Client Alert | US Public Company Advisory

Key Considerations for the 2024 Annual Reporting and Proxy Season Part II: Proxy Statements

March 15, 2024

Each year in our Annual Memo series, White & Case's Public Company Advisory Group provides practical insights on preparing Annual Reports on Form 10-Ks**,** Annual Meeting Proxy Statements and, for FPIs, the Annual Report on Form 20-F. This installment of our Annual Memo will focus on key considerations for 2024 Annual Meeting Proxy Statements in three subsections:

- **Compensation Related Disclosure Matters**
- **Boards of Directors and Related Governance Disclosures**
- **Proxy Housekeeping Items**

I. Compensation Related Disclosure Matters

1. **Pay versus Performance ("PVP") Disclosures and the SEC's New C&DIs**. This is the second year of pay versus performance, with Item 402(v) of Regulation S-K requiring companies to disclose the relationship between executive compensation and their financial performance in proxy statements. As a reminder, the rules apply to US domestic registrants (including smaller reporting companies ("SRCs") that have ceased to be emerging growth companies ("EGCs")) that file proxy statements requiring executive compensation disclosure under Item 402 of Regulation S-K. In accordance with the phase-in period under the rules, companies disclosing their second PVP disclosure now have an additional year of compensation disclosure (for a total of four years), and a total of three years is now required for SRCs. For a detailed discussion of the pay versus performance rules, see Key Considerations for the 2023 Annual Reporting and Proxy Season, Part II: Proxy Statements and SEC Adopts Pay Versus Performance Disclosure Rules.

   As companies approach the second year of this disclosure, they should also consider both SEC guidance and comments, along with PVP disclosure trends from year one and proxy advisory firm policies.

   SEC Guidance: The SEC issued three sets of C&DIs, in February, September, and November 2023,[1] which clarified, among other things, that:

[1] The full set of C&DIs covers: how to calculate compensation actually paid to a named executive officer (C&DI 128D.30 and C&DI 128D.23); requirements for disclosing peer group TSR on a pay-versus-performance table (C&DI 128D.07, C&DI 128D.27, C&DI 128D.24, C&DI 128D.25 and C&DI 128D.26); how to determine a company-selected measure used to link compensation actually paid to company performance (C&DI 128D.09, C&DI 128D.10, C&DI 128D.11 and C&DI

- the company-selected measure can be any financial performance measure that differs from the financial performance measures otherwise required to be disclosed in the table, including a measure that is derived from, a component of, or similar to those required measures (C&DI 128D.09);
- it would not be appropriate for a registrant to disclose its stock price as its company-selected measure if the registrant does not use it to link compensation actually paid to its NEOs to company performance, even if stock price has a significant impact on the amounts reported in the PVP table. However, if, for example, the registrant's stock price is a market condition applicable to an incentive plan award, or is used to determine the size of a bonus pool, it may be used as the company-selected measure (C&DI 128D.10);
- if an award did not meet vesting conditions during the year because the performance or market conditions were not met, but it ***could*** still vest in the future, the award fair value should ***not*** be subtracted under Item 402(v)(2)(iii)(C)(1)(v) of Regulation S-K, which refers to awards that were forfeited and the cumulative reported value of that award is $0. Awards that remain outstanding and have not yet vested are not considered to have failed to meet the applicable vesting conditions for the purpose of Item 402(v) (C&DI 128D.17); and
- if retirement eligibility is the ***sole*** vesting condition for stock and option awards, this condition would be considered satisfied and calculation of executive compensation actually paid in the year that the holder becomes retirement eligible, but if retirement is not the sole vesting condition, other conditions must also be considered in determining when an award has vested. (C&DI 128D.18).

SEC Comment Letters: The SEC issued approximately 19 comments to S&P 500 companies on the first round of PVP disclosures and generally commented on companies failing to meet the requirements of Item 402(v), such as improper headings and calculations.[2] Other specific takeaways include:

- Use only one company-selected measure in the PVP table that "represents the most important financial performance measure" used to link compensation actually paid to performance;[3]

128D.12); how to treat awards granted prior to an IPO, spin-off or other equity restructuring (C&DI 128D.15 and C&DI 128D.14); how to select a valuation technique for purposes of determining the fair value of an equity-based award (C&DI 128D.20 and C&DI 128D.21); the meaning of "vesting" for calculating compensation actually paid (C&DI 128D.18, C&DI 128D.19, C&DI 128D.16 and C&DI 128D.17); the requirements for footnote disclosures (C&DI 128D.22); that PVP disclosure is required to be included only in a company's proxy statement and is not required to be included in the Form 10-K (C&DI 128D.01); and the circumstances surrounding the loss of SRC or EGC status (C&DI 128D.28 and C&DI 128D.29).

2 For example, one SEC comment notes: "Refer to the reconciliation tables in the footnotes to your pay versus performance table. It is unclear what amounts are reflected in the row titled "Year over Year Change in Fair Value of Equity Awards Granted in Prior Years that Vested in the Year." Specifically, equity awards granted in prior years that vest during the relevant year should be valued as the difference between the fair value as of the end of the prior fiscal year and the vesting date, not the "year over year" change in value. Please ensure that your table headings reflect accurately the amounts used to calculate compensation actually paid. Refer to Item 402(v)(2)(iii)(C)(iv) of Regulation S-K."
For example, one SEC comment notes: "Refer to the graph titled "Absolute Pay vs TSR Alignment." The vertical bars identified as CEO Compensation Actually Paid and NEO Average Compensation Actually Paid appear to reflect the Summary Compensation Table amounts, rather Compensation Actually Paid amounts. In addition, it is not clear why the title of the graph refers to "Absolute Pay," or why such title refers to TSR but not to "Operating Income," which is also included in the graph. The requirement of Items 402(v)(5)(i) and (iii) is to describe the relationship between compensation actually paid and total shareholder return, and compensation actually paid and the [CSM], respectively. Please ensure that the disclosures provided pursuant to Regulation S-K Item 402(v)(5) reflect the correct amounts and terminology from the [PVP] table."

3 For example, one SEC comment notes: "We note that you include [Revenue, Adjusted Operating Income, and Adjusted EBITDA as your Company-Selected Measures]. Regulation S-K Item 402(v)(2)(vi) permits you to designate only one [CSM], which, in your assessment, "represents the most important financial performance measure (that is not otherwise required to be disclosed in the table) used by [you] to link compensation actually paid to [your] named executive officers, for the most recently completed fiscal year, to company performance." Please ensure that you include only one [CSM] in the [PVP] table."

- Provide clear descriptions of the relationship between compensation actually paid and net income. It is not sufficient to state that no relationship exists, even if a particular measure is not used in setting compensation;[4]
- If using a non-GAAP measure as the CSM, provide the required information regarding how it is calculated from the comparable GAAP measure;[5] and
- Include the required "net income" number as reported in your company's audited GAAP financial statements.[6]

PVP Trends: Companies should also consider trends observed in the first year of PVP disclosures. A White & Case survey of the 406 S&P 500 companies that had filed their PVP disclosure last year found that most companies included between three and five measures in their Tabular List, with three being the most common,[7] and nearly one-fifth (18%) including non-financial measures (***e.g.***, safety rates, methane emissions and diversity, equity and inclusion) in their tabular lists. With respect to the company selected measure, the most commonly used measure was some form of earnings per share (88 companies), followed by revenue (55 companies), some version of income (48 companies) and EBIT/EBITDA (47 companies).

Proxy Advisory Firm Policies: For 2024, Glass Lewis revised its discussion of the PVP analysis to note that the PVP disclosure mandated by the SEC may be used as part of its supplemental quantitative assessments of executive compensation. ISS stated that the required PVP disclosures will not be used in their screening or methodology, but they may be considered during their qualitative evaluations of executive compensation.

