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# "The Latest: Your Upcoming Proxy Disclosures"

## Thursday, January 19, 2023

## Course Materials

"**<u>The Latest: Your Upcoming Proxy Disclosures</u>**"

**Thursday, January 19, 2023**

2 to 3 p.m. Eastern [archive and transcript to follow]

As you prepare your 2023 proxy statement, this critical webcast will provide you with the **latest guidance** about executive and director pay disclosures and actions, including how to present newly required pay versus performance data. Understand what to expect for the upcoming proxy season, so that you can prepare your directors and C-suite — and handle the challenges that 2023 will throw your way. Hear from these experts:

- **Mark Borges**, Principal, Compensia and Editor, CompensationStandards.com
- **Alan Dye**, Partner, Hogan Lovells LLP and Senior Editor, Section16.net
- **Dave Lynn**, Partner, Morrison Foerster LLP and Senior Editor, TheCorporateCounsel.net and CompensationStandards.com
- **Ron Mueller**, Partner, Gibson Dunn & Crutcher LLP

Among other topics, this program will cover:

- Meeting Format
- Say-on-Pay Trends
- Showing "Responsiveness" to Low Say-on-Pay Votes
- CD&A Updates
- Pay vs. Performance Disclosures
- Clawbacks
- CEO Pay Ratio Considerations
- Shareholder Proposals
- ESG Metrics & Disclosures
- Director Compensation
- Perquisites Disclosure
- Proxy Advisor & Investor Policy Updates
- Status of Other Pay-Related & Human Capital Management Rulemaking

**“The Latest: Your Upcoming Proxy Disclosures”**

Course Outline/Notes

1. Meeting Format

2. Say-on-Pay Trends

3. Showing “Responsiveness” to Low Say-on-Pay Votes

4. CD&A Updates

5. Pay vs. Performance Disclosures

6. Clawbacks

7. CEO Pay Ratio Considerations

8. ESG Metrics & Disclosures

9. Director Compensation

10. Perquisites Disclosure

11. Proxy Advisor & Investor Policy Updates

12. Status of Other Pay-Related & Human Capital Management Rulemaking

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# "Conduct of the Annual Meeting"

**Tuesday, March 29, 2022**

**Audio Archive**

**Course Materials:**

- Course Materials

This year's annual shareholder meetings will be another unique experience. While the "virtual meeting" era continues - with new twists & turns in investor expectations and technology - other companies are returning to in-person or hybrid formats. In addition, there's a big "proxy plumbing" development, and retail holders that historically could be counted on to support management proposals are taking new approaches to voting. Join this webcast to get up to speed on the latest expectations and hear our panelists give practice pointers for the current season on meeting format & logistics, tricky vote tabulations, officer & director participation, and rules of conduct.

- **Ben Backberg**, Senior Counsel, Assistant Corporate Secretary, General Mills
- **Dorothy Flynn**, President - Corporate Issuer Solutions, Broadridge
- **Carl Hagberg**, Independent Inspector of Elections and Editor of The Shareholder Service Optimizer
- **Mary Catherine Malley**, Senior Corporate Counsel, Juniper Networks
- **Vernicka Shaw**, Associate General Counsel - Governance & Securities - and Assistant Corporate Secretary, Capital One

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1. **Developments in “Meeting Format” for 2022 Proxy Season**
2. **Managing Meeting Participants and Attendees**
3. **Freshening Up Your “Rules of Conduct”**
4. **Proxy Voting Disclosures & Monitoring the Vote Pre-Meeting**
5. **End-to-End Vote Confirmation Update & Pass-Through Voting Expectations**
6. **Getting Retail Investor Support**
7. **Post-Mortems & Preparing for Next Year**


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**Emily Sacks-Wilner**, *Editor, TheCorporateCounsel.net:*Hi, this is Emily Sacks-Wilner, Editor of TheCorporateCounsel.net. I'd like to welcome all of you to today’s webcast, “Conduct of the Annual Meeting.”

Annual meetings generally are the centerpiece of the corporate year for many companies, and they keep us busy with a lot of logistical and other challenges. After two years of the pandemic, some companies are venturing back into in-person meetings, as well.

Our panel will share practice pointers on new and perennial issues. First is Ben Backberg, Senior Counsel and Assistant Corporate Secretary at General Mills. Next is Dorothy Flynn, President of Corporate Issuer Solutions at Broadridge. We have Carl Hagberg, Independent Inspector of Elections and Editor of The Shareholder Service Optimizer, and Mary Catherine Malley, Senior Corporate Counsel at Juniper Networks. Finally, we have Vernicka Shaw, Associate General Counsel — Governance and Securities — and Assistant Corporate Secretary at Capital One.

Carl is going to kick things off by discussing the latest trends on the meeting format for the 2022 proxy season. Carl?

## Developments in "Meeting Format" for 2022 Proxy Season

**Carl Hagberg**, *Independent Inspector of Elections and Editor of The Shareholder Service Optimizer*: Hi everyone, and good afternoon. I have a weird observation to start with: I've been engaged in staffing, managing and attending annual meetings for over 50 years, and never have I seen such a rush for companies to set a date - starting in late January and going through March - to book their meeting and get their act in order.

I've never seen people act so early in my entire career, which is a very smart thing to do because there is competition for the best dates and times. Smart people also want to be sure they're getting the A-team from their service providers. They don't want to discover that the people they're familiar with and work with are fully booked. Especially if you're going to do a virtual shareholder meeting, engage your supplier and inspector as soon as you can, to make sure you've got the A-team.

As of March 31st, we have booked almost as many meetings as we did in all of 2021. Some of this is due to an upsurge in meetings that are using outside experts - instead of having entirely do-it-yourself events - and also hiring Independent Inspectors instead of using company employees. Interestingly, fifty-one companies - of the nearly 500 'on our books' so far are scheduled to be in-person this year, or 10.6%. But so far this year, 52 new clients - one more than last year, to date - has opted for a VSM.

We see the VSM business expanding, rather than "waning." VSMs may be more on my own radar screen, however, because, as noted, more companies are deciding they should engage professionals along the way - especially if they're doing a VSM or hybrid meeting. A lot of companies used to just have their meeting at a law firm and no one came, no one asked any questions. Many of them decided this year, "We should think about a VSM vs. our usual quick in-person meeting."

There's been more of a focus on the shareholder meeting in the past couple of years than there's been before. According to an ISS update I saw at TheCorporateCounsel.net, Institutional Shareholder Services was reporting that VSMs were on the wane. My numbers to date don't show me that.

It is true some companies decided, "Hey, we don't need to do it. We can go back to the law firm again, just have a quiet little 10-minute meeting and save some money." But other companies are discovering VSMs are cost-effective even compared to a small in-person meeting where you've got to book a hall, invite your directors, inspector and auditors to attend in person, book travel and deal with the logistical and security issues.

A lot of CEOs really love their in-person meetings and they miss them. There's been a modest comeback, mainly in decent climate zones. Although, the biggest one is Berkshire Hathaway - I don't know how Omaha, Nebraska is in May, but it's probably OK - but so far, I've only seen a couple of big companies — Berkshire Hathaway, Aflac, Verizon — go back to an in-person meeting. I don't see a big trend there, but I do see a modest uptick in hybrid meetings.

I like hybrid meetings if you can pull them off effectively. They're a bit more work, because you have to now juggle two sites and you've got technology in two different places, but it's the best of all worlds if you're an investor. You can come if you want, you could just listen if you want or you could listen or watch at your convenience. I think that long-term, hybrid meetings will exhibit slow, but steady, growth.

This year, big investors are going to be paying a lot more attention to shareholder meetings, particularly VSMs. Many have vowed to listen in and to assure there's a dialogue. They want the ability to engage and to ask questions, and they want to be sure the questions are teed up and selected fairly. My opening advice is to be aware that "Big Brother" will probably be listening more often than ever, and many people have said they will withhold votes from directors next year if they feel there haven't been adequate opportunities for shareholders to engage or to ask questions and get answers.

That's the background I see as we go into the busy season.

**Dorothy Flynn**, *President — Corporate Issuer Solutions, Broadridge*: You pointed out, Carl, in your last Optimizer publication that ISS was concerned about the practices around the questions. This is important – and first of all, this is not a technology issue. The questions can easily be handled in advance, during and after.

The technology isn't a challenge, but management handling the questions; the ability to answer live questions; and the ability to see those questions and answers later are something I think technology has solved for and will be important. We've had one meeting already this year where 800 questions were asked live.

There is definitely a move to continue to do virtual meetings. There's been three shareholder proposals so far asking companies to ensure that companies keep their meetings virtual, because the shareholders like the access they have when they otherwise couldn't travel to a meeting.

We're seeing that shift to have a wider spectrum of shareholders attend and vote, and issuers are realizing there's the added benefit of having a video. They can do that in advance, they can do that live, they can be live and they're touting a lot of these changes in their ESG documentation, because a virtual meeting is a smaller carbon footprint than people having to fly to different meetings.

**Hagberg:** Thanks Dorothy, I think those are excellent points. If you go to my website, there are articles with practical tips on how to handle the Q&A period in a fair way, in a good way, and in a well-organized way, and then there are links to meetings that did a particularly good job of doing this.

It's worth doing your homework, because the last thing you want is to have ISS, Chevedden or somebody else single you out as being one of the worst in the world. Pay special attention to that this season.

**Flynn:** It's getting easier for VIPs and board members. They're getting more used to this technology and we've added in things to help them manage the questions in the dropdown box, giving shareholders the ability to say what type of question they're asking. These things will help make for a smoother meeting this year. We're headed into our third season for this, and people generally have gotten the gist of it.

## Managing Meeting Participants and Attendees

**Ben Backberg**, *Senior Counsel and Assistant Corporate Secretary, General Mills***:** I think that's very helpful context, Carl and Dorothy, to kick off the conversation. Our chairman and CEO, and general counsel absolutely loved the virtual meeting format.

To echo what you said, Dorothy, folks have gotten used to the virtual meeting format. It was like when we took off for COVID from our offices, everyone thought we'd be back in two weeks. No one thought we'd go to full virtual meetings and now we've been at it for two years. People are getting more familiar with the technology and the process from that front.

For some historical context on how we ended up where we're at with General Mills, we've been having annual meetings for over 100 years. In 2010, we were still renting out a large theater where we would hold our annual meeting. We had approximately 700 people show up in-person. Most of them were employees, retirees or people who were there for the gift bags and free handouts. We would roll out tons of free samples of our product. Then, they would head off with a freebie and bag to go with it.

As you can imagine, that was very time-intensive and took a lot of drive from our investor relations team. There was a director-level employee who almost was fully responsible for the annual meeting, as well as the annual report. As we started to transition, we wanted to focus more on the business aspects of the meeting. We didn't want it to be the dog and pony show where people just show up to get food and have no interest in what's going on in the business.

So in 2015, we pivoted and moved to what a lot of companies have been doing, which is holding the meeting in-person at the hotel or a location where the board would meet right after that. We stopped handing out the food and gift bags, so that had an immediate impact. We went from about 700 people to 100 in 2015.

That number continued to dwindle until it bottomed out in 2019, the last year we had an in-person meeting. We had about 20 outside attendees and received one question during the annual meeting. It turned into a business formality where folks would get up there and give the script, and we would be done without many questions or much feedback.

The constant issue at General Mills was the activists who would show up at our meeting and cause a stir. We always had to involve security. Sometimes we would have uniformed and plainclothes police officers in case there was an issue, so security was the major thorn in the side. We had to go through the protocol of how we would get the board members in and how we would get them out if there was an issue. That was the painful part of the annual meeting.

We regularly heard from Broadridge on why we should go virtual, but we never really took the bait. We said, “We liked the in-person format and we'll continue to do it this way. It's not the biggest deal to have in-person meetings.” In 2020, as everyone knows, that all changed with COVID. It was basically a requirement and necessity that everyone went virtual.

I consider the virtual meetings a win for shareholders, investors and the company, because we went from 20 outside attendees to 150 shareholders attending the meeting in that initial year. We also went from one question to over 75, so a significant uptick in questions with the ability to be responsive to investors and allow them to attend and listen in to the meeting.

It also alleviated the issue of security for us. No longer did we have to waste company resources on ensuring meeting security, the ticketing of the event and how directors and other executives would get in and out of the meeting itself.

That's why our chairman and CEO, and general counsel really like the virtual meeting format. I think we'll continue. A few pointers: make sure your directors understand when they're joining the calls, what their role might be, and whether there will be a talking role for them or whether they will be muted. There's always angst in getting people into the meeting at the beginning.

Set clear expectations for the Q&A, like Carl and Dorothy said, because we take live questions during the meeting as we see them rolling in. We've made clear in our proxy statement that we will

take 15 to 20 minutes of Q&A, and then we will be responsive to any questions we don't get to answer during the meeting. Those will be posted immediately on our website, along with the full audio version of the annual meeting itself.

**Mary Catherine Malley***, Senior Corporate Counsel, Juniper Networks***:** I also wanted to mention that we have always had an in-person meeting. Our meetings tend to be small, whether in-person or virtual, and this year we really wanted to go back to virtual. It was around the time Omicron was surging and we said, "We're just going to go virtual."

In addition to security, you have to consider vaccination status. That was another reason we decided, "Let's go virtual this year. Let's see where we land next year. Whether we go with hybrid or not, we'll see."

We did not see a big jump in attendance last year, maybe minor. We did not have more questions. We typically don't have many. It'd be interesting to see if — again, going virtual — we will have questions. We just filed our proxy, so we are now working on the annual meeting.

One of the key things, as Carl said, is getting all the ducks in a row early. We have our kickoff with Broadridge scheduled soon.

One of the big things is to prepare for the meeting. Some folks mentioned the transition from physical to virtual meetings with the board members. The first year was a little bit hard to follow up and make sure the board members were all comfortable with the technology. It improved last year, but I know we were saying before, "Are they all on, do we need to be in touch with anybody?"

The other thing is to make sure you have a dry run for your meeting. Make sure the directors know about the dry run, and make sure there's another line of communication, whether it's internal email or text, so that if somebody is not on, you're able to reach out to them and provide that technical support for your team.

## Freshening Up Your "Rules of Conduct"

**Malley:** For the rules of conduct, typically you're providing the rules of conduct when the shareholders arrive at an in-person meeting and otherwise have it posted. The rules of conduct are posted on the virtual annual meeting, as well. They're important, because it's saying who can attend, who can speak and who can ask questions.

Ben, I think you've previously had an experience where you had a somewhat contentious meeting, but when you went over who can ask questions, people did comply. Those rules of conduct not only help the company in the presentation, but also help the investors or others who attend to understand how the meeting works.

It's super important to include in your rules of conduct that there are no recordings permitted, since these days, everybody records everything. It's important to go over the prohibited behaviors and what not to ask. As our society evolves, people feel more comfortable raising questions that are beyond the scope of the meeting, so level-set with everybody upfront and keep it simple. One page should be enough. Plain English, so that anybody can see it and there's no legalese to these kinds of things.

If you're looking to redo yours or refresh them, Corporate Counsel, Broadridge and others have good examples out there. A lot of companies tend to have rules of conduct that are similar. Again, the shareholder Q&A is key.

**Backberg:** You brought up the security issue, the rules of conduct and how to try to enforce them. As an example, we had an NEO who was the chairman of one of our local hospitals here in Minneapolis.

The nurses were striking at that hospital, and we became aware they were going to start their first protest/vocal strike at our annual meeting downtown. As you can imagine, they closed off the street in front of our annual meeting and were outside with the typical strike upkeep.

We had security and ticketing. We were prepared for it, but some of the strikers were able to get in because they had a valid ticket to access the meeting. We let them in, but they wanted to continue asking the same questions tied to the strike, which didn't have anything to do with our business. It was tied just to the hospital. We had to utilize the rules of conduct. Fortunately, they listened. One of our vice presidents and deputy general counsel softly said, “Hey, you've asked your question,” and they complied, and we were able to point to the rules of conduct.

This is an example of how those can be beneficial. Hopefully, folks do abide by them. I know that's not always the case.

**Flynn:** We also hosted over 2,300 meetings last year. In terms of total attendance across the board, it was over 108,000.

We often ask our clients to think about this the way we do internally — we think about it as your Super Bowl. It's the biggest event you'll have all year. Preparation, as you both were pointing out, is the key, even to the level of detail of having a run of the show and a script for the meeting so people know exactly what is supposed to happen when.

We try to encourage our clients to make sure they bring in the board members and VIPs at least 30 minutes before the actual start of the meeting to allow for pre-call commentary, audio and video checks.

We also like to make sure the speakers have that time blocked on their calendar in advance. A lot of times, the delays we've had happen are because someone shows up late, and it's usually someone important like a board member that needs to be there.

One other thing we heard many times in the past year: allowing shareholders to continue to vote after the proposals are reviewed, but before the polls close, is a best practice we advise and this avoids some negative feedback you can get after the meeting.

**Malley:** We found those tips to be helpful for us and included that.

The other thing is technical difficulties. In all those meetings you mentioned, Dorothy, I don’t know how many you saw with technical difficulties. That's a point to make sure you include in your rules of conduct, what's going to happen if you do have technical difficulties?

You may also want to include it in your proxy statement about how you may adjourn, recess or expedite the annual meeting; what our say is; or take any other action the chair determines appropriate in light of the circumstances, because you just don't know what they might be.

Hopefully you don't encounter that, but it's important to cover those bases.

**Flynn**: It's true. You can’t account for that last 100 feet from the cable box into your board members’ homes, if that's where they're dialing in. It's always fraught with potential problems. You do have to be able to prepare for that.

When you think about the number of people that dial in, and some who dial into many meetings, they can be disruptive, so make sure you have the proper sound checks and you know whose role and responsibility it is to make the call on whether you will start over or adjourn until the technology issue can be fixed. It's really important to document all of that in advance and be prepared.

**Malley:** Prepare your team. The day-of logistics is, do they have a variety of scripts? If something should come up, you have the language and exact steps to take so speakers know exactly what to do. Sometimes people have very detailed books — "If this happens, flip to this tab. If this happens, flip to that tab" — so no one is left wondering, "What's the next step?"

**Hagberg:** I've been saying for years that the rules of conduct are probably the most important document in your package and the most important security measure you have. I've been at meetings that got out of control and I feared for my own safety more than once, so be sure you've got those rules of conduct with little scripts of what to do, and you are prepared to enforce the rules. Maybe you need to have a script for the chairman to say, "I'm sorry. You've used your time and please sit down."

With VSMs, you don't have such a problem having to physically eject people, but you do have to be sure you enforce your rules in a nice way. There's a lot of peer pressure for people to behave, as someone else noted, but the other thing is to observe the rules yourselves. If you say we have three minutes to discuss the proposal and the chairman rebuts for five, that isn't good and doesn't sit well with stockholders.

The other thing would be to have a little flexibility. Give people a one-minute warning and then a gentle reminder, and then you could turn off their mics if you want. Be flexible and don't think of this as something that has to be enforced "Soviet-style."

## Proxy Voting Disclosures & Monitoring the Vote Pre-Meeting

**Malley:** With Vernicka taking the lead, I think that's a good point to move on to the actual proxy voting disclosure and monitoring voting.

**Vernicka Shaw**, *Associate General Counsel — Governance and Securities — and Assistant Corporate Secretary, Capital One***:** I just want to talk about the advanced proxy voting disclosure. As we're leading up to the meeting and we're at the day of the meeting, we've already disclosed the type of voting we have and we're well-versed on who our shareholder base will be, whether it's registered voters or a beneficial owner.

