



SUBMITTED BY EMAIL

February 26, 2018

Brent J. Fields
Secretary
US Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Petition for Rulemaking: Amend Exchange Act Rule 14(a) and Regulation 14B, or take Other Appropriate Measures to Facilitate Advanced Voting Instructions

Dear Mr. Fields:

The American Business Conference (ABC) is a Washington-based coalition of midsize growth companies founded in 1981 by Arthur Levitt, Jr. The chairman of ABC is Alfred P. West, Jr., Chairman and CEO of SEI Investments, Oaks, Pennsylvania.

This letter is a petition for rulemaking regarding Advanced Voting Instructions (AVI).

Background ABC has long advocated reforms to promote proxy voting by individual investors (see appendix for examples). We believe that encouraging individual investors to vote in corporate elections is the single most important way to improve the proxy system by insuring that shareholder votes truly reflect broad shareholder sentiment.

In the 2017 proxy season, only 29% of shares owned by individuals (retail shares) were voted in corporate elections. By way of comparison,

institutional investors voted 91% of their shares. The discrepancy in voting rates has held constant for years.¹

At a time of intensifying governance activism, this disparity has become increasingly problematic. As much as 30% of all shares are owned by individuals. The failure of this large segment of retail shareholders to match the voting rate of the institutions can result in elections that are not accurate measures of shareholder preferences.

Take for example shareholder support for climate change proposals. In the 2017 proxy season, 66% of institutional shares were cast in favor of such initiatives, compared to only 13% of retail shares voted.²

There is no way of knowing what the tally would have been if significantly more retail votes had been cast. That's the point: in many cases it is difficult to know overall shareholder sentiment regarding this and other contentious governance issues. This predicament also applies to director elections and other shareholder matters.

The Commission has worried about this problem for years. Most recently, in January 2018 remarks at the SEC-NYU Dialogue on Securities Markets, SEC Chairman Jay Clayton said in relation to proxy voting: "analyzing the issue up for a vote, the potentially varying points of view on that issue, formulating an opinion, and casting the ballot is a series of actions that requires nuanced determinations that may be beyond individual shareholders."

We interpret the Chairman's statement to mean that there is no single answer to the problem of the low retail voting rate. We agree. We think at a minimum, the Commission ought to simply permit the use of existing technology to facilitate the ability of individual shareholders to cast their ballots, technology that institutional investors already employ.³

¹ "2017 Proxy Season Review," *ProxyPulse*, September 2017. *ProxyPulse*, an initiative of PwC and Broadridge, is available at proxypulse.broadridge.com.

² *Ibid.* See also Gretchen Morgenson, "Small Investors support Boards, But Few Vote," *New York Times*, October 8, 2017.

³ In our experience, past SEC expressions of concern about shareholder voting have not yielded practical change. In fact, such Commission innovations as notice and access may have had the perverse effect of suppressing the retail vote. See letter of John Endean to Elizabeth M. Murphy, Secretary, U.S. Securities and

A way to do that is at hand: Advanced Voting Instructions (AVI) sometimes called Client Directed Voting (CDV). AVI would allow individual investors to register voting preferences with their broker for every stock they own. Each year retail shareholders would receive their proxy ballots reflecting their advance instructions. Shareholders could change those instructions, if they deem it necessary, before submitting their ballot.⁴

To its credit, the Commission included AVI in its 2010 Concept Release on the proxy system. No action was ever taken. Hence this petition for rulemaking: it is time for the Commission to act.

The Commission's neglect of AVI subsequent to its 2010 Concept Release has been to some extent compensated for by the work of independent scholars and proxy experts. We point in particular to a 2017 paper by Professor Jill E. Fisch of the University of Pennsylvania Law School.⁵ It could well be a roadmap for the Commission should it decide to move on AVI.

Believing that the "greatest promise for increasing retail participation involves harnessing technology to make retail voting more efficient," Professor Fisch addresses the various concerns, technological, regulatory, and attitudinal, that have blocked implementation of AVI.⁶

Fisch shows that the technical challenges are readily surmountable. The facilities that institutional investors use to set their voting preferences have been in use for at least a decade and are readily adaptable for use by retail

Exchange Commission, Re: File No. S7-14-10; Re: Concept Release on the U.S. Proxy System, September 22, 2010.

⁴ The process of being provided with pre-populated voting instructions prior to every meeting would likely encourage shareholder engagement.

