GOVERNANCE ROUND-UP

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Delaware Court Orders Specific Performance of Efforts-Based Covenants in Merger

In *Desktop Metal, Inc. v. Nano Dimension Ltd.*, the Delaware Court of Chancery ordered specific performance of regulatory efforts-based covenants in the merger agreement between Nano Dimension and Desktop Metal.

On July 2, 2024, Israeli company Nano Dimension agreed to acquire Desktop Metal, a U.S. company that supplies critical additive manufacturing products to the U.S. government. In the merger agreement, the parties negotiated a "hell-or-high-water" provision requiring Nano Dimension to take "all action necessary" to obtain Committee on Foreign Investment in the United States clearance and to use "reasonable best efforts" to consummate the merger. Upon review, CFIUS asked Nano Dimension to enter into a national security agreement ("NSA"). Following a change in its board triggered by an activist minority investor that opposed the deal, Nano Dimension became "radio silent" for 38 days and stalled the deal process. In December 2024, Desktop Metal sued seeking specific performance.

On March 24, 2025, the Court of Chancery found that Nano Dimension's change in behavior constituted a calculated effort to stall the CFIUS process and create a pretext for terminating the deal, thereby breaching its obligation to take "all action necessary" to obtain CFIUS approval. The court ordered Nano Dimension to enter into an NSA within 48 hours of the order and to perform its obligations to close under the merger agreement.

The decision, as well as the speed of the court's order, exemplifies the Court of Chancery's commitment to ensuring deal certainty and reaffirms that "reasonable best efforts" and "hell-or-high water" provisions impose substantive obligations. When parties agree to these provisions, they must take all reasonable efforts to consummate the transaction. As the court stated in *In re Anthem-Cigna Merger Litig.*, a party cannot go "looking for a way out of its deal."

Taking Stock of 2025 Incentive Compensation Plans

Setting 2025 incentive compensation goals posed significant challenges for compensation committees and boards, as tariffs, geopolitical shocks and ongoing supply-chain disruptions made financial forecasts a moving target. Companies faced a delicate balancing act: establishing goals rigorous enough to satisfy institutional investors and proxy advisory firms, yet realistic enough to effectively incentivize executive officers.

In response, companies implemented several strategies to shape their 2025 incentive plans and performance goals, including (among others) the following:

- setting performance targets using their best estimates of the impacts from tariffs (reserving the ability to apply year-end discretion if actual conditions diverged significantly);
- broadening threshold-to-maximum ranges (a tactic first popularized during the COVID-19 pandemic) and, in some cases, defining target as a band rather than a single point to absorb forecasting error; and
- delaying the finalization of 2025 goals by a quarter, waiting for clearer insight into tariff policies and other macroeconomic developments.

As market volatility continues, most compensation committees are monitoring current conditions without making immediate adjustments. However, many are preparing year-end "just-in-case" playbooks. Committees should remain cautious about lowering or waiving performance targets or, if plan goals are not achieved, making executives whole by granting other awards or paying discretionary bonuses. ISS considers these actions problematic pay practices, and Glass Lewis similarly may recommend against say-on-pay votes in these situations. Compensation committees should ensure that final payouts are justified by performance and are aligned with shareholder outcomes.

At year end, if compensation committees exercise discretion to make upward adjustments on payouts or adjust performance metrics, they should be prepared to provide detailed proxy disclosure explaining the rationale and impact. Item 402 of Regulation S-K requires disclosure of all material elements of a public company's compensation of its named executive officers, which includes any exercise of committee discretion, identifying the officers affected and the impact on payouts.

Investors and proxy advisory firms also expect to see clear rationale for any adjustments. ISS still generally views mid-cycle changes to metrics, performance targets and/or measurement periods negatively. Companies must offer a "clear and compelling rationale" and explain why the action does not circumvent pay-for-performance outcomes. Glass Lewis expects a robust discussion whenever the committee lowers goals mid-year, increases calculated payouts or retroactively prorates performance periods. Absent a convincing rationale, those actions can drive a negative say-on-pay vote recommendation.

Looking ahead, compensation committees should evaluate strategies to enhance the resilience and durability of incentive plans, given the significant volatility experienced in recent years. Practical approaches include emphasizing relative performance metrics, maintaining broader performance bands to account for forecasting uncertainties, incorporating strategic or operational metrics or modestly increasing the proportion of time-vested equity.

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Delaware Narrows the Scope of Books-and-Records Demands

On March 25, 2025, Delaware Governor Matt Meyer signed into law S.B. 21, which, among other things, amends Section 220 of the Delaware General Corporation Law in an effort to rein in the scope of materials available pursuant to stockholder books-and-records demands.

Section 220 productions were historically limited to "formal" documents, such as board minutes and materials; however, in recent years, Delaware courts expanded the scope of Section 220 by ordering corporations to produce directors' emails and text messages, as well as management-level documents. These decisions significantly increased the material available to plaintiffs, leading to burdensome and expansive pre-suit discovery.

