

Universal Proxy Ballots and Private Ordering

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I. INTRODUCTION

A universal proxy ballot is a ballot listing the candidates for both incumbents and challengers for a corporation’s board.¹ Proxy voting is when shareholders allow a proxy to vote for them at a shareholder meeting because the shareholder is not physically present at

1. Tiffany Fobes Campion et al., *Universal Proxies: What Companies Need to Know*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 5, 2018), <https://corpgov.law.harvard.edu/2018/12/05/universal-proxies-what-companies-need-to-know> [<https://perma.cc/Z2ZV-GNJ9>].

the meeting.² Universal proxy ballots have many proponents and opponents.³ The EQT Corporation (EQT) proxy fight offers a method of using universal proxy ballots without mandating the ballots via Securities and Exchange Commission (SEC) regulation. Private choosing—also called private ordering—provides a compromise for universal proxy ballots between the opposing sides in a proxy fight because they get to use universal proxy ballots on their own terms instead of the ballots being imposed by a government law or regulation.

“Rice group set to take control of EQT board in proxy contest,” states the headline.⁴ The Rice group, led by the Rice brothers—investors who sold their company, Rice Energy, to EQT—successfully challenged the board of EQT, the largest natural gas company in America.⁵ This proxy fight is important because the Rice group’s challenge was the first successful challenge to use a universal proxy ballot.⁶

Part II of this Note will describe the background of universal proxy ballots, including the history of the SEC’s attempts to require them. This Part also will explain the details of the EQT proxy fight. Part III will analyze the arguments for and against universal proxy ballots. This Part will also explain why the SEC’s proposals keep failing. Finally, Part IV will recommend using private ordering—à la the EQT proxy fight—as a compromise method of achieving universal proxy ballots.

II. BACKGROUND

A. The Development of Proxy Voting and Current Proxy Voting

Proxy voting was not always the method of choosing corporate boards of directors; in fact, in the nineteenth century, proxy voting was banned.⁷ The introduction of proxy voting coincided with the separation of ownership from control of the corporation.⁸ The drive of early twentieth century businesses for more capital led more people to own stock; thus, ownership of companies was spread out.⁹ Eventually, the ban on proxy voting was lifted, partly to facilitate shareholder participation when they could not physically travel to the shareholders’ meeting.¹⁰ In addition to the large number of shareholders, other policies

2. Evan Tarver, *Proxy*, INVESTOPEDIA (Aug. 27, 2020), <https://www.investopedia.com/terms/p/proxy.asp> [<https://perma.cc/C24P-5DAK>].

3. See Scott Hirst, *Universal Proxies*, 35 YALE J. ON REGUL. 437, 460, 500 (2018) (describing how both management and challengers support universal proxy ballots, and then explaining that both the Chamber of Commerce and Business Roundtable are against universal proxy ballots).

4. Svea Herbst-Bayliss & David French, *Rice Group Set to Take Control of EQT Board in Proxy Contest: Sources*, REUTERS (July 9, 2019, 4:28 PM), <https://www.reuters.com/article/us-eqt-corp-rice-group-proxy/rice-group-set-to-take-control-of-eqt-board-in-proxy-contest-sources-idUSKCN1U42KW>.

5. *Id.*

6. Lizanne Thomas & Robert A. Profusek, *A Win in Proxy Fight for Universal Proxy Card*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 19, 2019), <https://corpgov.law.harvard.edu/2019/08/19/a-win-in-proxy-fight-for-universal-proxy-card> [<https://perma.cc/LS74-35X9>].

7. Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1522 (2006).

8. See *id.* at 1519–27 (describing how entrepreneurs separated ownership from control).

9. *Id.* at 1521–22.

10. *Id.* at 1522; Andrew Tutt, *Choosing Representatives by Proxy Voting*, 116 COLUM. L. REV. SIDEBAR 61, 68 (2016).

weakened the bond between ownership and control, such as holding companies owning large portions of other companies' shares, and the creation of non-voting shares.¹¹ These reforms made it difficult for shareholders to challenge the board successfully.¹²

The success of proxy challenges increased when boards had a fiduciary duty to protect shareholders who do not directly control the corporation.¹³ The current system was established with the Securities Act of 1934, which created the SEC to regulate corporations, including proxy voting.¹⁴

Currently, proxy elections, which usually take place during the company's annual meeting,¹⁵ use separate ballots for incumbents and challengers.¹⁶ The rules governing proxy voting issued by the SEC state no votes are allowed for "any person to any office for which a bona fide nominee is not named in the proxy statement."¹⁷ In other words, candidates must consent to be nominees, and they must not consent to be on the other side's proxy card, which effectively limits candidates to the incumbent's ballot or the dissenter's ballot.¹⁸ Common state rules only allow voting from one proxy card, which means that proxy voters can only choose from either incumbent nominees or challenger nominees.¹⁹ They cannot mix and match between the different lists of nominees.²⁰

B. SEC's Attempts at Instituting Universal Proxy Ballots

The SEC tried multiple times to require universal proxy ballots but failed.²¹ The first attempt to regulate corporate voting involved implementing the shareholder proposal rule.²² In 1942, the SEC mandated corporations to include shareholder proposals in the proxy material they send out, provided the proposals were "proper subjects for action."²³ The SEC later created more exceptions to the shareholder proposal rule in 1948, 1952, and 1954.²⁴

In 1942 and 1977 the SEC considered requiring universal proxy ballots when they

11. Mitchell, *supra* note 7, at 1526.

12. *See id.* at 1525 (explaining that the only successful shareholder challenge in the early 20th century was conducted by John D. Rockefeller against the board of Standard Oil of Indiana).

13. *See id.* at 1534 (describing Adolf A. Berle, Jr.'s plan, which was adopted, to reform corporations).

14. *Id.* at 1541–42.

15. *Spotlight on Proxy Matter—Corporate Elections Generally*, SEC (May 23, 2012), https://www.sec.gov/spotlight/proxymatters/corporate_elections.shtml [<https://perma.cc/3NMS-5LAP>].

