

Via E-Mail

July 19, 2018

Nicole Puccio  
Branch Chief  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-2521

*Re: Draft 2018-2022 Strategic Plan*

Dear Ms. Puccio:

I am writing in response to the Securities and Exchange Commission's (SEC or Commission) request for comment on its draft 2018-2022 Strategic Plan (Strategic Plan).<sup>1</sup> We thank you for the opportunity to comment on the Strategic Plan.

The Council of Institutional Investors (CII) is a nonprofit, nonpartisan association of public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management exceeding \$3.5 trillion.

Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate members include a range of asset managers with more than \$25 trillion in assets under management.<sup>2</sup>

We strongly endorse the Strategic Plan's mission, vision, and values.<sup>3</sup> We offer the following specific comments on Goal 1 and initiatives 1.4, 2.2, and 2.3.<sup>4</sup>

**GOAL 1: Focus on the long-term interests of our Main Street investors.<sup>5</sup>**

We support the goal of focusing on the long-term interests of investors. CII member funds include US-based asset owners with assets under management representing 34% of the \$10.3

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<sup>1</sup> Draft 2018-2022 Strategic Plan for Securities and Exchange Commission, Exchange Act Release No. 83,463, 83 Fed. Reg. 29,589 (June 25, 2018), <https://www.gpo.gov/fdsys/pkg/FR-2018-06-25/pdf/2018-13484.pdf>; U.S. Securities and Exchange Commission, Strategic Plan, Fiscal Years 2018-2022, Draft for Comment [hereinafter Strategic Plan], <https://www.sec.gov/files/sec-strategic-plan-2018-2022.pdf>.

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

<sup>3</sup> Strategic Plan at 3.

<sup>4</sup> *Id.* at 5-6, 8.

<sup>5</sup> *Id.* at 5.

trillion managed by top 1,000 US plan sponsors.<sup>6</sup> The beneficiaries of those funds include millions of workers and retirees who reside in large and small cities and counties across America.<sup>7</sup> Our member funds have strong financial and fiduciary incentives to serve as responsible stewards of those workers' and retirees' interests.<sup>8</sup> We believe those workers and retirees benefit from the SEC's mission, including its promulgation and enforcement of rules designed to ensure and enhance the fairness and integrity of the capital markets. We respectfully request that the long-term interests of those workers and retirees *and* our member funds be explicitly included as "investors" in "GOAL 1."<sup>9</sup>

**Initiative 1.4 Modernize design, delivery, and content of disclosure so investors, including in particular retail investors, can access readable, useful, and timely information to make informed investment decisions.**<sup>10</sup>

We support the Strategic Plan initiative to modernize design, delivery, and content of disclosure so investors can access readable, useful, and timely information to make informed investment decisions. We believe that investors and other stakeholders benefit when SEC disclosure requirements ensure that important information is promptly and transparently provided to the marketplace.<sup>11</sup>

More specifically, we commend the SEC's plans to continue to "modernize EDGAR."<sup>12</sup> We believe enhancing the functionality of the EDGAR system can be a positive force for improving the quality and accessibility of disclosures.<sup>13</sup> In that regard, we view the Commission's recent adoption of amendments requiring the use of the Inline eXtensible Business Reporting Language (XBRL) format<sup>14</sup> as an important development. Inline XBRL "allows filers to embed XBRL data directly into the document filed on EDGAR."<sup>15</sup> This improvement in the functionality of

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<sup>6</sup> See Pensions & Investments Research Center (last visited July 13, 2018), <http://researchcenter.pionline.com/rankings/all/overview>.

<sup>7</sup> See Phillip M. Vidal, Annual Survey of Public Pensions: State- and Locally-Administered Defined Benefit Data Summary Brief: 2016 at 2 (July 2017) ("Total beneficiaries increased 3.3 percent from 10.0 million to 10.3 million, cresting the 10 million mark for the first time."), <https://www.census.gov/content/dam/Census/library/publications/2017/econ/g16-aspp-sl.pdf>.

<sup>8</sup> See, e.g., *Tesla, Inc. v. Musk*, 324 F.R.D. 73, 81 (D. Del. 2018) ("an institutional investor . . . 'can, consistent with its fiduciary obligations, balance the interest of the [shareholders] with the long-term interests of the company and its public investors'") (on file with CII).

<sup>9</sup> Strategic Plan at 5.

<sup>10</sup> *Id.* at 6.

<sup>11</sup> See, e.g., Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission 1 (July 8, 2016) [hereafter Concept Release Letter], <https://www.sec.gov/comments/s7-06-16/s70616-49.pdf>.

<sup>12</sup> Strategic Plan at 6.

<sup>13</sup> See Concept Release Letter at 2 ("The Council commends the Commission for its ongoing efforts to enhance the functionality of the EDGAR system.")

