Key Considerations for the 2024 Proxy Season

December 20, 2023

For many U.S. public companies, the end of the year marks the beginning of a busy annual reporting and proxy season. In this client update, we highlight key considerations public companies should keep in mind when preparing their proxy statements, including a number of Compliance and Disclosure Interpretations ("C&DIs") published by the U.S. Securities and Exchange Commission (the "SEC") regarding insider trading, Regulation 14A, and pay-versus-performance disclosure. For updates relating to annual reports on Forms 10-K and 20-F, please also refer to our companion client update on Key Considerations for the 2023 Annual Reporting Season.

Regulatory Updates

Rule 10b5-1 and Insider Trading

In December 2022, the SEC adopted amendments to Rule 10b5-1 and new disclosure requirements regarding (1) the adoption, modification, and termination of Rule 10b5-1 and other trading plans by directors and officers under Item 408(a) of Regulation S-K; (2) insider trading policies and procedures of companies under Item 408(b) of Regulation S-K; and (3) the timing of option awards to named executive officers made in close proximity to the company's release of material non-public information under Item 402(x) of Regulation S-K.

Under the final rule, a company must disclose whether it has adopted insider trading policies and procedures governing the purchase, sale, and other dispositions of its securities by directors, officers, and employees, or by the company itself, that are reasonably designed to promote compliance with insider trading laws, rules, regulations, and any listing standards applicable to the company. If a company has not adopted such insider trading policies and procedures, it must explain why it has not done so.[1]

[1] *Insider Trading Arrangements and Related Disclosures,* Release No. 33-11138 (Dec. 14, 2022) [Adopting Release] at 84.

Additionally, companies need to include (1) narrative disclosure about policies and practices for the timing of option grants in relation to the release of material non-public information and (2) tabular disclosure of any stock option or stock appreciation right award granted to any named executive officer within a period starting four business days before, and ending one business day after, the filing or furnishing of a Form 10-Q, 10-K or 8-K that discloses material non-public information. The tabular disclosure must include the award's grant date, number of shares, exercise price, grant date fair value, and percentage change in the market price of the underlying stock between one trading day prior to and one trading day following the applicable disclosure.

A company can incorporate by reference in its Form 10-K the information required under Item 408(b) and Item 402(x) from a definitive proxy statement if the proxy statement is filed within 120 days of the end of the fiscal year. In May 2023, the SEC released C&DI 120.27 identifying the compliance dates for such disclosures if a company chooses to include the information in its proxy statement. Calendar year-end public companies would need to include the information required by Item 408(b) and Item 402(x) in the proxy statement for their 2025 annual meeting.[2]

For more detailed guidance regarding the amendments to Rule 10b5-1, please refer to our Insider Trading Disclosure Update, and our Debevoise Updates—SEC Releases New and Updated Guidance on Amended Rule 10b5-1 and SEC Disclosure Requirements for Equity Grants: What You Need to Know for 2024.

Recent C&DIs Related to Regulation 14A

In the past year, the SEC has released additional C&DIs clarifying provisions under Regulation 14A, including the "10 calendar day" period in Rule 14a-6 (C&DI 126.03) for determining when the definitive proxy statement can be mailed following the filing of a preliminary proxy statement, the legend requirement under Rule 14a-12 (C&DI 132.03) requiring specific reference to participants in a solicitation, and a soliciting party's discretionary authority under Rule 14a-4 (C&DIs 139.07-139.09) as described in more detail below. The SEC also released a C&DI clarifying that a proposal "involves" another matter for purposes of Note A of Schedule 14A (requiring information about the other included matter) when information about the other matter is material to the security holder's voting decision on the proposal being voted on (C&DI 151.02).

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[2] Alternatively, this information can be included in a company's Form 10-K or 20-F for the first full fiscal year beginning on or after April 1, 2023 (i.e., the year ending December 31, 2024 for calendar year end companies). Note that for smaller reporting companies the compliance date for disclosing the information required by Item 408(b) and Item 402(x) on a proxy statement is the first annual meeting after the first full fiscal period beginning on or after October 1, 2023.

In the context of universal proxy cards, C&DIs 139.07-139.09 address a soliciting party's use of discretionary authority under Rule 14a-4 to vote the shares represented by:

- Overvoted proxy cards, where authority has been granted to vote for more director nominees than seats are up for election.
- Undervoted proxy cards, where authority is granted to vote for fewer nominees than seats are up for election.
- Signed but unmarked proxy cards.

