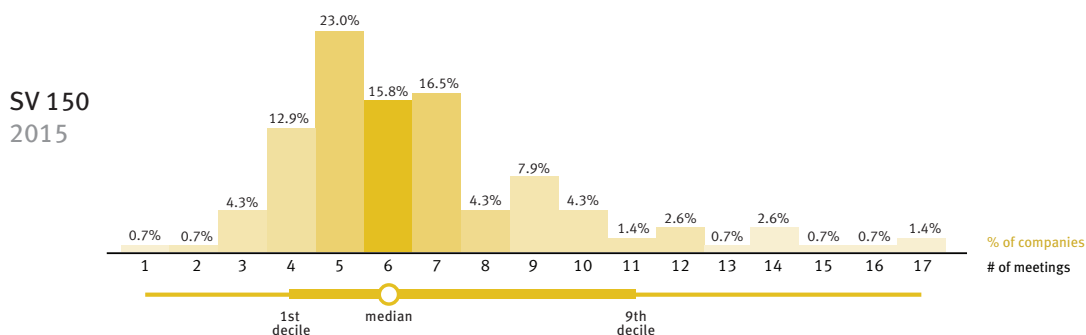


Compensation Committee Size and Meeting Frequency (continued)

In both groups, compensation committees hold more frequent meetings than at the outset of the survey period, though the trend is particularly pronounced among the SV 150 companies (S&P 100 average = 6.4 meetings; SV 150 average = 6.7 meetings).

The following graphs show the distribution by number of compensation committee meetings among the members of each group in 2015 as reported during the 2016 proxy season, as well as the trend over the period from 2003 through 2015 (showing both the median number and the cutoffs for the deciles with the most and the fewest meetings), as reported in the 2004 through 2016 proxy seasons.

NUMBER OF COMPENSATION COMMITTEE MEETINGS — DISTRIBUTIONS AND TRENDS OVER TIME

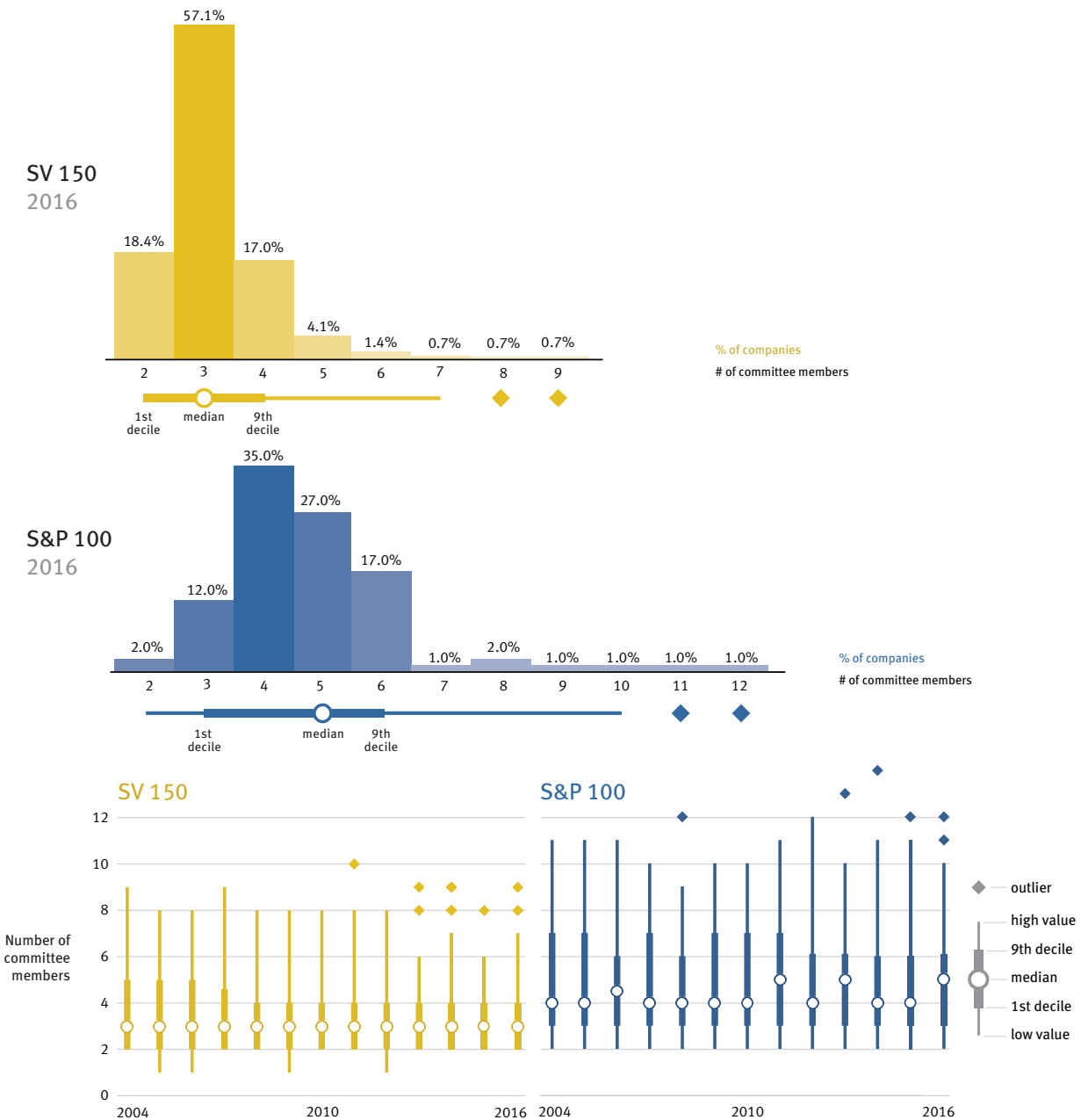


## Nominating Committee Size and Meeting Frequency

Nominating committees tend to be smaller among the technology and life sciences companies in the SV 150 (average = 3.2 directors) than among S&P 100 companies (average = 4.8 directors).

*The following graphs show the distribution by number of nominating committee members among the companies in each group during the 2016 proxy season, as well as the trend over the period from the 2004 through 2016 proxy seasons (showing both the median number and the cutoffs for the deciles with the most and fewest directors).*

### NOMINATING COMMITTEE SIZE — DISTRIBUTIONS AND TRENDS OVER TIME



**Nominating Committee Size and Meeting Frequency** *(continued)*

In both groups, nominating committees generally hold meetings more frequently over time, though the trend is somewhat more pronounced among the SV 150 companies (SV 150 average = 3.9 meetings; S&P 100 average = 5.3 meetings).

*The following graphs show the distribution by number of nominating committee meetings among the members of each group in 2015 as reported during the 2016 proxy season, as well as the trend over the period from 2003 through 2015 (showing both the median number and the cutoffs for the deciles with the most and fewest meetings), as reported in the 2004 through 2016 proxy seasons.*

**NUMBER OF NOMINATING COMMITTEE MEETINGS — DISTRIBUTIONS AND TRENDS OVER TIME**

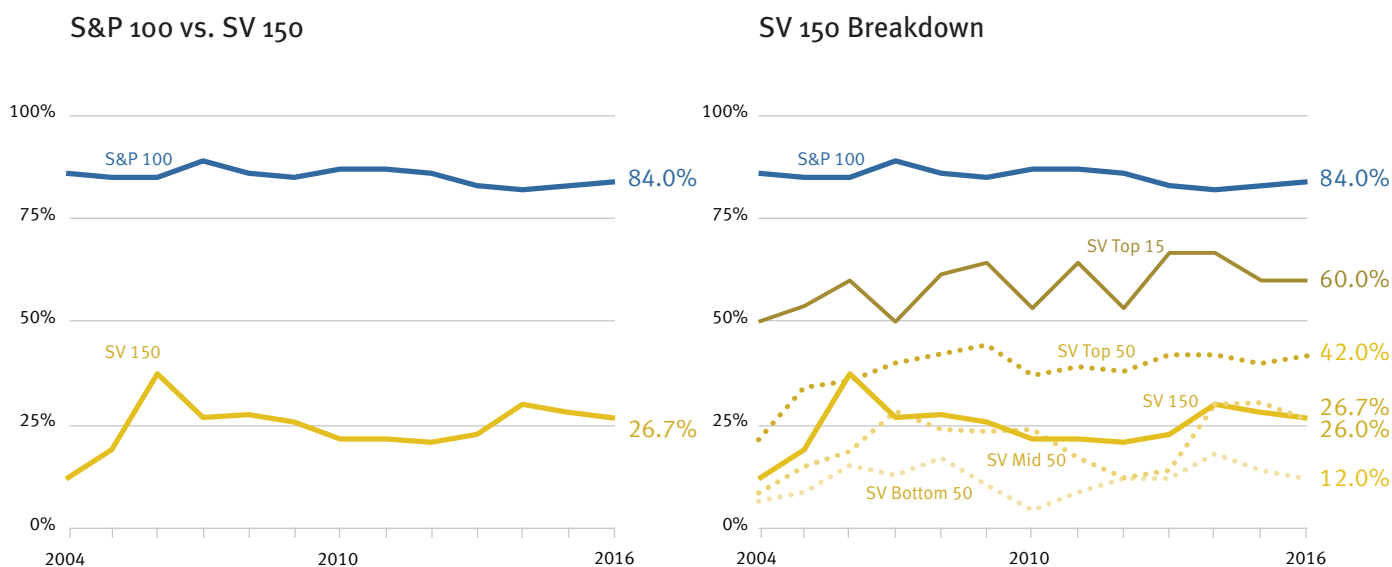


## Other Standing Committees

Standing committees other than the three primary board committees are quite common among S&P 100 companies (84%) and relatively uncommon among the technology and life sciences companies in the SV 150 (26.7%). These committees can serve a wide variety of purposes. Executive, finance and risk management committees are most common among the S&P 100 — though public policy committees are becoming increasingly common; with finance, some amalgam of strategy/M&A and technology committees most common among the SV 150 companies. While our data shows that within the SV 150, the rate of formation of other standing committees tracks to a degree with the size of company (measured by revenue), with an approximately 60% rate among the top 15 (somewhat closer to the S&P 100, though still meaningfully lower) and an approximately 26% and 12% rate among the middle 50 and bottom 50 in the 2016 proxy season, respectively, there are clearly other factors contributing to their relative infrequency in Silicon Valley.

