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By email: rule-comments@sec.gov

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

SEC File Number 4-725 (Roundtable on the Proxy Process) and File Number S7-24-16 (Universal Proxy)

Dear Mr. Fields:

I am writing on behalf of Trian Fund Management, L.P. (“Trian”) in response to the Securities and Exchange Commission’s (the “SEC” or the “Commission”) solicitation of comments on the proxy process and related SEC rules in connection with the staff roundtable, held on November 15, 2018 (the “Roundtable”). We appreciate the opportunity to provide our views on the proxy process. We also thank the Commission for the opportunity to participate on the Panel on Proxy Voting Mechanics and Technology at the Roundtable.

Trian is an investment management firm that manages capital for a global base of investors that includes institutional investors, individuals, public and private pension plans and sovereign wealth funds. As a highly engaged shareowner, Trian’s Principals and Partners have held a total of 14 Board seats at 12 different portfolio companies since Trian was founded in 2005. While Trian has engaged in only three proxy contests since its inception: H.J. Heinz (2006); DuPont (2015); and Procter & Gamble (“P&G”) (2017), our participation in these three seminal proxy contests resulted in our becoming integrally involved in the U.S. proxy voting process and enables us to share some of our observations, lessons learned and recommendations with respect to the accuracy, integrity, transparency and efficiency of the shareholder voting process.

As a guiding principle, we would submit to the Commission that shareholders’ ability to participate in director elections is fundamental to principles of shareholder democracy and is the primary mechanism by which shareholders can hold corporate directors accountable. However, in a close proxy contest, such as the Trian/P&G 2017 proxy contest, where approximately two

billion votes were cast and the final certified results showed a voting margin of approximately ¼ of 1%¹, the complexities of the current proxy voting infrastructure makes an accurate and verifiable voting tabulation extremely difficult. In fact, in such a close contest, virtually every vote cast has the potential to be the deciding vote. And it is in instances like this, where the results are so close, where a spotlight is shined on the current proxy voting system’s imperfections.

At the Roundtable, we discussed some of the specific issues and problems that were identified during the Trian/P&G proxy contest, which are set forth below, and range from the very complex to the very simple:

1. Over-voting: Over-voting occurs when securities intermediaries, brokers and custodians, lend out the shares they hold, which they often do for a fee. This can result in both the lending and borrowing broker-dealers submitting voting instructions for the same shares, which may give rise to over-voting if there is not a cut back in the number of votes submitted. What Trian found during the P&G proxy contest was that certain over-voting by securities intermediaries was not reconciled by broker-dealers until after the announcement of the preliminary tabulation of the vote by P&G’s independent inspector of election.
2. Chain of Custody: There is generally no way for a beneficial owner to confirm that its shares were actually voted. In addition, a break in the voting chain of authority between a voting intermediary like Broadridge, the custodian, any sub-custodian and a company’s registered list, has the potential to result in shares not being included in the final tabulation.² As a result, there is no consistent “end-to-end confirmation.”

¹ See P&G’s Current Report on Form 8-K/A, filed with the SEC on December 15, 2017, available at <https://www.sec.gov/Archives/edgar/data/80424/000119312517370868/d443566d8ka.htm>.

² Three examples where a break in the chain of custody resulted in shares not being counted during Trian’s proxy contest with P&G are described below:

- i. One major financial institution learned that because of chain of custody issues, the voting process it had been using for nearly a decade to vote a portfolio of shares held in one account, resulted in those shares being excluded by an independent inspector of election from the tabulation of every contested proxy contest tabulated by that inspector during that time period.
- ii. Shares voted by a small fund administrator were excluded because the name of the Broadridge client was changed following the transfer of its fund administration business even though the custodian remained unchanged and the beneficial owners had not made any changes to how they held or voted shares.
- iii. Another institution had its shares excluded because of conflicts on the face of The Depository Trust Company (DTC) omnibus proxy and the Broadridge proxy which led to the question of whether a financial intermediary or the beneficial owner had the right to vote the shares (in fact while these shares were going to be excluded by the independent inspector, the inspector had already counted votes cast by other beneficial holders with a similar chain of custody provenance).

