

Legal Update

SEC Reopens Universal Proxy Comment Period

On April 16, 2021, the US Securities and Exchange Commission (SEC) issued a release reopening the comment period (Reopening Release) on its proposal for a mandatory universal proxy to be used for all contested director elections (Universal Proxy Proposal).¹

On October 26, 2016, the SEC issued a release (2016 Proposing Release) on the Universal Proxy Proposal.² Under the Universal Proxy 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 comment period on the Universal Proxy Proposal ended on January 9, 2017, and the proposal has not been finalized.

Interested parties may submit further comments and data on any aspect of the amendments proposed in 2016, as well as on the additional requests for comments raised in the Reopening Release. The new comment period closes 30 days after publication of the Reopening Release in the *Federal Register*.

The proposed amendments to the proxy rules, and the additional requests for comments, 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 (i.e., nominees included in a company’s proxy statement pursuant to state or foreign law provisions or a company’s

governing documents), 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 both 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 a 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 anniversary date of the previous year's annual meeting of shareholders. The proposed notice requirement is in addition to any advance notice requirements set forth in the company's governing documents. In one of its requests for additional comments in the Reopening Release, the SEC has asked if settlements or withdrawals of proxy contests would be changed by the proposed notice requirement and mandatory use of a universal proxy card.

The company would be required to inform the dissident of the names of the company's nominees for directors, 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.

As proposed in 2016, 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. The Reopening Release requests comment on whether dissidents should be required to solicit a greater percentage of the voting power, such as 67 percent or 75 percent, or some other percentage. Similarly, the SEC has inquired whether high-profile contested elections at larger registrants should affect the minimum solicitation requirement. The Reopening Release also asks for comments as to whether such a higher minimum solicitation threshold would prevent more nominal contests, in which the dissidents incur little more than the basic required costs to pursue a contest, as compared to the proposed majority solicitation requirement.

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 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 companies) 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.³ 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.⁴

Differences from Proxy Access. Universal proxy rules would require a significant investment of resources by dissident shareholders. Universal proxy rules 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 Proposed Mandatory Universal Proxy Rules. As proposed in the 2016 Proposing Release, 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. However, the SEC now seems to be revisiting this issue. The Reopening Release contains a series of questions regarding the applicability of the Universal Proxy Proposal to funds and whether there should be differentiations in the proxy contest context between open-ended funds, registered closed-end funds and business development companies and other registrants.

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 rules 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

As part of the 2016 Proposing Release, the SEC proposed additional amendments to the proxy rules relating to voting options and standards that are applicable to all director elections. The SEC 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 in the 2016 Proposing Release, 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 with the way some companies have been disclosing and/or applying voting standards for director elections.

Request for Comments

The SEC included 75 separate requests for comments in the 2016 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 2016 Proposing Release also requested 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.

The Reopening Release includes 25 additional requests for comments, emphasizing that supporting data and analysis, especially quantitative information as to costs and benefits of alternatives, is particularly useful. Many of these additional requests involve developments that have arisen since 2016. For example, given the increase in the number of companies with dual or multi-class stock structures, the SEC asks how such structures should be considered in determining a minimum solicitation requirement. The SEC also requests comment on whether experiences with universal proxy cards or advance notice bylaws that require dissident nominees to be included on the registrant's proxy card affect any aspects of the Universal Proxy Proposal. The SEC is interested in receiving comments on how developments such as the increased frequency of virtual meetings and the increase in proxy access bylaws should impact the Universal Proxy Proposal. In addition, the Reopening Release requests comments on presentation and formatting, such as a uniform format for voting options listed next to nominees' names on universal proxy cards and standard presentation of all nominees on voting instruction forms and electronic proxy voting platforms in the context of contested elections.

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 Universal Proxy Proposal (even if they did so when it was first released) and the Reopening Release carefully and consider whether they want to submit new or additional comments to the SEC, especially in light of developments since 2016.

Companies may also want to consider whether any bylaw amendments would be appropriate 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 proxies. 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. While there may have been some disclosure improvements since the 2016 Proposing Release, companies should also evaluate the adequacy of their current proxy statement descriptions with respect to 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 consider 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, any of the following lawyers, or any other member of our Corporate & Securities practice.

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Endnotes

¹ The Reopening Release is available at <https://www.sec.gov/rules/proposed/2021/34-91603.pdf>

² The 2016 Proposing Release is available at <https://www.sec.gov/rules/proposed/2016/34-79164.pdf>

³ See footnote 29 of the 2016 Proposing Release.

⁴ See footnote 20 of the 2016 Proposing Release.

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