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June 7, 2021

Vanessa A. Countryman  
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 Ms. Countryman:

The undersigned, each an attorney with the firm of Sidley Austin LLP (“Sidley”), appreciate this opportunity to provide comments on the proposed amendments to the federal proxy rules by the Securities and Exchange Commission (the “SEC” or the “Commission”) to require the use of universal proxies (File No. S7-24-16) (the “Proposed Rule”). This letter states our views as individual legal professionals and advisors to public companies, but it does not reflect the opinion of Sidley as a firm or intend to convey the viewpoints of any of its clients.

We have been involved in over 85 proxy contests in the past five years, more than any other law firm representing companies.<sup>1</sup> In 2020, Sidley was ranked as the No. 1 legal advisor to companies in proxy contests by number of representations in the league tables maintained by *Bloomberg*, *FactSet*, *Refinitiv* (formerly *Thomson Reuters*), and *Activist Insight*. Since proxy contests are the context in which universal proxy cards would be used, we believe that our experience affords us with useful perspectives on legal, procedural, and practical considerations related to the Proposed Rule.

Our comments aim to identify certain technical considerations for the Commission should it elect to proceed with revising, and ultimately adopting, a version of the Proposed Rule:

1. Most importantly, looking to the precedent of vacated Rule 14a-11 under the Securities Exchange Act of 1934 (as amended, the “Exchange Act”), and mindful of the minimum ownership requirements and related restrictions under Rule 14a-8 under the Exchange Act, we recommend that the Proposed Rule require that a shareholder have continuously held at least 3% of the total voting power of a registrant’s securities that

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<sup>1</sup> Based on data from FactSet Research Systems Inc. as of June 7, 2021. “Proxy contest” as used herein refers to situations where a shareholder has given notice to a registrant of its intent to nominate directors for election at an upcoming shareholder meeting or where a dissident shareholder has filed proxy soliciting materials with the Commission related to its activism campaign.

are entitled to be voted on the election of directors, for at least three years, in order to access the universal proxy card.

We also recommend that the Commission add other limitations on the right to use universal proxies, as it has done with Rule 14a-8 and Rule 14a-11. The Commission included limitations on right of use under these rules in order to promote good faith use and to guard against undue imposition on registrants and shareholders of the costs and distractions associated with the use of shareholder rights conferred by these rules.

2. We offer the following additional perspectives on other aspects of the Proposed Rule to aid the Commission as it considers the Proposed Rule:

- The Proposed Rule should require a dissident shareholder to provide the registrant with the names of the nominees for whom it intends to solicit proxies no later than the earlier of (i) 90 days (rather than 60 days) prior to the anniversary of the previous year's annual meeting date and (ii) the nomination deadline set forth in a registrant's bylaws or other applicable governance documents.
- A registrant should not be required to provide 50 days' advance notice to a dissident shareholder of the registrant's director nominees, as the proxy rules already facilitate sufficient notice to dissident shareholders and provide needed flexibility to registrants.
- The Proposed Rule should include additional detail as to the formatting and styling of the universal proxy card in order to mitigate shareholder confusion.
- The amended definition of a bona fide nominee should apply only to proxy contests for director candidates and not to other types of campaigns.
- Consideration should also be given to the legal consequences for dissidents who request a universal proxy card and then do not follow through with a proxy solicitation, except in the case of good reason or with the permission of the registrant.
- Consideration should also be given to providing a registrant with the ability to opt out of the universal proxy requirement if it believes that using universal proxies in the manner of the Proposed Rule is not in the best interests of the registrant and its shareholders.

3. Lastly, we encourage the Commission to address a few other issues with the existing federal proxy rules in connection with any adoption of the Proposed Rule.

- Rule 14a-13 under the Exchange Act requires registrants to initiate a broker search at least 20 business days prior to the record date of an annual shareholder

meeting. The length of this time window is far in excess of what is required given technological advancements since the requirement was established. We recommend the Commission consider shortening this time period to one to three business days.

- To prevent the “bandwagon effect” of such disclosures, the Commission ought to consider an express and absolute prohibition on the disclosure of preliminary proxy tallies prior to a shareholder meeting.

## **1. Lack of Minimum Ownership Requirements and Related Restrictions**

Under the Proposed Rule, a dissident shareholder who owns only a single share could require dissident nominees to be included on a universal proxy card and thereby occupy the time and resources of the registrant. In the same vein, a shareholder holding a small number of shares could threaten to require a universal proxy card to pressure a registrant’s board to adopt a policy or measure, even though such shareholder does not intend to, cannot, or does not follow through with a solicitation of proxies. Moreover, a shareholder could threaten to require a universal proxy card, and do so, for certain inappropriate reasons, such as to promote a personal cause, air a personal grievance, or gain notoriety.

The existence of these and similar possibilities provides a rationale for imposing a minimum ownership requirement, as well as other limitations, on shareholders who wish to use the universal proxy card pursuant to the Proposed Rule.

Looking to the precedent of Rule 14a-11, and mindful of the minimum ownership requirements and related restrictions under Rule 14a-8, we recommend that the Proposed Rule require that a shareholder have continuously held at least 3% of the total voting power of a registrant’s securities that are entitled to be voted on the election of directors, for at least three years, in order to use the universal proxy card. Imposing a minimum share ownership threshold for a dissident shareholder to use the universal proxy card, in a manner comparable to Rule 14a-11 and Rule 14a-8, would promote good faith use of the shareholder right afforded by the Proposed Rule and guard against undue imposition on registrants and shareholders of the costs and distractions associated with dissident director nominations.<sup>2</sup>

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<sup>2</sup> If the Commission finds this recommendation and the arguments for it to have any merit, the Commission might want to solicit further comments on whether the minimum threshold should be higher, as the Commission did when soliciting and reviewing comments regarding minimum ownership thresholds and related restrictions during the adoption process for Rule 14a-11 and amendment processes for Rule 14a-8 since 1982. See *Facilitating Shareholder Director Nominations*, Release No. 33-9136 (Nov. 15, 2010), <https://www.sec.gov/rules/final/2010/33-9136.pdf> [hereinafter “Rule 14a-11 Adopting Release”], at 75–93 (reviewing comment letters that variously recommended higher and lower minimum ownership thresholds); *Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders*, Exchange Act Release No. 34-19135, 1982 SEC LEXIS 691, at \*28–29 (Oct. 14, 1982) [hereinafter “Rule 14a-8 1983 Amendments, Proposing Release”] (noting that the Commission had “received a number of suggestions from the public concerning the imposition of additional eligibility requirements for proponents” ranging to “a high of 5% of the issuer’s securities”). In such case, the

*a. Reasons for the Minimum Ownership Requirements and Related Limitations on Right of Use under Rule 14a-8*

The Commission has included minimum ownership thresholds and related limitations on right of use in Rule 14a-8 to promote good faith use of this rule and to guard against undue imposition on registrants and shareholders of the costs and distractions associated with the use of shareholder rights conferred by the rule.

