



SEC Proposes Rules for Requiring Universal Proxy Cards in Contested Director Elections

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Key Takeaways

- The proposed rule allows shareholders to vote in a manner that more closely resembles voting in person at a shareholder meeting by allowing them to “pick and choose” individual registrant and dissident nominees.
- Because dissidents generally must provide advance notice pursuant to registrant bylaws earlier than the 60 days set forth in the proposed rule, in most cases, there will be no additional obligation on dissidents.
- The universal proxy proposal effectively eliminates the short slate rule, which takes away the ability of the dissident to hand-select registrant nominees that it prefers to roundout its slate of directors. Preferences, however, can still be conveyed in the dissident’s proxy materials. In addition, the proposed rule would allow dissidents to nominate a majority of the directors without having to nominate a full slate.

Current Proxy Rules Do Not Allow Shareholders to Pick and Choose Director Nominees

Under the current proxy rules, shareholders voting by proxy in contested elections are often unable to make selections based solely on their preferences for particular candidates. Instead, such shareholders are effectively required to make a choice between submitting their votes on the registrant’s proxy card or the dissident’s proxy card. This impedes a shareholder’s ability to pick and choose nominees on each card. If a shareholder wants to split his or her vote by

voting for a mix of the registrant and dissident nominees, he or she generally must attend the meeting in person and vote.

Proposed Rules to Require Use of Universal Proxy Cards in Contested Elections

To replicate the choices available when voting in person, the proposed proxy rules would require each soliciting party in contested director elections involving nonexempt solicitations to distribute a universal proxy card that includes the names of all candidates for election to the board of directors—both the registrant’s director nominees and the dissident’s director nominees.

Additionally, the SEC is proposing to amend the proxy rules to establish new procedures for the solicitation of proxies, the preparation and use of proxy cards, and the dissemination of information about director nominees in contested elections. Specifically, in addition to requiring universal proxy cards in contested elections, the amendments to the proxy rules would:

- **Require the Dissident to Provide the Registrant with Notice of its Director Nominees.** No later than 60 calendar days prior to the anniversary of the previous year’s annual meeting date, the proposed rules would require the dissident in a contested election to provide notice to the registrant of its intent to solicit proxies in support of the dissident’s director nominees. If the registrant did not hold an annual meeting during the previous year or if the annual meeting date has changed by more than 30 calendar days from the previous year, the proposed rule would require the dissident to provide notice by the later of 60 calendar days prior to the annual meeting date or the 10th calendar day following public announcement of the annual meeting date. This requirement would be in addition to a dissident’s obligation to comply with any applicable advance notice provision in the registrant’s governing documents. As noted above, because dissidents generally must provide advance notice pursuant to registrant bylaws earlier than the 60 days set forth in the proposed rule, in most cases, there will be no additional obligation on dissidents.
- **Require the Registrant to Provide the Dissident with Notice of its Director Nominees.** No later than 50 calendar days prior to the anniversary of the previous year’s annual meeting date, the registrant in a contested election would be required to provide the dissident with notice of the names of the registrant’s nominees. If the registrant did not hold an annual meeting during the previous year or if the annual meeting date has changed by more than 30 calendar days from the previous year, the

proposed rule would require the registrant to provide notice no later than 50 calendar days prior to the annual meeting date.

