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SEC Adopts Rules Mandating Use of Universal Proxy Card

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On November 17, 2021, the Securities and Exchange Commission (SEC) approved amendments to the federal proxy rules to mandate the use of a universal proxy card in public solicitations involving director election contests. After the rules become effective on August 31, 2022, proxy cards distributed by both public companies and activist shareholders in a contested director election will have to include both sides' director nominees, such that shareholders casting their vote can "mix and match" nominees from the company's and dissident's slates of nominees. We believe that the new rules are likely to embolden activists and increase the incidence of contested director elections.

Rule Amendments

The final rules adopted by the SEC require that both public companies and activists use a universal proxy card when soliciting shareholders in a director election contest – that is, each proxy card, regardless of who delivers it, must include the names of both the company and activist nominees. Such a proxy card allows shareholders to combine candidates from the separate slates submitted by the company and activist shareholder. This contrasts with the current system in which shareholders generally have a binary choice of casting their vote for the company's slate in the company's proxy card, or the activist's slate in the activist's proxy card.[1]

In order to implement the use of universal proxy cards, the new rules also mandate the following in connection with director election contests:

- ***Activist's Notice of Intent to Solicit:*** Activist shareholders must provide companies with notice of their intent to solicit proxies and provide the names of their nominees no later than 60 calendar days before the anniversary of the previous year's annual meeting. We expect this "guardrail" to provide no benefit to most public companies since standard advance notice bylaws require activists to give notice of their intent to make director nominations 90 calendar days or more before the anniversary of the previous year's annual meeting.
- ***Company's Notice to Activist:*** Companies must notify activists of the names of the company's nominees no later than 50 calendar days before the anniversary of the previous year's annual meeting.
- ***Deadline for Filing of Activist's Proxy Statement:*** The activist will be required to file its definitive proxy statement by the later of 25 calendar days before the shareholder meeting or five calendar days after the company files its definitive proxy statement. Again, we expect this rule to have no practical implication on activists' behavior since they already typically file their definitive proxy materials at least one month before the meeting.
- ***Minimum Solicitation:*** The activist must solicit the holders of shares representing at least 67% of the voting power of the shares entitled to vote at the meeting. Although the SEC touts this provision as "a key piece" of the universal proxy requirement, it is a provision of no real consequence: activist campaigns involving director contests almost invariably involve solicitations by the activist of holders of

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over 67% of the outstanding shares. Of note, “soliciting” for purposes of the rule does not involve knocking on the door or otherwise meeting and actively engaging a shareholder. Mailing proxy materials to beneficial owners via Broadridge, standard practice for activists, would satisfy the requirement. The rule even permits the use of notice-and-access solicitation; as noted by Commissioner Hester M. Peirce in her dissent “sending a postcard with a website link to proxy materials will suffice.”

The new rules also require each side of the contest to refer shareholders to the other party’s proxy statement for information about the other party’s nominees, and establish presentation and formatting requirements for universal proxy cards.

What Does Universal Proxy Mean For Public Companies?

Although the impact of mandated universal proxies has been the subject of intense debate since 2016, the reality is that before the rules come into effect in the fall of 2022, we are all only able to engage in (educated) speculation:

- ***More Contested Director Elections:*** Shareholders will be more inclined to support one or two dissident nominees when they can do it on a universal proxy card, as opposed to the current system that generally requires shareholders voting by proxy to sign the activist’s card if they want to support any member of the activist’s slate. Therefore, the use of universal proxies should make it easier for activists to win at least one board seat, which will likely embolden traditional and new ESG-focused activists to run director campaigns.
- ***Potential for Cheaper Activist Election Campaigns:*** One of the traditional economic barriers for conducting a director proxy contest was the activist’s strategic need to make multiple mailings of its proxy card. This results from the fact that in a proxy contest only the last executed proxy card counts, so it has been imperative in a proxy contest for each side to make sure that it matches every proxy card mailing by the other side with one of its own to mitigate against the risk that a shareholder switches proxy cards (and thus entire slates). When a universal ballot is used by both the company and dissident, the consequences of a shareholder switching cards is less important as every proxy card, regardless of which side mails it, includes the nominees from both the company and dissident. Activists can therefore avoid the expense of making multiple mailings of a proxy card.

At the risk of oversimplifying: going forward an activist can comply with state law and the company’s governing documents to submit a nomination within the prescribed timeline, file electronically with the SEC a proxy statement, disseminate the proxy statement via notice-and-access with distribution of electronic copy (pdf) to the largest institutional holders, lobby ISS and Glass Lewis, and rely on the company’s mailing of a universal proxy card to get the activist’s nominees across the finish line. There is certainly more to it, but even the perception of a faster and cheaper process is likely to encourage activists (and aspiring activists) to launch a director election campaign. And needless to say, the new system compels companies to make sure they have state-of-the-art advance notice bylaws to protect the integrity of the director election process.

- ***Nirvana For Proxy Advisors:*** Proxy advisors such as ISS and Glass Lewis have traditionally expressed frustration at the constraints imposed by being unable to “mix and match” candidates from the management and dissident slate in making recommendations. Proxy advisors will feel liberated by universal proxy and will be more ready to recommend slates that include one or two dissident nominees in situations where they might have felt previously compelled to recommend that clients vote on the company’s proxy card. This will further embolden activists.
- ***But Universal Proxy Might Not Always Be Good For Activists:*** For those looking for the silver lining, it is not difficult to imagine a scenario where an activist

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might have been better off forcing shareholders into a binary choice of voting on the company's proxy card (for all of the company's nominees) versus the activist's card (for the activist's nominees). This phenomenon might be more pronounced where the activist was seeking to take control of the board, including hostile M&A situations.

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[1] In the case of certain short slate elections, the activist's slate may include company nominees cherry-picked by the activist.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work in the firm's Mergers and Acquisitions, Capital Markets, or Securities Regulation and Corporate Governance practice groups, or the following authors:

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