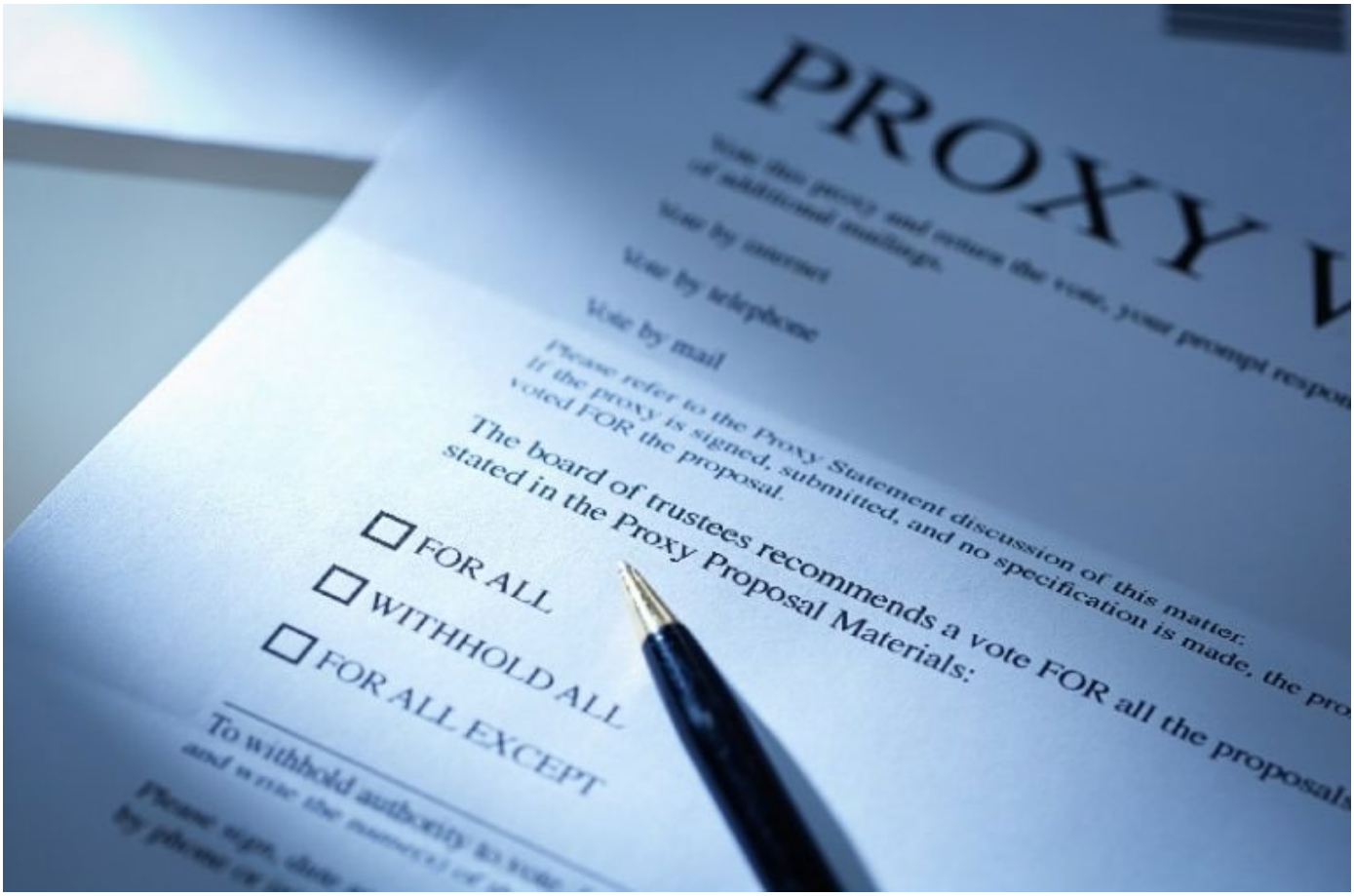
SOCIETY for Corporate Governance

SOLICITATION OF PROXIES:
A GUIDE FOR THE CORPORATE SECRETARY



November 2022

ABOUT THE SOCIETY

The Society for Corporate Governance is an association of corporate secretaries and governance professionals.

Founded in 1946, the Society for Corporate Governance, Inc. is a non-profit organization (Section 501(c)(6)) comprised of more than 3,600 corporate and assistant secretaries, in-house counsel, outside counsel, and other governance professionals in governance, legal, ESG/sustainability, and compliance functions at public, private, and not-for-profit organizations. Members are responsible for supporting their board of directors and executive management with respect to matters such as board practices; compliance, regulatory, and legal matters; investor communications and engagement; ESG/sustainability matters and disclosures; and subsidiary management.

The Society seeks to be a positive force for responsible corporate governance, providing news, research and "best practice" advice and professional development and education through seminars and conferences. Headquartered in New York City, the Society is administered by a national staff, by members who serve on national board and standing committees, and through the member activities of local chapters.

ACKNOWLEDGMENT

November 2022

Dear Reader:

The Society's Corporate Practices Committee is pleased to issue an updated edition of *Solicitation of Proxies: A Guide for the Corporate Secretary*. The Committee would like to thank the following members who contributed to this update:

Jonathan Gilbert, Alliance Advisors, LLC
Zachary Levine, BNY Mellon
Brian Valerio, Alliance Advisors, LLC

Note to readers: This monograph is not a legal treatise. Users of this guide should consult with legal counsel as to the application of the law in specific situations, and to determine whether there have been any changes to the rules.

Sincerely,
Suzanne Rolon
Chair, Corporate Practices Committee

TABLE OF CONTENTS

INTRODUCTION

Shareholder meetings are the cornerstone of the corporate governance relationship between a company and its shareholders. Through proxy voting, shareholders make their voice heard as owners of securities of the company and pass judgment on the board of directors and management's governance of the company.

A company's annual meeting and the period leading up to it are key opportunities for a company to engage with its shareholders. It is crucial for corporate governance professionals to understand the shareholder meeting process and timeline and the issues on which stakeholders are focused, because many shareholders view the annual meeting as a significant tool to pursue change with respect to substantive business and board issues. Even common management proposals, such as the election of directors and advisory votes on the compensation of executive officers (commonly referred to as "say-on-pay" votes), receive significant attention from investors and can lead to problematic voting outcomes and contentious meetings. The focus on environmental and social ("E&S") issues further exemplifies the changing dynamics for public companies as these issues are no longer relegated to shareholder proposals and can have a significant influence on investors' voting decisions for individual directors.

The increased focus that institutional investors are placing on corporate governance and E&S issues makes it more important for companies and their advisors to understand the complex and nuanced shareholder meeting process. This guide will provide an overview of the shareholder meeting cycle and provide insights into what governance professionals may do at other times of the year to maximize engagement with their companies' shareholders.

TYPES OF MEETINGS

When a company holds a shareholder meeting, the meeting may be either an annual meeting or a special meeting. The processes for each meeting type are similar.

Annual Meeting

State corporate statutes and stock exchange listing requirements typically require companies to hold a meeting of shareholders each year to elect directors and conduct other business.[1] Shareholders who do not attend the meeting may vote by proxy, which can be done online, by mail, or by phone. Annual meetings typically provide shareholders the opportunity to directly engage with company directors through a question and answer session. Activist investors frequently use annual meetings as an opportunity to articulate their concerns to management and the board either through contesting management proposals or submitting proposals of their own (shareholder proposals) for shareholders' consideration at the meeting.

One of the first steps in the annual meeting process is for the company to develop the list of items on which shareholders will vote. A typical annual meeting agenda consists of the election of directors, an advisory say-on-pay vote, and ratification of the appointment of an external auditor or "auditor ratification" (often presented in a proxy statement as the ratification of the appointment of an independent registered accounting firm). Other common proposals include approval of a stock incentive plan, an employee stock purchase plan, and an advisory vote on the frequency of future say-on-pay votes. Shareholders can submit proposals for inclusion in a company's proxy statement if they meet certain requirements.[2] Shareholder proposals may garner the most interest from the shareholder community and may require significant attention from a company's board and management.

Early in the annual meeting process, a company should evaluate whether any of its planned agenda items may face significant opposition. Frequently, voting on say-on-pay and shareholder proposals, so it is crucial that the company understand who its shareholders are and how they view certain proxy voting items. Proxy advisory firms, and Institutional Shareholder Services ("ISS") and Glass Lewis in particular, play a uniquely vital role in voting outcomes at many companies' shareholder meetings, so corporate governance professionals must also be familiar with their policies. Corporate advisors, including outside counsel, proxy solicitors, and governance and compensation consultants, are crucial to the process. They can often identify potential issues early in the process and work with companies to develop strategies to reduce voting that is unfavorable to the company.

