June 7, 2021

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

Re: Reopening of Comment Period for Universal Proxy (File No. S7-24-16)

Dear Ms. Countryman:

Better Markets appreciates the opportunity to further comment on the above-captioned release ("Release")[1] by the Securities and Exchange Commission ("SEC" or "Commission"), which reopens the comment period for the SEC's proposal to establish a universal proxy requirement for non-exempt contested director elections ("Proposal").[2] We reiterate our support for the Proposal, which we expressed in our previous comment letter in 2017, and urge the Commission to finalize it without further delay.[3]

OVERVIEW

Corporate suffrage is one of the most fundamental shareholder rights, largely created under state corporate law and a company's own policies but also recognized in the Securities Exchange Act of 1934 ("Exchange Act") and the federal framework for regulating the U.S. securities markets. In the Committee report that accompanied the Exchange Act, Congress wrote, "fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange."[4]

Exercising that right is typically accomplished through the proxy voting process, allowing shareholders to cast their votes on important matters of corporate governance even if they cannot

1 86 Fed. Reg. 24,364 (May 6, 2021).
2 Universal Proxy, 81 Fed. Reg. 79,122 (Nov. 10, 2016).
3 Comment Letter from Better Markets on Universal Proxy (Jan. 9, 2017) ("Better Markets 2017 Letter"), https://bettermarkets.com/rulemaking/better-markets-comment-letter-sec-universal-proxy.
4 *See* H.R. Rep. No. 73-1383, 2d Sess., at 13 (1934).

or choose not to attend shareholder meetings in person. Section 14 of the Exchange Act "authorizes the Commission to establish rules and regulations governing the solicitation of any proxy or consent or authorization in respect of any security registered pursuant to Section 12 of the Exchange Act."[5] And such "regulation of the proxy process has been a core function of the Commission since its inception."[6] In a detailed study of the U.S. proxy system, the Commission further emphasized that corporate proxy is the "principal means by which shareholders can exercise their voting rights."[7]

Today, the choices available to shareholders voting for duly nominated directors through the proxy process are not the same as those available to shareholders who attend shareholder meetings. Shareholders voting by proxy are effectively required to choose either the company's nominees or those submitted by dissident shareholders, but not a mixture of both slates. The Proposal aims to fix this problem by requiring both the company and the dissident shareholders to use a Universal Proxy listing all duly nominated candidates. This change will afford those voting through the proxy process the same ability to select their preferred mix of candidates as that available to shareholders attending shareholder meetings in person.

BACKGROUND

The ability to vote in the election of directors of public companies is perhaps the single most effective means by which shareholders can hold directors and management of the companies they invest in accountable. Shareholders exercise their right of corporate suffrage by either attending annual shareholder meetings or authorizing a third party through the proxy process to vote on their behalf. Currently, because few shareholders physically attend these meetings, most voting is done through the proxy process. Yet, during a contested election, where both management and dissident parties provide proxy cards, shareholders voting through proxy are typically able to pick from only one list. In contrast, shareholders physically present at the meeting (or having authorized a third party to be physically present on their behalf at a shareholder meeting) are able to select a mix of candidates from both slates.

In other words, shareholders voting by proxy may select from only one slate, either the management's or that of the dissident party, but cannot "mix and match." The SEC's own "bona fide nominee" rule requires that all soliciting parties receive the consent of a candidate before they can include them on their slate. Thus, in an "election contest, one party may not include the other party's nominees on its proxy card unless the other party's nominees consent."[8] However, since "contested elections are usually contentious, the nominees may refuse to consent to being included on the opposing party's card because of a perceived advantage to forcing shareholders to choose

5 Proposal at 79,123.
6 Proposal at 79,123.
7 *See* Concept Release on the U.S. Proxy System at 6 (Release No. 34-62495), Securities and Exchange Commission (2010).
8 Proposal at 79,124.

between the competing slates of nominees. A party's nominees may also refuse to consent to being named on the opposing party's proxy card because the nominees do not want to appear to support the opposing party's position or director nominees. As a result, non-attending shareholders are limited in their ability to vote for a mix of directors from both the company's and the dissident's slate."[9]

OVERVIEW OF PROPOSAL

Under the Proposal, those voting through proxy will have the ability to select their desired nominees from all parties, just as shareholders who attend shareholder meetings in person are able to do today. Specifically, the Proposal would:

- Revise the "bona fide nominee" rule to permit parties to use the names of duly nominated candidates without seeking consent;

- Eliminate the "short slate" rule, which currently helps dissidents to solicit proxies for a partial slate. Should the Proposal be adopted as released, the "short slate" rule would no longer be necessary since, through the use of a Universal Proxy, dissidents would be allowed to nominate as many or as few candidates as they decide;

- Require the use of Universal Proxy cards in all non-exempt solicitations in connection with contested elections;

- Require dissidents to provide companies with notice of intent to solicit proxies in support of nominees other than the company's nominees and the names of the nominees;

- Require companies to provide dissidents with notice of the names of the company's nominees;

- Prescribe a filing deadline for dissidents' definitive proxy statement;

- Require dissidents to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election; and

- Prescribe requirements for the form of universal proxy card that would be primarily aimed at preventing any shareholder confusion over the mechanics of voting and the significance of having competing slates of nominees on the same card.

