

SEC Requires Universal Proxy Cards for Contested Director Elections, Amends Other Proxy Disclosure Requirements for All Director Elections

by Cam C. Hoang

As expected, the SEC has adopted final rules requiring the use of universal proxy cards in shareholder meetings involving non-exempt contested director elections held after August 31, 2022. In addition, certain amendments will impact proxy disclosure for all director elections, contested or uncontested.

Universal Proxy Card Requirement

Currently, shareholders voting by proxy in contested director elections are unable to vote for a combination of director nominees from competing slates on a single ballot. Under new proxy Rule 14a-19, both management and dissident shareholders presenting their own candidates will distribute universal proxy cards that include all director nominees, including any proxy access nominees. Universal proxy cards will provide shareholders the ability to vote by proxy for their preferred combination of board candidates, as they would if they were voting in person.

The rules require management and dissident shareholders presenting their own candidates to provide each other with notice of the names of their director nominees. Shareholder dissidents generally must provide companies with notice of their intent to solicit proxies and to provide the names of their nominees no later than 60 calendar days before the anniversary of the previous year's annual meeting. Companies generally must notify dissident shareholders of the names of management nominees no later than 50 calendar days before the anniversary of the previous year's annual meeting.

The rules establish a filing deadline for dissident shareholder proxy statements, so that shareholders receive information on dissident candidates in a timely manner. The dissident shareholder must file a proxy statement by the later of 25 calendar days prior to the meeting date, or five calendar days after the date that the company files its definitive proxy statement. Dissident shareholders must fulfill a minimum solicitation requirement of 67% of the voting power of shares entitled to vote in the election.

In her dissenting statement, SEC Commissioner Hester Peirce commented that the price

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of entry onto the company's proxy card under this universal proxy rule is still too low, and she would have favored a less permissive threshold focused on shareholder accounts versus voting power and additional ownership requirements.

The rules also prescribe presentation and formatting requirements for universal proxy cards.

Management and dissident shareholders involved in a contested election should be aware of additional proxy disclosure requirements under amended Schedule 14A. For example, under revised Item 7(h), each proxy statement will be required to include a statement directing shareholders to refer to any other soliciting person's proxy statement for information required with regard to such person's nominees. Item 21 requires that when applicable, the soliciting person should disclose how it intends to treat proxy authority granted in favor of any other soliciting person's nominees if such other soliciting person abandons its solicitation or fails to comply with Rule 14a-19.

The universal proxy card requirement does not apply to registered investment companies, business development companies or consent solicitations.

Amended Proxy Disclosure for All Director Elections

The rules establish new proxy disclosure requirements for all director elections, including uncontested elections.

- The proxy card must include an "against" voting option when applicable state law gives effect to a vote "against" a nominee. Shareholders must have the ability to "abstain" in an election where a majority voting standard is in effect.
- Amended Item 21 of Schedule 14A requires disclosure regarding the effect of a "withhold" vote in an election.
- Amended Rule 14a-5 requires companies to disclose the deadline for dissident shareholders to provide notice of a solicitation of proxies in support of director nominees other than management nominees pursuant to Rule 14a-19 for the next annual meeting. Generally, the notice must be postmarked or transmitted electronically no later than 60 calendar days prior to the anniversary of the previous year's annual meeting date.

Effective Date

The universal proxy rules will apply to all shareholder meetings involving non-exempt contested director elections held after August 31, 2022. The other rule amendments will be applicable to all shareholder meetings involving director elections held after August 31, 2022.