Statement

Dissenting Statement on Universal Proxy

Commissioner Hester M. Peirce

Nov. 17, 2021

I support universal proxy, but not today's version of universal proxy.

Shareholders voting by proxy should be able to split their vote among company and dissident nominees. Allowing shareholders a straightforward way of choosing a mixed slate through a universal proxy card can facilitate sensible changes to board composition. Universal proxy makes sense for both operating companies and investment companies. This particular universal proxy rule, however, may facilitate changes to the company that advance special interests rather than enhancing corporate value by serving as a tool for frivolous, as well as serious, activists. I might have been able to support the rule if I felt we had explored thoroughly the potential that the rule could afford activists without a demonstrated commitment to the company an opportunity to meddle in the company's affairs. I do not believe we have done this work so I cannot support the rule.

The price of entry onto the company's proxy card under this rule is low. Aside from requiring the dissident to list the company's nominees on its proxy card and satisfy notice and filing requirements, the rule's only gating requirement is that the dissident state an intention to solicit 67 percent of the voting power of the shares entitled to vote at the meeting and alert the company if its intentions change. While a 67 percent threshold is an improvement from the 50 percent threshold in the proposal, even the new threshold is easy to meet or ignore. Indeed, most dissidents already meet it.[1] Moreover, because the rule focuses on voting power rather than shareholder accounts, dissidents will often be able to meet the threshold by soliciting a small number of institutional shareholders, while ignoring small shareholders. The solicitation of large shareholders is not very burdensome given that the rule permits the use of notice-and-access solicitation; sending a postcard with a website link to proxy materials will suffice. The rule also lacks a clear enforcement mechanism for a dissident that fails to carry through on its solicitation intentions.

The rule does not condition access to the company's proxy card on a demonstrated commitment to the company. Any non-shareholder looking to further any cause can buy a share just before putting up a director candidate. Doing so will get her the leverage she needs to enter the negotiating room with management. In that back room, she can elicit from the company a measure to further her cause. Those negotiations not only will distract managers from important company business, but could result in changes that do not benefit the company. Consider, for example, a light-hearted "gadbee" example: a passionate, wealthy, and sophisticated bee advocate—full disclosure, I am a big honey bee supporter—who is not a company shareholder. She might buy a few shares of several companies, put up a credible director candidate in compliance with each company's advance notice bylaw provision, and then negotiate with companies not enthusiastic about having this candidate on the proxy card and potentially on the board. She might elicit from those companies a promise to put beehives on the roof of each office building. A small ask for a noble purpose, but a needless distraction nonetheless for the company. Making matters worse, the activist-manager negotiations will happen outside of the view of other shareholders. Indeed, any non-shareholder activist need not buy any shares to

execute her strategy; she need only dangle the possibility of buying a few shares and putting forward directors to scare management into the negotiating room.

Contrast such an opportunistic shareholder with a long-time or large shareholder who has a serious plan for improving the way a company is managed. Under today's release, both the activist, indifferent to the company's future, and the activist, committed to the company's future, will have equal access to the company's proxy card and to the negotiating leverage that comes with such access. While I hope that today's rule improves the mechanics of proxy voting in contests in the latter context, I expect then that we will see more contested elections or threats thereof after the rule goes into effect.

A couple alternative approaches to today's rule might have worked better. For example, access to the company proxy card could have been reserved for shareholders who satisfied certain ownership requirements. We could have looked to analogues in Rule 14a-8, our shareholder proposal rule, and our now defunct proxy access rule, as one commenter suggested.[2] Any requirement to hold a particular amount of a company's shares for a particular minimum holding period would have to be designed to ensure that any shareholder with a demonstrated commitment to a company's long-term value could put forward directors for inclusion on the company's proxy card. So a requirement for a shareholder to hold at least three percent for three years, such as required in the non-operational proxy access rule, likely would be far too high. At the same time, any such requirement would need to preclude activists without an interest in the company's value from using the possibility of putting their director candidates on the company's proxy card as a way to force changes potentially inimical to the company's value. So a requirement to hold $2,000 worth of shares for three years, as required by Rule 14a-8, likely would be far too low. Alternatively, the rule, as another commenter suggested, could have allowed companies to opt out of the universal proxy regime if shareholders decided it would facilitate unwanted activism.[3] Such an opt-out would leave an escape valve for companies if the rule turned out to facilitate harmful activism. Finally, the rule could have required dissidents to solicit a majority of all shareholder accounts, as one commenter suggested.[4]

Thank you to the staff for your work on this release. I appreciated the time you spent with me discussing my concerns. While I ultimately decided that the costs the rule may impose on shareholders could outweigh the benefits, I found your reasons for believing otherwise compelling. I hope that when we do a retrospective review of this rulemaking, we find that you are right and I am wrong.

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[1] *See* Universal Proxy Adopting Release at note 258 and accompanying text.

[2] *See* Letter from Attorneys with Sidley Austin LLP (June 7, 2021), https://www.sec.gov/comments/s7-24-16/s72416-8893550-241161.pdf.

[3] *See* Letter from Scott Hirst, Associate Professor of Law, Boston University School of Law (June 7, 2021), https://www.sec.gov/comments/s7-24-16/s72416-8893542-241143.pdf.

[4] *See* Letter from Richard B. Zabel, General Counsel and Chief Legal Officer, Elliott Investment Management L.P. (June 4, 2021), https://www.sec.gov/comments/s7-24-16/s72416-8883055-240420.pdf.