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[1] *See, e.g.*, Del. Code Ann. tit. 8, §211; N.Y. Bus. Corp. Law §602; New York Stock Exchange Listed Company Manual Section 302.00.
[2] *See* Securities Exchange Act of 1934, Rule 14a-8.

Some common governance practices that lead to opposition from shareholders include classified boards, supermajority voting requirements, and pay-for-performance misalignment. These issues and strategies to maximize support at annual meetings will be examined throughout this guide.

Special Meeting

Occasionally, a corporate matter requires action from shareholders before the company's next annual meeting. In that scenario, a company can convene a special meeting of shareholders. Shareholders may also have the right to call a special meeting if certain requirements are satisfied. As a general matter, any meeting of shareholders, other than an annual meeting, is a special meeting. Some common proposals that are time sensitive and therefore may need to be addressed at a special meeting include increases in authorized common stock to permit a financing or an acquisition, a reverse stock split to maintain stock exchange listing, approval of the issuance of a significant amount of stock, and approval of a merger.

Additional detail on common special meeting proposals is provided below. These proposals may require approval by a majority of shares outstanding and as such can require enhanced proxy solicitation planning, strategies, and techniques. Often companies that seek increases in authorized common stock or approval of a reverse stock split have elevated levels of retail (individual) ownership. Retail holders do not vote their shares at the same rate as institutional investors. A 2022 report from Broadridge showed that "retail voting was down slightly to 30% of their owned shares" in 2021.[3] Meanwhile, institutional investors voted 83% of their shares.[4] This can create difficulties in obtaining the necessary support for these critical proposals. Companies that are considering these agenda items should engage with their advisors early in the planning process to maximize their ability to secure support.

Common special meeting proposals

Companies frequently seek increases in authorized common stock to provide them with financing flexibility (often through selling newly authorized shares). Some investors, particularly retail (that is, individual) investors view such requests negatively because they are concerned about the potential dilution of their existing shares (meaning that

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[3] *See* PwC/Broadridge, Proxy Pulse: 2022 Proxy Season Preview (Feb. 2022), available at https://www.pwc.com/us/en/governance-insights-center/publications/assets/pwc-and-broadridge-proxypulse-2022-proxy-season-preview.pdf.
[4] *Id.*

their existing shares will represent a smaller percentage of ownership, thereby making their shares less valuable). Investor concerns about increases in authorized shares may escalate if a company regularly conducts additional stock offerings both because of dilution and because the financings may be viewed as an indication that the company is not cash flow-positive and may have solvency concerns. Increases in authorized common stock can be beneficial for investors because the company can use the capital raised from selling additional shares to finance growth, which can ultimately lead to an increase in share price.

Companies seek shareholder approval for reverse stock splits so they can reduce their number of outstanding shares and increase their stock price. Frequently, companies follow this path to maintain their stock exchange listing (i.e., avoid being delisted). The New York Stock Exchange ("NYSE"), for example, requires shares to trade at or above $1.00.

Merger and acquisition transactions frequently require shareholder approval under state law. Typically, the target company's shareholders must approve the transaction. Acquirors are required to disclose information about the companies involved and the terms of the merger, including the consideration to be paid to shareholders if the transaction is consummated. This disclosure must be filed with the Securities and Exchange Commission ("SEC"). The acquiror may also need the approval of its own shareholders. In particular, NYSE and Nasdaq rules generally require acquiror shareholder approval when the acquiror proposes to issue more than 20% of its then outstanding common stock or voting power to the target's shareholders.

Special purpose acquisition company ("SPAC") mergers have increased in prevalence and have received significant attention in recent years. A SPAC is a company that is formed as a vehicle to acquire or merge with an existing company. A SPAC merger, commonly referred to as "de-SPAC," occurs when a SPAC acquires an operating company, and the operating company thereby becomes a public company. Two of the most significant differences between SPAC mergers and traditional mergers are: (1) shareholders can have their shares redeemed prior to the closing of a SPAC merger, and (2) if the SPAC fails to secure an acquisition during its limited life cycle,[5] the SPAC liquidates, and any remaining proceeds from the IPO are returned to shareholders.

[5] SPAC agreements typically specify a period of 18 to 24 months to complete an acquisition. SPACs may be able to seek shareholder approval to extend this period.

WHAT IS PROXY VOTING AND WHO VOTES AT SHAREHOLDER MEETINGS?

According to the SEC:

> "A proxy is a written authorization that one person gives to another person to act on the first person's behalf. In the context of corporate elections, when a shareholder votes 'by proxy,' he or she is instructing someone (often members of the company's management) to vote his or her shares in accordance with his or her instructions, as reflected on the proxy card, at the meeting. This way, the shareholder can vote without physically attending the meeting."[6]

Functionally, proxy voting permits shareholders who do not attend a shareholder meeting in person to authorize another person to act as their agent in voting on the proposals submitted to the shareholders. For many public companies, proxy voting is the primary way shareholders communicate their views and opinions about the company. There are several practices and mechanisms that companies must navigate for this process to run smoothly.

There are two types of shareholders: registered and beneficial. Registered shareholders either have a stock certificate issued in their name or hold their shares in an electronic, or "book-entry," account with a company's transfer agent. Companies typically hire a transfer agent to maintain the records of ownership of the company's shares and track transfers. Because a company has a direct relationship with its transfer agent, it will have access to registered shareholders' contact information and share ownership information. Beneficial shareholders hold shares indirectly through a bank or broker-dealer (e.g., Charles Schwab, Morgan Stanley, Fidelity). This practice is often referred to as holding shares in "street name." Most U.S. investors hold shares as beneficial owners.[7]

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[6] SEC, Spotlight on Proxy Matters – The Mechanics of Voting, available at https://www.sec.gov/spotlight/proxymatters/voting_mechanics.shtml (last visited October 15, 2022).
[7] *See* SEC, What is a "registered" owner? What is a "beneficial" owner?, available at https://www.investor.gov/what-registered-owner-what-beneficial-owner (last visited October 15, 2022).

Beneficial shareholders can be further broken down into two groups: institutional investors and retail investors. An institutional investor invests money on behalf of others.[8] Mutual funds, pension funds, and hedge funds are examples of institutional investors. Many institutional investors are required to report their holdings through 13F, 13G, or 13D filings with the SEC. Institutional investors will primarily custody their shares through banks. Based on their capital, net worth, and market knowledge and experience, institutional investors are viewed as being more sophisticated than retail investors and often have specific proxy voting guidelines and/or policies that outline the institution's position on particular governance and, increasingly E&S, matters.

Retail investors are individual investors who generally buy and sell their stock through a broker. Retail investors can be either non-objecting beneficial owners ("NOBO") or objecting beneficial owners ("OBO"). When individuals open their brokerage accounts, they are given a choice of whether they would like their information released to the companies in which they invest if such a company requests that information. NOBOs give their brokers permission to release their name, address, and share ownership information to the companies in which they have invested. This allows companies, often through proxy solicitors, to send information about shareholder meetings to these individuals or to contact them to encourage voting. OBOs, on the other hand, choose not to release their information to companies. As such, companies and their proxy solicitors will not be able to contact these holders. Following the Annual Meeting record date, companies can obtain a list of NOBO accounts and frequently do so as part of the annual meeting solicitation process. These lists can serve as a valuable tool in a proxy solicitor's arsenal in the event of a close or difficult vote. Strategies to turn out the vote from retail holders will be examined in subsequent sections.

LAWS AND REGULATIONS AFFECTING SHAREHOLDER MEETINGS

The requirements applicable to a shareholder meeting come from several sources, including state corporate law, SEC regulations, a company's governing documents, and potentially, stock exchange listing requirements.

[8] Investopedia, Institutional Investor, available at https://www.investopedia.com/terms/i/institutionalinvestor.asp (last visited October 15, 2022).

The law of the state where a company is organized typically requires the company to hold a shareholder meeting and has provisions governing procedural matters such as setting a date as of which shareholders must hold the company's shares to be entitled to notice of and to vote at the meeting (the "record date"), the percentage of outstanding voting stock that must be present at the meeting in order for the meeting to be held ("quorum"), and the vote required for various types of proposals that may be presented for approval at the meeting. Many state law requirements set "guard rails" or default provisions for procedural matters and a company can specify in its governing documents a more specific standard or choose a non-default standard allowed by state law.

For example, Delaware law states that in the absence of a provision in a company's certificate of incorporation or bylaws, a majority of the shares entitled to vote, present at the meeting, or represented by proxy constitutes a quorum.[9] In addition to this default provision, Delaware also sets a "guard rail" on quorum provisions, providing that quorum cannot be less than one third of the shares entitled to vote.

Company organizational documents may contain other procedural requirements for a shareholder meeting. One common provision is called an "advance notice" provision. This type of provision requires a shareholder desiring to raise business or propose a candidate for election as a director to notify the company before the meeting of its intention to do so and provide the company with information about the business or nominee to be proposed.

