Harvard Law School Forum on Corporate Governance

Open Letter to Directors and Activists Regarding Amendments to Advance Notice Bylaws

Posted by Ron Berenblat, Andrew Freedman, Dorothy Sluszka, Olshan Frome Wolosky LLP, on Wednesday, November 30, 2022

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We want to draw attention to a concerning corporate governance trend that directly impacts directors of public companies and shareholders with director representation on public company boards. As you are likely aware, the U.S. Securities and Exchange Commission adopted new rules regarding the use of "universal proxy cards" for contested director elections, which went into effect on August 31, 2022. In response to this, a large number of public companies have been amending the advance notice provisions under their bylaws to conform the timing and notification requirements of their shareholder nomination procedures to those of the new universal proxy card rules. Unfortunately, however, many of these bylaw amendments we are seeing go well beyond the provisions that would be needed to address the new universal proxy regime. Rather, company counsel have been using this opportunity to expand their advance notice bylaws with an array of so-called "disclosure enhancements" that make the process for a shareholder to nominate directors unnecessarily cumbersome and costly.

We have heard from several directors of public companies that company counsel have not been completely forthright regarding the rationale and full scope of the proposed changes when disseminating draft bylaws for review by the board. In many cases, company counsel have purported to justify such overreaching amendments by suggesting that the universal proxy regime renders companies highly vulnerable to a new wave of shareholder-led proxy contests and that an overhaul of advance notice requirements is needed to protect boards against frivolous shareholder nominations. This argument has no merit – the universal proxy regime does NOT create a new way for shareholders to obtain board representation or even make running a proxy contest easier. The new rules simply layer in new procedures to the existing proxy voting system that make it more democratic by allowing shareholders to elect their preferred mix of candidates by proxy in the same manner as they could if they were to attend the meeting and vote using the company's ballot.

Directors may have already been, or soon may be, asked by the public companies at which they serve to review and approve a new set of bylaw amendments. We urge you to be vigilant when reviewing and approving any new bylaws to avoid inadvertently adopting bylaw amendments that are predicated on misleading narratives and do not align with responsible corporate governance practices. In particular, be on the lookout for proposed amendments to nomination procedures requiring additional disclosure designed to make it more difficult, expensive or even impracticable to nominate directors or intended to chill permitted communications among shareholders such as provisions requiring disclosure of (i) the ownership interests of the nominating shareholder's

limited partners or distant family members in the company, competitors of the company or counterparties to any litigation involving the company, (ii)the nominating shareholder's past or future plans to nominate directors at other public companies or (iii) the nominating shareholder's prior communications with fellow shareholders concerning its plans or proposals relating to the company. Remember, directors are the ones who are ultimately responsible for their actions – not company counsel or their advisors.