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Considerations for Public Company Bylaw Amendments in View of the New SEC Universal Proxy Rules

The Securities and Exchange Commission (the SEC) Rule 14a-19 (the Rule) requiring use of universal proxy cards in contested director elections became effective August 31, 2022. As envisioned by the Rule, a universal proxy card is a voting proxy that permits stockholders to see and select from a complete list of all nominees in a director election (from both the company's slate and any "dissident" stockholder-nominated slates). This procedure is inconsistent with the language now commonly seen in many public company bylaws regarding director elections. Public companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934, and private companies who anticipate going public, should consider the Rule in preparing their advance notice, proxy access, and related bylaws. This GT Alert provides a brief overview of the Rule, certain potential bylaw revisions in view of the Rule, and some practical considerations for such companies.

Overview of the Rule

The SEC has been mulling a universal proxy regime since 1942, and its earlier attempts to adopt a universal proxy apparatus were either abandoned or struck down by reviewing courts following objections from the corporate community.

In adopting the Rule, the SEC sought to balance the potential benefits and costs of a universal proxy regime. The Rule requires both sides of a contested director election to include all nominees of all sides in their proxy statements, such that stockholders may “mix and match” their election by voting for individual nominees from multiple slates. The Rule also prescribes notice obligations for any dissident and for the company of their respective nominees, and such notice obligations may be complied with either by the mailing of a compliant proxy statement or via the e-proxy notice and access rules. For instance, the dissident must notify the company of its nominations and solicitation at least 60 days before the anniversary of the previous year’s annual meeting, the company must provide its slate to the dissident at least 50 days before such anniversary, and the dissident must file its proxy statement with the SEC by the later of 25 days before the meeting or five days after the company files its proxy statement. Each side then conducts its own solicitation, and the dissident must solicit holders of at least 67% of the voting power at the stockholders meeting. In connection with the Rule, the SEC’s short slate rule has been eliminated, and the bona fide nominee rule has been amended to include nominees that consent to being named in any proxy statement for the applicable shareholder meeting. The Rule does not apply to registered investment companies or business development companies.

Potential Bylaw Amendments

Public companies should review their bylaws to ensure consistency with the Rule, including its advance notice provisions. Below are some relevant issues to consider in such review.

Alternative pathways. Bylaws should be reviewed for statements that may no longer be accurate due to inconsistency with the Rule, including statements that such bylaw procedures are the exclusive pathway to including a dissident nominee on the company’s proxy statement. It is also important to ensure that bylaws applicable to annual meetings are made applicable in relevant part to stockholder special meetings.

Nomination and solicitation procedures. In light of the requirements for dissident nominations and solicitation of proxies under the Rule, public companies may consider amending their advance notice bylaws to require the dissident to represent in its notice that it intends to solicit proxies from holders of at least 67% of the voting power, to use a color other than white for its proxy card (which is reserved solely for the company), to notify the company promptly if the stockholder fails or declines to comply with the Rule, and to not be permitted to change its slate to include unnamed nominees after they were identified to the company. In addition, the bylaws may be revised to restrict changes to the dissident nominees after they were identified to the company, to require dissident nominees to submit written consent to being identified as a nominee and in any proxy statement, and to notify the company of any revocation of such consent. Finally, companies should consider how their existing advance notice deadlines align with related deadlines under the Rule.

Compliance. Just as public companies are considering adding requirements in their bylaws related to the Rule, they should also consider compliance of their bylaws under the Rule. The potential expense to the company of a universal proxy may also make it appropriate to impose a requirement that any nominating stockholder act and comply with the Rule in good faith and provide reasonable evidence of such compliance. As a corollary to such requirements, the bylaws may authorize the chair of a stockholders meeting and/or the board of directors to make determinations at any such meeting regarding compliance with the company’s bylaws and the Rule. Companies should consider whether to include a bylaw provision expressly providing that failure to comply with the procedures set forth in the bylaws and the Rule, including withdrawn nominations and solicitations, will result in such nominations and proxies being disregarded.

Related Considerations

There are several gating items to consider before pursuing bylaw amendments for the Rule. For instance, timing of deciding on the adoption of amended bylaws is important. Courts may view these bylaws more deferentially if the board of directors adopts them on a “clear day” and not in response to any actual or expected shareholder activism. Also, before proposing any such bylaw amendments, companies should confirm whether their board of directors is empowered to do so unilaterally or if certain stockholder approvals are required. When amending the bylaws in view of the Rule, the companies should also consider whether to adopt other bylaw amendments, such as those related to amendments to the Delaware General Corporation Law, which became effective in August 2022.¹ Finally, companies may want to consult with institutional investors and proxy advisors to ensure that their stockholder base is likely to be aligned behind such clarification.

[View SEC Universal Proxy Rules.](#)

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¹ See *Preparation of Corporate and M&A Documents for Proposed 2022 Delaware Corporate Law Amendments*.