"Activist Profiles & Playbooks"

Tuesday, February 7, 2023

Course Materials

“Activist Profiles & Playbooks”

Tuesday, February 7, 2023

2 to 3 p.m. Eastern [archive and transcript to follow]

High stock market volatility, a slump in dealmaking and economic uncertainty would likely be enough on their own to make 2023 a target rich environment for activists. But changes in the dynamics of proxy contests resulting from the universal proxy rules and the potential entry of new activists into the mix could result in unprecedented levels of activism in 2023. That makes it even more important to identify who the activists are, what makes them tick — and how activism is changing.

Join these experts:

- **Anne Chapman**, Managing Director, Joele Frank
- **Alexandra Higgins**, Managing Director, Okapi Partners
- **Damien Park**, Managing Director, Spotlight Advisors LLC
- **Dan Scorpio**, Managing Director, Abernathy MacGregor

Topics for this popular annual webcast include:

- What Are the Lessons from 2022's Activist Campaigns?
- What Can Companies Expect from Activists During This Proxy Season & How Are Companies Preparing?
- How Will Universal Proxy Change Activism & Companies' Response to It?
- Who Are the Activists & What Are Their Strategies?

“Activist Profiles & Playbooks”

Course Outline/Notes

1. What Are the Lessons from 2022’s Activist Campaigns?

2. What Can Companies Expect from Activists During This Proxy Season & How Are Companies Preparing?

3. How Will Universal Proxy Change Activism & Companies’ Response to It?

4. Who Are the Activists & What Are Their Strategies?

“Activist Profiles & Playbooks”

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January 12, 2023

Activism: 2022 Trends & Settlements

Sullivan & Cromwell recently published its annual report on 2022 shareholder activism and activist settlement agreements. The publication addresses a wide range in activism trends and the terms of settlement agreements between companies and activists. One of the many interesting observations in the report is the way last year's market volatility and macroeconomic shocks have influenced activist strategies:

> Although activists have not been deterred by the market volatility, these underlying macroeconomic conditions appear to have driven changes in activists' objectives. Campaigns targeting corporate strategies and operations (including demands for cost-cutting measures) have significantly increased this year, while the absolute number of capital allocation and M&A-related campaigns (historically the most common campaign objectives) has declined.
>
> Market conditions briefly rebounded over the summer, leading to a short-lived uptick in the number of M&A-related campaigns (particularly, attacks on announced deals) and capital allocation campaigns (including campaigns demanding the return of cash to shareholders at companies that built up cash reserves during the pandemic).
>
> However, with higher interest rates in effect for the foreseeable future, slower M&A markets and impending laws and regulatory proposals that could impact M&A activity and/or corporate cash reserves, activists may reduce or shift their capital allocation or M&A demands as we enter the 2023 proxy season. For example, the Inflation Reduction Act, which takes effect on January 1, 2023, will impose a nondeductible 1.0% excise tax on public company share repurchases that involve more than $1 million in the aggregate per tax year, which could make share buybacks a less desirable capital allocation strategy for activists.

While activist demands for M&A and buybacks may be down in the current environment, the report says that there was a significant uptick in campaigns calling for management changes in 2022. For the first 10 months of the year, 54 campaigns were launched against U.S. companies demanding the removal of officers, compared to 37 in 2021 and 42 in 2020. The report notes that last year's total was the second highest number of campaigns demanding management changes in the first 10 months of any year since Insightia began tracking this data in 2010.

– **John Jenkins**

Posted by John Jenkins
Permalink: https://www.deallawyers.com/blog/2023/01/activism-2022-trends-settlements.html

December 5, 2022

Universal Proxy: Want the White Proxy Card? Better Amend Your Bylaws!

In our recent podcast, Hunton Andrews Kurth's Steve Haas discussed bylaw changes that companies should consider in response to the implementation of the universal proxy rules. One possible change he suggested was including language in the bylaws reserving the use of the white proxy card to the board.

White is the color that's traditionally been used by management in proxy contests, and with all parties jockeying for leverage in the new environment, it certainly seemed plausible that dissidents might try to grab the white card to increase the likelihood that investors would return their version of the universal proxy card. Over the past couple of months, many companies, including heavyweights like Exxon Mobil and Alphabet. Here's the relevant language from Alphabet's bylaws:

> 2.12 PROXIES.
>
> Each stockholder entitled to vote at a meeting of stockholders may authorize another person or persons to act for such stockholder by proxy, but no such proxy shall be voted or acted upon after three (3) years from its date, unless the proxy provides for a longer period. A stockholder may authorize another person or persons to act for him, her or it as proxy in the manner(s) provided under Section 212(c) of the DGCL or as otherwise provided under Delaware law. The revocability of a proxy that states on its face that it is irrevocable shall be governed by the provisions of Section 212 of the DGCL.
>
> Any stockholder directly or indirectly soliciting proxies from other stockholders must use a proxy card color other than white, which shall be reserved for the exclusive use by the Board.

Anyway, it turns out that the concerns about dissidents beating companies to the punch and claiming the white card for their own that have prompted these amendments aren't just hypothetical. On Twitter, Andrew Droste pointed out that activist hedge fund Blackwells Capital has launched a proxy contest at Global Net Lease – and grabbed the white card before the company did. So, if any of you have clients that considering the possibility of this kind of amendment, you might want to share Andrew's tweet with them & suggest that there's no time like the present.

> Gibson Dunn's Ron Mueller points out that Engine No. 1 snagged the white card in its battle with Exxon Mobil, and that's what first put this issue on the radar screen for public companies (and likely prompted Exxon Mobil's bylaw amendment).

– John Jenkins

Posted by John Jenkins
Permalink: https://www.deallawyers.com/blog/2022/12/universal-proxy-want-the-white-proxy-card-better-amend-your-bylaws.html

December 23, 2022

Universal Proxy: Lessons From the First Proxy Contest

This recent memo from Goodwin's Sean Donahue takes a look at some of the lessons learned from the first proxy contest conducted after the effective date for the universal proxy rules. The contest pitted activist investor Land & Buildings against Apartment Invesment and Management. L&B nominated two directors, and one was elected to the Aimco board. Sean points out that ISS's recommendation that shareholders vote for one of L&B's two nominees may have played a significant role in the outcome – that candidate received twice as many votes as the company's nominee.

Many have predicted that proxy advisors will become more influential under the new regime, so it wouldn't be surprising if ISS's recommendation proved decisive. But not everything went as observers may have expected. For instance, many have predicted that it may be possible to conduct a proxy contest "on the cheap" under the new rules. The memo says that wasn't the case with this fight:

> Many observers have asserted that the universal proxy regime would significantly reduce the cost of proxy contests. We have been skeptical of this view as a shareholder still has to prepare an advance notice of nomination, file a proxy statement, and furnish a proxy statement and proxy card to shareholders having at least 67% of the voting power. We also believe that economic activists will conduct meaningful solicitation efforts that go beyond the SEC's minimum solicitation requirements as their goal is to be victorious.
>
> In the Aimco proxy contest, according to L&B's proxy statement, it estimated that the cost of the proxy contest would be $1,000,000. Notably, at the time it filed its definitive proxy statement, it disclosed that it had only spent $200,000 on the proxy contest meaning that most of its costs were back-end loaded.

The memo goes on to note that, by way of comparison, L&B ran a proxy contest earlier this year before universal proxy kicked in & estimated that the cost of that proxy contest would be $1,200,000, of which $500,000 was spent prior to filing the definitive proxy statement.

> Unless Delaware overrules *Revlon* or something equally significant happens next week, this will my final blog of the year. Thanks so much to everyone for reading my ramblings and passing on your suggestions and comments. Merry Christmas & Happy Hanukkah to everyone who celebrates those holidays, and best wishes for a healthy and prosperous New Year to all! I hope to see everyone back here in 2023.

– **John Jenkins**

Posted by John Jenkins
Permalink: https://www.deallawyers.com/blog/2022/12/universal-proxy-lessons-from-the-first-proxy-contest.html

December 8, 2022

Staff Issues 3 New Universal Proxy CDIs

Earlier this week, the Corp Fin Staff issued three new CDIs on universal proxy. Dave Lynn posted this blog about them on TheCorporateCounsel.net:

> Yesterday, the Staff published three new Proxy Rules and Schedule 14A Compliance and Disclosure Interpretations addressing the new universal proxy rules. Two of the new CDIs deal with the company's obligations when a dissident shareholder's nominees are rejected based on advance notice bylaw requirements, and one of the CDIs makes the point that a dissident must provide its own proxy card as part of its meaningful solicitation efforts and not just rely on the company's proxy card. The new CDIs are as follows:
>
> **Question 139.04**
>
> **Question:** A registrant receives director nominations from a dissident shareholder purporting to nominate candidates for election to the registrant's board of directors at an upcoming annual meeting. The registrant, however, determines that the nominations are invalid due to the dissident shareholder's failure to comply with its advance notice bylaw requirements. Must the registrant include the names of the dissident shareholder's nominees on its proxy card pursuant to Rule 14a-19(e)(1) under these circumstances?
>
> **Answer:** No. Only duly nominated candidates are required to be included on a universal proxy card. See Release No. 34-93596 (Nov. 17, 2021) (noting that universal proxy cards "must include the names of all duly nominated director candidates presented for election by any party…", and explaining that "[a] duly nominated director candidate is a candidate whose nomination satisfies the requirements of any applicable state or foreign law provision and a registrant's governing documents as they relate to director nominations"). If the registrant determines, in accordance with state or foreign law, that the dissident shareholder's nominations do not comply with its advance notice bylaw requirements, then it can omit the dissident shareholder's nominees from its proxy card. [December 6, 2022]
>
> **Question 139.05**
>
> **Question:** A registrant determines that a dissident shareholder's director nominations do not comply with its advance notice bylaw requirements and excludes the dissident shareholder's nominees from its proxy card. The dissident shareholder then initiates litigation challenging the registrant's determination regarding the validity of the director nominations. Under these factual circumstances, what are the registrant's obligations with respect to its proxy statement disclosures and solicitation efforts?
>
> **Answer:** The registrant must disclose in its proxy statement its determination that the dissident shareholder's director nominations are invalid, a brief description of the basis for that determination, the fact that the dissident shareholder initiated litigation challenging the determination, and the potential implications (including any risks to the registrant or its shareholders) if the dissident shareholder's nominations are ultimately deemed to be valid.

