

January 9, 2017

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

Re: **File Number S7-24-16 (Universal Proxies)**
Comments to SEC Release No. 34-79164

Dear Mr. Fields:

Olshan Frome Wolosky LLP (“Olshan”) is pleased to submit its comments to the proposed amendments to the federal proxy rules to require the use of universal proxies in non-exempt solicitations in connection with contested elections of directors as described in Release No. 34-79164 published by the Securities and Exchange Commission (“SEC”) on October 26, 2016. We commend the Staff of the SEC for the tremendous amount of time and effort it devoted to drafting the rule proposal and the corresponding discussion and analysis contained in the proposing release.

Olshan’s Activist & Equity Investment Practice Group is widely recognized as the nation’s premier legal practice in representing activist investors in contested director elections. We have vast experience in counseling clients on a wide variety of activist strategies, from proxy contests, consent solicitations and hostile takeovers to letter-writing campaigns and behind-the-scenes discussions with management and boards of directors. We are consistently ranked as the leading legal advisor to activist investors by various publications that cover shareholder activism, including the WSJ-FactSet Activism Scorecard, Thomson Reuters’ Global Shareholder Activism Scorecard and Activist Insight Monthly. In 2016, our firm advised on 80 activist campaigns, or 60 more campaigns than our next closest competitor, according to WSJ-FactSet. We believe our position as the leading law firm in the shareholder activism arena gives us unique insight and perspective into the proxy process and the proposed legal, procedural and policy considerations underlying the universal proxy rule proposal.

We are not commenting on every aspect of the rule proposal. Rather, the purpose of this comment letter is to express our deep and fundamental concern that under certain circumstances the proposed rules could (i) give the registrant an unfair strategic advantage over the dissident in a contested solicitation and (ii) have a chilling effect on settlement discussions between the parties. The following is a more detailed discussion

of these concerns and proposed modifications the SEC is invited to take into consideration prior to finalizing the rules.

Dissident Notice of Intent to Solicit Proxies

Under the proposed rules, the dissident would be required to provide the registrant with the names of its nominees no later than 60 calendar days prior to the anniversary of the prior year's annual meeting date. If the registrant did not hold an annual meeting during the prior year or the date of the annual meeting is changed by more than 30 calendar days from the date of the prior year's meeting, the dissident would be required to provide notice of the names of its nominees by the later of 60 calendar days prior to the meeting or the 10th calendar day following the day on which public announcement of the meeting is first made by the registrant. We agree with the Staff that a notice requirement is necessary in order to establish a deadline by which the registrant will know that the universal proxy rules will apply. However, there are certain circumstances under which the deadline, as proposed, would give the registrant an unfair strategic advantage in its solicitation or disrupt any ongoing settlement discussions.

When Universal Proxy Notice Deadline Falls Before Nomination Deadline Under Registrant's Governing Documents

As the Staff points out, most registrants already have advance notice nomination procedures in their governing documents requiring a dissident to provide notice to the registrant of a shareholder nomination 60 or more days prior to the annual meeting, subject to an adjustment to this deadline if the meeting has been advanced or postponed by more than 30 days. Therefore, in most cases, the dissident will already be required to provide notice to the registrant of its nominees under the registrant's advance notice nomination procedures on or prior to the proposed universal proxy notice deadline. However, some registrants have less widely recognized advance notice nomination procedures (e.g., a nomination deadline of 45 days prior to the anniversary of the prior year's meeting) that would result in the dissident being required to inform the registrant of its nominees under the proposed universal proxy rules prior to the registrant's own nomination deadline. We believe a statutory requirement that could force a dissident to reveal the identities of its nominees prior to the date it would be required to do so under the registrant's own governing documents would be inequitable and give the registrant an unfair advantage in preparing for an activist campaign. The Staff should consider formulating an exception to the proposed rule applicable to registrants that already have their own internal advance notice nomination procedures such that the deadline for a universal proxy submission will be the later of the currently proposed deadline and the registrant's own nomination deadline.

