SDX™

The Shareholder-Director Exchange

INTRODUCTION AND PROTOCOL | FEBRUARY 2014

Tapestry Networks   CADWALADER   Teneo™   Broadridge®

Introduction to the SDX™ Protocol†

The Shareholder-Director Exchange (SDX) is a working group of leading independent directors and representatives from some of the largest and most influential long-term institutional investors.[1] SDX participants came together to discuss shareholder-director engagement and to use their collective experience to develop the SDX Protocol, a set of guidelines to provide a framework for shareholder-director engagements. While the decision to engage directly with investors should be made in consultation with or at the request of management, the 10-point SDX Protocol offers guidance to US public company boards and shareholders on when such engagement is appropriate and how to make these engagements valuable and effective.

Changes to the corporate governance landscape, including an increasing focus on better and more effective governance practices, the frequency and scale of activist campaigns, the increased use of proxy advisory services, and an increased understanding of the potential benefits of direct engagement, have led institutional investors and public company boards to review their current approaches to shareholder-director engagement. More institutional investors are seeking meetings with the public company directors they elect, and more directors are accepting these requests. Some boards are proactively requesting meetings with significant shareholders.

In December 2013, Securities and Exchange Commission Chair Mary Jo White emphasized the importance of direct engagement by stating "the board of directors is – or ought to be – a central player in shareholder engagement."[2]

This Introduction synthesizes the perspectives of participating directors, institutional investor representatives, and other thought leaders concerning four key reasons why the time is right for the SDX Protocol:

- Shareholders are increasing their involvement with public companies and are often focused on corporate governance matters
- Directors are responding by engaging more frequently with the company's owners
- Both investors and directors are realizing significant value from direct engagement
- Perceived barriers to engagement can be avoided or addressed

Shareholders are increasing their involvement with public companies and are often focused on corporate governance matters

One of the most significant developments in corporate affairs in recent years is the shift in the balance of power between shareholders and the management and boards of the companies in which they commit their capital. Passive shareholders whose portfolios are largely indexed have long seen engagement as an important tool; now, active shareholders are no longer content with exiting their investments when operating performance, investment returns, or corporate governance are unsatisfactory. With increasing frequency, more investors are attempting to influence the corporate governance and operations of companies through

† SDX and the SDX logo are trademarks of Tapestry Networks, Inc., Cadwalader, Wickersham & Taft LLP, and Teneo Holdings, LLC.

[1] Working group participants and others interviewed in connection with the development of the SDX Protocol are identified in Appendix 2.

[2] Securities and Exchange Commission Chair Mary Jo White, "Remarks at the 10th Annual Transatlantic Corporate Governance Dialogue" (speech, December 3, 2013). Note that SDX participants do not wish to subordinate management's primary role with respect to investor relations, but rather to provide an additional mechanism for engagement with a company's owners. Management's role is addressed more fully on page 4.

the proxy process or other forms of activism, and long-term investors are increasingly willing to consider and support these efforts. It is shortsighted for corporate boards to avoid engaging with their long-term investors when activists frequently meet with those same institutions to pursue corporate change.

Some directors involved with the SDX Protocol noted that companies on whose boards they sit have received engagement requests because performance, policies, or practices have triggered shareholder interest. This is more than just anecdotal, as traditional activism is clearly on the rise:

- Activist shareholder interventions (e.g., seeking board representation, share buybacks, CEO removal) increased 88% between January 1, 2010 and September 20, 2013, with the majority of that growth in Europe and the United States.[3]
- Activist shareholders worldwide have stepped up their actions at companies with market capitalizations exceeding $2 billion by 129% since January 2010.[4] The average market value of companies targeted by activists increased to $8.2 billion in 2012, up from $3.9 billion in 2011.[5]
- The number of shareholders globally with a stated activist strategy has more than doubled over the last decade.[6]
- Activist funds are estimated to have over $100 billion in assets under management – three times the amount invested in 2008.[7]

An important change from the past is that activists no longer need to take large stakes in their targets to gain leverage over companies, even those that were previously viewed as unapproachable because of their large size. Today, relatively small positions can provide a platform for disproportionate influence, as in the case of ValueAct's 0.8% position in Microsoft and Pershing Square's 1% position in Procter & Gamble.[8]

In addition, some institutional investors are pushing companies to change policies and practices, adopting tactics traditionally associated with activists. For example, the California State Teachers' Retirement System recently co-sponsored a proposal with activist fund Relational Investors in an effort to break up Timken Co. The two organizations objected to the Timken family holding three of 11 board seats while holding only 10% of the stock.[9]

The Shareholder Rights Project at Harvard Law School has targeted staggered boards of directors with remarkable success. In 2012 and 2013, 58 of the 61 declassification proposals submitted by the Shareholder Rights Project and the investors it represents that went to a vote were passed by shareholders, with an average of 81% of votes cast in support; many other companies declassified by settlement.[10]

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[3] Linklaters, "Activist Investors Turn Up the Heat in Global Boardrooms," news release, November 11, 2013.

