

## Davis Polk Submits Comment Letter to SEC on Proposal for Universal Proxy Cards

January 4, 2017

In October 2016, the SEC proposed rules that would, if adopted, substantially impact proxy contests at U.S. public companies. As discussed in our [October 2016 client memo](#), under the [SEC's universal proxy proposal](#), each party – management and one or more dissident shareholders – would continue to distribute its own proxy materials and use its own proxy card to solicit votes for its preferred slate of nominees. However, each proxy card would be required to include the nominees of all parties – in other words, each party would be required to distribute a “universal” proxy card.

The proposed changes would –

- mandate the use of universal proxy cards for most director elections,
- establish notice and filing requirements for both companies and dissidents,
- require dissidents to solicit at least a majority of the voting power of the company's shareholders, and
- prescribe form and presentation criteria for the proxy card.

Today we submitted a [comment letter](#) to the SEC explaining our view that the SEC lacks authority to prescribe universal proxy cards. We believe the SEC is currently without an evidentiary basis needed to reverse longstanding agency policy, as reflected in the existing rules that prohibit distributing a proxy naming a candidate without his or her consent. We have urged the SEC not to act until it gathers data allowing it to evaluate the impact of these proposed changes to settled practice. Also, we believe the SEC's existing regulatory authority over the proxy process, which is a product of state corporate law, is insufficient to permit it to introduce wholesale changes. In our view these concerns would render any new mandate vulnerable to challenge in court.

If the SEC proceeds with rulemaking, we have suggested certain revisions to the proposal:

- the use of universal proxy cards should be optional, and dissidents and management should each have the choice either to list *only* their own nominees on their proxy card or to use a universal proxy card that lists *all* parties' nominees,
- any new rules should apply only to contested director elections and use of a universal proxy card should not be available in other situations, such as in a “vote no” campaign or when a proponent is putting forward a corporate governance proposal, and
- a dissident wishing to use a universal proxy card should be required to solicit all shareholders, not just a majority, since there is no good reason for dissidents and management to play on a tilted playing field.

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

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