



January 10, 2017

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

Re: Proposed Rule Change re: Universal Proxy (File No. S7-24-16)

Dear Mr. Fields:

The Society for Corporate Governance (the “Society”) appreciates this opportunity to provide comments on the proposed amendments to the federal proxy rules to require the use of universal proxies (the “Proposed Rule”).

Founded in 1946, the Society is a professional membership association of more than 3,200 corporate secretaries, in-house counsel, and other governance professionals who serve approximately 1,600 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 their committees and the executive management teams of their companies regarding corporate governance and disclosure. Our members generally are responsible for their companies’ compliance with the securities laws and regulations, corporate law, and stock exchange listing requirements. In their roles, our members are also central to the annual meeting and proxy solicitation process at their companies.

Summary

At the outset, the Society believes that a rule mandating the use of universal proxy cards in contested elections is not necessary at this time and does not further the Securities and Exchange Commission’s (the “SEC” or the “Commission”) mission to protect investors, maintain efficient markets and facilitate capital formation. As discussed further below, our view is that:

- There are a wide range of possible consequences to a final rule. These could include fostering more proxy contests at significantly higher costs to registrants and their shareholders and exacerbating the short-termism that good corporate governance is intended to combat.
- A universal proxy card could confuse retail voters as it would be a major change from how voting has been conducted.

- Improvements to numerous other elements of the proxy plumbing process could more meaningfully and broadly promote shareholders' ability to exercise their voting rights.
- While institutional investors want the flexibility to choose candidates from both slates without voting in person, there currently exist less costly "work arounds".
- There are very few proxy contests. These exceptional situations do not warrant the time and resources of the SEC, its staff, registrants, service providers and other interested parties that would be required to finalize the Proposed Rule.

If, however, the Commission decides to finalize the Proposed Rule, compliance with the rule should be voluntary. Furthermore, we believe any final rule should address several procedural and logistical concerns, including:

- Dissidents should own a minimum amount of shares to gain access to a universal proxy card.
- The amended definition of a *bona fide* nominee should not apply to "vote no" or "withhold the vote" campaigns, or other types of shareholder solicitations.
- The deadline by which dissidents must provide notice to the registrant should be earlier. This would better allow for effective engagement and consideration.
- Registrants should not be required to provide advance notice of its nominees to a dissident.
- To mitigate shareholder confusion, the form and presentation of the universal proxy card needs much more attention.
- Penalties should be imposed on a dissident who, after giving notice, does not follow through with a proxy solicitation or does not comply with the rules.

I. A Rule Mandating the Use of Universal Proxy Cards for Proxy Contests is Not Necessary at This Time and Does Not Further the Mission of the SEC.

The claimed objective of the Proposed Rule is to allow a shareholder to vote as if he or she were attending a shareholder meeting and voting in person. Certain institutional investors have said that, in contested proxy situations, they want the ability to choose individual board members, sometimes from opposing slates, rather than being forced into choosing a proxy card to vote. They have said that restricting investors' ability to vote as they wish only to meetings they are able to attend in person is less than optimal. However, we are aware that some investors have asked for custom cards to vote in special situations when they cannot send a representative to the meeting. This process works well. Therefore, we do not support a universal ballot rule. The possibility of a significant number of unpredictable consequences could impose substantial costs on companies. Indeed, the Proposed Rule expressed tremendous uncertainty as to

(1) whether the rule would lead to the election of more dissident nominees and (2) whether such increase would “enhance or detract from board effectiveness and shareholder value.”

When the SEC adopted the short-slate rule in 1992, the original proposal would have permitted proponents to include the names of registrant nominees on the proponent proxy cards. At that time, commenters opposed the change, contending that it could confuse a registrant’s shareholders by implying that the registrant supported the dissidents and that minority representation on boards could cause boards to be less effective. After due consideration, the SEC adopted the current version of the short-slate rule. The same concerns raised then still exist today; nothing has changed since then to suggest that adopting universal proxy cards would mitigate those prior misgivings.

A. The cost-benefit analysis indicates a wide range of possible unknown consequences to a final rule, including the possibility of fostering more proxy contests.

