

### On the Horizon: Universal Proxy Ballots

The Staff of the SEC's Division of Corporation Finance is currently working on rulemaking recommendations for the implementation of universal proxy ballots in contested elections. Existing federal proxy rules, state law requirements and practical considerations make it virtually impossible for shareholders in a contested election to choose freely among management and proponent nominees on each side's proxy cards, unless they attend and vote in person at the shareholders' meeting. As a result, shareholders executing a proxy card currently must choose between voting for the entire slate of candidates put forward by management or voting for the slate put forth by the proponent.<sup>25</sup> The adoption of a universal proxy ballot system would mean that a single proxy card would list both management and proponent nominees and allow shareholders to vote for a mix of nominees in a contested election. Some have argued that the existing system favors management's nominees and that a universal ballot would serve to bolster activist campaigns, particularly when seeking minority board representation. On the other hand, a universal ballot could help management limit the impact of an activist's campaign by recommending that shareholders vote for only certain nominees on the dissident's slate.

Recent events have signaled that rulemaking could be imminent. In 2014, the Council of Institutional Investors (CII) reignited interest in universal ballots with a petition to the SEC requesting an amendment to the proxy rules to facilitate their use.<sup>26</sup> In February 2015, the SEC hosted a Proxy Voting Roundtable that included a panel discussion on this topic.<sup>27</sup> In April 2015, The California Public Employees' Retirement System (CalPERS) submitted a supplement to the Proxy Voting Roundtable in which it provided its written endorsement for the use of universal ballots.<sup>28</sup> SEC Chair Mary Jo White championed a universal ballot rulemaking initiative in a June 2015 speech,<sup>29</sup> urging companies not to wait for the SEC to act and to "[g]ive meaningful consideration to using some form of a universal proxy ballot even though the proxy rules currently do not require it."<sup>30</sup>

Specific issues the Staff is grappling with in connection with this rulemaking initiative include: (1) whether universal ballots should be optional or mandatory for all parties in an election contest; (2) how the ballots should look and whether both sides should be required to use identical universal ballots; (3) whether universal proxies should be available in all contests or just in "short slate" elections; (4) whether any eligibility requirements to use universal ballots should be imposed on shareholders; and (5) what timing, filing and dissemination requirements should be imposed on shareholders seeking to use universal ballots.

### 3. Keeping Up With Fast-Moving Proxy Access Developments

"Proxy access" represents another turning point in the corporate governance of public companies. Designed to enable shareholders to use a company's proxy statement and proxy card to nominate one or more director candidates of their own, it is increasingly gaining acceptance as corporate behemoths such as Apple, General Electric, Microsoft, IBM, Chevron, Coca-Cola, Merck, Staples, McDonald's, Goldman Sachs, JPMorgan Chase and others adopt proxy access bylaws.

Proxy access came to the forefront during the 2015 proxy season through Rule 14a-8 proposals submitted by certain pension funds and other governance-oriented activists, including 75 proposals submitted by the Boardroom Accountability Project launched by the New York City Comptroller and the New York City Pension Funds. In 2015, over 91 proxy access proposals were submitted to a shareholder vote, with 55 receiving majority support.<sup>31</sup> Since January 1, 2015, 124 companies have adopted proxy access bylaws, whether voluntarily or in response to a shareholder proposal, and a recent uptick in companies implementing proxy access indicates that many boards have been addressing the topic in anticipation of their 2016 annual meetings.<sup>32</sup> It remains to be seen whether, this season, any of the companies that have adopted proxy access will face the first round of proxy access nominees. In *Appendix I*, we provide the list of companies that have adopted proxy access bylaws since January 1, 2015.