

Memorandum

SEC Proposes Amendments to Require Use of Universal Proxy Cards in Contested Elections

November 2, 2016

On October 26, 2016, the Securities and Exchange Commission (“SEC”) proposed amendments to the federal proxy rules that would require each soliciting party in a contested election to distribute a universal proxy card that would include the names of all director nominees (i.e., both management and dissident director nominees).¹ The SEC also proposed amendments to the form of proxy and proxy statement disclosure requirements relating to the disclosure of applicable voting options and voting standards in all director elections.

The SEC has set a 60-day comment period in connection with its proposed rule amendments.

I. Proposed Rule Amendments Regarding Universal Proxy Cards

In a contested election, while shareholders voting in person at a shareholder meeting “may select among all of the duly nominated director candidates proposed for election by any party and vote for any combination of those candidates,” shareholders voting by proxy may currently vote for candidates on either the registrant’s or the dissident’s proxy card. Proposed Rule 14a-19 under the Securities Exchange Act of 1934 (the “Exchange Act”) would require the use of a universal proxy card in contested elections to allow shareholders to vote by proxy for the combination of nominees of their choice, thereby creating a proxy process with voting choices that more closely replicate those available at a shareholder meeting.

- **Scope of Proposed Universal Proxy Card Requirement.**

- **Solicitations Requiring Use of a Universal Proxy Card.** As proposed by the SEC, the use of universal proxy cards would be mandated in “all non-exempt solicitations in connection with contested elections where a person or group of persons is soliciting proxies in support of director nominees other

¹ See [Universal Proxy](#), Release No. 34-79164; File No. S7-24-16 (Oct. 26, 2016) (hereinafter “Release”).

- than the registrant’s nominees.” In response to those who argue that requiring universal proxies in all contests will increase the likelihood of change-in-control situations, the SEC notes that it believes “these change-in-control implications and any associated risks are better addressed through disclosure in the proxy statement (as is currently the case)” and should not serve as a basis for imposing “regulatory barriers on the full exercise of the shareholder franchise.”
- **Solicitations Not Requiring Use of a Universal Proxy Card.** Under the proposed rule, the universal proxy card requirement would not apply to:
 - exempt solicitations under Exchange Act Rule 14a-2(b);
 - solicitations that do not involve a competing slate of dissident nominees, such as (1) an election of directors involving only registrant and proxy access nominees; (2) a “vote no” campaign (i.e., where a soliciting person is only soliciting “withhold” or “against” votes with respect to one or more of the registrant’s nominees); or (3) a shareholder’s solicitation of proxies solely in support of a shareholder proposal;
 - “a dissident’s consent solicitation to remove existing registrant directors and replace them with dissident nominees”; or
 - solicitations involving registered investment companies or business development companies as defined in the Investment Company Act of 1940.
 - **Minimum Solicitation Requirement for Dissidents.** The proposed rule would require dissidents in a contested election subject to the proposed rule to “solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors.”² According to the SEC, this requirement is intended to prevent dissidents from capitalizing on the registrant’s solicitation efforts and relieving themselves of “the time and expense necessary to solicit sufficient support for its nominees to win a seat on the board of directors.” The SEC believes that the majority threshold it proposes strikes the right balance between providing shareholders with the benefit of a mandatory universal proxy card and preventing dissidents from having their nominees listed on a universal ballot without undertaking meaningful solicitation efforts.
 - **Disclosure of Intent to Meet Minimum Solicitation Threshold.** Under the proposed rule, a dissident must state in its proxy materials that it will solicit holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors. This statement, like others in the dissident’s proxy materials, would be subject to Rule 14a-9, which prohibits materially false or misleading statements to be made in proxy materials.
 - **Dissident’s Notice Requirement.**
 - **Content of Notice.** The proposed rule would require any dissident in a non-exempt solicitation to

² The SEC is not proposing to impose a minimum solicitation requirement on registrants.

- notify the registrant of its intent to solicit proxies in support of director nominees other than the registrant's nominees, as well as the names of those nominees. The notice must also indicate the dissident's intent to comply with the minimum solicitation threshold in the proposed rule, thereby distinguishing this notice from advance notice provided pursuant to the registrant's governing documents. The notice required under the proposed rule would be in addition to the dissident's "obligation to comply with any applicable advance notice provision in the registrant's governing documents."
- **Timing of Notice.** Recognizing the importance of establishing "a definitive date by which parties in a contested election will know that use of universal proxies has been triggered," the SEC proposes to require the dissident to provide such notice to the registrant "no later than 60 calendar days prior to the anniversary of the previous year's annual meeting date."
 - Where a registrant did not hold an annual meeting during the previous year, or where the date of the annual meeting has changed by more than 30 calendar days from the previous year, the proposed rule "would require that the dissident provide notice by the later of 60 calendar days prior to the date of the annual meeting or the tenth calendar day following the day on which public announcement of the date of the annual meeting is first made by the registrant."
 - **Notice Not Required.** A dissident would not need to provide this notice to the registrant if the dissident has provided the information required in the notice in a preliminary or definitive proxy statement filed by the deadline imposed by the proposed rule.
 - **Change in Dissident's Intent.** In the event that, after providing the required notice, the dissident changes either its intent to comply with the minimum solicitation threshold or its nominees, the dissident would be required to "promptly notify the registrant" of the change.
 - Since a registrant may have disseminated a universal proxy card prior to discovering that the dissident has abandoned its solicitation, the proposed rule would require the registrant to disclose in its proxy statement "how it intends to treat proxy authority granted in favor of a dissident's nominees in the event the dissident abandons its solicitation or fails to comply with proposed Rule 14a-19." According to the SEC, in such a case, the registrant may opt to disseminate a new, non-universal proxy card including only the names of the registrant's nominees.
 - In the event of a change in the dissident's nominees after the universal proxy card is disseminated, the registrant may, but need not, disseminate a new universal proxy card reflecting the change in the dissident's nominees.
 - **Registrant's Notice Requirement.**
 - **Content of Notice.** The proposed rule would require the registrant to notify the dissident of the nominees for whom it intends to solicit proxies. This requirement is intended to prevent dissidents from facing an "informational and timing disadvantage in the proposed universal proxy system."

