

REAL ESTATE CAPITAL MARKETS

NEWSLETTER

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HUNTON
ANDREWS KURTH

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We are pleased to present the Fall 2022 edition of our Hunton Andrews Kurth *Real Estate Capital Markets Newsletter*.

As many of our readers know, a recurring theme in the industry is volatility and market uncertainty. Like recent quarters, the impact of inflation, Federal Reserve action, and interest rate movements continues to create uncertainty. In light of these conditions and declines in stock prices, we have observed many clients exploring less traditional ways to raise capital. Our corporate, financing, private equity and tax practices have been active in assisting in these efforts. In addition, the SEC continues to be busy with rule making activity, and we continue to advise clients on topics related to, among others, ESG, universal proxy rules and cybersecurity disclosure.

Despite choppy market conditions, we actively advised clients on a number of transactions. One transaction of particular note was our representation of Healthcare Realty Trust Incorporated in its \$18 billion acquisition of Healthcare Trust of America, Inc., creating one of the nation's largest owners of medical office buildings. The company created by the reverse merger retained the Healthcare Realty name and became the largest pure-play medical office building REIT, with 727 properties totaling 44 million square feet, nearly double the square footage of the next-largest U.S. MOB portfolio (read more about this transaction on page 5 in our "Deal Spotlight" column). This transaction, which was led by our partners **Jim Kennedy** and **Jim Davidson** (learn more about Jim Davidson on page 4 in our "Lawyer Spotlight" column), is an excellent example of our multidisciplinary approach to advising REIT clients, and was made possible by an integrated and collaborative approach that is the hallmark of our firm.

In industry-related news, we are thrilled to be a sponsor of the Nareit's REITworld: 2022 Annual Conference, being held this week in San Francisco from November 15 to 17. We are looking forward to seeing many of our clients and friends.

We are pleased to share some highlights of our recent activity, as well as some thought leadership and information about our team. Thank you, again, for your continued confidence in the work that we do together.



TEAM MEMBER SPOTLIGHT: JAMES V. DAVIDSON

Partner | Houston | jdavidson@HuntonAK.com | +1 713 220 3649

Jim Davidson is a partner in the firm's Houston office. Since joining the firm's Real Estate Capital Markets practice in 2011, he has become one of the country's most active and experienced REIT lawyers. He has advised on over 200 REIT transactions, aggregating to nearly \$60 billion in gross proceeds. Jim has been named counsel on more REIT IPOs over the past five years than all but a handful of lawyers in the country, according to Deal Point Data LLC.

Jim regularly advises on complex or novel REIT financings and industries, including capped call and equity forward transactions, the only postal REIT, cannabis REITs, and the first Mexican FIBRA. He regularly represents issuers and investment banks in connection with public and private offerings of equity debt securities, including initial public offerings, follow-on offerings, "at the market" offerings, tender offers and private placements. Jim recently advised Healthcare Realty Trust Incorporated in its \$18 billion acquisition of Healthcare Trust of America, Inc.

Jim has particular experience with respect to Agency and commercial mortgage REITs, hospitality REITs, and office REITs. He has experience in Latin American, Asian and European cross-border transactions and is a frequent speaker and author on REIT transactions. He is listed as a top lawyer for REITs by *Chambers USA* and *The Legal 500*.

Jim received his JD from New York University School of Law in 2009 and his BA in Diplomacy & Foreign Affairs from Miami University in 2005.

“James’ outstanding legal expertise, combined with his practical business acumen make him a valuable asset to our team.”

–Client quote
The Legal 500 US, 2021



DEAL SPOTLIGHT: HEALTHCARE REALTY TRUST INCORPORATED

Hunton Andrews Kurth LLP represented Healthcare Realty Trust Incorporated in its \$18 billion acquisition of Healthcare Trust of America, Inc. (HTA), creating one of the nation's largest owners of medical office buildings. The cash and stock transaction was announced in February 2022 and closed in July 2022. The company created by the reverse merger retained the Healthcare Realty (HR) name and became the largest pure-play medical office building REIT, with 727 properties totaling 44 million square feet, nearly double the square footage of the next-largest U.S. MOB portfolio. HTA shareholders own 61% of the combined company; HR shareholders own 39%.

