

Commissioner Stein Supports Universal Proxy Ballots and Questions SEC Staff's 14a-8 Decisions

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In a recent [speech](#) to the Council of Institutional Investors, SEC Commissioner Kara Stein expressed her support for CII's rulemaking petition seeking universal proxy ballots for proxy contests, analogizing it to the "basic rights of an owner of a company...to fire an employee." A universal ballot would allow a shareholder to mix and match the company's nominees and the dissident's nominees on one ballot without attending the meeting.

Her remarks also singled out the SEC staff's decisions in two shareholder proposal no-action letters submitted by the New York State Common Retirement Fund to [Wells Fargo](#) and [Bank of America](#) asking for a report on whether the banks have identified employees that have the ability to expose the banks to possible material losses, and related incentive-based compensation for those employees. In allowing the proposals to be excluded, the SEC staff wrote in its response that although it had previously stated that incentive compensation paid by a major financial institution to its personnel who are in a position to cause the institution to take inappropriate risks that could lead to a material financial loss is a significant policy issue, this particular proposal relates to the compensation of any employee, not just those receiving incentive compensation.

In her critique of those decisions, Commissioner Stein stated that the proponent "tried hard to follow guidance and carefully drafted proposals to be included in the proxy materials" but the fact that the proposals were excluded indicates that "the guidelines for review of these requests are not as clear as they should be, and this adds uncertainty and costs for issuers and shareholders alike. Both issuers and shareholders are entitled to more clarity and consistency as to which proposals are appropriate under our rules and which are not." She questioned whether the process may not be "working well... I'd like to step back and re-examine it in its entirety."

Commissioner Stein also made clear that she was concerned that the focus of disclosure reform has been on decreasing the amount of disclosure required. She inquired instead on whether there should be additional information in some cases, for example, regarding companies' funding obligations and whether some companies are too dependent on short-term funding.

In late April, Commissioner Stein made news when she [dissented](#) from the order granting Royal Bank of Scotland a waiver from being disqualified to be eligible as a WSKI (Well-Known Seasoned Issuer). RBS sought the waiver since its criminal conviction for the LIBOR scandal automatically disqualified it from benefiting from WSKI status. Commissioner Stein argued that the Commission had not previously granted a WSKI waiver for an entity charged with criminal conduct, and wondered if this action represented a "new policy... that some firms are just too big to bar." In her public dissent, she cited "waiver after waiver for the largest financial institutions," with 29 of 30 total WSKI waivers granted going to large financial institutions and broker-dealers, and noting that one firm has received "over 22 different waivers" in 10 years.

Commissioner Gallagher published his own statement regarding the same waiver a day later, noting that the criminal sanction does not implicate the reliability of the issuer's financial reporting, which is key to the determination of the WSKI waiver analysis. In addition, the decision to grant a WSKI waiver should be made separate from any enforcement decision, and should not be akin to a punishment, since there is no due process that permits a proper administrative proceeding such as available for cases seeking officer and director bars.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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