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Universal Proxy: Preparing for the New Regime

Tuesday, January 11, 2022

Course Materials

Universal Proxy: Preparing for the New Regime

Tuesday, January 11, 2022

2:00 - 3:00 pm, eastern [archive and transcript to follow]

Will the SEC's recent adoption of rules mandating the use of universal proxies change the game when it comes to proxy contests? What should companies do in advance of the August 31, 2022 compliance date to prepare for the new regime? Join us for insights on these and other issues relating to the universal proxy rules from our panel of experts:

- **Sean Donohue**, Partner, Goodwin Procter LLP
- **Eduardo Gallardo**, Partner, Gibson Dunn & Crutcher LLP
- **Kai Liekefett**, Partner, Sidley Austin LLP
- **Tiffany Posil**, Partner, Hogan Lovells LLP

The program will cover:

1. Overview of the Universal Proxy Requirement
2. Proxy Contests Under the New Regime
3. Universal Proxy's Influence on Activist Strategies and Tactics
4. Proxy Access Bylaws in a Post-Universal Proxy World
5. Other Rule Changes and Implications for Disclosure Controls & Procedures
6. What Should Companies Do In Advance of the Compliance Date?

“Universal Proxy: Preparing for the New Regime”

Course Outline / Notes

1. Overview of the Universal Proxy Requirement
2. Proxy Contests Under the New Regime
3. Universal Proxy’s Influence on Activist Strategies and Tactics
4. Proxy Access Bylaws in a Post-Universal Proxy World
5. Other Rule Changes and Implications for Disclosure Controls & Procedures
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“Universal Proxy: Preparing for the New Regime”

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November 18, 2021

Proxy Contests: SEC Mandates Universal Proxy Cards!

Yesterday, the SEC [announced](#) that it had adopted [final rules](#) that will require parties to proxy contests to use “universal” proxy cards that list all director nominees who are being presented for election. The rules also create new requirements for all director elections (including uncontested elections) – because they mandate that “against” and “abstain” voting options be provided on a proxy card where the options have legal effect under state law, and they require disclosure in the proxy statement about the effect of all voting options that are provided. All of this goes into effect for elections held after August 31, 2022.

The Commissioners adopted the rule at an open meeting by a rare 4-1 vote, with Commissioners [Lee](#) and [Crenshaw](#) issuing statements in full support of the rule, [Commissioner Roisman](#) supporting adoption but suggesting that the Commission consider in the future whether to impose additional eligibility criteria on dissidents launching campaigns and expressing reservations about the power that the rule could give to proxy advisors, and [Commissioner Peirce](#) dissenting. The Council of Institutional Investors issued a [press release](#) applauding the rule.

The [SEC’s Fact Sheet](#) summarizes the high points of the [197-page adopting release](#). To understand what this actually means for companies, though, you’ll want to read this [Sidley memo](#) – which predicts a “significant increase in proxy contest threats” once the rules go into effect. Here’s an excerpt:

While comparable to the vacated Rule 14a-11, which allowed shareholders holding at least 3% of the shares for three years to put dissident directors on the company’s proxy statement, the Universal Proxy Rules confer substantially more significant rights to shareholders without any minimum ownership requirements (i.e., owning only one share for one minute will be sufficient). While this was a concern voiced by several Commissioners, the SEC eventually went ahead with the adoption of the Universal Proxy Rules. The new rules will reshape the process by which hostile bidders, activist hedge funds, social and environmental activists, and other dissident shareholders may utilize director elections to influence control and policy at public companies.

As the rules will dramatically change the methods by which proxy contests at public companies have been conducted for decades, this Update summarizes the principal mechanics of the Universal Proxy Rules and the implications of the rules for public companies.

For more of this saga’s backstory, check out my [blog](#) from last spring when the SEC re-opened the comment period for these rules and my [summary](#) of themes from notable comment letters. We’ll be posting the avalanche of memos in our [“Proxy Cards” Practice Area](#).

– **Liz Dunshee**

Posted by Liz Dunshee

November 18, 2021

SEC ADOPTS RULES MANDATING USE OF UNIVERSAL PROXY CARD

To Our Clients and Friends:

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 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 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.

