SEC Approves Universal Proxy Card Rules; Proposes to Rescind Portions of July 2020 Amendments to Proxy Advisor Rules

November 17, 2021

Yesterday the SEC approved new proxy rules requiring the use of universal proxy cards by management and shareholders soliciting proxy votes for their candidates in non-exempt director election contests, as well as mandating inclusion of "against" and "abstain" voting options where permitted by state law. In addition, the SEC proposed to rescind two portions of its July 2020 amendments to the rules governing proxy advisory firms. The amendments are discussed in our July 24, 2020 blog post.

The new universal proxy card rules will apply to shareholder meetings involving contested director elections held after August 31, 2022. The voting option requirements will apply to shareholder meetings involving director elections held after August 31, 2022.

The new rules will not apply to registered investment companies or business development companies.

New Rules for Universal Proxy Cards in Proxy Contests

Authors/Presenters

R. Randall Wang

Senior Counsel
St. Louis
rrwang@bclplaw.com

Katherine Fleming Ashton

Partner
Los Angeles
kfashton@bclplaw.com

Under new Rule 14a-19, proxy cards in non-exempt elections must include all director nominees presented by management and shareholders for election at the upcoming shareholder meeting. The goal is to replicate the flexibility of in-person attendance where shareholders can "mix and match" their votes between management and dissident nominees in a proxy contest.

Changes for Contested Elections

- ***Inclusion of Names****.* Names of both company and dissident nominees must be included on proxy cards, along with certain other shareholder nominees included as a result of proxy access.
- ***Bona Fide Nominees.*** The concept of a "bona fide nominee" will be expanded to include a person who consents to being named in *any* proxy statement for a company's next shareholder meeting for the election of directors.
    - This eliminates a technical impediment to the use of universal proxy cards (i.e., a company nominee would typically not consent to being named in a dissident proxy cards, and vice versa).
- ***Notice by Dissidents.*** Dissidents must provide companies with notice of their intent to solicit proxies and the names of their nominees at least 60 calendar days before the anniversary of the previous year's annual meeting.
    - If there was no meeting the previous year or the date of the meeting has changed by more than 30 calendar days from the previous year, dissidents must provide notice by the later of (1) 60 calendar days before the date of the meeting or (2) the tenth calendar day following public announcement of the date of the meeting.
    - Dissidents must also promptly notify the company if any change occurs with respect to their intent to solicit proxies in support of their director nominees. If the company has already disseminated a universal proxy card, it has the option to send a new card reflecting the change.
    - These requirements are in addition to and do not override or supersede those contained in a company's governing documents, such as advance notice bylaws. If a company has not adopted such provisions, the new rules provide a compelling reason

to do so.

  - The SEC notes that dissidents that miss the deadline can still take other actions to attempt to make changes to the board, such as initiating a “vote no” campaign, conducting an exempt solicitation, or calling a special meeting (to the extent permitted) to remove and replace directors.

- ***Notice by Companies.*** Companies must notify dissidents of the names of the company’s nominees at least 50 calendar days before the anniversary of the previous year’s annual meeting.
  - If there was no meeting the previous year or the date of the meeting has changed by more than 30 calendar days from the previous year, the company must provide notice no later than 50 calendar days before the date of the meeting.
  - Companies must promptly notify the dissident of any change in the company’s nominees. If the dissident has already disseminated a universal proxy card, it has the option to send a new card reflecting the change.
- ***Dissident Filing Deadline.*** Dissidents must file their definitive proxy statement by the later of (1) 25 calendar days before the shareholder meeting or (2) five calendar days after the company files its definitive proxy statement.
  - The SEC indicated that if a dissident fails to file its definitive proxy statement on time, the company could elect to disseminate a new, non-universal proxy card including only the names of the company’s nominees.
- ***Access to Information about all Nominees.*** Each side in a proxy contest must refer shareholders to the other party’s proxy statement for information about the other party’s nominees and to the SEC’s website to access the other side’s proxy statement free of charge.
- ***Minimum Solicitation Requirement for Dissidents.*** Dissidents must solicit the holders of shares representing at least 67% of the voting power of the shares entitled to vote at the meeting.
- ***Formatting and Presentation on Proxy Card.*** New presentation and formatting requirements apply to universal proxy cards.

- Each side's nominees must be grouped together and clearly identified as such, in a fair and impartial manner.
- The card must disclose the treatment of proxies containing over-votes (i.e., voting for more than the number of seats up for election) and under-votes (i.e., failing to vote with respect to all seats up for election).

