

Via Email

December 28, 2016

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

Re: Comments on SEC Release No. 34–79164 – Universal Proxy (File No. S7–24–16)

Dear Mr. Fields:

On behalf of the Council of Institutional Investors (**CII**), we respectfully submit our comments on the proposed amendments to the federal proxy rules published by the U.S. Securities and Exchange Commission (**SEC**) on October 26, 2016 in SEC Release No. 34–79164 (Universal Proxy) (the **Release**).¹ CII is a non-profit, non-partisan association of corporate, public and union employee benefit funds, foundations and endowments with a focused policy mission: to be the leading U.S. voice for effective corporate governance practices and strong shareholder rights and protections. CII has more than 120 member funds with combined assets that exceed \$3 trillion. Additionally, CII’s associate members include a range of asset managers with more than \$20 trillion in assets under management.²

The shareholder franchise is a fundamental aspect of corporate democracy and a key area of regulatory reform for CII. On January 8, 2014, we filed a detailed rulemaking petition to amend Section 14 of the Securities Exchange Act of 1934 (the **Exchange Act**) to facilitate the use of universal proxy cards in contested elections of directors (the **Rulemaking Petition**).³ On May 22, 2014, we submitted a letter that provided our feedback on our meeting with the SEC staff on April 4, 2014 to discuss proxy-related issues, including universal proxy amendments.⁴ On March 5, 2015, we provided comments following the Proxy Voting Roundtable held by the SEC on February 19, 2015.⁵

Finally, on June 12, 2015, we submitted a request for interpretive guidance and rulemaking to clarify “the need for alignment between the voting options on the proxy card for the election of

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 “**Release**”).

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

³ Letter from Glenn Davis, Director of Research, CII, to Elizabeth Murphy, Secretary, U.S. Securities and Exchange Commission (Jan. 8, 2014), http://www.cii.org/files/issues_and_advocacy/correspondence/2014/01_08_14_CII_letter_to_sec_petition%20for_rulemaking.pdf (the “**Rulemaking Petition**”).

⁴ Letter from Jeff Mahoney, General Counsel, CII, to Keith F. Higgins, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission (May 22, 2014), http://www.cii.org/files/issues_and_advocacy/correspondence/2014/05_22_14_letter_to_SEC.pdf (the “**Meeting Follow-Up Letter**”).

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

directors [in a contested or uncontested election] and the voting requirement for a director to be elected.”⁶ We are pleased that the Release includes proposed revisions to the form of proxy and disclosure requirements with respect to voting options and voting standards applicable to *all* director elections.⁷ Those proposed revisions, with some suggested modifications as described later in this letter, are generally responsive to our request.

We note the proposed revisions to clarify voting options and standards in all elections are generally independent from the proposed rule amendments to require the use of universal proxy cards. If, therefore, the SEC should decide not to implement the proposed rule amendments to provide for a universal proxy regime in the near term, we would respectfully urge the prompt issuance of a final rule implementing these important reforms to clarify voting options and standards on a standalone basis.

Members of CII share the SEC’s expressed interest in ensuring that the “U.S. proxy system as a whole operates with the accuracy, reliability, transparency, accountability, and integrity that shareholders and issuers should rightfully expect.... [S]hareholders should be served by a well-functioning proxy system that promotes efficient and accurate voting.”⁸ Our Corporate Governance Policies, which provide guidelines that we have determined would be applicable in most circumstances,⁹ reflect our position on the implementation of universal proxy cards:¹⁰ “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.”¹¹

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.”¹² In furtherance of that goal, under our Rulemaking Petition, we requested that the SEC “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.”¹³

We would like to compliment the staff for the extraordinary work reflected in the Release. The rule amendments proposed were well-researched, thoughtful and appropriate. The reforms

⁶ Letter from Glenn Davis, Director of Research, CII, to Keith F. Higgins, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission 4 (June 12, 2015), http://www.cii.org/files/issues_and_advocacy/correspondence/2015/06-12-15%20CII%20Letter.pdf.

⁷ Release, *supra* note 1 at 79,143-44.

⁸ Concept Release on the U.S. Proxy System, SEC Release No. 34-62495 at 7 (July 14, 2010), <http://www.sec.gov/rules/concept/2010/34-62495.pdf>.

⁹ CII, Corporate Governance Policies (last updated Sept. 30, 2016) at §1.1, http://www.cii.org/files/policies/09_30_16_corp_gov_policies.pdf (the “**Council Policies**”).

¹⁰ We use the term ‘universal proxy’ instead of ‘universal ballot’ throughout. A universal proxy refers to a proxy card on which the names of all candidates for nomination to a board of directors appear, regardless of who such candidates were nominated by. In contrast, a universal ballot refers to what is distributed at a shareholders’ meeting for shareholders voting in person, and includes the names of all candidates who have been nominated, permitting the shareholder to select any combination of nominees.

¹¹ Council Policies, *supra* note 9 at §2.2.

¹² 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>.

¹³ Rulemaking Petition, *supra* note 3 at 1.

described in the Release address many longstanding concerns of CII. With minor enhancements, the proposed framework will provide for a constructive universal proxy regime that gives greater effect to existing shareholder rights.

The following is a brief summary of our responses to some of the key issues raised by the Release:

Bona Fide Nominee Rule

We support the proposed amendment to the “bona fide nominee rule” to change the requirement that a nominee consent to being named in “the” (specific) proxy statement to require that the nominee consent to being named in “a” (any) proxy statement for the next meeting at which directors are to be elected. We believe the proposed amendment will facilitate the implementation of universal proxy cards by removing the requirement that director nominees provide specific consent to being named in the proxy card of an opposing party. The proposed reform will also enable both sides in a proxy fight to present shareholders voting by proxy *all* of that side’s preferred candidates.

The Release notes potential concerns that dissident naming of registrant nominees could imply that the registrant or the registrant’s nominees support the dissident’s nominees. To the extent there is any validity to such concerns, we believe they can be eliminated by requiring that the nominees of each party be grouped together clearly and presented as competing slates, and the parties clearly identify which nominees they encourage shareholders to vote for on their respective proxy cards and which nominees they do not support in their respective proxy statements.

Mandatory Use of Universal Proxies

We support the proposed requirement for the mandatory use of universal proxy cards. We believe mandatory universal proxy cards will more effectively replicate in-person attendance at a shareholders’ meeting. This will facilitate the ability of shareholders to fully exercise their franchise by proxy by allowing them to vote for the combination of nominees of their choice. The SEC makes a persuasive case as to why a mandatory approach (as opposed to an optional approach) will be clearer and less confusing for both registrants and shareowners.

The mandatory use of universal proxy cards is unlikely to increase the frequency of contested elections. Shareholders invest significant resources in running a proxy contest; the decision to proceed generally is driven by the shareholder’s thesis regarding the economics of the engagement and likelihood of success. We did not propose a universal proxy card because we thought it would increase the likelihood of success for a dissident, and we do not believe it will. We proposed a universal proxy card to facilitate shareholder voting rights.

Minimum Solicitation Requirement

We support the proposed requirement that a dissident solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors. We believe a dissident should not be permitted to rely on the benefit of the proposed universal proxy

cards without undertaking a solicitation, including the time, effort and costs entailed with filing proxy materials with the SEC within the prescribed time frame. We agree with the SEC that the proposed universal proxy cards strikes an appropriate balance of providing the utility of the mandatory universal proxy system for shareowners while precluding dissidents from capitalizing on the inclusion of dissident nominees on the registrant's universal proxy card without undertaking meaningful solicitation efforts.

Access to Information about All Nominees

We support the proposed requirement that each soliciting person in a contested election refer shareholders to the other party's proxy statement for information about the other party's nominees and explain that shareholders can access the other's party's proxy statement for free on the SEC's website. We believe that such a statement is sufficient to inform shareholders how to access information about the parties' nominees such that shareholders can make an informed voting decision when they have only received a proxy statement and universal proxy card from one party. We also believe that no additional information, such as instructions as to how to access proxy statements on the SEC's website or a hyperlink to that website, is necessary.

Form of Universal Proxy

We support the proposed presentation and formatting requirements for all universal proxy cards used in contested elections, including requiring that the card clearly distinguish between registrant, dissident and proxy access nominees, that such nominees be listed alphabetically by last name, and that the same font type, style and size be used. We believe that parties should be granted only limited flexibility to tailor the format of the card.

In addition, we agree that the SEC should not mandate the use of a single universal proxy card. Requiring a single card would likely result in unnecessary and lengthy disputes between registrants and dissidents regarding formatting, timing and other related issues.

Director Election Voting Standards Disclosure and Voting Options

We support the proposed amendments to require the form of proxy for a director election governed by a majority voting standard to include a means for shareholders to vote "against" each nominee and a means for shareholders to "abstain" from voting in lieu of providing a means to "withhold authority to vote." We believe the proposed amendments would help alleviate shareholder confusion with respect to the effects of whether a vote is cast or withheld under the various voting standards.

We further request the SEC to amend the proxy rules on director elections to:

- Prohibit companies from providing an "against" voting option if marking that choice has no legal impact on the outcome of the election, and
- Require companies to refer to voting options consistently throughout the proxy materials.

We agree the “withhold” voting option should be eliminated under a majority standard for director elections, as proposed. In addition, if the “withhold” voting option is not replaced under a plurality voting standard, we would strongly support the proposed requirement that companies disclose in the proxy statement the treatment and effect of a “withhold” vote in a director election. That disclosure would make it clearer to investors that uncontested director elections under a plurality voting standard guarantees a victory for all nominees.

Retail Investors

We believe the proposed rules will give greater effect to the existing rights of all shareholders by facilitating the ability to vote for the combination of nominees of their choice by proxy, and in that sense, all types of shareholders will be affected and benefit equally. That said, we also believe retail shareholders in general often have holdings smaller than many institutions, and therefore attending company meetings to cast a vote for a preferred mix of candidates can be even more cost prohibitive. In that sense, the ability to vote by proxy in a manner similar to voting in person is even more important for retail investors.

Economic Analysis

We believe that split-ticket voting will increase as a result of the proposed amendments, and that the proposed amendments will reduce the cost and inconvenience currently faced by shareholders who choose to vote a split ticket. The rate of split-ticket voting will increase because the current regime makes split-ticket voting extraordinarily difficult when voting by proxy, if not impossible, and the universal proxy regime will facilitate it.

In addition, we believe the requiring the use of universal proxies will provide advantages to shareholders by providing them with the ability to vote by proxy for the mix of candidates they prefer, as they could if they attended a shareholders’ meeting in person. Whether that provides advantages or disadvantages to one party or the other in an election contest will no doubt vary from contest to contest depending on the circumstances. We do not believe the proposed universal proxy cards will favor either management or dissidents in any systematic way.

We also do not believe that the proposed amendments will shift burdens to registrants in proxy contests. Given the proposed rule that a dissident must file a proxy statement with the SEC and solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors, the proposed amendments should not result in an increase in nominal contests. This is because dissidents will be required to expend significant resources in soliciting at least a majority of shareholders.

Finally, we are doubtful that dissidents or registrants will materially alter solicitation expenditures under the proposed amendments. Proxy fights already put a premium on each side getting out its message to investors. We do not believe that enabling shareholders to vote by proxy for their preferred mix of candidates alters this equation.

Our detailed responses to the requests for comment in the Release are set forth below. The SEC questions to which we are responding appear in italics.