2. **Clawback Considerations*:*** Now that companies have adopted the required clawback policies, they should update the description of their policies in proxy statements.

   In addition, if at any time during or after the company's last completed fiscal year, the company either was required to prepare an accounting restatement that required a clawback under the policy, this must be disclosed in the company's proxy statement under new Item 402(w) of Regulation S-K. Companies must also disclose if there was an outstanding balance of unrecovered excess incentive based compensation relating to a prior restatement.[8] The new 402(w) disclosures are not required to be included in the Compensation

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For example, one SEC comment notes: "You may elect to provide in the table one or more performance measures in addition to the Company-Selected Measure, provided that the disclosures about those measures 'may not be misleading or obscure the required information, and the additional performance measures may not be presented with greater prominence than the required disclosure.' See Pay Versus Performance, Release No. 34–95607 (Apr. 29, 2015) [87 FR 55134 (Sept. 8, 2022)] at 55159."

4 For example, one SEC comment notes: "Please provide a clear description of the relationship between compensation actually paid and net income, as required by Regulation S-K Item 402(v)(5)(ii). Please note that it is not sufficient to state that no relationship exists, even if a particular measure is not used in setting compensation."

5 For example, one SEC comment notes: "We note that you have included Core EBITDA, a non-GAAP measure, as your [CSM] pursuant to Regulation S-K Item 402(v)(2)(vi). Please provide disclosure showing how this number is calculated from your audited financial statements, as required by Regulation S-K Item 402(v)(2)(v). If the disclosure appears in a different part of the definitive proxy statement, you may satisfy the disclosure requirement by a cross-reference thereto; however, incorporation by reference to a separate filing will not satisfy this disclosure requirement."

6 For example, one SEC comment notes: "We note that you have included Income (Loss) from Continuing Operations in column (h) of your [PVP] table in lieu of net income (loss) as required by Regulation S-K Item 402(v)(2)(v). Please include net income (loss), as reported in your audited GAAP financial statements, in column (h) for all years covered by the table. Refer to Regulation S-K [C&DI] Questions 128D.08 and 128D.09. Please note that you may voluntarily provide supplemental measures of compensation or financial performance, so long as any additional disclosure is clearly identified as supplemental, not misleading, and not presented with greater prominence than the required disclosure."

7 32.7% (130 companies) provided three measures in their tabular list, 25.3% (101 companies) provided four, 18.8% (75 companies) provided five, 8.8% (35 companies) provided seven and 8% (32 companies) provided six.

8 In either of these circumstances, the company would be required to disclose: (i) the date on which the company was required to prepare an accounting restatement; (ii) the aggregate dollar amount of excess incentive based compensation attributable to the restatement and an analysis of how the recoverable amount was calculated and, if the dollar amount has not yet been determined, a disclosure that explains the reasons and a disclosure in the next filing subject to Item 402 that discloses the determined amount and related disclosures; (iii) if the financial reporting measure that was restated related to stock price or total shareholder return, the estimates used to determine the erroneously awarded compensation

Discussion and Analysis ("CD&A"), and if the disclosure is located outside the CD&A, it will not be incorporated by reference into other SEC filings and will not be captured as part of the compensation committee report.[9]

Proxy Advisory Firm Policies on Clawbacks: For 2024, Glass Lewis modified its policy on clawback policies to state that effective clawback policies should provide for recoupment of incentive compensation "when there is evidence of problematic decisions or actions, such as material misconduct, a material reputational failure, material risk management failure, or a material operational failure." Previously, recoupment policies that included reputational harm ***might*** inform Glass Lewis's overall view of the company's compensation program. If a company decides to refrain from recouping compensation, the rationale, as well as any alternative measures that are pursued, such as the exercise of negative discretion on future payments, should be disclosed.[10] The absence of such enhanced disclosure may impact Glass Lewis's assessment of the quality of disclosure and, in turn, may play a role in the Glass Lewis recommendation on the Say on Pay vote.

Under ISS policy, in order for a company that has an equity plan on the ballot to receive points for ISS's clawback policy factor, the clawback policy should authorize recovery upon a financial restatement and cover all or most equity-based compensation for all NEOs -- including ***both*** time- and performance-vesting equity awards. For companies with an equity plan up for a vote, a clawback policy that meets the minimum requirements of the SEC's clawback rules may therefore not receive ISS's points for its clawback policy factor, because the SEC's final rules exempt time-vesting equity from compensation that must be covered by the policy. So far this year, we have not seen ISS apply their policy restrictively, but companies should assess whether this is an issue in cases where they have an equity plan up for a vote.[11]

3. **Executive Severance Considerations.** Executive severance remains a focus of shareholder and proxy advisory firms, and in the 2023 proxy season the most common type of compensation-related shareholder proposal asked boards to submit severance payments to a shareholder vote.[12] These proposals typically requested that boards seek shareholder approval of any senior manager's new or renewed pay package that provided for severance or termination payments with an estimated value exceeding 2.99 times the executive's base salary and bonus. Voting results on such proposals were impacted by whether the company had a policy to address key aspects of the proposal.

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attributable to the restatement and an explanation of the methodology used for the estimates; (iv) the aggregate dollar amount of excess incentive based compensation that remains outstanding at the end of the last completed fiscal year; and (v) if recovery is impracticable, such amounts for which recovery was forgone, for each current and former named executive officer and for all other current and former executive officers as a group, along with an explanation as to why recovery was not pursued. Additionally, if an accounting restatement was required during or since the issuer's last fiscal year, and the issuer determined recovery was not required pursuant to its policy, the issuer must explain why application of the policy led to this conclusion.

[9] Item 402(w)(3) of Regulation S-K.

[10] Glass Lewis will assess the appropriateness of such determination for each case. A thorough, detailed discussion of the company's decision to not pursue recoupment and, if applicable, how the company has otherwise rectified the disconnect between executive pay outcomes and negative impacts of their actions on the company and the shareholder experience will be considered.

[11] While it is not generally necessary to craft a clawback policy to meet ISS or Glass Lewis guidelines, in order to cover potential additional situations that could arise, companies may want to add a line to their clawback policy giving the Compensation Committee discretion to clawback additional compensation, such as: "To align with any investor or proxy advisory firm policies on clawback policies in effect from time to time, the Committee may determine, in its sole discretion and for reasons it considers appropriate or desirable, to recover additional equity based or other compensation if permitted by and consistent with applicable law."

[12] Proposal submissions nearly tripled in 2023 (47, up from 16 total in 2022), but support declined, from 44% in 2022 to 24% in 2023, with four passing. At least 43 of these 47 proposals were submitted by John Chevedden and/or his associates. He targeted major corporations, irrespective of industry, such as Rite Aid Corp., AMC Networks Inc., JetBlue Airways Corp., Kohls Corp., The Walt Disney Co., Visa Inc. and Walgreens Boots Alliance, Inc. Nine companies sought to exclude these proposals via no-action requests, seven of which were successful on procedural grounds. The two remaining companies were denied relief, one arguing for exclusion on procedural grounds and one on substantial implementation grounds.

