

SEC mandates universal proxy cards for contested board elections

November 18, 2021 | Client Update | 6-minute read

The new rule may make it easier for dissidents to persuade shareholders to vote for a few nominees opposed by management in order to “send a message.”

Yesterday, the SEC adopted significant changes to the proxy rules, for the first time requiring the use of “universal” proxy cards – which include the names of both management and dissident director nominees – in contested board elections. The changes apply to shareholder meetings held after August 31, 2022 and so do not impact most of the 2022 proxy season.

The changes may, in particular, make it easier for a dissident to persuade shareholders to vote for a few nominees opposed by management while also supporting most of management’s nominees, in order to “send a message.” Use of the universal proxy process is not subject to shareholder eligibility criteria, such as an ownership threshold. Acrimonious election contests could therefore become a more regular feature of the annual proxy season landscape.

Originally proposed by the SEC in late 2016 but left dormant following the change in administration, [new Rule 14a-19](#) scraps a feature of the current proxy rules that prevents shareholders from using a single proxy card to vote for their choice of management and dissident board nominees, which shareholders could do if they attended annual meetings in person. Both the company and any dissident proposing competing director nominees will be required to circulate proxy cards that include the names of all nominees. The rule does not apply to investment companies or business development companies.

How the rules work today

Nearly all shareholders elect directors by proxy rather than through in-person attendance at annual meetings. Under SEC rules in place for more than 50 years, when competing slates of directors vie for board seats, neither side’s proxy card is required, or often even permitted, to name all competing nominees. One side generally cannot include members of the other side’s slate because of the so-called “bona fide nominee” rule, which disallows naming an individual who has not consented to appearing on a particular side’s proxy card. As a result, companies and dissidents circulate dueling proxy cards listing only their own nominees, and whichever proxy card a shareholder submits automatically revokes any card that the same shareholder may have submitted earlier.

This quirk of the proxy process has long frustrated dissidents and other advocates who would prefer that shareholders be afforded the opportunity to “mix and match” their director choices and vote for a full complement of directors, but as an ingrained feature of the proxy process it has played a decades-long role in shaping contests for corporate control.

How the rules are changing

For shareholder meetings after August 31, 2022, the bona fide nominee rule is effectively revoked, and each party soliciting votes for directors will distribute its own solicitation materials and its own version of a proxy card that names all nominees (the SEC considered, but did not mandate, a single proxy card for use by both sides). In an election where a

dissident does not actually have competing nominees, the dissident will be permitted to name all or only some of management's nominees in its proxy card in order to solicit against their election, seek their removal or conduct a "vote no" campaign.

The new rule will not require dueling proxy cards to be identical. Instead, each party will be permitted to design its own card, so long as the content, format and presentation comply with the rule's criteria. Neither side is required to include information about the other side's candidates in its proxy statement. Instead, both sides must direct shareholders to the other side's soliciting materials available on the SEC's website. As noted below, the dissident is not required to solicit all shareholders and may very well ignore smaller shareholders. But it will likely be the company's burden to respond to questions from shareholders who may be confused about having choices to elect candidates that they have received no information about.

Content, format and presentation

Each universal proxy card must:

- set forth the names of all duly nominated director candidates
- clearly distinguish between management nominees, dissident nominees, and any "proxy access" nominees
- list nominees in alphabetical order by last name within each group of nominees
- use the same font type, style and size for all names
- prominently disclose the maximum number of directors for whom the shareholder can vote, and
- prominently disclose the treatment and effect of a proxy executed in a manner that grants authority to vote for more, or fewer, nominees than the number of directors being elected, or does not grant authority to vote for any nominees.

A universal proxy card may offer the ability to vote for all management nominees as a group or all dissident nominees as a group, so long as the card also permits voting against or withholding voting authority for the group.

Notice and filing

In addition to satisfying any requirements under a company's advance-notice bylaw, the new rule requires a dissident to notify the company of its intent to solicit proxies and the names of its nominees at least 60 days before the anniversary of the previous year's annual meeting. The company is required to provide the dissident with the names of management's nominees at least 50 days before that anniversary. Most companies' advance-notice bylaws require notification between 90 and 120 days before that anniversary, and the SEC acknowledges that the 60-day rule will not override the earlier notification requirement. Each side must promptly inform the other of any subsequent changes to its nominees.

The dissident will need to file its proxy statement with the SEC by the later of 25 days before the meeting or five days after the company has filed its definitive proxy statement. Companies are not subject to a particular deadline under the new rule, since they are subject to other requirements that essentially act as deadlines.

Minimum solicitation effort

A dissident will be obligated to solicit holders of at least two-thirds of the company's voting power, which means the dissident will be required to spend money in order to invoke universal proxy card procedures. However, because the dissident will not be required to solicit all shareholders, retail investors in particular may not all receive the dissident's proxy statement – lowering the financial burden on the dissident.

Revision of bona fide nominee rule

The new rule changes the definition of a "bona fide nominee" to a person who has consented to being named in *any* proxy statement relating to the company's next meeting of shareholders for the election of directors. If a nominee intends to serve only if their side's slate is elected, that must be disclosed.

Elimination of short-slate rule

The “short-slate” rule, a workaround to the bona fide nominee rule that the SEC adopted three decades ago, allows dissidents soliciting in support of a partial slate of nominees to seek authority to vote for some of the management nominees. The new rule eliminates the short-slate rule because universal proxy cards obviate the need for dissidents to “round out” partial slates with management nominees.

Changes to disclosure of director voting standards and options

The SEC believes many companies use terms such as “withhold” too loosely in describing legal voting standards. When an election is subject to a majority-voting standard under state law, the new rule requires the inclusion of both an “against” and an “abstain” voting option on the proxy card. The company cannot offer an option to “withhold” against a director.

A “withhold” option is available only for a company that applies a plurality voting standard, including one with a director resignation policy (often known as “plurality plus”). The company will need to disclose the treatment and effect of a “withhold” vote in the election – namely, that “withholds” have no legal effect for companies with a majority-voting standard.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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