If a registrant furnishes proxy cards that do not include the dissident shareholder's director candidates and a court subsequently determines that the dissident shareholder's candidates are duly nominated, then the registrant is obligated under Rule 14a-19 to furnish universal proxy cards with the dissident shareholder's candidates. Accordingly, it should discard any previously-furnished proxy cards that it received. The registrant also should ensure that shareholders are provided with sufficient time to receive and cast their votes on the universal proxy cards prior to the shareholder meeting, including, if necessary, through the postponement or adjournment of the meeting. [December 6, 2022]

Question 139.06

Question: Can a dissident shareholder conducting a non-exempt solicitation in support of its own director nominees simply file a proxy statement on EDGAR, avoid providing its own proxy card, and instead rely exclusively on the registrant's proxy card to seek to have its director nominees elected?

Answer: No. Rule 14a-19(e) requires each soliciting party in a director election contest to use a universal proxy card that includes the names of all director candidates, including those nominated by other soliciting parties and proxy access nominees. Rule 14a-19(a)(3) further requires a dissident shareholder to solicit holders of at least 67% of the voting power of shares entitled to vote on the director election contest and to include a representation to that effect in its proxy statement. This requirement is intended to prevent a dissident shareholder from capitalizing on the inclusion of its nominees on the registrant's universal proxy card without undertaking meaningful solicitation efforts. See Release No. 34-93596 (Nov. 17, 2021). A dissident shareholder would fail to comply with these rules if it does not furnish its own universal proxy cards to holders of at least 67% of the voting power through permitted methods of delivering proxy materials (such as the Rule 14a-16 "notice and access" method). [December 6, 2022]

– **John Jenkins**

Posted by John Jenkins
Permalink: https://www.deallawyers.com/blog/2022/12/staff-issues-3-new-universal-proxy-cdis.html

November 21, 2022

Advance Notice Bylaws: Battlelines are Drawn on Amendments Targeting Activists

Activists & their advisors are seeing red over some changes to advance notice bylaws being implemented by companies in response to the universal proxy rules. In a recent "Open Letter" to directors & activist investors, Olshan warns boards against adopting advance bylaw amendments that add an array of new disclosure requirements that the firm argues aren't necessary or appropriate responses to the universal proxy rule:

> We urge you to be vigilant when reviewing and approving any new bylaws to avoid inadvertently adopting bylaw amendments that are predicated on misleading narratives and do not align with responsible corporate governance practices. In particular, be on the lookout for proposed amendments to nomination procedures requiring additional disclosure designed to make it more difficult, expensive or even impracticable to nominate directors or intended to chill permitted communications among shareholders such as provisions requiring disclosure of (i) the ownership interests of the nominating shareholder's limited partners or distant family members in the company, competitors of the company or counterparties to any litigation involving the company, (ii) the nominating shareholder's past or future plans to nominate directors at other public companies or (iii) the nominating shareholder's prior communications with fellow shareholders concerning its plans or proposals relating to the company.

While Olshan doesn't drop any names, the bylaw provisions it highlights are the same ones that Masimo Corporation implemented in response to a campaign by activist hedge fund Politan Capital Management. Those parties are currently brawling in Delaware Chancery Court over the legality of the amendments.

Why does the activist community have its nose out of joint over bylaw amendments like these? In a recent blog, Prof. John Coffee notes that identifying limited partners of an activist shareholder might prove embarrassing to certain of those partners, particularly public sector funds. But he says there's a bigger reason for their concern with these bylaws:

> What most concerns the activist community appears to be the attempt of the Masimo bylaw to obtain disclosure about the recent track record of the activist seeking a board seat. What similar campaigns has it launched at other companies? To this end, the Masimo bylaw's critical term – "Covered Person" – includes persons "Acting in Concert" (as defined) with the nominating shareholder, even though they do not have any express agreement.
>
> In part, the intent here appears to have been to identify shareholders who have a special agenda (say, environmental activism) and have developed an ongoing association with the nominating person in order to pursue a common agenda (which may have little to do with the maximization of shareholder value). Corporate management's apparent premise here is that, with universal proxy

> voting, such informal alliances with single-issue activists may become more common and that shareholders deserve information about such associations.

Coffee's article takes a sympathetic view of the Masimo bylaw amendments, but if you're interested in a different perspective, check out this blog from Prof. Lawrence Cunningham. Cunningham contends that Delaware courts are okay with advance notice bylaws so long as they don't interfere with the exercise of the stockholders' franchise. He argues that the provisions of the Masimo bylaw "almost certainly cross the line, particularly in its call for a nominating shareholder to disclose its limited partners."

– **John Jenkins**

Posted by John Jenkins
Permalink: https://www.deallawyers.com/blog/2022/11/advance-notice-bylaws-battlelines-are-drawn-on-recent-amendments-targeting-activists.html

October 6, 2022

Universal Proxy: We've Got an Example

Michael Levin recently shared via Twitter an example of universal proxy cards used by participants in what's apparently the first contested election to be conducted under the new rules. Here are the preliminary proxy materials filed by Apartment Investment and Management Company, and here are the materials filed by the dissident group. Michael's tweet includes a link to his TAI newsletter discussing the filings, which provides some interesting insights into the contest & the filings themselves. Here's an excerpt:

> First, the proxy cards recommend how shareholders vote, in addition to properly distinguishing between the AIM and L&B nominees. The SEC rule was largely silent as to how the proxy card (not the proxy materials) should set forth specific voting instructions. We expect to see more companies and activists to test the boundaries of what the SEC will allow them to put on a proxy card.
>
> Second, both of the AIM and L&B proxy statements include a curious statement. AIM's appears in the Q&A section (p. 5), with a similar idea in the letter to shareholders:
>
> > **If I want to vote for one or more of Land & Buildings' nominees can I use the WHITE universal proxy card?**
> >
> > Yes, if you would like to elect some or all of Land & Buildings' nominees, we strongly recommend you use the Company's WHITE proxy card to do so.
>
> L&B states (p. 17):
>
> > Any stockholder who wishes to vote for one of the Company's nominees in addition to the Land & Buildings Nominees may do so on Land & Buildings' BLUE universal proxy card. **There is no need to use the Company's white proxy card or voting instruction form, regardless of how you wish to vote.**
>
> [emphasis theirs in each excerpt]
>
> Why would each acknowledge that shareholders might vote for the other's nominees, and suggest they could do so using their own proxy card? We'd think they would do everything it could to discourage this. It appears each wants to receive as many proxy cards as it can. They can thus track which shareholders have already voted. If AIM receives proxy cards with votes for L&B nominees, and L&B for AIM nominees, then each can easily contact those shareholders, and attempt to persuade them to change their votes. Clever…

– **John Jenkins**

Posted by John Jenkins
Permalink: https://www.deallawyers.com/blog/2022/10/universal-proxy-weve-got-an-example.html

August 22, 2022

Universal Proxy: Annual Meeting Roadmap for Activists

The universal proxy rules apply to all shareholders' meetings held after August 31st. Activist investors are gearing up for the new regime, and public companies should be as well. This Olshan memo provides a "roadmap" to the director nomination and solicitation process for activists considering a proxy contest under the new rules, and it's also likely to be of interest to public company advisors. This excerpt addresses the mechanics of the nomination process:

> Preparation and Submission of Nomination Notice/Universal Proxy Card Notice
>
> 1. If required, request company-form director nominee materials by letter to the company (may require identifying stockholder of record)
>
> 2. Prepare nomination notice
>
> a. May require extensive disclosure beyond that required in proxy statement, potentially including completed company-form director nominee questionnaire
>
> b. Generally should include information required for universal proxy notice to satisfy universal proxy rules, including names of proposed nominees and a statement that the nominating stockholder intends to solicit proxies from at least 67% of the voting power entitled to vote in the election of directors
>
> 3. Deliver nomination notice in accordance with timing/manner requirements
>
> a. Unless nominating stockholder is a Schedule 13D filer, in which case nomination will need to be disclosed in amendment to Schedule 13D, nomination can be delivered privately (without SEC filing or other public disclosure) if desired
>
> b. Announcement of date of next annual meeting may impact nomination timing requirement (may be based on date of meeting or reset nomination deadline if date of meeting is outside of specified timeframe)
>
> 4. If nomination notice is not due at least 60 calendar days prior to the anniversary of the company's previous year's annual meeting (subject to potential adjustment), required to provide separate
> universal proxy notice prior to such date

Other topics addressed by the memo include the activist's situation analysis, engagement with potential nominees and service providers, and various matters relating to proxy cards and soliciting materials.

