
SEC Adopts Universal Proxy Card Rules and Proposes to Amend Proxy Advisor Rules

In November 2021, the Securities and Exchange Commission (the “SEC”) voted to approve proposed amendments to the proxy rules, implementing the use of universal proxy cards in all non-exempt contested director elections and related proposals.¹ These rules will apply to shareholder meetings held after August 31, 2022 and are summarized below.

Also in November 2021, the SEC proposed amendments to its rules adopted in 2020, relating to proxy voting advice.² These proposals are meant to address concerns raised regarding the 2020 rules as originally adopted and are summarized below.

I. Universal Proxy Card – Final Rules

In October 2016, 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 all nominees named in any proxy statement. In April 2021, the SEC reopened the comment period on the proposed amendments. Our memorandum discussing the October 2016 proposals can be found [here](#), and our memorandum discussing the reopening of the comment period can be found [here](#). After consideration of public comments, the SEC has adopted these proposals, including the use of universal proxy cards, substantially as proposed.

A. Mandatory Universal Proxy Cards

The final rules mandating use of universal proxy cards require that a card used in any non-exempt contested director election for a public company (other than registered investment companies and business development companies) must include the names of all duly nominated company, dissident, and other shareholder nominees. The rules also amend the formatting and presentation requirements for proxy cards to require that they:

- set forth the names of all duly nominated director candidates;³
- clearly distinguish among company nominees, dissident nominees, and proxy access nominees, and list nominees in alphabetical order within each group;
- present all nominees in the same font type, style, and size; and

¹ For the full text of the final amendments, see Securities and Exchange Commission Release No. 34-93596; IC-34419; File No. S7-24-16 (Nov. 17, 2021), available at <https://www.sec.gov/rules/final/2021/34-93596.pdf> (the “Final Release”).

² For the full text of the proposed amendments, see Securities and Exchange Commission Release No. 34-93595; File No. S7-17-21 (Nov. 17, 2021), available at <https://www.sec.gov/rules/proposed/2021/34-93595.pdf> (the “Proposing Release”).

³ State law governs whether a nominee is duly nominated, so advance notice by-laws may become an even more important tool for a company to manage its director elections. The SEC noted that most advance notice bylaws require 90 days advance notice from a dissident.

- prominently disclose:
 - the maximum number of nominees for which authority to vote can be granted; and
 - the treatment and effect of a proxy executed in a manner that (i) grants authority to vote for more nominees than the number of directors being elected, (ii) grants authority to vote for fewer nominees than the number of directors being elected, or (iii) does not grant authority to vote with respect to any nominees.

In addition to the above, where both parties have presented a full slate of nominees and there are no proxy access nominees, the final rules would allow (but not require) the universal proxy card to provide the ability to vote for all dissident nominees as a group and all registrant nominees as a group, so long as a “vote against all” option is also provided for on the card.

The Final Release notes the objective of the requirements “is to ensure clarity and fairness in presentation, so that the cards allow shareholders to make an informed voting decision, while at the same time providing flexibility for each side in a contest to craft its own card.”

B. Notice and Other Requirements to Solicit Proxies

The SEC adopted, as proposed, the requirement that a dissident shareholder provide the company notice of the name of such dissident’s nominees no later than 60 days prior to the anniversary of the previous year’s annual meeting. The final rules also require a dissident to indicate its intent to comply with the minimum solicitation threshold by stating in its notice that it intends to solicit shareholders holding at least 67% of the voting power of the shares entitled to vote on the election of directors. The minimum solicitation requirement was increased in the final rules to 67% from a majority in order to strike “an appropriate balance between achieving the benefits of the universal proxy requirement for shareholders and preventing dissidents from capitalizing on the inclusion of dissident nominees on the registrant’s universal proxy card without undertaking meaningful solicitation efforts,” according to the Final Release.

Conversely, the final rules also require a company to inform dissident shareholders, at least 50 days prior to the anniversary of the prior year’s annual meeting, of the company’s nominees unless the names have been previously provided in a preliminary or definitive proxy statement. This requirement is intended to give dissidents adequate time to include the company’s nominees on their universal proxy cards.

Lastly, the final rules require that a dissident shareholder in a contested election must file its definitive proxy statement with the SEC by the later of 25 calendar days prior to the meeting date or five calendar days after the company files its definitive proxy statement.

C. Access to Nominee Information

The final rules call for each party in a contested election to refer shareholders to the other party’s proxy statement for information about the other party’s nominees as well as to disclose that shareholders can access the other party’s proxy statement without cost on the SEC’s website.

D. Voting Standards Disclosure and Voting Options

The Final Release also adopts the October 2016 proposals to amend the form of proxy card and disclosure requirements in connection with voting options and voting standards, including the following:

- requiring that an “against” voting option be included in the proxy card instead of a “withhold authority to vote” option for the election of directors where an “against” vote will have a legal effect; and

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- providing shareholders an opportunity to “abstain” from voting for a nominee they neither support nor oppose rather than “withhold authority to vote” in a director election governed by a majority voting standard.

The SEC said these changes “will provide shareholders with a better understanding of the effect of their votes on the outcome of the election.”

