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## **SEC Proposes Mandatory Universal Proxies in Contested Elections and Voting Procedure Enhancements**

The Securities and Exchange Commission has voted 2 to 1 to propose to require the use of universal proxy cards by both companies and dissidents in contested director elections. While both sides would still be able to use their own versions of proxy cards, those cards would be required to include the names of all director candidates up for election regardless of who nominated them. They would also be subject to various content and format requirements.

Under a universal proxy regime, shareholders voting by proxy, which is how most shareholders vote, will be able to pick and choose from among all candidates, instead of having to vote for one slate or another as is the current prevalent practice. While the SEC took pains to explain that the proposed rules are meant only to facilitate shareholder suffrage by equalizing the voting options available to shareholders voting by proxy with those available to shareholders voting in person at a shareholder meeting, the adoption of these rules would give a significant boost to dissidents in any proxy contest. The SEC's action is a long sought-after victory for activist hedge funds and further tilts the playing field in their favor.

Institutional investors have typically been hesitant to vote for a full dissident slate, and the universal proxy makes it much easier for them to choose a subset of those candidates. This — coupled with the generally greater willingness of proxy advisory firms and institutional investors to support a minority changeover of directors (as opposed to a full slate that would result in a change in control at a company) — strongly favors activists. In addition, a universal proxy card could decrease solicitation costs for dissidents because their ability to reach shareholders with a competing slate will, as a practical matter, be buoyed by the company's solicitation efforts. The SEC's proposed rules attempt to safeguard against this potential free-rider problem by specifying that a universal proxy card would only be available to dissidents that solicit at least a majority of the voting power of shares eligible to vote in director elections. While this would ensure that a dissident will continue to bear a significant portion of the cost of its solicitation, unless the final rule changes, the dissident would be able to solicit a subset of shareholders but nevertheless reach all shareholders with its candidates.

The proposed rules are described in detail below.

### Universal Proxy Card

*Procedures and Deadlines.* The proposed rules would add Rule 14a-19, which sets forth the bulk of the new universal proxy requirements. Under proposed Rule 14a-19, a dissident intending to solicit proxies in support of its director nominees would be subject to the following requirements:

- *60-day notice deadline.* The dissident would be required to notify the company (at the company's principal executive offices) of that intent no later than 60 calendar days before the anniversary of the previous year's annual meeting date. If the company did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, then the notice must be provided by the later of 60 calendar days before the date of the annual meeting or the 10th calendar day after the first public announcement of the date of the annual meeting by the company.
- *Notice requirements.* The dissident notice would be required to include (i) the names of all nominees for whom the dissident intends to solicit proxies and (ii) a statement that the dissident intends to solicit holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors in support of the dissident's nominees (in each case, unless the required information is already disclosed in a previously filed preliminary or definitive proxy statement).
- *Proxy filing deadlines.* The dissident would be required to file a definitive proxy statement in accordance with SEC requirements by the later of (i) 25 calendar days before the applicable meeting date or (ii) five calendar days after the company files its definitive proxy statement. There currently is no SEC-mandated deadline for dissidents to file their proxy statements.
- *Majority solicitation requirement.* The dissident would be required to solicit holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors, include a statement to that effect in its proxy statement or proxy and notify the company promptly of its intent to conduct such solicitation changes.

Proposed Rule 14a-19 would also require companies to notify the dissident of the names of all company nominees by no later than 50 calendar days before the anniversary of the prior year's annual meeting date (unless already disclosed in a previously filed preliminary or definitive proxy statement). If the company did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, then notice would be required to be provided no later than 50 calendar days before the date of the meeting. The company would also have to notify the dissident promptly if any change occurs with respect to the names of the company's nominees.

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*Form of Universal Proxy Card and Related Disclosure Changes.* While dissidents and companies may continue to use their own proxy cards, the proposed rules would establish standards that must be followed by both, including that the cards:

- Must set forth on their face the names of all persons nominated for election by the company or dissident and any proxy access nominees;
- Must provide a means for the shareholder to grant authority to vote for the nominees;
- Must clearly distinguish between the company's, the dissident's and proxy access nominees, if applicable, and, within each group of nominees, list them alphabetically by last name and use the same font type, style and size for all nominees;
- Must prominently disclose the maximum number of nominees for which authority to vote can be granted and the treatment and effect of a proxy that (i) grants authority to vote for fewer or more nominees than the number of directors being elected or (ii) does not grant authority to vote with respect to any nominees; and
- May provide the option for shareholders to grant authority to vote for company nominees or the dissident nominees, as a group, as long as there is a similar means for shareholders to withhold authority to vote for groups of nominees. This option is only available for full-slate proxy contests and when there are no proxy access nominees.

If universal proxy procedures apply, both the company and the dissident would be required to disclose in their proxy statements how they will treat proxy authority granted in favor of the other's nominees if the other party abandons its solicitation or otherwise fails to comply with the universal proxy procedures. Both parties would also be required to include a statement directing shareholders to refer to the other party's proxy statement for information required by Schedule 14A about the other party's nominees and that such materials are available for free on the SEC's website. The company would further be required to disclose the universal proxy card deadline for providing notice of a dissident's nominees for the next annual meeting.

Proxy cards for solicitations without a competing slate, such as those in support of a shareholder proposal or to remove directors or "vote no" campaigns, would not be required to include the company's nominees, although they would be permitted to do so.

Soliciting parties would maintain some flexibility under the mandated requirements of the proposed rules. For example, the proposing release confirms that soliciting parties could continue to use different color proxy cards, as is typical in proxy contests. Soliciting parties would continue to maintain control

over the dissemination of those cards and the conveyance of discretionary authority to a person of their choice and also to maintain insight into voting results.

*Conforming Changes to Implement Universal Proxy Cards.* The proposed rules also set forth a number of conforming changes to implement the above universal proxy requirements, including the following:

- Elimination of Rule 14a-f(d)'s "short-slate" rules that allow a dissident to round out its slate with company nominees because the rules would no longer be needed; and
- Amendment of the definition of "bona fide nominee" to refer to a person who has consented to being named in any proxy materials relating to the next annual meeting instead of a particular soliciting person's proxy materials, so that companies may include dissident nominees in their proxy materials and vice versa without seeking the nominees' specific consent to do so.

### **Voting Procedures for All Director Elections**

The proposed rules would also clarify existing proxy card and proxy statement disclosure requirements relating to voting procedures in all director elections. Rule 14a-4's proxy card requirements would be amended to clarify that if applicable state law gives legal effect to votes cast against a nominee (for example in uncontested elections where a standard majority voting provision applies), then the company must provide shareholders with a way to vote against each nominee (instead of a way to withhold authority) and also an option to abstain. If applicable law does not give legal effect to votes cast against a nominee (for example in contested elections where plurality voting often applies), then the existing rules regarding the provision of withhold authority would apply. Item 21(b) of Schedule 14A would also be amended to add a requirement to disclose the treatment and effect of withhold votes in a director election (in addition to the current requirement to provide such disclosure for abstentions and broker non-votes).

### **Applicability and Compliance Dates**

Foreign private issuers and companies registered pursuant to Section 15(d) of the Securities Exchange Act of 1934 would not be subject to these rules. Further, the proposed universal proxy requirements would not apply to investment companies and business development companies, but the proposed changes to voting procedures would.

No proposed effective date was disclosed, but, given the late date of this release and consistent with past SEC rulemaking, it is unlikely that these requirements will apply to the regular 2017 proxy season.

For the proposed rules, see <https://www.sec.gov/rules/proposed/2016/34-79164.pdf>. Comments are due 60 days after their publication in the Federal Register.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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