

## **SUPPORTING STATEMENT FOR UNIVERSAL PROXY PROPOSED AMENDMENTS**

This supporting statement is part of a submission under the Paperwork Reduction Act of 1995, 44 U.S.C. §3501, et seq.

### **A. JUSTIFICATION**

#### **1. CIRCUMSTANCES MAKING THE COLLECTION OF INFORMATION NECESSARY**

In Release No. 34-79164,<sup>1</sup> the Commission proposed amendments to require the use of universal proxies in all non-exempt solicitations in connection with contested elections of directors other than those involving registered investment companies and business development companies. The proposal would require the use of proxy cards that include the names of both registrant and dissident nominees allowing shareholders to vote by proxy in a manner that more closely resembles how they can vote in person at a shareholder meeting.

The Commission further proposed amendments to the form of proxy and proxy statement disclosure requirements to specify clearly the applicable voting options and voting standards in all director elections.

The proposed amendments contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995. The titles of the collections of information impacted by the amendments are:

- “Regulation 14A (Commission Rules 14a-1 through 14a-21 and Schedule 14A)” (OMB Control No. 3235-0059); and
- “Rule 20a-1 under the Investment Company Act of 1940, Solicitations of Proxies, Consents, and Authorizations” (OMB Control No. 3235-0158).

#### **2. PURPOSE AND USE OF THE INFORMATION COLLECTION**

The Commission proposed to amend the proxy rules as they apply to operating companies to revise the consent required of a bona fide nominee, eliminate the short slate rule and add Rule 14a-19 to 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. The purpose of the amendments is to implement the use of a universal proxy card to allow shareholders to vote by proxy in a manner that more closely resembles how they can vote in person at a shareholder meeting.

The Commission also proposed amendments to the proxy rules relating to all director elections to: specify that the proxy card must include an “against” voting option when applicable state law gives effect to a vote “against”; require proxy cards to give

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<sup>1</sup> Universal Proxy, Release No. 34-79164 (Oct. 26, 2016) [81 FR 79122 (Nov. 10, 2016)].

shareholders the ability to “abstain” in an election where a majority voting standard is in effect; and mandate disclosure about the effect of a “withhold” vote in an election. The purpose of these proposed amendments is to better enable soliciting parties to properly seek and authorize the appropriate voting option for shareholders.

### **3. CONSIDERATION GIVEN TO INFORMATION TECHNOLOGY**

The collection of information requirements of the amendments will be set forth in Regulation 14A and Rule 20a-1. The information required by these rules is filed electronically with the Commission using the Commission’s Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system.

### **4. DUPLICATION OF INFORMATION**

We are not aware of any rules that conflict with or substantially duplicate the final rules.

### **5. REDUCING THE BURDEN ON SMALL ENTITIES**

The proposed amendments would affect some companies that are small entities that have a class of securities that are registered under Section 12 of the Exchange Act. The Commission performed an Initial Regulatory Flexibility Act Analysis and estimated that there were approximately 692 issuers, other than investment companies, that may be considered small entities.

The Commission considered a variety of alternatives to achieve our regulatory objective to allow a shareholder voting by proxy to choose among director nominees in an election contest in a manner that reflects as closely as possible the choice that could be made by voting in person at a shareholder meeting. The Commission did not propose alternative approaches in this rulemaking because we do not believe they meet the regulatory objective as well.

### **6. CONSEQUENCES OF NOT CONDUCTING COLLECTION**

Regulation 14A sets forth the disclosure requirements for proxy statements to help investors make informed investment decisions. Rule 20a-1 applies those rules to investment companies. Failure to conduct the collection of the information required by the proposed amendments would frustrate the statutory intent of Section 14 of the Exchange Act because shareholders would have less information on which to base voting decisions.

### **7. SPECIAL CIRCUMSTANCES**

There are no special circumstances in connection with these amendments.

## 8. CONSULTATIONS WITH PERSONS OUTSIDE THE AGENCY

The Commission issued a release soliciting comment on the new “collection of information” requirements and associated paperwork burdens.<sup>2</sup> Comments on the Commission’s releases are generally received from registrants, investors, and other market participants. In addition, the Commission and staff participate in an ongoing dialogue with representatives of various market participants through public conferences, meetings and informal exchanges. The Commission considers all comments received. A copy of the proposing release is attached.

## 9. PAYMENT OR GIFT TO RESPONDENTS

No payment or gift to respondents.

## 10. CONFIDENTIALITY

All documents submitted to the Commission are available to the public.

