

# Better way to elect directors

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If proxy voting is the principal way shareholders influence corporate governance and the direction of corporations, the rules of the Securities and Exchange Commission fall short in enabling shareholders in contested elections to select the combination of nominees they believe will best foster long-term value creation.

The SEC ought to consider allowing shareholders to vote from a full list of candidates, both management and any dissenting nominees.

In casting their votes by proxy now, shareholders cannot pick and choose individual nominees from opposing slates to vote for any combination of management and dissident candidates.

Lucian A. Bebchuk, professor of law, economics and finance at Harvard Law School, calls the shareholder franchise a myth, in part because of constraints on shareholders' voting choices.

In recent years, much of the debate on nominations to corporate boards of dissident nominees has focused on shareholder inability to use the corporate proxy statement to nominate candidates. But a proposed change on the listing of nominees for director on proxy voting ballots is more fundamental and wouldn't upend the nomination process for directors.

For shareholders, the power to exercise their vote is fundamental to their oversight of boards of directors and management. But they cannot exercise their oversight in their best interest because they have to choose one set of nominees over another, without the ability to combine the best candidates of both slates.

The SEC's Investor Advisory Committee — members of which include leaders of the [California Public Employees' Retirement System](#), [California State Teachers' Retirement System](#) and money management firms, and which was established under the Dodd-Frank Wall Street Reform and Consumer Protection Act — recommended last July 25 that the SEC amend its rules on proxy voting somewhat.

Under the IAC recommendation, in contested elections in which dissident candidates would make up only a minority of a board and not seek control, the opposing side would have the option but not obligation, to list all candidates.

In a Dec. 5 speech, Luis A. Aguilar, SEC commissioner, said now “shareholders have virtually no ability to 'split their tickets' — that is, to vote for a combination of shareholder nominees and management nominees. As a practical matter, this disenfranchises shareholders and discourages shareholder involvement in the process.”

Mr. Aguilar said the concept proposed by the IAC of a broader proxy ballot is worth exploring.

“Removing artificial barriers to shareholder nominations would help protect investors by improving shareholder choice and making both management and boards of directors more

responsive to the interests of investors,” Mr. Aguilar said. “Over the long run, such enhanced engagement in the corporate governance process would foster greater system integrity, investor confidence and promote capital formation.”

But the IAC recommendation doesn't go far enough.

The Council of Institutional Investors on Jan. 8 petitioned the SEC to amend its rules to allow for a complete list of board candidates from which shareholders could choose.

The SEC should use the petition as a basis for seeking comment on amending the rules.

As it is now, “to qualify as a bona fide nominee with respect to any proxy solicitation, a candidate must consent to be named” in a dissident ballot, the IAC noted in its recommendation. “Experience has shown that few board candidates nominated by management will provide such consent.”

An exception to the rule is contests in which opposing shareholders seek to nominate only a minority of candidates to a board. Then the SEC provides more latitude but not a direct approach, allowing proponents to identify in their proxy form management nominees for whom they will not vote, but not management nominees for whom they will vote.

Only shareholders attending annual corporate meetings and voting in person can receive a ballot allowing them to pick and choose among all management and dissident nominees. Such an option is impractical for most institutional investors, which often hold stock in thousands of companies, as well as for most other investors because of cost.

The SEC shouldn't deny the same privilege to shareholders who cannot attend meetings that it allows to those shareholders who do show up.

Under current rules, the SEC shortchanges shareholders in exercising their voting rights. Shareholders tend to vote by proxy, and the SEC should recognize that practice in changing its rule.

The rules are unacceptable. The changes involve only how many names are listed, not how directors are nominated.

SEC should allow dissidents and management alike in circulating their respective proxy voting forms to name all nominees from both sides of a contested election, providing disclosure on which nominees a particular side favors or not.

Corporations want their nominees elected. That's fine. But the playing field should be fair, without restricting shareholders from having a full list of nominees from which to choose.