⁵ Jill E. Fisch, "Standing Voting Instructions: Empowering the Excluded Retail Investor," *Law Working Paper No. 360/2017*, European Corporate Governance Institute, July 2017. The monograph is available for downloading at <http://ssrn.com/abstract=2972838>. Fisch's article also appeared in the *Minnesota Law Review*, 102: November 2017. A pdf copy of this version is available at: http://www.minnesotalawreview.org/wp-content/uploads/2017/12/Fisch_MLR.pdf. References to Fisch's article in this letter are taken from the ECGC version.

⁶ Fisch, p. 29. Professor Fisch uses the term Standing Voting Instructions (SVI) in place of Advanced Voting Instructions (AVI). For purposes of consistency with the 2010 proxy release, we here employ AVI, although we believe SVI is the superior moniker.

shareholders. As Fisch writes, “the institutional experience demonstrates that the technological challenges to providing” AVI are “minimal.”⁷

Intermediaries are ready to support and encourage shareholders to engage more fully in the proxy process.⁸ For example, the development of enhanced brokers’ internet platforms (EBIPs) could easily serve as the technological backbone for AVI implementation once regulatory barriers are overcome. On the latter matter, Fisch describes, in Part II of her paper, the “very modest changes” to existing provisions, mostly pertaining to the broker exemption, to allow AVI to go forward.⁹ In Part IV, she considers some of the “practical considerations” for AVI implementation.¹⁰

Fisch does not pretend her paper is the final word on how, precisely, AVI should be put into place.¹¹ It must be said, however, that the issues she discusses, whether technological, regulatory, or practical, do not seem, either individually, or taken as a whole, terribly complex, *assuming a general desire to help retail investors participate more fully in corporate governance*. If that desire does not animate the Commission’s consideration of AVI, the idea will remain in limbo.

The real roadblock to implementation resides elsewhere. It is the belief that advanced voting directions would increase so-called uninformed voting.

AVI is often dismissed as a “set it and forget it” instrumentality, meaning that once retail shareholders have expressed their voting preferences, they are unlikely to revisit them each time there is a corporate election resulting in “uninformed” votes. Should the Commission feel the need to address this concern, it should look for factual support for the assertion that AVI and “uninformed voting” pose a risk to good corporate governance. This evidence will be hard to find. ABC believes that the notion that shareholders would use AVI and then pay no attention to the issues raised in corporate elections is

⁷ Fisch, p. 29.

⁸ Fisch, pp. 23 – 26.

⁹ See Fisch, pp. 29 – 32.

¹⁰ Fisch, pp. 31 – 32.

¹¹ While Professor Fisch proposes rule changes, we are aware that other experts believe that Interpretive Guidance could suffice to facilitate AVI.

based solely on a low view of retail holders – or perhaps a fear that retail holders have inconvenient opinions.¹²

Fisch makes the key point. As she writes, “the risk that retail investors will engage in uninformed voting is overstated,” largely because retail investors “have skin in the game.” By contrast, “most institutional votes are cast by agents or intermediaries, introducing the potential for conflicts of interest or other agency costs.”¹³

While a retail shareholder may not currently find the time and attention necessary to vote annually on each investment, the ability to establish preliminary – and changeable – preferences across all holdings could change that calculation, creating a virtuous circle of participation followed by education. Moreover, as Fisch notes, “increased levels of retail participation in the voting process” could provide “an incentive for participants in an election to reach out and communicate with retail investors.” Here is another virtuous circle: more retail voting may mean more efforts by election participants to provide better information to retail holders.¹⁴

In any event, requiring “informed voting” is simply contrary to settled law. As Fisch explains, while federal securities laws govern the proxy process, the right to vote corporate shares is a matter of state law. State corporation law imposes no duty on minority shareholders with respect to voting the shares they own.¹⁵

A retail holder, as the owner of the share, owes no fiduciary duty regarding that vote. He or she has no duty to vote at all, much less a duty to vote in

¹² Perhaps a sign of this low view is the trope “set it and forget it,” a jocular reference to the infomercials of Mr. Ron Popeil and featuring his Showtime Rotisserie. Expansion of voter participation in the political as well as the corporate world is often met with derision from those fearful of a dilution of their influence.

¹³ Fisch, p. 34. See letter of John Endean to Elizabeth M. Murphy, Secretary, United States Securities and Exchange Commission, Re: File No. S7-22-09, Amendments to Rules Requiring Internet Availability of Proxy Materials, November 25, 2009. (“The more important question...is not whether investors are “informed” but whether they are true to the assumptions underlying our system of corporate governance. We think individual investors are in this sense exemplary. They cast their votes with the simple, direct economic motivation that all shareholders are assumed to have in common under corporate law....It is a fair assumption that individuals know why they own the stock and are motivated to maximize the value of their investment in the company’s shares.”)