C&DI 139.07 provides that soliciting parties cannot use discretionary authority to vote the shares represented by overvoted proxy cards for the election of directors because the shareholder has specified choices for the election of directors and, as a practical matter, the shares cannot be voted in line with those specifications. The C&DI notes that, although the shares cannot be voted for the election of directors, the shares can still be:

- Voted on other matters on the proxy card for which there is no overvote.
- Counted for purposes of determining a quorum.

Similarly, C&DI 139.08 provides that a soliciting party cannot use discretionary authority to vote the shares represented by undervoted proxy cards for the remaining seats up for election. In such circumstances, the shares must be voted in accordance with the shareholder's specifications.

C&DI 139.09 provides that a soliciting party can use discretionary authority to vote the shares represented by a signed but unmarked proxy card in line with its recommendations as long as the form of proxy states in bold-faced type how the proxy holder will vote where no choice is specified.

Rule 14a-8 Proposed Amendments

In July 2022, the SEC proposed amendments to Rule 14a-8 that if adopted would make it significantly more challenging for companies to exclude shareholder proposals on "substantial implementation," "duplication," and "resubmission" grounds. The SEC regulatory agenda had initially targeted approval of the proposed amendments by October 2023, but the amendments were delayed, and the regulatory agenda now targets approval of the final rule in April 2024. As a result, these amendments are unlikely to directly affect the 2024 proxy season. However, we advise companies to consider these proposed amendments during this proxy season, as they could influence the SEC's decisions about whether to permit the exclusion of shareholder proposals.

For a detailed discussion, see our Debevoise In Depth—Shareholder Proposals under Rule 14a-8: Practical Guidance for Proxy Season.

Pay-versus-Performance

The 2024 proxy season will be the second in which narrative and tabular information related to pay-versus-performance disclosures are required for public companies. In August 2022, the SEC adopted final rules implementing the pay-versus-performance provisions of the Dodd-Frank Act. Item 402(v) requires the disclosure of information that shows the relationship between executive compensation actually paid and the financial performance of the company, which includes:

- **a pay-versus-performance table**, containing: (1) the summary compensation table total and the total "executive compensation actually paid" for the CEO and for the other named executive officers as an average; (2) total shareholder return ("TSR") for both the company and its peer group; (3) net income; and (4) a "company-selected measure," reported for up to five years (starting with three years for the first filing). The calculation of executive compensation actually paid includes adjustments from the summary compensation table totals for both pension benefits and equity awards;

- **accompanying narrative or graphical disclosures**, providing a clear description of: (1) the relationships between executive compensation actually paid to the CEO and other named executive officers (on average) and (a) the company's TSR, (b) the company's net income, and (c) the company-selected measure, in each case over the period of time included in the pay-versus-performance table; and (2) the relationship between the company's TSR and its peer-group TSR, in each case over the same period of years; and

- **a tabular list of the three to seven most important performance measures** used by the company to link executive compensation actually paid to its CEO and named executive officers during the most recently completed fiscal year to company performance.

The SEC has published three waves of C&DIs related to pay-versus-performance in February, September, and November 2023. The C&DIs clarify:

- how to calculate compensation actually paid to a named executive officer;

- requirements for disclosing peer group TSR on a pay-versus-performance table;

- how to determine a company-selected measure used to link compensation actually paid to company performance;

- how to treat awards granted prior to an IPO, spin-off or other equity restructuring;
- how to select a valuation technique for purposes of determining the fair value of an equity-based award;
- the meaning of "vesting";
- the requirements for footnote disclosures;
- that pay-versus-performance disclosure is required to be included only in a company's proxy statement and is not required to be included in a company's Form 10-K; and
- the circumstances surrounding the loss of smaller reporting company or emerging growth company status.

For a detailed discussion on the final pay-versus-performance disclosure rules, please refer to our Debevoise In Depth—Final Pay-versus-Performance Disclosure Rules: Compliance Q&As. For a detailed discussion on the recent pay-versus-performance C&DIs, please see our Debevoise Updates—SEC Issues Interpretive Guidance on Pay-versus-Performance Disclosures, SEC Issues Additional Interpretive Guidance on Pay-versus-Performance Disclosures and SEC Issues Third Round of Interpretive Guidance on Pay-versus-Performance Disclosures.

Please also see our Debevoise Update—2024 Executive Compensation To-Do List for Public Companies.

Cybersecurity Disclosure

In July 2023, the SEC adopted final rules on cybersecurity risk management, strategy, governance, and incident disclosure for companies. The rules introduce two new types of annual disclosure requirements relating to cybersecurity risk management processes and cybersecurity governance, which take effect beginning with the Form 10-K or Form 20-F for fiscal years ending on or after December 15, 2023.