*The following graphs show, over the period from the 2004 through 2016 proxy seasons, the percentage of all companies in each group with at least one standing committee other than the three primary committees, as well as the same information for the SV 150 broken down by the top 15, top 50, middle 50 and bottom 50 companies.*

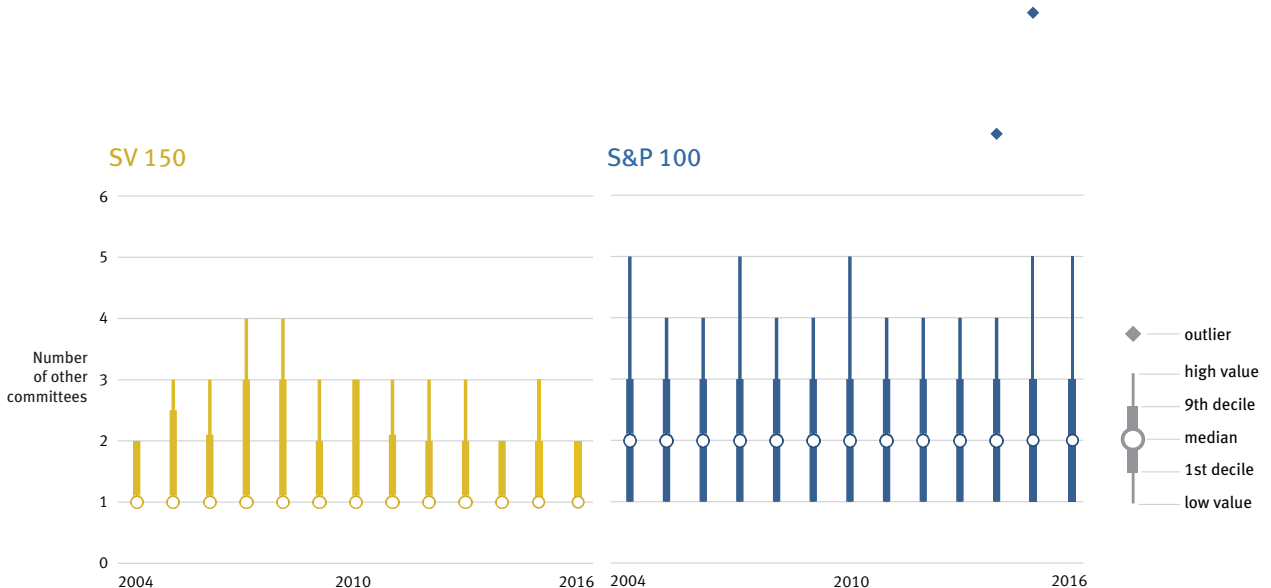
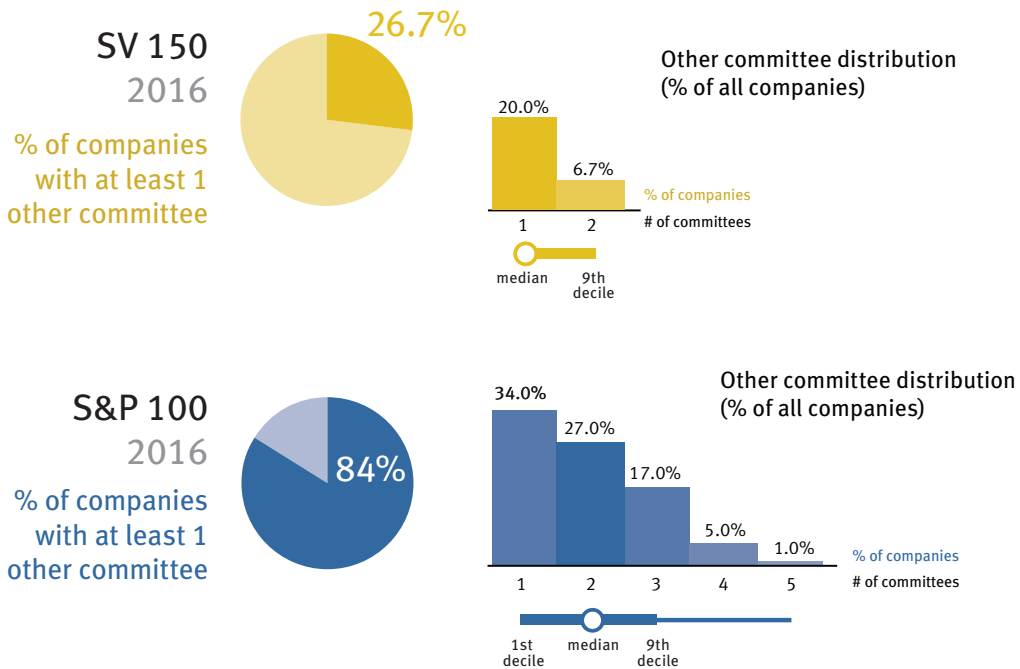
### OTHER COMMITTEES — TRENDS OVER TIME



Other Standing Committees (continued)

The following graphs show the distribution by number of standing committees other than the three primary board committees (for those that have any such other committees) among the members of each group as reported during the 2016 proxy season, as well as the trend over the period from the 2004 through 2016 proxy seasons (showing both the median number and the cutoff for the decile with the most such committees).

OTHER COMMITTEES — DISTRIBUTIONS AND TRENDS OVER TIME



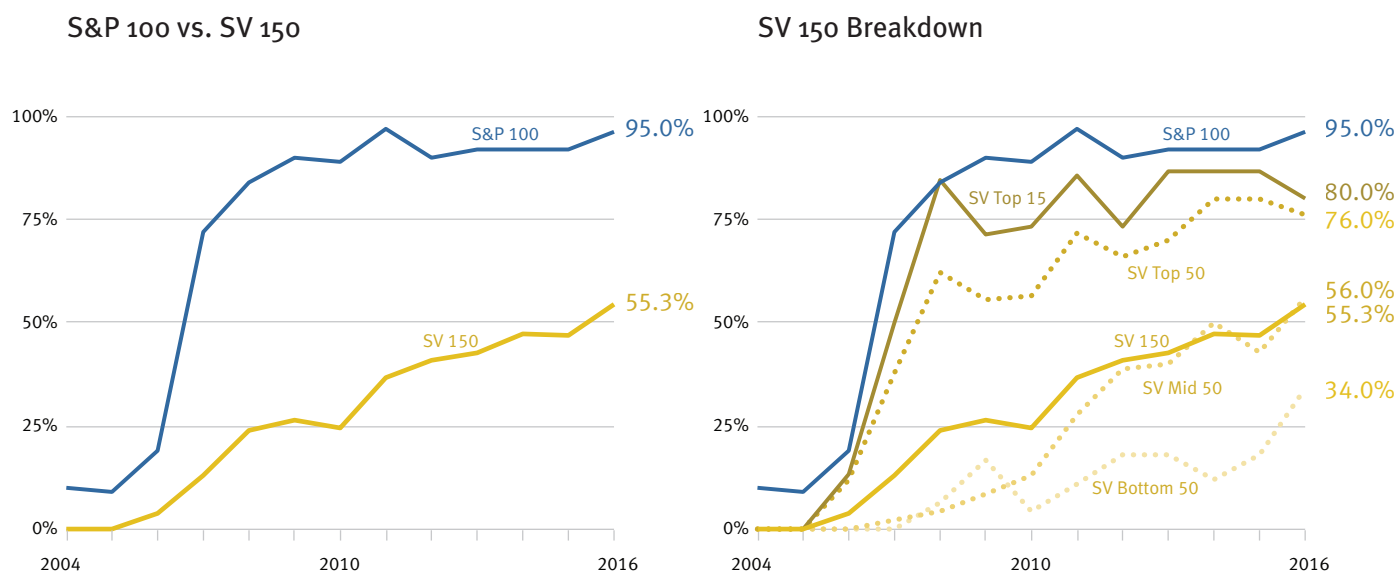


## Majority Voting

The rate of implementation of some form of majority voting has risen substantially over the period of this survey. The increase has been particularly dramatic among the S&P 100 companies, rising from 10% to 95% between the 2004 and 2016 proxy seasons (although that is still a drop from the 97% peak in the 2011 proxy season). Among the technology and life sciences companies in the SV 150, the rate has risen from none as recently as the 2005 proxy season to 55% in the 2016 proxy season (increasing about 31% from the 2010 proxy season). Our data shows that within the SV 150, the rate of adoption fairly closely tracks with the size of company (measured by revenue), with an approximately 80% rate among the top 15 (more similar to the S&P 100, but a drop from the 87% rate of the prior three proxy seasons) and an approximately 34% rate among the bottom 50 in the 2016 proxy season.