All documentation, including our proxy notice and other proxy documentation on our website, will say how individuals are able to vote based on their type of ownership and what type of deadlines they have. For example, at Capital One, our registered owners and our beneficial owners have different deadlines based on whether they're voting for the plan or not.

Making sure everyone is clear on how, when and where they should be voting is imperative. Another thing we need to do — and this seems strange, but it always happens — is check the links and documents you have in your documentation to make sure they work. You'd be surprised when you click a link and you're like, "Oh, this doesn't actually go anywhere," or, "Oh, this is actually an old document."

Make sure that when we get to this stage of the game, everything has been checked and double-checked. Everyone knows what the documents look like. Everyone has the proper links to go ahead and vote. Make sure there are no issues and impediments to your shareholders being able to exercise their legal rights.

**Malley:** I was doing that last week before signing off on the proxy, going through every link and making sure anything we put in there actually goes to the intended place. It's important.

**Shaw:** As you guys are talking about rules of conduct and being super methodical, we are the epitome of check, double-check, script, alternate script, emergency this, emergency that. We have the binder, we have the tabs, we are that company that's super buttoned up.

Before we filed our recent proxy, it was all the checks and working with your company, Dorothy, to make sure everything was set for the website and get everything together for our meeting.

I wanted to talk about this tabulation. For Capital One, we rely on our colleagues at Broadridge to provide our daily tabulation of our voted shares. We monitor every single day because that's the process we currently have. We also use Morrow Sodali as a proxy solicitor for our voting projections. They also give us a tabulation of what they find. We're just looking at a broad swath of who's doing what and how they're voting.

We also use Morrow for our call campaigns, getting a market landscape of what's happening with our investors and changes to our top 50 investors' voting guidelines. With the recent climate disclosure proposal and other SEC disclosures around ESG — and all of that swirling in the ether — a lot of voting guidelines have changed. We've focused on finding out what's changing and what the landscape looks like so when we have our investor discussions, we can have those in-depth conversations to address any concerns our shareholders have.

Most people don't know, but Capital One is an interesting company where 15% to 20% of our shares are held with five investors. We are heavily owned by a few companies, which leads to interesting voting conversations and tabulation.

**Malley:** I think those points are well taken, especially with proxy solicitors. Even if you know there's an issue that may not get ISS support, it's important in terms of reaching out.

**Hagberg:** Shareholder demographics at many companies have changed dramatically over the past year-and-a-half. There's been 22 million-plus new individual investors who've entered the market, many of them for the first time, and they tend to focus on companies or products they like. You could wake up one morning and be very surprised to discover your percentage of retail investors has increased by 10 or 20 percentage points.

Some companies found this was being exacerbated by buybacks that were reducing the amount of shares held by the big institutions, by your top 50 holders. They discovered, some of them to their dismay, the retail vote was bigger than they thought. Some had problems getting to quorum or getting their proposals passed. Check your shareholder demographics. Don't take it for granted that they're just like last year's, because you could find yourself in a bit of a bind if they're not.

**Shaw:** As we were planning for our shareholder meeting last year, we realized a big part of our shareholder base had diversified through different companies like Robinhood, where individuals can get into the market a lot easier, buy fractions of shares, exercise their right to their ownership and be involved. It's been interesting how things have changed in the past couple of years.

**Backberg:** Avoiding surprises seems to echo throughout this webcast. Like someone said, avoid the surprise of not having the emergency script, not knowing how to handle if someone gets disconnected or there's a technology issue.

That also ties to voting. We give our officers and directors a heads-up of where the vote tallies are coming in so there's not a surprise. Like many of us know, shareholder proposals are getting more support these days. We want to make sure everyone's in the loop on where those votes are tracking, and then also if we think we need to get out there and use a proxy solicitor to try to get some of the last few percentages to avoid getting majority support on a shareholder proposal that we recommended against.

**Malley:** Even following up with your own officers and directors to make sure they have voted.

**Backberg:** We do track that, yes. That's a painful email to send, but that's a good point.

## End-to-End Vote Confirmation Update & Pass-Through Voting Expectations

**Shaw:** Definitely encourage in advance. Dorothy, would you like to have the conversation about the end-to-end vote confirmations and pass-through voting?

**Flynn:** Absolutely. I'll touch on end-to-end confirmations and pass-through voting.

Just to frame this up, there are many actors in the proxy ecosystem — banks, brokers, vote agents, inspectors, central depositories, proxy distributors, solicitors, transfer agents and tabulators. This discussion on the transparency around end-to-end voting has been going on in the industry for more than 20 years.

We finally have tabulators participating in a pilot program this year. It includes our own company, Broadridge, as well as Computershare, Equiniti and Mediant. We've committed to providing vote confirmation for over 2,600 meetings in this season. Broadridge is providing vote confirmation for about 2,000 of them where we are the tabulator, and there'll be others involved. These do not cover proxy contests, but in the normal course of a season, we will see that 98.85%, to be very specific, 98% of the voted shares processed are accepted without any additional reconciliation.

There has been this question about over- and under-voting issues that plagued the industry for some time. The three biggest reasons why something like this can happen are missing omnibus names from the recordholder bank to the respondent bank, that's the issue 60% of the time; the nominee seceded their DTC position; or there's a missing entitlement due to the lack of the Canadian depository listing.

The percentages are in occurrences, not shares, but about 60% of the time it's a missing omnibus. The goal of end-to-end vote confirmation is to look at all the votes cast at selective meetings and make sure at least 99% of them are provided affirmative confirmation. We are trying to minimize last-minute rejections or corrections.

We're trying to develop industry-wide protocols for governing the communications among banks, brokers, tabulators, transfer agents and the like. This year, we'll take this on as a pilot program, we'll learn some things and we'll figure out how to do it better in 2023 and beyond.

I think it'll be very helpful to develop a common industry view regarding the benefits of early-stage entitlement reconciliations and make sure we can process these votes and give reports to each issuer. Especially if they ask, give them reports so they know exactly what has happened in their case.

The timing can be off - securities that may not yet be reflected in the DTC's entitled nominee position. Even though their client expects to have the right to vote, there can be a failed settlement where a client has purchased a share but has not received it yet from the counterparty. Again, the omnibus records, the record bank may fail to update the file to the issuer with the new respondent bank information, or the broker might fail to update a name change, something like that.

It's going to be an interesting time. I'm really looking forward to sharing our experiences with the industry and with the issuers, and making sure we reduce any instances of under-voting or over-voting. We'll be able to put a lot of this to bed.

The other topic I want to talk about is pass-through voting. At a high level, this allows investors to pass the voting rights from the asset manager or wealth manager to the institutional or retail shareholder. It provides a way for investors to inform the wealth or the asset manager's voting policies.

There are those who think the impact of Vanguard, BlackRock and other large passive investors having so much voting power is something to be addressed. BlackRock announced it would allow pass-through voting at the end of 2021, essentially handing the responsibility of voting over to the investor(s). Larry Fink highlighted this in his annual letter to CEOs. It's an example of the shift to recognize that the individual shareholders get more of the power back to invest. BlackRock calls this voting choice and will make it available to about 40% of its equity assets to start with, with institutional investors in the U.S. and U.K.

It's not exactly clear how this will work out. It's a fundamental change in shareholder influence. We're not sure how many BlackRock clients will participate. We're not sure who those clients will be and if we will know exactly who they are. We're assuming the process will become much more standardized. It may go to others besides BlackRock.

For issuers I spoke to, it's not clear how the BlackRock clients will vote. Typically, BlackRock has been mostly friendly toward management. It'll be interesting to see. It's too early to tell how the investors will vote and the extent they will vote, and how they would depart from what BlackRock policies otherwise would be. This is the first year it could happen, and we'll be monitoring it.

We're reacting to the request of funds in the industry who are counting on Broadridge to enable the technology and processing to support these types of client solutions.

**Backberg:** Yes, Dorothy, that is a good explanation and it ties to what Vernicka was saying about the power and sheer size of some of these large, passive investors. We engage regularly with BlackRock and often they're asking us the questions, which is great, but we also try to make it a dialogue. We were talking about how they were going to handle this pass-through voting initiative and you described it quite accurately. It's going to be interesting to see how or if they're able to disclose which institutional investors are voting in what manner.

From the issuer perspective, one thing we were asking is, “How do we engage with those investors?” If BlackRock owns 7% of the company, how do we engage with someone that has a rather substantial stake and may not vote in line with Blackrock’s policies like you noted? It'll be interesting to watch this unfold.

**Flynn:** It's true, and Carl made the point earlier of knowing your retail investors and understanding who they are, how they vote, what sort of characteristics drive them to invest in your company and where else they invest. This data is available and generating a lot of interest.

My issuer clients are asking us more questions about the retail investors, understanding them in advance of shifts like this and then being able to monitor what happens when things like pass-through voting start to happen. It's interesting in the age when we do have more data that we can share on a regular basis to help investor relations officers make better decisions.

**Hagberg:** You've summarized the BlackRock situation very nicely. I think it will not make much of a change in the majority of companies, but guess what? The only company we really need to care about is our own. It doesn't just add a major wildcard into the deck this year, it's like somebody threw two jokers and two extra deuces into the deck. We'll wait and see.

I don't think it will be a big change, but there are going to be some outliers that will wake us up. We know we don't like surprises. I do believe there will be some this season, but not too many.

**Malley:** Do you think there'll be more the following year, if more people and investors will be aware?

**Hagberg:** Across the board, there's an amazing new interest in voting. People are discovering there is power in their proxy votes. Some will use it to make a different point all together.

The focus on voting has increased dramatically and people are much less predictable than they were in general. There are many with knee-jerk reactions from people who use their proxy voting as a proxy for something else that's bugging them. We're going to see more on this.

### **Getting Retail Investor Support**

**Hagberg:** Dorothy, you've been seeing your voting numbers go up. The retail investor vote has gone up noticeably at a lot of companies. There's a focus on this, and some of the institutions are saying they will use these meeting experiences to punish, name and shame companies they feel haven't done a good job.

The needle has shifted in terms of investor sentiment. ESG is a given these days. You just have to say, "OK, where do I sign?" because it's been attracting such huge support. Interesting times.

**Flynn:** Support for shareholder proposals rose 240% overall on average in last year's season. We tracked 404 shareholder proposals. That's up from 37%. If you look at the retail vote, typically about half is likely to vote in favor of shareholder proposals as were institutional investors. We published the data points about last season in our *ProxyPulse* publication, which is available. It is fascinating to see what's happening, particularly around the retail vote.

**Malley:** There's a lot more popular press on these topics now, too, even commercials in big sporting events with major companies showing their ESG efforts. It influences the attention.

**Hagberg:** This is a good time to introduce another important change we're facing: Gen Z. This generation is on the receiving end of the biggest transfer of wealth in history. The baby boomers and their children now are passing enormous amounts of wealth onto Gen Z, who seem to march to a different drummer than the old-time moms and pops, aunts and uncles, and good citizens and clients who were much more unpredictable. The surveys show that Gen-Z investors are much more engaged in voting issues than their elders.

They are technology wizards, and they mark you down if your technology is poor; they'll name and shame you, saying, "What's wrong with you?" They have no patience for things that don't load well on the web or don't enable them to operate or do all their business on the web.

We're seeing a different generation of people, and they're experts at social media. If they're not happy, before you know it over a million people are tweeting about what went wrong. It's a good reminder that we need to keep our technology as close to the cutting edge as we can, because we're dealing with a new world in many ways.

**Backberg:** At General Mills, we are focused on some of those issues to drive retail investors. One thing we've focused in on is making sure our proxy statement is easy to read and understand, and pops out visually.

We did a significant proxy refresh last year with an emphasis on ESG and making clear what our initiatives are, how we're focused on climate, human capital management, and diversity and inclusion, while making it pop clearly on what the voting matters are so they can see them right away. We have a clear summary to give the landscape on what the voting is and what we're looking at, and then they can click down to find additional details.

That speaks volumes to the retail base and what they're looking for. We have an important and graphically enhanced global responsibility report that dives into some of these details in more depth. That gets a lot of popularity and is a talking piece for our off-season engagement with investors.

Vernicka talked about the importance of investor engagement. Not only are we focused on the retail investor, but also our largest investors that drive the votes. Someone mentioned shareholder

proposal votes are way up, but we're also seeing BlackRock, Vanguard and State Street finally start voting some of their policies. That's pushing the envelope to majority support for some shareholder proposals that in the past we would expect to see 10% to 12%. Now we're getting into the 40s and 50s, and one or two percentage points really matter. The retail investor or one big vote at the end can turn things.

I would just reiterate the importance of one off-season engagement investment. We also engage around the annual meeting time, so if there's questions our big investors have on the ballot, they can bring them forward.

We get more pickup when there is a shareholder proposal, but we have not received any significant investor pushback on our annual meeting format regarding the virtual meeting.

**Shaw:** We are focused on investor engagement. We have a robust cycle that we discuss in our proxy as well, with the amount of engagement we have around their proxy time, and then in the fall and spring to make sure we know what our investors are looking for, how we can best address their concerns that they have.

When they have concerns, we address them in the proxy the next year. We take those concerns to the board and management, and make sure they're heard and they are a driving force behind the belief that — whether it's more disclosure around compensation or more disclosure around decisions being made — we've made those changes. We've answered those questions. We make sure we're as engaged as we possibly can whenever they contact us or we contact them.

**Malley:** We also spent time on making sure our disclosures on board oversight and the interaction among management, the board and shareholders really popped in our proxy in a number of ways and issues, whether it's ESG, board risk oversight, nomination or a summary. We wanted to highlight that as a big part of our process and how the company functions.

**Backberg:** One thing our big investors — Vanguard, BlackRock, State Street and others — appreciated is offering up a director to engage with them. Then, they can get it right from the directors' lens on how the board has overseen these initiatives the investors are interested in.

## Post-Mortems & Preparing for Next Year

**Sacks-Wilner:** Vernicka, do you want to close with a few words on post-mortem practices?

**Shaw:** Absolutely. We file our Form 8-K announcing our results the next day because our meetings are early in the morning, so we spend the day making sure everything is tabulated and we have all the results and counts in.

Another thing we should be mindful of is your ASM binder, your annual stockholder meeting binder. That should have your Time & Responsibility checklist, the Oath of Inspector of Election, your omnibus proxy from the DTC, your certified list of shareholders of the record day and your affidavit of distribution of proxy materials. All those kinds of items should be in the binder for you to make sure you have it in posterity, but also to help you with planning in the next year.

As far as the lessons to learn, start planning early. One of the colleagues on the call said, you need to reserve your ASM date with your provider for access to Broadridge super-duper early. Everyone is vying for a great day, a great time. You want to make sure whether you're going to do a VSM, hybrid or in-person, to be the experts of that platform. Make sure you have time to train everyone who's going to be involved in that platform.

Particularly for us, this will be our third ASM/VSM in a row. We have restriction platforms, so we need to make sure everyone knows how to use and troubleshoot the platform. Those are the huge pieces.

Also, do a big walk through the logistics. Regardless of how you're going to have your meeting, make sure you have all those pieces together because it's important for you to plan early, plan well and consider any type of technological and security issues.

Ben mentioned how General Mills had a lot of security. We also have the security. We also make sure we have folks on-hand and the different go-plans, all these aspects you need to make sure you're covered on.

If nothing else, the one thing to remember as you are planning your ASM for next year is to make sure you're moving through everything, start planning early and have multiple situations and iterations on your documentation, because it's better to be overprepared than underprepared for the ASM.

**Sacks-Wilner:** This is an informative and practical discussion. Annual meetings are always such a dynamic topic. Thank you for joining us and thank you to our speakers for their insight. Have a great day!



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← Annual Letters to Shareholders: Reg G Applies | Main | Proxy Fights on Social Issues: Carl Icahn Strikes Again →

**March 30, 2022**

## 2024 for Climate Disclosures? Goldman's Director Votes Won't Be So Patient

The SEC wants to give companies at least 2-years to prepare for its recently proposed climate disclosure rules – but some investors aren't as patient. Late last week, Goldman Sachs Asset Management released its updated Proxy Voting Guidelines for this year's annual meetings. One of the biggest items to note is that GSAM has expanded the number of situations in which it will vote against members of the full board or an appropriate committee. The "Director Accountability" section that begins on page 6 now includes these scenarios that will result in a loss of director support:

> 1. Violations of the UN Global Compact or other significant global standards and failure to disclosure material ESG information
>
> 2. The company doesn't disclose various components of current emissions, a proxy for a company's dependence on fossil fuels and other sources of greenhouse gasses (Scope 1, 2 and 3), material to the company's business

In addition, the asset manager will vote against members of audit committees if there is excessive pledging or hedging of stock by executives, which is an expansion from this just being a say-on-pay factor.

These updates follow previously announced changes relating to board diversity and will push portfolio companies to expand emissions reporting ahead of the SEC's timeline, which may have a ripple effect on other companies too. This Investment News article says that GSAM is also already engaging with 271 companies around lack of GHG emissions data. Hopefully that captures most of the companies that could be affected by this policy and already filed their proxy statements and/or ESG reports!

The new policies also expand on how Goldman will approach Environmental & Social proposals, beginning on page 15. Here's the 2021 version of GSAM's Proxy Voting Guidelines if you want to take a deep dive on the changes.

– **Liz Dunshee**

Posted by Liz Dunshee
Permalink: https://www.thecorporatecounsel.net/member/blogs/proxy/2022/03/2024-for-climate-disclosures-goldmans-director-votes-wont-be-so-patient.html

**October 4, 2022**

## Say-on-Pay: Responsiveness Success Stories

With more large companies failing or coming in below 70% support on their say-on-pay vote this year, compensation committee members who are facing reelection will need to demonstrate responsiveness via fall engagements – and resulting actions – all of which will need to be described in 2023 proxy statements. This ISS Corporate Solutions blog emphasizes the importance of those efforts, with these key takeaways:

> – Median support for say-on-pay proposals fell to an all-time low in 2022
>
> – A total of 136 companies in the Russell 3000 Index received less than 70 percent support for their say on pay proposals in 2021
>
> – Companies with the highest levels of responsiveness to investor concerns saw the biggest gains in investor support in 2022 over 2021
>
> – Corporates with more moderate levels of responsiveness also saw investor support rise compared with 2021
>
> – In some cases, companies with a high level of engagement still saw say-on-pay support fall in 2022, while others with low responsiveness saw a gain

As the "Say-on-Pay Solicitation Strategies" chapter of *Lynn & Borges' Executive Compensation Disclosure Treatise* explains:

> ISS and Glass Lewis have the position that boards need to be responsive to say-on-pay votes that receive less than 70% and 80% support, respectively This means that your goal isn't to just receive a majority vote on your nonbinding say-on-pay—you need to do better than that. If a company receives a low vote and isn't sufficiently responsive, ISS and Glass Lewis may recommend against reelection of the compensation committee members — or the entire board — the following year. Increasingly, low say-on-pay support can also be a red flag to activists who closely monitor shareholder dissatisfaction at potential targets.

