

UNIVERSAL PROXIES ARE HERE – ARE YOU READY?

Aug 31, 2022

As discussed in our [November 17, 2021 post](#), management of public companies are required to use universal proxy cards for shareholder meetings involving most election contests held after August 31, 2022. This means that both companies and activists have to include all director nominees on their respective proxy cards. The new SEC rules also require inclusion of “against” and “abstain” voting options where permitted by state law. A detailed description of the new rules is contained in the above-linked post.

If companies have not done so already, they should take the following steps to prepare for upcoming annual meetings and related proxy materials:

Review activism response plans

Commentators generally believe the new rules will make proxy contests easier – both for traditional activists as well as historically less aggressive institutional investors – as shareholders will now be able to vote for nominees from among the full slate of competing candidates.

As a result, and in addition to updating their defense playbooks generally, companies should review:

- Any vulnerabilities of their director candidates, including factors such as their attendance at board and committee meetings, board tenure, diversity, skill sets and other criteria flagged by key institutional investors as well as by proxy advisory firms such as ISS and Glass Lewis;
- Opportunities to enhance the presentation in proxy statements of qualifications of director candidates – particularly in light of the possibility of proxy advisors recommending splitting votes among management and activist candidates;
- The scope and intensity of efforts to engage with shareholders, particularly key institutional investors, including regarding board composition; and
- Use of proxy solicitors and strategies for communicating with ISS, Glass Lewis and other proxy advisors, including regarding their directors and director nominees.

Update advance notice bylaws

Companies should make sure their advance notice bylaws:

- Require that anyone intending to solicit proxies for a director nominee complies with the new SEC rules, including all notice and solicitation requirements;
- Invalidate proxies solicited in violation of those rules;
- Require delivery of appropriate solicitation materials to shareholders by nominating persons;
- Require that any nominating person disclose information required under the advance notice bylaws and the new SEC rules about anyone with whom it is working in concert; and
- Require that the nominating person provide to the company reasonable evidence of compliance with both the new SEC rules and the bylaws.

Prepare for new additional proxy disclosure requirements

As discussed in our above-linked November post, companies should review and incorporate the new SEC disclosure requirements into their upcoming proxy statements, including:

- *Proxy cards.* New formatting and presentation requirements:
 - For all director elections, proxy cards must include “against” and “abstain” voting options where such options have legal effect under state law.
 - For proxy contests, proxy cards must include the names of both company and activist nominees, along with certain other shareholder nominees included as a result of proxy access. Each side’s nominees must be grouped together and clearly identified as such, in a fair and impartial manner (e.g., font, style and size should be consistent). Further, the card must disclose the maximum number of nominees for which authority to vote can be granted and 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 fewer than the number of seats up for election).
- *Proxy statement.* New disclosure requirements:
 - *Voting options.* For all director elections, proxy statements must disclose the effect of all voting options, including the effect of a “withhold” vote.
 - *Notice of nomination deadlines.* New Rule 14a-5(e)(4) requires disclosure in proxy statements of the next year’s deadline for a shareholder to provide notice to the issuer of its director nominees and other information under Rule 14a-19. Under recent [SEC guidance \(CDI 139.03\)](#), if a company’s advance notice bylaws require earlier notice than Rule 14a-19, then

the company need only disclose the earlier advance notice bylaw deadline. This is because the new Rule's notice requirement "does not override or supersede a longer period established in the registrant's governing documents."

The guidance also notes, however, that to the extent a company's advance notice bylaws do not require the same information as that called for by Rule 14a-19(b), the proxy statement must "clearly state the need . . . to comply with the additional requirements" of the Rule by the applicable deadline. Companies should either amend their bylaws to add such an obligation or disclose the additional requirement in their proxy statements.

- *Proxy contests.* For proxy contests, each side must refer shareholders to the other party's proxy statement for information about the other party's nominees as well as to the SEC's website to access the other side's proxy statement free of charge.

Additional recent SEC guidance

The SEC staff also recently issued guidance addressing two other topics:

- *Additional or alternate nominees.* In [CDI 139.01](#), the SEC staff confirmed that an activist's notice may only contain the names of nominees for whom it intends to solicit proxies (i.e., an activist may not provide a long list of possible nominees with the intent of later narrowing and finalizing the list). However, the SEC staff will not object if the activist includes the names of additional or alternate nominees who, in accordance with charter documents and state law, would be presented for election in the event of a need to change the original slate (so long as the notice clearly identifies the persons who are being presented as additional or alternate nominees). If the activist later changes its slate to include any such nominees, it must promptly notify the company of the change as required by Rule 14a-19(c).
- *Notice of nominees from multiple activists.* In [CDI 139.02](#), the SEC staff explained that where more than one activist intends to present a slate of director nominees, then by the deadline prescribed in Rule 14a-19(d) the company should inform each activist of not only the names of the company's nominees and any nominees submitted under a "proxy access" provision but also of the names of any other persons nominated by other activists who also provided a Rule 14a-19(b) notice.

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