*The following graphs show, over the period from the 2004 through 2016 proxy seasons, the percentage of all companies in each group with some form of majority voting, as well as the same information for the SV 150 broken down by the top 15, top 50, middle 50 and bottom 50 companies.*

### MAJORITY VOTING — TRENDS OVER TIME



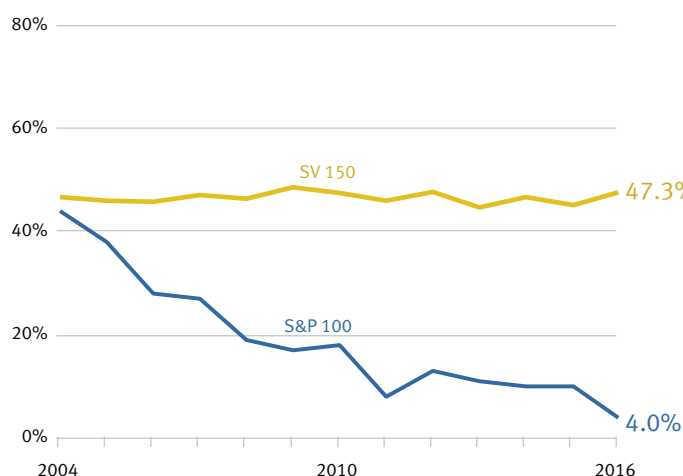
## Classified Board

Classified boards are now significantly more common among the technology and life sciences companies in the SV 150 than among the S&P 100 companies, though that has not always been the case. This graph illustrates that declassifying boards has been a trend among the largest public companies, but not among Silicon Valley companies. At the beginning of the survey period, both groups had similar rates of classified boards. But, while the frequency among the S&P 100 declined dramatically during the period of the survey, the rate has held fairly steady among the technology and life sciences companies in the SV 150. Our data shows that within the SV 150, the rate among the top 15 companies had fallen in half (to a rate similar to the S&P 100) in the 2011 proxy season, but had rebounded to 13.3% in the 2012 through 2014 proxy seasons (tracking a similar slight rebound in the S&P 100)—though it has fallen again since then. Meanwhile the rate among the bottom 50 companies had actually increased to 70% in the 2016 proxy season. To a major extent, this reflects the reality that one of the principal reasons for classification, as a takeover defense, is less compelling for some larger companies due to the sheer size the companies and dispersion of their stockholdings. The changes in recent years within the SV 150 largely reflect changes in the constituent companies of the subdivisions of the SV 150.

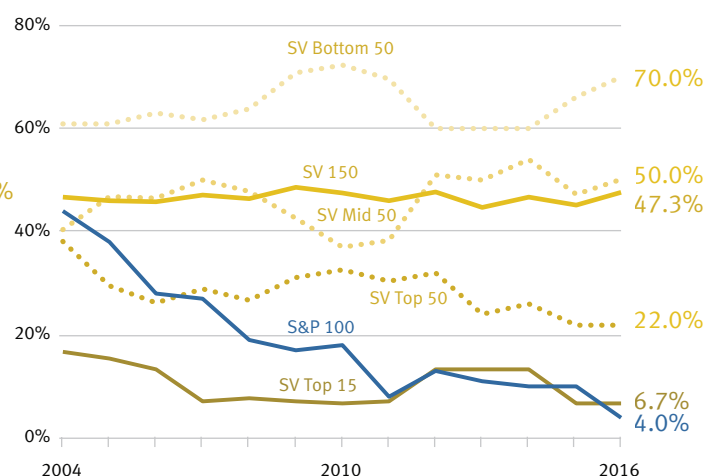
*The following graphs show, over the period from the 2004 through 2016 proxy seasons, the percentage of all companies in each group with a classified board, as well as the same information for the SV 150 broken down by the top 15, top 50, middle 50 and bottom 50 companies.*

### CLASSIFIED BOARD — TRENDS OVER TIME

S&P 100 vs. SV 150



SV 150 Breakdown



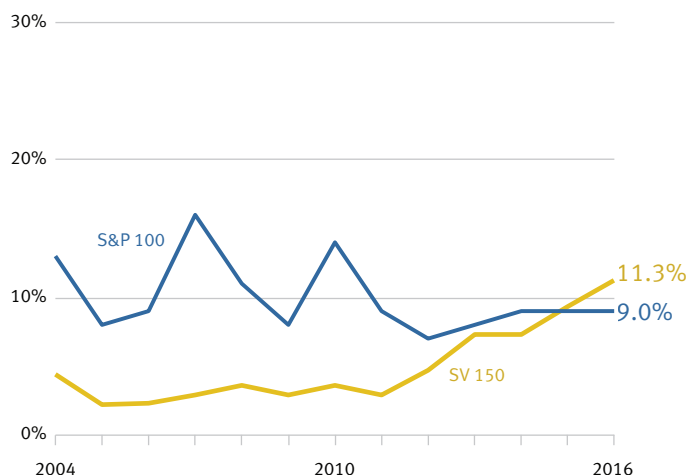
## Dual-Class Voting Stock Structure

Adoption of dual-class voting stock structures has now emerged as a recent clear trend among Silicon Valley technology companies (though it is still a small percentage of companies). Historically, dual-class voting stock structures have been significantly more common among S&P 100 companies than among the technology and life sciences companies in the SV 150 companies, though the frequency in the SV 150 has surpassed the S&P 100 in recent years. However, in both groups dual-class voting remains a small minority. Other than the recent overall trend in the SV 150, the variation in the percentage of each group over time is primarily a function of changes in the constituents of each group. Within the SV 150, our data suggests that there has been an increasing trend of dual-class voting structures among the mid-to-larger companies, with little appearance among the smallest companies. That has been a function of companies such as Google, Facebook, VMware, Workday and Zynga joining the SV 150 with dual-class structures (though during the period of the survey another large company, Electronic Arts, moved away from a dual-class structure), while smaller companies with dual-class voting have departed as constituents of the SV 150 (offset by the recent addition of Box and RingCentral).

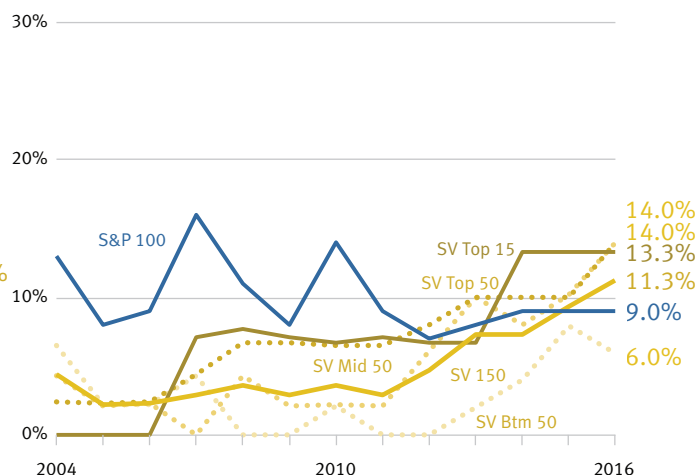
*The following graphs shows, over the period from the 2004 through 2016 proxy seasons, the percentage of all companies in each group with a dual-class voting stock structure, as well as the same information for the SV 150 broken down by the top 15, top 50, middle 50 and bottom 50 companies.*

### DUAL-CLASS STRUCTURE — TRENDS OVER TIME

S&P 100 vs. SV 150



SV 150 Breakdown

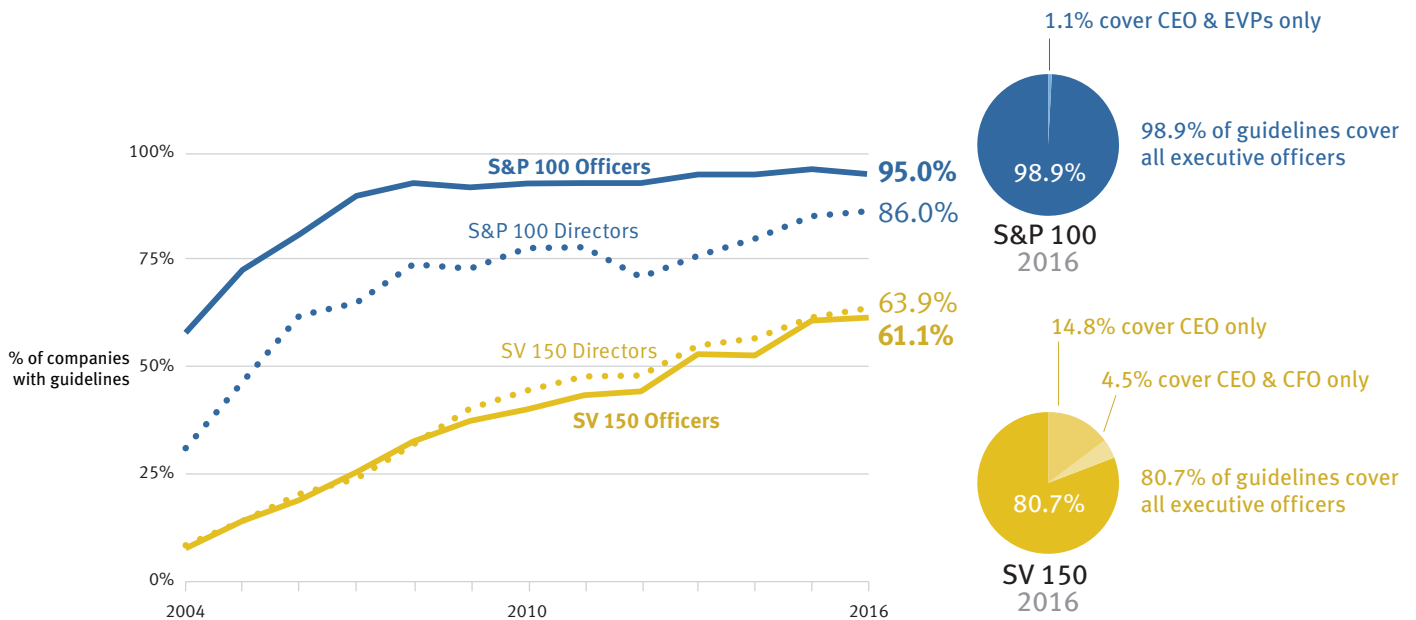


## Stock Ownership Guidelines

Alignment of executive officer and director economic interests with those of stockholders in the form of requirements that executive officers and directors hold specified amounts of a company’s stock has been on the rise during the period of the survey. While generally the prevalence of stock ownership guidelines has increased over time in both groups, the SV 150 has only recently surpassed the level of the S&P 100 at the start of the period covered by the survey, particularly with respect to executive officers. Further, our data shows that within the SV 150, the rate among the top 15 companies has risen to a rate generally comparable to that of the S&P 100, while the rate among the bottom 50 companies has risen very slowly. Such policies are still only implemented at about two-thirds of the middle 50 and at a distinct minority of bottom 50 companies (increasing from none in the 2004 proxy season to 34% in the 2016 proxy season, including an increase of 14% since the 2011 proxy season). We believe these differences are primarily a function of entrepreneurial ownership and the general culture of equity compensation in Silicon Valley, where insiders generally own larger stakes in their companies (particularly so with more recently public companies) and boards feel less need to establish guidelines to encourage alignment of interests (or for stockholder relations).<sup>16</sup>

