SHEARMAN & STERLING

2020

PROXY SEASON QUICK REFERENCE GUIDE

Board Oversight Disclosure.

Over the past several years, companies have increasingly used their proxy statements to communicate how their boards have exercised oversight over key matters. We expect this trend to accelerate in the 2020 proxy season. This trend is being driven both by institutional investors' desire for a greater understanding of the governance of their portfolio companies and companies' desires to efficiently and effectively disseminate information into the marketplace to enhance their shareholder engagement programs. "Voluntary" disclosures that are increasingly becoming common include descriptions of board's oversight of long-term strategy, culture, diversity, ethics, human capital management, cybersecurity, climate change, sustainability, human rights, political contributions and lobbying expenditures. Companies also have been increasingly including factors that connect to relevant ESG topics as part of their skill matrix in their proxy statements. In our Survey, we found that 52 of the Top 100 Companies identified ESG factors as a skill set in their director skills matrix or as part of their director biography.

Proxy Advisory Firms.

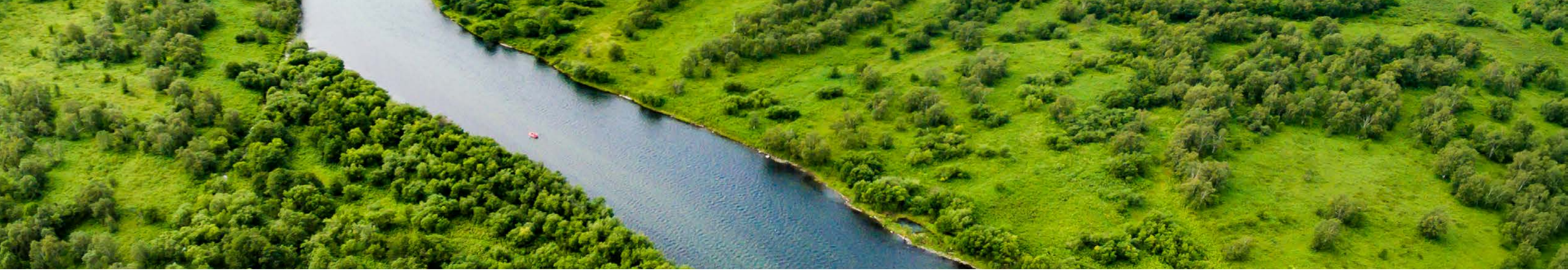
The lead-up to the 2020 proxy season has been filled with significant changes for proxy advisory firms. In August 2019, the SEC published two interpretive releases (Release No. 34-86721 and Release Nos. IA-5325; IC-33605) aimed at proxy advisory firms. The guidance could see proxy advisory firms change the way they present their reports and, more importantly, it may push investment advisers to demand proxy advisory firms do more so investment advisers can fulfill their fiduciary duties. A proxy advisory firm has already challenged the legality of a portion of the guidance in court. In addition, the SEC has proposed a rule that could fundamentally change the way that proxy advisory firms operate. The rule proposes that proxy advisory firms provide companies with reports in advance, give them a forum to publicly respond to the report and require more comprehensive conflicts of interest disclosures. Although this rule will not be in effect for the 2020 proxy season, we expect the guidance and the reverberations of the proposal to impact the dynamic this year.

Pay for Performance.

Pay for performance continues to be a key consideration of investors, and using the proxy statement to effectively explain the connection between a company's pay program and business performance is paramount. In recent years, in light of investor advocacy for objective performance criteria and reduced discretion, companies have measured performance for compensation purposes almost exclusively through the use of financial and operational metrics. As stakeholders, including institutional investors, expect companies to operate in a manner that demonstrates a commitment to their employees, community and the environment, ESG-related metrics are finding their way into plan design. Our Survey showed that 15 of the Top 100 Companies include so-called "soft" metrics tied to corporate responsibility, environment/sustainability and diversity in their incentive plan design. We expect this trend to continue in 2020, as companies are finding that the compensation program can serve as an effective response to shareholder questions (and proposals) on ESG-related issues.

Shearman & Sterling's 17th Annual Corporate Governance & Executive Compensation Survey

Please also see our 17th Annual Corporate Governance & Executive Compensation Survey, where we review the major themes from the 2019 proxy season and analyze the associated data to provide detailed insights for the coming proxy season. You can get a copy **here**.



Litigation.