The Commission adopted the predecessor rule to Rule 14a-8 in 1942 and revised the rule various times through the early 1970s.<sup>3</sup> During this period, the predecessor rule had no minimum ownership requirement. In 1976, the Commission instituted the requirement that a shareholder proponent must maintain ownership of its voting securities from the time it submitted its proposal through the date on which the meeting would be held at which the shareholder proposal would be voted upon by shareholders. The Commission decided, at that time, against requiring proponents to hold a minimum amount of securities in order to avail themselves of Rule 14a-8.<sup>4</sup>

In 1983, the Commission revised Rule 14a-8 to require that a shareholder proponent seeking to utilize the rule hold “one percent or \$1,000, whichever is less” for “at least one year prior to the meeting and . . . through the day on which the meeting is held.”<sup>5</sup> In 1998, the SEC increased this minimum ownership requirement from \$1,000 to \$2,000, to account for inflation.<sup>6</sup> On September 23, 2020, the SEC adopted amendments to Rule 14a-8 to provide that any shareholder that wishes to include a shareholder proposal in a registrant’s proxy materials pursuant to that rule, for an annual meeting or special meeting held on or after January 1, 2022, must have continuously held at least \$2,000 in market value of the registrant’s securities entitled to vote on the proposal for at least three years, or at least \$15,000 in market value of the registrant’s securities entitled to vote on the proposal for at least two years, or at least \$25,000 in market value of the registrant’s securities entitled to vote on the proposal for at least one year.<sup>7</sup>

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Commission should consider enumerating in the Proposed Rule circumstances under which it would become impermissible for a shareholder to access the universal proxy card repeatedly.

<sup>3</sup> See generally Louis Loss, Joel Seligman & Troy Paredes, *Contested Solicitations and Security Holder Proposals*, in *Securities Regulation* (6th ed. 2020).

<sup>4</sup> Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12999, 1976 SEC LEXIS 326 (Nov. 22, 1976), at \*5–6.

<sup>5</sup> Rule 14a-8 1983 Amendments, Proposing Release, at \*65; Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 34-20091, 1983 SEC LEXIS 1011, at \*7–8 (Aug. 16, 1983) [hereinafter “Rule 14a-8 1983 Amendments, Adopting Release”].

<sup>6</sup> Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, 1998 SEC LEXIS 1001 (May 21, 1998), at \*43.

<sup>7</sup> Rule 14a-8(b)(1). See also Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, Release No. 34-89964 (Sept. 23, 2020), <https://www.sec.gov/rules/final/2020/34-89964.pdf> [hereinafter, “Rule 14a-8 2020 Amendments, Adopting Release”], at 17–18. A transition period in the final rules permits a shareholder who, at the time the final rules take effect, has continuously held at least \$2,000 of a registrant’s voting securities for at least one year to submit a proposal for the registrant’s annual or special meeting to be held before January 1, 2023, as long as the shareholder maintains at least its current holdings through the date the proposal is submitted to the registrant.

The Commission’s proposing and adopting releases related to the 2020 amendments to Rule 14a-8 explain that the purpose of the minimum ownership requirements, along with related limitations on right of use, is to “ensure that the ability under Rule 14a-8 for a shareholder to have a proposal included alongside management’s in the registrant’s proxy materials—and thus to draw upon registrant resources and to command the time and attention of other shareholders—is not excessively or inappropriately used.”<sup>8</sup> The adopting release adds that “Over the years, the Commission has amended the shareholder-proposal rule as necessary to protect against such use and protect the integrity of the process.”<sup>9</sup> The proposing release expanded:

At the time the shareholder-proposal rule was initially adopted, a shareholder proponent’s eligibility to submit a proposal was not conditioned on owning a minimum amount of a company’s securities, or holding the securities for a specified period of time . . . . However, the Commission later reconsidered the matter in response to “criticisms of the current rule that have increased with the pressure placed upon the existing mechanism by the large number of proposals submitted each year and the increasing complexity of the issues involved in those proposals, as well as the susceptibility of certain provisions of the rule and the staff’s interpretations thereunder to abuse by a few proponents and issuers.” The Commission found merit in the views of many commenters that “abuse of the security holder proposal rule could be curtailed by requiring shareholders who put the company and other shareholders to the expense of including a proposal in a proxy statement to have some measured economic stake or investment interest in the corporation.” The Commission accordingly amended the rule in 1983 to require shareholder-proponents to own “at least 1% or \$1,000 in market value of securities entitled to be voted at the meeting” and to “have held such securities for at least one year.”<sup>10</sup>

Today, Rule 14a-8 includes well-known rules, in addition to its minimum ownership requirements, that serve to promote good faith use and guard against misuse. These rules include the “substantive” bases for registrants to omit shareholder proposals from their proxy materials, such as where a shareholder proposal is “contrary to any of the Commission’s proxy rules” (Rule

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As currently required, the shareholder must also provide the registrant with a written statement of its intention to continue to hold \$2,000 of voting securities through the date of the meeting for which the proposal is submitted.

<sup>8</sup> Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, Release No. 34-87458 (Nov. 5, 2019), <https://www.sec.gov/rules/proposed/2019/34-87458.pdf> [hereinafter, “Rule 14a-8 2020 Amendments, Proposing Release”], at 6–7; Rule 14a-8 2020 Amendments, Adopting Release, at 5–6.

<sup>9</sup> Rule 14a-8 2020 Amendments, Adopting Release, at 5–6.

<sup>10</sup> Rule 14a-8 2020 Amendments, Proposing Release, at 14–15 (citations omitted). *See also* Rule 14a-8 1983 Amendments, Proposing Release, at \*37 (noting the concerns of commentators that the “abuse of the security holder proposal rule could be curtailed by requiring shareholders who put the company and other shareholders to the expense of including a proposal in a proxy statement to have some measured economic stake or investment interest in the corporation” and stating that the “Commission believes that there is merit to those views and is adopting the eligibility requirement as proposed”).

