

Frequently Asked Questions: Universal Proxy and Contested Director Elections

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With the 2023 proxy season approaching, all public companies should factor into their planning the new rules adopted by the U.S. Securities and Exchange Commission (the "SEC") requiring the use of a universal proxy card in contested director elections. These rules lower the procedural hurdles that dissident shareholders previously faced when nominating director nominees and impose additional proxy and annual meeting-related disclosure and process obligations should a contested director election ensue. Below are a number of frequently asked questions and answers on the new universal proxy rule and contested director elections.

Q: WHAT ARE THE NEW "UNIVERSAL PROXY" RULES?

A: In November 2021, the SEC adopted rules requiring registrants to use a universal proxy card in contested elections. While each of the registrant and the dissident stockholder will disseminate a separate proxy card in a contested election, the rules require each proxy card to include both the registrant's nominees and the dissident stockholder's nominees. A universal proxy card allows stockholders to vote as if they were attending the stockholder meeting by deciding which director nominees to vote for (i.e., stockholders may mix and match the company nominees and the dissident nominees).

Q: WHEN DO THE UNIVERSAL PROXY RULES APPLY?

A: Rule 14a-19 and the use of the universal proxy card became effective for meetings of stockholders involving contested director elections held after August 31, 2022.

Q: IN THE CASE OF A CONTESTED ELECTION, WHAT NOTICE IS THE REGISTRANT REQUIRED TO PROVIDE?

A: A registrant must notify the dissident stockholder of its nominees' names unless the names have been provided in a preliminary or definitive proxy statement previously filed by the registrant. The notice must be postmarked or transmitted electronically no later than 50 calendar days prior to the anniversary of the previous year's annual meeting date, except that, if the date of the meeting has changed by more than 30 calendar days from the previous year, then notice must be provided no later than 50

calendar days prior to the date of the annual meeting. If the registrant changes nominees, the registrant must promptly notify the dissident stockholder.

Q: WHAT DISCLOSURE WILL BE REQUIRED IN THE REGISTRANT'S PROXY STATEMENT?

A: The registrant's required disclosure is generally limited and will include the fact that there has been a stockholder nomination and the nominating committee and/or board's recommendation on how to vote on the dissident stockholder's nominee. The registrant must refer stockholders to the dissident stockholder's proxy statement for information about the dissident stockholder's nominee(s) and include disclosure that stockholders can access the dissident stockholder's proxy statement free of charge on the SEC's website. The registrant's disclosure will also include information as to which proxy card to use and other voting mechanics. Finally, the registrant must disclose in its proxy statement how it will treat proxies granted in favor the dissident's nominee(s) if the dissident stockholder abandons its solicitation or fails to comply with the proxy rules.

Q: IN THE CASE OF A CONTESTED ELECTION, DOES THE REGISTRANT NEED TO FILE A PRELIMINARY PROXY STATEMENT AND IS IT SUBJECT TO SEC REVIEW?

A: Yes, under Rule 14a-6(a) and Rule 14a-19(d), the registrant will need to file a preliminary proxy statement 10 calendar days before it can file and mail the definitive proxy statement. The preliminary proxy statement may be subject to SEC review and comment.

Q: WHAT NOTICE IS THE DISSIDENT STOCKHOLDER REQUIRED TO PROVIDE?

A: The dissident stockholder must provide notice (which may be provided in a preliminary or definitive proxy statement) to the registrant (postmarked or transmitted electronically) with the names of the nominees for whom it intends to solicit proxies no later than 60 calendar days prior to the anniversary of the previous year's annual meeting date. If the date of the registrant's annual meeting of stockholders has changed by more than 30 calendar days from the previous year's meeting, then notice 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 registrant. The dissident's notice must contain a statement that it intends to solicit the holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors in support of director nominees other than the registrant's nominees.

Q: WHEN MUST THE DISSIDENT STOCKHOLDER FILE ITS DEFINITIVE PROXY STATEMENT?

A: The dissident stockholder must file its definitive proxy statement by the later of 25 calendar days prior to the annual meeting date or five calendar days after the date that the registrant files its definitive proxy statement. The dissident stockholder must also file a preliminary proxy statement in compliance with Rule 14a-6.

