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June 7, 2021

Vanessa A. Countryman, 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 Nos. 34-79164 and 34-91603

Dear Ms. Countryman:

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 for reopening the comment period pursuant to Release No. 34-91603 (the "Release") given the passage of time since the initial comment period and continued interest and discourse among market participants on this topic.

Olshan's Shareholder Activism Practice Group is widely recognized as the nation's premier legal practice in representing activist investors in contested solicitations. We have vast experience counseling clients on a wide variety of activist strategies, from election 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 Activist Insight Monthly, The Deal Activism League Table, FactSet SharkRepellent, The Legal 500 United States Guide, Bloomberg Activism Advisory League Table and Refinitiv Global Shareholder Activism Scorecard. In 2020, our firm advised on 111 activist campaigns, or 74 more campaigns than our next closest competitor, according to Bloomberg's Activism Advisory League Tables. 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.

Olshan initially provided its comments to the proposed rules in a letter to the Staff dated January 9, 2017. The purpose of the comment letter was 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. We are resubmitting our comments (with certain modifications) set forth in greater detail below, as we do not believe these fundamental concerns with the proposed rules have changed much despite the Staff's stated purpose for reopening the comment period in light of developments in proxy contests, corporate governance and shareholder activism since 2016. We first provide the following comments with respect to certain statements made by the Staff in the Release regarding developments in shareholder activism.

First, we respectfully disagree with the Staff's assertion that "there have been several contests in the United States where one or both parties used a universal proxy card since the 2016 Release." While the Staff correctly points out that universal proxy cards were used in election contests at EQT Corp. in 2019 (Olshan represented the activist) and at Sandridge Energy, Inc. in 2018, we are not aware of any other U.S. election contest that went to a meeting since 2016 where a universal proxy card was used.

Second, the Staff notes that there has been an increase of proxy access bylaws since 2016. While it is true that hundreds of public companies have adopted proxy access bylaws during the past five years, it is important to note for proper context that it is actually quite rare for shareholder nominees to be included in registrant proxy statements pursuant to proxy access bylaws. In fact, only between one and three Schedules 14N have been filed by shareholders notifying registrants of an intent to nominate directors pursuant to proxy access bylaws during any given year since 2016 and a subset of these nominations were ultimately rejected or withdrawn. We believe the lengthy and restrictive procedural and informational requirements to utilize various proxy access bylaw provisions have been the greatest impediment for shareholders. The same can be said for the ad hoc adoption of onerous and unnecessary informational and procedural requirements by registrants in order to nominate directors outside of the proxy access process.

Third, the Staff notes that since 2016 registrants have adopted advance notice bylaw provisions that require dissident nominees to consent to being named in the registrant's proxy statement and on its proxy card. While dozens of companies have in fact adopted such bylaw provisions based on the advice of overzealous defense lawyers, we believe such provisions are invalid and shareholder activists generally refuse to be coerced by registrants to provide such consents. In fact, since 2016, we were forced to threaten or initiate litigation on behalf of our clients against several registrants challenging these bylaw provisions in order to prevent the registrants from obtaining an unfair advantage in a proxy contest. Left unchallenged, these bylaw provisions would have allowed the registrant to use a universal proxy card while the dissident could not without receiving consents from the registrant's nominees to be named on the dissident's

card or would have allowed the registrant to name on its card certain but not all of the dissident's nominees in the hope that the dissident would win fewer board seats.

Notwithstanding the foregoing, our concerns that the proposed rules could give the registrant an unfair strategic advantage over the dissident and have a chilling effect on settlement discussions remain the same. 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 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. In fact, since the initial comment period a trend in shareholder activism has emerged where the dissident may no longer wait for the registrant to file its definitive proxy statement before the dissident files its definitive proxy statement if the dissident believes waiting to file would put it at a strategic disadvantage in its solicitation and is comfortable from a disclosure standpoint, often in consultation with the SEC Examiner, that it can file a definitive proxy statement excluding limited information that

has been left blank in the registrant's preliminary proxy statement (such as the number of shares outstanding as of the record date) with the intent to promptly supplement the filing to include the excluded information once it is made available in the registrant's definitive filing. Depending on the scope and materiality of the excluded information, the dissident will sometimes need to do a second mailing of the supplemental materials to shareholders, which adds another layer of significant fees and expenses to the dissident's solicitation and further tilts the playing field in favor of the registrant. Be that as it may, under the proposed rules dissidents would not under any circumstance be able to file definitive materials until it receives the names of the registrant's nominees. This would impose a significant hardship and inequity for dissidents who have the desire and ability to file definitive materials before the registrant rather than allowing the registrant to unfairly dictate the timing of the solicitation.

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, the meeting date 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 strategic timing disadvantage dissidents would 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.

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. 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, such as the record date and meeting 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 way, a dissident who is ready to commence its solicitation could do so before the registrant without being forced to incur the expense of filing and potentially mailing supplemental definitive materials containing information

that was previously left blank in the registrant's preliminary filings. With such a Form 8-K requirement, a dissident would also not be forced to wait until the registrant provides the names of its nominees, as would be the case under the proposed rules, before it can file a 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 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 the registrant's preliminary proxy statement or strategically leaving blank in its preliminary proxy statement certain material disclosure regarding the meeting and the business to be conducted thereat, 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, Elizabeth Gonzalez-Sussman 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