

MEMO# 30372

November 1, 2016

SEC Proposes to Exempt Funds from Universal Proxy Requirements

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TO: Closed-End Investment Company Committee

SEC Rules Committee

Small Funds Committee

Variable Insurance Products Advisory Committee RE: SEC Proposes to Exempt Funds from Universal Proxy Requirements

The SEC recently issued proposed amendments to the federal proxy rules that would mandate the use of universal proxy cards in contested elections at annual meetings.^[1]

The proposal aims to align the manner in which shareholders vote by proxy with how shareholders vote in person at a shareholder meeting. The proposed amendments would not apply, however, to registered investment companies or business development companies. The proposing release does not provide a compliance date.

Comments on the proposal are due 60 days after publication in the Federal Register. The Institute plans on filing a comment letter supporting the exclusion of registered investment companies from the proposed requirement. You may contact me at linda.french@ici.org or 202/326-5845 if you have any comments you would like us to consider including in the comment letter.

I. Background

Under the current proxy rules, soliciting parties in a contested election—management and any dissident shareholders—are not required to provide all shareholders with a universal proxy card containing the full slate of nominees. Shareholders voting by proxy may submit their votes on either the registrant's or the dissident's proxy card but cannot pick and choose from nominees on both cards. Shareholders voting in person at a meeting, however, may select among all of the duly nominated director candidates proposed for election and vote for any combination of those candidates.

II. Key Elements of the Proposed Rule

Mandatory Universal Proxy. The SEC's proposed amendments would require each soliciting party in a contested election to distribute a universal proxy that includes the names of all candidates for election to the board of directors.

Exemption for RICs and BDCs. These proposed amendments would not apply to director

elections involving registered investment companies or business development companies. The SEC's proposing release requests comment, however, on whether, and if so, the extent to which a universal proxy requirement would affect differentially investment companies or different types of investment companies.^[2] The SEC also requests information and data that would help them understand and quantify differences in the likely economic effects of applying the proposed amendments to investment companies as compared to operating companies and to different types of investment companies.

Provision of Notice. Dissidents would need to provide registrants with notice of intent to solicit proxies in support of nominees other than the registrant's nominees and the names of those nominees. Registrants would need to provide dissidents with notice of the names of the registrant's nominees.

Dissident Solicitation. The proposal would require the dissident in a contested election to solicit shareholders representing at least a majority of the shares entitled to vote on the election of directors. The proposal also would require the dissident to file its definitive proxy statement with the Commission within a certain timeframe.

Presentation and Formatting. The proposed rules would impose specific presentation and formatting requirements for all director election proposals on universal proxy cards. The universal proxy card would distinguish clearly between the registrant's and dissident's nominees. The proposal would not require the registrant to provide any disclosure about the dissident's nominees beyond listing the nominee names and explaining that shareholders can access the dissident's proxy statement for free on the Commission's website.

III. Dissenting Statement from Commissioner Piwowar

In voting against the proposed amendments, Commissioner Piwowar pointedly drew a comparison between the universal proxy's proposed electronic delivery model and the Commission's proposed Rule 30e-3. The universal proxy proposal would allow the registrant's proxy statement simply to advise shareholders that the dissident's disclosures are available on the Commission's website. Interested investors then could retrieve the dissident's proxy statement electronically from the SEC's EDGAR public interface. The proposal would not require the registrant to provide paper copies free of charge. Commissioner Piwowar noted that "[t]he fact that the majority of the Commission is willing to satisfy important voting information solely by electronic means in the case of universal proxy suggests that we should also be willing to proceed with electronic delivery in other contexts, especially when those other contexts include preserving a free paper delivery option."

Proposed Rule 30e-3 would permit funds to deliver shareholder reports by posting the reports online and mailing a notice to shareholders. This proposal also would require funds to deliver free paper shareholder reports upon request. Commissioner Piwowar voted against adopting the final fund reporting rules earlier this month because they did not include proposed Rule 30e-3.^[3]

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endnotes

[1] Proposed Rule: Universal Proxy, SEC Rel. Nos. 34-79164, IC-32339 (Oct. 26, 2016), available at <https://www.sec.gov/rules/proposed/2016/34-79164.pdf>.

[2] See id., at Sections II.D and IV.D.5.b.

[3] See ICI Memorandum No. 30331, dated Oct. 21, 2016, available at https://www.ici.org/my_ici/memorandum/ci.memo30331.idc.

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