

# 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 Reminders

As companies finalize materials for annual shareholder meetings, we recommend consideration of the following key requirements and disclosures:

- SEC proxy filing requirements;
- website and submission requirements;
- proxy statement disclosures; and
- post-meeting requirements.

A summary of these requirements and disclosures are included below.

### SEC Proxy Filing Requirements

**File proxy card, notice of internet availability and other soliciting materials with the Securities and Exchange Commission (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 (and likewise, information included with the annual report, such as a letter to shareholders) are not considered to be “soliciting materials” or required to be “filed” with the SEC, or subject to Regulation 14A or the liabilities under Section 18 of the Exchange Act.<sup>1</sup>

**Update Schedule 14A cover page.** On October 13, 2021, the SEC adopted amendments to modernize filing fee disclosures for certain forms and schedules. Among the affected forms are Schedules 14A, 14C, TO and 14D-1F, which require updated cover pages to account for the relocation of filing fees to a new exhibit pursuant to the amended rules. These amendments became effective January 21, 2022. As a result, companies that have not yet filed proxy statements for their annual meetings should update the cover page to Schedule 14A.

**Ensure clarity on the proxy card.** The SEC rules require company proxy cards to identify “clearly and impartially” each separate matter requiring action.<sup>2</sup> In particular, companies should, consistent with SEC staff guidance, ensure that proxy cards clearly

<sup>1</sup> See Exchange Act Rule 14a-3(c).

<sup>2</sup> See Exchange Act Rule 14a-4(a)(3).

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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.<sup>3</sup> For example, the title of a shareholder proposal on the proxy card should be consistent with this requirement if the title differs from the one 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.<sup>4</sup>

**Consider the impact of updated NYSE rules.** The New York Stock Exchange (NYSE) recently amended Section 312.07 of the NYSE Listed Company Manual to eliminate the requirement that listed companies include abstentions as “votes cast” in matters on which the NYSE requires shareholder approval (e.g., equity compensation plans and material revisions to those plans, stock issuances to certain related parties, nonpublic stock issuances exceeding 20% of total voting power or common stock outstanding pre-issuance, or stock issuances leading to a change of control). Prior to this amendment, abstentions were treated as votes “against” any proposal requiring approval under the NYSE rules, regardless of the company’s governing documents or applicable state law. Under the revised Section 312.07, NYSE-listed companies should treat abstentions in accordance with their governing documents and applicable state law.

**Plan for universal proxy.** On November 17, 2021, the SEC adopted amendments to the proxy rules mandating the use of universal proxy cards in contested elections. The new rules require both companies and dissidents to list on their proxy cards all duly nominated director candidates: the board’s nominees, the dissident’s nominees and any proxy access nominees. The new rules also will require companies to disclose the deadline for receiving notice of a dissident’s nominees under the universal proxy rules. The amendments take effect for shareholder meetings held after August 31, 2022, and will not apply to elections held by registered investment companies and business development companies. Given that these amendments are not effective for the 2022 proxy season and in light of statements from senior members of the SEC’s Division of Corporation Finance

indicating that the SEC will not expect disclosures in this year’s proxy statement, most companies are not required to update their disclosure this year.

## 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 the report on EDGAR, provided that the annual report remains available on the website for a year.<sup>5</sup> 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.<sup>6</sup> 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, the company 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. Companies should also be aware that the SEC has proposed rules that would disallow paper mailings and instead mandate the electronic submission in PDF format of “glossy” annual reports in all instances, though this rule has not yet been adopted.<sup>7</sup>

**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.<sup>8</sup> 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 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

<sup>3</sup> See the SEC’s Compliance and Disclosure Interpretations (CDI) regarding the Description Under Rule 14a-4(a)(3) of Rule 14a-8 Shareholder Proposals, March 22, 2016.

<sup>4</sup> See Exchange Act Rule 14a-8(m)(3).

<sup>5</sup> See CDI, [Proxy Rules and Schedule 14A \(Regarding Submission of Annual Reports to SEC Under Rules 14a-3\(c\) and 14c-3\(b\)\)](#), November 2, 2016.

<sup>6</sup> See Exchange Act Rule 14a-3(c).

<sup>7</sup> See Release No. 33-11005, [Updating EDGAR Filing Requirements](#).