The team advising Healthcare Realty was led by **James A. Kennedy II** and **James V. Davidson** and included **Steven M. Haas, John J. Ogilby, Jordan G. Sisco, Gabriel M. Lopez, Lee Davis, Kate Saltz** and **Enyonam O.K. Enniful**.

Hunton Andrews Kurth has extensive experience advising on significant REIT M&A deals, including representation of Pebblebrook Hotel Trust in its \$5.1 billion takeover of LaSalle Hotel Properties, Industrial Logistics Properties Trust in its \$4 billion acquisition of Monmouth Real Estate Investment Corp., Service Properties Trust in its \$2.4 billion acquisition of Spirit MTA REIT's property portfolio, and Capstead Mortgage Corp. in its \$1.07 billion merger with Franklin BSP Realty Trust, Inc.



THE SEC'S UNIVERSAL PROXY RULE AND HOW REITS CAN RESPOND

In November 2021, the U.S. Securities and Exchange Commission (SEC) adopted new Rule 14a-19¹ and amendments to existing rules to require the use of a “universal proxy card” by companies and dissident shareholders soliciting votes in contested director elections.² The new universal proxy rules became effective on January 31, 2022, and compliance is required for shareholder meetings held after August 31, 2022. This article (i) provides background and context on these new rules, (ii) summarizes the key features of the new universal rules, (iii) provides general guidance on potential bylaw amendments that may be necessary in response to the new rules, and (iv) provides specific guidance for real estate investment trusts (REITs).

BACKGROUND

The universal proxy rules have been in the works for over five years. The SEC first proposed similar rules in October 2016 and reopened the public comment period during 2021, before implementing the new rules in November 2021.

The general intent of the new rules is to provide shareholders with more choices in contested director elections. A contested election asks shareholders to vote on two competing slates—a company slate assembled by the board of directors and an opposing slate assembled by one or more dissident shareholders. The previous SEC rules did not allow shareholders to pick selectively from the company slate and dissident slate unless they voted

at a shareholder meeting that was held virtually or in person. Under the old rules, the company and dissident shareholder distributed their own separate proxy statements and proxy cards to shareholders not voting virtually or in person. Accordingly, if a shareholder was to vote by proxy, they were given voting instructions to vote for or against the company slate on the company’s proxy card or were given voting instructions to vote for or against the dissident slate on the dissident’s proxy card. The prior system only allowed for the possibility of an “all or nothing” vote for each respective slate and shareholders were not able to pick and choose nominees from both slates.

¹ See the SEC’s adopting release here: <https://www.sec.gov/news/press-release/2021-235>.

² See the full text of the new universal proxy rules under 17 CFR Part 240 here: <https://www.ecfr.gov/current/title-17/chapter-II/part-240?toc=1>.

As explained by the SEC in their final ruling to amend the Federal proxy rules, few shareholders of public companies attend annual or special meetings to vote in person and the primary means for shareholders to be informed and vote on matters is through the proxy process.³ The new rules amend the proxy rules to allow shareholders to elect directors by proxy in a manner consistent with their ability to vote in person at a shareholder meeting.

The universal proxy rules implement a mandatory universal proxy card system where a proxy card must include both the company nominees and the dissident nominees. The universal proxy cards must now be used by both management and the shareholders soliciting proxy votes for their candidates in contested director elections. This means that a company's shareholders are provided voting instructions to vote in favor of any combination of candidates as long as they are properly nominated and the shareholder only votes for up to the number of authorized seats up for election. Using the universal proxy card now gives shareholders the ability to pick and choose a combination of candidates from each slate in a contested election instead of the previous "all or nothing" method with separate proxy cards.

In addition to providing more flexibility for shareholders casting their votes by proxy, these new rules also provide incremental advantages to dissidents as compared with the prior system. As a result, many expect that new or lesser known activists, as well as activists that were not shy under the previous rules, will be more likely to launch or threaten proxy contests. The universal proxy rules provide more rights to shareholders to nominate a contested slate of directors without any minimum ownership requirements.

SUMMARY OF THE UNIVERSAL PROXY RULE

The new rules implement formatting and substantive requirements on the universal proxy card, notice rules, as well as other procedures and deadlines to make timing and information sharing from both company and dissident more consistent.

