

# Corporate Governance Resource

[Latham & Watkins Corporate Governance Practice](#)

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## Pumping Up for Proxy Season: Know Your Supplements

***In connection with a meeting of stockholders, many companies face the decision of whether and how to prepare and file supplemental or amended proxy materials.***

The decision to supplement or amend, and how to deliver the message, is guided as much by developed practices over time as it is by the law. Since the proxy solicitation rules only permit discussions with stockholders and other attempts to influence the vote of stockholders based on what has been disclosed in filed proxy soliciting material, it is critical that such disclosure is correct and complete throughout the solicitation process. In light of the approaching 2015 annual stockholder meeting season, we provide a helpful framework for understanding when proxy supplements or amendments are required or advisable and methods for delivery to stockholders.

### Reasons to Supplement or Amend

There are numerous reasons why a company may be required to, or desire to, provide additional information to stockholders after the proxy statement or notice of availability has been mailed. The most common reasons are discussed in detail below.

***Adding Information.*** A company may decide it is advisable to provide its stockholders with additional information. Common reasons for filing additional information include:

- Providing additional information to influence the vote, which may be important to address the concerns of some specific investors or generally for all investors
- Challenging a proxy advisor's negative voting recommendation (including by clarifying or correcting assumptions used in arriving at the voting recommendation) and telling or expanding on the company's "side of the story"
- Providing a tool with which companies can engage with major stockholders (e.g., a script for a Chief Executive Officer to use in reaching out to top institutional investors to discuss information outside the four corners of the proxy statement)
- Addressing statements dissident stockholders or the media have made
- Updating for events that occurred after filing to address stockholder concerns, such as an amendment to a compensation arrangement
- Responding to SEC comments

***Correcting Information.*** A company may determine after filing proxy materials that the materials included an error, and may want to correct the error to avoid negative publicity, to have a complete and accurate filing — and in the most serious cases — to avoid potential liability for misleading statements or omissions.

**Adding a New Proposal.** A company may also seek to add an entirely new proposal for stockholder consideration. Such a proposal could arise for a variety of reasons, including:

- Addressing the company's changed business needs (e.g., increasing the number of authorized shares of capital stock to conduct a secondary offering)
- Modifying corporate governance features to appease certain constituents (e.g., adding a stockholder right to act by written consent to the charter)

**Responding to Unbundling Comments.** Rule 14a-4 requires that the form of proxy "identify clearly and impartially each separate matter intended to be acted upon, whether or not related to or conditioned on the approval of other matters, and whether proposed by the registrant or by security holders."<sup>1</sup> These "unbundling" rules were adopted to ensure that stockholders would not be forced to vote on a package of items that could be broken into individual elements on which stockholders could vote separately. Until recently, SEC Staff had offered little guidance on these unbundling rules and what constitutes a "separate matter" beyond Staff interpretations published in 2004 that primarily involved mergers and acquisitions.<sup>2</sup> More recently, in January 2014, the Staff issued guidance concerning the unbundling of separate matters submitted to a stockholder vote by a person soliciting proxy authority.<sup>3</sup> In particular:

- **Multiple matters that are so "inextricably intertwined" as to effectively constitute a single matter need not be unbundled.** In the example provided, a company has negotiated concessions from preferred stockholders to reduce the dividend rate in exchange for an extension of the maturity date. The SEC would view these matters as inextricably intertwined, as each of the proposed provisions relates to a basic financial term of the same series of capital stock and was the sole consideration for the countervailing provision.<sup>4</sup>
- **Any number of immaterial matters may generally be bundled with a single material matter.** For example, a company plans to present for stockholder approval an amended and restated charter which would change the par value of the common stock, eliminate provisions relating to a series of preferred stock that is no longer outstanding and declassify the board of directors. Under the above analysis, the declassification amendment would be material, but the amendments relating to par value and preferred stock would not substantively affect stockholder rights. All three could be bundled into a single proposal.<sup>5</sup>
- **An omnibus amendment to a registrant's equity incentive plan that bundles multiple changes into a single proposal need not be unbundled, even though each change may be characterized individually as material.** While the Staff generally objects to bundling of multiple, material matters into a single proposal, the Staff will not object to the presentation of multiple changes to an equity incentive plan in a single proposal.<sup>6</sup>