[4] Ibid.

[5] James C. Woolery, "Bridging the Chasm Between Boards and Shareholders," *Wall Street Journal*, October 9, 2013.

[6] Linklaters, "Activist Investors Turn Up the Heat in Global Boardrooms."

[7] Woolery, "Bridging the Chasm Between Boards and Shareholders."

[8] Company and investor filings.

[9] Louis M. Thompson, "When Pension Funds Turn Activists," *Compliance Week*, December 17, 2013.

[10] Lucian Bebchuk, Scott Hirst, and June Rhee, "Towards Board Declassification in One-Hundred S&P 500 and Fortune 500 Companies," *Harvard Law School Forum on Corporate Governance and Financial Regulation* (blog), October 30, 2013.

To prepare for potential activities like those described above, companies must be mindful of a growing list of red flags that can draw the attention of activists and corporate governance experts and have led to engagement requests or activist campaigns:[11]

- Underperformance, whether operating performance or relative shareholder return
- Unplanned CEO or C-suite transition
- Significant litigation or government investigative activity
- Reputational event with negative mainstream or social-media attention
- Series of operational mishaps suggesting lack of board oversight
- Financial restatements, late filing, lack of clean audit opinion, or unplanned change of audit firm
- Board composition (e.g., quality, diversity, tenure, "overboarding")
- Below-average support for management proposals (e.g., say on pay, director nominees)
- Above-average support for shareholder proposals (e.g., CEO-chair separation, political contribution disclosure)
- Failure to implement election outcome or resolution supported by shareholder majority
- Disfavored compensation practices or elements
- Significant activist stake in company
- Plurality voting policy
- Classified board
- Dual-class stock
- Disempowered nonexecutive chair, lead director, or presiding director
- Controversial transaction activity, including related-party transactions
- Takeover defense plans
- Poor disclosures and shareholder communications
- Environmental, social, and other governance considerations (e.g., labor issues, environmental legislation, sustainability practices, or reporting)

Deciding when to engage

The presence of a red flag may not be sufficient reason to engage. Deciding when to make or accept an engagement request is a case-by-case determination based on the company's or investor's general philosophy of shareholder-director engagement and other important contextual factors. For more, see the second point of the SDX Protocol, "Adopting a clear policy for engagement."

[11] This list will likely evolve over time. Corporate secretaries can ensure their boards are kept up to date with the latest thinking in governance to avoid unwelcome surprises.

Directors are responding by engaging more frequently with the company's owners

Forward-thinking directors have moved to mitigate the impact of the shifting balance of power toward shareholders by engaging with longer-term shareholders. SDX participants reported that this type of engagement has become increasingly common.

Activists and corporate governance campaigners can use the presence of the red flags noted above as a lever to gain shareholder support for their initiatives, and failure to engage with shareholders can only bolster their efforts. James Woolery, chairman-elect of Cadwalader, Wickersham & Taft LLP, recently made this point: "Unable to effectively communicate with their boards, shareholders are routinely turning to aggressive activism … Boards that don't engage with their investors on a continuing basis risk making themselves vulnerable to activists eager to exploit the lack of communication."[12]

Objective self-analysis by companies can identify points of vulnerability that could lead to engagement requests or more disruptive forms of shareholder activism. Having a clear view of a company's vulnerabilities may lead the board to undertake an engagement process with shareholders designed to listen to concerns and explain the board's approach to strategy, business challenges, and compensation, for example. A company's corporate secretary can help the board and its nomination and governance committee by surfacing current governance issues, as well as any specific items cited by the company's largest shareholders.

Management's role

A company's primary investor relations function is vested in its management – specifically in the company's senior officers and investor relations professionals. Company management will continue to lead engagement with shareholders with respect to operating performance, financial matters, strategic execution, and other operational and performance matters for which management is directly responsible.