[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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Alert

November 22, 2021

New Rules for Proxy Contests: SEC Adopts Mandatory Universal Proxy Rules

by Sean M. Donahue, John O. Newell

The U.S. Securities and Exchange Commission (SEC) approved mandatory “universal proxy” on November 17, 2021. The final rules will apply to contested director elections at shareholder meetings held after August 31, 2022. The SEC also approved amendments that will clarify the shareholder voting options in all director elections. When the universal proxy rules become effective on September 1, 2022, they will significantly change the proxy mechanics for contested director elections. The rules provide that each of the company’s and dissident’s proxy card in a contested director election will now be required to include all director nominees up for election, rather than only those of the company or dissident filing the proxy statement. In this regard, the universal proxy rules provide dissidents with a new way to access a company’s proxy card in contested director elections, and unlike “proxy access” bylaws, without having to meet any share ownership thresholds or holding period requirements. In order to do so, dissidents will need to file their own definitive proxy statement and solicit at least 67% of the voting power of the shares entitled to vote on the election of directors at the meeting.

What Companies Should be Doing Now

The SEC approved the universal proxy and other proxy related amendments just over five years after the original proposal, discussed in this Goodwin alert, in October 2016. Although none of the amendments will apply to shareholder meetings involving director elections (or, in the case of the universal proxy amendments, shareholder meetings involving contested director elections) held before September 1, 2022, we recommend that all companies review the amendments now to evaluate the impact on the company’s proxy statement, proxy card, advance notice bylaws and the state of its overall shareholder activism preparedness. Although most calendar year-end companies will encounter the amendments in the context of their 2023 annual shareholder meetings, the amendments will apply to any shareholder meeting that

involves director elections held after August 31, 2022. The rules do not apply to shareholder meetings called to approve a merger, consolidation or other plan if the election of directors is an integral part of the plan.

Director Election Standards Disclosure and Voting Options. The amendments include new requirements with respect to proxy statement disclosure about voting options and voting standards that will apply to all proxy statements that include the election of directors. Although these amendments will not apply to proxy statements for shareholder meetings held before September 1, 2022, we recommend that companies begin reviewing the accuracy and clarity of their proxy statement and proxy card disclosure now, with special attention to disclosure about:

- The voting standard for director elections under the company's organizational documents and state law, including the number of votes required and whether "withheld," "against" or "abstain" options are legally applicable to elections of the company's directors;
- The effect of abstentions, broker non-votes and, to the extent applicable, withholding authority to vote for a nominee on director elections; and
- The requirements that apply to director nominations by shareholders under the company's advance notice bylaws, proxy access bylaws, or other provisions of its organizational documents.

When the amendments become effective, SEC rules will require disclosure about the impact of voting choices in director elections. The amendments will also impose specific requirements and prohibitions with respect to voting options on proxy cards. As part of their review of their overall shareholder activism preparedness, companies may wish to review these new requirements.

Shareholder Nomination Procedures Disclosure. The amendments require companies to disclose in their proxy statements the deadline for shareholders to give timely notice to the company of director nominations pursuant to the new universal proxy rule (Rule 14a-19) for the next annual meeting (new Rule 14a-5(e)(4)). Although the amendments do not apply to annual shareholder meetings held before September 1, 2022, we recommend that companies with a December 31 year-end review the disclosure that will be included in their 2022 proxy statements to ensure that the proxy statement accurately describes the shareholder director nomination requirements and process, especially the applicable advance notice, proxy access and Rule 14a-8 deadlines.

Advance Notice Bylaws. The amendments impose very few conditions on the use of the universal proxy rules by dissident shareholders. Advance notice bylaws can play an important role in protecting companies and their shareholders from abuse of the proxy solicitation and director elections process. Companies should review their advance notice bylaws and determine whether amendments would be appropriate in light of recent judicial decisions and emerging best practices.

Companies Subject to the Universal Proxy Rules

The universal proxy rules will not apply to registered investment companies or business development companies, but the amendments that require disclosure about the effect of “withheld” votes on director elections and the requirements that apply to voting choices on proxy cards will apply to such companies. Because foreign private issuers are exempt from SEC proxy rules, they will be exempt from all of the amendments.