<sup>14</sup> Press Release, SEC Adopts Inline XBRL for Tagged Data (June 28, 2018), <https://www.sec.gov/news/press-release/2018-117>

<sup>15</sup> Mayer Brown, SEC Adopts Inline XBRL Rule, JDSupra (July 12, 2018), <https://www.jdsupra.com/legalnews/sec-adopts-inline-xbrl-rule-83217/>; see Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to The Honorable Jeb Hensarling, Chairman, Committee on Financial Services et al. 4 (June 6, 2018) ("We look forward to the SEC's adoption of final rules on its outstanding 'inline XBRL' proposal that is expected to further reduce company costs for XBRL tagging going forward"), <https://www.cii.org/files/June%206%202018%20Letter%20to%20Committee%20on%20Financial%20Services.pdf>.

EDGAR makes disclosure documents more valuable and cost-effective for a broad range of users, including market analysts and data vendors that conduct research on smaller companies.<sup>16</sup>

**Initiative 2.2 Identify and take steps to address, existing SEC rules and approaches that are outdated.**<sup>17</sup>

We support the Strategic Plan initiative to identify and take steps to address existing SEC rules and approaches that are outdated or are not “functioning as intended.”<sup>18</sup> We note that Rule 14a-4(d), the so-called “bona fide nominee” rule promulgated in 1966,<sup>19</sup> is perhaps the best example of an existing SEC rule that is outdated.

We believe the problems caused by the bona fide nominee rule should be promptly addressed by the Commission in response to investor demand for proxy voting in the contested election of directors that is more compatible with modern capital markets.<sup>20</sup>

Bona Fide Nominee Rule

Under the existing bona fide nominee rule, one party in a proxy contest may not include the other party’s nominees for corporate director on its proxy card unless the other party’s nominees consent.<sup>21</sup> For a variety of reasons the consent is rarely granted.<sup>22</sup> As a result, shareowners who vote by proxy are effectively disenfranchised because they are generally limited to voting only for the corporation’s nominees or only for the dissident nominees unless they are willing and able to incur the time and costs of attending the annual meeting in person.<sup>23</sup>

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<sup>16</sup> See, e.g., Scott W. Bauguess, Deputy Chief Econ. & Deputy Dir., Div. of Econ. & Risk Analysis, SEC, Keynote Address at the FIMA Conference 5 (May 3, 2018) (“structured disclosures enable third-party vendors to make this information available to retail investors at low or even no cost”), <https://www.sec.gov/news/speech/speech-bauguess-050318>.

<sup>17</sup> Strategic Plan at 8.

<sup>18</sup> *Id.*

<sup>19</sup> Requirements as to proxy, 17 C.F.R. § 14a-4(d) (2010), <https://www.law.cornell.edu/cfr/text/17/240.14a-4>.

<sup>20</sup> See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to Brent J. Fields, Secretary, Securities and Exchange Commission 1 (July 11, 2018) (requesting the universal proxy project “be promptly advanced to the Final Rule Stage”), <https://www.cii.org/files/July%2011%202018%20SEC%20Reg%20Flex%20Letter%20Final.pdf>; see also Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Mr. Vikash Mohan, Program Analyst, Office of Financial Management 14 (Mar. 11, 2014) (requesting in response to the “Draft 2014-2018 Strategic Plan” that the “Commission should have a near-term initiative to amend Section 14 eliminating the requirement to obtain a nominee’s consent to be named on a proxy card in contested elections and allow shareowners to vote for their preferred combination of shareowner and management nominees on a single proxy card”), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2014/03\\_11\\_14\\_CII\\_letter\\_to\\_SEC\\_strategic\\_plan.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2014/03_11_14_CII_letter_to_SEC_strategic_plan.pdf).

<sup>21</sup> See Universal Proxy, Exchange Act Release No. 79,164, Investment Company Act Release No. 32,339, 81 Fed. Reg. 79,122, 79,164 (proposed rule Oct. 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-11-10/pdf/2016-26349.pdf>.

<sup>22</sup> *Id.* (describing the reasons why consent is “rarely provided”).

<sup>23</sup> *Id.* at 79,147.

## Universal Proxy Proposal

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>24</sup> The universal proxy proposal seeks to address the long-standing problem created by the bona fide nominee rule. The proposal was carefully developed and well-thought-out, and was responsive to two CII detailed rulemaking petitions.<sup>25</sup>

The comment period for the universal proxy proposal ended on January 9, 2017.<sup>26</sup> More than forty comment letters were received in response.<sup>27</sup>

A large majority of commentators supported the universal proxy proposal. In addition to CII,<sup>28</sup> the Investment Company Institute,<sup>29</sup> and the CFA Institute,<sup>30</sup> commentators supporting the proposal included the following investors:

- Almitas Capital<sup>31</sup>
- California Public Employees' Retirement System<sup>32</sup>

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<sup>24</sup> See Press Release, SEC Proposes Amendments to Require Use of Universal Proxy Cards (Oct. 26, 2016), <https://www.sec.gov/news/pressrelease/2016-225.html>.

