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Annual Meeting Handbook 2019 Edition

Providing a General Overview of State and Federal Laws and Stock Exchange Rules Relating to Annual Meetings of Shareholders

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About This Handbook

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INTRODUCTION

Every public company in the United States is required by its charter documents, the corporate law of its state of incorporation and the federal securities laws to hold a meeting of shareholders at least once each year. Holding an annual meeting of shareholders, however, is much more than merely fulfilling a legal requirement. The annual meeting allows shareholders to express a judgment on management's stewardship of their company, allows management to obtain shareholder approval of important matters and provides a forum for management and shareholders to discuss the progress and direction of the company's business.

This handbook is intended to assist companies in preparing for the annual meeting. It provides a general outline of the key legal requirements contained in the federal securities laws and state corporate laws, as well as the requirements of the stock exchanges and other trading markets. In addition, a discussion of some practical tips relating to the preparation and conduct of an annual meeting is included. Although this handbook addresses issues primarily of concern to companies with publicly traded securities, many of the same issues are also relevant to annual meetings of privately held companies.

This handbook is not intended as a substitute for a careful review of the relevant provisions of: the federal securities laws, rules and regulations; the state corporate law applicable to the company; stock exchange or stock market rules and regulations; the company's charter and bylaws; and any resolutions of the board of directors of the company that may affect the annual meeting. Readers should review the laws, rules and regulations that govern their company and its charter and bylaws in preparing for and conducting any meeting of shareholders, whether an annual meeting or a special meeting, and in preparing the required proxy solicitation materials.

DEVELOPMENTS IN THE LAW FOR THE 2019 PROXY SEASON

New laws are enacted each year that impact the proxy solicitation process and conduct of the annual meeting of shareholders. In addition, the Securities and Exchange Commission (SEC) issues new rules and interpretations from time to time and, on occasion, certain trends and other developments emerge which influence proxy materials and annual meeting preparations. The SEC has publicized at various times and in various forums in 2018 that proxy reform would be a top priority for the agency in 2019. If improving the proxy process remains a significant initiative for the SEC in 2019, legislative and regulatory developments affecting the 2019 proxy season that are not contemplated below may emerge. A description is provided below of the more significant legislative and regulatory developments that are expected to impact the 2019 proxy season. The information provided is not, however, intended to be an exhaustive examination of the relevant statutory changes and other developments that may concern any particular company. In addition to statutory changes, decisions rendered in court cases often impact shareholder meetings and related proxy materials. There may also be significant changes at the Commission and staff level of the SEC during 2019, which may impact policies. Readers are urged to discuss their specific situations with legal counsel to ascertain the changes that may influence their annual meeting preparations.

I. ENHANCED PROXY DISCLOSURE UNDER THE DODD-FRANK ACT

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) was signed into law. In addition to significantly reforming the U.S. financial services industry, the Dodd-Frank Act includes important executive compensation and corporate governance provisions that affect all U.S. public companies. The Dodd-Frank Act authorizes the SEC and national securities exchanges and associations, such as the New York Stock Exchange (NYSE) and the Nasdaq Stock Market (Nasdaq), to adopt rules that prohibit the listing of any U.S. public company that fails to adopt the new standards. The SEC has adopted numerous rules under the Dodd-Frank Act thus far, but many rules remain to be adopted in order to satisfy the rulemaking requirements of the Act. Rules that may impact the 2019 proxy season that were recently adopted, or may soon be adopted, under the Dodd-Frank Act are described below.

During the 2019 proxy season, most companies will need to comply with the pay ratio disclosure requirements adopted under the Dodd-Frank Act and discussed in detail below under the heading "Developments in the Law for the 2019 Proxy Season—Enhanced Proxy Disclosure Under the Dodd-Frank Act—Internal Pay Equity," and should begin to consider how to address the recently adopted director and employee hedging disclosure requirements discussed in detail below under the heading "Developments in the Law for the 2019 Proxy Season—Enhanced Proxy Disclosure Under the Dodd-Frank Act—Disclosure of Employee and Director Hedging," for the 2020 proxy season.

A. INTERNAL PAY EQUITY

On August 5, 2015, the SEC adopted final rules implementing Section 953(b) of the Dodd-Frank Act, requiring public companies, with the exception of emerging growth companies (EGCs), smaller reporting companies and foreign private issuers, to disclose information detailing the relationship between compensation paid to the principal executive officer (PEO) and the median compensation paid to all employees. The rules added a new Item 402(u) of Regulation S-K which requires companies subject to the rules to disclose annually (1) the median of the annual total compensation of all company employees, excluding the PEO, (2) the annual total compensation of the PEO and (3) the ratio of the amounts in clauses (1) and (2). In addition, disclosure will need to include the methodology used to identify the median, and any material assumptions, adjustments or estimates used to identify any of the above elements regarding total compensation.

The pay ratio is determined as of the last date of the fiscal year and is required to be included in companies' Annual Reports on Form 10-K, proxy and information statements, and any registration statement that requires executive compensation disclosure pursuant to Item 402 of Regulation S-K. The following discussion outlines key determinations in calculating the pay ratio and identifies potential issues facing companies subject to these rules.

1. Determining "median annual total compensation" of "all employees"

The SEC has adopted a flexible approach to calculating the required pay ratio, allowing companies an option to choose the methodology used in their calculations. The rules permit companies to identify the median employee using annual total compensation or any other consistently applied compensation measure to all employees included in the calculation, such as information derived from tax or payroll records. In an interpretive release issued on September 21, 2017, the SEC provided guidance as to how existing internal tax or payroll records can be used to identify a company's median employee, noting that in many circumstances a company may use internal records that reasonably identify the median employee, even if those records do not include every element of compensation, such as equity awards widely distributed to employees. The SEC has made clear that the required pay ratio disclosure may be based on a company's reasonable belief, use of reasonable estimates, assumptions and methodologies, and reasonable efforts to prepare the disclosures. The appropriateness of the compensation measure applied will depend on a company's particular facts and circumstances, and may not need to cover a full annual period if a shorter period is reasonably reflective of the annual compensation of the employees. Also, in determining the employees from which the median is identified, a company is permitted to use its employee population, statistical sampling or other reasonable methods. Companies should choose a consistent methodology (tailored to address the individual company's specific needs) to identify the employee whose compensation is at the median of all employees.

On the other hand, the SEC has taken a more rigid approach to the determination of "all employees" for determining median annual total compensation. Companies are required to include in their analysis all full-time, part-time, seasonal or temporary employees of a company and its subsidiaries worldwide as of a date selected by the company within the last three months of the company's last completed fiscal year, excluding independent contractors whose compensation is determined by the independent contractor and not pre-set by the company, and "leased" workers who are employed by an unaffiliated third party. Companies may exclude the services of workers obtained by contracting with an unaffiliated third party even if the company specifies that those workers receive a minimum level of compensation. In September 2017, the SEC clarified that companies are not strictly required to use the above exception in determining whether a worker is an employee, but rather, a company can apply another widely recognized test it otherwise uses in another area of law (e.g., tax or employment law) in order to make such determination. The rules permit companies to exclude from the determination of "all employees" (1) non-U.S. employees in jurisdictions where data privacy laws or regulations make the company unable to include such employees provided the company receives a legal opinion to that effect, (2) non-U.S. employees, if these employees account for 5% or less of the company's total worldwide employees, (3) up to 5% of the company's total employees who are non-U.S. employees, if the company's non-U.S. employees exceed 5% of the total worldwide employees and (4) any persons that became a company's employees as a result of a business combination or acquisition for the fiscal year in which the transaction occurred. If a company omits any employees based on the above exclusions, it will need to provide certain disclosures regarding the employees that have been omitted from the pay ratio calculations, including, among other information, the approximate number of employees omitted.

In order to mitigate compliance costs, the rules allow a company to identify the median employee once every three years, unless there has been a change in its employee population or employee compensation arrangements that the company reasonably believes would result in significant change in the pay ratio disclosure. Thus, absent one of these significant changes, the same median employee may be used for three consecutive years. Companies should assess whether there have been changes in the employee population or employee compensation arrangements that would result in a significant change in the pay ratio disclosure, and if necessary, identify a new median employee. If a company does not have any such changes, then the company must disclose that it is using the same median employee and that there have been no changes that it reasonably believes would significantly affect its pay ratio disclosure.

Once the median employee is identified, the company will need to calculate the employee's annual "total compensation" in accordance with Item 402 of Regulation S-K to determine the pay ratio. Companies may use reasonable estimates when calculating any elements of the annual compensation for the median employee, and are permitted to make cost of living adjustments to the compensation paid to employees in jurisdictions other than the jurisdiction where the PEO resides. A company that uses cost-of-living adjustments to present the pay ratio must also disclose the median employee's annual total compensation and pay ratio without the cost-of-living adjustments.

On September 21, 2017, the SEC provided additional guidance to assist companies in their efforts to comply with the pay ratio disclosure requirements, including examples to assist companies in determining how to use statistical sampling, reasonable estimates and reasonable methodologies to identify the median employee and to calculate the total compensation. Companies should consult the examples and methodologies provided by the SEC in the September 2017 guidance when evaluating methodologies for determining the median employee and calculating total compensation or any elements of total compensation for employees.

2. Pay ratio disclosure

The pay ratio described above must be expressed as a ratio in which the median of the annual total compensation of all employees is expressed as equal to one (e.g., 1 to 50), or, alternatively, expressed as a narrative in terms of the multiple that the PEO's total compensation bears to the median of the annual total compensation of all employees (e.g., "the PEO's annual total compensation is 50 times that of the median of the annual total compensation of all employees"). A company will normally use the total compensation figure of the PEO from the Summary Compensation Table as reported in its proxy statement. However, if a company has more than one PEO during the prior fiscal year, the rules permit the company to either (1) combine the total compensation of each PEO or (2) annualize the compensation of the person serving as PEO as of the date the company selected to determine the median employee.

In addition, the methodology used to identify the median, and any material assumptions, adjustments or estimates used to identify any of the elements regarding total compensation must be disclosed, but companies need not disclose technical analyses or formulas. If a company changes its methodology or its material assumptions, adjustments or estimates from those used in the prior fiscal year, and if the effects of any such change are significant, the company must briefly describe the change and the reasons for the change.

Companies are permitted to supplement the required disclosure with a narrative discussion of additional ratios, so long as the additional information is clearly identified, not misleading and not presented with greater prominence than the required ratio. Most companies provided only the mandated pay ratio disclosure in their 2018 proxy statement. After the end of the 2018 proxy season, S&P 500 companies received a form letter signed on behalf of a number of investors, including the New York City Comptroller, the New York State Comptroller as well as a number of advocacy groups (including the AFL-CIO, the International Brotherhood of Electrical Workers and the International Brotherhood of Teamsters) requesting that companies provide supplemental disclosures in their 2019 proxy statements that the signatories believed to be helpful to investors. The requested supplemental disclosures include, as examples only: identification of the median employee's job function, geographic location of the median employee, a breakdown of full vs. part-time employment states and use of temporary or seasonal employees or of subcontracted workers, amongst other disclosures. Companies may consider expanding their 2019 pay ratio disclosure to include additional supplemental disclosures that provide context to investors, such as adding language to contextualize the pay of rank-and-file employees and more broadly discussing human capital practices.

3. Timing Considerations

The pay ratio rules became effective for the 2018 proxy season and require most public companies, with the exception of EGCs, smaller reporting companies and foreign private issuers, to include pay ratio information relating to compensation in their upcoming 2019 proxy statements. Companies subject to the pay ratio disclosure rules should continue to devote time and resources to maintain compliance with the rules. Companies should continue to evaluate their payroll and other compensation recordkeeping systems and consider how they will analyze the company's employee population, determine what method they will use to identify the median employee, and gather other information necessary to make the pay ratio calculations with respect to compensation for fiscal year 2018.

B. PAY VERSUS PERFORMANCE

On April 29, 2015, the SEC proposed rules designed to implement and comply with Section 953(a) of the Dodd-Frank Act. The SEC requested comments on the proposed rules by July 6, 2015, and final rules have not yet been adopted. The proposed rules would require public companies, with the exception of EGCs, registered investment companies and foreign private issuers, to include a new Pay Versus Performance Table in proxy and information statements, detailing the relationship between executive compensation actually paid and the company's financial performance, taking into account any change in stock value, dividends and any other distributions. The proposed rules would add a new Item 402(v) to Regulation S-K and implement Section 14(i) of the Securities Exchange Act of 1934, as amended (Exchange Act). Smaller reporting companies would be subject to the new rule, although the disclosure requirements would be scaled down.

The Pay Versus Performance Table would show the amount of compensation paid to the company's PEO and its other named executive officers (NEOs), cumulative total shareholder return and total shareholder return of a peer group over the five most recent fiscal years (three years for smaller reporting companies). The rules would also require companies to use the values presented in the table to describe the relationship between executive compensation and the company's performance, and between the company's performance and its peer group's performance.

1. Individuals Covered

The compensation of a public company's PEO, typically the chief executive officer, must be provided on an individual basis, while only the average compensation for the other NEOs is required. If more than one PEO served during the year, the compensation of all such PEOs must be aggregated. For a discussion of the SEC rules for determination of a company's NEOs, *see* "Federal Rules and the Proxy Statement—the Proxy Statement—Executive Compensation Disclosure."

2. Determination of Executive Compensation Actually Paid

In addition to the disclosure required to be included in a Summary Compensation Table, the Pay Versus Performance Table is required to include the compensation "actually paid" to the company's NEOs, as compared to the compensation "awarded to, earned by or paid to" the NEOs, which is covered by the Summary Compensation Table. For purposes of the Pay Versus Performance Table, executive compensation actually paid would consist of total compensation as reported in the Summary Compensation Table, with adjustments related to pension amounts and equity awards.

Pension amounts would be adjusted by subtracting any portion of the change in the actuarial present value of the NEOs' accumulated defined benefit pension benefits that is not specifically attributable to services rendered during the covered fiscal year. Smaller reporting companies would not be required to make adjustments in pension amounts because they are subject to scaled compensation disclosure requirements that do not include disclosure of pension plans.

Under the proposed rules, equity awards would be considered actually paid on the vesting date and at fair value on that date, rather than fair value on the grant date as required in the Summary Compensation Table. Both amounts would be disclosed in the new Pay Versus Performance Table. A company would be required to disclose the vesting date valuation assumptions if they are materially different from those disclosed in its financial statements as of the grant date.

Additionally, companies would be required to include footnote disclosure in the Pay Versus Performance Table that describes the above adjustments to the totals in the Summary Compensation Table.

3. Determination of Total Shareholder Return

The proposed rules would require cumulative total shareholder return for the company and, for companies other than smaller reporting companies, total shareholder return of a peer group to be included in the Pay Versus Performance Table.

Total shareholder return is calculated in the same manner as the company's "performance graph" required by Item 201(e) of Regulation S-K and presented under the disclosure item entitled "Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters" in the company's annual report to shareholders that accompanies or precedes a proxy or information statement relating to an annual meeting at which directors are to be elected. Under this rule, total shareholder return for a given year equals (1) the sum of (a) the cumulative amount of dividends for such year, assuming dividend reinvestment, and (b) the difference between the company's share price at the end and the beginning of the year, divided by (2) the share price at the beginning of the year.

A company, other than a smaller reporting company, would also be required to include total shareholder return of its peer group, weighted according to market capitalization and using the same index or peer group used for purposes of the "performance graph" required by Item 201(e) of Regulation S-K or, if applicable, the peer group it uses for purposes of describing compensation benchmarking practices in the Compensation Discussion and Analysis (CD&A) section. For purposes of Item 201(e) of Regulation S-K, a peer group includes a published industry or line-of-business index, peer companies selected in good faith by the company or companies with similar market capitalizations. The names of the companies in the peer group must be disclosed if the peer group is not a published industry or line-of-business index. The returns of each company in the peer group must be weighted according to the company's stock market capitalization at the beginning of the relevant period. *See* "The Annual Report to Shareholders—Preparation" and Item 201(e) of Regulation S-K.

4. Additional Disclosures

The proposed rules would also require a clear description of the relationship between (1) executive compensation actually paid to the PEO and the average of the executive compensation actually paid to the other NEOs and (2) the company's cumulative total shareholder return for each year shown in the Pay Versus Performance Table, including, except in the case of a smaller reporting company, a comparison of the cumulative total shareholder return of the company and its peer group. There is no mandated format for the additional disclosures. They may be in tabular, graphical or narrative form.

5. Timing Considerations and Phase-In Periods

The timing of effectiveness of these rules remains uncertain. As of February 2019, pay versus performance disclosure remained on the long-term action section of the SEC's Current Unified Agenda of Regulatory and Deregulatory Actions (Agenda), signaling that the SEC does not expect to take action on this matter within the 12 months after publication of the Agenda. Thus, it is not likely that these rules will be in effect for the 2019 proxy season.

If the proposed rules are adopted, companies other than smaller reporting companies may provide the new disclosure for three years, rather than five, in the first filing subject to the rules, and then provide disclosure for an additional year in each of the two subsequent filings. Smaller reporting companies may provide the new disclosure for two years, rather than three years, in the first filing subject to the rules. Similar to the Summary Compensation Table transition rules following an initial public offering, information for fiscal years prior to the last completed fiscal year is not required if the company was not required to report such information at any time during that year.

EGCs, registered investment companies and foreign private issuers are exempt from the pay versus performance disclosure requirements.

C. DISCLOSURE OF INCENTIVE COMPENSATION CLAWBACK POLICY

On July 1, 2015, the SEC proposed rules designed to implement and comply with Section 954 of the Dodd-Frank Act. The SEC requested comments on the proposed rules by September 14, 2015, and final rules have not yet been adopted. The SEC proposed new Rule 10D-1, directing national securities exchanges and associations (including NYSE and Nasdaq) to establish listing standards that require public companies to adopt, implement and disclose a compensation “clawback” policy providing for recovery of excess incentive-based compensation from current and former executive officers. A company that fails to comply with the clawback mandate or provide the necessary disclosure would be delisted from the applicable exchange. The proposed rules apply to all companies listed on a national securities exchange, including smaller reporting companies, EGCs, foreign private issuers, controlled companies and companies with listed debt only.

Under such clawback policies, if a company is required to restate its financial statements to correct an error that is material to previously issued financial statements, it must recover from current and former executive officers any excess incentive-based compensation paid based on erroneous data for the preceding three fiscal years. Any recovery of excess incentive-based compensation would be on a “no fault” basis.

The proposed rules define “incentive-based compensation” as any compensation that is granted, earned or vested based wholly or in part on the attainment of any financial reporting measure. The proposed rules deem “financial reporting measure” to include measures that are determined and presented in the company’s financial statements, any measures derived wholly or in part from such financial information, stock price and total shareholder return. Salaries, discretionary bonuses, time-based equity awards and bonuses or equity awards based on non-financial reporting measures, including strategic or operational metrics, are explicitly excluded.

Excess compensation, or “erroneously awarded compensation” that is subject to recovery, is the amount of incentive-based compensation that the executive officer receives, based on erroneous data, over and above what would have been paid to the executive officer under the accounting restatement.

1. Clawback Trigger Event

The proposed rules would require recovery after any accounting restatement to correct an error deemed “material” to the previously issued financial statements. The SEC has suggested that companies should also consider whether a series of immaterial errors could be considered a material error when viewed in the aggregate. In practice, the type of error-correction restatements that would trigger a compensation clawback would likely coincide with restatements where the company would be required to file an Item 4.02 Current Report on Form 8-K disclosing that previously issued financial statements can no longer be relied on.

While final rules have not yet been adopted, in August 2016, the U.S. Court of Appeals for the Ninth Circuit issued an opinion in *SEC v. Jensen* confirming that any recovery of excess incentive-based compensation would be on a “no fault” basis. Because recovery is on a “no fault” basis, a PEO and principal financial officer (PFO) may be subject to the clawback rules if they have committed “mismanagement” insofar as their internal controls fail to prevent or detect “intentional wrongdoing by any authorized agent of the issuer,” which would include employees of the company.

2. Clawback Trigger Date

Clawback policies would be required to capture excess compensation received during the three completed fiscal years that immediately precede the "clawback trigger date," which is the date the company's board of directors, committee thereof or authorized officer concludes, or reasonably should have concluded, that previous financial statements contain a material error or, if earlier, the date a court or regulator directs the company to restate its financial statements to correct a material error. Therefore, the clawback trigger date is not the date of filing of the restatement itself, but instead, either (1) the date of the company's *decision* to restate its financials or (2) if no decision to restate was made, the date the company *should have made such a decision* based on receipt of independent accountant advice or notification. Compensation is deemed received by an executive officer in the fiscal period in which the financial reporting measure is attained, regardless of the actual payment date and even if the compensation remains subject to additional vesting conditions based on service or non-financial reporting metrics after the lookback period ends.

3. Recovery and Discretionary Enforcement

The proposed rules allow a committee of independent directors responsible for executive compensation decisions to consider (1) whether the direct costs of enforcing recovery would exceed the recoverable amount or (2) whether recovery would violate law in the executive's home country, to ultimately decide if recovery of erroneously awarded compensation would be impracticable. In both instances, however, a "reasonable attempt" to recover the applicable compensation would be required, and documentation of such attempts would need to be submitted as proof of impracticability along with disclosure of such efforts and determinations.

Companies are prohibited from protecting executives from the clawback policies, either through indemnification of executive officers for the loss of erroneously awarded compensation or through payment of insurance premiums on third party indemnification insurance. The SEC has also noted that discrepancies between the proposed rules and existing compensation contracts will not suffice for a finding of impracticable recovery.

4. Disclosure Requirements

Each listed company would be required to file its clawback policy as an exhibit to its Annual Report on Form 10-K. In addition, the newly proposed Item 402(w) of Regulation S-K would require the company's proxy statement to include disclosure of (1) any restatements completed in the past fiscal year that required recovery under the clawback policy or (2) the existence of any outstanding balance of excess compensation that remains due under the clawback policy for a prior restatement. The specific disclosure may be included in the CD&A in tandem with disclosure already required under Item 402(b)(2)(vii) of Regulation S-K or outside the CD&A in its own section. Smaller reporting companies, EGCs and foreign private issuers that are otherwise exempt from CD&A disclosure would still be required to provide disclosure under Item 402(w).

Specific disclosure under the proposal would include (1) for restatements completed in the past fiscal year, the date the restatement was required to be prepared, the aggregate amount of excess incentive-based compensation recoverable under the clawback policy with respect to the restatement, any estimates used in calculating the excess incentive-based compensation and the aggregate dollar amount of unrecovered compensation that remained outstanding at the end of the last completed fiscal year, (2) the name of each executive officer and amounts of incentive-based compensation erroneously awarded to each such executive officer that the company decided not to recover, along with the reasons why such recovery was not sought and (3) if amounts of excess incentive-based compensation are outstanding for more than 180 days, the name of, and amount due from, each executive officer at the end of the company's last completed fiscal year. In the event that a listed company recovers any amounts under its clawback policy, the company would need to reflect that recovery in its Summary Compensation Table in future filings by reducing the compensation reported in the applicable column, as well as the "total" column for the year in question, and identify the reduction in footnotes to the table.

5. Timing Considerations

The proposal requires national securities exchanges and associations to propose listing rules no later than 90 days after the publication of final rules by the SEC. Companies would be required to adopt a compliant clawback policy no later than 60 days following the effective date of the applicable exchange adopting final listing rules. In addition, companies would be required to comply with all clawback-related disclosure requirements under Item 402(w) of Regulation S-K as of the effective date of the applicable exchange adopting final listing rules, and reasonably prompt recovery would be required of any incentive-based compensation erroneously awarded to a current or former executive officer that is granted, earned or vested based wholly or in part on financial reporting metrics filed on or after the publication of final rules by the SEC. As of February 2019, the clawback mandate remained on the long-term action section of the Agenda, signaling that the SEC does not expect to take action on this matter within the 12 months after publication of the Agenda. Although these rules are unlikely to be in effect for the 2019 proxy season, companies should continue to plan for these changes now. Because companies may be able to mitigate the costs and risks associated with the proposed rules through careful planning, companies should consult with legal counsel and consider how best to position themselves to align their long-term compensation policies and disclosures with the proposed clawback mandate.

D. DISCLOSURE OF EMPLOYEE AND DIRECTOR HEDGING

On December 18, 2018, the SEC adopted final rules implementing Section 955 of the Dodd-Frank Act. The rules added a new Item 407(i) of Regulation S-K which will require a company to disclose in its proxy and information statements whether its employees or directors are allowed to purchase financial instruments to hedge against a decrease in the value of the company's equity securities. The rules expand current disclosure requirements for hedging of equity securities and extend disclosure of hedging policies to certain companies that are not currently subject to these disclosure requirements.

Under the previous SEC rules, the primary hedging policy disclosure requirement in proxy statements was disclosure in the CD&A of the information necessary to understand a company's compensation policies and decisions regarding its NEOs. Because the previous disclosure requirement was part of the CD&A, it did not apply to smaller reporting companies, EGCs, registered investment companies and foreign private issuers. The previous disclosure requirement also did not cover hedging policies that applied to directors, executive officers other than NEOs or other employees.

The rules require disclosure in any proxy or information statement relating to an election of directors as to whether employees or directors are permitted to purchase financial instruments or otherwise engage in transactions that are designed to or have the effect of hedging or offsetting any decrease in the market value of equity securities that have been granted to an employee, officer or director by the company as part of the compensation of such person or are held, directly or indirectly, by such person. A company could satisfy this requirement by either providing a fair and accurate summary of the practices or policies that apply, including the categories of persons they affect and any categories of hedging transactions that it permits and those that it prohibits, or, alternatively, by disclosing the practices or policies in full. Companies are not required to prohibit hedging transactions or to adopt policies or practices that address hedging by any category of individuals. A company that permits hedging transactions is required to explain the scope of the hedging transactions it permits. The rules apply to hedging policies with respect to equity securities of the company, any parent of the company, any subsidiary of the company, or any subsidiary of any parent of the company.

The disclosure is required in any proxy or information statement relating to the election of directors and is effective for fiscal years beginning on or after July 1, 2019. Smaller reporting companies and EGCs may delay compliance until fiscal years beginning on or after July 1, 2020, and foreign private issuers are exempt from this disclosure requirement. Companies should consider their current hedging policies and ensure that their proxy statement disclosure will comply with the new rule.

II. PROXY ACCESS

Under current SEC rules, only the company's director nominees are included in the company's proxy statement and proxy card. If shareholders wish to nominate their own candidates, they must prepare their own proxy statement and proxy card. Proxy access refers to an alternative regime in which shareholders could include director nominees in the company's proxy materials in opposition to the company's nominees. For a discussion of proxy access, *see* "Federal Rules and the Proxy Statement—the Proxy Statement—Proxy Access for Director Nominations."

A. UNIVERSAL PROXY CARD

On October 6, 2016, the SEC proposed amendments to the proxy rules to require the use of universal proxy cards in all contested director elections at annual meetings. The proposed amendments would allow shareholders to vote by proxy for their preferred combination of company director nominees and shareholder-recommended nominees.

Under the current proxy rules, a company's director nominees are typically presented as one slate in the company's proxy statement and proxy card, and shareholder-recommended nominees are presented in a separate proxy statement and proxy card. One party may not include the other party's nominees on its proxy card unless the other party's nominees consent, which consent is generally not provided. As a result, shareholders voting by proxy are forced to use either the company's or the shareholder's proxy card, which generally does not allow shareholders voting by proxy to pick and choose from all of the director nominees by submitting two separate proxy cards (even where the total number of nominees for which the two cards are marked does not exceed the number of directors being elected), because, under state law, a later-dated proxy card typically revokes any earlier-dated one and invalidates the votes on the earlier-dated proxy card.

The proposed rules would require all duly nominated candidates for election (i.e., the company's nominees and the shareholder-recommended nominees) to be included on a universal proxy card in any contested election (except for those involving registered investment companies and business development companies), allowing shareholders to vote by proxy for any mix of directors from slates proposed by both the company and nominating shareholders using one proxy card. The proposed rules would also require a nominating shareholder to solicit proxies with its own proxy statement from the holders of at least a majority of the shares entitled to vote in the director election. Each soliciting party would be able to use its own universal proxy card and design the proxy card how it wishes, subject to certain requirements, including that each party's nominees are clearly distinguished.

The SEC requested comments on the proposed rules by January 9, 2017, and final rules have not yet been adopted. The universal proxy card proposal remained on the long-term action section of the Agenda as of February 2019, signaling that the SEC does not expect to take action on this matter within the 12 months after publication of the Agenda. While the SEC's plans for adoption are unclear, there is a renewed interest in universal proxy cards, particularly after the SEC's November 15, 2018 roundtable on the proxy process where the Chairman of the SEC cited universal proxy cards as a key item of interest and follow-up for the Staff of the SEC. Despite the absence of adopted SEC rules, in 2018, a universal proxy card was used for the first time in a proxy contest involving a U.S.-listed company, and other U.S.-listed companies took steps to use a universal proxy card in proxy contests.

B. PROXY ACCESS

Proxy access has started to lose momentum after three active years in which 100 or more proxy access proposals were submitted by shareholders in each of 2017, 2016 and 2015. Only 53 companies adopted proxy access bylaws in the first six months of 2018, as compared to the 87 companies that adopted proxy access bylaws in the first six months of 2017. However, proxy access still remains a significant topic for shareholders as evidenced by over two-thirds of the S&P 500, and over 500 companies in total, having adopted proxy access bylaws by October 2018. Proxy access proposals from shareholders have been common in recent years, leading many companies to adopt some form of proxy access, and such proposals are likely to continue to be prevalent in the 2019 proxy season. As a result, companies that have not yet adopted proxy access should be prepared for such proposals. Companies that have already adopted proxy access should be prepared for "fix it" proposals focused on broadening or amending applicable thresholds for nomination, such as shareholders' ability to aggregate ownership. Companies should consult with legal counsel to discuss whether to implement a form of proxy access, and to determine how best to respond if they receive such a proposal.

C. SHAREHOLDER PROPOSALS IN THE 2019 PROXY SEASON

Rule 14a-8 of the Exchange Act requires a company to include a shareholder proposal in the company's proxy materials, unless the proposal violates one of the rule's eligibility and procedural requirements, or one of the substantive bases for exclusion specified in the rule. *See* "Shareholder Proposals—Procedural Requirements" and "Shareholder Proposals—Substantive Grounds for Exclusion of a Shareholder Proposal."

