



Via Email

March 5, 2015

Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Proxy Voting Roundtable, File Number 4-681

Dear Mr. Secretary:

The purpose of this letter is to express our appreciation to the Securities and Exchange Commission (“commission” or “SEC”) and staff for holding the February 19, 2015, Proxy Voting Roundtable (“roundtable”) and to provide you with our comments on the roundtable discussion addressing universal proxies.¹

As you are aware, the Council of Institutional Investors (“CII”) is a nonprofit association of employee benefit plans, foundations and endowments with combined assets under management exceeding \$3 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of American workers.²

On January 8, 2014, CII filed a detailed rulemaking petition with the SEC to amend Section 14 of the Securities Exchange Act of 1934 to facilitate the use of universal proxies in contested elections of directors (“petition”).³

¹ Throughout this letter we use the term “universal proxy” or “universal proxies” rather than “universal ballot” or “universal ballots.” Universal proxy or proxies refers to a proxy card on which the names of all candidates for the board appear, regardless of whom nominated them. In contrast, a universal ballot or ballots refers to what is distributed for voting by shareowners who attend the meeting in person, and includes the names of all candidates who have been nominated and permits the shareowner voting at the meeting to pick and choose whatever combination of nominees they prefer.

² For more information about the Council of Institutional Investors (“CII”) and our members, please visit the CII’s website at http://www.cii.org/about_us.

³ 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), http://www.cii.org/files/issues_and_advocacy/correspondence/2014/01_08_14_CII_letter_to_sec_petition%20_for_rulemaking.pdf [hereinafter Petition].

The petition addressed, at least in part, many of the issues raised at the roundtable. Consistent with the petition, the following is our response to those issues:

The problem is clear

The problem that universal proxies would resolve is a problem that was clearly articulated by the SEC's own Investor Advisory Committee ("IAC") more than a year ago: Namely, investors are currently disenfranchised in a proxy contest because they have no practical ability to "split their ticket" and vote for the combination of shareowner nominees and management nominees that they believe best serve their economic interests.⁴

As the commission well knows, proxy contests are pivotal events for both companies and their owners. It is, therefore, critically important that investors are able to cast their votes in accordance with their actual preferences when board seats, and in some cases, board control are at stake.

The inability of investors to choose from among all individuals nominated from all parties limits shareowner choice and diminishes director accountability by precluding shareowners from choosing the best candidates amongst all of those who have been duly nominated.⁵ This limitation weakens the quality of corporate governance in the United States.⁶

The importance of this issue to long-term institutional investors is evidenced by the approval of our general membership of the following amendment to CII's corporate governance best practices for director elections:

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.⁷

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

⁵ See *id.* at 4.

⁶ *Id.*

⁷ CII, Corporate Governance Policies, § 2.2 Director Elections (updated Oct. 1, 2014), [http://www.cii.org/files/policies/10_01_14_corp_gov_policies\(1\).pdf](http://www.cii.org/files/policies/10_01_14_corp_gov_policies(1).pdf).

What perhaps, unfortunately, was not evident from the roundtable discussion is that a growing number of companies and their legal advisers generally support universal proxies.⁸ As one example, last April, Keith Gottfried, formerly the head of the shareholder activism defense practice at Alston & Bird LLP said:

[A]s shareholder activism ramps up and more institutional investors are cozying up to activist campaigns, corporate America is beginning to see the upside of the proposed switch [to a universal proxy]

“A lack of universal ballot, or the inability to have [a] shareholder be able to combine nominees . . . is very frustrating”⁹

Rulemaking on universal proxies should be a commission priority

We understand and continue to support the commission giving priority to completing the congressionally mandated rulemakings assigned to the SEC in the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Jumpstart Our Business Startups Act.¹⁰ Outside of those projects, however, we believe the commission should prioritize its rulemaking agenda based on consideration of the following two factors: (1) is the rulemaking project broadly supported by the constituency in which the SEC is explicitly and uniquely designed to protect—investors, and (2) would the rulemaking project lower or eliminate the roadblocks that inhibit the ability of investors to exercise their fundamental rights as shareowners. Accepting those two criteria, there is little question that rulemaking to facilitate universal proxies should be given a high priority on the SEC’s agenda.

⁸ See, e.g., Karlee Weinmann, Logistics Questions Loom as SEC Mulls Proxy Ballot Reforms, Law360, Apr. 4, 2014, at 3 (registration required), <http://www.law360.com/articles/525002/logistics-questions-loom-as-sec-mulls-proxy-ballot-reforms>.

⁹ *Id.*

¹⁰ Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to The Honorable Scott Garrett, Chairman, Subcommittee on Capital Markets and Government Sponsored Enterprises et al. 2, 4 (July 23, 2014), http://www.cii.org/files/issues_and_advocacy/correspondence/2014/07_23_14_letter_Subcommittee_Capital_Markets.pdf.