I. Revision to the Consent Required of a Bona Fide Nominee

*SEC Request for Comment 1. We are proposing to amend Rule 14a-4(d)(1) to change the requirement that a nominee consent to being named in “the” proxy statement to require that the nominee consent to being named in “a” proxy statement for the next meeting at which directors are to be elected. This change would enable parties in a contested election to include all director nominees on their proxy card, including nominees of an opposing party. Should we amend the requirement as proposed? Why or why not? Could there be potential concerns with opposing parties naming nominees of the other party on their proxy card? Please explain. How can we address or mitigate any such concerns?*¹⁴

Rule 14a-4(d)(1) under Section 14 of the Exchange Act (the **Bona Fide Nominee Rule**) 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. Amending the Bona Fide Nominee Rule to change the requirement that a nominee consent to being named in “the” (specific) proxy statement to require that the nominee consent to being named in “a” (any) proxy statement for the next meeting at which directors are to be elected will facilitate the implementation of universal proxy cards by removing the requirement that director nominees provide specific consent to being named in the proxy card of an opposing party. The proposed reform will also able both sides in a proxy fight to present shareholders voting by proxy all of that side’s preferred candidates.

The Release notes potential concerns that dissident naming of registrant nominees could imply that the registrant or the registrant’s nominees support the dissident’s nominees. To the extent there is any validity to such concerns, they can be eliminated by requiring that the nominees of each party be grouped together clearly and presented as competing slates, and the parties clearly identify which nominees they encourage shareholders to vote for on their respective proxy cards and which nominees they do not support in their respective proxy statements.

*Request for Comment 2. Should the proposed amendments to Rule 14a-4(d)(1) be adopted without proposed Rule 14a-19, which would require the mandatory use of universal proxies? Why or why not? If only the proposed amendments to Rule 14a-4(d)(1) were adopted and a party in a contested election had the option, but was not required, to include all director nominees on its proxy card, would proposed Rule 14a-4(d)(1) further the goal of effectively facilitating shareholders’ ability to vote by proxy for director nominees as they could vote in person at a meeting? Why or why not?*¹⁵

Proposed Rule 14a-19 would require the mandatory use of universal proxy cards (the “**Universal Proxy Requirement**”). As indicated in our Rulemaking Petition and in our responses in this letter, we are strongly in favor of the Universal Proxy Requirement, and the SEC makes a persuasive case why a mandatory approach is clearer and less confusing. So we would oppose any

¹⁴ Release, *supra* note 1 at 79,129.

¹⁵ *Id.* (footnote omitted).

compromise where it is not implemented. However, if the SEC determines not to implement the Universal Proxy Requirement, we would still favor adoption of the proposed amendments to the Bona Fide Nominee Rule, since such amendments would enable either side to use a universal proxy card. It seems likely that one side or the other would do so, as one side is likely to perceive an advantage. There would be an incentive for shareholders to vote on the proxy card that presents all choices. Even a limited use of the universal proxy card would give some shareholders the ability to vote in the same manner as if they attended the meeting in person and would be an improvement over the current situation.

Request for Comment 3. *If we were to adopt the proposed amendments to Rule 14a–4(d)(1) to permit the parties in an election contest to include the other party’s nominees on their proxy card without mandating the use of universal proxies for all parties, are there other amendments that would need to be adopted to facilitate the operation of proposed Rule 14a–4(d)(1)? For example, should we permit parties to decide whether to include some or all of the opposing party’s nominees? Should we instead require a party seeking to include names of an opposing party’s nominees on its proxy card to include the names of all of the opposing party’s nominees? Should we consider rules that would require a party opting to use a universal proxy to provide notice of its intent to use a universal proxy and the names of its nominees or require the other party to provide a list of its nominees to the party seeking to use a universal proxy? Would other amendments be necessary, such as the proposed amendments concerning the form and format of the proxy card or additional disclosure requirements?*¹⁶

If the Bona Fide Nominee Rule were amended without also adopting the Universal Proxy Requirement, other amendments would not be able to fully facilitate the operation of the amended Bona Fide Nominee Rule. Permitting parties to decide whether to include some or all of the opposing party’s nominees would continue the current norm of gamesmanship with respect to refusing one party’s request to use universal proxy cards. If the Universal Proxy Requirement is not adopted, a party seeking to include the names of an opposing party’s nominees on its proxy card must, at a minimum, be required to include the names of all of the opposing party’s nominees and provide notice of intent to use a universal proxy card in order to standardize the information presented to shareholders.

Request for Comment 4. *Do the proposed amendments allow the soliciting parties in a contested election to adequately address the concerns raised about possible voter confusion arising from nominees of one party being placed on the proxy card of an opposing party or creating an implication that a party’s nominees support the opposing party and would serve with the opposing party’s nominees, if elected? Are there other ways that the amendments could address these concerns? For example, should we require a statement that inclusion of an opposing party’s nominees on the proxy card should not be construed as an endorsement of the opposing party’s views or nominees?*¹⁷

We believe the proposed amendments allow the soliciting parties to adequately address concerns raised about possible voter confusion. We, however, would support requiring a statement by both

¹⁶ *Id.*

¹⁷ *Id.*

registrants and dissidents that inclusion of the other party's nominees on the proxy card "should not be construed as an endorsement by the company of the shareholder proponent's views or nominees."¹⁸ As indicated, we would also support registrants and dissidents clearly identifying which nominees they encourage shareholders to vote for on their respective proxy cards and which nominees they do not support in their respective proxy statements.

Request for Comment 5. *When adopting the short slate rule, the Commission indicated that the possibility that nominees may not serve if elected with one or more of the opposing party's nominees is best addressed through disclosure. Should we adopt an amendment requiring disclosure about the possibility that nominees may refuse to serve if elected with any of the opposing party's nominees? Should we require disclosure describing how the resulting vacancy can be filled under the registrant's governing documents and applicable state law?*¹⁹

We believe it would be beneficial to adopt an amendment requiring disclosure if a party's nominees "will not" serve if elected with any of the opposing party's nominees. Disclosure that they "may not" serve is just a disguised threat, and does not provide the material information that should be disclosed to shareholders. A party's nominees should be required to disclose their actual intentions, not some hedged possibility. Disclosure describing how the resulting vacancy will be filled under the registrant's governing documents and applicable state law should also be required in order to fully equip shareholders with the information required to make an informed decision.

Request for Comment 6. *Are there any additional disclosures that we should require in the proxy materials or on the proxy card or other steps we should take to address concerns with the proposed amendments to Rule 14a-4(d)(1) to permit opposing parties to name each other's director nominees on their proxy cards?*²⁰

As indicated, we believe it would be beneficial to require both registrants and dissidents to state that inclusion of the other party's nominees on the card should not be construed as an endorsement of the opposing party's views or nominees. In addition, imposing formatting requirements that clearly distinguish between the slates of each party (as proposed for the universal proxy card) will further clarify to shareholders with which party each nominee is associated with.

II. Elimination of the Short Slate Rule

Request for Comment 7. *If we change the consent required of a bona fide nominee, as proposed, is there any reason the short slate rule, or a modified version of the rule, should be retained? If so, what circumstances would warrant the continued use of the short slate rule and should it be modified to enhance its utility?*²¹

If the Bona Fide Nominee Rule is amended as proposed, but the Universal Proxy Requirement is not adopted, the short slate rule should be made optional in order to allow a dissident to select

¹⁸ Rulemaking Petition, *supra* note 3 at 7.

¹⁹ Release, *supra* note 1 at 79,129.

²⁰ *Id.*

²¹ *Id.* at 79,130.

registrant nominees to round out its own short slate of nominees (since it believes that such directors are qualified and would complement its nominees). If the Bona Fide Nominee rule is amended as proposed and the Universal Proxy Requirement is adopted, the short slate rule can be eliminated since its purpose will be better served by the combination of the amended Bona Fide Nominee Rule and Universal Proxy Requirement.

Request for Comment 8. *While the short slate rule permits a dissident seeking to elect a minority of the board to solicit authority to vote for some of the registrant’s nominees on its proxy card, the dissident is only permitted to include on its proxy card the names of the registrant’s nominees for whom it will not vote. Should we consider modifying the short slate rule to enable a dissident soliciting in support of a slate that would constitute a minority of the board to round out its slate by soliciting authority to vote for the dissident’s choice of registrant nominees whose names are included on the dissident’s card instead of the current system of soliciting authority to vote for registrant nominees who are not named?*²²

If the short slate rule is retained, it should be modified to enable a dissident to round out its minority slate. Specifically, the dissident should be enabled to solicit authority to vote *for* its choice of registrant nominees whose names are included on the dissident’s card (instead of the current system of soliciting authority to vote for registrant nominees who are not named). If the Bona Fide Nominee Rule is amended as proposed, a dissident should be permitted to affirmatively state which nominees it intends to vote for, even if such nominees have not specifically consented to inclusion on the dissident’s proxy card. The concerns that led to the adoption of the “negative disclosure” in the short slate rule can be mitigated as indicated in response #1, above.

Request for Comment 9. *Should we retain the short slate rule but modify it to make it available to dissidents soliciting authority to vote for a slate of nominees that, if elected, would constitute a majority of the board of directors?*²³

If the Universal Proxy Requirement is adopted, there is no reason to retain the short slate rule. If the Universal Proxy Requirement is not adopted, the short slate rule should be modified to also make it available to dissidents soliciting authority to vote for a slate of nominees that, if elected, would constitute a majority of the board of directors. Although the second scenario would not reflect the comprehensive reform of the proxy rules that we have solicited the SEC to undertake, it would, at the very least, further enable shareholders to exercise their franchise by proxy in a way that is closer to how they can vote when attending a meeting in person than is currently available.

Request for Comment 10. *Should we retain the short slate rule but modify it to make it available to registrants as well as dissidents? A registrant can nominate less than the total number of directors up for election to ensure that some dissident nominees are elected. Should we make a modified short slate rule available to the registrant in that scenario?*²⁴

²² *Id.*

²³ *Id.*

²⁴ *Id.*

If retained, the short slate rule should be modified in order to make it available to registrants for a scenario in which a registrant would opt to nominate less than the total number of directors up for election to ensure that some dissident nominees are elected. Amending the short slate rule in this manner would enable registrants and dissidents to better engage with one another and reflect shareholder preferences in a more meaningful way.

Request for Comment 11. *Should we consider any modified version of the short slate rule instead of a universal proxy system? Would a modified version of the short slate rule further the goal of effectively facilitating shareholders' ability to vote by proxy for director nominees as they could vote in person at a meeting? Please explain.*²⁵

A modified version of the short slate rule would not effectively facilitate shareholders' ability to vote by proxy for director nominees as they could vote in person at a meeting. As described in detail above, there are benefits to retaining an amended short slate rule in the event that the Universal Proxy Requirement is not adopted. However, the proposed Universal Proxy Requirement more appropriately addresses our "long-standing goal of ensuring that the proxy process functions, as nearly as possible, as a replacement for an in-person meeting of shareowners."²⁶

III. Solicitation without a Competing Slate

Request for Comment 12. *The proposed amendments to the bona fide nominee definition would permit proponents to include the names of some or all of the registrant's nominees on its proxy card even when the proponent is not nominating its own candidates. Should this be permitted? Why or why not? Are there additional or different changes that we should make to our rules that apply to a situation in which the proponent is not nominating its own candidates? For example, should we instead require those proponents to include the names of all registrant nominees? Why or why not?*²⁷

Dissidents should be permitted to include the names of some or all of the registrant's nominees on its proxy card even when the dissident is not nominating its own candidates. This would enable shareholders to vote on both the nominees of the registrant as well as any business proposals (e.g., a corporate governance proposal) included by the dissident on the same proxy card. Under the existing rules, dissidents are not permitted to include the names of registrant nominees and solicit votes for such nominees without the consent of each nominee. Allowing dissidents to include the names of registrant nominees would enable shareholders to freely choose which proxy card to return, without the current bias in favor of the registrant's card where the shareholder can fully exercise its franchise right (i.e., by voting for directors).

Request for Comment 13. *Would the inclusion of registrant nominees on a proponent's proxy card when the proponent is not nominating its own candidates imply that the registrant nominees support the proponent's proposal? Would the inclusion cause shareholder confusion? If so, does*

²⁵ *Id.*

²⁶ Meeting Follow-Up Letter, *supra* note 4 at 4.