This blog from *As You Sow* gives examples of companies that have been able to successfully course-correct and regain shareholder support. Here's an excerpt:

> The company with perhaps the best disclosure of the change it made, and the extent of its outreach, was Marathon Petroleum. A chart in the proxy statement lists significant changes made in several governance, annual bonus and long term bonus. The company, which had been a bit of a governance laggard, is moving toward adopting several best practices including annual votes on directors and separating the chair and CEO. Compensation changes included:
>
> > · Updated compensation reference group (or peer group) to reflect the fact that the company is smaller after the sale of its Speedway business
> >
> > · Eliminated discretionary component of annual bonus, increasing the weighting of financial performance and adding an ESG metric with quantitative goals tied to greenhouse gas

> emissions intensity and diversity, equity & inclusion
>
> · Reduced the types of equity awards granted from five to three and discontinued the use of stock options
>
> · Increased alignment with shareholders by denominating performance share units in shares of MPC common stock (previously denominated in dollars)

The blog goes on to note:

> Of course, as can be seen in the votes and in the information above, the component of engagement that matters the most isn't the percentage of investors called, but the actions that flow from engagement.

Join us next week at our virtual "Proxy Disclosure & 19th Annual Executive Compensation Conferences" – where we'll be discussing what proxy advisors and investors expect to see when it comes to responsiveness. There is still time to register! Here's the agenda – 18 essential sessions over the course of three days. Sign up online (with the "Conference" drop-down, and the "PDEC" options), email sales@ccrcorp.com, or call 1-800-737-1271. Bundle your registration with our "1st Annual Practical ESG Conference" and get a discounted rate!

– **Liz Dunshee**

Posted by Liz Dunshee
Permalink: https://www.compensationstandards.com/member/blogs/consultant/2022/10/say-on-pay-responsiveness-success-stories.html

← Core & Main's Clawback Policy | Main | DXC Technology's Director Compensation Disclosure →

**June 3, 2022**

## Constellation Brands' Post-Pandemic Compensation Disclosure

Constellation Brands, Inc., the global producer and marketer of beer, wine, and spirits, always seems to have some interesting features in its definitive proxy statement. For example, as I've noted in the past, each year the company provides an extensive discussion in its Compensation Discussion and Analysis of the perquisites that it makes available to its named executive officers (see page 41).

This year, what caught my eye was the information that the company provided in its CD&A in response to the COVID-19 pandemic. As the company notes (on page 29):

> Learning from our experiences and successes in Fiscal 2021, we continued to implement policies and practices related to our people and our business that allowed us to focus on our foremost priority through the pandemic, the health and safety of our employees, consumers, and the communities we serve. Constellation's executive officers took decisive action to respond to the continued disruption caused by the pandemic.

The company then goes on to list 13 specific actions that it took in fiscal 2022 as it continued to deal with the effects of the pandemic.

For many companies, 2022 was the year when they began to return their executive compensation program to its pre-COVID design. That's what Constellation Brands did, and it devoted space in its CD&A to describe how, as the pandemic started to abate, it was able to leverage its prior experience to shape its compensation program for fiscal 2022 (at page 29):

> During Fiscal 2022, the Human Resources Committee . . . considered the impact of the COVID-19 pandemic on our executive compensation program by reference to the principles of the program, including pay for performance, alignment with stockholders' interests, and motivation and retention of key talent. For Fiscal 2022, the Committee was able to draw on over a year of experience in navigating the COVID-19 pandemic. As such, the impact of the pandemic on our Fiscal 2022 executive compensation program was more muted as compared with the Committee's actions taken with respect to the Fiscal 2021 program. For Fiscal 2022, the Committee took the following approach:
>
> • Continued to review with heightened focus and increased frequency the Company's planning and actions related to human capital, talent management, and succession planning.
>
> • Given our experiences in Fiscal 2021 managing through the financial planning and goal setting processes during COVID-19 pandemic, we did not delay setting our Fiscal 2022 annual operating plan or the performance goals and targets under our short-term cash incentive program in a similar fashion as taken for Fiscal 2021. As such, the Fiscal 2022 performance goals and targets under our short-term cash incentive program were set in early April 2021, as had been our practice prior to the COVID-19 pandemic.
>
> • Reverted to the pre-pandemic approach of using narrower performance ranges under our Fiscal 2022 short-term cash incentive program as compared to the wider performance ranges under the Fiscal 2021 short-term cash incentive program.

> For Fiscal 2022, the Committee did not modify the performance goals that were previously established for any outstanding PSU awards, delay setting goals for the Fiscal 2022 PSU awards, or exercise discretion at fiscal year end when determining short-term cash incentive payments for Fiscal 2022.

I've seen several companies include similar disclosure in their Compensation Discussion and Analyses; primarily as a way of signaling to the major proxy advisory firms that they are returning to their prior approach in structuring their executive compensation program. While such disclosure isn't required, it's a pretty effective way of letting shareholders and their advisors know that most, if not all, of the dramatic measures taken during the height of the pandemic have been tempered and that the company is getting back to its pre-pandemic plan design and related policies.

Posted by Mark Borges
Permalink: https://www.compensationstandards.com/member/blogs/compensationdisclosure/2022/06/constellation-brands-post-pandemic-compensation-disclosure.html

← Anterix's Compensation Peer Group Selection Process | Main | Monro's Post-Employment Compensation Disclosure →

**July 7, 2022**

## Athersys' Annual Bonus Plan Disclosure

By now, the characterization of annual bonuses as "non-equity incentive plan compensation" for disclosure purposes has become so ingrained in me that I rarely look at the "Bonus" column in the Summary Compensation Table (assuming that the company has even bothered to include the column in the table). However, today I came across a disclosure where a company actually explains why its annual incentive plan is a bonus plan for reporting purposes, rather than non-equity incentive plan compensation.

I was leafing through the definitive proxy statement of Athersys, Inc., a Cleveland, Ohio-based biotechnology company, and came across some interesting disclosure in its Compensation Discussion and Analysis.

This was actually the second proxy statement filed by the company for its 2022 Annual Meeting of Stockholders. The first proxy statement was filed on April 29, 2022 for an Annual Meeting to be held on June 15, 2022. Subsequently, the annual meeting was postponed until July 28, 2022 and a new proxy statement was filed on July 1, 2022. What changed? Well, the company reported disappointing results for its phase 2/3 trials of its MultiStem cell therapy by its Japanese partner, leading to dramatic drop in its stock price and employee layoffs. As a result, the company decided to seek the approval of its stockholders to conduct a reverse stock split (if deemed advisable by the Board of Directors) as a precautionary measure – part of its initiative to undertake a restructuring and reduce costs. Unfortunately, not an unusual result for a biotech company that didn't experience a successful outcome for its clinical trials.

In any event, in describing its annual cash incentive plan in its CD&A, the company notes the following:

> When appropriate, we reward our named executive officers with performance-related cash compensation. We utilize annual incentive compensation to reward officers and other employees for achieving, on a discretionary "look back" basis, corporate objectives and for meeting individual annual performance objectives. These objectives relate generally to strategic factors, including advancement of our product candidates, manufacturing and process development activities, establishment and maintenance of key strategic relationships, and financial factors, including raising capital and cash management. As described above, target bonuses are generally compared to our peer companies for overall reasonableness.
>
> The Compensation Committee approved a cash incentive compensation program for the year ended December 31, 2021 for our named executive officers other than Dr. Van Bokkelen. Under the 2021 incentive program, each participant was eligible to earn a target incentive compensation payment of a specified percentage of the named executive officer's base salary rate during the award term, weighted on the achievement of specific corporate goals, with the remainder based on individual/functional performance, as set forth in the following table. The weighting on corporate versus individual/functional performance is based on the relative impact on overall corporate goals and the emphasis and incentives toward departmental performance.
>
> . . . .

> The evaluation of goal achievement is at the discretion of the Compensation Committee or the Board based on input from the Chief Executive Officer (with respect to the named executive officers other than the Chief Executive Officer). The material 2021 corporate goals consisted of advancing the Company's clinical programs for MultiStem and manufacturing process development initiatives, executing against the established operating plan and capital acquisition objectives. Individual/functional goals were based on the named executive officer's scope of responsibility and are closely related to the corporate goals. Attainment of individual/functional goals was evaluated as part of the annual performance appraisal process.
>
> We do not disclose the specific corporate or individual/functional goals for our 2021 incentive compensation program. While the overall amount of incentive compensation is linked to predetermined metrics, the Compensation Committee or the Board has the discretion to adjust any amount ultimately paid under our annual incentive program after good faith consideration of executive officer performance, overall Company performance, market conditions and cash availability. We also do not have a formally adopted plan document for the 2021 incentive program, although the Compensation Committee approved the specific corporate goals, target compensation levels and weightings between corporate and individual/functional performance. As a result, we view any payments under our annual cash incentive program as discretionary bonuses as opposed to typical non-equity incentive plan compensation.

The disclosure then goes on to state that the Board, based on the recommendation of the Compensation Committee, determined that each named executive officers would receive a payment under the 2021 cash incentive program as a result of his individual performance and the achievement of operational and strategic goals in 2021, although the amounts paid were significantly below their incentive award targets and ranged from 25% to 36% of their annual base salary, depending on the executive.

While I'm sure there must be other instances where a compensation committee determined to use a discretionary, rather than a formulaic, bonus plan, thereby changing the way payments are reported in the Summary Compensation Table, this is the first time I've seen this type of detailed discussion explaining the basis for the disclosure. (Apparently, the company has taken this approach with its annual incentive plan for well over a decade, but only started including the explanation of why the payments are not considered non-equity incentive plan compensation in 2020. I'm not sure what prompted the additional disclosure.)

Posted by Mark Borges
Permalink: https://www.compensationstandards.com/member/blogs/compensationdisclosure/2022/07/athersys-annual-bonus-plan-disclosure.html

FACT SHEET

# Pay Versus Performance

The Securities and Exchange Commission adopted final rules implementing the pay versus performance requirement as required by Congress in the Dodd-Frank Act.

The rules will require registrants to disclose, in proxy or information statements in which executive compensation disclosure is required, how executive compensation actually paid by the registrants related to the financial performance of the registrants over the time horizon of the disclosure.

## Background

Section 14(i) of the Securities Exchange Act of 1934 was added by the Dodd-Frank Wall Street Reform and Consumer Protection Act and requires the SEC to adopt rules requiring a registrant to disclose the relationship between executive compensation actually paid and the financial performance of that registrant.

In April 2015, the SEC proposed amendments to Item 402 of Regulation S-K to implement the pay versus performance disclosure requirement. In January 2022, the SEC reopened the comment period for the 2015 proposed rules and provided the public with the opportunity to comment further and to address certain additional requirements the Commission was considering in connection with the reopening of the comment period.

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## What's Required

The rules will apply to all reporting companies, except foreign private issuers, registered investment companies, and Emerging Growth Companies. Smaller Reporting Companies ("SRCs") will be permitted to provide scaled disclosures.

New Item 402(v) of Regulation S-K will require registrants to provide a table disclosing specified executive compensation and financial performance measures for the registrant's five most recently completed fiscal years.

Registrants will be required to include in the table, for the principal executive officer ("PEO") and, as an average, for the other named executive officers ("NEOs"), the Summary Compensation Table measure of total compensation and a measure reflecting "executive compensation actually paid," calculated as prescribed by the rule.

The financial performance measures to be included in the table are:

- Total shareholder return ("TSR") for the registrant;

- TSR for the registrant's peer group;
- The registrant's net income; and
- A financial performance measure chosen by the registrant and specific to the registrant (the "Company-Selected Measure") that, in the registrant's assessment, represents the most important financial performance measure the registrant uses to link compensation actually paid to the registrant's NEOs to company performance for the most recently completed fiscal year.

New Item 402(v) also will require a registrant to provide a clear description of the relationships between each of the financial performance measures included in the table and the executive compensation actually paid to its PEO and, on average, to its other NEOs over the registrant's five most recently completed fiscal years. The registrant will be required to also include a description of the relationship between the registrant's TSR and its peer group TSR.

A registrant will also be required to provide a list of three to seven financial performance measures that the registrant determines are its most important measures (using the same approach as taken for the Company-Selected Measure). Registrants are permitted, but not required, to include non-financial measures in the list if they considered such measures to be among their three to seven "most important" measures.

Registrants will be required to use Inline XBRL to tag their pay versus performance disclosure.

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## What's Next

The rules will become effective 30 days following publication of the release in the Federal Register. Registrants must begin to comply with these disclosure requirements in proxy and information statements that are required to include Item 402 executive compensation disclosure for fiscal years ending on or after December 16, 2022.

Registrants, other than SRCs, will be required to provide the information for three years in the first proxy or information statement in which they provide the disclosure, adding another year of disclosure in each of the two subsequent annual proxy filings that require this disclosure. SRCs will initially be required to provide the information for two years, adding an additional year of disclosure in the subsequent annual proxy or information statement that requires this disclosure. In addition, an SRC will only be required to provide the required Inline XBRL data beginning in the third filing in which it provides pay versus performance disclosure, instead of the first.

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***Additional Information:***

Visit sec.gov to find for more information about the adopted amendments and the full text of the final rules.

← Say-on-Pay & Equity Plans: Insights From '22 Meetings | Main | Take Note: SEC Enforcement Gets Another SOX 304 Clawback →

**August 26, 2022**

## Pay vs. Performance: SEC Adopts Final Rules – Effective For '23 Proxies!

Yesterday, by a 3-2 vote, the SEC announced the adoption of final rules on "Pay Versus Performance" disclosure, which are required under the Dodd-Frank Act and had been a long time in the making. Here's the 234-page adopting release – which I'll be studying today in order to make sure we cover the most critical takeaways & action items during our upcoming "Proxy Disclosure & 19th Annual Executive Compensation Conferences."

Even though the Pay vs. Performance rules were flagged as a near-term item on the Reg Flex Agenda, the announcement came as a surprise because there was no open meeting and the last few weeks of August are typically quiet at the SEC. In his statement, Commissioner Uyeda also criticized the SEC's process in adopting this rule via a "reopening release" rather than a full-fledged re-proposal with new data & analysis.

However, there's not really time for companies to focus on that – because the new Item 402(v) disclosure will be required in 2023 proxy statements! Dave blogged on TheCorporateCounsel.net this morning about the details around the compliance date and phase-in disclosure. Here are more details from the fact sheet (also see Dave's overview on TheCorporateCounsel.net):

> The rules will apply to all reporting companies, except foreign private issuers, registered investment companies, and Emerging Growth Companies. Smaller Reporting Companies ("SRCs") will be permitted to provide scaled disclosures.
>
> New Item 402(v) of Regulation S-K will require registrants to provide a table disclosing specified executive compensation and financial performance measures for the registrant's five most recently completed fiscal years.
>
> Registrants will be required to include in the table, for the principal executive officer ("PEO") and, as an average, for the other named executive officers ("NEOs"), the Summary Compensation Table measure of total compensation and a measure reflecting "executive compensation actually paid," calculated as prescribed by the rule.
>
> The financial performance measures to be included in the table are:
>
> – Total shareholder return for the company;
>
> – TSR for the company's peer group;
>
> – The company's net income; and
>
> – A financial performance measure chosen by the company and specific to the company that, in the company's assessment, represents the most important financial performance measure the company uses to link compensation actually paid to the company's NEOs to company performance for the most recently completed fiscal year.
>
> New Item 402(v) also will require a registrant to provide a clear description of the relationships between each of the financial performance measures included in the table and the executive compensation actually paid to its PEO and, on average, to its other NEOs over the registrant's

> five most recently completed fiscal years. The registrant will be required to also include a description of the relationship between the registrant's TSR and its peer group TSR.
>
> A registrant will also be required to provide a list of three to seven financial performance measures that the registrant determines are its most important measures (using the same approach as taken for the Company-Selected Measure). Registrants are permitted, but not required, to include non-financial measures in the list if they considered such measures to be among their three to seven "most important" measures.
>
> Registrants will be required to use Inline XBRL to tag their pay versus performance disclosure.

In addition to Commissioner Uyeda's procedural complaints, Commissioner Peirce issued a statement accusing the rules of being too prescriptive and going beyond what the Dodd-Frank Act required, without a cost-benefit analysis.

Meanwhile, Chair Gensler's statement applauds the "consistent, comparable and decision-useful information" that the rule will provide and says the final version is actually more flexible than what was originally proposed. The flexibility he's most likely referring to is the fact that the final rule allows companies to include non-financial performance measures in their list of the 3-7 "most important" measures and also disclose those measures in a table as they see fit, as called out in Commissioner Crenshaw's supporting statement. By contrast, financial measures are required to be disclosed if companies are linking pay and performance to them. Commissioner Lizárraga also supported the final rules.

Honestly, I'm still processing the tight implementation schedule here. I had to read this cruel "fake out" part of the release about 6 times:

> In order to give companies adequate time to implement these disclosures, we are requiring registrants to begin complying with Item 402(v) of Regulation S-K in proxy and information statements that are required to include Item 402 disclosure for fiscal years ending on or after December 16, 2022.

In light of this timeframe, I urge anyone who hasn't registered for our "Proxy Disclosure & 19th Annual Executive Compensation Conferences" to claim their spot now! This virtual event is only 6 weeks away – and we'll be discussing key steps you need to take to comply with these new rules in a dedicated panel with Bindu Culas of FW Cook, Howard Dicker of Weil Gotshal, Renata Ferrari of Ropes & Gray and Maj Vaseghi of Latham. We'll also be addressing Pay vs. Performance during "The Top Compensation Consultants Speak" and "SEC All-Stars: Executive Pay Nuggets" panels.

Here are the full agendas for the Conferences – 18 critical sessions over the course of 3 days. To claim your spot, you can sign up online, email sales@ccrcorp.com, or call 1-800-737-1271. Let us equip you with the practical action items you need to face this avalanche of SEC rulemaking!

– **Liz Dunshee**

Posted by Liz Dunshee
Permalink: https://www.compensationstandards.com/member/blogs/consultant/2022/08/pay-vs-performance-sec-adopts-final-rules-effective-for-23-proxies.html

August 29, 2022

# SEC RELEASES FINAL PAY VERSUS PERFORMANCE RULES

To Our Clients and Friends:

On August 25, 2022, the Securities and Exchange Commission ("SEC" or "Commission"), in a 3-to-2 vote, adopted final rules implementing the pay versus performance disclosure requirement called for under Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). The final rules require proxy statements or information statements that include executive compensation disclosures to include a new compensation table setting forth for each of the five most recently completed fiscal years, the "executive compensation actually paid" (as defined in the final rule) to the company's principal executive officer ("PEO") and the average of such amounts for the company's other named executive officers ("NEOs"), total compensation as disclosed in the Summary Compensation Table for the PEO and the average of such amounts for the other NEOs, total shareholder return (TSR), peer group TSR, net income and a company-selected financial measure that represents the "most important financial measure" used by the company to link compensation actually paid to company performance. In addition, based on the information set forth in the new table, a company must provide a clear description of the relationship between each of (1) the executive compensation actually paid to the PEO and to the non-PEO NEOs and the company's TSR, the company's net income and the company-selected financial measure over the previous five years, and (2) the company's TSR and the TSR of a peer group chosen by the company. Finally, the rule requires companies to provide a list of three to seven other financial performance measures that the company determines are its most important measures "used to link compensation actually paid . . . to company performance."

The final rule release is available here, and the SEC's pay versus performance fact sheet is available here. The final rule will become effective 30 days after its publication in the Federal Register, and companies will be required to comply with the requirements in proxy and information statements that are required to include executive compensation disclosures for fiscal years ending on or after December 16, 2022. Set forth below is a summary of the final rules and considerations for companies.

