Proxy Season 2023:
A Checklist for Public Companies

INTRODUCTION

Navigating the road to a successful Annual General Meeting in 2023 will be a bit more complicated than in years past. Many observers expect two landmark rulings from the SEC and a recent increase in activism targeting U.S. publicly traded companies to lead to more proxy contests.

On August 25, 2022, the Securities and Exchange Commission (SEC) adopted final rules implementing the pay versus performance disclosure requirement called for by the Dodd-Frank Act. The rule will require public companies with fiscal years ending after December 15 to follow a standardized framework for disclosing executive compensation to demonstrate the relationship between executive compensation paid and the company's financial performance.

Six days later, the universal proxy card went into effect. The new rules require companies and dissidents alike to share their slate of candidates on a proxy card that lists all candidates that have been properly nominated by the company or a shareholder. Observers expect the new rule will make it easier for investors to influence the makeup of the board and lead to an increase in activism that targets directors.

To make the landscape even more challenging for publicly traded companies, the first half of 2022 saw a 10% increase in activist campaigns against publicly traded companies in the U.S. For companies with more than $1 billion in revenue, the increase leaped to 36%.

As regulators and activists boost scrutiny of publicly traded companies, here are steps organizations can start taking now to improve their posture as they prepare for the next Annual General Meeting.

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EXECUTIVE COMPENSATION

The pay versus performance rule from Dodd Frank represents the most significant change to compensation disclosure in more than a decade. Standardizing disclosures in a tabular format will introduce new information to investors that may not have been disclosed, let alone considered, by issuers when this year's compensation decisions were made. With little time and no precedent to prepare for the new disclosure, here's what issuers can do before they issue their 2023 proxy statement.

- [ ] **Educate key internal stakeholders on the rule change**

  Ensure your company's key decision makers are familiar with the details of the new rules. Stakeholders from across the business will need to play an important part in making key decisions that will dictate how the new tables get populated. Ensure they're clear on the new rules and how they will drive deviations from your company's approach in previous years.

- [ ] **Begin analysis on your two most recently completed fiscal years now**

  Companies will be required to include three years of compensation history in their next proxy statement. While this isn't over yet, complete financials for the previous two years are available. By completing those calculations now, public companies can establish a process they can follow when it comes time to evaluate their most recent fiscal year.

- [ ] **Determine your most important compensation measures**

  The new rule does provide companies with some freedom to establish additional performance measures driving compensation. Companies that disclose their three most important financial measures may also include non-financial measures to communicate pay versus performance. A process for identifying the most important performance measure related to compensation actually paid should be established early on.

- [ ] **Benchmark performance against different peer groups**

  Compare your company's performance against required metrics like total shareholder return and net income against different peer groups to understand how investors are likely to benchmark pay versus performance at your company.

- [ ] **Address any misalignment between SEC's current pay versus performance metrics and your compensation committee's past criteria directly**

  The new rule requires companies to clearly describe the relationship between the SEC's required performance measures and "compensation actually paid." It's likely that your compensation committee didn't use the compensation actually paid formula the new rule prescribes. If the required description will be a backwards looking review of decisions made with different criteria in mind, and the proxy statement should acknowledge that dichotomy.

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UNIVERSAL PROXY CARD

The Universal Proxy Card will allow shareholders to elect directors from a full list of candidates nominated by both the company and activists in contested board elections. The new rule will make it easier for investors to influence the makeup of the board. Many observers expect to see an increase in proxy contests targeting sitting directors.

Public companies and their board members should be vigilant in their approach planning for contested director elections.

- [ ] **Take steps to identify potential vulnerabilities and take corrective action**

  Companies should review key performance indicators like revenue, profitability, total shareholder return and other important metrics. This should be compared to historical performance and relative to the company's peer group.

- [ ] **Engage your shareholders proactively regarding the issues they care about**

  Investors need to understand and believe in your company's strategy for creating sustainable shareholder value. Be clear with investors on the company's goals and performance related to ESG and DE&I as investors increasingly look to board refreshment as a means of driving progress on issues that go beyond finances.

- [ ] **Review board composition and make changes now, if necessary**

  A skills matrix can help evaluate whether your company's directors possess the experience your management team needs to effectively manage risk, capitalize on new opportunities, and ultimately execute corporate strategy.

- [ ] **Clearly communicate board's qualifications and effectiveness**

  The proxy statement should illustrate how the board's talent and skills align with company needs. When done effectively, this can help undermine an activist challenge. The proxy statement and other channels for investor engagement should also communicate actions being taken to enhance board effectiveness, like board assessments, ongoing education and training.

- [ ] **Have a plan in place to combat an activist challenge**

  The universal proxy card lowers the barrier to entry for activists, so companies should be prepared to defend their strategy, board and leadership teams. Developing a response plan can help companies control their narrative and maintain credibility with shareholders by providing a clear gameplan to respond to, and ultimately overcome, the objections of dissident shareholders.

For more information or to request a demo, contact us today:
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