

MEMO# 33576

June 7, 2021

ICI Files Comment Letter on SEC's Re-Opened Universal Proxy Proposal

[33576]

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TO: ICI Members

Investment Company Directors SUBJECTS: Closed-End Funds

Disclosure RE: ICI Files Comment Letter on SEC's Re-Opened Universal Proxy Proposal

As previously reported, the Securities and Exchange Commission re-opened the comment period for its 2016 universal proxy proposal, which would amend the proxy rules to mandate the use of universal proxy cards in contested director elections.[\[1\]](#) As proposed, the amendments would apply the universal proxy requirements to operating company issuers but not to registered investment companies or business development companies ("BDCs," and together with registered investment companies, "funds") as issuers. In re-opening the comment period, the Commission cites to the many developments in proxy contests, corporate governance, and shareholder activism that have occurred since the 2016 Proposal was published, including with respect to closed-end funds and BDCs. The Re-Opening Release asks several questions, including whether the proposed amendments should apply to funds.

Earlier today, ICI submitted the attached comment letter supporting the proposal and the SEC's decision to exclude funds as issuers from it.[\[2\]](#) Although the letter welcomes the re-opening of the comment period, it indicates that nothing in the intervening five years since the proposal was issued warrants changes to the proposal's treatment of funds.

The letter focuses on post-2016 developments and is divided into three parts. The first part reiterates our support for universal proxy requirements on behalf of funds as investors in underlying operating companies. It explains that funds may see value in adding alternative voices to an operating company's board, while not supporting all dissident nominees and still supporting one or more management nominees.

The later parts explain why we continue to urge the Commission to not apply the universal proxy requirements to any funds, including closed-end funds. Specifically, the second part highlights four significant differences between funds and operating companies:

- fund shareholders would not benefit from split-ticket voting because (i) most funds are highly unlikely to have contested elections, or (ii) for the small number of funds that

might have contested elections (e.g., exchange-listed closed-end funds), choices between dissident and issuer nominees are binary as a practical matter, meaning that shareholders supporting the fund likely would vote for the issuer's slate *in full* and shareholders sympathetic to a dissident likely would vote for the dissident's slate *in full* (by contrast, operating company shareholders are much more likely to choose a mix of both issuer and dissident nominees);

- funds are subject to the Investment Company Act that supplements other laws and offers additional protections for shareholders, giving them voices in key determinations or constraining or prescribing a fund's activities, diminishing the need for shareholders to have access to universal proxies;
- funds have unique governance structures that would be disrupted by split-ticket voting resulting in a split board; and
- funds typically have different shareholder bases than operating companies that impose higher solicitation costs on them.

In addition, we explain why, if the Commission were to conclude differently and apply the universal proxy requirements to funds, we strongly urge that dissident shareholders be required to solicit a much higher percentage than a bare majority of the shares entitled to vote on the election of directors.

The third part further explains why the Commission should not apply the requirements to closed-end funds, based on the events of the past five years. Where possible, the letter provides updated data to respond to certain of the Commission's questions and requests for information.

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endnotes

[1] See Reopening of Comment Period for Universal Proxy, Sec. Exch. Act Rel. No. 91603 (Apr. 16, 2021) ("Re-Opening Release"), *available at* <https://www.sec.gov/rules/proposed/2021/34-91603.pdf>. For a summary of the Re-Opening Release, please see ICI Memorandum No. 33487 (Apr. 19, 2021), *available at* <https://www.ici.org/memo33487>. See also Universal Proxy, Sec. Exch. Act Rel. No. 79164 (Oct. 26, 2016) ("2016 Proposal"), *available at* www.sec.gov/rules/proposed/2016/34-79164.pdf. The proposal would, among other things: require each soliciting party in a contested director election to distribute a universal proxy that includes the names of all candidates for election to the board of directors; establish procedural requirements for dissidents and registrants to notify each other of their respective director nominees; require the dissident in a contested election to solicit

shareholders representing at least a majority of the shares entitled to vote on the election of directors; and impose presentation and formatting requirements on universal proxy cards. For a summary of the 2016 Proposal, *please see* ICI Memorandum No. 30377 (Nov. 1, 2016), *available at* <https://www.ici.org/memo30377>.

[2] The letter is consistent with a letter we submitted in 2016. See Letter from Dorothy M. Donohue, Deputy General Counsel, ICI, to Brent J. Fields, Secretary, SEC, dated Dec. 19, 2016 ("2016 ICI Comment Letter"), *available at* <https://www.sec.gov/comments/s7-24-16/s72416-1431117-129844.pdf>. For a summary of the 2016 ICI Comment Letter, *please see* ICI Memorandum No. 30489 (Dec. 19, 2016), *available at* <https://www.ici.org/memo30489>.

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