

# Capital Markets

Skadden

## 2021 Capital Markets and Corporate Governance Regulatory Review

### Final Rules

#### The NYSE Amends Shareholder Approval Rules

(Sections 312.03(b)-(c) and 314.00 of the NYSE Listed Company Manual)

[April 2021 Order Approving Proposed Rule Change](#)

[August 2021 Order Approving Proposed Rule Change](#)

- The NYSE first amended its shareholder approval rules largely to make permanent the temporary accommodations that were put into effect at the onset of COVID-19.
- The amendments permanently relaxed the requirements for shareholder approval in the case of 20% of the common stock or voting power, and in the case of related party transactions.
- The amended rules required auditor (or other independent body) prior review and oversight of any related party transactions, regardless of value or materiality.
- In a subsequent amendment in August 2021, NYSE further revised the rule to require prior review only if a minimum transaction value or materiality threshold was satisfied.

#### Practical Effect:

- The revision of the NYSE shareholder approval rules largely mirrors the temporary relief granted during the onset of the COVID-19 pandemic, and more closely aligns the NYSE shareholder approval rules with those of Nasdaq.

#### Effective Date:

April 2, 2021 except for the reintroduction of the materiality threshold triggering prior review of related party transactions. This became effective August 19, 2021.

#### More Analysis:

[NYSE Restores Thresholds for Related Party Transactions To Align With SEC](#)

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### Nasdaq Permits Primary Direct Listings and Proposes Relaxation of Pricing Limits (Nasdaq Rules 4120(c)(9)(B), 4573(a)(3) and 4753(b)(2) and IM-5315-2)

[Order Approving Proposed Rule Change](#)

[Proposal to Relax Pricing Limits](#)

- Nasdaq permits primary direct listings, in addition to secondary direct listings, which were already permitted.
- In a primary direct listing, the issuer can offer shares on its own behalf, provided certain requirements are met.
- Requirements include meeting all initial requirements to list on the Nasdaq Global Select Market, meeting stringent minimum market valuation requirements, and complying with Nasdaq's auction procedures, which include that the share price must fall within the price range disclosed in the registration statement.
- In rules that have not yet been approved, Nasdaq proposed permitting offers that were 20% outside the price range in the registration statement, or more than 20% greater than the disclosed price range provided the change in price does not materially change the issuer's disclosure.

#### Practical Effect:

- Nasdaq's primary direct listing requirements are closely aligned with those of the NYSE.
- Nasdaq's proposed pricing flexibility would reduce the chances of a failed offer and would permit price adjustments be disclosed in a 424(b) prospectus, rather than a post-effective amendment.

#### Effective Date:

May 19, 2021; relaxation of pricing limits proposal has not been approved

#### Further Analysis:

[Nasdaq Permits Primary Direct Listings and Proposes Relaxation of Pricing Limits](#)

### Nasdaq Board Diversity Disclosure and Complimentary Board Recruiting Service (Nasdaq Rules 5605(f) and 5606)

[Order Approving Proposed Rule Change](#)

- Nasdaq-listed companies must publicly disclose board-level diversity statistics on an annual basis using a standardized matrix template under Nasdaq Rule 5606. Diversity is determined by a board member's self-identification.
- Companies are required to comply with the diversity matrix disclosure by the later of (i) August 8, 2022, or (ii) the date the company files its proxy statement for its 2022 annual meeting/2022 annual report.
- Requires listed companies to either have, or disclose the reasons they do not have a minimum of two diverse board members under Nasdaq Rule 5605(f).
- Transition period for appointment of diverse directors depends on company tier. All companies must have one diverse director by August 7, 2023. Larger companies have until August 6, 2025 to have two diverse directors, while smaller companies have until August 6, 2026 to appoint a second diverse director (or explain the failure to appoint).
- Establishes board diversity recruiting service to assist with recruitment of diverse directors.

#### Practical Effect:

- Imposes a "comply or explain" model with regard to the appointment of diverse directors that encourages, but does not require, diverse representation.

#### Effective Date:

August 6, 2021 (with tiered compliance dates)

#### Further Analysis:

[SEC Approves Nasdaq Board Diversity Listing Standards](#)

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### PCAOB: Determinations Under the Holding Foreign Companies Accountable Act (PCAOB Rule 6100)

[Order Granting Approval of Proposed Rule](#)

- Provides a framework for the PCAOB to determine whether it is unable to inspect registered public accounting firms located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction.
- Determination may be that it is impossible to inspect any registered public accounting firms headquartered within a particular jurisdiction.
- Alternatively, the PCAOB may decide it is unable to inspect a particular registered public accounting firm with an office in a foreign jurisdiction.
- Determination reflects a multi-factor test, and the PCAOB may consider any relevant documents or information in making its decision.