Companies and dissidents now must coordinate on the inclusion of each other's nominees in their respective proxy cards, which includes several notice and filing deadlines, including:

- no later than 60 days before the anniversary of the prior year's annual meeting, the dissident must notify the company of its intent to solicit proxies in support of its nominees and any changes to this list must be provided promptly to the company. However, this is a minimum period and does not override a longer period that is already included in a company's bylaws;
- dissident notices to the company must include the names of all nominees for whom they intend to solicit proxies and a statement that the dissident intends to solicit holders of shares that represent at least 67% of the voting power of shares entitled to vote on director elections;
- no later than 50 days before the anniversary of the prior year's annual meeting, the company must notify the dissident of the names of all of the company nominees and any changes to this list must be provided promptly to the dissident; and
- no later than 25 days before the annual meeting or five calendar days after the company files its definitive proxy statement, the dissident is required to file its definitive proxy statement. The company may disseminate a non-universal proxy card only including names of its nominees if the dissident misses this time requirement.

Importantly, the new rules do not require the dissident to satisfy any minimum share ownership requirements, but there is now a minimum dissident solicitation requirement. The dissident is required to solicit shareholders representing at least 67% of the voting power of shares entitled to vote in the election of directors, whereas the old rule only required a majority. Additionally, the dissident may solicit shareholders under the notice and access method (rather than physically mailing materials) by mailing a notice of internet availability and posting the proxy materials to a website.



³ See the SEC's Final Rule Release.

Both the company and dissident are able to design and disseminate their own universal proxy cards, but, under Rule 14a-19, each card must: (1) include the names of all duly nominated director candidates, (2) clearly distinguish the nominees, (3) list the nominees in alphabetical order by last name within each group, (4) have all nominees presented using the same font type, style and size, and (5) prominently disclose the maximum number of nominees for which authority to vote can be granted. Despite the SEC receiving comments advocating for the opposite, dissidents are allowed to use any color proxy card under the new rules, including white.

Three additional notable amendments to the proxy rules include:

- the “bona fide nominee rule,” under revised Rule 14a-4, was expanded to include any nominee that has consented to being named in any proxy statement, so each party must refer shareholders to the other party’s proxy statement for nominee information and

include disclosure on how to access that proxy statement for free on the SEC’s website. Previously, this rarely occurred as this listing was not allowed unless the nominee consented;⁴

- the “short slate” rule was eliminated, where dissidents offering less than a full slate of nominees were allowed to include some company nominees under Rule 14a-4(d); and
- where state law gives effect to votes against nominees, the form of proxy must include the option to vote against nominees and the option to abstain, but may not include the option to vote against where those votes would have no legal effect. Rule 14a-4(b) includes new rules about when “against,” “abstain” and “withhold” votes are permitted and required.

There are many details, nuances and uncertainties associated with the new rules. Companies, including REITs, should consult with counsel regarding the potential effects and implications of the new rules.

RECOMMENDATIONS FOR COMPANIES AMENDING THEIR BYLAWS

Rule 14a-19 contains requirements for a dissident shareholder conducting a proxy contest, but it also reinforces the importance of a dissident shareholder complying with a corporation’s organizational documents. As mentioned above, it is expected that these new rules could lead to more proxy contests from traditional activists and potentially a new type of activist. Public companies should review and revise their bylaws to ensure that their advance notice bylaws will produce an orderly nomination and election process. In light of Rule 14a-19 and recently issued staff interpretive guidance, companies should review their bylaws now and consider the following.

First, a company should ensure that their bylaws are not inconsistent with the new universal proxy rule. A company’s bylaws should be amended (i) if they state that they are the sole method by which a shareholder can include a nominee in the

⁴ The old market practice was that company nominees generally did not consent to being named in the dissident’s proxy statement and vice versa. Companies should review the consent language in their bylaws to make sure it matches this new rule.

Market Data: Industry wide
422 REIT capital markets deals
aggregate total **\$61.14 billion**
completed thus far in 2022

company's proxy materials or (ii) if the bylaws expressly disclaim any right for a shareholder nominee to be included in the company's proxy materials. Both of these provisions are not unusual and are likely included in a company's bylaws.

