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December 5, 2016

Brent J. Fields
Secretary
Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

File No. S7-24-16 Universal Proxy

Dear Mr. Fields:

The introduction to the proposing release (the "Release") contains a succinct and principled rationale for revising the proxy solicitation rules.

> The changes to the federal proxy rules we propose today would allow a shareholder voting by proxy to choose among director nominees in an election contest in a manner that reflects as closely as possible the choice that could be made by voting in person at a shareholder meeting. To this end, we are proposing to require the use of a "universal proxy," or a proxy card that includes the names of all duly nominated director candidates for whom proxies are solicited, for all non-exempt solicitations in contested elections. We believe that shareholders should be afforded the opportunity to fully exercise their vote for the director nominees they prefer. This concept – that the proxy voting process should mirror to the greatest extent possible the vote that a shareholder could achieve by attending the shareholders' meeting and voting in person – has guided our efforts in proposing these changes. We have looked to this concept because we believe that replicating the vote that could be achieved at a shareholder meeting is the most appropriate means to ensure that shareholders using the proxy process are able to fully and consistently exercise the "fair corporate suffrage" available to them under state corporate law and that Congress intended our proxy rules to effectuate.

In sum, the Commission's laudable goal is to have every proxy card that is solicited for a contested election of directors replicate a ballot provided at the shareholder meeting. There is an obvious way to achieve that goal that is simple, direct, comprehensive, and effective and imposes no apparent costs on anyone. Rule 14a-9(a) should be amended to specify that if a proxy card does not include, in a clear and impartial manner, the name of any *bona fide* nominee or proposal[1] that the soliciting

[1] A *bona fide* nomination or proposal should be defined as one that does not violate state law or the issuer's governing documents.

party knows or should have known[2] is intended to be presented at the shareholder meeting for which such card will be used, it is presumptively materially misleading.[3] (Rule 14a-4(d)(1), the existing "short slate rule,"[4] should simultaneously be rescinded and Rule 14a-4(c) should be amended to bar use of any proxy card that confers discretionary voting authority except for ministerial acts or for proposals of which the soliciting party was unaware when the solicitation commenced.)[5] This change would effectively transform a proxy card from a cross between an electioneering device and absentee ballot into a pure absentee ballot.

Unfortunately, the Commission failed to apply the axiom that the shortest distance between two points is a straight line. Rather, the Release, a 243-page tome with lengthy discussions about the conditions for, and exceptions to, the use of a universal proxy, epitomizes the aphorism that a camel is horse designed by a committee. Much verbiage is concerned with predicting and assessing the effects of the rule but that is an inherently speculative and subjective task.[6] More important, it is a red herring. As the Commission appropriately responded to objections to the short slate rule from "the registrant community,"[7] claims about the effects of a rule enabling shareholders to more fully

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[2] Implicit in the proposed amendment to Rule 14a-9 is a requirement that (1) any person intending to solicit proxies must request the issuer to identify all known *bona fide* nominees and proposals, and (2) the issuer must respond promptly to such a request.

[3] The presumption would be rebuttable.

[4] A better name for Rule 14a-4(d)(1) would be the "Rube Goldberg short slate rule." Rule 14a-4(d)(1), was the result of a concession by the Commission to commenters from "the registrant community" that opposed a proposed rule that would have permitted a proxy card to include the names of registrant nominees for which the proxy holder would vote. Those commenters asserted that including one or more registrant nominees on the dissident's card could confuse security holders by falsely implying that those nominees supported the dissident's position. Thus, instead of simply naming the nominees for whom the proxy holder will vote, the rule only permits the dissident to name the registrant nominees for whom the dissident will not vote. Not only is the rule more confusing than the proposed rule, it is almost certainly unenforceable because it violates the First Amendment. A nominee has no right to prevent anyone from including his or her name on a proxy card provided the proxy card includes a disclaimer of an endorsement by such nominee. In general, the Commission should respond to any alleged potential confusion to investors by first considering whether adequate disclosure suffice to eliminate confusion -- not by censoring truthful statements.

