

# Client Alert

August 2022

## ISS Issues Note Regarding Universal Proxy Cards with Insights that Shareholder Activists Should Take Into Consideration When Planning Their Future Campaigns

On August 23, 2022, leading proxy advisory firm Institutional Shareholder Services (“ISS”) released a brief yet insightful research note regarding how it will approach contested situations under U.S. Securities and Exchange Commission rules regarding the use of “universal proxy cards” (“UPCs”) that are set to take effect for shareholder meetings to be held after August 31, 2022. In its note, ISS confirms its longstanding belief that the UPC system is “far superior” to the legacy two-card voting system from a shareholder franchise standpoint. Nevertheless, ISS predicts that “like the kid that receives the hot new toy at Christmas, only to become frustrated by its complex instructions, proxy advisors and investors will have to carefully navigate the first few UPC contests.”

### *ISS’ Two-Prong Framework*

Notwithstanding the new UPC rules, ISS states that its two-prong framework for election contests – Is there a case for change? If so, how much change? – will remain “largely unchanged” under the UPC regime. As a result, despite the ability for shareholders to mix and match candidates using a UPC, a strong nominee will not be enough to win support from ISS. ISS notes that to be successful the activist still must lead with a “detailed, insightful argument” as to why a company may not be achieving its potential assuming that the activist’s proposed action plan is “proportionate and its nominees are adequately qualified.”

#### *1. Is There a Case For Change?*

ISS emphasizes the importance for an activist to make a compelling case for change in order to be successful by stating that it “will continue to support campaigns where the patient truly needs intervention, and dismiss campaigns that amount to plastic surgery.” Yet, while ISS states that it will not directly recommend in favor of an activist solely on the qualifications of a specific nominee, it will “continue to highlight to clients those nominees from either party who, during [its] engagements appear particularly well-qualified.”

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## 2. *How Much Change?*

As to the second prong of its framework for election contests – How much change? – ISS states that it will “demand a greater degree of scrutiny” in the UPC regime. Particularly in control campaigns, ISS “may require far more engagement with each side – and potentially with every nominee, board or dissident – than has been necessary in the two-card era.”

However, ISS warns that activists who may have in the past “overreached” with respect to the size of their slates “will now have to carefully consider whether padding the number of nominees will backfire by diluting the overall quality of their slate – and whether, head-to-head, each of their nominees are in fact superior to the incumbents.”

### *Addition by Subtraction*

Interestingly, ISS claims the most relevant change for shareholders under the UPC regime is that it enables “addition by subtraction.” ISS contends that the UPC regime reduces the risk that shareholders will unintentionally unseat a good company nominee when supporting a necessary dissident nominee because shareholders “can now target the incumbents they believe to be least valuable – rather than a director perhaps targeted for reasons more beneficial to the activist.” As a result, ISS predicts that boards will be “far less able to shield their weakest contributors” under the new UPC regime.

### *ESG-Focused Campaigns*

Finally, ISS imparts a few words of wisdom directed at shareholders who may be considering running ESG-focused campaigns under the UPC regime. ISS warns that “an economic activist simply ‘weaponizing’ ESG issues is far less compelling than a significant long-term shareholder, concerned that companies are not appropriately focused on their long-term challenges, seeking board representation.” ISS also states generally that ESG-centered contests “would appear to be better suited for proxy access, rather than proxy fights.”

### *Key Takeaways for Shareholder Activists*

Both seasoned and new shareholder activists should carefully consider how ISS will approach campaigns under the new regime. ISS will continue to implement its two-prong approach – Is there a case for change? If so, how much change? – and the threshold question of whether an activist has made a strong case for change will precede the question of whether the activist has nominated a strong director candidate. Therefore, a strong nominee will not be enough to win support from ISS. However, as shareholders will be able to “more precisely adjust board composition” under the UPC system, the second prong of “How much change?” may invite more engagement by ISS on the qualifications of individual

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nominees than in the past, which both the activist and its nominees should be prepared for.

Strategic planning regarding the quality of the activist's slate will be critical. An activist that seeks to assemble a large slate, such as in a control contest, needs to make sure it does not dilute the overall quality of its slate in doing so. It may be advantageous for the activist's approach towards selecting its slate to be distilled down to how each individual dissident nominee stacks up against each company nominee. On the flip side, it would not surprise us to see more companies swap out long-tenured directors with more qualified, dynamic and diverse candidates specifically selected to match the profile and qualifications of a dissident slate in the face of an election contest.

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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