

Via Hand Delivery

July 20, 2017

The Honorable Paul D. Ryan  
Speaker  
United States House of Representatives  
Washington, DC 20515

The Honorable Nancy Pelosi  
Minority Leader  
United States House of Representatives  
Washington, DC 20515

Dear Mr. Speaker and Minority Leader Pelosi:

We are writing to respectfully request your assistance in striking from the FY2018 Financial Services and General Government Appropriations bill a rider that would prohibit the U.S. Securities and Exchange Commission (SEC or Commission) from promulgating a rule requiring a universal proxy.

The Council of Institutional Investors (Council or CII) is a nonpartisan, nonprofit association of employee benefit plans, foundations and endowments with combined assets under management exceeding \$3 trillion. Our voting member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate (non-voting) members include a range of asset managers with more than \$20 trillion in assets under management.<sup>1</sup>

CII has long held that good corporate governance—defined to include general issues affecting market transparency, integrity and accountability and specific relationships between boards, management and shareowners—is in the best long-term interests of shareowners and the U.S. capital markets.<sup>2</sup> We believe that shareowners, other investors and stakeholders benefit when cost-effective rules and regulations provide adequate protections to owners and ensure that important information is promptly and transparently provided to the marketplace.<sup>3</sup>

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<sup>1</sup> For more information about CII and our members, please visit the Council's website at <http://www.cii.org/members>.

<sup>2</sup> CII, Policies on Other Issues, Value of Corporate Governance, *available at* [http://www.cii.org/policies\\_other\\_issues#value\\_corp\\_gov](http://www.cii.org/policies_other_issues#value_corp_gov).

<sup>3</sup> *Id.*

We were surprised and disappointed to recently learn that the FY2018 Financial Services and Government Appropriations bill includes the following provision:

PROHIBITION ON REQUIRING A SINGLE BALLOT  
SEC. 932.

Section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78n) is amended by adding at the end the following:

“(k) PROHIBITION ON REQUIRING A SINGLE BALLOT.— The Commission may not require that a solicitation of a proxy, consent, or authorization to vote a security of an issuer in an election of members of the board of directors of the issuer be made using a single ballot or card that lists both individuals nominated by (or on behalf of) the issuer and individuals nominated by (or on behalf of) other proponents and permits the person granting the proxy, consent, or authorization to select from among individuals in both groups.”<sup>4</sup>

The above provision would effectively bar the Commission from issuing a rule that fixes a “glitch” in existing SEC rules.<sup>5</sup> The glitch prevents a shareholder who votes by proxy from having the same voting options for board nominees as a shareholder who votes in person at an annual meeting.

While we acknowledge that the provision was included in the House passed H.R. 10,<sup>6</sup> you should be aware that this provision was not subject to any substantive debate either in the Committee on Financial Services or on the House floor. In addition, there was no substantive debate on the provision in the Committee on Appropriations. In that regard, we note that the Committee on Appropriations report explaining the bill fails to even include a reference to the provision.<sup>7</sup>

If a substantive debate on the provision had occurred, it may well have become clear to Members that the provision is not supported by most investors<sup>8</sup> and many other market participants, including President Trump’s Special Advisor on Regulatory Reform.<sup>9</sup>

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<sup>4</sup> FY2018 Financial Services and General Services and Government Appropriations bill, H.R. \_\_, 115<sup>th</sup> Cong. (June 28, 2017), available at <https://appropriations.house.gov/uploadedfiles/bills-115hr-sc-ap-fy2018-fservices-financialservicesandgeneralgovernment.pdf>.

<sup>5</sup> Keith F. Higgins, Keynote Address at the Practicing Law Institute, Corporate Governance – A Master Class 2 (Mar. 9, 2017) (“it is a glitch in the system of fair suffrage that should be fixed”) (on file with CII).

<sup>6</sup> H.R. 10, 115<sup>th</sup> Cong. § 845 (June 13, 2017), available at <https://www.congress.gov/115/bills/hr10/BILLS-115hr10rfs.pdf>.

<sup>7</sup> H.R. Rep. 115- (2017) (Comm. on Appropriations Rep.), available at <https://appropriations.house.gov/uploadedfiles/fsgg.report.07.13.17.pdf>.

<sup>8</sup> See, e.g., Letter signed by more than 50 investors to The Honorable Paul Ryan, United States House of Representatives 2 (May 17, 2017) (opposing § 845 of H.R. 10 because it would “[r]estrict the right of shareholders to vote for directors in contested elections for board seats”), available at [http://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2017/05-17-17%20FinChoice%20Letter%20FINAL.pdf](http://www.cii.org/files/issues_and_advocacy/correspondence/2017/05-17-17%20FinChoice%20Letter%20FINAL.pdf).

