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## **LEGAL UPDATES AND NEWS**

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### **SEC Adopts Rules Requiring Universal Proxy Cards for Contested Director Elections**

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On November 17, 2021, the Securities and Exchange Commission (the “SEC”) adopted final rules to require the use of universal proxy cards in contested director elections, which will apply to shareholder meetings held after August 31, 2022. To facilitate the use of the universal proxy card, the proxy rules are also being amended to establish certain notice, minimum solicitation, filing, formatting and presentation requirements in contested director elections.

#### **New Rules for Contested Board Elections**

In a contested director election, the current regulatory framework generally allows shareholders to vote on management’s proxy card for the slate of candidates nominated by the board, or to vote on a dissident’s proxy card for the candidates nominated by the dissident shareholder. Unless a shareholder attends the meeting in person and votes by ballot, a shareholder cannot vote for some of the board’s nominees and some of the dissident shareholder’s nominees.

Under new SEC Rule 14a-19, both management and a dissident shareholder will be required to use a universal proxy card, which must include the names of all director candidates, both those nominated by the board and those nominated by the dissident shareholder. This will allow shareholders voting by proxy to “mix and match” nominees from the company’s and the dissident’s slates of nominees. According to the SEC, the requirement to use a universal proxy card in contested director elections is intended to afford shareholders voting by proxy the ability to elect directors in a manner consistent with their right to vote in person at the shareholder meeting.

*Bona Fide Nominees.* Currently, a proxy can confer authority only to vote for a “bona fide nominee,” which is a person who has consented to being named in the proxy statement of the party listing that nominee on its card. Board nominees generally do not consent to being named in a proxy statement of a dissident shareholder, and vice versa. The determination of a bona fide nominee will be expanded to include a person who consents to being named in *any* proxy statement for a company’s next shareholder meeting for the election of directors. This eliminates a technical hurdle to the use of universal proxy cards. The SEC also will eliminate its rule on short slates, which allows a dissident shareholder who is not seeking to elect persons to fill all director seats up for election to disclose which board nominees it would or would not vote for and to vote its proxy card accordingly.

*Names And Information About All Nominees.* The names of all of the nominees proposed by both the board and the dissident shareholder must be included on the universal proxy card, which each side is required to use. Additionally, each side in a proxy contest must refer shareholders to the other party’s proxy statement for information about the other party’s nominees and to the SEC’s website for access to the other side’s proxy statement.

*Dissident’s Notice To The Company Of Intent To Solicit Proxies In Support Of Nominees Other Than Those Proposed By The Board.* A dissident shareholder intending to engage in an

election contest must give the company notice of its intent to solicit proxies by providing the names of its nominees at least 60 calendar days before the anniversary of the previous year's annual meeting. If the dissident shareholder changes any of its nominees, the dissident must promptly notify the company. If the company has already disseminated a universal proxy card, the company may, but is not required to, send a new card reflecting the change.

Importantly, the 60 day deadline is a minimum notification requirement, and does not override advance notice bylaw provisions, which generally require that notice of a shareholder's intent to nominate and seek to elect a director and to bring business before a meeting of shareholders be provided to a company 90 to 120 days in advance of the date of the previous year's annual meeting. This deadline is required to be provided in the proxy statement.

*Company's Notice To Dissident.* Companies are required to notify a dissident shareholder of the names of the company's nominees at least 50 calendar days before the anniversary of the previous year's annual meeting, unless the names have already been provided in a preliminary or definitive proxy statement filed with the SEC. If a company changes any of its nominees, the company must promptly notify the dissident shareholder. If the dissident shareholder has already disseminated a universal proxy card, the dissident may, but is not required to, send a new card reflecting the change.

*Dissident's Filing Deadline.* Dissidents must file their definitive proxy statement by the later of: (i) 25 calendar days before the shareholder meeting, or (ii) five calendar days after the company files its definitive proxy statement. If a dissident fails to file its definitive proxy statement on time, the company may elect to disseminate a new, non-universal proxy card including only the names of the company's nominees. Moreover, the SEC stated that where a dissident fails to comply with the requirements of new Rule 14a-19, the dissident will not be permitted to continue with its solicitation.

*Dissident's Minimum Solicitation Requirement.* Dissident shareholders must solicit the holders of shares representing at least 67% of the voting power of the shares entitled to vote at the meeting. This threshold was increased from the 50% in the rule proposal, and according to the SEC the increase is intended to deter frivolous proxy contests. The SEC further stated that if a dissident fails to meet the 67% minimum solicitation threshold, that would constitute a violation of the federal proxy rules and the dissident shareholder would face the same consequences as if it had violated other proxy rules.

*Formatting And Presentation Of The Proxy Card.* Each universal proxy card must include each side's nominees grouped together and clearly identified as such, in a fair and impartial manner. Under Rule 14a-19, all universal proxy cards must:

- clearly distinguish between the company's director nominees, the dissident's nominees (and among the nominees of multiple dissidents, if any), and nominees pursuant to proxy access;
- list nominees in alphabetical order by last name within each group (i.e., the company slate and the dissident slate);
- exhibit all nominees in the same font type, style, and size; and
- prominently disclose the maximum allowable number of nominees.

These requirements are meant to prevent both companies and dissidents from strategically selecting font, style, sizing, and order of candidate names in ways that could create an advantage for their respective slates.

### New Additional Disclosures

The SEC has also adopted amendments to its proxy rules that will require the proxy card to permit a vote “against” directors, if state law gives effect to such a vote, and to allow an “abstain” vote in a director election governed by a majority voting standard. Furthermore, the proxy statement must have prominent disclosures explaining the effect of each voting option provided, including the effect of a “withhold” vote on director elections, as well as the treatment of proxies containing over-votes (i.e., voting for more than the number of seats up for election) and under-votes (i.e., voting for a fewer number of directors than the full number up for election).

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