Harvard Law School Forum on Corporate Governance

# 2024 Annual Meeting Filing and Disclosure Requirements

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

- SEC Proxy Filing Requirements
- Proxy Statement Disclosures and Tagging Requirements
- 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.** Annual reports distributed to shareholders in connection with the annual meeting must 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. Notably, the ARS must be submitted on EDGAR regardless of whether the annual report is also posted on the company's website. In addition, the requirement applies regardless of whether the company is filing a "glossy" annual report or using the shorter "10-K wrap" method of complying with Exchange Act 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,

as 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."[1]

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.[2]

**Ensure Clarity on the Proxy Card.** The SEC rules require company proxy cards to identify "clearly and impartially" each separate matter requiring action.[3] 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.[4] 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 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.[5]

# Proxy Statement Disclosures and Tagging Requirements

Companies should consider recent changes to proxy disclosure requirements and other disclosure trends, including those summarized below and discussed in our December 12, 2023, client alert "Matters to Consider for the 2024 Annual Meeting and Reporting Season." Below are a few highlights.

**Second Year of Pay Versus Performance Disclosure.** In August 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). Calendar-year companies were required to include this disclosure for the first time in their proxy statements filed in 2023. Companies should consider the

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[1] See 17 CFR Parts 230, 232, 239, 240 and 249, Updating EDGAR Filing Requirements and Form 144 Filings, n. 12.

[2] See Exchange Act Rule 14a-3(c).

[3] See Exchange Act Rule 14a-4(a)(3).

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

[5] See Exchange Act Rule 14a-8(m)(3).

lessons learned during the 2023 proxy season as they prepare for the second year of Pay Versus Performance.

Item 402(v) of Regulation S-K contains the Pay Versus Performance 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" (CAP), cumulative total shareholder return (TSR) for the company and its peer groups, financial performance measures and the company's net income.

ii. A description of the relationship between CAP and the company's performance metrics.

iii. A tabular list of important financial measures that the company selected to link the CAP with the performance metrics.

Companies are required to disclose the applicable information for their five most recently completed fiscal years (with three years required in the first year of Pay Versus Performance disclosure, and adding another year of disclosure in each of the two subsequent annual filings). Therefore, in 2024, calendar-year public companies will generally include data for four fiscal years in their Pay Versus Performance tables.

Companies also should consider SEC staff comment letters that were issued in 2023, which highlight key common mistakes from last year's Pay Versus Performance disclosures, including:

- Failing to describe the relationship between CAP and: (a) TSR, (b) net income and (c) the company-selected measure (CSM).
- Failing to include the tabular list.
- Including multiple CSMs or failing to include the CSM in the tabular list.
- Failing to provide a GAAP reconciliation for non-GAAP CSMs.
- Using a TSR peer group that does not match either the industry group in the company's 10-K performance graph or the compensation peer group disclosed in the Compensation Discussion and Analysis (CD&A).
- Failing to include or identify all NEOs who served each year.
- Using partial-year compensation (*e.g.*, only including compensation for the time served as an NEO during a given year).
- Valuing awards that vest during the year based on a year-over-year change, rather than valuing them as of the date of vesting.

Finally, Pay Versus Performance 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.

The Pay Versus Performance disclosure requirements are technical. See our August 31, 2022, client alert "SEC Adopts Long-Awaited Final Pay Versus Performance Disclosure Rules" for additional details.

**Consider Whether Clawback Disclosure Is Required.** In October 2022, the SEC adopted final rules directing stock exchanges to establish listing standards requiring companies to develop and implement clawback policies providing for the recovery of erroneously awarded incentive-based compensation received by current or former executive officers and to satisfy related disclosure obligations. December 1, 2023, was the deadline for listed companies to adopt a compliant clawback policy.