<sup>9</sup> See, e.g., Carl Icahn, Statement Regarding SEC Proposal to Require Use of Universal Proxy Cards (Oct. 27, 2016) (“the introduction of the universal proxy card will eliminate needless voter confusion in contested elections, give

## Background on Universal Proxy

In October 2016, the SEC issued for public comment a proposal that would require proxy contestants for corporate board seats to provide shareowners with a universal proxy card that includes the names of both management and dissident director nominees.<sup>10</sup>

The comment period for the proposal ended on January 9, 2017.<sup>11</sup> Thirty-eight comment letters were received in response to the proposal.<sup>12</sup>

The vast majority of commentators supported the proposal. In addition to CII,<sup>13</sup> the Investment Company Institute<sup>14</sup> and the CFA Institute,<sup>15</sup> commentators supporting the proposal included the following investors:

California State Teachers' Retirement System<sup>16</sup>  
California Public Employees' Retirement System<sup>17</sup>

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shareholders greater freedom of choice, and hopefully end some of the gamesmanship employed by incumbent boards to keep shareholder-nominated directors out of the boardroom”), available at <http://carlicahn.com/statement-regarding-sec-proposal-to-require-use-of-universal-proxy-cards/>.

<sup>10</sup> Press Release, SEC Proposes Amendments to Require Use of Universal Proxy Cards (Oct. 26, 2016), available at <https://www.sec.gov/news/pressrelease/2016-225.html>.

<sup>11</sup> Universal Proxy, Exchange Act Release No. 79,164, Investment Company Act Release No. 32,339, 81 Fed. Reg. 79,122, 79,122 (proposed rule Oct. 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-11-10/pdf/2016-26349.pdf>.

<sup>12</sup> U.S. Securities and Exchange Commission, Comments on Proposed Rule: Universal Proxy (last viewed July 18, 2017), available at <https://www.sec.gov/comments/s7-24-16/s72416.htm>.

<sup>13</sup> Letter from Ken Bertsch, Executive Director, Council of Institutional Investors 3 (Dec. 28, 2017) (“With minor enhancements, the proposed framework will provide for a constructive universal proxy regime that gives greater effect to existing shareholder rights.”), available at [http://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2016/12\\_28\\_16\\_comment\\_letter\\_SEC\\_universal\\_proxy.pdf](http://www.cii.org/files/issues_and_advocacy/correspondence/2016/12_28_16_comment_letter_SEC_universal_proxy.pdf).

<sup>14</sup> Letter from Dorothy M. Donohue, Deputy General Counsel, Investment Company Institute 9 (Dec. 19, 2016) (“In general, the adoption of a mandatory universal proxy for operating companies would serve the public interest in giving all shareholders the same voting options, whether they vote by proxy or in person.”), available at <https://www.sec.gov/comments/s7-24-16/s72416-1431117-129844.pdf>.

<sup>15</sup> Letter from James Allen, CFA, Head, Capital Markets Policy, CFA Institute et al. 1 (Jan. 29, 2017) (“We commend the SEC for addressing this shortcoming of the board voting process by introducing a new Universal Proxy ballot rule that will allow shareowners to effectively split their voting ticket if they chose to do so – without having to attend a company’s annual meeting in person.”), available at <https://www.sec.gov/comments/s7-24-16/s72416-1473944-130452.pdf>.

<sup>16</sup> Letter from Anne Sheehan, Director of Corporate Governance, California State Teacher’s Retirement System 1 (Jan. 9, 2017) (“We thank the Commission for the opportunity to support and comment on the well-researched, prudent and attentive proposed rule on Universal Proxy.”), available at <https://www.sec.gov/comments/s7-24-16/s72416-1471415-130426.pdf>.

<sup>17</sup> Letter from Marcie Frost, Chief Executive Officer, CalPERS 2 (Jan. 9, 2017) (“We support the proposed amendments which would require proxy contestants to furnish shareowners a universal proxy card; one that includes the names of both management and dissident director nominees in an election contest in a manner that reflects, as closely as possible, the voting process available in-person.”), available at <https://www.sec.gov/comments/s7-24-16/s72416-1470820-130402.pdf>.

