ANNUAL MEETING HANDBOOK

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2024 EDITION

Annual Meeting Handbook

2024 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

Nearly 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. However, holding an annual meeting of shareholders involves much more than merely fulfilling a legal requirement. The annual meeting allows shareholders to express a judgment on management's stewardship of their company, enables management to obtain shareholder approval of important matters, and provides a forum for management and shareholders to discuss the progress and direction of the business.

This handbook is intended to assist companies in preparing for the annual meeting. It provides an 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, it includes a discussion of practical tips relating to the preparation and conduct of an annual meeting. 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 2024 PROXY SEASON

I. UNIVERSAL PROXY CARDS

In 2021, the Securities and Exchange Commission (SEC) amended the federal proxy rules to require the use of universal proxy cards in contested director elections at annual meetings taking place after August 31, 2022. Before the amendments, only shareholders in attendance at an annual meeting could vote for director candidates from competing slates of nominees (e.g., voting for some candidates nominated by the company and others nominated by shareholders). Shareholders voting by proxy, on the other hand, could only vote for or against an entire slate of director candidates as nominated by the party soliciting their proxy.

Universal proxy cards take a different approach. The new Rule 14a-19 requires that proxy cards list the names of all the director nominees for whom proxies are solicited, whether by the company or by activist shareholders, providing shareholders voting by proxy the opportunity to "mix and match" their votes for candidates from competing slates of director nominees, just as shareholders in attendance at an annual meeting can do. These changes could lead to increased scrutiny of individual director candidates, who will no longer be shielded by the strength of the slate with which they are nominated. Some shareholders may find the increased number of director candidates on proxy cards and the ability to mix and match votes for those candidates confusing, and may therefore choose to rely upon the recommendations of proxy advisory firms to guide their decisions. In either case, the amended universal proxy rules may increase the likelihood that shareholders elect at least some dissident director candidates in contested elections.

The amended rules also require certain procedural changes. For example, companies and shareholders presenting alternative slates of director candidates must comply with heightened notice and reporting requirements so that universal proxy cards can be prepared. In particular, in addition to any advance notice requirements in the company's charter documents, an activist shareholder seeking to run an election contest must provide notice to the company no later than 60 calendar days prior to the anniversary of the company's previous year's annual meeting date. The activist shareholder must also file its definitive proxy statement with the SEC by the later of 25 calendar days prior to the meeting date or five calendar days after the company files its definitive proxy statement. Alternative slates of director candidates will only be included on a universal proxy card if the activist shareholder solicits shareholders representing at least 67% of the voting power of the shares entitled to vote. Unlike the previously adopted proxy access rules, the universal proxy rules do not impose minimum ownership thresholds or holding periods on the activist shareholder, nor do they cap the number of nominees proposed by an activist shareholder.

Additionally, the universal proxy rules have disclosure implications for proxy statements and impose constraints upon the content and formatting of proxy cards. Universal proxy cards must provide "against" and "abstain" voting options when state law gives those choices effect, and the company's proxy statement must include a description of each available voting option. If an activist shareholder provides notice of a contested election, the company must also disclose in its proxy statement how it intends to treat proxies granted in favor of the activist's nominees if the activist abandons its solicitation or fails to comply with the universal proxy rules. Finally, universal proxy cards must adhere to uniform formatting requirements to ensure that all director candidates are presented to shareholders on equal footing.

Notably, the SEC has advised that a company may reject a dissident shareholder's nominations if it does not comply with the company's advance notice bylaw requirements. Under those circumstances, the SEC has advised that the company should disclose in its proxy statement its determination that the dissident shareholder's director nominations are invalid as well as provide a brief description of the basis for that determination. The company should also include additional disclosure if the dissident shareholder has initiated litigation challenging the determination and describe the potential implications (including any risks to the company or its shareholders) if the dissident shareholder's nominations are ultimately deemed to be valid.

Companies should carefully screen their director candidates to avoid nominating candidates who are susceptible to increased individual attention or challenge under the new rules. Companies should also consider drafting or amending their bylaws to ensure that dissident shareholders adhere to the new rules and to enhance their advance notice requirements as necessary, although it is advisable to implement any such changes on a "clear day" before any activist campaign is initiated.

II. CLAWBACK RULES

On October 26, 2022, the SEC adopted final rules that directed stock exchanges to require public companies to adopt clawback policies for the mandatory recovery of erroneously awarded executive incentive compensation. The clawback rules apply to *nearly all* US public companies, including smaller reporting companies, emerging growth companies (EGCs), and foreign private issuers.

The rules require companies to clawback incentive compensation that is erroneously received by current or former executive officers during the three-year period preceding the date on which the company is required to prepare an accounting restatement due to the issuer's material noncompliance with any financial reporting requirement under the securities laws. A clawback is triggered by an accounting restatement that either (1) corrects an error in previously issued financial statements that is material to the

previously issued financial statements (defined by the SEC as a "Big R" restatement), or (2) would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period (a "little r" restatement).

Companies are required to file their clawback policies as an exhibit to their Annual Report on Form 10-K, Form 20-F, or Form 40-F, and in their proxy or information statements pursuant to new Item 402(w) of Regulation S-K. Further, a company will be required to check appropriate boxes on its Form 10-K (and analogous form applicable to FPIs and MJDS, such as Form 20-F and Form 40-F) regarding whether financial statements included in the filing reflect the correction of an error to previously issued financial statements and whether any of those error corrections are restatements that require a recovery analysis of incentive-based compensation received by its executive officers.

In October 2023, the listing standards proposed by the Nasdaq Stock Market LLC (Nasdaq) and New York Stock Exchange LLC (NYSE) became effective, requiring issuers to adopt a clawback policy compliant with the applicable listing standards and SEC rules by December 1, 2023.

For further information regarding the new clawback rules, *see* "Federal Proxy Rules and the Proxy Statement—the Proxy Statement—Executive Compensation Disclosure—Disclosure of incentive compensation clawback policy."

III. PAY VERSUS PERFORMANCE

On August 25, 2022, the SEC adopted final rules that require covered publicly traded companies to provide tabular and narrative/graphic disclosure of the relationship between executive compensation actually paid by the company to its named executive officers (NEOs) and the company's performance, or Pay Versus Performance Disclosure. The SEC has implemented the Pay Versus Performance Disclosure requirements through a new paragraph (v) to Item 402 of Regulation S-K. This new requirement applies to all public companies except EGCs, foreign private issuers or registered investment companies. Although subject to the rule, smaller reporting companies are permitted to provide scaled disclosure. The new disclosure must be included in any proxy statement or information statement covering any fiscal year ending on or after December 16, 2022 but need not be included in an Annual Report/Form 10-K or in registration statements.

Covered companies must provide Pay Versus Performance Disclosure in tabular format for the five most recently completed fiscal years (or, for smaller reporting companies, the three most recently completed years). However, to provide some transitional relief, the SEC permitted companies for the first year in which the Pay Versus Performance Table is required to limit the disclosure to only the three most recently

completed fiscal years (or, for smaller reporting companies, the two most recently completed fiscal years). Thereafter, an additional year will be added in each subsequent annual filing in which the Pay Versus Performance Disclosure is required until the company discloses the requisite information for the five most recently completed fiscal years (or, for smaller reporting companies, the three most recently completed fiscal years). Therefore, in most proxy statements in 2024, disclosure with respect to a minimum of the four most recently completed fiscal years (or, for smaller reporting companies, the three most recently completed fiscal years) will generally be required at a minimum.

For further information regarding the new Pay Versus Performance Disclosure requirements, *see* "Federal Proxy Rules and the Proxy Statement—the Proxy Statement—Executive Compensation Disclosure—Pay Versus Performance."

IV. CYBERSECURITY

In July 2023, the SEC adopted Item 106 of Regulation S-K, which requires companies to provide disclosure regarding cybersecurity risk management, strategy, and governance in annual reports on Form 10-K and Form 20-F, with the disclosure requirement beginning with annual reports for fiscal years ending on or after December 15, 2023.

Covered companies must describe their processes, if any, for assessing, identifying, and managing material risks from cybersecurity threats. In providing such disclosure, companies should address, as applicable, (1) whether and how they have integrated such processes into their overall risk management system or processes, (2) any engagement they have with assessors, consultants, auditors, or third parties in connection with such processes, and (3) any processes in place to identify material cybersecurity risks associated with their use of third-party service providers.

In addition, companies are required to describe whether any risks from cybersecurity threats, including as a result of any previous cybersecurity incidents, have materially affected or are reasonably likely to materially affect them, including their business strategy, results of operations, or financial condition, and if so, how.

Moreover, the new rules require that companies disclose their board of directors' role in overseeing cybersecurity risks. Specifically, companies must disclose which board committee or subcommittee, if any, is responsible for such oversight, along with the processes by which the board or applicable committee is informed about any cybersecurity risks.

Finally, companies need to disclose management's role in assessing and managing their material cybersecurity risks. In providing such disclosure, companies should address, as applicable, (1) which management positions or committees are responsible for assessing and managing such risks, and the relevant experience of such persons, (2) the processes by which such persons or committees are informed about and monitor the prevention, detection, mitigation, and remediation of cybersecurity incidents and (3) whether such persons or committees report information about such risks to the company's board of directors or a committee thereof.

The new rule also requires covered companies to tag the required disclosures in Inline XBRL, in accordance with Rule 405 and the Electronic Data Gathering, Analysis and Retrieval (EDGAR) Filer Manual. However, the tagging requirement has a staggered compliance date of one year beyond initial compliance with the disclosure requirements. Companies should evaluate their existing cybersecurity risks and processes for assessing, identifying, and managing risks from cybersecurity threats, specifically at the board and management level.

The new rules also require companies to make certain disclosures on Forms 8-K or 6-K within four business days of determining that a material cybersecurity incident has occurred, and must make such determination "without unreasonable delay." In their disclosure, companies should describe material aspects of the incident's nature, scope, and timing, as well as the impact or reasonably likely impact. The cybersecurity incident reporting on Forms 8-K or 6-K came into effect on December 18, 2023. Smaller reporting companies will have an additional 180 days to comply, or until June 17, 2024.

V. INSIDER TRADING POLICIES

In December 2022, the SEC adopted new Item 408 of Regulation S-K and Item 16J of Form 20-F, which require public companies to disclose in annual reports on Form 10-K, 20-F, and proxy and information statements on Schedules 14A and 14C, whether they have adopted insider trading policies and procedures that govern the purchase, sale, and other dispositions of securities by directors, officers, employees, or the company itself. Companies that have adopted such policies and procedures are required to file a copy of their insider trading policies and procedures as Exhibit 19 to Form 10-K. Pursuant to new Item 16J in Form 20-F, foreign private issuers are required to provide analogous disclosures, including filing a copy of their insider trading policies and procedures as an exhibit in their annual reports. If a company has not adopted insider trading policies and procedures, it is required to disclose why it has not done so in the relevant filings. Such disclosures must be tagged in Inline XBRL, in accordance with Rule 405 and the EDGAR Filer Manual.

The new rule requires disclosure regarding insider trading policies in Part III of Form 10-K, which allows registrants to incorporate by reference the information required by the new Item 408(b) from a definitive proxy or information statement involving the election of directors, if such proxy or information statement is filed within 120 days of the end of the fiscal year. However, the company's policies and procedures must still be filed as an exhibit to their annual report on Form 10-K.

In accordance with Compliance and Disclosure Interpretations (C&DIs) issued by the SEC in May 2023, companies must comply with these new disclosure and tagging requirements in the first filing that covers the first full fiscal period that begins on or after April 1, 2023. Therefore, a December 31 fiscal year-end company must first make these disclosures in their Form 10-K or 20-F for the fiscal year ending December 31, 2024 (filed in early 2025). Alternatively, a June 30 fiscal year-end company must first make these disclosures in their Form 10-K or 20-F for the fiscal year ending June 30, 2024. To provide some transitional relief, smaller reporting companies are not required to comply with the new disclosure and tagging requirements until their first filing that covers the first full fiscal period that began on or after October 1, 2023.