16. Campion et al., *supra* note 1.

17. 17 C.F.R. § 240.14a–4(d)(1) (2011).

18. Hirst, *supra* note 3, at 454.

19. *Id.* at 455.

20. *Id.*

21. *See, e.g.,* Bus. Roundtable v. SEC, 647 F.3d 1144, 1156 (D.C. Cir. 2011) (ruling that an SEC proposal requiring universal proxy ballots is arbitrary and capricious, and hence illegal).

22. *See* Mitchell, *supra* note 7, at 1511, 1548–51 (detailing the evolution of SEC regulatory efforts, especially through industry criticism and comment).

23. *Id.* at 1551 (quoting Phillip A. Nicholas, Jr., *The Securities and Exchange Commission and the Shareholder Proposal Rule: Agency, Administration, Corporate Influence, and Shareholder Power, 1942–1988*, 129 (2002) (unpublished Ph.D. dissertation, State University of New York at Albany) (on file with the Washington and Lee Law Review)).

24. *Id.* at 1554, 1556, 1558.

“expressed some interest . . . but ended up taking no action”²⁵ concerning universal proxy ballots. The SEC began considering universal proxy ballots again in 2003 when the SEC proposed allowing universal proxy ballots after a “triggering event”—when 35% of shareholders withheld their votes for a director.²⁶ However, only challengers with at least five percent of the total shares, who have owned those shares for two years, would be able to have their candidates on a universal proxy ballot.²⁷ However, after pushback from the Business Roundtable and the Chamber of Commerce, and a change in commissioners of the SEC, the 2003 proposal lost support and died.²⁸

In 2009, a new SEC proposal tried to implement universal proxy ballots.²⁹ This proposal based the amount of stock needed to nominate a candidate on the size of the company: for companies with assets of \$700 million or more, only one percent of the stock was required; for companies with assets between \$75 million and \$700 million, three percent of the shares was required; and for companies valued less than \$75 million, five percent of the shares was required.³⁰ Challengers also needed to own the stock for at least one year.³¹ An additional limitation was challengers could only vie for 25% of the board of directors.³² This proposal was struck down by the courts because the SEC, both in actions and in the proposal, “was arbitrary and capricious.”³³ The court considered the proposal arbitrary and capricious because the SEC did not consider the potential increase in costs of proxy materials and the potential devaluation of companies, especially companies with mixed boards of incumbents and challengers.³⁴ Also, the SEC “ignored the effect of the final rule upon the total number of election contests” when analyzing the frequency of proxy fights using the universal proxy ballot vis-à-vis traditional proxy fights.³⁵

The latest attempt to institute universal proxy ballots came in 2016 when the SEC proposed changing the bona fide nominee rule to allow nominees who consent to be on any proxy ballot, instead of consenting to be nominated for a particular ballot.³⁶ Additionally, the SEC proposed universal proxy ballots be required in contested elections,³⁷ provided the challengers solicited “at least a majority of the voting power of shares entitled to vote

25. Marcel Kahan & Edward Rock, *The Insignificance of Proxy Access*, 97 VA. L. REV. 1347, 1353 (2011).

26. *Id.*

27. *Id.*

28. *Id.* at 1354.

29. *Id.* at 1355.

30. Facilitating Shareholder Director Nominations, Securities Act Release No. 9046, Exchange Act Release No. 34-60089, Investment Company Act Release No. 28,765, 74 Fed. Reg. 29,024, 29,035 (June 18, 2019).

31. 74 Fed. Reg. 29,024, 29,037 (June 18, 2019).

32. *Id.* at 29,043.

33. *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1156 (D.C. Cir. 2011).

34. *Id.* at 1150–51.

35. *Id.* at 1153.

36. Universal Proxy, 81 Fed. Reg. 79,122, 79,128 (proposed Nov. 10, 2016). For definition of current bona fide nominee rule, see RECOMMENDATIONS OF THE INVESTOR ADVISORY COMMITTEE REGARDING SEC RULEMAKING TO EXPLORE UNIVERSAL PROXY BALLOTS, SEC 1, 2 (July 25, 2013), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/universal-proxy-recommendation-072613.pdf> [<https://perma.cc/2TLV-4FRL>] (explaining the committee’s position on universal ballots).

37. Universal Proxy, 81 Fed. Reg. 79,131–34 (proposed Nov. 10, 2016).

on the election of directors.”³⁸ This proposal also appears to have lost support because the switch from the Obama administration to the Trump administration signaled a switch from supporting universal proxy ballots to disfavoring universal proxy ballots.³⁹ However, the possibility of an SEC regulation requiring universal proxy ballots still exists because the SEC could always reconsider and some groups still support requiring universal proxy ballots.⁴⁰

C. State Regulations and Other Methods of Achieving Universal Proxy Ballots

The SEC is not the only entity that can institute universal proxy ballots.⁴¹ States can require companies incorporated under their laws to use universal proxy ballots, and individual companies can choose to implement universal proxy ballots.⁴² For example, North Dakota requires companies to put qualified challenger’s nominees on the same proxy ballot as the incumbent’s nominees.⁴³ To qualify, challengers need to own at least five percent of the shares of the company.⁴⁴ Some states do not require universal proxy ballots, but they simply allow companies to include them in the companies’ bylaws.⁴⁵ An example is Delaware, which allows companies’ bylaws to require universal proxy ballots.⁴⁶ The bylaws can require certain qualifications for challengers to get on the universal proxy ballot, like owning a required minimum amount of stock, providing specific information, and “[a]ny other lawful condition.”⁴⁷

Universal proxy ballots have also been adopted voluntarily.⁴⁸ For example, some companies, like the Coca-Cola Company, choose to adopt universal proxy ballots in their bylaws, whether by the board’s own initiative or shareholder proposals.⁴⁹ Foreign companies listed on the New York Stock Exchange have also used universal proxy ballots, such as Canadian Pacific Railway Ltd. and Transocean Ltd., whose Canadian and Swiss laws made it easier to use or required the use of universal proxy ballots.⁵⁰ The use of such ballots did not hurt either party in the contests.⁵¹

38. *Id.* at 79,138.