[5] See Footnote 149 of the Release: "Discretionary voting authority may be conferred under Rule 14a-4(c) for certain ministerial acts such as approving the minutes of a prior meeting, voting on certain shareholder proposals unknown to the registrant before circulation of the proxy statement, and voting on shareholder proposals properly omitted from the proxy statement." Such broad discretionary authority is at odds with the Commission's stated goal "that the proxy voting process should mirror to the greatest extent possible the vote that a shareholder could achieve by attending the shareholders' meeting and voting in person" and it should be abolished.

[6] "It's tough to make predictions, especially about the future." Yogi Berra

[7] Footnote 29 of the release states: "The term 'dissident' as used in this release refers to a soliciting person

exercise their voting rights "are arguments best made to the shareholders and determined in an election."[8] The same response would apply to most of the Commission's requests for comments.

In any event, the primary focus of the proposing release is to adopt rules to enable shareholders that do not attend a meeting to split their votes for *bona fide* nominees for director (however "*bona fide* nominee" is defined). That is progress but it is not sufficient to meet the Commission's stated goal. The following comments address four aspects of the Release that cause it to fall short of that goal.

1. Whether shareholders receive identical proxy cards is admittedly less important than that each card they receive allows them to make the same voting choices they could make at the meeting. Nevertheless, it is telling that the Release does not propose requiring each proxy contestant to use an identical proxy card, even though it should be obvious to the Commission that shareholders would benefit from such a requirement. It explained:

> Finally, we considered proposing that the registrant and dissident distribute an identical card, with the only difference being the persons given proxy authority on the card. An identical card providing proxy authority to different parties could be confusing to shareholders[9], who might think it did not matter which card was signed and returned. Additionally, the practical issue of having a dissident and a registrant agree on the presentation of nominees on a single card could make this alternative problematic. For example, the parties may disagree on whose nominees should be listed first.

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other than the registrant who is soliciting proxies in support of director nominees other than the registrant's nominees. But "dissident" is a loaded word. It often has a pejorative connotation although it can also have a positive one depending on one's subjective view of the person so labeled, e.g., George Washington or Edward Snowden. By contrast, "registrant" has no emotional overtones. The Commission should employ neutral terms to designate the opposing parties in a proxy contest, e.g., "challenger" and "incumbent."

[8] See Short Slate Rule Adopting Release, at 48288. In Animal Farm, George Orwell lampooned such disingenuous "concerns":

> Do not imagine, comrades, that leadership is a pleasure. On the contrary, it is a deep and heavy responsibility. No one believes more firmly than Comrade Napoleon that all animals are equal. He would be only too happy to let you make your decisions for yourselves. But sometimes you might make the wrong decisions, comrades, and then where should we be?

[9] There is that familiar "confusion" bogeyman that appears a number of times in the Release and that Orwell so cleverly deconstructed. See fn. 4 and fn. 8. One wonders how millions of American citizens are able to vote absentee ballots for political elections without becoming hopelessly confused. The Commission should be skeptical about claims of potential shareholder confusion, especially when asserted by parties with interests that conflict with those of shareholders.

The concern that shareholders might think it does not matter which proxy card is returned is easily resolved by requiring disclosure of the identity of the party seeking proxy authority, its recommendations, and why it matters which proxy card is returned. And if the soliciting parties cannot agree on the order of the nominees and proposals, the dispute can be resolved randomly, e.g., each proxy card must be ordered as proposed by the party that more closely predicts the closing price of the S & P 500 Index the day after an impasse is reached. In sum, there is no good reason not to require proxy contestants to use identical proxy cards.

2. The broad discretionary voting authority a soliciting party can exercise under Rule 14a-4(c) on *bona fide* proposals known to the party is contrary to the Commission's stated goal, i.e., "to replicate the voting choices a shareholder would have on non-election proposals if voting in person at a shareholder meeting,"[10] For example, under the current proxy rules, if a board's proxy material indicates that it will use its discretion to vote against a non-Rule 14a-8 shareholder proposal, a shareholder that wishes to vote to elect the board's slate of nominees and in favor of the proposal would not be able to effect his or her voting preferences without attending the meeting.