The SDX Protocol respects that relationship and is not intended to subordinate management's primary role in shareholder interaction, but rather to supplement investor relations activities by clarifying when and how the independent board directors ought to engage with the shareholders who elected them.

However, it is important that management and boards are unified and consistent in their communications with shareholders. In order for shareholder-director engagement to be an effective component of a company's overall communications effort, boards should coordinate engagements with management, including discussing the purpose of the engagement, topics for discussion, and preparation. Except in rare cases where confidentiality from management has been requested, the board should review with management the matters discussed during the engagement.

[12] Woolery, "Bridging the Chasm Between Boards and Shareholders."

Both investors and directors are realizing significant value from direct engagement

While shareholder activism is often the trigger for board-shareholder engagement, interaction between shareholders and directors is increasing simply because it is seen as beneficial to both parties. Engagement improves transparency, mutual understanding, and the overall quality of governance in the market. Engagement can also reduce friction and transaction costs.

SDX participants noted that engagement benefits companies by enabling them to do the following:

- **Demonstrate quality of board oversight.** Direct engagement gives boards the opportunity to present their processes, philosophy, and rationales with respect to specific corporate governance issues important to shareholders. In doing so, boards can improve the perception of, or enhance the awareness of, the company's unique business context and the quality and thoughtfulness of board efforts. Explaining a board's processes also builds a valuable sense of the board's accountability.

- **Create direct and open channels for substantive and productive communication.** Proactive engagement in the normal course of business, on clearly defined engagement topics, creates channels of communication between the board and representatives of its shareholders and can help the company provide context for the business environment and explain key strategic or governance decisions. The development of professional relationships arising from this process – and the experience directors gain through engagement – can improve targeting of communication and greatly enhance outcomes when directors solicit shareholder support in times of corporate crisis (e.g., activist attack, proxy battle, etc.).

- **Better understand investor perspective of business and governance issues.** Investors have an informed view of the company and its competitive landscape, both on an absolute basis and relative to its peers. Boards can gain valuable insight on how company management and strategy is perceived by the market. Investors can also be a source of insight on the attributes and skills desirable in board members or, in some cases, a source of candidates to consider for board membership.

- **Influence proxy-voting decisions.** Companies can move the percentage of votes for or against a proposal, either when engagement is requested or by requesting engagement. For example, companies can seek engagement to provide context for the board's thinking and enable investors to cast fully informed votes. This may convince investors to take an exception from their proxy-voting guidelines.

Likewise, SDX participants noted that engagement benefits investors by enabling them to do the following:

- **Evaluate board effectiveness.** Investors gain real insight into boardroom composition, capabilities, function, and dynamics by meeting with a company's directors.

- **Create direct and open channels for substantive and productive communication.** Direct engagement creates channels for communication and can create a history of good-faith engagement with respect to corporate governance issues. Investors may receive better reaction to their own requests and perspectives when there is a track record of engagement.

- **Better understand director perspective of business and governance issues.** Hearing a director explain the board's approach offers a unique window into the company that enhances the investor's understanding of the company's situation and thinking.

- **Influence governance policies and practices.** Direct engagement gives investors the opportunity to present unfiltered views and can persuade a company to reconsider and change corporate governance policies and practices. Investors can communicate their concerns directly to the board and potentially avoid the need to file a shareholder resolution or take a public position on a proxy item. Investors can use engagement to better inform their voting decisions and to supplement their overall investment thesis regarding a company.

Perceived barriers to engagement can be avoided or addressed

Some key objectives of the SDX Protocol are to address legacy practices and concerns that have historically kept directors from engaging with their shareholders and to provide solutions to issues that could be problematic. The table below outlines concerns and responses that SDX participants identified.

	Concern	**Response**
Resource constraints	There is insufficient time for directors to meet with all shareholders or for most institutional investors to meet with directors from all portfolio companies. Both groups have many demands on their limited time.	Despite time and resource constraints, company boards and investors make time for engagement when an issue is of sufficient importance. The SDX Protocol identifies factors that help directors and investors prioritize engagement opportunities. SDX participants also noted that the time required to prepare for and conduct engagements is relatively modest. Engagement conducted before an issue has a chance to become a significant problem can ultimately save time for participants. Avoiding perfunctory or non-issue driven engagements can serve to preserve resources and allow participants to focus their efforts on issues of critical importance.
Compliance concerns	Engagement with shareholders creates a risk of violating Regulation FD (Fair Disclosure) and subjecting the company and/or director(s) to liability.	With appropriate training, there is minimal risk that engagement will create a compliance event for issuers or institutional investors who wish to avoid becoming insiders. Additionally, corporate governance and other topics typically discussed during engagement are not the type of disclosures on which regulators are focused. For more, see Appendix 1: Regulation FD considerations.