39. Hirst, *supra* note 3, at 466.

40. See Andrea Vittorio, *Investors Seek Common Ballot for Corporate Board Battles*, BLOOMBERG L. NEWS (Sept. 6, 2019, 5:30 AM), https://www.bloomberglaw.com/document/X372A5E4000000?bna_news_filter=securities-law&jcsearch=BNA%25200000016cfdb3d3faa56dfdf3e0750001#jcite [https://perma.cc/N9LM-DSLJ] (reporting that investor groups told the SEC that they support universal proxy ballots).

41. See Danielle Vukovich, *Proxy Access Voting: Evaluating Proxy Access and the Recent Phenomenon of Corporations Adopting Shareholder Protective Policies*, 19 SAN DIEGO INT’L L.J. 437, 443–44 (2018) (mentioning congressional and state laws governing corporate voting).

42. *Id.* at 444.

43. N.D. CENT. CODE ANN. § 10-35-08(1) (West 2007).

44. N.D. CENT. CODE ANN. § 10-35-08(3) (West 2007).

45. DEL. CODE ANN. tit. 8, § 112 (West 2009).

46. *Id.*

47. *Id.*

48. Vukovich, *supra* note 41, at 446.

49. *Id.* at 446 (explaining that Coca-Cola adopted proxy access after talking to shareholders and realizing there is broad support for it).

50. Hirst, *supra* note 3, at 462.

51. *Id.*

Even without implementing universal proxy ballots, companies and shareholders have instituted actions designed to achieve similar results.⁵² One such major action to implement results similar to universal proxy ballots is withholding a vote—also known as a “just say no” campaign—where the shareholder refuses to vote for specific nominees on a proxy ballot.⁵³ Withholding as a reform tool was first suggested by Joe Grundfest who argued that “the symbolic impact of withhold votes . . . could act as an annual referendum on managerial performance.”⁵⁴ Mr. Grundfest’s theory did not catch on until 2004 when 45% of votes were withheld from Disney CEO, Michael Eisner.⁵⁵ The high level of withholding led to Mr. Eisner’s resignation as CEO.⁵⁶ The 2004 Disney board elections confirmed Mr. Grundfest’s theory and “showed shareholders that . . . a high withhold vote is both achievable and effective in inducing governance changes.”⁵⁷

As withholding campaigns became popular other proxy voting reforms did too.⁵⁸ One such reform is the switch to majority voting from plurality voting, which means nominees now need a majority of votes to win, not just a plurality. Most large companies have implemented this policy.⁵⁹

D. EQT Proxy Fight

The recent EQT proxy fight for control over the board of directors is an example of how investors can privately cause companies to use universal proxy ballots.⁶⁰ EQT is the largest natural gas manufacturer in America.⁶¹ The Rice group, shareholders who joined EQT by selling their company to EQT, felt the board had done a poor job since the acquisition of Rice Energy in 2017.⁶² Initially, EQT was going to use separate proxy ballots because EQT’s director nominating procedures required consent to be named in proxy materials only from the challengers.⁶³ The incumbents only agreed to a universal proxy ballot after the challengers threatened to fight the one-sided consent policy in court.⁶⁴ Ultimately, the challengers won 80% of the votes and took control of EQT’s board of directors.⁶⁵ Specifically, the EQT proxy fight shows one-sided consent requirements may

52. Kahan & Rock, *supra* note 25, at 1358–61.

53. *Id.* at 1358.

54. *Id.*

55. *Id.* at 1359.

56. *Id.*

57. Kahan & Rock, *supra* note 25, at 1359.

58. *See id.* (“[I]t also dawned on shareholders that there is something wrong with an election system in which a director can be elected even if a large majority of shareholders is opposed.”).

59. *Id.* at 1359–60 (detailing that the percentage of S&P 500 companies using majority voting “increased from 16% in February 2006 . . . to about 80% in 2010”).

60. Thomas & Profusek, *supra* note 6.

61. Scott Deveau & Naureen S. Malik, *Activists Take Control of EQT Board in Proxy Fight*, BLOOMBERG (July 10, 2019, 9:00 AM), <https://www.bloomberg.com/news/articles/2019-07-09/eqt-activists-are-said-to-take-control-of-board-in-proxy-fight> [<https://perma.cc/6ZEJ-XDV2>] (describing the nine-month battle to win control of the board at EQT Corporation).

62. *Id.*

63. Thomas & Profusek, *supra* note 6.

64. *Id.*

65. Deveau & Malik, *supra* note 61.

not ensure the use of separate proxy ballots.⁶⁶ More broadly, the EQT proxy fight shows it is possible to successfully challenge using universal proxy ballots to do so. It is not yet clear how influential the EQT proxy fight will be because it depends on how successful the challengers are at running EQT, especially since investors have generally grown wary of fracking companies.⁶⁷

III. ANALYSIS

A. Arguments in Support of Universal Proxy Ballots

There are people who support the implementation of universal proxy ballots, and there are those who are against it.⁶⁸ Supporters argue universal proxy ballots eliminate distortions between who the shareholders support and who actually gets elected to the board of directors, provide oversight and connect management to shareholders, and they reduce the costs of proxy fights.⁶⁹

1. Universal Proxy Ballots and Distortions

A major benefit of universal proxy ballots is the elimination of distortion between who the shareholders want on the board and who actually gets elected to the board.⁷⁰ Boston University corporate law professor, Scott Hirst, divides distortions between distortion amongst both sides and within one side.⁷¹ A good way of illustrating the distortions is by using hypotheticals. Scott Hirst gives the following example.⁷² Mary and Nathan are the incumbent candidates, while David and Emily are the dissident candidates. The first group of shareholders hold forty shares and support the incumbents, group two holds thirty shares and supports the dissidents, and a third group with the remaining thirty shares splits the vote supporting both Mary and David. With no restrictions on voting, Mary would receive the forty votes from group 1 and the thirty votes from group 3, Nathan would receive the forty votes from group 1, David would receive the thirty votes from group 2 and thirty votes from group 3, and Emily would receive the thirty votes from group 2. Ultimately, Mary and David would win because they received the two highest totals of votes, as seen in Table 1.