*The following graph shows the percentage of all companies in each of the S&P 100 and the SV 150 with stock ownership guidelines for executive officers over the survey period, and the coverage of those guidelines for each group in the 2016 proxy season, as well as the percentage of each group with stock ownership guidelines for directors over the same period.*

### STOCK OWNERSHIP GUIDELINES — EXECUTIVE OFFICERS AND DIRECTORS

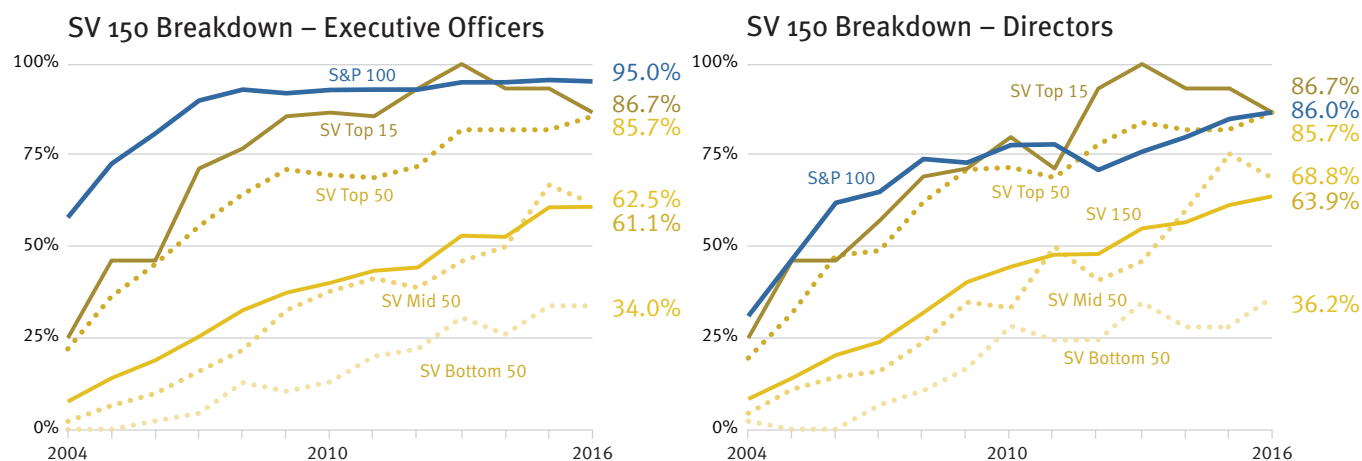


<sup>16</sup> For example, our data shows that equity ownership of executive officers and directors among the bottom 50 companies in the SV 150 ranges over time from roughly six to twenty times that of executive officers and directors at S&P 100 companies (also depending on whether you are comparing averages or medians). See the data regarding the actual equity and voting ownership of executive officers and directors for each group on pages 4 through 7.

Stock Ownership Guidelines (continued)

The following graphs show, over the period from the 2004 through 2016 proxy seasons, the percentage of all companies in each of the S&P 100 and the SV 150 with stock ownership guidelines for executive officers and directors, separately, for the SV 150 broken down by the top 15, top 50, middle 50 and bottom 50 companies.

STOCK OWNERSHIP GUIDELINES — EXECUTIVE OFFICERS AND DIRECTORS (SV 150 BREAKDOWN)



Among the 92 SV 150 companies with stock ownership guidelines, 12 companies specify the requirement based on a fixed number of shares or a fixed minimum value of shares that must be held, while 80 companies instead specify the requirement based on a multiple of base salary. Of the companies using a multiple, five companies specified 1 – 2x, 36 specified 3x, 27 companies specified 4 – 5x and 12 companies specified 6 – 10x of base salary for the CEO.<sup>17</sup> In addition, 64 companies specified a grace period of 5 years to reach the minimum, while the grace period for the remainder ranged from 2 – 4 years (though the disclosure for 16 companies did not specify a grace period in the proxy statement disclosure).<sup>18</sup> Twenty companies specify in their proxy statement disclosure that they require a minimum retention level pending achievement of the stated target during the grace period, of which seven companies required 100%, six companies required 50% and seven required 25 – 40% (with three requiring no minimum retention, of which one encourages a minimum level).<sup>19</sup> Of those with stock ownership guidelines, 56 companies specify which equity holdings are counted toward meeting the minimum, of which 20 count unvested RSUs (though only three specify that RSUs count at 50% per share and three specify that RSUs count in full).<sup>20</sup>

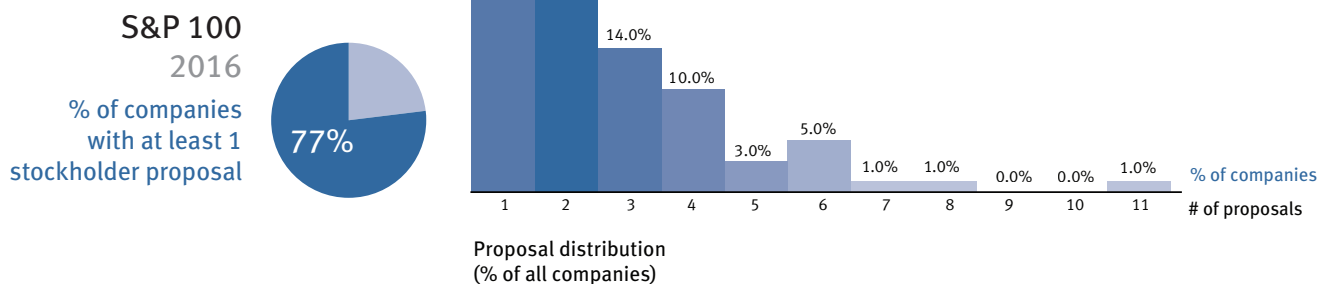
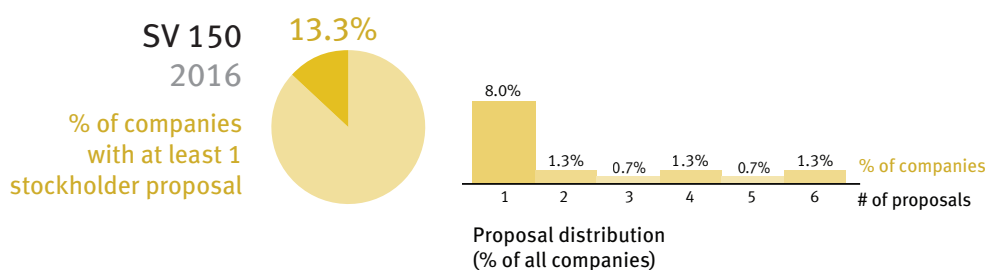
- 17 Among the 14 companies in the top 15 of the SV 150 with stock ownership guidelines, four companies specify the requirement based on a fixed number of shares or a fixed minimum value of shares that must be held, while 10 companies instead specify the requirement based on a multiple of salary. Of the companies using a multiple, one company specified 2x, six specified 4 – 5x, one specified 6x and two companies specified 7 – 10x of base salary for the CEO.
- 18 In the top 15, 11 companies had a 5-year grace period of 5 years to reach the minimum, and two specified 3 – 4 years (with one company not specifying a grace period in the proxy disclosure).
- 19 In the top 15, two companies specify in their proxy statement disclosure that they require a minimum retention level pending achievement of the stated target during the grace period, with one requiring 50% and one requiring 25%.
- 20 In the top 15, eight companies specify which equity holdings are counted toward meeting the minimum, of which four count unvested RSUs (though only one specifies that RSUs count at 50% per share, with the others not addressing weighting).

## Stockholder Proposals

Stockholder activism, measured in the form of proposals included in the proxy statements of companies, is substantially lower among the technology and life sciences companies in the SV 150 than among S&P 100 companies. However, our data shows a marked increase in recent years among the technology and life sciences companies in the top 15 of the SV 150, where 73.3% had at least one stockholder proposal. Five companies in the SV 150 had four or more proposals during the 2016 proxy season (with an average of 2.2 proposals among those with any), compared to 21 such companies in the S&P 100 (with an average of 2.8 among those with any). Our data reflects a current general downward trend of stockholder activism, measured in terms of stockholder proposal frequency, particularly in the S&P 100 — although the SV 150, where there are any proposals, has had an upward trend in number of proposals in recent years. Contested elections, another form of stockholder activism, were exceedingly rare among both the SV 150 and the S&P 100, where there were no contested elections in six of the years surveyed among the SV 150 (and one year each having three and four contested elections, and five years having one or two) and none in six years among the S&P 100 during the twelve years of the survey (and seven years each having one or two contested elections). Neither group had a contested director election in the 2016 proxy season.

