



Filed Electronically

June 7, 2021

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

Re: Universal Proxy; File No. S7-24-16

Dear Ms. Countryman:

Institutional Shareholder Services Inc. (ISS) is pleased to submit these comments in response to the above-referenced proposal to require the use of universal proxy cards in non-exempt solicitations related to contested elections of directors.¹ ISS applauds the Commission's decision to reopen the comment period and generally supports this proposal. We believe that modernizing and improving the proxy voting system is critical to ensuring that corporate elections are fair, transparent and efficient.

ISS is a federally registered investment adviser with more than 35 years of experience helping institutional investors meet their fiduciary responsibilities relating to proxy voting. Through its governance research and proxy voting recommendations, ISS today helps more than 1,600 clients—including employee benefit plans, investment managers and mutual funds—make and execute informed proxy voting decisions for approximately 45,000 shareholder meetings a year in over 110 developed and emerging markets worldwide. In addition to supplying data, research and vote recommendations, ISS also provides an electronic platform, known as ProxyExchange, that facilitates the operational aspects of proxy voting and allows institutional investors to focus their resources on the fiduciary task of making their voting decisions. Rounding out these services, ISS assists institutional investors in reporting their votes to their stakeholders and regulators.

Given our role in the proxy voting ecosystem, we have seen first-hand how the current rules impede shareholders' ability to exercise their right to elect directors through the proxy process. Thus, we support the mandatory inclusion of management and dissident nominees in a single proxy card, thereby providing shareholders voting by proxy with the ability to support what they believe to be the optimal board composition, more closely resembling how they can vote in person at a shareholder meeting.

¹ *Universal Proxy*, Exchange Act Rel. No. 79164 (Oct. 26, 2016), 81 Fed. Reg. 79122 (Nov. 10, 2016) (Proposing Release); *Reopening of Comment Period for Universal Proxy*, Exchange Act Rel. No. 91603 (Apr. 16, 2021), 86 Fed. Reg. 24364 (2021 Release).

General Thoughts on Cross-Slate Voting

Under current rules, shareholders, particularly those voting electronically, are generally limited to choosing among the slates of nominees selected by the soliciting parties, rather than being able to vote for their preferred combination of candidates. The rules for contested meetings typically allow only for the issuance of two or more competing proxy cards, which generally present one “management” slate and one or more “dissident” slates. There are currently no practical means to vote by proxy for a mix of nominees from more than one slate (a “cross-slate vote”). Instead, effecting a cross-slate vote generally requires a shareholder to appear at the contested meeting to vote in person and even this process is subject to complicated and often prohibitive conditions.

To attempt a cross-slate vote, the investor typically must first obtain consent from the inspector of the election, as well as the issuer’s solicitor, to confirm that such a vote will not simply be discarded as invalid. Once such consent has been granted, the investor must request necessary documentation—known as a “legal proxy request”—from the proxy delivery agent so the investor can attend and vote at the meeting. The issuance of this documentation can take anywhere from 48-72 hours to complete due to the need for the delivery agent to work with custodians and other intermediaries in the voting process to confirm the holdings data. Once the legal proxies have been issued, the investor must manually complete a proxy card and then add manual edits to indicate which director nominees from which slates are being chosen. The completed card and the legal proxies are then submitted to the issuer’s solicitation agent and the votes are processed manually at the meeting.

Even electronic voting platforms cannot speed this process along. Although ISS’ ProxyExchange streamlines proxy voting by facilitating the operational aspects of the process, cross-slate voting cannot be done electronically because of procedural requirements that typically demand manual intervention. Moreover, when we do facilitate manual cross-slate votes for clients through our client services and operations teams, we do not receive assurance that the vote will be accepted at the meeting, and recordkeeping challenges may arise. In ISS’ experience, these factors frequently discourage investors from attempting to cross-slate vote by proxy for fear that their votes could be miscounted or not processed at all. As the Proposing Release acknowledges, the only guaranteed way to effect a cross-slate vote is to attend a meeting and vote in person. Many investors, particularly small investors for whom the costs of attending a meeting and going through the process of a legal proxy request are prohibitive, are thus effectively denied the right to vote for the directors of their choice.

