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

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On November 17, 2021, the Securities and Exchange Commission (the “SEC”) adopted amendments to the federal proxy rules to mandate the use of “universal” proxy cards in contested director elections. Under the new rules, proxy cards distributed by both public companies and dissidents in contested director elections must include both sides’ director nominees, allowing shareholders to “mix and match” nominees from the company’s and the dissident’s slates of nominees when voting by proxy. The new rules, which do not apply to investment companies or business development companies, will become effective on August 31, 2022 and do not apply to shareholder meetings held prior to such date.

## **HOW THE EXISTING RULES WORK**

Under the existing rules governing contested director elections, typically neither side’s proxy card lists the other side’s nominees. This is because the so-called “bona fide nominee” rule generally prohibits naming an individual who has not consented to appearing on a particular side’s proxy card (though a dissident seeking only a minority of the board seats is permitted to “round out” its “short slate” with a selection of company nominees). As a result, shareholders voting by proxy cannot mix and match their choices of directors, but instead must pick a slate—the company’s or the dissident’s. In contrast, shareholders voting in person at shareholder meetings may select a mix of nominees from either slate. Because voting by proxy is far more common than voting in person at shareholder meetings, the inability to mix and match nominees has been a predominant feature of contested director elections for decades.

## **HOW THE NEW RULES WILL WORK**

Originally proposed in 2016 and reopened for comments in April 2021, the new rules revise the bona fide nominee rule and mandate the use of universal proxy cards by both public companies and dissidents when soliciting shareholders in contested director elections. That is, each proxy card must include the names of both the company’s and the dissident’s nominees, thereby permitting shareholders to vote for a combination of nominees from the separate slates submitted by the company and the dissident.

The new rules do not require universal proxy cards to be identical, but instead set forth various requirements pertaining to the inclusion and presentation of information in order to ensure consistency. Among other things, the proxy cards must clearly distinguish between the company’s and the dissident’s nominees (as well as any nominees submitted through the company’s proxy access bylaw) and nominees must be listed alphabetically by last name within each group using the same font type, size and style. The proxy cards must prominently disclose the maximum number of nominees that shareholders can vote for and the treatment of over-voted or under-voted cards.

Both the company and the dissident must refer shareholders to the other side's proxy statement for information about such side's nominees.

The new rules also require the dissident to notify the company of its intent to solicit proxies and provide the names of its nominees at least 60 calendar days before the anniversary of the previous year's annual meeting; the company must provide the dissident with the names of its nominees at least 50 calendar days before that anniversary. The 60-day requirement applicable to the dissident will not override any advance-notice provisions of the company's bylaws, which often require 90 calendar days' or more notice. The dissident must file its definitive proxy statement with the SEC by the later of 25 calendar days before the shareholder meeting or five calendar days after the company files its definitive proxy statement. The SEC declined to impose any new specific filing deadlines for the company's definitive proxy statement.

In addition, the new rules require the dissident to solicit the holders of shares representing at least 67% of the voting power of the shares entitled to vote at the meeting (increased from a majority in the original 2016 proposing release, which was one of the features that attracted the most comments in both the original and reopened comment periods). To satisfy this requirement, the dissident may mail the proxy materials to shareholders or use the less costly "notice and access" method.

Under the new rules, proxy cards for both contested and uncontested director elections must (1) include an "against" voting option when there is a legal effect to a vote against a director nominee under applicable state law and (2) provide shareholders with the ability to "abstain" when a majority voting standard applies. The proxy statement must include disclosure about the effect of a "withhold" vote in such elections.

## POTENTIAL IMPACTS

While it is difficult to predict all of the impacts that the new rules will have on contested director elections, a few possibilities are worth noting. We expect to see more situations in which proxy advisory firms, such as ISS and Glass Lewis, recommend one or two dissident nominees, and split-ticket proxy voting will likely increase the number of boards that are composed of a mix of company-nominated directors and dissident-nominated directors. Further, by increasing the chances that a dissident may win at least one board seat, the new rules may further embolden activist shareholders to nominate directors and actually follow through with contested elections or prompt so-called "gadfly" investors with relatively small holdings to pursue director nominations in lieu of shareholder proposals.

At a minimum, the new rules impose additional deadlines and procedural requirements, so companies will need to update their proxy procedures and coordinate with their legal advisors, transfer agents and proxy solicitors to ensure compliance with all applicable requirements and minimize shareholder confusion.

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