

Universal Proxy Case Study – Successful Defense of First Attempted Contest

In July 2022, a shareholder owning just 1,000 shares nominated 2 director candidates seeking to replace 2 of the 3 members of the board of biopharmaceutical company AIM ImmunoTech



- ▶ **First annual meeting subject to Universal Proxy Card (UPC) rules**
 - SEC’s universal proxy rules became effective for contested director elections starting on September 1, 2022
 - With AIM’s annual meeting typically occurring in October, AIM’s 2022 annual meeting was slated to be first instance of a company and dissident being required to use universal proxy cards
- ▶ **However, the nominating shareholder failed to comply with AIM’s advance notice bylaws when attempting to nominate director candidates**
 - Nominating shareholder was recruited to act as “face” of an undisclosed group of AIM shareholders – two of whom had checkered pasts (insider trading / wire fraud convictions)
 - AIM’s board rejected the nomination notice for its failure to comply with advance notice provisions in AIM’s bylaws
- ▶ **Following AIM’s rejection of the nomination notice, AIM (after extensive discussions between Kirkland and SEC Staff) used a traditional, non-universal proxy card only listing AIM’s 3 nominees during the pendency of litigation**
 - AIM committed to start a new solicitation using a universal card if the court later determined the activist nominees were valid
 - **On December 6, the SEC memorialized AIM’s approach in new Compliance and Disclosure Interpretations**
- ▶ **Board rejects nominations and Court upheld Board’s decision**
 - Nominating stockholder sued in Delaware Court of Chancery, seeking to have its nominations recognized and to force AIM to include its nominees on a universal proxy card (nominating stockholder used a UPC during litigation)
 - Court denied the requests, endorsing the Board’s strict application of its bylaws and AIM never used a UPC
- ▶ **Situation further underscores importance of having robust and reasonable advance notice bylaws**
 - AIM’s advance notice bylaw required disclosure of all arrangements or understandings between a nominating stockholder and each of its proposed nominee and any other persons pursuant to which nomination(s) are to be made
 - ▶ Nominating shareholder withheld information about other persons with whom he had arrangements or understandings, including with respect to entire funding of his attempted proxy contest and litigation
 - ▶ Certain arrangements and understandings are not necessarily picked up by proxy rules or 13D rules, so advance notice bylaws can fill crucial gaps

Result

Undisclosed group of shareholders were not permitted to nominate directors and could not use proxy contest to seize control of the board. AIM was able to hold its annual meeting without further delay (i.e., no need to amend proxy statement or proxy card) and stockholders re-elected all 3 nominees of AIM’s Board