June 7th, 2021

Submitted via electronic filing: rule-comments@sec.gov

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: File Number S7-24-16, Reopening of Comment Period for Universal Proxy

Dear Ms. Countryman:

The Ohio Public Employees Retirement System (OPERS) appreciates the opportunity to reiterate its support for the Securities and Exchange Commission's (Commission) 2016 release regarding the implementation of universal proxy cards. (Release No. 34-79164, October 26, 2016).

OPERS is the largest public retirement system in Ohio, with more than 1.1 million active, inactive, and retired members. This means that nearly one out of every 10 Ohioans has some connection to our System. For many of these individuals, OPERS represents the only retirement income they will ever receive. We invest more than $113 billion on our members' behalf and we make every effort to maximize the value of our investments, including regularly engaging with our portfolio companies on issues affecting shareholder value.

Introduction

We believe that boards of directors are shareholders' representatives at public companies. Just as voting for an elected official is the bedrock of a representative democracy, proposing and electing a director is perhaps the single most important stock ownership right that shareholders can exercise.

By electing directors who are best qualified to lead a company towards attainment of a sustainable long-term strategy, shareholders can help define the performance standards and expectations against which management is measured and held accountable. This is an integral part of maximizing the value of our investments, and as such, the shareholder franchise should be protected, and wherever practicable, strengthened. To that end, we believe that mandatory universal proxy cards should be provided in all non-exempt contested elections to (1) better allow shareholders to hold ineffective directors accountable for failures to properly monitor or prevent management misconduct, underperformance, or a diminishment in shareholder value, and (2) to enhance the ability of shareholders to elect directors of their choosing.

OPERS continues to support the Commission's 2016 proposal regarding the implementation and use of universal proxy cards. In our initial comments on the proposal, we praised the Commission's decisions to revise the consent requirement in the "bona fide nominee" rule and mandate the use of universal proxy cards in contested elections as these changes would allow shareholders to vote their proxies in a more equitable and flexible manner.

Since 2016, we have witnessed a noticeable and encouraging trend toward consensus on universal proxies. Various regulators have made public statements indicating interest in finalizing the Commission's 2016 proposal.[1] Scholars, researchers, and market observers have provided additional evidence and experience in support of universal proxies and their presumed effect on future proxy contests. Additionally, shareholder groups and other market participants have united, not only in support of the 2016 proposal, but also in support of recommendations for improving that proposal to ensure the proxy voting system continues to operate in a fair and effective manner.[2]

However, as the Commission notes in its reopening release, much has changed since 2016. In particular, shareholder engagement and activism has risen to become a topic of national conversation and debate, particularly on issues related to sustainability, including climate change, diversity, equity, inclusion, and human capital management.

Given the current focus on shareholder activities and influence, it makes sense to start by discussing again why we believe the establishment and use of universal proxies will not necessarily lead to frequent and costly proxy contests or promote short-sighted and self-interested views that are inconsistent with the maximization of shareholder wealth or company value.

There is little evidence to suggest that the establishment of a universal proxy mandate will lead to frequent proxy contests or disproportionately benefit special interests.

Scholarly research and analysis conducted since the release of the Commission's 2016 proposal does not support a conclusion that the adoption of a universal proxy mandate will be unduly

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[1] *See* speech by SEC Commissioner Elad L. Roisman at the Council of Institutional Investors' Spring Conference, (March 10, 2020), https://www.sec.gov/news/speech/speech-roisman-cii-2020-03-10 ("Finally, as I have been assessing our voting system from the perspective of how to best serve retail investors, I have come to believe the Commission should consider adopting a universal proxy rule. … There seems to be growing consensus that a universal proxy rule could provide benefits to everyone involved in a proxy contest, most importantly, the investors being solicited."). *See also*, speech by SEC Acting Chair Allison Herren Lee at the Center for American Progress, entitled "A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC," (March 15, 2021), https://www.sec.gov/news/speech/lee-climate-change ("Lastly, I have asked the staff to consider whether to recommend that the Commission re-open the comment file on the 2016 universal proxy rule proposal to take into account market developments since then and move towards finalization. … This rule proposal represents a common-sense step forward in modernizing our proxy rules and protecting shareholder rights. The proposal has been outstanding for far too long and should be finalized.").