Additionally, a company should review the nomination and advance notice procedure bylaws and update accordingly. Consider including updates that (i) the nominating shareholder should state whether it intends to solicit proxies for director nominees; (ii) the proxies solicited by the shareholder will be disregarded if federal securities laws, including Rule 14a-19, the company's organizational documents, or applicable law, are not complied with; (iii) the nominating shareholder must notify the company promptly if they fail to satisfy Rule 14a-19 based on timing or percentage requirements discussed above; (iv) a certification or evidence that the nominating shareholder has satisfied Rule 14a-19 be required prior to the shareholder meeting; (v) update the deadline for giving notice of nomination to be earlier than the minimum 60 calendar days discussed above; (vi) expressly prohibit "placeholder nominees;" and (vii) ensure these updates are also made to rules regarding special meetings.

REIT-SPECIFIC OBSERVATIONS AND RECOMMENDATIONS

We have observed more activist activity in the REIT space, if not all out proxy contests. While it remains to be seen if an uptick in activist activity translates into more proxy contests, certainly the new universal proxy rules could remove some previous barriers to waging such contests. This concern may be particularly acute in an environment, like the one we are in, where stocks are trading at significant

discounts to book values. While conditions could improve, we suspect that markets could continue to be volatile through the 2023 proxy season.

In light of the new rules and the conditions discussed above, we suggest REITs closely examine their bylaws for potential amendments, as discussed above (indeed, many REITs have already made such amendments). Some REITs may elect to make these changes sooner rather than later, as making such amendments during a company's director nomination "window" as set forth in the company's bylaws could be problematic if such a nomination was actually made. We are happy to assist you in the consideration of these matters, and we encourage you to reach out to your contact at our law firm or otherwise contact one of the attorneys listed below.



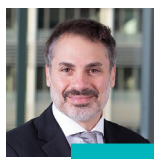
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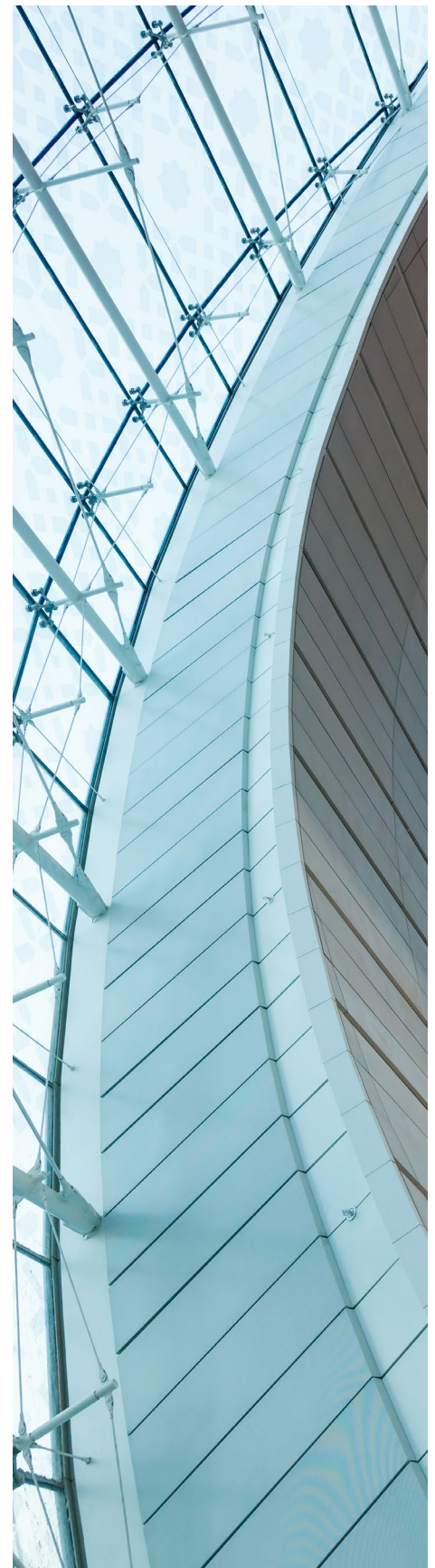
Alexander Abramenko



Rob Smith



Elizabeth White



MARKET DATA: TOP 5 REIT INDUSTRIES IN TERMS OF CAPITAL MARKETS DEAL VOLUME



DIVERSIFIED REITS: 81



RETAIL REITS: 69



MORTGAGE REITS: 64



RESIDENTIAL REITS: 51

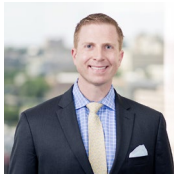


SPECIALIZED REITS: 49

Our Real Estate Capital Markets practice is proud to be ranked among the nation's **top firms** advising REITs in the 2022 *Chambers USA* and *Legal 500* rankings.