In response to the increased frequency of severance-related shareholder proposals, in 2024 ISS codified its case-by-case approach for analyzing these proposals. The updated ISS policy (i) harmonizes the factors used to analyze both regular severance arrangements and change-in-control related severance arrangements ("golden parachutes"), and (ii) clarifies the key factors it will consider in its analysis. The factors that will be considered include, but are not limited to:

- The company's severance or change-in-control agreements in place, and the presence of "problematic" features in the agreements, such as excessive severance entitlements (generally considered anything greater than three times base salary and bonus, single trigger arrangements, excise tax gross-ups, etc.);
- Any existing limits on cash severance payouts or policies which require shareholder ratification of severance payments exceeding a certain level;
- Any recent severance-related controversies; and
- Whether the proposal is overly prescriptive, such as requiring shareholder approval of severance that does not exceed market norms.[13]

To make the appropriate distinction between a problematic change-in-control severance provision and a "single trigger" change-in-control incentive award, ISS will review the company's disclosure of the incentive award structure and award rationale, and whether separate non-problematic severance entitlements are in place.

Disclosure Considerations. Item 402(j) requires proxy statement disclosure of "each contract, agreement, plan or arrangement…that provides for payment(s) to [an NEO] at, following, or in connection with any termination, including without limitation resignation, severance, retirement or a constructive termination of [an NEO], or a change in control of the registrant or a change in the [NEO's] responsibilities." The focus on executive severance both by shareholders and ISS emphasizes the importance of how such severance agreements are characterized in the proxy statement disclosure. Further, proxy advisory firms have increasingly focused on severance compensation provided to former executive officers that exceeds pre-existing contractual entitlements. If special severance is approved for a departing executive officer or severance is paid upon a voluntary resignation, care should be taken to explain the rationale for why such payments were approved and how the company determined that payment was appropriate.

In addition, companies should be thoughtful about their disclosure as it relates to characterizing executive terminations. ISS's view is that severance is intended for involuntary or constructive job loss and is not appropriate for executives who voluntarily resign or retire.[14] Only stating that an executive "stepped down" or that the executive and board "mutually agreed" on a departure does not clearly indicate an involuntary termination, and the payment of severance without disclosure of a corresponding involuntary termination is a problematic pay practice under ISS policies that can trigger an adverse vote recommendation.[15] To allow investors to fully evaluate severance payments, a company should disclose both the type of termination (***e.g.***, termination without cause or resignation for good reason) as defined under the agreement, as well as the provision by which severance payments were made under the agreement.

4. **Executive Share Ownership**: Another important element of executive compensation disclosure is executive share ownership requirements. Glass Lewis believes companies "should facilitate an alignment between the interests of the executive leadership with those of long-term shareholders by adopting and enforcing minimum

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13 ***See*** US-Voting-Guidelines.pdf (issgovernance.com). ISS also added a new FAQ that discusses how it distinguishes between "problematic" (***i.e.***, "single trigger" or "modified single trigger") change-in-control severance arrangements versus bona fide incentive compensation award that becomes payable upon a transaction involving a change-in-control of the company: (i) where an agreement provides for a change-in-control transaction bonus linked to an acquisition premium, ISS will analyze the provision as a change-in-control incentive award and not as a problematic "single trigger" severance arrangement; and (ii) change-in-control incentive awards will continue to be evaluated qualitatively, and therefore issues such as excessive magnitude or an unclear rationale for the arrangement may still raise concerns from a "pay-for-performance" perspective. ***See*** US-Equity-Compensation-Plans-FAQ.pdf (issgovernance.com),

14 ***See*** page 49 of ISS's US-Voting-Guidelines.pdf (issgovernance.com).

15 ***See*** Question 50 in ISS's US-Compensation-Policies-FAQ.pdf (issgovernance.com).

share ownership rules for their named executive officers." For 2024, Glass Lewis added a new policy requiring clear disclosure in a company's CD&A of their executive share ownership requirements and how various outstanding equity awards are treated when determining an executive's level of ownership. Glass Lewis views counting unearned performance-based full value awards and/or unexercised stock options towards shares held by an executive as inappropriate, and a company should provide a cogent rationale if they do so, or else these awards may be viewed as problematic.[16] ISS has a similar policy.[17]

Given this focus, companies should clearly describe their executive share ownership requirements and consider their policies in light of ISS and Glass Lewis policies.

5. **Stock Option Grant Policies.** Amendments to Rule 10b5-1 include a requirement to disclose stock option grant policies and practices, as well as tabular disclosures of awards ***only if*** the awards are made in the window starting four business days before and ending one day after the filing of a Form 10-K or 10-Q or the filing or furnishing of a Form 8-K that discloses MNPI. For calendar year end companies, this will only be required next year in **2025 proxy statements**, but will cover grants made **this year in 2024**, and companies should therefore already be carefully considering their equity grant policies and enhancements to their disclosures on this topic. For more information on equity grant procedures, , including important considerations regarding Staff Accounting Bulletin ("SAB") 120,[18] see our recent alert, Equity Grant Procedures and Guidelines for the Granting of Equity Awards.

II. Boards of Directors and Related Governance Disclosures

Investor and regulatory attention to board composition is not new, but the focus on ensuring the board has the right mix of skills and experiences continues to grow, particularly in light of the SEC's universal proxy rules, adopted last year.[19] With this in mind, companies should remember the following when crafting and finalizing board-related disclosures:

1. **Director Skills and Experience; Board Oversight*.***

Director Skills*:* Individual director skills are increasingly important in light of the focus that the new universal proxy regime places on individual director qualifications. Universal proxy allows individual directors to be targeted in a proxy contest, so it is important that each director's skills and qualifications are clearly articulated in the proxy statement. Director skills matrices have become the norm at S&P 500 companies: 68% included a skills matrix in their proxy statement in 2023, up from 45% in 2021, in part due to stockholder pressure.[20] This number is even higher at the 100 largest US companies (~75%). When determining which skills to include in a skills matrix, companies should focus on the particular skills that are necessary for effective oversight of the company's specific business (including risk oversight), industry and strategy. Further, given the focus on board oversight over key areas of potential risk, such as cybersecurity, artificial intelligence, climate and human capital management, companies may want to review their director skills disclosure to ensure any relevant skills or expertise in these areas is clearly set out in the director biographies.

Board Structure and Risk Oversight: The proxy statement (in Item 407(h) of Regulation S-K) requires companies to disclose their board leadership structure, including whether the roles of the CEO and Chair of the board are split or combined, as well as the board's role in risk oversight. In recent years, the SEC staff

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16 Glass Lewis's 2024 policies are available here.

17 ***See*** Question 45 in ISS's US-Compensation-Policies-FAQ.pdf (issgovernance.com).

18 SAB 120 provides guidance for companies as to how they should recognize and disclose the cost of providing "spring-loaded" awards, which SAB 120 defines as a "share-based payment award granted when a company is in possession of [MNPI] to which the market is likely to react positively when the information is announced." SAB 120 warns that "non-routine spring-loaded grants merit particular scrutiny by those charged with compensation and financial reporting governance." ***See*** SEC.gov | Staff Accounting Bulletin No. 120.

19 ***See*** our alert, "In Another Win for Shareholders, SEC Adopts New Rules for Universal Proxy Cards in Contested Director Elections."

20 ***See***, for example, the NYC Comptroller's Board Accountability Project 2.0, as described at "Overview : Office of the New York City Comptroller Brad Lander (nyc.gov)."

has issued comment letters asking companies to augment their required disclosures with more detail and increased granularity regarding: (i) the board leadership structure, such as whether the company may combine CEO and board chair roles and whether shareholders would receive advance notice and opportunity to provide input on such a change;[21] (ii) duties and responsibilities of lead directors, including how lead independent director's experience fits into risk oversight,[22] and (iii) board oversight of risk, including how often and on what timelines the board assesses risks, interaction with management around emerging risks, how the board's risk oversight processes align with disclosure controls and whether the board consults with outside advisors.[23] It appears that the staff is concerned that such disclosures may have become boilerplate over time and were not sufficiently tailored to the particular circumstances of a company and its unique challenges.