COMMENTS

We continue to support this Proposal, just as we did in 2017. The proxy system is the principal means by which shareholders in public companies exercise their voting rights. It is

[9] Proposal at 79,124.

"important that this system functions efficiently and in a manner that adequately protects the interests of shareholders"[10] and that **all** shareholders voting through the proxy process have fundamentally the same voting options and powers as that enjoyed by the small number of shareholders who are able to afford to be present at shareholder meetings in person.

We conveyed a sense of urgency in our comment letter in 2017, pressing the Commission to "act without delay."[11] Prompt action was warranted, as the inequities surrounding the existing proxy process had been examined and exposed for years. As explained in the original Release, calls for change, including use of the universal proxy, surfaced at the SEC's Investor Advisory Committee in 2013; in a petition for rulemaking submitted to the SEC in 2014; and at an SEC roundtable convened in 2015. And even where advocates may have disagreed on the details regarding proxy design, there was general acknowledgment of the need for reform: "While panelists [at the roundtable] differed on many aspects of the universal proxy card, the fundamental concept that the proxy system should allow shareholders to vote by proxy as closely as possible to how they could vote in person at a shareholder meeting was generally acknowledged."[12] Unfortunately, the Commission, which underwent a change in leadership with the transition to the Trump administration, took no action to finalize the Proposal.

In the meantime, the need for the Proposal has grown more urgent. Corporate boards are facing increasingly vital policy issues, especially those surrounding the environment, racial justice and other looming socio-economic challenges ("ESG" concerns). At the same time, shareholders are increasingly intent on making sure that corporate leaders address these challenges in accordance with their views. This shareholder engagement has intensified as many incumbent managers and boards have paid insufficient attention to these larger social and economic challenges and to shareholder preferences for changes in corporate policy. What's at stake are corporate policies that will impact companies, communities, and ultimately the entire world for decades. To the extent these decisions are shaped through board elections and proxy contests, it is essential that shareholders are able to fully exercise their suffrage in the manner that best reflects their values and perceptions of the best path forward for maximizing both corporate and societal value.

At the same time, the arguments from opponents of the Proposal have largely proven to be unconvincing. Accordingly, there is little reason for further delay, and Better Markets again stresses the urgency of finalizing the Proposal. We also reiterate our view that the Commission should enhance the Proposal by requiring both parties—management and dissidents alike—to solicit the same number of investors. This will help ensure that retail investors are included more fully in the proxy process and can make fully informed decisions. It will also promote fairness by reducing free-riding and providing reimbursement for successful dissenters. Finally, we urge the SEC to revisit its proposed exception for investment companies and business development companies ("BDCs").

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10 Release at 79,158.
11 Better Markets 2017 Comment Letter at 1.
12 Release at 79,126.

I. THE SEC MUST FINALIZE UNIVERSAL PROXY RULES WITHOUT ANY FURTHER DELAY.

The Proposal was the result of years of careful consideration by the Commission. The SEC, consistent with Congressional intent,[13] has long been focused on the proxy process, in particular how it contributes to the disenfranchisement of shareholders, and how it might change its proxy rules to address this disenfranchisement. The Commission adopted the short slate rule nearly three decades ago, in 1992, in part to address this disenfranchisement. Shareholder disenfranchisement through the proxy process has also been the subject of recommendations by the SEC's Investor Advisory Committee, issued in 2013, a 2014 rulemaking petition, and a 2015 Commission roundtable.

Given the meticulous attention paid to this issue over years by the Commission, it is unsurprising that the Proposal was and remains a well-considered, well-researched policy proposal with a clear-eyed view of the problem and a thoughtful solution to address it. And view has been shared by stakeholders representing a variety of interests, including pension funds and other institutional investors,[14] broker-dealers and other investment professionals,[15] at least one securities

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13 *See* S. Rep. No. 73-792, at 12 (1934) (explaining that the Exchange Act gives the SEC "power to control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which have frustrated the free exercise of the voting rights of stockholders").

