

SEC Proposes Universal Proxy Cards for Contested Director Elections

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Client Alert

On October 26, 2016, the Securities and Exchange Commission (the "Commission"), in 2-1 vote, proposed revisions to its proxy rules that would require registrants and dissident shareholders to use universal proxy cards naming all board nominees in contested elections of directors. Under current rules, registrants and dissidents use competing proxy cards, which effectively prevent shareholders from voting by proxy for their chosen mix of director candidates, but rather require them to vote for either the registrant's nominees or the dissident's preferred mix of dissident nominees and registrant nominees. Shareholders must attend, or have a representative attend, the shareholders' meeting in person to vote for a slate of directors that is not available via either proxy card. A universal proxy card as proposed by the Commission would include all registrant and dissident nominees on one card, as well as any proxy access nominees. A key goal of the proposed rules, as stated by Commission Chair Mary Jo White, is to "allow shareholders to vote by proxy in a manner that more closely replicates how they can vote in person at a shareholder meeting."

In the same release, the Commission also proposed revisions to the proxy rules applicable to all director elections that are designed to ensure that proxy cards specify all voting options available to shareholders in elections of directors and would require clear disclosure of the effect of withheld votes in elections governed by the plurality voting standard.

The Commission's [press release](#) announcing the proposed rules, an accompanying fact sheet, and the [full text of the proposed rules](#) are available on the SEC's website. Comments on the proposed rules are due on January 9, 2017.

Background

Under current rules, a director candidate may be included on a proxy card only if the candidate consents to inclusion. In the context of a contested election, a candidate of the registrant is very unlikely to consent to being included on a dissident's proxy card and the registrant is very unlikely to seek to include a dissident nominee on its proxy card. As a result, shareholders typically will receive a proxy card from the registrant with its nominees and a proxy card from the dissident with its nominees. If the dissident's proxy card contains a "short slate" (that is, it contains fewer nominees than board seats up for election), current Commission rules (known as the "short slate rules") permit the dissident to include the names of registrant nominees for whom it will *not* cast proxies received from shareholders. Shareholders then must choose whether to submit proxies for the registrant's slate using the registrant's proxy card or the dissident's slate using the dissident's proxy card. If a shareholder desires to cast votes for a mix of registrant and dissident director candidates that is not reflected in the dissident's short-slate proxy card, the shareholder must attend the shareholders meeting and cast the vote in person or appoint a representative to attend the meeting and vote on the shareholder's behalf. With a universal proxy card, all candidates would appear on a single card, allowing shareholders to "mix and match" nominees from both parties as the shareholder desires. Under the plurality voting standard applicable to contested elections, the nominees receiving the most "for" votes would be elected to the board of directors.

The Commission has considered universal proxy cards in the past, including in connection with amendments to the proxy rules adopted in 1992 and a proposed rule in 2003. In recent years, the movement towards the use of a universal proxy cards has gained momentum through various activities, including the following:

- In 2013, the Commission's Investor Advisory Committee recommended that the Commission consider revisions to the proxy rules to permit the use of universal proxy cards in "short-slate" director elections.
- In 2014, the Council of Institutional Investors ("CII") petitioned the Commission for rulemaking on the use of universal proxy cards.
- In 2015, the Commission held a roundtable on proxy voting issues, including the use of universal proxy cards.
- In 2015, CII sent another letter to the Commission urging rulemaking on universal proxy cards.
- In 2015, Commission Chair White announced to the Society for Corporate Governance that she had asked Commission staff to present recommendations on universal proxy rulemaking to the Commission.

The U.S. House of Representatives, however, has made clear its opposition to universal proxy cards, voting earlier this year to add language to a spending bill that would have prevented universal proxy rules. The bill, however, has not passed the Senate.

Key Elements of the Proposed Rules on Universal Proxy

Inclusion of All Nominees on Proxy Card in Contested Elections. The proposed rules would require registrants and dissident shareholders to use universal proxy cards in all non-exempt solicitations in contested director elections at annual meetings. Under the proposed rule's revised definition of "bona fide nominee" in Rule 14a-4(d), any person who has consented to being named in *any* proxy statement relating to the registrant's next meeting of shareholders for the election of directors may be included on the registrant's and the dissident's respective proxy card. Nominees would still be required to consent to serve if elected; if a nominee intends to serve only if one of the party's slate of candidates is elected, the applicable proxy statement must disclose that fact. As a universal proxy would obviate the need for the current "short slate" rule, the proposed rules would eliminate that rule.

If a shareholder or group of shareholders also has submitted one or more proxy access nominees for inclusion in the registrant's proxy materials, those nominees would be included on a universal proxy card. (We note, however, that proxy access bylaw provisions often prohibit proxy access nominees in the event of a contested election.) The universal proxy card must distinguish between registrant, dissident and proxy access nominees, as discussed further under "Presentation and Format" below.

Presentation and Format. Although registrants and dissidents may design their own universal proxy cards, the proposed rules set forth various requirements as to formatting and presentation of the cards, which are intended to ensure a clear and fair presentation of nominees from all parties. The requirements include the following:

- The card must distinguish clearly between registrant nominees, dissident nominees, and any proxy access nominees.
- Within each group of nominees, the nominees must be listed in alphabetical order.
- All nominees must be presented on the card in the same font type, style and size.
- The proxy card must clearly state the maximum number of nominees for whom shareholders may grant proxy authority.
- The proxy card must clearly state the treatment of a proxy executed in a manner that grants authority to vote for more or fewer nominees than the number of directors being elected or in a manner that does not grant authority to vote with respect to any nominees.