While the final rules do not require companies to include cybersecurity-related disclosure in their proxy statements, companies should consider including such disclosure as part of their board risk oversight disclosure. One analysis of proxy statement disclosures found that 96% of Fortune 100 companies disclosed a focus on cybersecurity in the risk oversight section of their proxy statements filed in the period

ending in May 2023.[3] Public companies should consider including cyber disclosures in their proxy statements, and coordinating their cybersecurity risk management and governance disclosures across their periodic reports, proxy statements, and other information statements.

For a detailed discussion of the cybersecurity disclosure rules, please see our Debevoise Update—SEC Adopts New Cybersecurity Rules for Issuers. For a discussion of best practices regarding cybersecurity disclosures, please see our Debevoise In Depth—SEC Adopts New Cybersecurity Rules for Issuers—Part 2 Key Takeaways and Key Considerations for the 2023 Annual Reporting Season.

Other Guidance for the 2024 Proxy Season

To help companies prepare for the 2024 proxy season, we have provided a summary below of shareholder proposal trends from 2023 as well as select noteworthy revisions to proxy advisor guidelines. Companies should consider these factors when preparing for the upcoming proxy season.

Shareholder Proposal Trends

The total number of proposals received in 2023 increased significantly from 2022. There were also many more proposals voted on than in previous proxy seasons. [4] Below is an overview of the shareholder proposal trends from the 2023 proxy season:

- Most climate proposals remained focused on greenhouse gas emissions. The average support and success rate for climate proposals dropped significantly.
- Social proposals increased in volume in the 2023 proxy season. The average support and success rate of social proposals decreased markedly.
- Governance proposals dropped in average support and fewer successfully passed.
- So-called "anti-ESG" proposals increased in number. While anti-ESG proposals still received low levels of support, they were voted on more than in past proxy seasons.

For more information about the 2023 proxy season, including the impacts of Rule 14a-19, please see our Debevoise in Depth—2023 Proxy Season in Review.

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[3] See Ernst & Young Center for Board Matters, What Cyber Disclosures Are Telling Shareholders in 2023 (Aug. 2023).

[4] For further resources, see Alliance Advisors 2023 Proxy Season Review and PwC Governance Insights Center 2023 Proxy Season.

Say-on-Pay Shareholder Proposals

During the 2023 proxy season, the say-on-pay shareholder proposal at most companies received majority approval. According to Semler Brossy, only 2.4% of S&P 500 companies and 2.1% of Russell 3000 companies received less than 50% support for say-on-pay proposals. 71% of Russell 3000 companies received greater than 90% support in 2023, which is slightly lower than 72% receiving greater than 90% support in 2022. Misalignment between pay and performance, problematic pay practices, non-performance based equity, and particularly large grants were the top factors contributing to the failure of say-on-pay proposals.

Proxy Advisor Guidance

In its benchmark policy guidelines for 2024 which will apply to shareholder meetings held after January 1, 2024, Glass Lewis made the following noteworthy revisions:

- **Board Oversight of Cyber Risk**: Glass Lewis views cybersecurity as a material risk area for all companies. In the absence of material cybersecurity incidents, Glass Lewis generally will not make voting recommendations based on a company's oversight of cybersecurity issues. However, in instances where a company has been materially affected by a cyber attack, Glass Lewis' recommendations will depend on their evaluation of the board's response.

  For a discussion of best practices regarding cybersecurity disclosures, please see our Debevoise In Depth—SEC Adopts New Cybersecurity Rules for Issuers—Part 2 Key Takeaways and our webcast—SEC Cybersecurity Rules for Issuers—Part 3: Practice Guide Q&A.

- **Clawback Provisions**: In addition to incorporating the new NYSE and Nasdaq listing requirements, Glass Lewis has updated its views to state that effective clawback policies should provide companies with the power to recoup incentive compensation from an executive when there is "evidence of problematic decisions or actions… the consequences of which have not already been reflected in incentive payments and where recovery is warranted." In situations where the company ultimately determines not to follow through with recovery of compensation, Glass Lewis will assess the appropriateness of that determination, which may affect Glass Lewis' overall recommendation on the advisory vote on executive compensation.

  To assist companies, we have prepared a model clawback policy that complies with Section 303A.14 of the NYSE Listed Company Manual and Nasdaq's Listing Rule 5608.

- **Board Oversight of Environmental and Social Issues**: Glass Lewis will examine a company's committee charters and other governing documents when examining

whether a company has "formally designed and codified" a meaningful level of oversight of a company's material environmental and social impacts. Given the importance of the board's role in overseeing environmental and social risks, Glass Lewis will generally recommend voting against the governance committee chair of a company in the Russell 1000 index that fails to provide explicit disclosure concerning the board's role in overseeing these issues.