Proxy Solicitations Subject to the Amendments

As noted above, the universal proxy rules will apply to proxy solicitations in contested director elections at shareholder meetings held after August 31, 2022, without regard to when the proxy solicitation began, unless the proxy solicitation is exempt under SEC rules. The universal proxy rules will not apply to consent solicitations, nor will they apply to shareholder meetings held to approve a merger, consolidation or other plan if the election of directors is an integral part of the plan. The amended rules that require proxy statement disclosure about the effect of “withheld” votes on director elections and require certain voting choices on proxy cards will apply to all director elections, including uncontested elections, held after August 31, 2022.

Amendments Applicable to All Director Elections

The SEC adopted several amendments that are not related to the universal proxy process.

- When applicable state law gives legal effect to votes cast against a nominee, the proxy card must provide a means for shareholders to vote against each nominee and a means for shareholders to abstain from voting, rather than providing a means to withhold authority to vote.
- When applicable state law does not give legal effect to votes cast against a nominee, the proxy card shall not provide a means for shareholders to vote against any nominee.

Instead, the proxy card must clearly provide one of the four means specified in Rule 14a-4(b) for shareholders to withhold authority to vote for each nominee.

- The proxy statement must disclose how votes will be counted, including the treatment and effect abstentions, broker non-votes, and, to the extent applicable, withholding authority to vote for a nominee in an election of directors under applicable state law and a company's organizational documents.
- The company's proxy statement must disclose the deadline for providing notice of a solicitation of proxies in support of director nominees, other than the company's nominees, pursuant to a universal proxy solicitation under Rule 14a-19 for the company's next annual meeting.

Universal Proxy Rules

The basic principle of the universal proxy rules is that shareholders who do not attend a shareholders' meeting in person – and therefore must vote their shares by authorizing someone else to vote their shares as the shareholder instructs – should be able to vote in the same way as shareholders who attend the meeting in person. Historically, shareholders who attended a meeting in person could vote for a mix of management nominees and dissident nominees if there were a director election contest. Shareholders voting by proxy, in contrast, were effectively limited to a choice between voting for all of the company's director nominees or all of the dissident director nominees because they could only vote on the company's or the dissident's proxy card.

The two central parts of the universal proxy rules are the required use of a "universal" proxy card by both the company and the dissident shareholder and a series of specific notice and filing requirements that apply to the company and the dissident shareholder.

Universal Proxy Card. "Universal" means, for purposes of the SEC's universal proxy rules, that both the company's proxy card and the dissident's proxy card must provide the option to give voting instructions for each of the director candidates nominated by the company and the dissident shareholder, including any combination of nominees chosen from both groups. If the dissident has nominated a complete slate of candidates, the universal proxy card can also permit shareholders to give voting instructions to vote for either all of the company's nominees as a group or all of the dissident's nominees as a group.

The universal proxy rules do not require that the company's proxy card and the dissident's

proxy card be the same. The rules do contain requirements that universal proxy cards must satisfy regarding presentation, formatting and disclosure. The principal requirements include:

- List the names of all persons nominated for election by the company and by the dissident, in alphabetical order, using the same font type, style and size for all nominees;
- Clearly distinguish between the company's nominees and the dissident's nominees;
- Prominently state the maximum number of nominees for which the shareholder can grant authority to vote;
- Provide a way for the shareholder to grant authority to vote for each of the nominees;
- If the dissident has nominated a full slate of candidates, the proxy card may provide a way for the shareholder to grant authority to vote for all nominees of the company or the dissident as a group, but in that case must also provide a way for the shareholder to withhold authority to vote for all of the company's nominees and all of the dissident's nominees as a group; and
- Prominently disclose the treatment and effect of a proxy card that (1) grants authority to vote for fewer or more directors than are to be elected or (2) does not grant authority to vote for any nominees.

Because it is possible that a dissident will abandon its proxy solicitation after the company has begun its own proxy solicitation with a universal proxy card that lists a dissident's nominees, the universal proxy rules require the company to disclose in its proxy how the company intends to treat proxy authority granted in favor of the dissident's nominees if the dissident abandons its solicitation or fails to comply with SEC proxy rules.

