

SEC Proposes Universal Ballots in Contested Elections

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On October 26, 2016, in a split vote, the SEC proposed the mandated use of universal ballots in contested director elections at annual meetings. The proposed rules were controversial even before they were proposed – the House of Representatives approved a spending bill this summer that included a provision prohibiting the SEC from proposing or implementing the use of the universal ballots in contested elections. We expect the comments on the proposed rule to be voluminous and varied. The press release and fact sheet on the proposed rules can be found [here](#), and the proposed rule release can be found [here](#).

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What is a universal ballot or universal proxy card?

It is a single proxy card that includes the names of both management and dissident nominees. It would allow shareholders to vote for any combination of director nominees using one proxy card. Under current SEC rules, in a contested election where the dissident prepares separate proxy solicitation materials, the shareholder is effectively limited to voting by proxy by using either the dissident's proxy card listing the dissident's nominees or the company's proxy card listing the company's nominees.

What is the SEC proposing?

The proposed rules would require:

- Use of a universal ballot in most non-exempt, contested elections for directors
- Proxy contestants to notify each other of their respective director candidates within specified time periods
 - Names of dissident nominees must be provided to the company no later than 60 calendar days prior to the anniversary of the previous year's annual meeting date
 - Names of company nominees must be provided to the dissident no later than 50 calendar days prior to the anniversary of the previous year's annual meeting date

- Dissidents to solicit shareholders holding not less than a majority of the shares entitled to vote on the election of directors
- Dissidents to file their definitive proxy statement with the SEC by the later of (i) 25 calendar days prior to the meeting date or (ii) five calendar days after the company files its definitive proxy statement
- The company and the dissident to refer shareholders to the other's proxy statement for information about that party's nominees
- Universal ballots to be presented and formatted to ensure fairness
- For all elections of directors, proxy cards to include (i) an "against" voting option, when there is a legal effect to a vote *against* a nominee and (ii) an "abstain" voting option in a director election governed by a majority voting standard

Why does the SEC want to require use of a universal ballot?

Most shareholders vote by proxy. The SEC's stated goal is to allow all shareholders to have the same voting rights by proxy as they would have if they attended the shareholder meeting in person. If a shareholder attends the meeting in person, the shareholder has the ability to cast a written ballot for nominees from both the company slate and the dissident slate, up to the specified number of board seats up for election.

Why can't investors split their vote using two different proxy cards?

When voting by proxy, current SEC rules provide that the last-dated proxy is valid and revokes all prior proxies. Therefore, if a shareholder completed a proxy card for both the company and the dissident, only the most recent proxy would be valid.

Why don't dissidents simply add company nominees to their proxy card now?

A nominee cannot be listed on a proxy card without his or her consent because of the SEC's "bona fide nominee" rule. And, in contested elections, it is unlikely that a nominee will give his or her consent to be included on the proxy card of the opposing party.

The issues created by the "bona fide nominee" rule led the SEC to adopt the "short slate" rule in 1992, which permitted dissidents to seek proxies to vote for (i) its nominees, which had to consist of a minority of the board, and (ii) some of the company's nominees named in the company's proxy statement. However, the "short slate" rule is cumbersome and rarely used by dissidents. Because company nominees could not be listed on the dissident proxy card without their consent, the proxy card states that it will vote for all of the company nominees, other than those company nominees specified by the dissident. Further, the dissident proxy card allows the shareholder to withhold authority with respect to any other company nominee by writing the name of that nominee on the proxy card.

Under the proposed rules, the "short slate" rule would be eliminated and the "bona fide nominee" definition would be amended to include on the universal ballot a person who agrees to be named in *any* proxy statement.

Why are dissidents required to solicit the holders of a majority of the shares entitled to vote?

Essentially, this is to help weed out gadfly activists and dissidents who would prefer to “ride the coattails” of the company’s solicitation efforts and avoid the time and expense of conducting their own solicitation.

Didn’t proxy access solve this issue?

Proxy access bylaw provisions give qualifying shareholders the right to nominate director candidates and have those nominees included in the company’s proxy statement and listed on the company’s proxy card. So, the universal proxy card is not necessary where the only nominees were company nominees or proxy access nominees. However, most proxy access bylaw provisions limit the number of proxy access nominees to 20% of the board and limit the shareholders eligible to make nominations to those who have held at 3% of the company’s outstanding shares for at least three years. So, if a dissident desired to solicit votes to elect more directors than permitted by proxy access, if a dissident did not meet the ownership thresholds for proxy access, or if a dissident wanted to submit separate proxy solicitation materials to make its case to shareholders, the dissident would need to launch a proxy contest rather than rely on proxy access.

Who is entitled to mail the universal proxy card and what would it look like?

Each party is entitled to mail its own universal proxy card containing the full list of both parties’ nominees. This allows each party to design and distribute its own proxy card and avoids one party controlling the discretionary authority for those matters for which a choice is not specified by the shareholder.

As proposed, the universal proxy card would require the following:

- It must clearly distinguish between company nominees, dissident nominees, and any proxy access nominees;
- Within each group, the nominees must be listed in alphabetical order by last name;
- The same font type, style and size must be used to present all nominees;
- It must prominently disclose the maximum number of nominees for which authority to vote can be granted;
- It 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 being elected,
 - fewer nominees than the number of directors being elected, or
 - none of the nominees;
- The ability to “vote for all” members of a group would be permitted only if the company and dissident each propose full slates, but is not permitted if any proxy access nominees are on the proxy card.

What are the ramifications of using universal proxy cards?

While the actual impact of mandated universal proxy cards is difficult to predict, some concerns include:

- Fewer qualified persons being willing to serve if a board seat is harder to retain, since loss of an election could be viewed as harmful to the nominee's reputation.
- Confusion among shareholders, no slates are voted into office creating a mix of directors that neither the company nor dissident intended.
- While it is far too early to tell, some observers believe that the universal proxy card could lead to more proxy contests with attendant increases in costs to the company (and its shareholders).
- Boards made up of company and dissident nominees ("mixed boards") may be less effective due to the possibility for greater internal conflict or loss of collegiality.

Depending on the slates proposed and elected, mixed boards could also however, lead to greater board diversity and bring new perspectives to board deliberations that could increase board effectiveness.

Do the proposed rules regarding use of universal proxy cards apply to all reporting companies?

No. The proposed rules would not apply to proxy contests involving foreign private issuers, companies with reporting obligations only under Section 15(d) of the U.S. Securities Exchange Act of 1934, registered investment companies or business development companies.

Why is the SEC proposing changes for proxy cards used in all director elections?

Directors are elected by a plurality vote standard, a majority vote standard or a plurality plus vote standard (where the nominee agrees to resign if the nominee receives more votes "withheld" than votes "for"). The SEC has been concerned about ambiguities and inaccuracies in proxy statements regarding the various voting standards in director elections. The proposed rules seek to clarify the voting options in the proxy card to better match the applicable standard.