



June 7, 2021

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: Reopening of Comment Period for Universal Proxy, Release No. 34-91603; File No. S7-24-16

Dear Ms. Countryman:

The Society for Corporate Governance (“Society”) appreciates the opportunity to provide comments in response to the Securities and Exchange Commission’s reopening of the comment period on the proposed rule on universal proxy cards.

Founded in 1946, the Society is a professional membership association of more than 3,400 corporate and assistant secretaries, in-house counsel, outside 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 the executive managements of their companies on corporate governance and disclosure matters.

Introduction

The Society has expressed concerns about mandating universal proxy cards in contested director elections in two previous comment letters since the Commission originally proposed its universal proxy rule in 2016.¹ In January 2017, the Society asserted that such a rule was not needed and was not justified on a cost-benefit basis, given the relatively low number of proxy contests that go to a shareholder vote each year. We also said that any usage of universal ballots should be voluntary, so that the parties in a proxy contest could determine whether they want all the

¹ Universal Proxy Proposing Release (“Proposing Release”), File No. S7-24-16, (October 26, 2016), *available at*: <https://www.sec.gov/rules/proposed/2016/34-79164.pdf>.

nominees on one card or separate cards based on factors such as the company’s shareholder profile and analysis of historical voting patterns. The Society and other commenters also noted that other reforms to the proxy process could more meaningfully promote shareholders’ ability to exercise their voting rights, such as the use of technology to allow for verification that proxies were voted in accordance with a shareholder’s instructions.²

In a November 2018 comment letter submitted in advance of the SEC’s roundtable on the proxy process, the Society expressed concern that universal proxy ballots could lead investors to mistakenly vote for too many nominees and thus be disenfranchised.³ The Society’s letter outlined various procedural safeguards the Commission should consider if it were to mandate universal proxy ballots.⁴ The Society reiterated its view that, if done at all, mandating the use of universal proxy cards should only be adopted in the context of a broader Commission effort to improve the processes and technology that support the proxy voting process, and not as a separate, stand-alone endeavor.⁵

In its Reopening Release,⁶ the Commission asked for additional input on variety of topics, including the minimum percentage of shares required to gain access to universal proxy cards, minimum solicitation thresholds, proxy contest settlements, virtual shareholder meetings, and proxy access.

² See Society for Corporate Governance, Letter re Proposed Rule Change re: Universal Proxy, File No. S7-24-16, (January 10, 2017), available at: <https://www.sec.gov/comments/s7-24-16/s72416-1475144-130482.pdf>.

³ See Society for Corporate Governance, Letter re SEC File Number 4-725 on Roundtable on the Proxy Process - Universal Proxy (November 9, 2018), available at: <https://www.sec.gov/comments/4-725/4725-4640451-176451.pdf>.

⁴ The Society’s 2018 recommendations included the following safeguards: 1) nominating shareholders should own a minimum amount of shares to gain access to a universal proxy card; 2) universal proxy cards should be required only for election contests and should not apply to “vote no” or “withhold” campaigns or other types of shareholder solicitations; 3) nominating shareholders should be required to solicit proxies from holders of at least some minimum percentage of the company’s outstanding shares; 4) 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; 5) the deadline by which a nominating shareholder must provide notice to the company should be governed by the advance notice requirements in the company’s bylaws; 6) universal proxy cards should be required to list all valid nominees; 7) to mitigate shareholder confusion, the form and presentation of the universal proxy card needed much more attention; and 8) penalties should be imposed on a nominating shareholder who does not comply with the rules.

⁵ To further this goal, Society representatives have participated in the SEC’s working groups on proxy modernization, including a group that focuses on end-to-end vote confirmation. The Society, as part of the Shareholder Communications Coalition, supports fundamental reforms to the proxy process and has called for the expanded use of “Non-Objecting Beneficial Owner” (NOBO) lists, so that issuers can more easily contact their shareholders at lower cost.