14 Comment Letter from California State Teachers' Retirement System on Universal Proxy at 1 (Jan. 9, 2017) ("We thank the Commission for the opportunity to support and comment on the well-researched, prudent and attentive proposed rule on Universal Proxy Letter"), https://www.sec.gov/comments/s7-24-16/s72416-1471415-130426.pdf; Comment Letter from United Brotherhood of Carpenters and Joiners of America on Universal Proxy at 1 (Jan. 9, 2017) ("The Commission's rulemaking proposal is a serious and thoughtful effort to address shortcomings in election proxies."), https://www.sec.gov/comments/s7-24-16/s72416-1471251-130421.pdf; Comment Letter from Council of Institutional Investors on Universal Proxy at 2-3 (Dec. 28, 2016) ("The rule amendments proposed were well-researched, thoughtful and appropriate."), https://www.sec.gov/comments/s7-24-16/s72416-1450259-130101.pdf.

15 Comment Letter from Fidelity Investments on Universal Proxy at 2 (Jan. 9, 2017) ("the Commission is right to focus its attention on shareholder voting in contested director elections given the importance of shareholder voting in this context and the discrepancy that arises between shareholder votes cast in person versus shareholder votes cast by proxy"), https://www.sec.gov/comments/s7-24-16/s72416-1471250-130420.pdf; Comment Letter from CFA Institute on Universal Proxy at 1 (Jan. 9, 2017) ("We commend the SEC for addressing this shortcoming of the board voting process by introducing a new Universal Proxy ballot rule that will allow shareowners to effectively split their voting ticket if they chose to do so – without having to attend a company's annual meeting in person."), https://www.sec.gov/comments/s7-24-16/s72416-1473944-130452.pdf.

industry trade association,[16] and investor advocates.[17] The upshot is that the Proposal could be finalized as proposed, immediately, and it would represent a marked improvement over the unfair and indefensible status quo. Thus, while Better Markets appreciates the Commission's reopening of the comment period to move forward with this rulemaking after it languished for four years under prior SEC leadership, and recognizes that the Commission can and should still make some improvements to the Proposal, as detailed below, we reiterate what we said over four years ago: "[A]bove all, we urge the Commission to act without delay on this Proposal and approve a final rule that promises to empower shareholders in simple but new and important ways."[18] The passage of time since the release of the Proposal has not changed its underlying premise. Indeed, recent experience with contested board elections only confirms the steadily growing acceptance of the need for reform even among corporate leaders.[19] And the pressing societal and economic challenges noted above make full and fair shareholder suffrage all the more urgent. Meanwhile, the arguments put forth against the Proposal remain as thin as ever.

A. Universal Proxy is More Important Than Ever to Ensure Shareholders Can Participate in Critical Decisions About the Direction of the Companies They Own.

The Proposal is an appropriate and necessary reform as a matter of fundamental fairness and as a means of facilitating shareholders' fundamental right to participate in the governance of the companies they own. It has recently taken on even greater importance in light of investors' increasing interest in the response to ESG challenges by the companies they own. More and more investors recognize that there is value in companies' proactively and constructively engaging with their communities and other stakeholders and pursuing a range of goals rather than just chasing short-term profits. These issues were brought to the fore when the murder of George Floyd, a Black man, by a white police officer last year, sparked a broad-based reckoning about race and racism in every aspect of American society, including corporate America. Investors, in addition to recognizing that racism is fundamentally unjust and cruel, also recognize that racism is bad for

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16 Comment Letter from SIFMA on Universal Proxy (Jan. 9, 2017) ("SIFMA recognizes the considerable efforts and research the SEC put into the release and proposals…SIFMA supports the proposed proxy voting process that seeks to replicate the choice shareholders could make by attending a shareholder meeting in person."), https://www.sec.gov/comments/s7-24-16/s72416-1481514-130535.pdf.

17 Better Markets Comment Letter on Universal Proxy at 5 (Jan. 9, 2017) ("The Commission has released a Proposal that promises to empower and further engages shareholders in exercising their corporate suffrage rights."), https://bettermarkets.com/rulemaking/better-markets-comment-letter-sec-universal-proxy.

18 Comment Letter from Better Markets on Universal Proxy at 1 (Jan. 9, 2017), https://bettermarkets.com/rulemaking/better-markets-comment-letter-sec-universal-proxy.