SEC rules have both procedural and disclosure requirements for annual meetings. For example, SEC rules require that a company send a proxy statement that includes numerous required disclosures to shareholders before soliciting their proxies to vote at the meeting.

The stock exchange on which a company's shares are listed may also have requirements applicable to a shareholder meeting. As an example, Nasdaq requires a listed company to provide a matrix that discloses specified diversity characteristics of its board of directors in its proxy statement or on its website (with an accompanying completed Company Event Form within one business day of posting).

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[9] Del. Code Ann. tit. 8 at §216.

A company will need to check each of these sources to make sure that the conduct of its meeting and the disclosure provided to shareholders meet all requirements.

SHAREHOLDER MEETING PROCESS

An important initial step in the solicitation process is to identify the proxy solicitation team. This typically includes both internal and external members with a varied set of experiences and expertise. Companies seek to have cross-functional teams so that they are well prepared to address the diverse range of issues that commonly arise during a solicitation.

The internal team should include, at a minimum: (1) someone who is responsible for meeting logistics – this includes printing, mailing, and distribution of materials, and shareholder meeting coordination, (2) a representative from the legal department who has ownership of the proxy statement and can address governance issues with investors should direct shareholder engagement be necessary, (3) a member of the investor relations team who can leverage existing relationships with large investors and provide a general business update as needed during engagement calls, (4) someone who can address executive compensation matters, and (5) someone who can speak to the company's environmental, social, and governance ("ESG") practices, disclosures, and initiatives.

This internal team should be complemented by an external team of advisors and service providers who can help to ensure that the process runs smoothly. The external advisors commonly include: (1) outside counsel, (2) a compensation consultant, and (3) a proxy solicitor/governance consultant. External service providers may also include: (1) a transfer agent, (2) a financial printer, (3) a proxy design firm, (4) a virtual meeting provider, (5) an inspector of elections, and (6) tabulators for registered and beneficial shareholders. Some service providers can provide more than one of these services.

Proxy Solicitation Calendar

The process of preparing and distributing proxy materials to shareholders is complex and requires coordination of multiple activities concurrently. Companies that execute this process well assign internal personnel to serve as the chief point of contact with the

outside vendors. Successfully navigating the shareholder meeting process requires attention to detail and organization. Having a list of tasks that must be completed and the corresponding deadlines is a great starting point and one that companies should review with their service providers and internal teams. See Appendix A for a sample annual meeting timeline.

Record Date

Companies must set a record date to determine which shareholders are entitled to receive notice of the shareholder meeting and to vote. The record date is one of the most important dates in the shareholder meeting process because it determines which shareholders can vote and how many shares they can vote. If a record date shareholder later sells their shares before the meeting, that shareholder generally retains the voting rights attached to those shares and does not pass them on to the buyer. Whether the seller is motivated enough to vote is a separate matter, but they are still eligible to vote and their vote may be important depending on the meeting agenda and size of their record date holdings.

State law governs the setting of a record date. Delaware, for example, requires the record date to be no more than 60 nor less than 10 days before the meeting.[10] Companies should check their governing documents as they may be more restrictive than state law. The stock exchanges will also need notice of the record date (e.g., a NYSE-listed company is required to notify the exchange at least 10 calendar days in advance of the record date).[11]

Broker Search

Rule 14a-13 of the Securities Exchange Act of 1934 requires a company to inquire of banks and brokers how many sets of proxy materials they will need to mail to their customers who held the company's shares on the record date. This is commonly referred to as a "broker search." This task, usually handled by the proxy solicitor, must be completed at least 20 business days prior to the record date for an annual meeting. For a special meeting, if the search is impracticable 20 business days prior to the record date, then the rule requires the search to occur "as many days before the record date of such meeting as is practicable." Particularly for a special meeting, a company should

[10] Del. Code Ann. tit. 8 at§213(a).
[11] *See* New York Stock Exchange Listed Company Manual at Section 401.02.

review the rules of the exchange on which the company's shares are listed because the exchange may have its own requirements. For example, the NYSE requires at least 10 calendar days notice.

Shareholder Data

Understanding who a company's major investors are and their positions on potential voting items at a meeting can help a company evaluate the likelihood of obtaining shareholder approval of those items and develop a strategy for maximizing the likelihood of obtaining that approval. A proxy solicitor can serve an important role in this process.

Based on its understanding of the voting policies of a company's major investors, a proxy solicitor can make an informed projection of the vote on a particular item. If potential issues are identified, management can seek to address possible concerns through proxy disclosure or governance changes, and notify board members of potential issues (for example, if a director nominee is likely to receive a significant number of "withhold" votes because they sit on too many corporate boards, which is commonly called "over-boarding") early in the process and avoid last minute surprises.

Information about the holdings of a company's significant shareholders can come from a number of sources, including the company's records of its registered stockholders and SEC filings.

SEC Schedules 13G and 13D are required to be filed within 10 days by persons or groups who acquire more than 5% ownership of a class of a company's stock.[12] Institutional investors may file a 13G in lieu of Schedule 13D if they have no intention of influencing control of the company. Retail investors may file a 13G if they have no intention of influencing control of the company and do not own 20% or more of the stock. On the other hand, an investor is required to file a 13D when they may seek to influence control of the company. For example, activist investors who are seeking to exercise influence over a company will file a 13D when they accumulate 5% of the outstanding shares.

SEC Form 13F is a report that is filed with the SEC quarterly by institutional investors. Holdings disclosed in Form 13F may not correspond exactly with the investor's ability to

[12] In February 2022, the SEC proposed reducing the 13D reporting period to five days. *See* Modernization of Beneficial Ownership Reporting, File No. S7-06-22 (Feb. 10, 2022), available at https://www.sec.gov/rules/proposed/2022/33-11030.pdf.

vote shares as the disclosure relates to securities over which the institutional investor has investment discretion. Further, the reports are filed up to 45 days after each calendar quarter, yet only provide information as of the last day of the quarter, and may exclude positions for which confidential treatment has been sought by the investor. However, the filings provide useful information; for example, they may allow a company to see significant holdings of an institutional investor whose holdings are approaching the 5% threshold for 13D/13G filings.

Registered Holders and Non-Objecting Beneficial Owners (NOBOs)

Companies and their advisors should analyze their list of registered shareholders and NOBO lists to assess whether outreach to any key holders in these groups would be helpful. The company's transfer agent can provide the registered shareholder list. The list contains contact information and share ownership information for registered accounts. The transfer agent will not, however, know the identity of shareholders who hold their shares through a bank, broker or other nominee. A NOBO list, which can be obtained from proxy intermediaries (Broadridge and Mediant), contains name, address, and share ownership information for NOBO accounts (i.e., accounts that do not object to the disclosure of their position to the company as discussed earlier in the guide). Depending on a company's shareholder profile, NOBO lists can be costly but provide a significant source of shareholder ownership data. Companies should request them well in advance of the annual meeting date so they can use them during the proxy solicitation. Companies should also examine the holdings of their officers and directors to understand the percentage of outstanding shares that can be voted by insiders. This is also helpful to the proxy solicitor for preparation of a preliminary voting analysis.

Depository Trust Company (DTC)

DTC lists are another tool companies and their advisors can leverage to gain intelligence on shareholder ownership. Typically, banks and brokers hold a company's shares in an account at DTC, which in turn holds all of its participant's shares in one account at the company's transfer agent. A company can obtain a listing from DTC that shows the number of shares held by each bank and broker, but does not show the underlying holders of those shares. For example, a DTC list may show that 5,000,000 shares are held through TD Ameritrade and 4,000,000 shares are held by State Street Bank and Trust. Analyzing this data can be critical in formulating a solicitation strategy as it may help determine the impact of broker discretionary voting (discussed below)

and may help determine whether major holders have voted or sold previously disclosed positions.

Many companies engage a market surveillance firm to analyze trading and ownership changes in their stock. These firms can identify the custodial arrangements of a company's largest investors, provide insight into the major buyers and sellers of a company's stock, and identify activist buying or selling activity.

Proxy Statement

A proxy statement is a document that public companies must file with the SEC prior to a shareholder meeting when seeking proxies from shareholders to vote at the meeting. The purpose of the proxy statement is to give shareholders sufficient information to make informed decisions about the proposals on which they will be voting. A public company's proxy statement must specify the date, time, and location of the shareholder meeting and include the meeting agenda, which, for an annual meeting, typically includes election of directors, an advisory say-on-pay vote, and auditor ratification, at a minimum. An annual meeting proxy statement will also instruct shareholders how they can vote and provide information about topics such as the candidates for the board of directors, the company's corporate governance practices, compensation of directors and executives, the company's auditors, holdings of the company's shares by officers, directors, and significant shareholders, and transactions with officers, directors, and significant shareholders. The proxy statement may also include proposals that shareholders submitted to the company for inclusion in the proxy statement for a vote if the shareholder submission meets certain requirements.[13] The proxy statement must be filed with the SEC before a company can solicit shareholder votes. Regulation 14A under the Securities Exchange Act of 1934 sets forth the information that must be provided in the proxy statement and the way the information must be presented.