²⁷ Release, *supra* note 1 at 79,130.

*the ability to provide disclosure in a party's soliciting materials sufficiently address this implication or possible confusion? Are there additional disclosures or are there other changes that would avoid or mitigate this implication or confusion? Please provide specific suggestions.*²⁸

Any implication that the registrant's nominees support the dissident's business proposal where they are named in the dissident's proxy card could be eliminated by a required explicit statement to the contrary.

IV. Mandatory Use of Universal Proxies

Request for Comment 14. *Should we mandate the use of universal proxies in contested elections, as proposed? Does such a requirement more effectively replicate in-person attendance at a shareholder meeting than the current proxy system? Are there additional changes we should make to our proxy rules to facilitate shareholders' ability to vote by proxy in the same manner they could vote in person at a meeting?*²⁹

The Universal Proxy Requirement should be adopted as proposed, since it more effectively replicates in-person attendance at a shareholders' meeting than the current proxy system does. The proposed changes facilitate the ability of shareholders to fully exercise their franchise by proxy by allowing them to vote for the combination of nominees of their choice. Extending this ability to shareholders voting by proxy continues to be the foundation of our thesis concerning reforms to the proxy voting regime.

Request for Comment 15. *Our proposal applies to all companies with a class of securities registered under Section 12 of the Exchange Act but would not apply to funds and BDCs. Should we exclude any other types of registrants, such as smaller reporting companies and/or emerging growth companies? Why or why not?*³⁰

The proposed rules should not exclude registrants such as smaller reporting companies or emerging growth companies ("EGCs"). We do not see structural differences in boards and the director election process at smaller reporting companies or EGCs that justify denial to shareholders of those companies' universal proxies when there is a contested election.

Request for Comment 16. *Would mandatory use of universal proxies impose additional costs on dissidents and/or registrants? If yes, please identify the costs and quantify them to the extent practicable. Would some of these costs be avoided under an optional system? If so, which ones and why? Would some of the benefits attributable to a mandatory system be reduced or eliminated under an optional system? If so, which ones and why?*³¹

We reiterate our position that the reforms "would result in *de minimis* changes in costs for proxy contest participants, and that the benefits to the shareowner voting franchise [if any] would far

²⁸ *Id.* at 79,130-31.

²⁹ *Id.* at 79,132.

³⁰ *Id.* at 79,132-33.

³¹ *Id.* at 79,133.

outweigh those costs.”³² We further note that the SEC’s Investor Advisory Committee stated in its Recommendations of the Investor Advisory Committee Regarding SEC Rulemaking to Explore Universal Proxy Ballots that “[r]ecent experience in Canada (including large-cap issuers with substantial shareholders in the U.S.) suggests that technical implementation for a Universal Ballot regime is cost effective.”³³

Request for Comment 17. *Would a mandatory universal proxy system result in investor confusion, such as confusion regarding which party a nominee supports? Would the proposed requirement to clearly distinguish between registrant and dissident nominees on the proxy card avoid or mitigate that confusion? Are there additional rule changes that we should make in this regard?*³⁴

Adopting the Universal Proxy Requirement would not result in investor confusion about which party a nominee supports. Potential shareholder confusion is further discussed in responses #4 and #13, above. The proposed requirement to clearly distinguish between registrant and dissident nominees on the proxy card eliminates that confusion.

Request for Comment 18. *Should we make the use of universal proxies optional rather than mandatory? Why or why not? Would an optional system further the goal of effectively facilitating shareholders’ ability to vote by proxy for director nominees as they could vote in person at a meeting? If universal proxies were optional, we are interested in the views of both registrants and dissidents as to how frequently they would choose to use a universal proxy and why. Under what circumstances would one party choose to include the names of an opponent’s nominees? Under an optional system, if one party opts to use a universal proxy, is the other party likely to follow suit? Would allowing for optional use of universal proxies result in confusion?*³⁵

The use of universal proxy cards should be mandatory, as currently proposed. An optional system would not as effectively facilitate shareholders’ ability to vote by proxy for director nominees as they could vote in person at a meeting, since parties would have the opportunity to use universal proxy cards only when perceived as advantageous from a tactical perspective. If there were an optional system we believe it likely that in many or most situations one or the other party would decide to provide a universal proxy, and the other side would be likely to follow suit so as to not be disadvantaged in that some shareholders may choose the proxy card with all available choices. Still, in some situations, allowing parties to simply opt into a new universal proxy regime when convenient could occur, and that would sow confusion, and serve to perpetuate the tendency of parties to engage in self-interested behavior at the expense of shareholders rights.

Request for Comment 19. *If we were to adopt an optional system, should we require a party opting to use a universal proxy to include all of the other party’s nominees on its card or should we allow each party to select which nominees to include? If we do not require all nominees to be listed,*

³² Rulemaking Petition, *supra* note 3 at 3.

³³ Investor Advisory Committee, Recommendations of the Investor Advisory Committee Regarding SEC Rulemaking to Explore Universal Proxy Ballots 3 (July 25, 2013), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/universal-proxy-recommendation-072613.pdf>.

³⁴ Release, *supra* note 1 at 79,133.

³⁵ *Id.*

*would shareholders be confused by the contrasting proxy cards? Would such a system lead to the parties utilizing universal proxies only when it offers them a strategic advantage?*³⁶

If an optional system were adopted, it is critical that a party opting to use a universal proxy should be required to include all of the other party's nominees on its card so that shareholders could vote on the dissident's card for the mix of nominees they prefer (rather than only the mix preferred by the dissident). Permitting parties that have opted to use a universal proxy to include only select nominees would introduce unnecessary complexity and could result in confusion among shareholders with respect to the number and identity of all registrant nominees and why some nominees are included and others are not. An optional rule with permission for a partial listing of nominees on a "universal" proxy would undermine rather than serve shareholder choice for those voting by proxy.

Request for Comment 20. *If we were to adopt an optional system, should both parties be permitted to decide whether to use a universal proxy card? If so, should this decision be made at the beginning of the contest before any proxy cards are distributed, or should a party be able to opt to use a universal proxy in the midst of a contest after it or the other party has distributed a conventional (non-universal) card? What, if any, of the other proposed amendments should we maintain in an optional system? For example, should we retain the proposed notice requirements and the dissident's definitive proxy statement filing deadline for universal proxy or some other variation of these proposed requirements? Should we retain the proposed amendments to the form of the universal proxy card?*³⁷

We view universal proxy cards as a significant step in effecting existing shareholder rights. If an optional system were adopted, both parties should be permitted to decide whether to use a universal proxy card at any point during a contest in order to increase the likelihood that a universal proxy card will be used. At a minimum, the proposed amendments to the Bona Fide Nominee Rule, notice provisions, new deadlines and proxy card formatting requirements should be adopted in order to provide a cohesive framework for the use of universal proxy cards.

Request for Comment 21. *Should we instead adopt a hybrid system in which the use of universal proxies in contested elections is mandatory for one party but optional for the other? Would such a system effectively facilitate shareholders' ability to vote by proxy for director nominees as they could vote in person at a meeting? Under a hybrid system, which party should be required to use the universal proxy? For example, should we require the use of a universal proxy by dissidents but make it optional for registrants? This type of hybrid system would permit shareholders to select their preferred combination of dissident and registrant nominees on the dissident's proxy card while still requiring a dissident to conduct an independent solicitation. However, only those shareholders that a dissident elects to solicit would receive a universal proxy unless the registrant opted to use a universal proxy. Should we require the party using the universal proxy in a hybrid system to furnish a proxy statement to all shareholders to ensure that every shareholder receives a universal proxy and can vote for their preferred combination of nominees as they could if attending the shareholder meeting in person? In a hybrid system, would it be necessary or helpful*

³⁶ *Id.*

³⁷ *Id.*

*to require dissidents to provide notice of the names of their nominees to registrants as we have proposed for the mandatory universal proxy system? What other requirements would be needed in a hybrid system? Under a hybrid system in which one party is required to use a universal proxy, is the other party likely to follow suit and elect to provide a universal proxy as well? Would a hybrid system provide advantages to one party or the other in an election contest? If so, which party would it benefit and why?*³⁸

The SEC should not adopt a hybrid system in which the use of universal proxy cards in contested elections is mandatory for one party but optional for the other.

Request for Comment 22. *If we do not adopt a mandatory system for universal proxies, how else could we enable shareholders to vote by proxy for their choice of nominees in a contested election?*³⁹

If the Universal Proxy Requirement is not adopted, the adoption of an optional system would give somewhat greater effect to existing shareholder rights than under the existing system. An alternative to enable shareholders to vote by proxy for their choice of nominees in a contested election would require a radical overhaul of proxy plumbing to replicate the techniques certain proxy solicitors have sought to facilitate vote splitting for large institutional shareholders.⁴⁰ One alternative would be to require that beneficial owners have the ability to easily and without cost appoint a representative to attend the shareholders' meeting and cast their votes as instructed. Another would be to require that registrants accept proxy cards that have been marked up with voting instructions different than those presented on the card. But either alternative would introduce complexity and additional opportunity for error, and require extensive disclosure in proxy statements. Both would fall far short of the Universal Proxy Requirement.

Request for Comment 23. *Would mandatory use of universal proxies increase the frequency of contested elections? Why or why not? Would the optional use of universal proxies have a similar impact? Why or why not?*⁴¹

The mandatory use of universal proxy cards is unlikely to increase the frequency of contested elections. Shareholders invest significant resources in running a proxy contest; the decision to proceed generally is driven by the shareholder's thesis regarding the economics of the engagement and likelihood of success. We did not propose the Universal Proxy Requirement because we thought it would increase the likelihood of success for a shareholder proponent, and we do not believe it will. We proposed it to facilitate shareholder voting rights.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ The SEC acknowledges the occurrence of this practice and the fact that parties to contested elections have questioned this approach as consistent with the existing proxy voting rules. See Release, *supra* note 1 at note 35. As previously stated in our Rulemaking Petition, professional proxy solicitors play a significant role in proxy contests and are "well-positioned to mitigate shareholders' confusion." Rulemaking Petition, *supra* note 3 at 7.

⁴¹ Release, *supra* note 1 at 79,133.

We note a 2016 Harvard study that concludes that universal proxy cards are unlikely to lead to more proxy contests.⁴² In addition, we note that dissidents at times have declined to use universal proxy cards when they did not believe it would be to their advantage. Companies and dissidents have been on both sides of this issue.

Tessera Technologies, Inc. sought universal cards in its 2013 contest with dissident Starboard Value, as did Shutterfly Inc. in its 2015 proxy fight with Marathon Partners, but the companies were rebuffed by dissidents⁴³ When dissidents sought universal proxy cards at Target Corporation in 2009 (Pershing Square) and DuPont in 2015 (Trian Fund Management), the companies declined.⁴⁴

Parties in contests rarely request universal proxy cards, and the reason this is true is because they assume the other side will refuse. The only clear “winner” from universal proxy cards is the investor. Even if universal proxy cards did increase the frequency of proxy contests, it would parallel an increase in shareholder representation through both the convenience of a universal proxy card and the ability to vote for a mix of shareholder-preferred candidates in a way that was not previously possible.

Request for Comment 24. *Would shareholders use mandatory universal proxy instead of a registrant’s proxy access bylaw? Why or why not? What would be the implications of such use and should any additional rule changes be made in this regard?*⁴⁵

Dissident shareholders currently rely on proxy contests in some cases, even where proxy access is available. They do so despite the additional cost of preparing dissident proxy materials, given the ownership and holding period requirements needed to give effect to shareholder rights under typical proxy access provisions, the limitation on the number of directors that can be nominated through proxy access, and the disqualifying provision in most proxy access bylaws that they cannot be utilized by a shareholder seeking to influence control of the registrant. Some dissidents also rely on proxy contests due, in part, to the desire to control their own proxy card.

