

## Bite-Size Reminders for the 2017 Proxy Season

With the 2017 proxy season underway, below are a few reminders that companies subject to the proxy rules of the US Securities and Exchange Commission (SEC) should consider in connection with their proxy materials and related matters.

**Say-When-on-Pay.** Companies must conduct a shareholder advisory vote on the desired frequency of the executive compensation say-on-pay vote at least every six years. The first mandatory say-on-pay votes pursuant to Rule 14a-21 under the Securities Exchange Act of 1934 (Exchange Act) were held during the 2011 proxy season. Therefore, many companies must include a say-when-on-pay agenda item at their 2017 annual meetings asking shareholders whether the say-on-pay vote should occur every one, two or three years. This advisory vote is required even if the company is already conducting its say-on-pay vote annually and intends to continue this practice.

**Form 8-K Reporting of Say-When-on-Pay Decision.** In addition to reporting the results of the say-when-on-pay vote on a Form 8-K filed within four business days of the annual meeting, Item 5.07(d) of Form 8-K requires companies to disclose their decision as to how often they intend to hold say-on-pay advisory votes in light of the results of the advisory say-when-on-pay vote. If a company does not initially include its frequency decision on its Form 8-K that reports voting results, the company must amend that Form 8-K to include such disclosure within 150 days of the annual meeting (but not less than 60

days prior to the deadline for submission of shareholder proposals under Exchange Act Rule 14a-8). In connection with the first say-when-on-pay votes held in 2011, some companies did not make the required Form 8-K disclosure in a timely fashion, thus rendering them ineligible to register their securities on Form S-3, absent relief from the staff of the SEC's Division of Corporation Finance (Staff).

**Non-GAAP Financial Measures.** In the past year, the SEC has increased its focus on compliance with the requirements for use of non-GAAP financial measures. The Staff issued new and updated compliance and disclosure interpretations (C&DIs) on the subject in May 2016, including guidance on the requirements for presenting the most directly comparable GAAP measure with equal or greater prominence.<sup>1</sup> While Regulation S-K and Staff interpretations provide guidance regarding non-GAAP financial measures used in certain proxy statement discussions (for example, with respect to target levels for performance and the location of required GAAP reconciliation and other information when non-GAAP financial measures are disclosed in pay-related circumstances), companies using non-GAAP financial measures in their proxy statements should also take the new guidance into account.

**Audit Committee Disclosure.** In 2015, the SEC issued a concept release on possible revisions to audit committee disclosures, exploring various areas of audit committee disclosure.<sup>2</sup> While the SEC has not issued any

specific proposals in response to the issues raised by the concept release and related comments, the conversation about whether there should be more audit committee disclosure already has begun. Some institutional investors began advocating for additional audit committee disclosures even before the SEC issued its concept release. Some companies, in the interest of transparency, are already expanding audit committee disclosures beyond the mandatory requirements, for example, by providing greater detail about the audit committee's oversight of the independent auditor.

**Virtual Meetings.** The number of companies conducting virtual annual meetings has been increasing over the past few years. In a virtual meeting, shareholders are allowed to attend the meeting from any location without incurring the time and cost of travel. Online shareholder meetings can take a variety of forms. Some are hybrids, with in-person meetings supplemented by audio and/or video options. Other companies conduct fully virtual meetings. In recent no-action letters, the Staff permitted companies to exclude from their proxy statements shareholder proposals requesting the adoption of a corporate governance policy to initiate or restore in-person annual meetings. The Staff concurred with the companies that the determination of whether to hold annual meetings in person relates to ordinary business operations under Rule 14a-8(i)(7).<sup>3</sup>

**Disclosure of Voting Standards.** In October 2016, the SEC proposed amending Exchange Act Rule 14a-4(b) to require proxy cards for all director elections to include an “against” option instead of a “withhold authority to vote” option if governing law provides a legal effect for a vote against a nominee. The SEC also proposed that when a director election is governed by a majority voting standard, shareholders that neither support nor oppose a nominee be given the opportunity to “abstain,” as opposed to withholding authority to vote. In addition, under the proposed amendments, proxy statements would be expressly required to disclose the effect

of a “withhold” vote in an election of directors.<sup>4</sup> While no final rule has been adopted, the SEC believes that there are issues in the way some companies currently disclose and/or apply voting standards for director elections, and the Staff has given comments to some companies in this regard. Therefore, companies should evaluate the adequacy of their proxy statement descriptions of director voting standards and options and consider whether revisions should be made to more accurately reflect the applicable voting standard.

**Proxy Cards.** In March 2016, the Staff issued C&DI 301.01, which emphasizes that a proxy card must describe the specific action on which shareholders will be asked to vote, whether the proposal is one submitted by management or one submitted by a shareholder.<sup>5</sup> The proxy card must contain sufficient detail to explain the proposal. For example, if management proposes an amendment to the company's charter to increase the number of authorized shares of common stock, it is not sufficient for the proxy card to simply describe the proposal as “a proposal to amend our charter.” Similarly, it would be insufficient for a proxy card to describe a shareholder proposal calling for a bylaw amendment to allow shareholders holding 10 percent of the company's common stock to call a special meeting as “a shareholder proposal on special meetings” or “shareholder proposal #3.” Companies should ensure that the descriptions of proposals on their proxy cards contain sufficient detail to comply with the Staff's guidance.

