

**ICGN**

International Corporate Governance Network

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

Submitted via SEC email: rule-comments@sec.gov

7th June 2021

Re: File Number S7-24-16 regarding the Universal Proxy

Dear Secretary Countryman,

The International Corporate Governance Network (“ICGN”) is pleased to respond to the Securities and Exchange Commission (“SEC”) upon its reopening of the comment period for its proposal to require the use of universal proxy cards in all non-exempt solicitations in connection with contested elections of directors (“Proposed Rules”).

Led by investors responsible for assets under management in excess of US\$59 trillion, ICGN is a leading authority on global standards of corporate governance and investor stewardship. Our membership is based in more than 30 countries and includes companies, advisors and other stakeholders. ICGN’s mission is to promote high standards of professionalism in governance for investors and companies alike in their mutual pursuit of long-term value creation contributing to sustainable economies world-wide.

The ICGN has issued guidance on matters that relate to this comment letter, including the:

- ICGN Global Governance Principles;¹
- ICGN Global Stewardship Principles;²
- ICGN Guidance on Investor Fiduciary Duties;³ and
- ICGN Guidance on Diversity on Boards.⁴

As part of the overarching review of the proposed amendments, ICGN would offer three fundamental tenets for issuers and their investors:

1. The nominees on a Board slate should be of the highest caliber and should be representative of the “knowledge, independence, competence, industry experience and diversity of perspectives to generate effective challenge, discussion and objective decision-making” that the Board of Directors needs to manage the significant decisions that must be made for the long-term success of the company. The Board should “operate “for the benefit of shareholders, while having regard to relevant stakeholders, including creditors.” (ICGN Global Governance Principles 1 & 3). In addition, “investors should disclose their proxy voting guidelines to investee companies, particularly with regard to how diversity factors may affect shareholder votes for board candidates.” (ICGN Guidance on Diversity on Boards, Part 3.2);

¹ <http://icgn.flpbks.com/icgn-global-governance-principles-2017/#p=1>

² <https://www.icgn.org/policy/global-stewardship-principles>

³ http://icgn.flpbks.com/icgn-fiduciary_duties/

⁴ http://icgn.flpbks.com/icgn_diversity-on-boards/#p=1

2. Voting by investors is one of the significant ways to fulfill their fiduciary duties, which include a “Duty of Care/Prudence”, “Duty of Loyalty”, and “Precautionary Do No Harm Duty”, and as such, impediments to the effective use of proxy voting should be scrutinized; (ICGN Guidance on Investor Fiduciary Duties); and
3. The most important vote that an investor will cast on a proxy ballot is often for the people that will serve on the Board of Directors. Investors must have confidence that the nominees of the Board, who are represented on the company ballot, will honor the long-term commitment they have to investors and to supporting a company’s sustainable value creation. In the case of a contested election, investors should be able to cast their ballots for nominees that may be presented on the management *and/or* dissident card to vote for whomever they believe will effectively represent their interests. (ICGN Global Stewardship Principle 5: Investors with voting rights should seek to vote shares held and make informed and independent voting decisions, applying due care, diligence, and judgement across their entire portfolio in the interests of beneficiaries or clients.)

First of all, ICGN agrees that since 2016, with the number of high-profile contested elections, a review is warranted. While proxy voting technology has improved, issues remain within the proxy “plumbing” mechanism that can cause tabulation delays and create risks for both companies and investors in close elections. Votes that are submitted “late” are not counted. However, the vote may have been cast by the investor in a timely manner and not transmitted to the company before the deadline. Who is responsible for any harm that results from that mistake? These votes could have made the difference in a close election. Secondly, ICGN has been concerned with the rise of dual-class share structures in newly formed companies, in particular, and has published its own guidance that one-share, one-vote is a fundamental protection for all investors.⁵

ICGN is also concerned with the final reporting on votes cast. ICGN is aware that investors have had difficulty finding out the final votes cast after the meetings and determining whether their votes were properly reported. A more transparent report on voting should be required.

The ICGN is well aware of the cost of proxy contests as issuers and dissidents vie for the votes of global investors. These have become expensive elections and the results for investors, whether positive or not, may not be known until some time has passed.

Additionally, institutional investors may have thousands of international companies in their portfolios and spend time and resources to vote their shares. A complicated process for voting in contested elections, which has become more prevalent since 2016, takes time from their review of other upcoming ballots that may have other important proxy issues.

