



January 11, 2016

Via Electronic Mail (rule-comments@sec.gov)

Mr. Brent J. Fields
Secretary
U.S. Securities & Exchange Commission
100 F Street N.E.
Washington, DC 20549-1090

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

Dear Mr. Fields:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on the Securities and Exchange Commission’s (the “Commission” or “SEC”) proposed amendments to the federal proxy rules to require the use of universal proxies in all non-exempt solicitations in contested elections of directors other than those involving registered investment companies and business development companies (the “Proposal”).² Specifically, the Proposal would mandate the use of universal proxy cards for most contested director’s elections, establish notice and filing requirements for Registrants and dissidents, establish minimum solicitation requirements by dissidents, and create new form and presentation benchmarks for proxy cards.³

Today, in a contested election for board representatives, each soliciting party issues a separate proxy card with the nominees of their choice. If a shareholder wishes to vote a split ticket, with both dissident and management board nominees, they cannot do so via the current proxy voting process and must attend the shareholder meeting in person. The Proposal would revise the “Bona

¹ SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over \$2.4 trillion for businesses and municipalities in the U.S., serving clients with over \$16 trillion in assets and managing more than \$62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² See Securities Exchange Act Release No. 34-79164; 81 FR 79122 (November 10, 2016). (the Proposal)

³ *Id.*

fide Nominee” rule⁴, eliminate the “Short Slate” rule,⁵ and allow shareholders to cast votes for the nominees of their choice across both management and dissident’s slate via a universal proxy card, replicating the shareholder’s in-person voting process.

SIFMA recognizes the considerable efforts and research the SEC put into the release and proposals. We believe that the current U.S. proxy system generally operates very efficiently and has proven to be an accurate and reliable method of allowing shareholders to cast their votes without physically attending shareholder meetings. SIFMA believes that the right to vote on corporate matters is of particular importance to shareholders. SIFMA supports the proposed proxy voting process that seeks to replicate the choice shareholders could make by attending a shareholder meeting in person; but wishes to highlight some of the challenges associated with the implementation of the SEC’s proposed universal proxy card requirements in our comments below.

Universal Proxy Solicitation During Contested Elections Should Be Mandatory, with Clear and Prescriptive Rules for its Use

SIFMA supports the mandatory use of universal proxy which would allow shareholders to vote for the nominee of their choice by proxy in a manner that replicates physical attendance at a shareholder meeting. SIFMA requests the Commission publish clear, specific guidelines on presentation and formatting requirements, and further refine processes arising out of competing proxy cards, such as mismatches.

SIFMA supports the mandatory use of universal proxy in all non-exempt solicitations in contested director elections. If the SEC does not mandate the use of universal proxy in contested director elections for both parties, we believe that universal proxy will only be used to suit strategic needs of a particular party. Moreover, a lack of standardized approach will likely lead to shareholder confusion as it will not be clear what process will be followed in any particular case and the Commission will not achieve the stated goal of providing shareholders the same voting experience by proxy as they could achieve in person.

Moreover, all parties in the proxy process, including shareholders, registrants and dissents, as well as tabulators, service providers and broker-dealers would benefit from a uniform and consistent standard voting format. The proposed rules prescribe the use of separate universal proxy cards in which each soliciting party in a contested election distributes its own proxy card, containing the names of both parties’ nominees. While we recognize the challenges of a single proxy card, and the logistical benefits of separate cards, including control over dissemination, empowerment over discretionary authority, as well as cost allocation concerns and voting transparency, the Proposal would benefit from clearer presentation and formatting rules. The

⁴ See 17 CFR 240. 14a-4(d)(1). Currently, one party’s director nominees in most contested elections cannot be included on an opponent’s proxy card unless the nominee gives consent. In practice, this usually results in two separate proxy cards submitted to shareholders.

⁵ See 17 CFR. 240. 14a-4(d). Currently, a dissident seeking fewer than all board seats will round out its slate by including nominees named in the company’s proxy statement in its proxy card.

Proposal should further define these requirements to avoid any shareholder confusion. Suggested additions to the proposed rule include:

- A clear, standardized approach to distinguish between registrant nominees and dissent nominees. While some formatting and alphabetical order is prescribed, more specific formatting for location of each set of nominees should be adopted. Solicited shareholders will receive up to two (or more) sets of proxy material and two (or more) different proxy cards with instructions. Consistency between the universal proxy cards will help avoid shareholder confusion and allow for better standards;
- All formatting, such as font, style and size, should be consistent. Information should be standardized on the universal proxy card to distinguish the respective nominees of each soliciting group and the treatment of voting, without the necessity to provide additional guidance in proxy statements or other material. We believe that specific formatting rules would provide a clear presentation to the shareholders on whether a nominee supports an opposing party and prescribe the treatment of the shareholder election on the proxy. The limitations and flexibility in the proposed rules can only lead to greater shareholder confusion; and
- The Commission should establish rules governing the treatment of mis-marked proxy cards. Shareholders can often make mistakes when the number of nominees presented on a proxy card exceed the number of director positions open for vote. We would expect that registrants and dissidents may handle the treatment of mis-marked ballots in different ways, possibly not in alignment with the shareholders' intent. We believe that the Commission should establish rules governing the treatment of mis-marked proxy cards so that it is clearly communicated to shareholders and creates a standard.