<sup>25</sup> See Letter from Glenn Davis, Director of Research, Council of Institutional Investors, to Keith F. Higgins, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission (June 12, 2015), <https://www.sec.gov/rules/petitions/2015/petn4-686.pdf>; Letter from Glenn Davis, Director of Research, Council of Institutional Investors, to Ms. Elizabeth Murphy, Secretary, U.S. Securities and Exchange Commission (Jan. 8, 2014), <https://www.sec.gov/rules/petitions/2014/petn4-672.pdf>.

<sup>26</sup> 81 Fed. Reg. at 79,122.

<sup>27</sup> U.S. Securities and Exchange Commission, Comments on Proposed Rule: Universal Proxy (last viewed July 6, 2018), <https://www.sec.gov/comments/s7-24-16/s72416.htm>.

<sup>28</sup> Letter from Ken Bertsch, Executive Director, Council of Institutional Investors, to Brent J. Fields, Secretary, Securities and Exchange Commission 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.”) [hereafter Universal Proxy Letter], [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>29</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.”), <https://www.sec.gov/comments/s7-24-16/s72416-1431117-129844.pdf>.

<sup>30</sup> Letter from James Allen, CFA, Head, Capital Markets Policy, CFA Institute et al. 1 (Jan. 9, 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.”), <https://www.sec.gov/comments/s7-24-16/s72416-1473944-130452.pdf>.

<sup>31</sup> Letter from Ron Mass, Managing Director, Almitas Capital 1 (Feb. 3, 2017) (“I support the Commission’s proposal to require the use of universal proxies for all contested elections of directors . . .”), <https://www.sec.gov/comments/s7-24-16/s72416-1574799-131790.pdf>.

<sup>32</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.”), <https://www.sec.gov/comments/s7-24-16/s72416-1470820-130402.pdf>.

- California State Teachers' Retirement System (CalSTRS)<sup>33</sup>
- Colorado Public Employees' Retirement Association<sup>34</sup>
- Fidelity Investments<sup>35</sup>
- Florida State Board of Administration<sup>36</sup>
- Hermes Equity Ownership Services Limited<sup>37</sup>
- Ohio Public Employees Retirement System<sup>38</sup>
- Comptroller, State of New York<sup>39</sup>
- Trian Fund Management,<sup>40</sup> and the
- Washington State Investment Board.<sup>41</sup>

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<sup>33</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."), <https://www.sec.gov/comments/s7-24-16/s72416-1471415-130426.pdf>.

<sup>34</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."), <https://www.sec.gov/comments/s7-24-16/s72416-1471329-130425.pdf>.

<sup>35</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."), <https://www.sec.gov/comments/s7-24-16/s72416-1471250-130420.pdf>.

<sup>36</sup> Letter from Michael P. McCauley, Senior Officer, Investment Programs and Governance, Florida State Board of Administration (SBA) 1 (Jan. 11, 2017) ("SBA staff strongly supports the Commission's effort to provide shareowners with equivalent voting opportunities, whether they vote in person or by proxy."), <https://www.sec.gov/comments/s7-24-16/s72416-1481390-130533.pdf>.

<sup>37</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."), <https://www.sec.gov/comments/s7-24-16/s72416-1440887-129987.pdf>.

<sup>38</sup> Letter from Karen Carraher, Executive Director, Ohio Public Employees Retirement System et al. 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."), <https://www.sec.gov/comments/s7-24-16/s72416-1471224-130416.pdf>.

<sup>39</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 . . ."), <https://www.sec.gov/comments/s7-24-16/s72416-1470796-130406.pdf>.

<sup>40</sup> Letter from Brian L. Schorr, Chief Legal Officer and Partner, Trian 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."), <https://www.sec.gov/comments/s7-24-16/s72416-1471095-130411.pdf>.

<sup>41</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."), <https://www.sec.gov/comments/s7-24-16/s72416-1463856-130298.pdf>.

The universal proxy proposal is consistent with CII’s corporate governance best practices for director elections, which state:

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>42</sup>

The universal proxy proposal is important for good corporate governance because, as previously described, it removes a long-standing flaw in the US proxy system. 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 of shareowner and management nominees that they believe best serve their economic interests.<sup>43</sup> As 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>44</sup>

In addition, Kai Liekefett, of the law firm Sidley Austin, confirms that in several recent proxy fights, including the high profile contests at Automatic Data Processing in 2017 and DuPont in 2015, several large institutional investors were interested in voting for both activist and management candidates, but were not able to do so under the current system.<sup>45</sup>

While proxy contests are rare events, the right of shareowners to elect directors is a fundamental right of share ownership, and these events are an important source of accountability and discipline more generally.<sup>46</sup> Contested elections are pivotal events for companies and for shareowners of those companies, 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.

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<sup>42</sup> CII, Corporate Governance Policies § 2.2 Director Elections (updated Sept. 15, 2017), [http://www.cii.org/files/policies/09\\_15\\_17\\_corp\\_gov\\_policies.pdf](http://www.cii.org/files/policies/09_15_17_corp_gov_policies.pdf).

<sup>43</sup> Recommendations of the Investor Advisory Committee Regarding SEC Rulemaking to Explore Universal Proxy Ballots 2-4 (adopted July 25, 2013), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/universal-proxy-recommendation-072613.pdf>.