When Registrant and Dissident are Engaged in Settlement Discussions

It is common in activist situations for the registrant and the dissident to engage in settlement discussions prior to the registrant's nomination deadline under its governing documents. In order to maintain good faith settlement discussions with a nomination deadline looming, the registrant will sometimes temporarily waive the applicability of its nomination procedures in the hope of reaching a settlement before the dissident is forced to formally submit a nomination. We believe the settlement of election contests, which typically result in the dissident obtaining board representation and agreeing to a reasonable standstill, is generally in the best interests of all shareholders. It is therefore imperative for the Staff to ensure that the proposed rules accommodate any interest the registrant and the dissident may have to settle an election contest and avoid the expense and disruption of an election contest.

We are concerned that even if a registrant's advance notice nomination procedures are waived in order to facilitate settlement discussions with a dissident (or if there are no nomination procedures under the governing documents), the proposed rules will still impose a hard statutory requirement for the dissident to submit notice of its intention to nominate during these discussions. To the extent the dissident is a Schedule 13D filer, the dissident's universal proxy submission would constitute an event requiring the dissident to promptly file an amendment to its Schedule 13D disclosing the submission. We believe this would have a chilling effect on any ongoing settlement discussions between the parties. In order to avoid this, we believe the Staff should consider modifying the proposed rules to include an exception that will temporarily exempt the dissident from the notification requirement while settlement discussions between the parties are taking place. The rule modification could provide that the dissident may avail itself of the exemption if, prior to the universal proxy notification deadline, the registrant and dissident confidentially submit a notice to the SEC certifying that good faith settlement discussions are taking place, with the dissident further undertaking to comply with the notification requirement within a certain number of business days after one party has received notice from the other party that it has formally terminated settlement discussions.

Registrant's Notice of its Nominees

Under the proposed rules, the registrant would be required to notify the dissident of the names of its nominees (unless the nominees have already been identified in a proxy statement filed by the registrant) no later than 50 calendar days prior to the anniversary of the prior year's annual meeting date. If the registrant did not hold an annual meeting during the prior year or the date of the annual meeting is changed by more than 30 calendar days from the date of the prior year's meeting, the registrant would be required to provide notice no later than 50 calendar days prior to the date of the meeting. As a

result, the registrant would be required to provide notice of the names of its nominees to the dissident 10 days after the latest date the registrant would have received the dissident's notice of the names of its nominees. The Staff believes this 10-day window is "appropriate because it provides a sufficient period of time for the registrant to consider the dissident's notice, finalize its nominees and respond with its own notice of nominees" and the absence of such a requirement would give the dissident an "informational and timing disadvantage."

We do not believe it would be appropriate for the registrant to provide to the dissident the names of its nominees only after it has received the names of the dissident's nominees as the registrant would have a significant strategic advantage over the dissident in its solicitation. In fact, this proposed notification sequence giving the registrant a first look at the dissident's competing slate is consistent with the inequitable state of affairs under the current proxy regime where the dissident is always required to provide notice of its slate of nominees to the registrant under its advance notice nomination procedures (which slate generally cannot be altered after the nomination deadline) without knowing who will comprise management's slate until the registrant files its proxy statement. Shareholders have a fundamental right to nominate and elect representatives to the board to serve as stewards of their company. In order for a shareholder to make a fully informed decision as to whether it would benefit all shareholders to nominate a competing slate of directors and, if a nomination is believed to be necessary, to allow a shareholder to identify director candidates with the breadth of skills, experience or independence that the incumbent directors may lack, the management slate should be publicly announced before shareholders are required to nominate.

