

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-91603; IC-34246; File No. S7-24-16]

RIN 3235-AL84

Reopening of Comment Period for Universal Proxy

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: The Securities and Exchange Commission (“Commission”) is reopening 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”). The Proposed Rules were set forth in a release published in the Federal Register on November 10, 2016 (Release No. 34-79164) (“2016 Release”), and the related comment period ended on January 9, 2017. The reopening of this comment period is intended to allow interested persons further opportunity to analyze and comment upon the Proposed Rules in light of developments since the publication of the Proposed Rules, including developments in corporate governance matters affecting funds.

DATES: The comment period for the proposed rule published on November 10, 2016 (81 FR 79122), is reopened. Comments should be received on or before June 7, 2021.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission’s Internet comment form
(<https://www.sec.gov/rules/submitcomments.htm>).

Paper comments:

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

All submissions should refer to File Number S7-24-16. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549-1090 on official business days between the hours of 10 a.m. and 3 p.m. Due to pandemic conditions, however, access to the Commission's public reference room is not permitted at this time. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: David M. Plattner, Special Counsel, Christina Chalk, Senior Special Counsel, or Joshua Shainess, Special Counsel, in the Office of Mergers and Acquisitions, at (202) 551-3440, or Steven G. Hearne, Senior Special Counsel, in the Office of Rulemaking, at (202) 551-3430, Division of Corporation Finance, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

As described more fully in the 2016 Release,¹ Section 14 of the Securities Exchange Act of 1934² (“Exchange Act”) authorizes the Commission to establish rules and regulations governing the solicitation of any proxy or consent or authorization with respect to any security registered pursuant to the Exchange Act. In regulating the proxy process, the Commission has sought to facilitate the exercise of voting rights shareholders have under state law.³ To allow shareholders to exercise fully these rights in contested director elections, the Commission proposed to amend the proxy rules to permit shareholders to vote by proxy for any combination of candidates for the board of directors, as they could if they attended the shareholder meeting in person and cast a written ballot.⁴

The Proposed Rules would establish new procedures for the solicitation of proxies, the preparation and use of proxy cards, and the dissemination of information about all director nominees in contested elections. Among other things, the Proposed Rules would:

- Revise the consent requirement for a bona fide nominee and eliminate the “short slate rule;”⁵
- Create new 17 CFR 240.14a-19 (Rule 14a-19) which, if adopted, would require the use of universal proxy cards – that is, proxy cards that include the names of all

¹ See *Universal Proxy*, Release No. 34-79164 (Oct. 26, 2016) [81 FR 79122 (Nov. 10, 2016)].

² 15 U.S.C. 78a *et seq.*

³ Registrants only reporting pursuant to Exchange Act Section 15(d) are not subject to the federal proxy rules, while foreign private issuers are exempt from the requirements of Section 14(a). 17 CFR 240.3a12-3(b).

⁴ As part of this effort, the staff is also considering recommending that the Commission propose amendments to the proxy rules to facilitate vote confirmations for shareholders and improve voting accuracy in the proxy system.

⁵ 17 CFR 240.14a-4(d)(1) and (4).

duly nominated director candidates for whom proxies are solicited – in all non-exempt solicitations for contested elections;

- Establish procedural requirements for dissidents and registrants to notify each other of their respective director nominees; and
- Require dissidents in a contested election subject to 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.

The Proposed Rules also include other improvements to the proxy voting process, such as mandating that proxy cards include an “against” voting option when permitted under state laws and requiring disclosure about the effect of a “withhold” vote in an election. Finally, in the 2016 Release, the Commission declined to propose extending the Proposed Rules to registered investment companies and business development companies (“BDCs,” and together with registered investment companies, “funds,”) at that time. Instead, the Commission shared certain observations about the corporate governance of funds and requested comment and data on several topics to determine whether to extend the proposed universal proxy rules to funds in the future.