<sup>44</sup> Keith F. Higgins, Keynote Address at the Practising Law Institute, Corporate Governance – A Master Class 2 (Mar. 9, 2017) (emphasis added) (on file with CII).

<sup>45</sup> Liana B. Baker & Michelle Price, U.S. Regulator Shelves Reform on Voting in Board Fights-Sources, Reuters News, July 11, 2018, <https://www.reuters.com/article/us-sec-universalproxy/u-s-regulator-shelves-reform-on-voting-in-board-fights-sources-idUSKBN1K10FX>.

<sup>46</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.”), [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).

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. As Commissioner Kara Stein recently remarked:

[W]e should adopt final rules regarding the use of universal proxy cards. These rules should recognize that few shareholders can dedicate the time and resources necessary to attend a company's meeting in person and that, in the modern marketplace, most voting is done by proxy.<sup>47</sup>

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.

In addition, we note that empirical evidence indicates universal proxies do not favor dissidents over management.<sup>48</sup> On this point, a study by Harvard Law School Professor Scott Hirst of proxy contests from 2001 to 2016 found about 15% might have turned out differently with a universal proxy.<sup>49</sup> The author explains:

The results . . . show that, of the 15 contests where universal proxies can be expected to have had distortions between sides, management nominees can be expected to have been favored at 10 contests, and the dissident nominees at five contests. These results are not significantly different from an even split between favoring management and favoring dissident. *This casts doubt on the claim made by opponents of universal proxies that they are likely to help dissidents. If anything, to the extent universal proxies led to different outcomes in contests, they would favor management more frequently than dissidents.*<sup>50</sup>

We note that during the 2018 proxy season SandRidge Energy, Inc., voluntarily adopted a universal proxy.<sup>51</sup> In doing so the company's board concluded that "[t]he use of a universal proxy card provides shareholders with flexibility and clarity regarding their votes in a contested

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<sup>47</sup> Commissioner Kara M. Stein, "Mutualism: Reimagining the Role of Shareholders in Modern Corporate Governance," Speech at Stanford University (Feb. 13, 2018) (footnotes omitted), <https://www.sec.gov/news/speech/speech-stein-021318>.

<sup>48</sup> See Scott Hirst, Harvard Law School, Program on Corporate Governance, Universal Proxies, 35 Yale J. On Reg. 437 (June 2018) (on file with CII); see also Gail Weinstein, Fried Frank Harris Shriver & Jacobson LLP et al., Expert Analysis, A Practical Assessment of the 'Universal Proxy Card' Plan, Law360, at 4 (Dec. 14, 2016) ("In our view, the universal proxy card mandate, if adopted, would not significantly affect the outcome of . . . activist situations." ), <http://www.friedfrank.com/siteFiles/Publications/A%20Practical%20Assessment%20Of%20The%20Universal%20Proxy%20Card%20Plan.pdf>.

<sup>49</sup> See Scott Hirst at 509 ("As many as 15% of proxy contests between 2001 and 2016 may have had distorted outcomes.").

<sup>50</sup> *Id.* at 495 (emphasis added).

<sup>51</sup> See Press Release, SandRidge Energy, Inc., SandRidge Energy Expands Board of Directors and Adopts Universal Proxy Card (May 7, 2018), <https://www.prnewswire.com/news-releases/sandridge-energy-expands-board-of-directors-and-adopts-universal-proxy-card-300643318.html>.

election and enables shareholders to cast votes for any director nominee . . . without attending the shareholder meeting in person.”<sup>52</sup>

Also this proxy season, Reuters reported that Destination Maternity, which had its entire board ousted after losing a shareholder vote in May, “would have seen some management nominees keep their seats had investors been able to choose from both slates of candidates, according to people familiar with the vote.”<sup>53</sup>

We acknowledge that universal proxies will not resolve the vote collection and counting issues that were laid bare last year in the contested election of directors at Proctor & Gamble Co. – another set of issues that demands attention to modernizing the “proxy plumbing” system.<sup>54</sup> However, we believe that requiring universal proxies would simplify the proxy voting system and lead to voting results that better reflect the intent of retail and institutional shareowners.

### Issues Raised at CII Spring Conference

At CII’s Spring 2018 conference, SEC Chair Jay Clayton was interviewed by former SEC Chair Elisse Walter.<sup>55</sup> As part of that interview, Chair Walter asked whether there were “any substantive blocks to action that can be addressed by CII and others who favor the [universal proxy] proposal.”<sup>56</sup>

In his response, Chair Clayton raised two issues that gave him “pause.”<sup>57</sup> Those two issues were: (1) the limited solicitation aspect of the proposal, and (2) the circumstance when the election of a dissident results in an incumbent board member refusing to serve.<sup>58</sup> As explained in more detail below, we believe both issues can be easily resolved and are not impediments to promptly issuing a final universal proxy rule.<sup>59</sup>

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<sup>52</sup> *Id.*; see, e.g., Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Michael L. Bennett, Chairman of the Board of Directors and Chair, Nominating and Governance Committee, SandRidge Energy Inc. 1 (May 10, 2018) (explaining how “the so-called ‘bona fide nominee rule’—effectively prevents most issuers and dissident shareholders from availing themselves of the benefits of a universal proxy”), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2018/May%2010%202018%20Universal%20Proxy%20Letter%20\(final\)%20\(Autosaved\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2018/May%2010%202018%20Universal%20Proxy%20Letter%20(final)%20(Autosaved).pdf).

