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SEC Adopts Universal Proxy and Proposes to Rescind Certain 2020 Proxy Solicitation Rules

Introduction

On Nov. 17, 2021, the Securities and Exchange Commission (SEC) adopted amendments to proxy voting rules (Final Rule) to require the use of a universal proxy card in contested director elections. The universal proxy card must include all registrant and dissident director nominees in non-exempt director elections, allowing shareholders to vote on each nominee rather than an entire slate of directors.¹ In a separate rulemaking, the SEC proposed amendments (Proposed Amendments) to proxy voting rules that generally would rescind certain 2020 rules governing advice provided by proxy voting advisors.²

KEY TAKEAWAYS

- The Final Rule does not apply to the director elections of investment companies or business development companies.
- The Final Rule is expected to make it easier for activist investors to win at least some board seats as the process to put dissident directors on the proxy card will be cheaper and more efficient.
- The Final Rule will become effective for any shareholder meeting held after Aug. 31, 2022.
- While the Proposed Amendments would rescind requirements that proxy voting advisors provide issuers an opportunity to comment on and provide their clients (e.g., investment advisers) with a mechanism by which the clients can reasonably be expected to become aware of any comments by public companies that are the subject of the advice, the largest proxy voting advisors have voluntarily provided similar opportunities and may continue to do so.³ This issue has become highly politicized and could be reversed again in a future administration.⁴
- The Proposed Amendments request comment on whether SEC guidance issued in conjunction with the 2020 Rules - which suggested how investment advisers should consider public company comments received through proxy voting advisor's mechanisms - should also be reconsidered or rescinded.

Universal Proxy

- *General.* For years, shareholders and their advocates have expressed concerns about being unable to choose a mix of dissident and registrant nominees when voting on contested director elections by proxy. To address the difference in voting opportunities between voting in person versus via proxy, new Rule 14a-19 under the Securities Exchange Act of 1934 (34 Act) includes a mandatory requirement to use a universal

proxy card that includes the names of all director nominees from both the registrant and dissident(s) in a contested election. The universal proxy card will permit shareholders to vote for or against individual directors, rather than the current practice of having to choose between the registrant's and dissident's slates of directors.⁵

- *Minimum Solicitation Requirement.* For dissident nominees to be listed on a universal proxy card, the dissident must indicate its intent to meet the minimum solicitation requirement when notifying a registrant of its nominees. The dissident must also solicit shareholders representing at least 67% of the voting power of shares entitled to vote in the election.⁶
- *Notice and Filing Requirements.* The Final Rule adopts, as proposed, the requirement that a dissident provide the registrant with names of nominees for whom it intends to solicit proxies at least 60 calendar days before the anniversary of the previous year's annual meeting date.⁷ Dissidents also must comply with advance notice requirements included in the registrant's bylaws, which may be longer. Registrants will be required to notify dissidents of their nominees no later than 50 days before the anniversary of the previous year's annual meeting date.⁸ Both a registrant and dissident's proxy statement "must direct shareholders to the opposing side's proxy statement for information about that participant's nominees" rather than including such information in its proxy statement.⁹
- *Universal Proxy Presentation and Formatting Requirements.* The Final Rule includes universal proxy card formatting and presentation requirements meant to avoid shareholder confusion and to "ensure that each side's nominees are grouped together and clearly identified as such and presented in a fair and impartial manner."¹⁰
- *Additional Amendments for All Director Elections.* Additional amendments to the form of proxy and disclosure requirements apply to all director elections, not only those that are contested. Unlike the universal proxy voting requirements, these amendments also apply to registered investment companies and business development companies.¹¹ These amendments mandate that a form of proxy for the election of directors include an "against" voting option in lieu of a "withhold authority to vote" option where permitted by state law.¹² They also provide shareholders with the "opportunity to 'abstain' in a director election governed by a majority voting standard."¹³

Proxy Solicitation Rules

- *General.* The Proposed Amendments would rescind certain final rules regarding proxy voting advice under the 34 Act that the SEC adopted in the 2020 Rules. The Proposed Amendments were adopted by a vote of 3-2, with Republican Commissioners Peirce and Roisman dissenting. Comments on

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the Proposed Amendments will be due thirty days after their publication in the Federal Register.