SIFMA also supports the proposed amendments on director election voting standards and options where applicable. With majority voting and plurality, shareholders can often be confused about the effects of their vote if casting an against or abstain vote. We believe that proper and consistent disclosure should be made to shareholders to fully describe the legal effect of a "withhold" or "against" vote applied to a director.

Full Dissident Solicitation Should be Required

The Proposal would require dissidents: 1) to undertake the cost of filing a proxy statement with the SEC and 2) to solicit at least a majority of the voting power of shares entitled to vote on the election of directors. Under current practices, registrants routinely satisfy their solicitation obligations by soliciting all shareholders. The Proposing Release states "although a dissident would not be required to solicit all shareholders under the Proposal, the Commission estimates that

in 97% of recent proxy contests the dissident solicited a number of shareholders greater than would be required under the proposed minimum solicitation requirement.”⁶

Frequently, the majority of shares for public companies are held by institutional investors rather than individual retail investors. If in fact a majority of company shares are held by institutions rather than individuals, the Proposal would effectively absolve a dissident from soliciting support from many retail investors, who, under the Proposal, would only receive notice of the availability of the dissident’s proxy materials upon receipt of the registrant’s proxy materials and could only access this material by navigating the complex SEC website and printing out this information at their own cost.

- We believe that the SEC should require dissidents to solicit *all* shareholders in order to treat retail investors on par with institutional investors. Moreover, we do not believe that a mere reference to the availability of dissident materials on the SEC’s website provides retail investors with enough information to locate these materials: the SEC’s EDGAR site is complex and difficult to navigate. If however, the Commission insists on moving forward with the Proposal in its current form, we believe the SEC should take further, necessary steps to provide retail investors easier access to the dissident’s proxy materials than what is currently required under the Proposal. For example:
- We believe that retail investors should have a means to obtain dissident materials without navigating the complex SEC website. To this end, we recommend that the SEC revise the Proposal to clarify that a broker-dealer can provide dissident proxy materials to a shareholder upon the shareholder request, and that the dissident would bear the costs of this mailing. Retail investors should have the ability to request paper copies of the dissident’s proxy materials and we believe that any costs associated with a dissident mailing should be borne by the dissident and not the broker-dealer;
- Similarly, the SEC should clarify how shareholders can obtain a physical copy of dissident material, if the shareholder was not part of the original solicitation. For example, the SEC might require a toll-free telephone number from which the shareholder can receive paper copies of the dissident’s materials free of charge; and
- The SEC should make locating proxy materials on the SEC’s website easier for retail shareholders. The SEC’s website can be confusing, with a non-user-friendly interface, and encouraging shareholders to utilize the site will likely further complicate voting processes. We would encourage the SEC to consider creating a dedicated page or link, with specific URL addresses, that could be referenced in proxy materials to refer shareholders to specific company filings.

⁶ See The Proposal, at 117.

We believe that these logical additions to the Proposal will enhance the retail shareholder experience and place retail shareholders on par with institutional shareholders for important company votes.

Threats of Contested Elections by Dissidents

The Proposal would require a dissident to notify a registrant of their intent to propose nominees 60 days in advance, and require Registrants to provide dissidents with notice 50 days in advance.

The Commission makes no mention as to timing penalties for dissidents who drop their solicitation efforts midway through this process. In this scenario, a dissident might provide required notice to the Registrant, but then abandon the effort to solicit proxies. If a dissident does not fulfil its solicitation, after the registrant has distributed material with a universal proxy card, this scenario will create further shareholder confusion, similar to non-solicited shareholders under the minimum threshold requirement section above. The SEC's remedy for such a scenario will be for a registrant to distribute an updated, non-universal proxy card that includes only the registrant nominees.⁷ However, the SEC does not consider immediate costs to the registrant or timing delays, nor does the Commission consider the additional costs arising from shareholder confusion. Specific timing penalties are not included in the Proposal; the Proposal dictates that notice by dissidents should be "timely" but what is timely is not always adequate.

SIFMA recommends that the Commission consider more explicit penalties, or create more explicit Registrant remedy for dissidents' actions regarding threatened, but uninitiated contests or abandoned dissident contest proceedings which have not given Registrants adequate notice, to lessen the possibility of frivolous election contests and shareholder confusion.

SIFMA appreciates the opportunity to comment on the Proposal. If you have any questions concerning these comments or would like to discuss these comments further, please feel free to contact me at 212-212-1287 or egreene@sifma.org.

Respectfully submitted,



Ellen Greene
Managing Director

cc:

The Honorable Mary Jo White, Chairman
The Honorable Kara M. Stein, Commissioner
The Honorable Michael S. Piwowar, Commissioner

⁷ See The Proposal at 79140.

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Ms. Shelley Parratt, Deputy Director, Division of Corporation Finance
Mr. David Grim, Director, Division of Investment Management
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