

X. *Mandatory Universal Proxy*

A. Introduction

On November 17, 2021, the Securities and Exchange Commission (SEC) voted to amend the federal proxy rules to require the use of universal proxy cards in contested director elections.¹ These new universal proxy rules will be required for any contested director election held after August 31, 2022.² A shareholder's right to participate in the corporation's election of directors is both "a fundamental right under state corporate law" and crucial to ensuring a corporation's directors are directly accountable to its shareholders.³ Shareholders can exercise their right to vote in two ways.⁴ First, they have the option to attend the annual shareholder meeting in person and cast their vote.⁵ Alternatively, if they cannot, or do not want, to attend the meeting, they can vote by proxy.⁶ To vote by proxy, a shareholder must execute a written directive that designates who the proxy is and how they are to vote.⁷ Currently, notwithstanding the amended the federal proxy rules which will go into effect in August 2022, there are differences in how voting works in person versus by proxy.⁸ Most critically, shareholders

¹ Press Release, Securities and Exchange Commission, SEC Adopts New Rule for Universal Proxy Cards in Contested Director Elections (Nov. 17, 2021), <https://www.sec.gov/news/press-release/2021-235> [<https://perma.cc/MR5G-NWQ2>] (announcing SEC amendments regarding shareholder proxy voting).

² *Id.* (describing scenarios in which the amended SEC rules are applicable).

³ Universal Proxy, Exchange Act Release No. 34-93596 (Nov. 17, 2021).

⁴ *Spotlight on Proxy Matters – The Mechanics of Voting*, U.S. SEC. AND EXCH. COMM'N (last modified May 23, 2012), https://www.sec.gov/spotlight/proxymatters/voting_mechanics.shtml [<https://perma.cc/SVM9-T69K>] (describing methods by which shareholders can vote within two categories).

⁵ *Id.* (describing how shareholders may vote at a given shareholder meeting).

⁶ *Id.* (describing the various methods by which shareholders may vote by proxy).

⁷ *See id.* (describing what a proxy is and the methods by which a shareholder can vote by proxy).

⁸ Cydney Posner, *SEC Adopts Mandatory Universal Proxy in Contested Elections*, COOLEY PUBCO, 1-2 (Nov. 22, 2021), <https://cooleypubco.com/2021/11/22/sec-universal-proxy/> [<https://perma.cc/2QTF-VCXH>].

voting in person are allowed to mix and match and vote for both company and dissident nominees, while those voting by proxy are limited to either all of the company nominees or all of the dissident nominees.⁹ This discrepancy in rules creates a problem because it unfairly treats those who vote by proxy differently from those who vote in person, despite the fact that the majority of shareholders who vote opt to vote by proxy.¹⁰ The SEC rule change presents a solution to this crucial difference and this paper aims to demonstrate the impact that the rule change will likely have.

Section B will explain the current rules regarding voting by proxy. Section C will detail the new federal proxy rules promulgated by the SEC in November of 2021 as well as the potential pros and cons once the rules go into effect. Section IV will explore the first time universal proxy rules resulted in a successful takeover of a corporation before Section V concludes the paper with some final thoughts on the future of the universal proxy mandate.

B. Current Full Slate and Short Slate Rules

The current rules for shareholders voting by proxy in contested director elections have had two iterations. As a result of Exchange Act Rules 14a-14(d)(1) (the “Bona fide nominee rule”) and 14a-4(d)(4), a party in a contested election cannot include a nominee from the opposing party on its proxy card unless they get express authorization from that nominee.¹¹ This express authorization is rarely provided, and as a result, both the company and the dissident put forward a full slate of directors made up of their candidates only (“full slate rule”).¹² Concerns about a shareholder’s inability to split their vote between the company’s and the dissident’s proxy cards is not new, so, in an attempt to rectify some of that concern, the SEC adopted the short slate rule in

⁹ *Id.* (elaborating on disparities between the ability for in-person and proxy shareholder-voters to cast votes).

¹⁰ Exchange Act Release, *supra* note 3, at n.42 (“We therefore expect that the vast majority of retail investors will continue to vote by proxy and will continue to rely on the ability to do so.”).

¹¹ Marc Weingarten, *Short slates, majority slates and full slates: strategic and voting considerations*, LEXOLOGY: SCHULTE ROTH & ZABEL LLP (Apr. 15, 2008), <https://www.lexology.com/library/detail.aspx?g=bc3a9c2a-03e2-4afa-b86a-a8438aad477e> [<https://perma.cc/B9K4-88WT>] (describing the effects of the enumerated SEC rules on shareholder proxy voting allowances).