## Summary of the Final Rules

***New Tabular Disclosure under Item 402(v) of Regulation S-K***. Section 953(a) of the Dodd-Frank Act instructs the Commission to adopt rules requiring companies to provide "a clear description of . . . information that shows the relationship between executive compensation actually paid and the financial performance of the issuer." To address this mandate, Item 402(v) of Regulation S-K will now require companies to include a new table (set forth below) in any proxy statement or information statement setting forth executive compensation disclosure, reporting:

- The "executive compensation actually paid" to the PEO and the total compensation reported in the Summary Compensation Table for the PEO. If more than one person served as the PEO

during the covered fiscal year, then each PEO would be reported separately in additional columns with information provided for the applicable year such individual was a PEO.

- An average of the "executive compensation actually paid" to the remaining NEOs and an average of the total compensation reported in the Summary Compensation Table for the remaining NEOs. Footnote disclosure of the names of individual NEOs and the years in which they are included is also required.

- The company's cumulative annual TSR calculated and presented as the dollar value of an investment of $100 (i.e., in the same manner as in the Stock Price Performance Graph required under Item 201(e) of Regulation S-K).

- The cumulative annual TSR of the companies in a peer group chosen by the company (which must be the same index or peer group used for the purposes of Item 201(e) or, if applicable, the peer group used for purposes of the Compensation Discussion and Analysis disclosures). Footnote disclosure of any year-over-year changes in peer group constituent companies as well as the reasons for any such change will be required along with a comparison of the issuer's cumulative annual TSR with that of both the new and prior fiscal year peer group.

- The company's net income for the fiscal year calculated in accordance with U.S. GAAP.

- A financial performance measure chosen by the company (the "Company-Selected Measure") that the company has determined represents the "most important financial performance measure" that the company uses to link compensation actually paid to the NEOs to company performance for the most recently completed fiscal year. If such measure is a non-GAAP measure, disclosure must be provided as to how the number is calculated from the issuer's audited financial statements, but a full reconciliation is not required.

**PAY VERSUS PERFORMANCE**

| | | | | | Value of Initial Fixed $100 Investment Based On: | | | |
|---|---|---|---|---|---|---|---|---|
| Year (a) | Summary Compensation Table Total for PEO (b) | Compensation Actually Paid to PEO (c) | Average Summary Compensation Table Total for Non-PEO NEOs (d) | Average Compensation Actually Paid to Non-PEO NEOs (e) | Total Shareholder Return (f) | Peer Group Total Shareholder Return (g) | Net Income (h) | [Company-Selected Measure] (i) |

The table is required to set forth this information for each of the five most recently completed fiscal years, subject to a transition rule and certain exceptions described below.

The final rule requires companies to provide disclosure accompanying the table that "use[s] the information provided in the table . . . to provide a clear description of the relationship" between:

- Executive compensation actually paid to the PEO and the other NEOs and the company's TSR across the last five fiscal years;

- Executive compensation actually paid to the PEO and the other NEOs and the company's net income across the last five fiscal years;

- Executive compensation actually paid to the PEO and the other NEOs and the Company-Selected Measure; and

- The company's TSR and the peer group TSR.

These descriptions could include narrative or graphic disclosure (or a combination of the two). If any additional, voluntary performance measures are included in the table, the disclosure must also include a description of the relationship between executive compensation actually paid to the PEO and the other NEOs and the additional performance measure across the last five fiscal years.

In addition, under the final rule companies must provide a tabular list of three to seven other financial performance measures that the company has determined represent the most important financial performance measures used to link compensation actually paid for the most recent fiscal year to company performance. So long as at least three of the measures are financial performance measures, the company may include non-financial performance measures in the tabular list. If fewer than three financial performance measures were used by the company to link compensation and performance, such list must include all such measures, if any, that were used.

Companies will also be required to tag each value disclosed in the table, block-text tag the footnote and relationship disclosure, and tag specific data points within the footnote disclosures in interactive data format using eXtensible Business Reporting Language, or XBRL.

***"Executive Compensation Actually Paid."*** Under the final rule, "executive compensation actually paid" is somewhat of a misnomer, as it includes both amounts paid or earned, as well as incremental accounting valuations for unvested equity awards that may never be earned or that could have different intrinsic values when earned. For these purposes, "executive compensation actually paid" is defined as the total compensation reported in the Summary Compensation Table, with adjustments made to the amounts report for pension values and equity awards.

Pension Values. With respect to pension values, the aggregate change in the actuarial present value of all defined benefit and actuarial pension plans will be deducted from the reported total compensation, and instead "executive compensation actually paid" will include both (1) the actuarially determined service cost for services rendered by the executive during the applicable year ("service cost") and (2) the entire cost of benefits granted in a plan amendment (or initial plan adoption) during the applicable year that are attributed by the benefit formula to services rendered in periods prior to the plan amendment or adoption ("prior service cost"), in each case, calculated in accordance with U.S. GAAP. If the prior service cost is a negative amount as a result of an amendment that reduces benefits relating to prior periods of service, then such amount would reduce the compensation actually paid.

Equity Awards. With respect to the stock award and option award values, the amounts included in the Summary Compensation Table, representing the grant date fair value, will be deducted, and the following adjustments will be made, in each case, with fair value calculated in accordance with U.S. GAAP:

- For awards granted in the covered fiscal year:
  - add the year-end fair value if the award is outstanding and unvested as of the end of the covered fiscal year; and
  - add the fair value as of the vesting date for awards that vested during the year.
- For any awards granted in prior years:
  - add or subtract any change in fair value as of the end of the covered fiscal year compared to the end of the prior fiscal year if the award is outstanding and unvested as of the end of the covered fiscal year;
  - add or subtract any change in fair value as of the vesting date (compared to the end of the prior fiscal year) if the award vested during the year; and
  - subtract the amount equal to the fair value at the end of the prior fiscal year if the award was forfeited during the covered fiscal year.
- Add the dollar value of any dividends or other earnings paid on stock awards or options in the covered fiscal year prior to the vesting date that are not otherwise reflected in the fair value of such award or included in any other component of total compensation for the covered fiscal year.

Footnote disclosure is required to identify the amount of each adjustment, as well as valuation assumptions used in determining any equity award adjustments that are materially different from those disclosed as of the grant date of such equity awards.

***Filings and Timing of Disclosures***. Companies will be required to include the pay versus performance disclosure in all proxy and information statements that are required to include executive compensations disclosures under Item 402 of Regulation S-K for fiscal years ending on or after December 16, 2022. Under the transition rules, companies will only be required to provide disclosure for three years in the first proxy or information statement in which disclosure is provided, adding one additional year in each of the two subsequent years. In addition, disclosure is only required for fiscal years in which the company was a reporting company. The Item 402(v) disclosure will be treated as "filed" for the purposes of the Exchange Act and will be subject to the say-on-pay advisory vote under Exchange Act Rule 14a-21(a).

***Issuers Subject to the Final Rules***. The final rules require pay versus performance disclosure for all companies other than emerging growth companies (which are statutorily exempt from the requirements pursuant to the Jumpstart Our Business Startups Act), foreign private issuers, and registered investment companies.

Smaller reporting companies are subject to scaled disclosure requirements. They are not required to provide peer group TSR or any Company-Selected Measure, and the calculation of executive compensation actually paid may exclude amounts relating to pensions. In addition, smaller reporting companies are only required to provide disclosure for the most recent three years and are allowed initially to provide disclosure for two years, adding one additional year in the next year. Smaller reporting companies also are afforded a transition period with respect to XBRL requirements and are not required to provide inline XBRL data until the third filing in which it provides the pay versus performance disclosure.

**Observations and Considerations for Companies**

The new rules will require extensive calculations and disclosures. For many companies, however, the biggest challenge will be drafting disclosure that uses the information in the table to provide a clear description of the relationship between "compensation actually paid" and the prescribed performance measures. This disclosure is, appropriately, not presented in the Compensation Discussion and Analysis, as it will not necessarily relate to the performance measures utilized by a company's compensation committee in designing and awarding executive compensation. Indeed, in our experience few compensation committees (if any) currently evaluate executive compensation based on the "compensation actually paid" formula prescribed under the new rules. As such, the required description may best be viewed as an after-the-fact review of whether and how this prescriptive and non-routine measure of "compensation actually paid" aligns with the discrete measures of corporate performance prescribed under the rule, if at all. In light of this disconnect between how compensation committees evaluate performance in awarding and paying out executive compensation and how compensation and performance will be presented under the new rules, some companies may determine to include additional voluntary disclosures that reflect how they view the connection between realized or realizable compensation and corporate performance. Indeed, while the final rules check the box in fulfilling a Dodd-Frank mandate to require a pay-for-performance presentation, it's unclear whether the manner in which the Commission chose to implement the Dodd-Frank mandate justifies the time and expense that companies will need to expend to produce the disclosures and whether investors will expend the effort that would be needed to assess the disclosures.

For companies with calendar year fiscal years, the pay versus performance disclosures will be required in the 2023 proxy statement, and for companies that are not smaller reporting companies, the first year of disclosure will cover the 2022, 2021 and 2020 fiscal years. Given the substantial undertaking required to prepare the historical disclosures and the likelihood that significant interpretive questions will arise when applied to companies' particular facts, companies should begin preparing for the new rules now by collecting the information that will be necessary for the disclosures, particularly with respect to the historical pension and equity award adjustments for calculating executive compensation actually paid, and should begin to mock up the required table now for historical periods. In addition, companies should begin discussions regarding what financial performance measure should be utilized as the Company-Selected Measure, understanding that it should be focused on the most recently completed fiscal year (i.e., 2022 for companies with calendar year fiscal years). Consultation with the company's compensation committee and its independent compensation consultant will be key in ensuring that appropriate performance measures are utilized for both the Company-Selected Measure and in the

tabular list. As well, companies should also consider whether any supplemental, voluntary disclosures or presentations may be appropriate. For instance, TSR amounts presented in the table may not align with the performance periods applicable to incentive and equity compensation awards.

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*The following Gibson Dunn lawyers assisted in the preparation of this alert: Krista Hanvey, Thomas Kim, Ronald Mueller, and Gina Hancock.*

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# SEC Adopts Pay Versus Performance Disclosure Requirements

31 Aug 2022

**Corporate Finance | Capital Markets Corporate Governance Executive Compensation** and **Public Companies Counseling + Compliance**

**Client Alert**

On August 25, 2022, the U.S. Securities and Exchange Commission (SEC) adopted the pay versus performance disclosure requirements that the agency was directed to promulgate by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).[1]

The new pay versus performance disclosure requirements specified in new paragraph (v) of Item 402 of Regulation S-K will become effective 30 days following publication of the adopting release in the Federal Register.

Item 402(v) of Regulation S-K will require that companies provide a new table disclosing specified executive compensation and financial performance measures for the company's five most recently completed fiscal years. This table will include, for the principal executive officer (PEO) and, as an average, for the other named executive officers (NEOs), the Summary Compensation Table measure of total compensation and a measure reflecting "executive compensation actually paid," as specified by the rule. The financial performance measures to be included in the table are:

- Cumulative total shareholder return (TSR) for the company;
- TSR for the company's self-selected peer group;
- The company's net income; and
- A financial performance measure chosen by the company and specific to the company that, in the company's assessment, represents the most important financial performance measure the company uses to link compensation actually paid to the company's NEOs to company performance for the most recently completed fiscal year.

In addition, Item 402(v) requires a clear description of the relationships between each of the financial performance measures included in the table and the executive compensation actually paid to its PEO and, on average, to its other NEOs over the company's five most recently completed fiscal years. The company will be required to also include a description of the relationship between the company's TSR and its peer group TSR.

Item 402(v) also requires a list of three to seven financial performance measures that the company determines are its most important measures. Companies are permitted, but not required, to include non-financial measures in the list if they considered such measures to be among their three to seven "most important" measures.

## Key Takeaways for Public Companies

- Subject to certain exceptions, public companies will need to comply with the new pay versus performance disclosure requirements in proxy and information statements that are required to include Item 402 executive compensation disclosure for fiscal years ending on or after December 16, 2022, therefore, calendar year-end companies will need to include the new disclosures in the proxy statements filed during the 2023 proxy season.
- New paragraph (v) of Item 402 of Regulation S-K mandates a new executive compensation table, along with additional narrative disclosure; however, this new disclosure is not required to be included in a company's Compensation Discussion and Analysis (CD&A) disclosure.
- Public companies will need to begin reporting a new measure of compensation called "executive compensation actually paid," which is the amount of total compensation reported in the Summary Compensation Table adjusted for certain amounts related to pension benefits and equity awards.

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- The SEC expanded the required disclosure beyond the original 2015 proposal to include additional measures of company performance.

## Background

On April 29, 2015, the SEC proposed rules to implement Section 953(a) of the Dodd-Frank Act, which were subject to a 60-day comment period that ended on July 6, 2015.**[2]** The SEC proposed to add new paragraph (v) to Item 402 of Regulation S-K, which would require a company to provide a clear description of (1) the relationship between executive compensation actually paid to the company's NEOs and the cumulative TSR of the company, and (2) the relationship between the company's TSR and the TSR of a peer group chosen by the company, over each of the company's five most recently completed fiscal years. The SEC proposed that the disclosure would be required in a new table to be included in a company's executive compensation disclosure.

In January 2022, the SEC reopened the comment period for the pay versus performance rule proposal.**[3]** In the reopening release, the SEC solicited comment on whether it should require disclosure of three other measures of performance in addition to TSR: (i) pre-tax net income; (ii) net income, and (iii) a measure specific to a particular company, chosen by the company. In addition to potentially including the company-selected measure in the proposed table, the SEC asked whether it should separately require companies to provide a list of the five most important performance measures used by the company to link compensation actually paid during the fiscal year to company performance, over the time horizon of the disclosure, in order of importance, and if the company considers fewer than five performance measures when it links compensation actually paid during the fiscal year to company performance, the company would be required to disclose only the number of measures it actually considers.

## New Item 402(v) of Regulation S-K

The amendments adopted by the SEC add new paragraph (v) to Item 402 of Regulation S-K, which requires companies to describe the relationship between the executive compensation actually paid by the company and the financial performance of the company over the time horizon of the disclosure. Item 402(v) of Regulation S-K requires disclosure of the cumulative TSR of the company (substantially as defined in Item 201(e) of Regulation S-K), the TSR of the company's peer group, the company's net income, and a measure chosen by the company and specific to the company (Company-Selected Measure) as the measures of financial performance. The final rules require that the information be presented in a tabular form as specified in the rule.

#### Location of the Disclosure

As proposed, the SEC adopted a requirement to include the new Item 402(v) of Regulation S-K disclosure in any proxy or information statement for which disclosure under Item 402 of Regulation S-K is required. Placing the pay-versus-performance information in proxy statements and information statements provides shareholders with the pay-versus-performance disclosure (along with all other executive compensation disclosures called for by Item 402 of Regulation S-K) in circumstances in which shareholder action is to be taken with regard to an election of directors or executive compensation. The SEC does not require the pay-versus-performance disclosure in other filings where disclosure under Item 402 of Regulation S-K is required, such as in registration statements filed under the Securities Act of 1933, as amended (Securities Act).

#### Form of the Disclosure

The relevant information must be presented in the following tabular format, subject to certain exceptions for smaller reporting companies:

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| Year | Summary Compensation Table Total for PEO | Compensation Actually Paid to PEO | Average Summary Compensation Table Total for Non-PEO NEOs | Average Compensation Actually Paid to Non-PEO NEOs | Value of Initial Fixed $100 Investment Based On: | | Net Income | [Company Selected Measure] |
|---|---|---|---|---|---|---|---|---|
| | | | | | Total Shareholder Return | Peer Group Total Shareholder Return | | |
| (a) | (b) | (c) | (d) | (e) | (f) | (g) | (h) | (i) |
| Y1 | | | | | | | | |
| Y2 | | | | | | | | |
| Y3 | | | | | | | | |
| Y4 | | | | | | | | |
| Y5 | | | | | | | | |

In addition, companies are required to use the information in the above table to provide clear descriptions of the relationships between compensation actually paid and three measures of financial performance, as follows: describe the relationship between (a) the executive compensation actually paid to the company's PEO and (b) the average of the executive compensation actually paid to the company's remaining NEOs to (i) the cumulative TSR of the company, (ii) the net income of the company, and (iii) the company's Company-Selected Measure, in each case over the company's five most recently completed fiscal years. Companies that do not use any financial performance measures to link executive compensation actually paid to company performance, or that only use measures already required to be disclosed in the table, would not be required to disclose a Company-Selected Measure or its relationship to executive compensation actually paid.

Companies are also required to provide a "clear" description of the relationship between the company's TSR and the TSR of a peer group chosen by the company, also over the company's five most recently completed fiscal years. Companies will have flexibility as to the format in which to present the descriptions of these relationships, whether graphical, narrative, or a combination of the two. Companies will also have flexibility to decide whether to group any of these relationship disclosures together when presenting their clear description disclosure, but any combined description of multiple relationships must be "clear." Smaller reporting companies will only be required to present such clear descriptions with respect to the measures they are required to include in the table and for their three, rather than five, most recently completed fiscal years.

The SEC notes that companies will have the flexibility to decide whether to group any of these relationship disclosures together when presenting this information, but any combined description of multiple relationships must be clear.

Companies also will be required to provide an unranked list of the most important financial performance measures used by the company to link executive compensation actually paid to the company's NEOs during the last fiscal year to company performance. While companies may include non-financial performance measures in this list, they must select the Company-Selected Measure from the financial performance measures included in this list, and it must be the financial performance measure that, in the company's assessment, represents the most important performance measure (that is not otherwise required to be disclosed in the table) used by the company to link compensation actually paid to the company's NEOs, for the most recently completed fiscal year, to company performance.

**Supplemental Disclosure**

Item 402(v) permits companies to voluntarily provide supplemental measures of compensation or financial performance (in the table or in other disclosure), and other supplemental disclosures, so long as any such measure or disclosure is clearly identified as supplemental, not misleading, and not presented with greater prominence than the required disclosure.

## Determination of Executive Compensation Actually Paid

For purposes of Item 402(v), the definition of "executive compensation actually paid" for a fiscal year is, generally, total compensation as reported in the Summary Compensation Table for that year (i) less the change in the actuarial present value of pension benefits, (ii) less the grant-date

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fair value of any stock and option awards granted during that year, (iii) plus the pension service cost for the year and, in the case of any plan amendments (or initiations), the associated prior service cost (or less any associated credit), and (iv) plus the change in fair value of outstanding and unvested stock and option awards during that year (or as of the vesting date or the date the company determines the award will not vest, if within the year) as well as the fair value of new stock and option awards granted during that year as of the end of the year (or as of the vesting date or the date the company determines the award will not vest, if within the year). Adjustments (i) and (iii) with respect to pension plans do not apply to smaller reporting companies, because they are not otherwise required to disclose executive compensation related to pension plans.

### Determination of Company Cumulative TSR and Peer Group TSR

Under Item 402(v) of Regulation S-K, a company will be required to disclose the cumulative TSR of the company, which is to be computed in accordance with the requirements set forth in Item 201(e) of Regulation S-K. Item 201(e) of Regulation S-K sets forth the specific disclosure requirements for the company's stock performance graph, which is required to be included in the annual report to security holders provided for by Rules 14a-3 and 240.14c-3 under the Securities Exchange Act of 1934, as amended (Exchange Act). Item 201(e) provides that cumulative TSR is calculated by dividing the sum of the cumulative amount of dividends for the measurement period, assuming dividend reinvestment, and the difference between the company's share price at the end and the beginning of the measurement period, by the share price at the beginning of the measurement period.