⁶ See Reopening of Comment Period for Universal Proxy (“Reopening Release”) (April 16, 2021), available at: <https://www.sec.gov/rules/proposed/2021/34-91603.pdf>.

The Society continues to believe that a mandatory universal proxy rule is not necessary and likely will expose more companies to the costly distraction of proxy contests and enhance the influence of short-term activist investors.⁷ If the Commission opts to proceed with a universal proxy rule, it should consider the safeguards outlined in the Society’s 2018 letter and the additional points outlined below. The Society continues to believe that universal proxy should not be a stand-alone rulemaking but should be accompanied with other proxy reforms to reduce barriers to issuer-shareholder communications and to enable investors to determine if their votes were cast correctly.⁸

I. Nominating Shareholders Should Own a Minimum Number of Shares to Have Access to a Universal Proxy Card.

To minimize the risk of frivolous proxy contests, a nominating shareholder should be required to meet a minimum share ownership threshold before the mandatory use of universal proxy cards is triggered. The same rationale that prompted the Commission to include minimum ownership requirements in the proxy access rule adopted in 2010 and to increase the minimum ownership requirements in the Rule 14a-8 amendments adopted in 2020 applies in the universal proxy context—a shareholder should be required to demonstrate a meaningful, long-term economic stake in the company before gaining access to the company’s proxy materials and imposing the attendant burdens on the company and its other shareholders.

A rule that allows shareholders to have their nominees included on the company’s proxy card without minimum ownership requirements could encourage shareholders with minimal or short-term economic stakes to engage in proxy contests in greater numbers.⁹ Not only would such a

⁷ The Society also believes that the SEC should modernize its Form 13F and Schedule 13D disclosure rules before adopting a universal proxy card. Under the outdated 13F and 13D rules, corporate secretaries and governance professionals do not receive timely information about accumulations of company stock, potentially leaving their companies unaware of accumulations by activist funds that may have very different agendas and goals than other shareholders. The Society supports reducing the quarterly 13F disclosure period from 45 to two business days and cutting the 13D reporting period from 10 to four business days, as well as expanding these disclosures to include derivative positions.

⁸ The SEC’s Investor Advisory Committee, which supports universal proxy, has recommended additional reforms, including requiring end-to-end vote confirmation and directing proxy participants to cooperate in reconciling vote-related information. The committee also called for studies on investor views on anonymity and on share lending. *See* Recommendation of the SEC Investor Advisory Committee (IAC) on Proxy Plumbing (September 9, 2019), available at: <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-recommendation-proxy-plumbing.pdf>. (As the IAC observed, “No one is satisfied with the current system. Shareholders cannot determine if their votes were cast as they intended; issuers cannot rapidly determine the outcome of close votes; and the legitimacy of corporate elections, which depend on accurate, reliable, and transparent vote counts, has been called into doubt.”)

⁹ In crafting a universal proxy rule, the Commission should balance its goal to reduce proxy contest expenses for investors against the additional financial burdens imposed on public companies that would have to defend against a greater number of proxy contests. Any final rule should be designed to ensure that nominating shareholders have sufficient “skin in the game” and are not waging proxy contests for frivolous reasons.

rule subject public companies to the significant costs of more frequent proxy contests but could also give greater influence to shareholders pursuing short-term goals or special interests. The Society believes a minimum share ownership requirement would help to protect against such an outcome by ensuring that nominating shareholders gaining access to the universal proxy card have the appropriate long-term economic incentives. We recommend that the Commission consider meaningful ownership requirements, such as three percent for three years.¹⁰ We believe that any ownership standards must include a meaningful duration component, such as three years, to ensure that universal proxy cards are not abused by short-term activists whose interests diverge from those of the company's long-term investors.¹¹