To the extent such a clawback policy has been triggered, companies are now required to provide certain clawback disclosures in their proxy statement (or annual report on Form 10-K). More specifically, the following disclosure requirements generally apply under Item 402(w) of Regulation S-K (or analogous disclosure provisions in the forms applicable to foreign private issuers and listed funds):

- If during or after the last completed fiscal year the listed company was required to prepare a restatement that required recovery of erroneously awarded incentive-based compensation under the company's clawback policy, or there was an outstanding balance as of fiscal year-end of erroneously awarded incentive-based compensation to be recovered from a previous application of the policy, the listed company is required to disclose:
    - The date it was required to prepare the restatement.
    - The aggregate dollar amount of erroneously awarded incentive-based compensation, including an analysis of how the amount was calculated (with enhanced disclosure if the financial reporting measure related to stock price or TSR).
    - The aggregate dollar amount of erroneously awarded incentive-based compensation that remains outstanding at the end of the last completed fiscal year; provided that alternative disclosure would be required if the aggregate dollar amount of erroneously awarded incentive-based compensation had not yet been determined.

- If recovery would be impracticable in accordance with the narrow exceptions in the clawback rules, companies are required to briefly disclose why recovery was not pursued and the amount of recovery foregone for each current and former named executive officer and for all other current and former executive officers as a group.
- For each current and former named executive officer from whom, as of the end of the last completed fiscal year, erroneously awarded incentive-based compensation had been outstanding for 180 days or longer since the date the listed company determined the amount owed, the dollar amount of outstanding erroneously awarded incentive-based compensation due from each such individual should be disclosed.
- If the company was required to prepare a restatement during or after its last completed fiscal year and concluded that recovery of erroneously awarded incentive-based compensation was not required under the clawback policy, the company is required to briefly disclose the reasoning behind that conclusion.
- Any recoupment of compensation must be reflected in the Summary Compensation Table by subtracting the amount recovered from the amounts reported in that table for that year and quantifying the amount recovered in a footnote.

Any such clawback disclosures must be tagged in Inline XBRL.

**ESG Disclosures.** Notwithstanding a pushback from certain market participants, environmental, social and governance (ESG) matters remain a focal point for many investors, proxy advisory firms and other stakeholders. Stakeholder expectations of ESG disclosures remain high, particularly for disclosures regarding 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,[6] the accuracy and completeness of companies' voluntary ESG disclosures are subject to scrutiny by the SEC and others. For example, the SEC staff has issued detailed comment letters on climate-related disclosures (or lack thereof) in companies' 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 related disclosures in proxy statements.

[6] For information regarding the climate-related disclosures rules the SEC adopted on March 6, 2024, which are not in effect for the 2024 proxy season, please see our March 8, 2024, client alert "SEC Adopts New Rules for Climate-Related Disclosures."

Given 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, 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.

**Remember 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 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.

**Universal Proxy.** In November 2021, the SEC adopted amendments to the proxy rules mandating the use of universal proxy cards in contested elections. The rules 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

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

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).

**Nasdaq Board Diversity Matrix Reminder.** In 2022, Nasdaq-listed companies became subject to a requirement to publicly disclose board-level diversity statistics under Nasdaq Rule 5606.[8] Specifically, Nasdaq Rule 5606 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 2024 proxy season marks the third 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.[9]

**Confirm Description of Voting Standards.** Item 21 of Schedule 14A requires a discussion in the proxy statement of the specific vote required for each proposal to be voted on, including a description of how abstentions and broker non-votes are treated. These standards are highly technical and can vary from proposal to proposal. The mechanics of these voting standards, including how abstentions and broker non-votes will be treated, are complex. In recent years, plaintiffs' firms have scrutinized the description of voting standards in annual meeting proxy statements and have issued shareholder demand letters to companies on the basis of allegedly inaccurate disclosure for minor errors. Accordingly, companies should double check their descriptions for accuracy and consider having outside counsel specifically review this section of their proxy statement.

# 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.[10] 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,

[8] See our August 10, 2021, client alert "SEC Approves Nasdaq Board Diversity Listing Standards."
[9] See Nasdaq's FAQ 1753 (April 26, 2022) for additional guidance.
[10] See Exchange Act Rule 14a-16(b).

provided that such proxy materials are included in an SEC filing available under Schedule 14A on EDGAR.[11] 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.[12] 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.

# 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.

**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.[13] U.S. issuers must submit this 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.

[11] See Sections 204.00(B) and 402.01 of the NYSE Listed Company Manual.

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

[13] See NYSE Listed Company Manual Section 303A.12.