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SEC Adopts Universal Proxy Cards – Giving Activists Access to a Company’s Proxy Card With Relatively Low Barriers to Entry

By Adé Heyliger

On November 17, 2021 the U.S. Securities and Exchange Commission (SEC) [adopted proxy rule amendments](#) that require, in a contested election of directors, the public company and the shareholder activist to each use a “universal” proxy card – i.e., a card that includes the names of both parties’ nominees. Activist shareholders will now have easier access to a company’s proxy card without the minimum ownership requirements or guardrails on the types of proposals that they can put forth required by other means of access – e.g., proxy access and the Rule 14a-8 shareholder proposal system, respectively.

Under the adopted rules, shareholders will be able to vote by proxy for a mix of company and dissident nominees of their choosing (i.e., “splitting the ticket”). Currently, split-ticket voting can be accomplished only by attending the shareholder meeting and voting by ballot. The rule changes are an attempt by the SEC to allow a shareholder voting by proxy in a contested election to have nearly the same choices that would be available if voting in person at a meeting. The final rule amendments regarding universal proxy will apply to all shareholder meetings involving contested director elections held after August 31, 2022, except those involving registered investment companies and business development companies.

The final rules also amend the form of proxy and disclosure requirements relating to voting options and standards that would apply to all director elections, contested or not. These rule amendments are also applicable to all shareholder meetings involving director elections held after August 31, 2022.

These new rules are expected to substantially alter the game theory component of contested elections and shift the incentive structure for settlement sharply in the activists’ favor. Companies should begin to strategize now for how the new contested battlefield may look.

Background

In 2016, the SEC proposed rule amendments to mandate the use of universal proxy cards in contested director elections (the “Proposed Rules”). In 2021, the SEC reopened the comment period to permit commenters to further analyze and comment upon the Proposed Rules in light of developments since the Proposed Rules were published. The SEC has now adopted the Proposed Rules substantially as proposed.

Amendments to the “Bona Fide Nominee” Rule and Elimination of the Short Slate Rule

The federal proxy rules permit only “bona fide nominees” to be named in a proxy statement. The current rule (Exchange Act Rule 14a-4(d)) defines a “bona fide nominee” as a nominee who has consented to being named in the proxy statement and to serve if elected.” As a result, in a contested election, one soliciting party is prohibited from including the other party’s nominees on its proxy card unless the other party’s nominees consent to being named in the first party’s proxy statement and to serve if elected. In practice, such consent is rarely if ever given. Instead, the company and dissidents produce separate slates, and shareholders must choose between voting on either one slate or the other. In order to allow for naming the other side’s nominees on a universal proxy card, the SEC expanded the consent requirement for a bona fide nominee determination from requiring a nominee to consent to being named in “the” proxy statement of the party listing the nominee on its card to include consent to being named in “a” proxy statement – i.e., whether that of the company or the dissident.

The final rules also eliminate the short slate rule, as it becomes unnecessary with a universal proxy requirement and the above revisions to the bona fide nominee rule.

Notice Requirements and Deadlines

The rule amendments create deadlines for the company and dissidents to notify each other of their candidates – no later than 60 calendar days before the anniversary of the prior year’s meeting for dissident candidates, and 50 calendar days for the board’s candidates. (If the registrant 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, dissidents are required to provide notice by the later of 60 calendar days prior to the annual meeting date or the tenth calendar day following the first public announcement of the meeting date, and the company is required to provide its notice no later than 50 calendar days prior to the meeting date). Each side must promptly notify the other of any change to its nominees.

Dissidents are required to file their definitive proxy statement with the SEC by the later of 25 calendar days prior to the meeting date or five days after the company files its proxy statement. Because shareholders may not otherwise have access to information about the dissidents’ nominees when they receive a universal proxy card from the company, the deadlines imposed on dissidents are intended to ensure that shareholders who receive a universal proxy will have access to information about all nominees and sufficient time prior to the meeting to rescind an earlier submitted proxy if desired.

Minimum Solicitation Requirements for Dissidents

Dissidents would also be responsible for disseminating information about their nominees to shareholders and be required to solicit the holders of shares representing at least 67% of voting power entitled to vote on the election of directors (an increase from the minimum solicitation requirement included in the Proposed Rules of at least a majority of the voting power entitled to vote).

Access to Information About All Nominees

Although each party in a contested election would be required to provide in its soliciting materials detailed disclosures about its own nominees only, each would be required to direct readers to the other party’s proxy statement (via the SEC’s website) for information about the other party’s nominees.

Changes to the Proxy Card

To help ensure that universal proxy cards clearly and fairly present information, the final rules include the following requirements:

- The proxy card must set forth the names of all duly nominated director candidates;
- The proxy card must provide a means for shareholders to grant authority to vote for the nominees set forth;
- The proxy card must clearly distinguish between company nominees, dissident nominees and any proxy access nominees;
- Within each group of nominees, the nominees must be listed in alphabetical order by last name on the proxy card;
- The same font type, style and size must be used to present all nominees on the proxy card;
- The proxy card must prominently disclose the maximum number of nominees for which authority to vote can be granted; and
- The proxy card must prominently disclose the treatment and effect of a proxy executed in a manner that grants authority to vote for more nominees than the number of directors being elected, in a manner that grants authority to vote for fewer nominees than the number of directors being elected, or in a manner that does not grant authority to vote with respect to any nominees.