> The universal proxy compliance date is just around the corner, and we have the resources you need to help you make sure that you're up to speed on the new rules. In addition to the law firm memos & other materials on the new rules available in our "Proxy Fights" Practice Area, we've also hosted a webcast on the new regime and, more recently, podcasts with Goodwin's Sean

Donahue and The Activist Investor's Michael Levin. Subscribe today to access these materials & our other resources! You can subscribe online, by emailing sales@ccrcorp.com, or by calling (800) 737-1271.

– **John Jenkins**

Posted by John Jenkins
Permalink: https://www.deallawyers.com/blog/2022/08/universal-proxy-annual-meeting-roadmap-for-activists.html

"Universal Proxy: Preparing for the New Regime"

Tuesday, January 11, 2022

Audio Archive

Course Materials

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

This program will cover:

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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?

John Jenkins, *Managing Editor, DealLawyers.com:* Hi, this is John Jenkins, Senior Editor of DealLawyers.com, and I'd like to welcome you to today's DealLawyers.com webcast, "Universal Proxy: Preparing for the New Regime." As everyone knows by now, after years of waiting, the SEC finally adopted universal proxy requirements for contested elections late last year. It's a potential game changer for proxy contests and although companies won't be required to comply with it for meetings held prior to August 31st of this year, a lot of preparation is needed. Our distinguished panel of experts is joining me today to help you identify some of the implications of the new regime and provide thoughts as to what you should be doing to prepare for it.

So, please join me in welcoming Sean Donahue, Partner at Goodwin Procter; Eduardo Gallardo, Partner at Gibson Dunn; Kai Liekefett, Partner at Sidley Austin; and Tiffany Posil, Partner at Hogan Lovells. I'm going to turn things over to Tiffany, who will get us started with an

overview of universal proxy requirements. She's in a good position to do so because when she was at the SEC, she played a major role in drafting the universal proxy proposing release.

Overview of the Universal Proxy Requirement

Tiffany Posil, *Partner, Hogan Lovells LLP*: Thanks John. This past November, the SEC amended the proxy rules to require the use of universal proxy cards and contested director elections. As was emphasized in the proposing and adopting releases, this rule-making effort was driven by the fundamental principle that shareholders should have the ability to vote by proxy in the same manner as they could if attending a shareholder meeting in person. To provide some context for the changes implemented by these amendments, let's first discuss how proxy cards are typically used in contested elections today, and then I'll provide a brief overview of the new requirements.

Today, the bona fide nominee rule prevents one party from including the other party's nominees on its proxy card without the other party's nominees' consent. Such consent is rarely provided in a contested election. As a result, in a vast majority of contested elections, shareholders received dueling proxy cards, presenting competing slates: one from the company that lists only the company's nominees, and then one from the dissident, but lists the dissident's nominees. Because shareholders can only submit one proxy card under state law with later dated proxy cards and validating any earlier dated ones, they must choose between executing the company's proxy card for some or all of the company's nominees or executing the dissident's proxy card for some or all of the dissident's nominees. Thus, shareholders are unable to choose a mix of dissident and company nominees when voting by proxy.

In contrast, shareholders who vote in person at a shareholder meeting are able to select nominees from a ballot that should include all of the company's nominees and all of the dissident's nominees, thereby enabling them to choose a mix of dissident and company nominees if they wish. The rules adopted by the commission in November are aimed at addressing the safe symmetry between shareholder choices when voting by proxy versus at the meeting, in person.

Next, I'll touch on the requirements that were implemented with the universal proxy rules. First, the universal proxy rules required that the company and dissident use a universal proxy card that includes the names of all duly nominated director candidates presented for election by any party, and for whom proxies are solicited. This means that the company and the dissident will each disseminate a proxy card that includes the names of both company and dissident nominees and proxy access nominees, which we'll touch on later. Because companies and dissidents will now have to coordinate on the inclusion of each other's nominees and their respective proxy cards, new Rule 14a-19 sets forth some notice and filing deadlines for companies and dissidents. However, the dissident must first notify the company of the dissident's intent to solicit proxies and the names of its nominees at least 60 days before the anniversary of the previous year's annual meeting.

Importantly, the dissident's obligation to comply with this notice requirement is in addition to its obligation to comply with any advance-notice provision in the company's governing documents. The Rule 14a-19 notice requirement is a minimum period that does not override or supersede a longer period or earlier deadline that's established by the company's governing documents. The dissident's notice must include a statement that the dissident intends to solicit 67% of the voting power, shares and title to vote on the election of directors, and we'll touch on this minimum solicitation requirement in a bit.

Following the dissident's notice - again, that's 60 days before the anniversary of the previous year's annual meeting - we then have the company that must notify the dissident of the

names of the company's nominees at least 50 days before the anniversary of the previous year's annual meeting. This is necessary to provide dissidents with the definitive date by which they will have the names of all nominees to compile their universal card. Absent of such a requirement, the dissidents would face an information and timing disadvantage. As with the dissident's notice requirement, the company's notice is not required if this information is already included in a preliminary or definitive proxy statement filed by the deadline. Each party is required to notify the other of any changes in their respective nominees.

Another timing mechanism put in place with the new rules is that the dissidents must file their definitive proxy statement at least 25 days before the meeting date, or five days after the company files its definitive proxy - whichever is later. This helps ensure that shareholders who receive a universal proxy card from the company will have access to the information about all nominees sufficiently in advance of the meeting. With all of these timing requirements, if the dissident fails to comply, the Rule 14a-19 rule will not permit the dissident to continue with the solicitation, and the company could disseminate a new, nonuniversal proxy card that only includes the names of company nominees.

In addition to the deadlines imposed by the new universal proxy rules, they also impose a requirement that each party refer shareholders to the other party's proxy statement for information about the other party's nominee. The parties are not required to include information about the opposing side's nominees in their own proxy statement. This requirement enables shareholders to access information with respect to all nominees when they do receive a universal proxy card.

A key feature of the new universal proxy regime is the requirement that dissidents solicit at least 67% of the voting power of shares entitled to vote at the meeting. This is one area where the adopted rules deviate from the proposals, and it represents an increase from the minimum solicitation requirement included in the proposal of at least the majority of the voting powers of shares entitled to vote.

Initially, there was significant support for a majority minimum solicitation requirement, but when the comment period was reopened for universal proxy in 2021, most comments favoredan increased minimum solicitation requirement. After giving this some additional consideration in light of the comments, the staff implemented a 67% minimum solicitation requirement in the adopting release. Most notably, the staff declined to adopt a special mechanism for ensuring compliance with this minimum solicitation requirement. Instead, if the dissident fails to meet the 67% minimum solicitation threshold, as with any failure to comply with other deadlines, it will constitute a violation of 14a-19, and the dissident would be exposed to the same liability as if it had violated other proxy rules.

Finally, the new universal proxy rules established presentation and formatting requirements for the universal proxy cards that are intended to ensure that each party's nominees are presented in a clear and neutral manner. The universal proxy cards must include the names of all duly nominated director candidates, and the card must grant authority to vote for the nominees that force barrier in, and distinguish among the registrant, the dissident and any proxy access nominees.

Within each group of nominees, the nominees must be listed in alphabetical order by last name on the proxy card, and they must be listed using the same font type, style, and size. The card must also prominently disclose the max number of nominees for which authority to vote can be granted, and then disclose the impact of any overvoting or under voting. As with the current proxy rule, each side will disseminate its own proxy card, and they're free to choose the design of the card, including color, subject of course to these new presentation and formatting requirements. That provides you with a brief overview of the deadlines and

other mechanisms implemented with the new universal proxy rules. I'll turn it over to Sean now to discuss proxy contests under the new regime.

Proxy Contests Under the New Regime

Sean Donahue, *Partner, Goodwin Procter LLP*: Thanks, Tiffany. That was a great overview. Before I continue, I'd like to say that this was a well-done release by the SEC staff. I may have come out differently on some of the rules, but the process and a lot of the data they collected started with Tiffany, back when she worked on the proposing release, and then got carried forward. I thought it was a really well-written, thoughtful release, so I commend the staff. I wasn't sure we were going to see it before the end of the year, so getting it out before Thanksgiving was impressive.

The first thing to note is this will not apply to proxy contests for this annual meeting season. We're not going to see it apply until after August 31st this year. It won't apply to proxy contests this season. Essentially, there's no minimum ownership levels or time period holding requirements for any of this. It's very different from Rule 14a-8 and what was proposed under Rule 14a-11. If you comply with the rules, then you use the universal proxy, and there's no type of ownership or holding period requirements whatsoever. You can own one share, hold it for a couple days and run a contest. However, you do have the minimum solicitation. You'll have 67%, so there is some limitation on what you're being able to do here. Even though there's not holding period or ownership requirements, you have to solicit 67%, as Tiffany mentioned.

You have to make a few distinctions before you talk about proxy contests, including assessing the overall impact on shareholder activism in general. The rules for proxy contest are going to have an impact on overall activism levels and the ability of activist investors to potentially have leverage against companies to force an early settlement if they only want one seat.

You need to differentiate between true hedge fund activist investors and gadflies who have not historically run proxy contests, but may be able to now, as well as short slates versus control slates. Short slate versus control slate is completely different in its potential impact. However, as this plays out over the next couple years, I believe there will be distinction in small cap versus large cap activism, which is a different game in a different type of fight. It's a different class of investor with different types of theses for why there should be change at the board level. There could be some distinctions there.