VI. 10b5-1 PLANS

In 2023, the SEC modified the Rule 10b5-1 affirmative defense under the Securities Exchange Act of 1934 (the Exchange Act) through new Item 408(a) and 408(d) to Regulation S-K. Rule 10b5-1 provides an affirmative defense to insider trading liability for persons who trade securities under plans they adopt when they do not possess material nonpublic information and then carry out their pre-planned trades even if they later become aware of material nonpublic information. New Items 408(a) and 408(d) modified the conditions that persons and companies must comply with to be covered by the affirmative defense. The amended rules apply to (1) new trading plans adopted on or after February 27, 2023 and (2) pre-existing plans that are modified to change the amount, price, or timing of trades, including a change to a formula that affects such inputs, on or after February 27, 2023. Any such modification to a pre-existing plan constitutes a termination of the pre-existing plan and adoption of a new trading plan.

In addition, Item 408(a) of Regulation S-K that requires issuers to disclose, on a quarterly basis on Forms 10-Q and Form-10-K, whether during the most recent quarter, any of their directors or officers adopted or terminated a Rule 10b5-1 trading plan or non-Rule 10b5-1 trading arrangement. As part of this disclosure, issuers must include material terms of the trading plan such as (1) the names and titles of the directors and officers adopting or terminating a plan; (2) the date of adoption or termination; (3) the stated duration of the plan; (4) the aggregate amount of securities to be sold or purchased under the plan; and (5) whether the plan is a Rule 10b5-1 trading plan or a non-Rule 10b5-1 trading arrangement. The rules do not require

the disclosure of the price terms of a plan. Notably, any modification or change to the amount, price, or timing of the purchase or sale of the securities underlying a Rule 10b5-1 trading plan constitutes the termination of the plan and the adoption of a new trading plan, triggering the disclosure described above. The SEC staff issued guidance that disclosure is not required for plans that end due to their expiration or completion. Moreover, the disclosures must be tagged in Inline XBRL.

VII. SHARE BUYBACKS/REPURCHASE RULES VACATED

In December 2023, the US Court of Appeals for the Fifth Circuit vacated the SEC's Share Repurchase Disclosure Modernization rules, which were adopted in May 2023 and became effective on July 31, 2023. In October 2023, the Fifth Circuit Court of Appeals ruled that the SEC had acted "arbitrarily and capriciously" in enacting the new rules by failing to adequately conduct a cost-benefit analysis, and remanded the rule for 30 days to allow the SEC to "remedy the deficiencies." Soon after, the SEC issued an order postponing the effective date of the new rules. However, when the SEC failed to address the issues in the rule by the court's deadline, the Fifth Circuit vacated the rule entirely. Although the SEC may appeal the Fifth Circuit's ruling or draft a new proposal for a similar share repurchase rule, issuers will not need to comply with the new share repurchase rules in the 2024 proxy season.

As adopted, the rules aimed at modernizing disclosure requirements related to repurchases of an issuer's equity securities. The amendments required issuers to disclose in an exhibit to their Form 10-K and 10-Q daily quantitative share repurchase information on a quarterly basis. For each day on which a repurchase was conducted, issuers would have been required to disclose certain very specific qualitative information in a specified tabular format, including, among other things, date, number of shares, average price, and additional details. In addition, issuers would have been required to disclose, via a checkbox adjacent to such share repurchase table, whether any officers or directors subject to Section 16(a) of the Exchange Act traded in the relevant securities within the four business days before or after the announcement of the repurchase plan or program or the announcement of an increase of an existing share repurchase plan or program. The amendments also expanded narrative repurchase disclosure requirements about the objectives, rationales, and other information relating to repurchase plans.

VIII. BOARD DIVERSITY OBJECTIVES AND DISCLOSURE

In 2022, Nasdaq Rule 5606, which requires Nasdaq-listed companies to disclose how their board members self-identify regarding gender, predefined race and ethnicity categories, and LGBTQ+ status went into effect. Disclosure must be provided in a specified matrix format (the Board Diversity Matrix), which varies depending on whether the company is a US company or a foreign issuer. All Nasdaq-listed companies must

publish a Board Diversity Matrix annually, with a deadline of December 31 each year. A company may choose to provide the Board Diversity Matrix in any proxy statement or information statement (or, if the company does not file or furnish a proxy, in its Form 10-K or 20-F) or on its website.

During the 2023 proxy season, most Nasdaq-listed companies (and even certain NYSE-listed companies) opted to include the Board Diversity Matrix in their proxy statements. Companies that choose to publish the Board Diversity Matrix via their website must submit a URL link to the disclosure to Nasdaq by completing Section 10 (Board Diversity Disclosure) of the Company Event Form through the Nasdaq Listing Center or via e-mail to Nasdaq. Companies that choose to include the Board Diversity Matrix in their proxy statement or information statement do not need to submit the Company Event Form.

In addition to the Board Diversity Matrix, by December 31, 2023, each Nasdaq-listed company must also have had at least one "diverse" director who self-identifies as female, LGBTQ+, or as an underrepresented minority (defined as "Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or two or more races or ethnicities"), or alternatively explain why the company does not meet Nasdaq's board diversity objective. Foreign issuers headquartered outside the United States or foreign private issuers (regardless of where headquartered) that are listed on Nasdaq were also subject to this requirement, with "diverse" defined as an individual who self-identifies as female, LGBTQ+, or "an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious, or linguistic identity in the country of the foreign issuer's principal executive offices (as reported on its Form F-1, 10-K, 20-F, or 40-F)."

By December 31, 2025, each company listed on the Nasdaq Global Select or Global Market must have at least two "diverse" directors, including one who self-identifies as female and one who self-identifies as LGBTQ+ or as an underrepresented minority, or explain why the company does not meet Nasdaq's board diversity objective. Companies listed on the Nasdaq Capital Market have an additional calendar year in which to comply with this requirement. The rule provides additional flexibility for smaller reporting companies and foreign issuers (including foreign private issuers), which can meet the diversity objective by including up to two female directors, and for all companies with five or fewer directors, which can meet the diversity objective by including one "diverse" director.

By contrast, certain state laws mandating particular levels of board diversity have been struck down in court. In April 2022, a California Superior Court judge ruled that a state law requiring publicly listed companies headquartered in California to have certain specified numbers of board members from underrepresented communities violated the California Constitution. The law, California Assembly Bill 979 (AB 979), required the boards of such companies to include a specified number of directors from

underrepresented communities based on the total board size. The law defined a director from underrepresented communities as someone who self-identifies as "Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender." In May 2022, another California Superior Court judge similarly rejected a second state law, California Senate Bill 826 (SB 826), which required California-headquartered public companies to include a certain number of female directors based on total board size.

While the quota-based board diversity mechanisms adopted by California in AB 979 and SB 826 have fallen after direct legal challenge, Nasdaq's "comply-or-explain" disclosure mechanism could survive and serve as a model for similar state laws. For example, in October 2023, the US Court of Appeals for the Fifth Circuit upheld Nasdaq's board diversity rule. Additionally, New York, Illinois, and Maryland have already adopted disclosure-focused strategies to spotlight board diversity.

Meanwhile, proxy advisory firms will generally recommend voting against the chairs of the nominating or governance committees, or other directors on a case-by-case basis, when there are no gender diverse directors on a company's board. Exceptions to this policy may be considered if a company has an adequate plan to address the lack of diversity on its board. Further, at least one proxy advisory firm, Glass Lewis, will consider recommending voting against the chair of a company's nominating committee if the board lacks any directors from an "underrepresented community," defined as a director who self-identifies as "Black, African American, North African, Middle Eastern, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaskan Native, or who self-identifies as gay, lesbian, bisexual, or transgender."

Companies should keep an eye on the diversity of their boards both to meet investor demand, evidenced by proxy advisory firms' recommendations, and to comply with applicable disclosure requirements. In fact, the SEC continues to consider proposed rule amendments to enhance company disclosures about the diversity of board members and nominees. NYSE-listed companies, in particular, should consider additional voluntary disclosure on board-level diversity in light of enhanced disclosure from peer companies listed on Nasdaq and potential upcoming SEC disclosure requirements.

At the same time, companies should be aware of anti-DEI trends in the wake of the Supreme Court's recent rulings on affirmative action. While the Supreme Court's recent decision was limited to the unique context of higher education, the decision has prompted a flood of litigation and activism looking to extend aspects of the ruling to the private sector. Companies should stay aware of the trends and potential liability associated with their diversity programs, including internal and external programs and efforts.

IX. ESG AND CLIMATE-RELATED DISCLOSURES

In 2022, the SEC proposed rules that would require public companies to include certain climate-related disclosures in their annual reports and registration statements regardless of their materiality. The proposed rules would require registrants to disclose information about the:

- Board and management's oversight of climate-related risk;
- Likely material impact of climate-related risks on the registrant's financial statements, business operations, or value chains;
- Likely impact of climate-related risks on the registrant's strategy, business model, and outlook;
- Methods by which the registrant identifies, assesses, and manages climate-related risks and integrates those processes into its broader risk management strategies; and
- Registrant's direct greenhouse gas emissions, indirect emissions from direct actions (e.g., purchasing electricity) and, in some cases, indirect emissions from indirect efforts (all other emissions), and, for certain filers, an attestation report about those emissions.

On March 6, 2024, the SEC adopted its final climate change disclosure rules. Given such disclosure rules are not in effect for the 2024 proxy season, the substance of such rules is beyond the scope of this publication, but companies should continue to focus on how they plan to satisfy these complex disclosure requirements.

In addition, companies should pay attention to potential climate change reporting requirements beyond the SEC rules. In particular, a number of climate bills recently passed the California legislature and were signed by the governor. This legislation, while it is currently being challenged in the courts, is nevertheless likely to change the climate disclosure landscape in the United States, particularly since these rules apply to many companies that do business in California, regardless of whether they are incorporated or headquartered there. In addition, certain climate and sustainability requirements in other jurisdictions, including in Europe, are extraterritorial in nature, and apply to many US-based companies. Companies should consider whether they have potential exposure to any of these requirements, as well as how any such requirements may impact how they address other climate-related regulations.

Investor demand continues to push for thorough and accurate climate-related disclosures. Major proxy advisory firms have indicated that companies for which climate-related issues present material financial risks should provide transparent and detailed disclosures regarding those risks, mitigation measures, and mechanisms for climate-risk oversight. Proxy advisory firms point companies to the Financial Stability

Board's Task Force on Climate-related Financial Disclosures for guidance regarding the range and extent of such disclosures. If companies fall short of recommended climate-related disclosure standards and, in some cases, corresponding emission reduction targets, proxy advisory firms may recommend voting against responsible directors or other measures.

Climate-related disclosures fall under the umbrella of Environmental, Social, and Governance (ESG) disclosures. Institutional Shareholder Services (ISS) began evaluating companies based on their ESG-related risks in 2018 and considers many risk areas, including climate, waste and toxicity, human rights, labor health and safety, and social reputation. In 2023, the frequency of environmental, human capital, corporate culture, and social impact and community-related ESG disclosures increased among major companies.

While investor demand and interest encourage companies in every industry to continually increase their ESG disclosures, those disclosures are also subject to meaningful and increasing oversight. The SEC created the Climate and ESG Task Force to identify and pursue possible misconduct related to registrants' ESG disclosures in 2021, and has filed actions against companies that allegedly made voluntary material misstatements in such disclosures. Notably, companies should expect these enforcement actions to continue for the foreseeable future, although a future SEC staff may take a different approach.

Companies should evaluate their industry peers' ESG disclosures in preparation for potential ESG rulemaking. However, companies should always prioritize internal vetting of any such statements, as well as external counsel's review, and ensure that adequate internal disclosure controls and procedures are in place to ensure the accuracy of all ESG disclosures.

X. OFFICER EXCULPATION

Following a recent change in Delaware law, a Delaware corporation may now eliminate or limit the personal liability of the corporation's officers for monetary damages arising from a breach of the fiduciary duty of care to the corporation.

Section 102(b)(7) of the Delaware General Corporation Law (DGCL) has long permitted a Delaware corporation to exculpate its directors from personal liability for money damages stemming from a breach of the fiduciary duty of care if the corporation's certificate of incorporation includes an exculpation provision, provided that such protections do not eliminate or limit a director's liability for breaching the fiduciary duty of loyalty, acts or omissions not in good faith, or which involve intentional misconduct or a knowing violation of law, or which result in an improper personal benefit to the director.