**Additional Proxy Materials.** As part of a proxy solicitation, companies sometimes choose to communicate information or emphasize positions to shareholders in addition to what is contained in the proxy statement. In these situations, companies must file the additional soliciting materials with the SEC no later than the date first used. Additional soliciting materials might include not only proxy statement supplements, letters to shareholders and slide decks but also scripts or talking points.

**Pay Ratio Preparations.** Pursuant to the SEC's final pay ratio disclosure rule adopted under the mandate of the Dodd-Frank Wall Street Reform and Consumer Protection Act, initial pay ratio disclosure will first be required in 2018 proxy statements (or later in the case of companies that are new SEC registrants). It is unclear whether the new administration may seek to repeal or amend the pay ratio disclosure requirement. However, given other, various legislative and regulatory initiatives that the new administration has articulated, it is uncertain whether any action will be taken before pay ratio disclosure is required. Because it may take significant time for companies subject to the rule to gather the necessary information to comply, they should continue to devote time and resources to prepare for compliance in case it is necessary.

**Optional 10-K Summary.** New Item 16 of Form 10-K authorizes, but does not require, summary information that is presented fairly and accurately and includes a hyperlink to the material contained in the Form 10-K, including exhibits, to which the summary relates. The summary may only refer to information that is included in the Form 10-K at the time it is filed. Companies do not need to update the summary for information required by Part III of Form 10-K that is incorporated by reference to a proxy or information statement filed after the Form 10-K. However, in that case the summary must state that it does not include Part III information because that information will be incorporated from a later-filed proxy or information statement involving the election of the board of directors. Companies may want to consider whether such a summary would be worthwhile.

**New Nasdaq Disclosure Requirements.** In July 2016, the SEC approved a new Nasdaq "golden leash" rule which requires companies listed on Nasdaq to "disclose either on or through the company's website or in the proxy or information statement for the next shareholders' meeting at which directors are

elected (or, if the company does not file proxy or information statements, in its Form 10-K or 20-F), the material terms of all agreements and arrangements between any director or nominee for director and any person or entity other than the company relating to compensation or other payment in connection with such person's candidacy or service as a director of the company."<sup>6</sup> Nasdaq companies are required to make the disclosure at least annually until the earlier of the resignation of the director or one year following the termination of the agreement or arrangement. The new rule does not require disclosure of arrangements (i) relating only to reimbursement of expenses in connection with candidacy as a director, (ii) that existed prior to the nominee's candidacy (if the relationship has been publicly disclosed in a proxy or information statement or annual report) or (iii) that have been previously disclosed under Item 5(b) of Schedule 14A or Item 5.02(d)(2) of Form 8-K in the current fiscal year (but the company still has the obligation to provide disclosure in future years on an annual basis).

**Presentation of Shareholder Proposals at an Annual Meeting.** If any shareholder proposals are included in the proxy statement, companies should have a procedure to confirm that an appropriate person is presenting the proposal. Companies should also decide in advance how they will proceed if neither the proponent nor the proponent's representative attends the meeting. Some companies may choose to present the proposal as a courtesy, especially if the proxies in hand indicate that the proposal will fail (since Rule 14a-8(i)(12) allows shareholder proposals dealing with substantially the same matter to be excluded from proxy statements within three calendar years from the last time such a proposal was included if the proposal failed to achieve certain thresholds when voted on). If, without good cause, the proponent or the proponent's representative fails to appear at the meeting and present the proposal, Rule 14a-8(h)(3) permits the company

to exclude from its proxy materials for the following two calendar years any proposals submitted by that proponent. While there is precedent permitting a company to exclude shareholder proposals on this basis even if the company submits an absentee proponent's proposal to a vote for the convenience of its shareholders,<sup>7</sup> companies should be careful not to take actions that may waive this right, for example, by asking another shareholder in attendance at the meeting to present the proposal.<sup>8</sup>

**No Need to Send Printed Annual Reports to the SEC.** It is no longer necessary for companies to send printed copies of annual reports to the SEC. The Staff issued an interpretation in November 2016 indicating that it will not object if a company posts an electronic version of its annual report to its corporate web site by the dates specified in Exchange Act Rule 14a-3(c) and Exchange Act Rule 14c-3(b) and in Form 10-K, in lieu of mailing paper copies of the annual report to the SEC or submitting it on EDGAR. If the annual report remains accessible for at least one year after posting, the Staff will consider it available for its information.<sup>9</sup>

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## Endnotes

- 1 See <https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm>.
- 2 See <https://www.sec.gov/rules/concept/2015/33-9862.pdf>.
- 3 See, for example, <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/cheveddennaylor122816-14a8.pdf>.
- 4 These proposals were included in the SEC's proposing release on universal proxy, available at <https://www.sec.gov/rules/proposed/2016/34-79164.pdf>.
- 5 See <https://www.sec.gov/divisions/corpfin/guidance/exchange-act-rule-14a-4a3-301.htm>.
- 6 See Nasdaq Rule 5250(b)(3), available at <http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?searched=1&selectednode=chp%5F1%5F1%5F4%5F2%5F8%5F25&CiRestriction=5635%2D1&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Fdequityrules%2F>.
- 7 See, for example, <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/marcoconsultinggroup030315-14a8.pdf>.

<sup>8</sup> See, for example, <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/newyorkcityemploymentretire031813-14a8.pdf>.

<sup>9</sup> See <https://www.sec.gov/divisions/corpfin/guidance/exchange-act-rule-14a3-14c3.htm>.

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