Let me return to activist investors versus gadflies. Rule 14a-8 is going to have stricter ownership thresholds starting next year - if you only have shares for $25,000 for one year, that's a real amount of money that you could easily see gadflies starting to run actual proxy contests, perhaps for one board seat, and then just a slew of shareholder proposals. Remember, under Rule 14a-8, there is the limitation on one proposal. Rule 14a-8 is when I get to include a shareholder proposal as a dissident in the company's proxy statement. There's a limitation of one proposal, but absolutely no limit on how many shareholder proposals I can stick on a proxy card if I'm willing to file my own proxy. It will come down to whether gadflies are going to use this, and whether they're going to figure out how to do it inexpensively or at least cost efficiently. If you think about the cost of a proxy contest, you have the compliance with the advance notice, and now the D&O Questionnaire that needs to get typically filled out.

They'll likely figure out how to do that economically. You have to file the proxy, which at the end of the day is not that long of a document, and under Rule 14a-5, you can incorporate by reference most of the company's disclosures, anyway. You then have to mail the 67%.

Because the goal with proxy contests has historically been to win, everybody has done full-set delivery. In 2008, Costa Brava tried using eproxy in a contest against Bassett Furniture, so it's not unprecedented that a dissident would use eproxy. To clarify, I use gadflies as people who tend to want to affect some kind of change but don't have a large ownership stake in the company - not a traditional hedge fund activist, but more of the proponents that you see doing Rule 14a-8 proposals on a serial basis against multiple companies.

If they can figure out a way to do proxy contests cost effectively, you could see a whole host of new types of proxy contests that maybe propose one nominee. Perhaps it's the shareholder proponent themselves, and a slew of Rule 14a-8-esque type of proposals.

Eduardo Gallardo, *Partner, Gibson Dunn & Crutcher LLP*: You are absolutely right. As a threshold matter, we need to appreciate that there is a big difference between the traditional hedge fund activist, on the one-hand, and the gadlies and single issue interest groups, on the other hand. For the activist hedge fund the universal proxy isn't going to change much in the way that they've run proxy contests. Those are well-funded entities that don't have a problem with spending the money that they need to spend to put together thick- campaign books mailed on multiple occasions to every record and beneficial shareholder. Money is no barrier to them. The impact of universal proxy will be more meaningful to certain interest groups, single-issue activists, that today run Rule 14a-8 proposals. They're going to switch over to running proxy contests for director elections and will figure out a cost-effective way of filing proxy statements with the SEC. I expect them to come up with boilerplate proxy materials that they file for 20 different companies in a single year, and they're going to be campaigning on the basis of a single issue. To me, that is the real, more meaningful consequence of the universal proxy. It's giving groups like that the ability to run mass campaigns across multiple companies, and that's where we need to pay attention.

Kai Liekefett, *Partner, Sidley Austin LLP*: I agree with this wholeheartedly, and I'm shocked that corporate America was asleep at the switch here. Corporate America went to war over proxy access and universal proxy is proxy access on steroids, from that perspective that Sean and Eduardo just described. It is way too easy for special interest groups and gadfliesto get on a company's proxy card. We had submitted a 20-page letter to the SEC about it. We spoke to commissioners and got two commissioners to express concerns to the staff about it, and one actually to vote against it over this issue. I am very concerned about the Microsoft of these worlds being bombarded in the near future, these nominations by special interest groups, just to further other interests.

Donahue: I completely agree. Regarding cost, I've heard the argument on the other side of, "Well, these are expensive and both the advance notice and proxy statement cost money, but all of the mailing is just ridiculously expensive." At a 67% solicitation threshold, it's easy given the institutional ownership, because you can do a stratified mailing, and you only have to solicit 67%. You might be able to literally - and I'm not trying to give a funny example - get the list of the top 15-20 shareholders, sit in your house doing advance notice, send it over to a company, go and prepare proxy statements, file with the SEC, clear comments, go over to Kinko's, print out 15 proxies and mail them. As long as you coordinate with Broadridge, it's not very hard.

The cost of the solicitation disclosure in the proxy statement is often hundreds of thousands of dollars, but if you drill down, there are definitely activists that have run their own contests that aren't from sophisticated hedge funds. They're a special interest group that have run single-issue or multiple-issue contests. You see solicitation fees in some of those proxy statements of $10,000. The question is, did they prepare an advance notice? No, but they can figure out how to do that as well. It's a long document, but it's not that complicated.

Gallardo: I agree that it's not that complicated of a document. However, let's pause for a moment and talk about the requirement to solicit two-thirds of the outstanding shares. In various conversations I've had since the proposed rule came out, I've noticed a misconception that this requirement to solicit involves engaging in a sort of roadshow - meeting with shareholders and actively engaging with them to solicit their vote. That's not the requirement as I currently read it. You could discharge the obligation by simply mailing a one-pager notice andaccess to holders of two-thirds of the shares. This in and of itself is not that expensive unless you are talking about the Microsoft or Apples of the world. For middle market companies, it's not going to be that expensive. My impression is that the staff is going to be pretty laid back on how they interpret that provision. That goes on to show how there are not sufficient guardrails around this process.

There's been a lot of discussion about how helpful it is to have this two-third requirement. I personally don't think it's helpful. Certainly, it's best at having no requirement, but it doesn't put a real, firm guardrail that requires an activist or a gadflyto invest in the contest.

Donahue: Let me make another point there. How does it affect not only proxy contests, but also shareholder activism? Let's say I'm a governance activist or gadfly, and I call the company and say, "Look, I've figured out how to fill advance notices, and I want you to take action on this one issue. But if you don't, I'm going to run a proxy contest for board representation, and also stick in eight shareholder proposals in there. I'm going to come up with some government and DEI proposals."

So, "Why don't you either implement exactly what I'm asking you to implement or you're going to face a proxy contest of me running myself or my neighbor down the street and putting eight proposals in your proxy statement that. By the way, just to be clear, under Rule 14a-4c, for shareholder proposals that aren't for director nominations, there's a minimum solicitation threshold there, too, which is the majority of shares needed to carry a proposal. Very easy to comply with, you have basically auto-compliance if you're going to do the 67 percent. Just to be clear, that's what I'm going to do. And if I do that, you're going to be in a horrible proxy contest this year. It's going to cost you millions of dollars. Or you can just implement my pet project, and I can take credit for it, and publish a press release about how I got all these companies to cave to my demands."

If we believe that governance activists and gadflies truly have this leverage, you could see them basically being able to get companies with the threat of a proxy contest under universal proxy, causing them to cave to their demands.

Liekefett: Yeah, and I don't think this is hypothetical. In fact, there was a gadfly activist very active in 2016 and 2017 on DCM Capital, and they nominated about 15 companies.There is minimal share ownership. In fact, in one case, they took it all the way to ISS and Glass Lewis,all the way to the vote, with 300 shares. Embarrassingly, they almost won, because the shareholders hated the company, not the company's board so much. For me, it demonstrated that was obviously pre-universal proxy - that you can have a minimum investment and a cost-efficient lawyer, and you can actually comply to the advance notice provisions and go forward with the proxy fight. Now they get on the proxy card. It's frightening.

Donahue: DCM bought 100 shares or maybe 300 in that case, and they're not alone. There are other small activists that have done this. You buy 100 shares, you stick it in record name so that you don't get your advance notice bounce, because of beneficial ownership, if that's how the bylaws read. You do the work yourself or you get the help of a solicitor.

I'm going to move off the gadflies for a second and talk about a more traditional hedge fund activist. Companies with a classified board are by definition are short slate because the whole board's not up for control. That probably benefits activists because you can run one

candidate and that candidate is now on the company's card. It wasn't the case before. That's a huge change and it's much easier for an activist to get one or two seats.

Also, if you run for one seat, they may say, "Well, what's the harm? You're adding a traditional activist that owns 5-10% of the company. You are only going for one seat, so why not?" It's going to be hard for the ISS and Glass in one-seat contests to always recommend for the company, and it becomes easier for the activists. People wonder what the big deal is about one seat. P&G proxy contest, which was $100 million and was all over the news years ago, was a one-seat contest. One seat does matter, depending on who's getting that seat.

On the other hand, control slate contests are completely different. This benefits the company, because now you can have split-ticket voting. I've had both situations - both in short slates, where it's possible the company would not have prevailed if there had been universal proxy. In a control slate, it goes the other way. With split-ticket voting, investors may be hesitant to hand over the entirety of control to a company and vote for all the dissident's nominees.

Secondly, ISS and Glass Lewis have a higher standard in controlled contests. In addition to indicating that there's a case for change, you also have to state what that change would be. You essentially have to advance your own platform, so it's harder to get ISS and Glass Lewis, even though they may be becoming less influential or still influential.

Thirdly, when people go to vote at the ballot box, it's hard to hand over control of a company to an activist. I've heard some people say controlled slate proxy contests are dead. I wouldn't go that far. At the end of the day, you could still see a controlled slate and an activist sweep out a company - for example, Darden and Starboard in 2014. However, it's going to get easier. My summary on this is that it's much easier for an activist to win in a short slate or a classified board situation, but harder for the activist to take control. Does anyone else have thoughts on that?