19 *See* Sydney Posner, *Has Universal Proxy Been Resuscitated*, COOLEY PUBCO BLOG (Apr. 19, 2021) ("However, it became apparent at a 2018 meeting of the SEC's Investor Advisory Committee…that something of a consensus had recently developed on the potential value of universal proxy cards in proxy contests, as some issuers had apparently recognized that universal proxy could, in some cases, help the management slate."), https://cooleypubco.com/2021/04/19/universal-proxy-resuscitated/.

business in a variety of ways. For example, a May 2020 report by McKinsey & Company demonstrated that companies with more diversity experience higher profitability.[20] Relatedly, consumers and potential customers are factoring corporate policies surrounding diversity into their spending decisions.[21] Consumers and investors also recognize that social unrest is bad for companies, communities, and the economy at large; and we know that the mistreatment of Black people and other marginalized groups leads to social unrest, as evidenced by the widespread protests in response to the George Floyd murder.[22]

Climate change is another ESG issue that is increasingly important to shareholders and that may have an even more direct and tangible impact on the value of the companies they own. There is no aspect of society that will not ultimately be impacted by both climate change itself and the effort to combat climate change. Climate change poses short-term and long-term threats to a wide range of businesses, including disruptions in supply chains, destruction of physical infrastructure and assets, reduced revenues, loss of buying power among clients and consumers, and costly changes in workforce distribution and access. Efforts to combat climate change, including reductions in the use of fossil fuels and increases in consumer preferences for products that are carbon-neutral, also promise to have a widespread impact on companies across a wide variety of sectors.

Unfortunately, generally speaking, companies have been slow to address these issues, in no small part because at many companies, incumbent management and directors lack the sensitivity, experience, or expertise necessary to do so; and they may not even recognize the threat that failure to address these issues pose to the value of the companies they are responsible for

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[20] McKinsey & Company, Diversity Wins: How Inclusion Matters (May 2020), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf.

[21] S&P Global Ratings, Why Corporations' Responses to George Floyd Protests Matter (Jul. 23, 2020) ("Companies are increasingly aware that failure to maintain stakeholder buy-in can lead to a loss of market share, which can affect credit quality in the long term. For example, a DeVries Global survey (published June 2, 2020) of 1,000 Americans found that more than 62% of respondents under the age of 35 said they will be "doing more research on brands and their inclusivity practices before purchasing." This implies companies that publicly demonstrate such practices may benefit from satisfying their customer base. To illustrate, after sportswear giant Nike launched its 2018 campaign featuring NFL quarterback Colin Kaepernick, its sales increased and its stock price reached an all-time high. Kaepernick controversially knelt during the national anthem before a 2016 game to protest against police brutality, and became a free agent the following season."), https://www.spglobal.com/ratings/en/research/articles/200723-environmental-social-and-governance-why-corporations-responses-to-george-floyd-protests-matter-11568216.

[22] Rob Garver, Economic Damage From Civil Unrest May Persist for Decades (Jun. 2, 2020), https://www.voanews.com/usa/nation-turmoil-george-floyd-protests/economic-damage-civil-unrest-may-persist-decades.

stewarding.[23] The failures of incumbent management and incumbent directors along these lines have often been to the detriment of their companies' value.[24] And the adverse consequences of this inattention promise to get worse, as decisions made at companies in the next few years about these and other ESG-related issues promise to have a decades-long impact on the financial viability of those companies and, accordingly, on the value of shareholder holdings.

Given these trends—the importance of ESG issues, increasing investor focus on those issues, and the shortcomings of corporate leadership in addressing them—ESG concerns such as racial justice and climate change are increasingly likely to be a major focus of proxy contests. It is therefore imperative that all shareholders have a full and fair ability to express their will—whatever position they make take on ESG issues—and influence corporate leadership via the proxy process. Accordingly, the SEC must ensure that all shareholders, regardless of their ability to attend a meeting in person,[25] have the ability to vote for the mix of directors that reflect both their values and their perception of what is best for the long-term value of their company.

B. Opponents to the Proposal Have Shown They Have No Real Arguments Except a Thinly-Veiled Desire to Protect Incumbents From Accountability.

Although there is broad agreement among many stakeholders regarding the need for proxy reform and the value of the universal proxy, some nevertheless voice opposition. However another reason the SEC should finalize the Proposal without further delay is that it has now seen the

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23 *See* McKinsey & Company, Diversity Wins: How Inclusion Matters at 13-21 (May 2020) (explaining there has been slow progress in increasing diversity at companies despite clear business case for doing so), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf.

24 *See* McKinsey & Company, Diversity Wins: How Inclusion Matters at 13-21 (May 2020) (explaining how failure to address lack of diversity hurts profitability), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf; Steven Mufson, *The Fight for the Soul—And the Future—of ExxonMobil*, Washington Post (May 22, 2021) (noting how ExxonMobil's failure to address climate change has led to poor financial results and a shareholder revolt), https://www.washingtonpost.com/climate-environment/2021/05/21/exxon-faces-shareholder-revolt-over-climate-change/.

