

Statement

Statement on Universal Proxy Ballots



Commissioner Allison Herren Lee

Nov. 17, 2021

Electing corporate directors is perhaps the most critical function of shareholders in our system of corporate democracy. Corporations are owned by shareholders, but managed and overseen by boards of directors. Thus, it is the shareholders – the owners – that decide whom to entrust to oversee their capital. This is the integral construct of American corporations. The amendments the Commission is voting on today will help ensure that shareholders voting by proxy can freely choose between and among all qualified candidates for the board – and are not limited to choosing the entire slate put forth by one side or the other.

These changes are long overdue,^[1] are supported by a broad and diverse coalition of market participants and commenters,^[2] and will help modernize the proxy voting rules to promote fairness.

Because most shareholders vote by proxy,^[3] it is critically important that the proxy voting process, to the extent possible, replicate the experience of voting in person at an annual meeting.^[4] With respect to contested director elections, however, there is a significant asymmetry between in-person and proxy voting. Specifically, shareholders voting in person may choose from all director nominees and vote for the combination of directors they think will best promote effective corporate governance and protect their interests. In other words, they can mix and match from both registrant and dissident slates of nominees. Shareholders voting by proxy, however, generally must choose between voting for either the nominees presented on the registrant's proxy card or the nominees presented on the dissident's proxy card.^[5] In other words, they do not have the flexibility afforded in-person voters to choose the best combination of candidates from among all nominees.

Today's amendments will eliminate this asymmetry by requiring the use of a universal proxy card that will allow shareholders to vote by proxy in the same manner as is allowed for in-person voting, as well as implementing a number of related changes.^[6] This common-sense, long-advocated change has broad and diverse support, including from the SEC's Investor Advisory Committee, the Universal Proxy Working Group, an informal working group with a wide range of participants, and many others.^[7] Indeed there was broad support among commenters on both the original proposal in 2016, and the re-opening release this year, in favor of adopting these changes. To the extent there was a noteworthy area of concern, it was the requirement that a dissident solicit shareholders representing only a simple majority of voting power in order for their candidates to be included on the universal ballot.^[8] To address these comments and ensure that dissidents engage in meaningful solicitation efforts, the final rules raise the minimum solicitation requirement for dissidents to 67 percent.

The result is a carefully and thoughtfully crafted package of rules that will help ensure parity for shareholders voting by proxy and promote a more effective and fair proxy voting system. I want to thank the staff for their diligent and thorough work on this rulemaking. I'm pleased to vote in support of the universal proxy amendments.

[1] As long ago as 2013, the SEC's Investor Advisory Committee recommended rule changes to facilitate the use of the universal proxy ballot. See [Recommendations of the Investor Advisory Committee Regarding SEC Rulemaking to Explore Universal Proxy Ballots](#) (July 25, 2013); see also Universal Proxy, Final Rule, Release No. [], 9 (Nov 17, 2021) ("For years, shareholders and their advocates have expressed concerns arising from being unable to choose a mix of dissident and registrant nominees when voting by proxy, and support for universal proxy has grown over time.") [hereinafter Adopting Release].

[2] For example, the proposal was supported by the SEC's Investor Advisory Committee. See [Recommendation of the Investor Advisory Committee on Proxy Plumbing](#) (Sept. 5, 2019). It was also supported by the Universal Proxy Working Group, an informal working group that includes representatives from Wachtell, Lipton, Rosen & Katz, Council of Institutional Investors, Investment Company Institute, Broadridge, JPMorgan Chase & Co., and others. See [Letter from the Universal Proxy Working Group](#) (Aug. 6, 2020).

[3] See Adopting Release at 6 ("Today, few shareholders of public companies with a class of securities registered under the Exchange Act attend a registrant's meeting to vote in person. Instead, the primary means for shareholders to become informed about matters to be decided on at a meeting and to vote on the election of directors and other matters is through the proxy process.").

[4] See [SEC Votes to Propose Rule Amendments to Facilitate Rights of Shareholders to Nominate Directors](#), Release No. 2009-116 (May 20, 2009) ("Congress gave the Commission authority over the corporate proxy process as a means of ensuring that it functions, as nearly as possible, as a replacement for an actual in-person meeting of shareholders. Refining the proxy process so that it replicates, as nearly as possible, the annual meeting is particularly important given that the proxy process has become the primary way for shareholders to know about the matters to be decided by the shareholder and to make their views known to company management.").

[5] In theory, one party may include another party's nominees on its proxy card with the consent of the nominees. However, because such consent is "rarely provided," in practice, shareholders must choose between the registrant's or dissident's proxy card. See Adopting Release at 8-9.

[6] Specifically, the final rules require the use of a universal proxy card for all non-exempt solicitations involving director election contests, except those involving registered investment companies and business development companies. They also include other changes to facilitate the use of the universal proxy card such as certain notice, minimum solicitation, filing, formatting, and presentation requirements. See Adopting Release at 1.

[7] In addition to the Investor Advisory Committee and Universal Proxy Working Group, the comment file reflects support for mandating universal proxy from the American Business Conference, Council of Institutional Investors, Better Markets, Investment Company Institute, SIFMA, Principles for Responsible Investment, California Public Employees' Retirement System, and Sidley Austin LLP, among many others. See [Comments on Proposed Rule: Universal Proxy](#).

[8] See Adopting Release at 35 ("Initially, there was significant support for the majority minimum solicitation requirement proposed. When the comment period was reopened in 2021, however, most commenters who addressed the issue favored an increased minimum solicitation requirement.").