



## Securities Law ADVISORY ■

**NOVEMBER 11, 2016**

### SEC Proposes Rules to Adopt Universal Proxy Cards in Contested Director Elections

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At an open meeting held on October 26, 2016, the Securities and Exchange Commission (SEC) voted two to one to propose amendments for the mandatory use of universal proxy cards and additional voting options and disclosure regarding voting standards in director elections.<sup>1</sup> Under current proxy rules, in a contested election, two separate proxy cards are used to vote: one card provided by the registrant for management's slate of directors and a separate card provided by the dissident investor waging the contest for the dissident investor's slate of directors. Shareholders voting via proxy must use one proxy card or the other. A shareholder voting in a contested election must attend the shareholder meeting in person if it wants to vote for individual directors from each slate. A universal proxy card or ballot would eliminate this discrepancy between in-person and proxy voting by allowing shareholders to vote by proxy for a combination of management and dissident nominees.

The proposed amendments to the proxy rules include:

- Revisions to required voting options in director elections
- Revisions to required disclosure regarding voting standards in director elections
- Revisions to the consent requirements for bona fide nominees in contested elections
- Elimination of the short slate rule
- Requirements regarding the use of universal proxy cards in all non-exempt solicitations in connection with contested elections
- Requirements that the dissident provide notice to the registrant
- Requirements that the registrant provide notice to the dissident
- Filing requirements for dissident proxy statements
- Dissident solicitation requirements
- Presentation and formatting requirements for universal proxy cards

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<sup>1</sup> The full text of the proposed rules along with commentary and background from the SEC can be accessed at <https://www.sec.gov/rules/proposed/2016/34-79164.pdf>.

Each of the above proposed amendments is discussed in more detail below. This advisory is a follow-up to [our special alert we published](#) immediately following the open meeting and is meant to provide a more detailed summary of the proposed rules.

In the open meeting, the SEC chair, commissioners and staff emphasized that the overarching goal of the proposed changes was to provide proxy voters with the same voting options that would be afforded to them if they attended the meeting in person. Chair Mary Jo White stated: "The proposed changes would allow shareholders to vote by proxy in a manner that more closely replicates how they can vote in person at a shareholder meeting. This change would allow shareholders through the proxy process to more fully exercise their vote for the director nominees they prefer."

Additional background is provided at the [end of this advisory](#).

Comments on the proposed rules are due by January 9, 2017.

## **What Should You Do Now?**

Until the proposed rule becomes final, companies should consider reviewing their current director-related voting standards and how they compare to the proposed requirements. Companies should also review the current disclosure in their proxy statements related to the effect of "withhold" votes to make sure that it is not confusing or misleading and make sure that the company is providing the correct voting options for the applicable voting standard for director elections (i.e., "withhold" for a plurality voting standard and "against" for a majority voting standard).

## **What Are the Proposed Amendments That Apply to All Director Elections?**

In promoting its goal of replicating the in-person voting process for proxy voters, the SEC proposed several amendments to the existing proxy rules, which are outlined below. Most of the proposed changes apply only to contested elections, but some amendments, including the following, apply to all director elections.

### ***Revisions to required voting options in director elections.***

Proxy cards would be required, with respect to director elections, to include an "against" voting option when applicable state law gives effect to a vote against a nominee and an "abstain" voting option where a majority voting standard is in effect. The proxy cards will exclude a "withhold" voting option when applicable state law gives effect to a vote against a nominee.

### ***Revisions to required disclosure regarding voting standards in director elections.***

When a "withhold" vote is allowed, registrants would be required to provide additional disclosure in their proxy statements about the effect of a withhold vote in director elections. The SEC recently reviewed several company proxy statements and found that some ambiguities existed that could be confusing to shareholders. Specifically, it found that some proxy cards failed to include an "against" voting option when using a majority voting standard where such a vote could have an effect, or the inclusion of an "against" option on the proxy card when using a plurality voting standard where the only proper alternative should be "withhold." The proposed changes are meant to help shareholders more easily understand the effect of their "withhold" vote.

## What Are the Proposed Amendments That Apply to Contested Elections?

### ***Revisions to the consent requirements for bona fide nominees.***

The proposed rules would permit a nominee to be named on a proxy card if the nominee has consented to being named in *any* proxy statement relating to the registrant's next meeting of shareholders at which directors are to be elected, as opposed to the current requirement to consent to being named in each proxy statement separately.<sup>2</sup> By changing the requirements, in a contested election, the company and the dissident can each include all director nominees in their proxy cards instead of only the nominees who have consented to being named on the proxy card of that particular party.