II. REOPENING OF COMMENT PERIOD

Since the publication of the Proposed Rules in 2016, there have been important developments in proxy contests, corporate governance, and shareholder activism. For example, there have been several contests in the United States where one or both parties used a universal proxy card since the 2016 Release.⁶ During the same time period, there

⁶ For example, both the dissident group and the registrant used universal proxy cards at EQT Corporation’s 2019 Annual Meeting. See DEFC14A filed May 20, 2019 by dissidents and DEFC14A filed May 22, 2019 filed by EQT Corp. The registrant but not the dissident group used a universal proxy card at the Sandridge Energy’s 2018 Annual Meeting. See DEFC14A filed May 10, 2018 by Sandridge Energy, Inc. and DEFC14A filed May 11, 2018 by dissidents.

has been increased adoption of proxy access bylaws⁷ and use of virtual shareholder meetings.⁸ Some registrants have adopted advance notice bylaw provisions that require dissident nominees to consent to being named in the registrant’s proxy statement and on its proxy card.⁹

In addition, there have been developments in corporate governance matters affecting funds, particularly registered closed-end funds and BDCs. In the 2016 Release, the Commission observed that contested elections at open-end funds¹⁰ are rare, because open-end funds generally do not hold annual meetings and their shares can be redeemed at net asset value (or in the case of ETFs, traded at or near net asset value).¹¹ The 2016 Release also noted that exchange-listed BDCs and registered closed-end funds, unlike most open-end funds, typically do hold annual shareholder meetings, and contested elections occur more frequently for these funds.¹² Contested elections of directors for registered closed-end funds and BDCs have been more common in recent years, as compared to the few years preceding the 2016 Release.¹³ Other corporate governance

⁷ Holly J. Gregory, Rebecca Grapsas & Claire Holland, *Proxy Access: A Five-Year Review*, SIDLEY AUSTIN LLP (Feb. 4, 2020), <https://corpgov.law.harvard.edu/2020/02/04/proxy-access-a-five-year-review/> (noting that proxy access bylaws have been adopted by 76% of S&P 500 companies and just over half of the companies in the Russell 1000).

⁸ See the following report from Broadridge with statistics on the increasing use of virtual shareholders meetings from 2016-2020: https://www.broadridge.com/_assets/pdf/vsm-facts-and-figures-2020-brochure-january-2021.pdf.

⁹ Tiffany Fobes Campion, Christopher R. Drewry and Joshua M. Dubofsky, *Universal Proxies: What Companies Need to Know*, LATHAM & WATKINS LLP (Dec. 5, 2018), <https://corpgov.law.harvard.edu/2018/12/05/universal-proxies-what-companies-need-to-know/> (stating that more than 80 companies have adopted such advance notice bylaw provisions).

¹⁰ References to open-end funds include both mutual funds and exchange-traded funds (“ETFs”).

¹¹ Based on staff review of DEFC14A and DFAN14A filings for open-end fund registrants, as was the case in 2016, we are unaware of any contested election involving open-end funds since 2000. See also 2016 Release at notes 182, 190, and accompanying text.

¹² *Id.* The Commission further explained that its understanding at the time was that when dissident shareholders initiated a proxy contest for electing directors, such dissidents normally solicited a complete slate of nominees for all director positions up for election, though the Commission noted some exceptions from that general observation.

¹³ Based on staff review of PREC14A and DEFC14A filings, for calendar years 2017 through 2020, we estimate that there have been 46 contested director elections involving funds, representing over two times the rate of such contests per year than that reported in the 2016 Release (for 2014

developments relating to funds since the 2016 Release include, for example, an increase in interest by closed-end funds in including provisions in their governing documents requiring that directors be elected by a majority of all shares outstanding, rather than of shares voted, and funds opting into a state's control share acquisition statute.¹⁴