Now, materials available pursuant to books-and-records demands are more narrowly circumscribed outside of certain specific exceptions. Under Section 220(a)(1), "books and records" is defined as the corporation's: (1) current certificate of incorporation; (2) current bylaws; (3) past three years of stockholder minutes; (4) written and electronic communications to stockholders generally within the past three years; (5) board minutes and records of actions taken by the board and committees of the

board; (6) materials provided to the board in connection with a board or committee action; (7) annual financial statements for the preceding three years; (8) certain contracts with stockholders and beneficial owners of the corporation's capital stock; and (9) independence questionnaires.

Notably, the definition no longer includes the catch-all term "other books and records." Although plaintiffs still have the right to access a comprehensive list of materials, that list does not include electronic communications (other than a narrowly defined set of such communications to stockholders), meaning that directors' emails and text messages can no longer routinely be requested as part of books-and-records demands.

Stockholders may apply to the Delaware Court of Chancery to compel inspection, but Section 220(e) provides that the court may not compel the production of any books and records other than those listed in Section 220(a)(1), except in limited circumstances. The court may compel production of materials outside the list of Section 220(a)(1) if the stockholder (i) shows a "compelling need" for such documents and (ii) demonstrates by clear and convincing evidence that such specific records are "necessary and essential" to further the stockholder's purpose. This new standard for compelling the production of books and records is expected to provide greater protection and predictability for corporations responding to books-and-records demands.

New York Applies Internal Affairs Doctrine to Shareholder Derivative Claims

In a key decision for foreign corporations that do business in New York, the state's highest court recently confirmed that foreign substantive law governing shareholders' standing to pursue derivative litigation displaces New York law in the event of a conflict. On May 20, 2025, the New York Court of Appeals in *Ezrasons, Inc. v. Rudd* affirmed the dismissal of a derivative suit filed by a beneficial owner of shares in Barclays PLC based on an English law limiting standing for derivative suits to a company's registered members. The Court of Appeals held that New York's Business Corporation Law did not displace the internal affairs doctrine—a common-law choice-of-law rule mandating that the substantive law of a company's place of incorporation generally governs disputes concerning its internal affairs—with respect to questions of shareholder standing under BCL Section 626.

For a detailed discussion of the decision, see our Debevoise *In Depth—New York Applies Internal Affairs Doctrine to Shareholder Derivative Claims*.

Second Circuit Limits Short-Swing Trading Claims Under Section 16(b)

On May 23, 2025, the United States Court of Appeals for the Second Circuit upheld two district court decisions, *Roth v. LAL Family Corp., et al.* and *Roth v. Patrick Drahi, et al.*, holding that a controlling shareholder's sales of a company's stock cannot be matched with that company's own stock buybacks to establish liability under Section 16(b) of the Exchange Act. The court rejected a shareholder's claim that the controlling shareholders of two corporations wrongfully profited $56.7 million and $17.3 million through these stock buybacks.

The plaintiff-shareholder argued that the controlling shareholders had a financial interest in the shares repurchased by the company and that these buybacks should be treated as "purchases" to be matched with the controlling shareholders' sales of company stock under Section 16(b). Based on this, the plaintiff sought to hold the controlling shareholders liable for short-swing profits subject to mandatory disgorgement under Section 16(b), which requires corporate insiders to return any profits realized from the purchase and sale of a company's securities by insiders within a six-month period. However, the court held that Section 16(b) does not apply when the buyer is the corporation itself.

The court explained that Section 16(b) applies only to transactions involving "substantively identical equity securities." The court further explained that the repurchased shares are materially different from the shares sold by the controlling shareholders since, under Delaware law, the repurchased shares become "treasury shares," which lose all ownership rights and value. As a result, the controlling shareholders could not have realized any profit because the treasury shares cannot be considered "substantively identical" to the controlling shareholders' sold shares.

The court found that accepting the plaintiff's argument would create an illogical situation allowing companies to trigger insider liability through their own stock buybacks. The court also noted that the plaintiff's interpretation would conflict with the strict liability nature of Section 16(b), effectively turning it into a "trap sprung" by every transaction.

In May 2025, the Eleventh Circuit heard oral argument on an appeal of a Florida district court's decision rejecting the same legal theory.

SEC Expands Flexibility for Written Consents and Lock-Up Agreements

On March 6, 2025, the staff of the SEC's Division of Corporation Finance issued two updated Compliance and Disclosure Interpretations relating to the use of "lock-up" agreements and written consents in business combination transactions, reversing its previous guidance on the topic.

