Updates
December 19, 2022

Preparing for the 2023 Public Company Reporting Season

The U.S. Securities and Exchange Commission (SEC) had a busy 2022, adopting a number of new rules and proposing additional rules, many of which are likely to be finalized over the next several months. In November, Glass Lewis published its *2023 Policy Guidelines*, and Institutional Shareholder Services (ISS) released its *2023 Proxy Voting Updates*, both of which apply to the upcoming proxy season.

In anticipation of the upcoming annual reporting and proxy season, we highlight the most significant new rules, policy changes, and proposed rules to know. This Update addresses the following topics:

Pay-Versus-Performance

The SEC adopted the long-awaited pay-versus-performance (PVP) rules in August 2022. The final rules implement disclosure requirements mandated under the Dodd-Frank Wall Street Reform and Consumer Protection Act and "require registrants to describe the relationship between the executive compensation actually paid by the registrant and the financial performance of the registrant over the time horizon of the disclosure." All companies other than emerging growth companies, registered investment companies, and foreign private issuers are subject to the new rules. The rules require companies to disclose the prescribed information in any proxy or information statement in which executive compensation disclosure for fiscal years ended on or after December 16, 2022, is required. The information is to be disclosed pursuant to new Item 402(v) of Regulation S-K and is to include the following:

- A new PVP table containing:
  - The total compensation for the Principal Executive Officer (PEO) pulled directly from the Summary Compensation Table; if the company had more than one PEO during the most recent fiscal year, the disclosure must include separate disclosure columns for each person serving as PEO during that fiscal year.
  - The compensation "actually paid" to the PEO, calculated by taking the PEO's total compensation from the Summary Compensation Table and adjusting for the year-over-year change in fair value of equity awards, deducting the aggregate change in the actuarial present value of all defined benefit and actuarial pension plans and adding back the aggregate of service costs and prior service costs; the company must include separate disclosure columns for each person serving as PEO during the most recent fiscal year.

    - The average total compensation for the non-PEO named executive officers (NEO), pulled directly from the Summary Compensation Table.
    - The average compensation "actually paid" to non-PEO NEOs, calculated in the same manner as the compensation actually paid to the PEO.
    - The cumulative total shareholder return (TSR) of the company based on the value of a fixed investment of $100 and calculated in the same manner as in the stock performance graph required under Item 201(e) of Regulation S-K.
    - The cumulative TSR of the company's peer group using either the same peer group used for the stock performance graph required under Item 201(e) of Regulation S-K or as set forth in the company's Compensation Discussion & Analysis (CD&A); if the company's peer group changes year over year, the company must include a footnote explaining the reason for the change and including a comparison of the company's TSR to both the old and new peer groups.
    - The company's net income.
    - A company-selected financial performance measure that is the "most important" measure the company uses to link compensation actually paid to NEOs to company performance.
- Narrative and/or graphical disclosure based on the PVP table that describes the relationship between compensation actually paid and company TSR and between company TSR and peer group TSR.
- For all companies subject to the rule except smaller reporting companies (SRC), a tabular list (that does not need to be ranked) of between three and seven of the company's "most important" financial performance measures used in the most recently completed fiscal year to link compensation actually paid with company performance; the list may include non financial measures so long as at least three measures included are financial measures, and the list must include the company-selected financial performance measure included in the pay-versus-performance table.

SRCs get a bit of a break in that they initially are required to provide only two years' worth of information, adding a third year of information in the next-filed proxy statement requiring this information, for a total of three years' worth of PVP disclosure. All other companies subject to the rule need to provide three years' worth of PVP disclosure at the outset, adding on an additional year's worth for the subsequent two proxy statements requiring this information, for a total of five years' worth of PVP disclosure. All non-SRC PVP disclosure must be in Inline XBRL, while SRC PVP disclosure is not required to be in Inline XBRL until the third filing in which PVP disclosure is required.