The final rules require a company to disclose weighted peer group TSR (weighted according to the respective companies' stock market capitalization at the beginning of each period for which a return is indicated), using either the same peer group used for purposes of Item 201(e) of Regulation S-K or a peer group used in the CD&A for purposes of disclosing a company's compensation benchmarking practices. If the peer group is not a published industry or line-of-business index, the identity of the companies composing the group must be disclosed in a footnote. A company that has previously disclosed the composition of the companies in its peer group in prior filings with the SEC would be permitted to comply with this requirement by incorporation by reference to those filings. Consistent with the approach specified in Item 201(e) of Regulation S-K, if a company changes the peer group used in its pay-versus-performance disclosure from the one used in the previous fiscal year, it will be required to include tabular disclosure of peer group TSR for that new peer group (for all years in the table), but must explain, in a footnote, the reason for the change, and compare the company's TSR to that of both the old and the new group.

### Data Tagging

The final rules require companies to separately tag each value disclosed in the table, block-text tag the footnote and relationship disclosure, and tag specific data points (such as quantitative amounts) within the footnote disclosures, all in Inline XBRL.

### Applicability of the New Disclosure Requirements

The final rules apply to all reporting companies except foreign private issuers, registered investment companies, and emerging growth companies (EGCs). As proposed, business development companies are treated in the same manner as companies other than registered investment companies and, therefore, are subject to the disclosure requirement of new Item 402(v) of Regulation S-K.

Smaller reporting companies are required to provide disclosure under Item 402(v) of Regulation S-K, but the disclosure is scaled for those companies, consistent with the existing scaled executive compensation disclosure requirements applicable to smaller reporting companies. Specifically, smaller reporting companies would:

- Only be required to present three, instead of five, fiscal years of disclosure under new Item 402(v) of Regulation S-K;
- Not be required to disclose amounts related to pensions for purposes of disclosing executive compensation actually paid;
- Not be required to present peer group TSR;

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- Be permitted to provide two years of data, instead of three, in the first applicable filing after the rules became effective; and
- Be required to provide disclosure in the prescribed table in Inline XBRL format beginning in the third filing in which the smaller reporting company provides pay-versus-performance disclosure.

### Compliance Dates

The new pay versus performance disclosure requirements will become effective 30 days following publication of the adopting release in the Federal Register. Companies (other than emerging growth companies, registered investment companies, or foreign private issuers, which are all exempt from the rule) will need to comply with these disclosure requirements in proxy and information statements that are required to include Item 402 executive compensation disclosure for fiscal years ending on or after December 16, 2022.

Companies (except for smaller reporting companies) will be required to provide the information for three years in the first proxy or information statement in which they provide the disclosure, adding another year of disclosure in each of the two subsequent annual proxy filings that require the Item 402(v) disclosure. Both company TSR and peer group TSR must be calculated based on a fixed investment of one hundred dollars at the measurement point.

Smaller reporting companies will initially be required to provide the information for two years, adding an additional year of disclosure in the subsequent annual proxy or information statement that requires this disclosure. In addition, a smaller reporting company will only be required to tag the information using Inline XBRL data beginning in the third filing in which it provides pay versus performance disclosure, instead of the first.

**[1]** Release No. 34-95607, Pay Versus Performance (Aug. 25, 2022), available at **https://www.sec.gov/rules/final/2022/34-95607.pdf**.

**[2]** Release No. 34-74835, Pay Versus Performance (Apr. 29, 2015), available at: **https://www.sec.gov/rules/proposed/2015/34-74835.pdf**.

**[3]** Release No. 34-94074, Reopening of Comment Period for Pay Versus Performance R (Jan. 27, 2022), available at: **https://www.sec.gov/rules/proposed/2022/34-94074.pdf**.

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SEC Update
September 9, 2022

*This is a commercial communication from Hogan Lovells. See note below.*

# SEC rule amendments require proxy disclosure of executive pay versus performance

On August 25, the SEC adopted rule amendments that require registrants to disclose, in proxy or information statements in which executive compensation disclosure is required, information showing the relationship between compensation actually paid to their named executive officers and the company's financial performance. Emerging growth companies, foreign private issuers, and registered investment companies are not subject to the new requirements, which apply in scaled form to smaller reporting companies.

Under a new paragraph (v) to Item 402 of Regulation S-K, registrants are required to disclose in a table the compensation actually paid to their named executive officers and specified financial performance measures for five fiscal years (three years in the case of smaller reporting companies), subject to a phase-in period. The tabular presentation must be accompanied by a clear description of the relationships for each fiscal year between such compensation and the financial performance measures. The registrant also must present a tabular list of the most important financial performance measures used to link such compensation to company performance for the most recently completed fiscal year.

The SEC's objective is to make pay-versus-performance information "clear and easy for investors to evaluate" in order "to facilitate investors' consideration of the alignment between pay and performance" when voting on the election of directors or approval of executive compensation or other compensation-related matters, or when making investment decisions. Although the SEC states that Item 402(v) largely requires registrants to "repackage" executive compensation information already disclosed in proxy statements, or information underlying those disclosures, rather than to produce substantial additional information, compliance with the new mandate will entail significant disclosure judgments.

The pay-versus-performance disclosure is required in filings for fiscal years ending on or after December 16, 2022, which will include 2023 proxy statements filed by registrants with a December 31 fiscal year-end.

The amendments will become effective on October 11, 2022. The SEC's lengthy release (No. 34-95607) can be viewed here and the related SEC fact sheet here.

## Overview

The rule amendments implement Exchange Act Section 14(i), which was added by a provision of the Dodd-Frank Act directing the SEC to require registrants to disclose, in any proxy or consent solicitation material for an annual meeting of shareholders, information that clearly shows the relationship between executive pay and the company's financial performance. Under the amendments, registrants are required to include the pay-versus-performance disclosure in any proxy or information statement for which executive compensation disclosure under Item 402 of Regulation S-K is required. As a result, the new disclosures will be limited to filings relating to shareholder action with respect to an election of directors or executive compensation and will not be required in other filings, such as registration statements, in which executive compensation disclosure is required.

The SEC has prescribed the major elements of the new disclosure in a standardized format to promote consistency in presentation and comparability of disclosures across registrants and within a registrant's filings over time. The requirements are primarily contained in a new paragraph (v) to Item 402 of

Regulation S-K that appears under the caption "Pay versus performance."

*Disclosures.* With some exceptions for smaller reporting companies, the registrant is required by Item 402(v) to provide the following disclosures in its proxy or information statement:

- a table presenting, for each of the last five fiscal years (subject to the phase-in periods described below):
  - — total compensation paid to the principal executive officer (PEO) and average total compensation paid to the other named executive officers (NEOs) as reported in the registrant's summary compensation table appearing as part of other executive compensation disclosures;
  - — compensation "actually paid" to the PEO and average compensation "actually paid" to the other NEOs, calculated by making specified adjustments to the amounts reflected in the summary compensation table; and
  - — specified company performance measures, consisting of (i) the registrant's cumulative total shareholder return (TSR), (ii) the TSR of its peer group, (iii) the registrant's net income, and (iv) a measure identified by the registrant as the most important financial performance measure used to link compensation actually paid to its NEOs for its most recently completed fiscal year to company performance (referred to as the "Company-Selected Measure");
- a clear description, in narrative or graphical form or a combination of such formats, of the relationships for each fiscal year covered by the table between (i) the compensation actually paid to the PEO and other NEOs as presented in the table and (ii) the financial performance measures presented in the table; and
- an unranked tabular list of at least three, and up to seven, of the most important financial performance measures, including the Company-Selected Measure, used by the registrant to link compensation actually paid to its NEOs for its most recently completed fiscal year to company performance.

The registrant is permitted to include supplemental measures of compensation or financial performance and other supplemental information in the table and as part of the other Item 402(v) disclosures, so long as the additional disclosure is clearly marked as supplemental and satisfies the "Plain English" principles summarized below.

*Scaled disclosure for smaller reporting companies.* In addition to being permitted to provide pay-versus-performance disclosure for three fiscal years, instead of five fiscal years as required for all other registrants, smaller reporting companies are not required to disclose a peer group TSR, a Company-Selected Measure, or a tabular list of the most important financial performance measures, or to disclose amounts related to pensions for purposes of disclosing NEO compensation actually paid. A smaller reporting company's description of the linkage of actual NEO pay to performance will appear in a scaled disclosure that does not refer to those measures unless the registrant includes them as supplemental information.

*Supplemental disclosure.* Registrants may provide information in addition to the information specifically required by the amendments so long as they observe the "Plain English" principles of Exchange Act Rules 13a-20 and 15d-20. The SEC construes those principles to require that the additional information:

- not be misleading;
- not obscure the required information; and
- not be presented with greater prominence than the required disclosure.

If the registrant elects to include supplemental information, the information must be clearly marked as supplemental in the applicable disclosure, such as by a heading in the table or by a reference in the narrative or graphical text.

*Format.* Except as expressly specified, Item 402(v) generally permits registrants to choose the format – whether narrative, graphical, tabular, or a combination – in which they believe they can most effectively address the pay-versus-performance relationship. In accordance with the SEC's 2006 guidance in adopting the current executive compensation rules, the disclosure design must be clear, understandable, consistent with applicable disclosure requirements and any other included information, and not misleading.

*Location.* Item 402(v) affords registrants the flexibility to determine where in the proxy or information statement to provide the required disclosure. In particular, the SEC notes that the new information is not required to appear in the Compensation Discussion and Analysis (CD&A).

*Inline XBRL tagging requirements.* The amendments require registrants to tag separately each value disclosed in the table, block-text tag the disclosure in the footnotes to the table and the relationship disclosure, and tag specific data points (such as quantitative amounts) within the footnote disclosure.

*No incorporation by reference.* Item 402(v) disclosure will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates the disclosure by reference.

*Phase-in periods.* The amendments include phase-in periods for compliance with Item 402(v). A registrant that is not a smaller reporting company is required to provide Item 402(v) disclosure for the last three fiscal years, instead of five fiscal years, in the first filing for which the disclosure is required. Item 402(v) disclosure is required for a four-year period in the subsequent year's filing and for the full five-year period in the third filing. For many registrants, the new disclosure will appear in the 2023 proxy statement for the three-year period and in the proxy statement filed in 2025 for the full five-year period.

For smaller reporting companies, the amendments prescribe Item 402(v) disclosure for the last two fiscal years instead of three fiscal years in the first filing, and require the disclosure for the full three-year period in the company's second filing. Smaller reporting companies are not required to include Inline XBRL tagging of the new disclosure until their third filing.

Newly public companies are required to provide Item 402(v) disclosure only for the years in which they have filed reports under Exchange Act Section 13(a) or 15(d).

## Summary of amendments

Item 402(v) details the requirements of each component of the pay-versus-performance disclosure.

### Pay-versus-performance table

Item 402(v) calls for compensation disclosure about the same executive officers for whom compensation disclosure, including the summary compensation table, is required under other provisions of Item 402. The new provisions require registrants to present executive compensation and performance information in the following tabular format:

| Pay versus performance | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Year (a) | Summary Compensation Table Total for PEO (b) | Compensation Actually Paid to PEO (c) | Average Summary Compensation Table Total for Non-PEO NEOs (d) | Average Compensation Actually Paid to Non-PEO NEOs (e) | Value of Initial Fixed $100 Investment Based On: | | Net Income (h) | [Company-Selected Measure] (i) |
| | | | | | Total Shareholder Return (f) | Peer Group Total Shareholder Return (g) | | |

*Executives covered.* The table will cover compensation for the PEO and the average compensation for the other named executive officers. If more than one individual served as PEO during a covered fiscal year, the registrant must include each PEO and disclose compensation for each such officer separately. The registrant also must identify the other named executive officers in a footnote to the table so that, as the SEC explains, investors can consider the effect on the average total compensation amounts of changes in the composition of such officers from year to year.

*Summary compensation table totals for PEO and other NEOs.* The new table will show for each fiscal year, as reflected in the "Total" column of the summary compensation table, (i) the total compensation amount for the PEO and (ii) the average (mean) of the total compensation amounts for the other named executive officers.

*Compensation actually paid to PEO and other NEOs.* The SEC contrasts the mandate of Exchange Act Section 14(i) implemented by Item 402(v), which is to require registrants to disclose the compensation "actually paid" to their named executive officers, with the directive elsewhere in Item 402 for registrants to disclose "compensation awarded to, earned by or paid to" the NEOs. To address Section 14(i)'s focus on actual pay, Item 402(v) requires registrants to adjust certain amounts reflected in the summary compensation table in order to arrive at amounts considered actually paid and more closely aligned with the executive's performance during the same period.

In accordance with Item 402(v), the registrant is required to adjust the amounts reflected in the summary compensation table for (i) pension benefits and (ii) equity awards.

*Pension benefits.* For pension benefits, the registrant must adjust the summary compensation table totals by:

- deducting the change in actual present value of all defined benefit and actuarial pension plans, and adding back (i) the actuarially determined service cost for services rendered by the executive during the covered fiscal year and (ii) the entire cost of benefits granted in a plan amendment (or initiation) during the covered fiscal year that are attributed by the benefit formula to services rendered in periods before the plan amendment or initiation; and
- adding to the total compensation reported in the summary compensation table above-market or preferential earnings on deferred compensation that is not tax-qualified.

*Equity awards.* The adjustments reflect compensation represented by stock and option awards as it is earned rather than upon vesting. For equity awards, the registrant must adjust the summary compensation table totals by deducting the reported equity award amounts from the total compensation reported in the table and:

- adding the year-end fair value of all equity awards granted during the covered fiscal year that are outstanding and unvested as of the end of the covered fiscal year;
- adding the amount equal to the change as of the end of the covered fiscal year (from the end of the prior fiscal year) in fair value (whether positive or negative) of any awards granted in any prior fiscal year that are outstanding and unvested as of the end of the covered fiscal year;
- adding the fair value as of the vesting date of awards that are granted and vest in the same covered fiscal year;
- adding the amount equal to the change as of the vesting date (from the end of the prior fiscal year) in fair value (whether positive or negative) of awards granted in any prior fiscal year that vest in the covered fiscal year;
- subtracting the amount equal to the fair value at the end of the prior fiscal year of awards granted in any prior fiscal year that fail to meet the applicable vesting conditions during the covered fiscal year; and
- adding the dollar value of any dividends or other earnings paid on stock or option awards in the covered fiscal year prior to the vesting date that are not otherwise included in the total compensation for the covered fiscal year.

The registrant is required to describe in footnotes to the table the amounts deducted from, and added to, the total compensation amounts reflected in the summary compensation table to calculate the compensation actually paid to the NEOs. Item 402(v) also requires footnote disclosure of any valuation assumptions with respect to equity awards that materially differ from those disclosed by the registrant at the time of grant.

*Registrant total shareholder return.* As one of the required company financial performance measures, the registrant is required to present for each fiscal year its total shareholder return calculated on a cumulative basis through the end of that fiscal year. In calculating TSR, the registrant must employ the same methodology it uses to prepare its stock

performance graph in accordance with Item 201(e) of Regulation S-K. To promote comparability with TSR presentations of other registrants, the registrant's TSR, as well as the peer group TSR, must be calculated based on an initial fixed investment of one hundred dollars.

*Peer group total shareholder return.* As an additional measure of financial performance, Item 402(v) requires the registrant to present for each fiscal year the cumulative TSR of a peer group, weighted according to the stock market capitalizations of the peer companies at the beginning of each period for which a return is indicated. The registrant must use for this measure either the same peer group it uses for its stock performance graph or the peer group it discloses in its CD&A description of its executive compensation benchmarking practices.

*Registrant net income.* Item 402(v) requires inclusion of the registrant's net income, as presented in its financial statements, for each fiscal year as a standardized financial performance measure to complement the market-based TSR measure.

*Company-Selected Measure.* Item 402(v) defines the "Company-Selected Measure" as the measure "which in the registrant's assessment represents the most important financial performance measure (that is not otherwise required to be disclosed in the table) used by the registrant to link compensation actually paid to the registrant's named executive officers, for the most recently completed fiscal year, to company performance." The registrant must identify the Company-Selected Measure from its tabular list of the "most important" financial performance measures discussed below.

If the registrant's "most important" financial performance measure is already included in the table (as TSR or net income), the registrant would be required to select its next most important measure as the Company-Selected Measure. Although the rule obligates the registrant to include only one Company-Selected Measure, it permits the registrant, consistent with the Plain English principles referred to above, to disclose in the table additional performance measures as new columns if it believes the additional measures are "important" measures.

The SEC affirms that a registrant will not be required to disclose a Company-Selected Measure if it only uses financial performance measures already required to be disclosed in the table to link NEO compensation to company performance, or if it does not use any such measures for this purpose.

The reference to "Company-Selected Measure" in the title of column (i) of the table will be replaced by the name of the registrant's most important measure. For example, if the Company-Selected Measure is determined to be total revenue, the data would appear under the title "Total Revenue."

The registrant is required to include its numerically quantifiable performance under the Company-Selected Measure for *each fiscal year* of the period covered by the table. By way of example, the SEC indicates that if the Company-Selected Measure for the most recently completed fiscal year is determined to be total revenue, the registrant would disclose its quantified total revenue performance for each covered fiscal year, not just for the most recently completed fiscal year.

The SEC notes Item 402(v) does not require the registrant to describe the methodology it used to calculate the Company-Selected Measure, but cautions that the registrant should consider whether such a disclosure would be helpful to investors or necessary to prevent the Company-Selected Measure from being confusing or misleading.

Any disclosure of a Company-Selected Measure that is a non-GAAP financial measure is entitled to the same accommodation under SEC rules as disclosure in the CD&A of a non-GAAP financial measure used as a target level of performance. Accordingly, the Item 402(v) non-GAAP disclosure would not be subject to the general rules applicable to disclosure of non-GAAP financial measures. Consistent with Instruction 5 to Item 402(b), however, the registrant would be required to disclose how a non-GAAP Company-Selected Measure is calculated from its audited financial statements.

## Description of relationships between compensation actually paid and company performance

Item 402(v) requires the registrant to use the information presented in the table to provide, over the fiscal years covered by the table, a "clear description" of the "relationships" between (i) the compensation actually paid to the PEO and the average of the compensation actually paid to the other NEOs and (ii) the registrant's TSR, its net income, and the Company-Selected Measure.

If the registrant includes any additional performance measures in the table, such as more than one Company-Selected Measure, its disclosure also must describe the relationships between executive compensation actually paid and the additional

measures. The SEC indicates that the registrant may "group" any of the relationship disclosures so long as the combined description of multiple relationships is "clear."

The registrant may present the description in narrative or graphical form or a combination of such formats. The SEC encourages registrants "to present this disclosure in the format that most clearly provides information to investors about the relationships, based on the nature of each measure and how it is associated with executive compensation actually paid." The SEC offers as two examples of potential presentations:

- a graph that shows on parallel axes executive compensation actually paid and change in the financial performance measure or measures (TSR, net income, or Company-Selected Measure) and that plots compensation and the applicable measure or measures over the required time period; and
- narrative or tabular disclosure that shows the percentage change over each fiscal year of the required time period in both executive compensation actually paid and the financial performance measure or measures, together with a brief discussion of how the changes are related.