The Staff correctly notes that the dissident almost always files its definitive proxy statement after the registrant has filed its preliminary or definitive proxy statement and that the dissident's definitive proxy statement is rarely filed more than 50 calendar days prior to the meeting date. Therefore, the Staff does not believe requiring the registrant to provide to the dissident the names of its nominees within 10 days after it has received the names of the dissident's nominees will impose a practical hardship for the dissident. However, dissidents often would like to have the ability to file a definitive proxy statement and solicit shareholders as soon as possible and without being hamstrung by the registrant's proxy filing timeline. But without knowing the names of management's nominees (especially in the case of short slate contests) and other important information that may be first disclosed in the registrant's definitive proxy statement (and previously left blank in preliminary filings) that is also required to be disclosed in the dissident's proxy statement or that is material to the dissident prior to finalizing its proxy statement, dissidents are unfairly forced to wait until the registrant files its proxy statement.

Accordingly, if the universal proxy rules are approved, we believe this would also be an appropriate time for the SEC to amend the rules to require the registrant to publicly

disclose in a Form 8-K the names of its nominees for an upcoming annual meeting (as well as other important information regarding the meeting, such as all other business proposals to be voted on at the meeting, the record date of the meeting and the number of shares outstanding as of the record date) at least 30 days prior to the earlier of the nomination deadline under the registrant's governing documents or the universal proxy notice deadline. This would allow each shareholder to evaluate whether it would be in the interest of all shareholders to nominate a competing slate and eliminate the existing strategic timing disadvantage current dissidents have in the solicitation process.

Dissident's Requirement to File Proxy Statement

Under the proposed rules, the dissident would be required to file its definitive proxy statement with the SEC by the later of (i) 25 calendar days prior to the meeting date, and (ii) 5 calendar days after the registrant files its definitive proxy statement with the SEC. However, the Staff is not proposing a rule change that would require the registrant to file its definitive proxy statement by a specified date. We believe imposing a filing deadline on the dissident but not the registrant is inequitable and is consistent with the current proxy rule regime, which gives the registrant the ability to mail its solicitation materials to shareholders before the dissident has the opportunity to finalize its proxy materials.

As discussed above, we believe the dissident would like to have the ability to file and mail its definitive proxy statement and solicit shareholders as soon as possible but often cannot until the registrant files its definitive proxy statement disclosing important information that had been previously left blank in the registrant's preliminary proxy statement. We proposed above that the proxy rules be amended to require the registrant to publicly disclose in a Form 8-K the names of its nominees as well as other important information regarding the meeting at least 30 days prior to the earlier of the nomination deadline under the registrant's governing documents or the universal proxy notice deadline. This way, a dissident who is ready to commence its solicitation is not forced to wait until the registrant files its definitive proxy statement containing information that was previously left blank in preliminary filings.

To the extent this Form 8-K or similar disclosure requirement is not adopted by the SEC, the registrant will continue to have the strategic advantage of forcing the dissident to wait until the registrant files its definitive proxy statement before the dissident has the ability to finalize and mail its definitive proxy statement. The Staff's stated rationale for not imposing a filing deadline on the registrant is that the registrant has an incentive to file its definitive proxy statement well in advance of the meeting date to ensure there is sufficient time to obtain proxies from the requisite number of shareholders to achieve a quorum. However, under the proposed rules, there could be circumstances under which the registrant would have a strategic advantage over the dissident by narrowing the window during which the dissident has the ability to solicit proxies. For example, if the

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registrant believes it has the support of institutional investors and the dissident would be required to secure a large retail vote to win the election (which requires much more time and resources compared to the solicitation of institutions), the registrant would have an incentive to force the dissident to commence its proxy statement mailing as late as possible. Under the proposed rules, with no filing deadline applicable to the registrant, the registrant could hold up the dissident's definitive filing by delaying for as long as possible the filing of its definitive proxy statement, thereby compressing the time period during which the dissident can conduct its solicitation prior to the meeting. The Staff should therefore consider imposing a filing deadline applicable to the registrant that is well in advance of the meeting date to the extent the Form 8-K disclosure requirement suggested above is not adopted by the SEC.

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Please feel free to contact Steve Wolosky, Andrew Freedman or Ron S. Berenblat at (212) 451-2300 if you would like to discuss any of the foregoing in further detail.

Very truly yours,

/s/ Steve Wolosky

Steve Wolosky