¹⁴ Fisch, p. 36.

¹⁵ Fisch, pp. 36 – 38.

anyone's best interest and certainly no duty to become informed prior to voting. Comparison of the duties of an institutional plan fiduciary and those of a direct owner of an equity share are simply inapt.

Finally, it is often repeated, especially in the context of the proposed Universal ballot, that one objective of the proxy process is to replicate, to the extent possible, in-person voting at an annual meeting. To our knowledge, shareholders attending an annual meeting never find their way barred because of an "informed voting" requirement they are unable to fulfill.¹⁶

Therefore, to state an obvious conclusion, the SEC has no authority to restrict a shareholder's exercise of his or her franchise through AVI on the basis of "informed voting." To do otherwise would be to act contrary to settled law and, more important, it would forego an opportunity to use technology to help individual shareholders participate in corporate governance and make the "nuanced determinations" Chairman Clayton rightly believes ought to be the goal of the proxy process.

To that end we believe the Commission should move expeditiously to make the AVI facility available to shareholders.

Sincerely,



John Endean

President

¹⁶ See Letter of John Endean to Brent J. Fields, Secretary, US Securities and Exchange Commission, Re: File Number S7-24-16, Universal Proxy, February 9, 2017. ("An informed voting requirement in the proxy system is...wholly inconsistent with the idea of recreating the in-person annual meeting experience for shareholders.")

cc: The Honorable Jay Clayton
The Honorable Kara M. Stein
The Honorable Michael S. Piwowar
The Honorable Robert J. Jackson, Jr.
The Honorable Hester M. Peirce

William Hinman
Division of Corporation Finance

Appendix

Selected Comment Letters

Letter of John Endean to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission Re: Release No. 34-466620; File No. SR-NYSE-2002-46, Regarding Voting of Proxies, October 31, 2002.

Letter of John Endean to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, Re: File No. S7-19-03, Security Holder Director Nominations, March 31, 2004.

Letter of John Endean to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, Re: Rule No. 4-493, Business Roundtable Petition for Rulemaking Regarding Shareholder Communications, July 19, 2004.

Letter of John Endean to Nancy M. Morris, Secretary, U.S. Securities and Exchange Commission, Re: File No. S&-10-05, Internet Availability of Proxy Materials, February 16, 2006.

Letter of John Endean to the Honorable Christopher Cox, Chairman, U.S. Securities and Exchange Commission, Re: NYSE Rule 452, January 16, 2007.

Letter of John Endean to Nancy M. Morris, Secretary, U.S. Securities and Exchange Commission, Re: File Numbers S7-16-07 and S7-17-07, Shareholder Proposals and Shareholder Proposals Relating to the Election of Directors, October 5, 2007.

Letter of John Endean to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, Re: File No. SR-NYSE-2006-92, Proposed Amendment to New York Stock Exchange Rule 452, March 31, 2009.

Letter of John Endean to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, Re: File No. S7-22-09, Amendments to Rules requiring internet Availability of Proxy Materials, November 25, 2009.

Letter of John Endean to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, Re: File no. S7-14-10, Concept Release on the U.S. Proxy System, September 22, 2010.

Letter of John Endean to Dodd-Frank Investor Advisory Committee, U.S. Securities and Exchange Commission, Re: File No. 265-28, Investor as Owner Subcommittee: Retail Shareholder Voting, November 30, 2012.

Letter of John Endean to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission, Re: File Number S7-24-16, Universal Proxy, February 9, 2017.

Selected Articles

John Endean, "A Snipe Hunt," *Directors & Boards*, First Quarter, 2007.

John Endean, "Endangered: The Individual Shareholder Vote," *Directors & Boards E-Briefing*, April 2009.

Frank G. Zarb, Jr. and John Endean, "The Case for Client-Directed Voting," *Law360*, January 4, 2010.

Frank G. Zarb, Jr. and John Endean, "Restoring Balance in Proxy Voting: The Case for Client Directed Voting," *Harvard Law School Forum on Corporate Governance and Financial Regulation*, February 14, 2010.

John Endean, "The Promise of the Enhanced Broker Internet Platform," *Harvard Law School Forum on Corporate Governance and Financial Regulation*, September 22, 2013.

John Endean, "The Untapped Power of Individual Investors," *Wall Street Journal*, October 6, 2014.

ABC Roundtable Participation

New York Stock Exchange, Proxy Working Group, May 31, 2005.

U.S. Securities and Exchange Commission, Roundtable Discussions Regarding Proxy Voting Mechanics, May 24, 2007.

U.S. Securities and Exchange Commission, Proxy Voting Roundtable, February 19, 2015.