Companies are increasingly viewing the proxy statement as a valuable opportunity to communicate their narrative directly to shareholders. As such, they are moving from viewing the document as strictly a matter of compliance and are increasingly utilizing the proxy as a marketing tool to complement the range of materials, reports, and disclosures that a company prepares to communicate with its stakeholders. In doing so, companies are voluntarily expanding the nature and scope of disclosure in the proxy statement beyond legal requirements. Companies are also cognizant of the robust task

[13] *See* Securities Exchange Act of 1934. Rule 14a-8.

institutional investors have each spring of reviewing hundreds or even thousands of proxy statements, and are seeking ways to make the documents easier to digest by adding more charts and graphs, for example. This is a welcome development for investors, including retail investors, and a practice that is likely to increase in the future.

Preliminary Proxy Statement

A company may be required to file a preliminary proxy statement with the SEC depending on the proposals to be voted on at the shareholder meeting. Companies are not required to file preliminary proxy statements for "plain vanilla" annual meetings where the only proposals up for shareholder vote are election of directors, say-on-pay, auditor ratification, and a stock incentive plan, but when the agenda includes charter amendments, mergers or acquisitions, or other non-routine matters, the company likely will be required to file a preliminary proxy statement with the SEC.[14]

The company must file a preliminary proxy statement, if required, at least 10 calendar days prior to the date definitive copies of such material are filed and first sent or given to shareholders. The SEC will review the filing and advise the company within 10 calendar days of filing if the SEC intends to comment on the preliminary proxy material. Accordingly, governance professionals supporting the solicitation process will need to build in sufficient time in the preparation and proxy drafting process in the event that the company must file a preliminary proxy statement.

Definitive Proxy Statement

If a company is not required to file a preliminary proxy statement, does not receive a communication from the SEC within 10 calendar days of filing a preliminary proxy statement, or satisfies any comments the SEC may have to such preliminary proxy statement, then the company can file its definitive proxy statement and distribute it to shareholders. All materials furnished to shareholders must be filed with the SEC no later

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[14] *See*, *e.g.*, Latham & Watkins, DFIN Solutions, Annual Meeting Handbook, 2019 Edition, Providing a General Overview of State and Federal Laws and Stock Exchange Rules Relating to Annual Meetings of Shareholders (Mar. 2019), available at https://www.lw.com/admin/upload/SiteAttachments/LW-annual-meeting-handbook.pdf ("There is no filing requirement for 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 pay frequency votes").

than the date the materials are mailed or distributed electronically to shareholders.[15] Companies and their solicitors may not begin soliciting votes until the proxy materials are furnished to shareholders.[16] Shareholders may vote at any time once they receive their proxy materials.

Distribution of Proxy Materials

Public companies are required to provide shareholders of record (both registered and beneficial holders as of the record date) with proxy statements along with notice of the shareholder meeting. Companies are also required to provide a separate annual report with the proxy statement if directors are to be elected at the meeting.[17]

While a company knows who its registered shareholders are and thus can engage its transfer agent or another agent to distribute the proxy materials to these holders, it does not know the ownership positions of shareholders who hold their shares in "street name" through a bank, broker, or other nominee. To distribute to these holders, the company must provide materials to the custodian to mail (see the 'Broker Search' discussion above for additional details). Most brokers use an intermediary such as Broadridge or Mediant to distribute materials and companies will simply deliver the materials to the intermediaries. The intermediaries then must forward the proxy materials to beneficial owners within five business days of receipt.[18]

There are two primary methods companies utilize to distribute proxy materials: full set mailing (hard copy) and "notice and access." Each method has advantages. Determining which method to employ requires an examination of a company's shareholder profile (most particularly, the amount of shares held by retail versus institutional investors), whether a challenging vote is anticipated (either in getting quorum or reaching a specific vote requirement), the meeting timeline, and any budgetary constraints.

Regardless of the method a company elects to use, it must consider the number of sets of materials it will need to have printed. Companies should order extra printed materials to account for spoilage and requests for additional materials that may be made during the solicitation process. The number of additional materials a company will want on

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[15] Securities Exchange Act of 1934, Rule 14a-6(b).
[16] Securities Exchange Act of 1934, Rule 14a-3.
[17] *Id.*
[18] *See* Securities Exchange Act of 1934, Rule 14b-1(b)(2).

hand depends on the number of packages it plans to distribute and whether the company is using notice and access delivery. Some companies also make copies of the materials available for shareholders to reference at the annual meeting. Companies should further consider how many copies they need or want for their internal use and for their proxy solicitor and other outside advisors.

Notice and Access Delivery

SEC rules allow companies to send a short notice of the meeting to shareholders with instructions on how to view the proxy materials on the internet in lieu of sending printed copies of the proxy materials. This method of delivering proxy materials is often referred to as “notice and access” and can save a company a substantial amount of printing and mailing expense. The notices, referred to as “notices of internet availability,” typically contain links to the proxy materials and instructions on how to vote over the internet and how to request paper copies of the materials. The notices do not contain a votable proxy card or instructions on how to vote by telephone. Companies using notice and access delivery must post the proxy materials on a public website by the time the notice is sent to shareholders.

These notices must be sent at least 40 calendar days before the meeting date.[19] This is one of the most significant considerations for companies in deciding whether to make use of the notice and access method of delivery because all proxy materials must be in final form at least 40 calendar days prior to the meeting date. In addition, the company must notify the intermediaries that it will be using notice and access in sufficient time for the intermediaries to mail notices to beneficial owners at least 40 days before the meeting.

Companies that utilize notice and access must still send hard copies of the proxy materials to shareholders upon request or to any shareholder who indicates a preference for hard copies of materials. The notice and access rules cannot be used for meetings related to mergers and acquisitions.

Full Set Mailing

“Full set mailing” is when a company sends shareholders hard copies of proxy materials in the mail. A “full set” of proxy materials includes the proxy statement and proxy

[19] See Securities Exchange Act of 1934, Rule 14a-16(a) and 14b-1(d).

card/voting instruction form (registered holders receive a proxy card and beneficial holders receive a voting instruction form, or "VIF"). Companies also mail an annual report if one is required,[20] which is typically when directors are to be elected at the meeting. The SEC rules require the provision of financial statements and certain other information as part of the mailing. Some companies produce a glossy annual report with the required information, while other companies include a copy of their Annual Report on Form 10-K.[21] Companies that utilize full set mailing also must post their proxy materials on a public website when they mail the packages.

One of the most significant advantages to full set delivery is that a company does not have to meet the notice and access timing requirements discussed above. Companies should review applicable state law and their bylaws, as their notice provisions will govern when the full set materials must be distributed.

Another instance where companies frequently use the full set delivery option is when they have a significant number of retail investors. Among other things, larger packages are more apt to be noticed than the thin envelopes shareholders receive with notice and access delivery, thus increasing the likelihood that recipients will examine the materials and exercise their voting rights. The larger package can also convey visually the importance of the meeting, ideally translating to greater voting "turnout."

Hybrid Delivery

A third option employs a combined approach. This is frequently referred to as a hybrid or stratified delivery method. In this process, companies send a notice of internet availability to some shareholders and full sets to the remaining shareholders. Companies can select the criteria they use to determine which shareholders will get notices and which will get full sets of materials. Often companies elect to send full sets to larger holders (for example, shareholders with at least 10,000 shares) and notices to smaller holders (those with 9,999 shares or fewer). This approach can reduce printing and mailing costs, but these savings may be offset by the fees incurred by utilizing notice and access. Companies also must still adhere to the strict notice and access timing requirements if they elect to use a hybrid approach.

Email Distribution

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[20] *See* Securities Exchange Act of 1934, Rule 14a-3(b).
[21] A glossy annual report typically contains less detailed information than a 10-K, but it will often also include materials not found in the 10-K, such as pictures, color diagrams and graphics, and a letter from the CEO.

Email distribution is another way that companies can disseminate proxy materials. Email distribution requires the shareholder to affirmatively elect to receive proxy materials via e-mail. To do so, shareholders must request email delivery with their broker or the transfer agent. Not all brokers participate in this process, but some of the largest including Charles Schwab and TD Ameritrade offer it to their clients. Some of the benefits of email delivery are that shareholders receive proxy materials faster than regular mail and it saves the company money. When shareholders choose email delivery, they receive an email when the materials are available, and they can also vote online. Companies often include information on how shareholders can sign up for email delivery in their proxy statements.