- **Timing of Notice.** The registrant’s notice is due “no later than 50 calendar days prior to the anniversary of the previous year’s annual meeting date.” The SEC believes that this deadline would provide registrants with sufficient time to consider the dissident’s notice, due ten days earlier, and to finalize its own nominees, while providing dissidents with timely access to the names of the registrant’s nominees for the purpose of creating its universal proxy card.
 - If the registrant did not hold a meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, the registrant would need to provide the requisite notice no later than 50 calendar days before the date of the meeting.
 - Under the proposed rule, where the names of the registrant’s nominees have not been provided to the dissident by the time the dissident plans to file its preliminary proxy statement, the dissident may file its preliminary proxy statement nonetheless and “include blank spaces for the names of the registrant’s nominees on its preliminary universal proxy card.” However, the dissident would be required to wait for the names of the registrant’s nominees before filing its definitive proxy statement and universal proxy card.
- **Notice Not Required.** Under the proposed rule, a registrant need not provide the dissident with notice of the names of its nominees if it has already included these names in a preliminary or definitive proxy statement filed with the SEC.
- **Change in Registrant’s Nominees.** Under the proposed rule, a registrant would need to “promptly notify the dissident of any change” with regard to the names of its nominees. If the registrant makes a change after the dissident has already disseminated a universal proxy card, the dissident can, but is not required to, disseminate a new universal proxy card reflecting the change.
- **Dissident’s Definitive Proxy Statement Filing Requirement.** The proposed rule would require a dissident to file its definitive proxy statement with the SEC “by the later of 25 calendar days prior to the meeting date or five calendar days after the registrant files its definitive proxy statement, regardless of the proxy delivery method.”³ According to the SEC, this timing requirement is intended to ensure that shareholders will have a sufficient amount of time before the meeting to access information regarding all nominees on the universal proxy card.
 - **Noncompliance With Filing Deadline.** In the event that a registrant discovers, after disseminating a universal proxy card, that the dissident failed to file its definitive proxy statement before the deadline, the proposed rule would permit the registrant to disseminate a new, non-universal proxy card including only the names of its own nominees. As noted above, given the possibility that a registrant may disseminate a universal proxy card and later determine that the dissident failed to comply with the proposed rule, the registrant would be required to address in its proxy statement how it will treat proxy authority granted in favor of a dissident’s nominees in this situation.

³ The SEC is not proposing to impose a specific filing deadline on registrants.

- **Requirement to Refer to Other Party's Proxy Statement.** In a contested election, because each party's proxy statement is not generally required to include information about the other party's nominees, and because the proxy statements need not be disseminated concurrently, shareholders receiving a universal proxy card would be asked to vote for nominees without necessarily having access to information about those nominees. Accordingly, the SEC proposes to require, in new Item 7(h) of Schedule 14A, that "each party in a contested election refer shareholders to the other party's proxy statement for information about the other party's nominees" and state that shareholders can access the other party's proxy statement for free on the SEC's website. According to the SEC, because this disclosure would be required to be included in the registrant's proxy materials, even shareholders that did not receive the dissident's proxy materials would know where to access information about the dissident's nominees. The SEC is also proposing to revise Rule 14a-5(c) to permit each party to refer to information that would be furnished in a filing of the other party to satisfy its disclosure obligations.
- **Form of Universal Proxy.**
 - **Distribution by Each Party.** The SEC proposes to require each party in a contested election to distribute its own universal proxy card and designate its own representatives as proxy holders to exercise the vote pursuant to the proxy.
 - **Presentation and Formatting Requirements.** In an effort to ensure the clear and fair presentation of information on universal proxy cards, the proposed rule includes specific presentation and formatting requirements for all universal proxy cards. Under the proposed rule:
 - The proxy card must provide a means for shareholders to grant authority to vote "for" the nominees on the card;
 - "The proxy card must clearly distinguish between registrant nominees, dissident nominees, and any proxy access nominees" (such as by using separate columns), and "if multiple dissidents are soliciting proxies in support of separate slates of directors, each slate must be clearly distinguished" (such as through designated columns);
 - "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."