Minimum Number of Shareholders Solicited by Dissident. In contrast to Rule 14a-8 and most "proxy access" bylaws, which require that shareholders satisfy minimum ownership thresholds and holding periods requirements in order to have a proposal or director nomination included on the company's proxy card, the universal proxy rules require only that a dissident who wishes to use the universal proxy process file its own definitive proxy statement and solicit the holders of at least 67% of the voting power of shares entitled to vote on the election of directors at the shareholder meeting, and include a statement to that effect in its proxy statement or proxy card. This requirement reflects an increase from the original proposal, which would have required the dissident to solicit only at least a majority of such shareholders.

The dissident can choose to use the "notice and access" method to solicit proxies, which

requires only mailing a notice of internet availability and posting the dissident's proxy materials on a website, which is often less expensive than a "full set delivery" of paper proxy materials using the postal service. Historically, dissident shareholders have not used "notice and access" and have opted for "full set delivery" in contested solicitations for strategic reasons.

Notice to the Company and SEC Filing Requirements. The universal proxy rules provide timing and notice requirements that are new and specific to a contested proxy solicitation. The universal proxy rules prohibit dissidents who do not satisfy these requirements from using a universal proxy card and continuing its proxy solicitation.

A dissident shareholder's obligation to comply with the notice requirement under Rule 14a-19 is in addition to its obligation to comply with any advance notice provisions in a company's governing documents that provide more specific requirements regarding the timing and content of a dissident shareholder's notice of director nominations.

The dissident's principal notice and filing requirements are summarized below.

- The dissident must provide the company with notice of the names of each of the dissident's nominees unless the dissident has previously filed a preliminary or definitive proxy statement naming the nominees. The notice must be postmarked or transmitted electronically to the company at its principal executive office not later than 60 calendar days before the anniversary of the date of the company's annual shareholder meeting in the previous year, except that if the company did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, then the dissident must provide this notice by the later of 60 calendar days before the date of the annual meeting or the 10th calendar day following the day on which the company first publicly announced the date of the annual meeting.
- The dissident must promptly notify the company if there is any change in the dissident's intent to solicit the holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors in support of the dissident's director nominees or with respect to the names of the dissident's nominees. If there is a change in the company's nominees after the dissident has disseminated a universal proxy card, the dissident could elect, but would not be required, to disseminate a new universal proxy card reflecting the change in the company's nominees.
- The dissident must file a definitive proxy statement with the SEC by the later of 25 calendar days before the date of the shareholder meeting or five calendar days after the date that the company files its definitive proxy statement.

Reference to Company Proxy Statement. New Item 7(h) of Schedule 14A requires the dissident to include a statement in its proxy statement referring shareholders to the company's proxy statement for information about the company's nominees. The statement must explain to shareholders that they can access the company's proxy statement, and any other relevant documents, without cost on the SEC website. The company is subject to an identical requirement in the event of a universal proxy solicitation by a dissident.

Under amended Rule 14a-5(c), the company and dissident will be able to satisfy certain disclosure obligations by referring to information that is already, or will be, furnished by another party in its proxy statement. Currently, as written, Rule 14a-5(c) permits parties to refer to information that has been previously furnished, but in a universal proxy system this could prevent a company from relying on Rule 14a-5(c) to omit required information by referencing the dissident proxy statement where the dissident proxy statement is still to be filed. The new rules therefore amend Rule 14a-5(c) to clarify that a party can rely on the rule to reference information that is reasonably expected to be filed in an upcoming proxy statement of the other party.

Company Notice and Filing Requirements. The universal proxy rules require the company to provide similar notice to the dissident on a similar timetable, except that the company's notice to the dissident containing the names of the company's nominees must be provided not later than 50 days before the anniversary of the date of the company's annual shareholder meeting in the previous year, which is only 10 calendar days after the dissident's notice to the company has been postmarked or transmitted electronically to the company. This notice deadline is subject to the same exceptions that apply to the dissident's notice.

As noted above, new Rule 14a-5(e)(4) requires a company to disclose the deadline for shareholders to give timely notice to the company of dissident nominations for inclusion on a universal proxy card in connection with the next annual meeting in its annual proxy statement, regardless of whether such meeting is expected to be the subject of a contested solicitation.