Householding

Companies are permitted to deliver a single set of proxy materials to all shareholders that have the same address and who provide either actual or implied consent. This is referred to as “householding.” While the company need mail only one copy of the proxy statement and annual report to the holders with the shared address, each shareholder must receive a separate proxy card, VIF, or notice of internet availability with a unique control number so they can vote their own shares. Upon request, companies must deliver a separate copy of the proxy materials to any shareholder at a shared address who wishes to receive an individual set of materials.

Householding may enable a company to reduce printing and mailing expenses and the associated environmental impacts. Companies should review applicable state corporate laws to confirm that their householding procedures meet the notice requirements.

Voting

The primary purpose of a shareholder meeting is to have shareholders vote on the proposals to be presented at the meeting. Most shareholders, however, do not attend shareholder meetings. The proxy solicitation process affords shareholders the ability to designate someone to vote on their behalf so that they do not have to attend the meeting in order to vote. This designated person, or proxy, votes in accordance with the shareholder's instructions.

Shareholders generally can provide their voting instructions in several ways, including online, by phone, or by mail. Shareholders can also vote at the meeting. Votes must be

received prior to a stated deadline, which is typically at 11:59 pm Eastern Time the night before the meeting for internet and telephone voting, and when the polls close for voting in person at the meeting. Beneficial holders vote by mail using a VIF provided by the bank, broker, or other nominee, as applicable, whereas registered holders use a proxy card.[22] Proxy cards and VIFs also instruct shareholders on how to vote over the internet or by telephone if those options are available.

For security reasons and to ensure that only record date holders can vote, companies use "control numbers" to authenticate shareholders. Control numbers are unique to each account and are included on the proxy card, VIF, or notice of internet availability. As a result, shareholders may have multiple control numbers for a single meeting and may receive multiple sets of proxy materials. When this happens, the shareholder is required to submit multiple votes in order for their entire ownership position to be represented at the meeting. This frequently happens with shareholders who have individual, taxable accounts and retirement accounts or trust accounts.

One issue that frequently arises during the proxy solicitation process is that holders misplace their proxy cards, VIFs, or notices of internet availability, but still want to vote their shares. For registered holders, the solution is simple because the transfer agent, as the keeper of the registered holder list, can provide the necessary information for them to vote their shares. The company or proxy solicitor can request the registered holders' control number from the transfer agent. Beneficial holders who misplace their VIF, on the other hand, must contact their bank or broker directly to obtain their control number. This can be a more cumbersome process that may require the shareholder to connect with their bank or broker's proxy department.

As discussed above under "Distribution of Proxy Materials," the proxy materials for beneficial holders are distributed to the underlying shareholders through intermediaries (e.g., Broadridge and Mediant). Once this process has been completed, the beneficial shareholders can cast their votes, which are collected by the intermediaries. The intermediaries subsequently transmit the votes to the tabulator who counts the votes (discussed below).

Routine v. Non-Routine Proposals and Broker Discretionary Voting

[22] *See* SEC, Spotlight on Proxy Matters – Receiving Proxy Materials, *infra* note 6.

If a registered shareholder does not vote, their shares will not be voted. If a beneficial shareholder does not provide voting instructions, it is still possible that their shares may be voted on some matters. Under the rules of the NYSE, brokers can vote "in their discretion" on matters that the NYSE deems to be "routine," such as the ratification of the appointment of auditors, when the brokers' customers have not provided voting instructions. Reverse stock splits and increases in authorized common stock can also be viewed as routine, depending on the facts.[23] The NYSE's rules apply to broker-dealers and, as a result, it does not matter on which stock exchange a company's shares are listed.

Here is an example of how discretionary voting can work. If a broker holds 1,000,000 shares on behalf of a number of retail holders and those retail holders collectively vote only 200,000 shares, the broker can vote the remaining 800,000 uninstructed shares in its discretion on a routine matter. If it does so, the broker will return a proxy for the full 1,000,000 shares and thus all the shares held through that firm will be represented at the shareholder meeting. Without discretionary voting, the broker could issue a proxy only for 200,000 shares and the remaining 800,000 shares would not be represented at the shareholder meeting.

In the example above, brokers have the choice of not voting the 800,000 uninstructed shares or voting the uninstructed shares in their discretion. While many brokers exercising discretion will vote in accordance with the board's recommendations, some will vote proportionately, based on how customers who did provide them with instructions voted, and some will not exercise discretionary voting authority at all.[24] Where an agenda has at least one routine matter and one non-routine matter, if the broker chooses to exercise discretionary voting on the routine matter, it cannot vote on the non-routine matter, and instead will report a "broker-non-vote" on the matter for all shares for which it did not receive voting instructions.

Discretionary voting can be critical to a company. Because many retail holders do not vote at shareholder meetings, the use of discretionary voting can have a significant impact on vote outcomes. According to Broadridge, only about 30% of retail shares are

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[23] *See* SEC Release No. 34-88736; File No. SR-NYSE-2020-38, Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Its Application of the Proxy Delivery Requirements of NYSE Rule 451(b)(1) Through and Including May 31, 2020 (Apr. 23, 2020) available at https://www.sec.gov/rules/sro/nyse/2020/34-88736.pdf.

[24] See, *e.g.*, Alliance Advisors, TD Ameritrade Eliminates Discretionary Voting (Mar. 2021), available at https://www.allianceadvisors.com/newsletters/td-ameritrade-eliminates-discretionary-voting-march-2021; SEC, Voting in Annual Shareholder Meetings – What's New in 2012 (Mar. 28, 2012), available at https://www.sec.gov/investor/alerts/votinginannualshareholdersmeetings.pdf.

voted annually.[25] It is important to remember that brokers are permitted to exercise discretionary voting authority only for "routine" ballot items. Brokers are not permitted to vote uninstructed shares for common non-routine proposals like election of directors, say-on-pay, approval of a stock incentive plan, approval of an employee stock purchase plan, or shareholder proposals. This means that for a "vanilla" annual meeting where the agenda consists of election of directors, auditor ratification, and say-on-pay, the only proposal on which brokers can exercise discretionary voting is auditor ratification.

Companies can provide a draft of their proxy statement to the NYSE to obtain the NYSE's guidance on which proposals it will deem "routine" and therefore permit brokers to exercise discretionary voting. To get the benefit of the discretionary vote, intermediaries must disseminate proxy materials at least 15 calendar days prior to the meeting date. To achieve this, companies should ensure that the intermediaries have the proxy materials no later than 20 days before the shareholder meeting.

At a company with high retail ownership, discretionary voting may be critical to achieving the necessary quorum to hold the meeting or to obtaining the required vote for a proposal such as a reverse stock split that qualifies for discretionary voting and requires the approval of a majority of the outstanding shares. Quorum and vote requirements are explored in greater detail in subsequent sections.

Vote Requirements

There are a number of different voting standards that may apply to a proposal included in the proxy statement. The standard that applies depends on state corporate law, the company's governing documents, and possibly stock exchange listing standards. The voting standard that applies can vary from proposal to proposal at the same company and may be different at two companies with the same proposal. It is important that a company understand the vote requirements for its agenda in advance of distributing the proxy materials so it can avoid disputes and can implement an appropriate solicitation strategy. Generally, shareholders can vote "For" or "Withhold" in director elections with a plurality vote standard, and "For," "Against," or "Abstain" for other proposals.

In the election of directors, companies commonly have a "plurality of the votes cast" standard. Under plurality voting, the directors receiving the most votes are elected. If there are four directors being elected, for example, the four nominees receiving the

[25] *See* PwC/Broadridge, Proxy Pulse: 2022 Proxy Season Preview (Feb. 2022), *infra* note 3.

most votes will be elected. Under plurality voting, only votes "For" a candidate are counted. "Withhold" votes have no impact on a nominee's election, and a director can be elected with only one "For" vote even though all other votes are "Withheld" against the candidate.[26] For governance purposes, some companies with a plurality voting standard require a nominee to offer to resign if the nominee does not receive more "For" votes than "Withhold" votes. The board then has a specified period to accept or reject the resignation.[27] Other companies have a voting standard that may require a nominee to receive more "For" votes than "Against" or "Withhold" votes to be elected. Many institutional investors and proxy advisory firms prefer this standard for uncontested director elections. In a contested election, i.e., where there are more nominees than directors to be elected, a plurality standard typically applies.

In other matters, common voting standards are a majority of the votes cast, a majority of the shares present, a majority of the shares outstanding, and some form of a supermajority vote.

Under a "majority of the votes cast" standard, for a proposal to be approved, 50% plus one vote of all votes cast must be cast "For" the proposal. When a shareholder abstains from voting, that is typically viewed as not casting a vote. As a result, abstentions, as well as broker non-votes, have no impact on a proposal subject to this standard. A sample disclosure about this standard is as follows:

> "If a quorum is present, the ratification of the selection of our independent registered public accounting firm requires a majority of the votes cast, which means that the number of votes cast in favor of proposal must exceed the number of votes cast against the proposal."