66. Thomas & Profusek, *supra* note 6.

67. Deveau & Malik, *supra* note 61.

68. See Hirst, *supra* note 3, at 460, 500 (describing how managers and challengers support universal proxy ballots, and that the Chamber of Commerce and Business Roundtable are against universal proxy ballots).

69. *Id.* at 468–72; Michelle M. Harner, *Disciplining Corporate Boards and Debtholders Through Targeted Proxy Access*, 92 IND. L.J. 227, 245 (2016); Kahan & Rock, *supra* note 25, at 1393.

70. Hirst, *supra* note 3, at 468–72.

71. *Id.* at 467.

72. *Id.* at 467–68.

Table 1—Voting with Universal Proxy Ballots⁷³

Candidate	<u>Group 1</u>	<u>Group 2</u>	<u>Group 3</u>	<u>Total</u>
Mary, incumbent	40	0	30	70
Nathan, incumbent	40	0	0	40
David, dissenter	0	30	30	60
Emily, dissenter	0	30	0	30

However, when the current rules restricting votes to one ballot are in effect, the winners of the election change. Group 3 must choose which ballot they vote on. In Scott Hirst's hypothetical, twenty-five votes of group 3 choose the incumbent ballot, while five votes of group 3 choose the dissident ballot.⁷⁴ In this election scenario, both incumbents, Mary and Nathan, win the election. The results are shown in Table 2.

Table 2-Voting with Partisan Ballots⁷⁵

Candidate	<u>Group 1</u>	<u>Group 2</u>	<u>Group 3</u>	<u>Total</u>
Mary, incumbent	40	0	25	65
Nathan, incumbent	40	0	0 (25 withheld)	40
David, dissenter	0	30	5	35

73. *Id.* at 468.

74. *Id.*

75. Hirst, *supra* note 3, at 468.

Emily, dissenter	0	30	0 (5 withheld)	30
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The shareholders want Mary and David to be on the board, but the current system distorts their preferences, and Mary and Nathan are elected instead.

Distortions happen within a side as well—like amongst challengers—or amongst incumbents. Scott Hirst uses the same hypothetical as above, but changes group 3 so that twenty-five support Mary and David and five support Nathan and Emily.⁷⁶ If mixing and matching between the different ballots is allowed, Mary and David would win, as shown in Table 3.

Table 3—Voting with Universal Proxy Ballots⁷⁷

Candidate	<u>Group 1</u>	<u>Group 2</u>	<u>Group 3</u>	<u>Total</u>
Mary, incumbent	40	0	25	65
Nathan, incumbent	40	0	5	45
David, dissenter	0	30	25	55
Emily, dissenter	0	30	5	35

However, if group 3 cannot switch votes between the ballots and the twenty-five who support Mary and David vote on the dissenting ballot, Nathan and David would win instead.⁷⁸ This distortion is shown in Table 4.

Table 4—Voting with Partisan Ballots⁷⁹

Candidate	<u>Group 1</u>	<u>Group 2</u>	<u>Group 3</u>	<u>Total</u>
Mary, incumbent	40	0	0 (5 withheld)	40
Nathan, incumbent	40	0	5	45

76. *Id.* at 471–72.

77. *Id.* at 471.

78. *Id.* at 471–72.

79. *Id.* at 471.

David, dissenter	0	30	25	55
Emily, dissenter	0	30	0 (25 withheld)	30

Again, there is a distortion between whom the shareholders want and who actually gets elected.

According to Scott Hirst's analysis of proxy fights between 2001 and 2016, 14.9% of all proxy contests were distorted, and 6.7% would have different results if universal proxy ballots were implemented.⁸⁰ While those numbers seem small, the amount of distortion shifts incumbent and dissident expectations from the preferences of investors.⁸¹

2. Universal Proxy Ballots Help Provide Oversight of Management

Universal proxy ballots help facilitate shareholder oversight of management.⁸² Activist shareholders are a "meaningful check on management that enhances management's accountability."⁸³ Activist shareholders challenging the board via a proxy fight may keep the board disciplined.⁸⁴ Universal proxy ballots—especially systems like the 2010 SEC proposal which limited the proxy ballots to 25% of the board—help harness the power of shareholder activism and direct the activists towards disciplining management.⁸⁵ The threat of proxy fights forces management to limit their risk and consider multiple options when making decisions.⁸⁶ Also, universal proxy ballots allow shareholders to make "more timely intervention[s]."⁸⁷ The Darden Restaurants, Inc. proxy fight is an example of a proxy fight disciplining a board.⁸⁸ In 2013, Darden's first quarter profits fell by 37.6%—panicking investors.⁸⁹ To head off a proxy fight, the board proposed spinning off the Red Lobster brand.⁹⁰ After Red Lobster was spun off against the will of the shareholders, activist shareholders intervened by winning a proxy fight and forcing management to lower food costs through economies of scale.⁹¹ Part of the campaign included a 294-slide presentation explaining how Darden went wrong and how the activists plan on fixing it, including lowering food costs.⁹² The shareholders were successful, and

80. Hirst, *supra* note 3, at 494–95.

81. *Id.* at 495.

82. Harner, *supra* note 69, at 245.

83. *Id.*

84. *Id.*

85. *See id.* at 265 (describing how limited universal proxy ballots "could have a prophylactic effect by encouraging executives to manage difficult operational and financial situations more proactively").