3. Empty-Voting. When unallocated shares held in a company employee stock option plan (ESOP) for future participants are voted by the ESOP's trustees on a mirror percentage basis to match the shares that were allocated to, and voted by, actual current plan participants (i.e., current employees and retirees) a fair and equitable result is not necessarily achieved because current participants tend to vote for management.³
4. Costs of a Proxy Contest. The cost of conducting a proxy contest for both the issuer and the dissident shareholder is very high. Out-of-pocket costs include those for lawyers, accountants, public relations and financial advisers, proxy solicitors, calling individual retail shareholders, advertising, printing, postage, transportation and processing, as well as litigation and other costs incidental to the solicitation. P&G disclosed a cost estimate of \$35 million in excess of its customary annual proxy solicitation costs and Trian estimated its costs at approximately \$25mm.⁴ As P&G's Chief Legal Officer, Deborah Majoras, pointed out at the SEC's Investor Advisory Committee's meeting on September 13, 2018, these costs are exacerbated by limitations on electronic distribution of proxy materials.⁵
5. Lack of a Paper Clip at Annual Meeting: One retail shareholder tried to vote its P&G shares at the annual meeting by submitting a legal proxy and ballot, however, those shares were not initially tabulated because the legal proxy and ballot were separated from each other between the time of the annual meeting and the tabulation by P&G's independent inspector. This separation occurred because shareholders were not provided paper clips at the annual meeting to hold their legal proxies and ballots together. Ultimately, those shares were counted after Trian inquired about them during the review process that followed the announcement of the preliminary tabulation by P&G's independent inspector of election.

RECOMMENDATIONS

Trian supports the Commission's review of the proxy voting system and based on our experience with, and study of, the current proxy voting system, believes the SEC should consider both short-term and long-term improvements to the proxy voting infrastructure. We further believe that developments in technology since the implementation of the current proxy

³ See letter from Carl T. Hagberg, Chairman & CEO of CT Hagberg LLC (Nov. 2, 2018), available at <https://www.sec.gov/comments/4-725/4-725.htm> (noting that "The Procter & Gamble contested election cast the issue of so-called 'empty voting' into high relief - and clearly indicated that regulatory reform is sorely needed.").

⁴ See page 4 of P&G's Definitive Proxy Statement on Schedule 14A filed with the SEC on Aug. 1, 2017, available at <https://www.sec.gov/Archives/edgar/data/80424/000119312517243084/d380211ddefc14a.htm> and see page 25 of Trian's Definitive Proxy Statement on Schedule 14A filed with the SEC on July 31, 2017, available at <https://www.sec.gov/Archives/edgar/data/80424/000090266417003104/p17-1611defc14a.htm>.

⁵ Remarks of Deborah P. Majoras, P&G's Chief Legal Officer & Secretary, at the SEC Investor Advisory Committee meeting, Discussion Regarding the U.S. Proxy Voting Infrastructure (Sept. 13, 2018), available at <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac091318-deborah-majoras-opening-remarks.pdf>.

voting infrastructure in the late 1960's and early 1970's (an era of paper stock certificates) can significantly enhance the proxy voting process. While our long-term recommendations will likely require significant time to review, study and implement, we believe that our short-term recommendations can be implemented relatively quickly and easily and can significantly improve the shareholder voting process within the existing proxy voting system.

Short-term recommendations:

- Universal Proxy Card. Rules mandating the use of a universal proxy card in contested elections should be finalized. As we noted in our January 9, 2017 comment letter to the SEC supporting the use of universal proxy cards,⁶ in 1934 Congress made it clear that the Federal proxy rules were designed to promote the shareholder franchise by removing barriers to the free exercise of voting rights.⁷ Given that the system of public share ownership is premised on shareholders' ability to vote for their preferred director candidates at annual elections, the vast majority of shareholders that vote by proxy--whether they be a Main Street investor or an institutional shareholder--should not have a more restricted set of voting options than those few shareholders who are able to attend annual meetings in person and vote by ballot.
 - In addition to furthering good corporate governance, we believe that the universal proxy card can also play a role in simplifying the proxy voting process and reduce tabulation issues by helping to eliminate the problem of identifying the last voted proxy card and the occurrence of invalid conflicting proxy cards that arise when a shareholder tries to mix and match nominees from competing slates.⁸
 - We recognize that a number of concerns have been raised concerning the use of universal proxy cards and would recommend that the SEC's final rule address the following issues:⁹

⁶ See Trian's letter to the SEC dated January 9, 2017, Regarding Use of Universal Proxy Cards, SEC Release No. 34-79164, File Number S7-24-16, available at <https://www.sec.gov/comments/s7-24-16/s72416.htm>.