14a-8(i)(3)); relates to a “personal grievance” or “special interest” (Rule 14a-8(i)(4)); “deals with a matter relating to the company’s ordinary business operations” (Rule 14a-8(i)(7)); or “addresses substantially the same subject matter as a proposal . . . previously included in the company’s proxy materials within the preceding five calendar years if the most recent vote occurred within the preceding three calendar years and the most recent vote was (i) [l]ess than 5 percent of the votes cast if previously voted on once; (ii) [l]ess than 15 percent of the votes cast if previously voted on twice; or (iii) [l]ess than 25 percent of the votes cast if previously voted on three or more times” (Rule 14a-8(i)(12)). Over the years, the SEC has developed an extensive body of guidance regarding these rules, through both formal bulletins and its record of no-action decisions (although we acknowledge that these decisions do not formally have precedential value). This guidance expands on the limitations on shareholders’ ability to use Rule 14a-8.

Since the 1940s, the Commission has added such limitations to shareholders’ rights to use Rule 14a-8 in order to promote good faith use and guard against misuse. In the adopting release for the 2020 amendments to Rule 14a-8, the Commission made the following observations about its prior amendments of Rule 14a-8:

The Commission has expressed concern over the years that Rule 14a-8 is susceptible to misuse. In 1948, the Commission adopted three new bases for exclusion to “relieve the management of harassment in cases where [shareholder] proposals are submitted for the purpose of achieving personal ends rather than for the common good of the issuer and its security holders.” See Notice of Proposal to Amend Proxy Rules, Release No. 34-4114 (July 6, 1948) [13 FR 3973 (July 14, 1948)], at 3974. In 1953, the Commission amended the shareholder-proposal rule to allow companies to omit the name and address of the shareholder-proponent to “discourage the use of this rule by persons who are motivated by a desire for publicity rather than the interests of the company and its security holders.” See Notice of Proposed Amendments to Proxy Rules, Release No. 34-4950 (Oct. 9, 1953) [18 FR 6646 (Oct. 20, 1953)], at 6647. In amending the resubmission basis for exclusion in 1983, the Commission noted that commenters “felt that it was an appropriate response to counter the abuse of the security holder proposal process by certain proponents who make minor changes in proposals each year so that they can keep raising the same issue despite the fact that other shareholders have indicated by their votes that they are not interested in that issue.” See Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 34-20091 (Aug. 16, 1983) [48 FR 38218 (Aug. 23, 1983)], at 38221 . . . . In addressing the personal-grievance basis for exclusion in 1982, the Commission noted that “[t]here has been an increase in the number of proposals used to harass issuers into giving the proponent some particular benefit or to accomplish objectives particular to the proponent.” See Proposed

Amendments to Rule 14a-8, Release No. 34-19135 (Oct. 14, 1982) [47 FR 47420 (Oct. 26, 1982)], at 47427 . . . .<sup>11</sup>

There is no debate, therefore, that the Commission has historically intended for minimum ownership requirements and related limitations on right of use in Rule 14a-8 to promote good faith use and to guard against undue imposition on registrants and shareholders of costs and distractions.

*b. Reasons for the Minimum Ownership Requirements and Related Limitations on Right of Use under Rule 14a-11*

Although Rule 14a-11 was vacated by a federal appellate court,<sup>12</sup> this occurred only after the Commission had given substantial consideration to its adoption of the rule, including consideration of public comments. Under the adopted rule, a shareholder was required to have continuously held at least 3% of the total voting power of a registrant's securities that are entitled to be voted on the election of directors for at least three years in order to make director nominations using its proxy access right under such rule.<sup>13</sup>

The adopting release for Rule 14a-11 made clear that the purpose of the minimum ownership thresholds and a minimum holding duration was to promote good faith use of these rules and guard against undue imposition on registrants and shareholders of costs and distractions. In the Release, the Commission stated:

Based on our consideration of these competing interests, including balancing and facilitating shareholders' ability to participate more fully in the nomination and election process against the potential cost and disruption of the amendments, we have determined that requiring a significant ownership threshold is appropriate to use Rule 14a-11. Indeed, we believe that the 3% ownership threshold – combined with the other requirements of the rule – properly addresses the potential practical difficulties of requiring inclusion of shareholder director nominations in a company's proxy materials, and some concerns that both company management and other shareholders may have about the application of Rule 14a-11. Providing this balanced, practical, and measured limitation in Rule 14a-11 is consistent with

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<sup>11</sup> Rule 14a-8 2020 Amendments, Proposing Release, at 7 n.6. See also Adoption of Amendments to Proxy Rules, Exchange Act Release No. 34-4185, 13 FR 6673, 6679 (Nov. 5, 1948) (noting that “in a few cases security holders have abused this privilege by using the rule to achieve personal ends which are not necessarily in the common interest of the issuer's security holders generally” and that “[i]n order to prevent such abuse of the rule, but without unduly restricting the privilege which it grants to security holders, the amendment places reasonable limitations upon the submission of such proposals”); Rule 14a-8 1983 Amendments, Proposing Release, at \*38–39, \*41 (noting that Rule 14a-8 “sets forth thirteen substantive grounds for omitting security holder proposals . . . that are not proper for security holders' action and . . . that constitute an abuse of the security holder proposal process”).

<sup>12</sup> Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

<sup>13</sup> Rule 14a-11(b)(1).

the approach we have taken in many of our other proxy rules and reflects our desire to proceed cautiously with these new amendments to our rules.<sup>14</sup>

In a footnote to the above excerpt—occurring after the words “this balanced, practical, and measured limitation in Rule 14a-11 is consistent with the approach we have taken in many of our other proxy rules”—the Commission cited the approach taken in Rule 14a-8(b). In this way, the Commission made clear that its chief reason for adopting minimum ownership requirements for Rule 14a-11 was the same as it was for adopting minimum ownership requirements for Rule 14a-8.

It should also be noted that, in adopting Rule 14a-11, the Commission justified its rulemaking power with the claim that the new rule aimed to make the “proxy process function[], as nearly as possible, as a replacement for an actual in-person meeting of shareholders.”<sup>15</sup> Notably, even though the Commission’s stated aim in adopting the rule was to replicate conditions of in-person shareholder meetings—suggesting the absence of any need for the Commission to superimpose additional restrictions that would not be found in a shareholder meeting—this did not prevent the Commission from adding to the rule minimum ownership requirements and related limitations on right of use.

*c. The Imposition of Limitations in Rules 14a-8 and 14a-11 Suggest a Need to Impose Similar Limitations in the Proposed Rule*

The question that follows is why Rules 14a-8 and 14a-11 would contain minimum ownership requirements and related restrictions on the right of use, but the Proposed Rule contains no comparable limitations.

