CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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[redacted]

January 9, 2017

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: **Universal Proxy; 17 CFR Part 240; Release Nos. 34-79164, IC-32339; File No. S7-24-16; RIN 3235–AL84**

Dear Mr. Fields:

The U.S. Chamber of Commerce (the "Chamber") created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century global economy.[1] The CCMC welcomes the opportunity to comment on the proposed rules issued by the Securities and Exchange Commission (the "SEC" or "Commission"), entitled Universal Proxy (the "Proposing Release").[2]

For decades, SEC rules have allowed a shareholder who is willing to commit the necessary resources to conduct a proxy contest to seek a change in board composition. If such a shareholder is able to nominate credible, qualified candidates that garner the widespread support of other investors, the shareholder can, in fact, alter the make-up of the board. In making a voting decision, other shareholders who wish to split their votes among a company's nominees and a dissident's nominees may do so by attending the shareholder meeting and casting a vote there. The current system of proxy voting for directors is well-understood by the marketplace and has been the basis for tens of thousands of orderly director elections (including countless proxy contests) over many years.

[1] The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region.
[2] https://www.sec.gov/rules/proposed/2016/34-79164.pdf

With these rules already in place, we do not see a compelling reason to change the status quo at this time. The unintended consequences—including the prospects of increased over-voting, more frequent disqualification of defective ballots, and routine shareholder confusion—would be far-reaching. More fundamentally, the proxy contest should be the last resort in corporate governance, not the first.

As we discuss in greater detail below, the Proposing Release suffers from a number of fatal flaws because it would:

- Increase the frequency and ease of proxy fights for dissident shareholders;
- Favor activist investors over rank-and-file shareholders and other corporate constituencies;
- Hamstring boards of directors and encourage balkanization of the board;
- Conflict with common advance notice bylaw provisions;
- Further empower proxy advisory firms;
- Discourage initial public offering ("IPO") activity by private companies; and
- Violate issuers' (and dissidents') First Amendment rights.

We respectfully urge the Commission to abandon this ill-advised rulemaking effort in its entirety.

DISCUSSION

Mandating a universal proxy card at all public companies would inevitably increase the frequency and ease of proxy fights. Such a development has no clear benefit to public companies, their shareholders, their employees or their customers. The SEC has historically sought to remain neutral with respect to interactions between public companies and their investors and has always taken great care not to implement any rule that would favor one side over the other. We do not understand why the Commission now seeks to depart so radically from that sound policy in order to encourage contested elections.

It is a well-settled principle that a board of directors has a fiduciary duty to act in the best interests of a corporation and its shareholders. A board is also accountable to the company's shareholders through the company's charter, bylaws, and corporate governance policies. Instead of this system of accountability, the universal proxy card would facilitate proxy fights by individual shareholders (or small groups of shareholders) who do not have a similar fiduciary duty, are not bound by the company's corporate governance policies, and who may nominate directors who advance their own parochial agenda without regard to the broader best interests of the company or its shareholders. In striking down Rule 14a-11 (the SEC's mandatory proxy access rule), the D.C. Circuit cited the SEC's failure to assess the risk of giving special interest groups new powers to pursue self-interested objectives rather than the goal of maximizing shareholder value.[3]

Proxy contests can be significantly disruptive to public companies, and often times can have a deleterious impact on investors. Promoting proxy contests should not be a goal of the SEC, as boards of directors would be increasingly forced to focus a company's resources in support of board-nominated candidates, detracting from managing and overseeing company business. Corporate governance policies must promote long-term shareholder value and profitability, not incentivize frequent proxy fights that would jeopardize the long-term view of a company that successful boards of directors must take.

The constant churning of directors in what would become an annual ritual would without a doubt lead to the formation of factions on board of directors, resulting in the balkanization of the board. This may appease some activists who are looking to advance a particular agenda, but a politicized board cannot effectively serve the long-term best interests of investors or other corporate constituencies. Rather, it would likely cause a company's board and management to focus more on short-term results to the ultimate detriment of their shareholders.

Among its many flaws, the Proposing Release would require a dissident investor to notify a company of the names of its nominees no later than a mere 60 calendar days prior to the anniversary of the previous year's annual meeting date.

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[3] *See Business Roundtable v SEC*, 647 F.3d 1144, 1152 (D.C. Cir. 2011).

