

MEMO# 33906

November 18, 2021

SEC Adopts Final Rules on Universal Proxy Requirements

[33906]

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TO: ICI Members

Investment Company Directors SUBJECTS: Closed-End Funds

Compliance

Disclosure RE: SEC Adopts Final Rules on Universal Proxy Requirements

The Securities and Exchange Commission yesterday adopted amendments to its proxy rules that will require the use of a "universal proxy card" in contested director elections.[\[1\]](#) Importantly, as ICI strongly recommended, these universal proxy rules will apply only to non-exempt solicitations from operating companies and at this time will not apply to solicitations involving registered investment companies and business development companies (together, "funds").[\[2\]](#) In connection with the universal proxy card requirement, the Commission also amended its proxy rules to establish certain related minimum solicitation, notice and filing, and formatting and presentation requirements. In addition, the Commission adopted new disclosure requirements for all director elections, including those involving funds, related to voting standards and certain shareholder voting options when those options have legal effect under state law.

The rules will apply to all applicable shareholder meetings involving director elections held after August 31, 2022. We provide background and summarize key elements of the amendments, below.

I. Background

The Commission's current proxy rules do not require soliciting parties in a contested election—management and any dissident shareholders—to provide other shareholders with a universal proxy card containing the full slate of nominees. Shareholders voting by proxy may submit their votes on either the registrant's or the dissident's proxy card but generally cannot pick and choose from nominees on both cards. Shareholders voting in person at a meeting, however, may select among all of the duly nominated director candidates proposed for election and vote for any combination of those candidates.

In 2016, the Commission proposed rule amendments mandating the use of universal proxy cards in contested director elections to allow shareholders to vote by proxy in the same

manner as they could if they were to attend the shareholder meeting in person. Earlier this year, following years of inaction on the proposal, the Commission reopened the comment period for the proposed rules to permit further comments in light of developments since the initial 2016 proposal.

II. Key Elements of the Final Rules

Requirement for Universal Proxy Card. The amended rules require all participants in a non-exempt contested director election (other than those for funds) to use a universal proxy card that contains the names of both registrant and dissident nominees. The Commission stated that the purpose for requiring a universal proxy is to allow shareholders to exercise their right to vote for directors in the same manner as they could if they were to attend the shareholder meeting in person. In addition, the Commission noted that a key reason for the rule amendments was to enhance the ability of shareholders to fully exercise their right under state law to elect their preferred candidates by proxy.

Exclusion for Funds. The Commission determined not to subject funds to the universal proxy requirements at this time. In explaining its position, the Commission stated that it currently continues to consider any application of the rules to funds. It added that developments since 2016, along with various comments received have led them to conclude that further consideration of the potential application of the universal proxy rules to certain funds is warranted. It is important to note that Commissioner Peirce in her dissenting statement and Commissioner Roisman in his statement, both indicated their belief that the Commission should expand the rule to include funds.[\[3\]](#)

Minimum Solicitation Requirement. The amended rules require dissidents to solicit the holders of shares representing at least 67 percent of the voting power of the shares entitled to vote at the meeting. This minimum solicitation requirement is intended to ensure that dissidents still engage in the time and expense necessary for a meaningful independent solicitation effort to have their director nominees elected.

Procedural Requirements. The amended rules establish certain notice and filing requirements for both registrants and dissidents, which will:

- require dissidents to provide registrants 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.[\[4\]](#)
- require registrants to notify dissidents of the names of the registrants' nominees no later than 50 calendar days before the anniversary of the previous year's annual meeting.
- require dissidents to file their definitive proxy statement by the later of 25 calendar days before the shareholder meeting or five calendar days after the registrant files its definitive proxy statement.
- require each side in a proxy contest to refer shareholders to the other party's proxy statement for information about the other party's nominees and refer shareholders to the Commission's website to access the other side's proxy statement free of charge.

The notice requirements are intended to provide definitive dates by which the parties in a contested election will know that use of universal proxies has been triggered and to provide the parties with a definitive date by which they will receive the names of all nominees to compile a universal proxy card.

The dissident filing deadline is to ensure that shareholders who receive a universal proxy card will have access to information about all nominees sufficiently in advance of the meeting.

The statement providing information on how shareholders can access information about all nominees is intended to enable shareholders to access information about all nominees on a universal proxy card.

Presentation and Format of Universal Proxy Cards. The amended rules also establish presentation and formatting requirements for universal proxy cards, requiring them to:

- set forth the names of all duly nominated director candidates.
- provide a means for shareholders to grant authority to vote for the nominees set forth.
- clearly distinguish among registrant nominees, dissident nominees, and any proxy access nominees.
- list the nominees in alphabetical order by last name, within each group of nominees
- use the same font type, style, and size to present all nominees.
- prominently disclose the maximum number of nominees for which authority to vote can be granted.
- 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.

These requirements aim to ensure that each party's nominees are presented in a clear, neutral manner.

Additional Disclosures. In addition to the universal proxy card requirements, the Commission adopted amendments that will change the form of proxy card and proxy statement disclosure requirements that are applicable to all director elections, including those for funds. These amendments will:

- require proxy cards to include an "against" voting option in director elections when there is legal effect to such a vote.
- require that the proxy card provide shareholders with the ability to "abstain" in a director election where a majority voting standard applies.
- require proxy statement disclosure about the effect of a "withhold" vote in an election of directors.

These changes aim to address ambiguities and inaccuracies in disclosures about voting standards in director elections. They also aim to provide shareholders with a better understanding of the effect of their votes on the outcome of the elections.

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endnotes

[1] See Universal Proxy, Securities Exchange Act Release No. 93596 (Nov. 17, 2021), available at www.sec.gov/rules/final/2021/34-93596.pdf. A "universal proxy card" is a proxy card containing the names of all duly nominated director candidates presented for election by any party and for whom proxies are solicited.

[2] ICI submitted two comment letters on the rulemaking. See Letter from Susan M. Olson, General Counsel, Investment Company Institute, to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, dated June 7, 2021, available at www.ici.org/system/files/2021-06/33576a.pdf; Letter from Dorothy M. Donohue, Deputy General Counsel, Investment Company Institute, to Brent J. Fields, Secretary, Securities and Exchange Commission, dated December 19, 2016, available at www.ici.org/system/files/attachments/pdf/30489a.pdf (together "ICI Comment Letters") For a summary of each ICI Comment Letter, please see ICI Memorandum Nos. 33576 and 30489, available at www.ici.org/memo33576 and www.ici.org/memo30489.

[3] See SEC Commissioner Hester M. Peirce, Dissenting Statement on Universal Proxy (November 17, 2021) ("Universal proxy makes sense for both operating companies and investment companies."), available at www.sec.gov/news/statement/peirce-universal-proxy-20211117; SEC Commissioner Elad L. Roisman, Statement on Universal Proxy Rules (November 17, 2021) ("I believe we should have given greater consideration to having this rule apply to funds. I have heard no clear argument for why they should be treated differently than operating companies for these purposes. I hope that the Commission will take up this issue again in the near future and, if appropriate, expand the rule to include funds or explain why such an approach is unsuitable."), available at www.sec.gov/news/statement/roisman-universal-proxy-20211117. But see ICI Comment Letters, *supra* note 2 (providing several reasons why universal proxy requirements should not apply to funds).

[4] A dissident's obligation to comply with the notice requirement is in addition to its obligation to comply with any applicable advance notice provision in the registrant's governing documents.