

**SEC Investor Advisory Committee  
September 13, 2018**

**Remarks by  
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Thank you Chairman Clayton, Anne Sheehan and the other members of the Investor Advisory Committee for the invitation to speak today.

I am the Chairman of Innisfree M&A Incorporated, a proxy solicitation firm that specializes in proxy fights and other contentious solicitations. I have been involved in proxy solicitations since the mid-1980's and have the scars to prove it.

There will be a lot of discussion today regarding the use of technology to resolve various serious issues in the proxy voting process. Technology solutions, which do offer the potential for great improvement in the current proxy voting processes, however, are likely a long time in coming and will undoubtedly create other issues that will also have to be resolved.

I will confine my remarks today to three issues that could be addressed in a comparatively short period: increased voting participation by individual holders; reducing to a minimum the breaks in the custodial chain of voting authority resulting in otherwise valid votes not being counted; and universal proxy cards.

**1. The Problem of Voting by Individual Investors**

While the percentage of individual holders as participants in the equity capital markets has declined precipitously over the last several decades, those holders can and should still play an important role in the electoral process at publicly traded companies. Many proxy contests, in particular, are decided by extremely small margins. Individual support can also be crucial for proposals that require a supermajority vote or transactions that have a majority of the minority vote requirement. According to Broadridge and PWC, however, participation by individual holders declined in the second half of last year to only 27%, from 28% in the same period for the prior year, notwithstanding recent efforts to use the Internet and e-mail to make proxy voting easier through changes such as Notice and Access and e-mail delivery of proxy materials and voting instructions.

In fact, in our experience those changes actually result in lower participation rates. The problem is ultimately neither a technology problem nor a problem that can be resolved through technology alone, the problem is ultimately a behavioral one – individual holders lead very busy lives and voting in corporate elections is not a major priority.

In our experience, the best way to increase participation by individual holders is through regular contact during the solicitation period by hard copy mailings with proxy cards and by direct solicitation through telephone calls in which our solicitors can take votes during the call. While such regular contacts can be seen as annoying by some holders, it is very effective and can increase participation to 50% or

possibly more.

At this time, however, the only way for issuers to reach out directly to individual holders is if they are non-objecting beneficial owners, so called NOBO's, or as we usually describe them, the people who forgot to check a box when they opened up their brokerage account. In our experience, NOBO's usually constitute at most 50% of the shares held by individual holders at a company. Modifying the current rules to facilitate more individuals becoming NOBO's could increase voter participation. Establishing a process whereby companies could solicit proxy votes directly from individual holders rather than through broker intermediaries could also substantially increase participation. For example, a broker could give the issuer a written authorization, or omnibus proxy, authorizing their clients to vote directly.

## **2. Reducing Breaks in the Custodial Chain of Voting Authority**

A significant problem at Procter & Gamble and other proxy fights is the invalidation of otherwise valid votes due to breaks in the custodial chain of voting authority.

The determination of the person or entity entitled to vote shares is determined by state law – in order to vote, the holder must be on the issuer's registered list or have written authority from a registered holder to vote in its stead. Since most shares are held in the Street in the names of custodians, almost all Street shares are held on the registered list by a nominee, Cede & Co, which, in turn, designates through an omnibus proxy the number of shares that each custodian can vote. Once Cede & Co. issues the omnibus proxy, however, its responsibilities and actions with respect to voting at a meeting come to an end. The custodians then transmit to Broadridge and the other voting intermediaries the relevant information for their clients holding shares on the record date in order for the intermediaries to distribute proxy materials to those holders, receive voting instructions from those holders and then vote in accordance with those instructions in the names of the custodians.

That all sounds very straight forward, sort of. The problem is that the information supplied by the custodians and the information maintained by the voting intermediaries often do not match the information on Cede's omnibus proxy, which is the final word on entitlement to vote. A custodian may report to the intermediary that shares are held in the name of an affiliate, but that affiliate's name is not on Cede's omnibus proxy. Or, the custodian may be clearing for a variety of smaller, regional sub-custodians which vote on behalf their customers, but the necessary paper work, so called respondent proxies authorizing the sub-custodians to vote, have not been issued. In those cases, votes that have been cast by shareholders fully entitled to vote may not be counted and those shareholders are disenfranchised.

It is important that the custodians and voting intermediaries regularly review their processes and records to ensure that the information used to disseminate proxy materials and to process voting instructions conform to the information the custodians supply to DTC for purposes of the omnibus proxy. It is particularly important that where sub-custodians have the authority to vote that respondent proxies are issued reflecting that authority. These breaks in the custodial chain are usually not one-off's, but recurring problems.

## **3. Universal Proxy Cards**

The inability of shareholders to vote for candidates from both slates in a proxy contest can result in the

election of a board of directors that does not reflect the wishes of a majority of the shareholders voting in the election. The current rules permit a shareholder to vote on only one side's proxy card – for all or some of that side's nominees. If the holder wishes to vote for only some of those nominees, say two of the dissident's five nominees, they can only vote for those two and withhold authority for the other three dissident nominees, thereby not casting a positive vote for any of the other seats that are up for election. In that case, the shareholder wants to see a board that contains only two dissident nominees, but because he or she cannot vote for any of management's nominees to fill the other open seats, a comparatively small number of other holders, not representing a majority of the shares voted, can elect more than two dissident nominees by voting for more than two dissident nominees.

The only way to vote for candidates on both slates is to go to the expense and inconvenience of attending the meeting and voting in person or authorizing another person to do so.

There has long been a concern that universal proxies would favor the dissident. Our experience, however, borne out by a few academic papers, is that a universal proxy card would generally favor management, if only because of the likelihood that the proxy advisory firms would support some of the dissident's nominees and, under the current rules, none of management's nominees.

We used a universal proxy card successfully in a proxy contest at Transocean several years ago. Transocean, although listed on NYSE, is incorporated in Switzerland which requires that all nominees must appear on the company's proxy card. We and the dissident used identical proxy cards that included both slates and experienced few difficulties in voting.

There are two issues in particular that need to be addressed, however. By permitting a holder to pick nominees from both sides, there is a possibility that he or she will vote for more nominees than the number of open seats. In that case, the shareholder's vote must be excluded, disenfranchising the shareholder, since there is no way to determine the voter's intent with respect to the seats that are open. This is not a problem for institutions or individual holders that vote on an electronic platform since safeguards against such over voting can be easily programmed. The real concern, however, is for individual holders voting on a paper proxy card. Card design to minimize over votes is essential, particularly for voting intermediaries which have fairly inflexible voting instruction forms. Because the penalty for inadvertently over voting is so severe – disenfranchisement – there should also be in place a process whereby the voting intermediaries must inform any holders that have over voted and give them an opportunity to correct their vote.

It is also important to require that both sides in a proxy contest use a universal proxy card since otherwise there is the same potential for distorted election results.

Again, while we believe that technology can help solve many of the current proxy voting issues and that the Commission should stay focused on facilitating those solutions, they are unlikely to be in place soon and so it is important to focus also on less complex, faster-to-implement solutions. There are many other issues, such as the voting issues caused by share lending that can also be addressed in the same way but time does not permit a full discussion.

Thank you again for the opportunity to participate in this important process and I look forward to

today's discussion.