	Concern	Response
Management or director reluctance	Historically, senior management – particularly the CEO, CFO, and head of investor relations – handled most company-investor engagement. For varied reasons, both members of management and the board may be reluctant to deviate from this historical practice.	Shareholder-director engagement does not subordinate management's primary role in investor relations activities; the board's role is to supplement management's work in particular situations or on appropriate topics. The primary focus of shareholder-director engagement should be with institutional investors that share the board's commitment to long-term value creation. For more, see "Management's role," on page 4. In addition, companies and investors benefit when their engagements demonstrate the quality of their representatives responsible for the matters discussed.
Lack of trust of underlying motivations	Companies and institutional investors sometimes perceive engagement requests as coming in bad faith: issuers fear an intent to embarrass, and institutional investors fear an intent to do nothing beyond sit through the requested meeting.	SDX participants reported that engagement requests are generally made and accepted in good faith and can generate substantial value for both parties.
Risk of mixed messages	Companies are concerned that having multiple people speak for the company – the CEO and one director, or several directors – increases the risk that messaging will be inconsistent. Institutional investors may worry that their investment and corporate governance professionals may also provide inconsistent messaging.	The risk of mixed messaging already exists: virtually all companies and institutional investors of scale delegate communications to multiple individuals. Appropriate coordination between boards and management can mitigate this risk effectively. The concern also assumes that the only purpose of engagement is to talk; however, listening is equally important.
Risk of harming relationship	Some opportunities to engage are missed because of concern that engagement may harm the relationship between the company and investor. Meetings can go poorly if there is no clear objective or agenda, the wrong representative is selected, the parties are not sufficiently prepared, or for other reasons.	Directors are elected by shareholders and no benefit arises from isolating each party. Failing to meet can be the more significant risk. SDX participants noted that engagements rarely backfire for either party, and that this risk can be minimized by following the SDX Protocol.

Adapting the SDX™ Protocol for engagement with other types of shareholders

The SDX Protocol is focused primarily on public company board engagement with institutional investors in real-time, two-way dialogue. However, this focus is not meant to imply that there is no value to be gained from better engagement with or communication between other shareholders and directors. Indeed, recent data shows that one-third of US company shares, on average, are held outside of institutional accounts and that individual "retail" shareholders can affect voting outcomes.[13] Therefore, most principles of the SDX Protocol can be adapted for engagement with other types of shareholders or other types of meetings.

"Scaling" engagement and communications with broader groups of shareholders may require the use of alternative approaches, including the use of technological resources and tools. Some current options include virtual annual meetings, electronic forums, and investor "days" that enable better communication or dialogue in between regularly scheduled events. Some newer technologies can validate the number of shares owned by participants in a forum or survey and provide secure communications in a company-controlled site. Other technologies can provide data on shareholder sentiment and voting patterns that enable a company to more effectively engage with its shareholders. Companies and investors are advised to keep informed of technology that may enable them to be more efficient or inclusive.

The SDX™ Protocol process

The work of the Shareholder-Director Exchange has been supported by Tapestry Networks, Cadwalader, Wickersham & Taft LLP, and Teneo Holdings, together with Broadridge Financial Solutions. Tapestry, Cadwalader, and Teneo conducted interviews with public company directors, institutional investor representatives, subject matter experts, and other thought leaders about shareholder-director engagement. For a list of working group participants and others interviewed in connection with the SDX, please see Appendix 2. The SDX Protocol reflects a majority perspective on detailed recommendations.[14]

Tapestry, Cadwalader, and Teneo can be contacted to discuss the SDX Protocol more generally or to provide further context and information with respect to shareholder-director engagement. Broadridge can be contacted to discuss the SDX Protocol and alternative methods in which engagement can be scaled to incorporate retail and other individual investor classes. For contact information for Tapestry, Cadwalader, Teneo, or Broadridge, please see Appendix 3.

Conclusion

Companies and investors often miss valuable opportunities to engage. While the SDX Protocol does not offer a one-size-fits-all approach to engagement, it does provide meaningful guidance and concrete suggestions from seasoned engagement practitioners. It is offered in service to public company directors and investors to enable them to more effectively make and respond to engagement requests.