25 One of the requests for comment posed by the Commission in the Release concerns the increased prevalence of virtual shareholder meetings in light of the COVID-19 pandemic, and the impact on the need for the Proposal. Release at 24,366. While the increased frequency of virtual meetings may make it somewhat easier for more shareholders to attend shareholder meetings, this does not lessen the need for the Commission to finalize the Proposal. Even when held virtually, there are still barriers that will prevent many (if not most) shareholders from attending shareholder meetings, including simple lack of time. Ultimately, the rationale for the Proposal is unchanged: Shareholders who are unable to attend a shareholder meeting should not be disenfranchised simply because of that fact.

arguments from those opponents, and it is clear that those arguments carry little weight, largely consisting of evidence-free speculation.

1. Opponents present no evidence that the Proposal would increase proxy contests and no evidence that, even if it did, an increase in proxy contests would be an adverse outcome.

One argument presented by opponents of the Proposal is that adoption of a universal proxy would "would inevitably increase the frequency and ease of proxy fights" that will drain company resources.[26] First, however, while this assertion is offered confidently, it is also offered with **absolutely no evidence** that would justify such a contention. Proxy contests are notoriously expensive.[27] As the SEC explained in the Proposal, for dissidents in a typical proxy contest, direct costs would

> "generally include solicitation costs, such as basic proxy distribution and postage costs, expenditures on proxy solicitors, attorneys and public relations advisors, and any time spent by the parties or their staff on outreach efforts… time spent by the dissident to pursue a contest, the cost to seek nominees and gain their consent to be nominated, and the cost of drafting a preliminary and definitive proxy statement and undergoing the staff's review and comment process for those filings."[28]

Opponents offer no plausible mechanism by which any of these costs would be reduced for dissidents simply by virtue of the Proposal so as to make proxy contests more likely.[29] The SEC notes that the Proposal may result in significant changes to the indirect costs of launching a proxy contest, but it correctly adds that both the direction and magnitude of the change would be highly dependent on the context in which any particular proxy contest might potentially take place.[30] Opponents offer no evidence or any plausible mechanism by which such indirect costs would be reduced for potential dissidents across the board. What evidence exists suggests that universal proxies would have **reduced dissidents' likelihood** of success, which would make proxy contests less likely, not more likely.[31]

Second, even if there were some compelling reason to think that adoption of the universal proxy would lower the costs of launching a proxy contest and, therefore, result in more such

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26 Comment Letter from Chamber of Commerce on Universal Proxy at 2-3 (Jan. 9, 2017), https://www.sec.gov/comments/s7-24-16/s72416-1471278-130423.pdf.

27 The Release cites a study that showed, on average, dissidents spend $275,000, but depending on the size of the capitalization of the company, the costs could be much higher than the average. *See* Release at 79,153 n.256.

28 Proposal at 79,161-62.

29 If anything, as the SEC notes, the requirement that dissidents solicit at least a majority of shares entitled to vote for board seats, which does not currently exist, would increase costs for dissidents, at least in those few cases where dissidents do not currently solicit a majority of shares for some reason. Proposal at 79,138, 79,162.

30 Proposal at 79,162.

31 Scott Hirst, *Universal Proxies*, 35 Yale J. on Reg. 437, 495 (2018).

contests, there is no reason (in the record or elsewhere) to conclude that this would necessarily be a bad or undesirable development. As a matter of principle, if proxy contests **were to** increase in frequency because an arbitrary and unfair system of proxy voting is corrected, then the outcome is fair and appropriate. In other words, such an increase might simply reflect the fact that the current rules are unduly and irrationally favorable to incumbent directors and management.

Moreover, as a practical matter, opponents have offered no evidence that the incidence of proxy contests under the status quo is optimal and that an increase in proxy contests would hurt investors. In fact, as the SEC has noted, evidence indicates that "[s]trong shareholder rights have been associated with higher firm valuations and better-developed equity markets."[32] In other words, even if the unfounded "fear" of opponents that adoption of the Proposal would result in more proxy contests proves to be accurate, the evidence suggests this would **actually be a desirable outcome** because it would increase shareholder value and the strength of the U.S. equity markets. Given that protection of investors and promotion of strong equity markets are explicit goals of the SEC, while the protection of incumbents is not, this argument from opponents of the Proposal actually is an argument in support the Proposal.

2. Opponents' opposition is belied by investors themselves, who overwhelmingly support the Proposal.

Relatedly, opponents of the Proposal argue that it will hurt most investors in part because it will emphasize short-term gains over long-term performance.[33] Yet again, opponents offer no evidence in support of this assertion. Indeed, there is no reason for the SEC to turn to business groups that inherently favor incumbent management to determine the impact on investors of the universal proxy, because investors themselves have weighed in and are overwhelmingly in favor of universal proxies.[34] Presumably, investors know what their interests are and can articulate those interests; opponents' insistence that they are the true stewards of investor interests, in defiance of what investors themselves say, is little more than a paternalistic smokescreen masking their desire to protect incumbents.