Colorado Public Employees' Retirement Association<sup>18</sup>

Fidelity Investments<sup>19</sup>

Florida State Board of Administration<sup>20</sup>

Hermes Equity Ownership Services Limited<sup>21</sup>

Ohio Public Employees Retirement System<sup>22</sup>

Comptroller, State of New York<sup>23</sup>

Triam Fund Management<sup>24</sup>

Washington State Investment Board.<sup>25</sup>

The proposal is important to good corporate governance because it removes a long-standing flaw in the U.S. proxy system.<sup>26</sup> That flaw effectively disenfranchises shareowners who vote by proxy cards—the vast majority of shareowners—instead of voting in person. Currently, shareowners, have no practical ability through proxy voting to “split their ticket” and vote for the combination

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<sup>18</sup> Letter from Gregory W. Smith, Executive Director, Colorado PERA 2 (Jan. 9, 2017) (“The universal proxy cards for all contested elections would guarantee that shareholders are able to choose from among all board nominees, regardless of whether they voted in person or by proxy.”), available at <https://www.sec.gov/comments/s7-24-16/s72416-1471329-130425.pdf>.

<sup>19</sup> Letter from Marc R. Bryant, Senior Vice President, Deputy General Counsel, Fidelity Investments 2 (Jan. 9, 2017) (“Fidelity support universal proxy as a logical way to fully accommodate shareholder voting preferences.”), available at <https://www.sec.gov/comments/s7-24-16/s72416-1471250-130420.pdf>.

<sup>20</sup> Letter from Michael P. McCauley, Senior Officer Investment Programs and Governance, Florida State Board of Administration (SBA) 1 (Jan. 11, 2017) (“The SBA staff strongly supports the Commission’s effort to provide shareowners with equivalent voting opportunities, whether they vote in person or by proxy.”), available at <https://www.sec.gov/comments/s7-24-16/s72416-1481390-130533.pdf>.

<sup>21</sup> Letter from Tim Goodman, Director, Hermes Equity Ownership Services Limited 1 (Dec. 23, 2016) (“Our experience is that we would often, possibly usually, prefer to recommend votes for candidates from both the board’s and the dissident’s slates. This opportunity is currently denied in practice to our clients.”), available at <https://www.sec.gov/comments/s7-24-16/s72416-1440887-129987.pdf>.

<sup>22</sup> Letter from Karen Carraher, Executive Director et al., Ohio Public Employees Retirement System 3 (Jan. 4, 2017) (“OPERS believes that the Universal Proxy Requirement should be mandated as proposed, since it more effectively replicates in-person attendance at a shareowners’ meeting, which permits shareowners to vote for their preferred combination of nominees from both slates”), available at <https://www.sec.gov/comments/s7-24-16/s72416-1471224-130416.pdf>.

<sup>23</sup> Letter from Thomas P. DiNapoli, State Comptroller, State of New York 1 (Jan. 9, 2017) (“I am writing as Trustee of the New York State Common Retirement Fund . . . and administrative head of the New York State and Local Retirement System . . . to express support for the proposed amendments to the federal proxy rules published by the Securities and Exchange Commission . . . in its Release No. 34-79164 pertaining to universal proxies . . .”), available at <https://www.sec.gov/comments/s7-24-16/s72416-1470796-130406.pdf>.

<sup>24</sup> Letter from Brian L. Schorr, Chief Legal Officer and Partner, Triam Fund Management LLP 1 (Jan. 9, 2017) (“We are writing in support of the proposed amendments to the Federal proxy rules published by the U.S. Securities and Exchange Commission . . . in the Release . . . providing for the use of universal proxy cards in contested director elections.”), available at <https://www.sec.gov/comments/s7-24-16/s72416-1471095-130411.pdf>.

<sup>25</sup> Letter from Theresa Whitmarsh, Executive Director, Washington State Investment Board 1 (Jan. 5, 2017) (“The WSIB strongly supports the U.S. Securities and Exchange Commission’s proposed release regarding the use of universal proxy cards in contested elections of directors.”), available at <https://www.sec.gov/comments/s7-24-16/s72416-1463856-130298.pdf>.

<sup>26</sup> The proposal is also important to good corporate governance because it addresses, at least in part, a long standing flaw in the U.S. proxy system that permits a “withhold” voting option in a director election without disclosure in the proxy statement of the treatment and effect of a “withhold” vote. Letter from Ken Bertsch at 4 & 28.

of shareowner and management nominees that they believe best serve their economic interests.<sup>27</sup> As recently explained by a former SEC Director of Corporation Finance:

*What I haven't heard is a good answer to this simple question: Why shouldn't a shareholder who votes by proxy have the same voting options as a shareholder who votes in person? Unless someone comes up with a good answer to that question, I think the Commission should move forward with the proposal. . . .*<sup>28</sup>

The proposal also is consistent with CII's corporate governance best practices for director elections that states:

To facilitate the shareholder voting franchise, the opposing sides engaged in a contested election should utilize a proxy card naming all management-nominees and all shareholder-proponent nominees, providing every nominee equal prominence on the proxy card.<sup>29</sup>

While proxy contests are rare events, the right of shareowners to elect directors is a fundamental right of share ownership.<sup>30</sup> Contested elections are pivotal events for companies and for shareowners, since board seats, and in some cases, board control, are at stake. The dissident group usually advances a specific strategic, operational or financial agenda, so it is important for shareowners to be able to participate fully, regardless of how they vote.