86. *Id.*

87. Harner, *supra* note 69, at 265.

88. *Id.* at 249–53.

89. *Id.* 250–51.

90. *Id.* at 251.

91. *Id.* at 251–53.

92. Harner, *supra* note 69, at 252.

Darden became one of the best-performing companies of 2015.⁹³

3. Universal Proxy Ballots Reduce Costs

Universal proxy ballots reduce the costs of proxy fights, a final major advantage. By definition, universal proxy ballots include the dissident's nominees on the company's proxy ballot.⁹⁴ Without universal proxy ballots, both incumbents and dissidents send out their own proxy materials.⁹⁵ The universal ballot only requires one set of proxy materials; thus, reducing the costs of "printing, mailing and distributing the proxy statement."⁹⁶

Universal proxy ballots also reduce the costs of processing votes.⁹⁷ Under the current system, incumbent ballots are returned to the incumbent and dissident ballots are returned to the dissident; the votes are then calculated and tabulated by the company's tabulator.⁹⁸ Universal proxy ballots are returned to one location, making it cheaper to calculate the vote totals.⁹⁹ Universal proxy ballots—specifically the 2010 SEC proposal—reduce costs of proxy fights by 3.4% to 6.6%¹⁰⁰ based on costs of \$30,000 to \$9,000,000.¹⁰¹

4. Mandatory Universal Proxy Ballots Are Needed to Achieve the Benefits

According to proponents of universal proxy ballots, it is unlikely for corporations to choose universal proxy ballots.¹⁰² They claim shareholder proposals affecting corporate governance are rare; in 2006 and 2007 less than 25% of S&P 1500 companies encountered a proposal for corporate governance.¹⁰³ Also, shareholder proposals are not binding on the corporate board.¹⁰⁴ Proponents feel requiring universal proxy ballots is the only way to ensure they actually are implemented.

B. The Disadvantages of Universal Proxy Ballots

Universal proxy ballots contain disadvantages in addition to the advantages examined above in Section III.A. The main disadvantages include an increased conflation of board elections with democracy and an increase in activists with interests counter to the corporation.¹⁰⁵

Democracy and corporate voting look similar but have different purposes. Democracy

93. *Id.* at 253.

94. *Campion et al., supra* note 1.

95. *Id.*

96. *Kahan & Rock, supra* note 25, at 1388.

97. *See id.* at 1393 (noting per account savings "for the costs associated with the printing and collection of voting forms and other expenses.").

98. *Id.* at 1390.

99. *Id.*

100. *Id.* at 1393.

101. *Kahan & Rock, supra* note 25, at 1384.

102. *Lucian A. Bebchuk & Scott Hirst, Private Ordering and the Proxy Access Debate*, 65 *BUS. LAW.* 329, 339–40 (2010).

103. *Id.* at 345.

104. *Id.* at 346.

105. *Peter J. Wallison, Are Corporations Democracies?*, *AM. ENTER. INST. FOR PUB. POL'Y RSCH.* 1, 2 (2006); *Joseph A. Grundfest, The SEC's Proposed Proxy Access Rules: Politics, Economics, and the Law*, 65 *BUS. LAW.* 361, 379 (2010).

“is a procedure for resolving the serious disputes over values and interests that exist in any political community.”¹⁰⁶ Investors in corporations, on the other hand, have a common interest: to make money.¹⁰⁷ Disputes in corporations arise over the details of how to best make money; however, shareholders do not decide those disputes.¹⁰⁸

Additionally, the directors elected by the shareholders are not representatives of the shareholders—like Congressmen are to their constituents—because directors owe duties to the corporation itself, not to the shareholders.¹⁰⁹ At best, the shareholders are “third-party beneficiaries of the fiduciary duties that the directors owe to the corporation itself.”¹¹⁰

A further difference between director elections and political office is corporations are voluntary organizations.¹¹¹ It is difficult to leave one’s country if dissatisfied.¹¹² In the corporate context, dissatisfied shareholders leave by selling their shares.¹¹³ This action is sometimes called the Wall Street Rule.¹¹⁴ The Wall Street Rule—in addition to limiting corporate voting to board elections and approving major changes to the corporate charter—“should push any discussion of corporate voting away from a focus on democratic theory and legitimacy . . . and more toward a framework based on information theory, which treats voting as a means of error correction for decisions.”¹¹⁵ Under the information theory, corporate voting affects the price of shares, which is an information spreading mechanism.¹¹⁶ The frequent justification for universal proxy ballots is separate proxy ballots create distortions between what shareholders want and who gets elected to the board, which is more focused on democratic theories of corporate voting.¹¹⁷ These theories are misguided because corporations are not democracies.¹¹⁸ Because corporations are not democracies, board membership does not have to be closely representational to the shareholders’ preferences.¹¹⁹

In addition to the theoretical problems involving corporate democracy, universal proxy ballots may encourage shareholder activism with interests separate from the

106. Wallison, *supra* note 105, at 2.

107. *See id.* (“There is a general agreement on the purpose of the corporation, which is to create value for the shareholders.”).

108. *Id.* *See also* Mitchell, *supra* note 7, at 1520 (explaining how ownership was separated from control in corporations).

109. Wallison, *supra* note 105, at 2–3. *See also* 15 PA. STAT. AND CONS. STAT. ANN. § 515(a)(1) (West 2020) (specifying that directors’ fiduciary duties to the corporation include stakeholders, not just shareholders); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (stating that the board has a duty “to protect the corporate enterprise,” and must analyze whether offers are good for the corporation).

110. Wallison, *supra* note 105, at 3.

111. *Id.* at 2.

112. *Id.*

113. Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 130 (2009).

114. *Id.*; Anat R. Admati & Paul Pfleiderer, *The “Wall Street Walk” and Shareholder Activism: Exit as a Form of Voice*, 22 REV. FIN. STUD. 2645, 2646 (2009).

