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SEC Proposes to Require Universal Proxy Cards for All Contested Director Elections

Would Require Both Issuer and Dissident to Use Proxy Cards Listing All Nominees, Permitting Shareholders to Choose Their Desired Mix of Issuer and Dissident Nominees; Dissident Must Solicit Holders of at Least a Majority of Shares

SUMMARY

Yesterday morning, the Securities and Exchange Commission, by a 2-to-1 vote, proposed the mandatory use of universal proxy cards in all contested director elections at annual meetings of listed U.S. public companies. In contrast to the current system of competing cards sent by the issuer and the dissident shareholder, the proposed rules would enable shareholders in contested elections to vote by selecting any mix of directors from slates proposed both by the issuer and a dissident shareholder using one proxy card. The proposed rules would require the dissident shareholder to solicit proxies with its own proxy statement from the holders of at least a majority of the shares entitled to vote in the director election. The SEC also proposed changes to proxy cards and proxy statements in both contested and uncontested elections to clarify the voting options available to shareholders. Comments on the proposed rules will be due 60 days after publication in the Federal Register. A [press release and fact sheet](#), along with the full text of the [proposed rules](#), are available on the SEC's website and highlights from the proposed rules are summarized in this memo.

Chair White and Commissioner Stein voted for the proposal, while Commissioner Piwowar voted against, focusing in particular on the lack of a requirement for all shareholders to receive the dissident shareholder's solicitation materials. The approving Commissioners and the SEC staff noted at the open meeting that the proposal is intended to replicate, to the extent practicable, the voting flexibility that shareholders have when they attend a meeting in person.

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Although the practical effect of a move to universal proxy cards is hard to predict and will vary from contest to contest, commentators have previously raised concerns that universal proxy cards may lead to confusion and undesired outcomes given that each shareholder could vote for a mix of directors that differs from that preferred by either the company or the dissident. Some argue that universal proxy cards may benefit dissident shareholders by providing a less costly process to put forth nominees and making a vote for individual nominees more appealing due to the flexibility in selecting the exact mix of directors a shareholder wants to elect. Universal proxy cards could ultimately lead to more proxy contests and therefore higher costs and greater disruptions for reporting companies and their shareholders generally. The SEC's proposed changes to the proxy card rules may also encourage the use of dissident proxy cards in "vote no" campaigns and campaigns on proposals other than director elections.

BACKGROUND

How Does a Proxy Contest Currently Work? Current rules governing proxy cards neither require an issuer to include dissident nominees on its proxy card nor prohibit an issuer from doing so if the nominee consents to inclusion. Accordingly, universal proxy cards would currently be used only if both parties agree, which has been rare. Instead, voters in a contested election are generally provided with two different proxy cards: one containing the full slate of nominees put forth by the issuer, and one with those put forth by the dissident. The existing rules permit a dissident who is nominating directors who would constitute a minority of the board (a "short slate") also to solicit authority to vote for all of the issuer's nominees, other than those specified by the dissident; in that way, the dissident's card effectively puts forward the dissident's preferred mix of dissident nominees and company nominees. Under current rules, shareholders generally may *not* vote for their chosen mix of nominees from both slates unless they attend and vote in person at the meeting. Because a later-dated proxy card controls over an earlier one, shareholders must choose one card or the other to complete, though they may vote however they like (*i.e.*, for, against, abstain or withhold, as applicable) for all directors on that card.

How Would a Universal Proxy Card Work? A universal proxy card would replace competing proxy cards and instead list all candidates on a single card, allowing shareholders to vote for nominees put forth by both parties. This would result in a proxy card that contained more nominees than there are board seats up for election. Directors would be selected by plurality vote, as is the case in all contested elections, with the nominees who receive the largest number of "for" votes being elected to the board.

How is a Proxy Contest Using a Universal Proxy Card Different from Proxy Access? A company-adopted proxy access bylaw provides a way for a qualifying shareholder or group of shareholders to include nominees in the company's proxy statement and on the company's proxy card. Qualifying shareholders are not required to undertake the expense of solicitation or to produce their own proxy materials, although the number of nominees a group can propose is generally limited. Proxy access bylaws generally provide certain requirements for a shareholder to qualify to use this streamlined process

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(including ownership and holding period thresholds). Proxy access bylaws are not required by SEC rules and have become more prevalent over the past two years as a result of shareholder proposals submitted by the New York City Comptroller and other proponents.