- **Board Accountability for Climate-Related Issues**: Glass Lewis will carefully examine the climate-related disclosures provided by companies in the S&P 500 index with material exposure to climate risk stemming from their own operations, as well as companies where Glass Lewis believes emissions or climate impacts, or stakeholder scrutiny thereof, represent an outsized, financially material risk, in order to assess whether they have produced disclosures in line with the recommendations of the Task Force on Climate-Related Financial Disclosures. Glass Lewis will also assess whether these companies have disclosed explicit and clearly defined board-level oversight responsibilities for climate-related issues. In instances where Glass Lewis finds either (or both) of these disclosures to be absent or significantly lacking, Glass Lewis may recommend voting against the chair of the committee (or board) charged with oversight of climate-related issues, or, if no committee has been charged with such oversight, the chair of the governance committee.

The Glass Lewis guidelines also include updates relating to executive ownership policies, proposals for equity awards for shareholders with large company holdings, net operating loss poison pills, and control share statutes. For more details, see Glass Lewis' 2024 US Benchmark Policy Guidelines.

Institutional Shareholder Services (ISS) has not published its U.S. voting guidelines for 2024 as of the date of this client update.

Reminders

Companies should take care to coordinate disclosures in their upcoming annual report, proxy statement, and other public statements. For instance, companies should ensure consistency across climate change risk factors, climate change mitigation strategies, and climate change goals and greenhouse gas emissions statistics appearing in SEC filings and other public statements such as sustainability reports. In the climate change disclosures model comment letter published by the SEC, for instance, the first comment highlights that the SEC staff will make note of inconsistencies in disclosures between public statements (such as a corporate social responsibility report) and SEC filings.

Recent Legal Developments Regarding Bylaw Amendments

In November 2021, the SEC adopted Rule 14a-19, which requires the use of a universal proxy card in any contested director election after August 31, 2022. Under the rule, in a contested election each proxy card disseminated by the company or the proposing shareholder must include both the company's nominees and the proposing shareholder's nominees. A universal proxy card allows shareholders to mix and match their votes for the company's nominees and the proposing shareholder's nominees.

For a more detailed discussion on the universal proxy amendments, please see our Debevoise Update—Frequently Asked Questions: Universal Proxy and Contested Director Elections.

Public companies should review their bylaws in light of the SEC's universal proxy rule, if they have not already done so, and consider whether amendments to their shareholder proposal advance notice procedures are appropriate. Potential amendments to consider generally fall into the following categories:

- **Implementation**: amendments that seek to implement Rule 14a-19, including by requiring that a shareholder proponent comply with Rule 14a-19 and certify compliance to the company;

- **Enhanced Process**: amendments that expand the advance notice bylaw to provide the company with more time and information to prepare for a contested election or give companies more control over the meeting process and determinations about compliance with the bylaws and proxy rules; and

- **Information Requirements**: amendments that elicit specific information about nominees, shareholder proponents and persons with whom the proponent is collaborating or from whom the proponent is receiving funding.

Since the adoption of Rule 14a-19, a number of legal challenges have been brought relating to bylaw provisions requiring greater disclosure about nominating shareholders and their nominees, arguing that they limit the ability of shareholders to make board nominations. In a number of recent cases, the Delaware Court of Chancery has strictly construed advance notice bylaws and ruled in favor of the enforcement of the company's bylaws.[5] Nonetheless, bylaw amendments that introduce barriers to shareholder proposals risk facing legal challenge. Plaintiffs have objected to overly long

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[5] *Rosenbaum v. CytoDyn Inc.* 2021 WL 4775140 (Del. Ch. Oct. 13, 2021); *Strategic Investment Opportunities LLC v. Lee Enterprises, Inc.* 2022 WL 453607 (Del. Ch. Feb. 14, 2022); *Sternlicht v. Hernandez* 2023 WL 3991642 (Del. Ch. June 14, 2023).

notice periods as well as disclosure requirements that would elicit information that is proprietary or confidential, or that are otherwise impracticable to comply with.

For example, in December 2023, a Peloton investor launched a purported class action lawsuit in the Delaware Court of Chancery challenging Peloton's advance notice bylaw for board member nominations. The petitioner argued that the bylaw could restrict shareholders' board nominations because the provisions require advance notice when shareholders are "acting in concert," and provides such a broad definition of shareholders "acting in concert" as to make it impracticable for the proposing shareholder to comply. We will continue to monitor and keep companies updated on developments in this area.