A similar standard is a 'majority of the shares present and entitled to vote'. The difference between this standard and the "majority of the votes cast" standard is important. Under a "majority of the shares present and entitled to vote" standard, to be approved, a proposal requires "For" votes from the holders of 50% plus one of the shares present at the meeting. Under this standard, abstentions have the effect of votes 'Against' a proposal, unlike in a majority of the votes cast standard, where abstentions

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[26] *See* Latham & Watkins, Recommended Proxy Disclosure for Director Elections & Other Proposals (Mar. 2016) available at https://higherlogicdownload.s3.amazonaws.com/GOVERNANCEPROFESSIONALS/a8892c7c-6297-4149-b9fc-378577d0b150/UploadedImages/Society%20Alert%20Docs/LW-recommended-proxy-disclosure.pdf.
[27] *Id.*

have no impact. Broker non-votes are typically viewed as either not present or not entitled to vote, and therefore have no impact on the outcome.

Another standard that often applies to amendments to a company's articles or certificate of incorporation is a 'majority of the outstanding shares'. Under this standard, the holders of a majority of a company's outstanding shares entitled to vote must approve the proposal for it to pass. Increases in authorized common stock and reverse stock splits typically require the approval of the holders of a majority of a company's outstanding shares. This can be a significant hurdle depending on a company's shareholder profile. Under this standard, abstentions and broker non-votes have the impact of votes "Against" the proposal. For example, if a proposal requires the approval of a majority of the outstanding shares, and 80% of outstanding shares vote, 62.5% of votes cast must vote "For" the proposal for it to pass.[28] A sample disclosure about this standard is as follows:

> "The holders of a majority of the outstanding shares of Common Stock of the Company, must vote FOR the proposal in order for the proposal to be approved."

A supermajority vote requirement requires the approval of the holders of more than either a majority of the votes cast or a majority of the outstanding shares. Supermajority voting requirements are often used by companies to protect rights viewed as important that are contained in a company's governing documents, such as indemnification and limitations on director and officer liability or take-over protections. This heightened threshold makes proposals that require a supermajority vote difficult to approve and even remove (because the provision that sets the supermajority vote standard often requires a supermajority vote to be repealed). Shareholders and proxy advisory firms generally disfavor supermajority vote requirements (e.g., ISS views them as a "problematic governance structure") because they can make it difficult to remove provisions that some believe are not in shareholders' best interests.

When planning the solicitation strategy for a shareholder meeting, understanding the company's shareholder profile, for example the extent of retail ownership compared to institutional ownership and who the major shareholders are, can be valuable. It may enable the company to identify key accounts needed to help secure passage of agenda

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[28] ISS Analytics, An Overview of Vote Requirements at U.S. Meetings (Jul. 2019), available at https://corpgov.law.harvard.edu/2019/07/06/an-overview-of-vote-requirements-at-u-s-meetings/.

items so that the company can focus solicitation efforts on those accounts. The information may also help the company assess how discretionary voting will impact the vote. For example, a company that has significant retail ownership may want to implement an aggressive solicitation strategy that includes direct outreach to retail holders to increase the likelihood of such holders exercising their votes. On the other hand, a company that is predominantly held by institutions and that has a proposal requiring a supermajority vote may not need to do more than engage with their institutional investors.

Understanding When Investors Vote

Voting typically occurs in waves during the solicitation. Once the proxy materials are distributed to the beneficial holders, there is an initial surge in voting on the “routine” proposals through the first phase of discretionary voting. As a result, far more shares are voted on the “routine” proposals than on the “non-routine” proposal during the early voting. This gap closes as more beneficial shareholders vote in the period leading up to the meeting. Further, a company may see a decline over time in the favorable vote for a discretionary proposal as broker discretionary votes (which may more likely be according to the board’s recommendation) are replaced with actual shareholder votes (which are less likely to be completely aligned with the board’s recommendation).

After this initial surge, there is often a lull in voting while institutional investors review the proxy materials. Institutional investors vote on thousands of meetings and proposals during the proxy season, so they often vote a few days before the meeting due to the time it takes to evaluate the proposals, speak with company representatives, if needed, and cast their votes.

The second surge in voting occurs after the proxy advisory firms release their vote recommendations. This is usually two to three weeks before a shareholder meeting. Many institutional investors are influenced by proxy advisory firms’ recommendations (or even commit to vote directly in line with such recommendations) and will wait until the recommendations are published before voting. ISS is the most influential proxy advisory firm, and many institutional investors will vote in the 24-48 hours after the release of ISS’s report. These votes are often in lock-step with ISS recommendations. Glass Lewis is the second most influential proxy advisory firm and companies often see a smaller bump in voting following the release of Glass Lewis’s vote recommendation report. Some institutional investors that are not influenced by the proxy advisory firms’ recommendations may vote before their release and others that are not significantly

influenced by their recommendations may still want to see the reports and utilize their data and research before casting their votes.

The final surge in voting typically occurs the week of the meeting as institutional investors cast their votes and a second phase of discretionary voting occurs.

Companies should closely monitor the voting trends throughout the solicitation period to identify potential issues with either achieving quorum or a proposal failing to receive the necessary votes to pass. Monitoring the voting can also serve as a valuable early detection tool for any issues with director voting, so that a director can be briefed on any concerns before the meeting and efforts can be made with the assistance of proxy solicitors and other advisors to limit the opposition voting.

PROXY ADVISORY FIRM RECOMMENDATIONS

There are two main domestic proxy advisory firms - ISS and Glass Lewis, both of which also have an international presence. A third firm, Egan Jones, is less influential, but does have some market share. Many institutional investors utilize one or more proxy advisory firms to help meet their fiduciary obligations for proxy voting decisions by reviewing the research, data, and vote recommendations that are contained in the firms' reports. The reports provide specific voting recommendations for each proposal on a shareholder meeting agenda (e.g., vote "For" say-on-pay and "Against" the re-election of Director Y) along with the rationale for such recommendations. A company should assess the level of influence that the proxy advisory firms may have on its shareholders early in the annual meeting process.

Typically, two to three weeks before the shareholder meeting, the proxy advisory firms will release their vote recommendations. This is one of the most anticipated events in the solicitation calendar, particularly with companies that have significant institutional ownership.

The proxy advisory firms' vote recommendation reports are highly influential with certain investors that closely follow their recommendations. This is particularly true of ISS's recommendations.

At a company with significant institutional ownership, an ISS recommendation against a proposal can result in approximately 25-30% of the shares being voted against the proposal.[29] The impact of an adverse Glass Lewis recommendation is considerably less, with around 7-10% of the shares generally being voted in accordance with Glass Lewis' recommendations. When both ISS and Glass Lewis recommend against a proposal, it can be difficult to obtain shareholder approval of the matter as the recommendations are often a sign of a governance or compensation practice that many institutional investors may find problematic, even if they do not follow the voting guidelines of ISS or Glass Lewis.

A company will generally not be able to change the recommendation of a proxy advisory firm. Therefore, it is to the company's advantage to explain in the proxy statement its position on a potentially controversial item. The explanation might be enough to avoid a negative recommendation, and if a negative recommendation is issued, the company's position has been disclosed so that investors can make their own decision. The proxy advisory firms may change their recommendations if a company can point out a factual error made by the proxy advisory firm or if the company files additional solicitation materials committing to address the issue that led to the adverse recommendation. Even if the company takes these actions, there is no guarantee that a proxy advisory firm will change its position.

Both ISS and Glass Lewis publish updated proxy voting guidelines each year that articulate their policies on corporate governance, environmental, and social proxy voting issues. Applying these guidelines to company practices and policies can shed light on how ISS and Glass Lewis may recommend shareholders vote at a company's upcoming shareholder meeting, and can be used as a reference point in preparing proxy statement disclosure supporting the board's recommendation on a particular proposal. Many large institutional investors also have publicly available proxy voting guidelines detailing their views on certain proxy issues.

ENGAGEMENT WITH INSTITUTIONAL INVESTORS

[29] See, *e.g.*, Semler Brossy, 2022 Say-on-Pay & Proxy Results (Aug. 2022) at page 2, available at https://semlerbrossy.com/wp-content/uploads/2022/05/SBCG-2022-SOP-Report-2022-07-14.pdf.

During the solicitation process, companies should communicate either directly or through their proxy solicitor with institutional investors about the upcoming meeting. This serves a dual purpose of ensuring that those investors are aware of the meeting and will vote their shares, while also providing an opportunity for dialogue if an investor has any issues or concerns with any of the agenda items. Companies can also request engagement to address a negative recommendation from ISS or Glass Lewis. Some institutional investors have specific processes for how they prefer companies request meetings. Institutional investors may also proactively reach out to companies to schedule a meeting if they have a particular issue they would like to discuss in advance of voting.