Compared to Rules 14a-8 and 14a-11, the Proposed Rule confers on shareholders substantially greater rights. The maximum effect of a shareholder proposal under Rule 14a-8 on corporate control and policy is that shareholders would approve a non-binding advisory proposal. The maximum effect of a proxy access nomination under Rule 14a-11 (or, given that it has been vacated, under the bylaws of many registrants) on corporate control and policy is that, at any given annual meeting, a 3% or greater shareholder, who has held the stock for three years or more, can nominate a number of directors not exceeding 20% of the total number of authorized board seats. By contrast, under the Proposed Rule, a dissident shareholder faces almost no limitations in exercising a rule that would allow it to replace the *entire* board of directors. And even if the dissident were to fail drastically in one year, or for five years in a row (for example, by receiving less than 1% of the vote for its nominees each time), or utilize its universal proxy right for facially inappropriate reasons, the shareholder would face almost no limitations when seeking to do the same in future years. In light of the foregoing, we would argue that the Proposed Rule is “proxy access on steroids.”

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<sup>14</sup> Rule 14a-11 Adopting Release, at 80–81 (citation omitted).

<sup>15</sup> *Id.*; Bus. Roundtable, 647 F.3d at 1147.



The only credible counterargument against limitations on the universal proxy card might be that the Proposed Rule, unlike Rule 14a-8 and Rule 14a-11, requires a dissident shareholder to file and disseminate its own proxy statement. However, in practice, the effort and cost of preparing a proxy statement is not significant for a dissident. Rule 14a-5(c) allows dissidents to omit from their proxy statement any information contained in the proxy materials of the registrant. Most dissidents rely on that rule, resulting in comparatively brief and straightforward dissident proxy statements. Also, the Proposed Rule would require a dissident to solicit only a majority (but not all) of the shares entitled to vote on the election of directors. Lastly, as the 2016 Release highlighted, the Proposed Rule would permit dissidents to utilize the “notice and access” rule, which allows sending only a one-page notice of the online availability of proxy materials.<sup>16</sup> As a result of the foregoing, the proxy statement requirement does not appear to justify the significantly different treatment of the Proposed Rule when compared to Rule 14a-8 and Rule 14a-11.

The below chart summarizes the inconsistencies between Rule 14a-8 and vacated Rule 14a-11 (and most proxy access bylaws), on the one hand, and the Proposed Rule, on the other hand.

	<b>Rule 14a-8</b>	<b>Vacated Rule 14a-11 (And Most Proxy Access Bylaws)</b>	<b>Proposed Rule 14a-19</b>
<b>Access to registrant’s proxy card</b>	Yes	Yes	Yes
<b>Shareholder right</b>	Shareholder proposals (no director nominations)	Director nominations (no shareholder proposals)	Director nominations (no shareholder proposals)
<b>Binding nature of shareholder vote</b>	Non-binding	Binding	Binding
<b>Ownership requirements</b>	Shares worth \$2,000 (for 3 years) \$15,000 (for 2 years) \$25,000 (for 1 year)	3%	1 share
<b>Minimum holding requirements</b>	1-3 years (see above)	3 years	None
<b>Use Restrictions</b>	Various use restrictions	20% of total authorized board seats	None
<b>Dissident proxy statement requirement</b>	No	No	Yes

<sup>16</sup> 2016 Release at 116–17.

*d. Cost Considerations*

Placing to the side the issue of outright abuse, we would also argue that tailoring the Proposed Rule to guard against undue imposition of costs is a useful purpose because the added costs and risks of including dissident nominees in a universal proxy card are considerable.

As the Commission recognized in its release published in the Federal Register on November 10, 2016 (Release No. 34-79164) (the “2016 Release”), the Proposed Rule would require the registrant to, among other things, include language in its proxy materials referencing dissident nominees and the mechanics of the universal proxy card;<sup>17</sup> notify the dissident of the names of the registrant’s nominees;<sup>18</sup> if the dissident fails to timely file its definitive proxy materials, disseminate revised proxy materials that remove the names of dissident candidates;<sup>19</sup> comply with the presentation and formatting requirements of the Proposed Rule;<sup>20</sup> and undertake other voluntary actions such as performing background checks on the dissident nominees before including them on the registrant’s proxy card and expending managerial time negotiating with the dissidents.<sup>21</sup>

Further, the Proposed Rule substantially expands the costs, risks, and obligations of a registrant when it comes to managing proxy voting in a proxy contest. Under the current proxy rules and practice of the Commission, when a dissident runs a proxy contest, a registrant is required to include additional disclosures in its proxy statement. For example, a registrant issuing a proxy statement for a proxy contest will note the existence of the dissident campaign, include a “background to the solicitation” section, and add additional disclosures under Items 4 and 5 of Schedule 14A it would not otherwise include in a proxy statement for an uncontested solicitation. But, under the current proxy rules, the registrant does not need to change the content of its proxy card, apart from underscoring the card’s particular color (thereby helping shareholders to distinguish the registrant’s proxy card from the dissident’s proxy card) and potentially adding emphasis to the disclosure (which is required even in uncontested elections) that the registrant is the party issuing the proxy card and soliciting proxies thereon. Under the current proxy rules, the registrant also does not need to handle the physical and electronic dissemination of its proxy card, and the management of shareholder proxies, in a substantially different manner than it would in an uncontested solicitation.

Under the Proposed Rule, by contrast, the registrant would become subject to additional obligations and risks associated with the language on the proxy card as well as the management of the proxy card’s dissemination and the collection of proxies. The registrant would first need to ensure that its version of the universal proxy card reflects the dissident’s slate and meets formatting

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<sup>17</sup> *Id.* at 26, 27, 41, 55.

<sup>18</sup> *Id.* at 57–60, 82.

<sup>19</sup> *Id.* at 69, 82 (noting that under the Proposed Rule a registrant may disseminate a new, non-universal proxy card including only the names of the registrant’s nominees if a dissident fails to file its definitive proxy statement 25 days prior to the shareholder meeting).

<sup>20</sup> *Id.* at 26–27, 75–79, 205–07.

<sup>21</sup> *Id.* at 118–19.

and styling requirements of the Proposed Rule. Down the line, the registrant may also find it necessary, if the dissident shareholder does not follow through with its solicitation to amend the proxy card and disseminate the revised card to all shareholders with revised instructions for granting their proxies. In cases where a dissident fails to follow through with its solicitation, circumstances could require the registrant to redo the entire proxy solicitation process and deem proxies previously given in favor of dissident nominees as moot. Moreover, whereas a dissident shareholder would only be required to solicit a majority of shareholders, a registrant generally sends its proxy materials to all shareholders and solicits as much support for its nominations and other proposals as possible, and thereby is likely to face higher costs, burdens, and risks than a dissident shareholder.<sup>22</sup>

These aforementioned factors underscore why it is sensible for the Proposed Rule, if adopted, to include minimum ownership requirements as well as other limitations on use to guard against undue imposition on registrants and shareholders of the costs and distractions associated with dissident director nominations.