- **Ability to Vote for Nominees as a Group.** Under the proposed rule, where both parties have proposed a full slate of nominees and there are no proxy access nominees, the universal proxy card may allow shareholders to vote for all dissident nominees as a group and all registrant nominees as a group. However, where the proxy card includes proxy access nominees or where either the dissident or registrant is proposing a partial slate, “neither proxy card would be permitted to provide the option to vote for any nominees as a group.”
- **“Bona Fide Nominees” and “The Short Slate Rule.”**
 - **Definition of “Bona Fide Nominee.”** In order to allow proxy cards to include the full roster of candidates for election, the SEC proposes to amend the definition of “bona fide nominee” in Rule 14a-4(d) for registrants other than registered investment companies and business development companies. Currently, Rule 14a-4(d) provides that no proxy shall confer authority to vote for any person for which a “bona fide nominee is not named in the proxy statement.” A “bona fide nominee,” in turn, is defined as a nominee who has “consented to being named in the proxy statement and to serve if elected.” The SEC proposes to revise this definition to indicate that a bona fide nominee is “a person who has consented to being named in a proxy statement relating to the registrant’s next meeting of shareholders at which directors are to be elected.”⁴ According to the SEC, expanding “the scope of a nominee’s consent to include consent to being named in any proxy statement for the applicable meeting” will allow parties in a contested election to include all director nominees on their proxy cards, rather than merely those who have consented to being named on a particular party’s proxy card.
 - **Elimination of “The Short Slate Rule.”** The short slate rule, codified in Rule 14a-4(d)(4), provides that, where a dissident solicits proxies in support of a partial slate of nominees, the dissident can round out its partial slate with nominees of the registrant by indicating on its proxy card that it intends to use its proxy authority to vote for registrant nominees other than those specified on its card. As explained by the SEC, in a universal proxy card system the short slate rule is no longer necessary, as the proposed universal proxy rule would permit shareholders to vote for any combination of registrant and dissident nominees in order to cast a vote for a full slate of directors. The SEC thus proposes to eliminate the short slate rule.
 - **Solicitation Without a Competing Slate.** As explained by the SEC, its proposed revision of the definition of “bona fide nominee” and elimination of the short slate rule would also affect proxy contests in which there is no competing slate of candidates for the board (e.g., a “vote no” campaign or where a proponent solicits proxies for a shareholder proposal unrelated to the election of directors). In such cases, “the proposed amendments to Rule 14a-4(d) would permit a proponent to solicit authority to vote on some or all of the named registrant nominees by providing that a person is a bona fide nominee as long as he or she consents to being named in ‘a’ proxy statement for the next meeting at which directors are to be elected.”

⁴ Release at 25 (emphasis added).

- **Comparison With Proxy Access Bylaws.** The proposed mandatory universal proxy system is separate and distinct from proxy access.
 - **Proxy Access.** For those companies that have adopted proxy access bylaws, if proxy access is triggered, the registrant must list the names of the proxy access nominees on its proxy card and include in its proxy statement:
 - the names of the proxy access nominees;
 - disclosure required by Schedule 14A about the nominating shareholder and its nominees; and
 - the nominating shareholder’s statement in support of its nominees.
- Under proxy access, nominating shareholders are not required to:
- prepare and file their own proxy statements; or
 - disseminate any proxy material or solicit any shareholders.
- **Mandatory Universal Proxy System.** In contrast to proxy access, the proposed mandatory universal proxy system would only require the registrant to include the names of the dissident nominees on its proxy card, clearly distinguishing them from its own nominees, and to include a sentence in its proxy statement referring shareholders to the dissident’s proxy statement for information regarding the dissident’s nominees. “No other disclosure about the dissident’s nominees would be required by the registrant.” The dissident would:
 - be required to prepare and file preliminary and definitive proxy statements (by the deadline imposed by the proposed rule); and
 - maintain sole responsibility for disseminating information about and soliciting proxies in support of its nominees (with the requirement of soliciting the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors).

II. Proposed Rule Amendments Regarding Voting Options and Voting Standards

In addition to proposing the mandatory use of universal proxy cards in contested elections, the SEC is proposing amendments to its form of proxy and proxy statement disclosure requirements “to specify clearly the applicable voting options and voting standards in all director elections.”

- **Voting Options Required to be Included on Proxy Card.** The SEC is proposing amendments to Rule 14a-4(b) that would require companies that apply a majority voting standard in director elections to:
 - include an “against” voting option instead of a “withhold authority to vote” option; and
 - provide shareholders the option to “abstain” if they neither support nor oppose a director nominee.

Because an “against” vote would only have legal effect where a majority voting standard applies, it would still be appropriate to include a “withhold” voting option on proxy cards in plurality voting situations.

- **Disclosure Regarding Effect of “Withhold” Vote.** The SEC is proposing to Item 21(b) of Schedule 14A to require disclosure regarding the effect of a “withhold” vote in a director election.

If you have any questions or would like additional information, please do not hesitate to contact **Yafit Cohn** at +1-212-455-3815 or yafit.cohn@stblaw.com, or any other member of the Firm’s Public Company Advisory Practice.

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