Given the significant number of calculations required to provide accurate disclosure, particularly with respect to outstanding equity awards as of the end of the fiscal year as well as equity awards that vested during the year, we urge companies to get started as soon as possible. Additionally, if you have not already, identify both the internal and external members of the PVP disclosure team. Many companies will include outside compensation, valuation, and legal advisors on the external team given the volume and complexity involved in calculating compensation actually paid and compliance with the rules. In this first year of PVP rules, we do not expect companies' disclosure to drive say-on-pay voting decisions. Glass Lewis explicitly acknowledged the new rules in its voting guidelines and clarified that the new disclosures will not affect their pay-versus-performance methodology for 2023. Institutional investors are likely to take a similar approach. For many companies preparing PVP disclosure this year, the goal will be to provide compliant tabular disclosure and seek alignment between the PVP narrative disclosures and discussion of pay practices and philosophy in the CD&A. We expect PVP narrative discussions to be somewhat limited this year, with companies expanding on the narrative next year as they respond to investor feedback and review other companies' disclosures.

Practitioners have raised several technical interpretive questions on the new rule for which they have sought further guidance from the SEC. We patiently await the requested guidance as we prepare for the 2023 proxy season.

Clawback Policies

In October 2022, the SEC adopted final rules related to the clawback of executive compensation, which were published in the *Federal Register* on November 28, 2022. New Rule 10D-1 directs the national securities exchanges to establish listing standards requiring companies to adopt, enforce and disclose policies for the recovery or clawback of excess incentive-based compensation from current and former executive officers in the event of an accounting restatement. Key highlights from our previous Update include the following:

- The new rules apply broadly to all listed companies, including smaller reporting companies, emerging growth companies, controlled companies, debt-only issuers, and foreign private issuers, with only limited exceptions.
- Under the transition provisions of the new rules, the national securities exchanges must propose listing standards within 90 days after the final rules were published in the *Federal Register* on November 28, 2022. The listing standards must become effective within one year after the publication date, or no later than November 28, 2023. Companies then have 60 days to adopt a compliant clawback policy, or no later than January 27, 2024. The deadline for companies to adopt a clawback policy could be much earlier, for example, if the effective date of the final listing standards was July 1, 2023, the deadline for companies to adopt a clawback policy would be August 30, 2023.
- The Rule 10D-1 definition of executive officer includes all Section 16 officers, not just the "named executive officers" whose compensation is required to be disclosed in the proxy statement. Recovery is required only for incentive-based compensation received by an individual (1) after beginning service as an executive officer and (2) if the individual served as an executive officer at any time during the clawback recovery period, including compensation received during the recovery period by former executive officers.
- Rule 10D-1 broadly construes incentive-based compensation to include any compensation that is granted, earned, or vested based wholly or in part on the attainment of any financial reporting measures, including stock price or total shareholder return measures. Although this definition does not apply to time-based awards such as stock options and restricted stock units that vest solely based on continued employment, it would apply if such awards were granted based on the attainment of previously specified financial reporting measures.
- Companies would have to recover the amount of incentive-based compensation that is erroneously "received" during the three-year period preceding the date the company is required to prepare an accounting restatement. Compensation is deemed "received" in the fiscal period during which the financial reporting measure is attained, even if the award is subject to further time vesting.
- In an expansion from the proposed rules, the clawback requirement covers not only "Big R" accounting restatements that correct an error that is material to previously issued financial statements and are required to be reported in an 8-K filing, but also "little r" restatements that correct an error that would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period.
- Recovery of erroneously awarded compensation is mandated with only three narrow exceptions: the direct expenses paid to third parties would exceed the amount to be recovered, recovery would likely cause disqualification of a tax-qualified retirement plan, or recovery would violate home country law. Companies are prohibited from indemnifying or insuring executive officers against recovery.
- Companies would be required to file their clawback policies as an exhibit to the Form 10-K and include two new check boxes on the10-K cover page indicating whether the filing contains the correction of an error to previously issued financial statements and whether any of those error corrections involved a restatement that triggered a clawback analysis. Companies would also be required to provide certain proxy statement disclosures if there was a restatement that required a clawback during the last fiscal year or if there was an outstanding balance of unrecovered excess incentive-based compensation relating to a prior

restatement. Companies will be required to use Inline XBRL to tag these disclosures.

Rule 10b5-1 Trading Plans

The SEC adopted amendments to Rule 10b5-1 in December 2022 to address concerns that the rule allows for opportunistic trading and is subject to manipulation. Other rule amendments adopted along with the changes to Rule 10b5-1 included imposing new disclosure requirements for periodic reports, proxy, and information statements regarding insider trading policies, trading plans of insiders, and option grant practices, and amending Section 16 filing requirements.

