

Opening Statement
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Discussion Regarding the U.S. Proxy Voting Infrastructure

Good morning. Thank you Chairman Clayton, Commissioners, Investor Advisory Committee Chairwoman Sheehan and the other members of the IAC, for providing us with the opportunity to participate in today's discussion and address what we view as a very important corporate governance issue that needs to be updated through SEC rulemaking. I also want to thank Alexandra Ledbetter and the SEC staff for putting today's program together and handling all of the logistics (including dealing with a pesky Hurricane named Florence that threatened to disrupt today's meeting).

By way of background, I am a corporate lawyer at Wachtell, Lipton, Rosen & Katz in New York City and have been practicing for over 30 years. My practice is primarily involved with representing public companies and boards of directors and, in recent years, a substantial amount of my time has been devoted to dealing with shareholder activists, contests for corporate control and proxy contests. Thus I have significant direct experience in the navigating the many intricacies of the U.S proxy voting infrastructure as well as experience with similar structures in Europe and Asia.

Simply put, the US voting infrastructure is outdated. Similar to another issue we have addressed with the Commission, Schedule 13D that came out of the 1968 Williams Act but has not kept up with market developments (and I promise that this is the first and last time I will refer to the need to reform the beneficial ownership reporting requirements today), the current proxy voting infrastructure was developed for a different era and has not been updated to address fundamental market and technological changes.

There are two sets of laws that regulate the ability of shareholders to cast votes in advance of and at shareholder meeting for public companies. By and large, led by Delaware, the state law aspects of allowing shareholders to exercise their fundamental rights to the shareholder franchise have kept pace with the technological developments and other changes in recent years. Unfortunately, the same cannot be said for the federal law aspects that regulate much of the mechanics of the proxy voting process. This is the aspect that the SEC regulates but with rules and tools that were developed long before emails, faxes, texts and the internet were even a glimmer in anyone's eyes.

You will hear from other panelists about the benefits that technology can bring to the table to address many of the concerns that will be raised today and it is my view that we need to embrace much of this technology as we revamp a system that is sorely outdated. However, these changes must address the interests of both issuers and investors, including investors who are shareholders activists, in a fair and balanced

manner that provides a level-playing field for all participants and does not discriminate against any investor, be they institutional or retail.

It is essential that we recognize several developments that have occurred in recent years and take them into account as we look to develop a proxy voting regime for the 21st Century. First, there has been a tremendous concentration in voting power in institutional investors, including passive investors such as index funds. For many public companies, this means that by talking to 20 or 30 investors (or in some cases, fewer than ten), issuers and shareholder activists can talk to the holders of a majority (or close to a majority) of a public company's shares. This concentration in voting power has significantly lowered the costs of communicating, but this tends to disadvantage issuers who need to communicate with all of their shareholders in the context of a proxy contest. Second (and recognizing that the Commission is already examining this issue separately), is what we see as the undue influence of proxy advisory firms such as ISS and Glass Lewis, to whom many institutional investors outsource their proxy voting decisions. There has been a recent trend where a number of the major institutional investors have taken their proxy voting decisions back in-house (not without bearing not insignificant costs) but most institutional investors, either for cost reasons or otherwise, have not abandoned the proxy advisory outsourcing model. The proxy advisory firms do not provide equal access to issuers as they do to investors (particularly shareholder activists) and these firms are in need of separate regulation, but their impact cannot be neglected as we look to update the current proxy voting infrastructure. Third, technology has significantly lowered the costs to communicate with shareholders, especially in situations where a shareholder proponent seeks to correspond with holders of a majority of shares, while issuers generally need to communicate with all of their shareholders. This can make it significantly more expensive for public company issuers in a proxy contest when facing a shareholder activist. It is in the public interest to make sure that all shareholders, be they large or small, active or passive, receive the same information provided to other shareholders, although this may be easier said than done.

