



Via Hand Delivery

January 8, 2014

Ms. Elizabeth Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, Northeast
Washington, DC 20549

Re: Petition for Rulemaking to Amend Section 14 of the Securities Exchange Act of 1934 to Facilitate the Use of Universal Proxy Cards in Contested Elections

Dear Ms. Murphy:

On behalf of the Council of Institutional Investors ("CII"), we respectfully submit this petition for rulemaking¹ to the Securities and Exchange Commission (the "Commission"), requesting that the Commission amend the proxy rules under Section 14 of the Securities Exchange Act of 1934 (the "Exchange Act") to facilitate the use of universal proxy cards featuring a complete list of board candidates in cases of a contested election of directors. We request the Commission to propose amendments that eliminate the requirement to obtain a nominee's consent to be named on a proxy card in contested elections and allow shareholders to vote for their preferred combination of shareholder and management nominees on a single proxy card, thereby ensuring that investors voting by proxy have the same practical ability to vote their shares for their preferred mix of nominees that they would have if they attend a shareholder meeting in person. We believe that such reform will ensure a less confusing, less cumbersome and fairer voting process.

CII is a nonprofit, nonpartisan association of public, corporate and union pension funds and other employee benefit plans, foundations and endowments with combined assets that exceed \$3 trillion.²

Our petition pertains solely to proxy contests, which carry crucial significance for the companies and shareholders involved. Currently, in contested elections, management's proxy card provides no "mix and match" capability, and the shareholder proponent's proxy card provides limited "mix and match" capability only if soliciting for a "short slate" of directors. Instead, shareholders voting by proxy are limited to supporting either the management slate or, in a short slate contest, the particular combination of candidates

¹ Rule 192(a), Securities and Exchange Commission Rules of Practice and Rules on Fair Fund and Disgorgement Plans.

² For more information about the Council of Institutional Investors, including its members, please visit the Council's website at <http://www.cii.org/>.

supported by the shareholder proponent. They cannot freely pick and choose between the two sets of candidates and “split their ticket.”

Concerned about this lack of flexibility, CII’s general membership voted on September 27, 2013, to amend its Corporate Governance Policies to support universal proxy cards. The addition to CII’s policies states:

To facilitate the shareholder voting franchise, the opposing sides engaged in a contested election should utilize a proxy card naming all management-nominees and all shareholder-proponent nominees, providing every nominee equal prominence on the proxy card.³

The shareholder voting franchise is a fundamental tenet of corporate democracy and has been described by numerous current and past members of the Commission as the most effective means of providing accountability.⁴ Unfortunately, the Commission's current proxy rules impede shareholders' state law voting rights in proxy contests. These rules restrict most shareholders to supporting either management's favored candidates using management's proxy card or a shareholder proponent's favored candidates using the shareholder proponent's proxy card. Shareholders voting via proxy—as most shareholders do—are foreclosed from picking and choosing the combination of candidates they most prefer from the two nominee sets. This diminishes their voting rights, as they would be able to pick and choose among all of the duly nominated candidates if they attend the shareholder meeting in-person—generally an expensive and impractical proposition.

The need for reform was recently highlighted by the Commission's Investor Advisory Committee (the "IAC"), established under the Dodd-Frank Act to advise the Commission on regulatory priorities.⁵ On July 25, 2013, the IAC adopted a recommendation requesting the Commission to explore relaxing the "bona fide nominee" rule embodied in Rule 14a-4(d)(1) "to provide proxy contestants with the option (but not the obligation) to use Universal Ballots in connection with short slate director nominations."⁶ We applaud the IAC's recognition of the problems embedded in the current rules. However,

³ COUNCIL OF INSTITUTIONAL INVESTORS, POLICIES ON CORPORATE GOVERNANCE § 2.2 (2013), http://www.cii.org/files/ciicorporategovernancepolicies/09_27_13%20CII%20Corp%20Gov%20Policies%20Full%20and%20Current%20%20FINAL.pdf.

⁴ *E.g.*, Mary Schapiro, Chairman, Sec. & Exch. Comm'n, Statement at SEC Open Meeting on Facilitating Shareholder Director Nominations (May 20, 2009), <http://www.sec.gov/news/speech/2009/spch052009mls.htm>.

See also Luis Aguilar, Commissioner, Sec. & Exch. Comm'n, Shareholders Need Robust Disclosure to Exercise Their Voting Rights as Investors and Owners (Feb. 20, 2013), <http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1365171492322#.UmmfdvleYeg>.

⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 911, 124 Stat. 1376, 1822 (2010) (to be codified at 15 U.S.C. § 78pp).

⁶ INVESTOR ADVISORY COMMITTEE, RECOMMENDATIONS REGARDING SEC RULEMAKING TO EXPLORE UNIVERSAL PROXY BALLOTS (2013), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/universal-proxy-recommendation-072613.pdf>.

we urge the Commission to undertake the comprehensive reform that is vital to the enfranchisement of shareholders and the fairness of elections. Our request for rulemaking seeks the inclusion of all board candidates on both cards, ensuring shareholders' ability to use either proxy card to vote for the combination of board candidates they prefer.

We believe the reform being requested would result in *de minimus* changes in costs for proxy contest participants, and that the benefits to the shareholder voting franchise would far outweigh those costs. We underscore our support for preserving the current practice of each party funding its own campaign and circulating its own proxy card and proxy statement. Indeed, we note the practical necessity of a system with two sets of proxy materials if this petition were to be implemented; proposals *other than* the election of directors could differ between the two cards, and biographical information on candidates would appear only in the corresponding party's proxy statement.

Historical Overview of the Proxy Regime

When Congress established the corporate disclosure regime, it tasked the Commission with a tripartite mission: to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation.⁷ Congress intended for company disclosure to allow shareholders to make rational and informed decisions and hold management accountable. As Commissioner Daniel Gallagher recently remarked, if shareholders are displeased with a company's board and management, "they can change the behavior of management and the direction of the company by exercising their votes at shareholder meetings."⁸ The Commission has recognized that the proxy process has become the "primary way" for shareholders to make their views known to company management and to effect such change.⁹

The Commission has noted that Congress gave it authority over the corporate proxy process "as a means of ensuring that it functions, *as nearly as possible*, as a replacement for an actual in-person meeting of shareholders."¹⁰ Unfortunately, that Congressional purpose is not being served and is, in fact, being undermined by the current rules.

In 1966, the Commission promulgated Rule 14a-4(d)(1) under Section 14 of the Exchange Act, which provides that no proxy shall confer authority to vote for any person unless that person has consented to being named in the proxy statement and to serve if elected. As a person is deemed to be a bona fide nominee only if he or she grants such consent, this rule has come to be known as the "bona fide nominee" rule.

⁷ Daniel Gallagher, Commissioner, Sec. & Exch. Comm'n, Remarks at Society of Corporate Secretaries & Governance Professionals (Jul. 11, 2013), <http://www.sec.gov/News/Speech/Detail/Speech/1370539700301>.

⁸ *Id.*

⁹ Press Release, Sec. & Exch. Comm'n, SEC Votes to Propose Rule Amendments to Facilitate Rights of Shareholders to Nominate Directors (May 20, 2009), <http://www.sec.gov/news/press/2009/2009-116.htm>.

¹⁰ *Id.* (emphasis added).

Directors nominated by an incumbent board have only very rarely consented to being named in a proxy statement issued by a shareholder seeking board representation. As a consequence, the practical effect of the bona fide nominee rule, in conjunction with typical "last in time" state corporate law provisions,¹¹ is that a shareholder proponent could not offer shareholders the opportunity to "split their tickets" and vote for a combination of shareholder nominees and management nominees—even though shareholders would be able to vote such combinations if they voted in person.

In contested elections where a shareholder proponent was not seeking to replace the entire board, shareholders wishing to vote on the shareholder proponent's proxy card were thus prevented from exercising their full voting power. In many cases, shareholders who sought to vote for a full slate of directors by attempting to split their tickets (by voting for both shareholder and management nominees on a single card) had their votes invalidated.¹² As the Commission has publicly observed, the "bona fide nominee rule has acted to prevent the form of proxy from being used to allow shareholders to exercise their state law right through the proxy process, and as a result has both cut off shareholder voting rights and greatly disadvantaged shareholder nominees seeking minority representation on the board of directors."¹³

In final rules promulgated in 1992,¹⁴ the Commission slightly modified the bona fide nominee rule by, in the words of former Chairman Mary Schapiro, "choosing a partial solution to the problem, opting *not* for the most simple approach that would permit inclusion of some management nominees on the dissident's proxy."¹⁵ Noting that the proxy rules had erected "unnecessary impediments" to the shareholder franchise underpinning the corporate disclosure regime, the Commission sought to alleviate "the difficulty experienced by shareholders in gaining a voice in determining the composition of the board of directors."¹⁶ Rather than mandating universal proxies or eliminating the bona fide rule, the Commission added an exception to Rule 14a-4 to allow a shareholder who nominates a short slate of directors (i.e., a number of directors which, if elected, would constitute a minority of the board) to obtain authority to vote for some of management's nominees as well (the "short slate exception").¹⁷ Shareholder

¹¹ Because state law almost universally provides that the latest dated proxy revokes any previous proxy, shareholders generally only can submit one effective proxy in connection with a solicitation.