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

The motivating principle behind a universal proxy card is that shareholders voting by proxy should have the same ability as shareholders voting at a meeting to select their desired director candidates from among all of those nominated. This goal would be accomplished by requiring the use of universal proxy cards when there is a contested election, i.e., when there are more nominees than board seats. However, as the SEC recognized and discussed in the Proposing Release, the Commission's proposed changes would go further by effectively expanding the scope of a nominee's consent to include consent to being named in *any* proxy statement for the applicable meeting. This would permit a shareholder proponent to include the names of some or all of a company's director nominees in a proxy statement even if such proponent is not nominating candidates for the board of directors (e.g., in “withhold the vote” or “just vote no” campaigns), or if the proposal is unrelated to the election of directors (such as corporate governance or social responsibility proposals). Such an outcome would go far beyond the SEC's stated goal and could have serious unintended and adverse consequences, including among them, confusing proxy materials that mislead investors. Accordingly, we recommend that the Commission structure any universal proxy amendments so as to meet its objective of facilitating voting in contested elections while limiting the impact in “vote no” campaigns and other solicitations that do not include a competing slate of nominees.

¹⁰ The three percent for three years ownership requirement was included in Rule 14a-11, the SEC's proxy access rule that was vacated by a federal appeals court in 2011. Since 2015, shareholders have submitted hundreds of proposals urging companies to adopt proxy access bylaws with similar ownership provisions. As of February 2020, 76% of S&P 500 companies had adopted proxy access bylaws. See Holly J. Gregory, Rebecca Grapsas, and Claire Holland, Sidley Austin LLP, *Harvard Law School Forum on Corporate Governance*, “Proxy Access: A Five-Year Review,” (February 4, 2020), available at: <https://corpgov.law.harvard.edu/2020/02/04/proxy-access-a-five-year-review/>

¹¹ If shareholders do not meet these minimum requirements, they could still pursue a traditional proxy fight. As the May 2021 contest at Exxon Mobil illustrates, investors with small stakes can still mount a successful proxy campaign if they are able to persuade enough major shareholders to support their candidates.

III. Nominating Shareholders Should be Required to Solicit Proxies from Holders of at Least 67% of the Voting Power Entitled to Vote on the Election of Directors.

As noted in the Proposing Release, 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. The proposed rule would require the shareholder seeking to use a universal proxy card to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors. The Reopening Release asks whether a higher threshold, such as 67% or 75% of the voting power, would be a more appropriate threshold.

As a practical matter, when seeking proxies, companies solicit all of their shareholders using a definitive proxy statement and proxy card and/or a Notice of Internet Availability. Although every proxy contest has its own facts and circumstances, in our experience dissidents in most contested elections solicit the holders of a substantial majority of shares, typically utilizing a share number cut-off whereby they do not transmit proxy materials to holders below that numeric cut-off (for example, only transmitting proxy materials to holders of 5,000 or more shares and not transmitting proxy materials to holders of less than 5,000 shares). The Society believes that a 67% of the voting power solicitation threshold to utilize a universal proxy card system would not create an undue burden for dissidents in a contested election and, at the same time, ensure that the nominating shareholder conducts a meaningful solicitation.¹² In response to the Commission's question regarding the effect on incremental costs of proxy contests, we do not believe the 67% threshold would have any meaningful impact on the costs of most proxy contests for nominating shareholders.¹³

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

As we noted in our 2018 comment letter, a shareholder's notice of nomination to appear on a universal proxy card should 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' notice prior to the anniversary of the previous year's annual meeting date.

¹² The 67% threshold was endorsed by the Universal Proxy Working Group. The Society participated in the group's discussions but did not sign the final letter. *See* Universal Proxy Working Group, Letter re Universal Proxy Cards (August 6, 2020), available at: <https://www.sec.gov/comments/s7-24-16/s72416-8347728-228998.pdf>.

¹³ In response to Question 2 in the Reopening Release on dual-class and multi-share class structures, the Society believes that the SEC should require the solicitation of investors that hold at least 67% of the combined voting power in the share classes that have voting rights.