In addition to the SEC, proxy advisory firms are focused on board oversight. Specific oversight considerations include:

Cyber Oversight: Emphasizing the importance of board oversight of cyber risk, Glass Lewis's 2024 policy guidelines state that if a company has been materially impacted by a cyber-attack, Glass Lewis may recommend against appropriate directors if the board's oversight, response or disclosures concerning cybersecurity-related issues are insufficient or are not provided to shareholders. Glass Lewis specifically set out the disclosures shareholders should receive, including periodic updates from the company communicating its ongoing progress towards resolving and remediating the impact of the cyber-attack. These disclosures should focus on the company's response to address the impacts to affected stakeholders and should not reveal specific and/or technical details that could impede the company's response or remediation of the incident or that could assist threat actors.[24]

Climate Oversight: For 2024, Glass Lewis updated its policy on board oversight of environmental and social ("E&S") risks, stating that such oversight should be formally designated and codified in the appropriate committee charters or other governing documents.[25] Glass Lewis will examine a company's committee charters and governing documents to determine if the company has codified a meaningful level of oversight of and accountability for a company's material E&S impacts.[26]

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21 For example, "Please expand your discussion of the reasons you believe that your leadership structure is appropriate, addressing your specific characteristics or circumstances. In your discussion, please also address the circumstances under which you would consider having the Chair and CEO roles filled by a single individual, when shareholders would be notified of any such change, and whether you will seek prior input from shareholders." ***See*** comment letter to Warrior Met Coal, Inc. (September 2022).

22 For example, "Please expand your discussion of the reasons you believe that your leadership structure is appropriate, addressing your specific characteristics or circumstances. In your discussion, please also address how the experience of your Lead Director is brought to bear in connection with your board's role in risk oversight." ***See*** comment letter to MSCI Inc. (September 2022).

23 For example, "Please expand upon how your board administers its risk oversight function. For example, please disclose: why your board elected to retain direct oversight responsibility for monitoring and assessing strategic risk exposure rather than assign oversight to a board committee; the timeframe over which you evaluate risks (***e.g.***, short-term, intermediate-term, or long-term) and how you apply different oversight standards based upon the immediacy of the risk assessed; whether you consult with outside advisors and experts to anticipate future threats and trends, and how often you re-assess your risk environment; how the board interacts with management to address existing risks and identify significant emerging risks; whether you have a Chief Compliance Officer and to whom this position reports; and how your risk oversight process aligns with your disclosure controls and procedures." ***See*** comment letter to Adobe Inc. (September 2022).

24 These disclosures should focus on the company's response to address the impacts to affected stakeholders and should not reveal specific and/or technical details that could impede the company's response or remediation of the incident or that could assist threat actors. Glass Lewis's 2024 policies are available here.

25 Previously, Glass Lewis would examine a company's proxy statement and governing documents to assess the board's oversight.

26 For companies in the Russell 3000 index and in instances where GL identifies material oversight concerns, it will review a company's overall governance practices and identify which directors or board-level committees have been charged with oversight of environmental and/or social issues. GL 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.

Glass Lewis also updated its policy on board accountability for climate-related issues. Under its updated policy, for S&P 500 companies operating in industries where greenhouse gas ("GHG") emissions represent a financially material risk, it will assess whether such companies have disclosures in line with the recommendations of the TCFD. 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 either of these disclosures is absent or significantly lacking, it may recommend voting against responsible directors.[27]

Artificial Intelligence ("AI"): AI is a recent focus for companies, and as they consider both the opportunities that AI may present for their businesses and the risks it may create, board involvement and oversight with respect to AI will be critical to ensure it is used strategically and responsibly. Companies and boards should be proactive in their AI preparations and consider establishing a governance framework around AI. They should also consider enhancing disclosure regarding board oversight over AI so that investors and the market are well-informed of how the company is handling these critical matters.[28]

2. **Diversity Considerations*.*** The 2024 proxy statement will be the third year for Nasdaq's mandated diversity statistics disclosure. Notably, Nasdaq rules specify that the disclosure should include both the current and prior year statistics; however, Nasdaq has issued an FAQ that functionally removes this requirement by allowing only one year if the prior year remains publicly available (***i.e.***, in a proxy statement, information statement or on your website).[29] The Nasdaq deadline for companies to have, or explain why they do not have, at least one diverse director was December 31, 2023. The rule has been challenged in court, and the U.S. Court of Appeals for the Fifth Circuit agreed recently to revisit a challenge to the rule, after it was upheld by a three-judge panel in October 2023.[30]

   In addition, both ISS and Glass Lewis, as well as many institutional investors, including BlackRock, Vanguard and State Street, have their own diversity policies, including various definitions of what diversity means. ***See*** **Appendix B**. For example, ISS and BlackRock consider diversity to be broader and include more categories than Nasdaq (***e.g.***, BlackRock considers individuals with disabilities and veterans to be diverse, while Nasdaq does not). As a result, for a company to potentially increase the number of directors on its board that ISS or institutional investors like BlackRock consider to be diverse, it should consider and, if beneficial, disclose information in accordance with the broader definition of diversity that is applicable.

3. **Overboarding and Director Interlocks**. Given the increasingly strict overboarding policies of institutional investors, it is crucial to monitor the number of outside public company directorships that each director holds and disclose them appropriately. A White & Case survey of Fortune 50 companies found that, between 2022 and 2023, fourteen companies (28%) either added specific limits on outside directorships or lowered existing limits in their corporate governance guidelines. An additional six companies (12%) specifically added references to evaluating a director's other time commitments and availability in the context of having sufficient time and attention to devote to the board.

   In proxy statements, information on outside directorships is provided in the directors' biographical section pursuant to Item 401(e)(2) of Regulation S-K, which requires disclosure of directorships at other US publicly traded companies. To the extent a director at your company is serving on the board of either a private company or non-profit company, there is no SEC requirement to disclose this information, but if it is voluntarily disclosed, companies should consider clarifying that the outside directorship is at a private company in order

27 In 2023, this policy applied only to companies whose GHG emissions represented a financially material risk as identified by groups such as Climate Action 100+.

28 Companies are also reminded that when discussing the potential impact of AI, it is important not to "AI" wash, or mislead investors as to your true artificial intelligence capabilities, which SEC Chair Gary Gensler cautioned companies against in a statement in early December.

29 ***See*** Nasdaq FAQ 1753, available here.

30 ***See*** here. The appeals court has vacated the panel's opinion and will reconsider the challenge in an ***en banc*** proceeding. The parties will submit supplemental briefing in March and April 2024, and oral argument is tentatively set for the week of May 13, 2024.

to avoid having that directorship inadvertently counted against the director under an overboarding policy. Proxy advisors and institutional investors may count directorships at companies publicly traded outside the US against the overboarding limit, so companies should track these, as well.

In the case of an overboarded director, companies should consider disclosure regarding extenuating circumstances or a commitment to step down from other boards. For some investors, this additional explanation may be helpful if a director is overboarded. For example, Vanguard's policy states that a fund might vote for an overboarded director if the director has publicly committed to stepping down from a directorship in order to fall within the thresholds. See **Appendix C.**

In addition to overboarding concerns, companies should consider any potential illegal interlocking directorates that might violate Section 8 of the Clayton Act. The US Department of Justice ("DOJ") continues to aggressively pursue alleged illegal interlocking directorates, with a particular focus interlocks involving private equity firms and technology companies,[31] and it is therefore critical that companies actively review with counsel their existing ownership and appointment rights, and director and officer positions, to avoid Section 8 risk.