   Therefore, each soliciting party should be required to include all known *bona fide* proposals[11] on its proxy card. The Release justifies the Commission's decision not to require the inclusion of all known *bona fide* proposals by noting that "[t]he current proxy rules do not limit shareholders' exercise of their voting rights on non-election proposals to the same extent they limit the exercise of shareholders' rights on election proposals because parties can include another party's non-election proposal on the proxy card without such party's consent."[12] (Emphasis added.) But, the Commission does not explain why it should continue to tolerate any unnecessary limitation on the voting rights of shareholders.

3. The Commission's dismissive treatment of the voting rights of

[10] See Footnote 25 of the Release and fn. 5 above.

[11] See fn. 1.

[12] See Footnote 25 of the Release.

shareholders of mutual funds and business development companies ("BDCs") is discouraging. It patronizingly pays lip service to their franchise rights ("We…recognize that the considerations discussed above do not diminish the importance of the rights that are granted to fund and BDC shareholders under state law and the Investment Company Act….")[13] but in the very next sentence repudiates them ("Nevertheless, we are not proposing to extend the universal proxy requirements to funds and BDCs at this time.").[14]

The Commission's reasons for declining to grant shareholders of funds and BDCs the benefits of universal proxy cards are as follows: (1) Shareholders of mutual funds have not been as vocal as shareholders of operating companies about addressing structural limitations on their franchise rights;[15] and (2) "[F]unds and BDCs have particular characteristics that could impact the economic effects of the proposed amendments" if their shareholders are able to fully exercise their franchise rights.[16]

First, as the Release notes, shares of mutual funds and BDCs are predominately owned by retail investors.[17] Unlike the Council of Institutional Investors, the most prominent advocate for a universal proxy rule, retail investors cannot readily engage in collective action to lobby for their voting rights. That is all the more reason the Commission should be vigilant about protecting them.

As far as the purported "particular characteristics that could impact the economic effects of the proposed amendments,"[18] the short response is

[13] Page 92 of the Release.

[14] *id.*

[15] Page 186 of the Release. ("[I]t is unclear whether there is a current demand for split-ticket voting among shareholders of funds and BDCs. In this regard, we note that petitioners seeking a universal proxy requirement have not specifically expressed a need for universal proxy cards at these types of registrants.") "Petitioners" is the Council of Institutional Investors whose voting members include more than 120 pension and other benefit funds with $3 trillion in combined assets under management. See http://www.cii.org/members

[16] *id.*

[17] Page 188 of the Release. ("[A] recent industry report shows that retail investors held approximately 89 percent of mutual fund assets in the United States, which is significantly larger than the corresponding ownership percentage that has been reported for operating companies.")

[18] According to the Release, the "particular characteristics" are the unitary or cluster board structures used

the same one that the Commission gave to reject objections to the short slate rule: "[A]rguments that the election of dissident nominees will hinder the board's effectiveness are best made to the shareholders for their consideration when making voting decisions and 'should not be a basis for imposing … regulatory barriers to the full exercise of the shareholder franchise.'"[19]

In sum, the Commission should not treat shareholders of funds and BDCs any differently than shareholders of other companies with respect to their right to receive a universal proxy card.

4. The Commission should not condition the use of a universal proxy card on a minimum solicitation effort.

The Release proposes a rule that would not require a company's board of directors to utilize a universal proxy unless a "dissident" commits to solicit proxies from holders of at least 50% of the voting power. The Commission seems troubled by the prospect that such a condition is needed to deter "nominal" or "frivolous" proxy contests[20] but fails to clearly articulate the actual harm resulting from such contests.

> However, without a minimum solicitation requirement, requiring registrants to use a universal proxy may increase the likelihood that dissidents engage in more nominal proxy contests. In particular, a dissident would be able to obtain exposure for its nominees on the registrant's proxy card without engaging in any meaningful solicitation at its own expense and without facing the limitations (such as on the number of nominees put forth) as well as the eligibility and procedural requirements of proxy access bylaws, where available, or (to the extent the dissident is concerned about a particular issue) the shareholder proposal process. While this may

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by many mutual funds and some BDCs. It then asserts a potential threat to the alleged efficacy of the unitary or cluster board structure as a basis for denying all fund and BDC shareholders the benefits of a universal proxy. However, the Release also notes that such board structures have been criticized for offering less effective monitoring and greater potential for conflicts of interests. See Footnote 373 of the Release and accompanying text. Whether such structures are, on balance, beneficial or harmful to investors, is an open question. Notably, the Release cites no examples of proxy contests that have harmed shareholders of funds or BDCs with a unitary or cluster board structure.