## **2. Considerations on Other Aspects of the Proposed Rule**

### *a. Dissident Notice Requirement*

The Proposed Rule would require a dissident shareholder to provide the registrant with the names of the nominees for whom it intends to solicit proxies no later than 60 calendar days prior to the anniversary of the previous year's annual meeting date. We recommend that the Proposed Rule, if adopted, instead establish a minimum deadline of the earlier of (i) 90 days prior to the meeting anniversary and (ii) the nomination deadline set forth in the registrant's bylaws or other organizational documents.

The proposed 60-day deadline would provide companies with a significantly shorter window to review dissident director nominations than is provided by the bylaws of the vast majority of publicly traded companies in the U.S. that have adopted advance notice bylaws. Approximately 87% of such companies set a minimum deadline of 90 days or more for director nominations.<sup>23</sup> A 90-day deadline provides a registrant with needed time (and in our experience, sometimes just barely sufficient time), between the receipt of dissident nominations and the annual shareholder meeting, for the registrant to complete many essential tasks: interview and review dissident nominees, solicit feedback from the registrant's other stakeholders (including its largest shareholders) regarding the dissident campaign and its nominees, consider whether to invite any of the dissident nominees to be among the registrant's nominees, persuade any dissident nominees

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<sup>22</sup> A registrant is not specifically required by the proxy rules to solicit, or furnish a proxy statement to, a certain number or percentage of shareholders. 2016 Release at 64. However, most companies are required to give notice of a shareholder meeting to all shareholders entitled to vote as a matter of corporate law, *see, e.g.*, 8 Del. C. § 222(b), and this notice is typically attached to a company's proxy materials. Therefore, as a practical matter, companies typically send their full proxy materials to all shareholders.

<sup>23</sup> Based on data from FactSet Research Systems Inc. as of June 7, 2021 for companies domiciled in a U.S. state and actively traded on the New York Stock Exchange or NASDAQ.

to accept to be among the registrant's nominees, reach a negotiated settlement with the dissident shareholder regarding the constitution of the registrant's slate of director nominees (or alternatively, permit good faith negotiation efforts with the dissident before deciding to proceed with a proxy contest), draft and file the registrant's preliminary and definitive proxy statements, and still hold the annual meeting within 13 months of the previous year's annual meeting (which is required in many jurisdictions, including Delaware).<sup>24</sup>

To illustrate difficulties that would be caused by a 60-day deadline: Registrants commonly file and start to disseminate their definitive proxy materials 45 to 60 days prior to the annual meeting. In a contested election, a preliminary proxy statement filing is necessary. Given that the Commission may comment for 10 days (or more) following the initial filing of the preliminary proxy statement and that additional time may be needed for a registrant to resolve such comments, the preliminary proxy statement must be filed at least 60 days before the annual meeting anniversary so as to adhere to the same timeline. Assuming a registrant intends to hold its annual meeting on the annual meeting anniversary, and assuming a registrant wants to finalize or exhaust its negotiation efforts with a dissident shareholder (whether or not such efforts lead to resolution) prior to filing definitive proxy materials, a 90-day deadline provides at least 30 to 45 days for a registrant to undertake its review process and the other steps mentioned above and still begin to disseminate its definitive proxy materials 45 to 60 days before the annual meeting.

The above considerations are among the reasons that the great majority of publicly traded companies in the U.S. have established a 90-day deadline (or longer) in their advance notice bylaws. By contrast, a 60-day deadline would cause significant practical issues.

#### *b. Registrant Notice Requirement*

According to the 2016 Release, proposed Rule 14a-19(d) would require a registrant to provide the dissident with the names of the nominees for whom the registrant intends to solicit proxies no later than 50 calendar days prior to the anniversary of the previous year's annual meeting date. If the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, proposed Rule 14a-19(d) would require that the registrant provide notice no later than 50 calendar days prior to the date of the meeting. Proposed Rule 14a-19 would not require a registrant to file the notice with the Commission.

We believe a registrant should not be required to provide advance notice of its nominees, pursuant to the proposed registrant notice deadline, for three reasons. First, the current proxy rules already ensure that dissidents receive sufficient advance notice of the board's slate of director nominees. In the context of contested solicitations, registrants must file a preliminary proxy statement with the Commission and such preliminary proxy statement sets forth the board's

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<sup>24</sup> See 8 Del. C. § 211(c) (providing that the Court of Chancery of the State of Delaware may summarily order a meeting to be held upon the application of any shareholder if a corporation fails to hold an annual meeting for the election of directors for a period of 13 months after the last annual meeting to elect directors).

nominees. Second, as further discussed below, the imposition of a firm registrant notice deadline on registrants would eliminate needed flexibility that the proxy rules currently afford registrants in determining when to finalize and publicly disclose the composition of the registrant's slate. Third, as also discussed below, allowing a registrant to disclose its director candidate slate in its preliminary proxy statement, rather than pursuant to a fixed deadline of 50 days before the meeting deadline, allows the registrant to disclose this material, non-public information regarding its slate of directors, to all shareholders at the same time.

Currently, Regulation 14A does not set a firm deadline for filing the preliminary proxy statement with the Commission; instead, it provides that preliminary proxy material should be filed with the Commission "at the earliest practicable date."<sup>25</sup> The existing proxy rules therefore allow registrants flexibility in determining the best time to file a preliminary proxy statement, including when doing so in the context of a contested solicitation. The result is that companies are currently afforded flexibility to determine when they will publicly disclose the composition of the registrant's slate of director candidates for an upcoming shareholder meeting. Registrants routinely avail themselves of this flexibility, with good reason.

To illustrate a problem that would be caused by replacing this flexibility with the proposed registrant notice deadline: If a registrant has not finalized or exhausted its negotiation efforts with the dissident 50 days prior to the annual meeting anniversary, and if the registrant wants to devote more time to the negotiation effort, then the registrant's board may decide to delay the annual meeting. A board would typically delay the meeting by no more than 30 days so as to not reopen the window for shareholder proposals under Rule 14a-8<sup>26</sup> and to not trigger a shareholder's right to petition a state court to compel the holding of a shareholder meeting.<sup>27</sup> If the Proposed Rule were adopted, registrants would be required to notify dissidents of their planned slate of nominees, even where the registrant and the dissident are still in the middle of negotiations, and even though the registrant may not intend to hold the shareholder meeting for another 80 days. Many boards would view the proposed notice deadline date as being too far ahead of the annual meeting to determine, with certainty and in good faith, the full slate of the registrant's director candidates—particularly if there were a possibility that the board would replace certain incumbent nominees with nominees of the dissident. In this context, a firm registrant notice requirement would create an artificial deadline in the background of negotiations between the registrant and the dissident and it would become leverage for the dissident because the registrant would be rushed to complete negotiations before the deadline.

