

Via E-Mail

June 2, 2021

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC
20549-1090

Re: Release No. 34-91603; IC- 34246; File No. S7-24-16

Dear Madam Secretary:

I am writing on behalf of the Council of Institutional Investors (CII) to express our strong support for the finalization of a rule to ensure that shareholders voting in contested director elections have the ability to use either the company's proxy card or the dissident's proxy card to vote for the combination of board nominees they support.

CII is a nonprofit, nonpartisan association of United States (U.S.) public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$40 trillion in assets under management.¹

The shareholder franchise is a fundamental aspect of corporate democracy and a key focal point for CII members. The SEC has been granted the authority by Congress to ensure that the proxy process functions “as nearly as possible, as a replacement for an actual in-person meeting of shareholders.”² Universal proxies would ensure 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.

Following the SEC's 2010 “Proxy Plumbing” Concept Release, CII expressed its shared interest with the SEC in ensuring that “the U.S. proxy system as a whole operates with the accuracy,

¹ For more information about the Council of Institutional Investors (“CII”), including its board and members, please visit CII's website at <http://www.cii.org>.

² Press Release, SEC Votes to Propose Rule Amendments to Facilitate Rights of Shareholders to Nominate Directors (May 20, 2009), <https://www.sec.gov/news/press/2009/2009-116.htm>.

reliability, transparency, accountability, and integrity that shareholders and issuers should rightfully expect... [Shareholders] should be served by a well-functioning proxy system that promotes efficient and accurate voting.”³ In that spirit, on November 8, 2013, CII’s membership adopted amendments to our corporate governance policies to support reforms that would provide shareholders with full flexibility to vote for the combination of board nominees they support in a contested election.⁴

Two months later CII filed a rulemaking petition to amend Section 14 of the Securities Exchange Act of 1934 to facilitate the use of universal proxy cards in contested director elections.⁵ CII members were encouraged by the SEC’s February 19, 2015, Proxy Voting Roundtable, and we provided written comments addressing questions about why universal proxies would improve the proxy voting system.⁶

Following the October 26, 2016, SEC Release No. 34-79164 (2016 Release)⁷, CII submitted a response answering each question posed by the 2016 Release.⁸ From December 2019 through August 2020 an informal group of market participants periodically convened to address some lingering concerns about universal proxies. Known as the Universal Proxy Working Group (Working Group), participants shared an interest in optimizing proxy voting logistics for non-exempt solicitations in connection with contested director elections. The Working Group’s efforts culminated in a letter noting some potential modest improvements to the 2016 Release to further enhance its neutrality, market benefits and practical implementation.⁹ A copy of that letter is provided herein as an appendix.

Today CII continues to support the universal proxy system put forward in the 2016 Release, as detailed in our above-referenced December 28, 2016, letter. CII believes the 2016 Release, if adopted, would deliver a critical benefit to the market: providing shareholders the ability to use either proxy card to vote for any combination of board

³ Concept Release on the U.S. Proxy Voting System, SEC Release No. 34-62495 at 7 (July 14, 2010), <https://www.sec.gov/rules/concept/2010/34-62495.pdf>.

⁴ CII, Corporate Governance Policies (last updated Sept. 22, 2020), https://www.cii.org/corp_gov_policies, at Section 2.2 (“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.”)

⁵ Letter from Glenn Davis, Director of Research, CII to Elizabeth Murphy, Secretary, U.S. Securities and Exchange Commission (Jan. 8, 2014), https://www.cii.org/files/issues_and_advocacy/correspondence/2014/01_08_14_CII_letter_to_sec_petition%20for_rulemaking.pdf.

⁶ Letter from Jeff Mahoney, General Counsel, CII, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission (Mar. 5, 2015), https://www.cii.org/files/issues_and_advocacy/correspondence/2015/03_05_15_cii_letter%20to%20SEC%20on%20universal%20proxy.pdf.

⁷ Universal Proxy, 81 Fed. Reg. 79,122 (SEC proposed Oct. 26, 2016), <https://www.govinfo.gov/content/pkg/FR-2016-11-10/pdf/2016-26349.pdf>.

⁸ Letter from Jeff Mahoney, General Counsel, CII to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission (Dec. 28, 2016), https://www.cii.org/files/issues_and_advocacy/correspondence/2016/12_28_16_comment_letter_SEC_universal_proxy.pdf.