[13] Broadridge and PwC, "2013 Proxy Season Recap," *ProxyPulse*, accessed January 11, 2014.

[14] Participation was in an individual capacity and neither these individuals nor the institutions with which they are affiliated necessarily endorse all aspects of the SDX Protocol.

The SDX™ Protocol

The SDX™ Protocol†

The Shareholder-Director Exchange Protocol (SDX Protocol) was created by a working group of leading independent directors and representatives from some of the largest and most influential long-term institutional investors. The group came together to provide guidance to other investors and directors about the growing trend towards shareholder-director engagement.[1]

The working group has devised the SDX Protocol to assist public company boards and institutional investors who wish to consider engagement by providing a practical framework for effective, mutually beneficial engagement. Although the SDX Protocol can be utilized in the context of a corporate crisis, it is intended to be a broader template for addressing corporate issues in the normal course of business.

Engagement creates benefits for both companies and investors by enabling them to:

Companies

- Demonstrate quality of board oversight
- Create direct and open channels for substantive and productive communication
- Better understand investor perspective of business and governance issues
- Influence proxy-voting decisions

Investors

- Evaluate board effectiveness
- Create direct and open channels for substantive and productive communication
- Better understand director perspective of business and governance issues
- Influence governance policies and practices

Historically, shareholders and directors have engaged each other infrequently and there have been no generally established processes and procedures for engagement. Contemporary engagement also frequently occurs in the context of a corporate crisis, requiring independent directors in particular to reach out to institutional investors – a difficult task if directors have not previously engaged with investors and are not comfortable doing so. As a result of these factors, engagement is often on an ad hoc basis and less effective.

The SDX Protocol consists of 10 points, outlined on the pages that follow.

1. Scope of the SDX™ Protocol

The SDX Protocol focuses on real-time, two-way interactions – or "engagement" – between non-executive directors of public company issuers and representatives from long-term institutional investors, such as asset managers and public pension funds. The SDX Protocol focuses on engagement with long-term institutional investors given the breadth and depth of their holdings and their alignment with public company boards in seeking long-term value creation.

The SDX Protocol is intended to be consistent with the current practice of public company management and boards, whereby company management has the primary responsibility for investor relations. The SDX Protocol respects that relationship and is not intended to subordinate management's primary role in leading

† SDX and the SDX logo are trademarks of Tapestry Networks, Inc., Cadwalader, Wickersham & Taft LLP, and Teneo Holdings, LLC.

[1] The factors driving the growth of direct engagement and the potential benefits of engagement are discussed in detail in the accompanying document, "Introduction to the Shareholder-Director Exchange Protocol." Working group participants and others interviewed as part of the SDX Protocol™ creation are identified in Appendix 2.

shareholder engagement with respect to operating performance, financial matters, strategic execution, and other operational and performance matters for which management is directly responsible. The SDX Protocol is instead meant to supplement these efforts by providing guidance for shareholder-director interaction and discussion with respect to governance-related topics for which the board is directly responsible, and for directors to hear the unfiltered views of shareholders on all topics.

2. Adopting a clear policy for engagement

Each company and institutional investor will develop a clear policy for how it will approach shareholder-director engagement. This engagement policy will consider what types of engagement requests the company or institutional investor will make or accept in times of crisis and during the normal course of business. For example, a board might identify a multiyear engagement program with a specific set of investors. In the case of companies, this work would likely be undertaken by the board's nominating and governance committee with the support of the corporate secretary.

In determining whether to make or accept an engagement request, companies and investors will make each decision on a case-by-case basis after considering some or all of the following respective factors:

Companies

- Anticipated productiveness of engagement
- Expected duration of investor's holding
- Appropriateness of the proposed topic
- Gravity or materiality of the topic
- Company's vulnerability to activist campaign
- Investor's leadership on the proposed topic
- Investor's approach to investment and corporate governance
- Changes in board membership or leadership
- Investor's recent voting history, at the company or on the proposed discussion topic(s)
- Investor's propensity to engage in various forms of activism
- Overall investor interest in subject, based on number of investor requests or investor survey results
- Size of investor (absolute and size of holding)
- History of engagement with investor

Investors

- Anticipated productiveness of engagement
- Expected duration of investor's holding
- Appropriateness of the proposed topic
- Gravity or materiality of the topic
- Depth and quality of the company's disclosures and shareholder communications
- Perceived quality of company governance, particularly when the company is underperforming
- Recent changes in board membership or leadership
- Recent proxy vote results for the company and for the proposed discussion topic(s)
- Company's response to past investor activity (e.g., votes, prior discussions)
- Number of companies making requests on given topic
- Number of investors interested in given topic
- Size of company (absolute and size of holding)

Each institution will also decide whether its policy will be posted to its website.