A company should not, however, wait until filing proxy materials to engage with its institutional investors if it believes it has a problematic compensation or governance matter because the company may not be able to secure meetings with key investors during the solicitation period. This is most likely to be the case during the busy spring proxy season when most annual shareholder meetings are held. “Off-season” engagement, during the summer or fall, is more likely to yield meetings with institutional investors. Companies increasingly engage with their major institutional investors on governance and compensation matters each year during the off-season.

Even if shareholders are not able to accommodate a meeting, a company can still gather valuable information (e.g., the investor does not have any concerns that warrant a call) by reaching out and may even be able to communicate some of its key messages via email. Increasingly institutional investors are conducting limited engagements via email to provide feedback on a specific proposal or issue. Companies must be cognizant of Regulation FD (Fair Disclosure), which precludes selective disclosure of material, non-public information, during these meetings. In addition, to the extent that the email engagement occurs during the solicitation process (i.e., once the proxy materials have been distributed to investors and filed with the SEC), governance professionals must be mindful that the proxy rules may require that any supplemental material that is provided to an institutional investor be filed as additional solicitation material and distributed to all shareholders.

A company should strategize with its advisors on which company representatives should participate in an engagement meeting and which topics each participant is best positioned to address. Investors may provide advance notice of the specific topics or issues they want to address but, even if they do, the company should still be prepared to address issues related to other proposals or significant ESG matters. Generally, in-

season engagements are focused on the particular controversial agenda items, and broader conversations around ESG and compensation issues are conducted during the off-season. Some investors will request the participation of an independent director with oversight on the key matter to be discussed during the call. When possible, companies should accommodate these requests because investors value the opportunity to have direct access to the board, whom they view as their representatives.

The engagement team should include: (1) someone who can address governance issues (often a member of the legal department), (2) someone who can provide a general business update if needed (frequently someone from investor relations), (3) someone who can address executive compensation, and (4) someone who can discuss ESG matters. The investor representatives will include whoever is responsible for proxy voting, which may be a member of the investment stewardship team and/or investment personnel, and may include a portfolio manager or other investment professional. The investment side is often involved in discussions about executive compensation.

Prior to these meetings, companies should familiarize themselves with the investor's proxy voting policies to identify potential areas of conflict between the investor's preferences and company practices. Companies should also be aware of and prepared to address concerns expressed by the proxy advisory firms (including in connection with the company's governance score generated by ISS Corporate Solutions). Companies should work with their advisors in advance of the meetings on appropriate messaging.

PROXY SOLICITATION - RETAIL SHAREHOLDERS

It is becoming increasingly challenging for companies to connect with retail investors. This creates a significant problem for companies that have a substantial portion of their outstanding shares held by retail holders because they often do not vote at shareholder meetings. As discussed above, the reduction in brokers that exercise discretionary voting authority has further increased the need for companies to get out the vote from this shareholder segment.

Companies that have significant retail ownership should work with a proxy solicitor to create a strategy for maximizing voting from retail holders. Some of the most effective strategies include outbound calls, reminder emails, text messages, reminder letters, and

social media campaigns. Companies should work with counsel to determine which, if any, of the additional solicitation materials must be filed with the SEC.

The first step in conducting a retail outreach effort is to obtain a NOBO list. Information derived from the NOBO list enables proxy solicitors to contact holders and directly capture their votes and transmit them to ensure that they are represented at the shareholder meeting. Companies will want to adjust the extent of their retail outreach to reflect the number of shares they need to capture to reach quorum or pass a key proposal. Retail outreach strategies should respond to shareholder feedback and sentiment. While some strategies may capture more direct votes, the retail outreach strategy should be viewed similar to a marketing campaign where the multiple touch points work together to increase shareholder awareness of the meeting and reinforce the importance of voting.

QUORUM

Quorum is the minimum number of shares required to be present at a shareholder meeting for the meeting to be held. The quorum requirements are set by a company's governing documents and state corporate law. The prevailing quorum standard is a majority of the shares outstanding. An example disclosure of this standard is:

> "The presence, in person or by proxy, of a majority of the aggregate voting power of the issued and outstanding shares of stock entitled to vote at the meeting will constitute a quorum at the meeting."

Abstentions will generally be treated as present for purposes of determining the presence of a quorum. Companies often include at least one "routine" proposal on the meeting agenda so that they can include votes cast by brokers using their discretionary voting authority in determining whether a quorum is present.

Brokers' ability to vote uninstructed shares can be crucial for companies with high retail ownership to achieve quorum. As discussed above, less than one-third of shares held by retail investors are typically voted,[30] while more than 80% of shares held by institutional investors are generally voted.[31] As a result, it can be challenging for smaller

[30] *See See* PwC/Broadridge, Proxy Pulse: 2022 Proxy Season Preview (Feb. 2022), *infra* note 3.
[31] *Id.*

companies without major institutional ownership or companies with high retail ownership to achieve quorum. This issue has been exacerbated in recent years with TD Ameritrade and Charles Schwab no longer exercising discretionary voting on “routine” proposals at shareholder meetings, and the rise in use by retail shareholders of Robinhood, which also does not exercise discretionary voting.

One way companies have responded to these recent developments is by lowering their quorum from a majority of shares outstanding to one-third of shares outstanding. Companies that are considering this type of change should carefully review their governing documents and consult with advisors to determine its feasibility. Companies should also consider utilizing the retail solicitation tools (including reminder letters, emails, and outbound calls) discussed above to increase the overall vote returns. Companies that are struggling to achieve quorum should engage a proxy solicitor to craft and execute a strategy to maximize voting by connecting with institutional investors and retail shareholders. Proxy solicitors can also track the voting and update the strategy as needed. Companies should not overlook the importance of contacting internal staff, executives, directors, and friendly shareholders to ensure that their shares are voted and represented at the meeting.

PROXY TABULATOR AND INSPECTOR OF ELECTIONS

If required by the law of a company’s state of incorporation or by the company’s articles of incorporation or bylaws, the vote at every shareholder meeting must be certified by an inspector of elections. The company’s transfer agent frequently supplies representatives to serve as inspector and to tabulate votes. Most of the securities voted at a shareholders’ meeting are voted by persons acting with a power of proxy granted by a document (i.e., a management proxy card or other valid form of proxy) previously executed and forwarded to the company, and the inspector of elections will determine the validity of these documents. For governance reasons or when a vote is contested, a company may retain an independent inspector, separate from the tabulator, to determine the validity of proxies and issue the final tally. The corporate secretary commonly uses periodic voting reports from the tabulator to monitor the progress of the proxy solicitation campaign.

LIST OF APPENDICES

Appendix A: Timetable for Public Company Annual Meeting (NYSE-Listed Delaware Company)

Additional Resources:
For further information on annual shareholder meetings, please see these and other Society resource pages:

Annual Meeting/Proxy Statement

Corporate Secretary's Office

D&O Questionnaires

Proxy Access

Proxy Advisors

Proxy Plumbing

Say-on-Pay

Shareholder Engagement

Shareholder Proposals

Transfer Agents

Universal Proxy

Virtual Shareholder Meetings

Voting Standards

Appendix A - Timetable for Public Company Annual Meeting (NYSE-Listed Delaware Company)[1]

Below is a sample timetable for an annual meeting of a corporation incorporated in Delaware whose shares are listed on the New York Stock Exchange ("NYSE"). The timetable is only a sample and may not be appropriate for all companies or all situations. A company should carefully review with its own advisors its unique circumstances and adjust the timetable accordingly. Where there is no specific rule dictating the exact timing, the times provided are estimates intended to allow a company sufficient time to complete all the required actions.

