

Client Update

Mandatory Universal Proxy Cards and Disclosure of Voting Options

NEW YORK

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On October 26, 2016, the Securities and Exchange Commission by a 2-to-1 vote proposed amendments to the federal proxy rules that would mandate the use of universal proxy cards in all contested director elections, subject to certain exceptions. The SEC argued that, if adopted, the proposal will enhance the ability of shareholders to exercise their right to elect directors through the proxy process. In addition, the SEC proposed amendments to the form of proxy and proxy statement disclosure requirements for proxy solicitations in all director elections (not just contested elections) to specify the applicable voting options and voting standards.

Under the current rules governing contested director elections, shareholders who attend the shareholder meeting may vote their shares for any nominee who has been validly nominated under the registrant's organizational documents. However, shareholders voting by proxy are typically forced to choose between voting for the dissident's slate on the dissident's proxy card or the registrant's slate on the registrant's proxy card. The proposed amendments are intended to allow shareholders to vote for any combination of nominees for the board of directors when voting their shares by proxy in advance of the shareholder meeting, as they could have if they attended the meeting.

PROPOSED RULE CHANGES

With respect to the proxy voting process, the proposed amendments would:

- Require the use of universal proxy cards for most contested director elections at annual meetings, subject to the exemptions noted below. Each soliciting party would distribute its own proxy materials and its own universal proxy card.
- Revise the consent required of a "bona fide nominee." Each director nominee would be required to consent to being named in any proxy statement

prepared in anticipation of the registrant’s next shareholder meeting. As a result, a registrant’s director nominee could be included in a dissident’s proxy card and vice versa.

- Eliminate the short slate rule, which allowed a dissident to propose a “short slate” of nominees in certain circumstances, for all registrants subject to the universal proxy rules, as a universal proxy card eliminates the need for the rule.
- Require dissidents to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors, but not all shareholders. Commissioner Pivowar dissented from the proposed rules, noting his preference for a requirement for dissidents to solicit all shareholders. The SEC has solicited comment on this point. This is an important issue because it is much more expensive to solicit all shareholders than to solicit holders of a majority of shares.¹
- Prescribe requirements for universal proxy cards, including stylistic requirements that clearly distinguish registrant and dissident director nominees.
- Impose the notice and filing deadlines set forth below.

UNIVERSAL PROXY NOTICE AND FILING DEADLINES

For subject solicitations where the registrant held an annual meeting during the previous year and the meeting date has not changed by more than 30 days, the following calendar would apply:

Date	Action
<p>≥ 60 calendar days before the anniversary of the previous year’s annual meeting date</p>	<p>Dissident must provide notice to the registrant of its intent to solicit the holders of at least a majority of the voting power of shares entitled to vote on the election of directors in support of director nominees other than the registrant’s nominees and include the names of those nominees.</p>

¹ In its proposing release, the SEC estimated that within a sample of recent proxy contests, the number of accounts needed to be solicited to reach a bare majority of shares ranges from about 0.1% to 10% of the outstanding shareholder accounts, with the median number of accounts required equaling about 1% of the outstanding shareholder accounts.

≥ 50 calendar days before the anniversary of the previous year’s annual meeting date	Registrant must notify the dissident of the names of the registrant’s nominees.
≥ 20 business days before the record date for the meeting	Registrant must conduct broker searches to determine the number of copies of proxy materials necessary to supply such material to beneficial owners.
By the later of 25 calendar days before the meeting date or five calendar days after the registrant files its definitive proxy statement	Dissident must file its definitive proxy statement.

DO THE PROPOSED RULES APPLY TO ALL REGISTRANTS?

No. Companies unaffected by the proposed amendments include:

- Foreign private issuers and issuers with reporting obligations only under Section 15(d) of the Exchange Act, which are not currently subject to the federal proxy rules.
- Investment companies registered under Section 8 of the Investment Company Act of 1940.
- Business development companies, as defined by Section 2(a)(48) of the Investment Company Act of 1940.

DO THE PROPOSED RULES APPLY TO ALL SOLICITATIONS?

No. The proposed rules governing mandatory universal proxy cards apply only in connection with a contested director election. The proposed rules would not apply to solicitations such as:

- Elections of directors involving only registrant and proxy access nominees;
- “Vote no” campaigns (where a soliciting person only solicits “withhold” or “against” votes with respect to a registrant’s nominee);
- Where a shareholder solicits proxies only in support of a shareholder proposal;
- A dissident’s consent solicitation to remove existing registrant directors and replace them with dissident nominees;
- Where the total number of persons solicited is not more than 10; or

- Other exempt solicitations described in Rule 14a-2(b).

HOW ARE UNIVERSAL PROXY CARDS DIFFERENT FROM PROXY ACCESS?

Proxy access bylaws commonly require the registrant to include a shareholder's nominees for the board in the proxy materials distributed by the registrant for a shareholder meeting if the shareholder or group of shareholders meets minimum requirements for percentage of shares held and duration of shareholding. In contrast, the proposed universal proxy system would require only that the registrant name the dissident nominees on its proxy card, clearly distinguishing those nominees from the registrant's nominees. No other disclosure about the dissident's nominees would be required in the registrant's proxy statement. The dissident would be responsible for disseminating information about its nominees to shareholders and soliciting proxies in support of its nominees. The dissident would also be responsible for bearing the costs associated with filing and mailing its proxy statement and soliciting shareholders.

PROXY CHANGES APPLICABLE IN ALL DIRECTOR ELECTIONS

The SEC has identified ambiguities and inaccuracies in company proxy statement disclosures with respect to voting standards in director elections. In light of these concerns, the SEC has proposed additional amendments to the form of proxy and disclosure requirements that would apply to all director elections, not just contested elections. The proposed rules require:

- Inclusion of an "against" voting option in lieu of a "withhold authority to vote" option on the form of proxy for the election of directors where there is legal effect to such a vote.
- Inclusion of an opportunity to "abstain" (rather than "withhold authority to vote") in a director election governed by a majority voting standard for shareholders that neither support nor oppose a director nominee.
- Disclosure of the effect of a "withhold" vote to provide shareholders with a better understanding of how such a vote affects the outcome of the election.

Even in advance of further action on the proposed amendments, registrants should review their forms of proxy and proxy statement disclosure to address the issues identified by the SEC under the current rules.

ADDITIONAL INFORMATION

The SEC has requested comments on the proposed rules and the deadline is expected to be in late December, 60 days following publication of the proposing

release in the Federal Register. It is unlikely that the proposed rules, if adopted, would be in effect for the 2017 proxy season.

Additional information regarding universal proxy cards can be found in the SEC press release at <https://www.sec.gov/news/pressrelease/2016-225.html>. Chair Mary Jo White's statement regarding the proposed rules can be found at <https://www.sec.gov/news/statement/white-statement-open-meeting-102616.html>. Commissioner Piwowar's dissenting statement can be found at <https://www.sec.gov/news/statement/statement-piwowar-universal-proxy-10-26-2015.html>.

Finally, the full proposing release can be found at <https://www.sec.gov/rules/proposed/2016/34-79164.pdf>.

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Please do not hesitate to contact us with any questions.