Shareholder litigation with respect to proxy statements is not new, but it is increasingly focusing on technical errors and violations. Even immaterial regulatory "foot faults" can trigger litigation, or the threat of litigation, that is an unnecessary distraction for the company in the run-up to the annual meeting. To minimize the likelihood of nuisance suits, have your proxy drafted or reviewed by securities regulation experts who are up to date on the latest requirements and can confirm that the proxy is technically compliant with all applicable regulations; even small refinements in the regulations can be drawn upon by litigants. Lawsuits may also focus on disclosures about perceived conflicts of interest, particularly as to third-party advisors, because such issues can be one of the few avenues for enterprising plaintiffs to attempt to undercut a shareholder vote of approval. Where appropriate, including disclosures about past work by the advisor—whether for the company or for a transaction counterparty—may discourage lawsuits challenging the validity of a vote.

Shareholder Proposals.

The last several years has seen an increase in shareholder proposals aimed at social and environmental topics, and we expect this trend to continue. At the same time, the SEC staff has issued guidance for three consecutive years (Staff Legal Bulletins 14I, 14J and 14K) covering its approach to evaluating the significance of social policy issues and the criteria for micromanagement in the context of the ordinary business exclusion. The SEC continues to urge boards to weigh in on the significance to the company of social policy issues and has stated that the absence of that analysis may impact whether the staff can concur in exclusion on ordinary business grounds. The SEC staff has also recently announced that it may begin to respond orally, or decline to state a view, in response to Rule 14a-8 no action letter requests. We expect these developments to necessitate a more strategic approach to shareholder proposals, including consideration of when and how to respond, if and when to involve the board or a committee, and what to do in the absence of SEC concurrence.

Board Diversity.

In July 2019, we finally reached the point where each S&P 500 company had at least one woman on its board. No longer is the discussion about whether diversity is the "right thing"; the focus has shifted to how boards can support the development of diverse talent in management and increase diversity at the board level. In this environment, effectively telling your company's "story" on diversity in your proxy is vital. Adhering strictly to the vague requirements for diversity disclosure under Rule 407 of Regulation S-K will no longer satisfy institutional investors focused on this important issue. Strong disclosure will describe the company's policy and perspective on diversity and describe board processes with respect to director candidate identification, as well as ensure related disclosure on charter requirements and governance guidelines tie together. Over three quarters of the Top 100 Companies in our Survey included director photos in their proxy statements and presented aggregated diversity information for all directors, while 56 of the Top 100 Companies also presented diversity information in distinct categories.

STILL TO COME – ON SHAREHOLDER PROPOSALS

In November 2019, the SEC proposed a new rule that would increase both the ownership requirements and resubmission thresholds to submit shareholder proposals. Additionally, it would require a proponent to meet with a company to discuss its proposal once submitted. Although this rule will not be in effect for the 2020 shareholder proposal season, this proposal will impact the climate this year.

PROXY DRAFTING AND ANNUAL MEETING HOUSEKEEPING CHECKLIST

Institutional Investor and Proxy Advisory Firm Guidelines. Review updates to the voting policies of your major investors, and ISS and Glass Lewis. ISS policy changes for the 2020 season have recently been released, and they include significant changes that you should consider when preparing for the proxy season.

Corporate Governance and Executive Compensation Highlights. Consider how to craft an executive summary of your company's proxy, and potentially separately its CD&A, that is a visually appealing and compelling communication. Keep it specific for the biggest impact.

Cybersecurity and Data Privacy. We recommend describing in your proxy statement which committee of the board owns cybersecurity and data privacy risk management responsibility and how that risk is managed.

Director Skills Matrix. Board diversity is a focus of both the NYC Comptroller's Board Accountability Project 3.0 and the voting policies of the largest institutional investors and guidelines from proxy advisory firms. Consider designing or redesigning your directors skills matrix to reflect a balanced set of skills that is aligned with your company's strategic goals and reflects its diversity objectives.

Non-GAAP Measures. Non-GAAP measures have been a focus of SEC comments in recent years. To the extent included in the proxy, including the CD&A, other than with respect to performance target levels, disclosure requirements regarding the use of Non-GAAP measures must be met.

Hedging Policy Disclosure Rules. The 2020 proxy season is the first reporting period in which the new hedging policy disclosures are required. Remember, disclosure is required even for companies without hedging policies.

Shareholder Engagement. Companies are increasingly touting shareholder engagement efforts in their proxy statement summaries. Consider describing your engagement efforts, topics of engagement and actions taken in response to shareholder feedback.

Equity Plan Adoptions or Amendments. If adopting or amending an equity compensation plan, make sure that your disclosure complies with Item 10 of Schedule 14A and that your plan provides adequate limits on director compensation (including any cash compensation).