[19] Page 21 of the Release. Notably, the Commission acknowledges that it does not know what those effects might be or whether they would be good or bad for shareholders. Page 190 of the Release. ("[T]here may be either a greater or lesser effect of the proposed amendments on the incidence of contests at these entities compared to operating companies.")

[20] The Release defines a "nominal proxy contest" as one in which a dissident incurs little more than the basic costs required to engage in a contest but does not define a "frivolous proxy contest."

> enable some beneficial contests that could otherwise be cost-prohibitive, it would also increase the risk of detrimental contests. That is, the ability of dissidents to introduce an alternative set of nominees to all shareholders without incurring meaningful solicitation expenditures may result in an increase in contests that are frivolous or that could be initiated in pursuit of certain idiosyncratic interests rather than shareholder value enhancement. Such contests could lead registrants to incur significant disclosure and solicitation expenses to advocate against the dissident's position and could distract management from critical business matters. There is also some chance that a frivolous contest could result in election outcomes which could disrupt the proper functioning of the board.[21]

In other words, "If we adopt this rule without a minimum solicitation condition, there might be more or less nominal proxy contests and we don't know whether more or less nominal proxy contests would be beneficial or detrimental to shareholders or companies."[22] That is hardly a rational basis for not requiring the use of a universal proxy if the board knows that a shareholder intends to present a nomination or proposal at the meeting. Nor is it a reason for deviating from the Commission's stated goal of a proxy voting process that mirrors "to the greatest extent possible the vote that a shareholder could achieve by attending the shareholders' meeting and voting in person." If a shareholder wants to vote for a fringe candidate or proposal, he or she should be able to do so via proxy.[23] In this regard, it bears mentioning that until fairly recently, Donald Trump was widely considered to be less than a serious candidate for President and decriminalizing the use of marijuana was long thought to be a fringe idea.

Rather than establishing a "one size fits all" condition for requiring the use of a universal proxy, the Commission should encourage boards to establish reasonable and equitable advance notice requirements for shareholders seeking to present nominations or proposals at a meeting.

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[21] Pp. 200-201 of the Release.

[22] Notably, the Release does not provide any examples of past nominal proxy contests that harmed a company or its shareholders.

[23] In contrast to the minimal requirements for submitting a proposal pursuant to Rule 14a-8, the Commission's proposed condition would require a shareholder to make a substantial financial commitment to conduct a proxy solicitation. The Release fails to explain why the Commission takes a different position with respect to nominal proxy contests than Rule 14a-8 proposals.

For example, a board could adopt an advance notice bylaw requiring a shareholder that intends to present a nomination or non-Rule 14a-8 proposal at a shareholder meeting to (1) commit to solicit at shareholders having at least 50% of the voting power, or (2) demonstrate the support of shareholders having 3% of the voting power.

Conclusion

Eighty-two years ago, Congress directed the Commission to adopt proxy solicitation rules that would permit shareholders to fully exercise their voting rights. The obvious way to achieve that goal is to amend Rule 14a-9(a) to specify that if a proxy card does not include, in a clear and impartial manner, the name of any *bona fide* nominee or proposal that the soliciting party knows or should have known is intended to be presented at the shareholder meeting for which such proxy card will be used, it is presumptively misleading. By contrast, the Commission's minutiae-laden Release takes a circuitous and tentative path that, unsurprisingly, falls short of the goal line.

Therefore, the Commission should stop tinkering with a fundamentally flawed proxy solicitation process and eliminate – not merely mitigate – the structural impediments that prevent all shareholders – including shareholders of mutual funds and business development companies – that cannot attend a meeting from voting for any *bona fide* nominee or on any proposal. Will the Commission, when faced with the inevitable opposition from lobbyists for incumbent directors and others that benefit from those structural impediments,[24] have the backbone to finally adopt proxy rules that eliminate them? If past performance is an indication, it is doubtful. But, time will tell.

Very truly yours,

Phillip Goldstein
Member

[24] "You don't need a weatherman to know which way the wind blows." Subterranean Homesick Blues by Bob Dylan.