Changes Applicable to All Director Elections

- Proxy cards must include "against" and "abstain" voting options where such options have legal effect under state law.
- Proxy statements must disclose the effect of all voting options, including the effect of a "withhold" vote.

Other Changes

- The "short slate" rules will be eliminated for operating companies[1] in light of the universal proxy card rule.

Dissenting Commissioner

Although supportive of universal proxy cards generally, Commissioner Peirce dissented because of the absence of eligibility requirements. She believes that the 67% threshold is "easy to meet or ignore" in light of the availability of notice-and-access. Further, she objects to the absence of any ownership or holding period requirement for dissidents demonstrating commitment to the company, such as those contained in Rule 14a-8 or the former[2] proxy access rule.

Commissioner Roisman shared some of Peirce's concerns but voted for the rule; however, he would have supported additional changes and believes they should be considered going forward.

Proposed Changes to Proxy Advisor Rules

In response to investor criticism, by a 3-2 vote, the SEC is proposing to rescind two portions of the July 2020 amendments[3] that established conditions for proxy advisory firms to utilize exemptions from the information and filing requirements of the proxy rules:

- That proxy advisory firms must make their advice available to the companies that are the subject of their advice at or before the time that they make the advice available to their clients.
- That proxy advisory firms must provide their clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding the proxy advisory firms' proxy voting advice by registrants who are the subject of the advice.

The conditions are set to become effective on December 1, 2021.

According to the SEC majority, investors and others expressed concerns that those conditions will impose increased compliance costs on proxy advisory firms and impair the independence of their proxy voting advice. The proposed amendments would address those concerns by rescinding Rule 14a-2(b)(9)(ii) as well as the related safe harbors and exclusions from those conditions. Then SEC majority noted that some proxy advisors, such as Glass Lewis and ISS, have developed practices that provide clients and companies with some of the opportunities and access to information contemplated by the conditions.

The 2020 rules also amended Rule 14a-9, which prohibits false or misleading statements, to add Note (e), which sets forth examples of material misstatements or omissions related to proxy voting advice. Specifically, Note (e) provides that the failure to disclose material information regarding proxy voting advice could be misleading.

According to the SEC majority, investors and others expressed concerns that Note (e) may increase proxy advisory firms' litigation risks, which could impair the independence and quality of their proxy voting

advice. The proposed amendments would rescind Note (e) while affirming that the rule applies to material misstatements of facts contained in proxy voting advice. The proposing release (at pages 29-31) also presents SEC guidance regarding the application of Rule 14a-9 to statements of opinion contained in proxy voting advice.

The SEC majority noted that the remaining portions of the 2020 rules would remain in effect, including:

- The treatment of proxy voting advice as solicitation subject to the proxy rules.

- The application of the conflicts of interest disclosure requirements to proxy advisors that seek to rely on the exemptions from the proxy rules' information and filing requirements.
- Despite the removal of Note (e), proxy voting advice would remain subject to liability under Rule 14a-9 for material misstatements or omissions.

Dissenting Commissioners

Commissioners Peirce and Roisman dissented, believing that proposing amendments so quickly after adoption of the 2020 rules is unjustified and establishes an ill-advised precedent – where no new information or issue has arisen. In Peirce's view, "we might as well simply acknowledge that the political winds have shifted." She noted that the SEC was aware of advisory firms' practices (cited as support for the proposal) at the time of adoption of the 2020 rules; she noted that the only new information is that one firm is actually engaging less with issuers. She also expressed confusion as to why the SEC would delete Note (e) from Rule 14a-9 while "reaffirming . . . the substance of the note as guidance."

Roisman focused on the importance of proxy voting advice to investors and the extensive rulemaking process leading up to the 2020 rules. He also believes the proposal lacks justification for eliminating protections requiring advisory firms to have engagement policies.

For further information on this topic, please contact Randy Wang, Katherine Ashton or any other BCLP Securities and Corporate Governance lawyer. Additional resources are available on our website for the BCLP Securities and Corporate Governance Practice. Bryan Cave Leighton Paisner LLP makes available the information and materials in its website for informational purposes only. The information is general in nature and does not constitute legal advice. Further, the use of this site, and the sending or receipt of any information, does not create any attorney-client relationship between us. Therefore, your communication with us through this website will not be considered as privileged or confidential.

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