In business combination transactions involving target companies with a majority stockholder, and where the stockholders are permitted to act by written consent in lieu of a meeting, an acquiror often requests that such stockholder deliver a written consent immediately after the signing of the transaction agreement. This "sign-and-consent" structure eliminates the need for a stockholder meeting to approve the transaction, enhancing the acquiror's deal certainty by cutting off the need for any "fiduciary out" for the target company to entertain competing bids. Absent a written consent, acquirors will seek voting agreements where management and principal stockholders commit to vote in favor of the transaction at the stockholders meeting, referred to as "lock-up agreements."

Though not enforced in recent years, the SEC historically objected to sign-and-consent structures in transactions where the target company stockholders were to receive unrestricted stock of the acquiring company as consideration.

Sign-and-Consent Structures. The SEC now formally permits registration of offers and sales of the acquiring company's securities on Form S-4 (or Form F-4) when a sign-and-consent structure has been implemented, provided that: (1) the insiders of the target company, who provided written consents, are offered and sold acquiring company securities only in an offering validly exempt from the Securities Act; and (2) the registered securities (on either Form S-4 or F-4) are offered and sold only to securityholders who did not sign such written consent.

This means that the SEC staff will allow stock-for-stock mergers that involve a combination of exempt offerings for target company insiders who executed consents in favor of the transaction and a registered offering for other target stockholders. The SEC's updated guidance offers additional flexibility for companies with significant stockholders (including private equity sponsors) to structure business combination transactions using a sign-and-consent arrangement.

Lock-Up Agreements. The SEC also clarified its guidance on stock mergers involving voting agreements with significant stockholders in lieu of a sign-and-consent structure. Four conditions must be satisfied to ensure the non-objection of SEC staff to the registration of offers and sales when significant stockholders sign lock-up agreements:

- the lock-up agreement involves only target company insiders, including executive officers, directors, affiliates, founders and their family members and holders of 5% or more of the voting equity securities of the target company;
- those signing the lock-up agreement own, in the aggregate, less than 100% of the target company's voting equity securities;
- votes are solicited from the target company's stockholders who have not signed lock-up agreements if required to approve the transaction under state or foreign law; and
- the acquiring company delivers a prospectus to all target company security holders entitled to vote on the transaction.

For more information, see "*Updated SEC Guidelines Bring Welcome Regulatory Clarity*," authored by Morgan J. Hayes, Eric T. Juergens and Benjamin R. Pedersen, in the spring edition of the *Debevoise & Plimpton Private Equity Report*.

SEC to Consider Foreign Private Issuer Eligibility

On June 4, 2025, the SEC issued a concept release on potential changes to the definition of "foreign private issuer" ("FPI") for purposes of federal securities laws, soliciting public comments on whether the current eligibility criteria for FPI status should be modified in light of significant changes to the FPI population since the SEC's last review of the FPI framework in 2008.

The concept release received unanimous support by all four SEC commissioners and is consistent with the current administration's increased focus on addressing perceived competitive disadvantages for U.S. companies.

The public comment period for the concept release closes on September 8, 2025.

The SEC's Concept Release on FPI Eligibility is available here.

SLM 14M: Insights from the 2025 Proxy Season

As we discussed previously, the SEC issued SLB 14M in the middle of this year's Rule 14a-8 proposal process. In a departure from typical protocol, issuers that had submitted no-action requests prior to the publication of SLB 14M were permitted to raise new legal arguments by submitting supplemental correspondence to the SEC, and issuers that had not submitted no-action requests could do so notwithstanding that their respective deadlines for submitting a no-action request had passed.

As of June 9, 2025, the Staff had issued responses to at least 65 no-action requests that included legal arguments relying on SLB 14M. Just under half of those responses were to no-action requests that had initially been submitted prior to the publication of SLB 14M and later supplemented to consider the new guidance. Although SLB 14M has been undoubtedly useful to issuers, it does not guarantee exclusion. Of the no-action requests that were submitted, 29 were granted, and 25 were rejected.

We recently discussed our insights from the 2025 season in *Law360*. See *Early Trends In Proxy Exclusion After SEC Relaxes Guidance*, authored by Benjamin R. Pedersen, Eric T. Juergens and Paul M. Rodel.

SEC Investor Advisory Committee Examines Pass-Through Voting

On June 5, 2025, the SEC Investor Advisory Committee met to discuss pass-through voting, a developing practice that invites investors into the corporate governance process by allowing them to influence how asset managers vote their interests at shareholder meetings, either by voting directly or by selecting third-party policy options. Pass-through voting programs provide a mechanism to enhance investor engagement and to further democratize corporate governance.

The Committee noted that there remains room for growth in the pass-through voting space and that any changes to the current proxy system need to account for the complexities of the proxy process and the historical low voting rates among retail shareholders. Although the Committee did not agree on a specific regulatory framework, there was general agreement that the SEC should provide guidance on how to implement pass-through voting and how to best inform individual investors about the process.

The Committee's June 2025 meeting signals that there may be future SEC guidance to help shape the evolving marketplace for pass-through voting.

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