<sup>53</sup> Liana B. Baker & Michelle Price.

<sup>54</sup> See Vito J. Racanelli, Proxy Voting is Broken and Needs to Change, *Barron’s*, July 6, 2018 (“Dozens of proxy voting professionals and practitioners . . . see the P&G . . . count as just the latest failure in a proxy system that is unresponsive to institutional and retail investors . . .”), <https://www.fn london.com/articles/proxy-voting-is-broken-and-needs-to-change-20180711>; see also Alexander Coolidge, How Did P&G Get the Initial Proxy Vote Wrong?, *Cincinnati.com*, Nov. 16, 2017, <https://www.cincinnati.com/story/money/2017/11/16/q-a-nelson-peltz-p-g-and-whats-next-the-snake-pit/870021001/>.

<sup>55</sup> See CII 2018 Spring Conference, Plenary 1: Interview with the SEC Chair (Mar. 12, 2018), <https://www.youtube.com/watch?v=CV7rb-b4sEM>.

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*; Telephone conversation with Raquel Fox, Senior Advisor to SEC Chairman Jay Clayton (Apr. 25, 2018) (providing clarification on the two issues raised by Chair Clayton at the CII Spring 2018 conference).



Issue 1: Limited solicitation aspect of proposal

In raising this issue, Chair Clayton explained:

That depending on the concentration of holding you could effectively accomplish solicitation by going to much less than a roomful of people, maybe a dinner table full of people. Not sure that that's really where we want to be.<sup>60</sup>

As currently written, the universal proxy proposal “would require dissidents in a contested election subject to Rule 14a-19 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.”<sup>61</sup> The SEC concluded:

We believe the threshold we are proposing—a majority of the voting power entitled to vote on the election of directors—strikes an appropriate balance of providing the utility of the mandatory universal proxy system for shareholders while precluding dissidents from capitalizing on the inclusion of dissident nominees on the registrant's universal proxy card without undertaking meaningful solicitation efforts.<sup>62</sup>

The Commission explicitly requested comment on this issue in question # 41 of the proposal.<sup>63</sup> In response to that question, CII's December 2016 comment letter agreed with the SEC's conclusion and the above-quoted language, adding:

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

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<sup>60</sup> CII 2018 Spring Conference, Plenary 1: Interview with the SEC Chair.

<sup>61</sup> 81 Fed. Reg. at 79,138 (emphasis added).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

requirement at 100% would foster game-playing by a dissident who wishes to avoid a universal proxy, through solicitation just under that level . . . .<sup>64</sup>

*Issue 1 solution: Revise proposal to increase solicitation percentage and require a minimum number of shareholders be solicited*

In light of Chair Clayton’s view that the proposed minimum solicitation requirement might include “a dinner table full of people” in the case of a registrant with concentrated holdings, we believe one simple resolution to address that issue would be to modify the minimum solicitation requirement in two ways: (1) increase minimum solicitation requirement to 75%; and (2) require that total number of persons solicited is more than 10.

*Increase minimum solicitation to 75%*

We note that the Commission’s own data shows that “requiring dissidents to solicit *all* shareholders would increase the costs borne by dissidents to solicit in a large fraction of typical proxy contests and may prevent some value-enhancing contests from taking place.”<sup>65</sup> The data also shows that in approximately 97% of proxy contests the dissident solicited shareholders representing more than 50% of the outstanding voting shares.<sup>66</sup>

Despite the Commission’s data, we would support a middle ground approach that would revise the universal proxy proposal to require a 75% minimum solicitation requirement. Such an approach would increase the number of shareholders solicited in a significant minority of proxy contests, presumably including some companies with concentrated holdings. In addition, our approach avoids substantially increasing the costs borne by dissidents that might prevent some value-enhancing contests from taking place.

*Require that total number of persons solicited is more than 10*

In addition to increasing the proposed minimum solicitation requirement to 75%, we would also support requiring that the total number of persons solicited be more than 10. The “more than 10” requirement is derived from existing Rule 14a-2(b)(2).<sup>67</sup> That rule provides that the requirements generally applicable to dissident proxy solicitations do not apply where the total number of persons solicited is “not more than 10.”<sup>68</sup>

Our proposed revision would also be consistent with the comment letter by CalSTRS that the “SEC consider whether a further amendment to the rule is essential to ensure a minimum number

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<sup>64</sup> Universal Proxy Letter at 21.

<sup>65</sup> 81 Fed. Reg. at 79,176 (emphasis added).

