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SEC Proposes Universal Proxy Cards: How Will the Proposal Fare Under the Trump Administration?

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On October 26, 2016 the U.S. Securities and Exchange Commission [proposed proxy rule amendments](#) that would require, in a contested election of directors, the public company and the shareholder activist to each use a “universal” proxy card – i.e., a card that includes the names of both parties’ nominees. Under the proposal, shareholders would be able to vote by proxy for a mix of company and dissident nominees of their choosing (i.e., “splitting the vote”). Currently, split-ticket voting can be accomplished only by attending the shareholder meeting and voting by ballot. The proposed changes are an attempt by the SEC to allow a shareholder voting by proxy in a contested election to have nearly the same choices that would be available if voting in person at a meeting. If adopted, the rule would not be effective in time for the upcoming proxy season.

We expect that the proposal will be of considerable interest to public companies and shareholders (activists and otherwise). The SEC is seeking public comments on or before January 9, 2017. As we discuss below, however, the results of the election cast into doubt whether final universal proxy rules will be adopted.

Proposed change to the “bona fide nominee” rule

To allow for proxy cards that reflect the complete choice of candidates for election, the definition of “bona fide nominee” would change. Under the current rule (Exchange Act Rule 14a-4(d)), in a contested election, one soliciting party is prohibited from including the other party’s nominees on its proxy card unless the other party’s nominees consent to being named in the first party’s proxy statement and to serve if elected. In practice, consent is rarely if ever given. The company and dissidents will produce separate slates, and shareholders must choose between voting on either one slate or the other. The proposed change would remove this hurdle by *requiring* a soliciting party to include on its proxy card the names of the other party’s nominees (provided that the other nominees had consented to being named in any one of the parties’ proxy statements and to serve if elected – which they would have of course done).

Proposed changes to the proxy card

Under the universal proxy card proposal, each party in a contested election will distribute to shareholders its own proxy card that designates its own representatives as proxy holders to exercise the vote pursuant to the proxy – not a change from current practice. However, each of the company’s and dissident’s cards must include the names of all nominees.

To help ensure that universal proxies clearly and fairly present information, the proposal includes the following requirements:

- The proxy card must clearly distinguish between company nominees, dissident nominees, and any proxy access nominees;
- Within each group of nominees, the nominees must be listed in alphabetical order by last name on the proxy card;
- The same font type, style and size must be used to present all nominees on the proxy card;
- The proxy card must prominently disclose the maximum number of nominees for which authority to vote can be granted; and
- The proxy card must prominently disclose the treatment and effect of a proxy executed in a manner that grants authority to vote for more nominees than the number of directors being elected, in a manner that grants authority to vote for fewer nominees than the number of directors being elected, or in a manner that does not grant authority to vote with respect to any nominees.

The proposal would not prohibit the current practice of distinguishing between company and dissident proxy cards by distinctive color (*e.g.*, white card and gold card).

Proposed deadlines and solicitation requirements for universal proxy

The proposed rule creates deadlines for the company and dissidents to notify each other of their candidates – 60 calendar days before the anniversary of the prior year’s meeting for dissident candidates, and 50 calendar days for the board’s candidates. Dissidents would file their definitive proxy statement with the SEC by the later of 25 calendar days prior to the meeting date or five days after the company files its proxy statement. Because shareholders may not otherwise have access to information about the dissidents’ nominees when they receive a universal proxy card from the company, the deadlines imposed on dissidents are intended to ensure that shareholders who receive a universal proxy will have access to information about all nominees and sufficient time prior to the meeting to rescind an earlier submitted proxy if desired.

Dissidents would also be responsible for disseminating information about their nominees to shareholders and be required to solicit the holders of shares representing at least a majority of voting power entitled to vote on the election of directors. Each party would be required to provide detailed disclosures about its own nominees only, directing readers to the other party’s solicitation materials (via the SEC’s website) for information about the other party’s nominees.