The final amendments add new conditions to the availability of the affirmative defense to insider trading, including a 90 – 120-day cooling-off period for directors and Section 16 officers, and a 30-day cooling-off period for persons other than issuers, directors, and Section 16 officers. The amendments to Rule 10b5-1 will be effective 60 days after publication of the adopting release in the *Federal Register*. The other reporting requirements will be phased in, with Section 16 reporting persons needing to comply with the amendments to Forms 4 and 5 for reports filed on or after April 1, 2023, smaller reporting companies needing to comply with new periodic report and proxy statement disclosure requirements for reports covering the first full fiscal period that begins on or after October 1, 2023, and other issuers needing to comply with these disclosure requirements for the first full fiscal period that begins on or after April 1, 2023.

We discussed the final amendments in a recent blog post. Highlights of the amendments include:

- Required quarterly disclosure of adoption and termination (including modification) of Rule 10b5-1 plans, and trading arrangements not intended to satisfy the affirmative defense, by officers and directors.
- Required annual disclosure of insider trading policies and procedures.
- Required annual disclosure regarding policies and practices related to the grant of options in relation to the release of material nonpublic information, and tabular disclosure of option grants within the period beginning four business days before the filing of a periodic report or certain current reports and ending one business day after the filing or furnishing of such report.
- Mandatory cooling-off period for officers and directors from the date of plan adoption to the later of 90 days after adoption and two business days following the filing of the periodic report covering financial results for the fiscal quarter in which the plan was adopted (not to exceed 120 days).
- Mandatory cooling-off period for persons other than issuers, directors, or officers of 30 days.
- Prohibition of overlapping 10b5-1 trading plans, with exceptions for (1) plans that provide for sell-to-cover transactions used to satisfy tax withholding obligations arising from vesting of a compensatory award and (2) trades under contracts with multiple broker-dealers or agents that constitute a "single plan" for securities held in different accounts.
- Prohibition of multiple single-trade plans during a 12-month period.
- Directors and officers required to certify that they are not aware of any material nonpublic information when they enter into the plans.
- Addition of a new check box on Forms 4 and 5 indicating whether the reported transactions were made pursuant to a Rule 10b5-1 trading agreement.
- Requirement that gifts of securities be reported on Form 4 instead of within two trading days.
- Requirement that 10b5-1 trading plans be operated in good faith.

Universal Proxy Rules

As we reported last year, in November 2021, the SEC adopted rules that require companies and dissident shareholders to use a universal proxy card in public solicitations involving the election of directors. The new rules became effective for any shareholder meeting held after August 31, 2022. Under the new rules, both companies and dissident shareholders must include all nominees for director on their proxy cards, giving shareholders the ability to "mix and match" their votes for nominees from each of the company's and a dissident shareholder's slate. In uncontested elections, companies' proxy cards must meet certain procedural requirements as well.

In August and December 2022, the SEC's Division of Corporation Finance issued six Compliance and Disclosure Interpretations (CDIs) related to the universal proxy rules. See our blog posts summarizing these CDIs (August and December).

Over the past several months, corporate governance commentators have debated what, if any, bylaw amendments companies might adopt in light of the universal proxy rules. Basic bylaw amendments that acknowledge and address the mechanics and requirements of the universal proxy rules are not likely to be controversial. For example, companies might consider specifying that information required by Rule 14a-19(b) must be included in a shareholder's advance notice of director nominations made in compliance with the company's bylaws. Several companies have also amended their bylaws to provide an enforcement mechanism for Rule 14a-19's requirements by providing that the company will not count votes for a shareholder's nominees if the shareholder failed to comply with the rules.

More aggressive bylaw amendments have drawn ire from the activist investor community and, reportedly, may be the subject of shareholder proposals as early as the 2023 proxy season. These amendments include moving advance bylaw deadlines earlier and requiring nominating shareholders to disclose more information about the shareholder and nominee, including regarding other proxy fights the investor is or expects to be involved in and, for shareholders that are funds, naming the fund's limited partner investors. These new amendments go beyond the "second generation" advance notice bylaws that many companies have adopted over the past 10 to 15 years that seek information about the nominating shareholder's derivative holdings and voting agreements with other investors.