We do not believe a mandatory universal proxy changes the equation either for those who have pursued separate proxy solicitations, or for those who may use proxy access in the future. A mandatory universal proxy simply improves the process when there is a proxy contest with competing proxy cards.

V. Use in Contested Elections

Request for Comment 25. *Should we require the use of universal proxies in all contested elections, as proposed? Should we instead limit the use of universal proxies to contested elections in which*

⁴² Scott Hirst, Universal Proxies, working paper 1 (Aug. 24, 2016) (“a universal proxy rule is unlikely to lead to more proxy contests”), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2805136.

⁴³ See Sullivan & Cromwell LLP, SEC Proposes to Require Universal Proxy Cards for all Contested Director Elections 3 (Oct. 27, 2016), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_SEC_Proposes_to_Require_Universal_Proxy_Cards_for_All_Contested_Direct_or_Elections.pdf.

⁴⁴ *Id.*

⁴⁵ Release, *supra* note 1 at 79,133.

*a dissident is soliciting proxies in support of a slate that, if elected, would constitute a minority of the board of directors? If so, why should we differentiate between such contests? Should we instead limit the use of universal proxies in a different way?*⁴⁶

The SEC should require the use of universal proxy cards in all contested elections, as proposed. Such a reform is vital to the shareholder franchise and overall fairness of corporate elections.

Request for Comment 26. *As proposed, a universal proxy would be permitted, but not required, for other types of solicitations. Should we instead require the use of a universal proxy in solicitations that do not involve a contested election, such as a ‘vote no’ campaign or where a shareholder is only soliciting proxies in support of a shareholder proposal? Why or why not?*⁴⁷

The use of universal proxy cards in non-exempt solicitations that do not involve a contested election, such as a ‘vote no’ campaign or where a shareholder is only soliciting proxies in support of a shareholder proposal, should be permitted but not required. Allowing a dissident to include the nominees of the registrant would enable shareholders voting by proxy to make an unencumbered decision as to which card to return.

Request for Comment 27. *Should we expressly exclude consent solicitations from the application of Rule 14a–19, as proposed? Are there any reasons why a universal proxy requirement should apply to consent solicitations? If so, please describe.*⁴⁸

Consent solicitations should be expressly excluded from the application of the Universal Proxy Requirement for the reasons noted by the SEC: “a universal proxy is [not] needed for consent solicitations because a registrant contesting such a solicitation typically does so by soliciting revocations of the consents and not by presenting a competing slate... [S]olicitations, although related to the election of directors, do not raise the same concerns that mandatory universal proxy is intended to address because shareholders would have access to a consent card that reflects all of their voting options.”⁴⁹

VI. Exempt Solicitations

Request for Comment 28. *Should we limit the requirement to use universal proxies to non-exempt solicitations, as proposed? Should we instead require that universal proxies also be used in some or all exempt solicitations? For example, should universal proxies be required in contested elections where a dissident is conducting an exempt solicitation under Rule 14a–2(b)(2)? If so, should the proposed rules be applied differently in the context of an exempt solicitation, such as requiring the dissident to use a universal proxy in its exempt solicitation while giving the registrant the option to use a universal proxy in its non-exempt solicitation?*⁵⁰

⁴⁶ *Id.* at 79,134.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 79,135.

The SEC should not require that universal proxy cards be used in exempt solicitations, for the reasons stated in the Release. In addition, where a dissident is soliciting 10 or fewer shareholders, those shareholders would typically be substantial holders who could negotiate privately for themselves the proxy they wish to grant.

VII. Shareholder Proponent's Notice of Intent to Solicit Proxies in Support of Nominees other than the Registrant's Nominees

Request for Comment 29. *Should we require a dissident to provide notice of its intent to solicit in advance of a shareholder meeting, as proposed? Would this requirement significantly hinder a dissident's ability to initiate a proxy contest? Why or why not? Does proposed Rule 14a–19 create logistical or timing issues not addressed in this release?*⁵¹

The requirement that a dissident provide notice of its intent to solicit 60 days in advance of a shareholders' meeting, as proposed, is appropriate. This requirement would not significantly hinder a shareholder proponent's ability to initiate a proxy contest since the notice period will be eclipsed by the minimum notice period of 90 days or more under most advance notice bylaws.⁵²

Request for Comment 30. *What percentage of companies with Section 12 registered securities have an advance notice provision in their governing documents today? What percentage of those companies that have an advance notice provision have a deadline of, or a submission window that ends, 90 days, 60 days, or another specified number of days prior to the upcoming annual meeting date or the first anniversary of the prior year's annual meeting?*⁵³

Our information from FactSet indicates that a large majority of companies have advance notice provisions, and most of those provisions are 90 days or more.

Request for Comment 31. *Does the proposed requirement to identify a dissident's nominees 60 days in advance of a meeting sufficiently accommodate the interests of both dissidents and registrants? Should the notice be required more or fewer days in advance? Alternatively, would some other triggering event for filing the notice, such as within five days of the registrant filing its preliminary proxy statement, better provide appropriate notice? Would some other period of time be more appropriate?*⁵⁴

We believe that the proposed requirement to identify a shareholder proponent's nominees 60 days in advance of a meeting sufficiently accommodates the interests of both shareholder proponents and registrants. The notice is appropriate in length and should not be tied to some other triggering event. Imposing a deadline tied to a triggering event, such as within five days of the registrant filing its preliminary proxy statement, would enable registrants to adjust their filing patterns in order to disadvantage shareholder proponents and gain a perceived tactical advantage. Registrants who believe the proposed 60-day notice period is too short have the ability to impose more stringent advance notice requirements in their bylaws.

⁵¹ *Id.* at 79,136.

⁵² *Id.* at 79,135.

⁵³ *Id.* at 79,136.

⁵⁴ *Id.*

Request for Comment 32. *If a 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, should we require a dissident to provide notice by the later of 60 calendar days prior to the date of the annual meeting or the tenth calendar day following the day on which public announcement of the date of such meeting is first made by the registrant, as proposed? Should we instead require registrants to file a Form 8-K within four business days of determining the anticipated meeting date to disclose the date by which a dissident must submit the required notice and require that such date be a reasonable time or a specified number of days before the registrant first files proxy materials with the Commission? Is there a more appropriate notice deadline we should use in situations in which a registrant did not hold an annual meeting during the previous year or the date of the meeting has changed by more than 30 calendar days from the previous year?*⁵⁵

If a 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, the proposal that a dissident should be required to provide notice by the later of 60 calendar days prior to the date of the annual meeting, or the tenth calendar day following the day on which public announcement of the date of such meeting is first made by the registrant, is appropriate. Although there is some risk that a registrant has the ability to obfuscate the date of the annual meeting if no annual meeting was held in the previous year, such risk is mitigated by the fact that a shareholder that proposes to engage in a proxy contest ought to be vigilant in monitoring company announcements.

Request for Comment 33. *The proposed notice requirement would effectively prevent a dissident from launching an election contest less than 60 days before a meeting. Would some shorter or longer period be preferable? Should the proposed rule include an exception mechanism similar to Rule 14a-6(a) to allow a dissident to provide the notice required by proposed Rule 14a-19 after the 60 calendar day deadline in exceptional circumstances (e.g., where a court of competent jurisdiction enjoins the advance notice bylaws of the registrant)? Should we instead have the notice requirement be a condition of the use of universal proxies but also permit dissidents to launch a contest as they could today, without the ability to use universal proxy if they do not comply with the notice requirements? Why or why not?*⁵⁶

The proposed rule should include an exception mechanism similar to Rule 14a-6(a) to allow a dissident to provide the notice required by proposed Rule 14a-19 after the 60-calendar day deadline where a court of competent jurisdiction enjoins the advance notice bylaws of the registrant. In addition, shareholder proponents should be permitted to launch a contest after the 60-calendar day deadline as they could under the existing rules, without the ability to use a universal proxy card. If they commence the solicitation prior to the 60-calendar day deadline, however, they should be required to utilize the universal proxy regime.

Request for Comment 34. *What information should be required in a dissident's notice? Should any other information besides the names of a dissident's nominees and dissident's statement that it intends to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors be required? For example, would a dissident be*

⁵⁵ *Id.*

⁵⁶ *Id.*

*required to include biographical or other information that is required of director nominees under Regulation 14A for its nominees in the notice?*⁵⁷

We do not believe that any information other than the names of a dissident's nominees and a dissident's statement that it intends to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors should be required in a dissident's notice. The purpose of the statutory notice is to provide the registrant with the names of the dissident's nominees to include in the registrant's proxy card. For that purpose, there is no need to also include biographical details (which likely have already been provided pursuant to the registrant's advance notice bylaws, and which in any case will be set forth in the shareholder proponent's proxy statement). Requiring dissidents to provide additional information could give the registrant some basis to object to the dissident's notice as deficient. Furthermore, registrants unsatisfied with the proposed notice requirements have the ability to impose more stringent informational requirements in their advance notice bylaws.

Request for Comment 35. *Should we require a dissident to file the notice with the Commission? Should we require a dissident to file the notice with each national securities exchange upon which any class of securities of the registrant is listed and registered? Why or why not?*⁵⁸

A dissident should not have to file the notice with the SEC or any national securities exchange upon which any class of securities of the registrant is listed and registered. The purpose of the notice is to alert the registrant and provide the names of the dissident's nominees for inclusion in the registrant's proxy materials.

VIII. Registrant's Notice of Its Nominees

Request for Comment 36. *Should we require a registrant to notify the dissident of the names of registrant nominees, as proposed? Would the proposed notice requirement for registrants affect the process by which a board of directors nominates candidates? If so, how? Is the proposed notice requirement for registrants inconsistent with any state or foreign law provision?*⁵⁹

A registrant should be required to notify the dissident of the names of registrant nominees, as proposed. We believe that registrants are in a better position to respond to the other questions raised.

Request for Comment 37. *Should any other information besides the names of the registrant's nominees be required?*⁶⁰

No other information besides the names of the registrant's nominees should be required in the registrant's notice to a dissident.

⁵⁷ *Id.*

⁵⁸ *Id.* at 79,137.

⁵⁹ *Id.*

⁶⁰ *Id.*

Request for Comment 38. *Is 50 calendar days prior to the anniversary of the previous year's annual meeting date an appropriate deadline for the notice of the registrant's director nominees? Should we require a longer or shorter period of time? Why or why not? Should the deadline for registrants be tied to the registrant's receipt of the dissident's notice? For example, should we instead adopt a deadline for registrants that is the later of 60 calendar days prior to the meeting or 10 calendar days following registrant's receipt of dissident's notice pursuant to proposed Rule 14a-19? Why or why not?*⁶¹

Fifty calendar days prior to the anniversary of the previous year's annual meeting date is an appropriate deadline for the notice of the registrant's director nominees. The notice deadline should not be tied to some triggering event such as the registrant's receipt of the dissident's notice. Imposing a deadline tied to a triggering event would enable dissidents to adjust their notification patterns in order to disadvantage registrants and gain a perceived tactical advantage.

Request for Comment 39. *Would the proposed mandatory universal proxy system alter the filing practices of soliciting parties in contested elections? If so, how? Are there any changes that we should make to the proposed rules as a result?*⁶²

We believe that registrants and dissidents are in a better position to respond to the questions raised.

Request for Comment 40. *Should we require registrants to file the notice with the Commission? For example, should a registrant be required to file a Form 8-K to disclose the names of its nominees when they are determined? Should we require registrants to file the notice with each national securities exchange upon which any class of securities of the registrant is listed and registered? Why or why not?*⁶³

A registrant should not have to file the notice with the SEC or any national securities exchange upon which any class of securities of the registrant is listed and registered. The purpose of the notice is to alert the dissident and provide the names of the registrant's nominees for inclusion in the shareholder proponent's proxy materials.