3. Identifying engagement topics

The value of shareholder-director engagement and decisions on whether and how to engage are dependent on the topics to be discussed. Engagements should be topic driven – the quality and value of engagement can suffer when a clear purpose or stated issue for the engagement is not articulated and agreed by the participants. Topics appropriate for shareholder-director engagement include governance-related topics for which the company board (as opposed to company management) is directly responsible. Some specific examples include the following:

- Board composition and leadership (including desirable attributes for directors, board member succession philosophy, board leadership structure, director tenure, and diversity)
- Board involvement in strategy development and oversight
- Board oversight of capital allocation
- Executive compensation philosophy and structure
- Executive succession philosophy, process, and oversight
- Financial oversight (including auditing, audit quality, and internal controls)
- Management performance, leadership, and track record
- Mergers and acquisitions (historical activity and transaction philosophy)
- Risk management oversight
- Response to exceptional events
- Shareholder proposals
- Takeover defenses

Generally, it is inappropriate for shareholder-director engagement to include discussion of general business operations, current and projected financial results, strategic execution, and other operational and performance issues for which company management is directly responsible. It is also clearly inappropriate to discuss any material non-public information. For further information, see Appendix 1: Regulation FD considerations.

4. Requesting engagement

Companies and investors will each establish a primary contact for receiving engagement requests. For companies, in most cases, this will be the corporate secretary; for investors, given the variety of ways investment firms are structured, the contact will vary. Both companies and investors will make contact information for the primary contact readily accessible on their websites.

A company or investor requesting engagement will reach out to the other party's primary contact, stating both the topic(s) proposed for discussion and the level of time-sensitivity of the engagement request. All requests will be acknowledged as soon as is practical and a decision on engagement will be made and relayed as soon as possible, but no later than 20 business days after receiving the engagement request.

5. Selecting participants

Participating institutions often select two or more individuals to represent them in engagements in order to ensure regulatory compliance, mitigate risks of misunderstanding, and improve communication after the engagement. To the extent practicable, subsequent engagements will involve the same personnel in order to preserve continuity. Parties agree to select participants after considering the following:

Companies

Directors: The company will specify participating directors based on the specific topic(s) to be discussed. Participants will be chosen based on experience, expertise, board role, and past relationship with the investor. The independent non-executive chairman, lead director, or relevant board committee chair will be one of the attendees.

Management: Management, which has the primary responsibility for most aspects of investor relations, will generally be involved before and after shareholder-director engagement but does not need to attend the meetings. If members of management attend, they should be prepared, if requested, to leave the meeting to allow for an "executive session" between the director(s) and shareholder representative(s). Investors generally prefer that fewer management representatives be present.

Investors

The investor will select senior representative(s) who have decision-making authority over voting or share disposition.

When the shares are actively managed, directors typically prefer that an investment professional or a member of the investment committee be present for the discussion. When the investor's holding is overseen by both a corporate governance team and one or more investment teams, the investor will either have representatives from each team attend or ensure communication between relevant teams before and after the engagement to ensure alignment.

With regard to third parties, having outside advisors such as legal counsel, investment bankers, or consultants attend shareholder-director engagements is generally counterproductive. Other than in the context of an activist approach, where the presence of third-party advisors is customary, inclusion of such advisors in meetings should be rare, requested on an exception basis, and agreed to by both parties.

6. Determining how to engage

Directors and institutional investors generally prefer meetings where one company meets with one investor. These meetings may be in person or virtual (e.g., teleconferences, web-based meetings).

Group meetings may also be successful and are sometimes preferred. These meetings may take many forms; for example, investors might attend a board committee meeting or strategy retreat, a focused investor day, or a part of an investor day devoted to environmental, social, and governance issues.

If a potential engagement participant is interested in hearing the concerns of a company or investor but for some reason would prefer not to engage in dialogue (e.g., because of the existence of material non-public information that is closely related to the topics to be discussed or because the company is about to make a decision that would be informed by enhancing board understanding of shareholder views), the parties may agree to a meeting where one participant simply listens to the other.