The economic analysis acknowledges the difficulty of predicting the extent or direction of the potential effects of the Proposed Rule, stating that “we cannot rule out the possibility that they could be significant.” Among the potential outcomes is the possibility of more “mixed” boards, which the Proposed Rule indicates “may affect the effectiveness of boards, either positively or negatively.” The Proposed Rule also concedes that it is possible that mandating the use of universal proxies would provide greater publicity for the dissident’s nominees or issues with the company “at a relatively low cost” to the dissident. Most importantly, the Proposed Rule concedes that it cannot evaluate whether the changes brought by the rule would “enhance or detract from board effectiveness and registrant’s efficiency and competitiveness.” Reducing board effectiveness would undoubtedly result in decreased shareholder value, which would be wholly contrary to the intent of the Proposed Rule and, generally, to the SEC’s mission.

The Proposed Rule indicates that the rule could result in more proxy contests for which registrants will bear more of the actual and indirect costs. As the Proposed Rule recognized, in a contested election, registrants’ costs far outweigh the dissidents’ costs; based on disclosed information, almost four times as much on average. These disclosed costs do not include either party’s indirect costs. For a registrant, proxy contests are out of the ordinary and therefore represent a distraction that could impose burdens on the board and management’s time and impede the company’s operations. Moreover, uncertainty created in proxy contests with regard to leadership, strategy or other key variables tend to erode customer confidence and create instability in the employee base.

B. Numerous other elements of the proxy plumbing process could be improved that could meaningfully promote shareholders’ ability to exercise their voting rights.

Shareholders’ right to make voting decisions is a fundamental right of ownership. As we have seen since the advent of say-on-pay votes, those votes wield enormous influence on registrants’ corporate governance. The SEC recognized this, and, in its 2010 “proxy plumbing” concept release, raised many issues relating to proxy processing including the accuracy, efficiency and transparency of the voting process. Many of the issues raised in the 2010 release remain unaddressed.

As noted in the concept release, “regulation of the proxy solicitation process is one of the original responsibilities that Congress assigned to the SEC in 1934.”¹ The SEC has previously acted when it appeared that the process was not functioning adequately, such as adopting the notice and access model for proxy material delivery. The concept release was a response to concerns and complaints about the integrity of the administration of the proxy system, a subject that was acknowledged to be of “considerable importance” given the complexity of the way shares are held in the U.S., the dispersion of shareholders and their ability to exercise their voting rights.

Multiple commenters, including the Society, shared these concerns and encouraged the SEC to address them through rulemaking. Many years later, we have not seen any attempts to try to resolve these widely recognized problems. Therefore, these problems continue to plague both registrants and shareholders. As focused efforts to rectify the proxy plumbing process would enhance a far greater number of meetings and proxies, and thereby have a much bigger and more meaningful impact on shareholders’ rights to cast votes, we urge the SEC to refocus its efforts there rather than on creating universal proxy cards and mandating a new system that can support their use.

C. The low number of proxy contests that go to a shareholder vote does not warrant the time and resources spent on adopting a rule on universal proxy cards and requiring registrants and dissidents to use them.

Because proxy contests are infrequent, the Proposed Rule based the economic analysis on 102 proxy contests in 2014 and 2015, of which only 72 had competing director slates. We question the use of SEC resources on issues that involve only 100 situations out of more than 5,000 annual meetings held by U.S. public companies each year.

D. If the SEC determines to move forward with the Proposed Rule, then use of a universal proxy card should be voluntary rather than mandatory.

If the Commission decides to finalize the Proposed Rule, it should not mandate the use of universal proxy cards but rather, provide registrants and dissidents the flexibility to determine – unilaterally (*i.e.*, without an agreement between the registrant and dissident) – whether or not to distribute universal proxy cards. A voluntary system may not impose nearly the same burdens and costs on registrants, would be unlikely to result in an increase in proxy contests, and would not have the potential to detract from board effectiveness. Furthermore, a voluntary system allows the parties to determine whether they want all the nominees on one card or separate cards based on consideration of situation-specific factors such as the registrant’s shareholder profile and analysis of historical voting patterns. If, after a certain period of time, the SEC observes that the adoption of a voluntary universal proxy card system needs to be reconsidered, it can always do so and re-propose a mandatory universal proxy card system, as necessary.²

¹ Concept Release on the U.S. Proxy System, Release No. 34-62495.