Companies considering amending their bylaws may refer to our Debrief—Potential Bylaw Amendments in Light of Universal Proxy Rules. We would be happy to discuss the range of potential bylaw amendments and the process and considerations for implementing them in the context of the company's broader corporate governance posture amid evolving caselaw.

Clawback Policy Requirement

In October 2022, the SEC adopted final rules on clawbacks of executive compensation as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The final clawback rules directed the national securities exchanges to adopt listing standards that require most exchange-listed issuers to adopt and comply with written clawback policies, and to provide disclosure regarding those clawback policies and amounts recovered. Accordingly, the NYSE and Nasdaq amended their listing standards to require listed issuers to adopt a compliant clawback policy by December 1, 2023.

Companies listed on the NYSE must confirm by December 31, 2023, via NYSE's Listing Manager, their adoption of a compliant compensation clawback policy or its reliance on an applicable exemption. All companies must also disclose on their proxy statement if they were required to prepare an accounting restatement (including "little r" restatements) to recover incentive-based compensation that had been erroneously received.[6]

For a more detailed discussion, please see our Debevoise In Depth—SEC Adopts Final Clawback Rules. To assist issuers, we have prepared a model clawback policy that complies with Section 303A.14 of the NYSE Listed Company Manual and Nasdaq's Listing Rule 5608.

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[6] 17 CFR §229.402(w). The information is required only in proxy or information statements that call for Item 402 disclosure and the company's annual report on Form 10–K. The information may be incorporated by reference into the Form 10-K if the company specifically incorporates the disclosure by reference.

Officer Exculpation under Delaware Law

Effective August 1, 2022, the DGCL was amended such that a company may limit personal liability of certain enumerated officers for breaches of the fiduciary duty of care by adding an exculpation clause in its certificate of incorporation, which requires board and shareholder approval. [7]

Since August 2022, a number of corporations have included a proposal in their proxy statement requesting shareholder approval for a charter amendment to adopt an officer exculpation provision. Proxy advisors have also released their recommendations regarding officer exculpation provisions. Glass Lewis evaluates such proposals on a "case-by-case" basis but generally recommends voting "against" such proposals unless there is a compelling rationale provided by the board, and the provisions are reasonable. ISS similarly evaluates on a "case-by-case" basis, but has largely recommended "for" the adoption of officer exculpation provisions. ISS has only recommended "against" proposals where ISS felt that shareholders had no practical ability to amend governing documents against the wishes of the controlling shareholders or when decisions have been made by a board that lacks accountability.

A proposal to amend the certificate of incorporation to include officer exculpation will require a preliminary proxy filing. A company should consider and incorporate such preliminary proxy filing in its timeline for its upcoming annual meeting if it is considering adding an officer exculpation clause to its certificate of incorporation.

Human Capital Management

As a reminder, human capital management was added as a line item to Regulation S-K (Item 101(c)) in 2020. While the disclosure is usually included in the Form 10-K, many companies have also chosen to include human capital management discussions in their proxy statements, and these disclosures vary widely in topic and level of detail. Companies should consider adding to their human capital management discussions in their proxy statements common themes that have emerged: diversity, equity and inclusion; geographic location of employees; recruitment; turnover; retention; training; and engagement. According to the SEC's rulemaking agenda, the Division of Corporation Finance is considering recommending rule proposals to enhance companies' disclosures regarding human capital management.

Board Diversity

In August 2021, the SEC approved Nasdaq's proposed listing rules that require all companies listed on Nasdaq's U.S. exchange to publicly disclose diversity statistics regarding their boards of directors. The rules also require most Nasdaq-listed companies

[7] DGCL §102(b)(7).

to have, or explain why they do not have, at least two diverse directors, including one who self-identifies as female and one who self-identifies as either an "underrepresented minority" or "LGBTQ+." According to the SEC's rulemaking agenda, the SEC's Division of Corporation Finance is considering recommending rule proposals to enhance companies' disclosures about the diversity of board members and nominees.

By August 7, 2023, each Nasdaq-listed company was required to have at least one diverse director or provide an explanation of why it did not have such a director. For a company listed on the Nasdaq Global Select or Global Markets, it must have two diverse directors by August 6, 2025 or provide the requisite explanation.

In October 2023, the Fifth Circuit upheld Nasdaq's board diversity rule. The court reasoned that, because Nasdaq is not a state actor, the Nasdaq rule is not a state action subject to constitutional challenges, and that the SEC therefore did not exceed its authority in approving the rule.

Nasdaq-listed companies should take care to include information in their annual reports or proxy statements regarding their compliance with the board diversity requirement.

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Please do not hesitate to contact us with any questions.

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