7. Preparing for the engagement

Companies and investors will prepare for meetings by reviewing relevant materials concerning the institution and individuals with which they will engage (e.g., corporate governance guidelines, proxy voting policy, history of prior engagements with the institution) and the topics to be discussed. Engagement participants will be given appropriate training on legal issues relevant to shareholder-director engagement.

Prior to meeting, engaging parties will agree on the following:

- Topics to be discussed
- Meeting participants
- Format and venue
- Confidentiality expectations
- Desired outcomes

8. Participating in the engagement

During the engagement, parties will agree to specific next steps resulting from the discussion and to communicate information about the engagement to board, management, or investor colleagues who were not present.

Changing either company or investor policy or practice is not essential for a successful engagement; however, an important element of engagement is each party's willingness to listen carefully to one another and to take action in response to valid concerns or explain the reasons why the party is not taking action.

9. Reviewing and revising approaches to engagement

Investors and companies will review their engagements on an annual basis and revise their approaches to engagement as necessary. Likewise, the SDX Protocol will be reviewed annually and updated as appropriate to reflect experience and emerging practice.

10. Customizing the SDX™ Protocol

The SDX Protocol is intended to support effective public company and investor engagement. The specific terms of mutually beneficial engagement will be influenced by company-specific or investor-specific contexts. Parties should use their judgment and modify engagement practices as needed.

About this document

Appendices

Appendix 1: Regulation FD considerations

Overview[1]

- Regulation FD (Fair Disclosure), or Reg FD, was adopted by the SEC to address the problem of selective disclosure by issuers of material nonpublic information.
- Reg FD generally requires that when an issuer discloses material nonpublic information to institutional investors (and other persons enumerated in Reg FD), the issuer must simultaneously make public disclosure of the information.
- Violations of Reg FD can subject an issuer, as well as the individual personnel at the issuer responsible for the violation, to an SEC enforcement action, which may result in civil penalties and/or injunctions.

Shareholder-director communications are generally subject to Reg FD

- Reg FD generally applies to communications by "senior officials" of an issuer (which includes directors) to specific persons, including, among others, institutional investment managers, hedge funds and other shareholders under circumstances in which it is reasonably foreseeable that such shareholders would trade on the basis of the information communicated. Accordingly, shareholder-director engagement as contemplated by the SDX will be subject to Reg FD.

Notwithstanding the applicability of Reg FD, the risk posed by Reg FD to shareholder-director communications is manageable

1. Reg FD applies to the disclosure of material nonpublic information – generally considered to be information that "there is a substantial likelihood a reasonable shareholder would consider important in making an investment decision" and the public disclosure of which "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information" available about the issuer.
    - Topics appropriate for shareholder-director engagement – such as succession planning, executive compensation, director nominating criteria, governance philosophies, and general board oversight (including of accounting, internal controls, risk, auditing and other related matters) – do not typically rise to the level of materiality commonly understood to be important to an investor making an investment decision and otherwise significantly alter the total mix of information available.
    - The Reg FD adopting release included a list (set forth in full under item 3 below) of the types of information that the SEC suggested may meet the standard of materiality implicated by Reg FD. That list generally focuses on earnings, extraordinary transactions (e.g., mergers), operating developments and related information, which is typically inappropriate for shareholder–director engagement.

[1] This Appendix has been prepared in connection with the SDX Protocol for informational purposes only and does not constitute advertising or solicitation and should not be used or taken as legal advice. Those seeking legal advice with respect to Reg FD or otherwise should contact legal counsel licensed in their jurisdiction. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship.

2. Reg FD is applicable to discussions between management and shareholders, and those discussions occur as a matter of course without undue concern about the prohibitions of Reg FD. There is no reason to believe that public company directors, especially those well versed in investor communications, will be generally more apt to violate Reg FD than corporate management. In addition, engagement participants that are unsure of Reg FD requirements can and should seek guidance from the company's general counsel or outside counsel prior to engagement.

3. Reg FD enforcement history suggests that robust SEC enforcement concerning shareholder-director communications is unlikely:

    - Since Reg FD was adopted in October 2000, the SEC has never brought a Reg FD enforcement action based on communications or disclosure by a non-executive director (including in connection with shareholder-director engagement).

    - Since Reg FD was adopted, the SEC has never brought a Reg FD enforcement action that concerned disclosure of a pure corporate governance matter.

