# Guidance on Drafting Proxies Under Delaware Law

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As the Delaware Supreme Court recently reaffirmed in *Daniel v. Hawkins*, 289 A.3d 631 (Del. 2023), proxies are generally construed narrowly under Delaware law. In light of these principles of strict construction, proxies in voting and support agreements, secured debt instruments, and other corporate documents should be drafted in a manner that fully reflects the intended scope of the parties' proxy relationship. A recent opinion from the U.S. Bankruptcy Court for the District of Delaware, *In re CII Parent*, 2023 WL 2926571 (Bankr. D. Del. Apr. 12, 2023), provides helpful guidance on drafting proxies and highlights potential pitfalls for the unwary, including in relation to the proxyholder's power to execute and deliver stockholder consents.

The decision addressed a debtor's challenge to the validity of action taken by its secured creditor to effect corporate governance changes with the debtor's direct and indirect subsidiaries. The dispute arose after the creditor notified the debtor that it defaulted on its loans, which were secured by the equity in the debtor's subsidiaries. This default prompted the creditor to implement the governance changes days before the debtor filed a voluntary petition under Chapter 11 of the U.S. Bankruptcy Code. Acting as proxy pursuant to its authority under a one-page irrevocable proxy and guarantee and collateral agreement entered into in connection with the loans, the creditor executed and delivered a consent of the stockholders (or other equityholders) of each applicable subsidiary in order to effect these changes, which included removing the subsidiaries' directors and managers.

In the one-page proxy, the debtor "irrevocably designated and appointed" the creditor as administrative agent "to represent it at all annual and special meetings of the holders of the Equity Interests" of the debtor's direct subsidiary (through which the debtor owned its other indirect subsidiaries). Pursuant to the one-page proxy, the debtor also authorized and empowered the creditor "to vote any and all equity interests owned by the debtor or standing in its name, and do all things which the undersigned might do if present and acting itself," during the continuance of any default. Although this language may have been sufficient to authorize the creditor to act as proxy at meetings of the subsidiary's stockholders, the court found that the one-page proxy's delegation of authority, standing alone, was insufficient to authorize the creditor to take action by stockholder consent. In this connection, the court focused on the proxy's terms authorizing the creditor to represent the debtor "at all annual and special meetings" and to do all things which the debtor "might do if present and acting itself."

The court explained that the "natural reading" of these terms is that the proxy "is intended to be used at meetings of stockholders as it specifically provides that agent may do all things which the grantor could do if present at a shareholder meeting," rejecting the extension of this language to action by consent as a "strained reading." While not expressly cited by the bankruptcy court, support for this conclusion can be drawn from at least one prior decision of the Delaware Court of Chancery, Freeman v. Fabiniak, 1985 WL 11583 (Del. Ch. Aug. 15, 1985), in which the Court of Chancery held that proxies failed to authorize the execution of stockholder consents where they only expressly authorized the proxyholder to vote the shares "at shareholder meetings" and lacked any "language which could be construed as allowing their use in a consent procedure."

The bankruptcy court nevertheless explained that the one-page proxy must be read together with the guarantee and collateral agreement entered into as part of the loans and, based on the additional authority granted under the

guarantee and collateral agreement, found that the creditor had the authority to execute and deliver the consents as both attorney-in-fact and proxy of the debtor and its subsidiaries. Pursuant to the guarantee and collateral agreement, the debtor and its subsidiaries appointed the creditor as their "attorney-in-fact and proxy" to act in their "place and stead" for the purpose of taking certain actions during the continuance of any default, including for the purpose of voting the subsidiaries' equity "in any manner" the creditor "deems advisable for or against all matters submitted or which may be submitted to a vote of shareholders, partners or members, as the case may be," and for the purpose of "voting any right or interest" with respect to the subsidiaries' equity. In addition, the guarantee and collateral agreement specifically authorized the creditor to "exercise the irrevocable proxy to vote the subsidiaries' equity at any and all times, including but not limited to, at any meeting of shareholders, partners or members, as the case may be, however called, and at any adjournment thereof, or in any action by written consent." Based on this language, the court found the proxy authority vested in the creditor sufficient to authorize the creditor to act by consent to effect the governance changes.

In upholding the creditor's actions, the bankruptcy court addressed another key component of many proxies—terms governing their duration and, specifically, the level of specificity required to extend a proxy's duration beyond the three-year default period provided under Section 212(b) of the Delaware General Corporation Law. In this connection, the court explained that "while duration can be expressed in terms of days, months or years, it can also be expressed or measured more generally, such as the proxy 'shall expire on the latest date permissible under such applicable law' or by events, such as the satisfaction of a judgment." On this basis, the court found that the language in the one-page proxy and guarantee and collateral agreement, which generally provided for their respective proxies to continue in effect "until the secured obligations are paid in full notwithstanding any time limitations set forth in the bylaws or other organizational documents of the company or the general corporation law of the state of Delaware," included durational terms based on a determinable event sufficient to override the default three-year term under the Delaware General Corporation Law.

The bankruptcy court's decision in CII Parent serves as a reminder of the rules of strict construction applicable to proxies. Practitioners drafting proxies for the benefit of their clients should ensure that the proxy broadly empowers the proxyholder to take any action that may be desired. Where there may be a prospect of future stockholder action by consent, the proxy's terms should not limit its scope to action "at stockholder meetings." Instead, the terms of the proxy should expressly extend to stockholder action by consent and appoint the proxyholder as attorney-in-fact for this purpose. Where a proxy may extend beyond three years, it should include durational language sufficient to extend the proxy's term beyond the statutory default period of three years. This may be accomplished through a provision fixing the proxy's term to be a specific measure of time, to be based on a determinable event, or even to be based on the longest period permissible under applicable law.

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