Gallardo: I've come to the same conclusions on both fronts. The control slate also has implications for hostile M&A work. Typically, the more sophisticated, hostile bids will have a proxy contest attached to them. In those situations, the hostile bidder's going to have a harder time getting their slate or their controlled slate to take over. It's going to make it, on the margins,more difficult to complete or put on the table a credible, hostile bid.

Liekefett: The key phrase you used is "on the margins," Eduardo. There's a lot of talk in the advisor community about how controlled fightsare dead. I don't believe that's true. I'm sure that in a number of cases, controlled fightswill be easier to defend. Just look at the two cases where we had of the universal proxy in the last four years in corporate America: the Sand Ridge - Icahn proxy fight in 2018 and the EQT-Rice proxy fightin 2019. Both were control fights, and both times the company lost. Obviously, two samples are not great empiric evidence. However, it does show that if there is enthusiasm on the shareholder base side for change, nothing will save the board - not universal proxy, not clever lawyering, not anything. I'm more careful about minimizing the risk of controlled fightsgoing forward, but I might be in a minority on that topic.

Gallardo: You aren't, Kai. No one could say that universal proxy will bring the end of controlled fights. But it is already hard to win those fights, especially for activists, because you're looking for a perfect storm-there are multiple elements that come into play to make one of those situations successful for the activist. Universal proxy is by no means going to be the death of control fights. They will happen, and once in a while we'll see one that is successful.

Donahue: We also have to define success. Kai makes an excellent point and as he was talking, I was considering the following. Let's say there's an annually elected board with 11 seats up,

but they only want three. Is there an advantage to them to run a controlled contest for seven or eight seats now that they get all their nominees on the other card? Maybe they only wanted two or three seats, but strategically, they think they have a better chance running a controlled contest, even to get a short slate, call it three of 11. It's a shock and awe tactic. You nominate for control. You say, "I have these 11 people that are great for control."

This brings me to my last point, which is that it's not just about the impact on proxy contests. This will be my last comment before we kick it to Kai on strategy and tactics. It's also about the impact on shareholder activism.

If an activist truly believes that they can easily get one seat in a proxy contest, the data backs that up, a company is confronted with spending millions of dollars and going through a proxy fight alongside the PR that goes along with that, and they're going to probably lose a seat anyway, why not just settle? Absent universal proxy, you might've won, but given that the activist is going to end up on your card, you decide to settle.

Lastly, you could also see it in the control context, where somebody says, "Look, I'm going to go for control. I have 11 nominees." Or, "If you don't want me to do any of that, I'll keep all this quiet, and why don't you give me two or three seats?" Maybe a company would've been willing to give one seat, pre universal proxy, but now with the threat of the control contest and potentially mix-and-match/split-ticket voting, they do their analysis. They then say, "We think we could lose three or four here, so why not just give the activist two or three and be done with it?"

It could have a major impact on activism settlement agreements if the universal proxy rules end up giving activists more leverage with respect to settlement negotiations. That's my last comment. Kai, do you want to move to the next topic?

Universal Proxy's Influence on Activist Strategies and Tactics

Liekefett: Thank you, Sean. I completely agree with that. While activists have been careful to not celebrate in public too much, this has been the biggest regulatory gift to activists in a generation. They have certainly celebrated this change with a lot of champagne in certain areas of Connecticut, Manhattan and Palm Beach.

It will give more leverage to activists. They are not pursuing proxy fights for the sake of proxy fights. They are pursuing proxy fights as another need to force change. You may recall the saying that in diplomacy, war is just another form of diplomacy. Proxy fights give them the threat of a proxy fight and it might become more dangerous to companies as a result of this change. The issue is that these requirements add additional costs and time constraints for companies. The universal proxy card introduced great uncertainty with respect to the potential voter counts. This might incentivize companies to agree to earlier settlement more often than before. There are situations where I think universal proxy is actually helpful for our clients. However, it's going to be unbalanced in most situations, with at least a seat advantage for the activist.

Now, one of bigger issues that the ruleshave is that it is extraordinarily cheap and riskless for an activist to threaten a proxy fight with universal proxy card, because what are the legal repercussions under the framework if an activist gives notice of the universal proxy card, but then doesn't follow through? There are no repercussions whatsoever. The activist can fight another proxy fight another day. There is no "cooling off period" like in other regulatory regimes, where you have a twelve-month cooling off period if you announce a tender offerand then not follow through, which is a situation that may be expected, or maybe not at all. There are no legal repercussions here, and I'm concerned about that.

There is a lot of leverage at no cost to the activist. The rule technically won't kick in until September 1st. However, there are activists that'll be pushing companies to voluntarily implement universal proxy in the upcoming proxy season. The most prominent proxy rule argument we used in the past to say no to activists was, "This is really experimental. There is no framework for that." These arguments just went out of the window. We have a framework. We may not like it, but it does exist, and in all fairness, it is a well-drafted proposal in all other respects, aside from the issues that we mentioned.

It's going to be interesting whether we are going to see a couple of proxy fights already in this proxy season that use the universal proxy and not sustain the fact that theformer implementation that is scheduled only for September 1st. What do others think about that?

Donahue: I tend to agree with you, overall, about the lack of enforcement teeth for what we can call the "head fake proxy contest." It looked like the staff tried to make the point in the release, perhaps in response to the Sidley comment letter, that there would still be some liability for potential violations of new Rule 14a-19. They go out of their way to point out that you can't have material omissions in proxy materials, but do you think that Rule 14a-19 violations are going to have a lot of teeth? Or are you in the camp of, at the end of the day, you could have a lot of head fake or threat-type of proxy contest well before you get to any period of time where the Rule 14a-19 liability would kick in?

I'm ultimately aligned with Kai in that, even though Rule 14a-19 technically could be violated in different ways, and technically you could have some issue with respect to not meeting the minimum solicitation threshold, or saying that you would meet it and then not meeting it, do you see any kind of teeth to failure to comply with the rules of universal proxy, specifically with respect to distance?

Posil: I agree. We are obviously speculating here, but I would like to think that there would be teeth and that it could lend itself to us seeing enforcement action and/or litigation.

Gallardo: I'm somewhat skeptical that there will be much litigation or enforcement in that area. I was trying to think of the last time that there was serious enforcement of Rule 14a-9 or a procedural rule requirement in the context of a proxy contest. We see some private litigation, but rarely do those get traction. It's hard for me to imagine a situation where the SEC is going to step in because an activist failed to solicit two-thirds of the shares or violated some procedural requirement on formatting the proxy card.

Posil: It will depend highly on the facts and circumstances, and in certain cases, there are measures where the company can evaluate itself. If the dissident misses certain deadlines, the company is free to subsequently disseminate a non-universal proxy card. It's not as if their hands are tied completely.

Proxy Access Bylaws in a Post-Universal Proxy World

Gallardo: Let's switch over to the next topic, which is on the bylaws, because it's relevant for this discussion. Tiffany, as you pointed out earlier, the new SEC rules do not override in any way any advance notice bylaws for companies. Most companies do have advance notice bylaws that include requirements as to information the activist needs to submit in advance of the meeting. Also, there are some procedural requirements as to the timing of that notice. Those, for the most part, tend to be more protective of the company than the requirements of Rule 14a-19.

For example, most advance notice bylaws would say that notice has to be delivered by the dissident within 90 to 120 days as counted from the anniversary of the prior meeting. Again, this is more advance notice requirement than those under the new rule. For the most part, I

believe we'll find that existing advance notice bylaws are more protective of the companies than the guardrails under the new rules. One of the real takeaways from universal proxy is that companies need to carefully look and calibrate their advance notice bylaws, because none of these new rules are going to trump the protection that a company can put in place in its bylaws in contemplation of a proxy contest.

We're going to have to all take a hard look at what the company bylaws say today. Over time, we've developed those bylaws in contemplation of a traditional activist play from a well-funded hedge fund, or similar dissident. We focus our attention and questionnaires and notice provisions in a way that again, contemplate a hedge fund or a large shareholder that is somehow trying to take control of the company through a proxy contest. When you look at the list of things that need to be delivered or disclosed in these advance notice bylaws, that's what we've typically been thinking about.

Now, with universal proxy, we're going to be seeing a lot of single-issue activists, or interest groups, bringing proposals. We're going to have to recalibrate some of these advance notice bylaws and consider that we're going to see different types of contests being run for director elections. It's important for shareholders to know about that type of activist - a gadfly or an interest group. We're going to find that the information that should be disclosed to shareholders is different than what we've traditionally been asking for from dissidents in these provisions.

There are other options that we should all consider. Going back to the point you were making, Tiffany, is the extent that the dissident violates the requirement of Rule 14a-19, for example, by failing to solicit to two-thirds. That's something that should be specifically called out in the bylaws to make sure that companies have a direct recourse against a dissident that threatens to run a proxy contest, but doesn't follow through its obligation to solicit two-third of the shares. We'll need to consider all of those things in coming months. To return to my initial point, companies need to go back and look at the advance notice bylaws in light of universal proxy, and we are just going to have to collectively rethink some of these requirements to serve their function in this new world order.

Donahue: That's excellent point about the 67% requirement in the advance notice bylaws. Whether or not we think there's going to be enforcement or litigation teeth, you could still have teeth under this on the catch all in advance notice bylaws. It says that if you fail to comply with the Exchange Act, we could bounce your advance notice. Historically, most of the issues that have caused successful challenges to advance notice bylaws has been based on violations under state law. If you had enough foot faults or there was a potential malfeasance to not comply with Rule 14a-19, you couldn't get the staff or a court interested in it initially. Perhaps you could at least send a letter or tell the activist why you think they're not compliant with the bylaws, because they potentially violated Rule 14a-19 in the Exchange Act.

