

SEC Reporting & Compliance Alert

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2023 Annual Meeting Filing and Disclosure Requirements

When finalizing proxy materials for annual shareholder meetings, companies should consider the following areas, which are described in more detail below:

- Securities and Exchange Commission (SEC) proxy filing requirements.
- Proxy statement disclosures.
- Website and submission requirements.
- Post-meeting requirements.

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 separately file the Notice of Internet Availability of Proxy Materials as additional proxy soliciting materials.

Submit annual report on EDGAR. As a result of rules adopted by the SEC in June 2022, annual reports required by Exchange Act Rule 14a-3 must now be furnished electronically on EDGAR as an “ARS” submission. The ARS submission should be in PDF format and is due no later than the date on which the report is first sent or given to shareholders. In a change from prior practice, the ARS must be submitted on EDGAR regardless of whether the annual report is also posted on a company’s website. In addition, the requirement applies regardless of whether a company is filing a “glossy” annual report or using the shorter “10-K wrap” method of complying with Rule 14a-3.

Absent guidance from the SEC staff, we recommend that all public companies submit their annual reports on EDGAR, even where a copy of the company’s Form 10-K is used to satisfy Rule 14a-3. In doing so, we note the [SEC’s guidance in the adopting release](#) indicating that EDGAR is intended to serve as a “repository for electronic copies of the ‘glossy’ annual reports.”

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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 under Section 18 of the Exchange Act.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 — and avoid overly generic descriptions.³ For example, a management proposal to amend a company’s articles of incorporation to increase the number of authorized shares of common stock should not be described as just “a proposal to amend our articles of incorporation.”

Provide management’s opposition statement to shareholder proposal proponents. Companies that intend to include an opposition statement in response to a shareholder proposal in the proxy statement are reminded to provide a copy of that 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

Proxy Statement Disclosures

Companies should consider recent changes to proxy disclosure requirements and other disclosure trends, including those discussed in our November 30, 2022, client alert, “[Matters To Consider for the 2023 Annual Meeting and Reporting Season](#).” Below are some changes and newer requirements worth highlighting.

Updates 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 are applicable to proxy statements for the 2023 season and require both companies and dissidents in contested elections 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 rules also require companies to disclose the deadline for receiving notice of a dissident’s nominees under the universal proxy rules, though the SEC staff has provided guidance that the rule notice period is a “minimum” and does not override or supersede a longer period established under advance notice

provisions in a company’s bylaws. Nevertheless, Rule 14a-19 contains additional requirements that are not typical elements of advance notice bylaws, such as a statement that a dissident intends to solicit 67% of outstanding voting shares. As a result, while companies that have updated their bylaws to incorporate the universal proxy rules into their advance notice bylaws should not need to take any further action, companies that have not amended their bylaws will need to disclose the need for a dissident shareholder to comply with the additional requirements of Rule 14a-19(b).

New Pay Versus Performance disclosure requirements. On August 25, 2022, the SEC adopted final rules requiring public companies to disclose the relationship between the executive compensation actually paid to the company’s named executive officers (NEOs) and the company’s financial performance (Pay Versus Performance). Pay Versus Performance disclosure is required in proxy statements for the 2023 proxy season.

Item 402(v) of Regulation S-K contains the new disclosure requirements, which consist of three components: (i) a pay-versus-performance table that includes metrics from the previous five fiscal years, such as CEO and NEO compensation “actually paid,” cumulative total shareholder return for the company and its peer groups, financial performance measures and the company’s net income; (ii) a description of the relationship between compensation “actually paid” and the company’s performance metrics; and (iii) a tabular list of important financial measures that the company selected to link the compensation “actually paid” with the performance metrics.

The Pay Versus Performance disclosure requirements are technical and lack a clear road map. Companies should work with their compensation consultants and counsel to evaluate and implement the new disclosure requirements. See our [August 31, 2022, client alert](#) for additional details.

Companies should also remember as they prepare their proxy statements that the new disclosure must be tagged in interactive data format using Inline eXtensible Business Reporting Language (Inline XBRL). Smaller reporting companies may phase in Inline XBRL tagging.

Say-on-Frequency vote. The SEC first required reporting companies to conduct an advisory vote on the frequency of advisory votes on NEO compensation (Say-on-Frequency) in 2011, with a requirement that subsequent frequency votes occur every six years. Because most companies held their first Say-on-Frequency vote in 2011 and again in 2017, many companies will need to include Say-on-Frequency votes in their 2023 proxy statements.

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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If holding a Say-on-Frequency vote, companies should pay attention to the description of the applicable voting standard in the proxy statement. Because there are multiple voting options (one year, two years, three years or abstain), it may be difficult for any one option to obtain a majority vote. As a result, a common solution is to explain that the company will consider the frequency receiving the highest number of votes as the frequency favored by shareholders.

