

Corp Fin Considers Universal Proxies and Warns Companies to Be Clear About the Voting Standards for Director Elections

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This is the first of a multipart series on SEC updates related to corporate governance areas discussed during the recent SEC Speaks conference.

The SEC Staff in Corporation Finance is considering recommending rulemaking on universal proxies. A universal proxy means that both management and dissident candidates would be named on the same proxy card. It would allow shareholders to vote the way they could if they actually attend the annual meeting.

The Staff emphasized that the goal is to view the issue from the shareholder's perspective, not to provide companies or dissident candidates with any advantages. It is unclear which party would benefit in any case, and it may depend on individual situations.

Three key issues that the Staff is grappling with on universal proxies include: (a) would a universal proxy be mandatory or optional; (b) would a universal proxy be permitted or required (for example, would it be allowed in every contest or only those with minority slates); and finally, (c) would it be one identical card that both parties must use or two different cards that each side can arrange separately so long as it names all the candidates.

Also on the agenda related to director elections, in light of two rulemaking petitions urging the SEC to review its rules on disclosure regarding the voting standards for director elections, the Staff has reviewed a sampling of company proxy disclosures focused on how companies make these disclosures. While it did not find widespread inaccuracies, the Staff noted that often the disclosure was "ambiguous" and "less than ideal" at best, and sometimes "imprecise" or downright "sloppy."

The areas of concern include: (a) companies that mistakenly use the "against" option when directors are elected by plurality voting; (b) companies that do not provide an "against" option when directors are elected by majority voting; (c) companies that disclose that they have adopted majority voting when they actually have "plurality-plus" policies (by which directors offer to resign if they have majority withhold votes); and (d) companies that either indicate that withhold votes count in director elections or completely omit a discussion about the impact of withhold votes.

The Staff warned that failure to voluntarily rectify these disclosures may result in companies receiving specific comments.

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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