

SEC Reporting & Compliance Alert

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SEC Mandates Universal Proxy Cards in Election Contests

On November 17, 2021, the Securities and Exchange Commission (SEC) adopted amendments to the proxy rules mandating the use of universal proxy cards in contested elections. The new rules require both companies and dissidents to list on their proxy cards all duly nominated director candidates: the board's nominees, the dissident's nominees and any proxy access nominees.

Whether universal proxy cards will increase companies' exposure to activist campaigns and proxy fights, as suggested by some, remains to be seen.

The rules were adopted largely as proposed in 2016, with the main change being a requirement that the dissident represent that it will solicit holders of at least 67% of the voting power entitled to vote in the election of directors. The new rules take effect for shareholder meetings held after August 31, 2022 and will not apply to elections held by registered investment companies and business development companies. (See [Adopting Release](#) for full text and the SEC's [Press Release](#).)

Overview and Key Action Items

Requiring that the names of all nominees appear in both the company's proxy card and the dissident's proxy card will permit shareholders to "mix and match" from the competing slates of candidates without having to attend the shareholder meeting. As described below, this will require notices from both sides to the other providing the names of the nominees. There are also new requirements affecting the proxy statements and proxy cards of both sides in the contest.

A key change is that director nominees will be required to consent to be named in any proxy statement relating to the shareholder meeting at which directors will be elected. Prior to the effective date for the new rules (and, for calendar-year companies, following 2022 annual meetings), companies may need to revise the consent language in their advance notice bylaws, proxy access bylaws and D&O questionnaires (or other documents in which incumbent directors provide consent to be named in the company's proxy statement) to ensure that nominees are required to give the necessary consents.

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Dissident Notice to the Company

A dissident shareholder seeking to run an election contest will be required to provide notice to the company not later than 60 calendar days prior to the anniversary date of the previous year's annual meeting containing (i) the names of all nominees for which the dissident intends to solicit proxies and (ii) a statement that the dissident intends to solicit holders of shares representing at least 67% of the voting power entitled to vote in the election of directors.¹

The dissident's notice is not required to be filed with the SEC or otherwise made public, and the notice is not required if the requisite information has already been made public in a proxy statement filed with the SEC. Any change in the dissident's intent to solicit the requisite percentage of voting power or regarding the names of the nominees requires prompt notification to the company.

The SEC made clear in the Adopting Release that this notice requirement is in addition to any notice or other requirements in a company's governing documents. Typically, the SEC notice requirement will be later than the notice required under a company's advance notice bylaws.

Company Notice to the Dissident

A company receiving a notice from a dissident will be required to notify the dissident of the names of the company's nominees no later than 50 calendar days prior to the anniversary date of the previous year's annual meeting. Any change in the company's nominees requires prompt notification to the dissident. If the dissident has already disseminated a universal proxy card, the dissident may (but will not be required to) disseminate a new universal proxy card reflecting the changes.

Company and Dissident Proxy Statements

Both the company's and the dissident's proxy statements will be required to include disclosure referring shareholders to the other party's proxy statement for information about the other party's nominees and explaining that the other proxy statement is available on the SEC's website free of charge.

A company will be required to disclose in its proxy statement how it intends to treat proxy authority granted in favor of a dissident's nominees if the dissident abandons its solicitation or fails

to comply with the universal proxy rule (for example, by failing to solicit the requisite percentage of shareholders). The Adopting Release makes clear that a dissident's failure to comply with the rules prohibits a dissident from soliciting proxies.

A dissident will be required to (i) file its definitive proxy statement at least 25 calendar days before the shareholder meeting or five calendar days after the company files its definitive proxy statement, whichever is later, and (ii) include disclosure concerning the dissident's intent to solicit holders of at least 67% of the voting power entitled to vote in the election of directors. A dissident's failure to timely file its proxy statement will preclude it from soliciting proxies, and the company has the option to disseminate a new proxy card with only the company's nominees (and, if applicable, any proxy access nominees).

Company and Dissident Proxy Cards

Companies and dissidents will be required to provide shareholders with a proxy card that:

- lists the names of all duly nominated nominees, clearly distinguishing between company nominees, dissident nominees and proxy access nominees, and alphabetically listing the nominees within each group;
- uses the same font type, style and size for all nominees presented on the card;
- prominently discloses the maximum number of nominees for which authority to vote can be granted; and
- prominently discloses how a proxy will be treated if it is cast for more or less than the number of directors to be elected, or if no direction is given.

Companies and dissidents will be permitted (but not required) to allow a shareholder to grant authority to vote for the full slate of either the dissident or the company as a group, so long as the card also provides a similar means by which a shareholder can withhold authority to vote for such group. However, this option is not available if there are also proxy access nominees on the ballot.

When the universal proxy rules take effect, the SEC's "short slate rule," permitting dissidents to seek proxies for a minority of board seats as well as company nominees who are not targeted, will be eliminated, except for registered investment companies and business development companies.

¹ There is a provision for adjusting the deadline if there was no previous annual meeting or the date of the meeting has changed by more than 30 days from the previous year. The adjustment also applies to the new notice requirement imposed on companies discussed in the next section.

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Additional Disclosure and Voting Rules Applicable to All Proxy Statements after August 31, 2022

Current rules require disclosure of the following deadlines:

- submission of shareholder proposals under Rule 14a-8;
- submissions of other business or nominations under a company's advance notice bylaws; and
- nominations under any proxy access provisions, if applicable.

Under the new rules, companies also will be required to disclose the deadline for receiving notice of a dissident's nominees under the universal proxy rules.

In an effort to address confusion that often arose when companies adopted majority voting standards for director elections but disseminated proxy cards that provided voting options based on a plurality voting standard, the new rules provide that:

- where there is a legal effect of a vote against directors, voting choices must include "against" and "abstain" voting boxes rather than a "withhold" option; and
- where there is no legal effect of a vote against directors, voting choices must include a "withhold" voting option rather than an "against" option and the proxy statement must disclose the effect of a "withhold" vote.

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