IX. Minimum Solicitation Requirement for Shareholder Proponents

Request for Comment 41. *Should we require a dissident to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors, as proposed? Should we instead require a dissident to solicit the holders of shares representing at least a majority of the outstanding voting power? Why or why not? Should we instead require a dissident to solicit all shareholders? Why or why not? Should we consider alternative solicitation or other requirements for dissidents? If so, what other requirements should we consider? For example, should dissidents be required to make all proxy materials publicly accessible, free of charge, at an Internet Web site other than the Commission's EDGAR system?*⁶⁴

⁶¹ *Id.* at 79,137-38.

⁶² *Id.* at 79,138.

⁶³ *Id.*

⁶⁴ *Id.*

We believe that the proposed requirement that a dissident solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors is appropriate. A dissident should not be permitted to rely on the benefit of the Universal Proxy Requirement without undertaking a solicitation, including the time, effort and costs entailed with filing proxy materials with the SEC within the prescribed time frame. We agree that the proposed requirement “strikes an appropriate balance of providing the utility of the mandatory universal proxy system for shareowners while precluding dissidents from capitalizing on the inclusion of dissident nominees on the registrant’s universal proxy card without undertaking meaningful solicitation efforts.”⁶⁵

We do not believe the dissident should be required to solicit all shareholders to trigger the Universal Proxy Requirement. Many proxy fights are settled early, but among those that go to the active solicitation stage, we believe that in a majority of cases (at least judging from a sample from June 30, 2015, to April 15, 2016), the dissident solicits all shareholders in their first mailing. However, in a significant minority of cases, the dissident solicits less than a majority using a stratified approach that solicits holders above some level of share ownership, because cost of soliciting all shareholders is prohibitive (although often even in these cases the dissident solicits holders of more than 90 percent of shares).

CII recognizes that there should be a solicitation requirement to avoid misuse of a universal proxy card. But given the time, effort and cost of preparing and filing a preliminary proxy statement, completing the SEC staff review process, preparing and filing a definitive proxy statement within the prescribed time frame, and solicitation (which will involve significant cost for soliciting any street-name holders), a requirement to solicit holders of a majority of shares is sufficient. Moreover, we believe that a universal proxy card sometimes would be tactically useful for companies, and sometimes for dissidents. A decision to set a solicitation requirement at 100% would foster game-playing by a dissident who wishes to avoid a universal proxy, through solicitation just under that level (a concern that would apply to other possible supermajority thresholds, such as a 75% requirement).

Request for Comment 42. *We are not proposing amendments that would require a registrant to solicit a certain number or percentage of shareholders when a solicitation in connection with a contested election is made in accordance with proposed Rule 14a-19 because we understand that currently registrants generally disseminate the proxy statement to all shareholders. Would mandatory universal proxy alter a registrant’s practice of generally disseminating the proxy statement to all shareholders? Should we include a minimum solicitation requirement for registrants?*⁶⁶

We agree that there is no need for purposes of this rulemaking to require a registrant to solicit a certain number or percentage of shareholders. For reasons including obtaining the requisite number of shares to meet quorum, it is our understanding that registrants generally disseminate the proxy statement to all shareholders.

⁶⁵ *Id.*

⁶⁶ *Id.*

Request for Comment 43. *Should we include any additional requirements in the rules for dissidents concerning compliance with the minimum solicitation requirement? If so, what requirements should we include? For example, should we require a dissident to provide the registrant with a statement from the solicitor or other person with knowledge indicating that the dissident has taken the steps necessary to solicit the holders of at least a majority of the voting power of shares entitled to vote on the election of directors? Why or why not?*⁶⁷

We believe it would make sense to require the dissident to provide the registrant with a statement from the solicitor, or other person with knowledge indicating that the dissident has taken the steps necessary to solicit holders of at least a majority of voting shares entitled to vote in the election of directors. While we oppose unnecessary requirements that will lead to unnecessary legal challenges from registrants, we believe this threshold requirement is important to establish the seriousness of the dissident nominations, and it is reasonable to require such attestation.

Request for Comment 44. *Would dissidents have access to sufficient information to determine how to meet the minimum solicitation threshold? Why or why not? Could proxy service providers provide sufficient information for dissidents to determine how to meet the minimum threshold? Why or why not?*⁶⁸

We believe that dissidents have access to sufficient information to determine how to meet the minimum solicitation threshold through provisions in the governance documents of the registrant that allow shareholders to request shareholder lists or provisions that enable such requests under state or federal law. In addition, we believe that professional proxy service providers can provide sufficient information for dissidents to determine how to meet the minimum threshold.

Request for Comment 45. *Under the proposed rules, a dissident could provide notice to the registrant pursuant to Rule 14a-19 intending to conduct a non-exempt solicitation under Regulation 14A and later determine to instead proceed with an exempt solicitation in support of the nominee(s) named in the Rule 14a-19 notice. Should we consider preventing a dissident that has provided notice to a registrant pursuant to proposed Rule 14a-19 from later relying on the exemption set forth in Rule 14a-2(b)(2) to solicit in support of the nominee(s) named in the Rule 14a-19 notice? Why or why not?*⁶⁹

A dissident that has provided notice to a registrant pursuant to proposed Rule 14a-19 should be prevented from later relying on the exemption set forth in Rule 14a-2(b)(2) (under which the total number of persons solicited is not more than ten) to solicit in support of the nominee(s) named in the Rule 14a-19 notice once the registrant has sent out a universal proxy card. It would be an abuse of the universal proxy regime for a dissident to “game the system” in this manner.

⁶⁷ *Id.* at 79,138-39 (footnote omitted).

⁶⁸ *Id.* at 79,139.

⁶⁹ *Id.*

X. Shareholder Proponent's Requirement to File Definitive Proxy Statement 25 Calendar Days Prior to Meeting

Request for Comment 46. *Should we require dissidents to file their definitive proxy statement by the later of the 25th calendar day before the meeting or five calendar days after the registrant files its definitive proxy statement where the registrant files its definitive proxy statement fewer than 30 calendar days prior to the meeting date, as proposed? Why or why not? Does the proposed deadline provide sufficient time before the meeting for shareholders who are not solicited by the dissident to access information about the dissident's nominees in the dissident's definitive proxy statement through the Commission's Web site?*⁷⁰

We believe that the requirement that shareholder proponents file their definitive proxy statement by the later of the 25th calendar day before the meeting or five calendar days after the registrant files its definitive proxy statement where the registrant files its definitive proxy statement fewer than 30 calendar days prior to the meeting date is appropriate. The proposed deadline provides sufficient time before the meeting for shareholders who are not solicited by the dissident to access information about the shareholder proponent's nominees in the shareholder proponent's definitive proxy statement through the SEC's website.

Request for Comment 47. *We are not proposing to require registrants to file definitive proxy statements by a specified deadline because we understand that, unlike dissidents, registrants have an incentive to file their definitive proxy statements well in advance of the meeting date to allow sufficient time to obtain proxies from the requisite number of shares to achieve a quorum for the meeting. Would mandatory universal proxy alter a registrant's practice regarding the timing of the filing of its definitive proxy statement? If so, how? Should we impose a definitive proxy statement filing deadline for registrants in contested elections? If so, what filing deadline would be appropriate for registrants?*⁷¹

We agree with the staff's view in the Release that a definitive proxy statement filing deadline need not be imposed on registrants in contested elections.

XI. Access to Information about all Nominees

Request for Comment 48. *Should we adopt proposed Item 7(h) of Regulation 14A to require that each soliciting person in a contested election refer shareholders to the other party's proxy statement for information about the other party's nominees and explain that shareholders can access the other party's proxy statement for free on the Commission's Web site, as proposed? Is this statement sufficient to inform shareholders how to access information about the parties' nominees such that shareholders can make an informed voting decision when they have only received a proxy statement and universal proxy card from one party? Should we require any additional information, such as instructions as to how to access proxy statements on the Commission's website or a hyperlink to that website?*⁷²

⁷⁰ *Id.* at 79,140.

⁷¹ *Id.*

⁷² *Id.* at 79,141.

Proposed Item 7(h) of Regulation 14A should be adopted to require that each soliciting person in a contested election refer shareholders to the other party's proxy statement for information about the other party's nominees and explain that shareholders can access the other party's proxy statement for free on the SEC's website, as proposed. Such a statement is sufficient to inform shareholders how to access information about the parties' nominees such that shareholders can make an informed voting decision when they have only received a proxy statement and universal proxy card from one party. We believe that no additional information, such as instructions as to how to access proxy statements on the SEC's website or a hyperlink to that website, is necessary.

Request for Comment 49. *Should we amend Rule 14a-5(c) to permit soliciting parties to refer to information that would be furnished in a filing of another soliciting party in order to satisfy their disclosure obligations, as proposed? Should we limit the ability to refer to a future filing of another soliciting person to solicitations in connection with contested elections?*⁷³

We believe that the proposed Rule 14a-5(c) to permit the soliciting parties to refer to information that would be furnished in a filing of another soliciting party in order to satisfy their disclosure obligations is appropriate. There is no reason to force a soliciting party to duplicate existing information if that party prefers to refer to the filing of another soliciting party.

Request for Comment 50. *Should we amend Instruction 3 to define "participant," as proposed? Are there additional categories of people that should be included in the definition of "participant" for registrants or dissidents? Would the amendment to Instruction 3, as proposed, make it sufficiently clear that nominees are not responsible for information contained in the opposing party's proxy materials? Are there other steps we should take to make this clear?*⁷⁴

Instruction 3 should be amended to define "participant" as proposed for conforming purposes. We are not aware of any additional categories of people who should be included in the definition of "participant" for registrants or shareholder proponents.

XII. Form of the Universal Proxy

Request for Comment 51. *We are proposing presentation and formatting requirements for all universal proxy cards used in contested elections, including requiring that the card clearly distinguish between registrant, dissident and proxy access nominees, that such nominees be listed alphabetically by last name, and that the same font type, style and size be used. Are these requirements for the proxy card appropriate or should we permit greater flexibility for parties to tailor the format of the card as they choose? Should we impose additional presentation and formatting requirements, such as requiring that nominees be grouped in columns to more clearly distinguish between groups of nominees? Is it sufficient to simply require that the proxy card clearly distinguish between nominees without specifying additional requirements? Should we permit, within the proposed categories of nominees, further subcategorization of nominees?*⁷⁵

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 79,142.

The proposed form of universal proxy card requirements is appropriate. Parties should be granted only limited flexibility to tailor the format of the card.

Request for Comment 52. *Should we require that nominees be listed alphabetically by last name, as proposed? Why or why not? Should we instead permit or require nominees to be listed in a random order within the groups of nominees? Should we instead permit or require the parties to specify in their notice of nominees to the other party how they prefer their own nominees to be listed within their group of nominees?*⁷⁶

Parties should be required to list nominees alphabetically by last name, as proposed, in order to prevent vote manipulation through formatting.

Request for Comment 53. *Should we require that the proxy card prominently disclose the maximum number of nominees that can be voted upon and the effect of over-voting or under-voting, as proposed? Is this disclosure sufficient for shareholders to understand the implications? How else can we address these issues, including mitigating any risk of over-voting with universal proxies?*⁷⁷

Parties should be required to prominently disclose the maximum number of nominees that can be voted upon and the effect of over-voting or under-voting, as proposed. We have previously recommended and reiterate that proxy cards should specify clearly the maximum number of board candidates for which a shareholder may vote.⁷⁸ We believe such disclosure is sufficient, in combination with what we believe are existing safeguards on electronic platforms used in vote instruction chains. Broadridge's proxyvote.com platform alerts users when a mark would exceed the number of marks that the voting instructions permit. We understand that ISS and Glass Lewis platforms prevent end users from electronically indicating to those service providers more candidates than there are seats up for election.