Gallardo: That's an option that we need to consider. Along those lines, we need to think about whether we need to have stricter compliance requirements around how this information gets disseminated to shareholders. Right now, there's some level of ambiguity as to what constitutes soliciting for purposes of Rule 14a-19. That's potentially one area where bylaws are going to have to be stricter or more concrete about the expectations that companies will have around the way that information gets properly disseminated to at least two-thirds, if not more, of the outstanding shares.

The potential gaps in the regulation should force companies to reconsider whether there are ways or other steps that they need to take in order to properly protect shareholders in making sure that all information relevant to the activist campaign gets properly disseminated to shareholders. Ultimately, this is about disclosure and making sure that people are not exploiting the system in a way that is detrimental to the corporation.

Liekefett: That's the way we think about it. The advance notice bylaws will become the last line of defense here. We've been working actively with dozens of issuers on reworking their bylaws to address the vary of steps of the universal proxy regime to ensure that there are some protections for our issuer clients. One example that we haven't discussed yet is director qualification laws. Under the current regime, Jack the Ripper could end up on the proxy card of Microsoft. There is no way to disqualify Jack the Ripper, putting aside that he's probably dead. This is a huge issue that will be something that we're going to have to deal with for years to come. There is limited case law on the Delaware and other jurisdictions, let alone other jurisdictions on how far you can go with director qualification bylaws. That's one other tool you can use in advance notice bylaws. You can disqualify directors who are clearly not suited to become directors.

Donahue: Kai, I completely agree. You'd pay a price at ISS with the unilateral dialog, as a material governance failure. It'd likely get withhold against either the non-gov chair or perhaps more. It sounds like you think, given the current environment, it might be worth any ISS or Glass Lewis withholds on non-gov chair to get a change like this implemented, given that it's the last line of defense?

Liekefett: We are making unilateral bylaw amendments five times a week for our clients. We've done hundreds of those in the last five years I'm not concerned about getting the withhold from ISS or Glass Lewis overstating in our bylaws that no one should be a proper nominee if that person is a convicted felon for murder. That's a risk I'm willing to take.

Gallardo: There's going to be some interesting case law in the next few years in that area. As Kai said, there's not much case law in Delaware around this. The court is going to look carefully at the timing, the nature of the bylaw amendment and how this implemented in specific situations. We'll eventually see more concrete guidance in this phase, but it's going to be interesting what we put in place, and what our clients do in the next few years in response to this.

Jenkins: We're getting close to the top of the hour, so as much as I hate to cut short our conversation, perhaps we can move to the final two topics on the list. The next thing would be the DCP. Sean or Eduardo, do you have some thoughts on that?

Other Rule Changes and Implications for Disclosure Controls & Procedures

Gallardo: There are specific requirements in the new rules around the form that a proxy card should take. Certainly, if companies that end up in a situation where nominations are made through universal proxies, they are going to have to revisit some of these rules around the proper formatting of the card. You have to clearly note which are the company versus the dissident directors. Ultimately, I don't envision much of a disclosure of controls, procedures or many issues around this area. Out of everything we've discussed so far, this is one that doesn't bother me much from the issuer's perspective.

Donahue: Agreed. I would say that in the normal non-contest, you now have to make very clear that if you have majority voting, that state law gives effect to votes cast against. There's some procedural clean up changes to the proxy card that needed to be made. Then you need to disclose the deadline under Rule 14a-19 for potential nominees under universal proxy. There are a few disclosures, so public companies should - even in the non-contested world - think about what disclosures they are going to need to include on any proxy statements that are filed with respect to meetings after the August 31st, 2022, compliance date.

What Should Companies Do in Advance of the Compliance Date?

Posil: In terms of what companies should do in advance of the compliance date, it's primarily buttoning up your advance notice bylaw provisions, as well as thinking about your director and officer questionnaire in terms of the bona fide nominee rule having been expanded, and the consent there. We've touched on many of the disclosure points, and again, that goes to buttoning up those items, as well as your regular proxy checklist. Kai, do you have anything to add?

Liekefett: The only thing I will add to your concise and pointed items is that you need to be ready for shareholder activism. If you haven't that so far, better late than never. Winter is not coming. Winter is already here, not just in the northeast. Activists will be coming for your company at some point or another. Even well-performing companies are going to have a couple of bad quarters at some point in the next five years. We have an entire business that is functioning as profession second guessers, and they will be coming for you once they see an opening. So, you need to get ready for it and the universal proxy is just another reason to get ready for shareholder activists.

Posil: To close, much of the discussion here has sighted the fact that the leverage that has been referred to is in part only as great as the director nominees. Clearly, whether the logistics or mechanics of how votes are cast through the voting system, should affect the substantive voting options of shareholders. The universal proxy roles were intended for that not to be the case.

Jenkins: It's been a terrific conversation. Thanks to all of the panelists for participating today.

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Universal Proxy: What Companies Need to Know in 'Year Zero'

By John Jenkins, Senior Editor of DealLawyers.com

The SEC adopted its universal proxy rules last December, but because they did not apply to meetings held before September 1, 2022, those rules did not come into play during this year's proxy season. Next year's proxy season is another story, and with the compliance date for the new rules looming, we thought that now was a good time to address what companies need to know about the fundamental changes in the landscape for proxy contests that will result from activists' ability to use a universal proxy card.

We have a number of resources on the DealLawyers.com website addressing the universal proxy rules, and I have drawn on many of them in preparing this article. These include law firm memos on the SEC's rules and other matters relating to the use of universal proxy cards that are available in our "Proxy Fights" Practice Area. We hosted a January 2022 webcast on "Universal Proxy: Preparing for the New Regime" and, more recently, we have hosted podcasts with Goodwin's Sean Donahue and The Activist Investor's Michael Levin in order to get the latest insights on universal proxy from the perspective of both public company advisors and activist investors. Michael has also contributed an article to this issue with his thoughts on the potentially transformative impact of universal proxy on proxy contests.

Historians sometimes refer to 1945 as "Year Zero," because of the fundamental reset of the international system that occurred following the end of the Second World War. Given how significantly the universal proxy rules have changed the regulatory landscape, it seems appropriate to say that the upcoming proxy season will likely be a "Year Zero" for proxy contests. Companies will not only need to reassess key aspects of how they plan for activist campaigns and proxy contests, but also consider the potential strategic and tactical implications of the new rules on the way future proxy contests will be fought.

Overview of Universal Proxy Rules

New Rule 14a-19(e) mandates the use of universal proxy cards in all non-exempt director election contests, with the exception of those involving funds registered under the Investment Company Act. The fundamental objective of the rules is to provide shareholders who vote by proxy the same

ability to "split their tickets" that shareholders who attend a meeting in person and vote by ballot have.

The new rules attempt to level the playing field for shareholders voting by proxy by mandating the use, in all contested elections, of a universal proxy card that includes the names of all candidates duly nominated by any party soliciting proxies. The rules establish presentation and formatting requirements for universal proxy cards that are intended to ensure that each party's nominees are presented in a clear, neutral manner.

In addition to requiring the use of a universal proxy card, the rules make a number of major changes that will significantly influence the way that proxy contests are conducted. Among other things, these changes will require each side to notify the other of their respective slates by specified deadlines, and require dissidents to file their definitive proxy statement by the later of 25 days before the shareholder meeting or five days after the company files its definitive proxy statement. These notice requirements are in addition to those that may be included in a company's advance notice bylaw.

Finally, in order to take advantage of the universal proxy rules, dissidents must solicit holders of shares representing at least 67% of the voting power of the shares entitled to vote at the meeting. Under Rule 14a-3, that effectively requires each solicited shareholder to be provided with a proxy statement, but that can be accomplished through notice and access or through full set delivery.

Planning for "Universal Proxy" Proxy Contests

In the past, investors were presented with an either/or choice — vote the "white card" or the "blue card." They were unable to pick and choose preferred candidates from the alternative slates. These limited voting options are now a thing of the past. Investors can now mix and match their votes, limited only by the number of available board seats. That new reality has important implications for companies that need to be considered in planning for proxy contests.

Prioritize Board Refreshment. With investors able to vote freely for the candidates they prefer, the qualifications of individual candidates will assume much greater prominence in proxy contests than they have in the past, and may often prove decisive. That heightens the importance of efforts to refresh the board with highly qualified new members. In a non-control proxy contest conducted under the universal proxy rules, management's slate is only as strong as its weakest links, and subpar directors will almost certainly be targeted by activists, who will offer up nominees who they claim to be more qualified as alternatives.

Companies need to be aware that an activist's assessment of the qualifications of their directors will not only factor in to whether to launch a proxy contest, but also the size of the slate that the activist may put forward. Directors with obsolescent skill sets represent targets of opportunity for activists who can put together a slate of nominees with more compelling credentials.

Shareholder Engagement: Know Your Base. In a world where voting a split ticket for directors is simple, effective shareholder engagement, including identifying and responding to specific investor concerns, becomes even more important for management. An investor who is relatively satisfied with a company's overall performance but has specific issues that the investor believes have not been appropriately addressed may be receptive to an activist's overtures. If activists can engage effectively, they can identify these institutions and persuade them to split their tickets. As one commenter put it, the question for investors in these situations is not "can you support activists?" but "how many activist nominees can you support?"