<sup>66</sup> *Id.* at 79,153 (“We estimate that in approximately 97 percent of these proxy contests the dissident solicited shareholders representing more than 50 percent of the outstanding voting shares.”).

<sup>67</sup> Solicitations to which § 240.14a-3 to § 240.14a-15 apply, 17 C.F.R. § 14a-2(b)(2) (2010) (“Any solicitation made otherwise than on behalf of the registrant where the total number of persons solicited is not more than ten”), <https://www.law.cornell.edu/cfr/text/17/240.14a-2>.

<sup>68</sup> *See* 81 Fed. Reg. at 79,134 (“the proposed amendments would not apply to solicitations in which the person is not acting on behalf of the registrant and the aggregate number of persons solicited is not more than ten, which are exempt under Rule 14a-2(b)(2)”).

of registered shareholders are solicited . . . .”<sup>69</sup> Notwithstanding Rule 14a-2(b)(2), we would be open to a requirement that the number of persons solicited be greater than 10, for example 25.

Combined, we believe our two modest revisions to the universal proxy proposal would address Chair Clayton’s first issue without substantially impairing the utility of a universal proxy system.

Issue 2: Circumstance when election of dissident results in incumbent board member refusing to serve

In raising this second issue, Chair Clayton queried “[h]ow do we deal with that it’s more than a one . . . step process on one piece of paper.”<sup>70</sup> The universal proxy proposal explicitly requested comment on this issue in question # 5.<sup>71</sup> That question states:

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?<sup>72</sup>

In CII’s comment letter we responded to question # 5 as follows:

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 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.<sup>73</sup>

Issue 2 solution: Revise proposal to require disclosure in proxy statement

In light of Chair Clayton’s concern about how to deal with the circumstance when election of a dissident results in an incumbent board member refusing to serve, we believe one simple solution, as described in our comment letter, is to require the registrant to disclose in its proxy statement: (1) if a party’s nominees will not serve if elected with any of the opposing party’s nominees; and (2) how the resulting vacancy will be filled under the registrant’s governing documents and applicable state law.

We note that the circumstance raised by Chair Clayton may occur in *any current* proxy contest and, therefore, is not unique to a universal proxy system. We also note that the SEC

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<sup>69</sup> Letter from Anne Sheehan at 4.

<sup>70</sup> See CII 2018 Spring Conference, Plenary 1: Interview with the SEC Chair.

<sup>71</sup> 81 Fed. Reg. at 79,129.

<sup>72</sup> *Id.*

<sup>73</sup> Universal Proxy Letter at 8.

acknowledges that staff “do not have specific data that suggests the proposed amendments would result in an increase in the reluctance of directors to serve . . . .”<sup>74</sup> Like the SEC, we are unaware of any specific data suggesting that adoption of the universal proxy proposal would increase the occurrence of the circumstance Chair Clayton envisions.

We believe our modest proposed revision to the universal proxy proposal would address Chair Clayton’s second issue and do so in a manner that is generally familiar to registrants and dissidents alike because it includes a disclosure generally consistent with the existing requirements of the SEC’s short slate rule.<sup>75</sup> That rule has been in place since 1992.<sup>76</sup>

### Majority Voting Disclosure

Finally, in addition to fixing the bona fide nominee rule, the universal proxy proposal provides for a critically important new cost-effective disclosure requirement relating to the *uncontested* election of directors.<sup>77</sup> More specifically, the proposal “expressly requires disclosure in the proxy statement about the treatment and effect of a ‘withhold’ vote in a director election.”<sup>78</sup>

We agree with the SEC that this proposed disclosure, which presumably could be complied with in a single sentence, “would provide shareholders with a better understanding of the effect of their ‘withhold’ votes on the outcome of the election.”<sup>79</sup> Because many shareowners, particularly many retail investors, do not understand that most US public corporations employ a plurality voting standard for the uncontested election of directors,<sup>80</sup> the proposed disclosure is critical.

Under a plurality voting standard in an uncontested election of directors, a “withhold” vote has no legal significance on the outcome of the election.<sup>81</sup> We believe that the proposed disclosure “would make it crystal clear to investors that uncontested plurality elections guarantee victory for all nominees.”<sup>82</sup>

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<sup>74</sup> 81 Fed. Reg. at 79,165.

<sup>75</sup> *Id.* at 79,129 (“As the Commission indicated when adopting the short slate rule, a proxy statement should disclose if any nominee has determined to serve only if its nominating party’s slate is elected or to resign if one or more of the opposing party’s nominees were elected to the board of directors.”).

<sup>76</sup> *Id.* at 79,123 n.17.

