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PERSPECTIVE

DR. T ON SECURITIES

2022 proxy preparation: procedure & purpose

By Sara L. Terheggen

Public companies have many things to consider as the proxy season kicks off in the coming year as many of the rule amendments the Securities and Exchange Commission made in late 2020 will be applicable to proxy statement filings in 2022. To be prepared, companies can start updating their proxy checklists and building in time to address certain disclosure requirements. These hot-topic items can be grouped into two categories: procedure and purpose. Taking these into consideration now as companies are building out their 2022 annual meeting checklists will give companies a head start and ensure a smoother proxy season as well as better compliance with new rules and requirements.

PROCEDURE

Virtual Meetings

Virtual has become commonplace in the time of COVID-19. Restrictions on indoor meetings, travel limitations and other physical meeting impediments forced public companies to adapt to the virtual shareholder meeting. Even as we continue to struggle with new variants, it seems unlikely that we will have another shutdown on our hands. As such, 2022 will provide public companies with more optionality on whether they want to have an in-person shareholder meeting, keep the meeting completely virtual, or do some combination. To the extent a company is considering any virtual component to their shareholder meeting, planning early is key to ensure shareholders feel engaged by the process. To keep the virtual meeting format consistent with developing best practices, companies should:

- Engage a service provider early to provide time for dry runs with virtual technology;
- Develop proxy statement disclosure to provide shareholders with all required information to attend and vote shares, including procedures for record and beneficial shareholders;
- Determine the proper procedures for making shareholder lists available for inspection in a virtual meeting;
- Provide virtual meeting logistics, including when shareholders can log in and what tools are available for shareholders to use during the meeting, including chat, email or telephone, as well as how to report technical issues;
- Q&A sessions in virtual meetings have been a highly criticized component so companies can do better for their shareholders by ensuring the process for asking and answering questions is clearly disclosed and procedure followed; and
- Establish protocols for how shareholder proposals will be presented on the agenda.

While virtual meetings do still bring shareholder criticism, early preparation and adherence

to key best practices will provide a company with the best opportunity for success when implementing a partially or completely virtual shareholder meeting.

Shareholder Proposals

In September 2020, the SEC adopted amendments to Rule 14a-8 of the Exchange Act which are in effect for any shareholder proposal submitted for a meeting held on or after January 1, 2022. These amendments, among other things, (i) revise submission thresholds, (ii) prohibit aggregation of holdings for purpose of satisfying amended ownership thresholds, (iii) eliminate the ability of one shareholder to submit multiple proposals for the same meeting, (iv) raise the required support needed for a shareholder proposal to be resubmitted at a future meeting, (v) require that shareholder representatives provide documentation to make clear the representative is authorized to act on behalf of a shareholder and (vi) require that the shareholder agree to meet with the company to discuss after submission of a proposal. While such amendments have been subject to scrutiny, the SEC emphasizes the amendments are intended to improve the proxy process and the ability of shareholders to exercise their voting rights.

Since these amendments will impact companies for the 2022 Proxy Season, companies should:

- Plan to check ownership thresholds of shareholders submitting proposals to confirm compliance;
- Request authorization documentation from shareholder representative(s);
- Ensure the proposal does not violate the one proposal limit imposed by the new rule amendments; and
- Confirm such proposals met the necessary thresholds for resubmission.

By preparing a shareholder proposal procedure checklist, com panies can quickly assess incoming proposals and determine next steps, including whether they want to build in time to discuss the proposal with the submitting shareholder.

PURPOSE

The purpose components have grown in importance over the last few years, including increasing disclosure of environmental, social and governance (aka "ESG") topics, such as updated climate change disclosure rules and improving board diversity. Institutional investors are increasingly focused on these areas and companies can be ahead of those concerns with a bit of strategic planning.

Environmental, Social and Governance Matters

During the last proxy season, ESG shareholder proposals were at an all-time high with the majority

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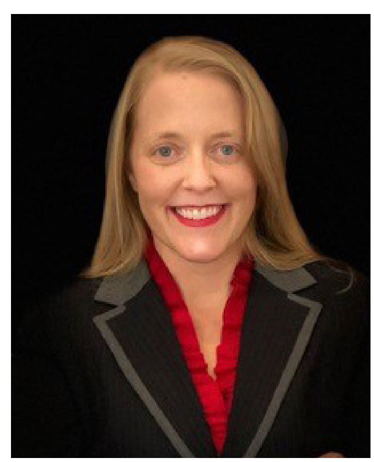

receiving support. Diversity and human capital management fall under this and diversity is specifically discussed below; however, the other area of increasing concern for shareholders is climate change. The SEC is currently working on proposed new climate disclosure rules and increasing review of company compliance with the 2010 guidance previously provided. The new rules, which are expected in early 2022, would be a departure from the current 2010 "principles-based" approach. It is highly likely that the new rules will be focused on more quantitative and qualitative information on climate risk.

Even if the new rules do not specifically impact the 2022 proxy and 10-Ks for 2021, institutional investors and other shareholders are increasingly submitting climate-related proposals for consideration and that is likely to increase for the 2022 proxy season. In 2021 alone, 11 climate-related Rule 14a-8 shareholder proposals were passed at S&P 1500 companies.

To be ahead of the curve, companies can review disclosure now related to climate change and begin analyzing current controls and procedures and possibly updates to disclosure. Companies should also review how best to align ESG disclosure with company initiatives and ensure proper board oversight to best prepare themselves for rule changes. Disclosure can also be reviewed to ensure it is not inaccurate or misleading as well as include important and standard cautionary disclaimers. Given the complexity of ESG generally and the ever-changing rules, focusing on this early will give companies maximum flexibility and ensure better success in meeting shareholder objectives.

Board Diversity

For NASDAQ-listed companies, new board diversity rules were approved by the SEC in August 2021. The new rule requires companies to provide a board diversity matrix by the later of August 8, 2022, or the date a company files their proxy statement. The new rule also requires companies to meet a board diversity objective by August 7, 2023, or explain their reasons for not doing so. Smaller reporting companies and foreign issuers can meet the diversity objective by including two female directors and for all companies with five or fewer directors, the diversity objective can be met by including only one diverse director.

While this new rule applies to NASDAQ-listed companies, board diversity has been a focus of importance for many large institutional investors and certain states such as California have statutory mandates for board diversity for companies who have principal offices in the state. All companies can prepare themselves to better meet the needs of their listing exchange, state requirements and their shareholders by updating their D&O questionnaires to collect additional diversity information that can assist with preparation of the board diversity matrix or provide helpful information for updating overall disclosure in a Company's 2022 proxy statement. Even if a Company files their proxy statement before August 8, 2022, the matrix will have to be disclosed on their website or in an amended annual report so updating D&O questionnaires and considering the disclosure implications now will help companies ensure they are complying with new rules and addressing shareholder concerns.

PLANNING AHEAD WITH PURPOSE

Proxy season is always a challenging time for companies but proper planning that is purpose-driven can go a long way to improving a company's disclosure as well as their interactions with shareholders. Making some key decisions early, such as whether to have a virtual meeting and identifying areas of disclosure for updates, as well as establishing a proxy season checklist and updating D&O questionnaires are all things that can be addressed early in the season and will not only improve a company's disclosure but also ensure they are at the forefront in addressing recent and upcoming rule changes.