One of the substantive bases provided in Rule 14a-8 for the exclusion of a shareholder proposal from the company's proxy materials is "if the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting." Some companies have relied on this language to exclude a shareholder proxy access proposal if the company's management submitted its own proxy access proposal to shareholders. In October 2015, the Staff of the SEC in Staff Legal Bulletin (SLB) No. 14H clarified when a company may exclude a shareholder proposal on the basis that the proposal directly conflicts with a management proposal. The SEC stated that it will not view a shareholder proposal as directly conflicting with a management proposal if a reasonable shareholder, although possibly preferring one proposal over the other, could logically vote for both proposals. The SEC specifically noted that shareholder and management proxy access proposals with conflicting terms still seek a similar objective, and accordingly shareholders could logically vote in favor of both proposals. As a result, companies may not exclude a shareholder proxy access proposal based on the inclusion of an alternative management proxy access proposal that has different, inconsistent or conflicting terms. Nevertheless, with more companies adopting proxy access in response to SLB No. 14H, many of the shareholder proxy access proposals submitted in 2018 were withdrawn or excluded because the company voluntarily adopted or negotiated proxy access bylaw provisions with similar terms.

Although it has not done so, the SEC may take a similar approach in interpreting whether a company may exclude a shareholder proposal on the grounds that "the company has already substantially implemented the proposal." In a series of SEC no-action letters, the Staff permitted companies to exclude proxy access proposals on these grounds if the company had already adopted a proxy access bylaw that conformed to market practice. On the other hand, to date, proposals seeking multiple amendments to proxy access bylaws were not excludable as substantially implemented unless a company could show that it had adopted at least some of the proposed changes.

On November 1, 2017, the SEC issued SLB No. 14I, which provides guidance on two additional substantive bases for the exclusion of shareholder proposals—proposals relating to the "ordinary business" of the company and proposals that are not of "economic relevance" to the company. Under SLB No. 14I, no-action requests made pursuant to the "ordinary business" exception should include a discussion that reflects the board's analysis of the particular policy issue raised by the shareholder proposal and the significance of the proposal to the company. The discussion should also detail the specific processes that the board employs to ensure that its conclusion (that the policy issue is not sufficiently significant so as to "transcend ordinary business") is "well-informed and well-reasoned."

Similarly, no-action requests made under the "economic relevance" exception should include a discussion that reflects the board's analysis of whether a proposal is "otherwise significantly related to the company's business." The discussion should similarly detail the specific processes that the board employs to ensure that its conclusion is "well-informed and well-reasoned." The SEC also announced that it would discontinue its prior practice of connecting the "economic relevance" exception to its analysis under the "ordinary business" exception, and will now evaluate claims made pursuant to the "economic relevance" exception under a separate analytical framework to ensure that each basis for exclusion serves its intended purpose.

On October 23, 2018, the SEC issued SLB No. 14J, which provides guidance on a board's analysis provided in no action requests subject to SLB No. 14I, and two bases for the "ordinary business" exception for exclusion—proposals constituting micromanagement and proposals touching on senior executive and/or director compensation.

The first basis for the "ordinary business" exception addressed by SLB No. 14I is proposals constituting micromanagement. A proposal micromanages a company "by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." A proposal that may not be excludable under the "ordinary business" exception by its subject matter may nonetheless be excludable on a micromanagement basis. All determinations on the excludability of proposals on micromanagement grounds will be made on a company-specific basis and will take into consideration the underlying substance of the matters addressed by the proposal.

The second basis for the "ordinary business" exception addressed by SLB No. 14I is proposals addressing senior executive and/or director compensation, which are not generally excludable. Proposals that relate to general employee compensation and benefits are excludable under the "ordinary business" exception since they relate to the management of a company's workforce generally. In considering proposals that raise senior executive and/or director compensation matters in addition to ordinary business matters related to a company's workforce, the SEC will focus on the concern underlying the proposal. A proposal that addresses senior executive and/or director compensation may be excludable under the "ordinary business" exception if a primary aspect of the relevant compensation is broadly applicable or available to the general workforce so as to not raise significant compensation issues that transcend a company's ordinary business. A proposal that addresses senior executive and/or director compensation that is available only to senior executives and/or directors may generally not be excluded under the "ordinary business" exception.

The guidance is effective immediately and therefore will be relevant to companies seeking to rely on the "ordinary business" exception to exclude shareholder proposals from their proxy materials and/or to provide discussions of the board's analysis in a no-action request pursuant to an exclusion for the 2019 proxy season. If making a no-action request to the SEC in response to such proposals, companies should additionally consult with legal counsel to discuss whether or not to include a board analysis in their no-action request.

III. NON-GAAP FINANCIAL MEASURES

Beginning in 2016, the SEC increased its level of scrutiny and focus on compliance with the requirements for use of financial measures not calculated in accordance with Generally Accepted Accounting Principles (GAAP), referred to as non-GAAP financial measures. The SEC has continued to review companies' compliance with these requirements throughout 2018. With the wave of new proxy disclosure rules to which companies are becoming subject, it has become increasingly common for companies to highlight performance measures, including non-GAAP financial measures, in their proxy statements to demonstrate a connection between pay and performance.

Non-GAAP financial measures are subject to the requirements of Regulation G and Item 10(e) of Regulation S-K. In general, companies that use non-GAAP financial measures are required to include a presentation of "the most directly comparable" GAAP financial measure (with "equal or greater prominence" in the case of filings with the SEC) and a reconciliation of the non-GAAP financial measure to the most directly comparable GAAP financial measure. However, in the CD&A, disclosure of target levels that are non-GAAP financial measures is not subject to Regulation G and Item 10(e) of

Regulation S-K, although disclosure must be provided as to how the number is calculated from the company's audited financial statements.

In 2016, the SEC issued new interpretations providing insight into the use and misuse of non-GAAP financial measures in SEC filings. The SEC provided specific examples of non-GAAP disclosures that the SEC would view as impermissibly "prominent," including: (1) presenting a non-GAAP financial measure before the most directly comparable GAAP financial measure; (2) presenting a non-GAAP financial measure using a style of presentation (e.g., bold, larger font) that emphasizes the non-GAAP financial measure over the comparable GAAP financial measure; (3) providing tabular disclosure of a non-GAAP financial measure without preceding it with an equally prominent tabular disclosure of the comparable GAAP financial measure or including the comparable GAAP financial measure in the same table; or (4) providing discussion and analysis of a non-GAAP financial measure without a similar discussion and analysis of the comparable GAAP financial measure in a location that has equal or greater prominence.

Although many companies have policies or procedures in place for review and disclosure of non-GAAP financial measures, companies should consider whether any revisions to such policies or procedures are necessary based on the new guidance.

IV. CHANGE TO SMALLER REPORTING COMPANY DEFINITION

On September 10, 2018, the SEC adopted final rules that expand the "smaller reporting company" definition, substantially increasing the relevant financial thresholds for determining smaller reporting company status. The rules permit companies with a public float of less than $250 million (compared to the prior threshold of $75 million) as of the last business day of the company's most recently completed second fiscal quarter to reflect their status as a smaller reporting company in subsequent filings and provide the scaled disclosures afforded to smaller reporting companies. In addition, the rules permit companies that do not have a public float or have a public float of less than $700 million to provide scaled disclosures if their annual revenues are less than $100 million (compared to the prior threshold of $50 million). Smaller reporting companies are eligible to comply with less rigorous disclosure requirements, including certain new proxy disclosure rules discussed above under "Developments in the Law for the 2019 Proxy Season—Enhanced Disclosure Under the Dodd-Frank Act." The new rules will be effective in the 2019 proxy season and thus, companies that may now qualify as smaller reporting companies should reassess if they meet one of the tests and determine whether they would benefit from utilizing smaller reporting company status for their 2019 proxy filings.

V. NYSE ELIMINATES HARD COPIES REQUIREMENT

Effective March 1, 2018, NYSE-listed companies are no longer required to provide physical copies of their proxy materials to the NYSE so long as such proxy materials are included in an SEC filing available on the SEC's Electronic Data Gathering, Analysis and Retrieval (EDGAR) filing system. However, if such proxy materials are made available on EDGAR but are not filed pursuant to Schedule 14A under the Exchange Act, the company is required to provide the NYSE with information sufficient to identify the filing no later than the date such material is sent or given to any security holders.

A listed company whose proxy materials are not available in their entirety, including the proxy card, in an SEC filing available on EDGAR is still required to provide copies of proxy materials in physical form to the NYSE. Such physical copies must include three definitive copies of any proxy material, including the proxy card, that is not available on EDGAR, and such physical copies shall be filed with the NYSE no later than the date on which such material is sent or given to any security holders.

Nasdaq-listed companies continue to be excused from providing hard copies of proxy materials to Nasdaq so long as the proxy materials are included in an SEC filing available on EDGAR.

VI. DIVERSITY ON THE BOARD OF DIRECTORS

Diversity on a company's board of directors, particularly with respect to women and minorities serving as directors, has continued to attract a growing amount of attention. For the 2019 proxy season, gender and minority board diversity is likely to remain an important topic. During 2018, various large investors indicated that they will vote against or withhold their votes from directors due to a lack of gender diversity. In some cases, investors have sent letters to companies requesting updated disclosure on board diversity and, in certain cases, have issued public statements regarding expectations for public companies to include women and minorities on their board of directors. Further, proxy advisory firms have indicated that beginning in the 2019 proxy season, they will generally recommend voting against the nominating committee chair of a board of directors that has no female members.

In February 2019, the Staff of the SEC issued new Compliance and Disclosure Interpretations (C&DIs) relating to diversity disclosure in a company's proxy statement. The SEC clarified its expectation that, in circumstances where a director or director nominee self-identifies specific diversity characteristics, a board or nominating committee that considered any such self-identified diversity characteristics in its evaluation of the specific qualifications and attributes applicable to the director's service on the board should disclose those characteristics and describe how they were considered. In addition, the description of a company's diversity policy, to the extent applicable, should include how the company considers the self-identified diversity attributes of director nominees as well as any other qualifications its diversity policy takes into account. In light of the new interpretations, companies should review and consider whether their disclosures appropriately reflect information provided by directors and nominees (and whether those individuals have consented to disclosure of that information), and how that information is taken into account under their board diversity policies.

In addition, on September 30, 2018, the Governor of California signed a bill into law that will require public companies with principal executive offices located in California to have a minimum number of women on their board of directors. The new law requires that any company subject to the law must have at least one female serving on its board of directors by December 31, 2019 and, by December 31, 2021, to have at least two female directors serving on a board of directors with five directors and at least three female directors serving on a board of directors with six or more directors. The law provides for a phase-in period for companies that currently have principal executive offices in California, but does not provide any transitional period for companies that become subject to the law after the December 31, 2019 phase-in date to come into full compliance with the law. In addition, legislation was introduced in both the U.S. House of Representatives and the U.S. Senate that would require public companies to disclose annually in their proxy statements the gender, race, ethnicity and veteran status of their directors, director nominees, and senior executive officers. Accordingly, public companies, and in particular public companies with principal executive offices located in California, should continue to evaluate board composition with a focus on diversity in the 2019 proxy season.

VII. PROXY TRENDS

After the passage of the Dodd-Frank Act in 2010, and with the SEC's increased focus on enhanced company disclosure and the increasing prominence of proxy advisory firms, there has been a coinciding evolution of the proxy statement and how the proxy statement is presented. In recent years, more and more companies are choosing to view the proxy statement not just as a tool for compliance, but as a way to engage with investors and to communicate the company's brand and narrative. Companies have increasingly provided voluntary disclosures to shareholders on topics that are not required to be disclosed by current legislation. In 2018, there was an increase in discussion of the audit committee's role in the oversight of cybersecurity risk. Cybersecurity garnered significant investor attention in 2018 and the SEC issued an interpretive release on February 26, 2018 to assist public companies in preparing disclosures about cybersecurity risks and incidents. The interpretive release additionally reminded companies about the board's role in material risk oversight matters, including cybersecurity matters, and the related disclosure thereof required in proxy statements.

Voluntary disclosure of board composition has also been on the rise as diversity on company boards has become a popular topic for discussion and even legislation. For more on this, *see* "Developments in the Law for the 2019 Proxy Season—Diversity on the Board of Directors" above. Similarly, the 2018 proxy season brought a sharp increase in the number of director skills matrices voluntarily disclosed, with many companies including graphics as a method for conveying board members' tenure, gender, race, ethnicity and age. As large proxy advisory firms continue to emphasize the importance of diversity on company boards, companies should prepare to evaluate their current board composition and hiring practices in the 2019 proxy season.

There has also been an increase in the use of investor-friendly platforms that aid in the delivery and navigation of proxy statements. The use of digital communications and electronic voting, as well as company-specific websites with helpful videos and navigation assistance may similarly increase investor engagement. As technological capabilities continue to advance, company use of virtual annual meetings is also on the rise and is expected to increase further as the 2019 proxy season progresses. During 2018, the number of companies that held virtual annual meetings grew approximately 27% compared to 2017. While virtual annual meetings are on the rise, proxy advisory firms and large institutional investors have expressed concern about this trend, and in certain cases are recommending a vote against members of a company's nominating committee for companies that a hold virtual annual meeting. For more on this, *see* "The Meeting—Transaction of Business at the Annual Meeting—Voting Procedures—Electronic Voting" and "The Meeting—Electronic Annual Meeting and Supplemental Broadcasts."

THE LEGAL REQUIREMENT THAT AN ANNUAL MEETING BE HELD

The legal requirement that an annual meeting of shareholders be held and the rules and regulations governing preparation of proxy solicitation materials are found generally in the law of the company's state of incorporation, in Section 14(a) of the Exchange Act, in the rules and regulations promulgated by the SEC under the Exchange Act, in the rules and regulations promulgated by the stock exchange or stock market on which the company's stock is listed and in the company's charter or formation documents.

I. STATE CORPORATE LAWS

The requirement that a meeting of shareholders be held each year is initially a matter of the corporate law of the state in which the company is incorporated. Every state requires that a meeting of shareholders be held annually to elect directors and to transact other appropriate business, including, in many cases, obtaining the approval of the shareholders for fundamental corporate changes, such as mergers, dissolutions or amendments of the company's articles or certificate of incorporation. Examples of state corporate statutes requiring annual meetings of shareholders include Section 602 of the New York Business Corporation Law and Section 600 of the California Corporations Code (CCC). In addition, Section 211 of the Delaware General Corporation Law (DGCL) requires an annual meeting be held to elect directors if they are not elected by written consent.

State law also governs many of the procedural aspects of the annual meeting of shareholders, including, among others, location, notice and record date requirements, quorum requirements, number of votes required for approval of matters about which state governments are concerned, the ability of shareholders to vote by proxy, the right of shareholders to review the company's shareholder list, the duties and powers of inspectors of election and the procedures for adjourning the meeting.

Although annual shareholders' meetings are usually held in person, most state statutes allow actions required or permitted to be taken at an annual meeting, including the election of directors, to be taken without a meeting upon the written consent of the shareholders. These statutory provisions typically provide that action may be taken without a meeting only if a consent in writing, setting forth the action to be taken, is signed by the holders of outstanding shares having at least the minimum number of votes required to take such action at the meeting. If a matter is approved by less than unanimous consent of shareholders without a meeting, these statutes typically also require that notice of the action be provided to the shareholders who did not consent to the matter. If a public company wishes to take action by written consent (and its charter or bylaws do not prohibit such action), it must provide its shareholders with an information statement containing much of the same information included in the proxy statement described below.

If an annual meeting of shareholders is not held, state statutes generally provide that the directors must call a special meeting for the purpose of electing directors. A company's failure to hold an annual meeting also may trigger the rights of other parties. In Delaware, pursuant to Section 211 of the DGCL, the Court of Chancery, upon the application of any shareholder or director, may order a meeting if no annual meeting for the election of directors has been held for 13 months after the last annual meeting or for a period of 30 days after the date designated for the annual meeting. Other states provide that a specified percentage of the shares entitled to vote in the election of directors may demand the calling of a meeting for the election of directors.

II. FEDERAL SECURITIES LAWS

Federal regulation of the proxy solicitation process focuses on the proxy solicitation materials rather than the annual meeting itself. In Section 14 of the Exchange Act, Congress conferred on the SEC broad authority to enact appropriate rules and regulations to govern the proxy solicitation process. The SEC has used this authority to enact a comprehensive set of rules and regulations, also known as the proxy rules, intended to increase the availability of accurate information to assist shareholders in making informed decisions on whether or not to approve, reject or abstain from voting on matters presented at the annual meeting. The federal government has extended its regulation of proxy solicitations through the enactment of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley).

The proxy rules establish the legal framework for the solicitation of proxies under the federal securities laws by regulating the form and substance of the proxy statement, the form of proxy and the annual report that are distributed to shareholders in connection with annual meetings of publicly held companies. They also impose filing requirements on companies or others engaged in proxy solicitations and regulate the distribution of proxy materials to the company's shareholders.

III. STOCK EXCHANGE RULES

Companies with securities listed on a national securities exchange must also comply with the applicable listing requirements of the relevant exchange. Each of these entities has requirements that listed companies hold annual meetings—found in Section 302 of the NYSE Listed Company Manual and Rule 5620 of the Nasdaq Marketplace Rules—as well as requirements relating to notice of the record date for the meeting, the filing and distribution of the proxy material and the reporting to the entity of actions taken at the meeting.

The national stock exchanges also regulate the types of matters that are required to be submitted to shareholders for approval and the communications between beneficial owners and street name owners, including the authority and procedures for some street name owners to vote proxies on behalf of beneficial owners. For additional information, readers are encouraged to review the relevant sections of the manual or guide of the exchange on which their stock is traded.

IV. CORPORATE CHARTER AND BYLAWS

Most companies also have charter and bylaw provisions that address a host of matters related to the annual meeting of shareholders. The more typical of these provisions include requirements as to the appropriate location, date and time of the annual meeting, the manner for calling the annual meeting, the proper notice required to be given to shareholders and the procedures for establishing a record date for the annual meeting.

Some less typical charter and bylaw provisions that may impact the annual meeting include super-majority voting requirements for some matters submitted to the shareholders, which may make it more difficult to obtain approval of the matter, so-called "advance notice" provisions, which require director nominations and shareholder proposal submissions to be received by the company for consideration at the annual meeting prior to a specified date, and proxy access requirements. These provisions allow the company to plan and conduct a more orderly annual meeting with fewer surprises.

Many public companies have "advance notice" bylaw requirements. Court decisions, such as *JANA Master Fund, Ltd. v. CNET Networks, Inc.* and *Levitt Corp. v. Office Depot*, highlight the importance of careful drafting of the advance notice and related bylaw provisions with respect to procedures for shareholders to call special meetings and to act by written consent in lieu of a meeting. In these cases, the Delaware courts allowed insurgent shareholders to nominate an alternative slate of directors despite the proponents' failure to satisfy the intended requirements of the respective companies' advance notice bylaws.

A decision by the U.S. District Court for the Southern District of New York, *CSX v. The Children's Investment Fund*, also has implications for advance notice bylaws. Typical advance notice bylaws require proponents to provide information about the proponent, including its stock ownership and the proposals it intends to bring before a shareholders meeting. In the *CSX* case, the court ruled that two hedge funds had violated the federal securities laws by evading disclosure requirements through the use of equity swaps to avoid obtaining beneficial ownership of the underlying shares. Many companies are now expanding the information required by proponents in their advance notice bylaws to include all stock ownership, including derivatives, hedges, swaps and other types of synthetic securities, to address the *CSX* case. In light of these cases, companies should carefully review their advance notice and related bylaw provisions to eliminate ambiguities and conform to applicable law.

To the extent that companies adopt proxy access, this is typically implemented through an amendment to the bylaws. For additional discussion regarding proxy access, *see* “Developments in the Law for the 2019 Proxy Season—Proxy Access” and “Federal Rules and the Proxy Statement—the Proxy Statement—Proxy Access for Director Nominations.”

FEDERAL PROXY RULES AND THE PROXY STATEMENT

I. APPLICATION OF THE PROXY RULES

A. BACKGROUND

The right of shareholders to appoint an agent to vote on their behalf at an annual meeting developed within the United States in the early 1800s. The right to proxy representation has since become an essential element in the progress of corporate democracy that has facilitated the tremendous growth in the size and number of publicly held companies. This right is governed by state corporate law and the company's charter documents, nearly all of which now permit proxy voting.

By authorizing another person to act as an agent of the shareholder to vote on the proposals submitted at the annual meeting, proxy representation allows shareholders to participate in the corporate decision-making process even if they are unable to attend the annual meeting in person. Due to the broad geographic shareholder base of most public companies, which makes it difficult for shareholders to attend and participate in the annual meeting in person, in recent years the proxy solicitation process, rather than the annual meeting, has become the primary means by which corporate governance by shareholders is conducted and fundamental shareholder actions by the company are considered and approved. This process allows the company's management to seek approval of matters that require shareholder approval and compels them to make a yearly accounting of their operation of the company's business to the company's owners.

State corporate law and provisions found in corporate charter documents are generally silent on disclosure requirements for proxies and proxy solicitation materials, and until the 1930s, the federal government did not involve itself in the proxy solicitation process. The federal government first became involved in the proxy solicitation process with the adoption of the Exchange Act in 1934. In the Exchange Act, Congress authorized and required the SEC to, among other things, design appropriate rules and regulations regarding the solicitation of proxies "in the public interest and for the protection of investors."

In response to the broad rulemaking authority provided in the Exchange Act, the SEC promulgated Regulation 14A, "Solicitation of Proxies," and Schedule 14A, "Information Required in Proxy Statement"—the proxy rules. Readers should be aware that a review of Regulation 14A and Schedule 14A alone will not provide all of the information required to prepare proxy solicitation materials in compliance with the federal securities laws. Like other rules and regulations of the SEC, the proxy rules are part of the SEC's integrated disclosure system and reference various items found in other SEC regulations, including Regulation S-K. Since the adoption of the Exchange Act and the initial proxy rules, the SEC has played an active role in the proxy solicitation process by reviewing solicitation materials and adopting new rules or amending the current rules. The federal securities laws also give the SEC broad enforcement tools, including monetary penalties for noncompliance and cease-and-desist orders.

B. SOLICITATION

The proxy rules do not apply to all proxy solicitations. The rules extend only to solicitations to holders of securities registered under Section 12 of the Exchange Act, regardless of whether such securities are actively traded at the time of the solicitation.

Entities whose securities are exempt from registration under Section 12 of the Exchange Act are generally also exempt from requirements of the proxy rules. Such entities include any of the following entities that do not have equity or debt securities traded on any stock exchange or market:

- savings and loan associations (and similar institutions subject to state or federal supervision);
- specified foreign corporations;
- agricultural and other similar cooperatives;
- insurance companies;

- banks; and
- non-profit corporations.

In determining what communications are governed by the proxy rules, it is first important to determine what is a “proxy” and what is a “solicitation” under federal securities law. The proxy rules contain a broad definition of proxy that includes any assignment of the power to vote or express consent or dissent with respect to any securities on behalf of the record owner of such securities. The proxy rules also define the term “solicitation” broadly in Rule 14a-1 of Regulation 14A to include any request for a proxy and any request to execute or not execute, or to revoke, a proxy. Thus, any communication requesting that shareholders execute, withhold or revoke a proxy will be treated as a solicitation within the meaning of the proxy rules. The definition of solicitation also includes any communication furnished to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.

1. Actions not within the definition of solicitation

The proxy rules also exclude some activities from the definition of solicitation, such as furnishing a form of proxy to a shareholder upon an unsolicited request, performing actions required by the proxy rules relating to shareholder lists, mailing proxy materials and performing ministerial acts on behalf of a soliciting person. The SEC has also removed from the coverage of the proxy rules a public announcement by a shareholder of how the shareholder intends to vote on a particular matter and the reasons for such vote; provided that the shareholder is not otherwise soliciting proxies; and provided further that the communication is made publicly, or is directed to persons to whom the shareholder owes a fiduciary duty in connection with voting, or is made in response to an unsolicited request for information. *See* Rule 14a-1(l) of Regulation 14A.

2. Solicitations exempt from one or more of the proxy rules

Although the definitions of proxy and solicitation have been broadly interpreted, the SEC has adopted amendments to the proxy rules to create safe-harbor exemptions for some solicitations and to exclude others from the definition of solicitation altogether. Private solicitations meeting the following requirements have been exempted from the application of the proxy rules:

- solicitations by persons with respect to securities carried in the person’s name, in the name of the person’s nominee (except as a voting trustee) or held in the person’s custody;
- solicitations by persons in respect of securities of which the person is the beneficial owner;
- some solicitations in connection with offers and sales of securities registered under the Securities Act of 1933, as amended (Securities Act);
- solicitations in connection with actions taken under specified laws of the United States (such as the Public Utility Holding Company Act, the Bankruptcy Reform Act and others); and
- solicitations via newspaper advertisement that provide to shareholders nothing more than information regarding how to obtain the proxy statement form of proxy and other proxy materials.

To qualify for these exemptions, the person making the subject solicitation must comply with additional conditions and requirements found in the proxy rules.

In an effort to increase participation in the proxy solicitation process by interested third parties, specifically institutional investors who the federal government determined to be well equipped to provide some protection to all security holders, the SEC has excluded the following types of solicitations from all of the proxy rules other than the anti-fraud provisions found in Rule 14a-9 of Regulation 14A and the shareholder list requirements of Rule 14a-7 of Regulation 14A:

- solicitations by persons not seeking the power to act as proxy for the shareholder at any time during the solicitation;
- the rendering of voting advice by financial advisers to persons with whom the financial adviser has a business relationship;
- solicitations made (other than by the company) to no more than ten persons;

- solicitations in connection with roll-up transactions in which the soliciting party is engaging in preliminary communications with other security holders to determine whether or not to solicit proxies in opposition to such transaction;
- publications or distributions by a broker or dealer of a research report during a transaction in which the broker or dealer or its affiliate participates or acts in an advisory role; and
- certain solicitations made in electronic shareholder forums as discussed more fully below. *See* "Federal Proxy Rules and the Proxy Statement—Application of Proxy Rules—Electronic Shareholder Forums."

These exemptions also require compliance with numerous conditions. Persons wishing to take advantage of any of the exemptions discussed above should thoroughly review the proxy rules for more information on use of these exemptions, particularly Rule 14a-2 of Regulation 14A, "Solicitations to Which §240.14a-3 to §240.14a-15 Apply."

3. Solicitation before furnishing a proxy statement

The proxy rules generally require the delivery of a proxy statement prepared in compliance with the proxy rules at or before any solicitation is made for a shareholder's proxy. The proxy rules also include a safe harbor exemption from the proxy delivery requirements that allows more communication among management and shareholders regarding matters submitted for consideration at an annual meeting so long as no proxy is solicited until a proxy statement is delivered. Under this safe harbor, written solicitations may be made prior to furnishing a proxy statement if the communication:

- is filed with the SEC on the date it is first used;
- identifies the soliciting parties and provides other specified information about the soliciting parties; and
- contains a prominent legend which, among other things, advises shareholders to read the proxy statement when it becomes available.

To take advantage of this safe harbor, additional requirements must be met. Among others, the soliciting party may not deliver a proxy before a definitive proxy statement complying with the proxy rules is also delivered to the shareholders. *See* Rule 14a-12 of Regulation 14A.

4. Prohibited solicitations

While establishing requirements relating to permitted proxy solicitation activities, the proxy rules entirely prohibit the solicitation of any undated or post-dated proxies or any proxies that provide for a deemed effective date that is subsequent to the date on which the proxy is signed by the shareholder. *See* Rule 14a-10 of Regulation 14A.

C. ELECTRONIC SHAREHOLDER FORUMS

In addition to the solicitations exempted from the proxy rules discussed above, effective February 2008, the SEC amended the proxy rules to facilitate the use of electronic shareholder forums to improve the free flow of information, ideas and opinions among shareholders and between shareholders and companies. The amendments permit both companies and shareholders to establish and maintain electronic shareholder forums under the federal securities laws, provided persons using the forum do not seek, directly or indirectly, the power to act as a proxy for a shareholder and do not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of proxy or revocation, abstention, consent or authorization regarding voting, and further provided that the forum is otherwise conducted in compliance with applicable state law and the company's charter and bylaws. Additionally, to be exempt, any solicitation using an electronic forum must occur more than 60 days prior to the date announced by the company for its meeting, or if the company announces the meeting less than 60 days before the meeting, then not later than two days after the company's announcement. The amended rules also provide that neither a company nor a shareholder who established, maintained or operated the electronic shareholder forum would be liable under the federal securities laws for any statement or information provided by another person to the forum. In subsequent guidance, the SEC reiterated that the anti-fraud provisions do apply to statements made by companies in these forums, but that companies do not have a duty to respond to or correct misstatements made by third parties. *See* Rules 14a-2(b)(6) and 14a-17 of Regulation 14A.

II. THE PROXY STATEMENT

Rule 14a-3 of Regulation 14A requires that each shareholder receive a proxy statement in connection with any solicitation of the shareholder's proxy. The proxy rules contain detailed requirements concerning the contents and form of a proxy statement. Although the proxy rules contain line item requirements as to information that must be included, only responses to the line items concerning matters to be acted upon at the annual meeting must be included.

A. NOTICE OF THE MEETING

State corporate law establishes the requirement that shareholders receive adequate notice of the annual meeting and that a record date be fixed for the meeting. Under state corporate law, written notice of the meeting must generally be given to all shareholders not more than nor fewer than a fixed number of days before the date of the meeting. For example, Delaware and California corporate laws require notice of an annual meeting be provided not more than 60 nor fewer than ten days prior to the annual meeting. *See* DGCL Section 222 and CCC Section 601.

The same or a similar time period applies to the fixing of the record date by the company's board of directors. Many state corporate laws also allow a company to close the transfer books of the company some number of days prior to the annual meeting in lieu of setting a record date. Closing the transfer books interferes with trading markets, so most companies choose to establish a record date instead. The corporate laws of some states now allow companies to deliver a single notice to numerous shareholders that reside at the same address if specified conditions are met. *See* "Federal Proxy Rules and the Proxy Statement—Distribution of Proxy Materials to Shareholders—Householding."

In addition to the state corporate law issues discussed above, the proxy rules also bear on the notice requirement. Several factors should be considered in determining the amount of advance notice given to shareholders, including:

- if the company is adopting the traditional full set delivery method under the e-proxy rules, the dates required by stock exchange organizations for mailing the annual report (because most companies mail the proxy materials and the annual report together to reduce expenses, the date for mailing the annual report often influences the notice date for the annual meeting);
- if the company is adopting the notice only option under the e-proxy rules, the requirement that the notice of internet availability of proxy materials be sent at least 40 days prior to the annual meeting and the amount of time needed to post and properly format all materials on the company's website;
- the types of matters to be considered at the annual meeting (the consideration of controversial matters may require additional time to solicit proxies); and
- the requirement that companies ensure that soliciting materials be provided to beneficial owners: (1) broker-dealers and banks are obligated to forward proxy materials to beneficial owners within five business days of receipt if the company meets requirements specified in the proxy rules and provides reasonable assurance of reimbursement of expenses; and (2) companies must send broker-dealers and banks the notice of internet availability of proxy materials required under the e-proxy rules in sufficient time for those intermediaries to send their own notice to beneficial owners at least 40 days prior to the annual meeting (intermediaries are likely to require at least five days for the process involved in compiling and distributing their own notice of internet availability of proxy materials).

