

## Securities and Exchange Commission Proposes Universal Proxy

On October 26, 2016, the US Securities and Exchange Commission (SEC) proposed a mandatory universal proxy to be used for all contested director elections.<sup>1</sup> Under this proposal, each universal proxy card would list all management and dissident nominees for director, enabling shareholders voting by proxy to pick and choose among the different slates of candidates, similar to the manner in which they would be able to vote for directors in person at a contested shareholders meeting. The SEC also proposed changes to proxy cards and proxy statement disclosure regarding voting standards and options applicable to all director elections. The proposed amendments to the proxy rules are summarized below.

### Implementation of Universal Proxy

**Mandatory Universal Proxy.** The SEC has proposed mandatory use of a universal proxy for all proxy solicitations in connection with contested elections for director that are not exempt under Rule 14a-2(b). As proposed, use of a universal proxy would be permitted but not required for other types of solicitations, including, for example, a “vote no” campaign or solicitations of proxies in support of a shareholder proposal.

As proposed, each party in a contested election would distribute separate universal proxy cards. Each universal proxy card would include the names of all nominees for director for whom proxies are solicited, either by the company or

by dissident shareholders. The universal proxy card would clearly distinguish between registrant and dissident nominees, as well as proxy access nominees if there are any. If there are proxy access nominees but no dissident nominees, the proposed universal proxy rules would not apply.

Within each group on a universal proxy card, the nominees would be listed in alphabetical order by last name. All nominees would have to be presented in the same font type, style and size on the proxy card. The proxy card would have to prominently disclose the maximum number of nominees for which voting authority can be granted. It would also have to prominently disclose the treatment and effect of a proxy that is executed in a manner that grants authority to vote for fewer or more nominees than the number of directors being elected or that does not grant authority to vote with respect to any nominees.

The key amendments to implement universal proxy are contained in proposed new Rule 14a-19, “Solicitation of proxies in support of director nominees other than the registrant’s nominees,” with related proxy card provisions set forth in amendments to Rule 14a-4, “Requirements as to proxy.”

### Notice, Timing and Solicitation

**Requirements.** A dissident that intends to solicit proxies for its own nominees in a contested election for directors would have to give the company notice of the names of its

nominees. The notice must be postmarked or transmitted electronically to the company at least 60 calendar days prior to the anniversary of the previous year's annual meeting date. If this requirement is adopted, it in effect would preclude a dissident from launching an election contest less than 60 days prior to the annual meeting of shareholders. The proposed notice requirement is in addition to any advance notice requirements set forth in the company's governing documents.

The company would be required to inform the dissident of the names of the company's nominees for director, unless the names of all nominees have been provided in a preliminary or definitive proxy statement. This notice must be postmarked or transmitted electronically to the dissident at least 50 calendar days prior to the anniversary of the previous year's annual meeting date. The dissident would be obligated to file its definitive proxy materials with the SEC by the later of 25 calendar days prior to the meeting date or five calendar days after the company files its definitive proxy statement with the SEC.

The dissident would be required to solicit the holders of shares representing at least a majority of the voting power for the election of directors in order to trigger the universal proxy requirements. The dissident would have to promptly notify the company of any change in its intent to comply with this minimum solicitation requirement or with respect to the names of its nominees.

**Abandoned Solicitations.** The dissident's plans could change after it provides the company with notice of its intention to solicit proxies for its own nominees for directors. Therefore, the proposed amendments to the SEC's proxy rules would require the company to disclose in its proxy statement how it intends to treat proxies granted in favor of a dissident's nominees if the dissident abandons its solicitation or if it fails to comply with the universal proxy rules. If the dissident

abandons its solicitation after the company has distributed its universal proxy card, the company could elect to distribute a new, non-universal proxy card with only its nominees. If there is a change in the dissident's nominees after the company has disseminated a universal proxy card, the company could, but would not be required to, distribute a new universal proxy card reflecting the new dissident nominees.

**Nominee Consent and Information.** To facilitate the requisite consent of a nominee to being named in proxy materials, the proposed amendments would amend the Rule 14a-4(d) definition of a "bona fide nominee" for director so that it encompasses a person who has consented to being named in *any* proxy statement relating to the company's next shareholder meeting at which directors are to be elected. In other words, by consenting to be named in the company's proxy statement, the nominee would also consent to be named in the dissident's proxy statement, and vice versa. This would enable both the company and the dissident to include the other party's nominees on their universal proxy cards even if a nominee's consent did not expressly mention that party's proxy statement. Both the company and the dissident would have to refer to the other party's proxy statement for information about that party's nominees and explain how shareholders can access that proxy statement.

**Elimination of Short Slate Rule.** The proposal would eliminate the existing short slate rule (other than for funds or business development corporations) contained in Rule 14a-4(d)(4), which currently allows a dissident to nominate a partial slate of directors by using its proxy authority to vote for some nominees named in the company's proxy statement to round up its slate of directors. The SEC believes the short slate rule would be unnecessary once universal proxy cards are mandated for contested director elections because universal proxies would give shareholders

the ability to vote for any combination of dissident and company nominees and therefore result in the ability of shareholders to cast a vote for a full slate of directors.