## 11. SENSITIVE QUESTIONS

No information of a sensitive nature, including social security numbers, will be required under these collections of information. The information collections collect basic Personally Identifiable Information (PII) that may include name and job title. However, the agency has determined that the information collections do not constitute a system of record for purposes of the Privacy Act. Information is not retrieved by a personal identifier. In accordance with Section 208 of the E-Government Act of 2002, the agency has conducted a Privacy Impact Assessment (PIA) of the EDGAR system, in connection with this collection of information. The EDGAR PIA, published on January 29, 2016, is provided as a supplemental document and is also available at <https://www.sec.gov/privacy>.

## 12/13. ESTIMATES OF HOUR AND COST BURDENS

The paperwork burden estimates associated with the proposed amendments include the burdens attributable to collecting, preparing, reviewing and retaining records.

### **Regulation 14A and Rule 20a-1**

The Commission proposed to amend the proxy rules as they apply to operating companies to revise the consent required of a bona fide nominee, eliminate the short slate rule and add Rule 14a-19 to 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.<sup>3</sup> The proposed amendments would affect the collection

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<sup>2</sup> Id.

<sup>3</sup> The Commission did not propose to amend the proxy rules for investment companies and business development companies.

of information requirements of soliciting parties by requiring the use of a universal proxy card in all non-exempt solicitations in connection with contested elections, prescribing requirements for universal proxy cards, and requiring the soliciting parties to add a reference to the other party's proxy statement for information about the other party's nominees and explain that shareholders can access the other party's proxy statement on the Commission's website. The proposed amendments would additionally require dissidents in such election contests to provide a notice of intent to solicit and a list of their nominees to the registrant, require registrants to provide notice of the names of nominees to the dissident, and eliminate the ability of dissidents to round out their slate with registrant nominees through use of the short slate rule. The proposed amendments would additionally prescribe filing deadlines for a dissident's definitive proxy statement and require dissidents to solicit at least a majority of the voting power of shares entitled to vote on the election of directors; however, we do not believe that these requirements will affect the reporting and cost burden associated with the collection of information.<sup>4</sup> We believe that the proposed amendments regarding the use of a universal proxy card, required notices and related disclosure would result in only a small amount of additional required disclosure and the addition of only a limited amount of material (the names of duly nominated director candidates for which the soliciting party has complied with Rule 14a-19 on proxy cards). The application of these amendments also would be limited to contested elections.

The Commission also proposed amendments to the proxy rules relating to all director elections to: specify that the proxy card must include an "against" voting option when applicable state law gives effect to a vote "against"; require proxy cards to give shareholders the ability to "abstain" in an election where a majority voting standard is in effect; and mandate disclosure about the effect of a "withhold" vote in an election. The proposed amendments requiring the appropriate use of an "against," "abstain" or "withhold" voting option should better enable soliciting parties to properly seek and authorize the appropriate voting option for shareholders. We believe that the additional

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<sup>4</sup> The Commission's current proxy rules do not prescribe minimum solicitation requirements for either registrants or dissidents; however, customary practice has been for soliciting parties to solicit more than a majority of shareholders because either, in the case of a registrant, they wish to meet notice, informational and quorum requirements for the annual meeting, or, in the case of a dissident, such solicitation is necessary in order to successfully wage a proxy contest. Based on staff analysis of the industry data provided by a proxy services provider for 35 proxy contests between June 30, 2015 and April 15, 2016, less than a majority of shareholders was solicited by a dissident in only a single proxy contest in that sample. It is possible that the proposed amendments may change the number and type of proxy contests, including a possible increase in nominal contests in which dissidents spend little more than the basic required costs to pursue a contest. In the release, we preliminarily estimated that, for a nominal proxy contest, it may cost approximately \$6,000 at a median-sized registrant using the least expensive approach to meet the proposed minimum solicitation requirements through an intermediary. See Universal Proxy, Release No. 34-79164 (Oct. 26, 2016) at notes 307 - 308. Because the Commission is unable to predict how the proposed amendments may impact the number and type of election contests, and in light of current solicitation practices, for PRA purposes, the Commission is not estimating that the majority solicitation requirement for dissidents would increase the reporting and cost burden associated with Regulation 14A.

disclosure and revisions to the proxy card relating to these changes would similarly result in only a small incremental increase in the required disclosure; however, the changes would apply to proxy materials in all director elections, not just contested elections.

