# Securities Regulation Daily Wrap Up, TOP STORY—SEC proposes universal proxy requirement; adopts rules to facilitate intrastate offerings, (Oct. 26, 2016)

Securities Regulation Daily Wrap Up

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By Jacquelyn Lumb

SEC Chair Mary Jo White and Commissioner Kara Stein voted to move forward with a proposal to require the use of a universal proxy card in all contested board elections that are subject to the Exchange Act, over the objection of Commissioner Michael Piwowar. The commissioners unanimously approved a separate initiative to provide exemptions to help facilitate intrastate and regional securities offerings (Release No. 34-79164, October 26, 2016; FAQ about universal proxies; Release No. 33-10238, October 26, 2016; FAQ about Securities Act rule amendments).

Under the current proxy rules, only shareholders that attend a meeting in person at which directors are elected are able to vote for nominees on both management's and a dissident's proxy cards. Those who vote by proxy must submit their votes either on the company's or the dissident's card but cannot choose a combination from both cards. White said the proposal reflects the principle that the proxy voting process should replicate to the greatest extent possible the vote that a shareholder could cast in person at a shareholder meeting. The proposal would eliminate the current disparity in a straightforward and efficient manner, she advised.

The proposed amendments to the proxy rules would require proxy contestants to provide a universal proxy card that includes the names of both registrant and dissident nominees, allowing shareholders to choose among all of the candidates rather than casting an all or nothing vote. The definition of a bona fide nominee under Rule 14a-4(d) would be amended to include any person who agrees to be named in any proxy statement relating to the next meeting of shareholders at which directors will be elected. The so-called short slate rule would be eliminated since it would no longer be needed.

**Deadlines for sharing nominee names.** Proxy contestants would be required to provide each other with a list of their director candidates, with the dissident's names provided no later than 60 calendar days prior to the anniversary of the previous year's annual meeting. The company, in turn, would provide its nominees to the dissident no later than 50 calendar days prior to the previous annual meeting date. Dissidents would be required to solicit shareholders representing at least a majority of the shares entitled to vote.

**Definitive proxy deadlines.** The contestants would have to refer shareholders to each other's proxy statements to obtain information about their nominees and must advise that the proxy statements are available on the SEC's website. Dissidents would have to file their definitive proxy statement with the SEC by the later of 25 calendar days before the meeting or five calendar days after the registrant files its definitive proxy statement. The proposal would not apply to foreign private issuers, companies that file only under Exchange Act Section 15(d), registered investment companies, or business development companies.

**Withhold and abstain votes.** The proxy cards would be required to include an option to vote against the directors where there is a legal effect in doing so, and an abstain option for elections governed by a majority voting standard. There would no longer be a withhold option when an "against" vote has legal effect. The effect of a withhold vote in an election of directors would also have to be disclosed.

**Piwowar's dissent.** Piwowar cited remarks by Rep. Scott Garrett (R-NJ), chair of the subcommittee on Capital Markets and Government-Sponsored Enterprises, who has questioned the SEC about prioritizing of resources. Garrett said the universal proxy initiative has been pushed for years by special interest groups and would

increase the likelihood of proxy fights. Piwowar said the universal proxy may allow dissidents to promote their own interests to the detriment of other shareholders.

The comment period will be open for 60 days.

**Intrastate and regional securities offerings.** In introducing the second item on the SEC's agenda, White noted that while many state regulators have updated their regulatory structures to better accommodate local offerings, the SEC's rules have not been updated for decades and do not sufficiently reflect the evolution of technology and business practices. Last fall, when the SEC adopted federal crowdfunding rules, it also proposed updates to its rules for local and regional offerings.

**New Rule 147A.** Under the proposal, a new exemption would have replaced Rule 147, the statutory safe harbor exemption for intrastate offerings. Instead, based on comments, the final rule establishes the exemption as a new Rule 147A and retains the current Rule 147 safe harbor with certain updates. White said the proposal received broad support from commenters, including state regulators.

The exemption from registration under the federal securities laws for local and regional offerings eliminates a restriction that became outdated with the expansion of Internet communications. Rather than being confined to the state of the issuer, offerings can be accessible to out-of-state residents as long as the sales are made to residents of the state or territory of the issuer's principal place of business. To use the exemption, issuers must demonstrate a meaningful presence in the state of the offering to ensure they remain local in nature.

The offerings will not be limited to those that are registered at the state level or that rely on a state exemption which includes an aggregate offering amount limit or investment limitations. Piwowar noted that he voted against the initial proposal because it provided for such limitations. That provision has been removed in recognition that state regulators are uniquely positioned to determine whether any additional requirements are needed for the protection of their residents. The states will provide the leading role in overseeing local offerings, but the offerings will remain subject to the antifraud and civil liability provisions of the federal securities laws.

**Close monitoring.** Stein had a number of reservations with the final rules but took comfort from the states' intention to closely monitor their implementation and the fact that the staff will study and report back to the Commission in three years to determine whether any fine-tuning is needed.

**Amendments to Rule 504, repeal of Rule 505.** The SEC also amended the aggregate offering amount for offerings under Regulation D Rule 504 to increase it from $1 million to $5 million in any 12-month period and to provide for the disqualification of bad actors in a manner that is consistent across Regulation D. This amendment would reduce the incentive to use the already seldom used exemption in Rule 505, which permits offerings of up to $5 million annually that must be sold solely to accredited investors or to no more than 35 non-accredited investors, so Rule 505 is being repealed.

**Effective dates.** Amended Rule 147 and new Rule 147A will take effect 150 days after publication in the *Federal Register*; amended Rule 504 60 days after publication; and the repeal of Rule 505 180 days after publication.

The releases are Nos. 34-79164 and 33-10238.

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