115. Thompson & Edelman, *supra* note 113.

116. *See id.* (explaining how corporate voting induces shareholders to buy and sell, which in turn changes the price, revealing information about the investor’s view of the company).

117. *See* Hirst, *supra* note 3, at 468–72 (examining the different ways separate proxy ballots distort voting between who shareholders want and who is elected).

118. *See* Wallison, *supra* note 105, at 2–3 (explaining that corporations are not democracies); Thompson & Edelman, *supra* note 113, at 130 (explaining that the democratic theory of corporate voting is weak).

119. Wallison, *supra* note 105, at 2–3.

corporation's interests.¹²⁰ For example, labor unions and pension funds invested in a corporation may have goals other than that of the corporation.¹²¹ Universal proxy ballots give megaphone externalities and electoral leverage to activist shareholders.¹²² Just by running candidates, the activists get media attention, especially if they use universal proxy ballots.¹²³ Universal proxy ballots encourage activist challenges because "[t]he fact that the candidates failed is irrelevant because the union leader scores points with the rank and file simply by making noise in support of the cause."¹²⁴ Electoral leverage is "the ability to extract concessions from corporations because of proxy access."¹²⁵ These externalities and leverages are problems because activists tend to be focused on short term returns. Therefore, they may pursue policies that help in the short term but hurt in the long term.¹²⁶

C. Middle Ground for Universal Proxy Ballots

There is a middle ground, or a compromise, between the proponents and opponents of universal proxy ballots. A current Stanford Law professor and former Commissioner of the SEC, Joseph Grundfest, calls this position the agnostic position, which he describes as: "I don't know whether proxy access is a good or bad idea at every corporation in America, and if it is a good idea at some, many, or every corporation, I don't know how to structure the access rules for every corporation. And neither do you."¹²⁷ The middle ground position supports a system in which companies can opt-in to the universal proxy ballots.¹²⁸ The opt-in option is beneficial because government bureaucrats might err in identifying the best universal proxy ballot system, private ordering can adjust to new circumstances, and one system might not work for every company in every circumstance.¹²⁹

A universal proxy ballot agnostic also recognizes there are other options affecting corporate elections. A popular option is the "just vote no" campaign, which is a campaign to get shareholders to withhold their votes.¹³⁰ These campaigns are "highly efficient, low-cost mechanisms for the positive expression of shareholder voice."¹³¹ Just vote no campaigns are increasing in popularity.¹³² Majority voting is another method to achieve some of the goals of universal proxy ballots.¹³³ Majority voting is when the candidate needs

120. Grundfest, *supra* note 105, at 379.

121. *Id.*

122. *Id.*

123. *See id.* at 380 (explaining that the *New York Times* and *Wall Street Journal* will cover activists who get universal proxy ballots even if the activists have no chance of winning the election).

124. *Id.* at 381.

125. Grundfest, *supra* note 105, at 382.

126. *See* Harner, *supra* note 69, at 245 ("[C]ommentators raise concerns regarding . . . activists' motivation and their typical focus on short-term returns.").

127. Grundfest, *supra* note 105, at 362.

128. *Id.* at 376.

129. *Id.* at 376 (quoting Lucian A. Bebchuk, *Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784, 1787 (2006)).

130. Grundfest, *supra* note 105, at 389.

131. *Id.* at 389.

132. *See id.* at 390 (describing how the number of director elections with at least 20% of the votes withheld went from 5.5% in 2008 to 9.8% in 2009).

133. *Id.*

to receive a majority of the votes, including the withheld votes.¹³⁴ Like the “just vote no” campaigns, majority voting is becoming more popular; in fact, the percentage of S&P 500 companies with majority voting went from 16% in 2006 to about 80% in 2010.¹³⁵ Logically, majority voting can increase the effectiveness of “just vote no” campaigns because enough withheld votes can stop a candidate from being elected. Finally, dissidents can be reimbursed for the costs of the proxy fight.¹³⁶ These methods, especially a combination of the methods, lessen the need for universal proxy ballots.

D. Why the SEC's Proposals Keep Failing

Another difficulty with implementing universal proxy ballots is the SEC's proposals to mandate universal proxy ballots keep failing.¹³⁷ The two main reasons they fail are internal contradictions and politics.¹³⁸ All agency actions are governed by the Administrative Procedure Act, which allows courts to strike down the regulation if, among other reasons, the regulation is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”¹³⁹ Internal contradictions within a regulation allow the courts to strike the regulation down because “[i]nternally contradictory rules are, by definition, arbitrary and capricious.”¹⁴⁰ An example is the 2009 SEC proposal, which courts ruled to be arbitrary and capricious.¹⁴¹ The court found the SEC failed to consider the costs of the proposal, evidence showing companies lose value after proxy fights, and the possibility special interests will abuse universal proxy ballots.¹⁴² Finally, the SEC was inconsistent in analyzing the frequency of proxy fights with universal proxy ballots.¹⁴³

The other impediment to the SEC's proposals is politics. “Labor unions and public pension funds are among the strongest proponents of proxy access. They are primarily allied with the Democratic Party. Certain corporations and corporate lobbying groups are among the most resolute opponents of proxy access. They are primarily allied with the Republican Party.”¹⁴⁴ The split—based on partisan lines—is seen in a series of bills. In 2009, the Democratic-controlled Senate passed a bill allowing universal proxy ballots if the dissidents have one percent of the shares and owned the shares for at least two years.¹⁴⁵ In 2016 and 2017, the Republican-controlled House of Representatives passed two bills: the first banned the SEC from using appropriated funds to implement universal proxy

134. Robert A. Profusek et al., *Majority Voting for Directors*, JONES DAY (Oct. 2006), <https://www.jonesday.com/en/insights/2006/10/majority-voting-for-directors> [<https://perma.cc/FDS4-G6M9>].

135. Kahan & Rock, *supra* note 25, at 1360.

136. Grundfest, *supra* note 105, at 391. *See* CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 237 (Del. 2008) (allowing shareholders to create bylaws to reimburse dissenters whose candidates are elected).