III. Proxy Housekeeping Items

Our housekeeping items for 2024 proxy statements include the following:

1. **Future Shareholder Proposal Information: Universal Proxy Rule Updates**. Like last year, this is the second year where disclosure is required for deadline and other information on future proposals that may be submitted under Rule 14a-19,[32] which is the SEC's universal proxy rule that requires the use of a universal proxy card in contested elections.[33] As background, under SEC guidance, the notice requirement under Rule 14a-19 serves as a minimum period that does not override or supersede a longer period established under advance notice provisions in a company's bylaws.[34] In light of this and other SEC guidance, companies can typically note that the deadline for Rule 14a-19 purposes is the same as the existing one that they already disclose in accordance with their advance notice provisions in their bylaws but should confirm that their disclosures align with their own bylaw provisions.[35]

   When deciding whether and how to amend their bylaws, companies should consider trends observed in the more than two hundred S&P 500 companies that have amended their bylaws.[36] An in-depth W&C survey of 100 of these companies found that 90% or more did so to directly address Rule 14a-19 by providing that a

31 On March 9, 2023, the DOJ announced that five more directors resigned from four US public company boards, and one PE firm declined to exercise its board appointment rights, in response to DOJ inquiries. ***See*** our alert, DOJ Antitrust Announces Five More Director Resignations from US Company Boards in Continued Aggressive Clayton Act Section 8 Enforcement, Increasing the Spotlight on Private Equity (PE) and Technology Firms. ***See also***, DOJ Announces Seven Director Resignations from Five US Public Company Boards in the Most Recent Wave of Reinvigorated Clayton Act Section 8 Enforcement.

32 Rule 14a-5(e).

33 ***See*** our alert, "In Another Win for Shareholders, SEC Adopts New Rules for Universal Proxy Cards in Contested Director Elections."

34 Moreover, Release No. 34-93596 states that in "most cases, Rule 14a-19(b) will not meaningfully impact dissidents because…most registrants' advance notice provisions impose an earlier deadline to provide notice of a dissident's nominees." ***See*** here. Also ***see*** C&DI Question 139.03, available here.

35 In addition, for companies that have not yet amended their bylaws in light of the universal proxy rules, their proxy statement disclosure will also need to state the need for a dissident shareholder to comply with the additional requirements of a Rule 14a-19(b) notice, including the statement that a dissident using the universal proxy rule intends to solicit 67% of outstanding voting shares.[35] Companies that have not already done so should consider whether amendments to their shareholder proposal advance notice procedures are appropriate. For example, the following language could be used for companies that have not yet amended their Bylaws to reference Rule 14a-19: "In order for stockholders to give timely notice of nominations for directors for inclusion on a universal proxy card in connection with the 2024 Annual Meeting, notice must be submitted by the same deadline as disclosed above under the advance notice provisions of our Bylaws and must include the information in the notice required by our Bylaws and by Rule 14a-19(b)(2) and Rule 14a-19(b)(3) under the Exchange Act."

36 Between April 22, 2022 and September 10, 2023.

nominating shareholder must satisfy all of the requirements of Rule 14a-19 in order to be eligible to nominate directors. For more information ***see*** our alert "Amending Bylaws and Charters to Address Universal Proxy, Shareholder Activism and Officer Exculpation."

To address some of the potential voting complexities created by the universal proxy rules, the SEC released several C&DIs addressing a soliciting party's use of discretionary authority under Rule 14a-4 to vote the shares in different situations, including 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 (C&DI 139.09).[37]

Officer Exculpation (Delaware Corporations). 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.[38] Since then, a number of corporations have included proposals in their proxy statements seeking shareholder approval for a charter amendment to adopt an officer exculpation provision in the charter, with an overwhelming percentage of such proposals passing. As of March 1, 2024, 220 such proposals had been submitted to a vote at Russell 3000 companies, and 198 (90%) passed. Of the 22 proposals that did not pass, approximately half required a supermajority vote, and companies with supermajority provisions should therefore consider whether it is feasible under their charter to adopt a new and separate exculpation provision for directors that will not require such a supermajority vote. With respect to proxy advisory firm policies on officer exculpation provisions, ISS states that it evaluates such proposals on a "case-by-case" basis, but it has largely recommended "for" the adoption of officer exculpation provisions.[39] ISS recommended "FOR" all but 33 of the 220 proposals (15%) voted on.

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. Companies may also want to consider proposing such an amendment in connection with any other required or desired updates to their certificate of incorporation.

2. **C&DIs Related to Regulation 14A**. In 2023, the SEC released several C&DIs clarifying provisions under Regulation 14A. These clarifications include that:

   - Consistent with longstanding company practice, for purposes of calculating the "10 calendar day" period in Rule 14a-6, the date of filing is day one pursuant to Rule 14a-6(k). For example, if the preliminary proxy statement is filed on Friday, October 20, 2023, then Sunday, October 29, 2023, would be day ten for purposes of Rule 14a-6. The registrant may send the definitive proxy statement to security holders starting at 12:01 a.m. on October 30, 2023[40] (C&DI 126.03);

   - 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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37 Other C&DIs address: (i) o***vervoted proxy cards***, clarifying that where authority has been granted to vote for more director nominees than seats are up for election, soliciting parties cannot use discretionary authority to vote the shares 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 the shares can still be voted on other matters on the proxy card for which there is no overvote and counted for purposes of determining a quorum (C&DI 139.07); and (ii) ***undervoted proxy cards,*** clarifying that ***w***here authority is granted to vote for fewer nominees than seats are up for election, 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 139.08).

38 ***See*** our alert, Amending Bylaws and Charters to Address Universal Proxy, Shareholder Activism and Officer Exculpation | White & Case LLP (whitecase.com)

39 ISS recommended "FOR" all but 33 proposals (15%).

40 This assumes that the preliminary proxy statement is submitted on or before 5:30 p.m. ET on October 20, 2023. If the filing is submitted after 5:30 p.m., the ten-day period does not start until the next business day, which would be Monday, October 23, 2023. See Rule 13(a)(2) of Regulation S-T.

3. Other Reminders:

a. **Review Voting Standards**. Once an annual meeting agenda is finalized, confirm your proxy statement disclosure on the voting standards that will apply to each agenda item, as well as how broker non-votes and abstentions will be treated. Getting this correct means considering the applicability of state law, your certificate of incorporation, bylaws and stock exchange requirements for each proposal. These voting standards should be checked annually, including consideration of recent rule changes and a company's annual meeting agenda. For example:
   - For NYSE companies that have equity plan amendments on the agenda, note that NYSE rules no longer require any special treatment for abstentions and, like Nasdaq, now defer to a company's governing documents and applicable state law for the treatment of abstentions for such proposals;[41]
   - The Say-on-Frequency vote now requires disclosure in the proxy statement of the voting standard used for this proposal. In the past, practice had been divided as to whether a majority vote standard under a company's bylaws and applicable state law is disclosed, or alternatively, a plurality voting standard (***i.e.***, meaning the frequency receiving the highest number of votes cast wins, rather than a majority) is disclosed in light of the non-binding, advisory nature of the proposal and practicalities of a plurality voting standard for a vote with three options; and
   - Lastly, remember that SEC rule amendments to Item 21 of the Schedule 14A now explicitly require disclosure in proxy statements on the treatment of any "withhold" votes (if applicable), in addition to the treatment of any abstention and broker non-votes.[42]

b. **Remember to File Annual Reports on EDGAR**. Starting in 2023, annual reports delivered to shareholders with a company's other proxy materials had to be electronically submitted, in PDF format, through EDGAR on Form ARS.[43] Under amended Rule 14a-3, this EDGAR submission is due no later than the date on which the report is first sent or given to shareholders. Companies that use "notice and access" are still required to publish their annual report on the website hosting their proxy materials. Notably, the glossy annual report will not be deemed "soliciting material" or to be "filed" with the SEC. Companies should be sure to check that the report meets all of the applicable requirements of Rule 14a-3, including identification of a company's directors and executive officers and their principal occupation or employment, which can be satisfied via a short list in the annual report.