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<sup>25</sup> Rule 14a-6, n.2.

<sup>26</sup> See Rule 14a-8(e)(2) (providing that if an upcoming annual meeting date has been changed by more than 30 days from the annual meeting anniversary, then the deadline for submitting a shareholder proposal to be included in the registrant proxy statement pursuant to Rule 14a-8 is "a reasonable time before the company begins to print and send its proxy materials").

<sup>27</sup> 8 Del. C. § 211(c) (providing that the Court of Chancery of the State of Delaware may summarily order a meeting to be held upon the application of any shareholder if a corporation fails to hold an annual meeting for the election of directors for a period of 13 months after the last annual meeting to elect directors).

In sum, the proposed registrant notice deadline would eliminate needed flexibility that the proxy rules currently afford registrants for disclosing the composition of the registrant's slate, and it would subject the registrant to arbitrary timelines and deadlines that work in certain preconceived scenarios (e.g., the registrant and the shareholder have finalized or exhausted negotiations 50 days before the annual meeting anniversary, even where the negotiations did not lead to a full resolution) but not in other scenarios such as the one described.

According to the 2016 Release, the objective of the Proposed Rule in requiring a registrant to give notice of the names of its nominees is to allow the dissident to begin soliciting shareholders promptly and to cure “a purported informational and timing disadvantage in the proposed universal proxy system.”<sup>28</sup> The 2016 Release observes that a dissident shareholder cannot file its definitive proxy statement and begin its solicitation without knowing the names of the registrant's director candidates. This reasoning, however, is at odds with practical aspects of Regulation 14A as it currently exists and prevailing practices of registrants and dissidents in proxy contests. Consistent with the proxy rules, dissident shareholders almost always file and disseminate their definitive proxy materials *after* the registrant files its definitive proxy materials. That is because, as mentioned before, dissidents typically rely on Rule 14a-5(c), which allows dissidents to omit from their proxy statement information contained in the proxy materials of the registrant.

### *c. Form of Proxy Card*

The proposed form of universal proxy card under the Proposed Rule presents more opportunities for shareholder confusion than are recognized by the 2016 Release.

In addressing the potential for shareholder confusion that may result from use of the proposed form of proxy, the 2016 Release mainly focuses on problems shareholders may encounter in understanding the universal proxy card and marking it properly so as not to invalidate the proxies that the shareholder is trying to give. For instance, the 2016 Release addresses how shareholders can distinguish nominees of the registrant from nominees of the dissident,<sup>29</sup> how shareholders can mark the proxy cards to accurately reflect their choices,<sup>30</sup> how shareholders can appreciate the maximum number of candidates for whom they can properly grant authority to vote, and the consequences of giving “for” voting instructions for a greater or lesser number of nominees than available director positions.<sup>31</sup> The 2016 Release discusses certain “presentation and formatting requirements” of the proposed form of proxy designed to give shareholders clear instructions on these points and thereby mitigate confusion.<sup>32</sup>

The presentation and formatting requirements for the proposed form of proxy discussed in the 2016 Release are a step in the right direction but would not, alone, sufficiently mitigate the potential for shareholder confusion. A leading proxy soliciting firm has observed that the 2016

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<sup>28</sup> 2016 Release at 58–59.

<sup>29</sup> *Id.* at 20, 26, 40, 75, 77–78, 205.

<sup>30</sup> *Id.* at 141–42.

<sup>31</sup> *Id.* at 147.

<sup>32</sup> *Id.* at 76, 205.

Release “does not go into detail as to what these requirements might be in order to ensure that the formatting of the universal card is consistent and does not disadvantage either party.”<sup>33</sup> The requirements, as presented by the 2016 Release, would still leave registrants and dissidents with latitude to design and draft their proxy cards in the manner of their choosing. Varying approaches to disclosures and instructions on universal proxy cards could, in turn, lead to improper use of universal proxy cards and the invalidation of the proxies that a shareholder is trying to give.

Moreover, the Proposed Rule lacks procedures and guidance on formatting, electronic tabulation, or the presentation of a proxy card where there are multiple dissidents submitting competing slates or if a proxy contest is run concurrently with a shareholder proxy access campaign. There is also concern about a likely increase in errors, particularly those involving marking “for” more nominees than the maximum number of candidates for whom a shareholder can properly grant authority to vote.<sup>34</sup>

The mandatory use of universal proxy cards may also exacerbate informational asymmetries already present in the proxy voting system and detract from shareholders’ ability to make informed voting instructions. It is more difficult for a shareholder to make informed voting decisions regarding each individual nominee on a ballot than it is to make an informed voting decision about two slates of candidates which have been introduced and recommended by the registrant, on one hand, and the dissident shareholder, on the other. To make an informed voting instruction regarding each nominee on a universal ballot, a shareholder needs considerably more information than it needs when choosing between a registrant slate and a dissident slate. When a shareholder chooses between giving voting instructions on the registrant or dissident proxy card, it places greater reliance on the informed opinions and recommendations of the registrant or the dissident shareholder that has created the slate on the given proxy card.

It seems possible that, under a universal proxy system, shareholders would delegate their proxy voting decisions to proxy advisory firms, such as ISS and Glass Lewis, even more than they already do, which could lead to unintended consequences that have a far-reaching impact.<sup>35</sup> It

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<sup>33</sup> MacKenzie Partners, Inc., *The Universal Proxy Gains Traction: Lessons from the 2018 Proxy Season* (2018), <http://www.mackenziepartners.com/UniversalProxyWhitePaper.pdf>.

<sup>34</sup> The Commission may also take particular note of the observations of Broadridge Financial Solutions, Inc. in its comment letter on this matter and, in particular, its discussion of the use of universal proxy cards in Canada. Broadridge noted that it has processed universal proxies of Canadian issuers and witnessed an increased number of improperly executed proxies among those universal proxies relative to the levels it typically sees “in the millions of other proxies” processed each year. Broadridge cautions that some shareholders, retail shareholders in particular, may inadvertently make marks (i.e., for, against, withhold, or abstain) on a greater or fewer number of candidates than the maximum number of candidates for whom a shareholder can properly grant authority to vote. Based on the foregoing, Broadridge’s comment letter recommends additional presentation and formatting requirements to standardize forms of proxies across registrants and to mitigate shareholder confusion. For example, Broadridge suggests providing examples of universal proxies and voting instructions to promote the use of consistent language. See Charles V. Callan (Broadridge Fin. Solutions, Inc.), Letter Re: Universal Proxy Proposing Release, File No. S7-24-16 (Jan. 9, 2017), <https://www.sec.gov/comments/s7-24-16/s72416-1471154-130413.pdf>.