In addition, the registrant must include as part of the relationship disclosures a comparison of (i) the registrant's TSR and (ii) the TSR of its peer group over the fiscal years covered by the table. The SEC states that the inclusion of the peer group TSR in the table and discussion of the relationship between the registrant's TSR and the peer group TSR is intended to provide a basis for assessing the registrant's pay-for-performance alignment compared to the financial performance of the registrant's peers over the same time period. The SEC adds that it expects that this disclosure also will "provide investors with more comprehensive information for assessing whether the registrant's performance was driven by factors common to its peers or instead by the registrant's own strategy and other factors."

## Tabular list of most important financial performance measures

As the final component of the pay-versus-performance disclosure, the registrant is required to provide a tabular list of at least three, and up to seven, financial performance measures which the registrant believes represented the "most important" such measures it used to link compensation actually paid to its named executive officers to company performance for its most recently completed fiscal year. The SEC notes that this disclosure is intended to supplement information in the registrant's CD&A, which, although required to address "all material elements of the compensation paid," is not subject to mandatory disclosure of the measures that determined actual NEO pay.

The SEC confirms that registrants that do not use any financial performance measures to link NEO compensation actually paid to company performance are not required to present such a list.

*Number of tabular lists.* Item 402(v) states that the registrant may provide the tabular list disclosure as:

- one separate tabular list;
- two separate tabular lists, one for the PEO and one for all other named executive officers; or
- separate tabular lists for the PEO and for each other named executive officer.

Each list must include at least three, and up to seven, of the most important financial performance measures used to link compensation actually paid to the particular NEO or NEOs to company performance.

*No ranking of performance measures.* Item 402(v) does not require the registrant to rank the measures included in the list.

*Number of performance measures listed.* The registrant may include in the list fewer than three financial performance measures if fewer than three such measures were linked to compensation actually paid to its named executive officers, but in such an event must include all financial performance measures used.

The list may include a maximum of seven performance measures even if the registrant elects to include non-financial performance measures in the list, as discussed below.

*Nature of performance measures listed.* Although the only required disclosures in the list are financial performance measures, Item 402(v) provides flexibility for the registrant also to include performance measures that do not fall within the definition of "financial performance measures." The Item defines financial performance measures to refer to:

- measures that are determined and presented in accordance with the accounting principles used in preparing the registrant's financial statements;
- any measures that are derived wholly or in part from the above measures;
- stock price; and

- total shareholder return.

The registrant may include non-financial performance measures in the list if it (i) determines that those measures are among its most important performance measures and (ii) has disclosed its three most important financial performance measures (or fewer than three, if the registrant uses fewer than three such measures).

*Methodology.* The registrant is not required to discuss the methodology it used to calculate the measures included in the list, although the SEC indicates that the registrant should consider doing so if such a discussion would help investors understand the measures or would be necessary to prevent the tabular list disclosure from being confusing or misleading.

## Looking ahead

The SEC adopted the rule amendments over the dissenting votes of two Commissioners and after a seven-year rulemaking process that generated a heavy volume of comments on the proposal. The final amendments are more expansive than many had predicted early in the process.

The SEC had discretionary authority to craft the new requirements within the mandate of Exchange Act Section 14(i). In exercising this authority, the SEC, as it acknowledges, "elected not to pursue a principles-based approach," but instead chose to adopt a number of standardized, prescriptive disclosure elements. The SEC judges that this approach, which attracted critical comment from one of the dissenting Commissioners, will make the Item 402(v) disclosures "significantly more comparable" across time periods and registrants than CD&A disclosures, and will enhance the ability of investors and others to evaluate the pay-versus-performance linkage.

The SEC recognizes that Item 402(v)'s disclosure framework might not present a complete picture of the relationship between executive pay and financial performance in the registrant's particular circumstances. Item 402(v) provides flexibility for the registrant to present a fuller account of this relationship by adding performance measures and other supplemental information to the mandated disclosures. Although the SEC concedes that this accommodation "does not provide registrants with the full flexibility of a principles-based approach," it should elicit additional disclosures that will provide a surer guide to the alignment of pay and performance.

Important disclosure-related decisions and actions required to implement the amendments warrant early attention by registrants as the 2023 proxy season draws closer. Among other actions, registrants should identify the personnel and resources that will be enlisted to comply with the new requirements; compile pay-versus-performance information from existing disclosures; compute adjustments to pension benefits and equity award values required to produce the actual pay amounts reflected in the new table; and identify the most important financial performance measures that will be presented in the disclosure. Further, in addressing the centerpiece of Item 402(v) disclosure, registrants will have to develop their description of the linkage between actual NEO pay and company outcomes and consider how the new presentation will relate to disclosures addressing pay and performance presented in the CD&A and elsewhere in the proxy statement.

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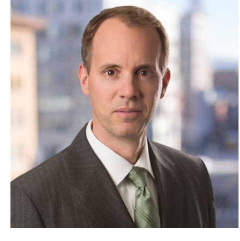

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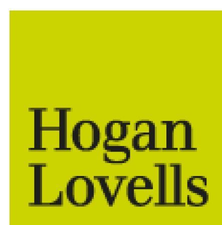

# You want what back? Key takeaways from DOJ on compensation clawbacks and compliance programs

04 December 2022

**On September 15, 2022, Deputy Attorney General Lisa Monaco released a memorandum titled "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group," known colloquially as the Monaco memo. Among other policy changes, DAG Monaco announced in particular that DOJ would be evaluating companies' compliance programs to see whether they use positive and negative compensation incentives to create a compliance culture.**

As the Monaco memo puts it, employee compensation clawbacks can be an important part of a compliance program:

> Corporations can best deter misconduct if they make clear that all individuals who engage in or contribute to criminal misconduct will be held personally accountable. In assessing a compliance program, prosecutors should consider whether the corporation's compensation agreements, arrangements, and packages (the "compensation systems") incorporate elements - such as compensation clawback provisions - that enable penalties to be levied against current or former employees, executives, or directors whose direct or supervisory actions or omissions contributed to criminal conduct. Since misconduct is often discovered after it has occurred, prosecutors should examine whether compensation systems are crafted in a way that allows for retroactive discipline, including through the use of clawback measures, partial escrowing of compensation, or equivalent arrangements.

The Monaco memo continues by advising prosecutors to look at how a company puts its compliance-related compensation policies into practice. Prosecutors should determine whether the policies have been put into effect: "If a corporation has included clawback provisions in its compensation agreements, prosecutors should consider whether, following the corporation's discovery of misconduct, a corporation has, to the extent possible, taken affirmative steps to execute on such agreements and clawback compensation previously paid to current or former executives whose actions or omissions resulted in, or contributed to, the criminal conduct at issue."

But clawbacks may be much more difficult to put into practice. During ACI's 39th International Conference on the FCPA last week, various speakers from the Department of Justice were asked about this specific change in policy and how companies could take steps to integrate this into their compliance programs. The speakers did not outline a one-size-fits-all approach, but they acknowledged jurisdictional challenges in countries with employee-friendly laws that might prohibit such compensation clawbacks. They elaborated that this is just one of the new changes announced, which was designed to provide companies with an additional way to disincentivize unethical behavior.

Panelists and attendees raised concerns that some jurisdictions would not permit such compensation clawback policies under their legal systems. Other panelists raised practical considerations, such as how a company would be expected to retrieve these funds paid to terminated individuals. In some cases, litigation abroad might be the only forum to recoup such payments – and at that point, the cost and delay might outweigh the benefit of potential remediation credit. Speakers from the DOJ acknowledged that the Department was aware of these challenges. The DOJ speakers stated that the Department is working with a group of practitioners, including the defense bar, to roll out additional guidance regarding compensation clawbacks in the near term.

In a similar vein, compensation programs incentivizing and rewarding positive compliance behavior are also being taken into consideration by the DOJ. The Monaco memo posits:

> Prosecutors should therefore also consider whether a corporation's compensation systems provide affirmative incentives for compliance-promoting behavior. Affirmative incentives include, for example, the use of compliance metrics and benchmarks in compensation calculations and the use of performance reviews that measure and reward compliance-promoting behavior, both as to the employee and any subordinates whom they supervise. When effectively implemented, such provisions incentivize executives and employees to engage in and promote compliant behavior and emphasize the corporation's commitment to its compliance programs and its culture.

Such positive incentives, although appearing noncontroversial at face value, are not without dissent in the compliance community. As one compliance expert has noted, ethical behavior by employees should be a baseline expectation, not the basis for a bonus, spot award, or pay increase. Suffice it to say, DOJ's proposed compensation-based incentives and penalties need some additional thought and analysis.

Authored by Stephanie Yonekura, Peter Spivack, and Carina Tenaglia

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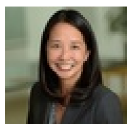

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October 27, 2022

# SEC RELEASES FINAL CLAWBACK RULES

To Our Clients and Friends:

On October 26, 2022, the Securities and Exchange Commission ("SEC" or "Commission"), in a 3-to-2 vote, adopted final rules that will require listed companies to implement policies for recovery (*i.e.*, "clawback") of erroneously awarded incentive compensation, implementing Section 10D of the Securities Exchange Act, which was added by Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[1] The SEC originally proposed clawback rules on July 14, 2015,[2] but the proposed rules remained dormant until October 14, 2021, when the SEC reopened the comment period[3] (and which was reopened for a second time on June 8, 2022).[4] The final rules add new Exchange Act Rule 10D-1 ("Rule 10D-1"), which largely tracks the long-pending proposed rules but also incorporate terms previewed in the 2021 release reopening the comment period.

Rule 10D-1 directs the national securities exchanges to establish listing standards that require issuers to adopt and comply with written clawback policies meeting strict conditions:

- The clawback policy must provide that, in the event the company is required to prepare an accounting restatement due to the material noncompliance of the company with any financial reporting requirement under the federal securities laws, the company will recover (on a pre-tax basis) the amount of incentive-based compensation received by its current and former executive officers in excess of the amount of incentive-based compensation that would have been received had it been determined based on the restated amount, subject to limited exceptions.

- Compensation recoupment is required regardless of whether the executive officer engaged in any misconduct and regardless of fault.

- The policy must apply to compensation "received"—which is defined as occurring when the financial reporting measure was attained regardless of when payment is actually made—during the three-year "recovery period" preceding the date the company is required to prepare the accounting restatement (the three-year period was mandated by the Dodd-Frank Act).

- The clawback policy must apply both to material accounting errors that require a restatement of prior years' financial results (commonly known as "Big R" restatements), *as well as* to errors that are corrected in the current year's results (commonly known as "little r" restatements).

In addition, the final rules require companies to file a copy of their policy as an exhibit to their Form 10-K, 20-F, 40-F or N-CSR, as applicable, and to publicly disclose how they have applied the policy whenever they experience a restatement. Rule 10D-1 also requires that issuers add two checkboxes to the cover page of their 10-Ks (or 20-Fs or 40-Fs): one checkbox to indicate whether the financial

statements included in the filing reflect the correction of an error to previously issued financial statements, and one to indicate whether any of the error corrections require a recovery analysis under the company's Rule 10D-1 clawback policy.

Almost all issuers are subject to the clawback rules, including those companies that are otherwise excluded from other SEC disclosure requirements related to executive compensation. A company would be subject to delisting if it does not adopt and comply with an exchange-compliant clawback policy.

The final rules release is available here and a Fact Sheet (*Recovery of Erroneously Awarded Compensation*) is available here. Set forth below is a summary of the final rules and considerations for companies.

**When the Rules Take Effect**

Each exchange will be required to propose rules or rule amendments consistent with Rule 10D-1 no later than 90 days following the date of the publication of the rules in the Federal Register. The listing standards must be effective no later than one year following the final rules publication date. Each company subject to such listing standards must adopt a compliant recovery policy no later than 60 days following the date on which the applicable listing standards become effective. The mandated clawback policies must apply to any incentive-based compensation that is received by current or former executive officers on or after the effective date of the applicable listing standard (which is a modification from the proposed rules). Compliance with the disclosure requirements is required in the first annual report or proxy or information statement required to be filed after the effective date of the new listing standards.

**Summary of the Final Rules**

All listed companies are covered by the rule, including foreign private issuers, emerging growth companies, smaller reporting companies, controlled companies and companies with only listed debt securities, but certain registered investment companies are excluded to the extent they have not provided incentive-based compensation to any current or former executive officer of the fund in the last three fiscal years.

There are five key components of the final rules:

1. *Covered individuals*. Current and former "executive officers" are subject to clawback of incentive-based compensation. "Executive officer" includes the company's president, principal financial officer, principal accounting officer, any vice president in charge of a principal business unit, division or function, and any other person who performs policymaking functions for the company and otherwise conforms to the full scope of the Exchange Act Section 16 definition. In a change from the proposed rules, the final rules will only require recovery of incentive-based compensation received by a person (i) after beginning service as an executive officer and (ii) if that person served as an executive officer at any time during the recovery period. Recovery of compensation received prior to becoming an executive officer will not be required, although compensation received during the recovery period by former executive officers is covered.

2. *Restatements that trigger application of clawback policy*. In a change from the proposed rules, the final rules require recoupment of erroneously awarded compensation (i) when the company is required to prepare an accounting restatement that corrects an error in previously issued financial statements that is material to the previously issued financial statements (commonly referred to as "Big R" restatement) and (ii) when the company is required to prepare an accounting restatement that corrects an error that is not material to previously issued financial statements, but that would result in a material misstatement if (A) the error was left uncorrected in the current report or (B) the error correction was recognized in the current period (commonly referred to as "little r" restatements). Application of the recovery policy would not be triggered by an "out-of-period adjustment" – a situation where the error is immaterial to the previously issued financial statements and the correction of the error is also immaterial to the current period. The recovery policy also would not be triggered by changes to prior period financial statements that do not arise due to error corrections, such as retrospective revisions to financial statements due to changes in accounting principles or segments.The Commission rejected a bright-light standard for determining when the recovery period begins, reasoning that doing so might incentivize companies to delay a restatement determination in order to manipulate the recovery date. Therefore, the final rules state that the recovery period runs from the earlier of: (i) the date the company's board of directors, committee of the board, or the officer or officers of the company authorized to take such action, concludes, or *reasonably should have concluded*, that the company is required to prepare an accounting statement due to the material noncompliance with any financial reporting requirement under the securities laws; or (ii) the date a court, regulator, or other legally authorized body directs the company to prepare an accounting restatement. The SEC stated in its October 14, 2021 Notice when it reopened the comment period: "For errors that are material to the previously issued financial statements, we generally expect the date . . . to coincide with the date disclosed in the Item 4.02(a) Form 8-K filed."

3. *Definition of incentive compensation and when it is "received."* "Incentive-based compensation" is any compensation (including cash and equity) granted, earned or vested based in whole or in part on the attainment of a "financial reporting measure." "Financial reporting measures" are measures that are determined and presented in accordance with the accounting principles used in preparing the company's financial statements, and any measures derived in whole or in part from such measures, as well as stock price and total shareholder return ("TSR"). A financial reporting measure is subject to the rule even if it is not actually presented in the company's financial statements or included in an SEC filing.

   Incentive-based compensation does not include compensation that is based *solely* on continued employment for a specified period of time (*e.g.*, time-vesting awards, including time-vesting stock options), unless such awards were granted or vested based in whole or in part on a financial reporting measure. Incentive-based compensation also does not include base salary (however, in the preamble to the proposed rule the SEC indicated that if the executive officer receives a salary increase earned wholly or in part based upon the attainment of a financial reporting measure, such increase would be subject to recovery), compensation awarded solely at the board's discretion, or compensation awarded upon the achievement of subjective, strategic or operational measures that are not financial reporting measures (such as the

achievement of ESG goals).The Dodd-Frank Act specified that the compensation subject to clawback is that which was received by the executive during a recovery period that is defined as "the three-year period preceding the date on which the issuer is required to prepare an accounting restatement." The final rules provide that incentive-based compensation is "received," and thus subject to clawback, in the fiscal period during which the applicable financial reporting measure is attained, even if the payment or grant occurs after the end of that period. In other words, the date of "receipt" of such compensation is tied to the satisfaction of the financial reporting measure goal, irrespective of applicable vesting, grant or payment dates. An award subject to both time- and performance-based vesting conditions is considered received upon satisfaction of the performance metric even if the award continues to be subject to time-based vesting criteria.

4. *Calculating the amount of clawback*. The amount required to be recouped is the amount of incentive-based compensation received by the executive in excess of what would have been received if the incentive-based compensation was determined based on the restated financial statements. To the extent the incentive-based compensation was based on stock price or TSR, such excess amount must be based on a reasonable estimate of the effect of the accounting restatement on the applicable measure. The company must maintain documentation of the determination of that reasonable estimate and provide it to the relevant exchange. In all cases, the calculation of erroneously awarded compensation would be calculated on a pre-tax basis. As discussed below, companies are required to disclose in their Form 10-K, 20-F, 40-F or N-CSR, as applicable, and proxy statement information on their calculation of the amount subject to clawback.

5. *Minimal discretion regarding recovery and its enforcement*. The rules require a company to recover erroneously awarded compensation in compliance with its recovery policy subject to limited exceptions. Recovery is not required only if the company's board or compensation committee has determined that recovery is impracticable for one of three reasons: (1) because the direct expenses paid to third parties to assist in enforcing the policy would exceed the amount to be recovered and the company has made a reasonable attempt to recover; (2) in the case of a foreign private issuer, because pursuing such recovery would violate home country law in effect prior to publication of the final rules in the Federal Register and where the company provides an opinion of counsel to that effect to the exchange; or (3) because recovery would likely cause an otherwise tax-qualified retirement plan to fail to meet the requirements of the Internal Revenue Code.[5] Clawback must be evaluated on a "no fault" basis – *e.*, without regard to whether any misconduct occurred or whether an executive bears responsibility. Executives may not be indemnified for the clawback, nor may companies pay premiums on an insurance policy that would cover an executive's potential clawback obligations. The rules require that companies pursue recovery "reasonably promptly," which suggests that boards may not allow covered executives to repay any clawed back amount in installments under a payment plan of any extended duration, barring any unreasonable economic hardship to the executive. In addition, under the new disclosure requirements (addressed further below), any amount subject to clawback from a current or former named executive officer but unpaid after 180 days must be disclosed.

**New Disclosure Requirements**

There are three key new disclosure requirements tied to the clawback rules:

1. *Clawback Policy Exhibit Requirement*. Each listed company must file its clawback policy as an exhibit to its annual report on Form 10-K, 20-F, 40-F or N-CSR, as applicable.

2. *New Item 402 disclosures*. Item 402 of Regulation S-K was amended to require companies to disclose how they have applied their recovery policies. If, during its last completed fiscal year, the company either completed a restatement that required recovery, or there was an outstanding balance of excess incentive-based compensation relating to a prior restatement, the company must disclose the following information for each restatement in any Form 10-K or proxy or information statements that includes executive compensation disclosure:

    (i) the date on which the company was required to prepare each accounting restatement and the aggregate dollar amount of excess incentive-based compensation attributable to the restatement, *including an analysis of how the recoverable amount was calculated* (an expansion of the proposed rules), or if the clawback amount has not been determined yet, an explanation of the reasons why it has not, and subsequent disclosure in the next filing that is subject to Item 402 of Regulation S-K;

    (ii) if the compensation is related to a stock price or TSR metric, the estimates used to determine the amount of erroneously awarded compensation attributable to such accounting restatement and an explanation of the methodology used for such estimates;

    (iii) the aggregate dollar amount of excess incentive-based compensation that remained outstanding at the end of the company's last completed fiscal year;

    (iv) where a company is invoking an impracticability exception, for each current and former named executive officer and for all other current and former executive officers as a group, the amount of recovery forgone and a brief description of the reason the listed registrant decided in each case not to pursue recovery, as well as (to the extent applicable to the invoked impracticability exception) a brief explanation of the types of direct expenses paid to a third party to assist in enforcing the recovery policy, identification of the provision of foreign law the recovery policy would violate, or how the recovery policy would cause an otherwise tax-qualified retirement plan to fail to meet the requirements of the Internal Revenue Code; and

    (iv) for each current and former named executive officer, the amounts of incentive-based compensation that are subject to a clawback but remain outstanding for more than 180 days since the date the company determined the amount owed.