c. **Confirm Any Disclosure on Section 16 Delinquencies**. Companies should review their prior Section 16 reports and identify any reports that were not filed on a timely basis. For each such late report, a company will need to disclose the Section 16 insider who filed late, the number of late reports and transactions that were not reported on a timely basis, and any known failure to file a form. Note that the instruction to Item 405(a) of Regulation S-K specifically encourages companies to exclude the "Delinquent Section 16(a) Reports" caption if there were no late filings to report; however, companies may opt to include the heading even if there were no delinquent filings, as a reminder to check compliance with this item in future year proxy statements.

d. **For NYSE-Listed Companies, Remember to Notify the NYSE of the Record Date at Least Ten Calendar Days Beforehand**. Under Section 204.21 of the NYSE Listed Company Manual, an NYSE-listed company must notify the exchange of the record date for a shareholder meeting at least ten calendar days before the record date and this notification should be completed

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41 ***See*** our alert, "NYSE Proposes to Amend Calculation of "Votes Cast" to Eliminate Confusion in Voting Standards."

42 ***See*** amended Item 21 of the Schedule 14A and this release. These SEC rule amendments also made clean-up changes to the proxy card rule requirements of Rule 14a-4(b), which in practice should not result in disclosure changes (***i.e.,*** they mandate that a proxy card provides for "against" and "abstain" voting options for companies with majority voting in director elections, instead of a "withhold" option).

43 ***See*** Rule 14a-3(c) and the SEC's press release, "SEC Updates Electronic Filing Requirements," available here.

immediately after the board sets the record date.[44] Additionally, the NYSE clarified in its 2023 Annual Guidance Letter that a record date cannot take place on a weekend or exchange holiday.

4. ***Last but not Least (Yet for the Top of Every Proxy Preparation List):*** **Confirm Sufficient Shares Available for Grants under Equity Compensation Plans**. Companies should confirm well in advance whether they will need to add shares to their equity-based incentive plans. A company should confirm both the number of existing shares still available for grant, as well as its plans for future equity grants. Adding shares to a plan can be a straightforward exercise when planned in advance, but it also involves many to-do items (***e.g.,*** updating the equity compensation plan itself with a company's desired amendments while considering ISS/Glass Lewis policies; drafting the additional required proposal for the proxy statement and carefully form-checking it against the technical requirements of Item 10 of Schedule 14A; if an NYSE-listed company, submitting a supplemental listing application to the NYSE;[45] preparing a Form S-8; and preparing an equity plan prospectus and distributing to grantees pursuant to Rule 428 under the Securities Act).

[44] ***See*** Rule 401.02 of the NYSE Listing Manual, which requires "immediate notification" of dates set in connection with the calling of any meeting of shareholders. Record date notifications should be submitted through Listing Manager or emailed to NYSE at proxyadmin@nyse.com.

[45] The NYSE reminds companies of this obligation in its 2023 Annual Guidance Letter, available here. No additional shares covered by the application may be issued until the NYSE has authorized the application (the NYSE requests at least two weeks to review and authorize the application). No such application or notification is required under Nasdaq rules, unless the company establishes or materially amends an equity compensation arrangement ***without*** shareholder approval. ***See*** Nasdaq Stock Market Rule 5250(e)(2)(i).

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Appendix A

Pay versus Performance Template

Explanatory Note: The following template was prepared by the White & Case Public Company Advisory Group (PCAG) and is intended to serve as a guide for your pay versus performance disclosures. Please note that this only a template and must be tailored for each company. Moreover, this template is not a replacement for a review and compliance check against Item 402(v) of Regulation S-K and the SEC's C&DIs issued February 10, 2023. For more information, please contact a member of your White & Case team.

Pay Versus Performance[46]

The following table provides information required by Item 402(v) of Regulation S-K. For information regarding the Company's pay-for-performance philosophy and how the Company aligns executive compensation with the Company's performance, refer to "Executive Compensation – Compensation Discussion and Analysis."[47]

Year[48]	Summary Compensation Table Total for PEO(1)	Compensation Actually Paid to PEO(3)	Average Summary Compensation Table Total for non-PEO Named Executive Officers(2)	Average Compensation Actually Paid to non-PEO Named Executive Officers(3)	Value of Initial Fixed $100 Investment Based On:(4)49		Net Income[50]	[Company-Selected Measure(6)][51]
					Total Shareholder Return	Peer Group Total Shareholder Return(5)		
2022								
2021								
2020								

[46] NTD: Smaller reporting companies ("SRCs") are exempt from certain of the tabular and other disclosures. Please ***see*** Exhibit 1 to Appendix A for the tabular disclosure required for SRCs.

[47] NTD: In the table below, each value must be separately tagged, with additional tagging within the footnote and relationship disclosure, all in Inline XBRL.

[48] NTD: In the initial compliance year, companies must provide the new pay versus table disclosing the executive compensation amounts and financial performance measures specified under Item 402(v)(2) for their ***three*** most recently completed fiscal years and will be required to add another year of disclosure in each of their two subsequent annual proxy statement filings.

[49] NTD: Cumulative total shareholder return ("TSR") generally is calculated in the same way as for the performance graph required under Item 201(e) of Regulation S-K. However, for each fiscal year, the amount included in the table must be the value of such fixed investment based on the cumulative TSR as of the end of that year.

[50] NTD: ***See*** C&DI Question 128D.08, which states that the metric required is "net income or loss as required by Regulation S-X to be disclosed in the registrant's audited GAAP financial statements," and ***not*** net income attributable to the controlling interest.

[51] NTD: This is the "most important financial performance measure" that is not otherwise disclosed in the table and that is used to link compensation actually paid, for the most recently completed fiscal year, to company performance. Multi-year performance measures, as well as stock price are generally not permitted to be used (***see*** C&DI Questions 128D.10 and 128D.11), and companies that do not use any such financial performance measures may be able to omit this column. However, note that the SEC has also indicated a broader view of such financial measures in its February 2023 C&DIs to include financial measures used to determine wholly or a portion of NEO compensation. For example, a financial performance measure can include a financial performance measure used to determine a bonus pool that is then allocated by a compensation committee in its discretion to individual participants. ***See*** C&DI Questions 128.09 and 128.12.

(1) Provide information about CEO. For example: "[***Name***] was our CEO for each of the years presented" ***or*** "During 2022, our Chief Executive Officers were [CEO#1 and CEO#2]." For multiple CEOs, add additional columns as shown on page 35 of the SEC Adopting Release.

(2) Provide information about other NEOs. For example: "Our non-CEO NEOs consisted of [list]" ***or*** "During 2022, our non-CEO NEOs consisted of [list]. During 2021, our non-CEO NEOs consisted of [list]. During 2020, our non-CEO NEOs consisted of [list]."

