

SEC Reporting & Compliance Alert

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

1440 New York Ave., N.W.
Washington, D.C. 20005
202.371.7000

Reminders for Annual Meeting Proxy Materials

When finalizing proxy materials for annual shareholder meetings, companies should consider the following U.S. Securities and Exchange Commission (SEC) rules and related SEC staff guidance, as well as stock exchange listing standards.

SEC Filings

File Proxy Card, Notice of Internet Availability and Other Soliciting Materials With SEC. In addition to filing the proxy statement, companies should confirm that the proxy card, the Notice of Internet Availability of Proxy Materials (if applicable) 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 together with the proxy statement, and the Notice of Internet Availability of Proxy Materials should be filed separately as additional proxy 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 18.¹

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 or against or withheld for each matter, as required by Item 5.07 of Form 8-K, within four business days following the annual meeting. In addition, companies that hold an advisory vote on the frequency of the say-on-pay vote (say-on-frequency vote), which is required at least every six years, must disclose the results of such vote in the Form 8-K filing. The disclosure must state the number of votes cast for each of “one year,” “two years” and “three years,” as well as the number of abstentions. Although the say-on-frequency vote is advisory in nature, companies also must disclose the decision of the board regarding the frequency of future say-on-pay votes in a Form 8-K filing. The SEC permits a company up to 150 calendar days after the annual shareholder meeting (but no later than 60 days prior to the deadline for shareholder proposals for the next year) to decide and disclose their decision on future say-on-pay votes.

¹ See Exchange Act Rule 14a-3(c).

SEC Reporting & Compliance Alert

Other Requirements

Post Annual Report on Company Website or Furnish Copies With SEC. If a company elects to have its Form 10-K serve as its annual report, there are no other requirements to furnish copies with the SEC or stock exchanges. Companies that post the annual report on their corporate website are not 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.² Otherwise, 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, which companies can also satisfy by furnishing the annual report in electronic format via EDGAR or in paper form under Regulation S-T. 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 mailing the annual report to the SEC will not result in the report being available on EDGAR.

Post Proxy Materials on a Publicly Available Website. In addition to the annual report, the proxy soliciting materials, including the proxy statement and proxy card, must be made publicly available and free of charge on a website other than the SEC's EDGAR.³ 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.

Comply With Listing Standards. Companies listed on the New York Stock Exchange (NYSE) are not required to submit hard copies of definitive proxy materials, provided that such proxy materials are included in an SEC filing available under Schedule 14A on EDGAR.⁴ Any NYSE-listed company whose proxy materials are not filed on Schedule 14A but are available on EDGAR, such as foreign private issuers that file proxy materials under Form 6-K or 8-K, or U.S. issuers that file proxy materials on Form S-4, must inform the NYSE of the information needed to identify the filing as containing proxy materials. Any NYSE-listed company not required to file proxy materials on EDGAR or whose materials are not filed in their entirety on EDGAR will continue to be required to provide three physical copies to the NYSE. Nasdaq-listed companies are not obligated to mail proxy materials to Nasdaq.

² 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](#).

³ See Exchange Act Rule 14a-16(b).

⁴ See Sections 204.00(B) and 402.01 of the NYSE Listed Company Manual.

Proxy Disclosures

Consider SEC Board Diversity Guidance. On February 6, 2019, the SEC published interpretive guidance regarding board diversity disclosures. The SEC explained that, to the extent a company's board or its nominating committee considers diversity characteristics identified by a director nominee in forming its recommendation that such person should serve on the board, the company should — consistent with its existing obligations under Regulation S-K Item 401(e)(1) — identify those characteristics in its proxy statement disclosure. In addition, the guidance explained that in those circumstances where diversity characteristics identified by a director nominee are taken into account by the board or its nominating committee, the disclosure already called for by Item 407(c)(2)(vi) regarding how the board or nominating committee considers diversity in identifying director nominees should discuss how those self-identified characteristics were considered. Based on this guidance, companies should consider what, if any, changes should be made to enhance their disclosures regarding director qualifications and nomination processes.⁵

Ensure Clarity on 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, companies should, consistent with SEC staff guidance, ensure that proxy cards 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.⁶

Hedging Policy Disclosures Not Required Until Later This Year. Companies that are not smaller reporting companies or emerging growth companies are required to comply with new Regulation S-K Item 407(i), which relates to the disclosure of hedging policies, in proxy or information statements related to the election of directors during fiscal years beginning on or after July 1, 2019. The final rules, which implement provisions of the Dodd-Frank Act, require disclosure of practices or policies in full, or, alternatively, a summary of those practices or policies that includes a description of any categories of hedging transactions that are specifically permitted or disallowed. If the company does not have such practices or policies, it should disclose that fact or state that hedging is generally permitted.

⁵ For additional information, see our February 12, 2019, client alert, "[SEC Staff Issues Interpretive Guidance on Board Diversity Disclosures](#)."

⁶ See Compliance and Disclosure Interpretations (Regarding Description under Rule 14a-4(a)(3) of Rule 14a-8 Shareholder Proposals), March 22, 2016, available [here](#).

SEC Reporting & Compliance Alert

Say-on-Frequency Vote for Smaller Reporting Companies.

Most smaller reporting companies held initial shareholder say-on-frequency votes in 2013, when the requirements went into effect. Given that say-on-frequency votes must be submitted at least once every six years, the 2019 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.

Failure to include a say-on-pay frequency vote once every six calendar years may expose a company to potential SEC enforcement action and other risks, such as a derivative shareholder lawsuit. If a company were to fail to include a required say-on-frequency vote, such a mistake could be corrected by filing a proxy statement amendment or a revised proxy statement

on EDGAR and posting the material on the same website where the original proxy materials were posted, which also should be disseminated to shareholders, either by circulating a new Notice of Internet Availability of Proxy Materials or by mailing the supplemental or revised material. The amendment or revised proxy statement can be in the form of a cover page that explains the error and provides the correct information, or it can be a restatement of the entire proxy statement containing the corrected information and an explanatory note regarding the error and corrections made.

* * *

For additional information, see our November 30, 2018 client alert, "[Matters to Consider for the 2019 Annual Meeting and Reporting Season.](#)"

Contacts

Brian V. Breheny

Partner / Washington, D.C.
202.371.7180
brian.breheny@skadden.com

Andrew J. Brady

Of Counsel / Washington, D.C.
202.371.7513
andrew.brady@skadden.com

Hagen J. Ganem

Counsel / Washington, D.C.
202.371.7503
hagen.ganem@skadden.com

Josh LaGrange

Counsel / Palo Alto
650.470.4575
josh.lagrange@skadden.com

Ryan J. Adams

Associate / Washington, D.C.
202.371.7526
ryan.adams@skadden.com

Andrew T. Bond

Associate / Washington, D.C.
202.371.7244
andrew.bond@skadden.com

Caroline S. Kim

Associate / Washington, D.C.
202.371.7555
caroline.kim@skadden.com

Justin A. Kisner

Associate / Washington, D.C.
202.371.7367
justin.kisner@skadden.com