

November 23, 2021

# SEC Mandates Universal Proxies

On November 17, 2021, the SEC adopted final rules (available [here](#)) requiring both companies and dissidents to use universal proxy cards that must include all director nominees in contested director elections. These changes, effective after August 31, 2022, will result in shareholders being able to choose from all candidates, whether nominated by the company or dissidents, even when voting by proxy. They are a significant departure from current practice, where proxies are granted in favor of either the company's full slate or the dissident's full slate.<sup>1</sup> Because these changes will make it easier for shareholders to "pick and choose" from all nominees, split-ticket results may become more common, which is likely to be materially beneficial to activists and other dissidents.

As summarized below, these new rules impose formatting and substantive requirements on the universal proxy card and notice and other procedures and deadlines to provide for consistency in timing and information sharing between the company and dissident. The SEC also adopted amendments to the form of proxy and proxy statement disclosure requirements applicable to all director elections, primarily to clarify the availability and impact of various voting options.

## Universal Proxy Rules

### Notice and Filing Procedures and Deadlines

Because companies and dissidents will now have to coordinate on the inclusion of each other's nominees in their respective proxy cards, new Rule 14a-19 sets several notice and filing deadlines for companies and dissidents. While they add another layer of timing considerations that companies must address when preparing for their annual meeting, because the SEC accounted for typical company filing timelines, we do not anticipate that these requirements will create significant burdens for most companies. New Rule 14a-19 does not apply to consent solicitations.

60 days before the anniversary of the prior year's annual meeting, the dissident must notify the company (at the company's principal executive offices) of its intent to solicit proxies in support of its nominees. This is a minimum period and does not override or supersede any longer period that may be required by a company's advance notice requirements. If the company did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, the dissident would have to provide notice by the later of 60 calendar days before the date of the annual meeting or the 10th calendar day after the company's first public announcement of the date of the annual meeting. This deadline will be required to be disclosed in the company's proxy statement along with the other shareholder proposal and director nominee deadlines.

The dissident notice must include: (i) the names of all nominees for whom the dissident intends to solicit proxies and (ii) a statement that the dissident intends to solicit holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors in support of the dissident's nominees (in each case, unless the required information is already disclosed in a previously filed preliminary or definitive proxy statement). If there are any changes to this information, the

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<sup>1</sup> Currently, absent company or dissident consent, neither party may include the others' nominees on their proxy card (except in "short-slate" situations where the dissident is permitted to include company nominees on their proxy card to round out their slate, and which option will no longer be needed under the new rules). In addition, unlike the SEC regime with respect to shareholder proposals under Rule 14a-8 or company requirements for proxy access, the new universal proxy rules do not require the dissident to satisfy any minimum share ownership requirements (either with respect to amount or the time held by the dissident) to take advantage of these new rules.

dissident is required to notify the company promptly. The dissident is not required to file the notice with the SEC or otherwise make the notice publicly available.

50 days before the anniversary of the prior year's annual meeting, the company must notify the dissident of the names of all company nominees (unless already disclosed in a previously filed preliminary or definitive proxy statement). If the company did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, then notice would be required no later than 50 calendar days before the date of the meeting. The company is also required to notify the dissident promptly of any changes to its nominee names.

25 days before the annual meeting or five calendar days after the company files its definitive proxy statement, whichever is later, the dissident must file its definitive proxy statement. If the dissident fails to file a definitive proxy statement on time, the company may disseminate a new, non-universal proxy card that only includes the names of the company's nominees (and, if applicable, any proxy access nominees).

### **Universal Proxy Card Requirements**

The company and dissident will each have the flexibility to design and disseminate their own universal proxy cards, however, Rule 14a-19 provides that each universal proxy card must:

- set forth the names of all duly nominated director candidates;
- provide a means for shareholders to grant authority to vote for the nominees;
- clearly distinguish among registrant nominees, dissident nominees and any proxy access nominees;
- within each group of nominees, list the nominees in alphabetical order by last name;
- use the same font type, style and size to present all nominees;
- prominently disclose the maximum number of nominees for which authority to vote can be granted; and
- prominently disclose 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 the company and the dissident have presented a full slate of nominees and there are no proxy access nominees, the universal proxy card may provide (but is not required to provide) the ability for shareholders to vote for the entire dissident or company slate as a group. In these circumstances, the universal proxy card must also provide shareholders with the option to vote against or withhold (depending on what has effect under state law) the vote from such a group.

### **Nominee Consent and Information Requirements**

Under revised Rule 14a-4, the bona fide nominee rule is expanded to include any nominee that has consented to being named in any proxy statement for the next shareholder meeting for director elections (instead of being limited to consenting to being named in the proxy statement of the party making their nomination). This represents a change from the currently prevailing market practice, where company nominees generally do not consent to being named in a dissident's proxy statement and the dissident's nominees generally do not consent to being named in the company's proxy statement. Because of these rule changes, companies should review the consent language included in the materials they use with director nominees (e.g., under company bylaws, D&O questionnaires) to confirm that the required consents are appropriately addressed. The requirement that each nominee must also consent to serve as a director, if elected, is unchanged.

Each party must refer shareholders to the other party's proxy statement for information about that other party's nominees, and include disclosure that shareholders can access that proxy statement free of charge on the SEC's website. A company must also include disclosure in its proxy statement advising shareholders how it will treat proxy authority granted in favor of the other party's nominees if the other party abandons its solicitation or fails to comply with the proxy rules (including if a dissident fails to solicit the required percentage of shareholders). If a dissident fails to comply with these rules, the dissident will be prohibited from using the universal proxy rules and continuing to solicit proxies under the proxy rules.

#### **Minimum Dissident Solicitation Requirement**

The dissident must solicit shareholders representing at least 67% of the voting power of shares entitled to vote in the election of directors (an increase from the majority originally proposed) and, as noted above, must state its intention to do so in its proxy statement or form of proxy and in its notice to the company. Failure to meet this solicitation threshold would constitute a violation of Rule 14a-19 and would thus expose the dissident to liability for violating the proxy rules. Additionally, the dissident would also be exposed to liability under Rule 14a-9 if its statements in the proxy statement/form of proxy regarding its intention to meet this solicitation threshold were false. The SEC's adopting release makes clear that the dissident may solicit shareholders under the "notice and access" method of mailing a notice of internet availability and posting the proxy materials to a website, which is less costly than mailing a full proxy statement to shareholders.

#### **Exemptions and Short Slate Rule**

Investment companies and business development companies are exempt from the new universal proxy rules. Funds too are exempt at the moment; the SEC noted that further consideration is necessary before determining whether the universal proxy rules should apply to some or all funds. In addition, the final rules eliminate the short slate rule for operating companies (as the universal proxy rules have rendered it unnecessary), but have maintained it for funds.

#### **Disclosure Requirements Applicable to All Director Elections**

Under the final rules, where state law provides for and gives effect to votes against nominees, the form of proxy must include the option to vote against nominees (in lieu of the option to withhold authority to vote) and the option to abstain. To avoid confusion, proxies may not include the option to vote against nominees where "against" votes would have no legal effect. Companies will also be required to include clear disclosure in the proxy statement about the effect of a "withhold" vote in the election.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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