In addition, companies holding their Say-on-Frequency votes this year will need to remember to make explicit disclosures in their annual meeting results Form 8-K, which is discussed in more detail below.

Corporate governance disclosure updates in response to staff comments. In 2022, the SEC staff issued a number of comment letters requesting enhanced proxy statement disclosures regarding board leadership structure and risk oversight. Among other things, the comments requested disclosure concerning why a board's leadership structure is appropriate, the role of the lead independent director in the leadership of the board and how the board administers its oversight function.

Even for companies that did not receive comment letters, we recommend proactively considering enhancements to the board leadership structure and risk oversight disclosures in 2023 proxy statements. Companies should consider providing more specific detail about the board's role in risk oversight and the relationship between the board's leadership structure and risk management matters. In doing so, the SEC's 2009 adopting release for Item 407(h) of Regulation S-K may be instructive. Companies also should remain mindful that the SEC's expected new disclosure rules for climate change and cybersecurity matters will likely mandate enhanced disclosures relating to board oversight of climate-related risks and cybersecurity risks.

ESG disclosures. Environmental, social and governance (ESG) matters remain a focal point for investors, proxy advisory firms and other stakeholders. Stakeholder expectations of robust ESG disclosures continue to grow, particularly for board oversight of ESG risks and the company's approach, commitment and measurable progress relating to climate change, human capital management, sustainability and other significant ESG matters.

While SEC rules currently do not mandate any specific ESG disclosure in proxy statements, the accuracy and completeness of companies' voluntary ESG disclosures may be scrutinized. For example, in 2022, the SEC continued to issue detailed comment letters on 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. In addition, many companies now incorporate ESG metrics into executive compensation, which could draw more investor attention to those metrics and to related disclosures in proxy statements.

Given the growing investor expectations and regulatory focus on ESG disclosures, companies should consider the following when adding or enhancing ESG disclosures in their annual proxy statements:

- Confirm support for disclosures and consistency with any related disclosures in, for example, other SEC filings, the corporate website, marketing materials, investor presentations and/or standalone ESG reports.
- Clarify parameters where appropriate, including, for example, how ESG targets and data are measured (*e.g.*, greenhouse gas emissions) and any assumptions or risks that could materially impact the implementation of ESG initiatives or expected timelines.
- Include appropriate cautionary language on forward-looking statements, particularly because ESG disclosures tend to involve future plans and estimates that are subject to uncertainties.

Nasdaq board diversity matrix. In 2022, Nasdaq-listed companies became subject to a requirement to publicly disclose board-level diversity statistics using a standardized matrix template under Nasdaq Rule 5606.⁵ Specifically, this rule requires companies to disclose, following a standardized matrix format, the number of directors who self-identify with specified categories, including gender, race/ethnicity and LGBTQ+ status. The 2023 proxy season marks the second year for Nasdaq's board diversity matrix disclosure.

The Nasdaq rules provide that disclosure should include statistics from both the current and prior year, though Nasdaq has provided guidance allowing disclosure of only one year if the prior year remains publicly available.⁶

Equity compensation plan disclosure. Item 201(d) of Regulation S-K requires a company to disclose in its annual report on Form 10-K tabular information about its equity compensation plans and individual compensation arrangements. Although a proxy statement is required to include disclosure about equity compensation plans only if the company is seeking shareholder approval for any equity or cash compensation, some companies satisfy their 10-K disclosure obligation by voluntarily providing this disclosure in their proxy statement even if they are not seeking shareholder approval and incorporating by reference this

⁵ See our August 10, 2021, client alert "[SEC Approves Nasdaq Board Diversity Listing Standards](#)."

⁶ See Nasdaq's [FAQ 1753](#) (April 26, 2022) for additional guidance.

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disclosure into Part III of Form 10-K. If the Item 201(d) disclosure is not included in the proxy statement, however, it must be included in the Form 10-K under Part III, Item 12.⁷

We have observed that companies sometimes entirely forget to include this disclosure. Companies should be mindful that Item 201(d) disclosure is required by Form 10-K, regardless of whether the company is seeking shareholder approval for any equity or cash compensation.

Website and Submission Requirements

Post proxy materials on a publicly available website. Companies must make their proxy soliciting materials publicly available and free of charge on a website other than through EDGAR.⁸ 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 New York 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.⁹ 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.¹⁰ 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.

⁷ See CDI 106.01 *Regarding Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters*, March 13, 2007.

⁸ See Exchange Act Rule 14a-16(b).

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

¹⁰ This can be accomplished by way of the online portal (NYSE Listing Manager) or with an email to proxyadmin@nyse.com.

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.

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. Companies that hold a Say-on-Frequency vote also must disclose their decision on the frequency of the “say-on-pay” vote, regardless of 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.

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.¹¹ 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 (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.

¹¹ See NYSE Listed Company Manual Section 303A.12.

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