*The following graphs show for each group during the 2016 proxy season the percentage of all companies with at least one stockholder proposal, and the distribution by number of stockholder proposals, included in the company's proxy statement.*

### STOCKHOLDER PROPOSALS — DISTRIBUTIONS

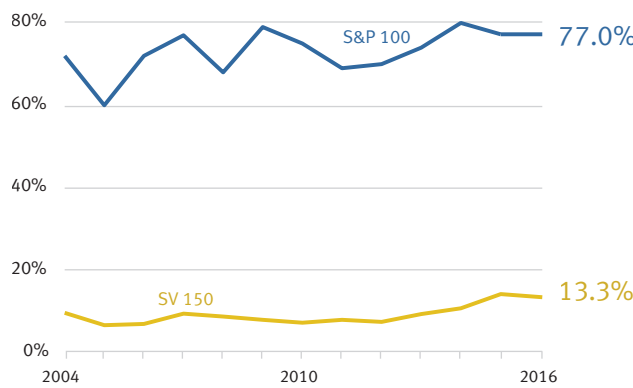


Stockholder Proposals (continued)

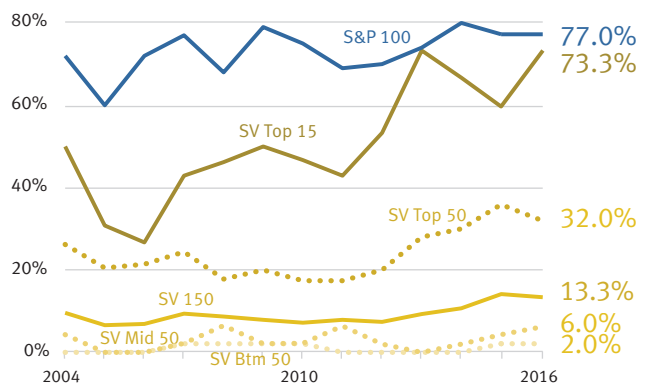
The following graphs show for each group, over the period from the 2004 through 2016 proxy seasons, the percentage of all companies with at least one stockholder proposal included in the company proxy statement and the average and median number of such proposals per company, as well as the percentage of all companies with at least one stockholder proposal and the average number of proposals for the SV 150 broken down by the top 15, top 50, middle 50 and bottom 50 companies.

STOCKHOLDER PROPOSALS — TRENDS OVER TIME

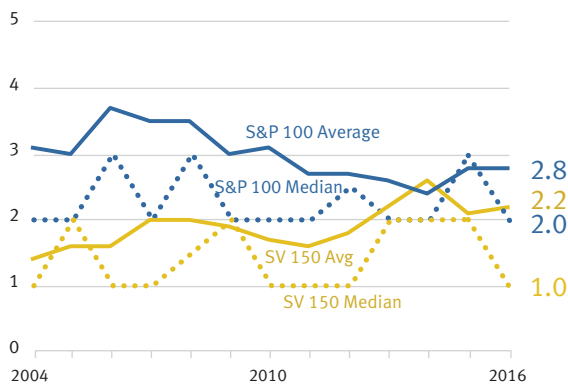
Percentage of Companies with at least one Stockholder Proposal



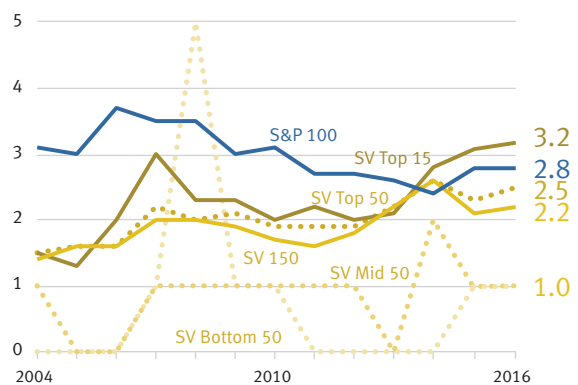
SV 150 Breakdown – at least one Stockholder Proposal



Number of Stockholder Proposals per Company



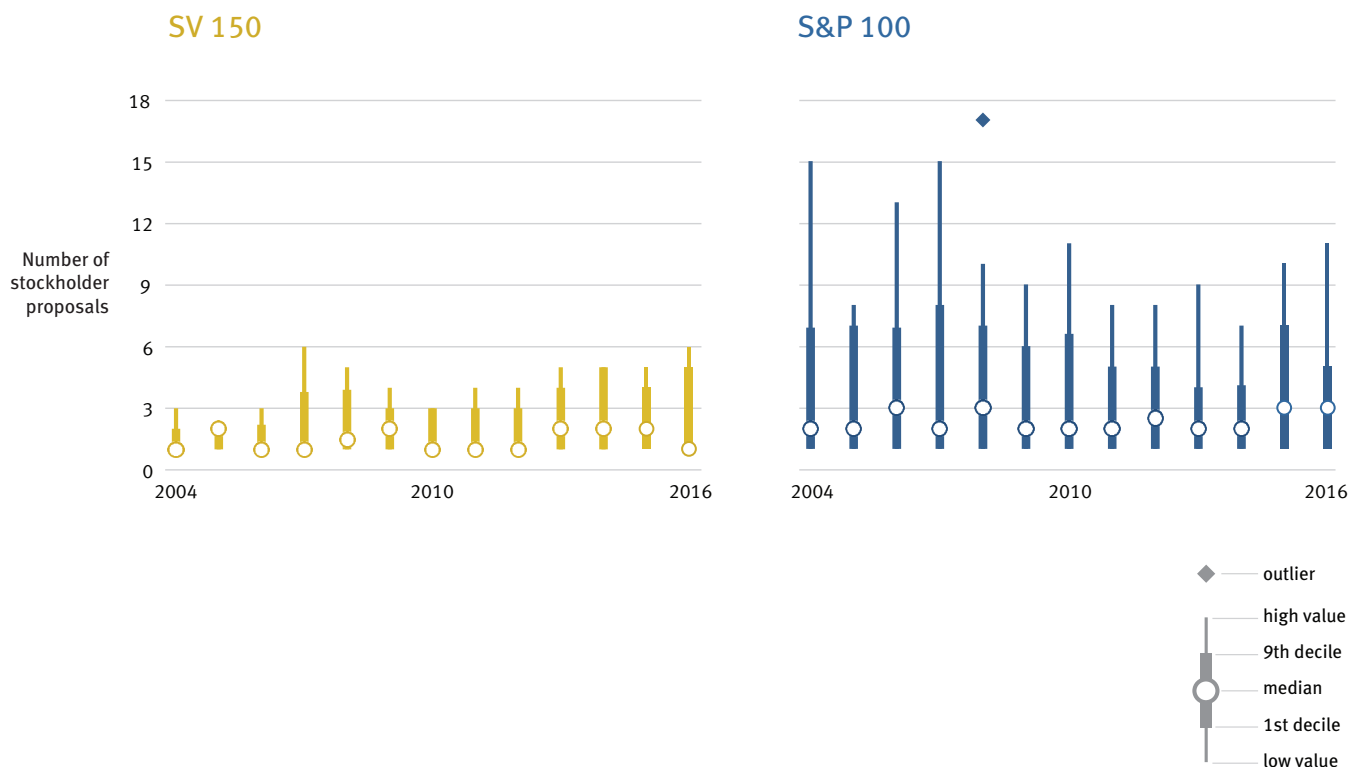
SV 150 Breakdown – Average # of Stockholder Proposals



Stockholder Proposals (continued)

The following graphs show for each group the range, over the period from the 2004 through 2016 proxy seasons, of the number of stockholder proposals included in company proxy statements, showing both the median and the cutoffs for the deciles with the most and fewest proposals (among those that have any such proposals).

STOCKHOLDER PROPOSALS — RANGE TRENDS OVER TIME



For a substantially more detailed review of stockholder proposals and other aspects of annual meeting voting in the SV 150, as well as the Bay Area 25, see the forthcoming Fenwick publication *Results of the 2016 Proxy Season in Silicon Valley: A Comparison of Silicon Valley Public Companies and Other Large Bay Area Public Companies*, anticipated to be released in December 2016. To be placed on an email list for this and future editions of the Proxy Season Results Survey when published, visit [www.fenwick.com/subscribe-proxy](http://www.fenwick.com/subscribe-proxy).



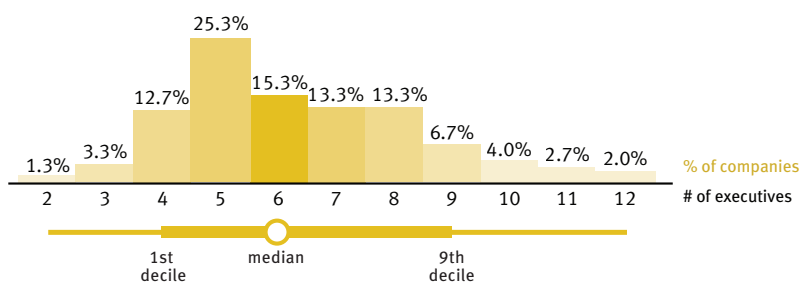
## Executive Officers

The number of executive officers tends to be substantially lower among the technology and life sciences companies in the SV 150 (average = 6.4 executive officers) than among S&P 100 companies (average = 10.4 executive officers), generally reflecting the scale differences between the groups of companies. In both groups there has been a general decline in the average number of executive officers per company (a trend that continued in the 2016 proxy season), as well as a narrowing of the range of that number in each group (SV 150 max = 20 and min = 4 in the 1996 proxy season compared to max = 12 and min = 2 in the 2016 proxy season; S&P 100 max = 41 and min = 5 in 1996 proxy season compared to max = 21 and min = 3 in the 2016 proxy season).