Officer Exculpation Under Delaware Law

Effective August 1, 2022, Delaware amended Section 102(b)(7) of the Delaware General Corporation Law (DGCL) to permit Delaware corporations to adopt an officer exculpation provision in their certificate of incorporation, which would remove or limit the personal liability of certain officers for monetary damages to the corporation or its stockholders for a breach of fiduciary duty, subject to certain conditions and exceptions. For most companies, an amendment to the certificate of incorporation to include the provision would require shareholder approval and the filing of a preliminary proxy statement, which could be subject to the SEC's examination and would accelerate the proxy statement filing timeline (which could be a significant challenge for many companies given the PVP rules discussed above).

The exculpation provision is only applicable to the fiduciary duty of care and to monetary damages, not equitable remedies. Section 102(b)(7)(i) provides that the provision may not apply to an officer who breaches the fiduciary duty of loyalty, including an officer whose "acts or omissions [are] not in good faith" or who "derived an improper personal benefit." Section 102(b)(7)(ii) states that liability may not be limited for an officer whose actions "involve intentional misconduct or knowing violation of law." Officers also cannot be exculpated "in any action by or in the right of the corporation," so companies can still sue their officers for a breach of the duty of care, and the amendment does not apply to stockholder derivative claims.

The importance of this DGCL amendment to companies is that it addresses a litigation strategy used in stockholder litigation, including in the mergers and acquisitions (M&A) context, of targeting officers for negligence claims.

Some Delaware corporations may seek to amend their certificate of incorporation to allow for officer exculpation based on the statutory change. Both ISS and Glass Lewis adopted voting policy updates reflecting that they will review proposals to adopt officer exculpation provisions on a case-by-case basis, and specified factors that they will consider. Glass Lewis goes on to say that it will generally recommend voting against provisions that eliminate (rather than limit) officer liability for duty of care breaches unless the board provides a compelling rationale. While many governance commentators expect that investors will understand and appreciate the long-term benefits of adopting an officer exculpation provision in line with DGCL Section 102(b)(7), the 2023 proxy season will be instructive for how best to frame the issue to garner support from institutional investors and proxy advisory firms.

Equity Awards and Equity Plans

Also, effective August 1, 2022, the DGCL was amended to provide greater flexibility for boards of directors to delegate authority to grant equity awards.

Previously boards were permitted to delegate to "1 or more officers" the authority to grant equity awards to "officers and employees of the corporation" within limited parameters. The delegated officer(s) had only the authority to (1) designate award recipients and (2) determine the number of shares to be awarded. They did not have authority to make grants to nonemployees, or to determine or alter any terms and conditions of the award.

The amended DGCL harmonizes the statutory provisions for board delegation of authority to issue stock, options, and other rights. The amendments give boards greater flexibility in delegating authority to grant equity awards and allow delegates broader discretion in establishing the terms and conditions of equity grants. Under the amended law (1) the board may now delegate to a "person or body," not just an officer, the authority to grant equity awards, (2) the delegate may now grant equity awards to nonemployees, including consultants and contractors, and (3) the delegate may now approve the terms and conditions of an award without board involvement, including vesting schedules and acceleration provisions.

Some limitations still apply under the amended law. Board resolutions delegating granting authority must specify (1) the maximum number of shares, rights, or options that may be issued pursuant to the delegation, (2) the period during which the shares, options, or rights may be issued, and (3) the minimum consideration that must be received for the shares.

Companies should consider whether and how to take advantage of the amended law, which will be particularly useful where special circumstances require deviation from the standard form of award agreement. Existing equity plans and compensation committee charters may need to be amended to allow for such delegation.

Delaware-incorporated companies seeking shareholder approval of new or amended equity plans should consider this statutory change in crafting plan terms and amendments. In addition, companies seeking approval of a plan should also consider ISS' previously announced change to its Equity Plan Scorecard that will be effective for 2023. Under the updated approach, ISS will calculate burn rate using a value-adjusted methodology, rather than the prior volatility-based approach.