- **Require the Dissident to Solicit Holders of Shares Representing a Majority of Voting Power.** The proposed rules would require that, after providing notice to the registrant, the dissident must solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors. This requirement, according to the SEC, helps address the concern that universal proxy cards would allow a dissident to have its nominees included on a registrant's proxy card without expending any of the dissident's own resources to engage in meaningful solicitation efforts.
- **Revise the consent required for a "Bona Fide Nominee."** Currently, Exchange Act Rule 14a-4(d)(1), the "bona fide nominee rule," prevents a party from including a director nominee on its proxy card who has not consented to being named in the proxy statement and serve if elected, except that dissidents may include company nominees on their slate if they are nominating less than a majority of the board (aka, a "short slate"). Accordingly, in an election contest, one party may not include the other party's nominees on its proxy card, unless the other party's nominees consent. For a variety of strategic reasons, in a contested election, the nominees for one party often refuse to consent to being included on the opposing party's card. The proposed rule would change the definition of "bona fide nominee" so that the scope of a nominee's consent is effectively expanded to include consent to being named in **any** proxy statement for the applicable meeting. This change would remove a current impediment to a registrant or dissident including the other party's nominees on its proxy card.
- **Eliminate Short Slate Rule.** The short slate rule, which is found in Exchange Act Rule 14a-4(d), allows a dissident seeking to elect a minority of the board to solicit authority to select some of the registrant's nominees for inclusion on its proxy card. Because the proposed rule requires each party in a contested election to include on its proxy card all candidates that consented to being named on a proxy card for the applicable meeting, the short slate rule would no longer be necessary. While eliminating the short slate rule does take away the ability of a dissident to select the registrant nominees that it prefers to round out its slate of nominees on its proxy card, the dissident still has the ability to include recommendations for its preferred registrant nominees in its proxy materials. Furthermore, it allows dissidents to nominate a majority of the directors without having to nominate a full slate.

- Require the Dissident to file a Definitive Proxy Statement with the SEC by the Later of 25 Calendar Days Prior to the Meeting or Five Calendar Days After the Registrant Files its Definitive Proxy Statement.** The proposed rule would require a dissident to file its definitive proxy statement with the SEC by the later of 25 calendar days prior to the applicable meeting or five calendar days after the registrant files its definitive proxy statement. According to the SEC, this deadline would ensure that shareholders that receive a universal proxy will have access to information about all nominees for a sufficient amount of time prior to the meeting. The SEC recognizes that some shareholders may submit their vote on the registrant's universal proxy before the dissident's proxy statement is available. However, the SEC believes that the 25-calendar-day deadline would provide these shareholders with sufficient time to review the dissident's proxy statement and change their votes by submitting a later-dated proxy card if they choose to do so.
- Impose Specific Presentation and Formatting Requirements for All Director Elections Proposals on Universal Proxy Cards.** In order to ensure that the universal proxies will clearly and fairly present information about all director nominees, proposed Rule 14a-19(e) would include the following presentation and formatting requirements for universal proxies in contested elections: (i) the proxy card must clearly distinguish between registrant nominees, dissident nominees and any proxy access nominees; (ii) within each group of nominees, the nominees must be listed in alphabetical order by last name on the proxy card; (iii) the proxy card must use the same font type, style and size to present all nominees on the proxy card; (iv) the maximum number of nominees for which authority to vote can be granted must be prominently disclosed on the proxy card; and (v) the proxy card must prominently disclose the treatment and effect of a proxy card executed so as to grant authority to vote for more nominees than the number of directors being elected or fewer nominees than the number of directors being elected, or not grant authority to vote for any nominees. Additionally, where both parties have proposed a full slate of nominees and there are no proxy access nominees, the SEC is proposing that the proxy card may provide the ability to vote for all dissident nominees as a group and all registrant nominees as a group. The proposed rules would not prohibit registrants and dissidents from continuing the practice of distinguishing their respective proxy cards by distributing them with a distinctive color.
- Amend Required Disclosure for Director Election Voting Standards and Voting Options.** The SEC is proposing to amend Exchange Act Rule 14a-4(b) so that proxy

cards for director elections must include an “against” voting option in lieu of a “withhold authority to vote” where there is a legal effect to such a vote. Also, the proposed rule would require that proxy cards provide shareholders with the opportunity to “abstain” (rather than “withhold authority to vote”) in a director election governed by a majority voting standard. Finally, the SEC is proposing amendments to Item 21(b) of Schedule 14A so that proxy statements are expressly required to disclose the effect of a “withhold vote.” These changes are being proposed to address the SEC’s awareness of concerns that the proxy statements of some companies contain ambiguities and inaccuracies about voting standards and director elections.

Request for Public Comment on the Proposed Rule

The SEC will seek public comment on the proposed rules for 60 days.

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