⁹ Letter from Working Group co-chair David A. Katz, Wachtell, Lipton, Rosen & Katz, co-chair Glenn Davis, Deputy Director, CII, et alia (Aug. 6, 2020), https://www.cii.org/files/issues_and_advocacy/correspondence/2020/UPWG%20final%20letter%20dated%208-6-20.pdf.

nominees they support. We also concur with the suggestions described in the Working Group letter. Namely, CII would support revising the 2016 Release to:

- Boost the minimum dissident solicitation threshold from a simple majority of voting power to as much as two-thirds of outstanding voting power
- Add certain presentation and formatting requirements not included in the 2016 Release, if the SEC feels doing so would improve fairness and make the process more orderly. Examples of additional presentation and formatting requirements include:
 - uniform presentation and formatting of vote boxes beside the nominee names, to prevent proxy contestants from bold-facing, enlarging or otherwise drawing special attention to favored candidates
 - standardized general colors for respective company and dissident proxy cards (e.g., company cards are always white and dissident cards are always a color other than white, to provide consistency and avoid investor confusion.)
- Require disclosure, either on proxy cards or in accompanying materials, clarifying what would happen in certain scenarios, such as when:
 - cards are marked with more or fewer candidates than available board seats
 - cards are returned signed and unmarked
 - an elected nominee chooses not to serve on the board after the election, as described more fully in the Working Group letter.

Lastly, apart from the rulemaking process, we share the Working Group's support for any SEC Staff guidance, if necessary and appropriate, to facilitate the fair presentation of all nominees on vote instruction forms and electronic proxy voting platforms in the context of proxy contests.

Former SEC Director of Corporation Finance Keith F. Higgins summarized the lack of shareholders' full flexibility to support their preferred combination of board nominees in contested elections as "a glitch in the system of fair suffrage that should be fixed."¹⁰ We agree. CII respectfully asks the SEC to adopt a final rule to complete this meaningful reform to strengthen the U.S. proxy voting system. If we can answer any questions or provide any additional information about CII's support, please do not hesitate to contact us.

Sincerely,



Glenn Davis
Deputy Director

¹⁰ Keith F. Higgins, Keynote Address at the Practising Law Institute, Corporate Governance –A Master Class 2 (Mar. 9, 2017) (on file with CII).

Appendix

The Universal Proxy Working Group

Via Email

August 6, 2020

William Hinman
Director of Corporation Finance
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Universal Proxy Cards

Dear Director Hinman:

The Universal Proxy Working Group (“UPWG”) is an informal committee of market participants who share an interest in optimizing proxy voting logistics for non-exempt solicitations in connection with contested corporate director elections. Although the informal committee has engaged in dialogue only since December 2019, many of its participants have individually followed the SEC’s important work in this area for several years. The perspectives of UPWG participants are not monolithic, but several important themes have emerged from our dialogue reaching across a substantial majority of the committee’s participants. In our capacity as the UPWG co-chairs, we are conveying the perspectives of the individual UPWG participants listed below, who generally agree with the following broad observations, which may be of interest to the ongoing important work of the Staff of the Division of Corporation Finance as well as the Commission:

- We believe the system for contested director elections should facilitate the objectives of clarity, ease of use and fairness in an orderly process. The Proposing Release¹ issued in 2016 signified an important milestone toward fulfilling these objectives by establishing that under qualifying circumstances, the registrant proxy card and the dissident proxy card each must include all nominees and present them fairly. Candidates and recommendations with respect to those nominees should be presented on the proxy card in a way that is understandable and generally consistent across both cards and contests.
- We support requiring disclosure on the universal proxy cards or in their accompanying materials (as well as in the definitive proxy statements), of the effect of:
 - voting on the universal proxy card for more candidates than available board seats;
 - voting on the universal proxy card for fewer candidates than available board seats;
 - and
 - signing and returning an otherwise unmarked universal proxy card

¹ Universal Proxy, 81 Fed. Reg. 79,122 (SEC proposed Oct. 26, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-11-10/pdf/2016-26349.pdf> (the “Proposing Release”). We agree with the scope of the Proposing Release, which excludes investment companies registered under Section 8 of the Investment Company Act of 1940 (“1940 Act”) and Business Development Companies as defined by the 1940 Act.

