



First Successful Use of a Universal Proxy Card for a Control Slate in the United States

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Editor’s note: Steve Wolosky, Andrew Freedman, and Elizabeth Gonzalez-Sussman are partners at Olshan Frome Wolosky LLP. This post is based on an Olshan memorandum by Mr. Wolosky, Mr. Freedman, Ms. Gonzalez-Sussman, and Mohammad Malik. Related research from the Program on Corporate Governance includes [Universal Proxies](#) by Scott Hirst (discussed on the Forum [here](#)).

On July 10, 2019, shareholders at EQT Corporation (“EQT” or the “Company”) overwhelmingly voted for a control slate of directors nominated by a shareholder group led by Toby Z. Rice, Derek Rice, Will Jordan and Kyle Derham (the “Rice Team”). Interestingly, this proxy contest involved the use of a universal ballot, a first in the United States involving a control slate of directors, in which all of the company and dissident’s nominees appeared on their respective proxy cards.

EQT is the largest natural gas producer in the United States. In November 2017, the Rice Team sold the company they had founded, Rice Energy, to EQT, for approximately \$6.7 billion. Unfortunately, within a year following the acquisition, EQT’s operational performance severely declined, with its shares falling 39% last year. Following a massive operational loss in the third quarter of 2018, many shareholders reached out to Toby Z. Rice for help. Despite efforts to engage with EQT privately, the Rice Team’s offers to help were rebuffed, forcing the Rice Team to call for the replacement of the CEO and nominate a control slate of directors.

As part of the nomination process, the Rice Team was required to deliver to EQT consents from each of its nominees to be named in the Company’s proxy materials. We are seeing this tactic employed in increasing fashion by many companies, which can give companies an unfair advantage in potentially naming one or more of a dissident’s nominees in the company’s proxy statement, while not providing reciprocal consents to the nominating shareholder to name some or all of the company’s nominees in the dissident’s proxy statement. The Rice Team sought to level the playing field by seeking a waiver of this requirement, but EQT would not grant one. Accordingly, the Rice Team had to submit its nomination with the required consents, but requested the use of a universal ballot in which all of the nominees would be named on a single proxy card. Due to EQT’s silence with respect to this request, the Rice Team filed a lawsuit against the Company to prevent the Company’s unfair use of the Rice Team’s nominee consents. In response to the lawsuit, EQT publicly agreed to the use of a universal ballot.

The universal ballot adopted by both EQT and the Rice Team named both EQT's and the Rice Team's nominees on their respective proxy cards. The only difference related to the presentation of the two cards, in which each side highlighted how it desired shareholders to vote. Copies of the two cards can be found here ([Rice Team](#)) and here ([EQT](#)). As shown, the Rice Team made clear on its proxy card a recommendation for all seven of its nominees and for five of the Company's nominees that it did not oppose, to permit shareholders to vote for all 12 available spots. Similarly, the Company recommended a vote for all 12 of its nominees and against the Rice Team's nominees, other than existing director, Daniel Rice IV, who was nominated by both EQT and the Rice Team.

The Rice Team obtained public support from many of EQT's largest shareholders, including T. Rowe Price Group Inc., D.E. Shaw & Co., Kensico Capital Management Corp. and Elliott Management Corp., along with proxy advisory firms Institutional Shareholder Services ("ISS") and Egan-Jones Ratings.

The use of a universal ballot for a majority slate of directors is unprecedented and, in our view, may become more common in future proxy contests given the Rice Team's success here. In fact, ISS noted the following in its report recommending that shareholders vote for all of the Rice Team's nominees on the Rice Team's universal proxy card:

"The adoption of a universal card was an inherently positive development for EQT shareholders (as it would be in any proxy contest), in that it will allow shareholders to optimize board composition by selecting candidates from both the management and dissident slates."

It is unfortunate that many companies are adding a requirement that nominees consent to being named in the company's proxy materials without the same consent given by the company's nominees to the nominating shareholder. Companies should either have a two-way consent requirement or no consent requirement to ensure a level playing field for the company and the activist in the solicitation of proxies. Activists should not have to resort to litigation to ensure a fair election process. Elections should be based on the merits and not on legal shenanigans. We hope today's outcome motivates companies to refrain from these types of games in future contests.