The table below, reproduced from the SEC's adopting release, summarizes the overall timetable for a typical universal proxy solicitation.

Due Date	Action Required
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No later than 60 calendar days before the anniversary of the previous year's annual meeting date or, if the company did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, by the later of 60 calendar days prior to the date of the annual meeting or the tenth calendar day following the day on which public announcement of the date of the annual meeting is first made by the company. [new Rule 14a-19(b)(1)]	Dissident must provide notice to the company of its intent to solicit the holders of at least 67% of the voting power of shares entitled to vote on the election of directors in support of director nominees other than the company's nominees and include the names of those nominees.
No later than 50 calendar days before the anniversary of the previous year's annual meeting date or, if the company did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, no later than 50 calendar days prior to the date of the annual meeting. [new Rule 14a-19(d)]	Company must notify the dissident of the names of the company's nominees.
No later than 20 business days before the record date for the meeting. [existing Rule 14a-13]	Company must conduct broker searches to determine the number of copies of proxy materials necessary to supply such material to beneficial owners.
By the later of 25 calendar days before the meeting date or five calendar days after the company files its definitive proxy statement. [new Rule 14a-19(a)(2)]	Dissident must file its definitive proxy statement with the Commission.

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Alert | November 22, 2021

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SEC Dramatically Changes the Rules for Proxy Contests, Adopts Universal Proxy

November 17, 2021

On November 17, 2021, the U.S. Securities and Exchange Commission (SEC) adopted new Rule 14a-19 and amendments to existing rules under the Securities Exchange Act of 1934 to require the use of “universal” proxy cards in all nonexempt director election contests at publicly traded companies in the U.S. The new “Universal Proxy Rules” contain only slight modifications from rules the SEC first proposed in October 2016, for which the SEC reopened the public comment period during 2021. The rules will take effect for shareholder meetings after August 31, 2022. We expect a significant increase in proxy contest threats once the Universal Proxy Rules go in effect.

The leaders of Sidley’s Shareholder Activism & Corporate Defense Practice sent a formal comment letter to the SEC regarding the proposed rules — the only letter from a U.S. law firm suggesting material amendments that would protect against the potential for misuse of a mandatory universal proxy system. As we argued previously, the Universal Proxy Rules create the equivalent of “proxy access on steroids.” While comparable to the vacated Rule 14a-11, which allowed shareholders holding at least 3% of the shares for three years to put dissident directors on the company’s proxy statement, the Universal Proxy Rules confer substantially more significant rights to shareholders without any minimum ownership requirements (i.e., owning only one share for one minute will be sufficient). While this was a concern voiced by several Commissioners, the SEC eventually went ahead with the adoption of the Universal Proxy Rules. The new rules will reshape the process by which hostile bidders, activist hedge funds, social and environmental activists, and other dissident shareholders may utilize director elections to influence control and policy at public companies.

As the rules will dramatically change the methods by which proxy contests at public companies have been conducted for decades, this Update summarizes the principal mechanics of the Universal Proxy Rules and the implications of the rules for public companies.

Background and Existing Rules

The central feature of a contested corporate election is that shareholders are asked to vote, or give voting instructions by proxy, for two competing slates of director nominees: a company slate assembled by the board of directors and a “dissident slate” assembled by one or more dissident shareholders.¹

Under existing SEC rules, shareholders are not able to give voting instructions by proxy for any combination of director nominees by picking selectively from the company and the dissident proxy

cards unless they attend and vote at a shareholder meeting virtually or in person. Shareholders voting by proxy have been limited, instead, to giving voting instructions on the “company proxy card,” for or against the company’s nominees, or on the “dissident proxy card,” for or against the dissident candidates and, in the case of “short slates,” additionally for and against any company nominees supported by the dissident.² Under the existing system, the company and dissident shareholder disseminate to shareholders both their own separate proxy statements and their own separate proxy cards that feature their distinct slates.³

Overview of the Universal Proxy Rules

Under the new, mandatory universal proxy card system, a proxy card will have to include both the company nominees and the dissident nominees. Shareholders will be able to give voting instructions in favor of any combination of properly nominated candidates they choose, up to the number of authorized seats for election at the meeting. The Universal Proxy Rules will become effective for shareholder meetings after August 31, 2022.