While the Proposing Release called for a 60-day period, the Society believes that imposing a different notice deadline for using a universal proxy card would create confusion and would be unnecessary.¹⁴ The timing requirements under the advance notice bylaws provide 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 a greater opportunity 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 without forcing the company to incur the full expense of a proxy contest that goes to a vote. The majority of proxy contests are withdrawn or settled before a vote and the SEC should not abbreviate the time for such negotiations by imposing a shorter time period.¹⁵ Imposing a 60-day deadline in the universal proxy rule likely would lead to more rescheduled or postponed shareholder meetings. Accordingly, the SEC should refrain from imposing a shorter time period than provided under a company's advance notice bylaw.

V. Impact of Virtual Shareholder Meetings on Proxy Contests Needs Further Study.

Due to the COVID-19 pandemic, most public companies conducted their 2020 and 2021 annual meetings in a virtual format. Many states, including Delaware, had previously adopted amendments to their state corporation laws to permit virtual or hybrid physical and virtual shareholder meetings, and numerous states responded to the pandemic by adopting similar changes in law or adopting emergency orders to facilitate virtual or hybrid meetings.

Given the convenience and necessity for holding virtual shareholder meetings in most circumstances, in 2020 we began to see contested meetings also held in a virtual format. Since the virtual meeting format does not allow for the physical interaction between the companies and inspectors of election, it creates potential challenges for the submission of last-minute proxies and ballots. Currently, shareholders voting by proxy in a contested director election are effectively required to choose between management's slate of directors and a slate of directors proposed by a dissident. By contrast, shareholders voting in person at a meeting may choose any combination of management and dissident director nominees.

Voting by ballot at the meeting under current SEC and state law frameworks, regardless of whether the meeting is physical or virtual, is more cumbersome than voting by proxy due to the administrative burden and execution risks of obtaining legal proxies. It remains to be seen whether we will have more contested virtual meetings once the pandemic restrictions are lifted

¹⁴ If a company does not have an advance notice bylaw, then it would be appropriate for the SEC to specify a minimum notice period for a nominating shareholder to appear on a universal proxy card.

¹⁵ Question 7 of the Reopening Release asks for data on the frequency of withdrawals and settlements. According to Activist Insight, there were 350 contested situations between 2014 and September 2020. Of those, 90 were withdrawn and 113 were settled, while 147 contests went to a vote. See Activist Insight, "Proxy Fights 2020," at 10, available at: https://www.activistsight.com/research/ACTIVISTINSIGHT_ProxyFights.pdf.

and they become optional. While some institutional investors support the use of universal proxy cards to facilitate split-ticket voting, an increase in this practice would increase uncertainty for both issuers and dissidents and potentially increase proxy solicitation costs in a close contest. Accordingly, the potential for increased virtual meetings and the likelihood they promote more split-ticket voting in the future, even in the absence of universal proxy cards, requires further study by the Commission Staff.¹⁶

If the Commission adopts a universal proxy rule, it should seek to be agnostic between in-person and virtual meetings, as shareholder meeting technology matures, and company and investor preferences continue to evolve. These trends should be allowed to play out without the SEC adopting a rule that could either favor or disfavor virtual meetings.¹⁷

VI. Proxy Access Experience Suggests Little Investor Demand for Universal Proxy Cards.

While proxy access bylaw provisions have been widely adopted by S&P 500 companies since the Commission's Proposing Release, investors have rarely invoked these provisions to nominate directors.¹⁸ Like a universal proxy card, a typical corporate proxy access bylaw permits a group of shareholders who meet minimum ownership requirements (such as holding a three percent stake for three years) to nominate candidates to appear on a management proxy card, provided that the shareholders are not seeking to elect more than a certain number of directors (such as two directors or 20% of the board). However, proxy access has not been utilized by U.S. hedge fund activists, which apparently have concluded that the flexibility of waging a traditional proxy contest outweighs the potential savings in printing and mailing costs through proxy access. Public pension funds and labor investors, which were the primary proponents of proxy access bylaws, also have not rushed to use these provisions to nominate directors. Given the reluctance of hedge funds, pension funds, and other shareholders to utilize proxy access bylaws to nominate