For more information on the foregoing, *see* "Federal Proxy Rules and the Proxy Statement—Distribution of Proxy Materials to Shareholders."

The bylaws of the company may also contain provisions governing the delivery of notice and establishment of a record date for an annual meeting, some of which may be more restrictive than the requirements of state law. Stock exchange or stock market listing rules also should be consulted as they often require notice to the exchange or market of the record date and annual meeting date. These provisions should be reviewed in preparing the notice section of the proxy statement.

It is common to begin the proxy statement with the official notice of the annual meeting. The notice of the annual meeting and the section immediately following the notice usually provide the following information required to be included in the proxy statement:

- the date, time and place of the annual meeting (or if action is to be taken by written consent, the date by which consents are to be submitted) (Item 1 of Schedule 14A);
- the mailing address of the principal executive office of the company (Item 1 of Schedule 14A);
- the date on which the proxy statement and form of proxy are first sent or given to shareholders (Item 1 of Schedule 14A);
- whether the proxy may be revoked and the procedure for revoking it (Item 2 of Schedule 14A);
- whether the shareholder has dissenter or appraisal rights and, if so, the procedures for exercising such rights (Item 3 of Schedule 14A);
- information relating to the person making the solicitation (Item 4 of Schedule 14A);
- the method by which the solicitation will be made, the anticipated costs of the solicitation and how such costs will be borne (Item 4 of Schedule 14A);
- the number of shares outstanding of each class of voting securities entitled to be voted at the annual meeting, as well as the number of votes to which each class is entitled (Item 6 of Schedule 14A);
- the record date for the meeting (Item 6 of Schedule 14A); and
- whether cumulative voting rights are involved and, if so, information describing the cumulative voting rights, the conditions precedent to their exercise, and whether discretionary authority to cumulate votes is solicited (Item 6 of Schedule 14A).

As an alternative, some companies prepare a separate notice that accompanies the proxy statement in the mailing to shareholders.

B. VOTING INFORMATION

The proxy rules also require a description of the voting procedures relating to each matter submitted to shareholders for vote. Specifically, the proxy statement must state the vote required for approval or election (other than for the approval of auditors) of each proposal and the method by which votes will be counted, including the treatment and effect of abstentions and broker non-votes under applicable state corporate law and the company's charter and bylaws. A "broker non-vote" occurs when a broker is unable to vote on a particular matter without instructions from the beneficial holder and such instructions are not received. Typically, abstentions and broker non-votes are not considered "votes cast" on the proposal, and therefore, they do not affect proposals that require the affirmative vote of a majority of the votes cast on the proposal, whereas they have the effect of votes "against" proposals requiring the affirmative vote of a majority of outstanding shares. Abstentions and broker non-votes are generally considered present at the meeting for purposes of determining whether a quorum is present. *See* Item 21 of Schedule 14A.

NYSE Rule 452 allows brokers to vote on "routine" matters if the beneficial owner of the stock has not provided specific voting instructions to the broker at least ten days before a scheduled meeting. Rule 452 lists various matters that are considered "non-routine," including the election of directors, approval of a stock plan, any matter that may affect substantially the privileges of shareholders and executive compensation matters, such as say on pay and say on pay frequency votes. On such "non-routine" matters, brokers are prohibited from voting in the absence of instructions from the beneficial owners. In casting votes on routine matters, brokers have generally voted as recommended by the board of directors.

Amendments to NYSE Rule 452 and Nasdaq Rule 2251 in 2009 and 2010, based in part on the requirements of Section 957 of the Dodd-Frank Act, eliminated broker discretionary voting of uninstructed shares in the election of directors and on executive compensation. Section 957 also requires the prohibition of such voting with respect to any "other significant matters" as determined by the SEC. However, the SEC has not yet indicated an expected timetable for the proposal and adoption of rules defining "other significant matters."

In January 2012, the NYSE expanded the limitations of NYSE Rule 452 further by issuing a memo stating that it would no longer continue its previous approach of allowing broker discretionary voting of uninstructed shares on certain corporate governance matters, including proposals to de-stagger the board of directors, majority voting in the election of directors, eliminating supermajority voting requirements, providing for the use of consents, providing rights to call a special meeting, and certain types of anti-takeover provision overrides. Thus, under NYSE Rule 452, Nasdaq Rule 2251 and Section 957 of the Dodd-Frank Act, brokers are unable to vote uninstructed shares in the election of directors or on executive compensation matters, and brokers who are NYSE members are also unable to vote uninstructed shares on certain corporate governance matters.

The limitations on broker discretionary voting described above have had, and are likely to continue to have, a considerable impact on the dynamics of director elections in uncontested elections. For example:

- *Majority Voting.* For a company that has adopted majority voting, a director nominee needs to receive at least a majority of the number of votes cast with respect to that director's election in order to be elected to the board of directors. Since brokers generally vote with management, the elimination of discretionary voting in the election of directors by brokers has meant the loss of a significant block of votes "for" nominees proposed by management and has made it more difficult for directors to achieve the majority support needed for election.
- *Disenfranchisement of Retail Investors.* Retail voters who do not provide voting instructions to their brokers no longer have such uninstructed shares voted. Therefore, institutional investors who do vote have had more influence over the election of directors, while the retail owners have been effectively disenfranchised to the extent they believe their brokers are voting their shares.
- *Influence by Activist Shareholders.* Activist shareholders are more able to push their agenda, whether new directors, vote "no" campaigns, corporate governance changes or strategic transactions, as a result of low voting turnouts.

It is estimated that as much as 70 to 80 percent of the shares of U.S. public companies are held in "street name" and managed by brokers. Section 957 of the Dodd-Frank Act, as well as the change in the NYSE's approach regarding broker discretionary voting of uninstructed shares on certain corporate governance matters and any rules the SEC may adopt in the future defining "other significant matters," will undoubtedly impact voting in upcoming proxy seasons.

C. INFORMATION ABOUT DIRECTORS, DIRECTOR NOMINEES AND EXECUTIVE OFFICERS

If action is to be taken at an annual meeting with respect to the election of directors, the proxy rules require a variety of information about the company's directors, executive officers and persons nominated to become a director or executive officer to be provided in tabular form to the extent practicable. Item 7 of Schedule 14A cross references Item 401 of Regulation S-K, which requires a description of:

- each person's name, age and position(s) and/or office(s) held within the company;
- the term of office and the period the office has been held;
- any arrangement between the director, executive officer or person nominated to become a director or executive officer and any other person(s) pursuant to which the director, executive officer or person nominated to become such was or is to be selected to his or her position or office;

- any family relationship between a director, executive officer or person nominated to become such;
- a brief five-year history of the business background of each director, executive officer or person nominated to become such, including any other public company directorships held by the person; and
- a description of any legal proceedings that (1) would be material to an evaluation of the ability or integrity of any director, director nominee or executive officer and (2) occurred within the ten years prior to the time of the proxy solicitation.

In addition, the proxy rules require that a company disclose the particular experience, attributes or skills that qualify directors and director nominees to serve as directors of the company.

If the company provides this information regarding executive officers in its Annual Report on Form 10-K under the caption "Executive Officers of the Registrant," the information need not also be provided in the proxy statement. Alternatively, such information may be incorporated by reference into the company's Annual Report on Form 10-K if it is contained in a definitive proxy statement that involves the election of directors and is filed with the SEC within 120 days after the end of the fiscal year covered by the Annual Report on Form 10-K. *See* Instruction G to Form 10-K.

The proxy rules also require that the proxy statement describe any transactions or relationships between the company and any director, director nominee, executive officer or principal shareholder or between the company and entities affiliated with these persons. *See* Item 7 of Schedule 14A.

D. VARIOUS MANNERS OF ELECTION OF DIRECTORS

What Is Majority Voting for Directors. Historically, most companies employed plurality voting for electing directors. Under a plurality voting system, directors receiving the largest number of votes "for" their election are elected and, in an uncontested election, a director receiving at least one "for" vote would be elected. In contrast, under a majority voting system, a director nominee is elected only if such nominee receives at least a majority of the "for" votes cast in his or her election.

There are two principal versions of majority voting, often referred to as "plurality plus" and "true majority" voting. The plurality plus regime is essentially the plurality voting system accompanied by a director resignation policy which requires a director to submit his or her resignation if he or she does not receive a majority of the votes cast. The company's board then determines whether to accept the director's resignation within a specified period and typically publishes the reasons for its decision in a press release. In contrast, under true majority voting, companies typically adopt a bylaw or charter provision which provides that a director must receive a majority of the votes cast to be elected in an uncontested election, i.e., an election in which the number of nominees does not exceed the number of vacant seats on the board of directors. An incumbent nominee who fails to secure the required majority vote would remain in office under the so-called "holdover rule," under which an incumbent director who is not reelected remains in office until his or her successor is duly elected and qualified. To address the holdover rule, true majority voting typically also features a director resignation policy, which generally requires each director, as a condition of his or her nomination, to execute and deliver a resignation effective upon the director's failure to garner a majority of votes in an uncontested election.

Legal Developments Facilitating Majority Voting. Developments have changed the landscape regarding director voting systems, resulting in an increased number of shareholder proposals seeking to adopt bylaws requiring majority voting for directors. Delaware law was amended in 2006 to facilitate majority voting in the election of directors. The two key aspects of those amendments provide that (1) a shareholder-adopted majority voting bylaw cannot be amended by subsequent action of the board of directors, and (2) a director's resignation may be made effective upon the occurrence of a future event or events (such as failure to receive a majority of votes cast). Other states also now permit the adoption of a majority voting structure through bylaw or charter amendment, including California (as discussed below), Virginia and Washington. In addition, the Model Business Corporation Act was amended in 2006 to permit implementation of majority voting through bylaw amendment (rather than via charter amendment, as had previously been the case), thereby providing a vehicle in most states for activist shareholders to propose binding bylaw adoption of a majority voting structure and eliminating the basis historically used by companies for exclusion of such proposals from proxy statements.

California domestic "listed corporations" which have eliminated cumulative voting may amend their bylaws or articles of incorporation to require that directors be elected by "approval of the shareholders" in uncontested elections. Listed corporations are those companies with outstanding shares listed on the NYSE or Nasdaq. The "approval of the shareholders" voting system is similar, though not identical, to a majority voting standard as the law requires both that director nominees receive the affirmative vote of a majority of the shares represented and voting at a duly held meeting at which a quorum is present and that the shares voting affirmatively constitute at least a majority of the quorum required for the meeting. The term of a director who fails to meet this standard ends at the earlier of 90 days after the vote is determined or the date on which a successor is appointed by the company's board, effectively eliminating the holdover rule.

Where Does Majority Voting Stand. According to Institutional Shareholder Services, majority voting has evolved into the prevailing standard at S&P 500 companies. Of the two majority voting systems, true majority voting is typically favored by shareholder activists because it adopts an actual majority-vote standard rather than just a resignation policy and, with the majority voting provisions included in the company's charter documents, is more difficult to change or eliminate than a corporate governance principle adopted by the company's board. Institutions have pressed hard for implementation of the true majority voting standard combined with a director resignation policy.

Withhold Vote Campaigns and Majority Voting. Under a plurality voting system, withheld votes are largely symbolic because even if 99 percent of the votes for a particular director are withheld, as long as that director receives at least one "for" vote, the director would be elected. As a result, under a plurality system, the likelihood of a failed election is quite low and the principal negative effect of withheld votes is public embarrassment. However, under plurality plus or true majority voting systems, a so-called "withhold vote campaign" has significant legal consequences because a large number of withheld votes may result in a failed election.

E. BOARD OF DIRECTORS AND COMMITTEE INFORMATION

Proxy statements must include information regarding the function of the board of directors of the company. The proxy statement must state (1) the total number of board meetings (including regularly scheduled meetings and special meetings) held during the preceding fiscal year, whether or not any director attended fewer than 75 percent of the board meetings and meetings of committees of the board on which the director served and (2) the name of any director failing to attend 75 percent of such meetings. The proxy statement also must indicate whether the company has standing audit, nominating and compensation committees, or committees performing similar functions. If such committees exist, the company must provide a description of the functions performed by each such committee, the identity of each committee member and the number of committee meetings held during the preceding fiscal year. In the case of the nominating or similar committee, the proxy statement must state whether the committee will consider nominees recommended by security holders, and, if so, describe the procedure for submitting recommendations. *See* Item 7 of Schedule 14A. One item to keep in mind is the related disclosures in quarterly and annual reports if there has been a material change to the company's procedures for security holder director nominations. Such a change will need to be reported in the company's Quarterly Report on Form 10-Q or Annual Report on Form 10-K. The SEC has stated that the adoption of procedures by which security holders may recommend director nominees, where the company previously disclosed that it did not have in place such procedures, will constitute a material change.

The composition and duties of audit committees and nominating committees were modified by the adoption of Sarbanes-Oxley and the amended corporate governance standards of the NYSE and Nasdaq. Although Sarbanes-Oxley does not directly modify proxy disclosure requirements, several of its provisions required new or modified disclosures under the proxy rules. This impact is discussed briefly below under “Federal Proxy Rules and the Proxy Statement—The Proxy Statement—Audit Committee Disclosure; Nominating Committee Disclosure.” For a full understanding of the impact of Sarbanes-Oxley on corporate governance and proxy disclosure obligations, readers should thoroughly review the provisions of Sarbanes-Oxley and consult with legal counsel regarding its impact on their particular company.

Past amendments to Item 407 of Regulation S-K regarding board of directors disclosure require companies to provide in their proxy statements a description of the board leadership structure, including whether the company has chosen to combine or separate the chairman of the board and chief executive officer positions and a statement as to why the company believes it is the appropriate structure for it given the specific characteristics or circumstances of the company. If a company has combined the chairman of the board and chief executive officer positions, it will be required to disclose whether and why it has a lead independent director and to discuss the specific role the lead independent director plays in the leadership of the company. In addition, proxy statements must include a discussion of the extent of the board’s role in the risk oversight of the company and the effect that such risk oversight has on the board’s leadership structure.

A recent law signed by the Governor of California requires any publicly held domestic or foreign corporation whose shares are listed on a major U.S. stock exchange and with principal executive offices located in California to have a minimum number of women on their board of directors. For a discussion of the new rule, *see* “Developments in the Law for the 2019 Proxy Season—Diversity on the Board of Directors.”

F. EXECUTIVE COMPENSATION DISCLOSURE

In response to investor concerns regarding the quality and transparency of executive compensation disclosure, the SEC adopted rules in 2006 regarding disclosure of executive and director compensation required in public company proxy statements, annual reports and registration statements. These rules became effective for the 2007 proxy season and comprehensively revised and expanded existing executive and director compensation disclosure rules. This was accomplished by both enhanced narrative disclosure relating to companies’ compensation policies and practices in a new CD&A section, increased tabular disclosure contained in the Summary Compensation Table and the addition of new tabular presentations addressing equity related holdings, post-employment compensation and director compensation.

In addition, in December 2009, the SEC adopted rules that require public companies to provide enhanced disclosure in proxy statements, Form 10-Ks, Form 8-Ks and other reports filed with the SEC concerning risk, compensation and corporate governance. These rules include: (1) enhanced disclosures concerning a company’s compensation policies and risks associated therewith; (2) changes in the manner in which the value of stock and option awards are reported; (3) disclosures concerning director qualifications; (4) disclosures concerning company leadership structure; (5) disclosures concerning potential conflicts of interest of compensation consultants; (6) disclosures of the board of directors’ role in risk management; (7) accelerated timing in the reporting of shareholder voting results; and (8) clarifications relating to proxy solicitations.

The 2009 SEC amendments to Item 402 of Regulation S-K require disclosure of information about how a company’s overall compensation policies for employees create incentives that can affect the company’s risk and management of that risk. Separate from the CD&A, the amendments require a company to discuss and analyze its broader compensation policies and practices for employees generally, including non-executive officers, if risks arising from those compensation policies or practices are reasonably likely to have a material adverse effect on the company. Although the 2009 amendments do not specify a location for the disclosure, companies may place it with other disclosures about compensation committee activities.

Furthermore, the proxy rules require extensive disclosures about the compensation paid by public companies to NEOs, which are defined in the proxy rules to include: (1) any person who served as the PEO of a company at any time during the prior fiscal year; (2) any person who served as the PFO of a company at any time during the prior fiscal year; (3) the company's three most highly compensated executive officers, other than the PEO and PFO, serving as of the end of the preceding fiscal year; and (4) up to two additional individuals who would have been included under (3) above, but for the fact that they were not executive officers at the end of the preceding fiscal year. The determination of who qualifies as an NEO is based on total compensation (rather than just base salary and bonus as was previously the case), except that pension value and non-qualified deferred compensation earnings are excluded when making this determination.

The information relating to the NEOs' compensation must be presented, to the extent applicable, in narrative form and tabular form as described below. However, the proxy rules allow disclosure not to be made in response to the requirements of Item 402 of Regulation S-K if the disclosure relates to a transaction between the company and a third party with the primary purpose of furnishing compensation to an NEO and if the disclosure is provided elsewhere in the proxy statement in accordance with Item 404 of Regulation S-K. *See* "Federal Rules and the Proxy Statement—the Proxy Statement—Certain Relationships and Related Party Transactions." In addition, Item 402(u) of Regulation S-K adopted by the SEC in August 2015 pursuant to Section 953(b) of the Dodd-Frank Act requires companies (excluding EGCs, smaller reporting companies and foreign private issuers) to disclose annually (1) the median of the annual total compensation of all company employees, excluding the PEO, (2) the annual total compensation of the PEO and (3) the ratio of the amounts in clauses (1) and (2). For a discussion of the new rules and Item 402(u), *see* "Developments in the Law for the 2019 Proxy Season—Enhanced Proxy Disclosure Under the Dodd-Frank Act—Internal Pay Equity."

Effective for fiscal years beginning on or after July 1, 2019, or on or after July 1, 2020 in the case of companies that qualify as smaller reporting companies or EGCs, pursuant to Section 955 of the Dodd-Frank Act, companies must disclose in their proxy and information statements whether employees or directors of the company are allowed to purchase financial instruments to hedge against a decrease in the value of the relevant company's equity securities. For additional detail on the new rule, *see* "Developments in the Law for the 2019 Proxy Season—Enhanced Proxy Disclosure Under the Dodd-Frank Act—Disclosure of Director and Employee Hedging."

Under the Jumpstart Our Business Startups Act (JOBS Act), EGCs may take advantage of the scaled executive compensation disclosure that previously was available only to smaller reporting companies and thereby avoid certain of the disclosure requirements described in this section. *See* "Federal Rules and the Proxy Statement—the Proxy Statement—Executive Compensation Disclosure—The JOBS Act."

The information presented below is a summary of the general provisions of the proxy rules related to compensation disclosure. Because these terms and provisions are complex and often difficult to understand, readers are urged to review the proxy rules (specifically Item 8 of Schedule 14A and Item 402 of Regulation S-K) for more information relating to executive compensation disclosure in proxy statements.

1. Compensation discussion and analysis

The CD&A provides a narrative general overview and analysis of a company's compensation policies, programs and practices for NEOs during the last fiscal year and, if appropriate, any actions taken since the end of such fiscal year and prior to the filing of the proxy statement which relate to compensation paid for the last fiscal year. The CD&A should identify the principles underlying the company's executive compensation policies and decisions. It must be comprehensive in scope and should provide perspective on the compensation policies underlying the numerical disclosure and other information contained in the tabular disclosure, and it should not simply repeat such disclosure. This section must contain disclosure regarding the material elements of a company's executive compensation program and how compensation is determined and paid. Such disclosure must specifically answer the following seven questions:

1. What are the objectives of the company's compensation program?

2. What is each compensation program designed to reward?
3. What is each element of compensation?
4. Why does the company choose to pay each element?
5. How does the company determine the amount (and, where applicable, the formula) paid for each element?
6. How does each element and the company's decisions regarding that element fit into the company's overall compensation objectives and affect decisions regarding other elements?
7. Has the company considered the results of its most recent shareholder advisory vote on executive compensation in determining compensation policies and decisions and, if so, how has that consideration affected the company's executive compensation decisions and policies?

To aid in formulating responsive disclosure, the SEC has identified 15 topics that may be appropriate for inclusion in this section, depending on the company's facts and circumstances. *See* Item 402(b) of Regulation S-K. Discussion of each topic is not required; however, discussion should be included if material to the company's executive compensation policies in light of the company's particular facts and circumstances.

Applicable disclosure must also include specific statements outlining corporate policies or practices in effect regarding the timing of stock option grants and the release of material information, the reasons the company chose a particular grant date for option awards and the methodology for selecting exercise prices and other terms of options, including, if applicable, the method for determining the price of the option award if not based on the stock's closing trading price on the applicable grant date. With respect to performance-based compensation, the CD&A must discuss the performance factors considered in setting executives' pay. In addition, if the compensation decisions or policies applicable for any NEO differ from those applicable to other NEOs, such differences, and the reasons for such differences, must be discussed.

Notably, the CD&A will be deemed "filed" with the SEC and therefore subject to the general disclosure and liability provisions of the Securities Act and the Exchange Act. Because the CD&A will be incorporated by reference or in some cases directly included in the Annual Report on Form 10-K, the CD&A will be subject to the chief executive officer and chief financial officer certifications required by Sarbanes-Oxley. The SEC has indicated that the CD&A is a company disclosure and, in making such certifications, a company's chief executive officer and chief financial officer are not being called upon to certify any deliberations of the company's compensation committee and are permitted to rely on the "furnished" compensation committee report discussed below.

2. Summary compensation table

The Summary Compensation Table is the centerpiece of a company's tabular disclosure of executive compensation and provides a comprehensive overview of executive compensation for the NEOs. The Summary Compensation Table must include, in addition to the names and other descriptive information, a description of the salary, bonus, stock awards, option awards, non-equity incentive plan compensation, change in pension value and non-qualified deferred compensation earnings, all other compensation and total compensation paid to or earned by the NEOs during the three preceding fiscal years. *See* Item 402(c) of Regulation S-K. In addition, the proxy rules require that the Summary Compensation Table be supplemented by a number of additional tables which are discussed in further detail below.

All compensation included in the Summary Compensation Table must be included in the fiscal year in which it was earned (rather than actually paid), even if subject to forfeiture conditions. In addition, all columns in the Summary Compensation Table are to be denominated in dollar values (rather than share or unit numbers).

Salary and Bonus. Under the proxy rules, all earned salary and bonus (cash and non-cash, including salary and bonus that is deferred) is included in the fiscal year in which it is earned in the appropriate column. If earned but deferred salary or bonus compensation is not calculable at the time of disclosure, the company must include footnote disclosure and is obligated to update its disclosure with a Form 8-K when such compensation becomes calculable (either through a payment, a decision to make a payment or another occurrence of which the amount becomes calculable in whole or in part). Furthermore, bonuses received by an NEO under a company's performance-based bonus plan will generally be included in the Non-Equity Incentive Plan Compensation column, rather than the Bonus column (unless a portion of the bonus is discretionary, in which case the discretionary portion should be included in the Bonus column).

Stock Awards. The aggregate grant date fair market value for all stock awards (e.g., restricted stock, restricted stock units, phantom stock, phantom stock units, common stock equivalent units or other similar awards which do not have option-like features) is required to be included in the Stock Awards column. The proxy rules require that the aggregate grant date fair market value of such awards be computed in accordance with FASB Accounting Standards Codification Topic 718 (ASC Topic 718). In addition, footnote disclosure is required of the assumptions used in the fair value determination.

Option Awards. The proxy rules require that the aggregate grant date fair market value of all stock option awards (including stock appreciation rights), as determined in accordance with ASC Topic 718, be disclosed in the Option Awards column. Footnote disclosure is also required of the assumptions used in the fair value determination.

Non-Equity Incentive Plan Compensation. The Non-Equity Incentive Plan Compensation column requires the disclosure of all awards earned during a fiscal year pursuant to non-equity incentive plans. It includes all incentive awards that are not included in the Stock Awards or Option Awards column. Most significantly, the Non-Equity Incentive Plan Compensation column will include amounts earned under performance-based cash bonus plans (whether single or multi-year) that previously would have appeared in the Bonus column. If the performance measure for an award is satisfied in a fiscal year, the award must be disclosed even if payment of the award is deferred. Also, earnings on the outstanding awards must be disclosed. Footnote disclosure must identify and quantify awards and payment terms.

Recent SEC enforcement activity has clarified how any discretionary portion of non-equity incentive plan compensation should be disclosed. If any portion of the compensation is discretionary, then such discretionary portion should be included in the Bonus column while the performance-based portion should continue to be included in the Non-Equity Incentive Plan Compensation column.

Change in Pension Value and Non-Qualified Deferred Compensation Earnings. The aggregate increase in the actuarial value of any defined benefit pension plan must be disclosed in the proxy statement. This disclosure applies to both tax-qualified defined benefit plans and non-tax-qualified supplemental executive retirement plans. In addition, for plans that are not defined benefit plans, above-market earnings on non-qualified deferred compensation must be disclosed (and disclosure may be limited to the above-market or preferential portion). Footnote disclosure must separately identify and quantify these amounts.

All Other Compensation. All other compensation not disclosed in any other column of the Summary Compensation Table is required to be disclosed in the All Other Compensation column. Included in this column is the value of any severance payments, change in control payments, contributions by the company to defined benefit contribution plans, company-provided insurance premiums, company-provided tax gross-ups and all perquisites and other personal benefits (unless all such perquisites and other personal benefits have an aggregate value of less than $10,000). Perquisites and other personal benefits must be described in the footnotes in a level of detail sufficient for a shareholder to identify the particular nature of the benefits received. The SEC has provided guidance in evaluating when a particular item is a perquisite or personal benefit. In particular, an item is *not* a perquisite or personal benefit it if is integrally and directly related to the performance of the executive's duties. For example, the provision to an NEO of a mobile phone or laptop computer may be integrally and directly related to the performance of the executive's duties and thus not a perquisite. Otherwise, an item is a perquisite or personal benefit if it confers a direct or indirect benefit that has a personal aspect, regardless of whether it is provided for some business reason or for the convenience of the company, unless it is generally available on a non-discriminatory basis to all employees.

Total Compensation. The Total Compensation column, which appears on the far right hand side of the Summary Compensation Table, sets forth the sum total of all of the preceding columns of the table. As the name suggests, it is intended to provide a single aggregate dollar value for compensation of each NEO with respect to a fiscal year.

3. Companion compensation tables

The proxy rules require proxy statements to also disclose in several additional tables other compensation paid to or earned by the NEOs.

Grants of Plan-Based Awards Table. The rules have consolidated all disclosure for plan-based awards (including stock awards, option awards and non-equity incentive compensation awards) into a single table called the Grants of Plan-Based Awards Table. As discussed above, non-equity incentive compensation awards will include performance-based awards which, under the current rules, were included in the Bonus column of the Summary Compensation Table. The Grants of Plan-Based Awards Table includes (1) each award's grant date, (2) the award's estimated future payouts, (3) the number of shares of stock or units underlying a stock or option award and (4) the exercise or base price of an option award. Estimated future payouts must be disclosed at threshold, target and maximum amounts (shown in dollars for non-equity incentive plan awards and shares for equity incentive plan awards). *See* Item 402(d) of Regulation S-K.

In conjunction with the Grants of Plan-Based Awards Table, additional tabular disclosure is required with respect to options if (1) the exercise or base price is different than the closing market price as of the date of the grant (in which case an adjoining column showing the closing market price as of the date of the grant would be required) or (2) the grant date is different from the date on which the compensation committee or full board of directors took action to grant the option or was deemed to have taken such action (in which case an adjoining column showing such date would be required). Additionally, if the exercise or base price is different than the closing market price as of the date of the grant, narrative disclosure including a description of the methodology for determining such price is required.

Outstanding Equity Awards at Fiscal Year-End Table. The Outstanding Equity Awards at Fiscal Year-End Table discloses all equity-based compensation awards outstanding at fiscal year-end, whether or not performance based. It is designed to provide a method of estimating potential amounts realizable by each NEO with respect to outstanding equity-based awards. With respect to option awards, the table requires disclosure on an award-to-award basis regarding (1) the number of securities underlying unexercised options (with separate columns for options that are unexercisable), (2) the number of securities underlying unexercised unearned options issued pursuant to an equity incentive plan, (3) the exercise price and (4) the expiration date. With respect to stock awards, this table requires disclosure regarding the number of shares that have not vested and the market value of shares that have not vested (in both cases, distinguishing between those granted pursuant to an equity incentive plan and those which were not). Footnote disclosure must include a description of the vesting dates of awards. *See* Item 402(f) of Regulation S-K.

Option Exercises and Stock Vested Table. This table summarizes all amounts realized on the vesting and exercise of any equity-based compensation awards in the latest fiscal year. With respect to both option and stock awards, this table requires disclosure of the number of shares acquired and the value realized upon exercise or vesting. *See* Item 402(g) of Regulation S-K.

Pension Benefits Table. The Pension Benefits Table requires disclosure of the actuarial present value of each NEO's accumulated benefit under any of the company's defined benefit plans (including tax-qualified and non-qualified defined benefit plans). The present value is calculated as of the measurement date used in the financial statements for the company's last completed fiscal year, taking into account the executive's current compensation, the plan's normal retirement age, and the same actuarial assumptions used for financial reporting purposes under GAAP. However, disclosure is made without regard to the forms of benefits available under the plan. The table also requires disclosure of each NEO's years of credited service and payments received during the company's last fiscal year under each plan. A separate row of disclosure is required for each defined benefit plan in which the NEO participates. In addition, the table must be accompanied by a narrative description of all material factors necessary to interpret the table. *See* Item 402(h) of Regulation S-K.

Non-Qualified Deferred Compensation Table. This table requires disclosure, with respect to each NEO during the prior fiscal year, of such NEO's and the company's contributions and all earnings, withdrawals and distributions under any non-qualified defined contribution plans (including non-qualified deferred compensation plans). Disclosure of each NEO's last fiscal year-end balance under such plans is also required. Narrative disclosure of all material facts necessary to understand the table must also be included. *See* Item 402(i) of Regulation S-K.