A universal proxy card could allow shareholders to vote for the full slate of registrant nominees or dissident nominees as a group if: (1) both the registrant and the dissident have proposed a full slate of nominees; and (2) there are no proxy access nominees.

Procedural Requirements. The proposed rules contain various notice and filing requirements, including the following:

- The dissident, in addition to complying with the advance notice requirements of the registrant's bylaws, must provide the registrant with the names of its nominees at least 60 days prior to the anniversary of the prior year's annual meeting. The proposed rules would require the registrant to include this deadline in its proxy materials, similar to the existing requirement to provide the Rule 14a-8 deadline for shareholder proposals.
- The registrant must provide the dissident with the names of its intended nominees no later than 50 calendar days prior to the anniversary of the prior year's annual meeting.
- The dissident must file its definitive proxy statement with the Commission by the later of 25 days before the meeting date or five calendar days after the registrant files its definitive proxy statement.
- The dissident must solicit shareholders holding at least a majority of the voting power of shares entitled to vote in the election, meaning it must mail proxy materials to those shareholders or make the proxy materials available to those shareholders via notice-and-access. (The Commission is seeking comment regarding whether dissidents should be required to solicit all shareholders, as retail investors holding smaller positions likely would be most impacted by the rules as proposed.)

As is the case under current rules, the registrant and the dissident would continue to prepare and disseminate their own proxy materials, and solicit shareholders to return their proxy cards or otherwise vote for their respective slate of candidates. The registrant and dissident, however, would be required in their proxy statements to refer shareholders to the other party's proxy statement for information about that party's nominees and to state that the other party's proxy statement is available free-of-charge on the Commission's website.

Comparing Universal Proxy to Proxy Access. Many registrants have recently adopted proxy access bylaw provisions that permit a shareholder, or a group of shareholders, meeting various ownership and other requirements to have a limited number of director nominees included in the registrant's proxy materials, including the proxy card. Proxy access bylaws also typically permit the nominating shareholder(s) to include a 500-word statement in support of their nominees in the registrant's proxy statement. In contrast, nominees of a dissident shareholder in a proxy context are not included in the registrant's proxy materials; the dissident prepares and files with the Commission its own proxy materials and conducts its own solicitation of shareholders at its expense. Shareholders putting forth director nominees through proxy access can avoid the substantial costs associated with a proxy contest, but they also must comply with the requirements and conditions of the proxy access bylaw provisions, which often include restrictions on the nominating shareholder's intention to change or influence control of the registrant in addition to ownership and other eligibility requirements. As proxy access nominees would already be included in a registrant's proxy materials, a universal proxy card stands to benefit more a dissident shareholder in a proxy contest situation, but the dissident still must conduct its own solicitation at its expense.

Disclosure of Voting Standards and Voting Options

The Commission also proposed rules regarding disclosure of voting standards and voting options that would apply to proxy statements and proxy cards for both contested and uncontested elections of directors. The Commission proposed these rules in response to concerns that some proxy statement disclosures are ambiguous with respect to voting standards in director elections, particularly in light of the widespread adoption of majority voting in elections of directors. Under the

proposed rules, proxy cards would have to include "against" and "abstain" voting options when there is a legal effect to a vote against a nominee under state law. This legal effect generally arises when a registrant has a majority voting standard for director elections. Further, registrants would not be permitted to include a "withhold" option on the proxy card in that situation. If a registrant utilizes a plurality voting standard for director elections, it would be required to disclose in its proxy statement the treatment and effect of a "withhold" vote (i.e., that "withholds" have no legal effect in plurality voting).

The Outlook for the Proposed Rules

As evidenced by numerous Commission requests for comments on the proposed rules, as well as early commentary on the proposed rules, concerns exist as to the potential impact of mandatory universal proxy cards. Those concerns include, among others:

- whether a universal proxy card would lead to voter confusion;
- whether the proposed rules would lead to more proxy contests and the election of more (or less) dissident nominees;
- whether a universal proxy card would lead to undesired outcomes, such as shareholders being more likely to vote for a mixed slate of nominees that neither the registrant nor the dissident is in favor of;
- whether a universal proxy card may lead to more invalid votes - for example, would it be more likely that shareholders will vote inadvertently for more nominees than available board seats; and
- whether retail investors will be negatively impacted by the requirement that dissidents need only solicit a majority of shareholders rather than all shareholders.

Given the above and other concerns, we expect substantial comment and debate on the proposed rules. Further, upcoming and anticipated changes at the Commission may impact elements of the proposed rules or the priority of universal proxy cards relative to other potential Commission actions.

With respect to the proposed rules regarding disclosure of voting standards and voting options, we recommend that registrants review their existing disclosures to ensure such disclosure is clear. Given the concern expressed by the Commission and Commission staff regarding ambiguity of disclosures in some proxy statements under existing rules, we expect this to be an area of particular review and comment by the Commission staff in the upcoming proxy season.