¹⁶ As noted in our 2017 letter, the Society believes that universal proxy cards should be voluntary so the parties in a proxy contest can determine, based on each company's circumstances and the voting history of its investors, whether to distribute one or two proxy cards. If a company intends to hold a virtual meeting, that may reduce the need for a combined proxy card.

¹⁷ Regardless of the meeting format selected by issuers in the future, the Society does expect to see a post-pandemic resurgence in proxy contests, particularly by activists who bought shares in target companies during the market declines of March 2020. Rather than potentially encourage more proxy contests by adopting a mandatory universal proxy rule, the Society and other issuer groups believe the SEC should focus on adopting interim improvements to the proxy system to enable companies to communicate with shareholders in a more cost-effective manner. *See, e.g.*, Shareholder Communications Coalition, Letter re Recommendations for Interim Improvements to the U.S. Proxy System (April 8, 2019), available at: <https://www.sec.gov/comments/4-725/4725-5335206-184008.pdf>.

¹⁸ As the Council of Institutional Investors explains on its website, "Proxy access is very rarely invoked, but its availability makes boards more vigilant in their oversight of management and more responsive to the preferences of the company's owners." https://www.cii.org/proxy_access

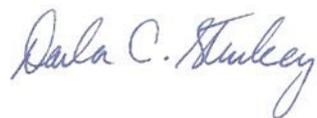
candidates, it appears that activist investors are mostly satisfied with the current set of activism tools they have at their disposal to engage with companies.¹⁹

In addition, the absence of a mandatory universal proxy card rule does not appear to have been a deterrent to activism, which flourished from 2016 until the start of the pandemic. In 2018, dissident investors obtained a record number of board seats, although most of those seats were won through settlements.²⁰

Finally, the Commission should consider that a universal proxy rule would not spare a company (or nominating shareholders) from having to pay the significant proxy solicitation and distribution costs necessary to send repeated communications to investors during a contentious proxy fight. If the Commission intends to reduce barriers to engagement and encourage more shareholder participation, it should focus its attention on other proxy system reforms, such as taking steps to improve investor confidence in proxy voting and bringing more competition to proxy distribution fees, which are a significant burden on both public companies and activist investors.

The Society appreciates the opportunity to provide comments during this Reopened Comment Period and would be happy to provide you with further information to the extent you would find it useful.

Respectfully submitted,



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President and CEO
Society for Corporate Governance

¹⁹ Instead of using proxy access, some activists have started using exempt solicitations as an inexpensive and visible method to oppose management nominees. As Gibson Dunn & Crutcher observed in a 2020 proxy season recap report, “Exempt solicitation filings continued to proliferate, with the number of filings reaching a record high again this year and increasing more than 40% over the last three years.” See Gibson Dunn & Crutcher, “Shareholder Proposal Developments During the 2020 Proxy Season,” (August 4, 2020), available at: <https://www.gibsondunn.com/shareholder-proposal-developments-during-the-2020-proxy-season/>.

²⁰ See, e.g., Skadden Arps, “Shareholder Activism Trends in the 2019 Proxy Season” (April 23, 2019), available at: <https://www.skadden.com/insights/publications/2019/04/quarterly-insights/shareholder-activism-trends-in-the-2019-proxy> (“Lazard reported that activists won a record number of board seats (160) in 2018, up more than 50% from 2017 and approximately 10% from 2016. . . . Further, Lazard noted that only 22% of board seats won were through a proxy contest, highlighting that companies prefer to grant activists a board seat (or two) to avoid the public distractions of a time-consuming and costly proxy contest.”)