#### Practical Effect:

- Most determinations are expected to be jurisdiction-based, and applicable to all registered accounting firms within a particular foreign jurisdiction.

#### Effective Date:

November 5, 2021

#### More Analysis:

[SEC Approves PCAOB Rule Establishing Framework for Determinations Under the Holding Foreign Companies Accountable Act](#)

### Holding Foreign Companies Accountable Act Disclosure (Rule 405 of Regulation S-T)

[Adopting Release](#)

- An issuer will become a “commission-identified issuer” if, in any given year, the PCAOB determines that it is unable to inspect the auditor of the issuer’s financial statements, completely because of a position taken by an authority in the foreign jurisdiction.
- A “commission-identified issuers” that is also a foreign issuers is subject to additional disclosures in its annual reports, related to foreign government interests in and control of the company.
- Any issuer identified as a “commission-identified issuer” for three consecutive years will be barred from trading on U.S. national securities exchanges, including over-the-counter markets.

#### Practical Effect:

- Note that the earliest any trading prohibitions would apply would be in 2024.

#### Effective Date:

January 10, 2022

#### More Analysis:

[SEC Adopts Final Amendments Implementing Mandates of the Holding Foreign Companies Accountable Act](#)

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### Universal Proxy

(Rules 14a-2 to -6 and 14a-19 and Schedule 14A under the Securities Exchange Act of 1934)

[Adopting Release](#)

- The new rules require both companies and dissidents to list on their proxy cards all duly nominated director candidates: the board's nominees, the dissident's nominees and any proxy access nominees.
- Company and dissident must provide each other with the names of their respective nominees in advance.

#### Practical Effect:

- Will permit shareholders to "mix and match" from the competing slates of candidates without having to attend the shareholder meeting.
- Companies may need to revise the consent language in their advance notice bylaws, proxy access bylaws and D&O questionnaires to ensure that nominees are required to give the necessary consents.
- Whether the rules will increase companies' exposure to activist campaigns and proxy fights remains to be seen.

#### Effective Date:

January 31, 2022

#### More Analysis:

[SEC Mandates](#)

[Universal Proxy Cards in Contested Elections](#)

### Filing Fee Disclosure and Payment Methods Modernization

(Item 601 of Regulation S-K; Rules 13, 405 and 408 of Regulation S-T; Rules 111, 415, 424, 456, 457 and 473 under the Securities Act of 1933; Rules 0-9, 0-11 and 13e-1 under the Securities Exchange Act of 1934; Rule 0-8 under the Investment Company Act of 1940; and various forms and schedules)

[Final Rule](#)

- Rules provide for Inline XBRL disclosure, and new filing fee tables require that certain mandatory information be presented.
- Instead of including filing fee disclosures in the header or body of the registration statement, issuers will file them as an exhibit to the registration statement or post-effective amendment. Certain information may no longer be incorporated by reference.
- Registrants will be able to pay registration fees via Automated Clearing House, credit and/or debit cards. Payment by check or money order will no longer be accepted.

#### Practical Effect:

- SEC continues move towards disclosure in structured data format.
- Significant transition period of 18 to 42 months eases immediate compliance burden.

#### Effective Date:

January 31, 2022, except for rules related to payment options, which are effective May 31, 2022

#### Additional Materials:

[Fact Sheet](#)

[Chair Gensler Statement](#)

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## 2021 Capital Markets and Corporate Governance Regulatory Review

### Proposed Rules

#### SEC Proposes Updates to Electronic Filing Requirements

[Proposed Rule \(EDGAR Filing\)](#)

[Proposed Rule \(Electronic Submissions\)](#)

- Proposed rules would modernize certain filing requirements, including increasing the use of mandatory electronic forms and no longer permitting optional paper filing in some cases.
- The proposed rules would also increase the requirements to use structured data language.

#### Comments Due:

December 22, 2021 for EDGAR Filing Requirements and December 20, 2021 for Electronic Submissions

#### Additional Materials:

[Press Release](#)

[Fact Sheet](#)

[Chair Gensler Statement](#)

#### Proxy Voting Advice

[Proposing Release](#)

- If adopted, rules would rescind recently adopted notice requirements applicable to registrants and proxy advisors.
- Under the recently adopted rules, to avoid certain filing requirements, proxy advisors would have been required to ensure that companies that were the subject of proxy voting advice were informed of that advice and that proxy advisor clients were made aware of any company responses to the proxy voting advice.
- While the proposing release confirms that proxy materials are subject to the anti-fraud provisions, the proposed rules would also rescind an explanatory note containing non-exclusive examples of when failing to disclose certain information in proxy voting advice may be considered misleading.
- The requirement that proxy advisors disclose material conflicts of interest would remain in place.