¹² *Id.* (describing the impact of the rule on how the shareholder proxy voting generally seems to occur).

addition to the preexisting full slate rule.¹³ The short slate rule allows a dissident who is only trying to obtain minority control of the corporation's board of directors to seek permission to include some of the company's nominees on its card to fill its slate.¹⁴ However, as with the full slate rule, once the dissident's short slate has added the company's nominees, the shareholders are still limited and can only vote for either the entire slate of the company nominees or the dissident's entire slate - which is comprised of dissident and company nominees.¹⁵ It is clear that the SEC's attempt to address concerns did not actually get to the heart of the problem: the inability of shareholders voting by proxy to mix and match their votes. The following Section explains these new rules and details the potential pros and cons.

C. The New Universal Proxy Mandate

1. Overview of the New Universal Proxy Rules

The primary change to come out of the new federal proxy rules promulgated by the SEC is that the new Rule 14a-19 will require the use of a universal proxy card by any corporation holding a contested director election.¹⁶ A universal proxy card is a card that includes the names of both the company and dissident nominees.¹⁷ As a result, shareholders voting by proxy will now be able to mix and match to vote for a combination of both company and dissident nominees if they choose to.¹⁸

In order to facilitate the new rule, dissidents must "provide companies with notice of [their] intent to solicit proxies..."¹⁹ The

¹³ *Id.* at 3 (describing the reasoning behind the SEC modifying the bona fide nominee rule as it pertains to short slates).

¹⁴ *Id.* (describing the purpose of the short slate rule).

¹⁵ Press Release, Securities and Exchange Commission, *supra* note 1 (describing the limitations of the modified SEC rule regarding short slates).

¹⁶ Era Anagosti et al., *In Another Win for Shareholders, SEC Adopts New Rules for Universal Proxy Cards in Contested Director Elections*, WHITE & CASE LLP 1-2 (Nov. 24, 2021),

<https://www.whitecase.com/publications/alert/another-win-shareholders-sec-adopts-new-rules-universal-proxy-cards-contested> [<https://perma.cc/PH3P-DQPR>].

¹⁷ *Universal Proxy Rules for Director Elections*, U.S. Securities and Exchange Commission 1 <https://www.sec.gov/files/34-93596-fact-sheet.pdf>.

¹⁸ Anagosti, et al., *supra* note 16, at 1-2 (describing the alterations made to the discussed SEC proxy rule).

¹⁹ Posner, *supra* note 8, at 3 (describing a key facet of the SEC universal proxy rules).

dissidents must provide the “names of [their] nominees no later than [sixty] days before the anniversary of the previous year’s annual [shareholder] meeting.”²⁰ The company must then notify dissidents of their nominees at most fifty calendar “days before the anniversary of the previous year’s annual meeting.”²¹ The rules further establish formatting requirements for the universal proxy cards, to make sure that the nominees from both sides are presented in an unbiased way.²²

2. *Pros of the New Universal Proxy Rules*

There are many potential benefits of the new universal proxy rules. First, shareholders voting by proxy will finally have the same rights as those who vote in person.²³ Even in a pandemic world with virtual shareholder meetings, shareholders still overwhelmingly vote by proxy.²⁴ Attending meetings in person, whether physically or virtually, can be both time-consuming and costly.²⁵ Considering that a large majority of shareholders opt to vote by proxy,²⁶ it is a very positive change that they will now have the same opportunities as those who can afford the time and money to go to these meetings.

Second, there may be an increased number of contested elections because the dissident will have to spend less money on their campaign and dissidents will only have to solicit 67 percent of existing shareholders to enter a proxy contest.²⁷ The lower campaign costs come from the change that dissident’s previously had to re-mail the proxy card with their slate of nominees on it every time the company did for fear that the shareholder would change their mind and use the most recent card it received.²⁸ The 67 percent requirement may provide a lower barrier to entry because, “for many companies, 67 percent of their shares are represented by institutional investors.”²⁹ Therefore it may be less

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Press Release, Securities and Exchange Commission, *supra* note 1.

²⁴ Exchange Act Release, *supra* note 3, at 6.

²⁵ *Id.* at 91.

²⁶ *Id.* at 92 (“Based on 1,957 virtual meetings hosted by one proxy services provider in 2020, the average number of shareholders voting at virtual meetings (rather than voting in advance by proxy), held in 2020 was 13 shareholders for meetings with shareholder proposals (218 cases) and 2 shareholder meetings without shareholder proposals.”).

²⁷ Anagosti, et al., *supra* note 16, at 3.