² Alternatively, as the Proposed Rule suggests in the economic analysis, the Commission could consider mandating the *availability* of universal proxy cards while allowing the parties to disseminate non-universal proxy cards. This would be similar to the notice and access model in which full set proxy materials are provided to shareholders upon

II. Dissidents Should Own a Minimum Amount of Shares to Gain Access to a Universal Proxy Card.

Under the Proposed Rule, a dissident could give Notice of Intent to Solicit Proxies, and thereby impose significant costs for a company, without owning a meaningful amount of shares of the registrant. In fact, the dissident could own only one share and obtain access to the universal proxy card. This is less than the minimum ownership requirements for shareholders to be eligible to submit a proposal for inclusion in a company's proxy statement under Rule 14a-8. The shareholder proposal rules mandate that a shareholder must own at least \$2,000 or 1% of a registrant's securities for at least one year. Obtaining access to a universal proxy card in a proxy contest for board seats should require a significantly higher threshold.³ Even the SEC's subsequently vacated Rule 14a-11 required ownership of at least 3% of a company's securities for at least three years to make director nominations using proxy access. We believe this threshold strikes a more appropriate threshold for access to a universal proxy card.

III. The Amended Definition of a Bona Fide Nominee Should Not Apply to "Withhold the Vote" or Other Types of Shareholder Solicitations.

We generally support a change to the definition of a *bona fide* nominee contained in Rule 14a-4(d). Such a change would facilitate the preparation of proxy materials *in a contested election*, where both the company and the dissident will prepare a universal proxy card to solicit votes for their respective slates. However, as the SEC recognizes and discusses in the Proposed Rule, the proposed changes to the definition of *bona fide* nominee would effectively expand the scope of a nominee's consent to include consent to being named in *any* proxy statement for the applicable meeting. This change would affect the conduct of all solicitations even when a proponent is not nominating its own candidates for the board of directors (e.g., in "withhold the vote" campaigns sometimes also referred to as "just vote no" campaigns).

For this reason, we believe this is an unnecessarily broad and problematic expansion of the applicable consent right. Moreover, it would not serve 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 and in connection with shareholder proposals unrelated to the election of directors, such as a corporate governance or social responsibility proposals. This proposed change could have serious unintended consequences, among them, misleading or confusing proxy materials and adverse impacts on voting results in otherwise uncontested elections. The SEC's proposed presentation and formatting requirements, which may mitigate potential confusion in connection with contested elections, would not so mitigate potential confusion in other contexts. Given the

request. See Universal Proxy, 81 Fed. Reg. 79,171 (SEC proposed Oct. 26, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-11-10/pdf/2016-26349.pdf>.

³ This is consistent with the Society's recommendation that the Commission raise the thresholds for resubmission of shareholder proposals. See <http://financialservices.house.gov/uploadedfiles/hhrg-114-ba16-wstate-dstuckey-20160921.pdf>.

increasing willingness of investors to publicly engage and challenge companies on myriad issues, there is real risk that certain shareholders could abuse this right to promote their own agendas.

We recommend that the SEC amend Rule 14a-4(d) in manner that meets its objectives of facilitating voting in contested elections while limiting the impact on solicitations that do not include a competing slate of directors. For example, “bona fide nominee” could be defined as “a person who has consented to being named in the case of a meeting of shareholders at which directors are to be elected:

- (i) in an uncontested election, in the company’s proxy statement relating to such meeting; and
- (ii) in a contested election, in the company’s proxy statement and in a proxy statement prepared by or on behalf of a shareholder or group of shareholders who are:
 - a. proposing one or more director nominees (who are not also the company’s nominees) and
 - b. soliciting votes in favor of such nominees in connection with the contested election.”

