

2023 PROXY AND ANNUAL REPORT SEASON – THINGS TO ADD TO YOUR “DON’T FORGET” LIST

Oct 10, 2022

As companies look ahead to the upcoming proxy and annual report season, the SEC has generated a number of new items to add to your compliance checklist. Those items, along with a few other “hot topics,” include the following:

Universal proxies now here; new disclosure requirements

- Universal proxy card requirements are now in effect for most election contests, as discussed in our [August 31, 2022](#) post.
- For any director elections, proxy statements must disclose the effect of all voting options, including the effect of a “withhold” vote.
- Companies must also disclose in annual proxy statements the next year’s deadline for a shareholder to provide notice to the company of its director nominees and other information required under Rule 14a-19, the SEC’s election contest rule.

Pay-for-performance table now required

- As discussed in our [August 29, 2022](#) post, the new pay-for-performance disclosure requirements will apply to annual proxy statements for companies with fiscal years ending on or after December 16, 2022 – in other words, starting with 2022 calendar year companies.
- Given the complexity of the tabular disclosure and related requirements, companies should begin planning now to address the new requirements for their 2023 annual meetings.

PDF filing requirement for glossy annual reports

- Companies must now furnish glossy annual reports to the SEC via Edgar in PDF format, effective January 11, 2023. For more information, see our [June 23, 2022](#) post.

Say-on-frequency vote required at least every six years

- If a company had its last say-when-on-pay vote in 2017 (e.g., if it was part of the first wave of votes in 2011), then it would need to conduct another vote in 2023.
- Rule 14a-21(b) requires companies to ask shareholders whether the shareholder vote on executive compensation should take place every one, two or three years, or to abstain.
- For more information, see our [January 27, 2011 client alert](#).

Hot topics in disclosure

- Consider the Russian invasion of Ukraine and any direct or indirect effects on a company's business, including the possible areas of disclosure covered in SEC guidance and the sample comment letter (see our [May 20, 2022 post](#)).
- Consider potential new or enhanced risk factors relating to such matters as the continuing Covid pandemic, U.S. or international sanctions, and inflation, as discussed in our [March 1, 2022 post](#).
- Review implementation of last year's MD&A changes (see our [October 1, 2021 post](#)).
- Consider any developments that might require updating disclosures and related controls and procedures, including in light of recent SEC enforcement actions with respect to cybersecurity vulnerabilities (see our [June 16, 2021 post](#)), perquisites (see our [November 2, 2021 post](#)) and director independence (see our [January 20, 2022 post](#)).
- Take into account that the SEC remains focused on disclosure regarding climate change, human capital and other ESG matters.
- With respect to climate change, review the SEC's (1) [2010 guidance](#) regarding existing disclosure requirements under the federal securities laws as they apply to climate change matters and (2) the [September 2021 sample SEC comment letter](#), as discussed in our [September 23, 2021 post](#), setting out comments that the Staff may make to companies regarding climate change disclosures in their SEC filings.
- Confirm implementation of the human capital disclosure requirement that has been in effect for two years now under principles-based Item 101(c) of Regulation S-K.
- For CEO pay ratio calculations: consider the three-year limit on using the same median employee for comparison purposes, in the absence of changes to the employee population or compensation arrangements that you reasonably believe would result in a significant change in the disclosure.

Annual updates of corporate governance matters

- Review board diversity in light of requirements of Nasdaq and other stakeholders
 - Beginning on August 7, 2023, Nasdaq companies will need to have, or explain why they don't have, at least one (and by later specified dates, two) diverse directors, as discussed in our [August 6, 2021 post](#). Certain relief is provided for Smaller Reporting Companies and Foreign Issuers, as well as companies with five or fewer directors.
 - A number of companies already include matrices, in some cases in response to an initiative launched by the NYC Comptroller "calling on the boards of 151 U.S. companies to disclose the race and gender of their directors, along with board members' skills, in a 'matrix' format – and to enter into a dialogue regarding their board's 'refreshment' process."
 - Nasdaq companies are required to include a board diversity matrix, as discussed in our [August 11, 2022 post](#). They may provide the disclosure in their proxy statement (or if companies do not file a proxy, on Form 10-K or 20-F), or on the company's website. Nasdaq's website provides examples of acceptable and unacceptable disclosures.

- Review board expertise, including with respect to
 - Cybersecurity in light of the SEC's proposal to require disclosure of director cyber expertise, as discussed in our [March 9, 2022 post](#), and
 - Climate-related matters, in light of the potential SEC requirement to discuss board oversight relating to climate-related risks, as discussed in our [March 22, 2022 post](#).

- Review insider trading controls and procedures, in light of the recent SEC enforcement action against executive officers for their defective Rule 10b5-1 plan, which was adopted when they were in possession of material nonpublic information, as discussed in our [September 27, 2022 post](#).

- Consider coverage of D&O questionnaires for:
 - Self-identification with respect to diversity characteristics.
 - Disclosure of a director's pronouns.
 - SEC disclosure requirements under Iran Threat Reduction Act (ITRA), including the extension to certain Russian individuals and entities (see our [April 29, 2021 post](#)).
 - Any certifications required under advance notice bylaws, as well as consent to being named as a director, including in any dissident's proxy statement – in light of universal proxy rules.
 - Disclosure of experience and expertise in areas important to investors such as ESG oversight, cybersecurity and human capital management.

Annual meeting format

- It is never too early for companies to begin considering whether the 2023 annual meeting will be an in person, virtual or hybrid meeting and to start planning disclosures and logistics accordingly.

Electronic filing of Form 144s required in early 2023

- Form 144s will soon need to be submitted electronically, as reported in our [June 22, 2022 post](#). The SEC recently [updated](#) its Edgar Filer Manual to address the technical requirements for e-filing, and created a webpage compiling [Form 144 - Resources for Filing Electronically](#) that includes detailed instructions and guidance.
- The SEC estimates that the compliance date will occur in March or April 2023, or six months after publication of the manual in the Federal Register.
- Companies should alert insiders to the new requirement and get started in obtaining the necessary Edgar codes. Additionally, they or the insiders should begin discussions with relevant brokers to work out how responsibilities for 144 filings will be handled in the future.

Questions for IRS on new excise tax on share repurchases

- Treasury departments should monitor IRS pronouncements for whether the IRS resolves some important questions about the new excise tax on share repurchases made after December 31, 2022, as discussed in our [September 13, 2022 post](#).

Annual compliance review

Although the following SEC rule proposals are still pending, companies would do well to begin taking steps in anticipation of their possible future adoption.

- [Proposed climate-related disclosure rules](#)
- [Proposed cybersecurity disclosure requirements](#)
- [Proposed expansion of share repurchase disclosure requirements](#)
- [Proposed changes to 13D/13G reporting requirements, which generated significant comments from the corporate community](#)
- [Proposed changes to Rule 10b5-1 requirements, which generated significant comments from the corporate community](#)

- [Proposed Dodd-Frank clawback rules for listed companies](#)

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MEET THE TEAM



R. Randall Wang

St. Louis

randy.wang@bclplaw.com

[+1 314 259 2149](tel:+13142592149)

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