#### Comments Due:

December 27, 2021

#### Current Proposal:

[SEC Proposes Rescinding 2020 Amendments to Rules Governing Proxy Advisors](#)

#### Prior Adopted Rules:

[SEC Adopts Proxy Rule Amendments Relating to Proxy Voting Advice Businesses](#)

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## 2021 Capital Markets and Corporate Governance Regulatory Review

### Key Guidance

#### **Bulletin: Shareholder Proposals**

[Staff Legal Bulletin No. 14L \(CF\)](#)

- SEC staff rescinded the last three bulletins on this issue, and reduced company ability to exclude ESG-related shareholder proposals.
- Companies previously could exclude shareholder proposals on human capital, climate change, or other ESG-related issues by claiming they dealt with the “ordinary business” of the company, or that they were not relevant or would result in micromanagement.
- New guidance makes clear that issues of broad societal impact are unlikely to be excludable under the ordinary business and relevance exceptions.
- The staff will also take a more “measured” less deferential assessment of a company’s assertion of micromanagement. A climate change proposal that imposes targets or timelines, for example, will not be excluded provided it affords management enough discretion in how to achieve such goals.

**Additional Materials:**  
[SEC Chair Gensler’s Statement](#)

[SEC Commissioners Peirce and Roisman’s Statement](#)

**Further Analysis:**  
[SEC Staff Issues New Shareholder Proposal Guidance, Rescinding 2017-2019 Guidance](#)

#### **SEC Staff Issues Accounting Guidance on “Spring-Loaded” Compensation Awards to Executives**

[Staff Accounting Bulletin No. 120](#)

- “Spring-loaded” compensation, or share-based awards that are granted shortly before the public announcement of market-moving information must take into account the additional value conveyed to the recipients, which will be realized upon announcement of the material nonpublic information.

**Additional Materials:**  
[Press Release](#)

#### **Sample Letter to Companies Regarding Climate Change Disclosures**

[Sample Letter](#)

- The sample letter highlights a number of ways in which the SEC staff may probe companies’ assessments on materiality of climate change disclosures.
- No indication of whether the SEC staff will accept or challenge companies’ materiality assessments, or whether previously filed disclosures will need to be amended.
- Letter is in line with the SEC staff’s recent statements that climate change disclosure will receive enhanced focus.

**Further Analysis:**  
[SEC Staff Issues Detailed Form 10-K Comments Regarding Climate-Related Disclosures](#)

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## 2021 Capital Markets and Corporate Governance Regulatory Review

### SEC's Regulatory Agenda

#### [SEC Chair Gensler's Prepared Remarks](#)

- SEC Chair Gensler discussed three key areas of the SEC's reform agenda: public company disclosure, market structure, and transparency.
- ESG disclosures, insider trading and share repurchases, proxy rules reform, executive compensation, SPACs, Rule 144, filing fee modernization and the Holding Foreign Companies Accountable Act were all items on the short-term agenda.
- On the long-term agenda, the SEC plans to address proxy plumbing and modernization of Rule 701 and Form S-8.

**Additional Materials:**  
[SEC Chair Gensler's Insight on the SEC's New Regulatory Agenda](#)

### SEC Issues Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies

#### [Statement](#)

- Provides guidance on clarifying warrants as equity.
- To be classified as equity, warrants should be indexed to issuer's stock, and if not, the warrants should be classified as a liability measured at fair value, with changes in fair value each period reported in earnings.
- Similar asset or liability accounting treatment required if an event that is not within the entity's control could require net cash settlement.
- The statement outlines steps to issue a restatement to companies that have misclassified their warrants.

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### SEC Primed To Act on ESG Disclosure

#### [Risk Alert Regarding ESG Investments](#)

- SEC staff observes that the definition of ESG investing is not consistent across firms/ industries, and that disclosures and internal controls are sometimes misleading or inconsistent.
- Provides an overview of effective ESG practices and disclosures that have been observed.

**Additional Materials:**  
[Commissioner Peirce's Response to ESG Risk Alert](#)

**Further Analysis:**  
[SEC Primed to Act on ESG Disclosure](#)

### Sample Comment Letter to Companies Regarding Securities Offerings During Times of Extreme Price Volatility

#### [Sample Letter](#)

- Highlights the increased risks of raising capital during periods of extreme price volatility for both shareholder and company.
- Notes that risks are particularly great during recent stock run-ups or recent divergences in valuation ratios relative to those seen during traditional markets; high short interest or reported short squeezes; and reports of strong and atypical retail investor interest (whether on social media or otherwise).
- Recommends that specific, tailored disclosure about market events and conditions, the company's situation and the potential impact on investors is warranted to provide investors with the information they need to make informed investment decisions and comply with the company's disclosure obligations under the federal securities laws.

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