If a company files a preliminary proxy statement containing a bundled proposal, the Staff often will comment, requesting the proxy material be revised or amended. Typically the Staff has allowed the company to reflect the revisions in its definitive proxy statement, rather than needing to re-file a preliminary proxy statement and wait another 10 calendar days before filing the definitive. The length of time a company takes to resolve an unbundling comment can impact whether a company will be able to maintain its original timeline for filing and its scheduled meeting date, or if the company will be required to reschedule the meeting for a later date.<sup>7</sup>

## Whether and How to Supplement or Amend Proxy Materials

Once the company determines what additional information or proposals, or corrective information, needs to be provided to stockholders, the company then needs to determine whether and how to supplement its proxy materials. In some cases, the SEC will specify the manner of providing information, but in most cases the manner is left to the company's judgment.

Materiality is the key factor in deciding whether to supplement or amend.<sup>8</sup> Material errors often result in an amendment or the filing of a revised proxy statement. Immaterial errors may result in supplemental filings depending on the nature of the information the error impacted — *e.g.*, a mistake in a director's biography may not be material to an investor but might be important enough to the director to rectify with a supplemental filing. Additional information could result in a supplement or amendment depending on the information's significance and the reason for providing to investors.

**Supplement.** A company files supplemental proxy material with the SEC by checking the "Definitive Additional Material" box on the cover page of Schedule 14A. On EDGAR, the filing appears as a "DEFA14A" entry. The contents of a supplemental filing vary widely depending on the nature of the information presented and can include: a letter to stockholders, press release, presentation, explanatory note or an employee communication. The supplement often involves one or two pages of additional information. Reiterating in the supplement how stockholders can vote on proposals, including how to revoke and change votes already cast as a result of the new information provided can be helpful.

**Amendment/Revised Proxy Statement.** A company files an amendment (often involving surgical changes to the original proxy statement) or a completely revised proxy statement with the SEC by labeling the filing as an amendment or revised proxy statement and checking the "Definitive Additional Material" box on the cover page of Schedule 14A. On EDGAR, the filing appears as a "DEFR14A" entry. In addition, Rule 14a-6(h) requires that two copies of the materials manually filed with the SEC be marked to indicate "clearly and precisely" the changes made, and if the amendment or revision alters the text of the material, the company needs to indicate the changes by means of underlining or some other demarcation.

The amended or revised proxy statement can be in the form of a page that explains the error and provides the corrected information, or it can be a restatement of the entire proxy containing the corrected information and an explanatory note regarding the error and corrections made. Companies may choose to amend and restate the original proxy statement or surgically address the revisions. As with proxy supplements, reiterating how stockholders may cast, or revoke and re-cast, their vote on the matters discussed in the proxy statement is advisable.

If a company needs to make a material change to a "non-routine" proposal, which originally necessitated a preliminary proxy statement,<sup>9</sup> a company needs to assess if the 10-day wait period for preliminary proxy statements recommences. The SEC provides in its rules that filing revised material does not recommence the 10-day time period, unless the revised material contains material revisions or material new proposal(s) that constitute a fundamental change in the proxy material.<sup>10</sup>

**Revised Proxy Card.** If any of the contents of the original proxy card change as a result of the amended or supplemental proxy material (*e.g.*, due to the addition of a new proposal or a change in the director slate), a company needs to file a new proxy card and modify the corresponding electronic voting platforms. A company is not permitted to disseminate a proxy card for just the new proposal. A full proxy card containing the new proposal must be used, filed and disseminated. Although the accompanying amended or supplemental proxy material would advise stockholders how they may revoke and re-cast

votes previously cast, the company generally would not disregard prior votes cast unless it determined that a proposal had changed so fundamentally that it would be unreasonable for the company to rely on prior votes. For example, as explained further in illustrative scenario 2 below, a director nominee's decision not to stand for re-election following the filing of a definitive proxy statement would not affect votes previously cast for other nominees. However, if a replacement nominee is named, previously submitted proxy cards would be insufficient to confer authority to vote for a replacement nominee except under certain limited circumstances specified in Rule 14a-4(c)(5), as discussed below.