Certain proposed amendments applicable in *all* director elections

Finally, the SEC proposes amendments to the form of proxy and disclosure requirements relating to voting options and standards that would apply to all director elections, contested or not. This comes in response to concerns regarding (and evidence of) ambiguous and inaccurate disclosures in some proxy statements. Under the proposal, if state law gives legal effect to votes cast against a nominee (*i.e.* under a majority voting standard), the form of proxy must include the options to vote “against” the nominee and to “abstain” from voting. Also, disclosure would be required in the proxy statement about the treatment and effect of a “withhold” vote in a director election.

Universal Proxy vs. Proxy Access

Although both “proxy access” and the SEC’s proposed universal proxy system may allow a shareholder to have its director nominees appear on the company’s proxy card, the two are different in many respects. Under the universal proxy system, the dissident shareholder must file its own proxy statement for its own nominees and solicit shareholders having at least a majority of voting power. In contrast, under proxy access, the nominating shareholder need not file its own proxy statement or engage in a separate solicitation. Provided that a shareholder nomination satisfies the requirements of the company’s proxy access bylaw (*e.g.*, owning 3% of shares for 3 years), the bylaw typically will require the company’s proxy statement to include information about the shareholder and its proxy

access nominees, and a statement provided by the shareholder in support of its nominees' election. As proposed, the mandatory universal proxy system would *not* apply to an election of directors involving only a company's nominees and proxy access nominees. Additionally, many proxy access bylaws permit a company to restrict the use of proxy access in the event of a proxy fight.

Future Implications

The impact of universal proxy cards, if adopted, may remain unclear for some time. The SEC suggests that the proposed rules could lead to an increase in the number and effectiveness of "nominal" proxy contests, in which the dissidents incur little more than the basic costs required to engage in a contest – i.e., they solicit holders that represent at least a majority of voting power and file a proxy statement, but do not engage in any other soliciting efforts.

The SEC also seems to concede the point that the proposed universal proxy rules could encourage dissidents to pursue nominal contests for reasons other than gaining board seats. In particular, the SEC notes that introducing the names of alternative candidates onto a company's proxy card could attract attention to a dissident and its agenda from shareholders, other market participants, proxy advisory services, analysts and journalists seeking to understand why these candidates were put forth and whether they deserve consideration. Such attention could be used by the dissident to publicize a desired change or a particular issue, or to encourage management to engage with the dissident. Further, the dissident and its cause would not have to meet eligibility requirements applicable to other alternatives that would give the dissident access to the company's proxy materials, such as proxy access or the Rule 14a-8 shareholder proposal process.

Impact of the Election

Given the election results, it is possible that the SEC may not adopt final universal proxy rules at all. At present, only three of the five SEC commissioner posts are filled. SEC Chair White, who has championed the use of universal proxy cards, is expected to step down by the end of President Obama's term in January. SEC Commissioner Piwowar, who fills a Republican seat and is reportedly a candidate for serving as interim SEC Chair until Senate confirmation of President-Elect Trump's eventual pick, voted against the rule proposal. [He argued](#) that the universal proxy initiative would hurt retail investors, and that it had been "pushed for years by special interest groups and it would increase the likelihood of proxy fights at public companies, thereby distracting management and employees from carrying out their core mission."

Moreover, in July 2016, House Republicans passed an appropriations bill – [H.R. 5485](#) – that would prevent the SEC from using any funds to implement or enforce a universal proxy system. [This provision](#) may not survive into the final bill, as its sponsor, Rep. Scott Garrett, did not win re-election. But other battles over the SEC are looming, even before the new Congress is seated – the current continuing resolution on agency appropriations expires December 9. Looking ahead, the proposed universal proxy rules have high hurdles to clear.

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If you have any questions, please do not hesitate to speak to your regular contact at Weil, Gotshal & Manges LLP, a member of the M&A practice, or any member of the Public Company Advisory Group, listed below.

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