Severance and Change of Control Payments. Companies must provide specific narrative disclosure of the amount of any payment or benefit that an NEO may receive upon termination of employment, change in responsibilities, or upon a change of control, including any tax gross-up payments and post-termination health care benefits. Specifically, the proxy rules require disclosure of the following regarding such payments and benefits:

- the specific circumstances that would trigger the payment;
- quantitative and narrative disclosure regarding the estimated payments and benefits, even where uncertainties exist as to amounts payable under the particular arrangement;
- disclosure regarding when the payments and benefits are paid (e.g., lump sum or over time);
- how the payments and benefits are determined;
- the material conditions and obligations applicable to the receipt of the payments and benefits (e.g., non-competition restrictions), including any provisions regarding waiver or breach of these provisions; and
- any other material factors regarding the agreement governing such payments.

Companies are not required to disclose payments or benefits that do not discriminate in favor of a company's executive officers and are available generally to all salaried employees. *See* Item 402(j) of Regulation S-K.

4. SEC observations regarding the CD&A

In recent years the SEC has made it clear through numerous reports, speeches, comment letters and interpretations that it believes companies must continue to improve their CD&As by ensuring that they are clear, concise and understandable with a meaningful analysis of how and why compensation committees make specific compensation decisions. The SEC has also made it clear that the manner of presentation is key. The CD&A needs to be in plain English and techniques such as executive summaries, overviews and layered disclosure should be used in tandem with charts and graphs to present executive compensation information in a way that helps readers better understand the company's plans, policies and practices.

(a) Increased analysis

Analysis. Companies have been asked to focus their CD&As on how they analyzed compensation information and why their analysis resulted in particular forms and amounts of compensation. The key points of such an analysis and disclosure include, as appropriate: (1) the key analytic tools used by the compensation committee; (2) the findings that emerged from the analysis; and (3) the resulting actions taken impacting executive compensation in the prior year.

Performance Targets. With respect to the disclosure of performance targets, a company first needs to determine whether performance compensation is a material element of its compensation program. If not, then performance targets do not need to be discussed. But then the company should not describe its compensation policy as one that is pay for performance. If performance compensation is a material element of its compensation program, the company is required to disclose performance targets unless it is able to demonstrate that disclosure of these targets would result in competitive harm. The company need only disclose the performance targets for the prior fiscal year, unless current year targets impact the compensation reported for prior years, in which case current year targets must also be disclosed. If the company withholds disclosure of these targets on the basis of competitive harm, it needs to disclose with specificity the difficulty or likelihood of achieving the targets. Companies are advised to draft a written analysis contemporaneous with the decision to omit disclosure on the basis of competitive harm to better substantiate the legal basis why such disclosure is excluded.

Difference in Compensation Policies and Decisions. Where policies or decisions for individual NEOs appear to be materially different based on the disclosure, companies have been asked to discuss these differences and the rationale for such differences.

Benchmarks. Where companies state that they use comparative compensation information, they have been asked to provide a more detailed explanation of how they used this information, how the information affected their compensation decisions, how the peer group was selected and in some circumstances specifically identify the companies which were used in the benchmark analyses. The use of broad-based third-party surveys to obtain a general understanding of current compensation practices is not considered benchmarking for this purpose.

Change-in-Control and Termination Arrangements. Companies have been asked to disclose the basis for the material terms and payment provisions in their change-in-control and termination arrangements.

Corporate Governance. Companies have been asked to describe more specifically the role of their PEOs in making compensation decisions, as well as the role of, and any material instructions provided to, their compensation consultants.

(b) Manner of presentation

Companies have been asked to make material information more prominent and de-emphasize less important information. For example, companies should emphasize in the CD&A how and why they established certain compensation levels and shorten discussions of compensation program mechanics or move them to the narrative disclosure for the appropriate tables. The SEC has also suggested that additional charts, tables and graphs, not specifically required by the CD&A rules, are helpful and that careful drafting with plain English principles can result in shorter, more concise and effective disclosures. Where companies use boilerplate disclosure, they have been asked to provide a clear and concise discussion of their own facts and circumstances, and where companies repeat information from the compensation tables in the CD&A, they have been asked to replace the repetitive disclosure with analysis.

5. Say on pay votes

With the advent of say on pay votes discussed below, a company should consider the CD&A as a means of explaining and justifying to its shareholders its compensation structure. By providing an executive summary, more analysis and specifically describing in plain English the bases for its compensation structure, the company may mitigate the risk of a shareholder no-vote on its executive compensation. In addition, for each year following the first year a company includes a say on pay vote in its proxy materials, the company is required to include disclosure in the CD&A regarding whether and, if so, how it has considered the results of its most recent say on pay vote in determining compensation policies and decisions and how that consideration has affected the company's executive compensation decisions and policies.

6. The JOBS Act

In April 2012, the JOBS Act was signed into law. The JOBS Act was designed to increase American job creation and economic growth by improving access to the public capital markets for small businesses and startup companies. Among other things, the JOBS Act streamlines the initial public offering (IPO) process for EGCs. In general, a company will qualify as an EGC if it had annual gross revenues of less than $1.07 billion (initially $1 billion and adjusted for inflation in 2017) during its most recently completed fiscal year and completed its IPO on or after December 9, 2011, and it will remain an EGC until the earliest of the following:

- the last day of the fiscal year in which it has annual gross revenues of $1.07 billion or more;
- the last day of the fiscal year following the fifth anniversary of its IPO;
- the date on which it has issued more than $1 billion in non-convertible debt in the preceding three years; and
- the date on which it becomes a large accelerated filer (generally a company subject to the requirements of the Exchange Act for at least twelve months with a public float of at least $700 million).

Once public, EGCs benefit from the "IPO on-ramp," a transition period during which they are exempt from certain costly requirements of being a public company. During the IPO on-ramp, EGCs may take advantage of the scaled executive compensation disclosure that previously was available only to smaller reporting companies (generally companies with a public float of less than $75 million). As a result, EGCs are able to, among other things:

- omit the CD&A section from their proxy statement and other filings;
- include compensation information for only three NEOs (the PEO and two other most highly compensated executive officers), rather than five NEOs;
- provide only three of the seven compensation tables otherwise required (Summary Compensation, Outstanding Equity Awards at Fiscal Year-End and Director Compensation Tables);
- cover only two years in the Summary Compensation Table, rather than three years; and
- omit the quantification of potential payments that may be received upon termination of employment or change in control.

In addition, EGCs are exempt from the Dodd-Frank requirements to include shareholder votes on executive compensation in their proxy materials, as well as the Dodd-Frank requirements to include disclosures regarding the relationship between executive compensation and financial performance (yet to be adopted) and the ratio between PEO compensation and median employee compensation in their proxy materials (adopted in 2015). For more information on such requirements, *see* "Developments in the Law for the 2019 Proxy Season—Enhanced Proxy Disclosure Under the Dodd-Frank Act" and "Federal Proxy Rules and the Proxy Statement—The Proxy Statement—Shareholder Approval of Executive Compensation."

G. SHAREHOLDER APPROVAL OF EXECUTIVE COMPENSATION

One of the most significant changes to the proxy rules to come from the Dodd-Frank Act is the requirement for shareholder votes on executive compensation, commonly referred to as "say on pay" votes. All public companies (excluding EGCs) are required to include the following votes in their proxy materials:

1. Advisory vote on executive compensation: "say on pay"

Every public company (excluding EGCs) must, beginning with its first shareholder meeting held on or after January 21, 2011 (or January 21, 2013 for smaller reporting companies), and at least once every three years thereafter, include a separate non-binding shareholder advisory vote on NEOs' compensation in its proxy materials. The proxy materials must indicate that the say on pay vote is to approve the compensation of the company's NEOs as disclosed pursuant to Item 402 of Regulation S-K. Although no specific language or form of resolution is required, the SEC provided a sample resolution that would satisfy the requirements of the Dodd-Frank Act. The form resolution is as follows:

> RESOLVED, that the compensation paid to the company's named executive officers, as disclosed pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis, compensation tables and narrative discussion, is hereby APPROVED.

2. Say on pay: frequency vote

Every public company (excluding EGCs) must, beginning with its first shareholder meeting held on or after January 21, 2011 (or January 21, 2013 for smaller reporting companies), and at least once every six years thereafter, include a separate non-binding shareholder advisory vote on whether its say on pay vote should be held every one, two or three years. No specific language or resolution is required, but shareholders must be given the following four choices regarding the vote: every year, every two years, every three years, or abstain. If no choice is selected by a shareholder, the proxy may be voted in accordance with management's recommendation if the company includes the recommendation in the proxy statement and includes language regarding how uninstructed shares will be voted on the proxy card. The frequency vote is required even if the company is already conducting its say on pay vote annually and intends to continue this practice.

3. Say on pay: golden parachute vote

Every public company (excluding EGCs) must, in initial filings with the SEC on or after April 25, 2011, include a separate non-binding shareholder advisory vote on executive change in control payments in proxy statements or consent solicitation materials where shareholders are voting on an acquisition, merger, consolidation or proposed sale or disposition of all or substantially all of the company's assets. Companies are required to clearly and simply describe the change in control compensation arrangement and disclose the aggregate amount of such compensation for each NEO. The separate advisory vote to approve the golden parachute payments is not required if such payments have already been subject to a general say on pay vote.

H. COMPENSATION COMMITTEE REPORT

The proxy statement must include a report by the compensation committee of the board of directors (or, in the absence of such committee, the entire board of directors) containing a statement as to whether the compensation committee has reviewed and discussed the CD&A with management and whether it has recommended that the CD&A be included in the company's annual report and proxy statement.

The proxy rules require the compensation committee report to be included only in proxy statements for meetings at which directors are to be elected. Further, the compensation committee report must be presented over the names of the committee members. *See* Item 407(e) of Regulation S-K. Because directors are ordinarily elected at annual meetings, the compensation committee report is generally included in proxy statements for the annual meeting of shareholders.

The compensation committee report is considered "furnished" and not "filed" with the SEC and therefore will be subject to less stringent liability standards under applicable securities laws than the CD&A.

I. DIRECTOR COMPENSATION DISCLOSURE

The proxy rules require the inclusion of a Director Compensation Table in proxy statements, with accompanying narrative disclosure. The Director Compensation Table resembles the Summary Compensation Table for executive officers discussed above, but only presents information with respect to the company's last fiscal year. Columns in the table include the following:

- fees earned and paid in cash;
- stock awards;
- option awards;
- non-equity incentive plan compensation;
- change in pension value and non-qualified deferred compensation earnings;
- all other compensation; and
- total compensation.

The All Other Compensation column includes items similar to those included in the Summary Compensation Table for executive officers. The final rules identify several items that must be included in that column, the most significant of which are:

- value of perquisites and other personal benefits unless the aggregate amount of such compensation is less than $10,000;
- awards under director legacy or charitable award programs;
- consulting fees;
- tax reimbursements;
- discount stock programs not generally available to employees;
- contributions or allocations to defined contribution or other deferred compensation plans;
- actuarial increases in defined pension plans;
- value of life insurance premiums paid by the company for the director's benefit; and
- payments in connection with the director's resignation, retirement, termination or change in control of the company.

Similar rules apply to completing the Director Compensation Table as apply to the corresponding column of the Summary Compensation Table. In addition, any material information necessary to understand the amounts disclosed in the table must be described in narrative format following the table. *See* Item 402(k) of Regulation S-K. For a discussion of lawsuits surrounding director compensation disclosure, *see* "Preparing For The Annual Meeting—Shareholder Lawsuits."

In addition, Nasdaq-listed companies are required to disclose on their website and/or their proxy statements compensation paid by third parties to directors or nominees for directors, including the material terms of any such agreements and arrangements. Compensation paid is construed broadly by Nasdaq and is intended to include non-cash compensation or other forms of payment, such as health insurance premiums or indemnifications. A listed company is required to make this disclosure annually, until the earlier of either the resignation of the director in question or one year following the termination of the compensation arrangement or agreement. If not done already, Nasdaq-listed companies should consider updating D&O Questionnaires to determine if any such disclosure is required. For a discussion of D&O Questionnaires, s*ee* "Federal Proxy Rules and the Proxy Statement—Due Diligence Regarding Proxy Materials."

J. BENEFICIAL OWNERSHIP INFORMATION

The proxy statement must also include information relating to the beneficial ownership of securities of the company by the NEOs, the company's directors and director nominees (naming them), holders of more than five percent of any class of the company's voting securities and all directors and executive officers of the company as a group (without naming them). *See* Item 5 of Schedule 14A and Item 403 of Regulation S-K. The required information regarding beneficial ownership of the company's securities includes:

- the title of the class of securities;
- the name and address of the beneficial owner;
- the amount and nature of the beneficial ownership; and
- the percentage of the class of securities so owned.

Under the proxy rules, "beneficial ownership" is determined in accordance with Rule 13d-3 promulgated under the Exchange Act, which defines a beneficial owner as a person with possession of sole or shared voting power or investment power with respect to the securities. "Voting power" is defined to include the power to vote or direct the vote of a security, and "investment power" is defined to include the power to dispose or direct the disposition of a security. A person is also deemed to have beneficial ownership of all securities that the person has the right to acquire within 60 days of the determination date through the exercise or conversion of an option, warrant or other security. Securities that are the subject of a voting trust, proxy, power of attorney or other similar agreement are also deemed to be "beneficially owned" for purposes of proxy statement disclosure.

Although the company collects the required information about directors and executive officers through the use of annual questionnaires sent to them by the company, the information regarding five-percent holders may be more difficult to obtain if the five-percent holders are not officers or directors. In such an event, the company can obtain this information from statements filed with the SEC by such parties. The proxy rules specifically provide that the company may rely upon information set forth in such statements unless the company knows or has reason to believe that the information is not complete or accurate, or that a statement or amendment should have been filed and was not.

K. SECTION 16 REPORTS

The federal securities laws contain requirements that each director, executive officer and holder of ten percent or more of any class of a company's equity securities file with the SEC reports disclosing transactions by such persons in the company's securities. A failure to file these reports on a timely basis during the company's last completed fiscal year must be disclosed in the proxy statement under a caption entitled "Section 16(a) Beneficial Ownership Reporting Compliance." In addition, where a company is incorporating by reference certain information disclosed in the proxy that is required in the company's Annual Report on Form 10-K, the company may have to disclose on the front page of its Annual Report on Form 10-K that it will be reporting such delinquency. The disclosure must include the identity of each person failing to make a report, the number of reports filed late, the number of untimely reported transactions and any known failure to file a required report. The proxy rules specifically allow the company to rely upon a review of Forms 3, 4 and 5, and amendments thereto, submitted to it, as well as any written representations from the persons required to make such filings that no Form 5 is required. *See* Item 7 of Schedule 14A and Item 405 of Regulation S-K.

Sarbanes-Oxley, and the rules issued by the SEC thereunder, accelerated the dates by which Section 16 reports must be filed following most transactions in the company's securities by directors, executive officers and ten-percent holders to two business days following the transaction and require that all Section 16 reports be filed with the SEC electronically. Persons responsible for preparing the company's proxy materials should review insiders' transactions carefully to ensure compliance with the accelerated filing requirements and report in the proxy statement any failures.

L. AUDIT COMMITTEE DISCLOSURE

The proxy rules require significant disclosures about the composition and function of the audit committee, including the following:

- if the company's securities are listed, a statement whether the members of the audit committee are "independent," within the meaning of the listing standards applicable to the company;
- if the audit committee includes a director who is not independent, the company must disclose the nature of the relationship that makes the individual not independent and the reasons the board appointed such person to the audit committee;
- if the company's securities are not listed, a statement whether the company has an audit committee established in accordance with the Exchange Act, and if so, whether the members of the committee are "independent," within the meaning of the listing standards of any registered national securities exchange or association; provided that the listing standards used are applied consistently to all members of the committee; and
- whether the board of directors has adopted a written charter for the audit committee (if so, the company is required to disclose whether a current copy of the charter is available to shareholders on the company's website, and if so, to provide the website address. If a current copy of the charter is not available on the company's website, the company must include a copy of the charter as an appendix to its proxy statement at least once every three fiscal years. If a current copy of the charter is not available on the company's website and is not included as an appendix to its current proxy statement, the company must identify in which of the prior proxy statements the charter was included).

Pursuant to the requirements of Sarbanes-Oxley, the SEC enacted Rule 10A-3 promulgated under the Exchange Act. Rule 10A-3 requires national securities exchanges and associations such as the NYSE and Nasdaq to decline to list securities of any company that fails to comply with certain audit committee requirements mandated by Sarbanes-Oxley. The NYSE and Nasdaq have adopted corporate governance rule changes that parallel and expand the requirements of Rule 10A-3 and Section 10A(m) of the Exchange Act. The following discussion explains the general requirements of Rule 10A-3 and identifies certain variations in the NYSE and Nasdaq rules. In addition, differences exist in the application and content of Rule 10A-3 and the NYSE and Nasdaq requirements as they apply to investment companies and foreign private issuers. Such companies should consult legal counsel for additional information.

1. Audit committee independence

Rule 10A-3 requires all audit committee members to be independent. Under the rule, audit committee members may not accept any consulting, advisory or other compensatory fee from the company or any of its subsidiaries. Thus, the rule prohibits payments to an audit committee member for services as an officer, employee or consultant of the company, but does not forbid an audit committee member from accepting payments for service as a director or member of any board committee or under a retirement plan. The rule also prohibits indirect compensation by prohibiting payments to current spouses, minor children or stepchildren or children or stepchildren currently sharing a home with the audit committee member. The NYSE and Nasdaq rules broaden this prohibition by also forbidding payments to additional family members, including parents, adult children, mothers- and fathers-in-law, sons- and daughters-in-law, sisters- and brothers-in-law and anyone (other than domestic employees) residing in the audit committee member's home. Rule 10A-3 further restricts indirect compensation by prohibiting payments to certain associated entities of which the audit committee member is currently a partner (unless merely a limited partner) or member, serves as a managing director or executive officer or occupies a similar position. Such associated entities include entities that provide accounting, consulting, legal, investment banking or financial advisory services to the company or any of its subsidiaries.

Rule 10A-3 also forbids any person affiliated with the company or any of its subsidiaries from serving on the audit committee. With respect to this requirement, the SEC adopted a safe harbor that excludes any person or entity from affiliate status if that person or entity is not an executive officer or shareholder owning ten percent or more of any class of voting equity securities of the company. Additionally, Rule 10A-3 excludes outside directors and passive owners of an affiliate of the company from automatic designation as affiliates themselves. Automatic designation as an affiliate does apply to executive officers, directors who are also employees of an affiliate, and general partners and managing members of an affiliate.

The NYSE and Nasdaq rules apply the following additional independence criteria:

- the rules require the board of directors of each listed company to affirmatively determine that each audit committee member has no material relationship with the company that would jeopardize the director's ability to exercise independent judgment;
- the rules prohibit any person who is employed or whose family member is employed as an executive officer of another corporation from serving on the company's audit committee if at any time within the past three years any of the company's executive officers served on the compensation committee of the other company;
- under the rules, any person who is or whose family member is employed by or affiliated with any of the company's current or former auditors, and under Nasdaq's rules, any person who has helped to prepare the company's or any of its subsidiaries' financial statements, may not serve on the audit committee until three years after that affiliation or employment relationship ends, and under NYSE's rules, any person with an immediate family member who is a partner in the company's auditing firm, regardless of that person's position in a "professional capacity" at the firm, will not be considered independent;

- the rules prevent audit committee service by persons having certain employment or ownership relationships with organizations that pay significant sums to or receive significant sums from the company (the precise level of those sums varies under the rules of each of the NYSE and Nasdaq, but both rules state such sums in terms of absolute amounts and percentages of consolidated gross revenue); and
- although Rule 10A-3 contains no look-back period for its independence requirements, both the NYSE and Nasdaq rules include a three-year look-back period applicable to all of the independence criteria, even those that parallel the Rule 10A-3 requirements.

Rule 10A-3 and the NYSE and Nasdaq rules contain various exemptions from the independence requirements. The rules exempt new public companies from the independence requirements for a limited transition period. Under the exemption, a new public company must have one independent audit committee member at the time of its initial listing, a majority of independent members within 90 days and a fully independent committee within one year. Moreover, under the Nasdaq rules, an audit committee member who fails to meet the Nasdaq independence requirements may still serve (for no more than two years) on the audit committee if (1) the director otherwise meets the requirements of Section 10A(m)(3) of the Exchange Act and the associated rules, including Rule 10A-3, (2) neither the director nor any of his or her family members is a current officer or employee of the company, (3) the board of directors determines that the company's best interests are furthered by the director's service on the audit committee and (4) the board discloses the reasons for its determination and the nature of the relationship between the company and the audit committee member in the next annual proxy statement (or Annual Report on Form 10-K if the company does not file a proxy statement). The Nasdaq rules also allow audit committee members who cease to be independent for reasons outside their control to continue to serve on the audit committee until the next annual shareholders meeting or one year, whichever period is shorter, provided that the company notifies Nasdaq immediately.

(a) Responsibility for the appointment, compensation, retention and oversight of the work of independent accountants

Rule 10A-3 requires public company audit committees to assume responsibility for hiring, overseeing and terminating the independent accountants engaged to prepare or issue an audit report or perform other audit, review or attest services for the company. Such services include all of the services encompassed by the "Audit Fees" category in the corporation's disclosure of fees paid to its independent accountants, such as services necessary to perform an audit, comfort letters, statutory audits and assistance with documents filed with the SEC. *See* "Federal Proxy Rules and the Proxy Statement—The Proxy Statement—Disclosure Related to Independent Auditors."

This provision of Rule 10A-3 does not preempt any law of the company's governing jurisdiction that might require or permit shareholders, the board of directors as a whole, a tribunal or any other governmental entity to select or oversee the company's outside auditors. In the case of such an apparent conflict, the audit committee must, to the extent permitted by the company's governing law, recommend outside auditors to the shareholders or board of directors.

The NYSE and Nasdaq corporate governance rules require an audit committee to perform certain additional duties that must be set forth in the audit committee charter. These duties relate largely to holding regular discussions with management and independent auditors about matters pertaining to risk management or audit problems and issues. Companies requiring additional information about such matters should consult legal counsel.

(b) Funding for the operation of the audit committee

Under Rule 10A-3, the audit committee determines the extent of funding that the company must provide to it. The funds provided to the audit committee should be sufficient to compensate the company's independent auditors engaged and overseen by the audit committee, to compensate any advisers engaged by the audit committee and for ordinary administrative expenses necessary or appropriate for the audit committee to carry out its duties.

(c) Exemptions from compliance; disclosure requirements

Rule 10A-3 contains a number of exemptions from compliance with requirements of the rule, including exemptions for boards of auditors of foreign private issuers, foreign government issuers, overlapping boards, security futures products, standardized options, asset-backed issuers, unit investment trusts and multiple listings. Companies must disclose their reliance on these exemptions in annual reports and proxy statements for shareholder meetings at which directors will be elected. Such companies must also disclose whether and how reliance on the exemption will materially adversely affect the audit committee's ability to act independently and otherwise comply with Rule 10A-3. These disclosure requirements apply to all exemptions under Rule 10A-3 other than:

- the exemption for unit investment trusts;
- subsidiaries relying on the multiple listing exemption;
- the exemption for overlapping boards;
- the exemptions for securities futures products and standardized options;
- the exemption for securities issued by foreign governments; and
- the exemptions for securities issued by asset-backed issuers and similar passive issuers.

Rule 10A-3 also modifies certain disclosure requirements. For instance, the disclosure about audit committee members that companies must include in proxy statements must also appear or be incorporated by reference in the listed company's Annual Report on Form 10-K. Related to this requirement, Rule 10A-3 deems a company's entire board of directors to be the audit committee in the absence of a separately designated audit committee and requires such a company to state in its disclosure that the entire board of directors serves as the audit committee. However, the rule does not require such a company to comply with this requirement if the company is not required to disclose its reliance on an exemption under Rule 10A-3, as discussed above.

Additionally, Rule 10A-3 requires companies with securities listed on a national securities exchange or an automated inter-dealer quotation system of a national securities association (such as the NYSE and Nasdaq) to disclose in proxy statements for shareholder meetings at which directors will be elected whether their audit committee members are independent according to the definition in the applicable listing standards, and companies with non-listed securities must disclose whether their audit committee members are independent according to any SEC-approved definition of independence developed by a national securities exchange or association (the rules further require the company to state which definition it chose and to apply that definition consistently in making independence determinations).

2. Audit committee report

Each proxy statement relating to an annual meeting at which directors are to be elected must also contain an audit committee report, which must state that:

- the audit committee has reviewed and discussed the audited financial statements with management;
- the audit committee has discussed with the independent accountant the matters required to be discussed by Statement on Auditing Standards No. 61, as amended, or the Codification of Statements on Auditing Standards, AU Section 380, which includes a review of the findings of the independent accountant during its examination of the company's financial statements;
- the audit committee has received the written disclosures and the letter from the independent accountant required by applicable requirements of the Public Company Accounting Oversight Board regarding communications concerning independence, and has discussed with the independent accountant the independent accountant's independence; and
- based on the above review and discussions, the audit committee recommended to the board of directors that the audited financial statements of the company be included in the Annual Report on Form 10-K for the last fiscal year for filing with the SEC.

Like the compensation committee report found elsewhere in the proxy statement, the audit committee report must appear over the names of each audit committee member. *See* Item 7 of Schedule 14A and Item 407(d) of Regulation S-K.

3. Additional Disclosures

In recent years, many companies have voluntarily provided additional disclosures regarding audit committee activities and independent auditor oversight, including enhanced proxy disclosures in the following areas:

- the ratification or selection of the outside auditors, including a more robust discussion of the audit committee's considerations in the appointment of the audit firm and the length of time the audit firm has been engaged with the company;
- the evaluation and supervision of the outside auditors, including discussion of the quality of communications with the audit committee, and the audit firm's technical expertise and knowledge of the company's industry;
- the role the audit committee plays in engagement partner selection and a statement that the engagement partner rotates every certain number of years; and
- the role the audit committee plays in determining compensation of the outside auditor, including insight into why a change in fees paid to the audit firm occurred in the prior year.

While these enhanced disclosures are not required in the proxy statement, companies and audit committees are receiving increased interest by investors and regulators, prompting a trend to provide more meaningful information about the audit committee's role in external auditor oversight, rather than relying on boilerplate or generic approaches.

M. NOMINATING COMMITTEE DISCLOSURE

The SEC's disclosure rules regarding nominating committees are contained in paragraph (d) of Item 7 of Schedule 14A. As with other Item 7 disclosures, the nominating committee disclosures are required in proxy materials relating to any meeting at which directors will be elected. The rules require proxy materials prepared by public companies to indicate whether the company has a standing nominating committee (or a committee performing similar functions) and, if not, why the board of directors believes that operating without a nominating committee is appropriate and who among the board members considers director nominees. In addition, the rules require proxy statements to provide the following information regarding the company's director nomination process:

- if the nominating committee has a charter, the company is required to disclose whether a current copy of the charter is available to shareholders on the company's website, and if so, to provide the website address. If a current copy of the charter is not available on the company's website, the company must include a copy of the charter as an appendix to its proxy statement at least once every three fiscal years. If a current copy of the charter is not available on the company's website, and is not included as an appendix to its current proxy statement, the company must identify in which of the prior proxy statements the charter was included;
- if the nominating committee does not have a charter, the company is required to make a statement to that effect;
- a company with securities listed on a national securities exchange or an automated inter-dealer quotation system of a national securities association with independence requirements for nominating committee members is required to disclose whether the members of its nominating committee are independent under the listing standards of the applicable national securities exchange or association;
- a company with non-listed securities is required to disclose whether the members of its nominating committee are independent according to any SEC-approved definition of independence in the listing standards of a national securities exchange or association (the rules further require the company to state which definition it chose and to apply that definition

consistently in determining the independence of nominating committee members and audit committee members);

- the company is required to describe the material terms of any nominating committee policy that governs the consideration of shareholder-recommended director candidates, including a statement as to whether the nominating committee will consider director candidates recommended by shareholders;
- if the nominating committee does not have a policy with regard to consideration of director candidates recommended by shareholders, the company must state that fact;
- if the nominating committee will consider candidates recommended by shareholders, the company must describe the procedures by which shareholders can recommend director candidates;
- the company must describe any specific, minimum qualifications that a nominating committee-recommended candidate must meet for a position on the company's board of directors as well as any qualities or skills that the nominating committee believes are prerequisites to board membership;
- the company must describe the process by which the nominating committee identifies and evaluates nominees and any particularities in the process arising in the case of shareholder-recommended nominees;
- for each non-incumbent nominee (other than current executive officers) who received nominating committee approval for inclusion in the company's proxy card, the company must state which one or more of the following categories of persons or entities recommended that nominee: security holder, non-management director, chief executive officer, other executive officer, third-party search firm or other specified source;
- the company must disclose the functions performed by any third party that the company pays to help identify or evaluate director nominees; and
- if the nominating committee received a nominee recommendation within the timeframe required by the rules from a shareholder beneficially owning more than five percent of the company's voting common stock for at least one year as of the date of the recommendation (or from a group of shareholders beneficially owning, in the aggregate, more than five percent of the voting common stock, with the securities used to calculate that ownership held for at least one year as of the date of the recommendation), the company is required to identify the candidate and the shareholder (or shareholder group) that recommended the candidate and disclose whether the nominating committee chose to nominate the candidate; provided, however, that no such identification or disclosure is required without the written consent of both the shareholder or shareholder group and the candidate to be so identified.

N. COMPENSATION COMMITTEE DISCLOSURE

The proxy rules also require the following compensation committee disclosures, which follow those already applicable to the audit committee and nominating committee. The company is required to disclose:

- whether the compensation committee has a charter and whether the charter is available through the company's website, and if so, to provide the website address. If a current copy of the charter is not available on the company's website, the company must include a copy of the charter as an appendix to its proxy statement at least once every three fiscal years. If a current copy of the charter is not available on the company's website and is not included as an appendix to its current proxy statement, the company must identify in which of the prior proxy statements the charter was included;
- the committee's processes and procedures for the consideration and determination of executive and director compensation, including the committee's scope of authority, the role of executive officers in determining or recommending executive officer and director compensation and the identity and role of compensation consultants;

- if a compensation consultant or its affiliates played a role in determining or recommending the amount or form of executive or director compensation, and any additional services provided, as well as the amount paid for all such services, if the amount paid for any non-executive compensation services exceeded $120,000; and
- the nature of any conflict of interest for any compensation consultant and how the conflict is being addressed.

SEC commentary regarding the rules emphasizes that this disclosure is intended to focus on aspects of corporate governance affecting the determination of executive compensation and supplement the separate CD&A section required by the rules. *See* Item 407(e) of Regulation S-K.

Pursuant to the requirements of Section 952 of the Dodd-Frank Act, on June 20, 2012, the SEC adopted Rule 10C-1 of the Exchange Act and added Item 407(e)(3)(iv) of Regulation S-K, which create heightened independence standards for compensation committees and advisers. The following discussion explains the general requirements for compensation committee and adviser independence pursuant to Rule 10C-1 and Item 407(e)(3)(iv) of Regulation S-K and identifies certain variations in the NYSE and Nasdaq rules.