A proxy contest involves a shareholder notification to the company, in accordance with the company's advance notice bylaw, that the shareholder intends to nominate one or more candidates at the upcoming meeting. In a proxy contest, the shareholder need not meet the requirements of a proxy access bylaw or comply with its restrictions but also would not have the right to include information on the candidate, or the proponent's 500-word statement, in the company's proxy statement itself. While a universal proxy card would be used in both a proxy access situation and a proxy contest, the dissident shareholder in a proxy contest must conduct its own solicitation.

How Often Have Universal Proxy Cards Been Used? Although permitted under the existing rules with the consent of both parties, U.S. public companies have rarely sought to use universal proxy cards. One U.S. corporation, GrafTech International Ltd., filed with the SEC a preliminary universal proxy card for intended use at its 2015 annual meeting prior to its acquisition and subsequent delisting from the NYSE.¹ Two other registrants, Shutterfly Inc. and Tessera Technologies, Inc., offered to use universal proxy cards in proxy contests in 2015 and 2013, respectively, but both offers were rejected by the activist shareholders leading the contest. After the activist rejected its universal proxy, Tessera provided a proxy card with a write-in slot that would have allowed shareholders to vote for its nominees and the two nominees of an activist shareholder and faced SEC scrutiny regarding such proxy card's potential violation of the "bona fide nominee" rule.² In contrast, DuPont in 2015 and Target Corporation in 2009 both rejected shareholder requests to use universal proxy cards. Universal proxy cards have also been used and successfully processed by Broadridge Financial Solutions in Canadian proxy contests, which advocates have pointed to as evidence that any logistical concerns with respect to universal proxies are manageable.

Why is the SEC Proposing Universal Proxy Cards Now? The SEC has considered requiring universal proxy cards in the past, including in 1992 amendments to the proxy rules and in a 2003 proposed rule. The topic regained prominence following proxy contests in recent years and, in 2013, the SEC's Investor Advisory Committee recommended that the SEC explore revising the proxy rules to allow for the use of a universal proxy card in connection with "short slate" director elections. This was followed by a rulemaking petition submitted to the SEC in 2014 by the Council on Institutional Investors, or CII. After the SEC's February 2015 roundtable on the proxy voting process, CII sent another letter to the SEC urging them to act on their rulemaking petition. On June 25, 2015, SEC Chair Mary Jo White addressed the Society for

¹ [Exhibit 99.1](#) to GrafTech International Ltd. Current Report on Form 8-K, dated April 10, 2015.

² [Letter from SEC to Tessera Technologies, Inc.](#), dated May 10, 2013. See Tessera Technologies, Inc. [Definitive Additional Proxy Materials on Schedule 14A](#), dated May 17, 2013.

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Corporate Governance and announced she had asked the staff to bring rulemaking recommendations before the Commission on universal proxy cards.³ The announcement was met with a critical reception by some, including certain members of the House of Representatives, who voted 243-180 earlier this year to add language to a spending bill that would have barred the SEC from writing such a rule. Despite the House vote, the bill did not pass the Senate.

HIGHLIGHTS OF THE PROPOSAL

Inclusion of Nominees on Proxy Cards. The definition of a “bona fide nominee” in Rule 14a-4(d) would be amended to permit proxy cards to include any nominee who agrees to be named in *any* proxy statement relating to the next meeting of shareholders at which directors are to be elected. The proposed rule would retain the requirement that a nominee consent to serve if elected. Furthermore, the proposed amendment would eliminate the existing “short slate” rule since a dissident would no longer need to round out its slate with company nominees.

Solicitations Requiring Universal Proxy Cards. The proposed rules would require the use of universal proxy cards in all non-exempt solicitations in contested director elections at annual meetings.⁴ The rules would *not* apply to proxy access nominations, though if there are proxy access nominations at the same meeting at which a proxy contest is occurring, the card must list all nominees. Furthermore, the proposal would not apply to contests that do not include a non-exempt solicitation, such as those in which a person does not intend to solicit proxies or where the aggregate number of persons solicited is not more than 10.

The universal proxy card requirement will also not apply to contested matters other than director elections, such as “vote no” campaigns against directors or consent solicitations to remove existing directors. However, the changes to the “bona fide nominee” rule will permit a dissident using a proxy card in any such campaign to include the names of, and solicit votes for, company nominees as well. This may encourage the use of dissident proxy cards in such campaigns (which is currently unusual), particularly if the dissident solicitation is to 10 or fewer shareholders or otherwise exempt.

Procedural Requirements for Companies and Dissidents.

