



INDUSTRY INSIGHT

Universal Proxy Cards: A New Era in Proxy Fights



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Universal Proxy Cards: A New Era in Proxy Fights

On September 1, 2022, we saw the dawn of a new era in proxy fights. On that day, new and amended Securities and Exchange Commission rules went into effect requiring the mandatory use of universal ballots or universal proxy cards (UPC) in virtually all non-exempt proxy fights¹. A universal proxy card is one on which the issuer and the dissident nominees are listed on each side's proxy card.



The UPC provides a shareholder voting by proxy with the same rights as if they attended the shareholder meeting. If a shareholder goes to a shareholder meeting, they are given a ballot that lists the nominees for both management and the dissident. This allows the shareholder to pick and choose candidates from either side. The universal proxy card allows a shareholder to vote for a combination of management and dissident nominees. Just as they could if they went to the shareholder meeting and voted by ballot.

The new rules represent a major change to the proxy rules that will:

- ❖ Impact strategic planning in proxy fights.
- ❖ Impose new timing requirements on issuers and dissidents.
- ❖ Potentially increase the overall number of proxy fights and threatened proxy fights.
- ❖ Potentially increase the number of settlements, since some issuers may be wary of waging fights that expose the "weakest" incumbent directors.
- ❖ Fundamentally change how proxy fights are run.

¹ Non-exempt solicitations (including proxy fights) are subject to the SEC proxy rules. On the other hand, there are exempt solicitations under Rule 14a-2. This rule sets out several exemptions from the proxy rules. For example, Rule 14a-2(b) exempts from the proxy rules, other than the anti-fraud requirements of Rule 14a-9, solicitations by certain persons not seeking proxy authority and solicitations of ten or fewer stockholders.

Overview

Under the new rules, a dissident could do a “13F end run” by, in effect, having the issuer do their mailing for them. This could increase the number of proxy fights as gadflies and shareholder proposal proponents may use this method to promote their causes.

A universal ballot can be used in vote-no or vote-yes campaigns, not just proxy fights. The new rules extend beyond contested elections for directors and would allow for dissidents soliciting in favor or against a proposal (but not its director nominees) to include some or all the registrant’s nominees on its proxy card. This also could lead to an increase in the number of proxy fights or threatened fights.

The “short slate” rule that allowed a dissident that was not running a full slate to “round out” its slate by voting for some of the issuer’s nominees has been eliminated. Since the new UPC rules allow for a shareholder to vote for a full slate of nominees on either universal proxy card, there is no longer a need for the short slate rule.

There are no minimum ownership or holding period requirements as there are under the shareholder proposal and proxy access rules.

The rules impose new deadlines:

- ❖ Dissidents must, in most cases, provide issuers notice of its nominees 60 days before the anniversary of the prior year’s annual shareholder meeting.
- ❖ Issuers must notify the dissident of the names of its director nominees at least 50 calendar days before the anniversary date of the prior year’s annual shareholders meeting.
- ❖ Dissidents must file a definitive proxy statement with the SEC by the later of 25 days before the meeting date or 5 days after the date that the registrant files its definitive proxy.

In its notice to the issuer, a dissident must include a statement that intends to solicit at least 67% of the voting power of shares entitled to vote on the election of directors.

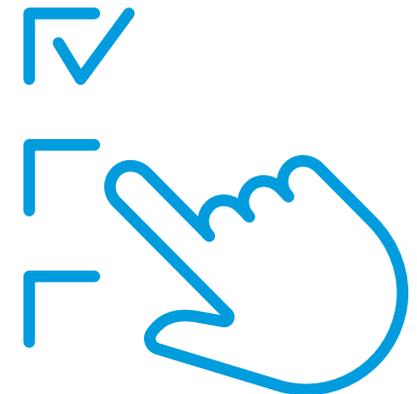
Issuers would be well advised to have their law firm review and perhaps revise their advance notice bylaws because of the new universal proxy rules; especially as it pertains to the 67% solicitation threshold requirements for a dissident.

Depending on their bylaws, issuers may want to consider adding additional disclosure to their proxy statement regarding 14a- 19.

The SEC has also adopted rule amendments that will apply to all director elections, not just contested meetings, in that the new rules require disclosure by companies regarding advance notice deadlines required under the rules and disclosure regarding the effect of for, against, and withhold votes in the election of directors.

Both ISS and Glass Lewis have praised the adoption of the new rules and indicated that they do not expect the new rules will substantially change their overall approach to evaluating proxy fights; though they do expect there will be greater scrutiny on the skills and qualifications of individual directors and the board’s will be “less able to shield their weakest contributors.”

A detailed overview of the changes and commentary on the changes follows.



