

SEC Introduces Universal Proxy Rule

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On September 1, 2022, the new Securities and Exchange Commission (“SEC”) rules requiring the use of universal proxy cards in all non-exempt director election contests at public companies go into effect (“non-exempt” meaning director election contests, except those involving registered investment companies and business development companies). The new rules, which take effect for all shareholder meetings beginning September 1, 2022, are expected to dramatically alter the way proxy contests are conducted. The new rules do not apply to non-contested director elections.

Under the old rules, shareholders voting by proxy in contested director elections were at a disadvantage compared to shareholders voting in person. While shareholders voting in person could select among all duly nominated director candidates, shareholders voting by proxy had to choose either the registrant or dissident’s proxy card, each on a ballot which only listed its respective candidates. In other words, shareholders voting by proxy were unable to replicate the vote they could have taken had they voted in person rather than by proxy.

The new rules require the use of a universal proxy card. This card must include the names of all duly nominated director candidates proposed by any party for whom proxies are solicited. Shareholders voting by proxy will be free to choose any combination of nominees put forth by both the registrant and any dissidents.

Mandatory Use of Universal Proxies in Non-Exempt Solicitations in Contested Elections

Universal Proxy cards will now be required in all non-exempt director election contests involving companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”). In a contested director contest, each side’s proxy card must include the names of all nominees from both the dissident and registrant, and the nominees of certain shareholders as a result of proxy access. The goal of the universal proxy system is to allow shareholders voting by proxy to vote in the same manner they would if they voted in person.

Under the old rules, institutional and other large shareholders had an advantage over small and retail shareholders. Large shareholders have the resources to split votes between registrant and dissident candidates by arranging for representatives to attend the shareholder meeting to vote in person. Smaller retail shareholders often lacked those same resources. The universal proxy card, along with additional disclosure and formatting provisions adopted and outlined below, will allow smaller shareholders to gain more equal footing compared to their larger counterparts in proxy contests.

Dissident’s Notice of Intent to Solicit Proxies in Support of Nominees Other Than Registrant’s Nominees

Under the new rules, dissidents must provide a notice with the names for which it intends to solicit proxies to the registrant no later than 60 calendar days before the anniversary of the previous year’s annual meeting. If the registrant did not hold an annual meeting during the previous year, or of the date of the meeting has changed by more than 30 calendar days from the previous year, then

the dissident must provide notice by the later of (i) 60 calendar days prior to the date of the upcoming annual meeting, or (ii) the 10th calendar day following the day on which the public announcement of the annual meeting's date is first made by the registrant. These timing requirements are set to provide enough time ahead of meetings for the parties to prepare a proxy statement that complies with the universal proxy rules.

Registrant's Notice of its Nominees

Similar to the dissident's notice requirement outlined above, the registrant will be required to notify the dissident of the names of its nominees, unless the names have already been provided in a preliminary or definitive proxy statement filed by the registrant. The deadline for the registrant's notice requirement is no later than 50 calendar days prior to the anniversary of the previous year's annual meeting (except that, 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, then notice must be provided no later than 50 calendar days prior to the date of the annual meeting).

According to the SEC, having the registrant's deadline be 10 days after the dissident's deadline (outlined above) is appropriate because it provides a sufficient amount of time for the registrant to consider the dissident's nominees provided in the dissident's notice, and respond with the registrant's own slate of nominees. The dissident's notice of nominees may be the first indication that there will be a contested solicitation.

Minimum Solicitation Requirement for Dissidents

Dissidents putting forth a slate of director candidates must solicit holders of shares representing at least 67% of the voting power of shares entitled to vote. A dissident must indicate its intent to comply with this minimum solicitation threshold by including, in its nomination notice, a statement of such intent. The dissident does not need to provide this notice to the SEC or otherwise make it publicly available – it need only provide this notice to the registrant. The SEC made clear that this obligation for the dissident to comply with the notice to the registrant requirement is in addition to its obligation to comply with applicable advance notice provisions in the registrant's governing documents.