1. Compensation Committee and Adviser Independence

Section 952 of the Dodd-Frank Act directs the SEC to require national securities exchanges and associations, such as the NYSE and Nasdaq, to decline to list securities of companies that fail to comply with certain heightened independence standards for compensation committees and advisers. Rule 10C-1 of the Exchange Act sets forth requirements regarding, in part, compensation committee independence, authorities and responsibilities of compensation committees, and assessments of the independence of compensation consultants, independent legal counsel or other advisers (collectively, compensation advisers). Rule 10C-1 requires national securities exchanges and associations to adopt listing rules that implement the requirements of Rule 10C-1. On January 11, 2013, the SEC approved rule changes proposed by the NYSE and Nasdaq, among other securities exchanges, to amend certain of their respective listing standards in order to implement the requirements of Rule 10C-1. In general, the rule changes closely track Section 952 of the Dodd-Frank Act and do not contain major changes from Rule 10C-1. NYSE and Nasdaq-listed companies had until the earlier of October 31, 2014 or their first annual meeting held after January 15, 2014 to comply with the rules regarding compensation committee independence described below. The rules regarding authority and responsibilities of compensation committees and the independence assessment of compensation advisers became effective as of July 1, 2013.

(a) Compensation Committee Independence

Rule 10C-1 requires each member of the compensation committee to be independent. In determining independence, the board of directors is required to consider (1) the source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the company to the director, and (2) whether the director is affiliated with the company, or its subsidiaries or their affiliates. These two factors are in addition to the bright-line independence tests currently required by certain national securities exchanges and associations in determining whether a director is independent and thus eligible to serve on the compensation committee.

The NYSE and Nasdaq rules require that the two above factors be considered with all other relevant factors in determining whether a director has a relationship with the listed company that is material to the director's ability to be independent from management in connection with the duties of a compensation committee member. The focus is on whether the compensation or affiliation would impair the director's ability to make independent judgments about the listed company's executive compensation.

(b) Authority and Responsibilities of Compensation Committees

Rule 10C-1 requires that compensation committees have certain specified authority and responsibilities, including the following:

- compensation committees are to have the authority, in their sole discretion, to retain or obtain the advice of a compensation adviser;
- compensation committees are to be directly responsible for the appointment, compensation and oversight of compensation advisers retained by the compensation committees; and
- companies are to provide appropriate funding for the payment of reasonable compensation, as determined by the compensation committee, to its compensation advisers.

Companies should consider revising their compensation committee charters to include such authority and responsibilities, as well as the responsibility to conduct the independence assessment of compensation advisers described below.

(c) Independence Assessment of Compensation Advisers

Before selecting compensation advisers, compensation committees are required to take into consideration the following six factors, as well as any additional factors specified by the relevant national securities exchange or association:

- the provision of other services to the company by the firm employing the compensation adviser;
- the amount of fees received from the company by the firm that employs the compensation adviser, as a percentage of the firm's total revenues;
- the policies or procedures of the firm employing the compensation adviser that are designed to prevent conflicts of interest;
- any business or personal relationship of the compensation adviser with a member of the compensation committee;
- any ownership of the company's stock by the compensation adviser; and
- any business or personal relationships between the executive officers of the company and the compensation adviser or the firm employing the compensation adviser.

Rule 10C-1 and the NYSE and Nasdaq rules do not provide for any materiality or quantitative thresholds with respect to any of these factors. The SEC has suggested that the factors should be considered in their totality and that no single factor should be determinative. The NYSE rules require consideration of *all* factors relevant to compensation adviser independence, including the six factors listed above, while the Nasdaq rules require consideration of only the six factors listed above, without any requirement to consider any additional factors that might be relevant to compensation adviser independence.

The independence assessment is not limited to compensation consultants, but includes legal counsel and other advisers to the compensation committee. The independence assessment requirement also applies regardless of whether the adviser was retained by the compensation committee, management or the company. Thus, one cannot avoid an independence analysis by having management retain the compensation adviser if indeed, as stated in Rule 10C-1(b)(4), the compensation adviser is an "adviser to the compensation committee." It is important to remember that neither the SEC's rules nor the NYSE or Nasdaq rules require compensation committees to obtain advice only from compensation consultants or other advisers who are independent. Furthermore, the rules do not require disclosure in the proxy statement or otherwise of the results of the independence assessments (only as to actual conflicts of interest for compensation consultants as described below under "—Expanded Disclosure for Compensation Consultants and Conflicts of Interest").

(d) Exemptions

Foreign private issuers that disclose annually why they do not have independent compensation committees, limited partnerships, companies in bankruptcy proceedings and registered open-end management investment companies are exempt from the compensation committee independence requirements of Rule 10C-1. Controlled companies and smaller reporting companies are exempt from all of the requirements of Rule 10C-1.

(e) Nasdaq Requirement for Compensation Committee; Compensation Committee Charters

Under prior Nasdaq rules, executive compensation decisions could be determined either by (1) a compensation committee comprised of independent directors or (2) independent directors constituting a majority of the board's independent directors. Accordingly, a Nasdaq-listed company could elect not to have a compensation committee. However, recent amendments to the Nasdaq rules mandated that a qualifying compensation committee had to be in place and a compensation committee charter had to be adopted by the earlier of October 31, 2014 or the first annual meeting held after January 15, 2014. In addition, by the same 2014 deadlines, each Nasdaq company had to certify that it adopted a formal written compensation committee charter, that the compensation committee would review and reassess the adequacy of the formal written charter on an annual basis and that the company had, and would continue to have, a compensation committee of at least two independent directors. Unlike NYSE companies, which are required to provide annual certifications that their compensation committees meet the requirements of Section 303A.05 of the NYSE Listed Company Manual, Nasdaq companies are not subject to annual certification requirements with respect to compensation committees. NYSE rules were recently amended to require compensation committee charters to provide compensation committees with the additional authority and responsibilities required by Rule 10C-1. Accordingly, compensation committee charters for NYSE and Nasdaq-listed companies must:

- set forth the committee's responsibility for determining, or recommending to the board for determination, the compensation of the chief executive officer and all other executive officers;
- provide that the chief executive officer may not be present during voting or deliberations on his or her compensation; and
- set forth the specific authority and responsibilities described above under "—Authority and Responsibilities of Compensation Committees."

2. Expanded Disclosure for Compensation Consultants and Conflicts of Interest

As of January 2013, Item 407(e)(3)(iv) expanded the disclosure requirements regarding compensation consultants and conflicts of interest under Item 407 of Regulation S-K in proxy and information statements for shareholder meetings at which directors are to be elected. As to any compensation consultant who has any role in determining or recommending the amount or form of executive or director compensation, companies are required to assess whether their work raises any "conflicts of interest" and, if so, to disclose in their proxy statements information about the nature of any such conflicts of interest and how the conflict is being addressed. This requirement only applies to those compensation consultants that are required to be identified in a company's proxy statement under Item 407(e)(3)(iii) as having any role in determining or recommending the amount or form of executive or director compensation.

Item 407 does not define "conflicts of interest," but provides that, at a minimum, the six factors in Rule 10C-1 described above for the independence assessment of compensation advisers should be considered in determining whether a conflict of interest exists. Disclosure is required only if there is an actual conflict of interest. The rules do not require disclosure of potential conflicts of interest, nor do they require disclosure of the appearance of a conflict of interest. However, even where there is no conflict of interest, some commentators believe that it will become a best practice for companies to include disclosure to the effect that the relationship was reviewed and that no conflict of interest was found. Therefore, companies should work with their compensation consultants to collect and confirm the information necessary to determine if the consultant's work raises any conflicts of interest based on the six factors described above, as well as any other factors that the company may deem relevant.

O. SHAREHOLDER COMMUNICATIONS WITH THE BOARD OF DIRECTORS AND ADDITIONAL DISCLOSURES

As with the shareholder nomination disclosures and other Item 7 disclosures, the disclosures regarding shareholder communications with directors of public companies are required in proxy materials relating to any meeting at which directors will be elected. The rules require the company's proxy materials relating to director elections to:

- disclose whether the company provides a process by which shareholders may send communications to the board of directors and, if not, why the board believes it is appropriate not to have such a process; and
- if the company does have such a process, the company must:
  - state the manner in which shareholders should send communications to the board of directors and, if applicable, to specified individual directors; and
  - if all shareholder communications are not sent directly to the board of directors, describe the company's procedure for determining which shareholder communications will be delivered to the board of directors.

In addition, the proxy statement must:

- describe the company's policy, if any, with regard to board members' attendance at annual shareholder meetings;
- state the number of board members who attended the prior year's annual meeting;
- disclose the company's leadership structure and why the company believes it is the best structure for it at the time of the filing; and
- disclose the board of directors' role in the company's risk management process.

P. DISCLOSURE RELATED TO INDEPENDENT AUDITORS

Under Item 9 of Schedule 14A, proxy statements related to annual meetings at which directors are to be elected (or special meetings or written consents in lieu of an annual meeting) or any meeting at which selection of the independent auditors is approved must include:

- the name of the principal accountant selected or being recommended to shareholders for election, approval or ratification, or, if no accountant has been selected or recommended, the reasons why one has not been selected or recommended;
- the identity of the company's principal accountant for the previous fiscal year if it is different from the accountant selected or recommended for the current year;
- if the company's principal accountant at any time during the past two fiscal years is no longer acting in that capacity, or a new principal accountant has been hired, specified additional information relating to the facts and circumstances of the change in accountant; and
- whether a representative of the principal accountant will attend the annual meeting and, if so, whether the representative will have an opportunity to make a statement and be available to respond to appropriate questions.

The company is also required to disclose:

- the aggregate fees billed by the principal accountant under the captions noted below:

Caption	Description
Audit Fees	Aggregate fees billed in each of the last two fiscal years for professional services rendered by the principal accountant in connection with the audit of the company's annual financial statements and for reviews of the financial statements included in its Quarterly Reports on Form 10-Q.
Audit-Related Fees	Aggregate fees billed in each of the last two fiscal years for assurance and related services by the principal accountant that are reasonably related to the performance of the audit or review of the company's financial statements that are not reported under the caption "Audit Fees" above, including a description of the nature of the services comprising the fees disclosed under this category.
Tax Fees	Aggregate fees billed in each of the last two fiscal years for professional services rendered by the principal accountant for tax compliance, tax advice and tax planning, including a description of the nature of the services comprising the fees disclosed under this category.
All Other Fees	Aggregate fees billed in each of the last two fiscal years for all other products and services provided by the principal accountant that are not otherwise disclosed above, including a description of the nature of the services comprising the fees disclosed under this category.

- the audit committee's pre-approval policies and procedures related to products and services provided by the principal accountant and the percentage of the products and services provided under the captions "Audit-Related Fees," "Tax Fees" and "All Other Fees" that were pre-approved by the audit committee; and
- if the percentage is greater than 50 percent, the percentage of hours expended on the principal accountant's audit of the company's financial statements for the most recent fiscal year that was attributed to work performed by persons other than the principal accountant's full-time, permanent employees.

Although there is no legal requirement that shareholders approve or ratify the selection of a company's independent accountant, it has become customary to submit the selection of the independent accountant to a shareholder vote at the company's annual meeting.

Q. CERTAIN RELATIONSHIPS AND RELATED PARTY TRANSACTIONS

If action is to be taken at an annual meeting with respect to the election of directors, the proxy rules require disclosure of a variety of information about transactions between the company and specified related parties. Item 7 of Schedule 14A cross references Item 404 of Regulation S-K, which adopts a principles based approach to disclosure as opposed to prior bright-line standards. The current rules expand the scope of the transactions covered by the disclosure requirements to include any individual or series of related financial transactions, arrangements or relationships in which:

- the company benefits from the transaction, even if not a contractual party to the arrangement;
- the amount exceeds $120,000; and
- the related person had or will have a direct or indirect material interest, determined on the basis of the significance of the information to investors, in light of all of the circumstances, including

consideration of the relationship of the related persons to the transaction, their relationship to each other and the importance of the interest to the person having the interest.

The rules provide a number of exceptions to the disclosure requirements, including, but not limited to, executive compensation arrangements otherwise reported under Item 402 of Regulation S-K (other than in the case of an immediate family member), indebtedness incurred in connection with the purchase of goods and services on usual trade terms, ordinary course business and travel advances and reimbursements, and pro rata benefits applicable to a class of equity security holders.

In addition, the rules require disclosure of the policies and procedures adopted by the company and its board of directors for the review, approval and ratification of related party transactions. The disclosure requires a description of the material features of the policies and procedures, such as:

- the types of transactions that are covered and the standards to be applied;
- the members of the company's board of directors responsible for applying the policies and procedures; and
- whether the policies and procedures are in writing, and if not, how such policies and procedures are documented.

The rules expressly require the identification of any transactions where the company's policies and procedures do not otherwise require review, approval or ratification, or circumstances in which the policies and practices were not followed.

Each of these disclosure requirements contains a number of instructions to assist and direct the company in providing the necessary disclosure. Readers are encouraged to review the relevant provisions of Item 404 of Regulation S-K to determine the appropriate disclosures for their company.

Pursuant to Statement on Auditing Standards No. 18, effective for audits of fiscal years beginning on or after December 15, 2014, auditors are required to perform additional procedures on related party transactions, which has led some companies to amend their D&O Questionnaires. For a discussion of D&O Questionnaires, *see* "Federal Proxy Rules and the Proxy Statement—Due Diligence Regarding Proxy Materials."

R. EQUITY COMPENSATION PLAN SHAREHOLDER APPROVAL RULES

The NYSE and Nasdaq listing standards require shareholder approval of a listed company's equity compensation plans. With a few limited exceptions, shareholder approval of all equity compensation plans, including stock option and restricted share plans as well as all material amendments to such plans, are required. The NYSE and Nasdaq prior exemptions for "broad-based" equity compensation plans and plans excluding officers and directors from a shareholder approval requirement have been eliminated by amendments to the NYSE and Nasdaq listing standards. The specific requirements of the NYSE and Nasdaq equity compensation plan shareholder approval rules are summarized below, along with the proxy disclosures required for an equity compensation plan proposal.

1. The New York Stock Exchange Rules

Plans Covered. Under the NYSE listing standards, an "equity-compensation plan" that requires shareholder approval is "a plan or other arrangement that provides for the delivery of equity securities (either newly issued or treasury shares) of the listed company to any employee, director or other service provider as compensation for services." Even a compensatory grant of options or other equity securities that is not made under a plan is, nonetheless, an equity compensation plan for these purposes.

The following are specifically exempted from the equity compensation plan definition even if the brokerage and other costs of the plan are paid for by the listed company:

- plans that pay all benefits in cash;
- plans adopted prior to June 30, 2003 (but not material revisions to such plans described below);
- plans that are made available to shareholders generally, such as a typical dividend reinvestment plan;

- plans that merely allow employees, directors or other service providers to elect to buy shares on the open market or from the listed company for their current fair market value, regardless of whether:
  - the shares are delivered immediately or on a deferred basis; or
  - the payments for the shares are made directly or by giving up compensation that is otherwise due (for example, through payroll deductions);
- tax-qualified plans, such as 401(k) plans and employee stock ownership plans;
- employee stock purchase plans intended to meet the requirements of Section 423 of the Internal Revenue Code of 1986, as amended (the Code); and
- parallel excess plans, which generally are plans that are designed to work in parallel with tax-qualified retirement plans such as 401(k) plans, to provide benefits in excess of various Code limits applicable to the tax-qualified retirement plans.

The NYSE listing standards require that, in circumstances in which equity compensation plans and amendments do not require shareholder approval, the plans and amendments still must be considered and approved by the company's compensation committee or a majority of the company's independent directors.

Material Revisions and Amendments. Under the NYSE listing standards, any material revision of an equity compensation plan also requires shareholder approval. A "material revision" includes, but is not limited to:

- a material increase in the number of shares available under the plan (other than an increase solely to reflect a reorganization, stock split, merger, spinoff or similar transaction), provided that:
  - if a plan contains a formula for automatic increases in the shares available or for automatic grants pursuant to a formula, each such increase or grant will be considered a revision requiring shareholder approval unless the plan has a term of not more than ten years (Formula Plan); and
  - if a plan contains no limit on the number of shares available and is not a Formula Plan, then each grant under the plan will require separate shareholder approval regardless of whether the plan has a term of not more than ten years (Discretionary Plan);
- an expansion of the types of awards available under the plan;
- a material expansion of the class of employees, directors or other service providers eligible to participate in the plan;
- a material extension of the term of the plan;
- a material change to the method of determining the strike price of options under the plan (a change in the method of determining "fair market value" from the closing price on the date of grant to the average of the high and low prices on the date of grant is an example of a change that the NYSE would not view as material); and
- the deletion or limitation of any provision prohibiting repricing of options. See the next section for details.

It is important to note that an amendment to an equity compensation plan will not be considered a "material revision" requiring shareholder approval if it curtails rather than expands the scope of the plan in question.

Option Repricings. Under the NYSE rules, a plan that does not specifically permit option repricing will be considered to prohibit repricing. Accordingly, any actual repricing of options will be considered a material revision of a plan even if the plan itself is not revised. The NYSE rules define "repricing" broadly to include any of the following or any other action that has the same effect:

- lowering the strike price of an option after it is granted;
- any other action that is treated as a repricing under GAAP; and
- canceling an option at a time when its strike price exceeds the fair market value of the underlying stock in exchange for another option, restricted stock or other equity, unless the cancellation and exchange occurs in connection with a merger, acquisition, spin-off or other similar corporate transaction.

Inducement Awards and Awards Assumed in Mergers and Acquisitions. The NYSE rules exempt "employment inducement grants" and certain grants with respect to options and plans that are assumed in mergers and acquisitions, but require companies relying on one or more of these exemptions to make a press release and/or written notification to the SEC, depending on the exemption. Such inducement awards are also available for rehires following a bona fide period of non-employment.

Broker Voting. The NYSE rules prohibit member organizations of the NYSE (brokers) from giving a proxy to vote on equity compensation plans unless the beneficial owner of the shares covered by the proxy has given voting instructions. Without broker votes, companies are often required to aggressively solicit shareholder votes in order to obtain approval of equity compensation plans. Significant shareholders, therefore, may exert substantial influence in the equity compensation plan shareholder approval process. Pursuant to Section 312.07 of the NYSE Listed Company Manual, a listed company has to receive approval of a majority of votes cast on a proposal requiring shareholder approval pursuant to NYSE rules, and broker non-votes are not considered votes cast. Companies can rely on the general requirements of their bylaws and governing law to determine if the required vote has been obtained.

Notification Requirement. NYSE-listed companies must notify the NYSE in writing when they rely on one or more of the shareholder approval exemptions described above, including the inducement grant exemption, the merger and acquisition exemption and the exemptions for certain types of plans.

2. The Nasdaq Stock Market Rules

Plans Covered. Like the NYSE rules, the Nasdaq rules govern a wide range of equity compensation arrangements. Specifically, the rules require shareholder approval of all "stock option plans and other equity compensation arrangements." As with the NYSE, Nasdaq also excludes certain plans from the shareholder approval requirements, including:

- plans adopted before June 30, 2003 (but not material revisions to such plans described below);
- plans that are made available to shareholders generally, such as a typical dividend reinvestment plan;
- arrangements that merely provide a convenient way for employees, directors or other service providers to purchase stock at fair market value;
- tax-qualified plans, such as 401(k) plans and employee stock option plans;
- parallel non-qualified plans, which generally are plans designed to work in parallel with tax-qualified retirement plans to provide benefits in excess of various Code limits applicable to the tax-qualified retirement plans; and
- plans or arrangements relating to an acquisition or merger.

The Nasdaq rules limit the term of any Formula Plan to ten years unless shareholder approval of the plan is obtained every ten years. Plans that do not limit the number of shares available for grant require shareholder approval of each grant under the plan.

Material Revisions and Amendments. Like the NYSE rules, the Nasdaq rules also require shareholder approval of material amendments to stock option plans or other equity compensation arrangements and provide a non-exclusive list of potential amendments requiring shareholder approval, including:

- a material increase in the number of shares available under the plan (other than an increase as a result of a stock split, merger, spinoff or similar transaction);
- a material increase in benefits to participants, including any material change to:
  - permit a repricing;
  - reduce the price at which shares or options may be offered; or
  - extend the duration of the plan;
- a material expansion of the class of participants eligible to participate in the plan; and
- an expansion in the types of options or awards provided under the plan.

Option Repricings. Under the Nasdaq rules, amending a plan to permit option repricings constitutes a material revision and requires shareholder approval. Additionally, the Nasdaq interpretive materials make it clear that shareholder approval is required to reprice options, unless the plan as approved by shareholders specifically allows for repricing.

Inducement Awards and Awards Assumed in Mergers and Acquisitions. The Nasdaq rules exempt "employment inducement grants" and certain grants with respect to options and plans that are assumed in mergers and acquisitions. Unlike the NYSE rules, the Nasdaq rules require inducement grants to be approved by the company's compensation committee or by a majority of the company's independent directors. In addition, in order to rely upon the inducement grant exception, the company must issue a press release promptly following the grant disclosing the material terms of the award. Under the Nasdaq rules, inducement awards are available for rehires following a bona fide period of non-employment. Awards assumed in connection with a merger or acquisition do not require shareholder approval only if:

- shareholder approval is not required to convert, replace or adjust outstanding options or other awards to reflect the transaction; and
- shares available under certain plans acquired in mergers and acquisitions may be used for certain post-transaction grants without further shareholder approval.

3. Disclosure Requirements for Equity Plan Proposals

Under Item 10 of Schedule 14A, if shareholder approval is being sought on an equity plan (or any other plan pursuant to which compensation may be paid), then the material features of the plan must be described, and the class of persons who will be eligible to participate in the plan must be identified, including the approximate number of persons in each such class and the basis for participation. Plans that grant options, warrants or rights must also describe (1) the title and amount of securities which may be subject to such options, warrants or rights, (2) the prices, expiration dates and other material conditions upon which the options, warrants or rights may be exercised, (3) the consideration to be received by the company for the grant of such options, warrants or rights, (4) the market value of the securities underlying the options, warrants or rights as of the latest practicable date, and (5) the federal income tax consequences of the issuance and exercise of such options to the recipient and the company.

Additionally, Item 10 of Schedule 14A requires inclusion of the "New Plan Benefits" table and the table setting forth the equity compensation plan information required under Item 201(d) of Regulation S-K regarding the number of securities that may be issued under shareholder and non-shareholder approved plans.

The New Plan Benefits table requires disclosure of readily determinable benefits that will be received by or allocated to the named executive officers, the executive officers as a group, the non-executive directors as a group and non-executive officer employees as a group under a plan or amendment being submitted to shareholder vote. The required disclosure will only be triggered if the proposed plan is one with set benefits or amounts or one under which grants or awards have already been made subject to shareholder approval. If this table is required, C&DI 161.03 provides that each individual or group for which award and benefit information is required must be listed in the table, even where the relevant amount to be reported is "0." Alternatively, the company can identify those for which the reported amount will be "0" using a narrative disclosure accompanying the table.

S. PROXY ACCESS FOR DIRECTOR NOMINATIONS

What Is Proxy Access. Under current SEC rules, only the company's director nominees are included in the company's proxy statement and proxy card. If shareholders wish to nominate their own candidates, they must prepare their own proxy statement and proxy card. Proxy access refers to an alternative regime in which shareholders could include director nominees in the company's proxy materials in opposition to the company's nominees.

Historical Background. Rule 14a-8 of the Exchange Act requires a public company to include a shareholder proposal in its proxy statement if the proponent meets modest share ownership, timeliness and length of proposed submission requirements. If a company seeks to exclude a shareholder proposal from its proxy statement, the company must, following receipt of a qualifying shareholder submission, establish that the proposal satisfies an SEC established justification for exclusion. With respect to the election of directors, in November 2007 the SEC amended Rule 14a-8(i)(8) to codify the SEC's interpretation that companies may exclude from their proxy materials any shareholder proposal that would result in an immediate election contest or set up a process for shareholders to conduct a future election contest.

Recent Amendments. Section 971 of the Dodd-Frank Act authorizes the SEC to adopt rules permitting a shareholder to use proxy materials supplied by a company for the purpose of nominating individuals to membership on the company's board of directors. On August 25, 2010, the SEC adopted rules to implement proxy access by adding Rule 14a-11 and amending existing Rule 14a-8 of the Exchange Act. However, on July 22, 2011, Rule 14a-11 was vacated by the U.S. Court of Appeals for the D.C. Circuit. Generally, Rule 14a-11 would have required a company to include in its proxy materials directors nominated by a shareholder, or group of shareholders acting together, that held at least three percent of the voting power of a company's securities continuously for at least three years. Although Rule 14a-11 was vacated, the amendments to Rule 14a-8 were not addressed by the Court's decision and remain in effect.

Rule 14a-8 currently requires a company to include in its proxy materials any proposals from qualifying shareholders that would amend, or request an amendment to, a company's director nomination procedures in its governing documents, so long as the proposals do not conflict with applicable law. To qualify under Rule 14a-8, shareholders must own at least $2,000 in market value or one percent, whichever is less, of the company's shares for at least one year. This type of proxy access is sometimes referred to as "private ordering." In essence, it allows shareholders to propose proxy access standards on an individual company-by-company basis, rather than a "one size fits all" approach, which was contemplated by Rule 14a-11.

Although the amendments to Rule 14a-8 narrow a company's ability to exclude proposals that relate to the nomination or election of directors, companies may still exclude a proposal if the proposal:

- would disqualify a nominee who is standing for election;
- would remove a director from office before his or her term expired;
- questions the competence, business judgment or character of one or more nominees for director;
- seeks to include a specific individual in the company's proxy materials for election to the board of directors; or
- otherwise could affect the outcome of the upcoming elections.

Proposals under Rule 14a-8 must be submitted no later than 120 calendar days before the anniversary of the date on which the company's proxy materials for the prior year's annual meeting were delivered to shareholders. For additional discussion regarding proxy access, *see* "Developments in the Law for the 2019 Proxy Season—Proxy Access."

In October 2016, the SEC proposed amendments to the proxy rules to require the use of universal proxy cards in all contested director elections at annual meetings. The proposed amendments would allow shareholders to vote by proxy for their preferred combination of company director nominees and shareholder-recommended nominees. However, these rules are unlikely to be in effect for the 2019 proxy season. For a discussion of the proposed amendments, *see* "Developments in the Law for the 2019 Proxy Season—Proxy Access—Universal Proxy Card."

T. PRESENTATION OF INFORMATION

The proxy rules also contain specific rules regarding the manner in which information is to be presented in the proxy statement. Among other things, Rule 14a-5 of Regulation 14A requires that:

- information in the proxy statement be clearly presented and organized according to subject matter with appropriate headings for the various categories of information;

- information in the proxy statement be presented in Roman type at least as large and as legible as ten-point modern type, except that financial statements and tables (but not the notes thereto) may be in eight-point modern type if necessary for convenient presentation;
- the proxy statement must include the deadline for any proposals shareholders intend to present at the company's next annual meeting; and
- the proxy statement must include the date after which notice of a shareholder proposal that is not submitted in accordance with the provisions of Rule 14a-8 of Regulation 14A will be considered untimely.

U. OTHER REQUIREMENTS RELATED TO PROXY SOLICITATION MATERIALS

In addition to the requirements described in this handbook, the proxy rules contain numerous additional items and instructions relating to information required to be presented in materials used to solicit proxies, depending on the type of meeting and the matters to be considered at the meeting. These additional items relate to, among other things, the prohibition against false or misleading statements in proxy materials and the inclusion of information specific to the types of matters to be considered at the annual meeting, such as equity plans and combination transactions.

V. PLAIN ENGLISH

Although the proxy statement is prepared to meet legal requirements, it also is a valuable shareholder communications tool. One way to make the proxy statement useful as a shareholder communications tool is to prepare a document that is well-organized, more visually appealing and more readable. The SEC's plain English rules do not currently govern proxy statements; however, as discussed above, the SEC has expressed its support for the use of plain English principles with respect to executive compensation disclosure in the proxy statement. Although not required to do so, more and more companies are using the plain English rules as a guide to prepare proxy statements that are more easily understood by their shareholders. Preparing the proxy statement in accordance with the plain English rules benefits the shareholders and the company—shareholders are able to better understand the matters discussed and to make an informed decision and the company is presented in a more positive light with disclosure that is more easily read and understood. There are many resources available for assistance in preparing the proxy statement and other documents in accordance with the plain English rules. Companies should consult with legal counsel or their DFIN representative for more guidance on these matters.

III. FORM OF PROXY

The proxy card on which shareholders actually mark their votes is largely dictated by the computer forms that most public companies now use to enable the proxies to be tallied electronically. The proxy card should be prepared in close cooperation with the company that will be tabulating the results for the meeting to ensure that it will work correctly with its technology. The company should also discuss the form of proxy with its inspector of election.

The form of proxy must comply with a number of requirements contained in Rule 14a-4 of Regulation 14A, which require the form of proxy to:

- identify in boldface type the person or entity on whose behalf the proxy is being solicited;
- contain a blank space for shareholders to date the proxy;
- identify clearly and impartially each matter to be acted upon regardless of whether it is conditioned upon approval of another matter or whether it was proposed by the company or a shareholder; and
- provide means by which the shareholder may approve, disapprove or abstain with respect to each separate matter (other than the election of directors) by marking the appropriate box.

In March 2016, the SEC issued an interpretation emphasizing that a proxy card must describe the specific action on which shareholders will be asked to vote, whether the proposal is submitted by management or by a shareholder. For the upcoming 2019 proxy season, companies should make sure that the descriptions of proposals on their proxy cards contain sufficient detail to comply with the SEC's guidance.

Where the proxy relates to the election of directors, the proxy card must set forth the name of each person nominated for election as a director. The proxy card may allow shareholders the opportunity to grant authority to vote for all nominees as a group only if similar means are provided to allow shareholders to withhold authority to vote for all nominees as a group. Conversely, the proxy card must include one of the following means for shareholders to withhold authority to vote for each nominee:

- a box opposite the name of each director nominee that may be marked to indicate a vote to withhold authority for that nominee;
- an instruction in bold face type indicating that a shareholder may withhold authority to vote for a specific nominee by lining through or otherwise striking out the name of the nominee;
- designated blank spaces in which the shareholder may write the names of the nominees with respect to whom authority to vote is withheld; or
- any other similar means if appropriate instructions are provided indicating how a shareholder may withhold authority for any director nominee.

