

Investors Seek Common Ballot for Corporate Board Battles

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News Story

- Companies, activists battling for board seats should use one ballot, not two, panel tells SEC
- Such universal ballots are championed by shareholders but face concerns from companies

By Andrea Vittorio

(Bloomberg Law) --

Companies and activist investors battling for board seats should list their nominees together on a single ballot to ensure fairness in voting, an investor panel recommended to regulators.

Each side of a fight for board control usually sends out separate voting cards listing their preferred candidates, forcing shareholders voting remotely to pick one roster or the other. Combining director nominees into one ballot would let shareholders mix and match their votes, an option now available only to in-person voters, the panel told the Securities and Exchange Commission Sept. 5.

Institutional investors have championed so-called universal ballots as a fairness issue because shareholders may not be able to vote for all open seats if the activist is nominating only a portion of the board. Companies are concerned that universal ballots could give activists a leg up by putting their nominees on par with management's candidates.

Mandating universal ballots was one of a few nonbinding suggestions from the SEC's Investor Advisory Committee for fixing shareholder voting mechanics at publicly held companies. The commission previously proposed requiring universal ballots, but the proposal fell off its agenda after the Trump administration took office. Recent examples of universal ballots' use could act as a model for the SEC, if the agency decides to act.

"It could only help to have practical examples to look to," Elizabeth Gonzalez-Sussman, a partner at Olshan, said in an interview. The law firm represented activist investors led by brothers Toby and Derek Rice in their recent win of a board majority at natural gas producer EQT Corp. It's considered the first real use of a universal ballot in the U.S.

She said the EQT example could also impact what voting cards look like in other fights for director spots.

Ballot Talks

Companies can use a universal ballot if, like EQT, they agree with activists. Universal ballots are more likely to

come as a result of such negotiations than as a requirement from regulators, said James Dougherty, a partner at law firm Jones Day.

“I don’t really see the SEC wanting to get in the mix on this,” Dougherty, who advises companies on proxy contests, said.

EQT agreed to a universal ballot after the Rice team filed a lawsuit over the company’s policy to get activist nominees’ consent to be listed on its card. The Rice team argued it was unfair to give their consent to be listed on EQT’s card, without EQT offering similar consent for its nominees to be listed on the activist card.

“It’s a one-way consent,” said Steve Wolosky, who co-chairs Olshan’s activist and equity investment practice. “It should be reciprocal.”

Picking Sides

SandRidge Energy Inc. likewise agreed to list activist investor Carl Icahn’s board candidates on its ballot in 2018. But Icahn still sent out his own voting card, urging shareholders to rip up the company card.

More examples of universal ballots could bring “greater recognition” that they don’t necessarily put sitting directors at a disadvantage, according to Scott Hirst, a professor at Boston University’s law school who has studied the issue.

Universal proxies would have favored one side or the other in less than 10 percent of proxy contests between 2001 and 2016, Hirst’s research shows.

“A lot of this comes down to the specifics” of each fight, including how many board seats are open and what each side sees as their chance of winning, Dougherty said.

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