Dissident's Requirement to File Definitive Proxy Statement 25 Calendar Days Prior to Meeting

In contested director elections, a dissident will be required to file its definitive proxy statement by the later of (i) 25 calendar days prior to the meeting, or (ii) five calendar days after the registrant files its definitive proxy statement. This deadline will help ensure that shareholders who receive the universal proxy card will have access to information about all the nominees, with sufficient time to review this information before the meeting.

Access to Information About All Nominees

The new rules introduce a number of mechanisms for the parties to access information about all director nominees. Item 7(h) of Schedule 14A has been amended (and is now referred to as Item 7(f)) to require each party in a contested election to refer shareholders to the proxy statement of the other party for information about the other party's nominees. Item 7(f) requires that shareholders can access the other party's proxy statement on the SEC's website without cost.

Rule 14a-5(c) of the Exchange Act has been amended to allow parties to refer to information that would be furnished in the other party's filing in order to satisfy disclosure obligations.

Additionally, the definition of "participant" in Instruction 3 to Items 4 and 5 of Schedule 14A has been updated. This new definition ensures that only the party's own nominees would be considered "participants" in that party's solicitation despite all nominees being included on the universal proxy card.

Formatting and Presentation of the Universal Proxy Card

The new rules include formatting, presentation and disclosure requirements for the universal proxy cards. Universal proxy cards must: (1) set forth the name of all duly nominated director candidates; (2) provide a means for shareholders to grant authority to vote for the nominees set forth; (3) clearly distinguish between nominees put forth by the registrant and dissident, as well as any proxy access nominees; (4) within each group of nominees, list the nominees alphabetically by last name; (5) use the same font type, style and size to present all nominees; (6) prominently disclose the maximum number of nominees for which authority to vote can be granted; and (7) prominently disclose the treatment and effect of a proxy executed in a manner (i) that grants authority to vote for more nominees than the number of directors being elected, (ii) that grants authority to vote for fewer nominees than the number of directors being elected, or (iii) that does not grant authority to vote with respect to any nominees.

Each side may design and will disseminate its own proxy card, subject to these rules.

Director Election Voting Standards Disclosure and Voting Options

Under the new rules, where there is a legal effect to an "against" vote in a director election, the proxy card must include an "against" voting option, rather than a "withhold authority to vote" option. Where there is no legal effect of an "against" vote, the proxy card is prohibited from including an "against" voting option. Additionally, proxy cards are required to include an "abstain" voting option, rather than a "withhold authority to vote" voting option, in director elections with a majority voting standard.

Elimination of the "Short Slate Rule"

A "short slate" proxy contest is one where a dissident is soliciting proxies in support of nominees that, if elected, would constitute a minority of the board of directors. The short slate rule allowed dissidents soliciting in support of a partial slate of nominees that would make up a minority of the board of directors to seek authority to vote for some of the registrant's nominees. The SEC adopted the short slate rule in 1992 to address the problem of limiting shareholder's ability to select their preferred mix of registrant and dissident nominees. The short slate rule failed to properly address this problem, so the SEC took the more dramatic step of instituting this universal proxy rule. Under the new rules, the short slate rule is eliminated for companies subject to the universal proxy requirement.

Modification of the Bona Fide Nominee Rule

Under the old bona fide nominee rule, director nominees were required to consent to being named in the proxy statement of the party listing that nominee on its card. This rule limited shareholders voting by proxy because they were only permitted to vote for bona fide nominees. One party was unable to include the other party's nominees on its proxy card without the other party's nominees'

consent, and in practice, such consent was rarely provided. Thus, shareholders voting by proxy in director elections were forced to choose between the registrant's and dissident's proxy cards.

The new rules modify the bona fide nominee rule. Rather than a nominee being required to consent to being included in the proxy statement of the party soliciting for that nominee, the nominee need only consent to being named in a proxy statement on either side of the contest. The new rule maintains the requirement that a nominee consent to serve, if elected.

Conclusion

This new universal proxy rule makes significant changes to the process for non-exempt contested director elections, with the aim of leveling the playing field between shareholders voting by proxy and shareholders voting in person. Rather than being limited to choosing between either the registrant or dissident's proxy card, shareholders voting by proxy will be able to choose from a mix of both party's candidates.

For further information, please contact a member of the Haynes Boone [Capital Markets and Securities Practice Group](#).