Finally, the use of virtual meetings or hybrid (virtual and live) meetings has had side effects that are both positive and challenging. While more investors may be able to “attend” a virtual shareholder meeting, a virtual meeting may make it more difficult for investors to participate in the annual general meetings (“AGMs”) within which it used to have to attend to vote a split ballot. Hence, the review by the SEC on universal ballots for contested director elections could help resolve this concern.

⁵ <https://www.icgn.org/policy/viewpoints/differential-rights>

With respect to the proposed amendments in Section II, ICGN offers the following comments to facilitate an open and transparent dialogue on the use of universal proxies in contested elections of directors. Within the Request for Comment, the SEC has asked 25 questions. While the ICGN will not specifically respond to each of the 25 questions, we do believe that the ICGN Global Governance and Stewardship Principles and related Guidance, as cited above, adopted by our global membership, is illustrative of the need to consider revisions to the universal proxy rules.

Questions:

- 1. The Proposed Rules would require dissidents in a contested election subject to proposed Rule 14a-19 to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors. Should we instead require dissidents to solicit a greater percentage of the voting power? For example, should the threshold be 67% or 75% of the voting power, or some other percentage? What would be the incremental effects of a higher minimum solicitation requirement on the cost of proxy contests?*

ICGN believes that a vote by a simple majority of shareholders should be normally sufficient to elect the members of a Board of Directors. The Proposed Rules provide that the dissidents solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote. In some contested elections, a dissident's solicitation to those that hold the majority of shares may be sufficient.

However, ICGN is increasingly concerned with the issuance of dual class shares, which may impact the rights of minority shareholders. In cases where a company has 1) dual or multi-class share structures that negatively impact minority shareholders, and 2) a supermajority voting requirement that could impact minority shareholders, ICGN would suggest that the SEC require a higher threshold of voting power, up to 75% if necessary, to ensure that minority shareholders are able to receive the proxy solicitation materials and express their viewpoints through their proxy votes.

- 2. How should we consider the recent increase in the number of companies with dual or multi-class stock structures in determining a minimum solicitation requirement?*

Please refer to the response in Question 1.

- 3. Would a higher minimum solicitation threshold, such as 67% or 75%, prevent more nominal contests, in which the dissidents incur little more than the basic required costs to pursue a contest, as compared to the proposed majority solicitation requirement? Would it be more likely to deter other contests than the proposed majority solicitation requirement and, if so, what are the costs and benefits of that outcome?*

ICGN recognizes that contested elections are generally expensive endeavors for both issuers and dissidents. Investors should have an easier mechanism to vote for the directors of their choice that appear on either the corporate or dissident cards. A universal proxy ballot would be an effective way for investors to select nominees on a combined proxy ballot. Such a change may reduce some of the costs in a contested election because both the issuer and dissident would be required to provide the universal ballot to shareholders.

4. Since the 2016 Release, there have been several high-profile contested elections at registrants that were significantly larger than the typical proxy contest target. To what extent does this development affect any of the aspects, including the costs and benefits, of the Proposed Rules? Should these contests affect our consideration of the appropriate minimum solicitation requirement? If so, how?

The ICGN is well aware of the cost of proxy contests as issuers and dissidents vie for the votes of global investors. In some of the most high-profile contested elections, investors have been bombarded with communication materials to urge investors to vote for either the “blue” or “white” cards, or some other color combination.

In addition, investors have been asked to provide precious time before the proxy voting deadline to meet personally (pre-pandemic) or schedule calls. Both the company representatives and the dissidents have been known to contact investors (or hire proxy solicitors) to discuss the virtues of either slate of nominees and the reasons that either the company or the dissident believes that its slate of nominees is better for investors.

These have become expensive elections and the results for investors, whether positive or not, may not be known until some time has passed. Ultimately, the costs impact companies and shareholders. After all the votes have been counted, the final election results will determine which nominees were elected to the Board. The results could have been achieved by the company or dissident spending more money than the other on solicitation materials, which may not correlate to the best fit of nominees for the Board.

5. We request any estimates or data that would allow us to refine our characterization of costs and benefits of nominal contests under the current state of the proxy process and how such effects would differ under the availability of a universal proxy card. In particular, we request specific estimates of the costs that are incurred by registrants in such contests, including the costs of disclosure, solicitation, and board and management time; and the costs and benefits to shareholders.

ICGN would have no comment on estimates or data.

