

Corp Fin Issues Three More “Universal Proxy” CDIs

A few days ago, Corp Fin issued [three more CDIs](#) related to universal proxy. As we [blogged](#) about back then, Corp Fin issued three universal proxy CDIs back in September - and now we have three more. The first two new ones address issues related to disputes over shareholder compliance with advance notice bylaws, and the third relates to solicitation requirements for the dissident shareholder.

Here are the three new CDIs:

1. Dissident Failure to Comply with Advance Notice Bylaws Are Grounds to Keep Dissident Nominees Off the Company's Proxy Card: CDI Question 139.04 confirms that companies can keep dissident nominees off of a proxy card if the dissident fails to comply with the company's advance notice bylaws. Specifically, the CDI states:

"Question: A registrant receives director nominations from a dissident shareholder purporting to nominate candidates for election to the registrant's board of directors at an upcoming annual meeting. The registrant, however, determines that the nominations are invalid due to the dissident shareholder's failure to comply with its advance notice bylaw requirements. Must the registrant include the names of the dissident shareholder's nominees on its proxy card pursuant to Rule 14a-19(e)(1) under these circumstances?"

Answer: No. Only duly nominated candidates are required to be included on a universal proxy card. See Release No. 34-93596 (Nov. 17, 2021) (noting that universal proxy cards "must include the names of all duly nominated director candidates presented for election by any party...", and explaining that "[a] duly nominated director candidate is a candidate whose nomination satisfies the requirements of any applicable state or foreign law provision and a registrant's governing documents as they relate to director nominations"). If the registrant determines, in accordance with state or foreign law, that the dissident shareholder's nominations do not comply with its advance notice bylaw requirements, then it can omit the dissident shareholder's nominees from its proxy card. [December 6, 2022]"

2. Proxy Disclosure Required If Dissident Sues Over Removal of Dissident Nominees from a Proxy Card: CDI Question 139.05 states that if a company leaves dissident nominees off a proxy card - due to the dissident's failure to comply with advance notice bylaws - and the dissident sues, proxy disclosure about the litigation is required. It also highlights the possible outcome that the company would need to send new proxy cards (and potentially postpone the meeting) if the litigation is resolved in the shareholder's favor. Specifically, the CDI states:

"Question: A registrant determines that a dissident shareholder's director nominations do not comply with its advance notice bylaw requirements and excludes the dissident shareholder's nominees from its proxy card. The dissident shareholder then initiates litigation challenging the registrant's determination regarding the validity of the director nominations. Under these factual circumstances, what are the registrant's obligations with respect to its proxy statement disclosures and solicitation efforts?"

Answer: The registrant must disclose in its proxy statement its determination that the dissident shareholder's director nominations are invalid, a brief description of the basis for that determination, the fact that the dissident

shareholder initiated litigation challenging the determination, and the potential implications (including any risks to the registrant or its shareholders) if the dissident shareholder's nominations are ultimately deemed to be valid.

If a registrant furnishes proxy cards that do not include the dissident shareholder's director candidates and a court subsequently determines that the dissident shareholder's candidates are duly nominated, then the registrant is obligated under Rule 14a-19 to furnish universal proxy cards with the dissident shareholder's candidates. Accordingly, it should discard any previously-furnished proxy cards that it received. The registrant also should ensure that shareholders are provided with sufficient time to receive and cast their votes on the universal proxy cards prior to the shareholder meeting, including, if necessary, through the postponement or adjournment of the meeting. [December 6, 2022]"

3. Dissidents Must Use Own Proxy Card: CDI Question 139.06 notes that a dissident must provide its own proxy card as part of its meaningful solicitation efforts and can't simply rely on the company's proxy card. Specifically, the CDI states:

"Question: Can a dissident shareholder conducting a non-exempt solicitation in support of its own director nominees simply file a proxy statement on EDGAR, avoid providing its own proxy card, and instead rely exclusively on the registrant's proxy card to seek to have its director nominees elected?"

Answer: No. Rule 14a-19(e) requires each soliciting party in a director election contest to use a universal proxy card that includes the names of all director candidates, including those nominated by other soliciting parties and proxy access nominees. Rule 14a-19(a)(3) further requires a dissident shareholder to solicit holders of at least 67% of the voting power of shares entitled to vote on the director election contest and to include a representation to that effect in its proxy statement. This requirement is intended to prevent a dissident shareholder from capitalizing on the inclusion of its nominees on the registrant's universal proxy card without undertaking meaningful solicitation efforts. See Release No. 34-93596 (Nov. 17, 2021). A dissident shareholder would fail to comply with these rules if it does not furnish its own universal proxy cards to holders of at least 67% of the voting power through permitted methods of delivering proxy materials (such as the Rule 14a-16 "notice and access" method). [December 6, 2022]"

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