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# SEC Reopens Comment Period on 2016 Universal Proxy Proposal

In October 2016, the Securities and Exchange Commission (the “SEC”) proposed amendments to the federal proxy rules that would impose mandatory use of a universal proxy card in election contests and would require each proxy card to include the names of *all* nominees named in *any* proxy statement (the “Proposing Release”).<sup>1</sup> Our November 2016 memorandum discussing the Proposing Release can be found [here](#). On April 16, 2021, the SEC reopened the comment period on the Proposing Release until June 7, 2021 and also raised additional questions for comment (the “Reopening Release”).<sup>2</sup> This memorandum summarizes the Proposing Release and highlights certain of the questions raised for comment in the Proposing Release and the Reopening Release.

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## I. The 2016 Universal Proxy Proposal

Under the rules as amended by the Proposing Release, a registrant’s proxy card would include the nominees of any dissident shareholder, as well as its own nominees, and vice versa. The proposed amendments are intended to enable shareholders who vote by proxy to be able to express their preference nominee-by-nominee, among all nominees, to replicate the voting rights a shareholder would have if the shareholder voted in person by ballot at a shareholders meeting.

### A. *Bona Fide* Nominee Definition and Short Slate Rule

The current proxy rules state that no proxy may confer authority to vote for a nominee unless that nominee has consented to being named in the proxy statement, *i.e.*, is a “*bona fide* nominee.”<sup>3</sup> This prevents either side in a contested election from including a nominee from the opposing side on its proxy card without the express authorization of that nominee. Practically, this results in a proxy card that lists nominees from only one side of the contest or the other, while in-person voters have the option to cast their vote for nominees’ from both sides. Additionally, the “short slate rule” was enacted to permit dissidents seeking to elect a minority of the board to solicit authority to vote for some of the registrant’s nominees on its proxy card. However, under this rule shareholders are limited to voting for the combination of nominees chosen by either the dissidents or the registrant.

The Proposing Release seeks to amend the definition of “*bona fide* nominee” by changing the requirement that a nominee consent to being named in “the” proxy statement to instead refer to “a” proxy statement. This would allow registrants and dissidents to include all consenting director nominees on their proxy cards, rather than being

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<sup>1</sup> For the full text of the Proposing Release, see Securities and Exchange Commission Release No. 34-79164; IC-32339; File No. S7-24-16 (Oct. 26, 2016), available at <https://www.sec.gov/rules/proposed/2016/34-79164.pdf>.

<sup>2</sup> For the full text of the Reopening Release, see Securities and Exchange Commission Release No. 34-91603; IC-34246; File No. S7-24-16 (Apr. 16, 2021), available at <https://www.sec.gov/rules/proposed/2021/34-91603.pdf>. Unless otherwise specified, quoted statements in this memorandum are taken from the Proposing Release or the Reopening Release, as the context indicates.

<sup>3</sup> 17 CFR 240.14a-4(d)(1).

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limited to only those nominees who have consented to being named in a particular proxy statement. The Proposing Release also seeks to eliminate the short slate rule (for registrants other than funds and business development companies) because the rule would no longer be necessary.

## **B. Rule 14a-19: Proposed Mandatory Universal Proxy Card**

The Proposing Release also includes a new Rule 14a-19(e), which would require that proxy cards used in any non-exempt solicitations in connection with a contested election include the names of all duly nominated candidates for election to the board. Taken together with the proposed bona fide nominee amendment, this proposed rule, would, in practice, require each side in a contested election to distribute a separate proxy card including the names of all nominees for director for whom proxies are solicited, whether by the company or the dissident shareholders.

To ease potential concerns, the Proposing Release includes certain notice and timing requirements. A dissident group that intends to solicit proxies for its own nominees would be required to give the company notice at least 60 days prior to the anniversary of the previous year's annual meeting, in addition to complying with any notice requirements set forth in the company's governing documents. In addition, the company would be required to give the dissidents notice at least 50 days prior to the anniversary of the previous year's annual meeting of all the company's nominees (if they have not already been listed in the proxy statement). The dissident group would then be obligated to file its definitive proxy statement by the later of 25 days prior to the meeting or five days after the company filed its definitive proxy statement. Notably, in order to solicit proxies under the new universal proxy rule, the dissidents would be required to solicit the holders of at least a majority of the shares entitled to vote for the election of directors.

## **C. Other Amendments**

The Proposing Release also includes proposed amendments to clarify voting options that would apply to all director elections. These amendments include (1) amending Rule 14a-4(b) to (a) require an "against" voting option rather than a "withhold authority to vote" option on the proxy card for director elections where there is legal effect to votes cast against a nominee and (b) allow shareholders to "abstain" in a director election governed by a majority voting standard if they are neutral toward a director nominee, and (2) amending Item 21(b) of Schedule 14A to require disclosure regarding a "withhold" vote's effects.

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## **II. Request for Comments**

### **A. Original 2016 Questions**

The SEC included numerous requests for comment in the Proposing Release, including:

- "Would a mandatory universal proxy system result in investor confusion, such as confusion regarding which party a nominee supports?"
- "Should we make the use of universal proxies optional rather than mandatory?"
- "Should the proposed amendments to [the "bona fide nominee" rule] be adopted without proposed Rule 14a-19, which would require the mandatory use of universal proxies?"
- "Are there reasons our rules should not seek to replicate the vote that could be achieved at a shareholder meeting in this manner?"

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## B. Additional 2021 Questions

Since the Proposing Release, there have been many developments in proxy contests, corporate governance and shareholder activism, including contests where one or both parties have used a universal proxy card and increased use of virtual meetings. In response to these developments, the SEC has reopened the comment period for the Proposing Release and posed additional questions for comment, including:

- “How should we consider the recent increase in the number of companies with dual or multi-class stock structures in determining a minimum solicitation requirement?”
- “Since the [Proposing] Release, there have been several high-profile contested elections at registrants that were significantly larger than the typical proxy contest target. To what extent does this development affect any of the aspects, including the costs and benefits, of the proposed rules?”
- “To what extent should [the increase in frequency of virtual shareholder meetings] affect our assessment of the [Proposing Release]? How are virtual meetings likely, or not, to affect the nature of proxy contests, such as their frequency or targets, in the future?”

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## III. Conclusion

After a nearly four-year hiatus, the universal proxy and related rule changes are back on the SEC’s near-term agenda. The final forms of the proposed amendments will be of interest to both registrants and those proposing their own directors alike.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email authors Geoffrey E. Liebmann (partner) at 212.701.3313 or [gliebmann@cahill.com](mailto:gliebmann@cahill.com); or Tina Davis (associate) at 212.701.3473 or [tdavis@cahill.com](mailto:tdavis@cahill.com); or email [publications@cahill.com](mailto:publications@cahill.com).

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