In light of these developments since the 2016 Release, the Commission is reopening the comment period for the Proposed Rules until [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] to provide the public with an additional opportunity to analyze and comment upon the Proposed Rules. Commenters may submit, and the Commission will consider, comments on any aspect of the Proposed Rules. Comments are particularly helpful to us if accompanied by quantified estimates or other detailed analysis and supporting data regarding the issues in those comments. Where possible, when providing data and information regarding funds, please provide distinct data and information for open-end funds, registered closed-end funds, and BDCs. In addition to the requests for comment included in the 2016 Release, the Commission specifically seeks comments on the following:

through 2015). We estimate that there were a total of 686 registered closed-end funds and 85 BDCs active in 2020, based on staff review of filings from July 1, 2019, through June 30, 2020. Excluding contests where the same dissident targeted additional funds in the same fund complex in the same year, we estimate that the rate of contested director elections involving funds from 2017 to 2020 was about 25% higher than that reported in the 2016 Release. We are aware of three contests involving funds in 2017 through 2020 in which the dissident sought fewer than the total number of seats up for election (overall or for certain shareholders voting as a separate class). Approximately 85% of funds involved in a contested election had a classified board, based on FactSet Corporate Governance data. Accordingly, dissident shareholders often presented a full slate of nominees for the director seats up for election, which, if elected, would have constituted a minority of the board. Along with nominating directors, such dissidents sometimes also presented proposals to declassify the board and require that all directors be elected annually. As the Commission observed in 2016, along with contested director elections, dissident shareholders commonly included proposals consistent with reducing the discount of the share price to the net asset value, such as terminating the advisory contract and commencing a self-tender offer.

¹⁴ Control share acquisition statutes provide a company with the right to prevent or restrict certain changes in corporate control by altering or removing voting rights when a person acquires control shares. In May 2020, the staff withdrew a prior staff position discussing the intersection of control share acquisition statutes and Section 18(i) of the Investment Company Act. Division of Investment Management Staff Statement, May 27, 2020, *avail. at* <https://www.sec.gov/investment/control-share-acquisition-statutes>.

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?

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?

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?

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?

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.

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?

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?

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?

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?

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?

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?

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?

13. In the 2016 Release, the Commission proposed to exclude all funds from the application of the Proposed Rules at that time, regardless of whether the fund was structured as a closed-end fund or an open-end fund. In light of the differences noted both in the 2016 Release and by commenters, as well as the fact there have been no

contests in open-end funds since 2000, but proxy contests for registered closed-end funds have increased in recent years relative to the years preceding the 2016 Release, we are considering whether we should differentiate between open-end funds, registered closed-end funds, BDCs, and other registrants. In particular, we are considering whether we should apply the proposed universal proxy card requirements to registered closed-end funds and BDCs. We request comment on the extent to which the similarities or differences among open-end funds, registered closed-end funds, and BDCs should result in similar or differential application of the universal proxy rules.

14. In the 2016 Release, the Commission discussed the use of cluster and unitary boards by funds and whether dissident board members on a board within such a fund complex could reduce the efficiencies of such board structures. Commenters on the Proposed Rules also discussed these concerns, particularly for open-end funds. How commonly do registered closed-end funds and BDCs utilize a unitary structure, where a single board oversees every fund in a fund complex? How frequently do they use a cluster board structure, where two or more boards each oversee a different set of funds in the complex? Do the same concerns noted by commenters about a dissident director disrupting this cluster board structure in open-end fund complexes apply to these registered closed-end funds and BDCs? To the extent a universal proxy card requirement would cause disruptions for open-end funds, closed-end funds, or BDCs, are the costs of these disruptions justified by the benefits to shareholders of the ability to vote by proxy as if they were attending the shareholder meeting in person? To what extent would disclosure to shareholders in the proxy materials regarding such potential losses in efficiency be sufficient to mitigate the risk of such disruptive outcomes?

15. We have observed that a large fraction of the recent contests at closed-end funds involve a dissident contesting elections of multiple funds in the same fund complex. To what extent is any potential disruption to unitary or cluster boards different

in situations where a dissident is seeking election of directors for multiple funds in a complex? How, if at all, should such contests affect our consideration of whether to extend the mandatory universal proxy card requirement to some or all funds?

