

# Client Alert

September 2022

## SEC Issues Interpretive Guidance on New Universal Proxy Card Rules

This Client Alert supplements our August 2022 Client Alert “Universal Proxy Rules: Roadmap for Annual Meetings After August 31, 2022” that can be found [here](#).

On August 25, 2022, the Division of Corporation Finance of the Securities and Exchange Commission (the “Staff”) issued [Compliance and Disclosure Interpretations](#) (“C&DIs”) clarifying the responsibilities and obligations of both issuers and dissident shareholders in complying with the SEC rules mandating the use of “universal proxy cards” (“UPC”) in contested director elections. These new rules are set to take effect for shareholder meetings to be held after August 31, 2022. A summary of the C&DIs and our takeaways from the Staff’s guidance are set forth below.

**Can a dissident shareholder include in the Rule 14a-19(b) notice (which is generally due no later than 60 calendar days before the anniversary of a prior year’s annual meeting date) the names of more nominees than there are director seats up for election, without the intent of actually soliciting proxies for all of them but, instead, finalize its slate of nominees after such Rule 14a-19(b) deadline? (Question 139.01)**

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No. According to the Staff, a dissident shareholder must only include in its Rule 14a-19(b) notice the names of the nominees for whom the dissident intends to solicit proxies. However, the Staff acknowledged that a dissident shareholder may need to make changes to its slate of nominees after the 60-day UPC deadline for various reasons, such as in the event a dissident nominee withdraws from the slate or the issuer changes the number of directors up for election. In anticipation of potential gaps in the dissident shareholder’s slate that may occur after the 60-day deadline, the Staff indicated that it would not object to a dissident shareholder including additional nominees in its Rule 14a-19(b) notice so long as the notice makes clear which individuals comprise its slate for inclusion in the universal proxy card and which individuals are additional or alternate

nominees. The dissident must also provide prompt notice to the issuer of any changes to its original slate pursuant to Rule 14a-19(c).

We note, however, that most advance notice bylaw provisions have deadlines for shareholders to deliver notice of their intent to nominate directors at an upcoming annual meeting earlier than the 60-day UPC deadline. Accordingly, dissident shareholders, in their bylaw-related nomination notices, may still provide notice of their intent to nominate more nominees than there are director seats up for election. However, where this timeframe is applicable, we believe dissident shareholders who have nominated more nominees than there are director seats up for election will have a few different options to maintain compliance under the new framework.

First, the dissident shareholder may designate in its bylaw-related nomination notice those individuals for whom it intends to solicit proxies and those individuals who will serve as additional or alternate nominees. The dissident shareholder will have until the 60-day UPC deadline to provide notice to the issuer of any modification to these designations. If the dissident shareholder later changes its slate to include any of the additional or alternate nominees (for example, in the event a nominee has withdrawn or additional seats are up for election), the Staff will not object as long as the dissident promptly notifies the issuer of the change pursuant to Rule 14a-19(c).

Second, the dissident shareholder may choose not to designate in its bylaw-related nomination notice the individuals who will serve as additional or alternate nominees. In such event, the dissident shareholder will have until the 60-day UPC deadline to provide notice to the issuer of its designation of nominees who will serve as additions or alternates if it so desires. Alternatively, the dissident shareholder will need to narrow down its slate to match the number of seats then up for election and inform the issuer of its final slate prior to the 60-day UPC deadline. Of course, by doing so the dissident will forgo the ability to fill any gaps in its slate resulting from a subsequent nominee withdrawal or increase in the number of directors up for election.

**In a contested director election where more than one dissident shareholder intends to present a slate of director nominees, should an issuer inform each dissident shareholder of the Rule 14a-19(b) notice that the issuer received with respect to persons nominated by other dissident shareholders? (Question 139.02)**

Yes. In a contested director election where more than one dissident shareholder has submitted notice of its intent to nominate directors, the Staff has advised that the issuer should inform each dissident shareholder of not only the names of its nominees and any “proxy access” nominees,

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but also the names of any persons nominated by another dissident shareholder as well as any subsequent changes to the original slates.

**Does an issuer’s proxy statement have to include the Rule 14a-19(b) deadline (which is generally no later than 60 calendar days before the anniversary of a prior year’s annual meeting date) in addition to or in place of the notice deadline contained in the issuer’s advance notice bylaw provision, if such advance notice bylaw provision includes an earlier deadline for notice of nominations? (Question 139.03)**

No. While the new UPC rules include the requirement that a dissident shareholder provide a notice of its director nominees no later than 60 calendar days before the anniversary of the prior year’s annual meeting, *the Staff specifies that this number is a minimum and not a maximum notice period* – meaning that the rules do not supersede a longer notice period established in an issuer’s governing documents. Accordingly, where an issuer’s advance notice bylaw provision requires earlier notice than the Rule 14a-19(b)(1) deadline, the issuer can just disclose the earlier advance notice bylaw deadline to satisfy the proxy rules.

The Staff noted, however, that an issuer must clearly state in its proxy statement the need for a dissident shareholder to comply with the additional requirements of Rule 14a-19(b) (such as the 67% minimum solicitation threshold) to the extent an issuer’s advance notice bylaws do not require the same information required by the UPC rules.

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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