- *Proposed Amendments to Rule 14a-2(b)(9).* The 2020 Rules added conditions that proxy voting advisors must meet in order to take advantage of exemptions from certain solicitor information and filing requirements. The Proposed Rules would retain conflicts of interest disclosure requirements, and proxy voting advice would remain a solicitation subject to the federal proxy rules. Additional conditions (and related safe harbor and exclusions) would be deleted under the Proposed Amendments. In particular, proxy voting advisors no longer will be required to make their advice available to the public companies on which they are providing advice at or before the time that they provide such advice to their clients or to provide a mechanism by which their clients could reasonably be expected to become aware of any written statements by public companies regarding their proxy voting advice in a timely manner and before the relevant shareholder meeting.¹⁴
- *Proposed Amendment to Rule 14a-9.* A proxy voting advisor's proxy voting advice generally constitutes a solicitation, according to the SEC, and such advice is prohibited from "containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact."¹⁵ Note (e) of Rule 14a-9 provides examples of material misstatements related to proxy voting advice. This note would be deleted under the Proposed Amendments, based on concerns that liability could extend to mere differences of opinion with public companies regarding proxy voting advisor's advice. Such liability concerns could impair the independence of the advice that proxy voting advisors provide because it could lead to public companies threatening litigation against proxy voting advisors in order to influence the advice that they provide.¹⁶

¹ See Universal Proxy (<https://www.sec.gov/rules/final/2021/34-93596.pdf>) (adopted Nov. 17, 2021) (to be codified at 17 CFR 240) (Final Rule Release). The Final Rule was adopted substantially as proposed by a vote of 4-1, with Commissioner Peirce dissenting.

² See Proxy Voting Advice (<https://www.sec.gov/rules/proposed/2021/34-93595.pdf>) (proposed Nov. 17, 2021) (to be codified at 17 CFR 240) (Proposed Amendments Release); Exemptions from the Proxy Rules for Proxy Voting Advice (<https://www.sec.gov/rules/final/2020/34-89372.pdf>) (effective Nov. 2, 2020) (17 CFR 240) (2020 Rules Release).

³ Proxy voting advisors established a best practice principles group (BPPG), which has an oversight committee composed of non-affiliated industry experts and academics. The oversight committee's 2021 report found that all six members of the BPPG including the two largest U.S. proxy voting advisors met the best practices principles regarding "(1) service quality, (2) conflicts-of-interest avoidance or management and (3) communications policy." *Proposed Amendments Release* at 14.

⁴ It is also possible that, if adopted, the Proposed Amendments could be subject to litigation. The National Association of Manufacturers already had filed suit against the SEC for announcing it would not enforce the 2020 Rules. See *National Association of Manufacturers et al. v. SEC*, No. 7:21-cv-183 (W.D. Tex.). The dissenting statements by Commissioners Roisman and Peirce highlight their procedural concerns regarding the rulemaking. Elad L. Roisman, Commissioner, U.S. Sec. & Exch. Comm'n, "Too Important to Regulate? Rolling Back Investor Protections on Proxy Voting Advice" (<https://www.sec.gov/news/statement/roisman-proxy-advice-20211117>) (Nov. 17, 2021); Hester M. Peirce, Commissioner, U.S. Sec. & Exch. Comm'n, "Dissenting Statement on Proxy Voting Advice Proposal" (<https://www.sec.gov/news/statement/peirce-proxy-advice-20211117>) (Nov. 17, 2021).

⁵ *Final Rule Release* at 8-9. Under current practice, shareholders are generally unable to vote for a mix of dissident and registrant nominees due to state and federal laws. The dissident and registrant generally send a proxy card listing only their respective nominees because consent is

required to list an opposing party's nominees on a proxy card, which is rarely provided. Additionally state law "provides that a later-dated proxy card invalidates an earlier dated proxy card," which means that a shareholder "must choose between the dissident's or registrant's proxy card."

⁶ *Id.* at 27. The proposed rule would only have required a dissident to solicit shareholders representing at least a majority of shares. Commissioner Roisman stated that the revised minimum solicitation requirement "is a large reason that I am able to support the rule." Elad L. Roisman, Commissioner, U.S. Sec. & Exch. Comm'n, "Statement on Universal Proxy Rules" (<https://www.sec.gov/news/statement/roisman-universal-proxy-20211117>) (Nov. 17, 2021).

⁷ *Final Rule Release* at 26-27.

⁸ *Id.* at 33.

⁹ *Id.* at 23-24.

¹⁰ *Id.* at 24.

¹¹ *Id.* at 56, fn. 146.

¹² *Id.* at 58.

¹³ *Id.*

¹⁴ Proposed Amendments Release at 9-10.

¹⁵ *Id.* at 25.

¹⁶ *Id.* at 27.