## How to Disseminate Supplemental or Revised Proxy Material

Additional soliciting material in the form of a proxy supplement or revised proxy, and any revised proxy card, that is filed with the SEC must be posted on the same Internet website on which the original proxy materials were posted, no later than the day on which such additional material is first sent to stockholders or otherwise made public.<sup>11</sup> There is no requirement to mail additional soliciting material, but a company may decide other means are effective tools for disseminating the information (e.g., direct mailing).<sup>12</sup>

Apart from filing materials with the SEC and posting the materials on the Internet website, a company must decide what further steps may be necessary or advisable to disseminate the information to its stockholders. A company's decision whether to further disseminate revised or supplemental proxy material, or to provide an updated or revised proxy card, hinges on several factors, including: materiality of the information, reason for the additional proxy material, method by which the company distributed the original proxy and timing.

**Materiality of Information.** The more material the information and the higher the likelihood that the information will impact stockholder voting decisions, the greater the weight a company should place on not only filing supplemental or amended material on EDGAR, but also disseminating it to stockholders, either by circulating a new Notice of Internet Availability or by sending the supplemental or revised material by postal mail.<sup>13</sup>

A company may also elect to distribute additional proxy material widely by postal mail in the hopes of catching the attention of the broadest possible group of stockholders. This desire will of course need to be balanced against the time and expense of mailing.

**Adding a New Proposal.** Adding a new proposal, whether in response to an unbundling comment from the SEC Staff or in the company's discretion, will always result in a new distribution of the proxy supplement and proxy card. Because a Notice of Internet Availability must be sent at least 40 calendar days prior to the annual meeting, in most circumstances a company would need to either deliver these supplemental proxy materials by postal mail or delay the annual meeting. A company can choose to adjourn the entire meeting to a later date, or it can adjourn the meeting only as to the new proposal to a later date. To adjourn a meeting to consider a new or revised proposal, a company should file a proxy supplement announcing the adjournment on or just prior to the day of the annual meeting. The supplement should identify which proposals are affected by the adjournment, the date, time and location of the adjourned meeting, new record date, if applicable, and voting instructions.

If the new proposal deals with a "non-routine" matter, Rule 14a-6 requires a company to file a preliminary supplement to the proxy statement.<sup>14</sup> This requirement could significantly impact timing, as the company needs to wait at least 10 days before filing definitive proxy material. In either case (whether the new proposal covers a routine or non-routine matter), a company needs to assess if there is enough time to allow stockholders to vote on the new proposal.<sup>15</sup>

**Proxy Card Dissemination.** As discussed above, adding a new proposal or changing the director slate will always result in the dissemination of a revised proxy card. Material changes in an existing proposal (even if the description on the proxy card is unaffected) may also warrant a re-distribution of the proxy card to ensure stockholders are provided with an opportunity to change a previously cast vote. The redistribution may also be a good tool for reminding stockholders of the importance of their vote. When a company files supplemental proxy material to address stockholder concerns or augment disclosure, whether and to whom to re-disseminate the proxy card often is a strategic decision by the company and its proxy solicitor based on the company's stockholder base and the desire to convince stockholders to change or cast votes to support the board's recommendation.<sup>16</sup>

