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Client Advisory

SEC Adopts New Universal Proxy Rules For Proxy Contests

On November 17, 2021, the Securities and Exchange Commission (SEC) adopted rules to require the use of universal proxy cards in director election contests. Universal proxy cards, which list all duly-nominated director candidates from all parties, allow shareholders to vote through the proxy process in the same manner as they could by voting in person.

What are the existing rules?

In a contested director election, shareholders vote, or give voting instructions by proxy, for two competing slates of director nominees. One slate is proposed by the company's board of directors, the "company slate," and the other slate is from dissident shareholders, the "dissident slate." Under current rules, shareholders voting by proxy in contested director elections are unable to vote for a combination of director nominees from the company slate and the dissident slate, as such shareholders could if they voted in person at the shareholder meeting.

What are the new universal proxy rules?

Under the new universal proxy rules, a proxy card will have to include both the nominees from the company slate and the nominees from the dissident slate. Shareholders will be able to give voting instructions in favor of any combination of properly nominated board candidates.

The new rules require that the universal proxy card must include all director nominees included in the company slate and dissident slate for election at the upcoming shareholder meeting. The universal proxy card must provide for the options to give voting instructions for any of the candidates nominated, whether such nominee is included in the company slate or the dissident slate. To facilitate the use of universal proxy cards, the SEC amended the current proxy rules so each side can list the other side's director candidates on its universal proxy card.

What are the notice requirements?

The new rules provide for certain specific notice requirements for companies and dissident shareholders soliciting proxies for director nominees. In general:

- The dissident shareholders must provide notice to the company of their intent to solicit proxies and the names of the dissident slate at least 60 calendar days prior to the anniversary of the company's prior year's annual meeting.
- The company must provide notice to the same dissident shareholders of the names of the company slate at least 50 calendar days prior to the anniversary of the company's prior year's annual meeting.

However, if no annual meeting was held in the prior year or the date of the annual meeting has been changed by more than 30 calendar days from the prior year, the notice deadline is modified as follows:

- The dissident shareholders must provide notice of the dissident slate by the later of 60 calendar days prior to the date of the company's annual meeting or the 10th calendar day following the first public announcement of the date of such annual meeting.
- The company must provide notice to the same dissident shareholders of the company slate at least 50 calendar days prior to the date of company's annual meeting.

Must the company notify dissident shareholders of the deadline for providing notice?

Yes. For the following year's annual shareholder meeting, the company must disclose in its current annual proxy statement the deadline for dissident shareholders to give timely notice of solicitation of proxies for a dissident slate.

What is the dissident shareholder proxy statement filing deadline?

The dissident shareholders must file a definitive proxy statement by the later of 25 calendar days before the shareholder meeting and five calendar days after the date that the company files its definitive proxy statement.

Who must the dissident shareholders solicit proxies?

The dissident shareholders must solicit the holders of shares representing at least 67% of the voting power of shares entitled to vote at the shareholder meeting.

What is the penalty to dissident shareholders for failure to meet these rules?

Dissidents who fail to comply with these requirements are prohibited from continuing with the dissident shareholders' solicitation of proxies for their nominees.

When do the universal proxy rules take effect?

The rules will take effect for shareholder meetings after August 31, 2022.

What should companies do?

Whether the new universal proxy rules provide dissident shareholders any practical advantages remains to be seen. A dissident shareholder's obligation to comply with these new notice rules is in addition to its obligation to comply with any advance notice provisions in a company's bylaws. Management should carefully review and consider amending the company's bylaws. A company's bylaws' advance notice provisions may provide more specific requirements regarding solicitation of proxies for dissident shareholders' director nominees.

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