



Executive

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practice of investor relations

ALERT

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SEC Proposes Universal Proxy Ballot Rules

On October 26, 2016, the U.S. Securities and Exchange Commission (SEC) proposed new proxy voting rules that would require public companies to provide universal proxy cards in contested board elections.

The SEC voted 2-1 for the draft rules, with Commissioner Michael Piwowar expressing concern that the rules would empower special interests, lead to an increase in proxy contests, and disadvantage retail investors. Chair Mary Jo White and Commissioner Kara Stein supported the proposal, saying they wanted investors who vote by proxy to have the same voting options if they attended a company's shareholder meeting in person.

The draft rules include the following provisions:

- Companies and dissidents would have to provide shareholders with universal proxy cards that include the names of both management and dissident director nominees on a single ballot. The rules would apply to full-slate and partial-slate contests and would apply to all non-exempt solicitations in contested elections. Foreign private issuers, registered investment companies, and business development companies would be exempt.
- Management and dissidents would have to provide each other the names of their respective nominees (e.g., a dissident would be required to provide a company with the names of its nominees) no later than 60 calendar days prior to the anniversary of the previous year's annual meeting date.
- To appear on a universal proxy card, dissidents would have to agree to send proxy materials to shareholders who hold at least a majority of the voting power at the company.
- In uncontested director elections, proxy cards would have to provide an "against" option when state law gives legal effect to votes against board nominees, and provide

shareholders the ability to “abstain” at companies with majority voting bylaws. Companies also would have to eliminate a “withhold” vote option where state law permits a vote “against” directors, and clarify their proxy statement disclosures on the impact of a “withhold” vote.

Public comments will be due 60 days after the draft rules are published in the Federal Register. Given the SEC’s two commissioner vacancies and the potential arrival of a new chair after the presidential election, the Commission is unlikely to finalize these rules before the 2017 proxy season.

Activism and the Universal Proxy

One of the more contentious aspects of universal proxy cards is whether they will increase shareholder activism and the number of proxy contests. In his dissenting statement, Piwowar warned that “a universal proxy may empower specific groups of shareholders, who may use their increased influence to advance their own special interests at the expense of other shareholders.” He also expressed concern that dissidents would decide not to send proxy materials to retail shareholders.

According to data from the EY Center for Board Matters and Activist Insight, dissidents sought board seats at 157 companies in 2015, up from 120 in 2014. Most (112) of the 2015 activist situations were settled; just 23 contests went to a vote. In the contests where there was a vote, activists won at least one board seat in 48 percent of those fights. Overall, dissidents obtained 184 seats through settlements or proxy contests in 2015.

IR Implications

This rule proposal is in line with the continuing trend toward greater “shareholder rights.” With passage, it does appear that it will become easier for dissidents to win partial board representation in the U.S., though universal proxy cards could enable an embattled company to persuade investors to retain some of the incumbent directors. In any case, the rule changes highlight the need for IR teams to detect and engage effectively with activists early, before they go public.

Resources

- [SEC Press Release, “SEC Proposes Amendments to Require Use of Universal Proxy Cards,” October 26, 2016](#)
- [Proposed SEC Rule on Universal Proxy Cards, Release No. 34-79164; File No. S7-24-16](#)
- [Commissioner Michael S. Piwowar, “Dissenting Statement at Open Meeting on Universal Proxy,” October 26, 2016](#)
- [Cooley LLP, PubCo @ Cooley blog, “SEC Proposes Use of ‘Universal Proxy’ in Election Contests and Adopts Changes to Rule 147 and Reg D,” October 26, 2016](#)

- [Council of Institutional Investors, Petition for Rulemaking to Amend Section 14 of the Securities Exchange Act of 1934 to Facilitate the Use of Universal Proxy Cards in Contested Elections, January 8, 2014](#)
- [NIRI IR Update Activism Issue, June 2016](#)
- [NIRI Analytics, "NIRI Activist Investor Survey – 2015"](#)
- [NIRI Analytics, "Board-Shareholder Engagement Survey – 2013"](#)

About the National Investor Relations Institute (NIRI)

Founded in 1969, NIRI (www.NIRI.org) is the professional association of corporate officers and investor relations consultants responsible for communication among corporate management, shareholders, securities analysts and other financial community constituents. NIRI is the largest professional investor relations association in the world with more than 3,300 members representing 1,600 publicly held companies and \$9 trillion in stock market capitalization.

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