



SEC Approves Universal Proxy Card Requirement

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On November 17, 2021, the Securities and Exchange Commission (SEC) adopted amendments to the federal proxy rules to require the use of a universal proxy card in public solicitations involving contested director elections where a dissident shareholder seeks to solicit proxies for a slate of candidates other than the company nominees. The universal proxy rules will become effective for any shareholder meeting involving a contested election held after August 31, 2022. Registered investment companies and business development companies (BDCs) are not subject to the universal proxy rules.

The new universal proxy rules require that in a non-exempt contested director election, or “proxy fight,” proxy cards must include the names of both the company’s and the dissident’s duly nominated candidates for directors on the same proxy card. As a result, shareholders voting by proxy will be able to “mix and match” nominees from both parties’ slates. This would allow shareholders voting through the proxy process to vote for directors in the same manner that they could vote in person had they attended the shareholders’ meeting.

Under the current federal proxy rules, the company’s nominees and the dissident’s nominees appear on separate proxy cards, and a shareholder voting by proxy may only use one of the proxy cards to vote. As a result, shareholders voting by proxy are not currently able to vote for a combination of the company’s nominees and the dissident’s nominees, except where the dissident is proposing nominees representing less than a majority of the board, a so-called “short slate.” Under the “short slate” rules, a dissident can seek on its proxy card the authority to vote for certain of the company’s nominees to complete its “short slate” of candidates.

To better align the federal proxy rules with a shareholder’s ability to vote in person at an annual shareholders’ meeting, the new universal proxy rules:

- Require the use of a universal proxy card by all participants in a non-exempt director election contest. The universal proxy card must include the names of both company and dissident nominees, along with certain other shareholder nominees included as a result of proxy access;
- Expand the determination of a “bona fide nominee” to include a person who consents to being named in any proxy statement for a company’s next shareholder meeting for the election of directors;

- Require dissidents to provide the company with notice of their intent to solicit proxies and to provide the names of their nominees no later than 60 calendar days before the anniversary of the previous year's annual meeting (in addition to complying with any of the company's advance notice requirements);
- Require a company to notify dissidents of the names of the company's nominees no later than 50 calendar days before the anniversary of the previous year's annual meeting;
- Require dissidents to file their definitive proxy statement by the later of 25 calendar days before the shareholder meeting or five calendar days after the company files its definitive proxy statement;
- Require each side in a proxy contest to refer shareholders to the other party's proxy statement for information about the other party's nominees and refer shareholders to the SEC's website to access the other side's proxy statement free of charge;
- Require that dissidents solicit the holders of shares representing at least 67% of the voting power of the shares entitled to vote at the annual meeting; and
- Establish presentation and formatting requirements for universal proxy cards that ensure that each party's nominees are presented in a clear, neutral manner. The proxy card must:
 - Set forth the names of all duly nominated candidates and clearly distinguish among the company's nominees, the dissident's nominees and any proxy access nominees;
 - Within each category of nominees, list the nominees in alphabetical order by last name;
 - Use the same font type, style, and size for presenting all nominees;
 - Provide a means for shareholders to grant authority to vote for the nominees set forth in the proxy card; and
 - Prominently disclose the maximum number of nominees for which such authority can be granted and the treatment and effect of a proxy card that grants authority to vote for fewer or more nominees than the number of directors being elected.

Notably, unlike proxy access, the universal proxy rules do not have any minimum stock ownership or holding period requirements because the SEC views such a requirement as inconsistent with a mandatory universal proxy requirement. The universal proxy rules also do not require the use of an identical card by the company and the dissident in a contested director election. Each side will still have the flexibility to design and use its own proxy card, subject to complying with the formatting and presentation requirements described above. Because the universal proxy rules are mandatory, the SEC eliminated the "short slate" rules as they are no longer needed for companies other than registered investment companies or BDCs.

The amendments also adopt changes to the form of proxy and proxy statement disclosure requirements applicable to all director elections, whether or not contested. These amended rules will:

- Require proxy cards to include an "against" voting option in director elections, when there is a legal effect to a vote against a director nominee;
- Require that the proxy card provide shareholders with the ability to "abstain" in a director election where a majority voting standard applies;
- Require proxy statement disclosure about the effect of a "withhold" vote in an election of directors; and
- Require proxy statement disclosure about the deadline for receiving notice of a dissident's nominees under the universal proxy rules.

It is too early to speculate as to whether these new rules may result in a greater number of proxy contests. However, the "mix and match" feature of the universal proxy card may make it easier for dissidents to get some of their director nominees elected, which may provide dissidents with more leverage in their negotiations with the company, and will likely reduce the costs to dissidents of having to mail multiple proxy cards to shareholders to match the company's mailings (because of the rule that a later-dated proxy card supersedes any prior proxy card submitted). Companies planning their strategies for responding to activist or other dissident shareholders will need

to consider the new landscape created by the universal proxy rules. And companies not facing contested director elections should still take note of the new proxy card and proxy statement disclosure requirements in preparing for their annual meetings taking place after August 31, 2022.

We will continue to monitor developments in shareholder voting trends as a result of the new universal proxy rule and provide updates on Winston’s Capital Markets & Securities Law Watch.

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