⁷ See 17 H.R. Rep. No. 1383, 73d Cong., 2d Sess., 14 (1934) (indicating Congress's intent that Section 14(a) should prevent frustration of the "free exercise of the voting rights of stockholders"). For an overview of the historical development of proxy voting and regulation, see Randall S. Thomas and Catherine T. Dixon, Aranow & Einhorn on Proxy Contests for Corporate Control, Third Edition (2001), at §1.01[A] ("Recognizing the need for federal intervention in the area of corporate voting, Congress enacted Section 14(a) of the Securities Exchange Act in 1934 to strengthen and preserve the shareholder franchise.").

⁸ In the P&G proxy contest, Trian and P&G did more than a dozen mailings between them, so shareholders had many opportunities to change their vote and submit later dated proxy cards or even change their vote at the annual meeting. This sometimes led to questions of which card was the last voted proxy card, since that is the proxy card which is ultimately counted.

⁹ For example, as noted by Theresa Whitmarsh and Gary Bruebaker of the State of Washington State Investment Board in their November 14, 2018 letter, "Reasonable provisions for mandatory universal proxy cards for all contested elections would guarantee shareholders a fair and expedient method for voting regardless of whether they vote in person or by proxy." (available at <https://www.sec.gov/comments/4-725/4-725.htm>).

- Inclusion of specific presentation and formatting rules. Because shareholders receive proxy cards from both management and the dissident shareholder, we believe that it is important that the SEC provide uniform presentation and formatting requirements to minimize confusion and the possibility of the universal proxy being structured to favor one side or the other.
 - Treatment of mismarked proxy cards. Given the possibility of “over-voting” on a universal proxy (i.e., voting for more directors than there are vacancies on the board), there should be rules governing the treatment of those “mismarked” proxies, including an opportunity for a shareholder to cure and resubmit another proxy card, time permitting.
 - Minimum solicitation threshold by the dissident shareholder to trigger the use of a universal proxy. While we agree that there should be a solicitation threshold that would trigger the requirement of a universal proxy—the 2016 Proposed Rules¹⁰ required a majority of the outstanding shares—we would ask that the SEC engage in a further review and study of, among other things, the economic impact to a dissident shareholder if the SEC considers raising the threshold beyond a simple majority of the outstanding shares. The threshold should not be set at a level that results in the required solicitation being prohibitively expensive to a dissident shareholder, thereby rendering the ability to use a universal proxy illusory.¹¹
- Adopt Rules to Require End-to-End Vote Confirmation. The current proxy voting system, with its numerous intermediaries, does not facilitate end-to-end vote confirmation and transparency to shareholders on whether their votes have been cast and tabulated. Subject to the SEC concluding it has the requisite jurisdiction over the parties, the SEC should require all intermediaries to provide the information necessary throughout the voting chain to enable end-to-end voting confirmation for all shareholders.¹²

¹⁰ See Universal Proxy, SEC Release No. 34-79164 (Oct. 26, 2016) [81 FR 79122 (Nov. 10, 2016)], available at <https://www.sec.gov/rules/proposed/proposedarchive/proposed2016.shtml>.

¹¹ Following up on Deborah Majoras of P&G’s comment at the September 13, 2018 SEC Investor Advisory Committee meeting concerning limitations in the use of electronic delivery of proxy materials (see text accompanying footnote 5), we, like others, recommend extending the use of electronic delivery for proxy materials in contested elections which is a cost-effective way of communicating with shareholders. See also letter from Barbara Novick and Ray Cameron, BlackRock (November 16, 2018), available at <https://www.sec.gov/comments/4-725/4-725.htm> (“[W]e recommend extending the use of e-delivery for the distribution of proxy materials.”).