<sup>77</sup> *Id.* at 79,144.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See Council of Institutional Investors, FAQ: Majority Voting for Directors 1 (Jan. 4, 2017) (“Although nearly 90 percent of S&P 500 companies use majority voting in some form, just 29 percent of Russell 2000 companies use a majority vote standard in uncontested elections, according to FactSet.”), [http://www.cii.org/files/issues\\_and\\_advocacy/board\\_accountability/majority\\_voting\\_directors/CII%20Majority%20Voting%20FAQ%201-4-17.pdf](http://www.cii.org/files/issues_and_advocacy/board_accountability/majority_voting_directors/CII%20Majority%20Voting%20FAQ%201-4-17.pdf); see also Jeff Green & Alicia Ritcey, With ‘Zombie Directors,’ It’s the Board of the Living Dead, Bloomberg, Aug. 10, 2017, at 2 (under a plurality voting standard in the election of directors, “since board members often run unopposed, just one positive vote could be enough”), <https://www.bloomberg.com/news/articles/2017-08-10/with-zombie-directors-it-s-the-board-of-the-living-dead>.

<sup>81</sup> FAQ: Majority Voting for Directors at 1 (“Withholding a vote allows shareholders to communicate their dissatisfaction with a given nominee, but it has no legal effect on the outcome of the election.”).

<sup>82</sup> *Id.* at 5.

Consistent with our long-standing membership approved policies,<sup>83</sup> CII continues to actively advocate the adoption by all US public companies of a majority, rather than a plurality, voting standard for the uncontested election of directors.<sup>84</sup> Under a majority voting standard, the “withhold” vote is replaced by an “against” vote, helping make board members more responsive to the people they represent.<sup>85</sup>

We believe the proposed disclosure in the universal proxy proposal, if finalized by the Commission, would encourage more US public companies to voluntarily adopt a majority voting standard. The result would be improved corporate governance and potentially higher long-term shareowner value and greater growth in the US public capital markets.<sup>86</sup>

### **Initiative 2.3 Examine strategies to address cyber and other system and infrastructure risks faced by our capital markets and our market participants.**<sup>87</sup>

We support the Strategic Plan initiative to “focus on ensuring that . . . market participants . . . are actively and effectively engaged in managing cybersecurity risks and that these participants and the public companies . . . are appropriately informing investors and other market participants of these risks and incidents.”<sup>88</sup> The initiative is consistent with our view that cybersecurity is an integral component of a board’s role in risk oversight.<sup>89</sup>

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<sup>83</sup> See § 2.2 Director Elections (“Directors in uncontested elections should be elected by a majority of the votes cast.”).

<sup>84</sup> See Council of Institutional Investors, Majority Voting for Directors (last visited July 3, 2018) (describing CII “campaign urging companies to adopt majority voting for directors” in the contested election of directors), [http://www.cii.org/majority\\_voting\\_directors](http://www.cii.org/majority_voting_directors); see also Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Mr. Craig S. Phillips, Counselor to the Secretary, U.S. Department of Treasury 9-12 (Aug. 23, 2017) (describing CII’s continuing advocacy efforts in support of a listing standard requiring majority voting in the uncontested election of directors”), <http://www.cii.org/files/August%2023%202017%20Letter%20to%20Treasury%20v3.pdf>.

<sup>85</sup> See, e.g., FAQ: Majority Voting for Directors at 1-2.

<sup>86</sup> See Interim Report of the Committee on Capital Markets Regulation 93 (Nov. 30, 2006) (“Even ignoring the entry and exit decisions of firms, public capital markets will be smaller as a result of inadequate shareholder rights [including lack of majority voting], given the reduced valuations resulting from higher agency costs.”), <http://www.capmksreg.org/wp-content/uploads/2014/08/Committees-November-2006-Interim-Report.pdf>.

<sup>87</sup> Strategic Plan at 8.

<sup>88</sup> *Id.*

<sup>89</sup> See CII, Prioritizing Cybersecurity, Five Investor Questions for Portfolio Company Boards 2 (Apr. 2016), <https://www.cii.org/files/publications/misc/4-27-16%20Prioritizing%20Cybersecurity.pdf>; see also Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to The Honorable Michael Crapo, Chairman, Committee on Banking, Housing, and Urban Affairs et al. 6-7 (June 27, 2018) (sharing CII views on cybersecurity and related legislation), [https://www.cii.org/files/June%2027%202018%20Letter%20to%20Senate%20Banking%20\(final\).pdf](https://www.cii.org/files/June%2027%202018%20Letter%20to%20Senate%20Banking%20(final).pdf); see generally Christophe Veltsos, How to Get Directors on Board with Cyber Risk Governance, Secur.Intelligence, July 9, 2018 (discussing insights into guiding principles for directors to “improve level of engagement around cyber risk governance”), <https://securityintelligence.com/how-to-get-directors-on-board-with-cyber-risk-governance/>.

