

SEC Adopts Universal Proxy Cards

By: Jeff Haughey & Michael S. Lewis
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On November 17, 2021, the Securities and Exchange Commission (SEC) [adopted new Rule 14a-19](#) and amendments to existing rules affecting the procedure for director elections. The most notable and drastic change requires the use of universal proxy cards by company management and dissident shareholders soliciting proxy votes for their respective candidates in contested board elections. Pursuant to new Rule 14a-19, such cards must include *all director nominees* regardless of whether management or dissidents nominate the candidate. For other solicitation types (i.e., “vote no” campaigns or those in support of a shareholder proposal), universal proxy cards are optional. Additionally, the newly adopted rules establish new notice and filing requirements for all soliciting parties, as well as new formatting and presentation requirements for universal proxy cards. As adopted, the new universal proxy rules apply to operating companies only, thereby not affecting the board elections of registered investment companies, business development companies or funds.

Originally proposed by the SEC in 2016, universal proxy allows shareholders voting by proxy to vote for their preferred mix of dissident and registrant nominees. Currently, shareholders voting by proxy are limited to voting for either the entire slate of nominees chosen by the board of directors or that of the dissident shareholders. In contrast, shareholders casting their vote in person can select nominees from either slate (i.e., split the ticket). According to SEC Chair Gary Gensler, the adoption of universal proxy places both shareholders voting in-person and those voting by proxy on “equal footing.”

Commissioner Hester Peirce, the lone dissenter in the SEC’s November 17 vote, stated that although in favor of universal proxy cards in contested director elections, she could not support the rule as proposed as it “[did] not condition access to the company’s proxy card on a demonstrated commitment to the company.” In her opinion, she believes the rule could be used as a tool by “frivolous, as well as serious, activists” to further “special interests rather than enhancing corporate value.”

Formatting Changes to Universal Proxy Cards

Although both the company and dissidents have the freedom to design their own universal proxy cards¹, new Rule 14a-19 requires that each party’s universal proxy cards:

- sets forth the names of all duly nominated director candidates;
- provides a means for shareholders to grant authority to vote for the nominees;
- clearly distinguishes among company, dissident and (as applicable) proxy nominees;

¹ Thus, each side may continue the existing practice of using different color cards to distinguish between the different party’s proxy cards (e.g., white and gold).

- (within each group of nominees), lists the nominees in alphabetical order by last name;
- uses the same font type, style and size to present all nominees;
- prominently discloses the maximum number of nominees for which authority to vote may be granted; and
- prominently discloses the treatment and effect of a proxy executed in a manner that grants authority to vote for more or fewer nominees than the number being elected, or does not grant authority to vote with respect to any nominees.

If both parties present a full slate of director nominees, they may allow shareholders to grant authority to vote for the full slate of either party's nominees provided that (i) there are no proxy access nominees and (ii) the card also allows shareholders to grant authority to vote against a party's slate of nominees or withhold their vote from such slate.² Where a contested election includes only proxy access nominees (not dissident nominees), the universal proxy rules are not applicable.

Notice Requirements³

At least sixty (60) days before the anniversary of the previous year's annual meeting date, dissident shareholders are required to provide the company at its principal executive offices with notice of (i) the names of their nominees for whom they intend to solicit proxies and (ii) a statement of intent to solicit the holders of shares representing at least 67%⁴ of the voting power of shares entitled to vote on the election of directors.⁵ If an annual meeting was not held the previous year, or if the date of the meeting has changed by more than thirty (30) days from the previous year, dissidents must provide notice to the company by the later of sixty (60) days before the annual meeting date or the tenth day after the company's first public announcement of the annual meeting date.

The company, in turn, must notify the dissidents of its candidates no later than fifty (50) days prior to the anniversary of the previous year's annual meeting date, or, in the event that an annual meeting was not held the previous year or the date of the meeting has changed by more than thirty (30) days from the previous year, the company must provide notice to the dissidents at least fifty (50) days prior to the annual meeting date.⁶ If either side makes changes to its nominees, or if the dissidents change any information regarding their intent to solicit the requisite holders of shares, the modifying party is required to promptly notify the other party.

Dissidents must file their definitive proxy statement with the SEC by the later of twenty-five (25) days before the annual meeting or five (5) days after the company files its definitive proxy statement. If, after the company has distributed its universal proxy card, the dissidents fail to file their definitive proxy statement on time, the company may distribute a new, non-universal proxy card including only the names of its nominees.⁷

² Whether the ability to grant authority to vote against or withhold one's vote from such a slate of nominees will depend on which action has effect under applicable state law.