¹² See also letter from Ken Bertsch, Council of Institutional Investors (“Bertsch”) (November 8, 2018), available at <https://www.sec.gov/comments/4-725/4-725.htm> (“We believe the SEC should mandate that all intermediaries transmit the necessary information to enable vote confirmation for all votes.”) citing letter from Jonathan Gabel,

Long-term recommendations:

- We believe that new technology can materially improve the distribution of proxy materials between issuers and shareholders and the execution and tabulation of shareholder proxies, and enhance the efficiency, accuracy, integrity and transparency of the proxy voting infrastructure.¹³
 - Given technological advances, the current system of “immobilized” and “fungible” shares should be reconsidered with the goal of ultimately moving to a system of traceable shares, specific share identification and accurate records of share ownership and chain of title, while safeguarding individual identities, holdings and voting decisions.¹⁴
 - There are various technological alternatives that should be considered, including:
 - Digital proxy voting platforms
 - A digital central-ledger book-entry system¹⁵
 - A private-permissioned distributed ledger (block-chain) technology with a central gatekeeper.

Rather than recommending one technological alternative over another, we would suggest that the SEC work with a diverse set of constituents to evaluate and study various alternatives and implement a series of proof of concept/pilot programs to test one or more of these alternatives in actual proxy voting situations. By way of example, we note that the

The Los Angeles County Employees Retirement Association (“Grabel”) (October 30, 2018), available at <https://www.sec.gov/comments/4-725/4-725.htm> (“LACERA recommends that the Commission assess options to efficiently facilitate end-to-end vote conformation.”); and letter from Carine Smith Ihenacho and Severine Neervoort, Norges Bank Investment Management (Nov. 2, 2018), available at <https://www.sec.gov/comments/4-725/4-725.htm> (“[W]e respectfully submit that introducing a mandatory requirement for all intermediaries to transmit the necessary information throughout the voting chain, to provide transparency to shareholders on how their votes have been cast, would help address this issue.”).

¹³ See, e.g., Grabel, “New technologies may present opportunities for cost-effective methods to better facilitate stakeholder collaboration and vote confirmation.” See also, letter from Joseph V. Amato, Neuberger Berman LLC (November 15, 2018), available at <https://www.sec.gov/comments/4-725/4-725.htm> (“We believe that new technology can enable a more efficient distribution, instruction and tabulation of shareholder ballots and we encourage efforts to bring innovative approaches to those areas.”)

¹⁴ See generally, George S. Geis, “Traceable Shares and Corporate Law,” *Northwestern University Law Review*, Vol. 113, Forthcoming, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3129042. See also Bertsch letter.

¹⁵ See generally, Marcel Kahan and Edward Rock, “The Hanging Chads of Corporate Voting,” *The Georgetown Law Journal*, Vol. 96 (2008) available at https://its.law.nyu.edu/faculty/profiles/representativeFiles/96GeoLJ_92649881-1B21-6206-60F6C451A4D13EEC.pdf, for a summary of the basic framework of a central-ledger book-entry system.

transition from a paper disclosure filing system to an electronic disclosure system (EDGAR), was handled in a similar deliberative manner.¹⁶

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As an actively engaged participant in the proxy voting process, we thank the Commission for allowing us to provide our input and welcome the opportunity to continue to engage in dialogue and assist the Commission in working to improve the accuracy, transparency, integrity and efficiency of the proxy voting infrastructure. Please contact me if you have any questions or would like to further discuss the issues raised in this letter.

Very truly yours,



Brian L. Schorr
Chief Legal Officer & Partner

¹⁶ See Electronic Filing and the EDGAR System: A Regulatory Overview (October 3, 2006), available at <https://www.sec.gov/info/edgar/regoverview.htm> (implementation of the EDGAR system included: a pilot system for volunteers; transition on a voluntary basis to an operational EDGAR system for the voluntary filers; a phase-in schedule to bring filers into the EDGAR system; evaluation of EDGAR's performance during a test period; full implementation of mandated electronic filing).