

# SEC Mandates Use of Universal Proxy Cards in Contested Director Elections

## SEC Also Changes Rules on Voting Options Disclosure in All Director Elections

November 22, 2021

Securities and Capital Markets

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On November 17, 2021, the Securities and Exchange Commission (SEC) [adopted a new rule](#) requiring the use of universal proxy cards in contested elections of directors. A universal proxy card lists the names of all duly-nominated director candidates for election at a shareholder meeting, regardless of who nominated the candidates. Revisions to Rule 14a-4 and newly adopted Rule 14a-19 are intended to replicate the voting options available to shareholders when voting in-person at a shareholder meeting.

Current SEC proxy rules generally do not allow for universal proxy cards in contested elections of directors and thus prevent shareholders voting by proxy from selecting a combination of company and dissident nominees in the same manner permitted to shareholders voting in person. Companies and dissidents typically present their nominees on separate and competing proxy cards, with shareholders choosing to vote for nominees from only one proxy card. The new rules will require the use of universal proxy cards by both parties and will allow shareholders voting by proxy to choose from their preferred combination of director nominees. These new rules will take effect for shareholder meetings held after August 31, 2022.

A universal proxy mandate has been under consideration by the SEC for a number of years, and the SEC [proposed a rule](#) to mandate the use of universal proxies in late 2016. The comment period for that proposal passed and for some time the idea for a universal proxy mandate lay dormant. In April 2021, however, then-Acting Chair Lee [reopened the public comment period](#) on the 2016 proposal. The recently adopted final rule substantially adopts the universal proxy requirement in the form proposed in 2016.

The SEC also adopted rule amendments regarding the disclosure of voting options and standards in all director elections.

### 1

#### Mandatory Use of Universal Proxy Cards

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Subject to a minimum solicitation requirement, the final rule mandates the use of universal proxy cards in all non-exempt solicitations in contested elections of directors of operating companies. Universal proxy cards will be required to include the names of all director candidates nominated by the company and by dissidents, including any director candidates nominated by shareholders

pursuant to “proxy access” procedures under applicable law or the company’s governing documents. As is the requirement under existing rules, all nominees will be required to consent to serve if elected. If a nominee intends to serve only if his or her nominating party’s full slate is elected, the applicable proxy statement must disclose that fact.

Although the new rules mandate the use of universal proxy cards, the parties in a contested election will continue to file their own proxy statements. Contestants will not be required to include information about the opposing side’s nominees in their own proxy statement, but must instead include disclosure in their proxy statement directing shareholders to the opposing side’s materials for information about that participant’s nominees.

The universal proxy rule will not apply to investment companies registered under the Investment Company Act of 1940 or business development companies. The SEC has stated that any application of the universal proxy rule to these entities would require further consideration and analysis.

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### Minimum Solicitation Threshold for Dissidents

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A key feature of the new universal proxy rule is a requirement that a dissident in a contested election must solicit shareholders representing at least 67% of the voting power of shares entitled to vote in the election. This minimum solicitation threshold, which was raised from the simple majority threshold originally proposed, is designed to mitigate concerns expressed by commenters that dissidents could decide to solicit a relatively small number of large institutional holders, while ignoring a substantial number of shareholders with smaller holdings (thus reducing solicitation costs). Dissidents must also include disclosure in their proxy statement or form of proxy stating that they intend to meet the minimum solicitation requirement.

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### Format of Universal Proxy Cards

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Each party in a contested election of directors will prepare its own universal proxy card. The proxy cards do not need to be identical, but the content of each card must comply with the formatting and presentation requirements of Rule 14a-19. These requirements are intended to ensure that each side’s nominees are grouped together and clearly identified as such and are presented in a fair and impartial manner. The requirements include the following:

- The proxy card must set forth the names of all duly-nominated director candidates and must clearly distinguish between company nominees, dissident shareholder nominees, and any proxy access nominees.
- Within each group of nominees, the nominees must be listed in alphabetical order by last name.
- The same font, style and size must be used to present all nominees.
- The proxy card must prominently disclose the maximum number of nominees for which authority to vote can be granted.
- The proxy card must 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.

- The proxy card may offer the ability to vote for all company nominees or dissident nominees as a group as long as both parties have proposed a full slate of nominees and there are no proxy access candidates.

## 4 Timeline for Notice and Proxy Filing

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Rule 14a-19 requires various notices between a company and a dissident in order to inform the company that a universal proxy has been triggered and to facilitate an orderly exchange of nominee information between the company and dissident. The rule's notice and filing requirements are as follows:

- **Dissident Notice.** No later than 60 calendar days before the anniversary of the previous year's annual meeting date, a dissident must provide the company with the names of its nominees.
  - *Interplay with Advance Notice Bylaws.* A dissident's obligation to comply with the notice requirement is in addition to its obligation to comply with any applicable advance notice provision in the company's governing documents. The 60-day notice requirement is a minimum period that does not override a longer period established in the company's governing documents.
- **Company Notice.** No later than 50 calendar days prior to the anniversary of the previous year's annual meeting date, the company must respond to the dissident's notice and provide the names of its nominees (unless the names of the nominees have already been disclosed in a preliminary or definitive proxy statement filed by the company).
- **Dissident Proxy Filing.** A dissident must file its definitive proxy statement with the SEC by the later of (i) 25 calendar days prior to the meeting date or (ii) five calendar days after the company files its definitive proxy statement.
  - The new rules do not mandate a corresponding filing deadline for companies.

If a dissident fails to meet these deadlines, Rule 14a-19 will not permit the dissident to continue with its solicitation. In this situation, if the company has already filed its definitive proxy statement, the company could elect to disseminate a new, non-universal proxy card including only the names of its nominees.

## 5 Presentation of Voting Options and Standards in All Director Elections

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The SEC also revised the rules that govern the presentation of voting options and voting standards in all elections of directors (whether contested or not). Under these amendments, when applicable state law gives legal effect to votes cast "against" a director nominee, then, in lieu of providing a means for shareholders to withhold authority to vote, the proxy card must provide a means for shareholders to vote against each nominee. In addition, if state law gives effect to abstentions or if the company has a majority voting standard, the proxy card must provide a means for shareholders to abstain from voting. The revised rules also require disclosure in the proxy statement regarding the effect of these votes.

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## Timeline for Implementation

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The universal proxy card mandate and other proxy rule revisions will apply to shareholder meetings involving elections of directors held after August 31, 2022. In selecting this implementation period the SEC noted that a transition period was appropriate in light of the notice and other mandates in Rule 14a-19 that will require coordination between companies and dissidents.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Securities and Capital Markets practice:

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