³ The notice requirements in this section are in addition to any notice requirements set forth in a company's governing documents, and therefore, merely set a floor for such notice and do not override or supersede any longer periods required by a company.

⁴ This represents an increase from the Proposed Rules which only required solicitation of 50% of the voting power entitled to vote.

⁵ Dissidents may elect to satisfy the minimum solicitation requirement by utilizing the notice and access method (i.e., mailing a notice directing the recipient to a website that includes the proxy materials).

⁶ If the company has already disclosed the names of its nominees in a preliminary or definitive proxy statement, then this requirement is inapplicable.

⁷ Such card must also include, as applicable, any proxy access nominees.

Amendment to the “Bona Fide Nominee” Rule (Rule 14a-4(d)(1))

Only those who qualify as a “bona fide nominee” under the federal proxy rules are allowed to be named in a proxy statement. Although this rule remains unchanged, the SEC amended the definition of “bona fide nominee” to facilitate the new universal proxy card rule. Before the SEC’s current amendment, a person was required to consent to being named in the proxy statement of the party nominating the person to qualify as a “bona fide nominee.” Now, the definition covers one who consents to being named in a proxy statement. Therefore, by consenting to be named in the proxy statement of the nominating party, a candidate also consents to be listed on the other party’s proxy card.⁸

Additions and Amendments to Proxy Information Rules

The SEC adopted new Rule Item 7(h) of Schedule 14A requiring both the company and the dissident to refer shareholders to the other party’s proxy statement for information regarding the other side’s nominees and explain how shareholders can access the opposing party’s proxy statement on the SEC’s website without incurring a cost. Additionally, Rule 14a-5 was modified to allow each side to refer to information that would be provided in the other side’s filing to satisfy its disclosure obligations. Another change was made to the definition of “participant” in Instruction 3 to Items 4 and 5 of Schedule 14A to ensure that, even though all nominees would be included on the universal proxy card, only those candidates nominated by a party would be considered “participants” in that party’s proxy solicitation.

In another change by the SEC, the company is required to disclose in its proxy statement how proxy authority granted in favor of dissident nominees will be treated if the dissident abandons its solicitation efforts or fails to comply with the proxy rules. The SEC made it clear that if the dissident fails to comply with the proxy rules, then the dissident is prohibited from soliciting proxies.

Short Slate Rule Eliminated (Rule 14a-4(d))

The SEC’s amendments will (other than for funds, registered investment companies and business development companies) eliminate the short slate rule, which allows dissidents to nominate a partial slate of directors by using proxy authority to vote for some company nominees.⁹

Additional Changes Affecting All Director Elections

In addition to rule changes to contested elections, the final rules establish new requirements applicable to all director elections, including those that are uncontested. Such requirements mandate that where “against” and “abstain” voting options have legal effect under state law, such options be provided on proxy cards. On the other hand, where there is no legal effect of an “against” vote under state law, voting options must include a “withhold” choice. Additionally, the effect of all voting options provided must be disclosed in the proxy statement along with the methods by which votes will be tallied.

The Effective Date

The new rules will go into effect 60 days after publication in the Federal Register. To allow companies the opportunity to transition, compliance with the new rules will be required for board elections occurring after August 31, 2022.

⁸ Due to this amendment, companies will need to review the consent language included in the materials (i.e., advance notice bylaws, proxy access bylaws, D&O questionnaires and calendars/checklists) used for nominees to ensure that such language reflects the change.

⁹ The rationale for eliminating the short slate rule is that it will be rendered unnecessary because universal proxy will allow shareholders to vote for a full slate of their preferred directors.

Companies should begin to analyze whether and how any of its governing documentation will need to change as a result of these new and revised rules. For example, the new obligation in contested elections that companies provide notice to dissidents of their nominees fifty (50) days prior to the anniversary of the prior year's meeting may require some companies to finalize their nominees earlier than they previously would have. In addition, under new Rule 14a-5(e)(4), companies must remember that after August 31, 2022, their proxy statements for shareholder meetings must include a disclosure of the deadline for receiving notice of dissident nominees under the universal proxy rules.

For questions regarding universal proxy cards and related changes, please contact your GableGotwals attorney or a member of our [Corporate & Securities team](#).



Jeffrey T. Haughey
918-595-4837
jhaughey@gablelaw.com



Michael S. Lewis
918-595-4862
mlewis@gablelaw.com

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