6. As discussed above, there have been several contests in the United States since the 2016 Release in which one or both parties used a universal proxy card. Do the experiences of registrants, shareholders, dissidents, and other participants in the proxy process in these situations provide any new information about any of the aspects, including the costs and benefits, of the Proposed Rules? To what extent does the experience with advance notice bylaws that require dissident nominees to consent to being included on the registrant's proxy card (e.g., as part of the director questionnaire) affect any aspects of the Proposed Rules?

ICGN recognizes that a universal proxy card has been used in several contests in the United States since the 2016 Release. Anecdotally, the investor members of ICGN have indicated that the use of a universal proxy card made the process of voting “For”, “Withhold” or “Against” (as the ballot required) the directors more efficient. It also provided the investors with the ability to select the nominees of *their* choice, in a blended format, thereby giving them the autonomy to decide for whom they would vote.

7. The Proposed Rules would require a dissident to provide notice to a registrant of its intent to solicit proxies in support of director nominees other than the registrant's nominees no

later than 60 calendar days prior to the anniversary of the previous year's annual meeting date. Have there been any developments since the 2016 Release with respect to the frequency with which contests are settled or withdrawn after the proposed deadline for dissidents to provide notice of their intent to solicit proxies for their own nominees? We request specific data on the timing and frequency of such actions. Would such settlements or withdrawals of proxy contests and the related actions of registrants and dissidents be changed by the proposed notice requirement and mandatory use of a universal proxy card and, if so, are there any modifications we should make to the Proposed Rules in response?

ICGN is aware that some contested elections have been resolved or settled after the deadlines set forth in current rules. The point of proxy voting is to allow the shareholders to cast their ballots for the board nominees of their choice. Certainly, as a contested election is conducted, both companies and dissidents have some ability to gauge whether they are going to be able to garner enough votes to be successful. Some elections, however, have been so close that the election results took several days to be announced. When a settlement is reached or the contest is withdrawn, it is more than likely that one side or the other, had knowledge that it might not completely prevail. For shareholders, who have taken the time and effort to research the contested election and the nominees offered by each side, a settlement or withdrawn contest at the 11th hour may not be the best result.

8. In the 2016 Release, the Commission noted that the burden of attending a meeting for the purpose of voting a split ticket may be lower in the case of a virtual shareholder meeting, but that such meetings were relatively rare and that the Commission was unaware of any proxy contest that culminated in a virtual meeting. Virtual shareholder meetings have increased in frequency since then, particularly due to the unique circumstances presented by COVID-19 in 2020. To what extent should this development affect our assessment of the Proposed Rules? Is the increase likely to continue if concerns about COVID-19 are reduced or eliminated? Are increased virtual meetings likely to affect the cost of split-ticket voting in the future, even in the absence of a universal proxy card? Are virtual meetings unlikely to be used in the case of a contest? How are virtual meetings likely, or not, to affect the nature of proxy contests, such as their frequency or targets, in the future?

ICGN recognizes positively the many global companies that were able to pivot successfully to virtual annual meetings that had to occur during the COVID-19 pandemic. Some investors did have difficulty gaining access to virtual meetings, asking questions and presenting shareholder proposals. ICGN's Viewpoint on the future of AGMs addresses the best practice ground of shareholder meetings in a post-COVID environment.⁶ ICGN is aware of the "Report of the 2020 Multi-Stakeholder Working Group on Practices for Virtual Shareholder Meetings", issued by the Council of Institutional Investors (CII), the Society for Corporate Governance, and Douglas K. Chia and Ann S. Lee (Rutgers Center for Corporate Law and Governance, that developed a guide for virtual annual meetings.⁷ The "aspiration of the 2020 Working Group is for companies, investors, and service providers to conduct VSMs in ways that replicate the in-person annual meeting experience for the shareholder as closely as possible in order to foster effective corporate governance."⁸

⁶ <https://www.icgn.org/future-annual-general-meetings>

⁷ https://cclq.rutgers.edu/wp-content/uploads/VSM-Working-Group-Report-12_10_2020.pdf

⁸ *Ibid*, page 4.

ICGN's position is that if a company is going to conduct a virtual shareholder meeting, the process for investors to vote in a contested election must be addressed. As we mentioned, the votes cast for nominees for the Board of Directors are vitally important. The issues from the 2020 virtual AGMs must be addressed to give investors the confidence they deserve to cast their ballots and know that the votes were counted accurately.

9. There have been several changes in the governance, activism, and voting landscape in recent years, such as an increase in the adoption of proxy access bylaws and other changes discussed above. To what extent do any of these developments affect any of the aspects, including the costs and benefits, of the Proposed Rules?

