Client Alert | US Public Company Advisory

Key Considerations for the 2023 Annual Reporting and Proxy Season Part II: Proxy Statement

February 15, 2023

Part I of our two-part Annual Memo series identified important considerations when preparing Annual Reports on Form 10-K in 2023. **Part II** of this memo below, describes our key considerations for 2023 Annual Meeting Proxy Statements in four subsections:

- **Compensation Related Disclosure Matters**
- **Boards of Directors and Related Governance Disclosures**
- **Other ESG Issues: Human Capital, Climate and Political Spending**
- **Proxy Housekeeping Items**

I. Compensation Related Disclosure Matters

1. **Pay versus Performance Disclosures and the SEC's New C&DIs Issued February 10, 2023**. Arguably the most significant change to proxy statements for calendar year companies is the new pay versus performance disclosures. New Item 402(v) of Regulation S-K requires companies to disclose the relationship between executive compensation and their financial performance in their proxy statements.[1] The rules apply to U.S. 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 for fiscal years ending on or after December 16, 2022. See **Appendix A** for our Pay versus Performance template.

   Notably, EGCs and foreign private issuers ("FPIs") are exempt from the new rules, and companies that had their last fiscal year end *before* December 16, 2022 are not required to provide this new disclosure until they file a subsequent proxy statement disclosing Item 402 information for a fiscal year ending *after* December 16, 2022.

   Key points for companies as they prepare the disclosure for the first time include:

   - ***Overview of New Pay versus Performance Table.*** In the initial compliance year, companies must provide the new Pay versus Performance Table disclosing the executive compensation amounts and

[1] For detailed information on the new rules, *see* our alert, "SEC Adopts Pay Versus Performance Disclosure Rules." Also *see* C&DI Question 128D.01, stating that the new disclosure is only required in a proxy statement, not in a Form 10-K, and will not be deemed to be incorporated by reference into other SEC filings.

financial performance measures 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 statements.[2] SRCs that are no longer EGCs will initially be required to provide two years of information and must add one additional year in their subsequent proxy statement. The table must include:

- For the principal executive officer and, as an average, for the other named executive officers ("NEOs"), the Summary Compensation Table amounts for total compensation and a new measure reflecting compensation "actually paid" (as calculated under Item 402(v)(2)(3)).
- Total shareholder return ("TSR"), the TSR of companies in their peer group, their net income, and a financial performance measure chosen by the company (the "Company-Selected Measure"). SRCs are subject to scaled-back disclosure requirements, and are not required to disclose peer group TSR, the Company-Selected Measure or certain pension amounts when measuring "actually paid" compensation. The SEC's C&DIs recently issued on February 10, 2023 clarify the following with respect to these financial performance measures:
  - A company must disclose the net income amount as required and calculated in accordance with Regulation S-X and disclosed in audited GAAP financial statements – it may not use other net income amounts (such as net income attributable to a controlling interest).[3]
  - The Company-Selected Measure can include any financial performance measure that differs from financial performance measures otherwise required in the Pay versus Performance Table, including one that is derived from, a component of, or similar to net income or TSR. However, stock price should not be disclosed as a Company-Selected Measure if the only impact of stock price on an NEO's compensation is through changes in the value of share-based awards.[4]

- ***Relationship Disclosure.*** Companies must describe the relationship between the executive compensation "actually paid" and each of the performance measures, as well as the relationship between their TSR and the TSR of their peer group. For situations where there are multiple CEOs in a fiscal year, a company may aggregate their compensation in a narrative or graphical discussion; however, the company must still provide separate columns for each CEO in the Pay versus Performance Table.[5]

- ***Calculation of Compensation "Actually Paid."*** The rules regarding the calculation of compensation "actually paid" under Item 402(v) are complex and differ from the amounts included in the Summary Compensation Table, specifically with respect to equity awards and pension values. The new disclosure generally determines the value of equity compensation actually paid based on the fair value as of the end of the covered fiscal year, requiring the preparation of accounting valuations not previously required by SEC rules. A few key considerations to remember in light of the SEC's C&DIs issued February 10, 2023 include:
  - In the first year of the Pay versus Performance disclosure, footnote disclosure is required to show each of the amounts deducted and added from values previously reported in the Summary Compensation Table for *each year presented in the table.* In future years, footnote disclosure is only required for the most recent fiscal year, unless the prior year information is material to an investor's understanding of the information reported in the Pay versus Performance Table or the relationship disclosure.[6]
  - When adding in the change in fair value of awards from the end of the prior fiscal year to the current fiscal year, this calculation includes any awards granted to an NEO *prior to* the time

2 *See* Item 402(v), *Instructions to paragraph (v).*

3 *See* C&DI Question 128D.08.