Effective in August 2022, the amended Section 102(b)(7) extends the reach of such customary exculpation provisions to the following enumerated officers: president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer, or chief accounting officer, "named executive officers" identified in a corporation's SEC filings, and individuals who have agreed to be identified as officers of a corporation. Consistent with customary director exculpation provisions, the amended Section 102(b)(7) limits officer exculpation to fiduciary duty of care claims. Further, in contrast with director exculpation under the DGCL, corporations may not exculpate officers from personal liability for monetary damages in actions "by or in the right of the corporation," including derivative suits on behalf of the corporation by shareholders who meet demand requirements.

As is the case for director exculpation, a corporation must "opt-in" to officer exculpation under Section 102(b)(7) by including an officer exculpation provision in its certificate of incorporation. Consequently, the 2023 proxy season saw various management proposals requesting shareholder approval of charter amendments to provide for exculpation of officers. Between August 1, 2022, when the amended Section 102(b)(7) became effective, and August 10, 2023, 288 Delaware corporations made such proposals with shareholders approving 80.2% of such proposals. The 2024 proxy season may continue to see a number of such proposals.

In its recent 2024 policy update, Glass Lewis indicated that it will generally recommend that shareholders vote against proposals that eliminate officers' monetary liability for breach of the duty of care unless the board has a "compelling rationale" and the exculpation provision is "reasonable." However, ISS indicated in its 2024 policy update that it will continue to evaluate such proposals on a case-by-case basis. Notably, ISS said it will consider, among other things, "the stated rationale for the proposed change" and the extent to which the charter amendment would limit "liability for monetary damages for violating" the duty of care and the duty of loyalty and "expand coverage beyond just legal expenses to liability for acts that are more serious violations of fiduciary obligation than mere carelessness."

XI. VIRTUAL ANNUAL SHAREHOLDER MEETING TRENDS

In 2024, many companies continue to evaluate whether to hold their annual shareholder meetings in person, virtually, or using a hybrid format.

Traditionally, annual shareholder meetings were conducted in person. However, technological advances now allow companies to hold annual meetings exclusively online, using electronic communications platforms. The virtual-only format has several potential advantages over the traditional in-person meeting, including reduced costs, logistical efficiency, and lowered barriers to shareholder participation and engagement.

The number of companies conducting virtual annual meetings has slowly increased since 2010. In 2020, the COVID-19 pandemic forced numerous companies to shift to a virtual format, driving an increase in virtual shareholder meetings that continued into 2021 and beyond. According to data from a public corporate services and financial technology company, 1,929 shareholder meetings were held online using their virtual shareholder meeting platform in 2021, compared to 1,494 in 2020 and 248 in 2019. Mirroring this trend, 86% of S&P 500 companies held virtual-only annual meetings in 2021, compared to 78% in 2020.

Despite the surge in virtual meetings throughout the COVID-19 pandemic and the potential benefits of the virtual format, data suggests that the number of companies holding virtual meetings is trending downward as the impact of the COVID-19 pandemic lessens. For example, Computershare, a leading stock transfer company, in analyzing more than 1,000 annual meetings of its US public company clients, found that 37% of meetings in 2022 used a virtual format compared to 28% in 2023. However 82% of the S&P 100 held virtual-only annual meetings in 2023, suggesting that the largest companies still find value in the virtual-only format.

Some companies have implemented hybrid meetings, allowing shareholders to attend either in person or online. Like the virtual-only format, a hybrid meeting lowers the barriers to shareholder attendance and participation. The hybrid approach can often be the most expensive, however, as the company incurs both in-person meeting and virtual meeting costs. Notably, Computershare's report suggested that only 2% of its public company clients chose the hybrid approach in 2023.For further information regarding what is required to host a virtual meeting, the challenges and burdens associated with a virtual meeting and best practices, *see* "Preparing for the Annual Meeting—Virtual Annual Meetings."

XII. ELECTRONIC SUBMISSION OF "GLOSSY" ANNUAL REPORTS

In 2022, the SEC adopted amendments to Rule 101 of Regulation S-T that mandate the electronic submission of annual reports to shareholders in .pdf format on "EDGAR," the SEC's Electronic Data Gathering, Analysis, and Retrieval system. Effective from January 2023, the amended rule applies to both standalone "glossy" annual reports and annual reports that use the "10-K wrap" approach, under which several "glossy" pages — such as a cover page and a letter to shareholders — are wrapped around the Form 10-K. The annual report should be filed on EDGAR as an "ARS" filing. The ARS submission is due no later than the date on which the annual report is first sent or given to shareholders. The amendments replace the previous requirement that such reports be furnished in paper form to the SEC or on a company's corporate website. While publishing the annual report on a company's corporate website is now optional under the amended rules, companies are still required to post a copy of the annual report to a website other than EDGAR pursuant to Rule 14a-16(b) of the Exchange Act.

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 (1) the law of the company's state of incorporation, (2) Section 14(a) of the Exchange Act and the rules and regulations promulgated by the SEC under the Exchange Act, (3) the rules and regulations promulgated by the stock exchange or stock market on which the company's stock is listed and (4) 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 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 involving state governments, 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 or virtually, 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 shareholders' written consent. These statutory provisions typically provide that action may be taken without a meeting only if written consent, setting forth the action, 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. If a public company wishes to take action by written consent (and its charter or bylaws do not

prohibit such action), the company must provide its shareholders with an information statement containing much of the same information that would be included in the proxy statement.

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 may also trigger the rights of other parties. In Delaware, for example, 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 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 Listing Rules — as well as requirements relating to notice of the record date for the meeting, the filing and distribution of proxy materials, and notice to the exchange 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 communications between beneficial owners and street name owners, including the authority of and procedures for certain 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 for the appropriate location, date, and time of the annual meeting, the manner for calling the annual meeting, the proper notice that must be given to shareholders, and the procedures for establishing a record date for the annual meeting.

Other charter and bylaw provisions that may impact a company's annual meeting include super-majority voting requirements for certain matters submitted to shareholders, which may make it more difficult for the company to obtain shareholder approval, proxy access requirements, and additional requirements in connection with the recently implemented universal proxy rules. These provisions allow the company to plan and conduct a more orderly annual meeting with fewer surprises.

Many public companies also have "advance notice" bylaw requirements, which require director nominations and other shareholder proposals to be received by the company for consideration prior to a specific date. Delaware courts have a longstanding practice of enforcing unambiguous bylaw provisions, highlighting the importance of careful drafting of the advance notice and related bylaw provisions with respect to procedures for shareholders to call special meetings. In 2022, the Delaware Chancery Court once again held in accordance with their longstanding practice in *Strategic Investment Opportunities LLC vs. Lee Enterprises*, affirming the company's rejection of an activist's director nomination due to the activist's failure to follow the technical and procedural requirements set forth in the company's advance notice bylaw provisions.

Additionally, under the universal proxy rules, a company may reject a dissident shareholder's nominations if they do not comply with the company's advance notice bylaw requirements. For additional discussion regarding the universal proxy rules, *see* "Developments in the Law for the 2024 Proxy Season—Universal Proxy Cards."

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* “Federal Proxy 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 to proxy representation, which authorizes shareholders to appoint an agent to vote on their behalf at an annual meeting, developed in 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 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 or virtually. Due to the broad geographic shareholder base of most public companies, which makes it difficult for shareholders to attend and participate in annual meetings in person, 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 for 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, which 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 and instead are limited 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 the proxy rules. Such entities include any of the following 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);
- certain foreign corporations, including foreign private issuers;
- 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 define what is a “proxy” and what is a “solicitation” under federal securities law. According to the proxy rules’ broad definition, a “proxy” 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, including proxy voting advice from proxy advisory firms, such as ISS and Glass Lewis.

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 one of the following scenarios 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 the above listed 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 10 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 pursuant to Rules 14a-2(b)(6) and 14a-17 of Regulation 14A.

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 that, 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.

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 10 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. The corporate laws of some states also 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 requirements 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 or a third party'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 should also 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 and, if applicable, the notice of internet availability of proxy materials.

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).

B. VOTING INFORMATION

The proxy rules also require a description of the voting procedures relating to each matter submitted for shareholders' vote. Specifically, the proxy statement must state the vote required for approval (or election of directors) 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. While the NYSE historically advised listed companies that abstentions were to be considered "votes cast," in 2021, the NYSE amended its rules to clarify that a company must calculate "votes cast" on a proposal in accordance with its own governing documents and any applicable state law, consistent with the corresponding Nasdaq rules.

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 10 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. In 2012, the NYSE expanded these limitations, prohibiting broker discretionary voting of uninstructed shares on additional 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. 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.

These limitations on broker discretionary voting are likely to continue to have a considerable impact on the dynamics of director elections in uncontested elections. It is estimated that as much as 85% of the shares of US public companies are held in "street name" and managed by brokers. The impacts of limiting broker discretionary voting include:

- *Majority Voting.* Under a majority voting standard, 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. Because brokers have historically voted with management, the elimination of broker discretionary voting in director elections 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 investors who do not provide voting instructions to their brokers no longer have such uninstructed shares voted. Therefore, institutional investors who do vote have more influence over the election of directors, while the retail investors may be effectively disenfranchised to the extent they believe their brokers are voting their shares. On the other hand, given the loss of brokers' votes "for" management's proposals as described above, companies facing low voting turnouts may be more incentivized to solicit proxies from retail investors.
- *Influence by Activist Shareholders.* Activist shareholders are better able to push their agenda, whether new directors, vote "no" campaigns, corporate governance changes, or strategic transactions, as a result of low voting turnouts.

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 information about the company's directors, executive officers, and persons nominated or chosen to become a director or executive officer to be provided. 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 10 years prior to 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 the above 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 (and the other "Part III" information from the Form 10-K) 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 and Item 404 of Regulation S-K.

D. VOTING STANDARDS IN THE ELECTION OF DIRECTORS

1. What is majority voting for directors?

Historically, most companies have 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. Thus, withheld votes are largely symbolic, and the likelihood of a failed election is very low. 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. Under both plurality plus and true majority voting systems, a so-called "withhold vote campaign" may result in a failed election.

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. Glass Lewis estimates that most directors who fail to receive a majority shareholder vote in favor of their election do not step down.

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.

2. Legal developments facilitating majority voting

Legal developments over the past two decades have increased adoption of bylaws requiring majority voting for the election of directors. Under the DGCL, a shareholder-adopted majority voting bylaw cannot be amended by subsequent action of the board of directors, and 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, Virginia, and Washington. In addition, the Model Business Corporation Act now provides for implementation of majority voting through bylaw amendment (rather than via charter amendment, as had previously been the case).

3. Where does majority voting stand?

Of the two majority voting systems, true majority voting is typically favored by shareholder activists and proxy advisory firms over plurality plus voting, because provisions in a company's governing documents are more difficult to change or eliminate than a corporate governance principle adopted by a company's board. Despite pressure from investors to adopt majority voting, according to Glass Lewis, most US companies still elect directors by a plurality voting standard.

E. BOARD OF DIRECTORS AND COMMITTEE INFORMATION

1. Required information about the Board of Directors

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% of the board meetings and meetings of committees of the board on which the director served and (2) the name of any director who failed to attend 75% 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.

If there has been a material change to the company's procedures for security holder director nominations, this change must be reported in the company's Quarterly Report on Form 10-Q or Annual Report on Form 10-K for the corresponding period in which the material change occurs. The SEC has stated that the adoption of procedures by which security holders may recommend director nominees, when the company previously disclosed that it did not have in place such procedures, constitutes a material change.

Item 407 of Regulation S-K requires 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 the company given the company's specific characteristics or circumstances. If a company has combined the chairman of the board and chief executive officer positions, it should also disclose whether and why it has a lead independent director and discuss the specific role the lead independent director plays in company leadership.

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. Beginning in 2022, the SEC sent a number of comment letters asking companies to enhance discussions of their leadership structures and risk oversight processes, addressing the concern that such disclosures have become too standardized and not tailored to a company's specific circumstances. Accordingly, companies should continue to consider whether to expand or clarify their disclosure regarding board leadership structure and risk oversight in the 2024 proxy season and beyond.

2. Diversity on the Board of Directors

Diversity on a company's board of directors, particularly with respect to female, LGBTQ+, and underrepresented individuals serving as directors, continues to attract significant attention. Some large investors now indicate that they may vote against or withhold their votes from directors who serve on nominating and governance committees if their boards lack appropriate levels of diversity. Many other investors now expect updated disclosures on board diversity, and some have issued public statements regarding expectations for public companies to include women and underrepresented minorities on their board of directors. Further, proxy advisory firms will generally recommend voting against the chairs of the nominating or governance committees, or other directors on a case-by-case basis, when there are no gender diverse directors on a company's board.