Given that a significant portion of the investments managed by major institutional investors are pension or retirement savings that are seeking long-term value, we need to develop a system that gives a voice to those who are ultimately impacted. And technology can help us achieve that so long as all of the impacts of that technology (including unintended consequences) are fully considered and taken into account.

Let me address some of the concerns I (and many of our clients) have with the current proxy voting system and infrastructure. Here I would note that the interests of issuers and shareholder activists do not always diverge. You will hear from Brian Schorr of Trian and Deborah Majoras of Procter & Gamble regarding a number of specific issues that arose in their recent proxy contest and you will see that many of these concerns are shared concerns. Professors Ed Rock's and Marcel Kahan's important article discusses many of the problems with the voting system and custodian issues and provides some thoughtful suggestions.

I would also note that it is in everyone's interest that we develop a system that promotes participation and achieves accuracy in a sufficiently transparent manner that allows individuals and institutions to have their voices appropriately heard in the board room and beyond.

Shareholder communications: Simply put, we do not have a system that provides all shareholders with the same information in a timely manner. It is a routine complaint that many investors (but, notably, not the large institutional investors), receive proxy voting materials after the vote has taken place. This is not just international shareholders who may be subject to the vagaries of a global postal system but also due to the inability of companies to communicate directly with their shareholders – they are forced to do so through intermediaries, whose efforts, unfortunately, often fall short. Technology should be able to overcome many (of not all) of these issues so long as some of the roadblocks (like allowing communications directly with beneficial holders) are removed.

Making sure their votes are counted: There is currently no way for an individual shareholder to make sure that their vote has been accurately and properly cast and counted. This is exacerbated with the practice of share-lending, since generally institutions will not vote shares that have been lent out, but this can impact the beneficial holder who has no knowledge of the transaction. In a number of recent contests, institutional shareholders have ended up voting far less than the number of shareholders they are listed as holding, as those shares have actually been lent to other parties who do not vote the shares. This only becomes clear at the end of the process as there is little to no transparency on the lending of shares. Disclosure here could be quite helpful to the process.

Transfers after the record date: Shares that held as of the record date but subsequently transferred often either do not get voted, or get voted improperly given the difficulty of buying shares and transferring the vote. Similar, mechanisms that permit the separation of the vote from the underlying economics of the shares (the so-called empty voting) need to be regulated. In some cases, this has led to over-voting but the fundamental concern is that when you separate a vote from the underlying economics, it tends to favor short-term interests who are not interested in creating long-term value.

Universal proxy card: As I have previously testified at a prior SEC roundtable, the universal proxy card does resolve some issues but it raises concerns that it could favor one party or the other in a proxy contest. Private ordering has not worked here as, in practice, either the issuer or the activist will not agree to use a universal proxy. In some circumstances, for example, the universal proxy card could allow shareholders to fully exercise their franchise that they cannot do if they vote on a single card that is either the issuer's or the shareholder proponent's. For example, if a shareholder wants to vote for one director on a dissident's slate but wants to vote in favor of the issuer's directors otherwise, they are forced to choose between two bad outcomes – either they vote on one card or the other but don't fully cast their vote, or they can attempt to go through the difficult process of attending the shareholder meeting and attempting to vote their

shares as they desire so long as they satisfy all of the necessary procedures (and bring a stapler to attach their voting power to the ballot).

Our current system invites shareholders to vote multiple times as each side sends out numerous mailings and proxy cards. However, there is clearly confusion and many shareholders do not understand that the last voted card supplants all earlier votes. Any system that encourages people to vote early and often is bound to have problems. The current system leads to significant costs for both sides. Proctor & Gamble was the most expensive proxy contest on record and it has been reported that the ADP/Pershing Square proxy contest cost over \$26 million, \$24 million of which was borne by ADP (and ultimately the ADP shareholders). When every vote counts, each vote gets expensive.

Our proxy voting system lacks transparency and is overly complicated. Through the use of technology, we can create a system that provides for the appropriate amount of transparency while ensuring an accurate and timely result.

Thank you again for the opportunity to address this important topic and I look forward to our discussion and answering any questions.