4 *See* C&DI Questions 128D.09 and 128D.10.

5 *See* C&DI Question 128D.13.

6 *See* C&DI Question 128D.03.

that the person became an NEO.[7]

- A company may *not* satisfy the requirement to disclose each of the amounts deducted and added from the value of equity awards and pensions by disclosing the aggregate amounts; each deduction and addition must be individually disclosed by footnote.[8]

➢ ***TSR Peer Group Composition.*** The weighted peer group TSR disclosure should use either the peer group used for purposes of the performance graph required by Item 201(e) of Regulation S-K, or alternatively, it may use the peer group disclosed in the Compensation Disclosure & Analysis ("CD&A") and actually used to help determine executive pay, even if such peer group is not technically used for "benchmarking" purposes.[9] Notably, the SEC also clarified that when a company changes its peer group for its CD&A and uses this in its Pay versus Performance Table, it may not limit its presentation solely to the new peer group. Instead the company would need to present the peer group TSR for each year using the respective peer group disclosed in its CD&A for such year.[10]

➢ ***Tabular List of Most Important Performance Measures.*** The new rules require the disclosure of a list of three to seven financial performance measures that the company determines are its "most important" performance measures for linking executive compensation "actually paid" to company performance for the most recently completed fiscal year. Non-financial measures may be included in the list if the company considered such measures to be among the three to seven most important measures, but at least three (or fewer, if the registrant only uses fewer) financial measures must be disclosed. Companies may also cross-reference to other disclosures in the proxy statement that describe the registrant's processes for determining NEO compensation.

In practice, companies have likely not previously calculated or determined "actually paid" compensation (as defined in Item 402(v)) based on any financial performance measures. However, the SEC's C&DIs indicate that the Tabular List should capture a broader group of financial measures – namely, financial measures used to determine wholly or a portion of NEO compensation. In particular, this 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.[11]

➢ ***Block Text Tagging.*** Each value in the table must be separately tagged, with additional tagging within the footnote and relationship disclosure, all in Inline XBRL. However, for SRCs, a phase-in period allows for the required Inline XBRL data tagging to begin with the third filing in which it provides the new disclosure, rather than the first.

➢ ***Location.*** The SEC did not mandate the placement of the new disclosures within the proxy statement. The disclosure is not required in the CD&A and, in our view, inclusion in the CD&A may suggest that it was part of the company's compensation decisions for the year, which may or may not be the case for all of the required disclosures.

2. **CD&A Disclosure in 2023: Discussing Compensation in a Volatile Market Environment**. Calendar year 2022 saw each of the major U.S. indexes posting their worst year since 2008,[12] and supply chain disruptions, a tight labor market, rising material costs and inflationary pressures continued to plague many businesses. In an environment where shareholders may have lost value, providing a clear and concise rationale and analysis for executive compensation decisions in the CD&A is critical. If changes were made to pay programs as a result of macroeconomic issues that impacted financial results, those changes will need to be clearly and

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7 *See* C&DI Question 128D.02.

8 *See* C&DI Question 128D.04.

9 *See* C&DI Question 128D.05.

10 *See* C&DI Question 128D.07.

11 *See* CD&I Question 128D.12.