In 2019, the Staff of the SEC issued new 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 as possessing specific diversity characteristics, a board or nominating committee that considered any such self-identified diversity characteristics in its evaluation of the director's qualifications for 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.

Nasdaq-listed companies are also subject to additional requirements. For example, Nasdaq-listed companies must disclose annually how their board members self-identify regarding gender, predefined race and ethnicity categories, and LGBTQ+ status in a specified matrix format in any proxy statement or information statement.

In light of the new interpretations, companies should review and consider whether their disclosures appropriately reflect information provided by directors and director nominees, whether those individuals have consented to disclosure of that information, and how that information is taken into account under their applicable corporate governance policies. Foreign issuers should also consider any applicable foreign laws that restrict the collection or disclosure of self-reported demographic information.

For further discussion regarding the Nasdaq requirements and other board diversity and related disclosure, *see* "Developments in the Law for the 2024 Proxy Season—Board Diversity Objectives and Disclosure."

F. EXECUTIVE COMPENSATION DISCLOSURE

In response to investor concerns regarding the quality and transparency of executive compensation disclosure, the SEC adopted rules regarding disclosure of executive and director compensation required in public company proxy statements, annual reports, and registration statements. The information presented below is a summary of the general provisions of the proxy rules related to compensation disclosure. As 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. Named Executive Officers

The proxy rules require extensive disclosures about the compensation paid by public companies to a company's NEOs, which are defined in the proxy rules to include (other than with respect to smaller reporting companies and EGCs):

- any person who served as the principal executive officer (PEO) of a company at any time during the prior fiscal year;
- any person who served as the principal financial officer (PFO) of a company at any time during the prior fiscal year;
- 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

- 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 as reported in the Summary Compensation Table for the applicable fiscal year (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 Proxy Rules and the Proxy Statement—the Proxy Statement—Certain Relationships and Related Party Transactions."

2. Scaled disclosure for smaller reporting companies and EGCs

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 Proxy Rules and the Proxy Statement—the Proxy Statement—Executive Compensation Disclosure—Emerging growth companies."

3. Compensation discussion and analysis

The Compensation Discussion and Analysis portion of the proxy statement (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 relates 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:

- What are the objectives of the company's compensation program?

- What is each compensation program designed to reward?
- What is each element of compensation?
- Why does the company choose to pay each element?
- How does the company determine the amount (and, where applicable, the formula) paid for each element?
- 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?
- 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 following:

- 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.

4. 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 (or one preceding fiscal year if it is that individual's first year as an NEO). *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 generally 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).

(a) 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 all or a portion of the 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). 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).

(b) Stock awards

The aggregate grant date fair market value for all stock awards (e.g., restricted stock, restricted stock units, common stock equivalent units, or other similar awards that 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 the Financial Accounting Standards Board (FASB) Accounting Standards Codification Topic 718 (ASC Topic 718). In addition, footnote disclosure is required of the assumptions used in the fair value determination.

(c) Option awards

The proxy rules require that the aggregate grant date fair market value of all stock option awards (including stock appreciation rights and other awards which have option-like features), 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.

(d) 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 occurs in a later fiscal year. Also, earnings on the outstanding awards must be disclosed. Footnote disclosure must identify and quantify awards and payment terms. 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.

(e) 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.

(f) 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 if it 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 the item 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.

(g) 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, the column is intended to provide a single aggregate dollar value for compensation of each NEO with respect to a fiscal year.

5. 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.

(a) 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. The Grants of Plan-Based Awards Table includes (1) each award's grant date, (2) with respect to non-equity incentive plan awards and equity incentive plan awards, the award's estimated future payouts, (3) the number of shares of stock or units underlying a stock award or option award, (4) the exercise or

base price of an option award, and (5) the grant date fair market value of each award under ASC Topic 718, if applicable. Estimated future payouts with respect to non-equity incentive plan awards and equity incentive plan awards 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.

(b) 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. The Table is designed to provide a method of estimating potential amounts realizable by each NEO, with respect to outstanding equity-based awards. For 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.

(c) 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.

(d) 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 Generally Accepted Accounting Principles (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.

(e) 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.

(f) 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, in each case assuming that such event occurred on the last day of the previous fiscal year. 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 when 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.

6. CEO pay ratio

Section 402(u) of Regulation S-K requires public companies, with the exception of EGCs, smaller reporting companies and foreign private issuers, to disclose information detailing the relationship between compensation paid to the PEO and the median compensation paid to all employees. Specifically, companies subject to the rules must 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 needs 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. Pay ratio is determined as of the last date of the fiscal year.

(a) 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.

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 is not pre-set by the company, and "leased" workers who are employed by an unaffiliated third party.

The SEC has 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 certain categories of employees from the determination of "all employees." If a company omits any employees based on such 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.

(b) 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 (even if such selection of the median employee occurred in a previous year).

7. Pay versus performance

The Pay Versus Performance rules became effective for the 2023 proxy season and apply to all public companies other than EGCs, foreign private issuers, or registered investment companies, although scaled

disclosure is permitted for SRCs (as discussed below). Under the rules, a company is required to provide tabular and narrative/graphic disclosure of the relationship between executive compensation actually paid by the company to its NEOs and the company's total shareholder return (TSR), the TSR of a peer group, and certain financial performance measures (the Pay Versus Performance Disclosure). Subject to certain exceptions discussed below, a company's Pay Versus Performance Disclosure must include (1) a Pay Versus Performance Table, (2) a "Tabular List" of the most important financial performance measures used by the company in setting pay-for-performance compensation for the most recently completed fiscal year, and (3) a "clear description" in narrative and/or graphical form of the relationship between certain amounts reported in the Pay Versus Performance Table.

The SEC has implemented the Pay Versus Performance Disclosure requirements through a new paragraph (v) to Item 402 of Regulation S-K. Inline XBRL must be used to tag the Pay Versus Performance Disclosure; however, smaller reporting companies will be permitted to phase in Inline XBRL tagging as described below.

(a) Pay versus performance table

A company's Pay Versus Performance Table must present data for the five most recently completed fiscal years or, for smaller reporting companies, the three most recently completed fiscal years, subject to the transitional rule described below. The Table must include:

- the amount of compensation reported in the "Total" column of the Summary Compensation Table for the PEO(s);
- the total compensation "actually paid" to the PEO(s);
- the average amount of compensation reported in the "Total" column of the Summary Compensation Table for all NEOs (other than the PEO);
- the average total compensation "actually paid" to all NEOs (other than the PEO);
- the company's cumulative TSR;
- the peer group cumulative TSR;
- the company's net income (or loss); and
- at least one company-selected measure that the company believes to represent its most important financial performance.

Smaller reporting companies are not required to include peer group cumulative TSR or a company-selected measure.

Compensation "Actually Paid." The Pay Versus Performance Table must include the compensation "actually paid" to the company's NEOs, as compared to the compensation "awarded to, earned by or paid to" the NEOs, as disclosed in the Summary Compensation Table. 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 disclosed.

The compensation "actually paid" to a NEO is calculated by adjusting the officer's total compensation as reported in the Summary Compensation Table for certain amounts related to equity awards and defined benefit pension plans. Specifically, the Pay Versus Performance Disclosure rules require companies to replace the grant date fair value of stock and option awards from the Summary Compensation Table (equity awards) with the fair value of the equity awards as determined under the rules, which generally includes the fair value (or the year-over-year change in fair value of equity awards granted in a prior fiscal year) of such awards of the specified fiscal year-end valuation dates or, if earlier, the vesting date during the year, plus dividends paid during the fiscal year (Adjusted Equity Award Value). Additionally, if applicable, companies must replace the change in the actuarial present value of an officer's accumulated benefit under all defined benefit and actuarial pension plans from the Summary Compensation Table with the "service cost" for such plans (the Adjusted Pension Value), which is defined under FASB ASC 715 as the actuarial present value of benefits attributed to services rendered by the officer during the covered year.

Total Shareholder Return. Both the company cumulative TSR and peer group cumulative TSR measurements should be calculated for the covered fiscal year in the same cumulative manner as calculated under Item 201(e) of Regulation S-K for the performance graph. Accordingly, both company cumulative TSR and peer group cumulative TSR should be calculated based on a fixed investment of $100 at the measurement point. The measurement period commences on the market close of the last trading day to occur before the earliest fiscal year reported in the Pay Versus Performance Table and ends on (and includes) the last day of the each covered fiscal year in the table. For example, if the company's Pay Versus Performance Table covers fiscal years ending December 31, 2020, 2021, and 2022, the cumulative TSR reported for 2022 will have a three-year measurement period, commencing on the last trading day to occur before January 1, 2020, and ending on December 31, 2022. In addition, the peer group cumulative TSR should be determined using either the same industry or line-of-business index or peer group that companies used for purposes of Item 201(e) or, if preferred, the same peer group as described in the company's CD&A. If the peer group used is not a published industry or line-of-business index, the company must name the companies in the peer group in a footnote to the Pay Versus Performance Table. The company must also include a footnote disclosing the name of any company that was added or removed from the peer group

used in the prior fiscal year, along with an explanation for the change and a comparison of the cumulative TSR as between any company that was removed from the peer group and its replacement.

Company-Selected Measure. The company must select at least one company-selected measure from the company's Tabular List (as discussed below) to be reported in the Pay Versus Performance Table for the covered fiscal years. A company-selected measure is what the company believes to represent its most important "financial performance measure" for the last completed fiscal year other than TSR or net income. For example, if the company's most important financial performance measure is net income and, therefore, is already included in the Pay Versus Performance Table, the company must select its "next-most" important financial performance measure to be used as the company-selected measure. A "financial performance measure" is any measure determined and presented in accordance with the accounting principles used in preparing the company's financial statements and any measures that are derived wholly or in part from such measures. This financial performance measure need not be reported in the company's financial statements. If the company did not use any financial performance measures in setting pay-for-performance compensation in the last completed fiscal year, or if the company only uses financial performance measures that are already included in the Pay Versus Performance Table (i.e., TSR and/or net income), the company is not required to include a company-selected measure in the table or describe a company-selected measure in the narrative and/or graphical disclosure to the table (as discussed below). Additionally, if the company-selected measure (or any additional performance measures that the company decides to include in the Pay Versus Performance Table) is not a financial measure under GAAP, the company must disclose how the measure is calculated from the company's audited financial statements. Disclosure of the measure is not otherwise subject to Item 10(e) of Regulation S-K or Regulation G.

(b) Tabular list

Companies (other than smaller reporting companies) are required to include a Tabular List of the most important financial performance measures used by the company in setting pay-for-performance compensation for the most recently completed fiscal year. The Tabular List must include at least three, but not more than seven, performance measures in no particular order or rank. However, if the company considers only two or fewer financial performance measures when assessing executive performance-based compensation, the company need only include the number of measures actually considered (which may be zero). Further, in addition to the financial performance measures, the company may also include non-financial performance measures (i.e., any performance measures that are not "financial performance measures") in the company's Tabular List, if such measures are among its most important performance measures and it has disclosed its most important three financial measures (or fewer, if fewer financial performance measures are used by the company).

The Tabular List disclosure may be provided as one list, two lists (separating the measures applicable to the PEO and, as a group, the other named executive officers), or multiple lists (separating the measures applicable to each named executive officer), and the Tabular List may include performance measures that are the same or similar to those already described in the CD&A. Companies should consider including explanatory narrative disclosure to the Tabular List if doing so would help investors understand the measures included in the Tabular List or otherwise prevent confusion.

(c) Additional narrative and/or graphical disclosures

Companies must also provide a narrative and/or graphical discussion explaining (1) the relationship between (a) the compensation actually paid to the PEO, (b) the average of the compensation actually paid to each other named executive officer (other than the PEO), and (c) each of (i) company cumulative TSR, (ii) net income, and (iii) the company-selected measure; and (2) the relationship between the company's cumulative TSR and the peer group cumulative TSR. Specifically, the narrative and/or graphical disclosure to the Pay Versus Performance Table is required to describe the foregoing relationships over the five most recently completed fiscal years (and for the first and second years in which the Pay Versus Performance Disclosure is included, such shorter period that is shown in the table).