<sup>35</sup> See Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice, Release No. 34-86721 (Aug. 21, 2019), <https://www.sec.gov/rules/interp/2019/34-86721.pdf>; Concept

should also be considered that the universal proxy system would create additional analytical complexity for proxy advisory firms that are making voting recommendations in a proxy contest. A universal proxy card system would cause a proxy advisory firm, as it would cause a shareholder giving voting instructions, to place more focus on the individual merits of each given candidate on a standalone basis, as opposed to considering his or her merits in the context of the broader slate of which he or she is a part.<sup>36</sup> In connection with the foregoing, it should also be considered that, generally, only institutional investors can afford or subscribe to the services of ISS and Glass Lewis. Retail investors, as well as institutional investors that cannot afford these services, will not have access to whatever informational benefit is conferred by such access when they make their voting instructions on individual candidates.

*d. Bona Fide Nominee Definition*

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 registrant and the dissident will prepare a universal proxy card to solicit votes for their respective slates.

However, as the Commission recognizes and discusses in the Proposed Rule,<sup>37</sup> 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. We are concerned that allowing the

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Release on the U.S. Proxy System, Release No. 34-75 (July 14, 2010), at 118, <https://www.sec.gov/rules/concept/2010/34-62495.pdf> (discussing the “concern that voting recommendations by proxy advisory firms may be made based on materially inaccurate or incomplete data, or that the analysis provided to an institutional client may be materially inaccurate or incomplete”); Timothy M. Doyle (Am. Council for Cap.), *The Realities of Robo-Voting* (Nov. 2018), [https://accfcorp.gov/wp-content/uploads/ACCF-RoboVoting-Report\\_11\\_8\\_FINAL.pdf](https://accfcorp.gov/wp-content/uploads/ACCF-RoboVoting-Report_11_8_FINAL.pdf) (finding that a “troubling number of assets managers that are automatically voting in alignment with proxy advisor recommendations”); Tom Quaadman (Ctr. for Cap. Mkts. Competitiveness), Letter Re: Universal Proxy; 17 CFR Part 240; Release Nos. 34-79164, IC-32339; File No. S7-24-16; RIN 3235-AL84 (Jan. 9, 2017) (noting “the lack of transparency, the one-size-fits-all policies, the routine mistakes and the rampant conflicts of interest at proxy advisory firms” and arguing that “despite all these flaws, movement to the universal proxy card would further expand the influence of proxy advisory firms and thereby cement their grasp on corporate governance of public companies”); Asaf Eckstein, *Great Expectations: The Peril of an Expectations Gap in Proxy Advisory Firm Regulation*, 40 Del. J. Corp. L. 77, 92–93 (2015) (providing a comprehensive description of the concerns of “delegation” by institutional investors of their voting decisions to proxy advisors); Proxy Voting: Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms, SEC Staff Legal Bulletin No. 20 (IM/CF) (June 30, 2014), <http://perma.cc/L7KN-MD8R>.

<sup>36</sup> Additionally, under the current system, when a proxy advisory firm recommends on a dissident's short slate proxy card, it does not have to separately consider which incumbent nominees to recommend for or against on the dissident card, because the dissident has already implicitly committed to vote its proxies for specific remaining incumbents in order to fill out its slate. By contrast, under the Proposed Rule, if a proxy advisor wanted to recommend “for” on all members of a dissident's proxy card, it would next fall on the proxy advisor to determine which additional registrant nominees to recommend “for” (and implicitly, against).

<sup>37</sup> 2016 Release at 25, 30, 175.



revised definition of a bona fide nominee to include consent to being named in “withhold the vote” or other campaigns may lead to unintended consequences and would not serve the goals of the Proposed Rules.

The Commission should consider refining the definition of bona fide nominee to apply, in an uncontested election, only to the registrant’s proxy statement relating to a certain meeting, and in a contested election, to the registrant’s or dissident’s proxy statement where the dissident is proposing a director nominee and soliciting votes in connection with the contested election.<sup>38</sup>

*e. Legal Consequences for Dissidents Not Following Through*

A concern raised by the 2016 Release and related comment letters is that the adoption of the Proposed Rule would increase the ease for shareholders of commencing a proxy contest and thereby significantly increase the frequency of proxy contests.<sup>39</sup> A related concern is that making the universal proxy card too readily accessible to shareholders would give individual shareholders, including those with minor stakes, undue leverage in negotiations with companies.

To promote good faith use of the shareholder right afforded by the Proposed Rule and guard against the undue imposition on registrants and shareholders of costs and distractions associated with threats of proxy contests, the Commission should consider including in the Proposed Rule legal consequences for dissidents who, after giving notice of a proxy contest, do not follow through with a proxy solicitation or do not comply with the Proposed Rule.

The Proposed Rule should provide that, if a dissident fails to file and disseminate its definitive proxy statement by the date that is 25 days prior to the shareholder meeting (absent a legitimate reason such as a settlement), then the dissident should be prohibited from engaging in a proxy contest at any registrant (or at the very least, the registrant in question) for a period of time (e.g., three years).<sup>40</sup> We believe that such a legal consequence would deter dissident shareholders

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<sup>38</sup> See Darla C. Stuckey (Soc. for Corp. Gov.), Letter Re: Proposed Rule Change re: Universal Proxy (File No. S7-24-16), Jan. 10, 2017, <https://www.sec.gov/comments/s7-24-16/s72416-1475144-130482.pdf> (proposing a new definition of bona fide nominee),

<sup>39</sup> See 2016 Release at 28, 48 (discussing “whether universal proxies would increase the frequency of election contests”); Scott Hirst, *Universal Proxies*, 35 Yale J. on Reg. 437, 495 (2018) (noting that “[o]pponents of a universal proxy rule have raised the concern that universal proxies would increase the ease by which dissidents can mount proxy contests”); Corp. Governance Coal. for Inv. Value, Letter Re: Universal Proxy; 17 CFR Part 240; Release Nos. 34-79164, IC-32339; File No. S7-24-16; RIN 3235-AL84, Jan. 9, 2017, at 2, <https://www.sec.gov/comments/s7-24-16/s72416-1471280-130424.pdf> (expressing the concern that a universal proxy rule would “[i]ncrease the frequency and ease of proxy fights for dissident shareholders”); Stuckey, *supra* note 38, at 1, 3 (expressing concern that a universal proxy rule “could result in more proxy contests for which registrants will bear more of the actual and indirect costs”).

<sup>40</sup> Other jurisdictions employ similar concepts. For example, the U.K. City Code on Takeovers and Mergers provides that if an offer is announced by a bidder and subsequently withdrawn or lapsed, such bidder may not make another offer for the target company for 12 months (Rule 35.1).

who do not really intend to proceed through the process of a proxy contest from using the universal proxy card as a tool to put pressure on a registrant.