Action	Time Prior to Meeting Date
Set date for the annual meeting and pick location	270-180 days • Meeting can be inside or outside the state as specified by organizing documents, or if not specified, as determined by board (Del. Code Ann. tit. 8, § 211(a)(1)). • A stockholder can petition the Chancery Court if no annual meeting has been held for 13 months (Del. Code Ann. tit. 8, § 211(c)). • NYSE requires listed companies to hold a shareholder meeting every year (Section 302 of NYSE Listed Company Manual).
Determine: • record date, notice date and mailing date • whether there will be full delivery of the proxy materials or whether the company will use the notice and access method	180-150 days • Record date must be set at no more than 60 or less than 10 days before the meeting (Del. Code Ann. tit. 8, § 213(a)). • Notice must be sent to stockholders no more than 60 or less than 10 days before the meeting (Del. Code Ann. tit. 8, § 222(b)). • Mailing must be at least 20 business days before the meeting date if a document is

[1] Source: LexisNexis

	incorporated by reference into the proxy statement (Instruction D-3 to Schedule 14 A (17 C.F.R. § 240.14a-101). • NYSE recommends but does not require a minimum of 30 days between record date and mailing date (Section 401.03 of the NYSE Listed Company Manual). • Companies must decide between the full delivery or notice and access model (17 C.F.R. § 240.14a-16) and this decision will affect timing and other mechanics.
Begin drafting the proxy statement and determine whether any matters to be voted on will require a preliminary proxy filing	180-150 days • No preliminary proxy filing is needed if the only matters to be voted on are the election of directors, appointment of auditors, an employee plan, say-on-pay, say-on-golden parachute and/or shareholder proposals or nominees for director (17 C.F.R. § 240.14a-6).
Determine whether any stockholder proposals were submitted before the required date for inclusion in the company's proxy statement	180-150 days • The date by which stockholder proposals must be received should be in the prior year's proxy statement. • The date is calculated under Rule 14a-8(e)(2) (17 C.F.R. § 240.14a-8(e)(2)) as 120 days before the date the previous year's proxy materials were sent to shareholders.
Determine whether any stockholder proposals timely submitted can be challenged on a procedural or eligibility basis	180-120 days • Challenges on a procedural or eligibility basis must be sent to the shareholder proponent within 14 days of the company's receipt of the stockholder proposal. Rule 14a-8(f) (17 C.F.R. § 240.14a-8(f))

Begin discussions with the shareholder proponent regarding possible withdrawal (if the stockholder proposal can't be challenged for procedural or eligibility reasons)	180-120 days • The shareholder proponent's voluntary withdrawal of the proposal is the best option and generally the company should try to negotiate with the proponent for that outcome.
Consider drafting and submitting to the SEC (with a copy to the proponent) a statement of opposition to the proposal and intent to exclude it (if the proposal is not withdrawn)	180-120 days • An opposition statement (or request for no-action letter) must be transmitted to the SEC no later than 80 days before the filing of the definitive proxy statement (17 C.F.R. § 240.14a-8(j)).
Hold a board of directors meeting to approve: • Time and place of annual meeting • Record date • Notice of meeting • Candidates for director and any other proposals • Inspector of election	150 days
Obtain bids from and select a: • Printer • Proxy fulfillment firm for registered shareholders • Proxy solicitor (if the company chooses to hire one)	150 days
Distribute a schedule showing important annual meeting/proxy statement dates to officers and other internal participants in the process (e.g., finance department, human resources, investor relations)	150 days
Begin drafting: • The annual report (or wrap-around portions such as a letter to stockholders) • Proxy card	150-125 days

• Voting instruction form • Notice of internet availability, if using notice and access	
Discuss logistics of distribution (e.g., mailing dates, record dates and other deadlines) with: • Transfer agent • Employee stock plan administrators • Printer • Proxy fulfillment firm • Proxy solicitor (if applicable)	150-125 days
Develop and distribute a director and officer questionnaire for the proxy statement, review responses and revise the proxy statement to reflect the information reported in the questionnaires	150-125 days
Contact the inspector of elections to advise of meeting date and location	120 days
Distribute a draft of the proxy statement to the officers for their review and incorporate any comments	120-100 days
Discuss with appropriate parties the physical aspects of the meeting, including: • Security • Travel and accommodations, as needed • Refreshments • Staffing • Meeting signs and parking • Registration • Audiovisual needs • Possible webcasting	120-100 days
If the company has an advance notice bylaw provision that establishes procedures and timing for stockholders to submit proposals or nominations at the annual meeting, determine	120-90 days • This is separate from the SEC Rule 14a-8 procedure.

whether any proposal received is in compliance with the bylaw	• Advance notice bylaws typically contain a 30-day window (commonly 120-90 days before the meeting) during which a stockholder may submit a proposal or nomination for inclusion on the agenda of the meeting. • Complying with the bylaw provision does not entitle a stockholder to have materials included in the company's proxy statement, only that they may have their matter included in the agenda at the meeting to be voted upon.
Distribute a draft of proxy statement to the directors for their review and incorporate any comments afterwards	100-90 days
Mail search cards to record holder banks and brokers to request lists of beneficial owners/quantities required	100-90 days • Search cards must be mailed at least 20 business days in advance of the record date (17 C.F.R. § 240.14a-13).
Hold a board of directors meeting to approve proxy materials and annual report	90-80 days.
Notify NYSE of record date	90-70 days • NYSE requires prompt notice of the record date, but notice in any event can be no later than 10 days before the record date (Section 204.21 of the NYSE Listed Company Manual).
File any required preliminary proxy statement with the SEC and NYSE	80 days • Any preliminary proxy filing must be made at least 10 days prior to the date definitive copies are filed and sent to shareholders (17 C.F.R. § 240.14a-6). • NYSE recommends they review any

	preliminary proxy materials containing matters that substantially affect the holders of listed securities (Section 402.02 of NYSE Listed Company Manual).
Record Date	60 days • This is the earliest date the record date can be under Delaware law. • It is also often the most convenient date since it allows the most time to get the mechanics of the distribution done.
Confirm that the transfer agent and employee stock plan administrators have sent their stockholder/participant lists to the proxy fulfillment firm	55 days
Send the final proxy statement to the printer and (for the purposes of uploading the document) the proxy fulfillment firm	55 days
Confirm the forms of proxy card, voting instruction form and (if using notice and access model) notice of internet availability	55 days
Begin drafting: • Annual meeting script • Ballots for in-person voting • Ballot of appointed proxies • Certificate of inspector of election as to quorum and vote • Rules and procedures of annual meeting • Potential Q&As for management	55 days
Review: • Proofs of proxy materials from printer • Proxy cards, notice of internet availability (if notice and access used) and voting instruction form from Broadridge	54-46 days

• Electronic upload of proxy statement	
File definitive proxy materials with the SEC and mail to the shareholders either: • Notice of internet availability (if using notice and access) or • Full proxy materials and annual report (if using full delivery method)	45-40 days • Notice of Internet Availability must be mailed to shareholders at least 40 days before the meeting date under the notice and access model of delivery (17 C.F.R. § 240.14a-16). • Pursuant to a November 2, 2016 C&DI, the requirement to file the annual report with the SEC may be satisfied by posting the annual report on the company website "by the dates specified in Rule 14a-3(c), 14c-3(b) and Form 10-K respectively, in lieu of mailing paper copies or submitting it on EDGAR," provided the report is available on the company website for one year.
Post proxy materials and annual report to company website	45-40 days • This should be simultaneous with filing with the SEC
File three copies of the definitive proxy materials and annual report with NYSE; provided, however, as of 2018, listed companies are no longer required to provide hard copies of proxy materials to the NYSE provided they are included in their entirety in an SEC filing available on EDGAR.	45-40 days • Filing with NYSE must be no later than the mailing date to shareholders (Section 402.01 of NYSE Listed Company Manual).
If desired, mail proxy cards if using notice and access method of distribution	30 days • Proxy cards cannot be mailed to shareholders until at least 10 days after the notice of internet availability was sent (17 C.F.R. § 240.14a-16).
Obtain a stockholder list as of the record date from the transfer agent (either a physical copy or electronic copy) and make it available for	10 days • The stockholder list must be available for examination by any stockholder at least 10

examination by the stockholders	days before the meeting (Del. Code Ann. tit. 8, § 219).
Confirm all annual meeting logistics with respect to the room, speakers, audio/visual equipment, meeting signs, refreshments, stockholder list, registration; hold rehearsal with speaking participants in the meeting if necessary	10-2 days
Annual Meeting of Stockholders	0 days
Optional: hold a meeting of the Board of Directors to: • Elect officers • Designate officers who are subject to Exchange Act section 16	0 days
Obtain final voting tabulation from inspector of elections	0 to 1 day after the meeting
File a Form 8-K with the SEC (and optionally issue a press release) reporting under Item 5.07: • The final vote counts for each director and proposal • Provide separate numbers for all withholds, abstentions and broker non-votes • If final voting results are not available, include preliminary results and amend with final results within four days after they become available	0 to 4 days after the meeting
Draft minutes for the annual meeting	0-7 days after the meeting
Hold a debriefing with the relevant parties reviewing execution of the annual meeting and note possible improvements for next year	7-14 days after the meeting
CEO must file with NYSE a certification as to compliance with corporate governance	0-30 days after the meeting

requirements	
If applicable, file a report (as an amendment under Item 5.07(d) of the Form 8-K filing above) on the company's decision, in view of the shareholder votes on executive compensation, regarding the frequency with which it will include an executive compensation vote in its proxy materials	0-150 calendar days after the meeting • This report must also be filed no later than 60 days before the deadline for shareholders to submit shareholder proposals pursuant to Rule 14a-8 (17 C.F.R. § 240.14a-8).
Send copies of proxy materials to those stockholders who request them	0-365 days after the meeting