Concerns have been raised that listing registrant nominees on the dissident's proxy card (or vice versa) could imply support for the dissident or registrant nominees. Additionally, the question has been raised whether listing dissident nominees on the registrant's proxy card could lend some credibility to dissident nominees.

The SEC addressed those concerns by explaining that, in its view, the proposed requirement that the dissident nominees be clearly distinguished from the registrant nominees, in connection with the proposed presentation and formatting requirements, would alleviate any confusion by shareholders or implied support by nominees for opposing nominees listed on the same ballot.

### ***Eliminate the short slate rule.***

The proposed revisions eliminate the "short slate" rule.<sup>3</sup> The short slate rule permits a dissident seeking to elect less than a full slate of directors to "round out its slate" by soliciting proxy authority to vote for some management nominees on the dissident's proxy card. When combined with the new proposed bona fide nominee rule and the introduction of universal proxy cards, the necessity of the short slate rule would be eliminated under the proposed amendments.

### ***Require the use of universal proxy cards in all non-exempt solicitations in connection with contested elections.***

#### ***In what situations would a universal proxy card be required?***

Proposed Rule 14a-19(e) would require all proxy cards used in non-exempt solicitations in connection with a contested election to include the names of all duly nominated candidates for election to the board. The proposed amendments only apply to contested elections where a dissident is actively soliciting proxies in support of director nominees other than the registrant's nominees through use of a proxy statement and proxy card.

#### ***Are there any contested elections that would be exempt from the universal proxy requirement?***

The proposed universal proxy card would not apply to election of directors involving only registrant and proxy access nominees because shareholders would already have access to a proxy that reflects all of their voting options.

The proposed amendments would not apply to solicitations where a person does not seek authority to act as proxy and does not furnish or request a form of revocation, abstention or consent. Additionally, the amendments would not apply to solicitations by a dissident when the aggregate number of persons solicited is not more than ten.

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<sup>2</sup> Rule 14a-4(d).

<sup>3</sup> Rule 14a-4(d).

***Requirements that the dissident provide notice to the registrant.***

Under the proposed rules, dissidents would be required to provide registrants with notice of their intent to solicit proxies in support of their own nominees, and the names of such nominees, no later than 60 calendar days before the anniversary of the registrant's previous year's annual meeting date.

The SEC stated that creating a notice requirement is necessary to provide a specific date by which parties to a contested election will know whether a universal proxy card will need to be used. The SEC believes that the deadline of 60 days prior to the anniversary of the previous year's annual meeting would allow sufficient time to give notice to all parties without creating a burden for most dissidents.

The proposed 60-day notice would be in addition to any applicable advance notice provisions in the registrant's governing documents, so dissidents must still comply with a company's advance notice bylaws, if applicable.

***Requirements that the registrant provide notice to the dissident.***

The proposed rules would require that registrants provide dissidents with notice of the names of the registrant's nominees no later than 50 calendar days before the anniversary of the registrant's previous year's annual meeting date, unless the names have already been provided in a preliminary or definitive proxy statement filed by the registrant.

The SEC specified 50 days' notice because it believed it would give registrants an additional 10 days after the latest date the registrant could have received notice from a dissident of its nominees (as described above).

***Filing requirements for dissident proxy statements.***

Under the proposed rules, dissidents would be required to file their definitive proxy statement by the later of 25 calendar days before the meeting date or five calendar days after the registrant files its definitive proxy statement.

The SEC believes that this amendment would help to ensure that all shareholders have sufficient information about each of the registrant and dissident nominees prior to the meeting. Currently, dissidents that elect full set delivery in a contested election do not face any filing deadline for their proxy statement. If a registrant has prepared and disseminated a definitive proxy statement with a universal proxy card, and later discovers that the dissident has failed to meet the imposed deadline, the proposed rules would allow the registrant to choose whether to disseminate a new, non-universal proxy card that includes only the names of the registrant's nominees.

***Dissident solicitation requirements.***

Under the proposed rules, dissidents would be required to solicit shareholders representing at least a majority of the voting power of shares entitled to vote on the election of directors. Dissidents would not be required to solicit or provide hard copies of written materials to all shareholders. Under the current rules, there is no requirement that a dissident solicit or furnish a proxy statement to a certain percentage of shareholders. In the proposing release, the SEC estimated that in approximately 97 percent of recent proxy contests the dissident shareholder distributed materials to more than a majority of the voting power of the target. The SEC stated that the proposal to implement a minimum solicitation requirement is meant to prevent the situation where a dissident can avoid the time and expense of soliciting shareholders and still have its nominees be included on the universal proxy card of the registrant.