Effective shareholder engagement will help companies identify investors who may be inclined to support one or more activist nominees and the issues that might sway them. This is essential information that will enable companies to assess potential vulnerabilities and take steps to address them before an activist can exploit them. If a potential proxy contest does emerge, this information will be useful to companies in assessing the advisability of a settlement, because it will help them gauge whether activists can wage a successful proxy contest and, if so, how many seats they might realistically expect to win.

Involve Proxy Solicitors and IR Advisors. With the increasing importance of understanding the priorities and concerns of investors, the knowledge about the shareholder base that proxy solicitors bring to the table will likely result in companies involving them more heavily in planning for a potential proxy contest. Activists are likely to do the same thing, and use the advice that their proxy solicitors provide in modeling the size and composition of their own slate.

Investment relations professionals are also expected to feature more prominently in the planning and execution of proxy contests. With campaigns likely to focus on the qualifications and personal characteristics of individual nominees, a more nuanced and sophisticated approach toward shareholder communications will likely be necessary. There may be less focus on competing strategic visions for the company, and more on comparing and contrasting the individual nominees themselves.

Prepare for Proxy Advisors to Play a Bigger Role. Traditionally, proxy advisory firms have effectively recommended one slate or the other. While they may have endorsed the election of a dissident's candidate, their bottom line was always which proxy card to vote, not which candidate. In effect, that meant that a recommendation to vote management's card almost always translated into a vote for management's slate by advisory firm clients who rely on the firm's recommendations.

That is no longer likely to be the case. Under universal proxy, it will be very easy to act on a split recommendation from proxy advisors. Some commenters have suggested that in this environment, both companies and activists are going to want proxy advisors to become more specific with recommendations addressing individual nominees rather than slates of directors. In turn, that means proxy advisors may want detailed information about the qualifications of incumbent directors well in advance of a proxy contest. Being prepared

to provide information highlighting the qualifications of your directors will be essential in dealing with proxy advisors and other constituents.

Update Your Activism Response Plan. Companies should take a hard look at their activism response plan with a view to updating it to reflect the changed landscape. In doing so, companies should consider whether they have the right team in place at the right time to deal with the challenges presented by the ability of investors to split their tickets. As noted above, the dynamics of proxy contests are likely to change significantly, and that may affect when and how companies engage with shareholders, address board refreshment and involve proxy solicitors, investment relations advisors and other professionals.

Amend Your Advance Notice Bylaw. Companies should amend their advance notice bylaws to address Rule 14a-19. At a minimum, the amendments should:

- Clarify that no person may solicit proxies in support of director nominees other than the company's nominees unless that person has complied with Rule 14a-19;
- Provide that the company will disregard any proxies or votes solicited for candidates who do not comply with the requirements of Rule 14a-19; and
- Require the nominating person to provide reasonable evidence that it has met the minimum solicitation requirement at the company's request in advance of the date of the shareholders' meeting.

The SEC may well take the position that persons who do not comply with Rule 14a-19 are disqualified from soliciting proxies or having votes cast in favor of their nominees counted at a shareholders' meeting. Nevertheless, it is better for companies to have specific mechanisms in place in their bylaws to provide certainty and to make it clear that the company itself has the authority to enforce those provisions.

Also, the ability to compel an activist to demonstrate compliance with the rule's minimum solicitation requirement is essential. Despite the SEC's warning in the adopting release that false statements about the intent to comply with that requirement are subject to liability under Rule 14a-9, some activists may be tempted to play fast and loose with the requirement, perhaps relying on the assumption that the SEC is unlikely to be interested in pursuing enforcement proceedings. Requiring the activist to provide reasonable evidence of compliance will enable the company to enforce the other provisions of its bylaws allowing votes solicited without complying with Rule 14a-19 to be disregarded.

New Strategic and Tactical Realities

The changes resulting from the implementation of the universal proxy regime not only require companies to prepare for potential proxy contests under an entirely new set of ground rules, but to also consider some of the strategic and tactical implications of the changed landscape when it comes to waging a proxy contest.

Impact of New Players? There is a widespread belief that proxy contests will cost less under a universal proxy regime and that, as a result,

there will be more of them. In particular, many believe that socially conscious investors with ESG agendas who traditionally would have opted to submit a shareholder proposal may now decide that a proxy contest seeking a board seat is a viable option.

Whether that proves to be the case remains to be seen. While access to the company's proxy card and the ability to use notice and access procedures to solicit votes may reduce the direct solicitation costs, there are some significant expenses associated with even the most bare-bones campaign. These include the legal fees associated with working through advance notice bylaw provisions, preparing proxy materials and determining how to navigate the minimum solicitation requirement. Additional costs, including proxy solicitor fees, are going to have to be incurred if the contestant is serious about winning a contest.

On the other hand, many socially conscious investors incur the expenses associated with offering up similar Rule 14a-8 proposals at multiple companies each year, so they may decide that the cost of learning to navigate advance notice bylaws (many of which have similar informational requirements) and preparing a "boilerplate" proxy statement that can be used with little modification for multiple contests may be worth the investment.

Ultimately, the consensus of most advisors seems to be that at least some of these investors will manage to devise a way to wage a low-cost proxy contest under universal proxy. Since that is the case, it is reasonable to expect to see more contests with multiple activists involved. Some suggest that, in practice, it is more likely that one activist will take the lead in multiple activist situations. This would result in greater efficiency due to the ability of the parties to share costs, and it would be less likely to result in multiple slates that would dilute the pro-activist nominee vote.

One of the wild cards in this analysis is the involvement of more inexperienced players, which could increase the time and complexity associated with consolidating activists' efforts under a single banner. In the worst-case scenario from a traditional activist's perspective, it could look a lot like trying to herd cats — and potentially provide opportunities for the company to capitalize on differences between the groups involved in the contests.

Supercharged ESG Campaigns. One tactic that Goodwin's Sean Donahue addressed in our recent podcast is the potential for ESG activists to pair the lower cost of waging a proxy contest under the universal proxy rules with ability to include multiple shareholder proposals on the company's proxy card under existing provisions of the proxy rules. Imagine the potential leverage an ESG-focused activist could obtain by including one or two nominees along with multiple ESG-related proposals on the company's proxy card.

How could this happen when Rule 14a-8 limits proponents to only one shareholder proposal? The answer lies in Rule 14a-4(c), which essentially prohibits companies from exercising discretionary authority over shareholder proposals if, among other things, the proponent notifies the company that it intends to deliver a proxy statement and form of proxy to a number of shareholders sufficient to carry the proposal. Due to the inability to exercise discretionary authority, the company will in practice be compelled to include the

proposals on its own proxy card if it wishes to effectively solicit votes in opposition to them.

Larger Activist Slate Sizes. As Michael Levin discusses in greater detail in his article appearing elsewhere in this issue, the replacement of the traditional binary choice presented to proxy voters with a system that allows them to divide their votes among candidates as they see fit creates an opportunity for activists to model the size of their slate to capture a voting "surplus" that they were unable to seize under the old system.

Because of the binary nature of the old system, activists tended to nominate only a small number of candidates. The continuous system established under universal proxy allows them to match the size of their slate to the level of shareholder support they expect to receive. In other words, if an activist expects to be able to garner 30% of the vote, it is reasonable to assume that it will be able to elect 30% of the board.

Of course, modeling the slate to match the anticipated level of support requires activists to have a solid understanding of the company's shareholder base, and means that they and their advisors will make engagement with investors as high a priority as companies will under the new regime. The need for that kind of engagement and the desire to get ahead of others in the potentially larger pool of activists considering proxy contests also means that companies should expect activists will start their efforts much earlier than they have in the past. While activists could be expected to surface a month or two before an advance notice deadline, they are likely to start well before that under the new regime.

Furthermore, the level of investor support that an activst can expect may fluctuate based on the size of the slate — the closer an activist comes to a control position, the less inclined many investors may be to support its slate. Nevertheless, activists who calculate their potential level of support well will have significant negotiating leverage with company management. For example, these activists may be in a position to argue effectively that the company should settle for one or two activist directors, because in the event of a proxy contest, the activist will likely gain more seats on the board.

Short Slate v. Control Campaigns. As highlighted by the foregoing discussion, the universal proxy rules significantly enhance activists' leverage on short-slate contests, because the new system significantly increases the odds of activists successfully winning one or more seats in those contests. However, many commenters suggest that universal proxy may have the opposite effect on control contests.

That is because while many institutional investors may be willing to "shake things up" by adding an activist nominee to the board, fewer are likely to be willing to throw the incumbent board out without a control premium to show for it. Ironically, universal proxy may increase the challenges that an activist faces in a control contest, because the personal qualifications of each nominee will become more important, and an activist will need to identify nominees that it can make the case are all better qualified than a majority of the incumbent directors.

Another reason the leverage may shift in control contests is that proxy advisors impose

a higher burden of persuasion on activists engaging in a change in control campaign. In addition to making a case that change is needed, the activists also have to provide information about their plans for change and advocate for their achievability.

Conclusion

Proxy contests are likely to look very different under a universal proxy system than they have in the past. The replacement of a binary system with one allowing investors to pick and choose their preferred nominees will likely bring the qualifications of individual directors front and center in any proxy contest. That means companies need to prioritize board refreshment and articulate the qualifications of their directors in their engagement with investors.

