



Securities Law ADVISORY ■

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SEC Adopts New Rules for Universal Proxy Cards in Contested Director Elections

On November 17, 2021, the Securities and Exchange Commission (SEC) voted 4–1 to adopt rules that mandate the use of universal proxy cards in contested elections of directors. Under the current voting system, registrants and dissidents soliciting proxies each circulate a proxy card containing their own slate of proposed directors. Shareholders voting by proxy then choose to vote for one slate or the other slate by selecting and filling out only one proxy card. However, shareholders voting in person or by representative have the option to vote for any combination of nominees. While sending a representative to an annual meeting is not unheard of, it is more costly than voting by proxy and an option not often exercised by many shareholders.

The new rules require that shareholders only receive one proxy card containing the names of all director nominees in a proxy contest. The [universal proxy rules](#) were [originally proposed](#) in 2016 but shelved shortly after; however, the SEC reopened the comment period for the 2016 proposal in April of this year. The new rules seek to provide equal selection options to shareholders who vote by proxy and shareholders who vote in person. Notably, many countries, such as Canada and Australia, already follow a similar rule.

Universal Proxy Card Requirement

Under the newly adopted Rule 14a-19, companies and dissidents soliciting proxy votes for their candidates in contested elections of directors will be required to use a universal proxy card for elections at upcoming shareholder meetings that includes all director nominees presented by management and dissidents. The new rules will not apply to registered investment companies or business development companies.

Requirements for Dissidents Nominating Directors

A dissident nominating directors will be required to provide the company notice of their intent to solicit proxies and provide the names of their nominees at least 60 calendar days before the anniversary of the company's prior year's annual meeting and is required to solicit 67% of the voting power of the shares.

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The dissident must include a declaration in its proxy statement that the dissident will comply with the minimum solicitation percentage. This minimum solicitation condition seeks to dissuade the misuse of the universal proxy by dissidents.

Similarly, a company will be required to notify the dissident of the names of the company's nominees at least 50 calendar days before the anniversary of the company's previous year's annual meeting, unless the names were provided in a prior proxy statement.

This new notice requirement is not intended to impact a company's advance notice bylaws and dissidents are still required to comply with such bylaws. If a company does not have an advance notice bylaw, a dissident nominating directors will need to comply with these new notice requirements.

Filing, Formatting, and Presentation Requirements

A dissident nominating directors must file a definitive proxy statement with the SEC by the later of either 25 calendar days before the meeting date or five calendar days after the company files its definitive proxy statement. Each party in a contested election must refer shareholders to the other party's proxy statement for information about the other party's nominees. The SEC has also adopted disclosure and formatting requirements for universal proxy cards, including:

- The proxy cards must include an "against" voting option in director elections when there is a legal effect under state law or a company's governing documents of a vote against a director nominee.
- The proxy cards must provide shareholders with the ability to "abstain" in a director election where a majority voting standard applies.
- The proxy statement must disclose the effect of a "withhold" vote in an election of directors.

What Should Companies Do Now?

The new rules have a long transition period and are effective for any shareholder meeting with a contested election held after August 31, 2022. Before then, companies should review their current voting standards, governing documents, and typical proxy calendar to best anticipate any issues that the new rules may raise.

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