137. Kahan & Rock, *supra* note 25, at 1353–57.

138. *See* Grundfest, *supra* note 105, at 378 (discussing proxy access politics); *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1156 (D.C. Cir. 2011) (ruling an SEC proposal for universal proxy ballots was arbitrary and capricious).

139. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237, 243 (1946).

140. Grundfest, *supra* note 105, at 363.

141. *Bus. Roundtable*, 647 F.3d at 1156.

142. *Id.* at 1150–52.

143. *Id.* at 1153.

144. Grundfest, *supra* note 105, at 378 (footnotes omitted).

145. Shareholder Bill of Rights Act of 2009, S. 1074, 111th Cong. § 4 (2009).

ballots,¹⁴⁶ and the second banned the SEC from mandating universal proxy ballots.¹⁴⁷

As Part III demonstrates, universal proxy ballots are slightly cheaper, provide oversight, and eliminate voting distortions.¹⁴⁸ However, oversight is problematic when shareholders have short-term incentives rather than the long-term interests of the corporation.¹⁴⁹ Also, voting distortions might not be a major issue because corporations are not democracies.¹⁵⁰ Regardless of one's position on universal proxy ballots, it is difficult to implement them through government regulation.¹⁵¹ The SEC has had difficulty not being arbitrary and capricious when attempting to mandate universal proxy ballots; the whole process has become politicized, with Democrats supporting universal proxy ballots and Republicans opposing universal proxy ballots.¹⁵²

IV. RECOMMENDATION

Both sides of the debate on universal proxy ballots present compelling arguments. However, the agnostic position is the best option because it is a compromise position. The agnostic position enables universal proxy ballots when conditions support it but does not require them when the disadvantages outweigh the advantages.¹⁵³ The agnostic position allows corporations to choose universal proxy ballots without fully committing to theories of corporate democracy, thus allowing the directors to maintain the necessary control over the corporation.¹⁵⁴

A. Advantages of the Voluntary Nature of the Agnostic Position

Because universal proxy ballots would be voluntary, corporations could choose them only in situations in which activists—with ulterior motives counter to the success of the corporation—will not use proxy fights to acquire gains over the corporations. After all, the board of directors and most shareholders should want the corporation to succeed, and activists sometimes have concerns other than corporation success.¹⁵⁵ The agnostic position can tailor the specifics of universal proxy ballots to the unique needs of the individual corporation. Finally, the agnostic position enables universal proxy ballots to exist without encountering the difficulties associated with a partisan fight, which has occurred when the SEC or Congress tries to impose universal proxy fights.¹⁵⁶

146. Financial Services and General Government Appropriations Act, H.R. 5485, 114th Cong. § 1215 (2016).

147. Financial CHOICE Act of 2017, H.R. 10, 115th Cong. § 845 (2017).

148. *Supra* Sections III.A.1–III.A.3.

149. *Supra* Section III.B.

150. *Id.*

151. *Supra* Section III.D.

152. *Id.*

153. Grundfest, *supra* note 105, at 376.

154. *See* Wallison, *supra* note 105, at 3 (describing how directors have fiduciary duties to the corporation itself, not just to the shareholders who elected them).

155. *See* Grundfest, *supra* note 105, at 379–80 (discussing the potential motivations of activists other than “shareholder wealth maximization”).

156. *See id.* at 378 (describing the partisan support for and against universal proxy ballots); S. 1074, 111th Cong. § 4 (2009) (exemplifying Senate Democratic support for universal proxy ballots); H.R. 10, 115th Cong. § 845 (2017) (exemplifying House Republican opposition to universal proxy ballots).

B. The Agnostic Position Doesn't Rely on Democratic Theories and Isn't Harmed by Some Level of Distortion

The agnostic position enables universal proxy ballots to exist without relying on corporate democratic theories.¹⁵⁷ As explained in Section III.B of this Note, corporations are not truly democracies, and directors are not representatives of shareholders like House members and Senators are to their constituents.¹⁵⁸ Because corporations are not truly democracies, some distortions in corporate elections are not a problem because the distortions do not undermine the foundational theories of the corporation.¹⁵⁹ Yet, too much distortion does change the expectations of shareholders and the probability that needed proxy fights will occur.¹⁶⁰ As mentioned above, only 14.9% of proxy contests are distorted, and only 6.7% would have different outcomes with universal proxy ballots.¹⁶¹ These numbers imply at least 93.3% of the time, universal proxy ballots are not needed to fix distortions. Only a few corporations require universal proxy ballots to avoid distortions.¹⁶² Because corporations can choose universal proxy ballots when they are needed, the agnostic position allows universal proxy ballots for the 6.7% of elections where distortions change the outcome but does not require universal proxy ballots for the rest of the elections where they are not required to fix distortions.

C. The Agnostic Position Solves Issues Involving Activists

The agnostic position also helps address the activist problems associated with mandatory universal proxy ballots.¹⁶³ Many activists, such as labor unions, may have goals different than the corporation; because of this, universal proxy ballots make it easier for activists to use proxy fights as a megaphone to promote themselves or as leverage in negotiations with management.¹⁶⁴ Furthermore, activists are also frequently short-term focused.¹⁶⁵ Yet, activists provide oversight of the board and connect the board to shareholders.¹⁶⁶ Allowing corporations to choose if and when to use universal proxy ballots aids in supporting the benefits of activists and limiting the negative consequences of activists. For example, corporations choosing when to use universal proxy ballots can adjust to new circumstances.¹⁶⁷ Thus, if a corporation notices a large number of activist shareholders, it could choose not to use universal proxy ballots to limit the megaphone externalities and limit electoral leverage. If a corporation does not notice many activists, it could allow universal proxy ballots because the shareholders would be more likely to use

157. See *supra* Sections III.C, IV.A (describing the voluntary foundation of the agnostic position, instead of a democratic foundation).