¹² Ronald J. Gilson, Lilli A. Gordon & John Pound, "How the Rules Discourage Constructive Engagement: Regulatory Barriers to Electing a Minority of Directors," 17 J. CORP. L. 29 (1992).

¹³ Regulation of Communications Among Shareholders, 57 Fed. Reg. 48,276, 48,289 (October 16, 1992) (to be codified at 17 C.F.R. pt. 240.14a-4) [hereinafter "Short Slate Release"].

¹⁴ Short Slate Release, 57 Fed. Reg. at 48,291. For a full review of the 1992 amendments, see Jill Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 Vanderbilt Law Review at 1165 (1993).

¹⁵ Mary Schapiro, Commissioner, Sec. & Exch. Comm'n, Remarks Before the National Investor Relations Institutes Fall Conference (Nov. 6, 1992) (emphasis added).

¹⁶ Short Slate Release, 57 Fed. Reg. at 48,288.

¹⁷ According to *The Disciplinary Effects of Proxy Contests*, the vast majority--82 percent--of all contested elections from 1994 to 2008 were "non-control" contests. See Vyacheslav Fos, *The Disciplinary Effects of Proxy Contests* (2013),

http://www.stern.nyu.edu/cons/groups/content/documents/webasset/con_039717.pdf. CII appreciates

proponents not seeking majority control can identify the management nominees they will *not* vote for and can indicate that they will vote for the rest of management's slate, but are prevented from including the management nominees they *will* vote for by name in their proxy statement or proxy card.

Shareholder proponents seeking to replace a majority of the board are still subject to the bona fide nominee rule and cannot include management nominees on their proxies without first obtaining the specific nominees' consents to be named and serve. Yet there is no sensible reason for the disparity in treatment that results from whether a shareholder is running a majority or minority slate of nominees.

When the Commission adopted the short slate exception, it simply asserted that it is not "unduly burdensome" for a shareholder seeking a majority of the board to propose a full slate of nominees. This rationale, however, overlooks situations when a shareholder proponent seeking majority control may still want to keep certain directors, such as the chief executive officer, on the board because it believes that such directors are qualified and will complement its nominees. Furthermore, there is no reason why a shareholder's practical ability to exercise his or her full voting power should depend on how many people a party is nominating.

Continuing Shareholder Disenfranchisement: Impediments to "Split Tickets"

Although the short slate exception to the bona fide nominee rule gave shareholders greater ability to vote for full slates of directors when supporting a shareholder proponent's minority slate, shareholders remain unable to vote by proxy for the mix of shareholder nominees and management nominees who they believe would best comprise the board. The only tested and certain way for a shareholder to vote freely for his or her individually preferred combination of director candidates is to attend the meeting in person—obtaining a "legal proxy" from the broker if the shareholder holds its shares in "street name" and is not the record holder—and vote on the manual ballots distributed. This is a cumbersome and expensive process that only the most sophisticated and deep-pocketed shareholders understand and may consider pursuing. Consequently, as the Commission's Division of Corporation Finance noted in a 2003 staff report, almost all shareholders vote through the grant of a proxy before the meeting instead of voting in person.¹⁸

The 2009 proxy contest between Target Corp. ("Target") and Pershing Square Capital Management ("Pershing Square") illustrates how the elimination of the bona fide nominee rule could enfranchise shareholders. After the shareholder proponent, Pershing Square, put forward a short slate of five board candidates,¹⁹ it formally sought

that the Commission's short slate exception to the bona fide nominee rule incrementally improved shareholders' ability to support a combination of candidates for the large majority of proxy contests.

¹⁸ DIV. OF CORP. FIN., SEC. & EXCH. COMM'N, REVIEW OF THE PROXY PROCESS REGARDING THE NOMINATION AND ELECTION OF DIRECTORS (2003), <http://www.sec.gov/news/studies/proxyrpt.htm>.

