

The Universal Proxy Working Group

Via Email

August 6, 2020

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

Re: Universal Proxy Cards

Dear Director Hinman:

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

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

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

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

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

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

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

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

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

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

Sincerely,



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



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

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