Securities Regulation Daily Wrap Up, PROXIES—SEC advisory committee members endorse universal proxy, encourage blockchain in corporate elections, (Sept. 17, 2018)

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At a recent meeting of the SEC's Investor Advisory Committee (IAC), members and stakeholders voiced their support for the use of technology, including the use of distributed ledger technology such as blockchain, in the proxy process. Attendees were also generally supportive of a universal proxy which would allow shareholders to vote by proxy instead of having to attend the annual meeting in person.

Universal proxies. Commissioner Kara Stein expressed her support for moving forward on an SEC proposal issued in 2016 that would require the use of universal proxy cards in director elections. These universal proxies would include the names of both registrant and dissident nominees and allow a shareholder to split their vote when voting by proxy. As it currently stands, splitting the vote in this way would require an in-person vote at a company's annual meeting, a tall order for many ordinary shareholders.

Ken Bertsch, executive director of the Council of Institutional Investors, agreed that shareholders can have a good reason for wanting to split tickets when voting for directors and that there is no good reason for requiring in-person attendance at the annual meeting. David A. Katz of Wachtell, Lipton, Rosen & Katz said that implementing a universal proxy card could resolve some issues, but would also raise others that could favor one party over another in a proxy contest. However, he believes that those concerns can be addressed. The system encourages each side to vote multiple times by sending out numerous mailings and proxy cards, which leads to confusion, and many shareholders do not realize that the last card submitted is the one that ultimately counts. Any system that encourages voting early and often is bound to have problems and leads to significant costs on both sides, Katz said.

Arthur Crozier, chairman of proxy solicitation firm Innisfree M&A, noted that in a proxy contest, there is a concern that a universal proxy card would favor the dissident; however, studies have shown it would actually favor management.

Use of technology and blockchain. Stein said that the Commission should embrace technology to improve the accuracy, transparency, and efficiency of the proxy system, including the use of distributed ledger technology, or blockchain. This sentiment was shared by many participants at the meeting. Bertsch noted that many investors lack confidence that their votes have actually been counted, and the use of a private blockchain could relay voting instructions and verification, providing immediate and accurate end-to-end confirmation. Blockchain-based proxy voting could protect investor privacy while enhancing timeliness, accessibility, accuracy, certainty, and cost-effectiveness, Bertsch advised.

Lyell Dampeer, president of investor communications solutions at Broadridge Financial Solutions, touted his firm's experience in providing proxy voting and shareholder communications services. Regarding vote confirmation, Dampeer explained that Broadridge has been providing it for at least 10 years, but it can only do it when Broadridge itself is the tabulator. Existing technology currently allows for reconciliation and confirmation in proxy voting, but it requires that everyone agree to participate in it. Addressing blockchain specifically, Dampeer said that it would require real-time reconciliation of disparate recordkeeping systems. It doesn't require all those systems themselves to move to blockchain, he added, it does require that those participants that have those records agree to operate on a shared ledger.

While Dampeer said that there are other service providers in this space and that he wouldn't "accept the M-word," other participants voiced concern that Broadridge does indeed operate a monopoly in this area. Professor Edward Rock of New York University School of Law stated that if Broadridge does become the engine for providing this minimal level of voting system robustness, how to handle the problem of a monopoly should be addressed. He noted that the SEC should be concerned about competitiveness because antitrust is the "fourth pillar" of its mission. This may require using Broadridge to provide services to figure out how to open up the space and give others an opportunity to compete, Rock observed.

Encouraging shareholder participation. The use of technology to encourage shareholder participation in the proxy process has been an issue in the past, but not everyone was in agreement on how to utilize technology to get shareholders to vote. AFL-CIO Special Counsel Damon Silvers, a member of the IAC, noted that there was a collapse in shareholder proxy voting after the SEC allowed the use of the notice-and-access model or e-proxies. If we want to get individual investors to participate, we have to reckon with that fact, he said.

Deborah P. Majoras, chief legal officer and secretary of Procter & Gamble, noted that the company is not permitted to distribute materials electronically in contested elections, and in the company's months-long proxy fight last year, it was forced to mail hard copies to investors, even when they didn't want them. While studies show that the best way to increase retail investor voter turnout is delivering hard copies of the materials to shareholders, it can also lead to frustration and complaints, she explained. Some investors were confused, others were concerned it was not environmentally friendly, and others "were just plain annoyed." There needs to be a convenient and user-friendly method to encourage shareholders to vote, Majoras advised.

Proxy advisory firms. While most of the comments on improving the proxy process at the IAC meeting did not address proxy advisory firms, Chairman Jay Clayton opened the meeting by drawing attention to an SEC roundtable on the proxy process later this fall. The announcement of the roundtable mentioned potential topics including improving the proxy voting process, increasing shareholder participation, and reassessing the shareholder proposal process. It also suggested considering a regulatory regime for proxy advisory firms. This last item was underscored by the announcement that the SEC's Division of Investment Management has withdrawn two 2004 letters to proxy advisory firms. According to Chairman Clayton, the withdrawal of the letters followed a re-examination of the letters to facilitate discussion at the upcoming roundtable. Representative Jeb Hensarling (R-Texas), chairman of the House Financial Services Committee, applauded the withdrawal of the letters, stating, "The proxy advisory firm duopoly is in serious need of reform and SEC attention."

Conversely, Commissioner Robert Jackson decried focusing on proxy advisory firms. He praised the work of the IAC and the input given by both the members of the committee and those providing remarks to the committee, noting that there is broad agreement on fixing the "Byzantine system" to that investors' votes are counted. Given the problems with the proxy system, Jackson expressed his concern that efforts to improve corporate democracy will be stymied by "misguided and controversial efforts" to regulate proxy advisors.

Corporate lobbyists who complain that proxy advisory firms have too much power have made the regulation of proxy advisors a top priority, according to Jackson. Of all the problems that plague corporate America today, Jackson wondered, why should the Commission conclude that investors getting too much advice is an issue that deserves our immediate attention? He urged his colleagues not to allow the priorities of corporate lobbyists to sidetrack the Commission's work in improving corporate voting in America.

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