Q: ARE THERE STEPS THAT A DISSIDENT STOCKHOLDER MUST TAKE BEFORE THE UNIVERSAL PROXY RULES APPLY?

A: While not a part of the universal proxy rules, a dissident stockholder must comply with any applicable advance notice provision in the registrant's constituent documents. An advance notice provision typically requires the stockholder to provide certain information about itself and about its nominee(s) some number of days (e.g., 90-120 days) prior to the anniversary of the prior year's annual meeting.

Q: ARE THERE ANY SPECIFIC RULES THAT GOVERN A REGISTRANT'S ENGAGEMENT WITH A DISSIDENT STOCKHOLDER?

A: No. If the registrant is content to allow the dissident's nomination to proceed, the registrant should solicit a completed "director and officer questionnaire" and other information that it deems necessary to allow its nominating committee or board of directors to make a determination as to whether to support the nominee. In the alternative, the registrant may seek a settlement with the dissident with the objective of avoiding a contested director election.

Q: DOES THE DISSIDENT STOCKHOLDER HAVE A LEGAL RIGHT TO SPEAK AT THE MEETING?

A: No. While it is customary to allow stockholders to speak at meetings of stockholders, there is no statutory requirement. The chairperson of the meeting may acknowledge the nomination as part of the annual meeting script, rather than allowing the stockholder to present the nomination.

Q: CAN THE DISSIDENT STOCKHOLDER REQUEST ANY INFORMATION FROM THE REGISTRANT FOR ITS FILINGS, AND IS THE REGISTRANT REQUIRED TO PROVIDE THAT INFORMATION?

A: The dissident stockholder will likely request that the registrant provide a list of security holders so that it knows whom to solicit. Under Rule 14a-7, the registrant is

required to provide, upon request, the stockholder list (or mail the dissident's materials on its behalf).

Q: WHAT IF THE DISSIDENT STOCKHOLDER INCLUDES DISCLOSURE IN ITS PRELIMINARY OR DEFINITIVE PROXY TO WHICH THE REGISTRANT WISHES TO RESPOND?

A: The registrant may file additional proxy soliciting materials in response to any dissident disclosure (the materials would be filed as DEFA14A on EDGAR).

Q: WHAT HAPPENS IF THE DISSIDENT STOCKHOLDER DOES NOT SOLICIT 67% OF THE VOTING POWER OF SHARES ENTITLED TO VOTE ON THE ELECTION OF DIRECTORS?

A: If a dissident stockholder fails to meet the 67% minimum solicitation threshold, that failure would be a violation of Rule 14a-19, and the dissident stockholder would face the same liability under the U.S. securities laws as if it had violated any other proxy rules. In addition, the dissident stockholder is required to represent in its proxy statement that it intends to solicit holders representing at least 67% of the voting power of shares entitled to vote on the election of directors. If such statement proved to be false, the dissident would be subject to liability under Rule 14a-9, which prohibits material misstatements or omissions in proxy soliciting materials.

Q: WHAT ARE THE FORM OR DESIGN REQUIREMENTS APPLICABLE TO UNIVERSAL PROXY CARDS?

A: The form of proxy card must:

- include the names of all persons properly nominated for election by the registrant and by the dissident stockholder;
- provide a means for the security holder to grant authority to vote for the nominees;
- clearly distinguish between the nominees of the registrant and the nominees of the dissident stockholder;
- within each group of nominees, list nominees in alphabetical order by last name;
- use the same font type, style and size for all nominees;
- prominently disclose the maximum number of nominees for which authority to vote can be granted; and

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- prominently disclose the treatment and effect of a proxy executed in a manner that grants authority to vote for the election of fewer or more nominees than the number of directors being elected and the treatment and effect of a proxy executed in a manner that does not grant authority to vote with respect to any nominees.

Q: IS THERE ANYTHING ELSE A REGISTRANT SHOULD CONSIDER DOING NOW?

A: A registrant should review its bylaws, including the advance notice bylaw provision, and consider whether any changes are necessary or advisable.

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Please do not hesitate to contact us with any questions or if you would like to discuss any aspect of the universal proxy rules in more detail.

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