The following discussion summarizes the principal components of the rules.

1. Required Use of Universal Proxy Cards in All Contested Elections

The Universal Proxy Rules require use of a universal proxy card by both the company and the dissident shareholder soliciting proxies in all nonexempt director election contests involving companies with a class of securities registered under Section 12 of the Exchange Act.⁴

Any proxy card used in director election contests must contain options to give voting instructions for any of the candidates nominated by the company and any dissident shareholder. If the dissident has nominated a full slate of dissident candidates, the universal proxy card may permit shareholders to grant voting authority for either all company nominees or all dissident nominees, as a group. Otherwise, the universal proxy card must give shareholders the ability to grant voting authority to any combination of nominees they select from both the company and dissident slates.

The rules also include presentation, formatting, and disclosure requirements for universal proxy cards. 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);
- present all nominees in the same font type, style, and size;
- prominently disclose the maximum number of nominees for which authority to vote can be granted; and
- prominently disclose the treatment and effect of a proxy executed in a manner that grants authority to vote for more nominees than the number of directors being elected (either granting authority to vote for fewer nominees than the number of directors being elected or not granting authority to vote with respect to any nominees).

The Universal Proxy Rules do not require the company and dissident to use identical cards but only that their respective universal proxy cards adhere to the same ground rules summarized above. Notably, the company and dissident are each permitted to provide their distinct proxy voting recommendations on their proxy cards; they can list the company nominees before the dissident nominees and vice versa; and can they can choose different colors for their proxy cards.

2. Nomination Notices and Filing Deadline for Proxy Statements

Rule 14a-19 includes new and specific requirements for companies and other persons soliciting proxies for director nominees. Dissidents who fail to comply with these requirements are prohibited from using the universal proxy card and continuing with their solicitation of proxies.

Notice of Nominees: The company and the dissident must provide timely notices to each other in connection with proxy contests:

- The dissident must provide notice to the company of the names of all dissident nominees for whom it intends to solicit proxies at least 60 calendar days prior to the anniversary of the prior year's annual meeting, unless this information has previously been provided in a preliminary or definitive proxy statement filed by the dissident.
- The company must provide notice to the same dissident shareholder furnishing the names of all nominees for whom the company intends to solicit proxies at least 50 calendar days prior to the anniversary of the prior year's annual meeting.

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 changed to (i) for the company, 50 calendar days prior to the date of the annual meeting and (ii) for the dissident, 60 calendar days prior to the date of the annual meeting or the 10th calendar day following the first public announcement of the date of the annual meeting. Under a new Rule 14a-5(e)(4), a company must disclose in its annual proxy statement the deadline for shareholders to give timely notice to the company of dissident nominations for the next annual meeting.

The dissident must also provide prompt notice to the company of any change in the names of its director nominees. If there is a change in the dissident's nominees after the registrant has disseminated a universal proxy card, the registrant could elect, but would not be required, to disseminate a new universal proxy card reflecting the change in dissident nominees.

A dissident shareholder's obligation to comply with the notice requirement under Rule 14a-19 is in addition to its obligation to comply with any advance notice provisions in a company's governing documents that provide more specific requirements regarding the timing and content of a dissident shareholder's notice of director nominations.

Filing Deadline: The dissident must file a definitive proxy statement by the later of (i) 25 calendar days prior to the date of the election meeting and (ii) five calendar days after the date that the company files its definitive proxy statement.

Scope of Solicitation: The dissident must solicit the holders of shares representing at least 67%⁵ of the voting power of shares entitled to vote on the election of directors and include a statement to that

effect in its proxy statement. However, as the SEC made clear, a dissident may choose to use the less costly e-proxy delivery method (i.e., the “notice and access” method of mailing a notice of internet availability and posting the proxy materials on a website) should it wish.