## **Whether to Adjourn Meeting or Call a New Meeting**

A company may need to adjourn all or a portion of the meeting to a later date to allow sufficient time for stockholders to vote on a new or revised proposal. In this latter situation, the company could file the proxy supplement on the date of the originally scheduled meeting and concurrently announce the plan to adjourn the meeting in full or only as to the new proposal. Subject to any bylaw provisions to the contrary, DGCL §222(c) does not require notice of an adjourned meeting as long as 1) the time, place (if any) and means of remote communications by which stockholders and proxy holders may be deemed to be present are announced at the adjourned meeting, 2) the adjournment is for 30 days or less and 3) the board does not set a new record date. The original record date set for a meeting also applies to any adjournment of the meeting,<sup>17</sup> although equitable considerations might support establishing a new record date if the company is aware of significant changes in the stockholder base or needs more time.

## **Proxy Supplements in Practice**

To give real-world context to the foregoing discussion, below are common situations companies have faced in recent proxy seasons, as well as their considerations and approaches. These situations are hypothetical only and we encourage companies to consult with a Latham attorney when navigating these issues.

### **Scenario 1: Changes Adopted in Response to Proxy Advisory Firm Pressure**

A board adopts an amendment to its long-term equity incentive plan to increase the number of shares authorized for issuance under the plan. The compensation committee has hired a compensation consultant to analyze the proposed increase in shares against major proxy advisory firms' models and anticipates the plan will satisfy the applicable burn rate, dilution and other objective tests. However, the consultant advises that proxy advisory firms are likely to recommend a vote "against" the plan proposal because the plan permits repricing of options without stockholder approval. The board wants to retain this flexibility and decides to leave the proposal unchanged.

A few weeks after the company files its definitive proxy statement, a major proxy advisory firm issues a recommendation to vote against the plan proposal, citing the repricing provision as the main reason for the decision. Based on the company's stockholder base, the company's proxy solicitor believes the plan proposal might not receive the requisite level of stockholder approval.

The board and compensation committee convene and decide to amend the equity plan further to require stockholder approval for certain repricings, and authorizes management to prepare the necessary filings. The proxy solicitor recommends that the CEO and others reach out to the company's top 10 institutional holders to discuss the change to the plan proposal.

- The company needs to prepare a supplement to its original proxy statement to announce the amendment to the plan (eliminating the repricing) and describing the considerations and deliberations of the compensation committee. The supplement further describes the process for changing any votes that have been submitted and that previously submitted votes not resubmitted will continue to count as votes for or against the plan, as so amended. After the company files the proxy supplement on EDGAR and posts it to the website containing the original proxy statement and annual report, the CEO and others may begin engaging with select stockholders to discuss the plan proposal changes. The company should consider drafting the proxy supplement in a manner so that the management team can use the supplement easily as a script (e.g., include a “Q&A” in the proxy amendment).
- The company may want to consider amending the proxy card (for stockholders receiving a proxy card) and/or voting website to flag that the proposal has changed since the original mailing and to indicate clearly how stockholders may revoke or retain their prior vote, if any.
- If the company develops additional written material for use in engaging stockholders, the company needs to consider whether to file it with the SEC. Generally, as long as the script stays within the four corners of the original proxy and proxy supplement, no additional filing should be necessary.
- The company may choose to further disseminate the proxy supplement to stockholders by postal mail. For this type of change (to remove unilateral repricing authority), which is stockholder friendly and not typically considered material, a mailing should not be required but may nevertheless be desirable if the company’s proxy solicitor or others view the mailing as a means to obtain stockholder approval for the proposal.

## **Scenario 2: Director Unable or Unwilling to Stand for Election After Company Files the Proxy Statement but Before the Annual Meeting**

After a company files its definitive proxy statement and before the meeting, a director becomes unable or unwilling to serve if elected.