[2] *See* letter from Universal Proxy Working Group to SEC Director of Corporation Finance William Hinman regarding "Universal Proxy Cards," pp. 2-3 (August 6, 2020) https://www.sec.gov/comments/s7-24-16/s72416-8347728-228998.pdf (Endorsing the SEC Investor Advisory Committee's recommendation regarding increasing the solicitation threshold for dissidents to use a universal proxy).

disruptive or deleterious to the proxy voting process. A 2016 post on the Harvard Law School Forum on Corporate Governance argued that a universal proxy mandate "would not significantly alter the outcome of proxy contests or activist situations."[3]

Similarly, a 2018 Harvard Law School study noted that there was, "no evidence to support the claim … that universal proxies … favor shareholder activists" and offered that the converse may, in fact, be true.[4] Based on this finding, the study extrapolated that since there was no evidence showing universal proxies favored dissidents, it followed that there would be "no evidence that dissidents are likely to initiate proxy contests more often under a universal proxy system."[5]

Given the high costs associated with waging a proxy contest, it is unlikely that dissidents will wage frequent or parochial proxy contests.

It is worth noting that waging a proxy battle can be expensive.[6] According to the Council of Institutional Investors, the legal, administrative, and solicitation costs associated with waging a proxy contest can run into the millions of dollars and dissidents are generally not reimbursed unless they win or reach some agreement with the company.[7] If as the research in the previous section suggests, a universal proxy card does not favor dissident nominees, there is little incentive for dissidents to engage in more frequent and resource intensive battles to further short-term or self-interested agendas simply because there is a universal proxy mandate.

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[3] Gail Weinstein and Philip Richter, Fried, Frank, Harris, Shriver & Jacobson LLP, "Universal Proxy Unlikely to be Adopted (and Would Have Little Effect Anyway)," Harvard Law School Forum on Corporate Governance (December 21, 2016), https://corpgov.law.harvard.edu/2016/12/21/universal-proxy-unlikely-to-be-adopted-and-would-have-little-effect-anyway/ ("In our view, in most cases, the universal proxy card mandate, if adopted, likely would not have a significant impact on the outcome in control elections or activist situations because: Strategic considerations override considerations relating to mechanics … [;] Institutional and other large shareholders already have meaningful incentive, and the ability, to split their vote when they wish to do so … [;] Most contested situations are settled before a vote … [; and] Dissidents rarely propose full slates.").

[4] Scott Hirst, *Universal Proxies*, 35 Yale J. on Reg. 437, 443 (2018) https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1519&context=yjreg ("The analysis shows no evidence to support the claim made by opponents of the regulation that universal proxies would favor shareholder activists. If anything, the actual effect is likely to favor managers. Of the contests where a distortion can be expected to have favored one side or the other, universal proxies can be expected to have resulted in management nominees being elected in place of dissident nominees in two-thirds of cases, compared to one-third of cases where dissident nominees would be elected in place of management nominees.").

[5] Id. at 444. ("Concerns have focused on the possibility that universal proxies would increase the ease of proxy contests for dissidents or dissidents' success rates in proxy contests. Since the evidence provides no basis to conclude that universal proxies would favor dissident nominees, there is also no evidence that dissidents are likely to initiate proxy contests more often under a universal proxy system. If anything, a universal proxy system may lead to slightly fewer proxy contests. Universal proxies could only have resulted in different outcomes where at least 30% of votes were in favor of at least one dissident. Contrary to concerns raised by commentators, universal proxies are therefore unlikely to result in greater success for dissidents with parochial views that are not shared by a significant proportion of shareholders.").

[6] Tima Bansal and Mark DesJardine, *Engine No. 1's big win over Exxon shows activist hedge funds joining fight against climate change*, Yahoo! Finance, May 26, 2021, https://finance.yahoo.com/news/engine-no-1s-big-win-194041355.html ("The total cost [of the proxy battle between Exxon and Engine No.1] … has exceeded $100m.")