The final rules also add a new instruction to the Summary Compensation Table to require that any amounts recovered pursuant to a company's compensation recovery policy reduce the amount reported

in the applicable column, as well as the "total" column" for the fiscal year in which the amount recovered initially was reported, with the clawback identified by footnote.

The final rules require information mirroring the above Item 402 disclosures to be included in annual reports on Form N-CSR and in proxy statements and information statements relating to the election of directors; on Form 20-F or, if the foreign private issuer elects to use the registration and reporting forms that U.S. issuers use, on Form 10-K; and on Form 40-F.

3. *New check boxes on cover pages of Forms 10-K, 20-F and 40-F*. In addition, and according to the SEC, "to assure that issuers listed on different exchanges are subject to the same disclosure requirements regarding erroneously awarded compensation recovery policies," companies must indicate by check boxes on their annual reports whether the financial statements included in the filings reflect a correction of an error to previously issued financial statements and whether any such corrections are restatements that required a recovery analysis.

**Observations and Considerations for Companies**

Companies do not need to adopt a Rule 10D-1 clawback policy until after the stock exchanges' listing standards implementing Rule 10D-1 are proposed, adopted and become effective. Nevertheless, there are important steps that companies should be taking before that time to prepare for the new rules:

1. *Prepare for Implementation*. The new listing standards will require companies to adopt "and comply" with their Rule 10D-1 clawback policies. In addition, the clawback policy needs to apply to any incentive compensation "received" on or after the effective date of the new listing standards, even if that compensation was received pursuant to an award granted before adoption of the company's Rule 10D-1 clawback policy. Therefore, to the extent they have not done so already, companies should be adding a term to their existing incentive compensation plans or award agreements and taking any other appropriate measures to enhance the enforceability of their Rule 10D-1 clawback policy once it is adopted.

2. *Evaluate Incentive Compensation Arrangements*. Companies should evaluate their existing compensation arrangements to assess which have any element that relates to a "financial performance measure" as defined under the SEC rules. At the same time, companies may wish to evaluate whether to modify or clarify the operation of arrangements that have financial performance measure elements. For example, companies with a legacy Section 162(m) bonus pool that is based on a financial performance measure, but under which actual payments are discretionary or based on other criteria, may wish to eliminate the performance-based funding of the bonus pool component. The clawback rules may also accelerate the trend toward the use of non-financial, strategic and ESG-related performance criteria in incentive compensation arrangements.

3. *Interaction with Existing Clawback Policies*. Companies will need to determine whether to integrate the Rule 10D-1 clawback policy with their existing policies, replace their existing policies, or adopt the Rule 10D-1 policy on a stand-alone basis. Various aspects of the Rule 10D-1 clawback requirements go beyond what companies typically have adopted to date, including

the mandatory nature of the clawback, the timing and length of the recovery period and the no-fault standard. At the same time, many company policies cover triggering events beyond financial restatements, may cover a larger population, and may apply to broader categories of compensation. Given the differences, companies may find it easier to adopt a stand-alone Rule 10D-1 clawback policy, and simply modify their existing clawback policies to clarify that they apply only to the extent that the Rule 10D-1 clawback policy does not. As noted above, the new rules require attaching the clawback policy as an exhibit to the annual report, so it is advisable to review the policy in light of that anticipated public disclosure.

4. *Enhance Documentation Around Compensation Committee Determinations*. Going forward, it will be more important than ever to have clear documentation around the extent to which financial performance measures affect decisions regarding granting, vesting and settlement/payout of each element of executives' compensation. To the extent that a compensation committee is exercising discretion, particularly if awarding compensation without regard to financial results, those decisions should be documented. Finally, it will be important to enhance internal and disclosure controls so that the implications of any restatement, including a "little r" restatement, can be taken into account.

The Rule 10D-1 clawback rules are designed to enhance an environment promoting compliance with applicable accounting rules. However, their application on a no-fault basis means that executives could be subject to compensation clawbacks based on inadvertent failures to satisfy complex accounting standards. It will be important to assess whether that possibility will lead to inadvertent consequences, such as a move away from financial performance measures in compensation arrangements or the loss of talented executives who feel unfairly penalized under a clawback claim that they intend to contest.

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[1] Pub. L. No. 111-203, 124 Stat. 1900 (2010).

[2] Listing Standards for Recovery of Erroneously Awarded Compensation, Exchange Act Release No. 34-75432 (July 14, 2015), available here.

[3] Reopening of Comment Period for Listing Standards for Recovery of Erroneously Awarded Compensation, Exchange Act Release No. 34-93311 (Oct. 14, 2021), available here.

[4] Reopening of Comment Period for Listing Standards for Recovery of Erroneously Awarded Compensation, Exchange Act Release No. 34-95057 (June 8, 2022), available here, which sought review and comment on the memo prepared by the staff of the SEC's Division of Economic and Risk Analysis, available here.

[5] With respect to this exception, Rule 10D-1(b)(1)(iv)(C) provides: "Recovery would likely cause an otherwise tax-qualified retirement plan, under which benefits are broadly available to employees of the registrant, to fail to meet the requirements of 26 U.S.C. 401(a)(13) or 26 U.S.C. 411(a) and regulations thereunder."

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**December 5, 2022**

## Shareholder Proposals: Disclose the Proponent, or Face Glass Lewis Scorn

I blogged a few weeks ago about Glass Lewis's 2023 policy guidelines. In addition to updating policies for various geographic markets, Glass Lewis has also issued an update on how it will approach ESG resolutions, in recognition of the fact that shareholder engagement is an important aspect of proxy season. And in many markets, the proposals are binding!

The policy reconfirms Glass Lewis's general approach to shareholder proposals:

> Glass Lewis evaluates all shareholder proposals on a case-by-case basis. However, we generally recommend shareholders support proposals on certain issues such as those calling for the elimination or prior shareholder approval of antitakeover devices such as poison pills and classified boards. Additionally, we generally recommend shareholders support proposals that are likely to increase or protect shareholder value, those that promote the furtherance of shareholder rights, those that promote director accountability and those that seek to improve compensation practices, especially those promoting a closer link between compensation and performance as well as those that promote more and better disclosure of relevant risk factors where such disclosure is lacking or inadequate.

Here's a big update for 2023 that applies to ALL shareholder proposals. We've blogged about whether companies should consider disclosing shareholder proponents in the proxy statement in light of the rise of "anti-ESG" proposals. Glass Lewis has come out with a strong "yes":

> **Disclosure of Shareholder Proponents:** We have included a new discussion regarding our approach to disclosure of shareholder proponents at U.S. companies. Given the growing number of and focus on shareholder-submitted proposals, we believe that companies should provide clear disclosure in their proxy statements concerning the identity of the proponent (or lead proponent if multiple proponents have submitted a proposal) of any shareholder resolutions that may be going to a vote. If such disclosure is not provided, we will generally recommend voting against the governance committee chair.

Other updates included in the 42-page ESG policies include:

> **Board Accountability for Climate Related Issues:** Similar to ISS, Glass Lewis may recommend voting against "responsible directors" at companies whose own GHG emissions represent a financially material risk if they don't provide thorough climate-related disclosures in line with TCFD and have explicit and clearly defined oversight responsibilities for climate-related issues. This includes (but is not limited to) companies identified by Climate Action 100+.
>
> **Racial Equity Audits:** Glass Lewis has codified its approach to proposals requesting that companies undertake racial equity or civil rights audits. When analyzing these resolutions, Glass Lewis will assess: (i) the nature of the company's operations; (ii) the level of disclosure provided by the company and its peers on its internal and external stakeholder impacts and the steps it is taking to mitigate any attendant risks; and (iii) any relevant controversies, fines, or lawsuits. After

taking into account these company-specific factors, we will generally recommend in favor of well-crafted proposals requesting that companies undertake a racial or civil rights-related audit when we believe that doing so could help the target company identify and mitigate potentially significant risks.

Note, ISS will also vote case-by-case on these proposals – it made a tweak to its voting policy for 2023 to consider as one factor whether the company adequately discloses workforce D&I metrics & goals. According to ISS, this allows investors to make quantitative assessments of progress. ISS removed the factor that referred to alignment with market norms, because in practice, it wasn't an analysis driver for this type of proposal.

**Retirement Benefits & Severance:** We've blogged about these shareholder proposals on CompensationStandards.com. Glass Lewis updated its guidelines to reflect that it may recommend shareholders vote against these proposals where companies have adopted policies to seek shareholder approval for any cash severance payments exceeding 2.99x the sum of an executives' salary & bonus.

– **Liz Dunshee**

Posted by Liz Dunshee
Permalink: https://www.thecorporatecounsel.net/member/blogs/proxy/2022/12/shareholder-proposals-disclose-the-proponent-or-face-glass-lewis-scorn.html

**November 16, 2022**

## Shareholder Proposals: Labor & Workforce Equity Trends

When it comes to shareholder proposals on "workforce" topics, this recent analysis from ISS Corporate Solutions shows that proponents are continuing to focus on disclosure of DEI data – but that isn't the only request that companies should prepare for. Proposals in 2022 addressed:

> – Harassment (including sexual harassment)
>
> – Discrimination
>
> – Diversity, equity and inclusion (DE&I)
>
> – Arbitration
>
> – Concealment clauses
>
> – Paid sick leave
>
> – Gender and racial pay gap disclosure

ISS Corporate Solutions found that out of 76 proposals so far this year, about half have been withdrawn, which signals some sort of settlement – mostly on providing DEI data. Here's more detail about the 28 that ended up going to a vote:

> Of the 28 proposals that were voted upon, seven received majority support and nine more received significant minority support, defined as at least 30 percent of votes cast. Of those that passed, four requested a report on concealment and arbitration clauses: at Apple, solar company SunRun, Twitter and IBM. The proposal at SunRun was supported by the board and management, leading to support by 98.2 percent of votes cast FOR and AGAINST.
>
> Average support for all types of employment issues-related proposals reached 37.4% of votes cast FOR and AGAINST. At five companies where proposals did not fare well, voting is controlled by either family trusts or groups of founders, including Alphabet (Google) and Meta Platforms (Facebook). In two of these cases, omitting controlled votes would have led to majority support for the proposals.

The blog goes on to note that proposals requesting reports on gender and/or racial pay gaps, EEO-1 data, and effectiveness of corporate DEI efforts received high levels of support, either passing or nearly passing.

– **Liz Dunshee**

Posted by Liz Dunshee
Permalink: https://www.thecorporatecounsel.net/member/blogs/proxy/2022/11/shareholder-proposals-labor-workforce-equity-trends.html

← My New Role Here | Main | Transcripts: "Special Session: Tackling Your Pay Vs. Performance Disclosures" →

**December 6, 2022**

## ESG Metrics: 5 Actions for Boards

This 32-page report from Southlea Group (which is a Canadian executive compensation consulting firm owned by the same group as Farient Advisors) says that ESG metrics are starting to evidence "staying power" globally – even though there's been some back & forth on whether they are actually valuable.

For the US, the report looks at the S&P 100. It offers this prediction on the direction of ESG metrics (also see this recent report from The Conference Board, ESGauge & Semler Brossy):

> Companies will continue to move toward better-defined and articulated alignment between stakeholder and shareholder value. That is, the focus on "value" will overcome a focus on "values."

The report is useful because (among other things) it shows the stages of incorporating ESG metrics into an executive compensation program, excerpts policies on this topic from select global institutional investors, and shows examples from specific companies of qualitative & quantitative metrics. Page 30 offers these action items for boards to consider:

> 1. Ask the right questions (see sidebar)
>
> 2. Identify measures that are derived from the strategy and can move the needle on sustainable performance
>
> 3. Consider the use of stakeholder measures not only in short-term but also in long-term incentive plans
>
> 4. Take a broad perspective in considering the use of stakeholder measures, e.g., use of measures inside as well as outside of incentives, alignment up and down the organization, messaging in all types of company communications (internally and externally), impact on culture, and comparisons with peer and most-admired companies
>
> 5. Review board governance of stakeholder matters to provide effective oversight. Ensure that governance responsibilities are assigned and overlapping, as needed, to avoid gaps or lapses in oversight

As these action items suggest, the decision of whether – and how – to incorporate ESG metrics is challenging and company-specific. I've blogged about common pitfalls specific to DEI metrics, which are the most common non-financial metrics for most companies right now. This Forbes article from McDermott's Michael Peregrine analyzes the risks of incorporating ESG metrics – including:

> – Investor skepticism
>
> – Data controls
>
> – Untested payout levels
>
> – Etra work

– Communication challenges

– The politicization of ESG

– Unreliability of ESG ratings

Visit our "Sustainability Metrics" Practice Area for more guidance on this topic.

– **Liz Dunshee**

Posted by Liz Dunshee
Permalink: https://www.compensationstandards.com/member/blogs/consultant/2022/12/esg-metrics-5-actions-for-boards.html

**February 14, 2022**

## ESG Scores: Proxy Advisor Updates

Lawrence blogged last week on PracticalESG.com about Glass Lewis’s new proprietary ESG scores & data, which will be featured in their proxy paper research reports via a dedicated ESG Profile page. The ESG Profile:

> Provides a snapshot view of key topics such as companies’ emission reduction initiatives and the disclosures they provide concerning their environmental and social risks and performance. The data is collected near a public company’s annual general meeting date, providing institutional investors the timeliest data of its kind in the marketplace.
>
> Updated proposal specific ESG data is provided to shareholders and to public companies in advance of their annual general meeting allowing for voting decisions and engagement to occur with timely data and research specific to agenda items.

In addition, ISS ESG (the responsible investment arm of ISS) announced last week that it is adding new factors to its Governance QualityScore – Diversity, Equity & Inclusion; CEO Pay Benchmarking; and Climate. Consistent with the ISS benchmark voting policy updates, QualityScore will now also count deficiencies in board climate accountability as a material governance failure.

Here’s more info on the new factors:

> With regard to DE&I, methodology updates include consideration of voluntary public disclosure by companies of U.S. Equal Employment Opportunity Commission data to supplement an existing factor on executive gender diversity and introduce a new factor on executive ethnic diversity to provide insight into companies’ diversity efforts at the senior management level. Other DE&I factors in today’s release assess board and executive diversity policies, statements, and targets in addition to considering aggregated–rather than individual–board and executive corporate diversity disclosures as well as support levels for diversity-related shareholder proposals.
>
> New CEO Pay Benchmarking factors include the CEO Pay Ratio, the percentage of CEO performance-conditioned equity by value, and the ISS Financial Performance Assessment (FPA) figure, which is part of the ISS Pay-For-Performance proxy voting Benchmark Policy and based on the principles of Economic Value Added (EVA).
>
> New factors assessing the level of disclosure of climate-related performance metrics in short- or long-term executive compensation plans and the level of voting support for climate-related shareholder proposals will provide screening capabilities for Environmental, Social and Governance (ESG) investors focused on climate.
>
> All new factors introduced with this update will not be scored until the fourth quarter or 2023.
>
> Recognizing the growing importance to investors that corporate governance plays in overseeing and managing environmental and social risks, Governance QualityScore will also introduce two new subcategories to be housed within the Audit & Risk Oversight category: Environmental and

> Social Risk Management and Environmental and Social Risk Oversight. The existing "Diversity and Inclusion" subcategory will be re-named to "Diversity, Equity, and Inclusion."

ISS ESG is also expanding parts of its existing factors to additional global markets. And, it will be taking a closer look at whether directors have "information security" expertise as part of the data privacy factor that it announced last spring.

– **Liz Dunshee**

Posted by Liz Dunshee
Permalink: https://www.thecorporatecounsel.net/member/blogs/proxy/2022/02/esg-scores-proxy-advisor-updates.html

**May 18, 2022**

## ESG Disclosures Continues to Proliferate

According to ISS Corporate Solutions, the peak of the 2022 U.S. corporate annual meeting season will occur tomorrow, Thursday May 19th, with 119 annual meetings scheduled. May is always the busiest month of the traditional proxy season, with almost 40% of the Russell 3000 holding their Annual Meeting of Shareholders at some point during the month. For example, today, May 18th, there are 115 annual meetings slated to take place, so its going to be a busy week.

This certainly is reflected in my work schedule over the past couple of months, as March and the first part of April was an especially busy time for drafting and reviewing the executive compensation sections of proxy statements. Things have quieted down somewhat recently as we work on the disclosures for companies with end of March fiscal year ends, but it will begin to pick up again in a few weeks as we reach mid-year and the companies with end of June fiscal year ends begin to prepare for their annual meetings this fall.

With that as the backdrop, I have been continuing to leaf through the proxy statements filed this spring and have seen a real increase in environmental, social, and governance ("ESG") disclosure – in both proxy statements generally and in Compensation Discussion and Analyses. Let me give you a couple of examples.

Werner Enterprises, Inc. filed its definitive proxy statement at the beginning of April and for the second consecutive year included an extensive Proxy Summary in its materials. What's most notable is that, along with the customary sections summarizing its business and executive compensation highlights, it also devotes an entire section to ESG:

> At Werner, we are proud of the strong foundation of driving greater sustainability and inclusion throughout the over 65 years of our organization. As an award-winning EPA SmartWay Transportation Partner, Werner eliminated over 300 million gallons in fuel consumption, improved fuel efficiency by over 29% and reduced over 3.3 million tons of $CO_2$ since 2007. Werner is proud of its highly-skilled and safety-conscious driver workforce. Our female driver workforce is well over the national average, and approximately half of our driver associates are ethnically diverse. Werner was also honored to be the only trucking company recognized as a 2021 Military Friendly® Company by VIQTORY Media. It is the fifth consecutive year Werner has received this designation. We are widely recognized as a transportation leader in military hiring with veterans and veteran spouses. Werner's talented Board of Directors has strong business experience, relevant leadership skills and increasing diversity among its membership. Seven of our eight directors are independent and four of our eight directors are gender or ethnically diverse.
>
> In October 2020, we launched a codified approach to sustainability organization-wide and unveiled key ESG milestones. As an important part of the Social component of ESG, we added "Inclusion" to our core values and adopted a Diversity, Equity and Inclusion ("DEI") vision statement. Our ESG strategy will continue to evolve through five key themes:
>
> (i)Establish a formalized ESG framework and strategy.

(ii)Identify meaningful, reportable metrics and goals to monitor, measure and report on our ESG performance and progress.

(iii)Build on our strong foundation as an industry leader focused on reducing our environmental impact and carbon footprint through a young, innovative and modern truck and trailer fleet.

(iv)Foster and empower an inclusive culture that upholds our core values and provides equal opportunities for all.

(v)Continue to uphold transparency, ethics and integrity in our governance practices with an emphasis on creating a more diverse Board with complementary skills that align with our long-term strategy.

