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SEC Adopts New Universal Proxy Rules for Director Elections

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On November 17, 2021, the U.S. Securities and Exchange Commission (“SEC”) adopted *final rules* requiring parties in a contested election of directors to use “universal proxy cards” that include all duly-nominated director candidates presented for election at a shareholder meeting, whether nominated by the company or a dissident shareholder. Compliance with the new rules is required for public company shareholder meetings involving director elections held after August 31, 2022. The rules do not apply to registered investment companies or business development companies.

The rule changes are notable for public companies and their investors because, among other things, shareholders will have the ability to vote by proxy for their preferred combination of director nominees, whether the individual nominees are put forward by the company or a shareholder. Prior to the rule change, shareholders voting by proxy could vote only for the slate of nominees advanced by the company or the slate of nominees advanced by a shareholder (including any shareholder-endorsed nominee to fill out a short slate) without making decisions on individual nominees by mixing the groups. The effect of the new rules places shareholders voting by proxy on equal footing with those attending shareholder meetings and voting virtually or in person.

The new rules require a dissident shareholder to provide the company with notice of the names of its nominees at least 60 days before the anniversary of the previous year’s annual meeting (with the company providing a responsive notice including the names of its nominees), establish a proxy statement filing deadline for dissidents, and require dissident shareholder to solicit at least 67% of the shares entitled to vote in the election. The rules also prescribe presentation, formatting, and disclosure requirements for the universal proxy cards.

Importantly, the new rules do not establish any minimum amount or duration of stock ownership to initiate a proxy contest and leverage the universal proxy rules. As a result, an up-to-date advance notice bylaw provision (i.e., a bylaw provision providing companies with notice of a shareholder’s proposal or director nominations in advance of

shareholder meetings) will be important to give companies additional time to screen candidates before dissidents place them before shareholders.

The SEC also adopted unrelated amendments to existing proxy rules. The applicable voting standard for director elections varies based on governing state law and a company's organizational documents. As a result, the new amendments are designed to reduce ambiguities in companies' disclosures by requiring the inclusion of an "against" voting option for director elections where there is a legal effect to such vote, the inclusion of an "abstain" option where a majority vote standard applies, and proxy statement disclosure regarding the effect of a shareholder's election to "withhold" its vote in a director election.

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