And even if the SEC were inclined to discount what investors themselves say is good for investors, there is little objective evidence that incumbent managers and directors have served shareholders well on the issues shareholders are increasingly concerned about. In particular, as noted above, ESG issues—which concern long-term value creation, not short-term profits—are increasingly important to shareholders and likely to be the predominant focus of proxy contests. And on those issues, companies have largely failed their shareholders as incumbent managers and

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32 Proposal at 79,158.

33 Comment Letter from Chamber of Commerce on Universal Proxy at 2-3 (Jan. 9, 2017), https://www.sec.gov/comments/s7-24-16/s72416-1471278-130423.pdf; Comment Letter from Business Roundtable on Universal Proxy at 3 (Jan. 9, 2017), https://www.sec.gov/comments/s7-24-16/s72416-1468026-130391.pdf.

34 *See supra* Section I.

directors have been slow to embrace ESG policies that would unlock value for their companies and serve broader public interests.[35]

Similarly, opponents have argued that universal proxies, which would facilitate split-ticket voting, would lead to "balkanization" of boards of directors, undermining the functioning of boards because increasingly fragmented boards will not be pulling in the same direction.[36] However, it is of little use to shareholders to have a unified board of directors all pulling in the same direction if those directors are all pulling in the wrong direction. Conversely, shareholders may realize significant value if at least some dissident directors are able to provide a fresh perspective on the issues facing a company. In any event, as the Commission has correctly noted, concerns that election of some dissident directors to serve alongside incumbent directors would decrease the effectiveness of a board are "best made to the shareholders for their consideration when making voting decisions" rather than through attempts to maintain a regulatory barrier to the fair exercise of the shareholder franchise.[37]

3. The SEC has already addressed concerns that adoption of universal proxy could confuse shareholders.

Opponents also argue that use of universal proxies could confuse shareholders, who apparently may suffer a variety of misconceptions from the presence of both management and dissident nominees on the same card: Shareholders may think that nominees from one slate endorse nominees from the other slate, or may believe that there is a "false equivalency" between the two slates of candidates, or may be induced to select an erroneous number of candidates.[38] Whatever merit these concerns may have in a vacuum, they are no longer relevant here given that in the Proposal, the SEC explicitly addressed concerns about potential confusion by requiring clear and conspicuous disclosures on the card itself, including delineating between the opposing slates, the

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35 *See* McKinsey & Company, Diversity Wins: How Inclusion Matters at 13-21 (May 2020) (explaining how failure to address lack of diversity hurts profitability), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf; Steven Mufson, *The Fight for the Soul—And the Future—of ExxonMobil*, Washington Post (May 22, 2021) (noting how ExxonMobil's failure to address climate change has led to poor financial results and a shareholder revolt), https://www.washingtonpost.com/climate-environment/2021/05/21/exxon-faces-shareholder-revolt-over-climate-change/.

36 Comment Letter from Chamber of Commerce on Universal Proxy at 3 (Jan. 9, 2017), https://www.sec.gov/comments/s7-24-16/s72416-1471278-130423.pdf; Comment Letter from National Association of Corporate Directors at 1-2 (Jan. 9, 2017), https://www.sec.gov/comments/s7-24-16/s72416-1459013-130215.pdf.

37 Proposal at 79,127.

38 Comment Letter from Business Roundtable on Universal Proxy at 2-3 (Jan. 9, 2017), https://www.sec.gov/comments/s7-24-16/s72416-1468026-130391.pdf.

maximum number of board seats, and the effect of various potential errors (i.e. overvotes or undervotes).[39]

II. THE SEC SHOULD REQUIRE THAT ALL PARTIES SOLICIT THE SAME NUMBER OF SHAREHOLDERS.

One concern raised by opponents that is not specious is that in proxy contests, some investors may not be afforded an opportunity to make a fully informed decision because there is no requirement that dissidents solicit all shareholders. The Proposal goes a long way towards mitigating this possibility (and eliminating the potential for dissidents to free ride on a company's own solicitation efforts) by requiring that dissidents at least solicit a majority of shares eligible to vote for directors. However, given that a majority of shares will often be held by just a few institutional investors, this minimum solicitation requirement may result in a significant number of retail investors not being solicited, and thus not having the opportunity to make a fully informed decision in the voting process. Accordingly, we reiterate that the SEC must include a provision that prevents unfair "free riding" by dissidents but also makes it more cost effective and feasible for them to solicit the currently under-involved small investor base. We therefore continue to recommend that the Commission adopt a hybrid approach:

1. Require all soliciting parties to solicit proxies from the same number of investors (which in practice will typically mean all investors), ensuring that a maximum number of shareholders are engaged in the proxy process and benefit from the receipt of solicitation materials; and

2. Require that the company reimburse the dissident party (or parties) for the reasonable costs associated with the solicitation process when 50% (or a more appropriate percentage deemed by the Commission to be in the interest of shareholders) of the dissident party's (or parties') nominees are elected.