(3) Compensation "actually paid" is calculated in accordance with Item 402(v) of Regulation S-K. The tables below sets forth each adjustment made during each year presented in the table to calculate the compensation "actually paid" to our NEOs during each year in the table:[52]

[Adjustments to Determine Compensation "Actually Paid" for [PEO][Non-PEO NEOs][53]]	2023	2022	2021	2020
[Pension Plans[54]				
Deduction for aggregate change in the actuarial present values reported under the "Change in Pension Value and Nonqualified Deferred Compensation Earnings" column of the Summary Compensation Table				
Increase for "Service Cost" for pension plans				
Increase for "Prior Service Cost" for pension plans]				
[Equity Awards[55]				
Deduction for amounts reported under the "Stock Awards" column in the Summary Compensation Table				
Deduction for amounts reported under the "Option Awards" column in the Summary Compensation Table				
Increase for fair value of awards granted during year that remain outstanding as of covered year end				
Increase for fair value of awards granted during year that vested during covered year				
Increase/deduction for change in fair value from prior year end to covered year end of awards granted prior to covered year that were outstanding and unvested as of year end				
Increase/deduction for change in fair value from prior year end to vesting date of awards granted prior to covered year that vested during covered year				
Deduction of fair value of awards granted prior to covered year that were forfeited during covered year				
Increase based upon incremental fair value of awards modified during year				
[Increase based on dividends or other earnings paid during covered year, prior to vesting date of award][56]]				
[Total Adjustments]				

52 NTD: Must provide footnote disclosure (1) for ***each amount*** deducted and added from the Summary Compensation Table amount (not in the aggregate), and (2) for ***each year*** shown in the Pay versus Performance Table (however, following the first year, only last fiscal year information is required unless material). ***See*** C&DI Questions 128D.03 and 128D.04.

53 NTD: Entire table may be omitted if there were no pension plans or equity awards during the years covered in the table.

54 NTD: May be deleted if the company has no pension plans or if the company is a smaller reporting company.

55 NTD: May be deleted if there are no equity awards in the years covered in table.

56 NTD: Not required if equity awards do not earn dividends or if the earnings were otherwise included in the total compensation for the covered fiscal year.

(4) [Assumes $100 invested in our common shares on December 31, 20XX, and reinvestment of all dividends.]

(5) The peer group used by the Company consists of [the companies used in the Company's performance graph as required by Item 201(e) of Regulation S-K and reported in Part II, Item 5 of its annual report on Form 10-K for the fiscal year ended December 31, 2022, namely, [***name of published industry or line-of-business index***]][***OR IF USING CD&A PEER GROUP***][the following companies [for 2022][57]: [●]][the companies listed in "[Cross-reference to section of CD&A discussing peer companies"] and [the following companies [for 2020 and 2021] "[Cross-reference to section of CD&A in prior years discussing peer companies"]]. [From 2021 to 2022, the Company's peer group changed due to [●]. The TSR of the peer group in [year] was [●], compared to the Company's TSR of [●].[58]

(6) Describe the Company Selected Measure. For example: [●] is calculated as operating income (loss) as included in our annual and/or quarterly financial statements, excluding [●].][59]

Relationship Between "Compensation Actually Paid" and Performance

The following [graphs][description] address[es] the relationship between compensation "actually paid" as disclosed in the Pay vs. Performance Table and:

- the Company's cumulative TSR;
- the peer group cumulative TSR; [and][60]
- the company's net income[.][; and]
- [the "Company-Selected Measure"].

Tabular List of Most Important Financial Performance Measures

The following provides a list of the financial performance measures that we believe are the most important financial performance measures used to link NEO compensation to company performance. For more information, see "Executive Compensation – Compensation Discussion and Analysis." Although we do not in practice use any performance measures to link compensation "actually paid" (as calculated herein) to company performance, we are providing this list in accordance with Item 402(v) of Regulation S-K to provide information on performance measures used by the Compensation Committee to determine NEO compensation, as more fully described in "Executive Compensation – Compensation Discussion and Analysis."

1. [Performance Measure #1][61]
2. [Performance Measure #2]
3. [Performance Measure #3][62]

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57 NTD: If using the peer group from the CD&A, this needs to match that peer group for each respective year (even if it changed). ***See*** C&DI Question 128D.07.

58 NTD: Item 402(v) states: "If the registrant selects or otherwise uses a different peer group from the peer group used by it for the immediately preceding fiscal year, explain, in a footnote, the reason(s) for this change and compare the registrant's cumulative total return with that of both the newly selected peer group and the peer group used in the immediately preceding fiscal year."

59 NTD: Required if the Company Selected Measure is a non-GAAP financial measure. The final rules specify that disclosure of a measure that is not a financial measure under generally accepted accounting principles will not be subject to Regulation G and Item 10(e) of Regulation S-K; however, disclosure must be provided as to how the number is calculated from the registrant's audited financial statements.

60 NTD: The descriptions described above must also include a comparison of the company's cumulative TSR (column (f) of the PVP Table) and peer group cumulative TSR (column (g) of the PVP Table) over the same period.

61 NTD: May be presented as one tabular list, as two separate tabular lists (one for PEO and one for all NEOs), or as tabular lists for the PEO and each NEO.

62 Item 402(v)(6) provides that the list should be of at least three and up to seven financial performance measures. If fewer than three financial performance measures were used by the registrant to link compensation "actually paid" to the

Exhibit 1 to Appendix A: SRC Pay versus Performance Template

Tabular Disclosure for SRCs

The following table provides information required by Item 402(v) of Regulation S-K. For information regarding the Company's pay-for-performance philosophy and how the Company aligns executive compensation with the Company's performance, refer to "Executive Compensation – Narrative Disclosure to Summary Compensation Table."[63]

Year[64]	Summary Compensation Table Total for PEO(1)	Compensation Actually Paid to PEO(3)	Average Summary Compensation Table Total for non-PEO Named Executive Officers(2)	Average Compensation Actually Paid to non-PEO Named Executive Officers(3)	Value of Initial Fixed $100 Investment Based On:(4) Total Shareholder Return	Net Income
2023						
2022						
2021						

registrant's NEOs to company performance for the most recently completed FY, the Tabular List must include all such measures that were used (regardless of number or importance). A company is permitted, but not required, to include non-financial measures in the list **if** they consider such measures to be among their three to seven "most important" measures and they have disclosed at least three (or fewer, if the company uses only fewer) **financial** performance measures.

63 NTD: SRCs are subject to scaled disclosure as follows: SRCs are ***not*** required to disclose peer group TSR, the Company-Selected Measure, the Tabular List or certain pension amounts when measuring "actually paid" compensation. However, the footnote disclosure for the table including a footnote showing each adjustment for "actually paid" compensation and the relationship disclosure in our template above is otherwise required for SRCs. ***See*** Item 402(v)(8) of Regulation S-K and page 107 of the Adopting Release.

64 NTD: SRCs must comply with Inline XBRL data beginning in the third filing in which it provides pay-versus-performance disclosure. At that time, each value in the table must be separately tagged, with additional tagging within the footnote and relationship disclosure, all in Inline XBRL.

Appendix B

ISS, Glass Lewis and Institutional Investor Policies on Board Diversity

Institution	Policy	Definition of "Diverse"
Nasdaq	Nasdaq's Board Diversity Rule[65] requires listed companies to: (1) **Diversity Disclosure:** by August 8, 2022,[66] publicly disclose board-level diversity statistics using a standardized template; and (2) **Diversity Objective:** Following a phase-in period, have or explain why they do not have at least two diverse directors. The phase begins with the first diverse director by August 7, 2023 and the second by August 6, 2025 (except for companies listed on the Nasdaq Capital Market, which have until August 6, 2026 for both directors).[67] Out of the two diverse directors, one must be female and the other must be racially/ethnically diverse or LGBTQ+ (except for smaller reporting companies, where one diverse director must be female and the other either female, ethnically/racially diverse or LGBTQ+).	• Female • Black or African American • Hispanic or Latinx • Asian • Native American or Alaska Native • Native Hawaiian or Pacific Islander • Two or More Races or Ethnicities • LGBTQ+
ISS	***Race/ethnicity:*** For Russell 3000 or S&P 1500 companies, will generally recommend against the chair of the nominating committee (or other directors on a case-by-case basis) where the board has no apparent racially or ethnically diverse members. ***Gender:*** For all companies, will generally recommend voting against the chair of the nominating committee (or other directors on	• Female • Asian (excluding Indian/South Asian) • Black/African American • Hispanic/Latin American • Indian/South Asian • Middle-Eastern/North African • Native American/Alaskan Native • Native Hawaiian/Other Pacific Islander

65 The following companies are exempt: special purpose acquisition companies, asset-backed issuers and other passive issuers, cooperatives, limited partnerships, management investment companies, issuers of non-voting preferred securities, debt securities and Derivative Securities (as defined in Rule 5615(a)(6)) that do not have equity securities listed on Nasdaq; and issuers of securities listed under the Nasdaq Rule 5700 Series.