By forcing shareholders to limit their choices to nominees available on either the management slate or the dissident slate, the current system gives shareholders a sub-optimal way to exercise their most fundamental right of share ownership². By contrast, the adoption of universal cards would allow shareholders to have a more direct and meaningful way to address critical issues through the election of the set of individuals that they think are best qualified to serve on the board.

For these reasons, ISS strongly supports the Commission’s universal proxy card proposal. Should this proposal be adopted, shareholders would have an appropriate path to elect the directors of their choice, and ISS would be able to support significant investor demand for cross-slate voting through Proxy Exchange. Allowing for cross-slate voting by proxy by the use of a single proxy card,

² See *Concept Release on the U.S. Proxy System*, Exchange Act Rel. No. 62495 (Jul. 14, 2010) 10, 75 Fed. Reg. 42982, 42984 (Jul. 22, 2010) (describing shareholders’ “right to vote their shares to elect directors” as “a fundamental tenet of state corporation law”).

which would also simplify the in-person voting process, will result in increased engagement between issuers and investors and facilitate investors' right to accurately represent their interests through full and informed suffrage.

Additional Comments

In addition to the above, ISS welcomes the opportunity to comment specifically on certain questions the Commission has asked in the Proposing Release and 2021 Release.

Proposing Release

*Question 18:*³ We support mandatory universal proxies under qualifying circumstances given our interest in ensuring equitable voting opportunities for shareholders. Optional use of universal proxies is likely to cause unnecessary confusion and result in the invalidation of shareholder votes. Additionally, contested elections already occur in a compressed time period. The Commission's proposed circumstances of an optional universal proxy, such as the ability for one party to opt to use a universal proxy in the midst of a contest, are unworkable due to time constraints, and again would lead to a strong likelihood of investor confusion.

*Question 51:*⁴ We support the Proposing Release's presentation and formatting requirements and agree that they advance the goal of avoiding investor confusion by standardizing the information presented to investors. We strongly support the requirement that nominees be listed alphabetically on the proxy by last name and that the nominees be clearly identified as being either management or dissident nominees. In our experience with universal proxy cards, flexibility regarding the order of how the nominees are listed generally results in each card's listing its own nominees first in an attempt to stack the deck.⁵

*Question 86:*⁶ Whether or not the use of universal proxies leads to more instances of mixed boards depends on the effectiveness of the current board. A board that is viewed by shareholders as effective is unlikely to be targeted by dissidents, and, where dissidents do target such a board, that board would have a strong argument against the dissident candidates. A universal proxy allowing shareholders to more fully examine all candidates improves corporate governance standards by providing board accountability in the unusual but serious situations where a board is considered to be ineffective and in need of changes from the outside.⁷ In such situations a universal card would facilitate the proper implementation of what

³ Proposing Release at 42, 81 Fed. Reg. at 79133.

⁴ *Id.* at 79, 81 Fed. Reg. at 79142.

⁵ For details of our experience with universal proxy cards which have not been standardized, please see our response to the 2021 Release, Question 6, *infra*.

⁶ Proposing Release at 210, 81 Fed. Reg. at 79178.

⁷ See Scott Hirst, *Universal Proxies*, 35 YALE J. ON REG. 437, 446 (2018) (describing contested elections as "a key feature of the corporate governance landscape" and universal proxies as a necessary tool for investor participation in this process).

shareholders believe to be the appropriate remedy while at the same time reducing the possibility of an inadvertent “overreach” because if a dissident makes a strong case for only a limited number of director replacements but nominates a full slate, investors voting on the dissident card run the risk of electing more than the necessary number of dissident nominees. We are aware of concerns that certain directors may refuse to serve on a mixed board, but note that any director who refuses to serve on a board not to their liking has the right to step down or be removed. We would also observe that an incumbent director who refuses to serve with dissident nominees duly elected by shareholders is arguably validating the concerns that caused a dissident slate to be proposed in the first place.