This hybrid approach would mean a maximum number of shareholders, especially retail shareholders, are solicited by both the company's and dissident's parties, and are afforded an opportunity to exercise their fully informed corporate suffrage right. It would at the same time help to offset the often prohibitive costs associated with the solicitation process when a dissident's nominees are elected by shareholders.

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[39] Proposal at 79,141. Further reducing the risk of investor confusion is the fact that many shareholders have likely voted in elections for political office, in which a single ballot will typically list all of the opposing candidates for an office, so it is likely that shareholders will actually be more familiar with the concept of a single ballot containing all potential officeholders than they are with the concept of receiving multiple ballots, each with its own competing slate of ballots. Put another way, it is highly unlikely that very many voters in the 2020 election thought that the presence of both Republican Donald Trump and Democrat Joe Biden on the same ballot meant that one was endorsing the other; there is little reason to think essentially the same presentation on proxy cards, with significant disclosures, will result in mass confusion.

III. THE SEC HAS NOT YET ADEQUATELY JUSTIFIED ITS PROPOSED EXCLUSIONS FOR INVESTMENT COMPANIES AND BUSINESS DEVELOPMENT COMPANIES.

The SEC proposed to exclude investment companies and business development companies ("BDCs") from the universal proxy requirements.[40] For open-end funds, the rationale is that they are not required to hold annual shareholder meetings, there is little opportunity to profit from any difference between the price of open-end fund shares and net-asset values (since open-end fund shares, except those issued by exchange traded funds, are not traded, and so there is no market price), and accordingly that contested elections at open-end funds are rare.[41] Similarly, while the SEC acknowledged that closed-end funds and BDCs are generally required to hold annual shareholder meetings, and contested elections are more frequent than at open-ended funds (in part because there is an opportunity to profit from the difference between the share price of the fund or BDC and its net asset value per share), dissidents in such contests "generally have not sought split-ticket voting."[42] Moreover, the Proposal notes that the efficiencies of certain board structures currently used by investment companies, including "unitary boards" where a single board oversees every fund in a complex and "cluster boards," in which multiple boards each oversee a different set of funds in a complex, may be undermined by the results of split-ticket voting.[43]

None of these are compelling reasons for excluding investment companies and BDCs from the universal proxy requirement, which will further the ability of shareholders to elect directors of their choice, a right the SEC characterizes "as a fundamental part of state corporate law."[44] For example, just because contested elections may be rare at open-ended funds, it does not necessarily follow that shareholders in those rare instances should not have the ability to vote for their preferred mix of directors. Likewise, the argument that split-ticket voting may reduce the efficiencies of a certain board structure employed by closed-end funds and BDCs would seem to be an argument "best made to the shareholders for their consideration when making voting decisions."[45] We urge the Commission to revisit its proposed exclusions and either (1) provide an adequate justification that accounts for the harm they inflict on shareholders by depriving them of

40 Proposal at 79,144-46.
41 Proposal at 79,145.
42 Proposal at 79,145.
43 Proposal at 79,146.
44 Proposal at 79,122.
45 Proposal at 79,127.

the benefits of being able to fully exercise their fundamental rights as shareholders,[46] or (2) revise the Proposal to include such funds in the universal proxy requirement.[47]

IV. THE SEC SHOULD NOT YIELD TO THOSE WHO INSIST ON A QUANTITATIVE COST-BENEFIT ANALYSIS OF THE PROPOSAL.

The Release repeatedly seeks comment on the costs and benefits of various approaches to the universal proxy and other aspects of the proxy voting process.[48] This suggests that the SEC feels compelled to quantify and weigh a wide assortment of costs and benefits associated with the Proposal and alternative approaches. However, as we have long argued, the law does not impose that obligation on the SEC, nor should it be interpreted as doing so.

For decades, the financial services industry has fought tenaciously to nullify or weaken regulation by forcing the SEC and other agencies to engage in an exhaustive and quantitative cost-benefit analysis for each rule they promulgate. Repeated efforts to impose cost-benefit analysis have surfaced over the years in Congress and in the executive branch, and the courts have entertained countless legal challenges to rules based largely on claims that agencies have failed to do an adequate job of assessing the economic impact of their rules.