66 Newly listed companies have one year from the date of listing to provide the required board diversity disclosure.

67 This explanation does not cover companies that are newly listing after the enactment of Nasdaq's rule in August 2021; these companies may be subject to a more accelerated timeline.

	a case-by-case basis) where there are no women on the company's board.	
Glass Lewis	***Race/ethnicity:*** For Russell 1000 companies, will generally recommend voting against the chair of the nominating and/or governance committee of a board with fewer than one director from an underrepresented community. ***Gender:*** For Russell 3000 companies, will generally recommend voting against the chair of the nominating and/or governance committee of a board that is less than 30% gender diverse, or the entire nominating committee of a board with no gender diverse directors. For companies outside the Russell 3000, and all boards with six or fewer total directors, will generally recommend voting against the chair of the nominating and/or governance committee of a board with no gender diverse directors.	• Female • "Underrepresented community director" is an individual who self-identifies as Black, African American, North African, Middle Eastern, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaskan Native, or who self-identifies as a member of the LGBTQIA+ community. • Will recommend in accordance with ***mandatory*** board composition requirements set forth in applicable state laws when they come into effect (***e.g***., CA[68]).
BlackRock	Boards should aspire to 30% diversity of membership; companies are encouraged to have at least two directors on their board who identify as female and at least one who identifies as a member of an underrepresented minority. BlackRock also asks that boards disclose how diversity, including demographic factors and professional characteristics, is considered in board composition, given the company's long-term strategy and business model, among other items. Asks boards to disclose: how diversity, including demographic factors and professional characteristics, is considered in board composition, given the company's long-term strategy and business model, among other items.	• Female • Black or African American • Hispanic or Latinx • Asian • Native American or Alaska Native • Native Hawaiian or Pacific Islander • LGBTQ+ • Individuals who identify as underrepresented based on national, indigenous, religious, or cultural identity • Individuals with disabilities • Veterans

State Street	***Race/ethnicity: For*** S&P 500 companies, will vote against the chair of the nominating committee if the company does not disclose the board's racial and ethnic composition or if there are no directors from an underrepresented racial or ethnic community. For S&P 500 companies, will also vote against the chair of the	• Female
		• Underrepresented community – based on:
		  o Race
		  o Ethnicity

68 The applicable California law defines a diverse individual as someone who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.

	compensation committee if the company does not disclose its EEO-1 report. ***Gender:*** Expects boards of all companies to have at least one female director, and boards of Russell 3000 companies to have at least 30% percent women directors. If not, may vote against the chair of the nominating committee or board leader in the absence of a nominating committee, but may waive the policy if a company engages with SSGA and provides a specific, time-bound plan for reaching 30% representation of women directors.	
Vanguard	Expects boards to reflect diversity of personal characteristics (such as gender, race, age, and ethnicity). Believes that boards should determine the composition best suited to their company while considering market best practices, expectations, and risks, and should publish their perspectives on diversity so that shareholders can better understand how a board considers diversity in its composition. Board diversity disclosure should at least include the genders, races, ethnicities, tenures, skills, and experience that are represented on the board. Disclosure of personal characteristics (such as race and ethnicity) should be on a self-identified basis and may occur at an aggregate level or at the director level.	• Gender • Race • Age • Ethnicity
Fidelity	***Gender:*** Fidelity will vote against boards that do not have at least 30% female representation at companies in developed markets (UK, EU, US and Australia) or at least 15% representation at companies in markets where standards on diversity are developing.	• Female

Appendix C

Director Overboarding Policies

- ***ISS:*** Generally recommend against/withhold from directors who: (i) sit on more than **five** boards; or (ii) are CEOs of public companies who sit on the boards of more than **two *other*** companies (total of **three**, withhold only at their outside boards).[69]
- ***Glass Lewis:*** Generally recommend against: (i) a director who serves as an executive officer of any public company while serving on more than **two** public company boards; and (ii) any other director who serves on more than **five** boards.[70]
- ***BlackRock:*** Public company executives can sit on **one** outside board (total of **two**); other directors can sit on **three** outside boards (total of **four**).
- ***Vanguard:*** A named executive officer ("NEO") can sit on **two** boards (either **one** outside board or **two** outside boards if does not serve on its "home" board); other directors can sit on **four** boards.[71]

  Will also look for portfolio companies to "adopt good governance practices regarding director commitments, including the adoption of an overboarding policy and disclosure of how the board oversees policy implementation."
- ***State Street*:** The CEO can sit on **one** outside board (total of two); an NEO can sit on **two** boards; board chairs or lead independent directors can sit on **three** boards; other directors can sit on **four** boards.

  For non-NEO directors who are overboarded, may consider waiving the policy to vote "against" such director if the company publicly discloses its overboarding policy (in its corporate governance guidelines, proxy statement, or on the company website) and the policy includes: (i) a numerical limit on public company board seats a director can serve on (which cannot exceed State Street's policy by more than one seat); (ii) consideration of public company board leadership positions (***e.g.***, Committee Chair); (iii) affirmation that all directors are currently compliant with the company policy; and (iv) a description of an annual policy review process undertaken by the Nominating Committee to evaluate outside director time commitments.
- ***Fidelity:*** A CEO can sit on **two** outside unaffiliated boards (**three** total).
- ***CalPERS*:** An executive officer can sit on **one** outside board (**two** total); other directors can sit on **four** boards.
- ***NYC Comptroller:*** A CEO can sit on **two** outside boards (**three** total, vote against only at outside boards); other directors can sit on **four** boards.
- ***NYSE:*** If an audit committee member serves on more than **three** public company audit committees (including the Company's), Company must disclose this on its website or in proxy statement.

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69 ISS will also generally vote against the bundled election of directors if one or more nominees, if elected, would be overboarded.

70 Glass Lewis may consider relevant factors such as: (i) the size and location of the other companies where the director serves on the board; (ii) the director's board roles at the companies in question; (iii) whether the director serves on the board of any large privately held companies; (iv) the director's tenure on the boards in question; and (v) the director's attendance record at all companies. For directors who serve in executive roles other than CEO (***e.g.***, executive chair), it will evaluate the specific duties and responsibilities of that role in determining whether an exception is warranted. Glass Lewis may also refrain from recommending against certain directors if the company provides sufficient rationale for their continued board service. The rationale should allow shareholders to evaluate the scope of the directors' other commitments, as well as their contributions to the board, including specialized knowledge of the company's industry, strategy or key markets, the diversity of skills, perspective and background they provide, and other relevant factors.

71 In certain instances, Vanguard will consider voting for a director who would otherwise be considered overboarded because of company-specific facts and circumstances that indicate the director will have sufficient capacity to fulfill his/her responsibilities or if the director has publicly committed to stepping down from the other directorship(s) as necessary to fall within the listed thresholds.