¹⁹ Target Corp., Schedule 14A (DEFC14A) (May 1, 2009), <http://www.sec.gov/Archives/edgar/data/27419/000095012309007750/y01431dcdefc14a.htm>.

permission from Target, through a letter authored by its nominee and securities law expert Professor Ronald Gilson, to circulate a universal proxy featuring all candidates.²⁰ When the company rejected Gilson's request, shareholders were left to choose between two proxy cards, each steering the voter to support a unique combination of candidates.²¹ Shareholders who wished to support a combination that deviated from the two fixed slates were able to do so only by attending the shareholder meeting in Minneapolis. Absent much-needed reform, the ability of either a company or a shareholder proponent to effectively veto the circulation of a universal proxy renders its likelihood of use highly remote.

The bona fide nominee rule can be detrimental to incumbent boards, as demonstrated in a recent proxy contest between Tessera Technologies ("Tessera") and Starboard Value ("Starboard"). After Starboard nominated a control slate of six nominees, Tessera expanded its board from six to eight members and announced that it would only nominate six directors; thus, two of Starboard's nominees were guaranteed election to the board. When Starboard declined to nominate more than six directors, Tessera requested Starboard's nominees to consent to be named in a universal proxy to be issued by the company. Starboard, however, rejected the company's request for a universal proxy. Tessera then sent shareholders a supplemental proxy card that listed all six of its management nominees and included a write-in slot to allow shareholders to vote for two of Starboard's nominees. By doing so, the company believed that it was giving stockholders "the complete freedom to choose the [] two Starboard nominees."²² The staff of the Commission objected to Tessera's proxy card as a violation of the bona fide nominee rule and instructed the vote tabulation company not to tabulate any votes made on that card.²³

Reform Should Include Universal Proxies

Reform of the proxy rules is necessary to enfranchise shareholders by fulfilling the Commission's goal of ensuring that the proxy process sensibly functions as a replacement for an actual in-person meeting of shareholders. We strongly believe that shareholders should have the freedom to vote for any combination of candidates in contested elections on a universal proxy. Indeed, the Commission itself has noted the appeal of a mandatory universal proxy as a substitute for physical attendance at a shareholder meeting.²⁴

²⁰ Target Corp., Schedule 14A (DFAN14A) (April 21, 2009), <http://www.sec.gov/Archives/edgar/data/27419/000095012309006877/y01431dfdfan14a.htm>.

²¹ Target Corp., Schedule 14A (DEFA14A) (April 21, 2009), http://www.sec.gov/Archives/edgar/data/27419/000110465909025226/a09-2081_10defa14a.htm.

²² Tessera Technologies Inc., Schedule 14A (DEFA14A) (May 3, 2013).

²³ Tessera Technologies Inc., Schedule 14A (DEFA14A) (May 15, 2013). Although the Commission eventually rescinded that order, Tessera was instructed to include the Commission's objections in bold, all-caps text on its proxy statement.

²⁴ In the 1992 proxy reform release, the Commission noted:

At a minimum, it is vital that the Commission acts to dismantle purely regulatory impediments to the election of shareholder nominees, starting with the bona fide nominee rule. Although the specific language of the amended rules is beyond the scope of this petition, we address some of the design choices and potential objections below.

We prefer reform that would facilitate the use of universal proxy cards naming all candidates in contested elections. Simply repealing the consent requirement may not be enough. That might encourage proxy contest participants to circulate "semi-universal" proxy cards featuring more—but not all—candidates.

The successful use of universal proxies in jurisdictions such as Canada demonstrates that universal proxies are feasible from a logistical standpoint.²⁵ Broadridge Financial Solutions ("Broadridge"), a company that controls more than 95 percent of the market for distributing and processing proxy materials, has already successfully processed such proxies abroad.²⁶ Another factor favoring the successful introduction of universal proxies is the significant role played in proxy contests by professional proxy solicitors, who are employed by management and shareholder proponents to facilitate the voting process and are well-positioned to mitigate shareholders' confusion.

When the Commission amended Rule 14a-4(d) in 1992, it noted that some corporate commenters contended that the unauthorized use of the names of the company's nominees on the shareholder proponent's proxy "would imply that the company nominees supported the soliciting shareholder's position, had agreed to be named on the shareholder's card, and would serve along with the shareholder's nominees if elected."²⁷ We believe that the Commission can address this objection by requiring a shareholder proponent to make two disclosures in its proxy statement and proxy card.

The first disclosure should be the same disclosure that the Commission adopted with the short slate exception: a disclaimer that certain company nominees may not serve if elected with any of the soliciting party's nominees. The second disclosure should be to the effect that the inclusion of management nominees on the shareholder proponent's proxy card should not be construed as an endorsement by the company of the shareholder proponent's views or nominees.