The Commission derived the new burden hour and cost estimates by estimating the total amount of time it would take to prepare and review the required disclosures called for by the proposed rules. This estimate represents the average burden for all soliciting parties, both large and small. In deriving the estimates, we recognize that the burdens will likely vary among soliciting parties, some soliciting parties will experience costs in excess of this average in the first year of compliance with the amendments and some parties may experience less than the average costs.

As discussed in the proposing release, it is unclear whether the proposed amendments would result in an increase or decrease in the number of election contests, and the Commission therefore estimates no change in the number of proxy statement filings as a result of the proposed amendments. The Commission estimates that the average incremental burden for a registrant to prepare a universal proxy card in a contested election and include the required disclosure would be two hours. The Commission similarly estimates that the average incremental burden for a dissident to prepare a universal proxy card in a contested election and include the required disclosure would be two hours. Additionally, the average incremental burden for a dissident and registrant to prepare the notice to the opposing party containing the names of its nominees in a contested election is estimated to be approximately one hour. Thus, the estimate for the total incremental burden for Regulation 14A would increase by three hours per election contest for registrants and three hours per election contest for other soliciting parties.<sup>5</sup> For purposes of the PRA, the Commission estimates there would be 36 annual election contests per year,<sup>6</sup> resulting in 216 additional total incremental burden hours (6 hours x 36 election contests) under Regulation 14A as a result of proposed Rule 14a-19 and the related amendments.

The Commission estimates that the additional disclosure and changes to the proxy card relating to the appropriate use of “against,” “abstain” or “withhold” voting options in proxy materials for all director elections would be considerably less than one hour for each proxy statement and card relating to an election of directors. Unlike the proposed amendments relating to election contests, these proposed amendments would apply to all director elections, including director elections for registered investment companies and business development companies. The disclosure and changes to the proxy card are being proposed to require registrants to clarify existing standards, and many of the descriptions and standards, once revised, are not likely to require significant revision from year to year. We estimate that these changes would result in an average of 10

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<sup>5</sup> There may be a range of burdens by soliciting parties as they determine exactly how to present the proxy card and the language of the required disclosure; however, the Commission estimates the burdens described above as the average burden for soliciting parties.

<sup>6</sup> The Commission does not estimate that there would be additional election contests as a result of the proposed amendments. The estimate of approximately 36 election contests per year is based on the average of actual proxy contests for elections of directors in 2014 (37) and 2015 (35).

minutes of additional burden per response.<sup>7</sup> For purposes of the PRA, we estimate the proposed changes would result in 931 hours of additional total incremental burden under Regulation 14A (10 minutes x 5,586 proxy statements) and 222 hours of total incremental burden under Rule 20a-1 (10 minutes x 1,333 filings).

These estimates include the time and cost of preparing disclosure that has been appropriately reviewed, including, as applicable, by management, in-house counsel, outside counsel and members of the board of directors. This burden would be added to the current burden for Regulation 14A and Rule 20a-1, as applicable. For proxy statements under Regulation 14A, we estimate that 75 percent of the burden of preparation is carried internally and that 25 percent of the burden of preparation is carried by outside professionals retained at an average cost of \$400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried internally is reflected in hours. We estimate a similar allocation between internal burden hours and outside professional costs with respect to the PRA burden for Rule 20a-1.

As a result of the estimates discussed above, we estimate for purposes of the PRA that the total incremental burden on all soliciting parties of the proposed amendments under Regulation 14A would be 860 hours for internal time (1,147 total incremental burden hours x 75 percent) and \$114,700 (1,147 total incremental burden hours x 25 percent x \$400) for the services of outside professionals. We further estimate for purposes of the PRA that the total incremental burden on all soliciting parties of the proposed amendments under Rule 20a-1 would be 166.5 hours for internal time (222 total incremental burden hours x 75 percent) and \$22,200 (222 total incremental burden hours x 25 percent x \$400) for the services of outside professionals.

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<sup>7</sup> We estimate that the incremental burden for the proposed disclosure and changes to the proxy card would increase by 20 minutes in the first year and then be reduced to five minutes in years two and three, resulting in a three year average of an increased 10 minute burden per response.