Environmental and Social Disclosures

Corporate stakeholders remain focused on understanding environmental and social (E&S) metrics, risks, and opportunities for companies. In our 2022 reporting season update, we highlighted E&S topics that companies should consider addressing in proxy statements, as well as the SEC's focus on climate change disclosures in periodic reports. These themes remain important in 2023, as the SEC continues to issue comment letters regarding climate change disclosures, and investors continue to seek additional E&S reporting.

Related proxy advisory firm policy updates are as follows:

- Glass Lewis' policy to recommend a vote against the governance committee chair where the company does not provide disclosure about the board's role in overseeing E&S issues expands in 2023 to all companies in the Russell 1000.
- Glass Lewis introduced a new policy that it may recommend voting against the chair of the committee (or board) charged with oversight of climate-related issues where a company with material exposure to climate risk stemming from its own operations does not provide adequate disclosure on (1) climate-related topics in line with the recommendations of the Task Force on Climate-related Financial Disclosure (TCFD) and (2) clear and explicitly defined board oversight responsibilities for climate-related issues.
- ISS also updated its policy on climate board accountability. ISS will generally vote against a company in the Climate 100+ Focus Group if it does not both (1) adequately disclose its climate risks (such as in accordance with the TCFD framework) and (2) have either medium-term greenhouse gas emission reduction targets or Net Zero-by-2050 for at least Scope 1 and Scope 2 emissions. The reduction targets should cover at least 95% of the company's Scope 1 and 2 emissions.

Board Diversity

Investors' focus on board diversity shows no signs of slowing in 2023. Most public company boards have acknowledged this focus, increasing disclosures regarding board diversity and representation of diverse communities on their boards over the past several years. In this ongoing landscape of a drive toward increased board diversity, key developments include:

- **Underrepresented community definitions.** Not all companies or investors define "diverse" or "underrepresented community" in the same way. Notably, a divergence has emerged between the Nasdaq definition of diverse and the definitions used by Glass Lewis and ISS. Both Glass Lewis and ISS consider individuals who identify as Middle Eastern or North African to be diverse, while these categories are not included in the Nasdaq matrix or Nasdaq's definition of diverse. Institutional investors may take one of these approaches or look to the company to make its own determinations about what diversity characteristics it uses. Note that Nasdaq-listed companies can include other diversity information (such as directors who identify as Middle Eastern or North African, or other categories of diversity, such as a director with a disability), but directors with those characteristics will not be considered "diverse" under Nasdaq's definition.
- **Board diversity rules and requirements updates.** Nasdaq-listed companies were required to disclose board diversity in a matrix format starting in 2022, and must have at least one diverse director by August 7, 2023, or explain why the company does not meet this objective. For more detail regarding the Nasdaq rules, please see our 2022 proxy season Update. The California gender and underrepresented community diversity requirements faced legal battles in 2022 and have been overturned on state constitutional grounds. See our blog posts on the underrepresented communities case and the gender diversities case. Both cases are being appealed.

- **Institutional investor policies and initiatives.** Voting policies regarding board diversity continue to expand, both in terms of companies subject to these policies and the expectations of number or percentage of diverse directors. Many institutional investors expect at a minimum that a company will address board diversity in its proxy statement and provide aggregated information about the gender, racial, and ethnic makeup of its board. A company with no women and no racially or ethnically diverse board members should be prepared to answer questions from institutional investors about the lack of diversity and any plans to add diverse board members. In addition, as we blogged about recently, a group of institutional investors is encouraging companies to provide director diversity characteristics on an individualized, rather than aggregate, basis.
- **ISS policy update.** For the 2023 season, the only change to ISS' voting policies with respect to board diversity is that the gender diversity voting policy will apply to all companies, and not only those in the Russell 3000 and S&P 1500 indices.
- **Glass Lewis policy update.** Glass Lewis's 2023 policy guidelines transition from a numerical-based gender diversity requirement to a percentage-based gender diversity requirement for Russell 3000 companies. Glass Lewis will generally recommend voting against the nominating committee chair at such companies if the board is not at least 30% gender diverse. In addition, 2023 will also be the first proxy season where Glass Lewis will recommend voting against the nominating committee chair of a board that has no directors from an underrepresented community unless the company has provided a sufficient rationale or plan to address the lack of diversity on the board. This policy will apply to Russell 1000 companies. Glass Lewis also added to its list of board diversity disclosure expectations for Russell 1000 companies. Starting in 2023, Glass Lewis will generally recommend voting against the nominating committee chair at such companies that do not disclose individual or aggregate racial and ethnic demographic information for the board.