We are also excited to have **five partners** individually ranked as leading practitioners by both publications.

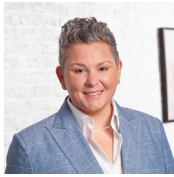
CONTACT US



James V. Davidson
Partner, Houston
j davidson@HuntonAK.com
+1 713 220 3649



Anna Knecht Page
Counsel, Richmond
a page@HuntonAK.com
+1 804 788 7214



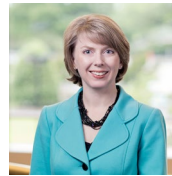
Mayme Beth M. Donohue
Counsel, Richmond
m donohue@HuntonAK.com
+1 804 787 8021



Kate Saltz
Partner, Richmond
k saltz@HuntonAK.com
+1 804 788 8642



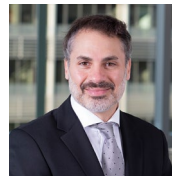
Steven M. Haas
Partner, Richmond and Washington, DC
s haas@HuntonAK.com
+1 804 788 7217 (Richmond)
+1 202 778 2220 (Washington, DC)



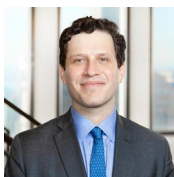
Kendal A. Sibley
Partner, Richmond
k sibley@HuntonAK.com
+1 804 788 8697



George C. Howell, III
Partner, New York and Richmond
g howell@HuntonAK.com
+1 212 309 1228 (New York)
+1 804 788 8793 (Richmond)



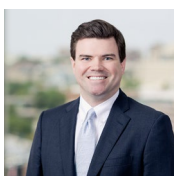
Robert K. Smith
Partner, Washington, DC
r smith@HuntonAK.com
+1 202 955 1611



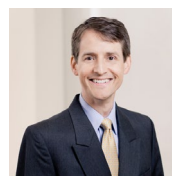
Samuel M. Kardon
Counsel, New York
s kardon@HuntonAK.com
+1 212 309 1189



Allison M. Stelter
Counsel, Richmond
a stelter@HuntonAK.com
+1 804 788 8672



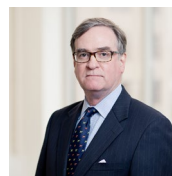
James A. Kennedy, II
Partner, Richmond
j kennedy@HuntonAK.com
+1 804 788 7302



Mark W. Wickersham
Partner, Richmond
m wickersham@HuntonAK.com
+1 804 788 7281



Joshua Milgrom
Counsel, New York
j milgrom@HuntonAK.com
+1 212 309 1015



David C. Wright
Partner, Richmond
d wright@HuntonAK.com
+1 804 788 8638

ABOUT US

Hunton Andrews Kurth LLP consistently ranks as one of the most experienced law firms with respect to real estate capital markets transactions, representing issuers, underwriters, sponsors and lenders in connection with structuring and financing publicly and privately owned real estate companies, including in particular real estate investment trusts (REITs). The firm regularly receives top tier national rankings for its work as both issuer's and underwriter's counsel in *Chambers USA*, *The Legal 500*, *Bloomberg* and *Refinitiv*.

Hunton Andrews Kurth has extensive experience in taking real estate companies public, both as REITs and as C corporations, and in subsequent financing transactions. We have handled approximately 155 IPOs and Rule 144A equity offerings and more than 1,100 capital markets transactions involving more than 210 REITs and other real estate companies. In the course of those and other engagements, we have worked closely with the leading investment banking firms, accounting firms and other professionals active in the real estate finance industry. As a result, our Real Estate Capital Markets Group is particularly well qualified to assist companies accessing the public capital markets as well as private capital sources.



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