    - Since Reg FD was adopted, the SEC has brought only 13 Reg FD enforcement actions, which have overwhelmingly concerned selective disclosure of earnings or operating performance-related information or have implicated one of the following subject matter areas described in the Reg FD adopting release as types of information or events that should be reviewed carefully to determine whether they are material:

      (1) earnings information;

      (2) mergers, acquisitions, tender offers, joint ventures, or changes in assets;

      (3) new products or discoveries, or developments regarding customers or suppliers (e.g., the acquisition or loss of a contract);

      (4) changes in control or in management;

      (5) change in auditors or auditor notification that the issuer may no longer rely on an auditor's audit report;

      (6) events regarding the issuer's securities – e.g., defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits or changes in dividends, changes to the rights of security holders, public or private sales of additional securities; and

      (7) bankruptcies or receiverships.

Appendix 2: Participants

Beginning in the autumn of 2013, Tapestry, Cadwalader, and Teneo interviewed public company directors, institutional investor representatives, subject matter experts, and other thought leaders about shareholder-director engagement.[1]

Working group

Glenn Booraem

Principal and Fund Controller, Vanguard

Les Brun

Director, Automatic Data Processing, Inc., Broadridge Financial Solutions, Merck

Stu Dalheim

Vice President, Shareholder Advocacy, Calvert Investments

Michelle Edkins

Managing Director and Global Head of Corporate Governance and Responsible Investment, BlackRock

Tim Goodman

Associate Director and Head of North American Engagement, Hermes EOS

Bonnie Hill

Director, AK Steel Holding Corp., California Water Service Group, The Home Depot, and Yum! Brands

Michele Hooper

Director, National Association of Corporate Directors, PPG Industries, and United Health Group

Labe Jackson

Director, JPMorgan Chase & Co.

Andrew Letts

Managing Director and Head of Corporate Governance, State Street Global Advisors*

Linda Fayne Levinson

Director, Hertz, Ingram Micro, Jacobs Engineering Group, NCR, and Western Union

[1] Participation was in an individual capacity and neither these individuals nor the institutions with which they are affiliated necessarily endorse all aspects of the SDX Protocol.

Working group *(continued)*

Mike McCauley

Senior Officer, Investment Programs & Governance, State Board of Administration of Florida

Eileen Mercier

Director, Intact Financial Corp., Ontario Teachers' Pension Plan, Teekay Shipping Corp., and the University Health Network

Thomas Mistele

Director, Chief Operating Officer, Senior Counsel, and Secretary, Dodge & Cox, San Francisco

Tom O'Neill

Director, Archer Daniels Midland, NASDAQ OMX Group, Inc., and Misonix

Nathan Partain

President and Chief Investment Officer, Duff & Phelps Investment Management Co.; Director, Otter Tail Corp.

Debra Perry

Director, Korn/Ferry International and PartnerRe

Rich Roedel

Director, IHS, Inc., Lorillard, Inc., Luna Innovations Inc., and Six Flags Entertainment Corp.

Interview participants

John Anderson

Partner, Meridian Compensation Partners

Ken Bertsch

President and CEO, Society of Corporate Secretaries and Governance Professionals*

Frank Biondi

Director, Amgen, Hasbro, RealD, CableVision, and Seagate Technology

Amy Borrus

Deputy Director, Council of Institutional Investors

Interview participants *(continued)*

Peter Browning

Director, Acuity Brands, EnPro Industries, Lowe's Companies, and Nucor Corporation

George Dallas

Director, Corporate Governance, F&C Investments

Stephen Davis

Associate Director of the Harvard Law School Programs on Corporate Governance and Institutional Investors; Senior Advisor, Teneo Intelligence

Krystal Gaboury

Assistant Vice President and Corporate Governance Analyst, Wellington Management Company*

Drew Hambly

Executive Director, Corporate Governance, Morgan Stanley Investment Management

Maria Elena Lagomasino

Director, Avon Products and The Coca-Cola Company

Oscar Munoz

Executive Vice President and Chief Operating Officer, CSX Corp.; Director, United Continental Holdings

Alex Popa

Analyst and Portfolio Manager, Capital Group

Ed Rust

Chairman and CEO of State Farm Mutual; Director, Caterpillar, Inc., Helmerich and Payne, Inc., and McGraw-Hill Companies

Allie Rutherford

Director, Center for Board Matters, EY

* *Role and title at time of SDX participation.*

Appendix 3: SDX™ Protocol sponsors

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