Mandated E-Filing of Glossy Annual Reports

As we discussed in a June blog post, the SEC amended its rules to require electronic filing for "glossy" annual reports, among other forms that were not previously subject to electronic filing requirements. Beginning January 11, 2023, companies must electronically file their glossy annual reports with the SEC in PDF format, which should capture the same graphics, styles of presentation, and prominence of disclosures in the version provided to shareholders. Companies will no longer be able to furnish paper copies with the SEC, and the former CDI permitting a company to furnish the report by posting it on the company website will be withdrawn. The EDGAR submission must be made no later than the date on which the report is first sent or given to shareholders. The glossy annual report will be considered "furnished" and not "filed" with the SEC.

A Look Ahead at SEC Proposed Rule Changes

Climate Change Disclosure

As noted above, climate change-related risk disclosures continue to receive noteworthy attention from the SEC and investors. The SEC made an extensive rule proposal regarding climate risk disclosures in March 2022, and later extended the comment period for the rule to November 1, 2022. While final rules were initially expected to be published in 2022, we have not yet seen a firm indication of when final amendments will be adopted.

The proposed rule changes are far-reaching, with disclosure requirements related to climate-related risks, board and management oversight of climate risks, Scope 1 and Scope 2 greenhouse gas emissions, disclosure topics for companies that have set climate goals, and financial statement disclosures regarding financial impacts of climate-related events and transition activities. For discussion of the SEC's climate change disclosure proposal, see our guide, "The SEC's Climate Disclosure Proposal: A Comprehensive Look."

Cybersecurity Disclosure

In March 2022, the SEC proposed rules to enhance and standardize disclosures regarding cybersecurity risk management, strategy, governance, and incident reporting. The proposed rules would require current reporting about material cybersecurity incidents, as well as periodic disclosures about companies' policies and procedures to identify and manage cybersecurity risks. The rules would also require companies to disclose management's role in implementing cybersecurity policies and procedures, the board of directors' oversight of such implementation, and whether any board member has cybersecurity expertise. Cybersecurity disclosures would need to be presented in Inline XBRL and ongoing, such that updates are provided about previously reported cybersecurity incidents.

Notably, for the 2023 proxy season, Glass Lewis added a policy regarding cybersecurity oversight, encouraging companies to provide transparent disclosure about the board's role in overseeing cybersecurity. Glass Lewis has not adopted a general voting policy related to these disclosures, but in cases where a company has suffered cybersecurity incidents that have caused significant harm to shareholders, it may recommend votes against certain directors if it finds the disclosure or oversight provided to be lacking.

For additional information on the SEC's cybersecurity disclosure proposal, see our Client Update, "SEC Proposes New Cybersecurity Disclosure Rules on Incident Reporting, Risk Management, Strategy, and Governance."

Share Repurchases

The SEC also proposed amendments regarding the disclosure of share repurchases. We provided key takeaways in this December 2021 blog post. The amendments would create new real-time reporting obligations regarding repurchases and enhance existing periodic disclosure requirements.

In December 2022, the SEC extended the comment period for the rules, and added additional topics for comment. If the final rule is adopted as proposed, share repurchase disclosures will become more burdensome on issuers, similar to Section 16 reports.

Shareholder Proposal Rule Changes

In July 2022, the SEC proposed amendments to certain rules governing shareholder proposals and the potential substantive bases upon which a company may rely to exclude a shareholder proposal from its proxy statement. The proposed amendments would narrow the exclusionary bases available to companies under Rule 14a-8(i)(10), the substantially implemented exclusion, Rule 14a-8(i)(11), the duplication exclusion, and Rule 14a-8(i)(12), the resubmission exclusion.

If the rules are adopted as proposed, we expect many shareholder proposals that were previously excludable to no longer be excludable. For more information on the proposed rules governing shareholder proposals, see our July 2022 blog post.

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