### ***Presentation and formatting requirements for universal proxy cards.***

The proposed rules prescribe requirements for the format of the universal proxy cards to ensure that each party's nominees are presented in a clear and impartial manner. Each party would still be permitted to design and distribute its own proxy card, but the proposed rules outline certain general requirements that each universal proxy card must meet.

Such requirements include, but are not limited to, clearly distinguishing between registrant nominees, dissident nominees and any proxy access nominees, using the same font type, style and size to present all nominees on the proxy card and plainly disclosing the maximum number of nominees for whom a shareholder can vote.

### **Requests for Comment**

In the SEC's release for the proposed rules, there are more than 70 questions seeking specific comments on different aspects of the proposed rules. Market participants that wish to comment on the proposed rules can respond to the specific questions posed by the SEC or submit more general comments or concerns through the SEC's website. The comment period will be open through January 9, 2017.

### **Additional Background**

The SEC has the authority, under Section 14 of the Exchange Act of 1934, as amended (Exchange Act), to establish rules and regulations governing the solicitation of any proxy or consent or authorization in respect to any security registered in accordance with Section 12 of the Exchange Act. Over the years, the SEC has sought to enhance the ability of shareholders to exercise their right to elect directors through the proxy process. Despite progress, shareholders today voting by proxy in contested elections cannot replicate the vote shareholders could have made in person at a shareholder meeting.

The concept of a universal proxy ballot has been on the SEC's radar for some time. As early as 1992, the SEC addressed the topic but did not adopt a universal ballot because, while it offered some advantages to shareholders, it represented too substantial of a change to the SEC's proxy rules.<sup>4</sup> In 2013, the SEC's Investor Advisory Committee recommended that the SEC consider revisions to the proxy rules to allow for a universal proxy card in "short slate" elections. The Council of Institutional Investors (CII) has also been a proponent of a universal proxy. CII has argued that a universal proxy would help both companies and shareholders because each nominee would stand on his or her own merit rather than as a part of a slate put forward by a company or a challenging activist firm. Chair Mary Jo White has publicly discussed the concept of universal proxies and how the current proxy rules act as an obstacle that prevents shareholders from voting how they want. White had previously asked the SEC staff to make appropriate rule-making recommendations and has encouraged companies to give "meaningful consideration" to implementing some form of a universal proxy, despite it not being required by the current proxy rules.

The idea of implementing a universal proxy ballot has also faced some significant opposition. The U.S. Chamber of Commerce wrote to the SEC last year and argued that a universal proxy rule would facilitate proxy fights by individual shareholders who might be looking to advance their own agendas rather than the good of the company, and noted that "promoting proxy contests should not be a goal of the SEC." The U.S. House of Representatives also passed legislation last summer that would bar the SEC from creating universal proxy rules, asserting that universal proxies would facilitate proxy fights and distract companies from their core operations. Although the legislation hasn't gone

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<sup>4</sup> Release No. 34-31326.

any further, it indicates the strength of the opposition to the adoption of new rules to implement a universal proxy. In a February 2015 roundtable hosted by the SEC to discuss proxy issues, some company representatives expressed concern with implementing a universal proxy and noted that there didn't seem to be a lack of shareholder activism under the current rules. Despite these concerns, the SEC reported that the overwhelming sentiment from the discussions was that the proxy system should allow shareholders to vote by proxy in the same way that they could vote if they attended the shareholder meeting in person.

Similarly, the Commissioners were divided in their commentary regarding the proposed rules at the open meeting. Chair Mary Jo White and Commissioner Kara Stein spoke favorably of the changes and how affording shareholders who are unable or unwilling to attend the shareholder meeting the same voting rights as those who attend in person is an important pursuit. Commissioner Michael Piwowar expressed his concern that the changes would increase the number of proxy fights, distract companies from the operation of their businesses and make it easier for shareholders with special interests to attempt to further their own agendas even though they may not have the best interests of all shareholders in mind. Commissioner Piwowar also expressed his concern that the proposed rules would disproportionately affect retail investors who are accustomed to receiving hard-copy proxy statements. The release publishing the proposed rules addressed a variety of common concerns, which closely mirror some of the concerns brought forward by the commissioners themselves in the open meeting.

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