There is no mandated format for this disclosure. Formats suggested in the SEC's adopting release include a graph providing executive compensation actually paid and change in the financial performance measure (TSR, net income, or company-selected measure) on parallel axes and plotting compensation and such measure(s) over the required time period and disclosing the percentage change over each year of the required time period in both executive compensation actually paid and the financial performance measure, together with a brief discussion of that relationship.

(d) Transition rule and scaled disclosure for smaller reporting companies

Covered companies must provide Pay Versus Performance Disclosure in tabular format for the five most recently completed fiscal years (or, for smaller reporting companies, the three most recently completed years). However, to provide some transitional relief, the SEC will permit a company, for the first year in which the Pay Versus Performance Table is required, to limit the disclosure to only the three most recently completed fiscal years (or, for smaller reporting companies, the two most recently completed fiscal years). Thereafter, an additional year will be added in each subsequent annual filing in which Pay Versus Performance Disclosure is required until the company discloses the requisite information for the five most recently completed fiscal years (or, for smaller reporting companies, the three most recently completed fiscal years).

Additionally, smaller reporting companies are subject to scaled disclosure requirements and are not required to: (1) account for the Adjusted Pension Value in computing the compensation "actually paid" to its named executive officers; (2) report, in the Pay Versus Performance Table, peer group cumulative TSR or a company-selected measure; or (3) include a Tabular List of financial performance measures. The foregoing disclosure requirements are discussed in further detail above. A smaller reporting company will be required to provide disclosure in the prescribed table in Inline XBRL format beginning in the third filing in which it provides Pay Versus Performance Disclosure.

8. Adoption of incentive-based compensation clawback policy and disclosure of compensation recovery

In October 2022, the SEC adopted final rules that direct stock exchanges to require public companies, including smaller reporting companies, EGCs and foreign private issuers, to adopt clawback policies for the recovery of erroneously awarded executive incentive compensation. The clawback rules are mandatory — meaning that companies have no discretion on whether or not to clawback covered compensation — and companies are prohibited from insuring or indemnifying any current or former executive officers against the loss of erroneously awarded compensation. The clawback rules contain only narrow exceptions, including situations in which a clawback would cause an otherwise tax-qualified retirement plan to fail to meet the requirements of the Internal Revenue Service.

(a) Adoption of compliant clawback policy

The rules require companies to clawback incentive-based compensation that current or former executive officers erroneously received during the three-year period preceding the date the company is "required" to prepare an accounting restatement due to the issuer's material noncompliance with any financial reporting requirement under the securities laws. The date that the company is "required" to prepare the accounting restatement is not the date of the filing of the restatement itself but instead is either the date of the company's decision to restate its financials, or if no decision to restate was made, the date the company should have made a decision. A clawback is triggered by an accounting restatement that either (i) corrects an error in previously issued financial statements that is material to the previously issued financial statements (defined by the SEC as a "Big R" restatement), or (ii) would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period (a "little r" restatement).

The clawback rules apply only to "incentive-based compensation" that is "received." Incentive-based compensation is any compensation that is granted, earned, or vested based wholly or in part upon the

attainment of a financial reporting measure (i.e. measures used in preparing, or derived from, the issuer's financial statements). Equity awards that are granted without regard to achieving financial reporting measures, and whose vesting schedule is solely based on continued service or employment of time, do not qualify as incentive-based compensation. Incentive compensation is deemed "received" in the fiscal period during which the financial reporting measure is attained; if an award is subject to multiple vesting conditions, it is deemed received when the performance goal tied to the relevant financial reporting measure is attained, even if it is contingent upon the occurrence of other events. For example, an equity award that is subject to a time-vesting requirement following the date on which a performance goal tied to a financial reporting measure is attained, is deemed "received" when the goal is attained, without regard to the additional time-vesting requirement.

The amount of incentive compensation that is subject to recovery is the amount the executive officer received in excess of the amount that would have been received based on the restated financial statements, computed on a pre-tax basis. For incentive-based compensation based on TSR or stock price, the amount must be based on a reasonable estimate of the effect of the accounting restatement on the applicable financial measure. For cash awards, the erroneously awarded compensation is the difference between the amount of the cash award received and the amount that should have been received applying the restated financial reporting measure. For equity awards, the method of calculating erroneously awarded compensation depends on whether the shares have been issued upon exercise or settlement and whether they are still held at the time of recovery. If the shares or equity awards are still held at the time of recovery, the erroneously awarded compensation is the number of such securities received in excess of the number that should have been received applying the restated financial reporting measure (or the value of that excess number). If shares have been issued upon exercise or settlement of the equity awards, but the underlying shares have not been sold, the erroneously awarded compensation is the number of shares underlying the excess equity awards (or the value thereof). With respect to other compensation, the SEC has indicated that issuers and their boards are in the best position to make these determinations using a principles-based application of the rules.

The clawback rules require companies to file their clawback policies with the SEC and to provide disclosure about the policies and how they are implemented, including information about any erroneously awarded incentive compensation attributable to an accounting restatement, any estimates used in determining the amount of recoverable compensation, the amount that remains to be collected, and the names of/amounts owed by executive officers. Companies are required to file their clawback policies as an exhibit to their annual report on Form 10-K, Form 20-F, or Form 40-F, and in their proxy or information statements pursuant to new Item 402(w) of Regulation S-K.

In October 2023, the listing standards proposed by the Nasdaq and NYSE became effective, requiring issuers to adopt a compliant clawback policy by December 1, 2023.

With respect to the timing of recovery, companies are required to recover excess incentive-based compensation "reasonably promptly." Specifically, Nasdaq and the NYSE will use a holistic approach to assess whether an issuer's recovery meets the "reasonably promptly" standard by considering whether the company's recovery efforts strike a balance of cost versus speed and whether such efforts are appropriate in light of the facts and circumstances surrounding the recovery. While Nasdaq and the NYSE elected not to prescribe strict timing requirements for compensation recovery, the exchanges are permitted to adopt more prescriptive approaches to the timing and method of recovery and may choose to do so in the future. Additionally, companies must ensure that their recovery efforts align with fiduciary duties under state law to safeguard the assets of the company, including the time value of any potentially recoverable compensation that belongs to the company rather than the executive officers who erroneously received it.

Companies listed on Nasdaq that fail to comply with the new compensation recovery listing standard will be subject to delisting and must follow an administrative process that generally reflects the established pattern for similar corporate governance deficiencies. Such companies will be required to issue a press release disclosing the failure to adopt a compliant clawback policy, and must submit a compliance plan to Nasdaq staff, which could then provide the company up to 180 days to cure the deficiency. However, Nasdaq staff will not be permitted to issue a public reprimand letter for violations of listing standards required by the clawback rules. Instead, Nasdaq staff would be required to issue a Staff Delisting Determination Letter that the company could appeal to the Hearings Panel, which in turn could allow the company an additional 180 days to cure the deficiency.

Companies listed on the NYSE are obligated to notify the NYSE within four days of any failure to comply with the SEC clawback rules (including a failure to adopt a policy by the deadline). If the NYSE determines that a failure has occurred, it will promptly notify the company. Within five days of receipt of the notification, the company must contact the NYSE to discuss the status of the delinquency and issue a press release disclosing the delinquency. The NYSE may provide the company with an initial six-month cure period. If the company does not cure the failure during the initial cure period, the NYSE may grant up to an additional six-month cure period before commencing delisting procedures. Notwithstanding the foregoing, the NYSE may commence suspension and delisting procedures without affording any cure period at all based on an analysis of all relevant factors.

(b) Disclosure of recovery of erroneously awarded compensation

In the event that an issuer is required under Item 402(w) of Regulation S-K to prepare an accounting restatement that required recovery pursuant to the clawback policy, or there was an outstanding balance as of the end of the last completed fiscal year of erroneously awarded compensation to be recovered from the application of the policy to a prior restatement, it is required to prepare:

- the date on which the issuer was required to prepare an accounting restatement;
- the aggregate dollar amount of erroneously awarded compensation attributable to such accounting restatement, including an analysis of how the amount was calculated;
- the aggregate amount of incentive-based compensation that was erroneously awarded and that remains outstanding at the end of the last completed fiscal year;
- if the financial reporting measure related to a stock price or TSR metric, the estimates that were used in determining the erroneously awarded compensation attributable to such accounting restatement and an explanation of the methodology used for such estimates;
- any outstanding amounts due from any current or former named executive officer for 180 days or more, separately identified for each named executive officer;
- if recovery would be impracticable, for each current and former named executive officer and for all other current and former executive officers as a group, the amount of recovery forgone and a brief description of the reason the listed registrant decided in each case not to pursue recovery; and
- if the aggregate dollar amount of erroneously awarded compensation has not yet been determined, then this fact must be disclosed, an explanation of the reasons for it must be provided, and the issuer must disclose the information in all of the bullet points set forth above in the next filing that is required to include this disclosure.

In addition, companies must disclose in the Summary Compensation Table the effect of any recovered amounts, which will be deducted from the applicable column in the table for the year in which the recovered amount was originally reported and identified in a footnote to the table.

9. Disclosure of practices or policies relating to hedging/pledging transactions

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. 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.

10. SEC observations regarding the CD&A

The SEC has made it clear through numerous reports, speeches, comment letters, and interpretations that it believes companies must ensure their CD&As are clear, concise, and understandable, and must include a meaningful analysis of how and why compensation committees make specific compensation decisions. The SEC has also emphasized 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 alongside 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) SEC areas of focus

Analysis. Companies should 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 those targets and the compensation tied to those targets is a material element of its compensation program. If not, then performance targets do not need to be discussed. 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 needs only disclose the performance targets for completed performance periods, 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 must 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. When policies or decisions for individual NEOs appear to be materially different based on the disclosure, companies should discuss these differences and the rationale for such differences.

Benchmarks. When companies state that they use comparative compensation information, they should 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 that 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 should disclose the basis for the material terms and payment provisions in their change-in-control and termination arrangements.

Corporate Governance. Companies should 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

The SEC generally expects companies 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 either shorten discussions of compensation program mechanics or move such discussions 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 more

effective disclosures. The SEC disfavors the use of boilerplate disclosure, and companies should strive to provide a clear and concise discussion of their own facts and circumstances.

11. Say-on-pay votes

In light of required say-on-pay votes discussed below, a company should consider the CD&A as a means of explaining and justifying to its shareholders the company's 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.

12. EGCs

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 $1.235 billion (initially $1 billion, then adjusted for inflation in 2022) during its most recently completed fiscal year and completed its IPO on or after December 9, 2011. A company 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 $1.235 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 12 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 (i) public float of less than $250 million or (ii) public float of less than $700 million and annual revenues of less than $100 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 their PEO and two other most highly compensated executive officers, rather than their PEO, PFO, and three other most highly compensated officers;
- 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 requirement to include shareholder votes on executive compensation in their proxy materials, as well as the requirement to include disclosures regarding the relationship between executive compensation and financial performance and the ratio between PEO compensation and median employee compensation in their proxy materials.

13. Smaller reporting companies

The SEC has expanded the definition of the "smaller reporting company," 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 being exempt from certain of the new proxy disclosure rules discussed above.

G. SHAREHOLDER APPROVAL OF EXECUTIVE COMPENSATION

All public companies (excluding EGCs) are required to include the following votes (commonly referred to as "say–on-pay" votes and "say-on-frequency votes") in their proxy materials:

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

Every public company (excluding EGCs) must include a separate non-binding shareholder advisory vote on NEOs' compensation in its proxy materials at least once every three years (with the frequency to be determined as described below under "Say-on-frequency"). 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 CD&A, compensation tables and narrative discussion, is hereby APPROVED.

2. Say-on-frequency

Every public company (excluding EGCs) must, 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. Most long-term public companies commenced this with their annual meetings in 2011 when the requirement first took effect, so such companies held a say-on-frequency vote in 2023.

3. Say-on-pay: golden parachute vote

Every public company (excluding EGCs) must 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 or 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 (gross-ups);
- 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—Director Compensation Litigation."

