

[Securities Regulation Daily Wrap Up, TOP STORY—SEC's universal proxy proposal draws comments from investor groups, \(Jun. 11, 2021\)](#)

Securities Regulation Daily Wrap Up

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The comment letters were largely supportive of the Commission's proposal, with one exception.

Recent letters to the SEC commenting on its universal proxy proposal by three investor groups, the Counsel of Institutional Investors, the Investment Company Institute, and Better Markets were largely supportive; however the Center for Capital Markets Competitiveness had reservations about the proposal, saying that the "SEC's sudden and unwarranted reconsideration of the Proposal is fundamentally at odds with the deliberative and holistic process the Commission recently used when promulgating rules related to proxy advisory firms and the shareholder proposal process."

Universal proxy comment period. The SEC [reopened](#) the comment period for this proposal last April in order to "allow interested persons further opportunity to analyze and comment upon the Proposed Rules in light of developments since the publication of the Proposed Rules including developments in corporate governance matters affecting funds." The extended comment period ended on June 7.

The proposed rules, originally put forth in a [2016 release](#), aimed to establish a universal proxy. The changes would, among other things, establish new procedures for the solicitation of proxies, the preparation and use of proxy cards, and the dissemination of information about all director nominees in contested elections. The proposed rules would also include other changes to the proxy voting process, such as mandating that proxy cards include an "against" voting option when permitted under state laws and requiring disclosure about the effect of a "withhold" vote in an election.

According to the Commission, since the publication of the proposed rules, there have been important developments in proxy contests, corporate governance, and shareholder activism that may warrant additional comment.

Counsel of Institutional Investors. In a June 2, 2021 letter signed by Deputy Director Glen Davis, [\(CII\)](#) expressed "strong support" for finalizing a rule to ensure that shareholders voting in contested director elections have the ability to use either the company's proxy card or the dissident's proxy card to vote for the combination of board nominees they support. CII believes the changes proposed, if adopted, would deliver a "critical benefit" to the market by providing shareholders the ability to use either proxy card to vote for any combination of board nominees.

However, CII would support revising the 2016 release to: boost the minimum dissident solicitation threshold from a simple majority of voting power to as much as two-thirds of outstanding voting power; add certain presentation and formatting requirements not included in the 2016 release; and require disclosure, either on proxy cards or in accompanying materials, clarifying what would happen in certain scenarios.

Investment Company Institute. The institute also supported the proposal in a [June 7 letter](#) to the Commission from General Counsel Susan M. Olson, approving the requirement that operating companies and dissidents use universal proxy cards in contested elections. The institute also approves excluding registered investment companies and business development companies from any new universal proxy requirements because of the associated burdens would outweigh any benefits.

Among other things, the institute supports requiring operating companies to use universal proxies in contested director elections; excluding all funds from universal proxy requirements; claims split ticket voting would not benefit most shareholders (most funds rarely have contested elections and most closed-end funds contested

elections rarely present binary decisions anyway, and funds activities are limited and subject to the Investment Company Act); and says that split-ticket voting would increase fund costs.

Better Markets. In a supplementary comment letter filed on June 7, [Better Markets](#) expressed support for the creation of a universal proxy requirement, saying that it would improve corporate governance and accountability. Strong shareholder suffrage rights and protections are some of the reasons that U.S. equity markets continue to be the envy of the world, Better Markets claimed.

Because most shareholders are unable to attend the annual shareholder meetings for every firm they hold stock in, most voting is done by mail-in proxies. Currently, the letter continues, when there is a contested election in which multiple parties put forward slates of candidates, shareholders voting by proxy are unable to exercise their full voting rights and must pick one of the slates in its entirety, without selecting a mix of the candidates they believe are optimal.

Better Markets urged the SEC to finalize and enact the proposal as soon as possible.

The Center for Capital Markets Competitiveness. Contrary to the other commenters, the center claims that there is no compelling reason for the SEC to mandate the use of universal proxy ballots. According to a [June 7 letter](#) signed by Executive Vice-President Tom Quaadman, mandating universal proxies would "increase the frequency and ease of proxy fights at public companies, favor large activist investors and their agendas at the expense of Main Street investors, balkanize the boards of public companies by allowing activists to "mix and match" between nominees from different slates of directors, and ultimately provide another disincentive for companies to go public in the United States"

Further, the center says that the Commission's "sudden and unwarranted reconsideration" of the proposal is fundamentally at odds with the deliberative and holistic process it has recently used when promulgating rules related to proxy advisory firms and the shareholder proposal process.

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