

“Short Slate” Rules: A Recap

By Enrico Granata

“Short slate” proxy contests (i.e., contests where a dissident is soliciting proxies in support of nominees that, if elected, would constitute a minority of the board of directors) are expected to continue to be popular during the 2013 proxy season (see, for example, the International Game Technology proxy contest). There are several strategic and practical reasons why a dissident would choose to run a short slate rather than a control slate, including, among others, the perception among stockholders that adding a limited number of a dissident’s nominees is often of some benefit to the company and usually not particularly disruptive, a comparatively greater willingness of proxy advisory firms to support a dissident’s short slate rather than a control slate, and the fact that dissidents may want to achieve some influence through a successful campaign but may not want to run the company. What follows is a recap of the basic dos and don’ts under the “short slate” voting rules:

- *Rounding out with company’s nominees:* Notwithstanding the “bona fide nominee” rule¹ (requiring the consent of any director nominee to be named in a proxy statement and to serve on the board if elected), if a dissident is soliciting proxies in support of a short slate, the proxy rules² specifically permit the dissident to round out its slate by including in its proxy card nominees named in the company’s proxy statement without obtaining their prior consent. The rounding out permits stockholders to vote for the dissident’s short slate without foregoing their right to vote for all seats up for election. A dissident’s ability to round out its slate with the company’s nominees is subject to four requirements:
 - The dissident must seek authority to vote in the aggregate for all director positions subject to election;
 - The dissident must represent that it will vote for all the company’s nominees, other than those specified;
 - The dissident’s proxy card must provide stockholders with an opportunity to withhold authority with respect to any other company nominee by writing the name of that nominee on the proxy card; and
 - The dissident must state on its proxy card that there is no assurance that the company’s nominees will serve if elected with the dissident’s nominees.
- *Rounding out with another dissident’s nominees:* If a dissident is soliciting proxies in support of a short slate, the dissident can also round out its slate with nominees supported by another dissident (see Icahn Associates Corp.’s slate in the 2009 Amylin Pharmaceuticals, Inc. proxy contest). The SEC has articulated certain conditions to the ability of a dissident to round out its slate with nominees of another dissident,³ including:
 - The two dissidents must have not expressly or impliedly agreed to act as a group, must have not otherwise formed a group, and must have no intention to form a group within the meaning of Regulation 13D;
 - Each dissident must be soliciting proxies in support of a short slate; and
 - The dissident will not actively recommend the election of the nominees of the other dissident, but will only state its intention to vote for the nominees of the other dissident other than those specified.

¹ Securities and Exchange Act Rule 14a-4(d)(1).

² Securities and Exchange Act Rule 14a-4(d)(4).

³ Icahn Associates Corp., SEC No-Action Letter (March 30, 2009).

“Short Slate” Rules: A Recap

- *No clear way to mix and match:* Unless there is an agreement between the company and the dissident(s) on voting for any composition of nominees via electronic voting (if permitted under state laws) or voting is done at the meeting (after obtaining a legal proxy for the shares held in street name), a stockholder cannot use a dissident’s short slate proxy card and (i) vote for less than all of the dissident’s nominees while rounding out the card with additional nominees of the company or another dissident or (ii) vote for nominees of the company or another dissident other than those chosen by the dissident for rounding out its card.

Given the limited SEC guidance on proxy card mechanics, any attempt to split voting in connection with a short slate campaign that is not within the scope of the “short slate” rules (e.g., adding names of different nominees from the company’s or another dissident’s proxy card or using multiple cards and a letter of direction to indicate a split vote) will be subject to significant scrutiny and is likely to result in a legal battle if its validity would affect the outcome of the proxy contest.

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We’ve been included on *The American Lawyer’s* A-List for nine straight years, and *Fortune* named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.