If the board decides to proceed with the election for all other directors and simply reduce its size in advance of the meeting, the company could choose to update the proxy statement by filing definitive additional material on EDGAR (e.g., in the form of a letter to stockholders). The supplement ensures the proxy statement remains up to date and not materially misleading. In this circumstance, most companies would choose not to mail the supplemental proxy material to stockholders because the nominee’s withdrawal is not material to the disclosure regarding, or the vote for, the remaining nominees. Additionally, the company would not need to revise or re-distribute a new proxy card, as the company would explain in the supplement that any votes with respect to the departed nominee would be disregarded.

If the board instead decides to appoint a new board member and the company’s bylaws require the director to stand for election at the upcoming meeting, the company would be required not only to file supplemental proxy material but also to disseminate that material by sending a new Notice of Internet Availability (time permitting) or mailing the supplement and a new proxy card to stockholders. Most companies would allow previously submitted proxies voting for the remaining directors to continue to count. However, such proxies would be insufficient to confer authority to vote for the replacement nominee, except for the limited circumstances described in Rule 14a-4(c)(5), and therefore a new solicitation would be required. The company would also need to determine whether sufficient time remains for the stockholders to consider and vote on the additional director or decide to postpone the meeting. The only exception to the requirement to disseminate new materials is if the withdrawing

nominee is unable to serve, or for "good cause" will not serve, and the proxy expressly confers discretionary authority to vote for a replacement candidate under such circumstances.<sup>18</sup>

## **Some Guideposts for Proxy Supplements and Amendments**

### **Proxy Supplements**

- Triggered by the addition of new information (including a new proposal) to or correction of immaterial information in definitive proxy material
- Required to be filed on EDGAR and posted to e-proxy website
- Proxy card and any Internet or telephone voting platforms need to be reviewed to evaluate if changes are needed. If adding a new proposal, need to revise proxy card to include new proposal (if company originally distributed a proxy card to stockholders)
- No requirement to mail, but mailing to key stockholders (or to retain investors, if applicable) may help achieve the desired voting outcome
- Timing considerations
  - Rarely (if ever) will trigger a new 10-day waiting period for preliminary proxy materials before the company can file its definitive proxy statement
  - Scheduled meeting date usually retained, but if a company adds a new proposal, the company can adjourn the scheduled meeting in full or only as to the new proposal

### **Proxy Amendments/Revisions**

- Triggered by material change or revision to preliminary or definitive proxy material often to clarify or correct an error
- Same filing and mailing considerations as with proxy supplements
- Required to be filed on EDGAR and posted to e-proxy website
- Proxy card and any Internet or telephone voting platforms need to be reviewed to evaluate if changes are needed
- No requirement to mail, but mailing to key stockholders (or to retail investors, if applicable) may help achieve the desired voting outcome
- Timing considerations
  - If amending a preliminary proxy statement, may need to re-start 10-day waiting period if changes are significant and impact a proposal that triggered the preliminary proxy
  - May need to adjourn or postpone the meeting to allow time for consideration of the revised proposal — depending on the time between the proxy amendment's filing and the scheduled meeting, as well as the ability of the company to conduct outreach to key constituents

## Conclusion

Determining whether and how to amend proxy material requires careful analysis under time pressure. Companies facing these issues should refer to the guideposts outlined above and are encouraged to consult with outside counsel to ensure disclosures remain correct and complete throughout the proxy solicitation process.

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#### Endnotes

- <sup>1</sup> 17 CFR 240.14a-4(a)(3).
- <sup>2</sup> SEC Staff Guidance, Division of Corporation Finance: Manual of Publicly Available Telephone Interpretations, Fifth Supplement, September 2004, available at <http://www.sec.gov/interps/telephone/phonesupplement5.htm>.
- <sup>3</sup> Staff of the Division of Corporate Finance, Compliance and Disclosure Interpretations (CD&I), Unbundling under Rule 14a-4(a)(3) Generally, at <http://www.sec.gov/divisions/corpfin/guidance/14a-interps.htm> (Jan. 24, 2014).
- <sup>4</sup> *Id.* at CD&I 101.01.