The form of proxy may grant discretionary authority with respect to matters as to which a choice is not specified by the shareholder if certain conditions are met, as more fully described in the proxy rules. In addition, the proxy rules allow persons soliciting support of a minority slate of nominees to also seek authority to vote for one or more of the nominees named in the company's proxy statement if additional specified conditions are satisfied. The specific rules relating to granting or seeking authority to vote by proxy depend upon the type of matter upon which authority is being granted or sought. Readers should review the proxy rules regarding granting discretionary authority found in Rule 14a-4 of Regulation 14A before including any statement in a form of proxy purporting to grant such authority.

As discussed previously, no form of proxy or consent may be delivered to or requested from any person before such person has received a definitive proxy statement filed with the SEC. In filing the form of proxy with the definitive proxy statement in accordance with the requirements of the proxy rules, the form of proxy should be filed as an appendix at the end of the proxy statement.

IV. DUE DILIGENCE REGARDING PROXY MATERIALS

The proxy rules contain anti-fraud regulations similar to those contained elsewhere in the federal securities laws. Specifically, the proxy rules prohibit the use of proxy solicitations that:

- contain any statement that, at the time and in light of the circumstances in which it is made, is false or misleading with respect to any material fact;
- omit to state any material fact necessary to make the statements in the proxy materials not false or misleading; or
- omit to state any material fact necessary to correct any statement in any earlier communication related to the solicitation of a proxy for the same meeting or subject matter that has become false or misleading.

To ensure compliance, persons responsible for preparation of the company's proxy materials must ensure that directors and officers of the company are provided ample time prior to their filing or mailing to review and verify the information contained in the solicitation materials and annual report to shareholders.

Most companies also circulate a formal questionnaire for all directors and officers in order to obtain or confirm the personal information that must be included in the proxy statement. Preparation of the "D&O Questionnaire," as they are called, involves a review of disclosure requirements, government regulations and officer and director biographies. As these forms can be difficult to prepare, persons responsible for preparing the D&O Questionnaire should consult with legal counsel to ensure compliance with the legal and technical disclosure requirements. Once the questionnaires have been completed and returned by the directors and officers, the information included must be reviewed and summarized for inclusion in the proxy statement and other year-end documents. Adequate time should also be provided for the review of the CD&A by members of the compensation committee and members of management who participate in the compensation process.

V. DISTRIBUTION OF PROXY MATERIALS TO SHAREHOLDERS

The proxy rules prohibit the solicitation of proxies prior to the delivery to each solicited shareholder of a proxy statement that complies with the disclosure requirements of the proxy rules. The proxy rules also require that an annual report to shareholders accompany or precede the proxy statement if directors are to be elected at the meeting. *See* Rule 14a-3 of Regulation 14A. Historically, companies have mailed paper copies of proxy statements, annual reports and additional solicitation materials to shareholders.

Under the e-proxy rules, companies may deliver proxy materials, including notices of shareholder meetings, proxy statements, forms of proxy, annual reports and any amendments to such materials that are required to be furnished to shareholders, either by the “notice only option” or the traditional method of delivering a full set of printed materials, also referred to as the “full set delivery option.” Companies choosing to use the traditional full set delivery option, however, must still undertake limited elements of the notice only option, thus creating a mandatory e-proxy requirement.

Companies are not limited to one option as the exclusive means for providing proxy materials to shareholders. Rather, they may use the notice only option to provide proxy materials to some shareholders and the full set delivery option to provide proxy materials to other shareholders.

A. NOTICE ONLY OPTION

The notice only option may be used in connection with the delivery of proxy materials for all shareholder meetings other than business combination transactions. To adopt the notice only option, companies must (1) send a notice of internet availability of proxy materials to shareholders at least 40 days before the meeting date or the date that consents may be used to effect a corporate action if no meeting is scheduled, (2) post the proxy materials on a publicly-accessible internet website which meets certain criteria by the time the notice is first sent to shareholders and (3) provide shareholders with a voting method at the time the notice is first sent to shareholders. Companies can satisfy the final requirement by providing electronic voting platforms, a toll-free telephone number for voting or a downloadable, printable proxy card on a website. To avoid an instance where shareholders execute a proxy without having reviewed the proxy statement, the telephone number for voting of the proxy may not be included in the notice, though the telephone number may be posted to the website. The requirements related to this “notice and access” model of proxy material distribution are often referred to as the e-proxy rules.

Contents of the Notice of Internet Availability of Proxy Materials. The rules provide that the notice is required to contain certain prominent legends and other information. *See* “Appendix D—Selected Contents of the Notice of Internet Availability of Proxy Materials” for a list of the information required in the notice.

Amendments to E-Proxy Rules. In February 2010, the SEC issued amendments to the e-proxy rules, which were intended to improve the notice and access model by providing companies and other soliciting persons with additional flexibility in designing and preparing the notice of internet availability of proxy materials and in providing explanatory materials to shareholders regarding how to access the proxy materials, request paper copies and vote. The amendments replaced the SEC’s prior legend requirement for the notice of internet availability of proxy materials with a shorter legend and requirements to include the information described in “Appendix D—Selected Contents of the Notice of Internet Availability of Proxy Materials.” The amended rules do not specify the exact language or format to be used to present the information, allowing companies the flexibility to tailor the language as they desire.

Prior to the amendments to the e-proxy rules, no other information could accompany the notice of internet availability of proxy materials other than the notice of a shareholders meeting required by state law. Under the amended e-proxy rules, a company may include with the notice an explanation of the notice and access model and the reasons for the use of such process. The explanation, however, must be limited to the process of receiving or reviewing proxy materials and voting, and the amended rules continue to prohibit any statements intended to persuade shareholders to vote in a specific way or alter their preferred method of delivery. The notice must conform to plain English requirements and constitutes "other soliciting material" that must be filed with the SEC no later than the date on which the notice is first sent to shareholders.

Delivery of Proxy Card. A proxy card may only be sent to shareholders ten or more days after sending the notice, though the proxy card may be sent before the end of the ten-day period if it is accompanied by the proxy statement and annual report. If a company chooses not to send the proxy statement and annual report with the proxy card, another copy of the notice of internet availability of proxy materials must accompany the proxy card.

Delivery of Written Proxy Materials. Companies adopting the notice only option must send paper copies of the proxy materials to shareholders upon request, free of charge. Shareholders have the right to make a permanent election to receive either paper or e-mail copies of proxy materials in connection with future proxy solicitations, and companies are required to record such elections. Shareholder requests to receive paper proxy materials must be fulfilled by first class mail or other reasonably prompt method of delivery within three business days, provided such request is received prior to the company's meeting. Thereafter, companies are obligated to provide copies of the proxy materials for a period of one year after the date of the shareholders meeting or corporate action to which the materials relate, though the materials need not be sent within three business days nor by first class mail.

Design of the Publicly Accessible Website. All proxy materials identified in the notice must be made publicly accessible, free of charge, at the website address specified in the notice, which cannot be the EDGAR website, on or before the date that the notice is sent to shareholders. The materials must be presented on the website in a format or formats convenient for both reading online and printing on paper, and must remain available on that website through the conclusion of the shareholders meeting. As noted above, the website must provide shareholders with at least one method to execute proxies as of the time the notice is first sent to shareholders, such as an electronic voting platform, a toll-free telephone number for voting, or a printable or downloadable proxy card on the website.

Website and E-mail Confidentiality. Companies must ensure that their website is designed such that users remain anonymous, including the elimination of any cookies or tracking features. Companies also may not use an e-mail address provided solely to request a copy of proxy materials for any purpose other than to send copies of those materials to shareholders.

Potential State Law Conflicts with E-Proxy Rules. Notwithstanding the mandatory e-proxy requirement, many companies may continue to elect the full set delivery option to avoid potential conflicts with state law that might occur if written proxy materials are not provided. One such state law conflict was addressed in 2008 when California eliminated its requirement that shareholders must first provide an unrevoked consent before companies could lawfully send annual reports and any accompanying materials electronically to them. As a result, companies incorporated in California or having a principal executive office in California may now take advantage of the notice only model. Other state laws, however, may continue to conflict with the e-proxy rules. Readers are urged to discuss their specific situations with legal counsel to address any particular issues they may face as a result of the e-proxy rules.

E-Proxy Rules and ERISA Requirements. Companies that have company stock funds in their 401(k) plans or maintain employee stock ownership plans should be aware that the notice and access model alone will not likely satisfy the requirements of the Employee Retirement Income Security Act (ERISA) regarding notice to participants of their voting rights. Therefore, such companies should work with their plan administrators to confirm that they are complying with ERISA notice requirements if they are using the notice and access model.

Suggested Actions for Companies Planning to Employ the Notice only Option. It is recommended that companies planning to adopt the notice only option consider the following:

- Determine whether it is appropriate to continue to use the full set delivery option initially to allow time to evaluate the notice only option and to assess other companies' experience with the new regime.
- Begin planning and complete the company's proxy materials earlier than in the past because, among other things, the notice only option will require that the materials be posted not later than 40 days prior to the shareholders meeting. In addition, careful coordination will be required between the company and its proxy solicitor (if any) and intermediaries because companies will be required to supply intermediaries with the information required for intermediaries to prepare their own notices and post the proxy materials to their own website, which will add several days to the process (intermediaries are likely to require at least five days for the process involved in compiling and distributing their own notice of internet availability of proxy materials).
- Review state laws that may conflict with the e-proxy rules with legal counsel before utilizing the new regime.
- Many companies' bylaws require that proxy materials be sent by mail. This is an appropriate time to update bylaws to provide for electronic notice. Companies are advised to consult with legal counsel regarding this matter.
- Companies should make sure they have plans in place to comply with website anonymity requirements, to answer questions from shareholders regarding the distribution of proxy materials electronically and to process requests from intermediaries for proxy materials.

B. FULL SET DELIVERY OPTION

Companies may operate under the traditional proxy rules and deliver paper copies of the proxy materials to shareholders by mail as in the past. Under the e-proxy rules, companies choosing the full set delivery option also must (1) send a notice of internet availability of proxy materials accompanied by a full set of proxy materials, or incorporate all of the information required to appear in the notice of internet availability of proxy materials into the proxy statement and proxy card, and (2) post the company's proxy materials on a publicly-accessible internet website which meets certain criteria by the time the notice is first sent to shareholders. Companies that elect to use the full set delivery option need not comply with the 40-day deadline above and are not required to respond to requests for copies of proxy materials.

The full set delivery option varies from the notice only option in a number of ways. The SEC recently published guidance containing the following table comparing some of the key differences between the notice only and full set delivery options:

	Notice Only	**Full Set Delivery**
Preparation of notice	Must prepare a Notice of Internet Availability of Proxy Materials.	Need not prepare a separate Notice of Internet Availability of Proxy Materials if same information is included in the proxy materials.
Delivery of notice	The notice must be sent to shareholders separately from any other communications or documents, except for explanatory materials.	The notice must accompany, or the information in the notice must be incorporated into, the full set of proxy materials.
Timing of notice	The notice must be sent to shareholders at least 40 days prior to the shareholders meeting.	The notice information is provided at the same time as the full set of proxy materials are delivered.
Means to vote	Must provide a means to vote on a website, which could be an internet voting platform, telephone number, or printable/ downloadable proxy card.	A paper proxy card included in full set would provide a means to vote; no need to provide a separate electronic means to vote.
Request for copies	The soliciting party must provide copies upon request of shareholder.	Need not provide copies of proxy materials upon request because a paper copy has already been provided.

In addition to the above, if the full set delivery option is chosen:

- The company need not send the notice of internet availability of proxy materials and full set of proxy materials at least 40 days before the meeting date because shareholders will not need extra time to request printed copies of the proxy materials.
- The notice may be accompanied by a copy of the proxy statement, annual report to shareholders (if required by Rule 14a-3(b)) and proxy card.
- The text of the prescribed legend and the required contents of the notice differ; specifically, the company need not include the information relating to shareholder requests for copies of the proxy materials and instructions on how to request a copy of the proxy materials. See "Appendix D—Selected Contents of the Notice of Internet Availability of Proxy Materials" for a list of the information required in the notice.

C. INTERMEDIARIES

As discussed above, Rule 14a-13 of Regulation 14A establishes the rules by which the company works with broker-dealers, banks, voting trustees and other record holders to ensure that the proxy materials are provided to the beneficial holders of the company's voting securities. Companies are required to survey, by first class mail, these organizations at least 20 business days prior to the record date for the annual meeting to determine the number of copies these organizations will require for distribution to beneficial holders. Following receipt of this information, the company is required to supply each organization with copies of the proxy statement and other proxy solicitation materials and annual reports in the number and assembled in the manner as requested by the record holder to ensure delivery to the beneficial holders of the company's voting securities. The company is also required, upon the request of the record holder, to pay its reasonable expenses for completing the mailing of the proxy materials to the beneficial holders.

Under the e-proxy rules, broker-dealers, banks, voting trustees and other record holders are required to adopt the notice only option if the company requests them to do so. In that case, intermediaries are required to send their own notice of internet availability of proxy materials to shareholders. Companies choosing the notice only option must provide each intermediary with the information necessary to prepare the intermediary's notice of internet availability of proxy materials with sufficient time for the intermediary to prepare and send its notice and post the proxy materials on a publicly available website at least 40 days before the shareholders meeting date. Intermediaries may not adopt the notice only option if the company has chosen not to do so.

Contents of the Intermediary's Notice. Although a specific list of the required contents of the intermediary's notice is beyond the scope of this publication, the intermediary's notice is generally the same as that sent by the company, though tailored specifically for beneficial owners. Among other things, the intermediary's notice must provide instructions on when and how to request paper copies and the website where the beneficial owner can access his or her request for voting instructions. The intermediary may direct beneficial owners to the company's website or its own website to access the proxy materials. If it directs beneficial owners to the company's website, the intermediary must inform beneficial owners that they can submit voting instructions to the intermediary, but that the beneficial owner cannot execute a proxy directly unless the intermediary has executed a proxy in favor of the beneficial owner.

Responsibilities of the Intermediary. In addition to sending its own notice, intermediaries must permit beneficial owners to make a permanent election to receive paper or e-mail copies of the proxy materials, keep records of beneficial owner preferences, provide proxy materials in accordance with those preferences and provide a means to access a request for voting instructions no later than the date on which the intermediary's notice is first sent.

D. HOUSEHOLDING

The SEC permits "householding"—the delivery of a single proxy statement or annual report to all shareholders of record having the same address—if:

- the proxy statement or annual report is addressed to all shareholders at the same address as a group;
- the company receives either affirmative consent or implied consent in accordance with the requirements of the proxy rules to household delivery;
- each shareholder at the shared address receives a separate proxy card; and
- the company includes an undertaking in the proxy statement to deliver upon request a separate copy of the annual report or proxy statement, as applicable.

Companies using the notice only model may household materials; however, each householded account must be allowed to execute separate proxies. Therefore, the company must ensure that separate account numbers or identification numbers are used for each householded account or it may send separate notices of internet availability of proxy materials for each householded account in a single envelope.

As discussed previously, the requirements relating to delivery of the notice of annual meeting are governed by state corporate law. Any company considering the delivery of proxy statements under the householding rules should confirm that household delivery will comply with the corporate law of its jurisdiction of incorporation. Section 233 of the DGCL allows companies to make use of the "householding" rules promulgated under the Exchange Act. Under Section 233, a notice given by a Delaware corporation under the DGCL or the company's charter or bylaws is effective if given by a single written notice to shareholders sharing the same address so long as the shareholders consent. Section 233 further provides that any shareholder who fails to object in writing to the company within 60 days after receiving written notice from the company of its intention to send a single notice to shareholders sharing the same address is deemed to have consented to receiving such single written notice.

VI. FILING PROXY MATERIALS

A. SECURITIES AND EXCHANGE COMMISSION

All proxy materials filed with the SEC, whether preliminary or definitive, must include a cover page in the form set forth in Schedule 14A identifying the filing party and the nature of the filing (e.g., preliminary proxy statement, definitive proxy materials), and explaining the payment of the filing fee in cases where a fee is required. *See* Rule 14a-6 of Regulation 14A.

The SEC's EDGAR system is a helpful resource in obtaining examples of disclosure used by other companies for similar matters. If the matter requires SEC review, using these examples may facilitate prompt SEC clearance.

1. Preliminary proxy materials

Rule 14a-6(a) of Regulation 14A requires preliminary proxy soliciting materials to be filed with the SEC at least ten days prior to the date they are first sent or given to shareholders. The rule states that a shorter period may be authorized upon a showing of good cause.

There is no filing requirement for preliminary proxy materials that relate to an annual meeting at which only the following "routine" matters will be considered:

- the election of directors;
- the approval or ratification of independent auditors;
- shareholder proposals submitted in accordance with Rule 14a-8 of Regulation 14A (the proxy rule governing the submission of proposals by shareholders);
- the approval or ratification of benefit plans, or any amendment thereto, that falls within restrictions imposed by the federal securities laws; and
- shareholder advisory votes, such as say on pay votes and say on pay frequency votes.

Each preliminary proxy filing must include the preliminary proxy statement, the preliminary form of proxy and any other soliciting material. In addition, the preliminary proxy materials must be filed electronically and clearly marked "Preliminary Copies" and accompanied by a statement of the date on which definitive copies of such preliminary materials are intended to be provided to security holders. There are no filing fees for proxy statements unless the proxy materials relate to an acquisition, merger or similar transaction.

Under the proxy rules, the SEC has ten days following the filing to advise the company if it intends to commence a complete review of the proxy materials. If the company is not notified by the SEC within ten days of filing that a review is being undertaken, the company is free to distribute the proxy materials to its shareholders without further consultation with the SEC. Nevertheless, because the SEC does not provide notice if no review is to be undertaken, it is advisable to contact the SEC to confirm that the SEC will not review the filing or that the review is complete before materials are sent to shareholders.

On May 11, 2018, the Staff of the SEC issued two proxy rule C&DIs related to preliminary proxy materials. C&DI 126.02 provides that a change in a company's name does not, by itself, trigger the need to file preliminary proxy materials. C&DI 124.07 provides that a company is required to file preliminary proxy materials if it receives adequate advance notification of a non-Rule 14a-8 matter that could be raised at a meeting if the company cannot properly exercise discretionary authority on such matter in compliance with Rule 14a-4(c)(2).

2. SEC review

If the SEC elects to undertake a complete review of the preliminary proxy materials, the review period may take up to 30 days or more. The SEC's review of preliminary proxy materials focuses on the company's compliance with the proxy rules and the regulations contemplated thereby. The SEC's authority does not extend to any consideration of the fairness or the merits of a proposal. If a company anticipates that a preliminary proxy filing will be required, the timetable for holding the annual meeting should allow for the 30 or more day review period as well as additional time to respond to the SEC's comments. In addition, the preliminary materials should be filed as early as possible to allow sufficient time to revise the proxy statement in response to comments from the SEC and still be able to mail the materials to shareholders within the timetable established to hold the annual meeting.

3. Revised or supplemental proxy materials

Upon review, the SEC may require substantive changes to be made to the preliminary proxy materials. In such event, revised materials must be submitted to the SEC prior to distributing definitive copies of the proxy materials to shareholders. The filing of revised proxy materials does not recommence the ten-day time period unless the revised materials contain material revisions or material new proposals that constitute a fundamental change in the proxy materials. If the revisions to the proxy materials are material or material new proposals are included, the final proxy materials must be reviewed and cleared by the SEC before they are delivered to shareholders. In addition, companies may want or need to provide supplemental information to investors after the proxy materials have been mailed. This information can be conveyed in a separate document or by a revision to the proxy statement. Rule 14a-6(h) of Regulation 14A requires that any revised or amended proxy material filed with the SEC be marked, by underscoring or some other appropriate manner, to indicate clearly and precisely the changes effected therein.

4. Definitive proxy materials

Definitive proxy materials relating to an annual meeting at which only routine matters are to be considered must be filed with the SEC no later than the date the materials are first sent or given to shareholders. *See* Rule 14a-6(b) of Regulation 14A. Like the preliminary filing requirements, the company must electronically file the proxy statement, proxy card and all other soliciting material, in the form in which such material is furnished to shareholders, on the date they are first mailed to shareholders. The proxy rules require that companies file three copies of the definitive proxy materials with each national securities exchange on which the company has a class of securities listed or registered. Definitive proxy materials must also be accompanied by a statement of the date on which copies of such materials were provided to security holders, or, if not yet provided, the date on which copies thereof are intended to be released. Nasdaq allows proxy materials filed with the SEC electronically to satisfy the company's filing requirements with Nasdaq and, effective March 1, 2018, the NYSE allows proxy materials filed with the SEC electronically pursuant to Schedule 14A under the Exchange Act or sufficiently identified by the company for the NYSE, to satisfy the company's filing requirements with the NYSE.

5. EDGAR

Since 1993, the SEC has required public companies to submit at least some of the documents they file with the SEC electronically via the EDGAR system, and by 1999, all domestic companies were subject to electronic filing requirements. With a few limited exceptions, generally relating to confidential proxy materials for business combinations and the company's annual report to shareholders, all proxy materials must be submitted to the SEC electronically through EDGAR.

Regulation S-T, the rule specifically requiring electronic filing, contains numerous rules and regulations governing electronic filings through EDGAR, including the requirement that first-time filers obtain EDGAR access codes and corporate account numbers, requirements related to signatures filed electronically and the format of documents filed electronically, among others. Filers should contact their DFIN representative for further information relating to these rules and preparing documents for electronic filing.

B. STOCK EXCHANGES

The NYSE and Nasdaq also require the filing of proxy solicitation materials. The NYSE requires listed companies to file three definitive copies of all proxy materials with the NYSE not later than the date on which such materials are sent to shareholders. In addition, the NYSE suggests listed companies file preliminary materials with the NYSE if any action is to be taken at an annual meeting relating to matters that may affect substantially the rights or privileges of listed securities of the company or result in the creation of new issues or classes of securities that the company may desire to list on the NYSE. In such an event, the NYSE staff will review preliminary materials and submit such comments as it may have before such materials become final. Nasdaq requires listed companies to file with Nasdaq copies of all proxy solicitation materials and three copies of all reports and other documents that the company files with the SEC. Both Nasdaq and the NYSE allow proxy materials filed via EDGAR to satisfy the respective filing requirements.

THE ANNUAL REPORT TO SHAREHOLDERS

I. PREPARATION

If the company's proxy statement relates to an annual meeting at which directors are to be elected, the proxy rules require that it be accompanied or preceded by an annual report to shareholders that complies with the requirements of Rule 14a-3 of Regulation 14A. The annual report is a different document than the proxy statement and the Annual Report on Form 10-K that public companies must file with the SEC, and is subject to much less regulation and supervision by the SEC.

Although the SEC does not dictate the contents of the annual report to shareholders to the extent of the proxy statement, the annual report to shareholders must include the following items required by Rule 14a-3 of Regulation 14A:

- consolidated, audited balance sheets as of the end of each of the two most recent fiscal years and audited statements of income and cash flows for the three most recent fiscal years for the company and its subsidiaries, that are:
  - prepared in accordance with the rules and regulations promulgated by the SEC in Regulation S-X; and
  - presented in Roman type at least as large and as legible as ten-point modern type, except that financial statements (but not the notes thereto) may be in eight-point modern type if necessary for convenient presentation;
- additional information required by Items 301–305 of Regulation S-K, including selected financial data for the preceding five-year period (Item 301), supplementary quarterly and other financial information (Item 302), management's discussion and analysis of the financial condition and results of operations of the company (Item 303), information concerning changes in or disagreements with the company's independent auditors on accounting and financial disclosures (Item 304) and quantitative and qualitative disclosures about market risk (Item 305);
- a brief description of the business conducted by the company and its subsidiaries during the preceding fiscal year;
- information relating to the company's industry segments, products and services, operations and export sales required by Item 101 of Regulation S-K;
- information identifying each of the company's executive officers and directors and indicating each person's principal occupation or employment;
- information required by Item 201 of Regulation S-K relating to the market price, trading market and security holders of the company's equity securities and dividends paid by the company; and
- unless included in the company's proxy statement, an undertaking in boldface type that a copy of the company's Annual Report on Form 10-K will be provided free of charge to any person solicited who requests the report in writing, except that the company is not required to provide copies of all exhibits to the Annual Report on Form 10-K free of charge.

In addition, the company's "performance graph" should now be presented under the disclosure item entitled "Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters" in the company's annual report to shareholders that accompanies or precedes a proxy or information statement relating to an annual meeting at which directors are to be elected, rather than in the company's proxy statement. A company's performance graph is the graph comparing the company's "cumulative shareholder return" for a minimum five-year period (or such period of time as the company's securities have been registered under the Exchange Act) with the cumulative total return of a broad market index (such as the Standard & Poor's 500 Stock Index) and the cumulative return of an index of companies similar to the company. *See* Item 201(e) of Regulation S-K.

II. INTEGRATION OF ANNUAL REPORT TO SHAREHOLDERS AND OTHER SECURITIES LAW FORMS

Some companies have chosen to include their Annual Report on Form 10-K as part of their annual report to shareholders or to deliver to shareholders their Annual Report on Form 10-K in satisfaction of the proxy rules' annual report delivery requirements. All information required to be included in the annual report to shareholders is also required to be included in the Annual Report on Form 10-K. Other companies elect to incorporate by reference into their Annual Report on Form 10-K some of the information presented in the annual report to shareholders. Companies that elect to bind their Annual Report on Form 10-K into the annual report to shareholders will sometimes also include a "wrap-around" forepart containing the president's or chairperson's letter and glossy photographs of the company's management or operations. Companies considering integrating their annual report and Annual Report on Form 10-K should be aware of the implications of Rule 14a-3(d), which states that information in such an integrated document in response to items required by Form 10-K is subject to liability under Section 18 of the Exchange Act, including information from the annual report that otherwise would not be subject to such liability.

III. FILING REQUIREMENTS

A. SECURITIES AND EXCHANGE COMMISSION

SEC rules state that seven copies of the annual report to shareholders must be provided to the SEC, solely for informational purposes, not later than the date the proxy statement is first mailed to shareholders or the date the preliminary proxy materials (or definitive proxy materials in the absence of a preliminary filing) are first filed with the SEC, whichever is later. In November 2016, the SEC issued guidance stating that a company may satisfy this requirement by posting an electronic version of its annual report to its website within the same time frame, so long as the annual report remains accessible for at least one year after posting. Unless the annual report to shareholders is incorporated by reference into other documents filed with the SEC by the company, it may be, but is not required to be, filed using EDGAR. *See* Rule 14a-3 of Regulation 14A and the related compliance and disclosure interpretation dated November 2, 2016 issued by the SEC.

B. STOCK EXCHANGES

In general, companies listed on the NYSE or Nasdaq are no longer required to file the annual report to shareholders with their stock exchange, so long as they file their Annual Report on Form 10-K (or equivalent) with the SEC using EDGAR, or otherwise furnish their Annual Report on Form 10-K (or equivalent) to their stock exchange. *See* NYSE Listed Company Manual Rule 204.00; Nasdaq Marketplace Rule 5250(c)(1). A company listed on the NYSE is also required to make its Annual Report on Form 10-K (or equivalent) available to shareholders on the company's website at the time it is filed with the SEC. *See* NYSE Listed Company Manual Rule 203.01.

IV. DELIVERY TO SHAREHOLDERS

As stated above, an annual report to shareholders must be delivered to each shareholder either before or with any proxy statement related to an annual meeting at which directors will be elected. Many companies send the proxy statement, proxy card, notice of internet availability of proxy materials (if such information is not included in the proxy materials) and annual report to shareholders together in one package. If the documents are sent in separate mailings, they must be sent in a manner reasonably designed to ensure that the annual report reaches the shareholder first. To save on mailing costs, some companies mail the proxy statement by third class or bulk mail and the annual report by first class mail to ensure that it arrives first. The company will be under the same obligations to survey the broker-dealers, banks, voting trustees or other clearing agencies prior to the mailing as they are with the proxy statement. *See* “Federal Proxy Rules and the Proxy Statement—Distribution of Proxy Materials to Shareholders.”

Like proxy statements, the company may deliver a single copy of the annual report to all shareholders of record having the same address if specified conditions are met. See the discussion relating to householding delivery of proxy materials above for a description of the conditions that must be satisfied to take advantage of these provisions for delivery of the company’s annual report to shareholders. The proxy rules also allow for electronic delivery of the annual report to shareholders. In addition, the listing requirements of each of the NYSE and Nasdaq contain a requirement that companies with listed securities prepare and deliver to shareholders an annual report containing audited financial statements of the company and its subsidiaries.

SHAREHOLDER PROPOSALS

Rule 14a-8 of Regulation 14A, the shareholder proposal rule, permits shareholders to submit matters for inclusion in the company's proxy statement and consideration at the company's annual meeting. Rule 14a-8 is presented in a plain-English style and question-and-answer format to make the requirements relating to shareholder proposals more easily understood by shareholders. Even with a more readable shareholder proposal rule, however, only a small proportion of public companies actually receive shareholder proposals for consideration at their annual meeting. However, this proportion has increased in recent years, as described above in "Developments in the Law for the 2019 Proxy Season—Shareholder Proposals in the 2019 Proxy Season," and may continue to increase in coming years with the adoption of recent amendments to Rule 14a-8, as described above in "Federal Proxy Rules and the Proxy Statement—The Proxy Statement—Proxy Access for Director Nominations," that require a company to include in its proxy materials any proposals from qualifying shareholders that would amend, or request an amendment to, a company's director nomination procedures in its governing documents, so long as the proposals do not conflict with applicable law. Readers should consult with legal counsel before responding to a proposal submitted by a shareholder under Rule 14a-8.

I. PROCEDURAL REQUIREMENTS

To properly submit a shareholder proposal, the proxy rules require the shareholder submitting the proposal to satisfy specified conditions, including:

- holding a minimum of $2,000 in market value, or one percent, of the company's securities entitled to vote on the proposal for at least one year prior to the date the proposal is submitted and through the date of the annual meeting (if the shareholder fails to hold the required number of securities through the annual meeting date, the company may exclude any proposal submitted by the shareholder for meetings held in the following two years) (Rule 14a-8(b));
- providing information regarding the shareholder submitting the proposal for inclusion in the proxy statement (Rule 14a-8(l));
- submitting no more than one proposal to the company for a particular annual meeting of shareholders (Rule 14a-8(c));
- submitting a proposal and accompanying supporting statement not exceeding 500 words (Rule 14a-8(d));
- attending the annual meeting, or arranging for a qualified representative to attend the annual meeting on the shareholder's behalf, to present the proposal (if the shareholder, or its qualified representative, fails to attend the annual meeting and present the proposal without good cause, the company may exclude any proposal submitted by the shareholder for meetings held in the following two years) (Rule 14a-8(h)); and
- submitting the proposal prior to the deadline required by the proxy rules, which is 120 calendar days before the anniversary of the date on which the company's proxy materials for the prior year's annual meeting were delivered to shareholders (Rule 14a-8(e)).