In our comment letters, amicus briefs, and special reports, Better Markets has staunchly opposed this tactic in the industry's war on regulation.[49] What has remained true throughout this longstanding policy debate are a number of core principles that the SEC should observe as it proceeds with MMF reform and all of its regulatory actions.

- Congress seldom actually requires an agency to conduct quantitative cost-benefit analysis when it writes rules, and it certainly has not done so with respect to the SEC. Rather, the SEC's limited obligation is to "to consider . . . whether the action will promote efficiency, competition,

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46 We note that at least some investors in closed-end funds and BDCs are urging the SEC to rescind the proposal to exclude such companies from the universal proxy requirement. *See* Comment Letter from Ad Hoc Coalition of Institutional Investors in Closed-End Funds (Jan. 9, 2017), https://www.sec.gov/comments/s7-24-16/s72416-1470819-130407.pdf.

47 However, the SEC should not delay the finalization of the remainder of the Proposal over this issue. If the Commission concludes it needs more time to fully consider the inclusion or exclusion of investment companies and BDCs, it should commence a separate or supplemental rulemaking subsequent to finalizing the current Proposal.

48 *See, e.g.*, Release at Paras. 3, 4, 5, 10, 21.

49 For example, in 2012, we issued a report examining and exposing the largely successful attempt to foist more stringent cost-benefit analysis requirements upon the SEC, even though the securities laws include no such mandate. *See, e.g.*, BETTER MARKETS, SETTING THE RECORD STRAIGHT ON COST-BENEFIT ANALYSIS AND FINANCIAL REFORM AT THE SEC (July 30, 2012), https://bettermarkets.com/sites/default/files/Setting%20The%20Record%20Straight.pdf. In addition, we have updated the report; BETTER MARKETS, COST-BENEFIT ANALYSIS IN CONSUMER AND INVESTOR PROTECTION REGULATION: AN OVERVIEW AND UPDATE (Dec. 8, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_WhitePaper_CBA_Consumer_Investor_Investor_Protection_Dec-2020.pdf . We incorporate those two reports by reference as if fully set forth herein.

and capital formation.**"**[50] Moreover, Congress's careful choice of words make clear that the SEC has broad discretion in discharging its duty. The Supreme Court has long recognized that statutorily mandated **considerations** "imply wide areas of judgment and therefore of discretion" as an agency fulfills its statutory duty.[51] And the D.C. Circuit has similarly confirmed that the SEC need not conduct a rigorous cost-benefit analysis in its rulemakings: "An agency is not required to measure the immeasurable, and need not conduct a rigorous, quantitative economic analysis unless the statute explicitly directs it to do so."[52]

- These Congressional judgments are well-founded, as requiring a rigorous and quantitative cost-benefit analysis takes a huge toll on the quality and pace of rulemaking. Cost-benefit is inaccurate, burdensome, and biased in favor of industry. It tends to result in rules that favor industry's desire for light-touch regulation, and it creates needless and fertile grounds for legal challenges in court—challenges that often lead courts astray as they fail to address industry claims in accordance with what the law actually says.

- The SEC's primary mission is investor protection, and nothing in the law alters that overriding objective. Indeed, even as Congress imposed a limited requirement that the SEC consider certain economic factors in its rulemaking, it reiterated the primacy of investor protection: "The new section [requiring consideration of the three factors] makes clear that matters relating to efficiency, competition, and capital formation are only part of the public interest determination, which also includes, among other things, consideration of the protection of investors**. For 62 years, the foremost mission of the Commission has been investor protection, and this section does not alter the Commission's mission**."[53]

In light of these legal principles and mission objectives, the SEC should strictly adhere to what the law requires with respect to economic analysis and place investor protection always at the top of its priorities. And to the extent the SEC deems it appropriate to consider the costs and benefits of a proposed rule, it should consider the benefits in expansive terms. That means including both direct and indirect benefits, tangible and intangible benefits, and benefits derived from the role each rule plays as part of a collection of reforms aimed at a public good, not just the benefits of rules in isolation.

CONCLUSION

We hope you find these comments helpful.

Sincerely,

50 *See* 15 U.S.C. § 80a-2(c); 15 U.S.C. § 80b-2(c); 15 U.S.C. § 77b(b).
51 *Sec'y of Agric. v. Cent. Roig Ref. Co.,* 338 U.S. 604, 611 (1950).
52 *Nat'l Ass'n of Mfrs. v. SEC*, 748 F. 3d 359 (D.C. Cir. 2014).
53 H.R. REP. No. 104-622, at 39 (1996).

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