The universal proxy would be required in non-exempt solicitations

Under the new rules, in all non-exempt director fights, the universal proxy must include the names of both the company and dissident nominees; there is no option.²

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- ❖ The universal proxy will change the dynamics of a proxy fight; rather than slate vs. slate, there will be a more granular focus on individual
- ❖ One consequence of the mandatory nature of the new rule is that this could force an issuer that has received nominations to put the dissident nominees on its card, even before the dissident mails proxy material. This takes away a timing advantage that is available under the current rules where the side that mails first has a first-starter advantage and can solicit proxies for a time without the other side's proxy in distribution.

The new rules guide the formatting and presentation of the dueling slates on a proxy card and in the proxy statement

To ensure that “universal proxy cards clearly and fairly present information”, the new rules include requirements regarding the format of the proxy card and disclosure in the proxy statements of the issuer and the dissident.

As to the proxy card:

- ❖ Each side's proxy card in a contested director election must include the names of all nominees of both the dissident and registrant and the nominees of certain shareholders (i.e., proxy access nominees).
- ❖ There would need to be a clear distinction between the issuer's nominees and the dissident's nominees.
- ❖ The nominees would need to be listed in alphabetical order by the last name on the proxy card.
- ❖ The same font type, style and size would be required for all nominees.
- ❖ The maximum number of nominees which shareholders can vote on would need to be prominently displayed.
- ❖ The proxy card would also need to disclose the treatment of a proxy that votes for too many or too few nominees. The card must also disclose how a card will be voted if the card is signed but unmarked.
- ❖ If both parties have proposed a full slate of nominees, the rules state that a proxy card can provide for boxes that would allow a shareholder to vote for all dissident nominees as a group or all registrant nominees as a group.
- ❖ The SEC is not proposing where the groups of nominees should be placed.

² The amendments do not apply to investment companies registered under Section 8 of the Investment Company Act of 1940 or business development companies as defined by Section 2(a)(48) of the Investment Company Act of 1940 (“BDCs,” and together with registered investment companies, “funds”).

As to the proxy statement:

- ❖ The rules only require that the issuer include the name of the dissident nominees on its proxy card, not in the issuer's proxy statement
- ❖ There would need to be disclosure in the proxy statement to refer shareholders to the other side's proxy for information on its nominees and tell shareholders that they can access additional information on the SEC's website.
- ❖ Both the issuer and the dissident would need to disclose how they intend to treat proxy authority granted for the other party's nominees if that other party abandons its solicitation or does not comply with Rule 14a-19.

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- ❖ The design and setup of the proxy card will be very important to make sure shareholders are not confused and vote incorrectly.
- ❖ The new requirements to disclose the effect of voting for too many or too few nominees and listing two slates of nominees will make it a challenge to get all required disclosure on the proxy card.
- ❖ With regard to Broadridge and Mediant, the use of custom voting instruction forms will increase, as will the lead time before mailings.
- ❖ Issuers will need to contemplate additional voluntary disclosure in the proxy statement to make sure shareholders are not confused and that there is clear and easy-to-understand disclosure that the issuer does not endorse the dissident nominees

The short slate rule is being eliminated³

The short slate rule allowed a dissident that was not running a full slate to "round out" its slate by voting for some of the issuer's nominees and thus allow shareholders to vote for a full slate of nominees even if the dissident was soliciting less than a full slate. Since the new UPC rules allow for a shareholder to vote for a full slate of nominees on either universal proxy card, there is no longer a need for the short slate rule.

TAKEAWAYS

- ❖ This may result in some unintended consequences since the dissident can no longer directly target specific management nominees. Under the old short-slate rule, the dissident could tell shareholders which directors they were not voting for (since the bona fide nominee rule did not allow the dissident to name who they are voting for). Thus, shareholders knew who the dissident was voting for by looking at the issuer's proxy statement. If the shareholder agreed with the dissident, they could just sign the dissident's proxy and not have to check individual boxes.
- ❖ Under the new rules, a dissident does not have the same control over which issuer nominees get elected. While the dissident could make an argument in its proxy statement for which issuer nominees' shareholders should not vote for, the dissident has less control over the outcome.

³ The short slate rule remains available for investment companies and business development companies but is no longer available for director election contests involving operating companies evaluating proxy fights

ISS and Glass Lewis weigh in

Both ISS and Glass Lewis have weighed in on the implications of the new UPC rules. Both applauded the new rules (not a surprise since they have been long-term proponents of the UPC).

