



November 9, 2018

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: SEC File Number 4-725 on *Roundtable on the Proxy Process - Universal Proxy*

Dear Mr. Fields:

The Society for Corporate Governance (the “Society”) appreciates the opportunity to provide comments to the U.S. Securities and Exchange Commission (“SEC” or “Commission”) on the proxy process and related SEC rules in advance of the Roundtable on the Proxy Process.

Founded in 1946, the Society is a professional membership association of more than 3,600 corporate and assistant secretaries, in-house counsel, outside counsel and other governance professionals who serve approximately 1,700 entities, including 1,000 public companies of almost every size and industry. Society members are responsible for supporting the work of corporate boards of directors and the executive managements of their companies on corporate governance and disclosure matters.

Introduction and Timing Considerations

In January 2017, the Society expressed a number of concerns regarding the rule change proposed by the Commission that would mandate the use of universal proxy cards in contested elections (the “Proposed Rule”).¹ Among other things, the Society noted that improvements to numerous other elements of the proxy process could more meaningfully and broadly promote shareholders’ ability to exercise their voting rights.

At the September 2018 SEC Investor Advisory Committee discussion on proxy voting matters, a number of participants commented on the topic of universal proxy cards and may have suggested that this topic is one that could be addressed separately from, and on a faster timetable than, other aspects of the proxy voting process, such as the use of technology to allow for verification that proxies were voted in accordance with a shareholder’s instructions.

¹ <https://www.sec.gov/comments/s7-24-16/s72416-1475144-130482.pdf>

Commenters on this topic also noted that the use of universal proxy cards carries with it the risk of shareholders voting for more nominees than the number of board seats, which would result in those shareholders' votes being excluded altogether. To address those concerns, processes must be established so that such shareholders have an ability to correct their votes in order to avoid the potential result of being disenfranchised. Accordingly, although the discussion below addresses specific items relating to the potential for mandatory use of universal proxy cards, these comments are provided in the context of the Society's overarching view that mandating the use of universal proxy cards should be done, if at all, only in the context of a broader effort to improve the processes and technology that support the proxy voting process, and not as a separate, stand-alone endeavor.

Summary

The Society believes that a requirement concerning the use of universal proxy cards would be a significant change and presents a meaningful risk of unintended consequences. Accordingly, any change in this area requires careful evaluation. In particular, if the SEC were going to mandate the use of universal proxy cards, we believe any final rule should address several procedural and logistical concerns, including:

- Nominating shareholders should own a minimum amount of shares to gain access to a universal proxy card.
- Universal proxy cards should be required only for election contests and should not apply to "vote no" or "withhold the vote" campaigns or other types of shareholder solicitations.
- Nominating shareholders should be required to solicit proxies from holders of at least some minimum percentage of the company's outstanding shares through the mailing of a definitive proxy statement and proxy card and/or the mailing of a Notice of Internet Availability.
- The deadline by which a nominating shareholder must provide notice to the company should be governed by the company's bylaws (to the extent they contain advance notice requirements).
- Companies should not be required to provide advance notice of board nominees to a nominating shareholder, other than via the company's preliminary proxy statement.
- Universal proxy cards should be required to list all valid nominees, whether nominated by the company, the nominating shareholder or other nominating shareholders.
- To mitigate shareholder confusion, the form and presentation of the universal proxy card needs much more attention.
- Penalties should be imposed on a nominating shareholder who does not comply with the rules.

I. Nominating Shareholders Should Own a Minimum Amount of Shares to Gain Access to a Universal Proxy Card.

Under the proxy voting system currently in place, a nominating shareholder engaging in an election contest, other than a proxy access election contest, must expend the resources to prepare, file and mail a definitive proxy statement and proxy card and/or mail a Notice of Internet Availability before shareholders could vote for any directors nominated by that shareholder. Those expenditures work to protect companies and all shareholders by increasing the likelihood that a nominating shareholder will engage in an election contest only if the economic rationale for doing so justifies the expense. For this reason and to try to ensure that a proxy contest using the company's own proxy materials could only be brought about by shareholders with a meaningful and long-term economic interest in the company, the Commission included a three percent for three years ownership requirement in the proxy access rule that it adopted.

Similarly, to ensure that a shareholder cannot impose on the company and all other shareholders the costs of an election contest without having the appropriate economic incentives, we believe that nominating shareholders should own a minimum amount of shares to gain access to a universal proxy card. Whether that minimum level of ownership should be three percent for three years, as was the case in vacated Rule 14a-11, or some other minimum level of ownership to avoid frivolous proxy contests likely requires further study by the Staff.

II. Universal Proxy Cards Should be Required Only for Election Contests and Should Not Apply to “Withhold the Vote” or Other Types of Shareholder Solicitations.

As the principle behind a universal proxy card is to provide shareholders not attending a shareholder meeting with the same ability as shareholders attending a meeting to select the desired director candidates from among all of those being nominated, this goal would be satisfied by requiring a universal proxy card when there is an election contest, i.e., when there are more nominees than board seats. However, as the SEC recognized and discussed in the Proposed Rule, the Commission previously proposed changes that would effectively expand the scope of a nominee's consent to include consent to being named in *any* proxy statement for the applicable meeting. That proposed change would affect the conduct of all solicitations even when a proponent is not nominating candidates for the board of directors (*e.g.*, in “withhold the vote” or “just vote no” campaigns).

Such an expansion would extend beyond the SEC's stated goal of enhancing the ability of shareholders voting by proxy in a contested election to replicate the vote they could cast if they voted in person at a shareholder meeting. As noted in the Proposed Rule, the proposed changes would permit shareholder proponents to name some or all of a company's director nominees in proxy materials in connection with “withhold the vote” campaigns, as well as in connection with shareholder proposals unrelated to the election of directors, such as corporate governance or social responsibility proposals. This could have serious unintended and adverse consequences, among them, misleading or confusing proxy materials. Accordingly, any rule change should be limited to the context of election contests rather than any solicitations relating to a shareholder meeting.