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, *see* "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 the company's securities by the NEOs, the company's directors and director nominees (naming them), holders of more than 5%of any class of the company's voting securities and all directors, director nominees, 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 or investment power with respect to the securities. "Voting power" includes the power to vote or direct the vote of a security, and "investment power" includes the power to dispose or direct the disposition of a security. A person is also deemed to have beneficial ownership of all convertible securities that he or she has the right to acquire within 60 days of the determination date (typically the record date for the annual meeting). 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 companies often collect the required information about directors, director nominees, and executive officers through annual questionnaires, information regarding 5% holders may be less readily available. Generally, the required information is contained in statements filed with the SEC by investors, particularly Schedule 13D and Schedule 13G filings. The proxy rules specifically provide that a 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 10% 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. Any 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 the caption, "Delinquent Section 16(a) Reports." If no such reports were missed, registrants are encouraged to exclude the caption. *See* Item 7 of Schedule 14A and Item 405 of Regulation S-K, including Instruction 1 to paragraph (a) thereto.

L. AUDIT COMMITTEE DISCLOSURE

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

- 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 a written charter exists, the company is required to disclose whether a current copy of the charter is available to shareholders on the company's website and 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, member of any board committee, or under a retirement plan. The rule also prohibits indirect compensation by forbidding 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 10% 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:

- the director otherwise meets the requirements of Section 10A(m)(3) of the Exchange Act and the associated rules, including Rule 10A-3;
- neither the director nor any of his or her family members is a current officer or employee of the company;
- the board of directors determines that the company's best interests are furthered by the director's service on the audit committee; and

- 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 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 related 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 amount 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 to cover 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. 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;
- discussed with the independent accountant the matters required to be discussed by the applicable requirements of the Public Company Accounting Oversight Board and the SEC;
- 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, 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;
- 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; and
- the audit committee's role in risk oversight, in particular with respect to cybersecurity matters.

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

M. NOMINATING COMMITTEE DISCLOSURE

The rules require proxy materials 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 and the basis for the board of directors' decision that not having such policy is appropriate;
- 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, and whether, and if so how, the nominating committee considers diversity in identifying nominees for director;
- if the nominating committee has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee assesses the effectiveness of such policy;
- 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 5% 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 5% 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 are similar to the required disclosures for 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 during the company's last completed fiscal year; and
- the nature of any conflict of interest for any compensation consultant and how the conflict is being addressed.

SEC commentary on 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, in 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 directed 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. In 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 did not contain major changes from Rule 10C-1.

(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 ensure that their compensation committee charters 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 the above factors. The SEC 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 an independent compensation committee, 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

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 the compensation committees.

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

Item 407(e)(3)(iv) requires disclosure 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 a 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 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

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; 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%, 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 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 scope of the transactions covered by the disclosure requirements includes any individual or series of related financial transactions, arrangements, or relationships, including any currently proposed transaction, in which:

- the company is or will be a participant, even if not a direct contractual party;
- the amount involved exceeds $120,000 since the beginning of the company's last fiscal year; and
- the related person has 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.

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 persons or groups of persons, whether members of the company's board of directors or otherwise, 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.

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, as well as all material amendments to such plans, is required. 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

(a) 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 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;
- amendments to employee stock purchase plans (ESPPs) intended to meet the requirements of Section 423 of the Internal Revenue Code of 1986, as amended (the Code), except to the extent the

plan amendment increases the number of shares reserved for issuance under the ESPP (and, for the avoidance of doubt, the initial adoption of the ESPP must be approved by shareholders); 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.

(b) 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 10 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 10 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. For more details, see the next section.

Notably, 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.

(c) 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.

(d) Inducement awards and awards assumed in mergers and acquisitions

The NYSE rules exempt "employment inducement grants," which are grants of equity-based compensation that is intended to be a material inducement to a person being hired by the company, or being rehired following a bona fide period of interruption of employment. Additionally, certain grants with respect to options and plans that are assumed in mergers and acquisitions are exempt, 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.

(e) 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

(a) 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 10 years unless shareholder approval of the plan is obtained every 10 years. Plans that do not limit the number of shares available for grant require shareholder approval of each grant under the plan.

(b) 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.

(c) 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.

(d) 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:

- the title and amount of securities that may be subject to such options, warrants, or rights,
- the prices, expiration dates, and other material conditions upon which the options, warrants, or rights may be exercised,
- the consideration the company will receive for the grant of such options, warrants, or rights,
- the market value of the securities underlying the options, warrants, or rights as of the latest practicable date, and

- in the case of options, 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 including 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 "New Plan Benefits" 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 if 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

1. What is proxy access

Prior to the SEC's adoption of the proxy access rules, only a company's director nominees were included in the company's proxy statement and proxy card. If shareholders wished to nominate their own candidates, they would need to prepare their own proxy statement and proxy card. Proxy access refers to an alternative regime in which qualifying shareholders may include director nominees in the company's proxy materials in opposition to the company's nominees.

2. 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, Rule 14a-8(i)(8) codifies 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.

3. Recent amendments

Rule 14a-8 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. This type of proxy access is sometimes referred to as "private ordering." To qualify under Rule 14a-8, shareholders must demonstrate continuous ownership of at least (i) $2,000 of the company's securities for at least three years; (ii) $15,000 of the company's securities for at least two years; or (iii) $25,000 of the company's securities for at least one year. Aggregating holdings for the purpose of satisfying such ownership thresholds is prohibited by the amended rule. Shareholders must also provide the company with a written statement agreeing to meet with the company in person or via teleconference no less than 10 or more than 30 calendar days after the proposal is submitted. The rule also requires that a shareholder submit specific written documentation to the company where the proposal is submitted through a representative.

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 further information, see "Shareholder Proposals."

4. Universal proxy card

In November 2021, the SEC amended the proxy rules to require the use of universal proxy cards in all contested director elections at annual meetings taking place after August 31, 2022. The amendments allow shareholders to vote by proxy for their preferred combination of company director nominees and shareholder-recommended nominees, including dissident nominees and certain other shareholder nominees included as a result of proxy access.

Under the previous proxy rules, a company's director nominees were presented as one slate in the company's proxy statement and proxy card, and dissident nominees were presented in a separate proxy statement and proxy card. One party could not include the other party's nominees on its proxy card without the other party's nominees consent, which was generally not provided. As a result, shareholders voting by proxy were forced to use either the company's or the shareholder's proxy card, which generally did not allow shareholders voting by proxy to pick and choose from all of the director nominees by submitting two separate proxy cards. Submitting two separate proxy cards was not allowed even if the total number of nominees for which the two cards are marked did not exceed the number of directors being elected, because, under state law, a later-dated proxy card typically revokes any earlier-dated proxy card.

Universal proxy cards take a different approach. The recently amended Rule 14a-19 requires all duly nominated candidates for election (i.e., the company's nominees, the dissident shareholders' nominees, and any proxy access nominees) to be included on a universal proxy card in any contested election, 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.

How the new universal proxy rules will impact shareholders' use of the proxy access regime remains unclear. Some commentators suggested that adoption of the universal proxy rules could impede private ordering and frustrate recent efforts to adopt proxy access bylaws. Others argued the universal proxy regime simply improves the process when there is a proxy contest with competing proxy cards and should not otherwise influence shareholders' use of proxy access bylaws.

For additional details on the new universal proxy rules, *see* "Developments in the Law for the 2024 Proxy Season – Universal Proxy Cards."

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 a printed 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;

- where a proxy statement is delivered through an electronic medium, the type size and font legibility requirements may be met by presenting all required information in a format readily communicated to investors;
- 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. NON-GAAP FINANCIAL MEASURES

Over the past decade, the SEC has intensified its scrutiny of companies' use of financial measures not calculated in accordance with GAAP, referred to as non-GAAP financial measures. Increasingly, companies highlight performance measures, including non-GAAP financial measures, in their proxy statements to demonstrate a connection between pay and performance, and this trend is likely to intensify in light of the recently adopted pay versus performance requirements. For additional discussion of pay versus performance disclosure, *see* "Developments in the Law for the 2024 Proxy Season – Pay Versus Performance."

Non-GAAP financial measures are subject to the requirements of Regulation G and Item 10(e) of Regulation S-K. In general, companies using 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.

Specific examples of non-GAAP disclosures that the SEC would view as impermissibly "prominent" include:

- presenting a non-GAAP financial measure before the most directly comparable GAAP financial measure;
- 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;
- 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

- 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 in light of new or expanded compensation-related proxy disclosures.

V. 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 business combination transactions.

W. PLAIN ENGLISH

Although the proxy statement is prepared to meet legal requirements, it also is a valuable shareholder communications tool. To leverage the proxy statement as a useful shareholder communications tool, companies can 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 supports plain English principles with respect to executive compensation disclosure in the proxy statement. Although not required to do so, companies are increasingly 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 make an informed decision. Moreover, 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.

III. FORM OF PROXY

The proxy card on which shareholders actually vote is largely dictated by the forms that most public companies 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.

The SEC has emphasized that a proxy card must describe the specific action on which shareholders will be asked to vote and whether the proposal is submitted by management or by a shareholder.

If 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. Except as otherwise provided in Rule 14a-19, the universal proxy rules described in "Developments in the Law for the 2024 Proxy Season – Universal Proxy Cards," 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. 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.

Other than expressly set forth, the discussion above does not apply to universal proxy cards, which are newly required in connection with contested director elections as of 2022. For additional details on the new universal proxy rules, *see* “Developments in the Law for the 2024 Proxy Season – Universal Proxy Cards.”

As discussed elsewhere in this handbook, 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 this “D&O

Questionnaire" 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 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 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 that 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. The requirements related to this "notice and access" model of proxy material distribution are often referred to as the e-proxy rules.

1. 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. Companies 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 rules prohibit any statements intended to persuade shareholders to vote in a specific way or alter their preferred method of delivery. *See* "Appendix D—Selected Contents of the Notice of Internet Availability of Proxy Materials" for a list of the information required in the notice. The notice must conform to plain English requirements and constitutes "other soliciting material" that must be filed with the SEC (as a DEFA14A filing) no later than the date on which the notice is first sent to shareholders.

2. 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.

3. 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.

4. 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.

5. Website and e-mail confidentiality

Companies must ensure that the 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.

6. 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.

7. Suggested actions for companies that employ the notice only option

Companies that employ the notice only option are recommended to consider:

- Planning and completing the company's proxy materials in a timely manner because, among other things, the notice only option requires 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 generally require at least five days for the process involved in compiling and distributing their own notice of internet availability of proxy materials).

- Reviewing state laws that may conflict with the e-proxy rules with legal counsel.
- Reviewing bylaws to confirm that electronic delivery is permissible, and if not, consider consulting with legal counsel to make such updates, as many companies' bylaws historically required that proxy materials be sent by mail.
- Ensuring plans are 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. Under the e-proxy rules, companies choosing the full set delivery option must also (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 that 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 and are not required to respond to requests for copies of proxy materials.

Differences between the full set delivery option and the notice only option are set forth in the table below:

	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

	Notice Only	Full Set Delivery
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

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 or other equally prompt means, 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 in what is known as a "broker search." 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.

1. 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 on which 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.

2. 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 elsewhere in this handbook, 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 requirement to file 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-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 file its definitive proxy statement and 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.

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 be considered in light of the potential for the 30-or-more-day review period as well as extra 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.

4. Definitive proxy materials

Definitive proxy materials 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. If the proxy materials relate to an annual meeting at which only the routine matters discussed above are to be considered, no preliminary proxy materials are required and the company may file only its definitive proxy materials. 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, no later than 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. Both Nasdaq and the NYSE allow proxy materials filed with the SEC electronically to satisfy the company's filing requirements with the applicable exchange.

5. Glossy annual reports

As of January 2023, the electronic submission requirement for proxy materials also extended to the annual report to shareholders, including any glossy annual report or 10-K wrap. For additional details on the new electronic submission requirements, *see* “Developments in the Law for the 2024 Proxy Season – Electronic Submission of ‘Glossy’ Annual Reports.”

6. 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 filing system, and by 1999, all domestic companies were subject to electronic filing requirements. With a few limited exceptions, 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 no 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.

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 302–305 of Regulation S-K, including supplementary 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, provided that the copy of the Annual Report on Form 10-K furnished to requesting security holders is accompanied by a list briefly describing all the exhibits not contained therein and indicates that the company will furnish any exhibit upon the payment of a specified reasonable fee, not to exceed the company's reasonable expenses in furnishing such exhibit.

In addition, the company's "performance graph" should 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 total 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

Many companies choose to include some or all of the Annual Report on Form 10-K as part of their glossy annual report to shareholders or to deliver to shareholders their full Annual Report on Form 10-K, referred to as an "integrated report," to satisfy the proxy rules' annual report delivery requirements.

