



January 9, 2017

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Universal Proxy (Release No. 34-79164; File No. S7-24-16)

Dear Mr. Fields:

Better Markets¹ appreciates the opportunity to comment on the above-captioned rulemaking proposal ("Release" or "Proposal"), released for public comment by the Securities and Exchange Commission ("SEC" or "Commission"). We strongly support the Commission's policy goal of increasing shareholders' choice in the election of members of the Board of Directors of the companies of which they are part-owners. We also largely support this proposal in achieving that goal. Our comment letter discusses some aspects of the Proposal that we believe should be strengthened before final approval. But above 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.

OVERVIEW

Corporate suffrage is a right of shareholders, largely born out of state corporate law and a company's own policies but also recognized in the Securities Exchange Act of 1934 ("34 Act") and the federal framework for regulating the U.S. securities markets. In the Committee report that accompanied the '34 Act, Congress wrote, "fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange."² Section 14 of '34 Act "authorizes the Commission to establish rules and regulations governing the solicitation of any proxy or consent or authorization in respect of any security

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

² See H.R. Rep. No. 73-1383, 2d Sess., at 13.

registered pursuant to Section 12 of the Exchange Act.”³ And such “regulation of the proxy process has been a core function of the Commission since its inception.”⁴ 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.”⁵

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 the dissidents, 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 (with no regard to the nominating party). This change will afford those voting through the proxy process the same selection as that available to shareholders attending the shareholder meetings in person.

We support this Proposal. The proxy system is the principal means by which shareholders in public companies exercise their voting rights. It is “important that this system functions efficiently and in a manner that adequately protects the interests of shareholders”⁶ 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.

In brief, we urge the Commission to:

- Require all parties to solicit proxies from the same number of shareholders, provided that the company reimburses the dissident party (or parties) for the costs associated with solicitation when at least 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.
- Prohibit evasion of the rule by limiting the use of new or amended company by-laws.

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. Nowadays, because few shareholders will physically attend these meetings, most voting is done through the proxy process. Yet, during

³ Release at p.79123.

⁴ *Ibid.*

⁵ See Concept Release on the U.S. Proxy System (Release No. 34-62495), Securities and Exchange Commission (2010) p.6.

⁶ Release p.79158

a contested election, where both management and dissident parties provide proxy cards, shareholders voting through proxy are allowed 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 allowed select from both slates.

Currently, in short, 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." 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."⁷ 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 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 directors from both the company's and the dissident's slate."⁸

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 additional 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 will 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;

⁷ Release p.79124

⁸ *Ibid.*

- 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 some stylistic requirements for the Universal Proxy cards.

COMMENTS

Both parties should be required to solicit the same number of investors.

One of the important considerations before the Commission is whether to require the dissident party to solicit from all shareholders or limit that solicitation to the majority of the shareholders. Current SEC rules do not require a company or a dissident party to solicit a certain number or percentage of shareholders, "instead, [SEC rules] only require the parties to furnish a proxy statement to each person solicited."⁹ In contrast, the Proposal sets a minimum solicitation requirement for dissidents. The Proposal would require dissidents (and, only the dissidents) to solicit the "holders of shares representing at least a majority of the voting power of shares entitled to vote."¹⁰

We agree with the Commission that without a minimum solicitation requirement, mandatory Universal Proxy could indeed "enable dissidents to capitalize on the company's solicitation efforts and relieve dissidents of the time and expense necessary to solicit sufficient support for their own nominees."¹¹ But we are also mindful that a significant portion of the unsolicited shareholder voter base is predominantly retail investors. The Proposal cites an industry survey which shows in contests in which fewer than all shareholders were solicited, the dissidents solicited shareholders holding between 100 to 1 million shares with "most often between 500 to 1,000."¹² This practice of soliciting proxies from large and institutional shareholders, which makes the proxy process cost effective for the dissident party, can mean that a significant portion of retail shareholders are never solicited. The Proposal 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 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 may mean all investors), ensuring that a maximum number of shareholders are engaged in the proxy process, and benefit from receiving 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

⁹ Release at p.79138

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Release fn. 292.

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 corporate suffrage right, while at the same time helping to offset the often prohibitive costs¹³ associated with the solicitation process when a dissident's nominees are elected by shareholders.

The Commission should prohibit by-laws that undo the benefits of the Proposal.

We recommend the Commission adopt a general provision to bar the company from adding to or amending its by-laws that in any way would in effect circumvent or otherwise weaken the policy goals of the proposal. Possible strategies that would negate the new rule might include adopting by-laws that make it easy for the company to disqualify or invalidate a dissident's Universal Proxy (for example, due to stylistic or formatting reasons), or solicited proxy cards, or inclusion of language in the solicitation materials that in effect intimidate shareholders by pronouncing or predicting discord among board of directors should the dissident's nominees win a seat. Including a strict anti-evasion provision would ensure that a company cannot engage in practices that weaken a shareholder's corporate suffrage rights, as enlarged by the Proposal.

CONCLUSION

The Commission has released a Proposal that promises to empower and further engage shareholders in exercising their corporate suffrage rights. There is good evidence that suggests stronger shareholder rights and corporate engagement leads to more highly valued firms and better developed equity markets.¹⁴ This Proposal is in the interest of shareholders, and the Commission would fulfill its missions of protecting investors, making the capital markets fairer, and facilitating capital formation by approving this Proposal with the suggested changes.

Sincerely,



Stephen W. Hall
Legal Director & Securities Specialist

Lev Bagramian
Senior Securities Policy Advisor

¹³ 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 p.79153 and fn. 256.

¹⁴ Release at p.79158

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