**Summary of the proposed changes to annual compliance in Collection of Information**

	Current Annual Responses (A)	Proposed Annual Responses (B)	Current Burden Hours (C)	Increase in Burden Hours (D)	Proposed Burden Hours (E) =C+D	Current Professional Costs (F)	Increase in Professional Costs (G)	Proposed Professional Costs =F+G
Regulation 14A	5,586	5,586	551,101	860	551,961	\$73,480,012	\$114,700	\$73,594,712
Rule 20a-1	1,333	1,333	113,305	167	113,472	\$39,990,000	\$22,200	\$40,012,200

**14. COSTS TO FEDERAL GOVERNMENT**

The annual cost of reviewing and processing disclosure documents, including registration statements, post-effective amendments, proxy statements, annual reports and other filings of operating companies amounted to approximately \$102 million in fiscal year 2018, based on the Commission’s computation of the value of staff time devoted to this activity and related overhead for the Division of Corporation Finance.

The annual cost of reviewing and processing registration statements, post-effective amendments, proxy statements, shareholder reports, and other filings of investment companies amounted to approximately \$22.2 million in fiscal year 2017, based on the Commission’s computation of the value of staff time devoted to this activity and related overhead for the Division of Investment Management.

**15. REASON FOR CHANGE IN BURDEN**

As explained in further detail in Items 12 and 13 above, the proposed amendments in Release No. 34-79164 implement changes to permit the use of a universal proxy card to allow shareholders to vote by proxy in a manner that more closely resembles how they can vote in person at a shareholder meeting.

The changes in burden of Regulation 14A relate to the incremental burden for a registrant to prepare a universal proxy card in a contested election and include the required disclosure and the incremental burden for a dissident to prepare a universal proxy card in a contested election and include the required disclosure. Additionally, the changes in burden of Regulation 14A include the incremental burden for a dissident and registrant to prepare the notice to the opposing party containing the names of its nominees in a contested election. The Commission proposed these changes to implement the use of a universal proxy card in non-exempt solicitations in connection with contested elections.

Additionally, the Commission proposed changes to better enable soliciting parties to properly seek and authorize the appropriate voting option for shareholders. Unlike the proposed amendments relating to election contests, these proposed amendments would apply to all director elections, including director elections for registered investment companies and business development companies. The disclosure and changes to the

proxy card are being proposed to require clarification of the existing standards, and many of the descriptions and standards, once revised, are not likely to require significant revision from year to year. The changes in burden of Regulation 14A and Rule 20a-1 reflect the incremental burden from preparing the disclosure relating to these proposed amendments.

**16. INFORMATION COLLECTION PLANNED FOR STATISTICAL PURPOSES**

The information collections do not employ statistical methods.

**17. APPROVAL TO OMIT OMB EXPIRATION DATE**

We request authorization to omit the expiration date on the electronic version of the form. Including the expiration date on the electronic version of the form will result in increased costs, because the need to make changes to the form may not follow the application's scheduled version release dates. The OMB control number will be displayed.

**18. EXCEPTIONS TO CERTIFICATION FOR PAPERWORK REDUCTION ACT SUBMISSIONS**

There are no exceptions to certification for the Paperwork Reduction Act submissions.

**B. STATISTICAL METHODS**

The information collections do not employ statistical methods.



## **Regulation 14A Short Statement**

The proposed amendments in Release 34-79164 would revise the consent required of a bona fide nominee, eliminate the short slate rule and 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 to implement the use of a universal proxy card to allow shareholders to vote by proxy in a manner that more closely resembles how they can vote in person at a shareholder meeting. Additionally, the proposed amendments would specify certain required voting options and mandate disclosure about the effect of certain votes in an election to better enable soliciting parties to properly seek and authorize the appropriate voting option for shareholders. We anticipate that the proposed amendments would result in a small increase in the required disclosure and the related burdens and costs for the registrants to prepare and review the collections of information. For purposes of the PRA, we estimate that the proposed amendments to Regulation 14A would result in a net increase of 860 burden hours and a net increase in the cost burden of \$114,700 for the services of outside professionals.

## **Rule 20a-1**

The proposed amendments in Release 34-79164 would revise the consent required of a bona fide nominee, eliminate the short slate rule and 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 to implement the use of a universal proxy card to allow shareholders to vote by proxy in a manner that more closely resembles how they can vote in person at a shareholder meeting. Additionally, the proposed amendments would specify certain required voting options and mandate disclosure about the effect of certain votes in an election to better enable soliciting parties to properly seek and authorize the appropriate voting option for shareholders. We anticipate that the proposed amendments would result in a small increase in the required disclosure and the related burdens and costs for the registrants to prepare and review the collections of information. For purposes of the PRA, we estimate that the proposed amendments to Rule 20a-1 would result in a net increase of 167 burden hours and a net increase in the cost burden of \$22,200 for the services of outside professionals.