Directors have the authority, capacity and responsibility to make pivotal contributions in this area by ensuring adequate resources and management expertise are allocated to robust cyber risk management policies and practices, and ensuring disclosure fairly and accurately portrays material cyber risks and incidents.<sup>90</sup> To achieve these objectives, directors need to:

- Understand management’s cybersecurity strategy;
- Learn where cybersecurity weaknesses lie, and
- Support informed, reasonable investment in the protection of critical data and assets.<sup>91</sup>

We generally agree with Chair Clayton that “in today’s world, companies must have adequate policies and procedures in place to ensure that they respond appropriately to—and, where necessary, adequately disclose—material cyber risks and incidents.”<sup>92</sup>

We commend the SEC for issuing in February a statement and interpretative guidance to assist public companies in preparing disclosures about cybersecurity.<sup>93</sup> We also commend the Commission for the April action charging Yahoo! Inc. for failure to disclose a cybersecurity breach.<sup>94</sup> However, some investors believe the February guidance is insufficient.<sup>95</sup>

We note that in June the Committee on Banking, Housing and Urban Affairs of the US Senate (Banking Committee) held a hearing that included a discussion of S. 536, the Cybersecurity Disclosure Act of 2017.<sup>96</sup> S. 536 directs the SEC to issue final rules requiring a registered issuer to:

- Disclose in its mandatory annual report or annual proxy statement whether any member of its governing body has expertise or experience in cybersecurity, including details necessary to describe fully the nature of that expertise or experience; and
- If no member has such expertise or experience, describe what other company cybersecurity steps were taken into account by the persons responsible for identifying and evaluating nominees for the governing body.<sup>97</sup>

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<sup>90</sup> Prioritizing Cybersecurity at 2.

<sup>91</sup> *Id.*

<sup>92</sup> Oversight of the U.S. Securities and Exchange Commission, Before the H. Comm. on Fin. Servs., 115<sup>th</sup> Cong. (June 21, 2018) (Testimony of Jay Clayton, Chairman, SEC), <http://www.mondovisione.com/media-and-resources/news/testimony-on-oversight-of-the-us-securities-and-exchange-commission-sec-cha-1/>.

<sup>93</sup> Press Release 2018-22, SEC Adopts Statement and Interpretative Guidance on Public Company Cybersecurity Disclosures (Feb. 21, 2018), <https://www.sec.gov/news/press-release/2018-22>.

<sup>94</sup> Press Release 2018-71, Altaba, Formerly Known as Yahoo!, Charged with Failing to Disclose Massive Cybersecurity Breach; Agrees to Pay \$35 Million (Apr. 24, 2018), <https://www.sec.gov/news/press-release/2018-71>.

<sup>95</sup> See, e.g., Hazel Bradford, Investors Pushing Harder for Cybersecurity Solution, P&I, Mar. 5, 2018 (“Mr. DiNapoli, the sole trustee of the \$209.1 billion New York State Common Retirement Fund, Albany, agrees that the latest SEC action fell short.”), <http://www.pionline.com/article/20180305/PRINT/180309912/investors-pushing-harder-for-cybersecurity-solution>.

<sup>96</sup> See United States Senate Committee on Banking, Housing, and Urban Affairs, Hearings, Full Committee Hearing, Legislative Proposals to Examine Corporate Governance (June 28, 2018), <https://www.banking.senate.gov/hearings/legislative-proposals-to-examine-corporate-governance>.

<sup>97</sup> S. 536, 115<sup>th</sup> Cong. § 2 (Mar. 7, 2017), <https://www.congress.gov/115/bills/s536/BILLS-115s536is.pdf>.

At the Banking Committee hearing, Professor John C. Coates IV, professor of law and economics at Harvard Law School, testified in support of S. 536 stating:

S. 536 is well designed. It does not attempt to second-guess SEC guidance and rules regarding disclosures generally, or even as to cyber-risk overall. The bill simply asks publicly traded companies to disclose whether a cybersecurity expert is on the board of directors, and if not, why one is not necessary. To be clear, the bill does not require every publicly traded company to have a cybersecurity expert on its board. Publicly traded companies will still decide for themselves how to tailor their resources to their cybersecurity needs and disclose what they have decided. Some companies may choose to hire outside cyber consultants. Some may choose to boost cybersecurity expertise on staff. And some may decide to have a cybersecurity expert on the board of directors.<sup>98</sup>

CII strongly supports the stated goal of S. 536 to “promote transparency in the oversight of cybersecurity risks at publicly traded companies.”<sup>99</sup> We look forward to working cooperatively with the Banking Committee and the Commission in support of Strategic Plan initiative 2.3.

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Thank you for consideration of our views. If we can answer any questions or provide additional information regarding this letter, please do not hesitate to contact me at [REDACTED] or [REDACTED].

Sincerely,



Jeffrey P. Mahoney  
General Counsel

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<sup>98</sup> Legislative Proposals to Examine Corporate Governance: Hearing Before the S. Comm. on Banking, Hous. & Urb. Affs. (testimony of Prof. John C. Coates IV, John F. Cogan, Jr. Prof. of Law & Econs., Harv. L. Sch.), <https://www.banking.senate.gov/imo/media/doc/Coates%20Testimony%206-28-18.pdf>.

<sup>99</sup> S. 536; *see, e.g.*, Letter from Ken Bertsch, Executive Director, Council of Institutional Investors, to The Honorable Jack Reed, United States Senate 1 (July 7, 2017), [https://www.cii.org/files/07\\_07\\_17%20letter%20to%20Senator%20Reed.pdf](https://www.cii.org/files/07_07_17%20letter%20to%20Senator%20Reed.pdf).