IV. The Timing Requirements for Notice by a Dissident is Inconsistent with Most Advance Notice Bylaws and Reduces the Timeframe for Engagement.

We recommend the SEC re-consider the timeline for when the Notice of Intent to Solicit Proxies should be provided by a dissident. The 60-day window in the Proposed Rule is significantly shorter than most registrants’ advance notice bylaw provisions. According to FactSet SharkRepellent, approximately 75% of all public companies have an advance notice bylaw that requires notice of nominations be given with at least 90 days’ advance notice. The timing requirements under the Proposed Rule should be consistent with the timing requirements of advance notice bylaws.

Moreover, in practice, 60 days are not always sufficient time for a board to evaluate the dissident nominees or for the Nominating and Corporate Governance Committee to undertake the same process as they would when considering director candidates in the normal course. Nor does it provide time for the solicitation of input from large shareholders, as is being mandated by an increasing number of institutional investors who have spoken out against privately negotiated settlements. Finally, the likelihood of negotiating with the dissident and reaching a potentially amicable and mutually acceptable resolution is significantly narrowed.

As more and more companies, dissidents and shareholders express a commitment to engagement, the Proposed Rule should facilitate open and transparent discussions rather than create unnatural contracted timeframes that foster a more adversarial atmosphere.

V. There Should be No Requirement for Registrants to Give Notice to the Dissidents.

A registrant should not be required to provide advance notice of its nominees to a dissident. In practice, it would be nearly impossible for a registrant to give notice of the board's slate 10 days after receiving notice that a dissident will commence a proxy contest. When advance notice of a proxy contest is given, registrants typically re-evaluate their contemplated slate; boards often go out and recruit new director candidates. Decisions of such import cannot be made within 10 days. Moreover, requiring a company to give notice of its slate by a date certain could unnecessarily disrupt any settlement negotiations between the parties.

Under the proxy rules, a registrant 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 dissident. In our experience, it is common practice for a dissident to wait to file its preliminary proxy statement until after the registrant has filed its preliminary proxy statement. We see no compelling reason to change this common practice.

VI. 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. As the Proposed Rule recognizes, numerous practical questions remain unanswered. 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. If the Commission determines to move forward, we respectfully request a further opportunity to comment on specific questions raised in the Proposed Rule regarding the form of a universal proxy card.

VII. Penalties Should be Imposed on a Dissident Who Does Not Follow Through With a Proxy Solicitation or Does Not Comply with the Rules.

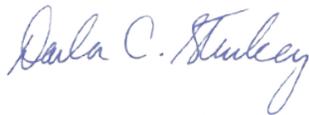
All participants in the proxy solicitation process should be held to high standards. We urge the SEC to consider remedies against dissidents who, after giving notice of a proxy contest, do not follow through with a proxy solicitation or do not comply with the rules. In our experience, certain dissidents attempt to leverage the threat of a proxy contest to obtain concessions from a registrant and its board of directors. A mandate for use of a universal proxy card may make the universal proxy card one more tool in a dissident's arsenal. There is the real possibility that after a registrant prepares proxy materials for a contested election and mails out a universal proxy card to shareholders with the dissident nominees listed, the dissident will fail to conduct a separate solicitation or fail to appear at the meeting to nominate its candidates. Due to the short notice window in the Proposed Rule, there is also a significant possibility that the parties subsequently reach agreement on a board slate and new proxy cards have to be created, printed and mailed. The Proposed Rule suggests that a registrant may circulate a revised proxy card, but we believe the additional expense and more importantly, shareholder confusion created by multiple cards with different director nominees, makes this approach unappealing. Accordingly, we recommend that the SEC consider imposing severe penalties on a dissident

who, after giving notice of a proxy contest, does not follow through with a proxy solicitation or comply with the rules. Such penalties could include, among other things, a prohibition on the dissident from engaging in any proxy contest for some period of time (at least two years) and/or a reimbursement of the registrant's costs.

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We appreciate the opportunity to provide comments on the Proposed Rule and would be happy to provide you with further information to the extent you would find it useful.

Respectfully submitted,



Darla C. Stuckey
President and CEO

cc: Mary Jo White, Chair
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