A proposal that is not submitted in compliance with the eligibility or procedural requirements discussed above may be excluded by the company. If a company wishes to exclude a proposal on eligibility or procedural grounds, the company must first notify the shareholder of the deficiency within 14 days of receipt of the proposal and allow the shareholder to correct the problem. The shareholder then has 14 days following receipt of the company's notice to correct the deficiency. The company can only exclude the proposal if the shareholder fails to adequately remedy the deficiency. If a deficiency cannot be remedied, such as failure to submit the proposal prior to the deadline, the company is not required to provide the shareholder notice or an opportunity to cure. *See* Rule 14a-8(f) of Regulation 14A.

II. SUBSTANTIVE GROUNDS FOR EXCLUSION OF A SHAREHOLDER PROPOSAL

In addition to the eligibility and procedural rules, Rule 14a-8(i) provides several substantive means by which a company may exclude shareholder proposals from the proxy statement and proxy card, including any proposal that:

- is not a proper subject for action by shareholders under the laws of the company's jurisdiction of incorporation;
- would, if implemented, cause the company to violate any state, federal or foreign law to which it is subject, or that is contrary to any of the proxy rules;
- relates to a personal claim or grievance against the company or any other person, or that is designed to result in a benefit to the shareholder submitting the proposal that is not shared by the company's shareholders at large;
- relates to operations that account for less than a specified percentage of the company's total assets, net earnings and gross sales for its most recent fiscal year, or is not otherwise significantly related to the company's business (see "Developments in the Law for the 2019 Proxy Season—Shareholder Proposals in the 2019 Proxy Season");
- deals with a matter relating to the company's ordinary business operations (see "Developments in the Law for the 2019 Proxy Season—Shareholder Proposals in the 2019 Proxy Season");
- the company does not have the power or authority to implement;
- would disqualify a nominee who is standing for election;
- would remove a director from office before his or her term expired;
- questions the competence, business judgment or character of one or more nominees for director;
- seeks to include a specific individual in the company's proxy materials for election to the board of directors;
- could affect the outcome of the upcoming election of directors;
- directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting, such that a reasonable shareholder could not logically vote in favor of both proposals (see "Developments in the Law for the 2019 Proxy Season—Shareholder Proposals in the 2019 Proxy Season");
- the company has already substantially implemented (see "Developments in the Law for the 2019 Proxy Season—Shareholder Proposals in the 2019 Proxy Season");
- substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the proxy materials for the same meeting;
- deals with substantially the same subject matter as another proposal that was previously included in the company's proxy materials within the preceding five calendar years and received fewer than a specified number of votes at the meeting or meetings; or
- relates to the payment of cash or stock dividends, or to the company's ordinary business operations (which may not apply if there is a substantial policy issue).

If a company desires to exclude a shareholder proposal based on one or more of the substantive requirements described above, the proxy rules include detailed procedures that must be followed. *See* Rule 14a-8(i) of Regulation 14A.

On October 22, 2015, the Staff of the SEC in SLB No. 14H provided guidance on when a company may exclude a shareholder proposal on the basis that the proposal directly conflicts with a management proposal. Additionally, on November 1, 2017, the SEC issued SLB No. 14I, which provides guidance on two additional substantive bases for the exclusion of shareholder proposals—proposals relating to the "ordinary business" of the company and proposals that are not of "economic relevance" to the company (see "Developments in the Law for the 2019 Proxy Season—Shareholder Proposals in the 2019 Proxy Season").

On October 23, 2018, the SEC issued SLB No. 14J which provides guidance on board analysis provided in no-action requests pursuant to SLB No. 14I and on the scope and application of micromanagement and senior executive and/or director compensation matters in shareholder proposals as each relates to exclusion (see "Developments in the Law for the 2019 Proxy Season—Shareholder Proposals in the 2019 Proxy Season").

III. EXCLUDING SHAREHOLDER PROPOSALS RELATED TO RISK AND MANAGEMENT SUCCESSION

SLB No. 14E marks a reverse in course for the SEC, which now takes the position that proposals relating to risk assessment (including environmental and health risks) and management succession are generally not excludable on this basis.

The SEC previously witnessed a marked increase in the number of no-action requests in which companies sought to exclude these proposals. Companies argued that while the shareholder proposals did not explicitly request an evaluation of risk, they were nonetheless excludable under Rule 14a-8(i)(7) because they would require the company to engage in risk assessment.

The Staff will no longer focus on whether a proposal relates to the company engaging in an evaluation of risk. Instead, the Staff will focus on the subject matter to which the risk pertains or that gives rise to the risk. "In those cases in which a proposal's underlying subject matter transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote, the proposal generally will not be excludable under Rule 14a-8(i)(7) as long as a sufficient nexus exists between the nature of the proposal and the company." For those proposals relating to the ordinary business matters of the company, the proposal generally will be excludable.

The Staff also announced in SLB No. 14E that it generally will no longer allow companies to exclude proposals relating to chief executive officer succession planning in reliance on Rule 14a-8(i)(7). Previously, the Staff considered proposals concerning chief executive officer succession planning to be excludable because they relate to the termination, hiring or promotion of employees, which are each ordinary business matters. The Staff now believes that chief executive officer succession planning raises a significant policy issue regarding the governance of the company which transcends the day-to-day business matter of managing the workforce.

IV. RESPONSES TO SHAREHOLDER PROPOSALS

Upon receiving a proposal for inclusion in a company's proxy materials, the company has numerous alternatives for responding to the proposal. The company may elect not to dispute inclusion of the proposal, in which case the proposal must be included in the company's proxy statement and the proxy card to be used at the annual meeting. In such an event, the company may make a recommendation to the shareholders to vote for or against the proposal or may take no position on the proposal. If the company determines to recommend a vote against the proposal and desires to include in the proxy statement a statement in opposition to the proposal, the company must follow specified filing requirements contained in the proxy rules.

The company may also seek to exclude the proposal from the proxy materials based on the procedural or substantive rules discussed above. If the company desires to exclude the proposal, the company must follow the requirements contained in the proxy rules. As the procedures for opposing a shareholder proposal can be complicated, readers are urged to consult with legal counsel to ensure compliance. In addition, the company may meet with the submitting shareholder and negotiate a mutually agreed resolution of the issue.

Shareholders facing exclusion of their proposals from the proxy statement or proxy card may now file a Notice of Exempt Solicitation so their proposals are otherwise exposed to the other shareholders of the excluding company. For a discussion of the Notice of Exempt Solicitation method being increasingly used to disseminate excluded proposals, *see* "Developments in the Law for the 2019 Proxy Season—Notice of Exempt Solicitation."

PREPARING FOR THE ANNUAL MEETING

I. TIME AND RESPONSIBILITY SCHEDULE AND CHECKLIST

One of the most important components in conducting a successful annual meeting of shareholders is early and consistent preparation. For some, this preparation begins more than a year prior to the date of the annual meeting. To prepare properly for and coordinate the many activities involved in conducting a successful annual meeting, most companies prepare a detailed time and responsibility schedule. As its name indicates, the time and responsibility schedule outlines the tasks that must be completed prior to the annual meeting, establishes the expected deadline for completion of the tasks and allocates responsibility among the persons preparing for the annual meeting to complete the required tasks. A good place to start in preparing the time and responsibility schedule for the upcoming annual meeting is with the schedule that was prepared for the most recent annual meeting. Each party that may be responsible to perform any of the required tasks should be consulted and have an opportunity to comment on the form of the time and responsibility schedule.

While the prior year's time and responsibility schedule is an appropriate starting place for the preparation of the schedule for the upcoming meeting, care should be taken to ensure that lessons learned from last year's meeting are incorporated into the current time and responsibility schedule and that any revisions required by changes to the laws, rules and regulations governing the annual meeting are also incorporated. It is important to review the time and responsibility schedule frequently to make corrections required as events change during preparation for the annual meeting. Although the time and responsibility schedule will differ among companies, it should contain expected deadlines and allocate responsibility for the following tasks at a minimum:

- determination of appropriate notice and record dates for the annual meeting in accordance with applicable rules and regulations;
- determination of an appropriate location in accordance with the company's charter documents and reservation of appropriate meeting facilities;
- determination of the company's director nominees;
- preparation and adoption of board of directors resolutions to:
  - establish the annual meeting date and record date;
  - approve the company's director nominees and other matters to be considered at the annual meeting;
  - approve the proxy statement, annual report to shareholders and other proxy materials for distribution to shareholders; and
  - appoint the inspector of elections for the meeting;
- determination of final date for receipt of shareholder proposals and responsibility for submission of such proposals;
- preparation and distribution of D&O Questionnaires (See "Federal Proxy Rules and the Proxy Statement—Due Diligence Regarding Proxy Materials");
- preparation of the notice of internet availability of proxy materials, proxy statement and form of proxy, and determination of the appropriate date for filing such materials with the SEC and appropriate stock exchange organizations;
- preparation of the annual report to shareholders and filing the annual report with the SEC and appropriate stock exchange organizations;
- distribution of letters to broker-dealers, banks, voting trustees and other clearing organizations regarding beneficial owners;
- arrangements with financial printers to print and distribute the proxy materials and annual report;
- arrangements with internal information technology personnel or with external vendors, as applicable, to post the company's proxy materials on a publicly-accessible website which complies with the proxy rules and regulations;
- coordination with intermediaries for a proxy distribution;

- coordination of physical arrangements for the annual meeting, including meeting facilities, security, promotional items for shareholders and transportation and accommodation arrangements for directors, officers and other support people; and
- preparation of appropriate annual meeting documents such as an agenda, script and management presentations.

This is not an exhaustive list of the items that may be included in a time and responsibility schedule for many companies. The schedule will need to be continually revised and updated throughout the preparation for the annual meeting. Additionally, preparing for and conducting an annual meeting requires extensive coordination among many of the company's internal departments, including representatives of the executive, legal, finance and communications departments, as well as among the company's outside advisers, such as legal counsel, auditors, transfer agent and proxy solicitor, if one is used.

II. SETTING THE ANNUAL MEETING DATE

Some states require annual meetings to be held within a specified time period following the company's prior annual meeting. If a meeting is not held within the specified time period, these states generally give shareholders the right to demand that a meeting be held. Most states leave the setting of the specific annual meeting date to the company, whether pursuant to a date set in the company's bylaws or by a resolution of the board of directors. In addition, companies with shares listed for trading on the NYSE are required to hold their annual meeting within a reasonable time after the end of the company's fiscal year so that the information in the annual report is relatively timely. The annual meeting is usually held shortly after the financial statements for the most recent fiscal year have been audited and the annual report of the company has been distributed to shareholders. As a result, for a company whose fiscal year is the calendar year, the annual meeting of shareholders is generally held in late spring.

III. SETTING THE RECORD DATE

All state corporate statutes allow for the use of a record date to establish the persons eligible for notice of and voting at an annual meeting, whether as an alternative to or replacement of the closing of shareholder records for some time prior to the annual meeting. State corporate law generally allows the record date to be fixed in the bylaws of the company or established by a resolution of the board of directors. In addition, the record date must generally be no more than, nor fewer than, a fixed number of days before the date of the annual meeting. For example, under Delaware corporate law, the record date must be no more than 60, nor fewer than ten, days before the meeting date. *See* DGCL Section 213. Companies typically establish a record date far enough in advance to allow sufficient time for the solicitation of proxies prior to the meeting. Federal proxy rules require that companies contact institutional record holders at least 20 business days prior to the record date of the annual meeting to inquire whether other persons are the beneficial owners of the company's securities and the number of proxies and other soliciting material to supply to the record holder for such beneficial owners. *See* Rule 14a-13 of Regulation 14A. In February 2015, the NYSE amended its rules on the solicitation of proxies through member organizations, as set forth in Section 402.05 of the NYSE Listed Company Manual, to make clear that companies or others soliciting proxy materials through brokers must comply with Rule 14a-13 of Regulation 14A.

IV. DETERMINING THE ORDER OF BUSINESS; PREPARING THE AGENDA AND RULES OF CONDUCT

There is no required order of business that must be followed in conducting an annual meeting of shareholders. Nonetheless, a well-organized order of business and agenda are essential elements to conducting a successful annual meeting. Another important element to maintaining control at the annual meeting is preparing clear and understandable rules of conduct for the meeting and making them available for shareholders as they enter the meeting. Such rules will increase the control that the chairperson has over the conduct of the meeting. In preparing the rules of conduct for the annual meeting, readers should note that Robert's Rules of Order are not required and most practitioners recommend against their use. The rules of conduct prepared for the annual meeting should be designed to provide guidelines for an orderly meeting, while providing flexibility to the chairperson to make appropriate modifications and adjustments as the meeting progresses and as the situation may require. In addition, the rules of conduct should include limits on the number of questions that shareholders may ask and the time periods for which shareholders may speak during the meeting. Sample agenda and rules of conduct for an annual meeting are included in this handbook as Appendix B. *See* page B-1.

In addition, most companies prepare a detailed script for speakers to follow during the meeting, including alternate scenarios to manage various events that may arise during the meeting (e.g., dealing with an unruly shareholder, a request to speak to matters not on the agenda or a request for cumulative voting, where allowed by state law). For more information on the type of information to include in an annual meeting script, *see* "Preparing for the Annual Meeting—Preparing for Unexpected Events; Informational Packages and Detailed Meeting Script."

V. PRE-MEETING LOGISTICS

A. LOCATION

The proper location of the annual meeting of shareholders is generally governed by state corporate statutes. Under most of these statutes, annual meetings are permitted to be held inside or outside the state of incorporation in accordance with the bylaws of the company. Some states require the meetings to be held at the company's principal office unless expressly permitted to be held elsewhere by its charter or bylaws. Bylaws typically defer the actual location decision to the board of directors of the company. Some companies hold their meetings at the same location (generally at or near their corporate headquarters) each year, while some larger companies with a national shareholder base have found it beneficial to rotate their annual meeting location among a number of metropolitan areas where they have large shareholder density and where a large facility is located. Recent technological advancements offer companies even more flexibility, including satellite transmissions to various locations or use of the internet or other electronic sources to hold a meeting with no physical location. *See* "The Meeting—Electronic Annual Meetings and Supplemental Broadcasts" for more information regarding regional and electronic meetings.

Factors to consider in selecting a location for the annual meeting include, among other things:

- the ability of a sufficient number of shareholders to attend the meeting at that location;
- access to the company's headquarters or other facilities;
- access to suitable meeting facilities;
- access to appropriate transportation alternatives; and
- the absence of mitigating factors, such as local anti-business climate, previous demonstrations at similar meetings or election-year campaign issues.

Once the geographic location has been selected, the specific meeting facilities should be chosen and reserved as soon as possible. Some meeting facilities are booked a year or more in advance. Factors to consider in selecting a meeting facility include, among other things, exhibit areas, appropriate meeting rooms, access for handicapped shareholders, adequate sound equipment, lighting, seating and ventilation, access to technology connections and expense.

B. PHYSICAL ARRANGEMENTS

Following reservation of the meeting facilities, preparation of the physical arrangements begins. Persons responsible for preparing the physical accommodations for the annual meeting should consider the following items:

- seating arrangements for the directors, officers, legal and accounting advisers, shareholders and other necessary participants;
- shareholder access to microphone stations to address the meeting;
- adequate audio-visual equipment for participants;
- adequate telephone, data and other telecommunications connections;
- arrangements for beverages or other refreshments for meeting participants; and
- hotel accommodations, transportation and parking arrangements for meeting participants.

Those responsible for the physical arrangements should make themselves familiar with the layout of the building and its audio-visual equipment and coordinate the availability of the various services or special arrangements that will be necessary to conduct the meeting. Social events and hotel accommodations for the directors and officers of the company, if desired, should also be arranged prior to the meeting.

C. ATTENDANCE RULES

Although shareholders (or their proxy holders) are the only parties with an enforceable right to enter the meeting, many companies also allow admission to other persons, such as employees of the company, representatives of the press, legal counsel, accounting advisers, the inspector of elections, representatives of the company's transfer agent and other invited guests. Once it is determined who will be allowed to enter the meeting, those responsible for conducting the meeting must ensure that ample space is provided to allow attendance by all such parties. Companies should also establish clear policies in advance concerning the attendance of these parties at the annual meeting. Policies that may restrict access by shareholders based on room size, late arrival, etc., should be publicized in the company's proxy materials.

To enforce these attendance restrictions, some companies require attendees to present admission tickets, usually obtained by returning a card provided with the company's proxy materials. In addition, many companies require shareholders to present picture identification prior to entering the meeting. A registration desk is also an important part of enforcing attendance rules. A registration desk will allow verification of the shareholder status of any person who decides to attend the meeting at the last minute. In addition, registration procedures can alert the company as to the number of shareholders wishing to address the meeting. Some companies also arrange for an attorney to be present at the registration desk to arbitrate any non-standard request for admission.

D. SECURITY

Even though fewer disruptive demonstrations have been seen in recent years, shareholder attendance at annual meetings can fluctuate year-to-year, and shareholders are at times very active in voicing questions and concerns. With this in mind, security is an important part of conducting a successful meeting. Persons responsible for coordinating security arrangements should consider the following (depending on the likelihood of disruptions):

- becoming aware of the security offered by the facility hosting the annual meeting;
- assigning individuals in the company's security or legal department to assist with escorting disruptive shareholders from the meeting;
- contacting the local police department to alert them of the annual meeting, to provide any information that may be known regarding possible disturbances and to coordinate between the police and company or hired security personnel; and
- preparing a detailed meeting script containing scenarios to provide guidance in the event of various disruptions.

VI. PREPARING FOR UNEXPECTED EVENTS; INFORMATIONAL PACKAGES AND DETAILED MEETING SCRIPT

At even the most well-planned annual meetings, unexpected events will occur. The best way to minimize the impact of unexpected events is to provide the chairperson and other participants in the meeting with the information needed to handle the various situations that may arise at the annual meeting. Individuals who deal with shareholder questions and comments at the annual meeting must have access to the information needed to respond to a wide array of questions and concerns about the company and its business. This information is often prepared by persons in the company's communications department and provided to directors and officers for their review prior to the meeting. The chairperson and other corporate personnel should also receive information outlining the legal matters that must occur to properly transact business at the annual meeting, including:

- determination that a quorum is present at the annual meeting;
- the vote required to approve the matters to be considered at the meeting;
- the availability of corporate records and the shareholder list; and
- the procedures for processing and tabulating the votes received by proxy prior to the meeting and/or in person at the meeting.

Preparing a detailed script for the annual meeting will also assist the directors and officers in conducting the meeting. The script generally follows the meeting agenda and adds the specific text that the chairperson can follow to ensure that the meeting proceeds in an orderly manner. In addition to including appropriate text for conducting the meeting, the person preparing the meeting script should also consider the following:

- The script should provide that all legally required items be accomplished early in the meeting so that the meeting may be adjourned if a disruption occurs during the question and answer session or during management's presentation regarding the company's business.
- Instructions and alternative text should be included to respond to various scenarios that may arise, including:
  - requests for cumulative voting;
  - shareholders who exceed the time limits for making comments;
  - generally disruptive shareholders;
  - requests to be heard on matters outside the approved agenda; or
  - shareholders wishing to bring a motion before the meeting.
- The script should include procedures in the event that an emergency or major disturbance occurs that requires evacuation of the meeting facilities. These procedures may include:
  - announcing that a quorum is present for transacting business at the meeting;
  - announcing preliminary results of matters presented at the meeting;
  - adjourning the meeting if necessary; and
  - exiting the meeting room in an orderly fashion, including a description of the appropriate exits for different participants.

A sample annual meeting script is included in this handbook as Appendix C. *See* page C-1.

VII. CORPORATE GADFLIES

Another event that companies, particularly larger companies with numerous shareholders, should prepare for is the attendance at the annual meeting of shareholders of so-called corporate "gadflies," who attend annual meetings solely to make complaints, ask disruptive questions or submit proposals that do little more than disrupt the meeting and further their specific social or political agenda. These parties sometimes take extreme positions at meetings to dramatize what they view as a lack of corporate democracy. Some try to dominate the meeting by shouting management down or refusing to abide by the rules of conduct. The tactics used by these shareholders can add additional time to the meeting, and can be very disruptive to the proceedings of the meeting. A well-prepared meeting script, easily understood rules of conduct and an understanding of the company's charter documents and the state law governing the annual meeting will assist the chairperson of the meeting in dealing with these parties. Although corporate gadflies can disrupt the meeting, they have little power to effect change if sufficient proxies have been received to transact business at the meeting and to approve the matters submitted to shareholders. If these shareholders do attempt to cause a disruption, practitioners generally advise companies to wait out the disruption or, as often occurs, allow other shareholders to request the disruptive shareholders to be silent and permit the meeting to proceed. Rules of conduct that limit the time shareholders are allowed to address the meeting and that are made clear at the beginning of the meeting also assist in discouraging overly disruptive behavior.

VIII. SHAREHOLDER LISTS

Most states provide shareholders the right to inspect a list of the shareholders of the company under specified conditions. Shareholders may wish to review the company's shareholder list for purposes of soliciting proxies for the upcoming annual meeting. The proxy rules also contain provisions that require companies to assist parties wishing to solicit proxies or provide information to shareholders. Under Rule 14a-7 of Regulation 14A, companies are generally required, upon the request of a shareholder and at the company's option, to either provide a shareholder list or mail the requesting shareholder's materials on his or her behalf.

In addition, state corporate statutes in most states require that companies make available to shareholders prior to the annual meeting a list of shareholders entitled to vote at the meeting. Nearly all states require the shareholder list to be available at the meeting; however, some states require shareholders to comply with specified conditions to gain access to the list.

IX. SHAREHOLDER LAWSUITS

A. PROXY DISCLOSURE LITIGATION

Shareholder lawsuits have the potential to disrupt annual meetings. In the last several proxy seasons, waves of shareholder lawsuits have been filed against companies with respect to various executive compensation matters. These lawsuits are typically filed shortly after the definitive proxy statement is filed and are often directed at the following:

- companies with failed say on pay votes;
- companies with alleged inadequate disclosures regarding required equity plan proposals;
- companies that have granted equity in excess of the equity plan limits; and
- disclosures regarding Section 162(m) of the Code (which claims will become irrelevant since shareholder approval of plans for exemption under 162(m) is no longer necessary due to the passage of the Tax Cuts and Jobs Act of 2017).

Although certain types of shareholder lawsuits are waning, in large part due to enhanced proxy disclosure by companies and unfavorable outcomes for many plaintiffs, public companies should still be aware of potential compensation-related lawsuits that could be brought in connection with their proxy filings, in particular with respect to say on pay votes and equity plan proposals. Even if plaintiffs are unsuccessful with their lawsuits, the costs of litigation can be significant and the lawsuits can damage reputations of companies and their board members. Accordingly, companies should as always conduct a diligent rules check on any equity or other compensation plan proposals, as well as review their proxy disclosure with legal counsel in light of the typical allegations to determine whether any enhanced disclosure may be appropriate in order to mitigate any litigation risk associated with these lawsuits.

B. DIRECTOR COMPENSATION LITIGATION

Director compensation is permitted to be, and frequently is, set by directors. In the last several years, the Delaware courts have decided cases that make it easier for plaintiffs to sue companies for their director compensation. These cases suggest that a new wave of shareholder lawsuits may focus on the “self-dealing” related to directors setting their own compensation. A decision by the board of directors generally receives the protection of the “business judgment rule” and will be subject to challenge only if a plaintiff can show that the decision had no rational business purpose. If, however, a shareholder rebuts the business judgment standard by, for example, establishing that a board decision was not approved by a majority of disinterested directors, then the court will review such decision under the higher standard of “entire fairness” (i.e., determine whether the decision was made based on fair dealing and at a fair price) unless the decision was ratified by the company’s shareholders.

While each company’s situation will be unique, companies may wish to consider taking proactive steps in order to reduce the risk of these types of shareholder lawsuits, such as:

- reviewing existing director compensation arrangements to assess what, if any, limits apply and have been approved by the company’s shareholders;
- amending existing compensation plans to institute a specific annual director compensation limit for both equity and cash compensation and seeking shareholder approval, or, alternatively, adopting a standalone director compensation plan and seeking shareholder approval; or
- seeking shareholder ratification of past director compensation under existing compensation arrangements.

Companies should consult with legal counsel regarding their director compensation practices and related compensation plans to determine what steps may be appropriate in order to mitigate any litigation risk associated with these lawsuits.

THE MEETING

I. TRANSACTION OF BUSINESS AT THE ANNUAL MEETING

A. VOTING PROCEDURES—QUORUM

State corporate law governs the requirements to properly transact business at an annual meeting, including the requirement that a quorum of votes be present in person or by proxy at the meeting. State law also establishes the procedures by which the presence of a quorum is determined, some of which are found in the state corporate statutes and others of which are found in the company's charter documents. Although not determined until the beginning of the meeting, most public companies seek to determine through the receipt of proxies that a quorum will be present at the meeting well before the meeting date.

In determining whether a quorum is present at an annual meeting, the following should be considered:

- votes represented by shareholders who attend the meeting will generally be included even if the shareholder does not vote at the meeting (unless the shareholder is attending solely to contest the legality of the meeting, in which case the shareholder's shares will not be included in the quorum determination);
- shares represented by proxies with instructions to vote on less than all of the matters are considered present at the annual meeting for quorum purposes; and
- treasury shares and shares held by subsidiaries of the company conducting the annual meeting are generally not included in the number of shares present at the annual meeting.

After a quorum has been established, a shareholder leaving the meeting will generally not nullify the presence of a quorum for the meeting or invalidate any action taken at the meeting.

B. VOTING PROCEDURES—VOTE REQUIRED

Requirements differ among state corporate statutes regarding the vote required to approve matters submitted at an annual meeting. Most states require the affirmative vote of a majority of the shares voting at the annual meeting to approve most matters submitted at the meeting. Some states require a higher threshold, the affirmative vote of a majority of the company's outstanding voting stock, to approve fundamental corporate matters, while other states have even higher super-majority voting requirements to approve fundamental corporate transactions. In some states, companies are allowed to specify in their charter documents, within limits, the vote required to approve matters submitted to shareholders at the annual meeting that may be different from a baseline established in the state corporate law. State corporate statutes should also be reviewed to determine the proper treatment of abstentions, broker non-votes and votes to withhold authority, the determination of which can be complicated.

In addition, the stock exchanges may have requirements regarding shareholder votes on certain matters mandated to be submitted to a vote of the shareholders. For example, Section 312.07 of the NYSE Listed Company Manual and Rule 5635 of the Nasdaq Marketplace Rules each requires a vote of a company's shareholders for certain issuances of additional stock, and the minimum vote that will constitute shareholder approval in such case is a majority of the total votes cast on the proposal.

C. VOTING PROCEDURES—ELECTRONIC VOTING

A technological advancement that has impacted the annual meeting is the use of electronic voting. Although commentators generally believe that electronic voting does not increase the number of votes cast at the meeting, they do believe that electronic votes are often cast earlier, which provides the company with information regarding the shareholder vote earlier in the process and allows the company to change its solicitation efforts if the early results are not as expected. Before allowing shareholders to vote electronically, a company must ensure that electronic voting is allowed under

(1) the corporate laws of its state of incorporation (see Section 212 of the DGCL and Section 178 of the CCC, which allow shareholders to authorize a proxy through an electronic transmission), (2) the company's charter documents and (3) the rules of the stock exchange or market on which the company's stock is listed for trading.

If the company is authorized to use electronic voting, a technology must be selected that will satisfy state and federal proxy rules. Companies that elect to use electronic voting should consider providing disclosure in their proxy materials regarding the procedures for using electronic voting and the validity of the procedures under state corporate law. Other issues to consider in creating electronic voting procedures include:

- *Security and Authenticity*. Any complaint that a company's voting system can be manipulated electronically could result in negative publicity or even invalidate the results of the meeting.
- *Costs and Expenses*. Although there will be a fee associated with initiating electronic voting, electronic votes are generally less expensive per vote compared to votes received by mail.

II. UNEXPECTED PROPOSALS

The chairperson of the meeting should be prepared to respond to unexpected proposals that may be presented during the meeting. Although these proposals can disrupt the meeting, they can usually be excluded based on provisions contained in the company's charter documents and the state corporate law governing the meeting. Corporate charter documents generally require shareholders to submit matters for consideration at the annual meeting a specified number of days prior to the annual meeting. If proposals are submitted to the company after the deadline, they may be excluded on that basis alone. Proposals may also be excluded if they are inconsistent with state corporate law, including if the proposed matter would be illegal or relates to activities that have been delegated by state corporate law to the board of directors of the company. If the proposal is not in order for the meeting, the chairperson has a variety of alternatives to exclude the matter rather than taking a vote at the meeting. The chairperson can explain why the matter is out of order and request the shareholder to withdraw the matter and submit it for consideration at next year's meeting.

Proposals that are valid for consideration at the annual meeting should be presented at the meeting. Proposals relating to the conduct of the meeting may be submitted to a vote of the shareholders present. Because most proxy statements grant discretionary authority to the proxy holders to act on matters that properly come before the annual meeting, it is not likely that any undesired proposal that is properly presented will be approved.

III. SHAREHOLDER QUESTIONS

At most annual meetings, the company's management makes a presentation to the shareholders on the company's progress during the prior fiscal year. The presentation is often followed by a question and answer period during which shareholders are allowed to ask questions of management. Although some shareholders ask questions about actions being considered at the meeting or about the company's business, many shareholders, such as the corporate gadflies discussed above, attend the annual meeting simply to make complaints about the direction of the company, its stock price or operations or to further a personal agenda. The chairperson of the meeting and the other officers responsible for responding to these questions should be provided sufficient information about the operations of the company and should be prepared for the types of questions or comments that may be expected from shareholders.

IV. INFORMATION PROVIDED TO SHAREHOLDERS AT THE ANNUAL MEETING

In addition to state corporate statutes that require companies to make available a list of the shareholders authorized to vote at the annual meeting, good corporate practice suggests that companies should make available to shareholders who attend the annual meeting copies of their annual report to shareholders, proxy statement and other proxy materials and Exchange Act reports, such as the company's Annual Report on Form 10-K. Some companies also use the annual meeting to prepare displays or provide promotional materials to shareholders regarding the company's business.

V. ADJOURNMENT

State law governs the procedures for adjourning a meeting of shareholders and will typically determine the need for (1) notice of the adjourned meeting, (2) a new record date and (3) a quorum count, and whether new business may be validly taken at the adjourned meeting.

VI. ELECTRONIC ANNUAL MEETINGS AND SUPPLEMENTAL BROADCASTS

Recent technological advances allow companies to hold electronic meetings with no physical location or to broadcast their annual meetings over the internet or by satellite or other telecommunications medium to numerous locations and to shareholders, employees or other participants who may be unable to attend the meeting. In recent years, an increasing number of companies have conducted electronic annual meetings exclusively online, without corresponding physical meetings.