Our recent accomplishments under our ESG program include:

**Environmental**

• Launched WernerBlue, our branded Sustainability endeavor

• Earned SmartWay Excellence award from the EPA for the 5th consecutive year and eight of the last nine years

• Purchased a battery diesel hybrid vehicle and initiated purchase of 10 battery electric vehicle (BEV) trucks

**Social**

• Created eight associate resource groups ("ARG") in 2021

• Added WEbelieve ARG in March 2022; Abled & Disabled Partnering Together (ADAPT) ARG will launch in June 2022

• Participated in Commitment to Opportunity, Diversity and Equity (CODE) assessment focusing on inclusion, perspective, and company culture

**Governance**

• Established a stand-alone ESG Committee of our Board of Directors

• Created two new leadership positions: AVP of Sustainability and AVP of Diversity, Inclusion, and Learning

• Published inaugural Corporate Social Responsibility Report

• Gained endorsement by Sustainability Accounting Standards Board (SASB) as a reporter under its framework; also aligned with specific United Nations Sustainable Development Goals that support our values, strategy, and aspirations

As we further develop our ESG strategy, we will continue to advance these efforts, and others, and report on our progress in future Corporate Social Responsibility Reports to be available on our website.

As the company discloses, in 2021 it formed a new Board committee dedicated to ESG matters. Here's the description of the committee that's in the proxy statement:

The Company formed an ESG Committee effective January 1, 2022. The primary functions of the ESG Committee are to: (i) support and oversee Company policies relating to relevant environmental, social, corporate social responsibility, sustainability, and public policy matters; (ii) work closely with other Board Committees, including the Nominating and Corporate Governance Committee in the development and oversight of corporate governance policies and the Audit

> Committee to ensure the Company has appropriate disclosure controls and procedures in place relating to ESG matters; and (iii) assist management in setting general strategy relating to ESG matters and provide oversight to the Company's underlying ESG programs and policies. The ESG Committee makes policy, program and strategy recommendations to the Board concerning current and emerging ESG trends that may affect our business, operations, performance, or public image. Committee members also play an active role in the creation of our periodic Corporate Responsibility Report. A more complete description of the ESG Committee's functions is provided in its charter.

While I haven't seen too many separate committees devoted to ESG matters (in my experience, companies tend to parcel out the responsibilities among the Board's standing committees), they appear to be growing in popularity as ESG continues to become a more important area for companies and investors.

Trimble, Inc., the Sunnyvale, California-based technology company, has taken a slightly more expansive approach as reflected in its most recent definitive proxy statement, which was also filed last month. Trimble uses its Executive Overview to address its strategy for sustainability, which includes discussions of its ESG efforts as categorized in five distinct areas (or "Pillars") – Solutions, People, Communities, Environment, and Governance. It then shifts to brief discussions of of its overall diversity, equity, and inclusion efforts under the heading of "Culture and People," provides highlights of its corporate governance framework section (including the newly-required Bard Diversity Matrix and a director skills and attributes table), lists each key compensation policies and practices, and finishes with a discussion of its stockholder engagement efforts, including changes in its compensation program resulting from investor feedback and the results of its most recent Say-on-Pay vote.

In contrast to Werner Enterprises, Trimble also addresses ESG matters in its Compensation Discussion and Analysis, as part of its discussion of its 2021 business highlights:

> 2021 continued to present many unique macro environmental challenges, including the continuation of a global pandemic, highly competitive labor markets, global economic volatility as well as heightening environmental and social justice concerns. As a Company, we recognize the importance of navigating talent and compensation programs and decisions during this unprecedented time and have been thoughtful to provide rewards that are in support of the Company's business and talent strategy in the context of the environment we are operating in. Notably, the Company has taken deliberate actions to make a difference with employees, and communities, with the support of and oversight by the Compensation Committee, including:
>
> • implementing new executive performance equity awards in 2022 that incentivize our management to achieve carbon emissions reductions and increase diversity in the workforce,
>
> • improving the recruitment, retention, engagement and development of our diverse workforce, and strengthening our capability and insights around inclusion and demographic data, internally and externally,
>
> • ensuring we offer competitive rewards, recognition and well-being programs that meet the diverse needs of our employees, and
>
> •investing in our employees' career growth by offering a wide range of development opportunities that promote learning and growth.

You'll note that the company has added some ESG metrics to its current year executive performance awards, a subject to which it devotes more attention in the body of the CD&A (at page 45):

> Each year, the Compensation Committee reviews our incentive plans to ensure their alignment with our strategic and operational initiatives and to reflect feedback we receive from our shareholders. For 2022, the Compensation Committee introduced a quantitative, operational metrics-focused modifier to our PRSUs intended to further focus our executive officers on our multi-year goals related to sustainability and diversity, inclusion and belonging. These goals are generally designed to incentivize achievement of the following:
>
> • Decrease our carbon emissions by a meaningful amount by the end of 2024 in line with long-term reduction goals; and
>
> • Diversify our workforce, including, without limitation, by increasing female representation globally; and increasing representation in the U.S. of underrepresented black, indigenous and people of color (BIPOC) by the end of 2024.
>
> The modifier could result in up to a 10% increase or decrease in the number of shares that pay out with respect to our Named Executive Officers' PRSUs granted in 2022.

In previous years, the use of ESG-oriented performance measures had largely been limited to short-term incentive compensation plans. However, that's changing – quickly. We're starting to see these measures appear in long-term equity awards as well, even if only as a modifier. I expect that we're going to see one or more ESG metrics as a regular component of most incentive compensation programs in the next couple of years.

Posted by Mark Borges
Permalink: https://www.compensationstandards.com/member/blogs/compensationdisclosure/2022/05/esg-disclosures-continues-to-proliferate.html

← Some Interesting Compensation Risk Assessments | Main | Core & Main's Clawback Policy →

**May 24, 2022**

## JBT's Disclosure as to How it Identified its Most Important ESG Issues

I was reading through the definitive proxy statement of John Bean Technologies Corporation when I encountered an interesting explanation of how the company went about identifying and assessing the environmental, social, and governance ("ESG") issues that it determined were most important to its business and stakeholders. I don't believe that I've come across this type of disclosure before leading into the discussion of the specific ESG actions the company has taken during its last completed fiscal year.

As part of its information on its Board of Directors, the company, like so many others, devotes a separate section to ESG issues:

> Our approach on Environmental, Social and Corporate Governance (ESG) issues builds on our culture and long tradition of concern for our employees' health and safety; partnering with our customers to find ways to make better use of the earth's precious resources; and working to create a diverse and inclusive culture where our employees can reach their full and unique potential.
>
> Sustainability is not only part of our philosophy, it is something positive for the world and indispensable for our industry as a whole. What we do is reduce waste by increasing yields, increase the recovery of products or by-products and create a more efficient industry. We want to achieve this hand-in-hand with our customers. Our technologies are key to this focus, providing solutions to maximize yield, minimize waste and preserve food in all its forms to increase shelf-life and to get more food to people that need it.
>
> **Materiality Assessment**
>
> To help us identify and assess the environmental, social and governance issues that are most important to our business and our stakeholders, we completed our first comprehensive materiality assessment in 2020. The information gained from the assessment shapes our reporting strategy and focuses our efforts on where we can make the most meaningful impact. We followed these steps:
>
> Identify Focus Areas – We conducted a gap analysis comparing the priorities of key ESG benchmarks against our current priorities and compiled a list of 24 ESG issues.
>
> Engage Stakeholders – Using a third-party consultant, we collected input on the relative importance of our focus on these issues from our leaders and stakeholders such as customers, employees and investors.
>
> Build a Materiality Matrix – Combining the results of the gap analysis and stakeholder surveys, we created a materiality matrix that shows the environmental, social and governance issues that are a primary focus for our business and stakeholders.
>
> We categorize an issue as material if 1) it could impact our business in terms of costs, growth, risk or reputation or 2) if it is important to our stakeholders. Topics in the "critically important" category are viewed by both JBT leaders and stakeholders as potential big wins/differentiators and/or critical risks.

> Based on this assessment, the current issues we have developed focus around are:
>
> **Environmental and Social Impact of Products** – Managing and mitigating the impact products have on the environment and communities; strategy towards a more environmentally or socially beneficial product portfolio.
>
> **Environmental Sustainability and Climate Strategy** – JBT's approach to reducing greenhouse gas (GHG) emissions across operations while managing physical and transition risks related to climate change.
>
> **Talent Attraction & Development** – Policies and practices that retain, develop and attract top tier talent with the right skills to deliver on current and future business needs.
>
> **Diversity, Equity & Inclusion (DEI)** – Policies and practices that create a welcoming environment for all employees (regardless of race, color, gender, sexual orientation, backgrounds, beliefs, experiences, etc.) to fulfill their potential.
>
> We plan to periodically update this assessment to reflect our business and our stakeholders' expectations. These evaluations were further reviewed with the Board's Nominating and Governance Committee, which has oversight over management's processes to identify, assess, manage and disclose environmental, social and governance related risks and opportunities.

From there, the company then presents a table highlighting the actions taken with respect to each of five specific areas (page 8). For example, in the area of ESG Reporting, it accomplished the following:

> – We conducted an evaluation of our climate-related risks and opportunities and will share our findings consistent with the Task Force on Climate Related Financial Disclosures (TCFD) framework in our 2021 ESG Report.
>
> – We spent over $29.3 million with 55 confirmed diverse suppliers providing products and services to our North American manufacturing sites.
>
> – We received a Bronze EcoVadis Medal for achieving a higher sustainability performance than 50% assessed companies. We have moved up in rank by 22 percentiles since our assessment in 2017 and continue to use EcoVadis as a benchmark for our performance.

And in the governance area, it took the following two steps:

> – We appointed our first Chief Ethics and Compliance Officer, who reports to our Executive Vice President and General Counsel.
>
> – We established a cross functional Ethics and Compliance Committee in 2021 to broaden the awareness and increase the integration of our ethics programs in our businesses. In addition, this committee will allow us to more comprehensively evaluate the effectiveness of our ethics and compliance program.

It's a very effective presentation; especially walking stakeholders through the mechanics of how it selected its most important ESG issues. Even for a company that doesn't plan to be that detailed with its disclosure, it's a useful framework for determining materiality.

Posted by Mark Borges
Permalink: https://www.compensationstandards.com/member/blogs/compensationdisclosure/2022/05/jbts-disclosure-as-to-how-it-identified-its-most-important-esg-issues.html

← Dodd-Frank Clawback Rules Published in Federal Register | Main | Stock Ownership Guidelines: Higher Salary Multiples on the Way? →

**November 30, 2022**

## Director Compensation: Tips for Regular Reviews

On our page about "Director Compensation Practices," we regularly share trend reports on the amount and form of director pay. I blogged a couple of months ago that average total compensation for directors in the S&P 500 is around $316k.

This recent *Directors & Boards* article, written by Jena Abernathy and Don Lowman of Korn Ferry, notes that while you don't want to pay directors so much that it's unreasonable or affects their independence, directors are being asked to do more & more. In addition, competitive director compensation not only attracts talented individuals who have in-demand experience & skills, it also reinforces accountability expectations.

The Korn Ferry folks also note that – unlike the annual review of executive compensation – director compensation is more typically reviewed only once every 2 – 4 years. They suggest scheduling regular board compensation reviews in order to verify that what the company is providing is competitive & reasonable, and propose these guidelines:

> – Establish a timetable for board compensation review.
>
> – Compare your board compensation program with programs of other peer organizations.
>
> – Choose companies for comparison by size, reputation, growth, products and services, financial performance, employees, customers and investors.
>
> – Develop a rationale or justification for the mix of cash and equity offered to board members.
>
> – Engage an external compensation consultant to review your board compensation program for alignment with company goals, shareholder expectations, public perceptions and regulations.

I'm blogging about this here because it's a responsibility often handled by the compensation committee and because Item 402 of Reg S-K, which is something we obviously cover on this site, requires disclosure about director compensation (see our Treatise chapter for the details). But as noted in the article, at some companies, this is handled by the nominating/governance committee.

– **Liz Dunshee**

Posted by Liz Dunshee
Permalink: https://www.compensationstandards.com/member/blogs/consultant/2022/11/director-compensation-tips-for-regular-reviews.html

**June 14, 2022**

## DXC Technology's Director Compensation Disclosure

DXC Technology Company received only 47% support on its Say-on-Pay proposal at its 2021 Annual Meeting of Stockholders. As a result, the company provided extensive disclosure in its fiscal 2022 definitive proxy statement on the vote outcome and subsequent stockholder engagement in response to the vote in its Compensation Discussion and Analysis (with this disclosure starting at page 46). From there, the company went on to disclose its discussions and feedback from stockholders this February that was unrelated to the negative Say-on-Pay vote, including the retirement terms of the Chief Executive Officer's employment agreement and the company's ESG practices. This is in addition to a letter from the Compensation Committee that addressed the committee's actions (both immediately and for fiscal 2023) in response to what it learned from its stockholders (see page 37).

While the Say-on-Pay response is worth a quick review, what really caught my attention was the "Best Practices" table that the company included in its director compensation section. After noting that its director pay is reviewed annually and approved by the Board of Directors (following an analysis by the Compensation Committee's independent consultant of the program's framework and pay levels relative to the company's peer group, the following table was presented:

> **Director Compensation Best Practices**
>
> **Annual Benchmarking** – Director compensation is reviewed annually relative to DXC's peer group to ensure it is market-competitive.
>
> **Mix of Cash and Equity** – The program includes an appropriate mix of annual cash compensation and equity awards.
>
> **Vesting Requirements of Annual Equity Awards** – Restricted stock units granted under the Director Plan are scheduled to vest in full at the earlier of the first anniversary of the grant date, or the date of the next annual stockholders meeting.
>
> **Ownership Guidelines** – Directors have an equity ownership guideline of five times their annual retainer to be achieved over a five-year period.
>
> **Anti-Hedging or Anti-Pledging of Company Stock** – Our insider trading policy prohibits employees and directors from engaging in any speculative or hedging transactions in our securities. Additionally, the policy prohibits employees and directors from pledging DXC securities as collateral for a loan.

The rest of the director compensation disclosure is pretty standard – a table listing the annual directors' fees, the Director Compensation Table itself, and a table showing outstanding equity awards held by the directors at fiscal year-end. While none of the disclosure in the "Best Practices" table was unusual, it's the first time I've seen this information in anything other than narrative form and covering all of these topics in one place. I'm inclined to consider using this type of table in the future to enhance transparency about director pay.

Posted by Mark Borges
Permalink: https://www.compensationstandards.com/member/blogs/compensationdisclosure/2022/06/dxc-technologys-director-compensation-disclosure.html

← Proxy Voting & Investments: DOL Finalizes "ESG" Rule for ERISA Fiduciaries | Main | Shareholder Proposals: Disclose the Proponent, or Face Glass Lewis Scorn →

**December 2, 2022**

## ISS Issues '23 Benchmark Policies

Yesterday, ISS announced that it has published updates to its 2023 benchmark proxy voting policies. The updates will apply to meetings taking place on or after February 1st (unless there's an express transition period).

Here's the Executive Summary of the policy development process & key updates. Here are the high points for US companies:

> – **Climate Disclosure & Targets** – Globally, there's a new "climate board accountability" policy for companies in the Climate Action 100+ Focus Group. If the company isn't adequately disclosing climate risk and doesn't have either medium-term GHG emission reduction targets or Net Zero-by-2050 for at least Scope 1 & Scope 2, ISS will generally recommend voting against the appropriate directors and/or other voting items available. There will also be additional info in research reports on this, for all Climate Action 100+ companies.
>
> – **Board Gender Diversity** – Now in effect for all Russell 3000 and S&P 1500 companies, generally vote against or withhold from the nominating committee chair where there are no women on the board (exception if there was a woman at the preceding annual meeting and there's a "firm commitment" to return to gender-diverse status within one year)
>
> – **Officer Exculpation** – In light of DGCL changes, ISS is adopting a policy to recommend case-by-case on proposals providing for exculpation provisions in a company's charter.
>
> – **Unequal Voting Rights** – The previous grandfathering of older companies with unequal voting rights will be removed in 2023. As part of this update, a *de minimis* exception has been defined as no more than 5 percent of total voting power.
>
> – **Problematic Governance Structures** – For the U.S. policy on companies that go public with other problematic governance structures (including classified boards and supermajority vote requirements), a "reasonable sunset period" to fully eliminate the provision is being defined as no more than 7 years from the date of going public.
>
> – **Political Expenditures Alignment Transparency Shareholder Proposals** – A new specific policy is being introduced for shareholder proposals requesting company transparency on the congruency of its political contributions and lobbying with its public commitments and policies, including climate lobbying congruency to its climate goals. The new policy will provide more transparency to the market about how such shareholder proposals are assessed and codify the case-by-case approach used in the 2022 proxy season. (Emily blogged about these proposals emerging last year, and it sounds like they are going to continue to proliferate.)
>
> – **Share Issue Mandates** – For U.S. domestic issuers incorporated outside the U.S. and listed solely on a U.S. exchange, a policy is being introduced to generally vote for resolutions to authorize the issuance of common shares up to 20 percent of currently issued common share capital, where not tied to a specific transaction or financing proposal.

We'll be posting memos about these updates in our "Proxy Advisors" Practice Area, and of course continuing to analyze proposals and voting outcomes here on this blog throughout proxy season.

> Mark your calendars for our webcast on Tuesday, January 10th at 2pm Eastern, "ISS Forecast for 2023 Proxy Season." We'll have ISS's Head of US Research, Marc Goldstein, to offer tips on how to prepare for 2023 issues. Marc will be joined by Davis Polk's Ning Chiu and Gunster's Bob Lamm for additional insights & color commentary!

– **Liz Dunshee**

Posted by Liz Dunshee
Permalink: https://www.thecorporatecounsel.net/member/blogs/proxy/2022/12/iss-issues-23-benchmark-policies.html

**November 21, 2022**

## Glass Lewis Issues ’23 Voting Policies

Late last week, Glass Lewis issued its 2023 policy guidelines for the US and certain other markets – which apply for annual meetings held after January 1st. Helpfully, Glass Lewis includes all of its current policies in one 85-page document – with a summary of key changes & clarifications at the front. The changes apply to these topics:

> – **Board Diversity:** transitioning to a percentage-based approach on board gender diversity and applying it to the Russell 3000, expanding the policy on measures of diversity beyond gender, acknowledging the impact of state board diversity laws, and expecting disclosure on director diversity & skills.
>
> – **Board Oversight of E&S Issues:** looking for disclosure on the board’s role for Russell 1000 companies
>
> – **Director Commitments:** tightening up overboarding to recommend votes against a director who serves as an executive officer (other than executive chair) of any public company while serving on more than one external public company board, a director who serves as an executive chair of any public company while serving on more than two external public company boards, and any other director who serves on more than five public company boards.
>
> – **Cyber Risk Oversight:** Glass Lewis believes cyber risk is material for all companies and encourages clear disclosure about the oversight role of the board.
>
> – **Board Accountability for Climate-related Issues:** wanting comprehensive disclosure about climate risk from companies whose own GHG emissions represent a financially material risk.
>
> – **Officer Exculpation:** as John blogged today, it’s not looking like Glass Lewis will provide easy support for these amendments.
>
> – **Long-Term Incentives:** Glass Lewis will raise concerns if less than 50% of the value of LTI awards are subject to performance conditions.

– **Liz Dunshee**

Posted by Liz Dunshee
Permalink: https://www.thecorporatecounsel.net/member/blogs/proxy/2022/11/glass-lewis-issues-23-voting-policies.html