Request for Comment 54. *Should the universal proxy card provide the ability for a shareholder to vote for all of a soliciting person's nominees as a group only where both parties have proposed a full slate of nominees, as proposed? Should group voting be permitted where one party has proposed a partial slate? Should we additionally permit group voting where a shareholder director nominee is included in the registrant's proxy material pursuant to proxy access provisions in the registrant's governing documents or applicable state or foreign law? Would group voting in such circumstances create an unfair advantage for the registrant or other party providing a full slate?*⁷⁹

The universal proxy card should provide the ability for a shareholder to vote for all of a soliciting person's nominees as a group only where both parties have proposed a full slate of nominees, as proposed. Otherwise, such an option may result in unnecessary complexity and may result in shareholder confusion. Group voting should not be permitted for situations where a shareholder nominee is included in the registrant's proxy materials pursuant to proxy access provisions in the

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Rulemaking Petition, *supra* note 3 at 8.

⁷⁹ Release, *supra* note 1 at 79,143.

registrant's governing documents or applicable state or foreign law, for the reason that it would create an unfair advantage for the registrant or other party providing a full slate.

Request for Comment 55. *Could the use of a universal proxy card lead to shareholder confusion? If so, do the proposed formatting requirements help to reduce any shareholder confusion? Are there other requirements the proxy rules should include or other steps we should take to help reduce such confusion?*⁸⁰

The use of a universal proxy card, if properly formatted in line with the requirements under the Release, will not lead to shareholder confusion.

Request for Comment 56. *Are there any concerns with the ability of proxy service providers to effectively implement the choices made on universal proxies? Are there any concerns with the ability of proxy service providers to prepare and distribute universal proxy cards or the associated voting instruction forms? For example, would the proposed rules lengthen proxy cards in contested elections such that placing all nominees on one card would be impracticable? Are there ways that our proxy rules can address such concerns? For example, should the proxy rules require that director nominees be listed in columns on universal proxies?*⁸¹

It is critical that voting instructions be clear to shareholders. We believe it will be useful for the SEC to provide very clear guidance on this. However, we believe that proxy service providers are in a better position to comment specifically on these questions.

Request for Comment 57. *Should the proposed rules be more prescriptive? For example, should we require both parties' universal proxy cards to be mirror images of each other, except for the individuals to whom proxy authority is granted?*⁸²

Requiring that both parties' universal proxy cards be mirror images of each other, except for the individuals to whom proxy authority is granted, is unnecessary. The proposed rules should minimize game-playing and unnecessary disputes between parties over the form of proxy in the highly contentious atmosphere of a typical proxy fight. While we believe the proposed rules generally strike the right balance, we would be open to suggestions from proxy service providers that would seem likely to further decrease points of contention with reference to the form of proxy.

Request for Comment 58. *Should we instead mandate the use of a single universal proxy card? If so, who should be responsible for compiling and disseminating the single proxy card?*⁸³

The SEC should not mandate the use of a single universal proxy card. Requiring a single card would likely result in unnecessary and lengthy disputes between registrants and dissidents regarding formatting, timing and other related issues.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Request for Comment 59. Under the current proxy rules each party in a contested election determines whether and how to include the other party's non-election proposal(s) on its proxy card and the proposed amendments would not change this practice. Should we make any changes in how matters other than the election of directors are presented on a universal proxy card? For example, should the revised rules address how shareholder proposals and other matters to be voted on at the meeting should be presented on a universal proxy card as well? If a universal proxy card is used for the election of directors, should the parties be permitted to exclude other proposals to be voted on at the meeting?⁸⁴

The SEC should not implement changes in how matters other than the election of directors are presented on a universal proxy card. The proposed rules adequately address the deficiencies in the proxy voting system to enable shareholders to vote for whatever mix of nominees they prefer, and ensure that the proxy process for electing directors functions equally for both shareholders voting by proxy and those voting in person.

Request for Comment 60. Would it be helpful if we included a sample universal proxy card in the adopting release? Why or why not?⁸⁵

It would be beneficial for the SEC to provide a sample universal proxy card in the adopting release, which will serve as both an initial precedent and standard to which parties can later compare their cards with respect to correct formatting. A sample card will also be helpful in resolving any disputes between a registrant and dissident with respect to claims that one party's card deviates from the requirements in the adopted rules.

XIII. Director Election Voting Standards Disclosure and Voting Options

Request for Comment 61. We are proposing to amend Rule 14a-4(b) to require the form of proxy for a director election governed by a majority voting standard to include a means for shareholders to vote "against" each nominee and a means for shareholders to "abstain" from voting in lieu of providing a means to "withhold authority to vote." Should we eliminate the "withhold" voting option under a majority voting standard for director elections, as proposed? Should we eliminate the "withhold" voting option for contested elections subject to proposed Rule 14a-19 (i.e., where universal proxies are required)? Why or why not? If we do not adopt a mandatory system for universal proxies, as proposed, should we prohibit the "withhold" voting option for contested elections? Why or why not?⁸⁶

Although the federal proxy rules do not govern the voting standards used in director elections, the rules cover the form of proxy, which can be amended to resolve any inconsistencies or ambiguities that arise due to the way in which a registrant's governing documents are drafted or disclosure is made in the proxy statement. Amending the applicable rules will help alleviate shareholder confusion with respect to the effects of whether a vote is cast or withheld under the various voting standards.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 79,144.

We note the proposed revisions to clarify voting options and standards in all elections are generally independent from the proposed rule amendments to require the use of universal proxy cards. If, therefore, the SEC should decide not to implement the proposed rule amendments to provide for a universal proxy regime in the near term, we would respectfully urge the prompt issuance of a final rule implementing these important reforms to clarify voting options and standards on a standalone basis.

Rule 14a-4(b) should be amended to require the form of proxy for a director election governed by a majority voting standard to include a means for shareholders to vote “against” each nominee and a means for shareholders to “abstain” from voting in lieu of providing a means to “withhold authority to vote.” We further request the SEC to amend the proxy rules on director elections to:

- Prohibit companies from providing an “against” voting option if marking that choice has no legal impact on the outcome of the election, and⁸⁷
- Require companies to refer to voting options consistently throughout the proxy materials.⁸⁸

We agree the “withhold” voting option should be eliminated under a majority standard for director elections, as proposed. In addition, the “withhold” voting option for contested elections subject to the Universal Proxy Requirement should be eliminated.

Request for Comment 62. *Some commenters have expressed concerns that shareholders may not understand that a “withhold” vote has no legal effect under a plurality voting standard. Should the Commission replace the “withhold” voting option under a plurality voting standard with “abstain?” Do parties view an “abstention” differently than a “withhold” vote? Is there any relevant legal effect under state law of an abstention as compared to a vote withholding proxy authority when directors are elected by plurality vote? Would there be other consequences under state law or a registrant’s governing documents if we were to implement such a change (e.g., would this change affect quorum requirements)?⁸⁹*

Although marking the “withhold” option allows shareowners to communicate their dissatisfaction with a given nominee, doing so has no legal effect on the outcome of the election. A “withhold” vote is fundamentally the equivalent to an abstention, although as a practical matter, many interpret it as a non-binding “against” vote. We are concerned that some shareowners may believe that a “withhold” option has legal significance different from an abstention. We believe that “abstain” more clearly conveys to a shareholder that the shareholder is not casting a vote than does the word “withhold.” If the “withhold” voting option is not replaced, we would strongly support the proposed requirement that companies disclose “in the proxy statement about the treatment and

⁸⁷ This reform would resolve confusion caused by companies such as Cliffs Natural Resources Inc. The proxy card for the company’s 2016 annual meeting permitted shareholders to vote “against” uncontested board nominees, conveying legal impact to shareholders marking that choice, despite the company electing all nominees by a plurality of votes cast. See Schedule 14A, dated Mar. 11, 2016, <https://www.sec.gov/Archives/edgar/data/764065/000076406516000205/clf2016def14a.htm>. Similarly, Parsley Energy, Inc. in 2016 elected uncontested directors by a plurality, but provided a toothless “against” choice on the proxy card. See Schedule 14A, dated Apr. 26, 2016, <https://www.sec.gov/Archives/edgar/data/1594466/000119312516551011/d48240ddef14a.htm>.

⁸⁸ This reform would resolve confusion caused by companies such as Qualys, Inc. which in 2016 informed shareholders in the proxy statement they may vote “for,” “against” or “abstain,” but provided “for” and “withhold” choices on the proxy card. See Schedule 14A, dated Apr. 25, 2016, <https://www.sec.gov/Archives/edgar/data/1107843/000119312516554340/d85159ddef14a.htm>.

⁸⁹ Release, *supra* note 1 at 79,144.

effect of a ‘withhold’ vote in a director election”⁹⁰ That disclosure would make it clearer to investors that uncontested director elections under a plurality voting standard guarantees a victory for all nominees.

Request for Comment 63. *We are proposing to delete the phrase “the method by which votes will be counted” from Item 21 of Schedule 14A. Is the language needed for a specific purpose or scenario that is not covered by the proposed amendment to Item 21(b)? Is there any other reason to retain it?*⁹¹

We oppose deleting the phrase “the method by which votes will be counted” from Item 21 of Schedule 14A. We do not believe the SEC’s amendment to Item 21(b) as proposed fully resolves the current confusion in director elections.⁹² The requirement to disclose the method by which votes will be counted should therefore continue. We also question the harm of preserving the requirement to disclose the method by which votes will be counted in light of the history of market confusion over vote requirements and the effect of voting options other than “for.”

XIV. Investment Companies

Request for Comment 64. *To what extent do investment companies generally, and open-end funds, closed-end funds and BDCs in particular, experience contested elections under the current proxy rules? Please provide any data to the extent available. To what extent do shareholders of investment companies engage in split-ticket voting? To what extent is split-ticket voting by certain shareholders facilitated by proxy solicitors and parties to the contested election? Please provide any data to the extent available.*⁹³

We have no data to add to that set forth in the Release by the staff.

Request for Comment 65. *We are not proposing to require investment companies to use universal proxies at this time. Should the use of universal proxies be mandatory as applied to investment companies generally, or should their use be mandatory only with respect to certain types of investment companies (e.g., only to open-end funds or only to closed-end funds or only BDCs)? Why or why not? Should any aspects of the proposed universal proxy system be modified to account for the unique characteristics of investment companies? If so, what modifications should be made? Would a universal proxy system affect funds and BDCs differently than operating companies? If so, how? How would a universal proxy system affect unitary or cluster boards?*⁹⁴

We believe it is appropriate for the SEC to exclude investment companies from use of universal proxies at this time. We have expressed the view in the past that shareholders should have access to universal proxies in contested elections at every public company in which they invest, including funds and business development companies (“BDCs”). However, we acknowledge that, as

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² For example, the proposed amendment does not prevent companies from providing an “against” voting option while electing uncontested directors by a plurality of votes cast.

⁹³ Release, *supra* note 1 at 79,146.

⁹⁴ *Id.*

discussed in the Release, there are key governance differences at investment companies registered under Section 8 of the Investment Company Act and BDCs that make universal proxies much less pressing for those entities, and that could cause some unique complications. Open-end management investment companies generally are not required to hold annual shareholder meetings, and the proposed universal proxy rule is inapplicable in that context. Registered closed-end funds and BDCs generally are required to hold annual director elections. As the SEC points out, historically dissidents in election contests at exchange-listed closed-end funds and BDCs generally have sought to terminate the fund's advisory contract or gain board control, and have not used short slates.⁹⁵ A mixed board and split-ticket voting generally do not make sense in an investment company context. Where there is concern on discounted NAV that shareholders come to see as critical, it is logical to take an action, which could include replacement of the entire board, to replace the investment adviser. Moreover, shareholders in investment companies have rights to approve certain operational matters.

