

## SEC Proposes Universal Proxy Cards

On October 26, 2016, the Securities and Exchange Commission (“SEC”) proposed amendments to the proxy rules to require the use of universal proxy-voting cards in contested board of directors’ elections. The proposed universal proxy card must include all board of director nominees, the company’s as well as any dissident’s. The proposed amendments are open for public comment for sixty days and will not become effective until the SEC adopts final rules.

### Background

Under current proxy rules, shareholders voting by proxy in a contested election do not have the same voting options as shareholders physically attending the meeting and voting by written ballot. In contested elections, shareholders present at the meeting may use a written ballot that includes all of the board of director nominees, regardless of who nominated them. However, shareholders voting by proxy receive two separate proxies: one proxy card containing names of management’s director nominees and the other proxy card containing names of the dissident’s nominees. Shareholders voting by proxy must choose which proxy card to submit and cannot choose among the nominees from both the management’s proxy card and the dissident’s proxy card. A universal proxy card replicates the in-person shareholder voting process allowing shareholders voting by proxy to choose from all nominees and eliminating any differences between voting by proxy and voting in-person.

### Summary of Proposed Amendments

The primary purposes of the amendments are to create uniformity in the voting process of contested elections and to allow shareholders to vote for any combination of director nominees. To further advance those objectives, the amendments would:

- Mandate the use of universal proxy cards for all solicitations in contested board of directors’ elections except those involving foreign private issuers, registered investment companies, business development companies, and companies with reporting obligations arising only under Section 15(d) of the Exchange Act;
- Amend the definition of a “bona fide nominee” to allow the names of all board of director nominees to be included on the universal proxy;
- Eliminate the “short slate rule,” which is available only in contested elections where the dissident’s nominees would represent, if elected, a minority of the board;
- Require dissidents to solicit shareholders representing at least a majority of the voting power of shares entitled to vote on the election of directors (preventing dissidents from having their director nominees included on the universal proxy without having to expend any time or resources to solicit support);
- Mandate that both management and dissidents inform each other of their respective director nominees;
- Require dissidents to file their definitive proxy statements by the later of 25 calendar days prior to the meeting date or five calendar days after the company files its definitive proxy statement; and
- Require proxy contestants to inform shareholders of the other party’s proxy statement and to direct shareholders to the SEC’s website for free access to the other party’s proxy statement.

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The proposed amendments would prescribe formatting and presentation requirements for the universal proxy cards. For example, the universal proxy card must (i) differentiate between the company's and the dissident's nominees; (ii) list the nominees in alphabetical order within each group of nominees; (iii) display the nominees' names in the same font, style and size; (iv) disclose the maximum number of nominees for which authority to vote can be granted; and (v) disclose the treatment of a proxy card executed in a manner that grants authority to vote for more nominees or fewer nominees than the number of directors being elected or in a manner that does not grant authority to vote with respect to nominees.

## Proposed Changes to Voting Options

The SEC also proposed to amend the voting options available on proxy cards in all director elections, whether contested or uncontested. If a company has a majority voting standard for the election of directors, the proposed amendments would require proxy cards contain both an "against" voting option, instead of a "withhold" voting option, as well as an "abstain" voting option. To ensure shareholders understand the effect of their "withhold" votes, the proposed amendments would require proxy statements to contain information explaining the treatment of a "withhold" vote.

## Conclusion

The proposed rules regarding universal proxy cards are open for public comment for sixty days. If the SEC adopts final rules, non-exempt solicitations in contested board of directors' elections will require the use of universal proxy cards setting forth both the company's and the dissident's director nominees. The proposed changes to the voting options in the event of a majority voting standard would apply to all director elections, contested or otherwise.

If you would like more information regarding the proposed amendments and how they may apply to you or your company, please contact a member of our firm's Securities Group at 585-232-6500. ■



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