**Explanation of Key Terms.** The SEC used certain terms in the proposing release that are not defined in the proposed rules. The proposing release contains explanations of its intended meanings for some of these terms. For example, the term “dissident” for the purposes of the proposing release refers to a soliciting person, other than the company, who is soliciting proxies in support of director nominees other than the company’s nominees.<sup>2</sup> In addition, “contested election” as used in the proposing release refers to an election of directors where a company is soliciting proxies in support of nominees and a person or group of persons is soliciting proxies in support of director nominees other than the company’s nominees.<sup>3</sup>

**Differences from Proxy Access.** Universal proxy would require a significant investment of resources by dissident shareholders. Universal proxy would not provide dissidents with access to a company’s proxy materials to the extent provided by proxy access bylaws. Under the universal proxy rules as proposed, a dissident’s access to the company’s proxy materials is limited to the company listing the names of the dissident’s nominees on its proxy card, and this access would be accompanied by an obligation of the dissident to prepare a proxy statement and to solicit proxies on behalf of its own nominees.

**Companies and Solicitations Not Subject to Mandatory Universal Proxy Requirements.** As proposed, neither investment companies registered under Section 8 of the Investment Company Act of 1940 nor business development companies as defined under Section 2(2)(48) of the Investment Company Act of 1940 would be subject to the universal proxy rules. Because foreign private issuers and companies with reporting obligations only under Section 15(d) of the Securities Exchange Act of 1934

are not subject to US proxy solicitation rules, they also would not be subject to the proposed universal proxy rules.

The proposed amendments would not apply to solicitations exempted under Rule 14a-2(b), including, for example, solicitations in which a person is not seeking a proxy and does not furnish or request a form of revocation, abstention, consent or authorization and solicitations limited to a maximum of 10 persons. The proposed amendments also would not apply to solicitations that are not related to the election of directors. In addition, universal proxy would not apply to a dissident’s consent solicitation to remove directors and replace them with nominees of the dissident, where written consents are solicited to take action without a meeting.

## Director Election Voting Standards and Options

At the same time that it proposed use of a universal proxy, the SEC also proposed additional amendments to the proxy rules relating to voting options and standards that are applicable to all director elections. The SEC has proposed amending Rule 14a-4(b) to require proxy cards for all director elections to include an “against” option instead of a “withhold authority to vote” option if governing law provides for a legal effect to a vote against a nominee. The SEC has also proposed that when a director election is governed by a majority voting standard, shareholders that neither support nor oppose a nominee be given the opportunity to “abstain,” as opposed to withholding authority to vote. In addition, under the proposed amendments, proxy statements would be expressly required to disclose the effect of a “withhold” vote in an election of directors.

The fact that the SEC has addressed distinctions between abstaining from a vote and withholding a vote indicates that the SEC is not comfortable that proxy cards and related proxy statement

disclosure are sufficiently clear with respect to voting standards for election of directors. The proposing release observes that the SEC has become “aware of concerns that some company proxy statements had ambiguities and inaccuracies in their disclosures about voting standards in director elections.” Although these amendments have not yet been adopted, the proposed director election voting standards and options amendments, which are not limited to proxy contests, signal that the SEC believes that there are issues in the way some companies currently disclose and/or apply voting standards for director elections.

## Request for Comments

The SEC included 75 separate requests for comments in the proposing release (in addition to questions appearing in the explanatory sections of the proposing release). Some of these requests for comments have multiple parts. Among the topics for requested comments are the possible positive or negative impact of the proposed amendments on board performance and data on the effect of universal proxy on both the number of proxy contests and resulting effect on dissident or incumbent director representation. The proposing release also requests comment on whether a universal proxy should be mandatory in contested elections, whether it should be limited to non-exempt solicitations and whether dissident shareholders would be more proactive in nominating persons for director if a universal proxy were available instead of the options available today. In the voting standards and options area, the SEC is seeking comments on whether the “withhold” option on a proxy card for the election of directors under a plurality voting standard should be replaced with an “abstain” option to emphasize that a “withhold” vote has no legal effect in a plurality situation. Comments on this proposal are due within 60 days after its publication in the *Federal Register*.

## Practical Considerations

The adoption of universal proxy requirements is an important topic that would impact proxy fights and, potentially, board governance. Therefore, companies should review the proposing release carefully and consider whether they want to submit comments to the SEC.

Companies may also want to consider whether they will need any bylaw amendments if the universal proxy proposal is adopted. Potential bylaw amendments could be prepared for advance review and discussion, but there is no need to adopt them before the SEC finalizes the rules.

It is possible that the SEC staff might comment on proxy cards and voting standards disclosure if the staff is concerned that there are mistakes or incorrect statements, even before any final amendments are adopted. Although included as part of the same proposing release, the SEC could seek to adopt the voting standards and options amendments separately from any action it might take on universal proxy. Therefore companies that only include “for” and “withhold” boxes on their proxy cards for director elections should review applicable governing law to determine whether it gives legal effect to “against” votes. Companies should also evaluate the adequacy of their current proxy statement descriptions of director voting standards and options and consider whether refinements could be made to such discussions to enhance the clarity of the disclosure. Companies with opinions or questions regarding the SEC’s proposed changes involving director voting standards and options should think about submitting comments to the SEC on this topic.

*For more information about the topics raised in this Legal Update, please contact the author of this Legal Update, Laura D. Richman, at +1 312 701 7304, or any of the following lawyers:*

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## Endnotes

- <sup>1</sup> The proposing release is available at <https://www.sec.gov/rules/proposed/2016/34-79164.pdf>.
- <sup>2</sup> See footnote 29 of the proposing release.
- <sup>3</sup> See footnote 20 of the proposing release.