ICGN supported the adoption of proxy access bylaws and similar governance changes that were adopted by companies outright or after the passage of shareholder proposals. In our view, these developments have been positive for both companies and investors, leading to more engagement and dialogue. We see these as different governance issues than those of a contested election. The proposed rules for a universal proxy would provide another avenue for investors to vote for the nominees of their choice.

10. Are there any other developments since the 2016 Release that should affect our consideration of adopting a universal proxy card requirement? Are there any other developments that affect any of the aspects, including the costs and benefits, of the Proposed Rules? Are there any changes we should consider in the analytical methodologies and estimates presented in the 2016 Release? Are there any other types of changes we should consider in light of developments since the 2016 Release?

One significant development since 2016 is the rise of stewardship for investors. ICGN issued its Global Stewardship Principles in 2016 and updated them in 2020. In the Preamble, ICGN said:

The ICGN Global Stewardship Principles (Principles) set out ICGN's view of current best practices in relation to investor stewardship obligations, policies, and processes. These Principles provide a framework to implement stewardship practices in fulfilling an investor's fiduciary obligations to beneficiaries or clients.

...

At an individual company level investor stewardship helps to promote high standards of corporate governance which contributes to sustainable value creation, thereby increasing the long-term risk adjusted rate of return to investors and their beneficiaries or clients. At an investor level, stewardship is about preserving and enhancing long-term value as part of a responsible investment approach. This includes the consideration of wider ethical, environmental, and social factors and the consideration of relevant systemic risks as core components of fiduciary duty.

In a broader context, stewardship enhances overall financial market stability and economic growth, and, by focusing on long-term value creation, stewardship is directly linked to sustainable benefits for the economy, environment, and society.⁹

Good stewardship practices inherently require that investors review the companies in their investment portfolios to preserve long-term value creation. Investors recognize the role that

⁹ [ICGN Global Stewardship Principles 2020_0.pdf](#), p. 4.

the Board of Directors plays in the long-term success of the company, its commitment to stability and sustainability. Therefore, the proposed rules for a universal proxy would assist investors in meeting their stewardship requirements.

11. Would any presentation and formatting requirements in addition or as an alternative to those discussed in the 2016 Release be appropriate or helpful for universal proxy cards used in contested elections? For example, should we consider requiring a uniform format for the voting options listed next to the nominees' names?

ICGN believes that a uniform format would be desirable, including a format that provides investors with the means and ability to utilize it effectively.

12. Is there a need for the Proposed Rules to facilitate a standardized presentation of all nominees on voting instruction forms and electronic proxy voting platforms in the context of contested elections?

ICGN recognizes that some type of standardization would be useful, particularly on the proxy voting platforms that are utilized by most institutional investors as a way to efficiently vote a multitude of proxy ballots during the year. However, ICGN would like the SEC to consider the needs of retail investors, as well, who may choose to vote their proxies in person during an annual meeting, by mail or through electronic means.

16. In reviewing proxy contests since 2016, we observed that many closed-end funds subject to a proxy contest utilized a classified board structure, meaning that only a minority of the board was up for election each year. Accordingly, even when dissidents ran a full slate of directors, such directors, if elected, would still only represent a minority of the board. How common is a classified board structure for registered closed-end funds and BDCs? How, if at all, does such a structure affect contested elections, or our assessment of whether the Proposed Rules should apply to registered closed-end funds or BDCs? In particular, does a classified board structure itself increase the chance of dissident directors disrupting unitary and cluster boards, regardless of whether funds with classified boards are subject to the Proposed Rules?

ICGN does not have data to provide an answer to the specific question, but as a general rule we prefer the annual election of directors rather than classified boards. We believe this underscores director accountability to shareholders.

17. We request any data or examples that would help us to better ascertain the degree of interest by shareholders in funds in splitting their votes in contested elections.

We do not have data to address this question.

We hope that our comments are helpful, and we look forward to engaging with you in this or other matters where we could provide meaningful input. Should you wish to discuss our comments further, please contact me or George Dallas, ICGN's Policy Director, by email at george.dallas@icgn.org . Thank you again for reopening the comment period again.

Sincerely,



Kerrie Waring
Chief Executive Officer, ICGN

Copy: George Dallas, ICGN Policy Director
Alison Schneider, Co-Chair ICGN Shareholder Responsibilities Committee
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