



## New SEC Rules Require Universal Proxy Cards in Contested Elections for Corporate Boards

By: Thomas G. Voekler

**04.19.2023**

Beginning August 31, 2022, the Securities and Exchange Commission (SEC) began enforcing newly enacted rules governing the use of universal proxy cards in elections for board of directors. The new requirements apply to any non-exempt public company holding a shareholder meeting involving a director election.

In November 2021, the SEC adopted amendments to Schedule 14A under the Securities Exchange Act of 1934 requiring the use of a "universal proxy card" in all non-exempt director election contests, except those involving registered investment companies and business development companies.

The amendments, effective August 31, 2022, mandate that a universal proxy card must now list all director nominees presented by company management and shareholders in a director election contest. The new requirements will give shareholders the ability to vote by proxy for their preferred combination of board candidates, similar to those shareholders voting in person.

The amendments apply to all sides nominating and soliciting proxies for their candidates in a director election contest. These typically include the registrant and one or more dissidents who may nominate and solicit in support of director candidates.

### How the Proxy Voting Rules Have Changed

Prior to the changes, shareholders voting by proxy and those voting in person had different options for voting in a contested director election. Shareholders voting in person were able to select individual candidates from competing slates of nominees. In other words, they could pick and choose candidates from a management-backed slate, as well as candidates from a slate backed by dissident shareholders.

Shareholders voting by proxy, however, were unable to select individual candidates and could only vote for an entire slate of nominees.

The universal proxy card now gives proxy voters the same option as in-person voters. According to the SEC, the amendments allow shareholders voting by proxy to choose among director nominees in an election contest in a manner that more closely reflects the choice they could make by voting in person at a shareholder meeting.

The SEC's move is designed, in part, to help level the playing field for retail and smaller shareholders in board contests. Previously, larger shareholders had an advantage over smaller and retail shareholders in director elections because (1) they have greater resources to attend meetings in person and (2) they were able to take advantage of split-ticket voting.

### **Other Changes to the Rules**

The SEC's changes require the use of universal proxy cards in all non-exempt solicitations in connection with contested elections and mandate additional disclosure and voting options in all other director elections, whether contested or not. The amendments also:

- Revise the consent required of a bona fide nominee. The nominee now needs only to consent to be named in a proxy statement on either side of the contest.
- Eliminate the "short slate" rule. The new universal proxy rule has supplanted the short slate, which allowed dissidents to simultaneously solicit proxies for a minority of board seats and for company nominees who were not targeted by activists.
- Establish notice and filing deadlines for both registrants and dissidents to facilitate the preparation and dissemination of proxy materials under a mandatory universal proxy system.
- Prescribe formatting and presentation requirements for universal proxy cards to ensure information is presented clearly.

Commissioners also adopted amendments that apply to all director elections and require disclosure regarding the effect of a shareholder action to vote "against," "withhold" or "abstain" and require that the appropriate voting options be included on the proxy card.

### **Next Steps**

Working with their in-house and external counsel, boards and companies can take steps to prepare themselves for contested board elections. For example, boards and companies of non-exempt public companies may:

- Update corporate bylaws to ensure they align with the new universal proxy rules.
- Create an action plan to defend the company in the event of an activist shareholder effort.
- Educate board members and senior managers about the new rules and their potential impact.
- Conduct an analysis of the company's vulnerability to activist shareholders and act on those findings.
- Review the current makeup of the board of directors and make changes if necessary.

To learn more about universal proxy cards and how our firm can assist with compliance, as well as strategies for addressing activist shareholders, contact us for a consultation.

## **Related People**

- Thomas G. Voekler ? 804.420.6018 ? [tvoekler@williamsmullen.com](mailto:tvoekler@williamsmullen.com)

## **Related Services**

- Securities & Corporate Governance