12 *See* Pound, Jesse and Subin, Samantha, "Stocks fall to end Wall Street's worst year since 2008, S&P 500 finishes 2022 down nearly 20%." CNBC.com, December 30, 2022, available at https://www.cnbc.com/2022/12/29/stock-market-futures-open-to-close-news.html. Accessed February 12, 2023, noting that the Dow Jones Industrial Average was down 8.8% for the year, the S&P 500 was down 19.4% and the Nasdaq was down 33.1% for the year.

thoughtfully explained. In 2022, the leading causes of Say-on-Pay failures included pay for performance misalignment and special awards (*see* our *Strategies for Say-on-Pay Failures* below). Additionally, stock price volatility may have resulted in awards covering a larger number of shares, putting pressure on share limits under equity-based incentive plans. Companies that seek approval for new share reserves this year may need to recalibrate the size of their requests to reflect the reduced value of the shares (*also see "*Proxy Housekeeping Items – *Confirm Sufficient Shares Available for Grants under Equity Compensation Plans"*)**.**

3. **Proxy Advisory Firm Considerations for Compensation**. When drafting CD&As, companies should be cognizant of the voting policies of ISS and Glass Lewis as well as institutional investors. Understanding these policies is important for 2023 compensation decision-making purposes and considerations of additional disclosures that may be warranted this year. Last November, ISS added as a problematic pay practice those "severance payments made when the termination is not clearly disclosed as involuntary (for example, a termination without cause or resignation for good reason)."[13] Any such terminations for a principal or NEO that occurred in 2022 will already have been disclosed on a Form 8-K, but companies should be aware of how they describe the termination and the severance payments, if applicable, in their proxy statement. This focus is further underscored by the SEC's recent enforcement action against McDonald's and its former CEO, where the SEC found that the company failed to disclose that it had exercised discretion in terminating him "without cause" and allowing him to retain certain equity-based compensation following his violation of corporate policy.[14]

   Notably, Glass Lewis made revisions to its policy in December 2022, increasing the threshold for the minimum percentage of long-term incentive grants that should be performance-based from 33% to 50%.[15] Glass Lewis also made clarifications in its 2023 policy guidelines, many of which focus on the need for adequate disclosures:

   - Companies are expected to include a thorough discussion of how they considered significant, material events that otherwise would be excluded from performance results when deciding to exercise or refrain from exercising discretion.
   - If any one-time awards were granted, companies should include thorough explanations of how the company determined the size of the award and its structure.[16]
   - Although the new clawback rules are not yet in effect (for more information, see "Clawback Policy Disclosures" below), Glass Lewis will continue to raise concerns at companies whose clawback policies only meet the requirements of Section 304 of the Sarbanes-Oxley Act. However, Glass Lewis policy states that "detailed disclosure" in the proxy statement evidencing "the board's proactive effort to ensure that the company will be in compliance" with the new rules may serve to mitigate such concerns.[17]

   Notably, both ISS and Glass Lewis have stated that the new pay versus performance disclosures will *not* be used in their screening or methodology during the 2023 proxy season, but may be considered during their qualitative evaluations.

4. **Don't Forget Say-on-Frequency**. For companies that first included the Say-on-Frequency vote in 2011 and then subsequently in 2017, 2023 marks the next sixth year in the cycle when the Say-on-Frequency vote will need to be included in proxy statements. If Say-on-Frequency is a proposal on the ballot, the voting options for it on the proxy card must be "1 Year," "2 Years," "3 Years" and "Against." Both ISS and Glass Lewis will generally recommend that shareholders support annual votes on compensation. In the Form 8-K that must be filed to disclose voting results following an annual meeting with a Say-on-Frequency vote, companies must

[13] *See* ISS US Compensation Policies FAQs, available here.

[14] *See* the SEC's order, available here.

[15] *See* Glass Lewis's US Voting Guidelines, available here.

[16] Glass Lewis expects "a cogent and convincing explanation of their necessity and why existing awards do not provide sufficient motivation and a discussion of how the quantum of the award and its structure were determined" and a description of "if and how the regular compensation arrangements will be affected by these additional grants." *See* Glass Lewis's US Voting Guidelines, available here.

[17] For more information, *see* p. 61 of Glass Lewis's US Voting Guidelines, available here.

also disclose the company's decision in light of this vote, and boards may be well advised to make this determination in advance of the Form 8-K filing (for example, by adopting a resolution that opts for the frequency that receives the highest number of votes). *Also see* Proxy Housekeeping Items – *Review Voting Standards.*

5. **Strategies for Say-on-Pay Vote Failures (or Weak Results).** During 2022, increased opposition to Say-on-Pay votes resulted in the lowest average support and the highest number of Say-on-Pay vote failures in the last 10 years. A total of 82 Russell 3000 companies, including 22 S&P 500 companies, received less than 50% support for their Say-on-Pay votes, and 215 companies received less than 70% support (the ISS adequacy threshold).