[7] Council of Institutional Investors, FAQ: Why CII Supports the SEC's Universal Proxy Proposal, at 2 (2016) https://www.cii.org/files/issues_and_advocacy/board_accountability/universal%20proxy/Universal%20Proxy%20FAQ%2011-2-16%20final.pdf.

Further, though the Commission's 2016 proposal did not address the high costs associated with waging a proxy battle, subsequent recommendations made by various market participants could actually increase costs for dissidents, further disincentivizing frivolous contests. While the 2016 proposal required dissidents to solicit at least a majority of outstanding votes, OPERS has endorsed a recommendation offered by the SEC Investor Advisory Committee that would increase that threshold to two-thirds of outstanding votes.[8] In supporting this change, we hoped to prevent cases where dissidents focus their solicitation efforts on a relatively small number of institutional investors that constitute a simple majority of the voting power and largely ignore the broader shareholder base because their votes are not necessary to win the contest. That said, we also see an added benefit in discouraging proxy fights that are not in the best interests of all shareholders.

We believe the higher 67% threshold strikes an appropriate balance between improving the utility of the proxy voting system and ensuring that meaningful solicitation efforts are made. To the extent that this change results in higher costs, we are hopeful that this will cause challengers to prioritize those proxy battles that will result in increased value for all shareholders.

Plurality vote requirements for contested elections in place at many public companies suggest that only those directors actually favored by shareholders will be elected to corporate boards.

Contrary to speculation that a universal proxy mandate would favor special interests, it is perhaps more appropriate to say that it will assist in identifying special interests (i.e., nominees that are not aligned with the owners of the company). It is important to remember that there are plurality vote requirements in place at many public companies that govern contested elections and specify that, in order to be elected to the board, a nominee must obtain more votes than at least one nominee put forward by the opposing side. Simply submitting a slate of dissident candidates and soliciting votes on their behalf does not guarantee consideration, let alone success. There must be a reason for the change and some purpose tied to the enhancement of shareholder value.

OPERS has a duty to vote its proxies in the best interests of its members. If we vote for a director, it is because we believe they will enhance the long-term value of our investment. We depend on investment returns to fund two-thirds of our outgoing pension benefit payments. As such, we cannot use our rights and responsibilities as a shareholder to further special interests or other non-financial agendas.

Simply put, if shareholders believe that a company is undervalued or its directors lack the necessary skill sets to enhance shareholder value, they should have a meaningful ability to protect their investment and state their views by voting for directors who are aligned with their goals and will move the company in a more profitable and sustainable direction.

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[8] *See* Recommendations of the SEC Investor Advisory Committee regarding Proxy Plumbing, at 9 (September 5, 2019) https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-recommendation-proxy-plumbing.pdf.

Other Considerations – Presentation and Formatting Requirements

With regard to the format and presentation of the information on the universal proxy card, OPERS believes that the foremost concern should be ensuring a level playing field for all nominees. We have stated repeatedly that our goal in supporting a universal proxy mandate is to promote the right of shareholders to maximize the value of their investments by selecting the best directors, regardless of whether they have been put forward by management or a dissident. To that end, we have little interest in providing either side with an undue advantage.

To the extent that information on a universal proxy card can be manipulated to confer such an advantage, there is a need for additional consideration and perhaps regulation. Priority should be given to standardization or uniformity that reduces confusion and leads shareholders to consider the combined nominees on the basis of their own research and analysis, and not on the order, appearance, or spacing of the information. We believe that the information should be as clear and objective for retail investors as it is for institutional investors that have the capability to parse and interpret such information.

Conclusion

OPERS appreciates the opportunity to repeat and reinforce its support for the Commission's 2016 proposal. There is little evidence to suggest that this rule will disproportionately benefit special interests at the expense of public companies and their shareholders. Rather, a universal proxy mandate would allow shareholders – institutional and retail – to better exercise their rights in determining the most profitable direction for their portfolio companies. We view the universal proxy as a good corporate governance reform and a commonsense step toward introducing additional fairness, clarity, and efficiency into the proxy voting process.

Sincerely,

Patti Gazda

Patti Gazda
Corporate Governance Officer
Ohio Public Employees Retirement System