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SEC Announces Proposed Rules to Require Universal Ballots in Proxy Fights

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The Securities and Exchange Commission today[4] announced proposed rules that, if adopted, would mandate "universal" proxy cards in contested director elections and impose new nominee notification and proxy filing deadlines. Under the proposed rules, shareholders voting in a contested election would receive a single "universal" proxy card presenting both company and dissident nominees, enabling them to "mix and match." Under the current proxy rules, by contrast, shareholders almost always receive two sets of proxy cards in a proxy contest—one from the company and one from the dissident, each with a rival slate of candidates—and rely on various workarounds (including appearing in person at the meeting) to "split their vote."

Today's proposed rules were adopted by a vote of 2 to 1 (with Chair White and Commissioner Stein voting in favor, Commissioner Piwowar against and two seats vacant) and have long been the subject of heated debate. Congressional legislation was even introduced to bar the SEC from expending funds towards universal ballot rulemaking. Proponents argue that the rules would enfranchise shareholders and, per Chair White, "eliminate th[e] disparity" "between proxy voting and in-person voting." Opponents have expressed concern that the rules could embolden short-term activists, empower special interest groups, create voter confusion, undermine retail voter participation (including because dissidents will not be required to solicit all shareholders), disenfranchise voters who inadvertently "over-vote" for more candidates than there are available board seats, or have other unintended and unforeseen consequences. Concerns as to the adequacy of underly-

[4] This memo was originally released October 26, 2016.

ing technological systems have also been raised. A significant and consistent concern is that a universal ballot will increase the incidence, and perhaps success, of proxy fights and thus lead to corporate distraction, adversely affect board dynamics and promote the short-termism that is now widely recognized as a major factor in our economy's slow growth and underinvestment in the long-term.

Before the proposed rules go into effect, they will be subject to a 60-day comment period and a second SEC vote (which may by then feature a full allotment of Commissioners), so it is unlikely that the rules will go into effect before a new administration takes office in January. Corporations who are likely to be adversely impacted under the new rules should take advantage of the opportunity afforded by the comment period to share their concerns. In particular, we note that while the headline debate is over the potential advantages and disadvantages of universal proxies, the new rules include other changes (such as those imposing new deadlines by which companies and dissidents must notify the other of proposed candidates and specifying new deadlines for proxy statement filings) that require careful consideration, as they could have significant and unintended effects on settlement negotiations and create opportunities for dissident gamesmanship.

While the universal ballot may have some significant impacts, we believe that companies and shareholders will ultimately adjust without fundamentally changing the balance of power in corporate governance as it has been redefined in recent years. We would hope that, having prioritized an item high on the activist agenda, the SEC will now turn its focus to long-overdue updates to the outdated and routinely abused early-warning provisions of Regulation 13D.

In the final analysis, in the new paradigm for governance, companies that prudently prepare for activism and productively engage and build relationships of trust with their long-term shareholders will have a path for obtaining investor support, even in the era of universal proxy cards.

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