Links to the Institutional Investors' Most Recently Published Proxy Voting Guidelines

- Amundi
- BlackRock
- BNY Mellon
- Capital Group
- Cohen & Steers
- Fidelity
- Goldman Sachs
- J.P. Morgan
- Janus Capital
- State Street
- T. Rowe Price
- Vanguard

Human Capital Management Disclosure. In light of recently proposed amendments to Item 101 of Regulation S-K, begin considering what disclosures you may want to make with respect to human capital management.

Equal Pay. Be sure your pay practices and policies comply with state equal pay legislation (which, in New York State, was recently strengthened) and consider whether major shareholders want to understand your gender pay parity policies.

Pay Ratio. Consider reviewing your compensation practices and employee composition to determine whether a new median employee designation is required.

Say on Pay Response. ISS requires a robust response to say-on-pay proposals that received less than 70% support. Disclosure of responsive shareholder on engagement must include, among other things, the frequency of engagement, as well as the specific concerns that had been raised. ISS will consider the relationship of the company's pay and disclosure changes to the feedback received.

Perquisite Disclosure. Check and then double-check your perquisites disclosure in light of recent SEC actions on this topic. The mere fact that a benefit is provided for a business reason is not sufficient to conclude that the benefit is not a perquisite.

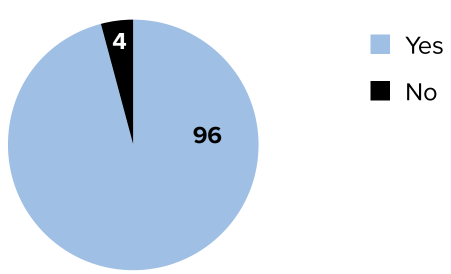
Alternative Pay Disclosures. Consider whether to include alternative pay disclosures—such as realized or realizable pay—being mindful that shareholders may ask questions to the extent these disclosures are omitted or modified in future years.

Compensation Committee Independence. Review the independence of your compensation committee members under NYSE and Nasdaq listing standards, ISS's affiliated outside director test, Section 16 of the Securities Exchange Act and 162(m) of the Internal Revenue Code (to the extent covered employees hold grandfathered awards).

HSR Thresholds. Proxy preparation time is always a good time of year to check your compliance on other matters, like executive HSR thresholds.

D&O Questionnaires. Ensure your D&O questionnaiares are up to date and include questions regarding board diversity and inclusion.

Do Top 100 Companies issue a CSR Report?



When are the Top 100 Companies releasing their CSR Reports?

Part of the decision-making process regarding ESG communications is deciding when to publish your CSR report. While a number of Top 100 Companies do not indicate the date their CSR report is released, 36 of the 58 Top 100 Companies for which a release date for their CSR report was determinable, issued their CSR reports before their annual meeting. Issuing CSR reports prior to the annual meeting indicates the increasing importance of the topics covered in CSR reports in shareholder engagement efforts.

KEY CONTACTS

RICHARD ALSOP
Partner, New York
richard.alsop@shearman.com
+1 212 848 7333

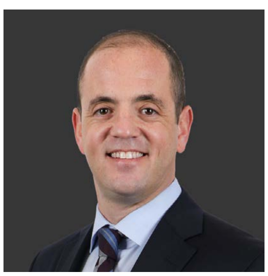
K. MALLORY BRENNAN
Partner, New York
mallory.brennan@shearman.com
+1 212 848 7657

STEPHEN T. GIOVE
Partner, New York
sgiove@shearman.com
+1 212 848 7325

DOREEN E. LILIENFELD
Partner, New York
dlilienfeld@shearman.com
+1 212 848 7171

GILLIAN EMMETT MOLDOWAN
Partner, New York
gillian.moldowan@shearman.com
+1 212 848 5356

LONA NALLENGARA
Partner, New York
lona.nallengara@shearman.com
+1 212 848 8414



MATTHEW BEHRENS
Associate, New York
matthew.behrens@shearman.com
+1 212 848 7045

MELISA BROWER
Associate, New York
melisa.brower@shearman.com
+1 212 848 5070

MARK A. DUNHAM, JR.
Associate, New York
mark.dunham@shearman.com
+1 212 848 4767

ABU DHABI · AUSTIN · BEIJING · BRUSSELS · DUBAI · FRANKFURT · HONG KONG · HOUSTON · LONDON · MENLO PARK · MILAN · NEW YORK PARIS · RIYADH* · ROME · SAN FRANCISCO · SÃO PAULO · SEOUL · SHANGHAI · SINGAPORE · TOKYO · TORONTO · WASHINGTON, DC