

# SEC Reporting & Compliance Alert

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## Annual Meeting Proxy Statement Reminders

As companies finalize their proxy materials for annual shareholder meetings, they should consider the following U.S. Securities and Exchange Commission (SEC) filing and disclosure requirements.

**Ensure clarity on the proxy card.** The SEC rules require that the company's proxy card identify "clearly and impartially" each separate matter intended to be acted upon. In particular:

- *Say-on-Frequency Vote.* Most companies held initial shareholder votes on the frequency of the say-on-pay vote (say-on-frequency votes) in 2011, when the requirements went into effect. Given that say-on-frequency votes must be submitted at least once every six years, the 2017 proxy season will mark the second time such votes are required for those companies. The proxy cards from those companies must provide shareholders the option to vote for one, two or three-year periods between say-on-pay votes or to abstain from voting.
- *Rule 14a-8 Shareholder Proposals.* Companies required to include shareholder proposals in their proxy materials should consider SEC staff guidance regarding the descriptions of proposals in proxy materials.<sup>1</sup> In that guidance, the SEC staff noted that proxy cards should clearly identify and describe the specific action on which shareholders will be asked to vote, regardless of whether the matter is a management or shareholder proposal. The SEC staff also provided examples of proxy card descriptions that would not be considered sufficiently detailed to comply with the proxy rules. Given that the guidance does not address whether using the title of a shareholder proposal necessarily satisfies the proxy card requirements, companies must carefully consider whether shareholder proposals are adequately described on their proxy cards in accordance with such guidance.

**File the proxy card, Notice of Internet Availability of Proxy Materials and other proxy soliciting materials with the SEC.** In addition to filing the proxy statement, companies should confirm that a copy of the proxy card, the required Notice of Internet Availability of Proxy Materials and any other written communication materials used in connection with the annual meeting solicitation are filed with the SEC. The proxy card should be filed with the proxy statement, and the Notice of Internet Availability of Proxy Materials

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<sup>1</sup> See Compliance and Disclosure Interpretations (Regarding Description under Rule 14a-4(a)(3) of Rule 14a-8 Proposals), March 22, 2016, available [here](#).

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should be filed as additional proxy statement soliciting materials. Information included with the annual report, such as a letter to shareholders, is not considered soliciting materials or required to be filed with the SEC. Unless a company specifically chooses otherwise, an annual report is not deemed to be “soliciting materials” or “filed” with the SEC or subject to Regulation 14A or the liabilities of Exchange Act Section 18.<sup>2</sup>

**Furnish a copy of the annual report to the SEC or post it on the company website.** Exchange Act Rule 14a-3(c) requires that companies mail to the SEC seven copies of their annual reports to shareholders no later than the date on which such report is first sent or given to shareholders. Regulation S-T permits companies to satisfy the Rule 14a-3(c) requirement by furnishing the annual report in electronic format via EDGAR or in paper form. If a company elects to have its Form 10-K serve as its annual report, there are no other filing requirements. Based on recent SEC staff guidance, companies that post the annual report on their corporate website are no longer required to mail hard copies of their annual report to the SEC or furnish it on EDGAR, provided that the annual report remains available on the website for a year.<sup>3</sup>

Companies should confirm that the annual report has been mailed to the SEC, furnished on EDGAR or posted on the company website. If the annual report is mailed to the SEC, confirmation of the mailing should be retained in the company’s records. Companies should note that if the annual report is mailed to the SEC, the report will not be available on EDGAR. In the past, the SEC would scan a copy of an annual report received by mail and post it with the company’s other EDGAR filings. More recently, however, the SEC staff announced that “[i]n an effort to reduce costs and simplify administrative processes, and in light of the availability of these annual reports on other web sites, the staff has determined to discontinue this practice.”

<sup>2</sup> See Exchange Act Rule 14a-3(c).

<sup>3</sup> See Compliance and Disclosure Interpretations (Regarding Submission of Annual Reports to SEC under Rules 14a-3(c) and 14c-3(b)), November 2, 2016, available [here](#).

**Post the proxy materials and annual report on a publicly available website.** All proxy soliciting materials, including the proxy statement, proxy card and the annual report to shareholders, must be made publicly available and free of charge on a website other than the SEC’s EDGAR website.<sup>4</sup> Those materials must be posted on or before the time the notice is sent to the shareholders and must remain available online until the conclusion of the annual meeting.

**Furnish a copy of the proxy materials to the NYSE.** Companies with securities listed on the New York Stock Exchange are required to submit three copies of all definitive proxy materials, including the proxy card, no later than the date on which the materials are released to shareholders, to Market Watch & Proxy Compliance, New York Stock Exchange, 11 Wall Street, 5th Floor Mailroom, New York, NY 10005. Nasdaq-listed companies are not subject to similar requirements and may instead file the Form 10-K and proxy materials on EDGAR.

**File Form 8-K to announce voting results.** Companies should announce the matters presented at the annual meeting for a shareholder vote, as well as the number of votes cast for, against or withheld for each matter, as required by Item 5.07 of Form 8-K. This Form 8-K filing is required within four business days of the annual meeting. Companies that hold a say-on-frequency vote also must disclose their decision on the frequency of the say-on-pay vote, regardless whether the decision is consistent with the outcome of the say-on-frequency vote. If this decision occurs after the Form 8-K is filed, disclosure is required by amending the previously filed Form 8-K the earlier of 150 days after the vote, or 60 days prior to the submission deadline for Rule 14a-8 shareholder proposals, which is disclosed in the proxy statement.

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For additional information, see our December 6, 2016, client alert, “Matters to Consider for the 2017 Annual Meeting and Reporting Season,” available [here](#).

<sup>4</sup> See Exchange Act Rule 14a-16(b).

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