2021 Release

*Question 1:*⁸ Requiring dissident candidates to receive a higher majority of shareholder support than board candidates would be an unnecessary barrier to a well-rounded set of candidates reaching voters. Majority voting standards for director elections are a generally accepted good corporate governance practice⁹ and already set an appropriately high bar for shareholder-proposed candidates. Adopting higher solicitation requirements for dissident candidates would also break from the standards adopted by other developed markets, which utilize a universal proxy as standard practice, with simple majority or equal solicitation requirements for all director candidates, including those put forward by shareholders. Higher requirements would also undermine what we view as one of the key points of using universal cards, namely leveling the playing field in a contested election.

*Question 6:*¹⁰ Between 2012-2017, bona fide universal proxy cards appear to have been used only in three contests that went to a vote, none of which involved a US-incorporated company.

Year	Company	Dissident	Result
2012	Canadian Pacific Railway Ltd. (Canada)	Pershing Square	7 of 7 dissidents elected
2013	Transocean Ltd. (Switzerland)	Icahn Capital	1 of 3 dissidents elected
2017	Granite REIT Inc. (Canada)	FrontFour/Sandpiper	1 of 3 dissidents elected

The form of universal proxies used in these contests suggests that universal cards, in the absence of set standards for formatting, may still be prone to tactical manipulation. For example, in the Granite contest, board size was limited to eight directors. If shareholders utilizing the dissident card (which included the eight

⁸ 2021 Release at 7, 86 Fed. Reg. at 24366.

⁹ See David P. Porter, *Institutional Investors and Their Role in Corporate Governance: Reflections by a “Recovering” Corporate Governance Lawyer*, 59 CASE W. RES. L. REV. 627, 666 (2009) (describing majority voting standards as “a concept of good governance and shareholder democracy”).

¹⁰ 2021 Release at 8, 86 Fed. Reg. at 24366.

management and three dissident nominees) voted for more than eight total directors, only the first eight votes were recorded. The dissident card listed the three dissident nominees first, while the management card did not include the dissident nominees at all. In the Canadian Pacific contest, shareholders were asked to select 16 directors among 22 total candidates, including 15 management and seven dissident nominees. Each side listed their nominees first on their respective cards. Pershing's proxy card recorded only the first 16 votes "FOR." If shareholders voted more than 16 nominees on the management card, none of their votes was counted. And in the TransOcean contest, votes were invalidated on both the management and dissident cards if shareholders selected more than the maximum of five seats available (there were eight total candidates including five management and three dissident nominees). The company nominees were listed first on both cards. These results reinforce the need for uniform standards on the universal proxy and suggest that, to date, U.S. investors have limited experience with appropriately formatted universal proxy cards.

Since 2017, only one contest that went all the way to a vote in the US utilized a universal card (EQT Corp. in 2019). In this case, however, the universal card was of limited consequence because the dissident not only articulated a compelling case for majority change, but measured its request for board representation by seeking to elect a simple majority, nominating seven candidates to the 12-member board, all of whom were elected.

* * * *

We would be happy to supply the Commission or the staff with additional information regarding any of the matters discussed herein. Please direct questions about these comments to the undersigned, to our General Counsel, Steven Friedman, who can be reached at 301.556.0420, or to our outside counsel, Mari-Anne Pisarri, who can be reached at 202.223.4418.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gary Retelny", with a long horizontal flourish extending to the left.

Gary Retelny
President and CEO

cc: The Honorable Gary Gensler, Chairman
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
The Honorable Allison H. Lee
The Honorable Caroline A. Crenshaw
John Coates, Acting Director, Division of Corporation Finance