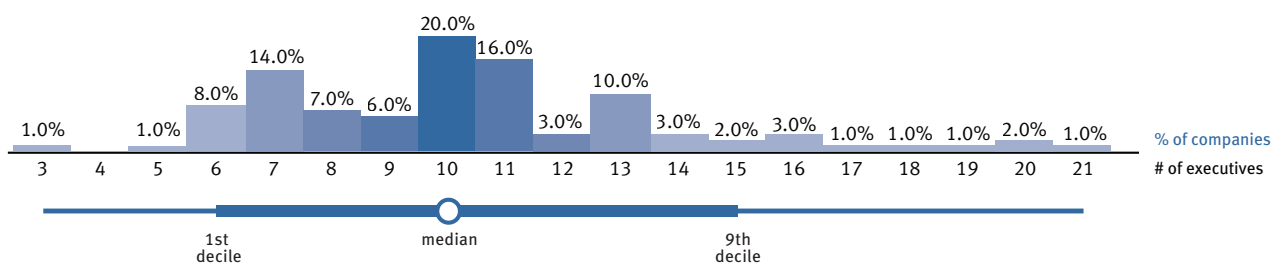
*The following graphs show the distribution by number of executive officers among the two groups during the 2016 proxy season.*

### NUMBER OF EXECUTIVE OFFICERS — DISTRIBUTIONS AND TRENDS OVER TIME

#### SV 150 2016



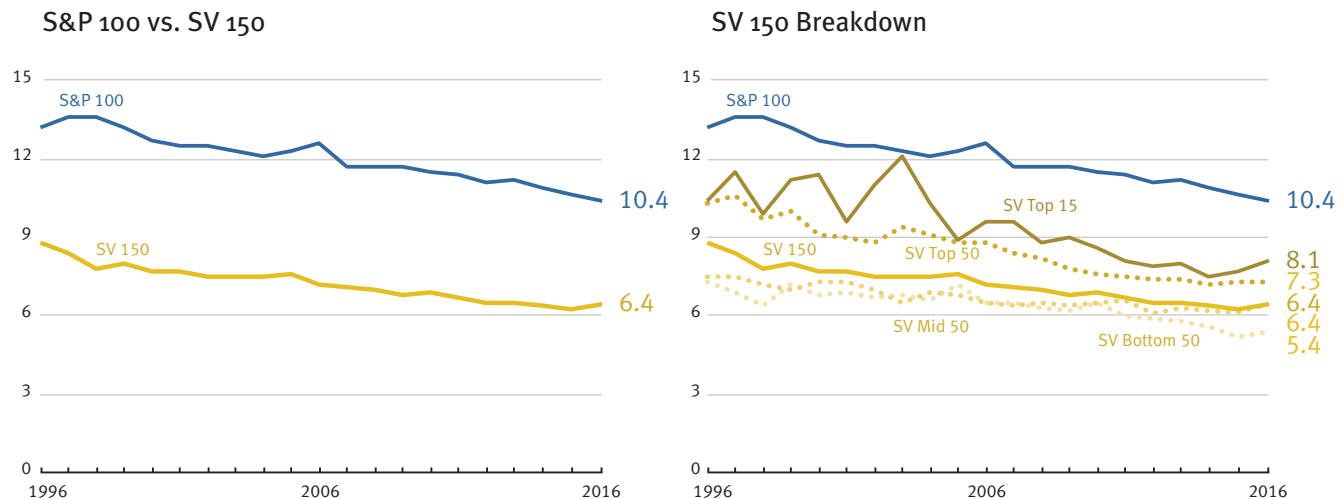
#### S&P 100 2016



Executive Officers *(continued)*

The following graphs show the average number of executive officers in each group, as well as the same information for the SV 150 broken down by the top 15, top 50, middle 50 and bottom 50 companies, over the period from the 1996 through 2016 proxy seasons.

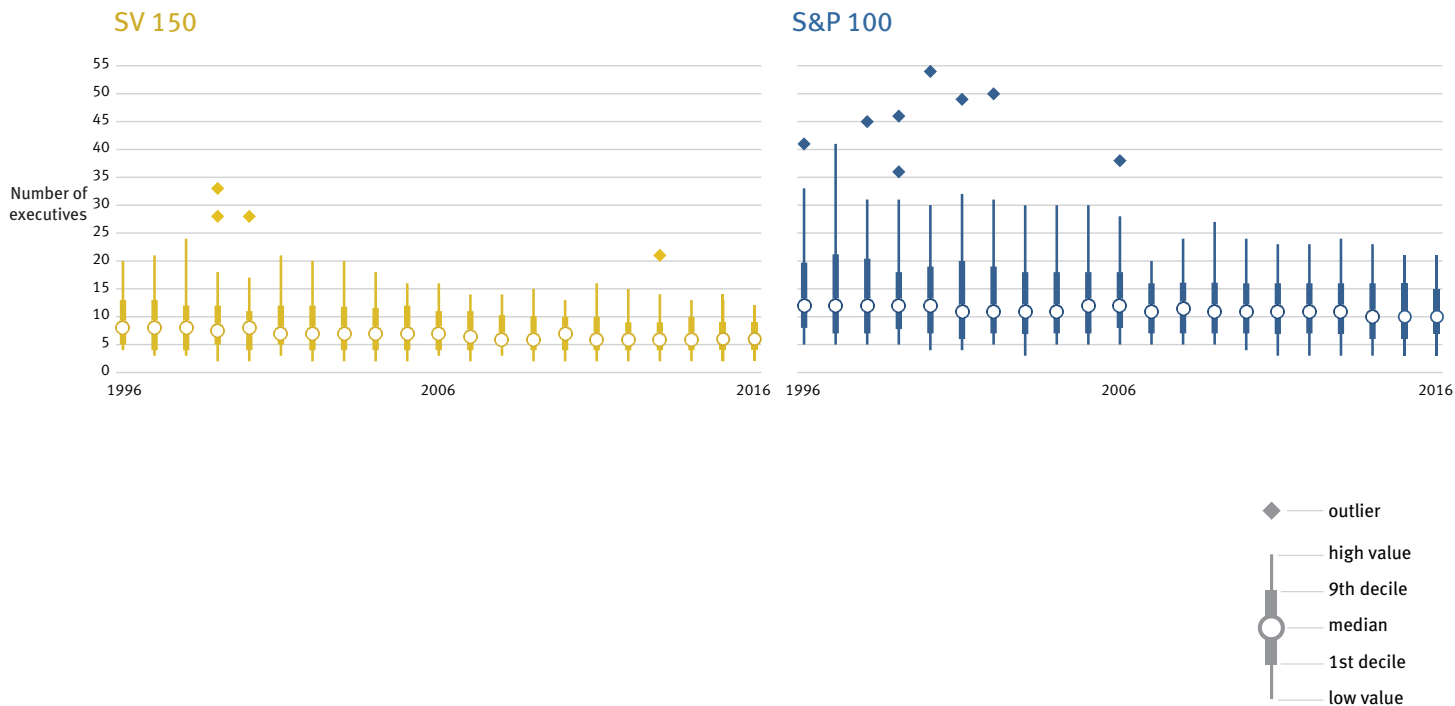
AVERAGE NUMBER OF EXECUTIVE OFFICERS — TRENDS OVER TIME



Executive Officers (continued)

The following graphs show the range of the number of executive officers per company in each group, showing both the median and the cutoffs for the deciles with the most and fewest executive officers, over the period from the 1996 through 2016 proxy seasons.

RANGE OF NUMBER OF EXECUTIVE OFFICERS — TRENDS OVER TIME



## Methodology

### Group Makeup

We reviewed the corporate governance practices of the companies included in the Standard & Poor's 100 Index (S&P 100)<sup>21</sup> and the technology and life sciences companies included in the Silicon Valley 150 Index (SV 150).<sup>22</sup> The makeup of the indices has changed over time as determined by their publishers,<sup>23</sup> with the SV 150 makeup being updated generally once annually and the S&P 100 changing more frequently.<sup>24</sup> For analytical purposes, companies are included in the survey if they appeared in the relevant index as determined as of the most recent calendar year end.<sup>25</sup> Further, in past years, to focus the survey on the industries most relevant to Silicon Valley, companies were excluded from the SV 150 data set for purposes of the survey if they were not primarily in the technology or life sciences industries (broadly interpreted).<sup>26</sup> To some degree, the volatility in the statistical trends within each of the indices is a reflection of changes in