- A dissident shareholder would be required to provide the company with the names of its intended nominees no later than 60 calendar days prior to the anniversary of the previous year’s annual meeting date. The company would be required to include this deadline in the prior year’s proxy statement.
- The dissident shareholder would also be required to comply with any notice requirements under the company’s advance notice bylaw for director nominations, in addition to the SEC deadline.

³ Chair Mary Jo White, Securities and Exchange Commission, [Keynote Address at the Society of Corporate Secretaries and Governance Professionals](#), 69th National Conference: Building Meaningful Communication and Engagement with Shareholders (June 25, 2015).

⁴ While the SEC has not proposed applying the rules to special meetings of shareholders, it has requested comment as to whether to do so.

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- The company would be required to provide the dissident shareholder with the names of its intended nominees no later than 50 calendar days prior to the anniversary of the previous year's annual meeting date.
- Dissident shareholders would be required to send proxy statements (which, under SEC rules, can be by notice-and-access rather than physical mailing of a full set of documents) to shareholders representing at least a majority of the voting power of shares entitled to vote in the director election.
- Information about the dissident nominees would not need to be included in the company's proxy statement. Each party's proxy statement would be required to refer shareholders to the other party's proxy statement for information about that party's nominees and state that the other party's proxy statement may be obtained without charge on the SEC website.
- The dissident's definitive proxy statements would need to be filed with the SEC by the later of 25 calendar days prior to the meeting date or five calendar days after the company files its definitive proxy statement.
- When applicable, the proxy statement would need to disclose how the company or the dissident, as applicable, intends to treat proxy authority granted in favor of the other party's nominees if the other party abandons its solicitation or fails to comply with the universal proxy rule.

Presentation and Formatting Requirements of Universal Proxy Cards. Universal proxy cards would be subject to a number of presentation and formatting requirements under the proposal. The cards would be required to list and clearly distinguish the company's nominees, the dissident's nominees and any proxy access nominees (though, in practice, most proxy access bylaws provide that proxy access is not available at a meeting where there is a proxy contest). Nominees would be listed alphabetically within each group, using the same font, size, and style. If both the company and the dissident have nominated full slates, the cards *may* generally give the option to vote for all management nominees or all dissident nominees as a group. The card must prominently indicate the maximum number of nominees to vote for and disclose the treatment of over-voted or under-voted cards.

Voting Option Requirements Applicable to All Proxy Cards and Proxy Statements. Under the proposal, all proxy cards subject to the proxy rules (whether or not for a contested election) would be required to include an "against" voting option and an "abstain" voting option when there is a legal effect to vote against a nominee under state law (for example, in a director election governed by a majority voting standard). The ability of shareholders to "withhold" a vote using a proxy card when an "against" vote has legal effect would be eliminated. In addition to the changes to proxy cards, proxy statements would be required to disclose voting options and the effects of each in director elections, including, if applicable, the effect of a "withhold" vote in a director election. These proposed changes seem relatively technical and clarifying, rather than substantive.

Exemptions for Certain Companies. In addition to registrants that are not subject to the proxy rules (foreign private issuers and companies with reporting obligations only under Section 15(d) of the Exchange Act, such as issuers who registered debt securities that are not listed on an exchange), the proposed rules would not apply to registered investment companies or business development companies.

POTENTIAL IMPLICATIONS

The SEC staff stated at the open meeting that the mandatory use of universal proxy cards is not intended to favor either issuers or dissidents in proxy contests but rather to enhance voting flexibility for shareholders unable to attend the annual meeting. The ultimate effect is uncertain and may vary depending on the details of a particular contest. Many commentators, however, have raised concerns about the use of universal proxy cards. For example, the practice could lead to confusion and undesired outcomes, given that each shareholder could vote for a mix of directors that differs from that preferred by either the company or the issuer. It also may lead to more invalid votes due to shareholders voting for more candidates than there are available seats. In addition, the use of universal proxy cards could favor dissidents by making a vote for dissident nominees more appealing due to the flexibility in selecting a mix of directors. Any change that favors dissidents could ultimately lead to more proxy contests and therefore higher costs and disruptions for reporting companies and their shareholders generally. The ability to split the vote with universal proxies may also impact the recommendations of proxy advisory firms. Finally, as Commissioner Piwowar noted, the proposal does not require the dissident to solicit all shareholders and would likely lead to retail shareholders being provided with less information. In light of these and other concerns, as noted above, both companies and activist shareholders have in the past rejected offers by the other to use universal proxy cards.

Companies should review their bylaws and consider whether any amendments are needed to implement universal proxies if the proposed rules are ultimately adopted. In addition, because universal proxy cards have not been commonly used in the past, companies would need to draft proxy instructions and related disclosure carefully to avoid the potential for voter confusion and potential shareholder disenfranchisement.