Investor engagement will also need to become more sophisticated in order to gauge the level of support that management might expect in a short slate proxy contest. No longer will the focus be on whether a particular investor will return management's proxy card, but the degree to which that investor might be willing to support directors on an activist's slate. This effort will require involvement of proxy solicitors and investor relations advisors in the planning process to a greater extent than in the past.

Companies need to reassess their existing activism response plans and update their charter documents to ensure that the terms of their advance notice bylaws appropriately address the provisions of Rule 14a-19 and allow them to effectively address non-compliance with its provisions.

Perhaps the most important thing for companies to keep in mind is that, although no one knows whether universal proxy will result in more proxy contests, the rules clearly encourage the entry of new investors into the process and increase the leverage of activists and other investors seeking board seats. The playing field has shifted in a fundamental way, and it seems fair to conclude that, as Year Zero begins, public companies are likely to find themselves in a less defensible position to wage a proxy contest then they have ever been in before.

How Continuous Voting with UPC Will Change Proxy Contests

By Michael Levin, Founder, The Activist Investor and UniversalProxyCard.com

Most thinking and writing about the new universal proxy card (UPC) rule tend to consider basic compliance: new notices, the 67% requirement or proxy contest costs. Some look a little further, like how to navigate multiple activists at a company. Yet, UPC opens up completely new opportunities to influence a portfolio company through board of director elections. The entire strategy around how to structure and solicit votes for an activist slate will change significantly. We have thought hard about that strategy under UPC, and explain here how that will work.

In short, shareholders will have much more influence over board composition. A shrewd activist investor anticipates this. Rather than an activist deciding how much incremental change to request in a board, an activist can position a proxy contest so that shareholders

decide how much change they want. Activists can model a proxy contest using expected shareholder support to create the needed strategy, and plan a slate accordingly.

Contest Strategy

UPC changes the strategy, literally, in a proxy contest. This entails how many candidates an activist nominates for a board, whom to nominate, when to nominate them and how to communicate these nominees to other shareholders.

One of the abiding frustrations of a proxy contest is how an activist needs to work really hard to win a substantial share of shareholder votes just to gain one or two seats on the board of directors. UPC responds to this. An activist's board representation can now reflect with more precision the extent of support it receives from shareholders.

Overall, with a sound UPC strategy, instead of settling for a couple or even just one seat, an activist can aim higher. Or, an activist that does win a meaningful number of votes, but falls short of a plurality, will still win board representation. The remainder of this article explains the thinking.

Binary vs. Continuous Voting

For decades, proxy contests amounted to a binary, either/or proposition. Shareholders choose between a company's or an activist's plan for the company, as reflected in their respective director slates. Based on its analysis of these competing plans, a shareholder votes for one or the other slate.

A really unhappy shareholder that seeks even more change than the activist proposes must accept only what the activist proposes. That shareholder would vote for anything and anyone the activist submits, and even more than that. A mildly unhappy shareholder that wants just a little change has a harder decision. It could accept the company's plan as expressed through incumbent directors and promises to improve. Or, it could gamble the activist's thesis will work, and reluctantly vote for its nominees.

Sure, that mildly unhappy shareholder does have limited ways to support some company and some activist candidates, but it is a significant hassle. The shareholder could go to the expense of preparing a custom, legal proxy that provides for specific, divided voting instructions. It could also vote for only some of the activist candidates using the activist proxy card, and not exercise all of its available votes.

The usual outcome of this binary vote is that an activist will hustle to persuade a plurality of shareholders about the virtues of its plan for the company. Yet, they win or settle for modest representation on the board of directors. Further, an activist that wins a decent number of votes, but falls short of a plurality, gets nothing.

In contrast to this binary system, UPC makes proxy voting continuous. The shareholder that agrees exactly with an activist about how to improve a company will contentedly vote for the activist's nominees. The really unhappy shareholder that demands extensive change will support all of an activist's nominees, and wish the activist sought more and, most important, the mildly unhappy shareholder that wants just a little change can easily and directly support only some of the activist's candidates, commensurate with its desired change at the company.

With UPC, a shareholder votes for as much (or as little) change as it desires. UPC calibrates activist representation on the board to reflect the votes it receives from shareholders.

How Should an Activist Work Within this New Reality?

Model a Slate Based on Expected Shareholder Support. We created a proprietary model that incorporates expected shareholder support into the strategic decisions necessary to plan and execute a proxy contest. The model solves for the number of candidates an activist should nominate. We illustrate the model with a simplified example.

Let us assume a portfolio company has 10 board seats. The company nominates candidates for all 10. And suppose shareholders support change at the company such that 40% of the shares voted will support the activist slate, less than a plurality. Without UPC and with that expected 40% support, the activist might nominate one or two candidates. It would then seek to persuade shareholders that level of change is an acceptable outcome for the proxy contest. Maybe shareholders will exceed expectations, and the activist will indeed win a plurality. On average, with only 40% of the votes, the activist wins no seats. With UPC and that 40% level of shareholder support at the company, the model indicates the activist will win 40% of the board. In the example, this means electing four activist nominees for the 10 available seats. If the activist nominates only two candidates, it leaves votes on the table. If the activist nominates six candidates, the model indicates shareholders will divide support among all six, and on average none will prevail over the company's 10 nominees.

The critical input to the model is the expected level of shareholder support. An activist can assess this based on past director votes, past votes on other shareholder and company proposals, and input from current investors. The output is the precise number of activist nominees needed to capture and express this support.

Control Contests and Classified Boards. Two factors complicate how to think about strategy under UPC. Some shareholders, many regulators and, of course, almost all companies especially fear proxy contests in which an activist seeks control of the board of directors. Control can mean the activist having a majority of the seats on the board or even all the seats. Opponents argue that a control contest grants control to the activist without the activist paying for that right. These opponents contend the activist acquires the company without paying a "control premium." In these situations, a majority or more of the board seats could serve as a constraint on the number of seats to seek.

In our example above, if an activist thinks control will concern enough investors, they would limit the slate to five nominees, just short of a majority. Alternatively, if control concerns these investors, we expect shareholder support at 50% and no more. This 50% input to the strategy model yields the same five nominees.

Note control and control premiums are not settled issues. Some companies underperform so badly and need enough change that shareholders will happily grant a majority or more seats to an activist without worrying about a control premium.

A classified board allows an activist to seek to elect a full slate at a shareholder meeting, without seeking control of the board. Of course, the point of a classified board is to prevent an activist from winning a majority of board seats in a single election. An activist that runs a proxy contest at such a company can seek all available seats in that election without prompting concerns about control.

In our example above, suppose the company has 10 board seats in three classes, say with three or four seats in each class, and four available in the subject election. The activist can then use UPC to seek all four seats, rather than a smaller number, without prompting control concerns. Based on the assumed 40% expected shareholder support, the activist would win all four.

Nominate People, Not a Slate. Strategy under UPC goes beyond the size of an activist slate. Shareholders can compare individual nominees explicitly, between company incumbents and activist candidates. A resourceful activist will make this comparison easy for other shareholders.

Of course, in some proxy contests an activist already does target specific company incumbents. Before UPC, an activist could nominate a "short slate" of a few candidates. It would then identify which incumbents it wants to replace with its few nominees. Shareholders would still support either the few activist candidates, or the entire company slate.

Under UPC, shareholders can act directly on these individual choices. An activist should make clear to other shareholders the advantages of its specific nominees compared to each incumbent, and urge votes following these distinctions. Even better, an activist will need to connect its nominees directly to its thesis for the company, and demonstrate how individual candidates will carry out its plans.

Working backward, the experience and expertise of individual nominees compared to that of individual incumbents becomes much more important than before. Activists can no longer scramble to recruit whatever willing nominees it can scrounge at the deadline to notify companies.

Changes for Proxy Solicitors and Advisors, Too. Proxy solicitors will have more to do. They provide critical advice on the shareholder support input to the proxy contest strategy model. They understand the investor community and have ready access to data on past proxy contest and shareholder proposal votes.

They also have a new challenge to help shareholders compare individual activist candidates to company incumbents. Beyond promoting the activist thesis for the company, proxy solicitors will also explain how each activist candidate improves on company nominees.

Similarly, proxy solicitors have a new tactic in promoting an activist slate. They can offer shareholders the option of supporting limited change at a company. Rather than telling shareholders, "Vote for the activist," they can say, "Vote for whatever change you want." For shareholders that are reluctant to vote for an activist's entire slate, a proxy solicitor can offer more options beyond the binary either/or proposition available today.

Proxy advisors will have more power. They frequently advise shareholders to vote for

only some of an activist's slate. Now, these recommendations will have more impact. Proxy advisors that handle proxies for investor clients can directly implement the advice to support only a few specific activist candidates.

Start Early! Strategy extends to the timing of the steps in a proxy contest. Overall, UPC means an activist should begin thinking about and planning for a proxy contest earlier than it has before.

Communicating with shareholders in a proxy contest will become trickier. While clumsy, telling a shareholder which color proxy card to vote is rather simple. Now, activists will need to communicate detail about individual nominees, compare those nominees to incumbents and connect those nominees to the activist's thesis for the company. All of this takes time. Other shareholders may not want to focus on a contest too far before a shareholder meeting, but that does not mean an activist should avoid early, substantive messaging.

Multiple activists can complicate a proxy contest. The first activist will have an advantage in recruiting board candidates and communicating with other shareholders.

Conclusion

UPC offers a significant opportunity for an activist to improve proxy contest outcomes. It will do so only with proper planning for the size of a slate, qualifications of specific nominees and communicating the value of those nominees to shareholders.

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