- 21 *Standard & Poor's* has stated that "[t]he S&P 100 consists of 100 companies selected from the S&P 500. To be included, the companies should be among the larger and most established companies in the S&P 500, and must have listed options. Sector balance is considered in the selection of companies for the S&P 100." (*Standard & Poor's* states that "[t]he S&P 500 focuses on the large-cap sector of the market; however, since it includes a significant portion of the total value of the market, it also represents the market; [c]ompanies in the S&P 500 are considered leading companies in leading industries" and that constituents of the S&P 100 are selected for sector balance and represent over 57% of the market capitalization of the S&P 500 and almost 45% of the market capitalization of the U.S. equity markets.)
- 22 In the past, the *San Jose Mercury News* had stated that "[t]he Silicon Valley 150 ranks [public] companies headquartered in Santa Clara, Santa Cruz, southern San Mateo and southern Alameda counties [in California] on the basis of worldwide revenue for the most recent available four quarters ended on or near [the most recent December 31]." However, in recognition of the continued geographic spread of technology and life sciences companies beyond the traditional Silicon Valley area, beginning in the 2012 proxy season, the *San Jose Mercury News* expanded the definition for purposes of the index to "include [the entirety of] the five core Bay Area counties: Santa Clara, San Mateo, San Francisco, Alameda and Contra Costa." (According to local lore, the term "Silicon Valley" was coined in 1971 to describe the concentration of semiconductor companies in what was then the northern portion of Santa Clara County. The term has since expanded to include all technology and life sciences companies and their geographic spread in the region.) For a discussion of the change in geographical area and its history, see "O'Brien: Welcome to the new and expanded Silicon Valley" in the *San Jose Mercury News* (April 22, 2012). The most recent determination of the makeup of the SV 150, based on the revenues of public companies in Silicon Valley for the most recent available four quarters ended on or near December 31, 2015, was announced by the *San Jose Mercury News* in April 2016. That group was used for purposes of the 2016 proxy season in this report. In 2014, the *San Jose Mercury News* made an unpublished correction to the SV 150, following its initial publication, and added Fair Isaac Corporation to the list at number 64. As Fair Isaac Corporation was not included in the original publication of the SV 150, in April 2014, it was similarly excluded from the SV 150 data set analyzed in this report as it discusses the 2014 proxy season. Similar exclusions occurred in some prior years.
- 23 The constituents of the Standard & Poor's 100 (S&P 100) Index are now determined by S&P/Dow Jones Indices LLC (a subsidiary of The McGraw-Hill Companies, Inc. that was originally launched by Standard & Poor's) and the constituents of the Silicon Valley 150 Index (SV 150) are determined by the San Jose Mercury News (part of the Bay Area News Group, a MediaNews Group company).
- 24 However, while changes are more frequent, *Standard & Poor's* has noted that "in past years, turnover among stocks in the S&P 100 has been even lower than the turnover in the S&P 500." Given the relative rapidity of acquisitions and the volatility of the technology business, constituent turnover in the SV 150 is somewhat greater than the S&P 100 in terms of the number of companies changing.
- 25 I.e., the Fenwick & West survey for the 2016 proxy season included companies constituent in the S&P 100 as of December 31, 2015, and constituent in the SV 150 as published on April 25, 2016, based on "the most recent available four quarters ended on or near December 31, 2015."
- 26 E.g., for the 2011 proxy season, the following companies were excluded from the SV 150 data set for purpose of the survey (in order of rank within the index): Franklin Resources (14), Con-Way (17), Robert Half (25), Granite Construction (38), West Marine (66), California Water (74), Essex Property (79), SJW (105), Financial Engines (138), Coast Distribution (141) and Mission West (142). However, beginning with the 2012 proxy season, the *San Jose Mercury News* removed all of the non-technology/life sciences companies from the SV 150 and created a parallel Bay Area 25 (BA 25) index made up of the 25 largest such companies ranked by revenue. While not presented in this report, Fenwick does collect and analyze the same set of data for the BA 25 (and companies that we excluded from the SV 150 for purposes of this survey prior to the 2012 proxy season), which can be obtained by consulting your Fenwick & West Securities Partner. In addition, companies are not included in the data set (on a subject-by-subject basis) if information is not available because no SEC filing with the relevant data was made (generally as a result of acquisition). For example, in the 2015 proxy season, one such company was not included in the SV 150 data set for all subjects. Similar exclusions occurred in prior years.

**Methodology** *(continued)*

the constituents of the index over time.<sup>27</sup> Finally, some companies are constituents of both indices.<sup>28</sup> Those companies are included in the data sets of both groups for purposes of this survey.

**Proxy Season / Proxy Statements**

To be included in the data set for a particular “proxy season,” the definitive proxy statement for a company’s annual meeting generally must have been filed by the company with the Securities and Exchange Commission (SEC) during the year ended June 30, irrespective of when the annual meeting was actually held.<sup>29</sup> In some instances, a company may not have consistently filed its annual meeting proxy statement on the same side of the cutoff date each year. In such cases, we have normalized the data by including only one proxy statement per year for a company (and including a proxy statement in a “proxy season” year even though it was filed beyond the normal cutoff).<sup>30</sup> In some instances, a company may not have filed an annual meeting proxy statement during a year at all (or held any annual meeting).<sup>31</sup> In such instances, data was gleaned for that company from other SEC filings to the extent available.<sup>32</sup>

Generally, where a trend graphic identifies a year, it presents information as of the time of the proxy statement (such as the number of directors or whether the company has majority voting for directors, a classified board or dual-class stock structure), in which event the data speaks as to circumstances in effect at the time of the proxy statement (rather than at some particular time during the preceding year or immediately following the annual meeting) and is presented by “proxy season” (as defined for purposes of the survey). Generally, any discussion of the data will be by proxy season and will contain a “2016” statistic in the graphic. However, some information (primarily meeting data) is shown in graphics for the year for which the data was presented in the relevant proxy statements rather than the year of the proxy statement themselves. For example, a proxy statement filed in April 2016 included data about the number of board and committee meetings for 2015. That data would be included in the graphic in the year “2015” statistic (and no “2016” statistic would be included since the fiscal year for the relevant data is ongoing).

<sup>27</sup> Other factors include changes in board membership and turnover in the chief executive officer of constituent companies.

<sup>28</sup> For example, for the 2016 proxy season, the following companies were included in each of the S&P 100 and the SV 150 (in order of rank within the SV 150 index): Apple (1), Alphabet (2), Intel (3), Cisco (6), Oracle (7), Gilead (8), Facebook (9), PayPal Holdings (12).

<sup>29</sup> I.e., the proxy statements included in the 2016 proxy season survey were generally filed with the SEC from July 1, 2015 through June 30, 2016.

<sup>30</sup> E.g., several companies generally filed proxy statements in June each year, but in a particular year filed in July (or later). The data for such a proxy statement was “moved” into the data set for the “proxy season” year before the cutoff.

<sup>31</sup> This can occur for a variety of reasons, including among others instances where: (a) a company could fail to timely file its periodic reports due to a pending or potential accounting restatement (such as during the so-called “stock option backdating scandals” that afflicted several Silicon Valley companies), or (b) a company was acquired or had agreed to be acquired (and determined to defer an annual meeting during the pendency of the acquisition).

<sup>32</sup> Generally Forms 10-K or S-4 and Schedules 14D-9 or TO as well as proxy statements for mergers (Schedules 14A) when the company is in the process of being acquired. These sources generally provide only a subset of the data available in an annual meeting proxy statement (Schedule 14A). Sometimes these filings were made beyond the standard cutoff for the relevant proxy season for purposes of the survey, but were nonetheless included in the survey data set for that proxy season if they generally presented data for the period that would have been covered by the proxy statement for that company if it had been filed. See footnote 30 and accompanying text.

**Methodology** *(continued)***Insider / Independent**

There are a variety of meanings that are ascribed to the terms “insider” and “not independent,” which are colloquially used somewhat interchangeably. We have attempted to cover a variety of these meanings within the same survey. At the narrowest end of the spectrum, a director is considered an insider if he or she is currently an officer or otherwise an employee of the company (and not an insider if he or she is not currently an officer/employee). At the broadest end of the spectrum, some commentators consider a director to be an insider if he or she has ever been an officer of the company. In between these ends of the spectrum, the stock exchanges have promulgated rules that define independence as not having been an officer or otherwise an employee of a company for the last three years, in addition to other specified criteria that vary somewhat by stock exchange.<sup>33</sup>

However, companies have not always been required to state with respect to each director whether he or she meets the applicable stock exchange’s independence criteria (as implemented by that company).<sup>34</sup> Consequently, when our survey was initiated, we also utilized a simplified version of the stock exchange rules, only applying the three-year employment test to the director since that information can be gleaned from the requisite biographical summary that has long been included in proxy statements.<sup>35</sup> This allowed us to include all companies surveyed in this particular version of “insider” status throughout the period covered (while not all have been historically included for the applicable stock exchange independence criteria statistics across the period),<sup>36</sup> and we have carried that methodology forward for trend analysis purposes.

Finally, for purposes of the statistics regarding insider board chairs in this report, we have collected information based on the same four meanings. However, when only presenting one meaning of insider board

<sup>33</sup> See, e.g., Section 303A.02 of the New York Stock Exchange (NYSE) Listed Company Manual and Rule 5605(a)(2) of the Nasdaq Stock Market (Nasdaq) Marketplace Rules. They generally provide coverage for compensation from the company to a director above a specified level (other than for board service) [currently each exchange specifies \$120,000 during any 12 months within the last three years], certain levels of business relationship between the company on whose board a director serves and a company that employs him or her, and similar employment by, compensation to or business relationships with a director’s immediate family members, among other factors. Further, in implementing these rules, a number of companies have adopted their own independence standards (e.g., to define “material relationships” that will preclude independence under a portion of the NYSE rule).

<sup>34</sup> Current Item 407(a) of Regulation S-K requires such disclosure. Prior to its adoption in 2006, companies were merely required to state whether a majority of their directors were independent, and some merely stated that fact rather than identifying their independent or non-independent directors (though for many of those independence could be largely deduced based on the disclosures in the proxy statement regarding independence of members of the primary board committees and director biography – particularly with smaller boards).

<sup>35</sup> Accordingly, family member relationships or other indicia of non-independence are not factored in for this purpose.

<sup>36</sup> Where a company did not provide enough information to determine the independence of each director (e.g., by affirmative statement or by elimination through biographical and committee membership information), the company was excluded from the data set for calculating the statistics based on the applicable stock exchange criteria.

**Methodology** *(continued)*

chair, the statistics generally have presented information based on the applicable stock exchange standard (or simplified three-year employment rule where that is not available).<sup>37</sup>

**Nominating and Governance Committees / Other Standing Committees**

Generally, the companies surveyed have a unified committee with responsibility for both nominating and governance functions. However, a small number of companies have separate committees for nominating functions and for governance functions.<sup>38</sup> For statistical purposes, where separate committees existed, the data for the nominating committee was included (and data for the governance committee ignored) for the information presented in this report. Such separate governance committees were also ignored for purposes of the statistics for “Other Standing Committees” included in this report. Similarly, an exceedingly small number of companies have had a committee that combined the nominating function with the function of one of the other primary committees in a single committee.<sup>39</sup> In such rare instances, the data for that committee was included in the data set for each of the primary committees it comprised.<sup>40</sup> In addition, some companies have not formed a nominating committee,<sup>41</sup> and instead nomination decisions are made by the independent directors as a group.<sup>42</sup> In such instances, our statistics have treated that group as the nominating committee. Further, with respect to the statistics regarding “Other Standing Committees” included in this report, we have disregarded “Stock Option,” “Equity Incentive” and other committees whose sole (or almost exclusive) function is to approve grants to non-executive employees and consultants of the company.<sup>43</sup>

**Equity / Voting Ownership**

The percentage of equity and voting ownership statistics was based on beneficial ownership data presented in the Security Ownership of Certain Beneficial Owners and Management table,<sup>44</sup> as well as other information regarding voting and conversion rights included elsewhere in proxy statements and other filings with the SEC. A fair number of companies report aggregate ownership by all executive officers and directors as a group of

<sup>37</sup> For purposes of the Lead Director statistics, we have not applied this methodology. Rather, we have included any company as having a Lead Director if the proxy statement identified a specific director as having the title of “Lead Director,” “Lead Independent Director” or “Presiding Director” (or a similar title). Generally all such directors were independent under all of the methods we applied (including the applicable stock exchange independence requirement), though some were not under the “Ever” [a company employee] Rule.