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We note that last August, CII's Advisory Council, representing \$1.6 trillion in combined assets under management, issued a letter to the commission on this topic stating:

Electing directors is a fundamental right of shareowners and an effective way to ensure that directors are accountable. But the Commission's proxy rules can impede shareowners' ability to choose their preferred candidates unless they attend the shareholder meeting in person. . . .

We believe *it is time* for the Commission to ensure that investors voting by proxy have the same rights as those voting in person. Universal proxy cards for contested elections would make that possible. It would also enhance the confidence of market participants in the integrity of U.S. public companies and financial markets.¹¹

Continued strong support from our general membership for SEC rulemaking to facilitate the use of universal proxies was a message we heard loud and clear at our annual conference in Washington, DC last spring.¹² As we described in a letter to the Director of the Division of Corporation Finance following the conference:

[I]ssues relating to universal proxy cards and CII's related petition for rulemaking were prevalent topics of discussion for both conference presenters and CII members in attendance.

Conference presenters addressing issues relating to universal proxy cards included SEC Commissioner Kara Stein. As reported by Reuters:

Stein drew applause when she threw her support behind requiring universal proxy ballots, a plan that CII formally petitioned the agency to consider in January.

¹¹ Letter from Tim Goodman, Associate Director, Hermes Equity Ownership Services Limited et al., to Ms. Elizabeth Murphy, Secretary, U.S. Securities and Exchange Commission 1-2 (Aug. 21, 2014), http://www.cii.org/files/issues_and_advocacy/correspondence/2014/08_21_14_CII_letter_to_SEC_Universal%20Proxy.pdf.

¹² Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Keith F. Higgins, Director, Division of Corporation Finance, Securities and Exchange Commission 3-4 (May 22, 2014), http://www.cii.org/files/issues_and_advocacy/correspondence/2014/05_22_14_letter_to_SEC.pdf.

“It is time for the commission to consider permitting, if not mandating, universal proxy ballots, Stein said.”

We wholeheartedly agree with Commissioner Stein that “it is time” for the SEC to act on our rulemaking petition.¹³

Universal proxies would lessen investor confusion

While a corporate lawyer at the roundtable and some other parties have expressed concern that universal proxies would cause “investor confusion,” we are unaware of any CII General Members who share those views.¹⁴ In fact, we believe the views of most investors are exactly the opposite—investors believe that universal proxies *would lessen investor confusion*. As explained in our petition:

The current proxy rules are the real source of complexity. The Commission’s explanation of the steps a shareholder must take to vote for management nominees using a shareholder proponent’s proxy in a contest for a minority of the board provides an apt example:

The [shareholder proponent’s] proxy statement and form of proxy will refer the shareholder to management’s soliciting materials for the names, background and qualifications of the company’s nominees. Thus, shareholders will know precisely which company nominees their shares will be voted for by comparing the full company slate with the list of company nominees the proxy holder will not vote for, and by indicating additional company nominees with respect to whom the shareholder wishes to withhold authority.

*Changing the proxy rules to facilitate universal proxies would eliminate this confusion and ensure a less cumbersome voting process.*¹⁵

Beyond the investor community, the actions of some SEC registrants indicate that they too are confused by the current SEC rules governing shareowner voting in proxy contests.¹⁶

¹³ *Id.* at 4 (footnotes omitted).

¹⁴ Yin Wilczek, Panelists at SEC Roundtable Spar Over Benefits of Universal Proxy Cards, BBNA Daily Report for Executives, Feb. 20, 2015, at EE-13 (on file with CII) [hereinafter BBNA].

¹⁵ Petition, *supra* note 3, at 8 (emphasis added and footnote omitted).

¹⁶ See, e.g., Ronald Barusch, Dealpolitick: Management Takes Page from Activist Playbook with ‘Short Slates,’ Wall St. J., July 31, 2014, at 1-2, <http://blogs.wsj.com/moneybeat/2014/07/31/dealpolitick-management-takes-page-from-activists-playbook-with-short-slates/>.

As described last July in a Dealpolitik commentary in *The Wall Street Journal*:

Tessera Technologies Inc. last year tried to defeat Starboard in a proxy fight by proposing a slate of only six directors to fill eight seats that were up for election. Tessera suggested shareholders write in, on the company's proxy card, the names of the Starboard nominees they wanted to elect to fill the remaining two seats. In a series of letters commenting on Tessera's proxy materials, the SEC indicated that it was less than pleased with this tactic. The agency said the company's proxy card violated a rule that prohibits proxies for being used for the election of people not named in the proxy statement and prohibits the naming of director candidates without their consent. Tessera and Starboard ultimately settled (Starboard got to name a majority of the board) and it does not appear that the SEC issue was ever resolved.¹⁷

The commentary concludes with the following statement:

*Despite the current confusion over how shareholders can vote for candidates from both sides, it looks like management short slates are here to stay as they try to hold on to control. The SEC needs to catch up with the times.*¹⁸

Finally, we agree with the "consensus" reached by the SEC's IAC that any investor confusion that might potentially result from "voter inability to easily determine the recommended candidates nominated by a contestant . . . could be mitigated with conspicuous disclosure on proxy cards."¹⁹

Universal proxies would lower investors' costs to vote

It is our understanding that none of the roundtable participants disputed the fact that universal proxies would *lower* the "substantial" costs that investors currently face if they wish to exercise their full voting rights by picking and choosing among all the candidates who are duly nominated in a proxy contest.²⁰

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ IAC, *supra* note 4, at 4; see Petition, *supra* note 3, at 9 ("Additionally, the Commission may wish to consider whether nominees should be grouped by slate (e.g., 'ABC Corp. Nominees' and 'Shareholder Proponent Nominees'), and whether the order in which candidates appear on the card should be consistent between the two cards).")