E. Bona Fide Nominee and Short Slate Rules

In order to facilitate the new universal proxy system, the final rules, adopted as proposed, expand the scope of a bona fide nominee’s consent in an election contest to “include consent to being named in *any* proxy statement for the applicable meeting.” Thus, by consenting to be named in the company’s proxy statement, the nominee also consents to being named in the dissident’s proxy statement and vice versa. This change, together with the universal proxy card, makes it possible for a dissident to engage in a “vote no” campaign (rather than putting forth their own slate of directors) by including some or all of the management slate on its proxy card while urging votes against those management nominees it does not support.

The “short slate” rule, which “allow[ed] dissidents soliciting in support of a partial slate of nominees that would make up a minority of the board to seek authority to vote for some of the registrant’s nominees,” have been eliminated by the final rules (other than for registered investment companies or business development companies) in light of the amendments to the bona fide nominee rule and the mandatory use of universal proxy cards.

II. Proxy Voting Advice - Proposed Amendments

In July 2020, the SEC adopted final rules regarding proxy voting advice provided by proxy advisory firms or proxy voting advice businesses (the “2020 Final Rules”). Our memorandum on the 2020 Final Rules can be found [here](#). In November 2021, the SEC proposed amendments to the 2020 Final Rules that would rescind two of those rules:

A. Proposed Amendment to Rule 14a-2(b)(9) to Remove Rule 14(a)-2(b)(9)(ii) Conditions

Currently, the conditions set forth in Rule 14(a)-2(b)(9)(ii) require proxy advisors to (i) adopt and disclose policies and procedures to ensure that registrants that are the subject of voting advice are able to access that advice prior to or at the same time as the advice is disseminated to clients, and (ii) provide clients with a mechanism to confirm any response the registrant may provide on voting advice before those clients vote (together, the “14(a)-2(b)(9)(ii) conditions”). The Proposing Release proposes rescinding the 14(a)-2(b)(9)(ii) conditions.

The Proposing Release notes that proxy advisory firms, such as Glass, Lewis & Co. and Institutional Shareholder Services Inc., have developed policies and practices that address the underlying concerns of the Rule 14(a)-2(b)(9)(ii) conditions. The Proposing Release also notes that without this rule there is no assurance that all proxy advisory firms will adopt these measures. However, the SEC shares the concerns of others regarding “the conditions’ potential adverse effects on the independence, cost and timeliness of proxy voting advice.” The Proposing Release also poses the following questions (among others):

- “[R]ather than rescinding the Rule 14a-2(b)(9)(ii) conditions as proposed, should we commit to a retrospective review of the Rule 14a-2(b)(9)(ii) conditions after they have become effective?”
- “How might we address the risk that proxy advisory firms will change their policies and procedures to the detriment of investors if we rescind the Rule 14a-2(b)(9)(ii) conditions?”
- “Are there ways that we can mitigate the potential adverse effects on proxy voting advice associated with the Rule 14a-2(b)(9)(ii) conditions other than by rescinding those conditions?”

B. Proposed Amendment to Rule 14a-9 to Remove Note (e)

Rule 14a-9 prohibits any proxy solicitation from containing false or misleading statements with respect to any material fact at the time and in light of the circumstances under which statements are made. The 2020 Final Rules codified the SEC's previous guidance that proxy voting advice is generally subject to Rule 14a-9 and added paragraph (e) to the Rule providing examples of what may be misleading. Note (e) to the Rule states that the failure to disclose material information regarding proxy voting advice, "such as the proxy advice firm's methodology, sources of information, or conflicts of interest" could be misleading within the meaning of the Rule. The Proposing Release proposes removing Note (e).

The Proposing Release notes "[a]lthough Note (e) was intended to clarify the potential implications of Rule 14a-9 for proxy voting advice under existing law, it appears instead to have unintentionally created a misperception that the addition of Note (e) to Rule 14a-9 purported to determine or alter the law governing Rule 14a-9's application and scope, including its application to statements of opinion." The Proposing Release also poses the following questions (among others):

- "Rather than rescinding or amending Note (e), should we instead commit to conducting a retrospective review of Note (e) after a given period of time?"
- "Have proxy advisory firms experienced an increase in litigation costs or credible threats of litigation since the adoption of the 2020 Final Rules? Have there been any other adverse consequences associated with the addition of Note (e) to Rule 14a-9?"
- "Is there a risk that proxy advisory firms will change their policies and procedures to the detriment of investors if the Commission adopts the proposed amendments to Rule 14a-9?"

III. Conclusion

The final amendments to the universal proxy card rules will become effective on January 31, 2022 but are subject to a transition period and therefore will only apply to shareholder meetings held after August 31, 2022.

The proposed amendments to the 2020 Final Rules relating to proxy voting advice are under on-going review.

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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 Helene R. Banks (partner) at 212.701.3439 or hbanks@cahill.com; Geoffrey E. Liebmann (partner) at 212.701.3313 or gliebmann@cahill.com; or Tina Davis (associate) at 212.701.3473 or tdavis@cahill.com; or email publications@cahill.com.

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