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- ❖ ISS has stated that “The indisputable fact about the universal proxy card (UPC) is that it is a far superior way for shareholders to exercise their voting franchise than the two-card system...”. While less effusive in its praise, Glass Lewis has said it “generally supports the use of a universal proxy card due to the enhanced flexibility it provides investors when deciding whether to support management and/or dissident nominees in a contested director election...”
- ❖ For its part, ISS will continue to use its two-prong framework for proxy fights, i.e., Is there a case for change? And if so, how much change? But ISS notes that now that the second prong of the ISS framework – “How much change?” – will require a greater degree of analysis since shareholders will have the ability to adjust board composition more precisely. In particular, when an activist seeks a change in board control, it may necessitate that ISS and institutional shareholders have far more engagement with each side – and possibly with each nominee, both board or dissident – than had been necessary in the two-card era.
- ❖ ISS also says that the “most relevant change for shareholders is that UPCs enable addition by subtraction.” ISS notes that shareholders will no longer “run the risk of unintentionally unseating a good director when supporting a necessary dissident nominee.” And that boards may find that under the UPC system, “they will be far less able to shield their weakest contributors.”
- ❖ As for Glass Lewis, they say that under the UPC system, the hurdles for activists in a proxy contest will not be lower and that for GL to support a dissident nominee they will “still require the activist to make a compelling case for change and to nominate qualified, unconflicted director candidates who seem better suited to address deficiencies or to facilitate a superior outcome for shareholders.”
- ❖ But Glass Lewis notes that the new rules could potentially make all incumbent directors on a board more vulnerable for replacement and that all incumbent directors will potentially need to be deeply involved in the situation and engaging with shareholders.

The new rules impose new advance notice and disclosure requirements on both the dissident and the issuer

New rule 14a-19 imposes new advance notice requirements that apply to both the company and the dissident.

- ❖ No later than 60 calendar days prior to the anniversary of the previous year’s annual meeting date a dissident would be required to notify the issuer of its intent to solicit proxies in support of director nominees, the names of the nominees (but no biographical information on the nominees) and a statement that it intends to comply with minimum 67% solicitation threshold.⁴

- There is no requirement that the dissident file a notice with the SEC or make the notice publicly available.
- An issuer that has received the 60-day notice from a dissident would have to reciprocate by providing the dissident with the names of its nominees 50 calendar days prior to the anniversary of the previous year's annual meeting date.
- ❖ An issuer that has received the 60-day notice from a dissident would have to reciprocate by providing the dissident with the names of its nominees 50 calendar days prior to the anniversary of the previous year's annual meeting date.
 - The notice requirement requires both the dissident and the issuer to "promptly notify" the other side of any changes in their nominees.
- ❖ A dissident would have to file definitive proxy material with the SEC no later than 25 calendar days prior to the annual meeting date, or five days after the issuer files its definitive proxy statement if the issuer files its definitive less than 30 calendar days before the meeting date.
 - If a dissident fails to meet the 25-day deadline, the company could issue a new non-universal proxy card including only the names of the company's nominees.
- ❖ There are no advance filing deadlines for issuers because the SEC states that registrants have an incentive to file a proxy statement and card early to allow sufficient time to solicit.

TAKEAWAYS

- ❖ Under the new rules, not only is there to be a universal proxy, but there is also be a universal 60 calendar day advance notice provision. In some cases, this will allow issuers more time than they would otherwise have had and takes away the possibility of a "sneak attack" by a dissident less than 60 days prior to the meeting.
- ❖ Considering the new advance notice requirements, companies would be well advised to have their law firm review and perhaps revise their advance notice bylaws because of the new universal proxy rules.
- ❖ Companies should also ensure that their proxy statement clearly states the need for a dissident shareholder to comply with the additional requirements of Rule 14a-19(b), whether or not those requirements are stated in the company's advance notice bylaws.
- ❖ Recent guidance from the SEC – <https://www.sec.gov/corpfin/proxy-rules-schedules-14a-14c-cdi> - notes that if a registrant's advance notice bylaw provision requires earlier notice than 60 calendar days under Rule 14a-19(b)(1), then the registrant disclosing only the earlier advance notice bylaw deadline would satisfy new Rule 14a-5(e)(4) which requires that the proxy statement disclose the deadline for timely notice of dissident director nominees.
- ❖ The recent guidance also noted that if a registrant's advance notice bylaw provision "does not require the same information as that required by Rule 14a-19(b), then the registrant's proxy statement must clearly state the need for a dissident shareholder to comply with the additional requirements of Rule 14a-19(b)."
- ❖ Since the new rules require a dissident to file a definitive proxy statement with the SEC days before the 25 days before the meeting, a dissident would be well served to file preliminary at least two weeks before the deadline to allow time for review and clearance by the SEC, and the dissident might also be well served by not putting anything in its preliminary proxy that could hold up clearance.