²⁰ IAC, *supra* note 4, at 1.

In addition, we believe that the benefits to the shareowner voting franchise provided by universal proxies far outweigh any costs that universal proxies might add to proxy contest participants.²¹ On this point, we agree with roundtable participant Drexel University Professor Michelle Lowry who indicated that universal proxies “may not have that much impact on the costs of proxy contests.”²²

When evaluating the costs of universal proxies, we also believe it is instructive to look to our neighbor to the north, Canada, as an example of a jurisdiction that has demonstrated that universal proxies are both feasible and cost effective. As the SEC’s IAC concluded, “[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.”²³

Whether universal proxies would result in election of more shareowner or company nominees is unclear and should be irrelevant

Several roundtable participants expressed an opinion on whether or not universal proxies would favor shareowner or company nominees.²⁴ We believe it is unclear whether universal proxies would result in the election of more shareowner or company nominees and none of the roundtable participants provided empirical evidence indicating otherwise. We note that roundtable participant, Charles Penner, chief legal officer at investment manager JANA Partners LLC, indicated that “[a]ll the evidence supports’ that companies are more productive and shareholders benefit over sustained periods as a result of shareholder activism”²⁵

More broadly, we believe the debate about whether universal proxies would favor shareowner-proponent nominees over company-nominees should be irrelevant. The more relevant question for the commission is whether universal proxies would provide investors, its primary constituent, with the ability to more fully exercise their fundamental right to vote for the election of directors in a proxy contest. The answer to that question is unequivocally yes.

²¹ Petition, *supra* note 3, at 3 (“We believe the reform being requested would result in *de minimus* changes in costs for proxy contest participants, and that the benefits of the shareholder voting franchise would far outweigh those costs.”).

²² BBNA, *supra* note 14, at EE-13.

²³ IAC, *supra* note 4, at 3.

²⁴ BBNA, *supra* note 14, at EE-13-14 (David Katz, partner, Wachtell, Lipton, Rosen & Katz LLP stating that universal proxies could “potentially lead to activists fielding more candidates” and Sarah Teslik, senior vice president at Apache Corp. indicating that universal proxies would “help” activism.)

²⁵ *Id.* at EE-13.

As explained by roundtable participant Anne Simpson, senior portfolio manager and director of global governance at the California Public Employees' Retirement System, and a current CII board member:

[T]he SEC must facilitate, "not frustrate," the important exercise of shareholder rights. We need a system that works without that physical presence" where shareholders must be present to vote for the full slate of candidates"

The whole purpose of [universal proxies] . . . is to "level the playing field" and ensure that shareholders voting by proxy have the same rights as if they attended the meeting. "All we're doing is ironing out a wrinkle."²⁶

Universal proxy rulemaking would require some implementation guidance

We agree with those roundtable participants who indicated that SEC rulemaking to facilitate universal proxies would necessarily require some guidance on "mechanics."²⁷ We, however, do not believe such implementation guidance would necessarily be difficult to develop, or be complex, or voluminous.

We believe that the commission can and should provide basic guidance in its proposed rulemaking on the physical design of universal proxies.²⁸ The guidance might simply require that the cards "list the names of all director nominees clearly, equally in terms of form, and on the front of the proxy card."²⁹

In other words, the guidance might require that "fonts and styles should be consistent for all candidates, and the names should not be permitted to appear on separate pages of the proxy card."³⁰ Finally, as indicated, we believe the proposed rulemaking guidance might also appropriately require that the nominees be grouped by slate.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Petition, *supra* note 3, at 8 ("We expect the Commission may be required to provide guidance on the physical design of universal proxy cards.").

²⁹ *Id.*

³⁰ *Id.*

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As outlined in this letter, and as described in more detail in our petition, we believe the commission should propose promptly rules to facilitate the use of universal proxies for contested elections and fulfill “the Commission’s goal of ensuring that the proxy process functions, as nearly as possible, as a replacement for an in-person meeting of shareholders.”³¹

We thank you again for holding the roundtable and look forward to commenting on the proposed rule. In the meantime, should you have any questions or require any additional information about the views expressed in this letter or the petition, please feel free to contact me at [REDACTED] or [REDACTED].

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney".

Jeff Mahoney
General Counsel

³¹ Petition, *supra* note 3, at 9.