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Corp Fin New “Universal Proxy” CDI May Require Proxy Disclosure

As universal proxy kicks in (it applies to any shareholder meetings involving a director election starting today, September 1st), Corp Fin issued three CDIs regarding Rule 14a-19 last week. To access these three new "[Proxy Rules & Schedule 14A/14C](#)" CDIs, you'll need to search for, or scroll down to, 139.01, 139.02 and 139.03, but they are repeated way below for your convenience.

Two of the new CDIs apply to contested solicitations:

- 139.01 clarifies the process for a dissident shareholder to submit additional or alternate nominees in its Rule 14a-19(b) notice
- 139.02 explains what a company should do in a situation where multiple dissident shareholders separately submit slates of nominees (notifying all dissidents of all nominees)

But new CDI 139.03 will need to be considered by all companies. It is generally consistent with how many companies disclosed universal proxy deadlines in their 2022 proxy statements.

Many companies have an advance notice bylaw that requires shareholders to provide notice of director nominees earlier than the deadline provided in Rule 14a-19(b)(1) (60 calendar days before the anniversary of the prior year's annual meeting). These bylaw provisions often don't require the same information that is required in a Rule 14a-19(b)(1) notice, such as a statement that the dissident intends to solicit at least 67% of the voting power of shares entitled to vote during the election of directors.

Under this new CDI, companies that have an earlier bylaw deadline that doesn't require all of the information required by Rule 14a-19(b) need to be sure to disclose the need to comply with the additional Rule 14a-19 requirements in the proxy statement for the following year's meeting. Many companies already provided this disclosure in their 2022 proxy statements, but those that didn't should be sure to update their disclosure this year.

The three CDIs are:

- Question 139.01

Question: Rule 14a-19(a)(1), in conjunction with Rule 14a-19(b), generally requires a dissident shareholder in an election contest to provide the registrant with notice of the names of the dissident shareholder's nominees for whom it intends to solicit proxies at least 60 calendar days before the anniversary of the prior year's annual meeting date. Can a dissident shareholder include in the Rule 14a-19(b) notice 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, finalizing its slate of nominees after the Rule 14a-19(b) deadline and closer to the date of the shareholder meeting?

Answer: No. The Rule 14a-19(b) notice must contain only the names of nominees for whom the dissident shareholder intends to solicit proxies. The purpose of this requirement is to provide a definitive date by which the parties in a contested election will have the names of all nominees in order to compile a universal proxy card. See Release No. 34-93596 (Nov. 17, 2021). Knowingly submitting the names of more nominees than there are director seats up for election, with the intention of finalizing the actual slate of nominees after the Rule 14a-19(b) notice deadline, would be inconsistent with the purpose of the rule.

The staff, however, recognizes that a dissident shareholder may need to change its slate of nominees after the Rule 14a-19(b) notice deadline (for example, because a nominee withdraws from the slate or the registrant increases the number of director seats up for election). Therefore, the staff will not object if the dissident shareholder includes in its Rule 14a-19(b) notice: (1) the names of the nominees for whom it intends to solicit proxies and (2) the names of additional or alternate nominees who, in accordance with the registrant's governing documents and state law, would be presented for election in the event of a need to change the original slate, so long as the notice clearly identifies the persons who are being presented as additional or alternate nominees. If the dissident shareholder later changes its slate to include any of the additional or alternate nominees, then it must promptly notify the registrant of the change as required by Rule 14a-19(c).

The views above also apply to the ability of a registrant to include in its Rule 14a-19(d) notice the names of more nominees than director seats up for election. [August 25, 2022]

- Question 139.02

Question: Rule 14a-19(b) generally requires a dissident shareholder in an election contest to send a notice to the registrant with the names of its nominees. Similarly, Rule 14a-19(d) requires the registrant to provide the names of the registrant's nominees to any person conducting a solicitation pursuant to Rule 14a-19. In a contested director election where more than one dissident shareholder intends to present a slate of director nominees, should the registrant inform each dissident shareholder of the Rule 14a-19(b) notice that the registrant received with respect to persons nominated by other dissident shareholders?

Answer: Yes. The Rule 14a-19 notification requirements are intended to provide the parties in a contested election with the names of all director nominees by a definitive date so they can compile a universal proxy card. See Release No. 34-93596 (Nov. 17, 2021). Although Rule 14a-19 does not expressly address a situation where there is more than one dissident shareholder submitting a slate of nominees, the registrant is best positioned to notify all parties of the slates submitted by the dissident shareholders as it alone receives the Rule 14a-19(b) notices that all dissident shareholders must send in a contested election. Accordingly, the registrant should notify each dissident shareholder, by the deadline prescribed in Rule 14a-19(d), of not only the names of its nominees and any nominees submitted under a "proxy access" provision but also of the names of any other persons nominated by another dissident shareholder who provided a Rule 14a-19(b) notice. This view also applies to the Rule 14a-19 requirements with respect to prompt notifications of any changes in the registrant's and dissident shareholders' slates of nominees. [August 25, 2022]

- Question 139.03

Question: Rule 14a-19(b)(1) requires the dissident shareholder in an election contest to send notice of its director nominees generally no later than 60 calendar days before the anniversary of the prior year's annual meeting. In addition, Rule 14a-5(e)(4) requires the registrant to disclose in its proxy statement the Rule 14a-19(b)(1) deadline for a dissident shareholder to provide notice of its director nominees for election at the next annual meeting. If the registrant's advance notice bylaw provision imposes an earlier deadline for notice of a dissident shareholder's nominees than Rule 14a-19(b)(1), must the registrant's proxy statement also include disclosure of Rule 14a-19(b)(1)'s later deadline?

Answer: Rule 14a-19(b)(1) establishes a minimum, not a maximum, notice period for a dissident shareholder to inform the registrant of its intent to present its own director nominees. See Release No. 34-93596 (Nov. 17, 2021)("Rule 14a-19's notice requirement is a minimum period that does not override or supersede a longer period established in the registrant's governing documents."). Accordingly, where the registrant's advance notice bylaw provision requires earlier notice than Rule 14a-19(b)(1), then the registrant disclosing only the earlier advance notice bylaw deadline would satisfy Rule 14a-5(e)(4).

Note, however, that Rule 14a-19(b) requires specific information to be included in the notice, such as a statement that the dissident shareholder 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. To the extent that the registrant's advance notice bylaw provision does not require the same information as that required by Rule 14a-19(b), then the registrant's proxy statement must clearly state the need for a dissident shareholder to comply with the additional requirements of Rule 14a-19(b). [August 25, 2022]

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