<sup>8</sup> See Exchange Act Rule 14a-16(b).

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Schedule 14A on EDGAR.<sup>9</sup> 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.<sup>10</sup> 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 7, 2021, client alert “[Matters to Consider for the 2022 Annual Meeting and Reporting Season](#).” Below are some matters to assess.

## Virtual Meetings Disclosures

Many companies continue to hold virtual meetings. Companies holding virtual and hybrid annual meetings should provide clear disclosure regarding logistical details, including how shareholders can access, participate in and vote at the meeting.<sup>11</sup> Proxy advisory firms generally will not oppose virtual-only meetings as 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 if a company holds a virtual-only annual meeting without disclosing:

- 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

<sup>9</sup> See Sections 204.00(B) and 402.01 of the NYSE Listed Company Manual.

<sup>10</sup> This can be accomplished by way of the online portal (NYSE Listing Manager) or email to [proxysadmin@nyse.com](mailto:proxysadmin@nyse.com).

<sup>11</sup> See the SEC’s “[Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns](#),” updated January 19, 2022.

- that technical support will be available to shareholders prior to and during the meeting.<sup>12</sup>

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.<sup>13</sup> In addition, in accordance with a policy that became effective in February 2021, ISS generally recommends voting in favor of management proposals to allow virtual shareholder meetings, as long as the proposal does not preclude in-person meetings.

## ESG Disclosures

Environmental, social and governance (ESG) matters continue to be a focus for investors, proxy advisory firms and other stakeholders, with increasing requests for more robust voluntary disclosures and corporate actions regarding topics such as a transition to a low-carbon economy, human capital management and community engagement. For example, in his January 2022 [letter to CEOs](#), BlackRock Chief Executive Officer and Chairman Larry Fink noted that companies should be “deliberate about their role in society and act in the interests of their employees, customers, communities, and their shareholders,” emphasizing the need for companies to strengthen employee relationships and set short-, medium- and long-term targets for greenhouse gas reductions and plans to meet them.

In addition, the SEC continues to focus on ESG disclosures in public company filings. Beginning in September 2021, for example, the staff in the SEC’s Division of Corporation Finance issued detailed, stand-alone comment letters regarding climate-related disclosures (or lack thereof) in companies’ most recent Form 10-K filings, asking companies to provide specific support, including quantification where appropriate, for materiality determinations on climate-related disclosures. Moreover, the SEC is expected to propose mandatory disclosure rules related to ESG matters such as climate change, board diversity, human capital management and cybersecurity risk governance.

Accordingly, companies should consider addressing relevant ESG issues in a prudent and deliberate manner as the reporting landscape continues to evolve.

<sup>12</sup> See “[Glass Lewis’ Updated Approach to Virtual Meetings Globally](#),” January 14, 2021, and Glass Lewis’ “[2022 Policy Guidelines — United States](#),” November 15, 2021.

<sup>13</sup> See ISS’ “[United States Proxy Voting Guidelines — Benchmark Policy Recommendations](#),” December 13, 2021.

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## Growing Focus on Board Diversity

Board diversity continues to be a focal point for investors and proxy advisory firms.<sup>14</sup> Given the sustained focus on this topic, companies should consider proactively taking steps to begin complying with applicable board diversity disclosure rules and investor requests to increase diversity in the boardroom in 2022.

## Racial and Ethnic Diversity

In 2022, ISS will recommend voting against or withholding a vote for the chairs of nominating committees — or other directors on a case-by-case basis — of companies in the Russell 3000 or S&P 1500 with no apparent racial or ethnically diverse board members and for which no mitigating factors are identified. ISS will provide an exception to this voting policy if a board included a racial and/or ethnic minority member at the preceding annual meeting and if the company makes a firm commitment to appoint at least one racially and/or ethnically diverse director within one year. In determining its specific recommendation, ISS will consider aggregate diversity statistics provided by company boards if the statistics are specific to racial and/or ethnic diversity.

In 2022, Glass Lewis may recommend voting against the chair of an S&P 500 company's nominating committee if the company has "particularly poor disclosure" concerning director diversity and skills. Starting in 2023, Glass Lewis will generally recommend voting against the chairs of nominating committees at companies that do not provide any disclosure regarding individual or aggregate director racial/ethnic diversity data. For annual meetings held after August 8, 2022, Glass Lewis also will recommend voting against nominating committee chairs of Nasdaq-listed companies that do not comply with Nasdaq's board diversity disclosure requirements discussed below.

