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Brent J. Fields, Secretary, Securities & Exchange Commission

VIA E-Mail

100 F Street, NE Washington, DC

Re: 20549-1090 File No. S7-24-16 Universal Proxy January 5, 2017

Dear Mr. Fields:

While I truly believe that both the Council of Institutional Investors and the SEC had the best of intentions when they advanced the idea of making a "Universal Proxy" mandatory in contested elections - and while I personally think that the objective, of allowing shareholders the same ability to vote by proxy that they would have if they attended meetings in person is a laudable one - there are several unforeseen and potentially undesirable consequences to the many options that are currently up for comment that I believe the SEC needs to address if indeed it decides to move forward.

I write this from the perspective of someone who has closely observed hundreds and hundreds of formal proxy contests over more than 40 years, and who has served as the Inspector of Election at well over 100 of them - and who has witnessed, and has sometimes been the target of hundreds of formal "challenges" to the reported results.

The biggest set of problems I find with the release arise from the *name* of the thing: Asking for parties to a proxy contest to use a "Universal Proxy" strongly implies that in every situation, every proxy on both sides of a proxy contest should look the same, and cover - and say basically the same things - in essentially the same way – maybe even down to things like listing candidates from each slate in alphabetical order - and maybe even regulating the size of the typefaces that are used, as the release suggested. This approach would decidedly not foster "good corporate governance" - for the reasons I will try to explain below:

**The release, as it stands now, presents daunting drafting difficulties for issuers and opponents alike - and provides no clear guidance to drafters, which is very much needed:** While it *seems fair* to us, as it did to the Council of Institutional Investors, that every shareowner should be able to know about every item that is on the meeting agenda – and be able to cast a vote, or abstain if they choose to do so - this approach can and will

create some daunting drafting difficulties - and sometimes, some hard strategic decisions too - for both sides: Each side would have to state whether they are recommending a vote for or against each such item - or maybe they will decide to make no recommendation at all on certain items - which will make the two versions look, and be, entirely different. So much for the "universal" part we say…So coming up with a new and better name for the desired form(s) - and coming up with something much shorter, and clearer - and studiously avoiding a "one size fits all" approach - should be top priorities in any next steps.

**Proxy forms are critically important 'strategic weapons' in a proxy contest:** In a formal proxy contest, the Proxy Forms - and the Voting Instruction Forms too - are important, and ideally powerful *strategic weapons* in terms of "soliciting proxies" – regardless of which side the sender is on. Each side wants – and needs – and should be allowed to make its "best and most convincing case" – AND, we say, to use their best and most creative efforts to present the most compelling *document* it possibly can.

For example, a smart drafter on the opposition side of a proxy contest will want to single out one or more of the management candidates (as many of them as they have opposing candidates to offer) and specifically solicit a vote NO against them. This is a very effective tactic when there are more candidates than seats up for grabs, since it allows opponents to target specific candidates for criticism in their proxy materials - and to single out the "weakest" candidates to be taken down from the "management herd" via a vote-No. This *greatly improves their odds of winning seats,* vs. allowing voters to pick and choose among, let's say, ten or twelve management candidates on an alphabetical list.

**The release needs to provide clear guidance to assure that voters do not invalidate their votes, by casting more votes than allowable:** A very important aspect of a so-called Universal Proxy that needs to be addressed with more care is how to assure that shareholders (who often fill out cards for both sides in a proxy contest, strange as it may seem) do not end up voting for more directors than there are seats available to be filled. Doing so will make their card or cards totally invalid.

To prevent this, voters need to be instructed to vote either Yes or No - and voters on both sets of proxies need to be warned - in a very prominent way - that they may "Vote for no more than 'X number' of candidates in total." No "Abstain" or "Withhold" boxes should be allowed, in order to remove any ambiguities and to reduce the chances that more boxes will be checked than there are seats to be filled.

