

Company Declines to Use Universal Proxy Card in Contest, Citing Lack of Proven Processes and Potential for Shareholder Confusion

October 3, 2017 | Client Update | 2-minute read

ADP rejected Pershing Square's recommendation to use a universal proxy card, arguing that given the solicitation has already commenced, changing the voting procedures for a new and untested process could disenfranchise shareholders.

Pershing Square has nominated three candidates to ADP's board. In September the activist wrote to the board calling for both sides to use a universal proxy card that would list all the nominees, calling it a "hallmark of good corporate governance" and citing to the CII report advocating for the practice. The activist had to seek approval from the company because the company nominees must consent to be named in its proxy statement. They also acknowledged that the company may have already sent proxy cards to their shareholders and additional details may need to be worked out with Broadridge, but given that a number of additional cards were likely to be mailed in any case, the company could include a new universal card in one of its mailings.

ADP rejected the request, citing several concerns. Since universal proxy cards are not widely used by U.S. public companies and have never been used by a large-cap, broadly held company, the risk for shareholder confusion is great. While the SEC has proposed rules for universal proxy cards, the rules have not been adopted and no procedures have been enacted to govern a contest where shareholders vote using such a card.

Trying out a new process for a company with a significant retail investor base of approximately 310,000 individual shareholders is particularly risky, and the existing "street name" structure also may not support universal proxies at this time. In addition, both sides have already distributed proxy materials. The use of a universal proxy card would require sending out new replacement materials, the implementation of new mechanics for collection and educating shareholders on the changes in voting procedures.

ADP concluded that all of these issues could lead to a more disruptive and complicated process that confuses investors who well understand and have long exercised the existing voting structures for proxy contests, and could ultimately interfere with the conduct of a fair election.

While it is unclear whether the SEC would proceed with the universal proxy card rules that were proposed under the prior chair, we will soon find out whether it is on the regulatory flex agenda as an item the Commission may take up.

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.

Ning Chiu

+1 212 450 4908

ning.chiu@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.