3. Revision of Bona Fide Nominee Rule and Elimination of the Short Slate Rule

Under existing Rule 14a-4(d)(1) under the Exchange Act, shareholders voting by proxy in contested elections have been limited in their choice of nominees by the “bona fide nominee” rule, which provides that no proxy card can confer authority to vote for any director nominee who has not “consented to being named” in the applicable proxy statement and to serve if elected. In practice, company candidates have rarely consented to being named on the dissident proxy card, and dissident candidates have rarely intentionally consented to being named on the company proxy card. As the existing bona fide nominee rule was incompatible with the adoption of a mandatory universal proxy card system, the Universal Proxy Rules amend the rule to permit proxy cards to confer voting authority for nominees who consent to be named in any proxy statement relating to the election meeting.

Rule 14a-4(d)(4), the “short slate rule,” permits a dissident shareholder seeking to elect a minority of dissident candidates of the board to “round out” its slate by soliciting from shareholders their proxy authority to vote for some of the company’s nominees through the dissident card. As the short slate rule is unnecessary in a mandatory universal proxy card system, the Universal Proxy Rules eliminate the rule altogether.

5. Other Amendments Relating to Universal Proxy Cards

The Universal Proxy Rules are designed to allow that universal proxy cards can be used while still permitting the company and dissident to create and disseminate their own individualized proxy statements. To this end, the new rules contain the following features:

- The company and the dissident will each be required to include a statement in its respective proxy statement referring shareholders to the other party’s proxy statement for information about such other party’s director nominees. This rule is a new Item 7(h) of Schedule 14A.
- Under the amended Rule 14a-5(c), the company and dissident will be able to satisfy certain disclosure obligations by referring information that is already, or will be, furnished by another party in its proxy statement. Currently, as written, Rule 14a-5(c) permits parties to refer to information that has been previously furnished, but in a universal proxy system this could prevent a company from relying on Rule 14a-5(c) to omit required information by referencing the dissident proxy statement where the proxy statement is still to be filed. The new rules therefore amend Rule 14a-5(c) to clarify that a party can rely on the rule to reference information that is reasonably expected to be filed in an upcoming proxy statement of the other party.⁶
- The new rules also require a company to disclose in its annual proxy statement the deadline for shareholders to give timely notice to the company of dissident nominations for the next annual meeting. This change is being made through a new Rule 14a-5(e)(4).

6. Miscellaneous Amendments Relating to Director Elections

The SEC has also used this rulemaking opportunity to adopt amendments to existing proxy rules with

respect to voting options for director elections, unrelated to the universal proxy card regime.

Voting options for director elections and the effects of these options differ based on the applicable voting standards established under state law and a company's governing documents. As a result, director elections may be subject to one of many different voting standards, including, primarily, the plurality, majority of votes cast, and "majority of shares present and entitled to vote" standards. The plurality standard allows shareholders to give voting instructions "for" and to "withhold" votes from candidates, but it generally does not allow shareholders to "abstain"; the majority standards allow shareholders to give voting instructions "for" and "against" candidates or to "abstain" but typically do not allow shareholders to "withhold" votes. The effect of "against," "withhold," and "abstain" options vary depending on the voting standard, applicable law, and the company's organizational documents.

While the federal proxy rules do not govern the voting standards used in director elections, the new rules amend Rule 14a-4 and Item 21(b) of Schedule 14A to reduce ambiguities and inaccuracies in companies' disclosure by requiring

- inclusion of an "against" voting option for director elections where there is a legal effect to such vote;
- inclusion of an "abstain" option for director elections where a majority voting standard applies; and
- disclosure regarding the effect of a "withhold" vote on director elections in the proxy statement.

Conclusions and Guidance for Public Companies

We provide the following practical guidance for consideration:

- **Boards of directors may expect dissident shareholders to use the availability of the universal proxy card — and the specter of the unknown it creates — as an additional source of leverage when they make demands to, and negotiate with, boards.** It is uncertain whether the new regime will give dissidents new advantages at the ballot box. Public advocates of shareholder activism have, however, championed the adoption of the new rules. Their enthusiasm may reflect a premonition that the universal proxy card will afford dissidents with additional leverage when negotiating with boards and ultimately allow them to place more dissident candidates on boards through negotiations and proxy contests.
- **The Universal Proxy Rules constitute a seismic shift in the regulatory regime governing proxy contests at public companies, but the new rules contain few guardrails to protect against misuse.** Unlike comparable rules previously adopted by the SEC, the new rules provide no barrier to entry in the way of fixing a minimum amount or duration for stock ownership. They provide no meaningful consequences for shareholders that initiate a proxy contest insincerely, causing a company to expend resources but without the intent follow through. **To the extent a company has not been thoroughly evaluating its shareholder activism preparedness and defenses outside of the proxy seasons, the coming year is a good time to start.**
- **Advance notice bylaws — which impose requirements on dissident shareholders to provide information about dissident candidates in advance of the dissemination of**