158. *Supra* Section III.B.

159. *Supra* Section III.B.

160. Hirst, *supra* note 3, at 495–96.

161. *Id.* at 494–95.

162. *Cf. id.* (universal proxy ballots are needed simply to help the 6.7% of proxy contests that are distorted).

163. See generally Grundfest, *supra* note 105 (describing activists using megaphone externalities and electoral leverage).

164. *Id.*

165. Harner, *supra* note 69, at 245.

166. *Id.*

167. Grundfest, *supra* note 105, at 376.

them to provide needed oversight.

D. The Agnostic Position Allows Private Ordering

Private ordering found in the agnostic position allows individual corporations to design their own universal proxy ballot scheme.¹⁶⁸ As explained above, private ordering can adjust to new circumstances, and the same universal proxy ballot scheme might not work for every corporation.¹⁶⁹ For example, corporations can impose various requirements on dissidents' access to universal proxy ballots.¹⁷⁰ Also, corporations can choose alternatives to universal proxy ballots, like withholding campaigns, majority voting, and reimbursements.¹⁷¹ As explained above, these alternatives can be cheaper than a full scale proxy fight, with or without universal proxy ballots.¹⁷² Also, the alternatives lessen the need for universal proxy ballots because the alternatives can achieve many of the same goals as universal proxy ballots.¹⁷³

E. The Agnostic Position Avoids Partisanship

Finally, the agnostic position allows some universal proxy ballots to exist without surviving a partisan process. As explained in Section III.D, support for and against universal proxy ballots is split by partisan lines: Democrats are for universal proxy ballots and Republicans are against them.¹⁷⁴ SEC proposals supporting universal proxy ballots under a Democratic administration get reversed when a Republican becomes president.¹⁷⁵ Congressional Republicans have tried to ban the SEC from mandating universal proxy ballots,¹⁷⁶ and Senate Democrats have tried to require the SEC to mandate universal proxy ballots.¹⁷⁷ The agnostic position allows corporations to choose whether they want universal proxy ballots.¹⁷⁸ This choice does not have to pass through Congress or go through the shifting focuses of the SEC; the corporation can choose universal proxy ballots independently from any partisan concerns. Corporations are more attuned to their specific needs than legislatures and bureaucrats in Washington, D.C., or state capitals like Dover, Harrisburg, or Des Moines.

168. *Id.*

169. *Id.*

170. See N.D. CENT. CODE ANN. § 10-35-08(3) (West 2007) (requiring a shareholder to own five percent of the shares to nominate challengers); Facilitating Shareholder Director Nominations, Exchange Act Release No. 34-60089, 74 Fed. Reg. 29,024, 29,035 (June 18, 2009) (adjusting the minimum amount of shares needed to get on a universal proxy ballot depending on the size of the corporation).

171. Grundfest, *supra* note 105, at 389–91. See *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 237 (Del. 2008) (allowing bylaws to reimburse dissidents in proxy fights).

172. See *supra* Section III.C (describing various alternatives to proxy fights).

173. Grundfest, *supra* note 105, at 389–91.

174. *Supra* Section III.D.

175. See Hirst, *supra* note 3, at 465–66 (describing how the 2016 SEC proposal disappeared when the Trump administration took over from the Obama administration).

176. Financial CHOICE Act of 2017, H.R. Res. 10, 115th Cong. § 845 (2017); Financial Services and General Government Appropriations Act, H.R. Res. 5485, 114th Cong. § 1215 (2016).

177. Shareholder Bill of Rights Act of 2009, S. Res. 1074, 111th Cong. § 4 (2009).

178. Grundfest, *supra* note 105, at 362.

F. The EQT Proxy Fight Is a Model for the Agnostic Position

The recent EQT proxy fight can serve as a model for the agnostic position.¹⁷⁹ The Rice Group challenged the incumbent board at EQT. At the time, EQT had a requirement mandating dissidents to consent to appear on ballots, but the incumbents did not have to consent.¹⁸⁰ The Rice group challenged the one-sided consent requirement in Pennsylvania court, and EQT agreed to universal proxy ballots instead of fighting in court.¹⁸¹ The EQT proxy fight also provides a counterargument to the concern that few companies will choose universal proxy fights.¹⁸² Universal proxy fights can be opted for after negotiations, sometimes involving brinkmanship and threatened litigation—like what happened with EQT.¹⁸³

The EQT proxy fight shows, while not easy, it is possible for corporations to choose universal proxy ballots voluntarily. Getting both sides to agree to universal proxy ballots may require sophisticated negotiation and brinkmanship. It may be easier to get universal proxy ballots if the corporate rules are one-sided. If they are one-sided, the disadvantaged side could challenge in court—as the Rice group did.¹⁸⁴ The other side may capitulate and agree to universal proxy ballots rather than go through the costs of a trial to settle a proxy fight issue.

V. CONCLUSION

Universal proxy ballots are beneficial in some situations; however, their use should be left to private ordering instead of being mandated by the SEC. Private ordering—which is the foundation of the agnostic position—allows universal proxy ballots to be used only when they are thought to be needed. Private ordering acknowledges the power to elect directors without adhering to corporate democratic theories. It also addresses the problems of activists abusing universal proxy ballots to use megaphone externalities and electoral leverage. Private ordering is flexible, and it avoids partisanship.

A great model for private ordering leading to universal proxy ballots is the recent EQT proxy fight. The dissidents got the incumbents to agree to use universal proxy ballots. The dissidents then proceeded to win control of the board. Now that one proxy fight has used universal proxy ballots it is possible more fights may use universal proxy ballots—only time will tell, although it is more likely with the agnostic position.

179. Thomas & Profusek, *supra* note 6.

180. *Id.*

181. *Id.*

182. *See generally id.* (detailing how successful a universal proxy fight can be through the EQT Corporation example).

183. *Id.*

184. Thomas & Profusek, *supra* note 6.