A particular investment company complication on which we have concern with reference to universal proxies at investment companies is that such companies typically are part of large complexes that use a "unitary" board structure, where a single board oversees every fund in the complex, or "cluster" boards consisting of two or more separate boards that oversee each different set of funds in the complex.⁹⁶ This structure is important for cost-efficient, effective oversight of funds, and would be undermined by election of a minority of dissident directors.

To be clear, we do support application of voting standard disclosure requirements to investment companies, as we articulate in responses #61-63, above.

Request for Comment 66. *Alternatively, should the use of universal proxies be optional as applied to investment companies generally, or should their use be optional only with respect to certain types of investment companies (e.g., only to open-end funds or only to closed-end funds or only BDCs)? Why or why not? Instead, should a hybrid system be applied to investment companies generally, or only with respect to certain types of investment companies (e.g., only to open-end funds or only to closed-end funds or only to BDCs) where the use of universal proxies in contested elections is mandatory for one party but optional for another? Why or why not? We are interested in the views of both investment companies and shareholders as to how frequently they would choose to use a universal proxy under a mandatory, optional or hybrid approach and why.*⁹⁷

We believe it is appropriate for the SEC to exclude investment companies from the universal proxy rule at this time, in either mandatory or optional versions, for the reasons stated in response #65.

Request for Comment 67. *Would the frequency of contested elections increase or decrease for investment companies under a universal proxy system and why? Please provide any data to the extent available. Would the frequency of contested elections vary depending on whether an investment company is an open-end fund, closed-end fund, or BDC, and why? Would the frequency*

⁹⁵ *Id.* at 79,145.

⁹⁶ *Id.* at 79,146.

⁹⁷ *Id.*

*vary depending on whether the use of universal proxies is under a mandatory, optional, or hybrid approach? Why or why not?*⁹⁸

While we accept the SEC exclusion of investment companies from a universal proxy requirement at this time, we believe that, for the same reasons we discuss in response #23, above, the adoption of universal proxies for funds and BDCs is unlikely to increase the frequency of contested elections. Contests are most often initiated after a significant amount of time and resources have been invested by a shareholder in developing a thesis regarding the economics of the engagement and likelihood of success; we do not believe that the availability of certain proxy mechanics will materially affect that analysis.

Request for Comment 68. *To what extent do investment companies generally, and open-end funds, closed-end funds and BDCs in particular, experience exempt solicitations under the current proxy rules? Please provide any data to the extent available. Should investment companies generally, and open-end funds, closed-end funds and BDCs in particular, be required to use universal proxies in non-exempt solicitations only, or in some or all exempt solicitations? Why or why not?*⁹⁹

As stated in response #28, above, we would not impose the requirement to use universal proxy cards in exempt solicitations.

Request for Comment 69. *To what extent do investment companies generally, and open-end funds, closed-end funds and BDCs in particular, have bylaws that contain advance notice provisions? Please provide any data to the extent available. Should special rules regarding notice apply for investment companies that do not regularly hold annual meetings (i.e., open-end funds)? For example, should such investment companies be required to provide a specific date by which a dissident must provide the investment company with the names of the nominees for whom it intends to solicit proxies? If so, how should such date be provided to investors? For example, should an investment company be required to disclose the date via disclosure on its website or via a press release? Would that disclosure be sufficient, or should such date also be provided in a filing made with the Commission (e.g., in the investment company's annual or semi-annual report to shareholders, a report on Form N-CSR, etc.)? Although funds generally are not required to file reports on Form 8-K, should they be required to file a report on Form 8-K providing the notice date? Should funds instead be permitted to provide this disclosure in a different manner? If so, what manner of disclosure would be appropriate?*¹⁰⁰

We do not have the data requested, and are expressing no view on these questions at this time.

XV. General Request for Comment

Request for Comment 70. *We preliminarily believe that universal proxy cards are not needed for special meetings of shareholders because historically shareholders have not been presented with an opportunity to vote on competing slates of nominees at special meetings. Therefore, we are not*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 79,146-47.

*proposing to require universal proxy cards at a special meeting of shareholders. Should they be required at a special meeting? Why or why not?*¹⁰¹

Regardless of the fact that, historically, shareholders have not been presented with an opportunity to vote on competing slates of nominees at special meetings, the SEC should extend the applicability of the proposed reforms to special meetings. If there is no election contest at a special meeting, then extension of the universal proxy regime to special meetings will be no burden. But we believe that any number of public companies have advance notice bylaws that permit shareholders to nominate directors at a special meeting when the registrant has called for a special meeting for that purpose. Again, shareholders should be given the ability to vote by proxy in a way that replicates the way they would be able to vote in person.

Request for Comment 71. *We are proposing to mandate the use of universal proxy cards to allow shareholders to vote by proxy in a manner that more closely resembles how they can vote in person at a shareholders' meeting based on our belief that replicating the vote that could be achieved at the meeting facilitates the "fair corporate suffrage" that Congress intended our proxy rules to effectuate. Are there reasons our rules should not seek to replicate the vote that could be achieved at a shareholder meeting in this manner? Would replicating the vote that could be achieved at a shareholder meeting appropriately ensure that shareholders using the proxy process are able to fully and consistently exercise their state law voting rights? Are there other means to achieve this objective?*¹⁰²

We are in favor of the proposed rules precisely because they replicate the vote that could be achieved at a shareholders' meeting. As described throughout this comment letter, the proposed amendments are necessary in order for shareholders to be able to use the proxy process to fully exercise their state law voting rights and election preferences.

Request for Comment 72. *If a dissident provides a notice of intent to solicit proxies in support of nominees other than the registrant's nominees but fails to fulfill other requirements, such as filing a definitive proxy statement or the minimum solicitation requirement, should there be consequences for the dissident? If so, what should those consequences be and in what circumstances should they apply? Should the dissident be deemed ineligible to use universal proxy for a period of time in the future?*¹⁰³

If a dissident provides a notice of intent to solicit proxies in support of nominees other than the registrant's nominees but fails to fulfill other requirements, such as filing a definitive proxy statement or the minimum solicitation requirement, there should be adverse consequences for the dissident. Such conduct should be considered a violation of the proxy rules, with the same consequences as other such violations. In addition, the dissident could be required to compensate the registrant for its expenses incurred in connection with the dissident's actions.

¹⁰¹ *Id.* at 79,147.

¹⁰² *Id.*

¹⁰³ *Id.*

Request for Comment 73. *Would our proposed rules affect retail investors differently than institutional investors? If so, how?*¹⁰⁴

The proposed rules will give greater effect to the existing rights of all shareholders by facilitating the ability to vote for the combination of nominees of their choice by proxy, and in that sense, all types of shareholders will be affected and benefit equally. That said, we believe retail shareholders in general often have holdings smaller than many institutions, and therefore the costs of attending company meetings to cast a vote for a preferred mix of candidates can be even more cost prohibitive. In that sense, the ability to vote by proxy in a manner similar to voting in person arguably is even more important for retail investors.

Request for Comment 74. *Does mandating a universal proxy card give rise to any conflicts or other concerns under state law? Would those concerns exist if we were instead to permit but not mandate a universal proxy card? For example, many state laws permit cumulative voting for directors. Are there any concerns relating to cumulative voting under the proposed universal proxy system?*¹⁰⁵

We are not aware of any conflicts or other concerns under state law in connection with the Universal Proxy Requirement.

Request for Comment 75. *Does the proposed universal proxy system give rise to any conflicts or other concerns under existing stock exchange rules?*¹⁰⁶

We suggest that the stock exchanges are in a better position to respond to this question.

XVI. Economic Analysis

Requests for Comment 76 – 81 request various data.

We do not have any data to add to that cited by the staff in the Release, which we believe to be the best available.

Request for Comment 82. *Would split-ticket voting increase as a result of the proposed amendments? Would the proposed amendments reduce the cost and inconvenience currently faced by shareholders who choose to vote a split-ticket, while not changing the rate of split-ticket voting? Or are there shareholders who would choose to vote a split-ticket in some cases but do not because of the current impediments to doing so?*¹⁰⁷

We expect that split-ticket voting will increase as a result of the proposed amendments, and that the proposed amendments will reduce the cost and inconvenience currently faced by shareholders who choose to vote a split ticket. The rate of split-ticket voting will increase because the current

¹⁰⁴ *Id.* (footnote omitted).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 79,178.

regime makes split-ticket voting extraordinarily difficult when voting by proxy, if not impossible, and the universal proxy regime will facilitate it.

Request for Comment 83. *To what extent are votes for the full dissident slate likely to increase as a result of including the dissident nominees on registrant proxy cards, as proposed? Would dissidents change the number of shareholders they solicit as a result of the proposed amendments?*¹⁰⁸

We do not expect that votes for the full dissident slate are likely to increase as a result of including the dissident nominees on a registrant's proxy card, as proposed. Shareholders can already vote for a full dissident slate on the dissident proxy card, if that is their voting preference. There is no reason to think they will do so more often simply because they could now do so on the registrant's card as well. There is also no reason to think dissidents will change the number of shareholders they solicit as a result of the proposed amendments—they will continue to solicit that number of shareholders that they think is required to win the election. Dissidents wish to control their own proxy card, which will continue to put a premium on their solicitation activity.

Request for Comment 84. *Are some kinds of voting choices more likely to be affected by adoption of universal proxy? For example, are either full-slate votes for the registrant or full-slate votes for the dissident more likely to switch to a split-ticket vote?*¹⁰⁹

We expect that some full-slate votes for both the registrant and the dissident will likely switch to a split-ticket vote following the adoption of the Universal Proxy Requirement, which will reflect the new ability of shareholders voting by proxy to select the combination of nominees they prefer. Whether it will be more for one party or the other is irrelevant—it will better reflect what shareholders want.

Request for Comment 85. *Would removing constraints on shareholder voting choices through universal proxies result in election outcomes that better reflect shareholder preferences, or could there be unintended outcomes? That is, would changes in shareholder voting behavior due to the availability of universal ballots result in election outcomes that do not reflect overall shareholder preferences as well as the outcomes that would have occurred without universal ballots? If so, please explain.*¹¹⁰

As described throughout this comment letter, removing constraints on shareholder voting choices through universal proxy cards will result in election outcomes that better reflect shareholder preferences. Any changes in shareholder voting behavior due to the availability of universal proxy cards will result in election outcomes that reflect overall shareholder preferences more accurately than under the existing regime, which restricts shareholders voting by proxy to select only those nominees appearing on either the registrant's card or the dissident's card.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

Request for Comment 86. *Would the use of universal proxy cards lead to more mixed boards, including both management and dissident nominees? How and to what extent? What would be the effect of any such change, including any effects on efficiency, competition, and capital formation? Would any such increase in mixed boards be beneficial or detrimental, and why is that the case?*¹¹¹

The use of universal proxy cards will lead to the election of boards that more accurately reflect shareholder preferences. If that results in the election of more mixed boards, it will be because shareholders believe it will be economically beneficial.

Request for Comment 87. *Would the use of universal proxy cards lead to an increase or decrease in the incidence of typical proxy contests (as opposed to the nominal contests discussed above)? How and to what extent? What would be the effects of any such change, including any effects on efficiency, competition, and capital formation? Would any such change in the incidence of proxy contests be beneficial or detrimental, and why is that the case?*¹¹²

See response #23, above.

Request for Comment 88. *Would requiring the use of universal proxies provide advantages or disadvantages to one party or the other in an election contest? Would the expected effects of mandating universal proxies lead to an increase or decrease in the threat of proxy contests or otherwise change the nature of the relationship between registrants, dissidents, and shareholders, resulting in changes in managerial decision-making or registrant performance? How and to what extent? What would be the effects of any such change, including any effects on efficiency, competition, and capital formation? Would any such changes be beneficial or detrimental, and why is that the case?*¹¹³

We believe the Universal Proxy Requirement will provide advantages to shareholders by giving them with the ability to vote by proxy for the mix of candidates they prefer, as they could if they attended a shareholders' meeting in person. Whether that provides advantages or disadvantages to one party or the other in an election contest will no doubt vary from contest to contest depending on the circumstances. We do not believe the Universal Proxy Requirement will favor either management or dissidents in any systematic way.

