

Client Alert

August 2022

Universal Proxy Rules: Roadmap for Annual Meetings after August 31, 2022

The rules adopted by the U.S. Securities and Exchange Commission (the “Commission”) in November 2021 regarding the use of “universal proxy cards” for contested director elections, and certain related matters, are set to take effect for stockholder meetings to be held after August 31, 2022. The core impact of these rules will be that **both companies and stockholders nominating director candidates generally will be required to include all director nominees on their respective proxy cards distributed to stockholders** (while continuing to allow for other differences between those proxy cards), giving stockholders voting by proxy the ability to vote “for” the election of any director candidate regardless of which proxy card they use.¹ Further, under the new regime, **both companies and stockholders nominating director candidates will have the ability to express support for, and solicit votes for the election of, candidates nominated by the other through the use of their respective universal proxy cards and accompanying proxy statements.** These rules also add certain processes and timeframes to the director nomination and proxy solicitation process and impose new requirements on companies and nominating stockholders.

In light of these developments, we have prepared this “roadmap” as a reference tool for stockholders considering whether to nominate director candidates for election at an annual meeting of stockholders occurring after August 31, 2022 at companies required to comply with the Commission’s proxy rules. As you will see below, under the new rules, in most circumstances, nominating stockholders will not be required to

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¹ Under prior Commission rules, companies and nominating stockholders were only permitted to include on their proxy cards director nominees who had consented to be named in the particular related proxy statements. Generally, the company’s candidates did not consent to be named in the nominating stockholder’s proxy statement, and vice versa (although certain companies forced such consents through their nomination notice requirements), so this regime effectively limited the ability of stockholders voting by proxy to vote on candidates from both slates (subject to a limited ability for a stockholder nominating a minority slate to use the “short slate rule” to have its proxy cards voted “for” certain company candidates).

prepare additional documents or follow an accelerated timeframe for nominations, as the required disclosures can be addressed in the nomination notice and proxy statement as submitted/filed on typical timeframes.

Please note that this roadmap covers general issues with respect to the director nomination and proxy solicitation process at a high level and is not a substitute for situation-specific review and analysis needed for a stockholder preparing to move forward with a director election campaign. If you are considering nominating director candidates, we strongly encourage you to consult with an Olshan attorney as early in the process as practicable.

Typical nomination/campaign workstreams and timeframes under the new universal proxy regime will be as follows:

A. Review and Analysis of Situation

1. Work with counsel to analyze the company's corporate governance profile, and applicable law and regulations. Critical factors include:
 - a. Directors elected annually or for staggered terms (typically three years)
 - b. Number and identity of directors up for election at next annual meeting
 - c. Deadline for stockholder to submit nomination notice; information required to be included in nomination notice; whether stockholder is required to request any materials from the company in advance of nomination (such as a form of nominee questionnaire)
 - d. Expected timeframe for next annual meeting
 - e. Ability for stockholders to change the composition of the board outside of the annual meeting process
 - f. Presence of anti-takeover protections, which may include a stockholder rights plan (i.e., poison pill), ownership limitations, regulatory ownership/change of control limitations and state law anti-takeover provisions

B. Engagement with Potential Director Candidates and Service Providers

1. Assemble director nominee slate
 - a. Consider desired number of candidates (including whether majority/minority slate) and experience/qualifications of candidates

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- b. Identify potential candidates and have them complete materials necessary for nomination
 2. Consider timing to engage a proxy solicitor and potentially other service providers (such as a public relations firm)
 3. ***Place shares in record name (generally recommend 1,000 shares)***
 - a. Process can take upwards of five business days (longer if shares must be purchased and then transferred into record name) and must be completed prior to nomination
 - b. Company advisors may be monitoring record holder list and alert the company

C. 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*

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(subject to potential adjustment), required to provide separate universal proxy notice prior to such date²

D. Company's Universal Proxy Notice

1. Company required to provide notice to nominating stockholder including the names of company's nominees at least 50 calendar days prior to the anniversary of the company's previous year's annual meeting (subject to potential adjustment) unless previously disclosed in a proxy statement³

E. Proxy Statements and Proxy Cards/Soliciting Materials

1. Both nominating stockholder and company required to file preliminary proxy statements subject to review and comment by the Commission, and then definitive proxy statements
 - a. Cannot commence solicitation of stockholder votes/proxies until filing/ mailing of definitive proxy statement
 - b. The Commission has 10 calendar days to review preliminary proxy statement before determining whether to issue comments (may require a response and revised preliminary proxy statement) so need to build in appropriate time from filing of preliminary to when intend to commence solicitation
 - c. Nominating stockholder must file/mail definitive proxy statement by the later of (i) 25 calendar days prior to the meeting date and (ii) 5 calendar days after the date the company files its definitive proxy statement
2. *Universal proxy cards to be used in solicitation required to be filed with the Commission with preliminary and definitive proxy statements, and to comply with content and formatting requirements under the new rules*
 - a. ***Proxy cards generally required to include all director nominees***, with nominees grouped together according to the

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² If the company did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, then notice by the stockholder must be provided by the later of 60 calendar days prior to the date of the annual meeting or the 10th calendar day following the day on which public announcement of the date of the annual meeting is first made by the company.

³ If the company did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, then notice by the company must be provided no later than 50 calendar days prior to the date of the annual meeting.

- party nominating them and listed alphabetically, among other requirements
- b. ***Proxy cards may include expression of support for the election of specified candidates nominated by another party (such as the nominating stockholder recommending votes “for” specified company candidates), and may be used to solicit votes for the election of those candidates in addition to the candidates nominated by the party distributing the proxy card***
3. *Nominating stockholder must solicit proxies from stockholders representing at least 67% of the voting power entitled to vote on the election of directors (and must include a statement to that effect in the proxy statement itself)*
 - a. Stockholders entitled to vote will be the stockholders as of the close of business on the record date set by the company
 - b. Final proxy cards prepared in accordance with universal proxy rules will be mailed to stockholders together with definitive proxy statements
 4. All soliciting material is required to be filed with the Commission on date of first use
 - a. Legal legend (including current ownership information) required for soliciting material issued prior to filing of definitive proxy statement

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

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