<sup>38</sup> While always rare, it has become increasingly less common over time.

<sup>39</sup> Such as a unified “Compensation and Corporate Governance Committee” that the proxy statement described as having nominating functions.

<sup>40</sup> E.g., data for a unified “Compensation and Corporate Governance Committee” that the proxy statement described as having nominating functions was included in the data for the Compensation Committee and the Nominating Committee with respect to that company.

<sup>41</sup> This was considerably more common, particularly in the SV 150, prior to the wave of governance reforms in the wake of the Sarbanes-Oxley Act of 2002.

<sup>42</sup> In some instances, particularly before the wave of governance reforms in the wake of the Sarbanes-Oxley Act of 2002, the nominating decisions were made by the board as a whole.

<sup>43</sup> These “committees” generally consist of the CEO as the sole member or are made up of members of the company’s management team operating with delegated authority in order to relieve the Board of the burden of routine grants of stock-based compensation. Consequently, they are not really indicative of general board operations.

<sup>44</sup> Item 403 of Regulation S-K (required by Item 6(d) of Schedule 14A).

**Methodology** *(continued)*

“less than 1%” (whether measured as simply equity or voting ownership).<sup>45</sup> For purposes of calculating the average ownership statistics, companies that reported “less than 1%” ownership were treated as having ownership of 0.5% in the data set.<sup>46</sup>

**Majority Voting**

There are a variety of ways to implement majority voting. These range from strict majority voting provisions in the charter or bylaws that require a majority of “for” votes for a director to be elected (and if less than a majority, the director simply does not take, or loses, office) to various resignation policies implemented in corporate governance principles that simply require a director to tender a resignation if less than a majority of “for” votes are received, which may or may not be accepted by the board or nominating committee (which retains full discretion in making the decision) — with a range of variations in between (often implemented in bylaws), generally with contested elections retaining plurality voting. The effectiveness of any of these (including the charter implementations) are further impacted by state laws that often provide for holding over of an incumbent even if a majority of “for” votes is not received (to prevent an unnecessary vacancy). Consequently, rather than attempt to illustrate the trends among the many variations, we have simply presented data regarding whether the companies surveyed have implemented any form of majority voting policy for uncontested elections (rather than having simply retained plurality voting for all director elections).

**Dual-Class Structure**

Generally, where a company has more than one class of stock and those classes have disparate voting rights, they were included in the data set as having a dual-class structure. However, in some instances companies may have a class of stock with disparate voting rights, but that class is incredibly small compared to the overall voting power represented by all voting stock or there are other indicia that the voting rights are not really effectively disparate.<sup>47</sup> In such cases, such companies were not included in the data set as having a dual-class voting stock structure.

**Executive Officer and Director Stock Ownership Guidelines**

Generally companies disclose whether they have, and details regarding, any stock ownership requirements for executive officers and directors in the Compensation Discussion and Analysis (CD&A) sections and

<sup>45</sup> SEC regulations permit such reporting. In the 2016 season, this included approximately 71% of S&P 100 companies and 14% of SV 150 companies.

<sup>46</sup> Companies that reported an actual numerical ownership percentage that happened to be less than 1% were included in the data set with the numerical ownership percentage reported.

<sup>47</sup> E.g., where the company might have a class of preferred stock outstanding in addition to its common stock and each share of preferred stock is entitled to more votes than each share of common stock, but the preferred stock is also convertible to common stock at the same ratio as the ratio of votes per share of preferred to votes per share of common. Some editorial judgment was necessarily applied in drawing such distinctions.



**Methodology** *(continued)*

Director Compensation sections of their proxy statements.<sup>48</sup> However, the SEC only began requiring the CD&A section to be included in filed proxy statements filed on or after December 15, 2006. Further, SEC rules do not strictly call for disclosure of director stock ownership requirements. In our experience, companies that had such executive officer or director ownership guidelines generally have disclosed them for stockholder relations reasons even in the absence of such requirements. In addition, where a company later disclosed stock ownership requirements and provided a history of those guidelines that indicated that they were adopted in prior years, we have retroactively applied that information in our data set (even though those guidelines were not discussed in the proxy statement covering that prior period).<sup>49</sup> Consequently, we believe that the trend information regarding stock ownership guidelines presented in this report is fairly representative of company practices in this area.

**Executive Officers**

SEC regulations define the term “executive officer” as a company’s “president, any vice president of the [company] in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function, or any other person who performs similar policy making functions for the [company].”<sup>50</sup> A company’s determination of executive officers under this definition is an inherently factual one, with the focus less on a person’s title and more on their actual duties or substantive role within the company. The SEC Staff will not provide advice or concurrence regarding a determination. So companies, with the advice of their counsel, must apply the facts, judicial decisions and various statements by the SEC Staff when applying the rule.<sup>51</sup> We have not tried to second guess these inherently subjective conclusions, and have simply accepted the executive officer determinations made by companies and/or their boards as reflected in their SEC filings.<sup>52</sup> It is possible that the number of executive officers is effectively systematically under-reported due to the timing of executive departures.<sup>53</sup>

48 Among the items that the SEC listed as examples of material elements of the company’s compensation for the named executive officers to be included in CD&A is “the company’s equity or other security ownership requirements or guidelines and any company policies regarding hedging the economic risk of such ownership.” See current [Item 402\(b\)\(2\)\(xiii\)](#) of Regulation S-K, which requires such disclosure.

49 This was a fairly rare circumstance.

50 See Rule 3b-7 under the Securities Exchange Act of 1934, as amended. The rule goes on to provide that “[e]xecutive officers of subsidiaries [of a company] may be deemed executive officers of the [parent company] if they perform such policy making functions for the [parent company].”

51 As noted in “[Study: Benchmarking the Number of ‘Executive Officers’](#)” by TheCorporateCounsel.net and LogixData, “[i]n particular, determining whether a business unit, division or function is a ‘principal’ one – or whether a person’s sphere of responsibility involves significant policymaking – can be challenging. Internal company politics can play a role too. Sometimes people are deemed to be ‘executive officers’ even though they really do not have important functions or policymaking responsibilities, but are deemed as such because the company doesn’t want to tell them that their stature isn’t equal to others at the same level on the organization chart, etc.” Companies and their advisers often use as a starting point in this analysis an informal rule of thumb that any officer that reports directly to the CEO (or sometimes president) should be presumed to be an executive officer, absent meaningful substantive indicia to the contrary.

52 As a practical matter, the judgment of who is an executive officer is made annually by the board of directors of most companies at the time the board approves the list of executive officers in connection with the filing of their Forms 10-K (or proxy statement).

53 For example, if an executive officer resigns shortly prior to the filing of the company’s proxy statement and the company has not yet hired a replacement (even though it intends to do so – and in fact for most of the years preceding and succeeding the filing in fact has a person filling the position of the departed executive), then that company may list one fewer executive officer in its proxy statement than it generally has in practice.

**Methodology** *(continued)***Gender**

In almost all cases, the proxy statement or other SEC filings of a company clearly identify the gender of each of its executive officers and directors.<sup>54</sup> In a small number of instances, we resorted to limited supplemental research (apart from reviewing SEC filings) to identify gender.<sup>55</sup> This supplemental research generally took the form of researching a relevant individual on freely available public sources.<sup>56</sup> We accepted the gender identifications in SEC filings or such supplemental sources at face value.

**Outliers**

For purposes of the distribution graphs (such as those at the top and bottom of page 9), outliers have been determined by applying a fence equal to 1.5 times the interdecile range (*i.e.*, the difference between the first and ninth decile amounts multiplied by 1.5). Any result beyond that fence is shown as an outlier (represented by a ◆).

<sup>54</sup> *I.e.*, through the use of the prefix “Mr.” or “Ms.” in the individual’s biographical description or elsewhere in the filing(s).

<sup>55</sup> Most typically these involved instances in which the prefix “Dr.” was consistently used (and the prefixes “Mr.” or “Ms.” were not).

<sup>56</sup> *I.e.*, the bios for such individual on the relevant company’s web page or the web pages for other companies for which the individual serves as an executive officer or director, LinkedIn profiles, biographical profiles prepared by reputable online sources, etc.

## About the Firm

Fenwick & West provides comprehensive legal services to technology and life sciences clients of national and international prominence. Fenwick is committed to providing innovative, cost-effective and practical legal services that focus on global technology industries and issues. We have built internationally recognized practices in a wide spectrum of corporate, intellectual property, tax and litigation areas. We have also received praise for our innovative use of technology, our pro bono work and diversity efforts. We differentiate ourselves by having a deep understanding of our clients' technologies, industry environments and business needs. For more information, visit [www.fenwick.com](http://www.fenwick.com).

## About the Author



David A. Bell's practice includes advising start-up companies, venture capital financings, mergers and acquisitions, initial public offerings and intellectual property licensing, as well as counseling public companies in corporate, securities, governance and compliance matters. He represents a wide range of technology companies, from privately held start-ups to publicly traded corporations.

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