

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.

One Manhattan West
New York, NY 10001
212.735.3000

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

Annual Meeting Filing and Disclosure Requirements

When finalizing proxy materials for annual shareholder meetings, companies should consider the following 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. 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 Section 18 of the Securities Exchange Act.¹ Likewise, information included with the annual report, such as a letter to shareholders, would not be considered soliciting materials or required to be filed with the SEC.

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).

SEC Reporting & Compliance Alert

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 obligation 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 the SEC's database, EDGAR, provided that the annual report remains available on the website for a year.⁵ Otherwise, SEC rules require companies 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 requirement can be satisfied by furnishing the annual report in electronic format via EDGAR or in paper form under Regulation S-T.⁶ Companies should confirm that their annual reports have been mailed to the SEC, furnished on EDGAR or posted on the corporate website. If a company elects to mail its annual report to the SEC, it should 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 made 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.⁷ Those materials must be posted on or before the time the Notice of Internet Availability of Proxy Materials, or a full set of proxy materials, are 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 furnish or 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. The NYSE does not require listed companies to mail annual reports to the exchange.

Nasdaq 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 14, 2020, client alert "[Matters To Consider for the 2021 Annual Meeting and Reporting Season](#)." Below are some matters worth highlighting.

Virtual Meeting Disclosures. Companies holding virtual annual meetings should provide clear disclosure regarding logistical details, including how shareholders can access, participate in and vote at the meeting.¹⁰ Proxy advisory firms generally will not oppose virtual meetings, so long as companies adequately explain the reasoning behind holding the meetings virtually. For example, Glass Lewis has stated that it may recommend a vote against governance committee members unless the company discloses:

- when, where and how shareholders will have an opportunity to ask questions;
- the manner in which appropriate questions received prior to or during the meeting will be addressed by the board, if applicable, and a commitment that questions that meet the board's guidelines will be answered in a format that is accessible by all shareholders;
- procedures and requirements to participate in the meeting and/or access the meeting platform; and
- that technical support will be available to shareholders prior to and during the meeting.¹¹

Institutional Shareholder Services (ISS) encourages companies to disclose the circumstances under which virtual meetings will be held and to allow for comparable rights and opportunities for shareholders to participate electronically as they would have during an in-person meeting.¹² In addition, ISS has adopted a new policy of generally recommending voting in favor of

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 with an email to proxysadmin@nyse.com.

¹⁰ See the SEC's "[Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns](#)," April 7, 2020.

¹¹ See Glass Lewis' "[Glass Lewis' Updated Approach to Virtual Meetings Globally](#)," January 14, 2021, and Glass Lewis' "[2021 Proxy Paper Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice — United States](#)," November 17, 2020.

¹² See ISS' "[Americas Proxy Voting Guidelines Updates for 2021: Benchmark Policy Changes for U.S., Canada and Latin America](#)," November 12, 2020.

SEC Reporting & Compliance Alert

management proposals to allow virtual shareholder meetings, as long as the proposal does not preclude in-person meetings.

ESG Disclosures. Requests for voluntary disclosures on environmental, social and governance (ESG) matters remain a focus for investors and proxy advisory firms. For example, in his January 2021 [letter to CEOs](#), BlackRock CEO and Chairman Larry Fink explained that BlackRock is asking companies to disclose their plans for how their business model will be compatible with a net-zero economy (*i.e.*, an economy that emits no more carbon dioxide than it removes from the atmosphere) and how this strategy is overseen by the company's board.

In addition, the SEC has signaled an increased focus on ESG disclosures. In February 2021, Acting SEC Chair Allison Herren Lee [directed](#) the Division of Corporation Finance "to enhance its focus on climate-related disclosure in public company filings." In March 2021, Ms. Lee [confirmed](#) that the SEC has "begun to take critical steps toward a comprehensive ESG disclosure framework aimed at producing the consistent, comparable, and reliable data that investors need." Similarly, in March 2021, Acting Director of the Division of Corporation Finance John Coates [stated](#) that the SEC should help lead the creation of an effective ESG disclosure system for companies.

Accordingly, companies should consider addressing relevant ESG issues and calls for disclosures as the landscape continues to evolve.

Growing Focus on Board Diversity. Board diversity is expected to be a primary focus of investors, proxy advisory firms¹³ and others in 2021.

Racial and Ethnic Diversity. In 2021, ISS will highlight boards of Russell 3000 and S&P 1500 companies that lack racial or ethnic diversity. Starting in 2022, ISS will recommend voting against nominating committee chairs of such companies with no apparent racial or ethnic board diversity. Similarly, in 2021, Glass Lewis' reports for companies in the S&P 500 will include an assessment of company disclosure in the proxy statement relating to board diversity, skills and the director nomination process, including the board's current percentage of racial/ethnic diversity.

Gender Diversity. In 2021, Glass Lewis and ISS will generally recommend against the nominating committee chair of an all-male board. Moreover, Glass Lewis will also highlight companies with fewer than two female directors, and, beginning

in 2022, will recommend against nominating committee chairs of boards with fewer than two female directors at companies where the board consists of at least seven members.

Nasdaq Board Diversity Proposal. In December 2020, Nasdaq submitted a [rules proposal](#) with the SEC that would impose a mandatory "board diversity matrix" disclosure framework and require Nasdaq-listed companies to either meet certain board composition diversity thresholds or explain their non-compliance.¹⁴ In February 2021, Nasdaq filed with the SEC an [amendment](#) to the proposal that would provide greater flexibility to companies with smaller boards in complying with the proposed rules, as well as a two-year phase-in for newly listed companies and a one-year grace period for companies that fall out of compliance due to board vacancies.¹⁵

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 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.¹⁶ 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 submit an annual affirmation 30 days after the company's annual report on

¹³ See Glass Lewis' "[2021 Proxy Paper Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice — United States](#)," November 17, 2020, and ISS' "[Americas Proxy Voting Guidelines Updates for 2021: Benchmark Policy Changes for U.S., Canada and Latin America](#)," November 12, 2020.

¹⁴ See our December 4, 2020, client alert "[Nasdaq Proposes New Board Diversity Requirements](#)."

¹⁵ See Nasdaq's "[Nasdaq's Proposal To Adopt Listing Requirements for Board Diversity: What Nasdaq-Listed Companies Should Know](#)," last updated February 26, 2021.

¹⁶ See NYSE Listed Company Manual Section 303A.12.

SEC Reporting & Compliance Alert

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.

Nasdaq does not require listed companies to affirm compliance with its corporate governance rules on a similar annual or interim basis.

Contacts

Brian V. Breheny

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

Raquel Fox

Partner / Washington, D.C.
202.371.7050
raquel.fox@skadden.com

Marc S. Gerber

Partner / Washington, D.C.
202.371.7233
marc.gerber@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

Ryan J. Adams

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

Jeongu Gim

Associate / Washington, D.C.
202.371.7223
jeongu.gim@skadden.com

Blake M. Grady

Associate / Washington, D.C.
202.371.7591
blake.grady@skadden.com

Caroline S. Kim

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

Leo W. Chomiak

Law Clerk / Washington, D.C.
202.371.7511
leon.chomiak@skadden.com