²⁸ *Id.*

²⁹ *Id.*

costly to solicit votes from a few institutional investors, than hundreds, if not thousands, of individual investors.³⁰

Third, proxy campaigns may now be used to address and fight for a wider range of issues.³¹ Expanding on the previous point of easier entry for those who want to challenge a corporation's board of directors, easier entry may allow activities to use proxy campaigns to further their goals.³² In an era where ESG concerns are becoming an increasing part of a corporation's agenda and of increasing concern for investors, the use of universal proxy cards may enable these changes to happen at a board level because investors will have more say over the board of directors through these lower barriers to entry.

Fourth, the use of universal proxy cards may help companies maintain control when shareholders only want a few dissident nominees but not the full slate.³³ Under the current rules, the shareholders would have to vote for one entire slate or the other, despite potentially only wanting one or two new voices on the board of directors.³⁴ These changes may help companies retain majority control while only giving up a few seats on the board of directors to the dissidents. A company therefore will be able to consider a more diverse set of opinions as they proceed and make decisions without fearing that they are going to lose control of the board of directors completely.

Lastly, the use of universal proxy cards may encourage cooperation between corporation's and dissidents, therefore increasing settlements and decreasing contests.³⁵ In 2018, three years before the SEC adopted the new universal proxy rules, Mellanox Technologies, facing a proxy contest with Starboard Value, added a provision to their governing documents that required universal proxy cards be used in all future contested director elections.³⁶ After the provision was added though the governing documents, Mellanox Technologies and Starboard Value ended up reaching an agreement instead of proceeding with using a universal proxy.³⁷ The Mellanox Technologies case is a

³⁰ *See id.*

³¹ *Id.*

³² *Id.*

³³ Posner, *supra* note 8, at 2.

³⁴ *Id.*

³⁵ *See* Anagosti, et al., *supra* note 16, at 3-4.

³⁶ Tiffany Forbes Campion et al., *Universal Proxies: What Companies Need to Know Now*, LATHAM & WATKINS: CLIENT ALERT COMMENTARY 1-4 (Nov. 16, 2018), <https://www.lw.com/thoughtLeadership/lw-universal-proxies-what-companies-need-to-know> [<https://perma.cc/TY2G-EQAY>].

³⁷ *Id.*

great example of how the threat of a future universal proxy competition will encourage cooperation, increase settlements, and decrease contests.

3. *Cons of the New Universal Proxy Rules*

While there are many potential benefits of the new universal proxy rules, there are also some negatives to be aware of. First, it is thought that a board of directors that is made up of both company and dissident nominated directors could possibly affect the boards' effectiveness.³⁸ While there is definitely potential for this type of impact to be positive or negative, it seems more likely to happen in a negative way, with board of directors unable to make progress due to differing views for what is best for the company. If the dissidents had come into the proxy contest seeking majority control but only managed to get one or two of their nominees on the board of directors, there is good reason for distrust among board members which could ultimately have a negative impact on the board of director's ability to work productively and effectively.

Secondly, the lower barrier to entry could allow frivolous, or serious, activists in to disrupt the governance of the corporation.³⁹ SEC Commissioner Hester Peirce articulated this concern pointing to two primary issues.⁴⁰ First, Commissioner Peirce believes that the 67 percent threshold could be "too easy to meet or ignore."⁴¹ Secondly, Commissioner Peirce believes that without a requirement to show a "demonstrated commitment" to the company through either a minimum amount of stock ownership or a minimum holding period for the stock, it could allow too many activists to bring frivolous proxy challenges.⁴² Despite Commissioner Peirce's view, it seems that "frivolous" may be an understatement. While there may be no minimum holding amount or holding period, a "frivolous" activist is likely not going to be able to attain the 67 percent threshold. That seems to be a large number for those who are not serious about a proxy contest. This seems to be the case especially when considering that they would likely have to approach institutional investors to obtain that 67 percent. In a similar vein, Commissioner Peirce's second concern can be eased with the 67 percent requirement because, while there may be no minimum amount

³⁸ Posner, *supra* note 8, at 4.

³⁹ *Id.* at 4-5.

⁴⁰ Commissioner Hester M. Peirce, *Dissenting Statement on Universal Proxy* (Nov. 17, 2021), <https://www.sec.gov/news/statement/peirce-universal-proxy-20211117> [<https://perma.cc/A66T-28MT>].

⁴¹ *Id.*

⁴² *Id.*

of stock ownership or a minimum holding period for the stock, activists with no stock ownership or who have recently acquired stock who are seeking to bring a frivolous proxy challenge are highly unlikely to be able to reach the 67 percent threshold.

