

Securities and Exchange Commission Adopts Universal Proxies for Contested Director Elections

New rules apply to all shareholder meetings involving contested director elections held after August 31, 2022

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What You Need To Know:

- The new rules require the use of universal proxy cards in all contested elections.
- The new rules will take effect on September 1, 2022.

On November 17, 2021, the Securities and Exchange Commission (the Commission) **adopted final rules** requiring the use of universal proxy cards in contested director elections.

Background

Currently, shareholders voting by proxy in contested director elections are unable to vote for a combination of director nominees from competing slates. These shareholders can currently only vote for those directors appearing on one proxy card (i.e., either the company's or the dissident's card), while those shareholders who attend a meeting in person may vote for any combination of director nominees from both management's slate and the dissident's slate. The Commission's new rules require the use of universal proxy cards that list *all* duly-nominated director candidates from all parties. The rules are intended to put shareholders voting by proxy on equal footing with those attending a meeting and voting in person.

Rule Requirements

The Commission's new rules make the following changes with respect to the use of universal proxy cards in contested elections:

- A universal proxy card must be used by all participants in non-exempt director election contests.
- The dissident must provide the company with notice of the dissident's intention to solicit proxies and a list of its nominees no later than 60 calendar days before the anniversary of the company's previous annual meeting. This notice requirement does not supersede compliance with any advance notice bylaw that a company may have.
- The company must provide the dissident with the names of the company's nominees no later than 50 calendar days before the anniversary of the company's previous annual meeting.
- The dissident must file its definitive proxy statement by the later of (i) 25 calendar days before the shareholder meeting or (ii) five calendar days after the company files its definitive proxy statement.
- Both the company's and the dissident's proxy statements must refer shareholders to the other party's proxy statement for information about the other party's nominees and refer shareholders to the Commission's website to access the other side's proxy statement.
- The dissident must undertake to solicit

the holders representing at least 67% of the voting power of the company's shares entitled to vote at the meeting.

- The rules establish certain formatting and disclosure standards for universal proxy cards. Pursuant to the new rules, each universal proxy card must:
 - Clearly distinguish between the company's nominees, the dissident's 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 to present all nominees.
 - Prominently disclose the maximum number of nominees for whom authority to vote can be granted.
 - Prominently disclose the treatment and effect of a proxy executed in a manner that grants authority to vote for more nominees than the number of directors being elected or fewer nominees than the number of directors being elected, or in a manner that does not grant authority to vote with respect to any nominees.

The Commission also adopted additional amendments to the form of proxy and disclosure requirements with respect to voting options and voting standards that would apply to all director elections, not just contested ones. These amendments do the following:

- Mandate the inclusion of an "against" voting option in lieu of a "withhold authority to vote" option on the form of proxy for the election of directors where there is a legal effect to such a vote.
- Provide shareholders who neither support nor oppose a director nominee an opportunity to "abstain" (rather than "withhold authority to vote") in a director election governed by a majority voting standard.
- Require the disclosure of the effect of a "withhold" vote.

The foregoing changes become effective for all shareholder meetings held after August 31, 2022.

Key Takeaways

As a result of the new rules, boards of directors and management of public companies should consider the following:

- **These rule changes may lead to increased activist shareholder activity.** Boards should start to formulate action plans for when/if a dissident commences a proxy contest. Boards should work with management regarding how and when to engage and/or negotiate with dissidents.
- **Boards should understand the interplay between the new universal proxy rules and advance notice bylaws.** To the extent a company already has an advance notice bylaw, boards and management should become familiar with its contours and understand any intersections between it and the new rules. If a company does not yet have an advance notice bylaw, boards and management should consider whether one is appropriate. These bylaws can elicit valuable information about any dissident nominees or other matters a dissident may propose, in both cases, well in advance of a shareholder meeting.
- **Companies should understand the applicability of the new rules even outside of a contested election.** The new rules include certain new disclosure requirements, including the requirement to disclose in an annual proxy statement the deadline for shareholders to give timely notice to the company of dissident nominations for the next annual meeting and to make certain disclosures related to its voting standards.

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