⁴ If the date of the meeting has changed by more than 30 calendar days from the previous year, the new rules require that the dissident provide notice by the later of 60 calendar days prior to the date of the annual meeting or the tenth calendar day following the day on which public announcement of the date of the annual meeting is first made by the issuer.

A dissident is required to solicit at least 67% of the voting power, 13F end runs

The new rules require that a dissident group commit in its notice to the issuer or its proxy statement that it will solicit at least 67% of the outstanding shares. This threshold is what the capitalizing on the universal ballot without undertaking a robust solicitation.

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- ❖ While a 67% requirement appears to be substantial, a dissident could comply with the minimum requirement relatively inexpensively by doing a Notice & Access mailing to shareholders above a certain share range to meet the 67% threshold.
- ❖ Further, a dissident could do a “13F end run” by, in effect, having the issuer do their mailing for them. Here’s how it could work
 - The new rules merely require that the dissident state in its notice to the company or in its proxy material that it will solicit 67% of the outstanding shares.
 - But the rules do not define “solicit”.
 - The new rules do not require a “special mechanism” to ensure compliance with the 67% requirement, such as providing the issuer with a statement from a proxy solicitor or other person with knowledge concerning compliance with the minimum solicitation requirement.
 - Nor do the rules specify a “specific method of furnishing proxy material”.
 - So, in theory, a dissident could use a 13F list to simply mail to the institutions holding at least 67% of the outstanding shares and comply with the minimum solicitation requirement. This would allow the dissident to avoid the expense of mailing to hundreds or thousands of shareholders and let management do their work for them.
 - Since management must mail to all shareholders, a votable proxy card with the dissident’s nominees would get in the hands of all shareholders that can vote for some or all of the dissident nominees.
 - The dissident could set up website and use social media to get out their message and tell shareholders how to vote, using management’s card.

No minimum ownership or holding period requirement

Unlike the 14a-8 shareholder proposal rules and the Proxy Access rules, there are no ownership or holding period requirements under the new rules. The SEC states that “The purpose of requiring a universal proxy is to allow shareholders to exercise their right to vote for directors in the same manner as they could vote through in-person attendance at a shareholder meeting.” And the SEC states that “conditioning a universal proxy mandate on a minimum ownership threshold or holding period, as certain commenters advocated, would be contrary to this purpose.”

TAKEAWAYS

- ❖ The lack of minimum ownership and holding period requirements has prompted some critics to refer to the universal proxy as “Proxy Access on steroids”. While according to FactSet there have only been eight Proxy Access campaigns to date, it will be interesting to see if the lack of ownership and holding requirements will prove this to be true. It certainly bears watching.
- ❖ Of course, it should be noted that there are no minimum ownership or holding periods under current proxy rules (unless there are issuer-specific requirements).

The universal ballot rules apply to vote no campaigns and solicitations without a competing slate

A universal ballot can be used in vote-no or vote-yes campaigns, not just proxy fights. The new rules extend beyond contested elections for directors and would allow for dissidents soliciting in favor or against a proposal (but not its own director nominees) to include some or all the registrant's nominees on its proxy card.

TAKEAWAYS

- ❖ For those running vote-no campaigns or campaigns in support of a shareholder proposal, the new rules potentially put a big arrow in the quiver of disgruntled shareholders. The new rules would allow a disgruntled shareholder to include some or all the issuer's nominees on its proxy card, meaning the issuer would be fighting a battle on two fronts. This could lead to increased support for proponents, would increase the pressure on issuers, and potentially take these campaigns to a new level

Disclosure of director election voting standards and voting options for all director elections – not just contested elections

To address what it calls “concerns that some company proxy statements had ambiguities and inaccuracies in their disclosures about voting standards in director elections” the SEC is mandating changes to disclosure on the proxy card and in proxy statements. The new rules mandate that proxy cards include an “against” voting option in lieu of a withhold option when applicable state laws give effect to a vote against.

In majority voting situations the new rules would require proxy cards to give shareholders the ability to “abstain”. Finally, the rules require disclosure in the proxy statement about the effect of a “withhold” vote in an election.

In order to allow for the use of universal proxies, the bona fide nominee rule has been changed

The rule (14a-4(c)(5)) that is at the crux of things is known as the “bona fide nominee” rule; which requires a nominee to agree to be named in the proxy statement (that is the proxy statement of the issuer or the proxy statement of the dissident, but not both). This rule has been changed in a simple and elegant way by substituting the word “a” for “the”. This will allow for a nominee that has consented to being named in a proxy statement (whether issuer or dissident) to be named on both proxy cards.

People



Data



Process



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