In addition, where both parties have presented a full slate and there are no proxy access nominees, the adopted rules would allow (but not require) the universal proxy card to provide the ability to vote for all dissident nominees as a group and all company nominees as a group. The final rules would also not prohibit the current practice of distinguishing between company and dissident proxy cards by distinctive color (e.g., white card and gold card); rather, each side can design its card as it chooses, subject to the requirements and parameters noted above.

Certain Amendments Applicable in *All* Director Elections

Finally, the SEC adopted amendments to the form of proxy and disclosure requirements relating to voting options and standards that would apply to all director elections, contested or not. This comes in response to concerns regarding ambiguous and inaccurate disclosures in some proxy statements. Under the final rules, if state law gives legal effect to votes cast against a nominee, the form of proxy must include the options to vote “against” the nominee and to “abstain” from voting in a director election governed by a majority voting standard. Disclosure would also be required in the proxy statement about the treatment and effect of a “withhold” vote in a director election.

Possible Future Implications

Nominal contests and “freeriding”

The impact of universal proxy cards, and whether the rule amendments will increase the number of contested elections, may remain unclear for some time. The SEC acknowledged that mandatory universal proxy cards could lead to an increase in the number and effectiveness of “nominal” proxy contests, in which the dissidents incur little more than the basic costs required to engage in a contest by refraining from material solicitation efforts. There’s an incentive for “freeriding” by dissidents who want to take advantage of the benefits of the universal proxy requirement, but do not intend to undertake meaningful solicitation efforts. Though the increased minimum solicitation threshold was adopted in part to address this concern, this may be too easy of a hurdle to truly serve as an effective deterrent, a concern raised by SEC Commissioner Peirce in the [Dissenting Statement](#).

Alternative agendas

The SEC also seems to concede the point that the universal proxy rules could encourage dissidents to pursue nominal contests for reasons other than gaining board seats. In particular, the SEC notes that introducing the names of alternative candidates onto a company's proxy card could attract attention to a dissident and its agenda from shareholders, other market participants, proxy advisory services, analysts and journalists seeking to understand why these candidates were put forth and whether they deserve consideration. Such attention could be used by the dissident to publicize a desired change or a particular issue, or to encourage management to engage with the dissident.

Easy access to the company's proxy card

Further, the dissident and its cause would not need to meet eligibility requirements applicable to other alternatives that would give the dissident access to the company's proxy materials, such as proxy access (e.g., owning 3% of shares for 3 years) or the Rule 14a-8 shareholder proposal process (e.g., submitting proposals on certain topics that companies can properly exclude from their proxy materials). It may now be possible for a short-term activist with a small shareholding to put forth (or threaten to do so) a candidate and force the company to negotiate on a vanity cause wholly unrelated to the business, as cautioned in the Dissenting Statement.

Split-ticket voting

The SEC further notes that the mandated use of universal proxy cards may result in additional shareholders submitting split-ticket votes, with dissident nominees receiving an increase in voting support, even without being directly solicited by the dissident. Vote recommendations supporting split slates from proxy advisors, such as ISS and Glass Lewis, who have expressed support for universal ballots will further increase split-ticket submissions. The actual or perceived potential for increased split-ticket voting, coupled with the relatively low barriers to entry noted above, arguably swings the pendulum on the incentive structure for settlement in the activists' favor.

Next Steps

Potential future impacts of mandating universal proxy cards aside, there are a few matters companies should consider now. First, as noted above, the universal proxy rules require a dissident to provide notice of its nominees no later than 60 calendar days before the anniversary of the prior year's meeting. This obligation to comply with the universal proxy notice requirement is in addition to a dissident's obligation to comply with any applicable advance notice provision the company may have in place. Therefore, companies without an advance notice bylaw, or with a bylaw that provides for a notice period of 60 days or less in advance of the anniversary of the meeting date, should consider adopting a more typical advance notice bylaw provision requiring notice to be delivered no earlier than 120 days and no later than 90 days prior to the first anniversary of the prior year's annual meeting.

Second, the requirement to provide notice of the board's candidates to the dissident 50 calendar days prior to the anniversary of the prior year's meeting will be a new obligation for companies in contested elections, and may require some companies to finalize their nominees earlier than they would have otherwise. Companies should review their shareholder meeting preparation calendars and adjust accordingly.

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Please contact any member of Weil’s Public Company Advisory Group or your regular contact at Weil, Gotshal & Manges LLP:

Howard B. Dicker	View Bio	howard.dicker@weil.com	+1 212 310 8858
Catherine T. Dixon	View Bio	cathy.dixon@weil.com	+1 202 682 7147
Lyuba Goltser	View Bio	lyuba.goltser@weil.com	+1 212 310 8048
Adé K. Heyliger	View Bio	ade.heylinger@weil.com	+1 202 682 7095
P.J. Himelfarb	View Bio	pj.himelfarb@weil.com	+1 202 682 7208
Alicia Alterbaum	View Bio	alicia.alterbaum@weil.com	+1 212 310 8207
Kaitlin Descovich	View Bio	kaitlin.descovich@weil.com	+1 202 682 7154
Shira Barron	View Bio	shira.barron@weil.com	+1 212 310 8336
Michael Foland	View Bio	michael.foland@weil.com	+1 202 682 7046
Bianca Lazar	View Bio	bianca.lazar@weil.com	+1 212 310 8748

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