A. SIMULCASTING THE ANNUAL MEETING TO NUMEROUS LOCATIONS

A number of companies now supplement their official meeting with simultaneous broadcasts. Providing expanded access to the annual meeting can be a useful investor and employee relations tool by allowing shareholders and employees who otherwise would be unable to attend the annual meeting to access and participate in the meeting. Some companies also allow online participants to e-mail questions to management.

B. ELECTRONIC MEETINGS

Delaware companies are able to not only broadcast their meetings to remote locations, but to hold their annual meetings entirely electronically without a physical location. Section 211(a)(1) of the DGCL allows boards of directors of Delaware companies that are authorized to select the location for the annual meeting to determine that the meeting not be held at a physical location, but instead be held solely by means of remote communication, and other states have adopted similar statutes. In Delaware, in order for companies to conduct an electronic annual meeting, the company must "implement reasonable measures" to confirm that each person voting is a shareholder or proxyholder and to provide such persons with "a reasonable opportunity to participate in the meeting and to vote."

Holding an annual meeting electronically offers the company advantages such as:

- reducing the expense of conducting the annual meeting, which can be a costly process for some companies;
- reducing the amount of senior management and board member time that is occupied by the annual meeting through the elimination of travel that is sometimes required to attend remote annual meetings;
- providing access to the annual meeting to a broader group of shareholders and employees, who may be unable or unwilling to travel to a physical meeting held at a remote location; and
- flexibility in approach to handling shareholder questions, allowing companies to preview and prioritize important questions, eliminate redundancies and prepare more thorough responses.

Holding a meeting electronically is becoming increasingly popular, despite its share of criticism. The number of companies holding exclusively virtual meetings has increased considerably since 2010. During 2018, the number of companies that held virtual annual meetings grew approximately 27% compared to 2017. In response, numerous companies have received shareholder proposals requesting in-person meetings. However, on December 28, 2016, the SEC issued a no-action letter permitting such a proposal to be excluded from the proxy statement as dealing with ordinary business operations (*see* "Shareholder Proposals—Substantive Grounds for Exclusion of a Shareholder Proposal"). Companies considering an electronic meeting should consider the following:

- Not all states have adopted statutes allowing for entirely electronic annual meetings. Companies should consult with legal counsel to determine if an electronic meeting is authorized by corporate statutes in their state of incorporation.
- Typical attendance at physical annual meetings and the interest in management and the board of directors in holding the annual meeting electronically.
- The technology used to conduct the meeting must meet state corporate law requirements for shareholder participation. For a shareholder to be "present" for purposes of a quorum and voting under Delaware corporate law, the company must have the reasonable ability to:
  - verify that each person deemed present and permitted to vote at an electronic meeting is a shareholder or proxyholder;
  - provide shareholders and proxyholders a reasonable opportunity to participate in and vote at the meeting, including the ability to concurrently read or hear proceedings of the meeting; and
  - maintain a record of each vote or other action taken by a shareholder or proxyholder at the meeting by means of remote communication.
- Companies should review their charter documents (and make any appropriate amendments) to ensure that an electronic meeting is authorized.
- Because electronic meetings will likely increase the number of shareholders participating in the meeting, results may be less predictable as shareholders wait to vote at the meeting or change their vote at the meeting. This is particularly the case with meetings at which controversial proposals will be submitted.
- If more shareholders participate in the electronic meeting, companies should also be prepared for increased shareholder activism. Electronic meetings have been criticized by institutional investors and corporate gadflies because they eliminate the shareholders' face to face contact with the company's management.

Although electronic meetings will likely result in less certainty by corporate management about the outcome of the annual meeting, some commentators believe that the electronic meeting may ultimately provide companies and shareholders some of the advantages the annual meeting was intended to provide.

Nearly half of the states now permit electronic meetings. However, some of these states include conditions that limit the practical ability to hold an electronic meeting. California, for example, allows for electronic meetings without corresponding physical meetings but only with the consent of each shareholder. Of the states that do not allow exclusively electronic meetings, the majority allow for simulcasting the annual meeting remotely to various locations. It is uncertain whether the remaining states that have not adopted electronic meetings will follow Delaware's lead or how many companies will take advantage of the technological and statutory changes to hold electronic meetings, but recent trends suggest that electronic meetings are here to stay and will be an integral part of corporate democracy in the future.

Beginning January 1, 2019, for companies that hold virtual only meetings, certain proxy advisory firms will examine the company's disclosure of its meeting procedures and may recommend voting against directors on the nominating committee if the company does not provide disclosure ensuring that shareholders will have the same opportunities to participate in the virtual meeting as they would at an in-person meeting.

VII. REGIONAL MEETINGS

In addition to supplementing their annual meeting through remote broadcast of the principal meeting, some companies with geographically diverse shareholder bases have chosen to hold regional open houses or forums around the country to provide shareholders an opportunity to meet and hear firsthand from corporate executives. Even though no action is taken at these meetings, they are shareholder communication tools that allow shareholders to evaluate and interact with management of the company.

POST-MEETING ACTIVITIES

I. MINUTES OF THE MEETING AND CORPORATE DOCUMENTS

Preparing minutes of the annual meeting is generally the responsibility of the corporate secretary pursuant to state corporate law or the company's charter documents. While minutes of the annual meeting do not affect the validity of the actions taken at the meeting, they are kept to ensure that the records of the company are complete. Accurate minutes also avoid confusion relating to the actions taken at the annual meeting. After the minutes have been prepared, the corporate secretary should file the minutes and the other critical meeting documents (such as the Inspector of Election Report, the Oath of the Inspector of Election, the voting results and meeting transcripts) with the corporate records.

Companies often use recording devices or court reporters to accurately document the proceedings at the annual meeting. Although these tapes or transcripts may be useful to the corporate secretary in preparing the minutes, they should not be a substitute for the preparation of written minutes of the meeting. If a meeting is taped or recorded, companies often make copies of the tapes available to shareholders upon request. Some companies also include an archived version of the annual meeting on their website. Companies that provide access to archived copies of their annual meeting should also consider the information that is discussed at the annual meeting and how that information will be received by shareholders. Commentators suggest that the archive should be placed in a section of the company's website where other information is archived and clearly marked. In addition, at some time following the meeting the archived annual meeting should be removed entirely from the company's website to avoid access to information that is no longer accurate or current.

II. ORGANIZATIONAL BOARD MEETING FOLLOWING SHAREHOLDERS MEETING

Many companies hold a board of directors meeting following their annual shareholders meeting. If the company's directors are present for the annual meeting, this is an excellent time to convene a meeting of the board of directors. The types of matters discussed and action taken at such meetings, in addition to any action that needs to be taken related to the business of the company, generally include:

- electing the officers of the company for the ensuing year;
- designating the executive officers of the company who are subject to the requirements of Section 16 under the Exchange Act;
- conducting annual shareholders meeting proceedings for the company's wholly-owned subsidiaries, if any, to elect directors and officers of such subsidiaries; and
- reviewing the functioning of the just-completed annual meeting of shareholders, and taking any action that may be required for the company's next annual meeting of shareholders.

III. REPORT ON THE RESULTS OF VOTING

Because the large majority of shareholders of publicly traded companies do not attend annual meetings, many companies issue press releases announcing the results of voting at the meeting. Some companies also circulate to their shareholders a newsletter or bulletin describing the highlights of the meeting. Companies can also provide a more detailed discussion of the results of the meeting to shareholders who request a more detailed review. As discussed above, some companies provide access to an archived version of the annual meeting on their website. These archived recordings can be accompanied by a written description of the results of voting at the meeting. The final determination as to what information to provide and the means by which it is provided is generally based on the investor relations, marketing and expense impact of the various alternatives.

Federal securities laws require that public companies report the voting results of shareholder meetings on a Current Report on Form 8-K within four business days after the meeting at which a shareholder vote was held. If final voting results are not available, a company must report preliminary results on Form 8-K within four business days, and disclose final results on an amendment to the Form 8-K within four business days after the final voting results are known.

The Current Report on Form 8-K must contain:

- the date of the meeting and whether it was an annual or special meeting;
- if the meeting involved the election of directors, the name of each director elected at the meeting, as well as a brief description of each other matter voted upon at the meeting; and
- the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes as to each such matter, including a separate tabulation with respect to each nominee for office and, with respect to a say on pay frequency vote, the number of votes for each of one year, two years and three years.

In addition, if the meeting included a vote on the frequency of the say on pay vote, the company must file an amended Form 8-K within 150 days after the date of the meeting (but in no event later than 60 days prior to the deadline for the submission of shareholder proposals under Rule 14a-8 for the subsequent annual meeting) describing its determination regarding the frequency of say on pay votes if such determination was not included in the initial Form 8-K.

IV. POST-MEETING REVIEW

Following the annual meeting, many companies find it useful for all of the staff participants to meet and review the execution of the annual meeting. At such a meeting, the participants review the time and responsibility schedule and meeting agenda to note any items that can be improved for the following year's annual meeting. All aspects of the meeting should be examined for possible improvement, including the proxy solicitation materials, annual report, meeting facilities, agenda, script, security, logistics, proxy solicitor and shareholder participation.

Following the annual meeting, sometimes shortly after the post-meeting review is complete, many companies begin planning for the following year's meeting, including preparing a new time and responsibility schedule and selecting and arranging the facilities for the next meeting.

CONCLUSION

Preparing for the annual meeting is a complex process requiring the company to comply with state and federal laws, stock exchange rules and the company's charter documents. Persons preparing for the annual meeting should consult with legal counsel to ensure the numerous requirements are satisfied. In addition, the actions of a host of participants must be coordinated, including representatives of the company's executive, legal, finance and communications departments, and representatives of the company's outside legal counsel, independent auditors, transfer agent and possibly a proxy solicitor. The key to a successful meeting is starting the preparation process early, enlisting the help of the necessary participants and working diligently to see the process through to completion.

RESOURCES

APPENDIX A

General Notice and Filing Requirements for Annual Meetings and Related Matters[1]

	Meeting and Record Date	Annual Report to Shareholders	Preliminary Proxy Materials	Definitive Proxy Materials	Report of Actions Taken
State Law	Notice must be provided and a record date established that is within a specified number of days prior to the annual meeting.[2]	No Specific Requirement.	No Specific Requirement.	No Specific Requirement.	No Specific Requirement.
Federal Securities Law	The proxy rules require certain inquiries to institutional record holders regarding beneficial owners and delivery of proxy materials and annual reports to those beneficial holders. These inquiries must be made no later than 20 business days prior to the record date for the annual meeting. (Rule 14a-13)	An annual report complying with Rule 14a-3 of Regulation 14A under the Exchange Act must be delivered to each shareholder and either (1) an electronic copy must be posted to the company's website and remain for at least one year after posting, or (2) seven copies must be mailed to the SEC, in either case, no later than the later of the date on which the annual report is first sent or delivered to shareholders or the date that the company files preliminary proxy materials (or definitive materials if preliminary materials are not required) with the SEC. (Rule 14a-3) The proxy rules also require certain inquiries to institutional record holders regarding	Five copies of the preliminary proxy statement and proxy card relating to any meeting at which non-routine matters will be considered must be filed with the SEC at least 10 days (or such shorter period as the SEC may authorize) before definitive proxy materials are mailed to shareholders. (Rule 14a-6(a))	Concurrently with or before the mailing of the definitive proxy statement, proxy card and other soliciting materials to shareholders, the company must file copies of such materials with the SEC and provide three copies to each national securities exchange on which the company's securities are listed. (Rule 14a-6(b)) The proxy rules also require certain inquiries to institutional record holders regarding beneficial owners and delivery of proxy materials to those beneficial holders. (Rule 14a-13) If the company is adopting the "notice only" option of	For each matter submitted to a vote of shareholders, the company must provide the following information on Form 8-K disclosing voting results within four business days after the meeting at which a shareholder vote was held: (1) the date and type (annual or special) of meeting; (2) if directors were elected, the name of each director elected; (3) a brief description of each matter voted upon, and the number of votes cast for, against or withheld (as well as the number of abstentions and broker non-votes) for each matter, including a separate tabulation for each director nominee and, with respect to a

Meeting and Record Date	Annual Report to Shareholders	Preliminary Proxy Materials	Definitive Proxy Materials	Report of Actions Taken
	beneficial owners and delivery of annual reports to those beneficial holders. (Rule 14a-13)		providing proxy materials to its shareholders, the company must post its proxy materials on a publicly accessible internet website and send a Notice of Internet Availability of Proxy Materials at least 40 days before the shareholders meeting to which the proxy materials relate. In addition, the contents of the notice must be provided to institutional record holders and intermediaries to provide such parties sufficient time to prepare, print and send such parties' own Notice of Internet Availability of Proxy Materials to beneficial owners. (Rule 14a-16)	say on pay frequency vote, the number of votes for each of one year, two years and three years (as well as the number of abstentions); and (4) a description of the terms of any settlement with any participant terminating a solicitation in opposition, including the cost to the company. In addition, if the meeting included a vote on the frequency of the say on pay vote, the company must file an amended Form 8-K within 150 days after the date of the meeting (but in no event later than 60 days prior to the deadline for the submission of shareholder proposals under Rule 14a-8 for the subsequent annual meeting) describing its determination regarding the frequency of say on pay votes if such determination was not included in the initial Form 8-K.

	Meeting and Record Date	Annual Report to Shareholders	Preliminary Proxy Materials	Definitive Proxy Materials	Report of Actions Taken
NYSE	Notice must be provided to the NYSE immediately (and no later than 10 days before the record date, subject to narrowly limited exception) of the meeting and record date, and the company must publicize any meeting to consider non-routine matters. (Listed Company Manual §§ 204 & 401). Companies must also comply with the advance inquiry provisions of Rule 14a-13 of Regulation 14A described above.	The annual report to shareholders need not be filed with the NYSE, but the Annual Report on Form 10-K (or equivalent) must be filed with the SEC using EDGAR and must simultaneously be made available to shareholders on the company's website. (Listed Company Manual §§ 203 & 204)	Preliminary proxy materials relating to specified matters should be filed with the NYSE for review and comment before they become final. Material submitted for review should be marked to indicate clearly that it is in preliminary form and that it is confidential material, as applicable. (Listed Company Manual §§ 204 & 402)	The definitive proxy statement and proxy card need not be filed with the NYSE, provided such proxy materials are included in an SEC filing on EDGAR pursuant to Schedule 14A under the Exchange Act or otherwise identified to the NYSE at the same time they are provided to shareholders. (Listed Company Manual § 402)	Companies must notify the NYSE of the occurrence of numerous specified events. (Listed Company Manual § 204)
Nasdaq	Companies are required to hold an annual meeting. (Marketplace Rule 5620)	So long as the Annual Report on Form 10-K (or equivalent) is filed with the SEC using EDGAR or otherwise furnished to Nasdaq, the annual report to shareholders need not be filed with Nasdaq. (Marketplace Rule 5250(c)(1))	It is suggested that copies of preliminary proxy materials relating to matters subject to Nasdaq's Voting Rights Policy be furnished to Nasdaq for review prior to formal filing. (IM-5640)[3]	Proxies must be solicited and proxy statements provided to shareholders for all meetings and copies concurrently delivered to Nasdaq. (Marketplace Rule 5620(b))[3]	Companies must notify Nasdaq of the occurrence of numerous specified events. (Marketplace Rules)

[1] The information provided in this Appendix A is not intended to be an exhaustive list of the notice and filing requirements that may be applicable to all companies. Readers are urged to consult with legal counsel for the requirements applicable to their particular company.

2 The following is a list of notice and record date requirements for annual meetings at which routine matters will be considered in states that are popular jurisdictions of incorporation:

	Not More Than	Not Less Than		Not More Than	Not Less Than		Not More Than	Not Less Than
Delaware	60 days	10 days	Massachusetts	60 days (record date only)	7 days (notice only)	New Jersey	60 days	10 days
California	60 days	10 days	Pennsylvania	90 days (record date only)	5 days (notice only)	Maryland	90 days	10 days (notice only)
New York	60 days	10 days	Nevada	60 days	10 days	Illinois	60 days	10 days

3 Nasdaq rules allow companies' EDGAR filings to satisfy these proxy material filing requirements. *See* Nasdaq Marketplace Rule 5005 (15); 5250(c)(1).

APPENDIX B

The sample agenda and rules of conduct provided below are intended to be a general guide in preparing for the meeting. The sample agenda and rules are not intended to include all of the matters that may be required for any particular company. Readers are urged to review the law applicable to their company to ensure that matters required to be completed during the meeting are included in the agenda, and to ensure that any rules of conduct applicable to their company are provided to shareholders upon entering the meeting.

SAMPLE ANNUAL MEETING OF SHAREHOLDERS
OF
[NAME OF COMPANY]
AGENDA
[DATE]

A. CALL THE MEETING TO ORDER

1. Introductions
2. Instructions on Rules of Conduct and Procedures
3. Proof of Notice of Meeting
4. Proxies; Existence of Quorum

B. PROPOSALS AND DISCUSSION

1. Proposal No. 1—Election of Directors
   - **[List Director Nominee Names]**
2. Proposal No. 2—**[Describe additional proposals and include full text of resolutions being considered rather than reading them in their entirety during the meeting.]**

C. VOTING

1. Opening of Polls
2. Voting on Proposals
3. Closing of Polls

D. RESULTS OF VOTING

E. ADJOURNMENT

F. MANAGEMENT PRESENTATION

G. QUESTIONS AND ANSWERS

If you have sent in your proxy card your shares will be voted accordingly.

PLEASE DO NOT SIGN A BALLOT AT THIS MEETING UNLESS YOU WANT TO CHANGE THE WAY YOU VOTED ON YOUR PROXY.

SAMPLE RULES AND PROCEDURES FOR THE CONDUCT OF ANNUAL MEETING

We would like to welcome you to the **[year]** Annual Meeting of Shareholders of **[Name of Company]**. In fairness to all shareholders in attendance and in the interest of an orderly meeting, we require that you honor the following rules of conduct:

1. All shareholders and proxy holders must register at the reception desk before entering the room for the meeting.
2. The taking of photographs and use of audio or video recording equipment is prohibited.
3. The meeting will follow the agenda provided to all shareholders upon entering the meeting.
4. Only shareholders of record or their proxy holders may address the meeting.
5. All questions and comments should be directed to the chairperson of the meeting. You may address the meeting only after you have been recognized.
6. If you wish to address the meeting, please **[go to the nearest microphone station] [raise your hand]**. Upon being recognized, please state your name clearly, your status as a shareholder or a proxy holder and present your question or comment.
7. Each speaker is limited to a total of no more than three questions or comments, no more than one of which may be on any single topic and each of which must be no more than one minute in length.
8. Please permit each speaker the courtesy of concluding his or her remarks without interruption.
9. The views and comments of all shareholders are welcome. However, the purpose of the meeting will be observed and the chairperson or secretary will stop discussions that are:
    - irrelevant to the business of the company or the conduct of its operations;
    - related to pending or threatened litigation;
    - derogatory references that are not in good taste;
    - unduly prolonged (longer than one minute);
    - substantially repetitious of statements made by other shareholders; or
    - discussions related to personal grievances.

APPENDIX C

Provided below is a sample annual meeting script intended as a general guide in preparing for the meeting. This sample script is not intended to include all of the matters that may be required for any particular company. Readers are urged to review the law applicable to their company to ensure that matters required to be completed during the meeting are included in the script.

SAMPLE SCRIPT FOR ANNUAL MEETING
[COMPANY NAME]
ANNUAL MEETING OF SHAREHOLDERS
[DATE AND TIME]

I. CALL THE MEETING TO ORDER

A. INTRODUCTIONS

Chairperson: Hello, ladies and gentlemen. Will the meeting please come to order. I want to welcome all of you to the annual meeting of shareholders of **[Company Name]**. I am **[Name]**, Chairperson of the Board of **[Company Name]**, and I will be presiding at this meeting.

Also present at the meeting today are: **[Introduction of directors, officers and invited guests present at the meeting.] [Name]** will act as secretary of the meeting. **[Name of Inspector of Election]**, our transfer agent, has been appointed to act as Inspector of Election.

[Name of representative from independent auditor], a representative from **[name of independent auditor]**, is also present at the meeting. During the question and answer period at the end of the meeting, **[he/she]** will be available to answer questions concerning the company's financial statements.

B. INSTRUCTIONS ON RULES OF CONDUCT AND PROCEDURES

Chairperson: Each of you should have registered at the desk as you entered the meeting. If there are any of you who have not registered, would you at this time please step over to the desk and sign the register.

Upon entering the meeting, each of you was presented with an agenda for the meeting. On the reverse side of the agenda is a list of the rules of conduct for the annual meeting. To conduct an orderly meeting, we ask that participants abide by these rules.

As stated in the rules of conduct, shareholders should not address the meeting until recognized. Should you desire to ask a question or speak during the meeting, please raise your hand. After being recognized, first identify yourself and your status as a shareholder or representative of a shareholder, then state your point or ask your question. As stated in the rules of conduct, we ask that you restrict your remarks to the item of the agenda that is before us.

Thank you for your cooperation with these rules.

[USE ANNEXES A—E, AS NECESSARY.]

C. PROOF OF NOTICE OF MEETING

Chairperson: The Secretary has delivered an Affidavit of Mailing establishing that notice of this meeting was duly given. A copy of the notice of meeting and the Affidavit of Mailing will be incorporated into the minutes of this meeting. All shareholders of record at the close of business on **[record date]** are entitled to vote at the annual meeting.

D. PROXIES; EXISTENCE OF QUORUM

Chairperson: Our first order of business at this meeting is to determine whether the shares represented at the meeting, either in person or by proxy, are sufficient to constitute a quorum for the purpose of transacting business. **[Secretary's Name]** do you have a report?

Secretary: Yes, the shareholders list shows that holders of **[   ]** shares of common stock of the company are entitled to vote at this meeting. We are informed by **[Inspector of Election]** that there are represented in person or by proxy **[   ]** shares of common stock or approximately **[   ]**% of all of the shares entitled to vote at this meeting.

Chairperson: Thank you. Because holders of a majority of the shares entitled to vote at this meeting are present in person or by proxy, I declare this meeting to be duly convened for purposes of transacting such business as may properly come before it.

II. PROPOSALS AND DISCUSSION

A. PROPOSAL NO. 1—ELECTION OF DIRECTORS

Chairperson: The next order of business is a description of the matters to be voted on at today's meeting. The first proposal before the shareholders of the company is the election of **[   ]** directors to serve until the annual meeting of shareholders in **[   ]** and until their successors are duly elected and qualified. The management of the company recommends the election of the following persons as directors of the company:

[Names of Director Nominees]

B. PROPOSAL NO. 2—ADDITIONAL PROPOSALS

[PREPARE APPROPRIATE SCRIPT DESCRIBING ADDITIONAL PROPOSALS.]

III. VOTING

A. OPENING POLLS

Chairperson: The polls are now open. If you desire a ballot, please raise your hand to so indicate and it will be provided. The Inspector of Election will provide ballots to those who desire them. If you previously voted by proxy, you do not need to vote today unless you wish to change your vote.

B. VOTING ON PROPOSALS

Chairperson: The Inspector of Election will now collect any outstanding ballots. If you have brought your proxy or wish to vote by ballot, please provide your proxy or ballot to the Inspector of Election. Again, if you have already voted by proxy, you need not vote today unless you would like to change your vote. Please hold up your hand so that your ballot can be collected.

C. CLOSING POLLS

Chairperson: We now seem to have all the ballots, and since all those desiring to vote by ballot have done so, I hereby declare the polls closed. The ballots and proxies will be held in the possession of the Inspector of Election. The Inspector of Election will count the votes.

[ALLOW BALLOTS AND PROXIES TO BE COUNTED.]

IV. RESULTS OF VOTING

[CONFIRM WITH THE INSPECTOR OF ELECTION THAT BALLOTS HAVE BEEN COUNTED.]

Chairperson: Will the Secretary please report the results of the voting.

Secretary: We have been informed by the Inspector of Election that the ballots have been counted and that the nominees for election to the Board of Directors have been duly elected and **[report any additional results of voting]**.

V. ADJOURNMENT

Chairperson: Thank you for attending today's meeting. The meeting is adjourned. We will now have a presentation by the company's management, after which we will have a brief question and answer period.

VI. MANAGEMENT PRESENTATION

[REMARKS BY MANAGEMENT.]

VII. QUESTIONS AND ANSWERS

[OPEN THE MEETING TO QUESTIONS BY SHAREHOLDERS.]

SHAREHOLDER'S COMMENTS EXCEED TIME LIMIT

Chairperson: I'm sorry, but you have exceeded the time limit set forth in the rules. Please promptly conclude your remarks.

[IF SHAREHOLDER PERSISTS.]

Chairperson: I repeat, you have exceeded the time limit set forth in the rules. Time limits have been imposed so that everyone may have a chance to speak and so that we may conduct the meeting in an orderly manner. Now please take your seat **[so that we may respond to your comments]**.

[IF SHAREHOLDER STILL PERSISTS—*SEE* ANNEX B REGARDING DISRUPTIVE SHAREHOLDERS.]

Annex B

RESPONSE TO DISRUPTIVE SHAREHOLDER CONDUCT

Request for Quiet

Chairperson: I must request that if you are not recognized, please refrain from speaking out so that we may continue with the orderly conduct of this meeting. **[If not in the question and answer period also state—You will have the opportunity to ask questions about the business and financial condition of the company after we have conducted the formal items of business of the meeting.]**

[IF SHAREHOLDER PERSISTS.]

Second Warning

Chairperson: I repeat that if you are not recognized, your conduct is out of order. Please keep quiet so that we may continue with the meeting in an orderly manner. Otherwise you will be asked to leave the meeting, and, if necessary, removed from this room.

[IF SHAREHOLDER STILL PERSISTS.]

Removal of Shareholder

Chairperson: Sir (or madam), I have repeatedly asked you to stop your disruptive conduct and have advised you that your action is out of order. However, you have chosen not to comply with my request and as Chairperson of this meeting, I must now ask you to leave the meeting. Security, would you please escort this individual from the meeting.

SHAREHOLDER DEMANDING TO BE HEARD ON MATTERS OUTSIDE THE AGENDA

Chairperson: We have established an order of business which is set out in the agenda for this meeting so that we can conduct the meeting in an orderly manner. All discussion at this meeting should be limited to the proposals that are the subject of this meeting.

[IF SHAREHOLDER PERSISTS.]

Chairperson: Your comments go beyond the business of the meeting as set forth in the agenda and are out of order. If you would like to speak with someone from the company about this issue, please wait until after the meeting when one of the officers will discuss the matter with you or arrange a mutually convenient time to discuss the matter.

[IF SHAREHOLDER STILL PERSISTS.]

Chairperson: Rather than debate this point, I will ask the shareholders present to decide whether they agree with me that we follow the order of business as set forth in the agenda or depart from the printed agenda and listen to your remarks at this time.

The question is: Do the shareholders present desire to follow the order of business set forth in the agenda? All shareholders in favor, say “aye.” All opposed, “no.” The “ayes” have it. We will therefore proceed with the order of business as set forth in the agenda.

[IF SHAREHOLDER STILL PERSISTS.]

Chairperson: Your comments and conduct at this time are out of order, and if you persist, I will be forced to ask you to leave the meeting.

Annex D

SHAREHOLDER WISHING TO BRING A MOTION BEFORE THE MEETING

Chairperson: Our Bylaws provide that only business brought before this meeting by or at the direction of our Board of Directors may be considered. The only business noticed and brought before this meeting by the Board is to elect directors and **[other proposals]**. As a result, we are prohibited from addressing your motion at this meeting.

Additionally, the vast majority of our shareholders are voting today by proxy. These shareholders have not been given notice of your proposal and it would be unfair to act on your motion without first giving them notice and the opportunity to consider the substance of your motion.

[IF SHAREHOLDER PERSISTS AND COMPANY HAS SUFFICIENT PROXIES TO CARRY THE VOTE.]

Chairperson: May I have a motion to table the shareholder's motion.

[Name]: I so move.

[Name]: I second the motion.

Chairperson: All shareholders in favor, say "aye." All opposed, "no." The "ayes" have it. The motion is tabled.

Annex E

EMERGENCY PROCEDURES

While unlikely, a situation may arise before or during the shareholders meeting that requires deviation from the agenda. In the event of a major disturbance, it may be necessary or desirable to adjourn the meeting as promptly as possible while making sure that all the legal prerequisites to effect corporate action at the meeting have been satisfied.

Chairperson: As Chairperson of this meeting I now rule:

1) notice of this meeting has been properly served;

2) a quorum is present—over **[ ]**% of the voting power of the company is represented by proxy;

3) all items of business are properly before the meeting;

4) the polls are open and will stay open for 48 hours to receive any votes you may wish to cast by proxy or ballot. Mail them to **[address of company]**; and

5) I declare the meeting adjourned.

Ballots are available from ushers. A post-meeting report will include the final vote tabulation.

APPENDIX D

SELECTED CONTENTS OF THE NOTICE OF INTERNET AVAILABILITY OF PROXY MATERIALS

Companies are advised to consult legal counsel for additional information regarding the contents of the notice of internet availability of proxy materials in each particular instance. The notice must contain certain information, including the items listed below:[1]

- A prominent legend in bold-face type that states:
  "Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date]";
- An indication that the communication is not a form for voting and presents only an overview of the more complete proxy materials, which contain important information and are available on the internet or by mail, and encouraging a security holder to access and review the proxy materials before voting;
- The internet website address where the proxy materials are available;
- Instructions regarding how a security holder may request a paper or e-mail copy of the proxy materials at no charge, including the date by which they should make the request to facilitate timely delivery, and an indication that they will not otherwise receive a paper or e-mail copy;
- The date, time, and location of the meeting, or if corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected;
- A clear and impartial identification of each separate matter intended to be acted on and the soliciting person's recommendations, if any, regarding those matters, but no supporting statements;
- A list of the materials being made available at the specified website;
- A toll-free telephone number, an e-mail address, and an internet website where the security holder can request a copy of the proxy statement, annual report to security holders, and form of proxy, relating to all of the company's future security holder meetings and for the particular meeting to which the proxy materials being furnished relate;
- Any control/identification numbers that the security holder needs to access his or her form of proxy;
- Instructions on how to access the form of proxy, provided that such instructions do not enable a security holder to execute a proxy without having access to the proxy statement; and
- Information on how to obtain directions to be able to attend the meeting and vote in person.

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1 The notice used by companies adopting the full set delivery option need not include the information relating to shareholder requests for copies of the proxy materials nor the instructions on how to request a copy of the proxy materials.

APPENDIX E

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