Such short notice is inconsistent with the typical advance notice bylaw, which provides for the notice to be delivered not earlier than the close of business on the 120th day and not later than the close of business on the 90th day prior to the first anniversary of the prior year's annual meeting. The longer notice period is generally intended to provide the board of directors with sufficient time to assess a nominee's credentials so that it may advise shareholders regarding the nominee and any potential sources of conflict between the dissident investor who nominated the nominee and other shareholders. Compelling the board to vet nominees on an accelerated timeframe does not benefit shareholders at large.

Equally problematic is the feature of the Proposing Release that would permit dissident shareholders to send proxy statements (which could be notice-and-access rather than physical mailing of a full set of documents) to shareholders representing only a majority of the voting power of shares entitled to vote in the election. Because the proposed rules do not require an insurgent to solicit all shareholders, it stands to reason that retail investors (who, on average, possess fewer votes and proportionally less voting power) will be left out in the cold. In fact, due to the concentrated institutional ownership at many public companies, a dissident could satisfy this requirement by sending proxy statements to only a handful of the largest institutional shareholders at a given company. This approach runs afoul of the basic corporate law principle concerning equal treatment of all shareholders within a class, and even conflicts with the public policy embodied in other SEC regulations, such as Rules 14d-10(a)(2) and 13e-4(f)(8)(ii), the "all holders/best price" rule. Picking winners and losers among similarly-situated investors would create a dangerous precedent, and more fundamentally, we see no reason to favor one subgroup of investors over another.

Seeking to avoid the cost and distraction of an SEC-sanctioned proxy fight, many companies will simply follow the path of least resistance and negotiate to place dissident directors directly on their boards without the need for a shareholder vote. This phenomenon will serve to further accelerate the pace at which activists pursue board representation in what becomes a vicious cycle. Again, the winner here is the special interest activist—not the rank-and-file investor.[4]

[4] Advancing a universal ballot would also impede private ordering and frustrate recent efforts by issuers and their shareholders to adopt "proxy access" bylaws.

As the SEC is aware, the two dominant proxy advisory firms—firms that own no stock and owe no duties to American shareholders, workers or consumers—have come to exert an inordinate influence on the casting of votes at U.S. public companies. The lack of transparency, the one-size-fits-all policies, the routine mistakes and the rampant conflicts of interest at proxy advisory firms are well-documented. Yet despite all these flaws, movement to the universal proxy card would *further expand* the influence of proxy advisory firms and thereby cement their grasp on corporate governance of public companies. We simply do not understand why the Commission would choose voluntarily to pursue such an outcome.

We are also concerned that the Proposing Release, if adopted, will further hasten the steady decline in the number of private companies seeking public listings in the United States. Founders of successful private companies will not relish the prospect of an annual proxy fight and all that entails once the IPO process is completed. Thus, the universal ballot would provide one more disincentive to taking a company public.

Finally, we are deeply troubled that the Proposing Release represents another attempt by the Commission to compel controversial corporate speech in direct contravention of the First Amendment.[5] As you well know, the SEC's rulemaking authority is not limitless. The D.C. Circuit recently spoke to these issues when it invalidated portions of another divisive SEC rulemaking on First Amendment grounds.[6] Far from being "just a name on a card", we cannot conceive of a more controversial topic than requiring a corporation to subsidize and publicize the election campaign of a group of insurgents who have no duty to act in the best interests of the corporation or its shareholders. The D.C. Circuit has been clear that SEC-compelled speech of this kind unequivocally violates the Constitution.

CONCLUSION

In sum, we see no reason to reimagine a process that by and large has served public companies and their investors well for decades. The Commission should not

[5] Because the Proposing Release contemplates that each side of a contested election provide a universal proxy card, the First Amendment rights of dissidents would equally be violated.
[6] *See generally Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015).

pursue a policy that would increase the regularity of contested elections and, among other costs, would distract management and the board from their important work of running the company with an eye toward the long-term best interests of all shareholders. In light of the irreparable fatal flaws in the Proposing Release, we respectfully encourage the Commission to halt this misguided rulemaking immediately.

We thank you for your consideration of these comments and are available to discuss them further with the Commissioners or Staff at your convenience.

Sincerely,

Tom Quaadman

cc: The Honorable Mary Jo White
The Honorable Kara M. Stein
The Honorable Michael S. Piwowar