

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.

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Annual Meeting Filing and Disclosure Requirements

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

SEC Proxy Filing Requirements

File proxy card, Notice of Internet Availability and other soliciting materials with the 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. Companies should file the proxy card together with the proxy statement and file separately the Notice of Internet Availability of Proxy Materials 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

Ensure clarity on the proxy card. The SEC rules require company proxy cards to identify “clearly and impartially” each separate matter requiring action.² 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.³ For example, the title of a shareholder proposal on the proxy card should be consistent with this requirement if it differs from the title that was provided by the proponent and required to be reproduced in the proxy statement.

Provide notice to shareholder proposal proponents. Companies that intend to include an opposition statement in response to a shareholder proposal in the proxy statement must provide a copy of the opposition statement to the proponent no later than 30 calendar days before the company files its definitive proxy statement and proxy card with the SEC.⁴

¹ See Exchange Act Rule 14a-3(c).

² See Exchange Act Rule 14a-4(a)(3).

³ See Compliance and Disclosure Interpretations (CDI) [Regarding Description Under Rule 14a-4\(a\)\(3\) of Rule 14a-8 Shareholder Proposals](#), March 22, 2016.

⁴ See Exchange Act Rule 14a-8(m)(3).

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Website and Submission Requirements

Post the annual report on the company website or furnish copies to the SEC. If a company elects to have its Form 10-K serve as its annual report, it has no other requirements to furnish copies to the SEC or stock exchanges. A company that posts its annual report on its corporate website is not required to mail hard copies of the report to the SEC or furnish it on EDGAR, provided that the annual report remains available on the website for a year.⁵ Otherwise, companies are required to mail to the SEC seven copies of their annual reports to shareholders no later than the date on which such reports are first sent or given to shareholders, which companies also can satisfy by furnishing the annual report in electronic format via EDGAR or in paper form under Regulation S-T.⁶ Companies should confirm that the annual reports have been mailed to the SEC, furnished on EDGAR or posted on the corporate website — and if an annual report is mailed to the SEC, retain confirmation of the mailing 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, companies must make the proxy soliciting materials, including the proxy statement and proxy card, publicly available and free of charge on a website other than EDGAR at sec.gov.⁷ 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.

Submit hard copies to the stock exchange, if required. 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.⁸ 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.⁹ 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. NYSE does not require listed companies to mail annual reports to the exchange. Nasdaq

⁵ See [CDI Regarding Submission of Annual Reports to SEC under Rules 14a-3\(c\) and 14c-3\(b\)](#), November 2, 2016.

⁶ See Exchange Act Rule 14a-3(c).

⁷ See Exchange Act Rule 14a-16(b).

⁸ See Sections 204.00(B) and 402.01 of the NYSE Listed Company Manual.

⁹ This can be accomplished by way of the online portal (NYSE Listing Manager) or email to proxyadmin@nyse.com.

does not require listed companies to mail proxy materials to the exchange. This includes the annual report if the company has filed its Form 10-K, 20-F or 40-F on EDGAR.

Proxy Statement Disclosures

Companies should consider recent changes to proxy disclosure requirements and other disclosure trends, including those summarized below and discussed in our December 2, 2019 client alert, "[Matters to Consider for the 2020 Annual Meeting and Reporting Season](#)." Below are some matters worth highlighting.

Prepare for new hedging disclosure requirements. New Regulation S-K Item 407(i) will require most companies to describe their hedging policies and practices in their proxy or information statements starting in 2020.¹⁰ The new rule requires a description in full, or a summary, of a company's hedging policies and practices that cover directors, officers and employees and of the types of transactions or instruments specifically permitted or disallowed.

The rule specifically identifies prepaid variable forward contracts, equity swaps, collars and exchange funds among the types of instruments considered to involve hedging. Some companies and practitioners, however, do not agree with the characterization of exchange funds (which are different from exchange-traded funds, or ETFs) as hedging instruments. As a result, a company that discloses that it prohibits all hedging in the company's securities should confirm that participation in exchange funds (and use of the other instruments mentioned above) are in fact prohibited.

Many companies already have disclosed hedging policies as applicable to named executive officers in their compensation discussion and analysis (CD&A). Those companies may expand their CD&A to address the new Item 407(i) requirement or may incorporate by reference into the CD&A disclosure elsewhere in the proxy or information statement that addresses Item 407(i).¹¹

Address revised proxy disclosure requirements. Companies should disclose late Section 16 filings under a new heading, "Delinquent Section 16(a) Reports," which replaces the previous heading, "Section 16(a) Beneficial Ownership Reporting Compliance." The SEC rule encourages companies to omit such heading to the extent late Section 16 filings are not required to be reported.¹² In addition, the audit committee report required to be included in the proxy statement should refer generally to

¹⁰ Emerging growth companies and smaller reporting companies will become subject to the new requirements in proxy or information statements related to the election of directors during fiscal years beginning on or after July 1, 2020.

¹¹ See Instruction 6 to Regulation S-K Item 402(b).

¹² See Regulation S-K Item 405(a)(1).

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the applicable requirements of the Public Company Accounting Oversight Board and the SEC, instead of citing a specific auditing standard requiring discussions of certain audit-related matters between an audit committee and the auditor.¹³

Consider ESG disclosures. Requests for voluntary disclosures on environmental, social and governance (ESG) matters remain a focus for certain investors. This is due in part to recent statements addressing these matters made by large asset managers. For example, BlackRock CEO Larry Fink explained in his January 2020 [letter to CEOs](#) and [letter to clients](#) the importance of ESG disclosures and that BlackRock will be more disposed to vote against directors if a company does not make sufficient progress on sustainability-related disclosures. Similarly, [State Street's 2020 letter](#) to corporate boards indicated that it will measure company performance on financially material and sector-specific ESG issues. More generally, environmental issues/climate change, board diversity and human capital management are the top three engagement priorities for institutional investors in 2020, according to a recent [Ernst & Young survey](#). Investors that have prioritized climate changes issues generally are engaging companies and urging them to provide enhanced disclosure on those issues. Companies that cover ESG topics in their proxy statements or other SEC filings should consider describing their ESG-related initiatives in terms of plans, goals and expectations and accompanying those disclosures with appropriate forward-looking cautionary language.

Post-Meeting Requirements

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

¹³See Regulation S-K Item 407(d)(3)(i)(B).

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 a 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, a company 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 disclose its decision on future say-on-pay votes.

Submit NYSE annual and interim affirmations. NYSE requires listed companies to submit an annual written affirmation each calendar year regarding their compliance with NYSE’s corporate governance rules.¹⁴ U.S. issuers must submit such affirmation, as well as an annual CEO certification, no later than 30 days after the annual meeting or, if no annual meeting is held, 30 days after the company’s annual report on Form 10-K is filed with the SEC. Foreign private issuers are required to file an annual affirmation 30 days after the company’s annual report on Form 20-F or 40-F is filed with the SEC and are not subject to the CEO certification requirement. In addition, companies must submit an interim written affirmation within five business days of any triggering event identified in the interim written affirmation form, such as, for example, changes in the composition of the company’s board of directors or of the nominating and corporate governance, compensation or audit committee.

¹⁴See NYSE Listed Company Manual Section 303A.12.

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