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?

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.

18. In the 2016 Release, the Commission noted that the types of changes pursued by dissidents at registered closed-end funds and BDCs, such as converting a closed-end fund to an open-end fund, have tended to be binary in nature. Are there other types of goals or compromise approaches that dissidents have pursued at such registrants in more recent years? To what extent are mixed board outcomes, where some but not all of a dissident's nominees are elected, an effective means of achieving dissident goals in contests at registered closed-end funds and BDCs?

19. If we extended the Proposed Rules to some or all funds, would a different minimum solicitation requirement be appropriate for these registrants than for others? If so, what threshold would be appropriate, and why? How, if at all, would the appropriate threshold differ across open-end funds, registered closed-end funds and BDCs? How

does the concentration of ownership and types of holders of open-end funds, registered closed-end funds and BDCs differ from other registrants that may be the subject of proxy contests? Does the solicitation process differ for contests at open-end funds, registered closed-end funds or BDCs as compared to other registrants? How would the costs and other effects of the minimum solicitation requirement differ when applied to contests at these registrants as opposed to other registrants?

20. As discussed above, we have observed recent developments in the area of corporate governance affecting funds, particularly registered closed-end funds and BDCs. How, if at all, are such developments, or other developments, relevant to our assessment of whether the Proposed Rules should apply to registered closed-end funds and BDCs? Would a universal proxy card facilitate shareholder voting in registered closed-end fund and BDC elections?

21. What would be the costs and benefits and other economic effects of applying the Proposed Rules to registered closed-end funds and BDCs, or more broadly to other kinds of funds? To what extent do any developments since the 2016 Release affect the anticipated costs and benefits? How, if at all, have any such developments changed the differences in the likely economic effects of applying the Proposed Rules to some or all funds as compared to operating companies?

22. As noted above, we have not observed any proxy contests in open-end funds since 2000. Would there be benefits to applying the Proposed Rules to all funds, including open-end funds, to the extent open-end funds do face proxy contests? What would be the costs of applying the Proposed Rules to open-end funds in the absence of contests?

23. The Commission noted in the 2016 Release that in the absence of the proposed universal proxy card requirement applying to funds, the current rules would continue to apply, including the short slate and bona fide nominee rules. Do commenters

believe that these rules are necessary or appropriate for any fund not required to use a universal proxy card? Or does the lack of proxy contests in open-end funds indicate that it would be appropriate to rescind these rules even if we do not extend the application of the Proposed Rules to open-end funds?

24. There are registered closed-end funds and BDCs that, like open-end funds, do not hold annual meetings to elect directors because of their state of incorporation or type of corporate entity, or because they are not listed on an exchange. If we were to exclude open-end funds from the Proposed Rules because of the lack of annual meetings, should the exclusion apply to registered closed-end funds and BDCs that do not hold annual meetings? Should such funds continue to be subject to the short slate and bona fide nominee rules?

25. Are there any other developments since 2016 we should consider in our assessment of whether the Proposed Rules should apply to open-end funds, closed-end funds or BDCs? What are the economic effects of any such developments?

We request and encourage any interested person to submit comments regarding the Proposed Rules, specific issues discussed in this release or the 2016 Release, and other matters that may have an effect on the Proposed Rules. We request comment from the point of view of registrants, shareholders, directors, and other market participants. We note that comments are of particular assistance to us if accompanied by supporting data and analysis of the issues addressed in those comments, particularly quantitative information as to the costs and benefits. If alternatives to the Proposed Rules are suggested, supporting data and analysis and quantitative information as to the costs and benefits of those alternatives are of particular assistance. Commenters are urged to be as

specific as possible. All comments received to date on the Proposed Rules will be considered and need not be resubmitted. If any commenters who have already submitted a letter wish to provide supplemental or updated comments, we encourage them to do so.

By the Commission.

Date: April 16, 2021.

J. Lynn Taylor,

Assistant Secretary.