*f. Opt-Out Approach*

The Commission should consider revising the Proposed Rule to provide that a registrant may opt out of the universal proxy system if it believes that using universal proxies in the manner of the Proposed Rule is not in the best interests of the registrant or its shareholders.

Companies would opt out through a board decision and then publicly disclose the opt-out either in a Form 8-K or their annual proxy statements. We have noted the concerns identified by the Commission that, among other things, optional adoption may be used by a contesting party, in a self-serving manner, “to the possible detriment of its opponent.”<sup>41</sup> At the same time, there are many uncertainties about how the proposed system will work.

For these reasons, it might make sense to allow registrants that want the universal proxy card system to test its functionality first and identify issues prior to market-wide adoption.

### **3. Other Issues with the Existing Federal Proxy Rules**

Lastly, we encourage the Commission to address select longstanding issues with the existing federal proxy rules in connection with any adoption of the Proposed Rule.

*a. Broker Search Timing*

Rule 14a-13(a)(3) requires registrants to initiate a broker search at least 20 business days prior to the record date of an annual shareholder meeting.

This rule dates to 1987 and no longer has a strong justification in the digital age. In practice, there is no problem with allowing significantly shorter time periods for a broker search. Notably, for *special* meetings Rule 14a-13(a)(3)(i) allows a registrant to shorten this window to “as many days before the record date of such meeting as is practicable” where “such inquiry is impractical 20 business days prior to the record date.” In today’s world, broker searches in respect of special meetings for shareholder votes on mergers and similar transactions are initiated with as little as one business day advance notice.

In our view, the different treatment of broker search windows in the proxy rules for annual and special meetings is not justified by any practical considerations. As such, we believe that the minimum time period for broker searches in respect of annual meetings should be shortened to one to three business days in connection with any adoption of the Proposed Rule.

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<sup>41</sup> 2016 Release at 179–85, 181.

*b. Disclosure of Preliminary Proxy Voting Tallies*

The Commission may wish to consider revising the existing proxy rules to expressly prohibit any disclosure of preliminary proxy voting tallies prior to the convening of, or the closing of polls at, a shareholder meeting.

For many years, there has been some debate among market participants as to whether disclosure of preliminary proxy voting tallies is permissible under the proxy rules. The source of this debate is note (d) to Rule 14a-9, which, in providing an example of a situation that could give rise to false or misleading statement under Rule 14a-9, cites “[c]laims made prior to a meeting regarding the results of a solicitation.” Over the years, many market participants have interpreted note (d) to mean that participants in a solicitation are never permitted to disclose preliminary proxy voting tallies. However, federal courts and the Commission’s staff (in comment letters) interpreted note (d) not as an *absolute* prohibition on disclosure of preliminary proxy voting tallies, but rather as a context in which false or misleading statements under Rule 14a-9 *could* arise. Federal courts have generally set a high bar for plaintiffs to successfully claim that a soliciting party violated Rule 14a-9 through statements made about the status of voting results prior to the convening of a shareholder meeting. For most part, courts have expressed that statements about preliminary voting tallies must be materially false or misleading in order to constitute a violation of the proxy rules.<sup>42</sup>

Nevertheless, these various court cases and staff comments have identified, in the course of their analyses, negative impacts on proxy soliciting dynamics that arise when participants make disclosures, projections, predictions, or even purportedly factual statements about preliminary voting results. Courts have observed that such disclosures can spoil the fairness of the voting process by creating a “bandwagon effect,” whereby shareholders may decide to vote for the purported likely winner in the belief that the outcome has become a “foregone conclusion.”<sup>43</sup> In a recent 2017 case, a dissident shareholder announced preliminary proxy voting results that turned out to be incorrect, and it then proceeded to succeed in its proxy contest.<sup>44</sup> Given the absence of

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<sup>42</sup> See, e.g., Mgmt. Assistance Inc. v. Edelman, 584 F. Supp. 1016, 1020 (S.D.N.Y. 1984) (holding that “predictions regarding the results of a solicitation are not materially misleading or otherwise actionable under rule 14a-9”); Kennecott Copper Corp. v. Curtiss-Wright Corp., 449 F. Supp. 951, 960–61 (S.D.N.Y.), *aff’d in part, rev’d in part*, 584 F.2d 1195 (2d Cir. 1978) (finding that prediction of victory made at a press conference was “an expectable exclamation of confidence that would not divert a reasonable shareholder from the task of coolly determining how best to vote his shares in light of the opposing platforms”); Gould v. Am. Hawaiian S. S. Co., 331 F. Supp. 981, 989 (D. Del. 1971) (finding a violation of the proxy rules where a proxy statement created the misleading impression that 64% of stockholders were legally obligated to vote for a merger).

<sup>43</sup> Kennecott, 449 F. Supp. at 960–61 (acknowledging that, hypothetically, Rule 14a-9 “might be violated by a claim of sure victory calculated to induce wavering shareholders to jump upon an apparently victory-bound bandwagon”); Gould, 331 F. Supp. at 991 (finding that “at least one effect of the statement that 64% of the shareholders had agreed to vote for the merger would be that the average shareholder would not give the proxy statement careful consideration because the merger would appear to be a foregone conclusion”).

<sup>44</sup> See Immunomedics, Inc. v. Venbio Select Advisor LLC, No. CV 17-176-LPS, 2017 WL 822800, at \*2 (D. Del. Mar. 2, 2017) (denying plaintiff’s motion for a temporary restraining order and preliminary injunction and indicating that a violation of Rule 14a-9 is not likely to be established where a dissident shareholder disclosed inaccurate

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an express prohibition under the proxy rules, a soliciting party may have no sure legal remedy for the wrong caused in a situation like this. We have observed numerous proxy contests in the recent past where participants disclosed preliminary proxy tallies—in press releases, one-on-one conversations with shareholders, and interviews with the media—without legal consequences.

Therefore, in connection with any adoption of the Proposed Rule, we request that the Commission consider introducing an express and absolute prohibition on the disclosure of preliminary proxy voting tallies by either side prior to a shareholder meeting.

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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,

/s/ Kai H.E. Liekefett

/s/ Derek Zaba

/s/ Beth Berg

/s/ Holly J. Gregory

/s/ Leonard Wood

cc: Gary Gensler, Chair of the SEC  
Hester M. Peirce, Commissioner  
Elad L. Roisman, Commissioner  
Allison Herren Lee, Commissioner  
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preliminary voting results, but at the time reported, neither the dissident shareholder nor plaintiff “knew that the data relied on was incorrect”).