Integrated reports can be a convenient option because, with the exception of the performance graph required by Item 201(e) of Regulation S-K, all information required in the annual report to shareholders is also required in the Annual Report on Form 10-K. For this reason, many companies routinely include the performance graph in the Annual Report on Form 10-K.

In lieu of an integrated report or a full glossy annual report, companies that elect to incorporate their Annual Report on Form 10-K into the annual report to shareholders often include a "wrap-around" forepart containing the president's or chairperson's letter and glossy photographs of the company's management or operations, often referred to as a 10-K wrap.

Companies may also elect to incorporate into their Annual Report on Form 10-K some of the information presented in a separate glossy annual report to shareholders. Companies considering this option should be aware of Rule 14a-3(d), which states that information included in response to items required by Form 10-K is subject to liability under Section 18 of the Exchange Act, including information from the glossy annual report that otherwise would not be subject to such liability.

III. FILING REQUIREMENTS

A. SECURITIES AND EXCHANGE COMMISSION

As of January 2023, SEC rules required that a copy of the glossy annual report to shareholders must be submitted in electronic (.pdf) format to the SEC using EDGAR, solely for informational purposes, not later than the date such report is first sent or given to shareholders. *See* "Developments in the Law for the 2024 Proxy Season – Electronic Submission of 'Glossy' Annual Reports" and Rule 14a-3(c) of Regulation 14A.

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 noted 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. For a description of the conditions companies must satisfy to take advantage of these provisions for delivery of the company's annual report to shareholders, *see* "Federal Proxy Rules and the Proxy Statement—Distribution of Proxy Materials to Shareholders—Householding."

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 plain English and in a question-and-answer format to make the requirements relating to shareholder proposals more comprehensible for shareholders. While, traditionally, only a small proportion of public companies actually received shareholder proposals for consideration at their annual meeting, this proportion has increased in recent years and may continue to increase. 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:

- having continuously held a minimum of (i) $2,000 in market value of the company's securities entitled to vote on the proposal for at least three years, (ii) $15,000 in market value of the company's securities entitled to vote on the proposal for at least two years, or (iii) $25,000 in market value of the company's securities entitled to vote on the proposal for at least one year (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, provided that if the company holds its meeting in whole or in part via electronic media, and the company permits the shareholder or its qualified representative to present its proposal via such media, then the shareholder may appear through electronic media rather than in person (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. If a company intends to exclude a proposal, it must file its reasons with the SEC and simultaneously provide the shareholder with a copy of its submission. *See* Rules 14a-8(f) and 14a-8(j) of Regulation 14A.

II. SUBSTANTIVE GROUNDS FOR EXCLUSION OF A SHAREHOLDER PROPOSAL

A. RULE 14a-8(i) GROUNDS FOR EXCLUSION OF SHAREHOLDER PROPOSALS

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;
- deals with a matter relating to the company's ordinary business;
- 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;
- the company has already substantially implemented;
- 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.

B. SEC GUIDANCE ON EXCLUSION OF SHAREHOLDER PROPOSALS

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.

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.

In November 2021, the SEC issued SLB No. 14L, which rescinded prior SLB Nos. 14I, 14J, and 14K and provided 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. Rule 14a-8(i)(7) aims to permit management and the board of directors to resolve "ordinary business" issues without interference from shareholders, who could not practically solve such issues at an annual meeting. Some shareholder proposals, however, might raise significant policy issues that "transcend the ordinary business of the company." Under SLB No. 14L, the Staff will not consider the connection between a policy issue and its importance to the specific company's business, and instead will focus on whether the proposal raises issues with such a broad societal impact that they transcend the ordinary business of the company. Accordingly, companies seeking no-action relief under the ordinary business exception for exclusion no longer need to include a board analysis of the nexus between the policy question raised by a shareholder proposal and the company's business. SLB No. 14L specifically notes "proposals squarely raising human capital management issues with a broad societal impact" as an example of the type of proposal that will no longer be subject to exclusion solely because the proponent does not demonstrate that the human capital management issue is significant to the company.

Even if a shareholder proposal raises a policy issue that is so significant it would transcend the company's ordinary business matters and be appropriate for a shareholder vote, the proposal could still potentially be excluded under Rule 14a-8(i)(7) if it seeks to micromanage the company. 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." However, SLB No. 14L clarified that shareholder proposals "seeking detail or seeking to promote timeframes or methods do not per se constitute micromanagement." Instead, the Staff will primarily consider "the level of granularity sought" and "whether and to what extent it inappropriately limits discretion of the board or management."

SLB No. 14L also provides that no-action requests made under the "economic relevance" exception no longer must include a discussion that reflects the board's analysis of whether a proposal is "otherwise significantly related to the company's business." Instead, shareholder proposals that raise issues of "broad social or ethical concern related to the company's business" may not be excluded by the company even if

the associated business fails to meet the economic thresholds set forth by Rule 14a-8(i)(5). 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.

Finally, SLB No. 14L provided guidance regarding the exclusion of graphics within shareholder proposals under Rule 14a-8(d), which requires that a shareholder proposal not exceed 500 words. While the Rule does not preclude the use of graphics in proposals, such graphics could be excluded when they (i) make the proposal materially false or misleading; (ii) render the proposal so inherently vague or indefinite that neither shareholders nor the company could determine with reasonable certainty what actions are required by the proposal; (iii) impugn character, integrity, or personal reputation or make charges of improper, illegal, or immoral conduct or association without factual foundation; or (iv) are irrelevant to the consideration of the subject matter of the proposal, such that the graphic creates a strong likelihood that a reasonable shareholder would be uncertain as to the question on which they are being asked to vote. Further, the requirement that a proposal not exceed 500 words covers any words within included graphics.

In July 2022, the SEC proposed amendments to Rule 14a-8 that would revise three other bases for excluding shareholder proposals from a company's proxy statement. The amendments, if adopted, would (i) revise Rule 14a-8(i)(10)'s substantial implementation exclusion to encompass situations in which the company has already implemented the "essential elements" of the proposal; (ii) revise Rule 14a-8(i)(11)'s duplication exclusion to clarify that a proposal that "addresses the same subject matter and seeks the same objective by the same means" as a previously submitted proposal is substantially duplicative and excludable; and (iii) revise Rule 14a-8(i)(12)'s resubmission exclusion to clarify that a proposal will constitute a resubmission if it substantially duplicates another proposal submitted for the same company's prior shareholder meetings. These amendments have not yet been approved as of the date of this publication.

III. 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.

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. This preparation may begin 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.

When preparing the time and responsibility schedule for the upcoming annual meeting, a good place to start is referencing the schedule that was prepared for the previous year's annual meeting. That said, care should be taken to ensure that lessons learned from the prior year's meeting are incorporated into the current time and responsibility schedule as well as any revisions required by changes to the laws, rules, and regulations governing the annual meeting. Similarly, it is important to review the time and responsibility schedule frequently to make corrections required as events change during preparation. Additionally, each party that may be responsible to perform any of the required tasks should be consulted and should have an opportunity to comment on the form of the time and responsibility schedule.

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 whether to hold the annual meeting in a virtual or in-person format, complying with the company's charter documents;
- if the meeting is to be held in person, determination of an appropriate location in accordance with the company's charter documents, and reservation of appropriate meeting facilities;
- if the meeting is to be held virtually, coordination with the appropriate third parties to host the meeting and ensure a seamless presentation;
- 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;
- distribution of letters to broker-dealers, banks, voting trustees, and other clearing organizations regarding beneficial owners to complete the "broker search";
- arrangements with financial printers to print and distribute the proxy materials and annual report, as applicable;
- 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 proxy distribution;
- coordination of physical arrangements for the annual meeting if held in person, 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.

Note, this is not an exhaustive list of the items that may be included in a time and responsibility schedule. Additionally, companies should recognize that 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 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 to state requirements, 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, to ensure 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. Therefore, for a company whose fiscal year is the calendar year, the annual meeting of shareholders is generally held in late spring. This timing is often consistent with the company's filing of its definitive proxy statement with the SEC within 120 days after the end of the fiscal year covered by its Annual Report on Form 10-K in order to incorporate by reference the "Part III" information into the company's Annual Report on Form 10-K, as well as the requirement under the notice and access rules to send a notice of internet availability of proxy materials to shareholders at least 40 days before the meeting date.

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 10, days before the meeting date. *See* DGCL Section 213. In compliance with these rules, companies typically establish a record date far enough in advance to allow sufficient time for the solicitation of proxies prior to the meeting. Additionally, given that the notice and access rules require companies to send a notice of internet availability of proxy materials to shareholders at least 40 days before the meeting date, practically speaking, companies generally set a record date closer to the outer limit of 60 days prior to the meeting date.

Federal proxy rules require that companies contact institutional record holders by conducting a "broker search" 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.

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 set agenda items 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 either online if the meeting is virtual, or as they enter the meeting if the meeting is in person. Such rules will increase the chairperson's control over the meeting's conduct. The rules of conduct prepared for the annual meeting should be designed to provide guidelines for an orderly meeting, while providing flexibility for 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 alternative scenarios and information to help 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. VIRTUAL ANNUAL MEETINGS

In recent years, particularly as a result of the COVID-19 pandemic, an increasing number of companies have conducted virtual annual meetings exclusively online without corresponding physical meetings, or have otherwise supplemented physical meetings with audio and video streaming. *See* "Developments in the Law for the 2024 Proxy Season—Virtual Annual Shareholder Meeting Trends" for further details.

A. VIRTUAL MEETING CONSIDERATIONS

If a company decides to host its annual shareholder meeting virtually, it must comply with state corporate law and the company's charter documents. Delaware companies can not only broadcast their meetings to remote locations, but can 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 their annual meetings to determine that the meeting not be held at a physical location, but instead be held solely remotely. Most states have adopted similar statutes, particularly in response to COVID-19 travel and gathering restrictions adopted in 2020.

Companies planning to hold virtual meetings should consider the following:

- Consult with legal counsel to determine if virtual meetings are authorized by corporate statutes in their state of incorporation; not all states have adopted statutes permitting entirely virtual annual meetings
- Review their charter documents (and make any appropriate amendments) to ensure that a virtual meeting is authorized
- Take into account typical attendance at physical annual meetings and the interest in management and the board of directors in holding the annual meeting electronically
- Use technology to conduct the meeting that meets 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 virtual 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.
- Communicate in their proxy statement why they elected to hold a virtual meeting and clear directions regarding the logistical details of the meeting, such as how shareholders can remotely access, participate in, and vote at the meeting; they should also include instructions on how shareholders can ask questions before and/or during the meeting

- Determine how to comply with any state corporate law requirements for making shareholder lists available for inspection, if required to be available at the annual meeting
- Be aware that virtual meetings could increase the number of participating shareholders by making the meetings more accessible to more shareholders; results may therefore be less predictable as shareholders wait to vote or change their votes at the meeting, particularly in meetings at which controversial proposals will be submitted
- If shareholder proposals are on the agenda for the meeting, companies should coordinate with proponents regarding the logistics for their presentation before the meeting
- Companies should conduct a run-through of the meeting in advance with the relevant technology and discuss contingency plans if technical difficulties arise

B. ADVANTAGES AND DISADVANTAGES OF VIRTUAL MEETINGS

Companies should take several factors into account when deciding the best format for their annual meetings, including available resources, the composition of the shareholder base, comfort level with technology, and historical shareholder attendance. Each company should evaluate its particular facts and circumstances, taking into account the various advantages and disadvantages discussed below, when determining the best format to serve the needs of the company and its shareholders.

Pros of virtual shareholder meetings for shareholders and companies:

- Alleviate burdens of travel expenses and travel-related scheduling conflicts by allowing participants to attend from any location. This may expand access to more shareholders and employees who may be unwilling or unable to attend an in-person meeting at a remote location. Further, eliminating travel may align with the company's corporate sustainability objectives.
- Facilitate increased shareholder participation. Virtual meetings are often more accessible and shareholders may be more inclined to ask questions than during an in-person meeting.
- Provide companies with more flexibility in their approach to handling shareholder questions, by allowing them to preview and prioritize important questions, eliminate redundancies, and prepare more thorough responses.
- Save costs as many logistics related to an in-person meeting — finding an appropriate location, printing materials, security, etc., — are not necessary.

Cons of virtual shareholder meetings:

- The planning process may be complicated and the costs for necessary technology is high.