- We support the Proposing Release’s presentation and formatting requirements, which advance the above objectives without compelling opposing sides to produce identical cards or co-ordinate the creation of a single universal proxy card.² We believe both of these alternative models could cause unnecessary disruption for market participants accustomed to the circulation of two competing cards. The core improvement we seek is the ability of shareholders to use any proxy card they choose to vote for any combination of board nominees they prefer.
- We acknowledge that the presentation and formatting requirements described in the Proposing Release are not necessarily exhaustive of all appropriate requirements to ensure clarity, ease of use and fairness in an orderly process, and that further requirements, *e.g.*, uniform presentation and formatting of the vote boxes beside the nominees, as well as standardized general colors for respective registrant and dissident cards,³ could be appropriate and helpful.
- While the Proposing Release centers on the universal proxy card, we would favorably view the SEC Staff having authority where necessary and appropriate to also facilitate the fair presentation of all nominees on vote instruction forms (VIFs) and electronic proxy voting platforms in the context of proxy contests.
- While the Proposing Release requires the dissident to solicit holders of shares representing a simple majority of outstanding voting power, the majority of the UPWG participants believe that requiring the solicitation of holders of two-thirds of outstanding voting power could also be workable, while commanding broader comfort that the threshold strikes an appropriate balance between providing the utility of the universal proxy system and precluding dissidents from capitalizing on the inclusion of dissident nominees on the registrant’s card without undertaking meaningful solicitation efforts.⁴ A requirement to solicit the holders of all outstanding votes would ensure that no shareholder is disenfranchised, but would not strike an appropriate balance, in the view of the majority of UPWG participants, especially taking into account the fact that dissidents generally are

² The presentation requirements in the Proposing Release to which we refer are: 1) to distinguish between registrant nominees and dissident nominees; 2) to list each nominee in alphabetical order by last name, within each group; 3) to use the same font type, style and size to present all nominees on the card; 4) to prominently disclose the maximum number of nominees for which authority to vote can be granted; 5) to prominently disclose the treatment and effect of a proxy executed that grants authority to vote for fewer nominees than a available board seats, or in a manner that does not grant authority to vote with respect to any nominees.

³ In the current system, it is our experience that there is a significant degree of gamesmanship regarding whether the company or the dissident can lay claim to the use of the white colored proxy card. This gamesmanship occurs precisely because of the confusion generated if the white proxy card (which is the color almost universally used by the company in uncontested proxy elections) is claimed by the “dissident.” Since one of the major tenets of the Proposing Release is to provide clarity and minimize confusion, removing confusion with respect to which side lays claim to the “white” proxy card would be beneficial to a fair and orderly election process.

⁴ See SEC Investor Advisory Committee Proxy Plumbing recommendation, Sept. 9, 2019, <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-recommendation-proxy-plumbing.pdf> at 9, citing 66.7% as a possible threshold that could address many of the stated concerns.

not reimbursed for their proxy solicitations (regardless of whether the solicitation fails or succeeds).

- We are aware of some concerns with scenarios in which a registrant nominee chooses not to serve on the post-election board in the event of the election of one or more of the dissident's directors. The UPWG believes this issue could be resolved by first requiring disclosure in the proxy materials for each side either 1) acknowledging there is no assurance that elected nominees will serve on the board; or 2) identifying any candidate who does not intend to serve if elected with the opposing side's nominee(s), and second, how the resulting vacancy could (or would) be filled under the company's governing documents and applicable state law.

On behalf of the UPWG participants listed below, we appreciate this opportunity to share our views on this important topic.

Sincerely,



David A. Katz
Wachtell, Lipton, Rosen & Katz
Co-chair, Universal Proxy Working Group



Glenn Davis
Council of Institutional Investors
Co-chair, Universal Proxy Working Group

Chuck Callan
Broadridge

Aeisha Mastagni
California State Teachers' Retirement System

Richard Grubaugh
D.F. King & Co.

Mike McCauley, Tracy Stewart, Jacob Williams
Florida State Board of Administration

Dorothy Donohue
Investment Company Institute

Page 4 of 4
August 6, 2020

Sachin Goyal
JP Morgan

Scott Zdrazil
Los Angeles County Employees Retirement Association (LACERA)

Kyle Seeley
New York State Common Retirement Fund

Bruce Goldfarb
Okapi Partners

Gwen LaBerre
Parametric Portfolio Associates LLC

Brian L. Schorr
Triam Fund Management, L.P.

Washington State Investment Board

Steven Bochner
Wilson, Sonsini Goodrich & Rosati

Cc: Chairman Jay Clayton
Cc: Commissioner Hester M. Peirce
Cc: Commissioner Elad L. Roisman
Cc: Commissioner Allison Herren Lee