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- <sup>5</sup> *Id.* at 101.02.
- <sup>6</sup> *Id.* at 101.03.
- <sup>7</sup> Beyond Rule 14a-16 of the Exchange Act that permits using the notice and access method of proxy delivery, SEC rules do not require a specific amount of time for allowing stockholders to consider and vote upon new proposals. Section 401.03 of the NYSE's Listed Company Manual "recommends" but does not require at least 30 days between the record and meeting dates for a meeting to give ample time for the solicitation of proxies. Delaware law requires notice of any meeting to be given at least 10 days and no more than 60 days prior to the meeting. In the case of certain votes, such as the authorization of additional securities, that require the filing of financial information that is incorporated by reference into the proxy statement, Note D of Schedule 14A requires the proxy statement be sent to security holders at least 20 business days prior to the meeting date. Taking all of these factors into consideration, most companies endeavor to mail initial proxy materials no later than 30 days prior to the annual meeting (or are required to mail a Notice of Internet Availability at least 40 days prior to the meeting for companies relying on notice and access). Broadridge Financial Solutions, which handles a large percentage of the "street side" mailings for companies, typically requires at least 20 days prior to a meeting to deliver proxy materials to beneficial owners and permit sufficient time for voting and tabulation of votes.
- <sup>8</sup> Rule 14a-9's anti-fraud provisions, which prohibit false or misleading statements from being made in connection with any proxy solicitation, help frame the materiality analysis, as does the familiar standard articulated in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), which looks at whether there is a substantial likelihood that a reasonable stockholder would consider information important in deciding how to vote on a matter.
- <sup>9</sup> A matter is routine, and no preliminary proxy is required, if it relates only to: (1) the election of directors; (2) the election, approval or ratification of accountant(s); (3) a stockholder proposal included pursuant to Rule 14a-8; (4) a stockholder nominee for director included pursuant to Rule 14a-11, an applicable state or foreign law provision or a company's governing documents as they relate to stockholder director nominees; (5) the approval or ratification of an equity compensation plan (or amendment thereto); (6) certain matters with respect to investment companies or (7) a stockholder advisory vote on executive compensation, including a vote on the frequency of a company's say-on-pay vote.
- <sup>10</sup> 17 CFR 240.14a-6(a) – Note 1.
- <sup>11</sup> 17 CFR 240.14a-16(b)(2). The New York Stock Exchange also requires listed companies to deliver three hard copies of all definitive proxy materials with the exchange, which should include supplemental or amended materials. NYSE Listed Company Manual Section 402.01.
- <sup>12</sup> SEC Release No. 34-55146 at p. 29 (Jan. 22, 2007).
- <sup>13</sup> Even if the company has sufficient time to send a new Notice of Internet Availability, most companies have at least a handful (or more) of stockholders who have opted to receive a full set of hard copy proxy materials by postal mail.
- <sup>14</sup> See Note 9 above for what constitutes a "non-routine" matter.
- <sup>15</sup> As discussed in note 7, SEC rules do not require a specific length of time for stockholders to consider proposals. When a company adds a new proposal, the typical 30 to 40 day timeframe between mailing and meeting often is compressed to two weeks or less prior to the meeting, or as discussed above, the meeting is adjourned for a period of time to permit adequate consideration of, and voting upon, the new proposal. Companies need to coordinate closely with their proxy solicitor, transfer agent and other third parties administering the distribution of proxy material and tabulation of votes to ensure all parties involved have time to address a new proposal.
- <sup>16</sup> 17 CFR 240.14a-16(f)(1) requires the initial Notice of Internet Availability to be sent separately from other stockholder communications, including the proxy card. Additionally, 17 CFR 240.14a-16(h)(1) requires a company to wait at least 10 calendar days after sending the Notice of Internet Availability before sending a proxy card, and any such proxy card must be accompanied by the Notice.
- <sup>17</sup> 8 Del. C. §213(a).
- <sup>18</sup> 17 CFR 240.14a-4(c)(5).