- Companies run the risk of experiencing technological issues prior to or during the virtual shareholder meeting. For example, shareholders using a virtual meeting platform may experience issues accessing and verifying their identity as a registered shareholder.
- Virtual meetings can lead to shareholder disfranchisement. Some shareholders may be concerned about what they view as a reduced level of engagement with the board and management, regardless of whether this appearance is true in reality. Institutional investors and corporate gadflies historically criticized virtual meetings because they eliminate the shareholders' face-to-face contact with the company's management.
- Shareholders have also accused companies of utilizing the question-and-answer practices in the virtual format to avoid difficult questions. Some companies have limited questions to those submitted in advance of the meeting, and some investors have questioned whether companies were "cherry-picking" questions or whether the companies were generating the questions themselves to avoid more unfavorable questions.
- Some shareholders report concerns regarding companies putting limitations or barriers on shareholder proposal presentations.

For more on the foregoing, *see* "Developments in the Law for the 2024 Proxy Season—Virtual Annual Shareholder Meeting Trends."

VI. 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. Historically, some companies held 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. As discussed above, since 2020, in light of the COVID-19 pandemic, numerous companies shifted their annual meetings to a virtual format, and many companies continue to employ the virtual meeting format with no physical location. *See* "Developments in the Law for the 2024 Proxy Season—Virtual Annual Shareholder Meeting Trends" and "—Virtual Annual Meetings" above for more information regarding virtual meetings.

Factors to consider in selecting a geographical location for an in-person 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, so early preparation is key. 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 an in-person 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, internet, and data connections;
- arrangements for beverages or other refreshments for meeting participants; and
- hotel accommodation, transportation, and parking arrangements for meeting participants.

In the event of a virtual meeting, if the company's directors, management, or other participants gather in a single location, or in the event of a hybrid meeting, many of the same considerations apply, with the added layer of coordination with the virtual meeting provider to ensure appropriate technological capabilities at the site. Those responsible for the physical arrangements should be familiar with the layout of the building

and its audio-visual equipment, and should coordinate the availability of the various technology services or special arrangements that will be necessary to conduct the meeting. If desired, social events and hotel accommodations for the directors and officers of the company should also be arranged prior to the meeting.

C. ATTENDANCE RULES AND ENFORCEMENT

Although shareholders (or their proxy holders) are the only parties with an enforceable right to attend the meeting, many companies also allow admission to in-person meetings 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 attend 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., or with respect to attendance and entry into virtual meeting rooms, should be publicized in the company's proxy materials.

If the meeting is in person, 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. With respect to virtual meetings, virtual meeting providers often require shareholders to verify their identity and register in advance in order to be granted access to the meeting. These requirements and qualifications should be described in the company's proxy materials and should be reviewed by the virtual meeting administrator to confirm their accuracy.

D. SECURITY

Shareholders can, at times, be very active in voicing questions and concerns. With this in mind, security is an important aspect of conducting a successful in-person meeting. Persons responsible for coordinating security arrangements should consider the following (depending on the likelihood of disruptions):

- increasing awareness 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.

E. HYBRID MEETINGS

A number of companies supplement their in-person meetings with a simultaneous broadcast in a hybrid of an in-person and virtual meeting. 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 in person to access and participate in the meeting. Some companies also allow online participants to e-mail questions to management or to participate virtually, as if the meeting was being held exclusively online. *See* "Developments in the Law for the 2024 Proxy Season—Virtual Annual Shareholder Meeting Trends" and "—Virtual Annual Meetings."

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

At even the most well-planned annual meetings, unexpected events can 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. Specifically, individuals who deal with shareholder questions and comments 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, including:

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

Preparing a detailed script 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 must 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:
  - 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
  - with respect to an emergency at an in-person meeting, 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.

VIII. CORPORATE GADFLIES

Companies, particularly larger companies with numerous shareholders, should also prepare for 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 often disrupt the meeting and further a specific social or political agenda. These parties sometimes take extreme positions to dramatize a perceived lack of corporate democracy. Some try to dominate the meeting by shouting

management down or refusing to abide by the rules of conduct. These tactics can add additional time to the meeting and can be very disruptive to proceedings . 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 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 clearly communicated at the beginning of the meeting that limit the time shareholders are allowed to address the meeting also assist in discouraging overly disruptive behavior. In the case of a virtual meeting, companies often have the ability to restrict participation of any attendees, including shareholders, to only certain segments of the meeting (i.e., question-and-answer sessions), perhaps minimizing the risk of significant disruption.

IX. SHAREHOLDER LISTS

Most states provide shareholders the right to inspect a list of a company's shareholders under specified conditions. One reason shareholders may want to review the company's shareholder list is 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, 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 have historically required the shareholder list to be available at the meeting even if the meeting takes place in a virtual format; however, some states require shareholders to comply with specified conditions to gain access to the list.

In 2022, the DGCL was amended to eliminate the requirement that companies make the shareholder list available at the meeting. Additionally, notwithstanding the DGCL amendments, many companies' bylaws still require shareholder lists to be available at the meeting, so companies should be mindful of the specific requirements set forth in their organizational documents. Nevertheless, the existing requirement to make the list available prior to the meeting remains unchanged.

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. The procedures by which the presence of a quorum is determined is governed by state corporate statutes and the company's charter documents. Although not officially 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, companies should consider the following:

- votes represented by shareholders who attend the meeting (whether in person or virtually) 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;
- 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; and
- 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. 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 the baseline established in the relevant state's 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.

In August 2023, Delaware amended Section 242 of the DGCL to, among other things, reduce the default stockholder vote required to approve an amendment to increase or decrease the authorized number of shares of a class of stock or a reverse stock split under specified circumstances. As amended, for publicly traded companies, assuming the other requirements are met, such proposals can be approved by a majority of the votes cast rather than the more onerous standard, which previously required a majority of the outstanding voting stock to approve.

C. VOTING PROCEDURES—ELECTRONIC VOTING

Most shareholders vote electronically in connection with annual meetings in advance of the meeting. As a result, companies receive information regarding the current status of the shareholder vote relatively early in the process, which 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, companies must work with appropriate third parties to select the appropriate platforms and technology that will satisfy state and federal proxy rules. Companies should also provide sufficient 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 the electronic voting platform and process, 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, the proposals 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 event. 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 compliant with the charter documents or state corporate law, the chairperson has a variety of alternatives to exclude the matter rather than taking a vote at the meeting. For example, 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, any undesired proposal that is properly presented is unlikely to be approved.

III. SHAREHOLDER QUESTIONS

At most annual meetings, including virtual 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, attend the annual meeting simply to complain about the direction of the company, its stock price, or operations, or to further a personal agenda. As discussed above, the chairperson of the meeting and the other officers responsible for responding to these questions should receive sufficient information about the operations of the company and should be prepared for such questions or comments from shareholders.

IV. INFORMATION PROVIDED TO SHAREHOLDERS AT THE ANNUAL MEETING

In addition to state corporate statutes that require companies to provide 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 statements, and other proxy materials and Exchange Act reports, such as the company's Annual Report on Form 10-K. In a virtual meeting context, the meeting platform often contains links to these documents so that attendees may readily access them. At an in-person meeting, 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, (3) a quorum count, and (4) whether new business may be validly taken at the adjourned meeting.

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 company records are complete. Accurate minutes also avoid confusion about the actions taken at the annual meeting. After the minutes have been prepared, the corporate secretary should file them 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 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 recording should be removed entirely from the company's website to avoid access to information that is no longer accurate or current.

II. 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 (or convened virtually) for the annual meeting, this is an excellent time to also 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 a large majority of shareholders of publicly traded companies do not attend annual meetings, some 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. Further, companies can provide a thorough discussion of the meeting results 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 voting results at the meeting. The final determination about 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 under Item 5.07 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-frequency vote, the number of votes for each of one year, two years, and three years, as well as the number of abstentions.

In addition, if the meeting included a say-on-frequency vote, the company must either describe in such Form 8-K, or 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 in light of such say-on-frequency vote as to how frequently the company will hold say-on-pay votes until the next required say-on-frequency vote.

IV. POST-MEETING REVIEW

Following the annual meeting, many companies find it useful for all 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 for improvement at 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/virtual meeting platform, 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 next meeting, including preparing a new time and responsibility schedule and selecting and arranging facilities.

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 many 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**
APPENDIX B:	**SAMPLE AGENDA AND RULES OF CONDUCT**
APPENDIX C:	**SAMPLE ANNUAL MEETING SCRIPT**
APPENDIX D:	**SELECTED CONTENTS OF THE NOTICE OF INTERNET AVAILABILITY OF PROXY MATERIALS**
APPENDIX E:	**SELECTED BIBLIOGRAPHY**

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, commonly known as a “broker search” 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 submitted in electronic (.pdf) format to the SEC using EDGAR, solely for informational purposes, not later than the date such report is first sent or given to shareholders or the date the preliminary copies (or definitive copies if a preliminary filing was not required) are first filed with the SEC, whichever is later. (Rule 14a-3) The proxy rules also require certain inquiries to institutional record holders regarding beneficial owners and delivery of annual reports to those beneficial holders. (Rule 14a-13)	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 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	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 say-on-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

	Meeting and Record Date	Annual Report to Shareholders	Preliminary Proxy Materials	Definitive Proxy Materials	Report of Actions Taken
				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)	the cost to the company. In addition, if the meeting included a say-on-frequency vote, the company must either describe in such Form 8-K, or 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.
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	40 days	10 days

[3] Both the NYSE and Nasdaq rules allow companies' EDGAR filings to satisfy these proxy material filing requirements. *See* Nasdaq Marketplace Rule 5005 (15); 5250(c)(1); and NYSE Listed Company Manual § 402.

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

[IF THE MEETING IS IN PERSON]

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 only business to be transacted at the meeting are the matters set forth in the Notice of Annual Meeting of Shareholders and as described in the Proxy Statement, dated [ ]. 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.

10. In the event of disorder, technical malfunction or other significant problem that disrupts the meeting, the chairperson or secretary may adjourn, recess or expedite the meeting or take such other action as the chairperson or secretary determines is appropriate in light of the circumstances.

[IF THE MEETING IS VIRTUAL]

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 be registered to attend the meeting at **[meeting registration website]**, using the control number you received with your proxy materials.
2. Any recording or retransmission of the meeting is prohibited. Copying of materials presented at the meeting is also prohibited, including screenshots.
3. The only business to be transacted at the meeting are the matters set forth in the Notice of Annual Meeting of Shareholders and as described in the Proxy Statement, dated [ ]. The meeting will follow the agenda posted on the meeting website.
4. Only shareholders of record or their proxy holders may address the meeting.
5. All questions and comments should [have been submitted in advance of the meeting]/[be submitted in the field provided on the virtual meeting website].
6. Questions submitted in the field provided on the virtual meeting website will be addressed during the question and answer session.
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.
8. 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;

- substantially repetitious of statements made by other shareholders; or
- discussions related to personal grievances.

9. In the event of disorder, technical malfunction, or other significant problem that disrupts the meeting, the chairperson or secretary may adjourn, recess or expedite the meeting or take such other action as the chairperson or secretary determines is appropriate in light of the circumstances.

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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: Good **[morning/afternoon]**. 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:

[IF MEETING IS IN PERSON]

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.

[IF MEETING IS VIRTUAL]

Please note that a copy of the agenda and rules of conduct and procedures for this annual meeting are available in the ["Meeting Documents"] section of the virtual annual meeting website. To conduct an orderly meeting, we ask that participants abide by these rules.

As stated in the rules of conduct, questions submitted in the field provided on the virtual meeting website will be addressed during the question-and-answer session.

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:

[IF MEETING IS IN PERSON]

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.

[IF MEETING IS VIRTUAL]

The polls are now open. If you already submitted your proxy or voted via telephone or the internet, you do not need to vote today. If you have not yet submitted a proxy and wish to vote on these items or wish to revoke a proxy previously submitted, you may vote via the voting link contained in the access email you received one hour before this meeting.

B. VOTING ON PROPOSALS

Chairperson:

[IF THE MEETING IS IN PERSON]

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.

[IF THE MEETING IS VIRTUAL, SKIP TO CLOSING POLLS]

C. CLOSING POLLS

Chairperson: Now that you have had the opportunity to vote, 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 preliminary 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.]

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 the meeting.

[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.

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.

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.

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.

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 encourages 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.

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APPENDIX E

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