Proposals to require the company to include shareholder nominees in the company's proxy statement represent a substantial change in the Commission's proxy rules. This would essentially mandate a universal ballot including both management nominees and independent candidates for board seats. However, any such universal ballot is appealing since the shareholder could make such a selection if they were attending the annual meeting in person.

Short Slate Release, 57 Fed. Reg. at 48,288.

²⁵ In a proxy contest involving Canadian Pacific, both the company and the soliciting shareholder issued a universal proxy unimpeded by Canadian law. See AMY GOODMAN ET AL., PRACTICAL GUIDE TO SEC PROXY AND COMPENSATION RULES § 10.02 (2013).

²⁶ Broadridge successfully tallied universal proxies in the Canadian Pacific proxy contest and partial universal proxies issued by a shareholder proponent in a proxy contest at Agrium in April 2013.

²⁷ Short Slate Release, 57 Fed. Reg. at 48,288.

It has also been argued that universal proxy cards would confuse shareholders. We respectfully believe that this objection is baseless. The current proxy rules are the real source of complexity. The Commission's explanation of the steps a shareholder must take to vote for management nominees using a shareholder proponent's proxy in a contest for a minority of the board provides an apt example:

The [shareholder proponent's] proxy statement and form of proxy will refer the shareholder to management's soliciting materials for the names, background and qualifications of the company's nominees. Thus, shareholders will know precisely which company nominees their shares will be voted for by comparing the full company slate with the list of company nominees the proxy holder will not vote for, and by indicating additional company nominees with respect to whom the shareholder wishes to withhold authority.²⁸

Changing the proxy rules to facilitate universal proxies would eliminate this confusion and ensure a less cumbersome voting process.

We believe the soliciting parties should *not* be required to publish biographical information on opposing director nominees, even if they are soliciting in favor of certain such opposing nominees. The Commission should make clear that a cross-reference pursuant to Rule 14a-5(c)²⁹ to the other side's proxy materials for information about the opposing party's nominees is permitted³⁰ and sufficient.³¹

We expect that the Commission may be required to provide guidance on the physical design of universal proxy cards. We believe that both soliciting parties should be required to list the names of all director nominees clearly, equally in terms of form, and on the front of the proxy card. In other words, fonts and styles should be consistent for all candidates, and the names should not be permitted to appear on separate pages of the proxy card.

While the potential for over-voting will always exist when there are more candidates on a proxy card than available board seats, we believe certain disclosures could meaningfully reduce such risk. We suggest that the proxy cards specify the maximum number of board candidates for which the shareholder may vote. We also support

²⁸ *Id.*

²⁹ Rule 14a-5(c) currently provides that “[a]ny information contained in any other proxy soliciting material which has been furnished to each person solicited in connection with the same meeting or subject matter may be omitted from the proxy statement, if a clear reference is made to the particular document containing such information.”

³⁰ Unless a party knows or has reason to know the information is false.

³¹ If cross-reference to the opposing party's proxy materials is not viewed as sufficient, the soliciting party could be required to include in its proxy materials the biographical information on any opposing nominee it names on its proxy card, as taken verbatim from the opposing party's materials, and without liability for the accuracy of such information.

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language on the card reminding shareholders that voting for more nominees than available seats will result in the invalidation of the proxy card.

Additionally, the Commission may wish to consider whether nominees should be grouped by slate (e.g., "ABC Corp. Nominees" and "Shareholder Proponent Nominees"), and whether the order in which candidates appear on the card should be consistent between the two cards.

Conclusion

Companies' accountability to their owners and the efficiency of our capital markets greatly depend on the sustenance of corporate democracy. A corporate democracy cannot exist without its paramount tool—the vote. Unfortunately, current proxy rules undermine the shareholder franchise. We firmly believe that the elimination of the bona fide nominee rule and the introduction of universal proxy cards for contested elections are integral to facilitating robust corporate democracy and necessary to fulfilling the Commission's goal of ensuring that the proxy process functions, as nearly as possible, as a replacement for an in-person meeting of shareholders. We therefore urge the Commission to promptly adopt rules to carry out this much needed reform.

If the Commission or the staff have any questions, or wish to discuss any of these matters in greater detail, please do not hesitate to contact me at (202) 261-7097 or Glenn@cii.org, or our general counsel, Jeff Mahoney, at (202) 261-7081 or Jeff@cii.org.

Sincerely,



Glenn Davis
Director of Research

cc: Chairman Mary Jo White
Commissioner Luis Aguilar
Commissioner Daniel Gallagher
Commissioner Michael Piwowar
Commissioner Kara Stein
Keith Higgins, Director, Division of Corporation Finance