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CONTACTS

New York

Francis J. Aquila	+1-212-558-4048	aquilaf@sullcrom.com
Robert E. Buckholz	+1-212-558-3876	buckholzr@sullcrom.com
Catherine M. Clarkin	+1-212-558-4175	clarkinc@sullcrom.com
Jay Clayton	+1-212-558-3445	claytonwj@sullcrom.com
Audra D. Cohen	+1-212-558-3275	cohenad@sullcrom.com
H. Rodgin Cohen	+1-212-558-3534	cohenhr@sullcrom.com
Heather L. Coleman	+1-212-558-4600	colemanh@sullcrom.com
Donald R. Crawshaw	+1-212-558-4016	crawshawd@sullcrom.com
Robert W. Downes	+1-212-558-4312	downesr@sullcrom.com
Mitchell S. Eitel	+1-212-558-4960	eitelms@sullcrom.com
William G. Farrar	+1-212-558-4940	farrarw@sullcrom.com
Matthew M. Friestedt	+1-212-558-3370	friestedtm@sullcrom.com
Joseph B. Frumkin	+1-212-558-4101	frumkinj@sullcrom.com
David B. Harms	+1-212-558-3882	harmsd@sullcrom.com
Alexandra D. Korry	+1-212-558-4370	korrya@sullcrom.com
Stephen M. Kotran	+1-212-558-4963	kotrans@sullcrom.com
John P. Mead	+1-212-558-3764	meadj@sullcrom.com
Mark J. Menting	+1-212-558-4859	mentingm@sullcrom.com
Scott D. Miller	+1-212-558-3109	millersc@sullcrom.com
Robert W. Reeder III	+1-212-558-3755	reederr@sullcrom.com

SULLIVAN & CROMWELL LLP

Robert S. Risoleo	+1-212-558-4813	risoleor@sullcrom.com
Melissa Sawyer	+1-212-558-4243	sawyer@sullcrom.com
Glen T. Schleyer	+1-212-558-7284	schleyerg@sullcrom.com
Marc Trevino	+1-212-558-4239	trevinom@sullcrom.com
Krishna Veeraraghavan	+1-212 558 7931	veeraraghavank@sullcrom.com
Washington, D.C.		
Eric J. Kadel, Jr.	+1-202-956-7640	kadelej@sullcrom.com
Janet T. Geldzahler	+1-202-956-7515	geldzahlerj@sullcrom.com
Richard C. Morrissey	+1-202-956-7565	morrisseyr@sullcrom.com
Robert S. Risoleo	+1-202-956-7510	risoleor@sullcrom.com
Los Angeles		
Patrick S. Brown	+1-310-712-6603	brownp@sullcrom.com
Eric M. Krautheimer	+1-310-712-6678	krautheimere@sullcrom.com
Alison S. Ressler	+1-310-712-6630	resslera@sullcrom.com
Palo Alto		
Sarah P. Payne	+1-650-461-5669	paynesa@sullcrom.com
John L. Savva	+1-650-461-5610	savvaj@sullcrom.com
London		
Nikolaos G. Andronikos	+44-20-7959-8470	andronikosn@sullcrom.com
Kathryn A. Campbell	+44-20-7959-8580	campbellk@sullcrom.com
John O'Connor	+44-20-7959-8515	oconnorj@sullcrom.com
David Rockwell	+44-20-7959-8575	rockwelld@sullcrom.com
George H. White III	+44-20-7959-8570	whiteg@sullcrom.com
Paris		
William D. Torchiana	+33-1-7304-5890	torchianaw@sullcrom.com
Frankfurt		
Krystian Czerniecki	+49-69-4272-5525	czernieckik@sullcrom.com
Melbourne		
Robert Chu	+61-3-9635-1506	chur@sullcrom.com
Sydney		
Waldo D. Jones Jr.	+61-2-8227-6702	jonesw@sullcrom.com
Tokyo		
Izumi Akai	+81-3-3213-6145	akaii@sullcrom.com
Keiji Hatano	+81-3-3213-6171	hatanok@sullcrom.com

SULLIVAN & CROMWELL LLP

Hong Kong

Garth W. Bray	+852-2826-8691	brayg@sullcrom.com
Michael G. DeSombre	+852-2826-8696	desombrem@sullcrom.com
Chun Wei	+852-2826-8666	weic@sullcrom.com
John D. Young Jr.	+852-2826-8668	youngji@sullcrom.com