Importantly, requiring a universal proxy would benefit retail investors and institutional investors with relatively smaller positions by allowing them to choose among all board nominees without attending the shareholder meeting, which can involve travel and other costs that may be prohibitive. Moreover, the current system of competing slates of nominees may be disproportionately confusing to retail investors, who are presented with multiple conflicting proxy cards and may not realize that tabulators count only the most recently submitted card.

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<sup>27</sup> Recommendations of the Investor Advisory Committee Regarding SEC Rulemaking to Explore Universal Proxy Ballots 2-4 (Adopted July 25, 2013), available at <http://www.sec.gov/spotlight/investor-advisorycommittee-2012/universal-proxy-recommendation-072613.pdf>.

<sup>28</sup> Keith F. Higgins at 2 (emphasis added).

<sup>29</sup> CII, Corporate Governance Policies § 2.2 Director Elections (updated Sept. 30, 2016), available at [http://www.cii.org/files/policies/09\\_30\\_16\\_corp\\_gov\\_policies.pdf](http://www.cii.org/files/policies/09_30_16_corp_gov_policies.pdf).

<sup>30</sup> See, e.g., Letter from Jack Ehnes, Chief Executive Officer, CalSTRS, to The Honorable Maxine Waters, Ranking Member, Committee on Financial Services 4 (June 5, 2017) ("Voting for director nominees is a fundamental right, and as a long-term investor, CalSTRS supports the ability to choose among the best suited candidates to represent its interests inside the boardroom."), available at [https://www.calstrs.com/sites/main/files/file-attachments/06-05-2017\\_maxine\\_financial\\_choice\\_act.pdf](https://www.calstrs.com/sites/main/files/file-attachments/06-05-2017_maxine_financial_choice_act.pdf).

Finally, we note that empirical evidence indicates universal proxies do not favor dissidents over management.<sup>31</sup> On this point, a 2016 study by Harvard Law School Professor Scott Hirst of proxy contests from 2008 and 2015 found about 22 percent might have turned out differently with a universal proxy.<sup>32</sup> The study explains:

This paper describes the consequences of the unilateral proxy system, and provides empirical evidence of the likely effects of a universal proxy rule that would eliminate the problem. The unilateral proxy system results in distorted vote outcomes, which disenfranchise shareholders. Distorted outcomes are an important problem in a significant subset of proxy contests. 12% of proxy contests at large U.S. corporations between 2008 and 2015 can be expected to have had distorted outcomes, with as many as 22% possibly affected. By eliminating these distorted outcomes, universal proxies would significantly enfranchise shareholders.

This analysis permits further inferences that illuminate the debate over a universal proxy rule. *A universal proxy rule can be expected to have benefitted management nominees more than twice as often as dissident nominees at recent proxy contests. Contrary to the claims of many commentators, a universal proxy rule is therefore unlikely to benefit dissidents . . .*<sup>33</sup>

An analysis by attorneys' for a prominent international corporate law firm reached a similar conclusion: "In our view, the universal proxy card mandate, if adopted, would not significantly affect the outcome of . . . activist situations."<sup>34</sup>

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<sup>31</sup> Scott Hirst, Harvard Law School, Universal Proxies 1 (July 2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2805136](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2805136).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 75.

<sup>34</sup> Gail Weinstein et al., Fried Frank Harris Shriver & Jacobson LLP, Expert Analysis, A Practical Assessment of the 'Universal Proxy Card' Plan, Law360, at 4 (Dec. 14, 2016) (emphasis omitted), available at <http://www.friedfrank.com/siteFiles/Publications/A%20Practical%20Assessment%20Of%20The%20Universal%20Proxy%20Card%20Plan.pdf>.

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Thank you for considering our views on this important matter. We would welcome the opportunity to discuss this issue in more detail with you or your staff at your convenience. Please feel free to contact me at 202.822.0800.

Sincerely,

A handwritten signature in black ink that reads "Jeff Mahoney". The signature is written in a cursive, flowing style.

Jeff Mahoney  
General Counsel

CC: The Honorable Rodney Frelinghuysen, Chairman, Committee on Appropriations  
The Honorable Nita M. Lowey, Ranking Member, Committee on Appropriations  
The Honorable Jeb Hensarling, Chairman, Committee on Financial Services  
The Honorable Maxine Waters, Ranking Member, Committee on Financial Services