III. Nominating Shareholders Should be Required to Solicit Proxies from Holders of at Least Some Minimum Percentage of the Company's Outstanding Shares.

As noted in the Proposed Rule, imposing a solicitation requirement on the nominating shareholder is intended to ensure that the shareholder conducts a meaningful, independent solicitation rather than relying on the company's use of a universal proxy card to have the shareholder's nominees elected. As a practical matter, when seeking proxies, companies solicit all of their shareholders through the mailing of a definitive proxy statement and proxy card and/or the mailing of a Notice of Internet Availability. Any universal proxy card system should require nominating shareholders to solicit holders of at least some minimum percentage of the company's outstanding shares through the mailing of a definitive proxy statement and proxy card and/or the mailing of a Notice of Internet Availability. Whether that minimum percentage should be holders of a majority of the shares or a higher percentage likely requires further study by the Staff.

IV. The Deadline by Which a Nominating Shareholder Must Provide Notice to the Company Should be Governed by the Company's Advance Notice Bylaws.

Under the current system, as a matter of state law, a shareholder's notice of nomination must comply with the company's bylaws. The vast majority of public companies have an advance notice bylaw that requires notice of nominations be given to the company, typically with at least 90 or 120 days' advance notice. A separate and different deadline for notice using a universal proxy card would create needless confusion and would be unnecessary.

The timing requirements under advance notice bylaws provides a company and its board with the time necessary to evaluate the nominees or to undertake the same process as they would when considering director candidates in the normal course. The timing requirements also provide time for the solicitation of input from large shareholders, as well as time to negotiate with the nominating shareholder to reach a potentially amicable and mutually acceptable resolution. Accordingly, a shorter time period than that provided under a company's advance notice bylaw would be too short.

Any SEC rule in this area could provide a deadline for notice in the event that a company does not have an advance notice bylaw. For example, the Commission may consider a provision similar to Rule 14a-4(c)(1), which provides that a proxy may confer discretionary authority to vote on a matter if the company did not have notice of the matter by the company's advance notice deadline or, if the company does not have an advance notice provision, by at least 45 days prior to the anniversary date of mailing the prior year's proxy statement.

V. There Should be No Requirement for Companies to Give Notice to the Nominating Shareholder.

A company should not be required to provide advance notice of its nominees to a nominating shareholder. In practice, when advance notice of a proxy contest is given, companies may re-evaluate their contemplated slate and may recruit new director candidates, which takes time. Under the proxy rules, a company is required to file a preliminary proxy statement disclosing the board's nominees for director as well as other information regarding the annual (or

special) meeting itself. That is sufficient advance notice for a nominating shareholder. In our experience, it is common practice for a nominating shareholder to wait to file its preliminary proxy statement until after the company has filed its preliminary proxy statement. We see no compelling reason to seek to change this common and accepted practice.

VI. Universal Proxy Cards Should be Required to List All Valid Nominees, Whether Nominated by the Company, the Nominating Shareholder or Other Nominating Shareholders.

Consistent with the goal of a universal proxy card, and as contemplated in the Proposed Rule, a universal proxy card should contain the names of all valid nominees, whether put forth by the company, by the nominating shareholder or by other nominating shareholders (including pursuant to any proxy access bylaw). Although we acknowledge that the scenario of multiple and competing investor-nominated slates of nominees is not common, we believe that it may become more common under a universal proxy card system. Any universal proxy card system that would permit less than all valid nominees to be listed in the card would cause shareholder confusion and fail to achieve the stated goal of a universal proxy card requirement.

VII. The Proposed Form of a Universal Proxy Card has the Potential for Significant Shareholder Confusion.

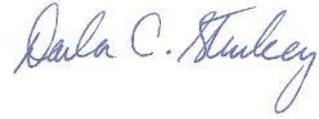
We are concerned that there is a significant possibility of shareholder confusion. The complexities and variety of alternatives in the form and presentation of a universal proxy card are myriad. It is difficult to predict what may or may not cause or mitigate shareholder confusion. We believe that additional time would be well spent to consider these practical and logistical issues.

VIII. Penalties Should be Imposed on a Nominating Shareholder Who Does Not Comply with the Rules.

All participants in the proxy solicitation process should be held to high standards. We urge the SEC to consider remedies against nominating shareholders who, after giving notice of a proxy contest, do not comply with the rules. There is the real possibility that after a company prepares proxy materials for a contested election and mails out a universal proxy card to shareholders with the shareholder's nominees listed, the shareholder will fail to conduct a separate solicitation or fail to appear at the meeting to nominate its candidates. Accordingly, we recommend that the SEC consider imposing penalties on a shareholder who, after giving notice of a proxy contest, does not comply with the rules. Such penalties could include, among other things, a prohibition on the shareholder from engaging in any proxy contest for some period of time (at least two annual meetings). A two-year penalty, for example, would be consistent with Rule 14a-8 (h)(3), which imposes a two-year ban on a shareholder who submits a proposal under Rule 14a-8 and fails to appear (or have a qualified representative appear) at the meeting to present the proposal.

We appreciate the opportunity to provide comments on the proxy process and universal proxy cards and would be happy to provide you with further information to the extent you would find it useful.

Respectfully submitted,

A handwritten signature in blue ink that reads "Darla C. Stuckey". The signature is written in a cursive style with a large, looping initial "D".

Darla C. Stuckey
President and CEO
Society for Corporate Governance