

SEC Proposes Rules on Universal Ballots and Proxy Disclosure for All Director Elections

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At the SEC open meeting today, the Commission proposed changes to require the use of universal proxy cards in contested proxy elections and rules to specify clearly the applicable voting options and standards in all director elections. Chair White and Commissioner Klein approved the proposed amendments, while Commissioner Piwowar declined.

This summary is based on statements at the open meeting. The proposed rule is not yet available. We will issue a client memorandum about the proposed rules in the near term.

Universal ballot. Today, a shareholder voting by proxy in a contested election cannot replicate the vote that they could cast at an in-person meeting. Shareholders voting by proxy must choose between competing slates and cannot freely select among individual nominees on both slates.

The SEC will propose amendments to the proxy rules that will allow shareholders to vote for a preferred combination of company nominees and dissident nominees. The amended rules will require proxy contestants to provide shareholders with a universal proxy card that includes the names of all duly nominated candidates.

The rules will affect all universal proxy cards used in non-exempt solicitations, including both partial slate and full slate contests. To enable universal proxy cards, the SEC will propose amendments to establish new procedures for soliciting proxies, preparing and using proxy cards and disseminating information about all director nominees in contested elections.

The rules will revise the consent required of a bona fide nominee and eliminate short slate rules as unnecessary. In addition, the rules will require dissidents to provide companies with notice of their intent to solicit proxies in support of their own nominees and companies to provide dissidents with their nominees, within specified time periods.

Dissidents must solicit holders representing at least a majority of the voting powers of shares entitled to vote on the election of directors. Commissioner Piwowar expressed concern that this requirement would result in dissidents not providing retail investors with solicitation materials.

The rules will also prescribe presentation and formatting requirements to ensure the cards are “clear” and “impartial.”

All director elections. Over the years, the Staff became aware of concerns about ambiguities and inaccuracies in proxy statement disclosures. A rulemaking petition had long complained that proxy cards and proxy disclosure about the voting standards for director elections were often unclear as to either the vote required to elect directors and the impact of the vote options.

The SEC will propose amendments to the proxy rules to: (a) mandate proxy cards to provide for an “against” option when state law gives effect to a vote against a nominee; (b) require proxy cards to provide shareholders the ability to abstain in an election of directors with majority voting standards, (c) eliminate the option to cast a “withhold” vote when state law gives legal effect to a vote “against” directors and (d) clarify disclosure in proxy statements on the impact of a “withhold” vote.

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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