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SEC Requires Universal Proxies in Contested Director Elections

The Securities and Exchange Commission (the “SEC”) has announced the long-anticipated [final rules](#) requiring universal proxy cards that include all director nominees to be used in contested elections. For shareholder meetings involving a proxy contest held after August 31, 2022, all valid director candidates will be listed on both the company proxy card and the dissident proxy card, and shareholders will be able to pick and choose among the candidates to build their preferred board. Candidates receiving the highest number of votes will be elected where plurality voting applies. Under existing rules, a proxy card generally cannot include a nominee who has not consented to being named, resulting in shareholders who vote by proxy generally facing a binary choice between management and dissident slates. The new rules will not apply to certain registered investment companies and business development companies at this time.

The universal proxy mandate includes procedural and disclosure requirements of both dissidents and companies. Dissidents must solicit holders of shares representing at least 67% of voting power, and provide notice to companies of their intent to solicit proxies, and the names of their nominees, no later than 60 calendar days before the anniversary of the prior year’s annual meeting. Companies must provide the names of management nominees to dissidents no later than 50 calendar days before that anniversary. Dissidents will also be required to file their definitive proxy statement by the later of 25 calendar days before the shareholder meeting or five days after the company files its definitive proxy statement. Each side in the proxy contest must refer shareholders to the other party’s proxy statement and the SEC website for additional information on the other party’s candidates. The SEC has also established presentation and formatting requirements to ensure clear and neutral presentation of nominees on the universal proxy card.

For companies covered by the universal proxy requirements, the SEC has eliminated the short slate rule, which had enabled dissidents to include management nominees on the dissident’s proxy card where the dissident nominees would comprise only a minority of the board.

In addition to changes applicable to contested elections, the SEC also adopted rule changes applicable to all director elections, including requiring proxy cards to include “against” and “abstain” voting options, where such votes would

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have legal effect. Proxy statements must also include disclosure about the effect of a “withhold” vote in an election of directors.

While the mandated use of universal proxies could benefit activists seeking minority representation on boards, it may also result in unexpected outcomes. For example, companies who would previously include board seats in a settlement with an activist may instead consider whether the universal proxy would result in a more favorable outcome. In addition, the universal proxy mandate notably lacks ownership thresholds or holding period requirements, in contrast to the rules governing shareholder proposals and the proxy access bylaws of most companies. As a result, companies may face opportunistic shareholders with limited stakes and no demonstrated long-term interest nominating directors and receiving access to the universal proxy, provided they meet the requirement to solicit shares holding 67% of voting power.

With the prospect of universal proxy cards resulting in more competitive director elections, companies should review their corporate profile, including advance notice bylaws, and potential exposure to activist campaigns.

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