

Public Company

ADVISORY PRACTICE

Lessons from the First Universal Proxy Contest

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On December 16, 2022, shareholders of Apartment Investment and Management Company (the “Company” or “Aimco”) cast their vote in the first proxy contest under the SEC’s new universal proxy rules. The activist shareholder, Land & Buildings Investment Management (the “Activist” or “L&B”), nominated two directors for election to the Company’s Board. One of the Activist’s nominees was elected to the Board while its other nominee was not elected to the Board. We discuss three key takeaways from the proxy contest below.

The Activist Obtained A Board Seat.

Consistent with predictions made by us and others that activist shareholders would likely have an easier time obtaining at least one Board seat in a proxy contest under the universal proxy rules, the Activist did in fact obtain one Board seat. One very interesting thing to note is that the Company nominee that lost the election is 73 years old and served on the Board for 18 years. The Activist’s director nominee that defeated him had no public company Board experience, but did have relevant industry experience as a real estate and REIT analyst and advisor.

ISS Recommended for One of the Activist’s Nominees.

Also consistent with predictions made by us and others, ISS split its recommendation in recommending for one of the Company’s nominees and one of the Activist’s nominees. Such recommendation is consistent with ISS’ previous warning that “Boards should quickly realize that under the [universal proxy] regime, they will be far less able to shield their weakest contributors”. According to preliminary vote tabulations, the Activist director nominee that ISS recommended in favor of received more than twice as many votes as the Company’s nominee. While it is not clear whether the ISS recommendation was outcome determinative, we believe such recommendation had a significant impact on the voting outcome. Lastly, it should be noted that Glass Lewis recommended in favor of both of the Company’s nominees.

The Cost of the Proxy Contest for the Activist Was Not Significantly Reduced.

Many observers have asserted that the universal proxy regime would significantly reduce the cost of proxy contests. We have been skeptical of this view as a shareholder still has to prepare an advance notice of nomination, file a proxy statement, and furnish a proxy statement and proxy card to shareholders having at least 67% of the voting power. We also believe that economic activists will conduct meaningful solicitation efforts that go beyond the SEC’s minimum solicitation requirements as their goal is to be victorious. In the Aimco proxy contest, according to L&B’s proxy statement, it estimated that the cost of the proxy contest would be \$1,000,000. Notably, at the time it filed its definitive proxy statement, it disclosed that it had only spent \$200,000 on the proxy contest meaning that most of its costs were back-end loaded. By comparison, L&B ran a proxy contest earlier this year where the universal proxy rules did not apply and estimated that the cost of such proxy contest would be \$1,200,000, with \$500,000 spent as of the date of filing the definitive proxy statement. We do not view the differences in costs of these proxy contests as significant.