

Client Alert

November 2021

SEC Approves New Rules to Require Use of Universal Proxy Cards in Contested Director Elections Starting August 31, 2022

On November 17, 2021, the Securities and Exchange Commission (“SEC”) voted to approve final rules requiring the use of universal proxy cards in contested director elections. Under the new rules, nominating shareholders and companies will each have a proxy card that includes all director nominees up for election and provides shareholders the ability to vote by proxy for their preferred set of director candidates in a “mix-and-match” fashion. Previously, only shareholders voting in person at the shareholder meeting had the ability to vote for a preferred mix of shareholder and company nominees as they saw fit, while shareholders voting by proxy were limited to voting for either company director nominees on the company’s proxy card or shareholder nominees on the shareholder proxy card with no “mix-and-match” ability.

Under the new rules, both dissident shareholders and the company will be required to provide shareholders with a proxy card that includes the names of both the company’s director nominees and the shareholder’s nominees in any non-exempt proxy solicitation for contested director elections, save for solicitations at registered investment companies and business development companies. In addition, the rules provide that the company and nominating shareholder will give each other timely notice of their respective nominees, establish a filing deadline and certain requirements for the nominating shareholder’s solicitation, and dictate certain items regarding the formatting and presentation of the universal proxy cards.

As we noted in a previous client alert, we had expected the rules, if approved, to become applicable to contested director elections sometime after the 2022 proxy season. Sure enough, according to the SEC, once published in the federal register, the new rules will become applicable to any shareholder meetings involving a contested election of directors held after August 31, 2022.

Olshan previously submitted a comment letter to the SEC regarding the proposed universal proxy rules in which we expressed some concerns

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about the procedural requirements under the proposed rules that could tilt the playing field against the nominating shareholder. We will publish a follow-up alert with the procedural mechanics for the universal proxy as soon as the rules are available in final form.

We will also monitor reactions from the proxy advisory firms and keep you posted on any developments.

Please contact the Olshan attorney with whom you regularly work or one of the attorneys below if you would like to discuss further or have questions.

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