## Gender Diversity

In 2022, ISS will recommend voting against or withholding a vote for the chairs of nominating committees — or other directors on a case-by-case basis — of companies in the Russell 3000 or S&P 1500 with an all-male board of directors. ISS will provide an exception to this voting policy if a board included a woman as a member at the preceding annual meeting and if the company makes a firm commitment to return to "a gender diverse status" within one year. This policy will also apply to companies not in the Russell 3000 or S&P 1500 indices effective February 1, 2023.

<sup>14</sup> See Glass Lewis' "2022 Policy Guidelines — United States," November 15, 2021; Glass Lewis' "2022 Policy Guidelines — ESG Initiatives"; and ISS' "United States Proxy Voting Guidelines — Benchmark Policy Recommendations," December 13, 2021.

In 2022, for companies in the Russell 3000 index, Glass Lewis generally will recommend voting against the nominating committee chair of a board with fewer than two gender-diverse directors or against the entire nominating committee of a board with no gender diverse directors. Beginning in 2023, Glass Lewis will transition to a percentage-based approach and will generally recommend voting against nominating committee chairs of boards that are not at least 30% gender diverse. In determining its recommendation, Glass Lewis will consider company disclosure of its diversity considerations and may refrain from recommending against votes if a board has provided a sufficient rationale or plans to address the lack of diversity on its board.

## Nasdaq Board Diversity Rules

Starting in 2022, Nasdaq-listed companies are subject to a requirement to publicly disclose board-level diversity statistics using a standardized matrix template under Nasdaq Rule 5606.<sup>15</sup> Specifically, Nasdaq Rule 5606 requires companies to disclose in this matrix the number of directors who self-identify with specified categories, including gender, race/ethnicity and LGBTQ+ status.<sup>16</sup> For the first year of compliance in 2022, Nasdaq-listed companies are required to disclose the board diversity matrix by the later of (i) August 8, 2022, or (ii) the date the company files its proxy or information statement for its 2022 annual meeting of shareholders (or, if the company does not file a proxy or information statement, in its annual report on Form 10-K or 20-F). Companies can include the matrix disclosure in one of the foregoing filings, as applicable, but are not required to include it in such filings if the matrix is posted on the company's website.<sup>17</sup> Accordingly, companies with fiscal years ended December 31, 2021, can omit the matrix disclosure in their annual proxy or information statements (or annual report on Form 10-K or 20-F) filed before August 8, 2022, and then post the matrix disclosure on the company website by the August 8, 2022, deadline.<sup>18</sup>

Nasdaq Rule 5605(f) also requires companies to meet specified board diversity objectives, or otherwise explain the company's reasons for not meeting such objectives. Subject to limited exemptions and transition periods, companies will be required to have, or explain why they do not have, one diverse director by August 7, 2023, and two diverse directors by August 6, 2025

<sup>15</sup> See our August 10, 2021, client alert "[SEC Approves Nasdaq Board Diversity Listing Standards](#)."

<sup>16</sup> For examples of matrix disclosure that Nasdaq considers acceptable versus unacceptable, refer to Nasdaq's [Board Diversity Matrix Disclosure Requirements and Examples](#), February 23, 2022.

<sup>17</sup> For additional guidance on website posting of the matrix, see [Nasdaq's FAQ 1755](#), August 6, 2021.

<sup>18</sup> Nasdaq clarified deadlines for initial compliance in its [FAQ 1796](#), August 18, 2021.

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or 2026, depending on listing tier.<sup>19</sup> Companies may reference [Nasdaq's related FAQs](#) to understand and assess compliance with the new rules.

While not required, NYSE-listed companies may wish to consider voluntarily providing similar information.

## 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

<sup>19</sup>Nasdaq clarified deadlines for initial compliance in its [FAQ 1748](#), August 13, 2021.

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.** The NYSE requires listed companies to submit an annual written affirmation each calendar year regarding their compliance with the NYSE's corporate governance rules.<sup>20</sup> 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.

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

<sup>20</sup>See NYSE Listed Company Manual Section 303A.12.

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