**Parties to a proxy contest should not be permitted to solicit a proxy, or tabulate a proxy using a "Universal Proxy" unless investors simultaneously receive a copy of the soliciting entity's own proxy statement:** This is another set of practical and "good governance" difficulties that the release did not adequately address, but one the SEC can and should cure if it decides to go forward with a so-called Universal Proxy."

In accordance with longstanding SEC rules, neither side should be allowed to solicit a proxy on its own form - unless the voters who are being solicited have received proxy

statements that fully explain all of the matters to be voted upon. *Perhaps,* as some have suggested, voters could be directed to a website where the proxy statement can be found - but this option, it should be noted, is currently not allowable under SEC rules in a *non-contested election*.

How could it possibly be fair to require an issuer - who typically makes a mailing to every shareholder in a proxy fight - to show all of the items up for a vote, and to tabulate all such votes, if the opposition side has not sent a similar form - along with their own proxy statement - to every holder? And surely it would not be fair to require issuers to publicize, and refer all of its shareholders to opposition materials that are posted on another site if the opposition is conducting an "exempt solicitation" - and soliciting proxies only from a small group of holders.

**Any new rules governing proxy contests should not allow abstentions, and so-called "broker votes" on routine matters, to be counted as part of the quorum for holding a contested election of directors:** It *seems fair* - and a *good thing* - at least at first blush - to allow voters on both sides a chance to ratify the appointment of auditors, for example (or to vote no, or to abstain) even if the "opposition" is not offering a recommendation one way or the other.

But in practice, this would be a very bad thing to do in a proxy contest, in that not just the yes and no votes – but abstentions - and "broker votes" too on this and other "routine matters" - make it much easier to achieve a quorum. This would allow contested meetings to proceed even if a majority of "the shareholders present in person or by proxy", i.e., "the quorum," is made up of abstainers, and/or represented by large numbers of "broker-votes" on so-called "routine matters"

It is critically important to understand that trying to prevent a quorum is often a *very important tactic* in contested elections – and a legitimate one, we'd say – when one side or the other believes they will prevail if given more time to solicit proxies…So, on balance, helping one side or the other to achieve a quorum with the help of "broker votes" - simply because there is one "routine item" on the agenda - is not so fair or so good a thing to allow in a proxy contest when all is said and done.

We are not sure that the SEC *can* fix this situation. It might be something that each issuer would have to address by amending its charter documents if the SEC were to rule that every shareholder must be able to vote on every matter on the agenda in a contested meeting.

**The SEC draft fails to fully appreciate that the conduct of corporate elections is - and should be, we say - largely a matter of state law:** When there are "challenges" as to the way a specific proxy form was designed and/or executed (as there almost always *are* in proxy contests) there are, almost always, state court rulings that come into play – which become the deciding factors in determining whether a given proxy is valid - or not. Do we really need or want new SEC "Universal Proxy Rules and Regulations" that run the risk of muddling up, or perhaps negating the numerous state court rulings that already

exist, and that often differ in important respects from state to state? We think the answer is no.

**To sum up, we feel, as has often been noted, that "The strongest corporate governance measure there is, is to maintain a vigorous market for corporate control."** Accordingly, we feel strongly that both sides in a proxy contest need to be allowed to take their very best shot at winning the votes they need to carry the day, consistent, of course, with the need for full and fair disclosure.

While we basically agree with the idea that every shareholder should have a right to know about, and to vote if desired on every item on the agenda in a proxy contest, we also feel strongly that a new set of SEC-prescribed "Universal Proxy Rules and Regulations" - as currently proposed for comment - could have a *chilling effect* on the ability of both sides to design their materials in the clearest and most compelling way possible, and to "electioneer" as effectively as possible for their positions.

We also believe that even if all of the technical shortcomings in the subject release were to be successfully addressed, there is no need whatsoever for new SEC-promulgated standards for proxy contests - and that state laws, and their time-tested practices and procedures should continue to prevail.

Respectfully submitted,

Carl T. Hagberg, Managing Partner, CT Hagberg LLC