proxy statements — have become all the more important as a last line of meaningful screening of dissident nominees. To help ensure the quality of dissident director candidates and to protect a company and its shareholders from misuse of annual elections and proxy machinery, a company's advance notice bylaws should be thorough and designed in the interest of obtaining information a company needs to vet director candidates before they are nominated and elected to a board of directors. Advance notice bylaws have long been enforced by state courts. They were recently given additional, significant support by the Delaware Court of Chancery in *Rosenbaum v. CytoDyn*, a case argued and won by Sidley attorneys.⁷

- **Public companies should review the applicability of the Universal Proxy Rules to their peacetime disclosure requirements.** The new rules require, among other things, that a company disclose in its annual proxy statement the deadline for shareholders to give timely notice to the company of dissident nominations for the next annual meeting and that a company include specific disclosures concerning its voting standards.
- **If faced with dissident nominations in the coming year, it will be especially important for companies to apply the Universal Proxy Rules accurately to their disclosures and solicitation process.** The SEC is likely to be vigilant of proxy materials in contested elections in the upcoming proxy seasons on account of the new rules. Consulting with counsel experienced in proxy contests will smooth the path to clearing SEC review and other regulatory barriers and soliciting proxies quickly and efficiently.

For additional information on the topics covered in this Sidley Update, visit our [Shareholder Activism](#) practice page.

¹In the current (and outgoing) system, while the company always nominates a number of director candidates equal to the number of available seats for election, a dissident shareholder may nominate either the same number of “dissident candidates” (a “full slate”) or fewer dissident candidates (a “short slate”) and then “round out” its slate, up to the number of available seats, by indicating which of the company's nominees the dissident shareholder will additionally support at the election upon receipt of proxies from shareholders. Pursuant to technicalities under the federal proxy rules, a dissident proxy card offering a short slate states which company nominees the dissident will not vote for upon receipt of shareholder proxies, thereby indirectly indicating which company nominees it will vote for upon receipt of shareholder proxies.

²Depending on applicable voting standards, shareholders may be given the option to “withhold” votes on the director candidates as opposed to the option to vote “against” director candidates. See below under “Miscellaneous Amendments Relating to Director Elections.”

³Under the current proxy rules, companies and dissident shareholders are permitted to instead use universal proxy cards, as are further described below, on their own volition. In practice, such use has only occurred in two recent proxy contests (Sandridge Energy Inc. in 2018 and EQT Corporation in 2019).

⁴The universal proxy system is not mandatory for a dissident's consent solicitation to remove existing company directors and does not apply to director elections at registered investment companies or business development companies. In its proposing release, the SEC opined that consent solicitations,

although related to the election of directors, do not raise the same concerns that mandatory universal proxy is intended to address because shareholders would have access to a consent card that reflects all of their voting options for the removal and appointment of directors to fill the vacancies, if any, created by the removal of directors. Funds and business development companies will remain subject to the federal proxy rules currently in effect.

⁵The SEC originally contemplated a mere majority threshold, but the threshold was increased to 67% in the final rulemaking.

⁶This change in effect codifies how Rule 14a-5(c) has been applied in recent years, as dissident preliminary proxy statements periodically clear SEC review while relying on Rule 14a-5(c) to incorporate information from a forthcoming proxy statement of a company.

⁷*Rosenbaum v. CytoDyn Inc.*, No. CV 2021-0728-JRS (Del. Ch. Oct. 13, 2021). See also [Sidley Secures Trial Victory on Behalf of CytoDyn, Inc. in the Delaware Court of Chancery](#), Sidley News, Oct. 14, 2021.

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