The purpose and primary intended beneficiary of requiring the use of universal proxies are shareholders voting by proxy; the universal proxy card will provide the ability for a shareholder to vote for all or some of a dissident's nominees as well as all or some of the registrant's nominees in a convenient manner.

Request for Comment 89. *Would the proposed amendments shift burdens to registrants in proxy contests? Would the proposed amendments result in nominal contests where the dissident does not expend resources on solicitation beyond the minimum required by the proposed amendments? Would dissidents be deterred from nominal contests by the cost of the proposed minimum*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 79,178-79.

*solicitation requirement? Or is the magnitude of the cost such that it would not serve as a deterrent? What would be the effects of such contests, including any costs to registrants and any effects on efficiency, competition, and capital formation? Would nominal contests be beneficial or detrimental, and why is that the case? If we changed the proposed minimum solicitation requirements, such as to require solicitation of all shareholders, how would that affect the frequency of nominal contests? What would be the effect if instead we were to eliminate the proposed minimum solicitation requirements?*¹¹⁴

We do not believe that the proposed amendments will shift burdens to registrants in proxy contests. Given the proposed rule that a dissident must file a proxy statement with the SEC and solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors, the proposed amendments should not result in an increase in nominal contests. This is because dissidents will be required to expend significant resources in soliciting at least a majority of shareholders.

The proposed rule requires that the proxy statement filed by the dissident with the SEC contain substantial information about the director nominees. Dissidents would be appropriately deterred from nominal contests by the costs; we oppose a requirement or option for a universal proxy in an exempt solicitation exactly because the burden would be too low, with no requirement for filing of proxy materials.

Increasing the minimum solicitation requirements to require the solicitation of all shareholders would likely eliminate nominal contests, but would also significantly decrease the number of legitimate “typical” proxy contests by making them prohibitively expensive for many dissidents. We believe solicitation of a majority of shares is sufficient. Should the SEC explore a higher threshold, we believe such threshold should be significantly less than a requirement to solicit all shareholders, and that the SEC should consider whether a dissident that prefers not to have a universal proxy would play games by soliciting just under any supermajority number set forth in the rule.

Eliminating the proposed minimum solicitation requirement while retaining the balance of the proposed amendments would undoubtedly result in an increase in the frequency of nominal contests, and would be a mistake in our view. It is a reasonable measure of seriousness to require solicitation of a majority of shares outstanding, given high levels of meeting participation at most U.S. corporations and the need to solicit shares to be in a position to win a proxy contest.

Request for Comment 90. *Would dissidents have a reasonable likelihood of gaining board representation under the proposed amendments if they did no more than the minimum required under the proposed amendments (i.e., solicitation, such as by notice and access, of holders of shares representing at least a majority of the voting power of shares entitled to vote)? If so, is this due to the ability of shareholders to vote for dissident nominees on the registrant’s universal proxy card? Are there other reasons why dissidents may be likely to initiate nominal contests?*¹¹⁵

¹¹⁴ *Id.* at 79,179.

¹¹⁵ *Id.*

We think it highly likely that dissidents would solicit more than a majority of shares in most instances. The burdens of waging a proxy contest, including identifying and recruiting nominees, as well as proxy filing requirements, entail substantial costs. There may be situations for which the case for board change are so clear that the minimum required effort will be sufficient to gain board representation, but we believe the investment is such that a dissident is likely to go well beyond the minimum. We believe the costs are sufficient that they will discourage dissidents from putting forth director nominees where there is not an intent to win and achieve real change in board composition.

Request for Comment 91. *Would dissidents in typical proxy contests bear any incremental costs in order to comply with the minimum solicitation requirements of the proposed amendments? If so, please provide estimates of such costs. Would those incremental costs unduly deter proxy contests, and if so, to what extent?*¹¹⁶

As indicated above, we believe the minimum solicitation requirements as proposed would impose appropriate costs on dissidents, including the costs of filing proxy materials with the SEC.

Request for Comment 92. *What is the current prevalence and distribution of different types of advance notice bylaws? Would the proposed notice deadline of 60 calendar days prior to the anniversary of the previous year's annual meeting date create a new constraint on dissidents, relative to existing advance notice bylaws? If so, how and to what extent? What would the effect be if we were instead to adopt a different notice deadline, such as 90 or 45 days prior to the anniversary of the previous year's annual meeting date?*¹¹⁷

We are not in a position to comment on this request. See also responses #29 and #31, above.

Request for Comment 93. *Would the proposed proxy statement filing deadline for dissidents of 25 calendar days prior to the meeting date or five days after the registrant files its definitive proxy statement be sufficient to provide shareholders with the information needed to submit an informed vote? Would the proposed filing deadline create a new constraint on dissidents? If so, how and to what extent? Would a different filing deadline be more appropriate? If so, what deadline should apply and why?*¹¹⁸

The proposed proxy statement filing deadline for dissidents of 25 calendar days prior to the meeting date or five days after the registrant files its definitive proxy statement is sufficient to provide shareholders with the information needed to submit an informed vote. The proposed deadline provides sufficient time before the meeting for shareholders who are not solicited by the dissident to access information about the dissident's nominees in the dissident's definitive proxy statement. We do not foresee the proposed filing deadline creating a new constraint on shareholder proponents, but note that some mechanism should be implemented to allow for noncompliance with the filing deadline in extraordinary situations.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

Request for Comment 94. Are dissidents or registrants likely to change their solicitation expenditures under the proposed amendments? If so how and to what extent?

We are doubtful that dissidents or registrants would materially alter solicitation expenditures under the proposed amendments. Proxy fights already put a premium on each side getting out its message to investors. We do not believe that enabling shareholders to vote by proxy for their preferred mix of candidates alters this equation.

Request for Comment 95. Are dissidents or registrants likely to incur incremental costs other than solicitation expenditures under the proposed amendments? If so, please describe and quantify those costs, if possible. For example, would registrants or dissidents incur costs to add disclosures to their proxy statements in reaction to the proposed amendments, such as disclosures urging shareholders not to support their opponent's candidates using their card and expressing their views as to the importance of a homogenous, rather than a mixed, board? What would it cost to prepare such disclosures?¹¹⁹

See response #94.

Request for Comment 96. Would there be advantages or disadvantages to shareholders, registrants, or dissidents if registrants and dissidents were required to make universal proxy cards available on request, but were allowed to initially disseminate either a standard or a universal proxy card at their option? Would requiring shareholders to request a universal proxy card impose a burden on their ability to vote for the combination of director nominees of their choice? Would this approach be logistically feasible and cost-effective? In particular, how would the process of fulfilling shareholder requests be managed to ensure that shareholders electing a universal proxy card are provided with one in a timely manner? How would the cost of this process be borne by the different parties to the contest? Would electronic and logistical systems need to be changed to accommodate such an approach? Please provide detail on how this approach could be implemented and estimates of the associated costs where possible.¹²⁰

Requiring shareholders to request a universal proxy card would eviscerate the benefits of the Universal Proxy Requirement. It would result in additional expense, additional proxy plumbing and timing requirements, and an unreasonable burden on the shareholders' exercise of their voting rights.

Request for Comment 97. Would dissidents and registrants take actions in response to the proposed amendments to lessen or capitalize on any potential effects of the proposed amendments? If so, what actions would they take and why?¹²¹

We believe that dissidents and registrants are likely to focus even more attention in their solicitations on the attributes of their individual nominees. See also responses #31 and #38, above.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

Request for Comment 98. *If registrants and dissidents were permitted, but not required, to use universal proxies, would registrants and/or dissidents choose to use universal proxies? To what extent? In what circumstances would universal proxies be likely to be used by registrants? In what circumstances would universal proxies be likely to be used by dissidents? If one party were to choose to use a universal proxy, would that decision prompt the opposing party also to use a universal proxy?*¹²²

If registrants or dissidents were permitted, but not required, to use universal proxy cards, they would likely use universal proxy cards only when it was determined that such use would be tactically advantageous. We expect that registrants would likely use a universal proxy card where they concluded that shareholders were primarily going to vote on the dissident's card, thereby denying any votes to the registrant's nominees, but actually would prefer to vote for a mix of candidates. If dissidents were permitted, but not required, to use universal proxy cards, they would likely use universal proxy cards in short slate contests where they concluded that shareholders were primarily going to vote on the registrant's card, thereby denying any votes to the dissident's nominees, but actually would prefer to vote for one or more of the dissident's nominees.

Request for Comment 99. *If registrants and dissidents were permitted, but not required, to include opponent nominees on their proxy cards, should we require that all duly nominated candidates be included, or should we allow registrants and dissidents to select which opponent nominees they include? What would be the effects of allowing only some of the opponent's nominees to be included on a card? Would that give rise to confusion in the voting process?*¹²³

If registrants and dissidents were permitted, but not required, to include opponent nominees on their proxy cards, they should be required to include all duly-nominated candidates. Permitting parties that have opted to use a universal proxy to include only select nominees of the other party would not enable shareholders to vote for the mix of candidates they prefer, as opposed to the mix proposed by the party.

Request for Comment 100. *If dissidents were required to use universal proxies, while registrants were permitted, but not required, to do so, would such an approach provide an advantage to registrants in proxy contests? How and to what extent? Would any such advantage be offset by the ability of dissidents to choose which and how many shareholders they solicit, in contrast to the general practice that registrants solicit all shareholders? Would such an approach provide an advantage to dissidents? How and why?*¹²⁴

If dissidents were required to use universal proxy cards, while registrants were permitted, but not required, to do so, such an approach would presumably provide an advantage to registrants in proxy contests, since it would permit registrants to utilize universal proxy cards only when they believed it offered a tactical advantage. And as we have expressed throughout this comment letter, we believe strongly that both parties should be required to use universal proxy cards.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

Requests for Comment 101 - 102 relate to data on investment companies.

We do not have any data to add to that cited by the staff in the Release, which we believe to be the best available.

Request for Comment 103. *What effect would the proposed amendments have on competition? Would the proposed amendments put registrants subject to the proxy rules or particular types of registrants subject to the proxy rules at a competitive advantage or disadvantage? If so, what changes to the proposed requirements could mitigate any such impact?*¹²⁵

We believe that shareholders are the most appropriate party to assess the effect on competition, efficiency and capital formation in voting for the directors they prefer, and should be free to vote those preferences through a universal proxy card.

Request for Comment 104. *What effect would the propose amendments have on efficiency? Are there any positive or negative effects of the proposed amendments on efficiency that we have overlooked? How could the proposed amendments be changed to promote any positive effect or to mitigate any negative effect on efficiency?*¹²⁶

See response #103.

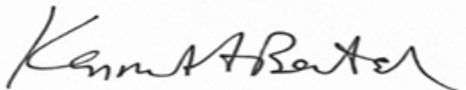
Request for Comment 105. *What effect would the proposed amendments have on capital formation? How could the proposed amendments be changed to promote capital formation or to mitigate any negative effect on capital formation resulting from the amendments?*¹²⁷

See response #103.

* * *

We commend the SEC for its proposals embodied in the Release and welcome further opportunities to engage in dialogue and provide feedback that reflects our guiding principles and the experiences of shareholders. If you have any questions or require additional information, please do not hesitate to contact me at (202) 822-0800 or ken@cii.org, our general counsel, Jeff Mahoney, at the same number or jeff@cii.org, or our counsel, Marc Weingarten, at Schulte Roth & Zabel LLP at (212) 756-2280 or marc.weingarten@srz.com.

Sincerely,



Ken Bertsch
Executive Director

¹²⁵ *Id.* at 79,179-80.

¹²⁶ *Id.* at 79,180.

¹²⁷ *Id.*