D. The Universal Proxy Rules in Use – The First Success Story

The use of universal proxy cards does work. The first time a contested director election that used a universal proxy card resulted in a dissident shareholder group winning control of the board of directors was in the case of EQT Corporation (EQT).⁴³ In 2017, Rice Energy was sold to EQT for approximately \$6.7 billion in a stock-for-stock merger.⁴⁴ Rice Energy was sold by the Rice Team, who had founded Rice Energy.⁴⁵ Less than a year after EQT acquired Rice Energy, their performance declined, and shares fell by 39 percent.⁴⁶ Many of EQT's shareholders sought Toby Z. Rice's help.⁴⁷ Toby Z. Rice was one of the Rice Team owners and the Rice Team subsequently made efforts to privately engage with EQT to help them out of their declining situation.⁴⁸ EQT would not accept the Rice Team's help and so the Rice Team called for the EQT CEO to be replaced and sought to nominate a slate of directors to gain control of EQT.⁴⁹

During the nomination process, the Rice Team was to provide EQT with consent to list their nominees in EQT's proxy materials.⁵⁰ Fearing an inherent unfairness because EQT was not required to provide the Rice Team with the same consents, the Rice Team went to EQT for

⁴³ Steve Wolosky et al., *Client Alert: Olshan Represents Activist in First Successful Use of a Universal Proxy Card for a Control Slate in the United States*, OLSHAN FROME WOLOSKY LLP: NEWS & RESOURCES (July 2019), olshanlaw.com/resources-alerts-Olshan-Activist-FirstSuccessfulUniversalProxyCard-ControlSlate-US.html [<https://perma.cc/2DXQ-CPWF>].

⁴⁴ *Id.*; EQT Corp., Current Report (Form 8-K) (June 19, 2017), https://www.sec.gov/Archives/edgar/data/0000033213/000110465917040193/a17-15395_18k.htm [<https://perma.cc/U7NE-REE6>].

⁴⁵ Wolosky et al., *supra* note 43, at 1 (describing players involved in the transaction).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

a waiver of this requirement but EQT would not grant the waiver.⁵¹ As an alternative, the Rice Team requested the use of a universal ballot but EQT did not respond.⁵² The Rice Team then filed a lawsuit to prohibit EQT from using the Rice Team’s nominee consents, and “[i]n response to the lawsuit, EQT publicly agreed to the use of a universal ballot.”⁵³ This universal ballot was slightly different than the new SEC rules provide for, as each side created their own cards and included the other side’s nominees on them.⁵⁴ Because they did it this way, each side highlighted their own nominees while leaving the other side’s nominees unlighted, indicating how they would like the shareholders to vote.⁵⁵ Ultimately, the Rice Team prevailed and won control of EQT and the company is still operational and profitable today.⁵⁶

The use of a universal proxy, though slightly different from the SEC’s guidelines, demonstrates how a more flexible election system could be quite a successful way to conduct contested director elections. First, EQT was struggling, some of the shareholders were seeking out help, and yet their own Board of Directors were doing nothing.⁵⁷ The use of the universal proxy allowed the company to get the help it needed and to save the shareholders from increased losses.⁵⁸ Secondly, it demonstrated the cooperation that can come from these scenarios as the two sides had to work together and ultimately compromise as they presented their proxy cards.⁵⁹ Lastly, it at the most basic level showed that this universal proxy mechanism, with the use of a proxy card containing both side’s nominees, can work.⁶⁰ While it is impossible to know whether the Rice Team would have been able to acquire control without a universal ballot, the fact that they were able to shows the potential for this mechanism in the future.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 1-2.

⁵⁴ *See id.*; *cf.* Anagosti et al., *supra* note 16, at 2.

⁵⁵ Wolosky, et al., *supra* note 43, at 2.

⁵⁶ *Id.*; Paul J. Gough, *A year after takeover, Rice sees progress at EQT* PITTSBURGH BUSINESS TIMES (July 27, 2020, 1:43 PM), <https://www.bizjournals.com/pittsburgh/news/2020/07/27/a-year-after-takeover-rice-sees-progress-at-eqt.html> [<https://perma.cc/MBR3-8L9U>].

⁵⁷ *See* Wolosky, et al., *supra* note 43, at 1-2.

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See id.* (illustrating a scenario where a proxy contest resulted in a positive outcome for shareholders).

E. Conclusion

The future of the universal proxy card mandate is unclear because the rules have not gone into effect yet and will only begin to have an impact on contested director elections held after August 31, 2022.⁶¹ While we only have few cases to go on, with Mellanox and EQT being two of them, the future looks positive based on those two cases. Mellanox demonstrates the possibility of increased cooperation and EQT shows that the use of a proxy card containing the names of both side's nominees does work. While some, including SEC Commissioner Peirce may have their concerns and the future may be uncertain, the new universal proxy rules have all the makings to be a very positive change for the future of contested director elections.

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⁶¹ See Press Release, Securities and Exchange Commission, *supra* note 1 (describing that the SEC adopted new rules pertaining to universal proxy cards and stating the date after which the rules will come into effect).

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