   ISS recommendations have a significant impact on vote results, with results being on average approximately 30% lower for companies that receive an ISS "against" recommendation. As a result, receiving an "against" recommendation from ISS will often result in a lost Say-on-Pay vote under ISS standards. For any company that either failed a Say-on-Pay vote or experienced weak results last year, proxy advisory firms will expect compensation committees to demonstrate responsiveness to shareholder concerns. Developing an effective CD&A to address the failure head-on and regain shareholder support involves the following:

   - *Demonstrate an understanding of the drivers behind the failed vote*. Carefully review ISS and Glass Lewis reports and voting results, and identify in the CD&A the specific issues raised. Make it clear that the company heard the message, and understands the concerns of shareholders.
   - *Describe the shareholder engagement process.* Describe in detail the company's engagement efforts (*e.g.*, percentage of total investors and/or large investors contacted, and the percentage of total investors and/or large investors with whom the company spoke), who participated in the discussions (ideally, this includes the compensation committee chair) and the specific feedback received.
   - *Identify specific actions to address shareholder concerns*. Explain any actions taken clearly and tie them directly to the feedback received during engagement. Use charts and graphics when possible to strengthen the narrative, including a chart showing each concern and the company's actions in response. The company should also discuss its process for implementing these changes.
   - *Don't side-step disagreement, but do provide a compelling justification*. While a company should be responsive to shareholder concerns, this does not mean acceding to every demand. The CD&A should identify any aspects of the company's compensation program that were not changed despite shareholder feedback, clearly explaining the rationale for retaining such elements and the importance to the company's overall compensation philosophy.

6. **Clawbacks.** Although new Item 402(w) of Regulation S-K has been adopted and will require, in the event of an accounting restatement, detailed disclosure regarding the restatement and any clawbacks made under the company's policy, the SEC has clarified that it does not expect companies to make such disclosures until they are required to have a clawback policy under applicable stock exchange listing standards. As of the date of this memo, stock exchanges have not adopted rules requiring a recovery policy. The stock exchange rules must be effective no later than November 28, 2023, and each issuer will be required to adopt a compliant clawback policy no later than 60 days after the effective date of the stock exchange rules.[18] Although there is time until a clawback policy is required under the new rules, companies should consider proxy statement disclosure this year on their efforts to ensure that they will be in compliance once the new rules are in effect. *Also see* Proxy Advisory Firm Considerations above.

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 new universal proxy rules.[19] With this in mind, companies should remember the following when crafting and finalizing board-related disclosures:

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[18] *See* final rule, available here.

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

1. **Board Oversight, Including Skills and Experiences**. 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. Last year, the staff issued several comment letters to companies asking for expanded disclosures regarding (i) how the board administers its risk oversight function and (ii) why the company believes its leadership structure is appropriate, including with respect to the board's role in risk oversight. It appears that the staff is concerned that such disclosures may have become boilerplate over time, and in the wake of social, geopolitical, macroeconomic and pandemic related factors over the last few years, companies would be advised to revisit their disclosures to ensure they are company specific, explaining how their leadership structure assists in board oversight as well as the processes in place for risk oversight.

   In addition, the SEC's proposed rules for climate change and cybsersecurity matters would, if adopted, include mandated disclosures related to board oversight of climate-related and cybersecurity risks.[20] Although these proposed rules are not expected to become final until April 2023, companies should consider enhancements to proxy statement disclosure on board oversight in light of investor and proxy advisory firms' focus on these issues. For example, Glass Lewis's policy calls for "explicit disclosure" concerning the board's role in overseeing ESG issues such as climate change, human capital management, diversity, and health, safety and environment, and, in particular, calls on companies to "provide clear disclosure concerning the role of the board in overseeing issues related to cybersecurity" and "oversight responsibilities for climate-related issues."

   Moreover, companies should consider other areas of importance to their business strategy and ensure they are adequately conveying the specific skills and experiences their directors bring to the board. The universal proxy card requirements, which are now effective for contested elections,[21] are likely to increase the focus on individual director qualifications in such elections, making these disclosures even more important.

   Given the increased scrutiny on the skills and experiences needed of directors to effectively carry out the board's oversight role, companies may also need to consider the level, detail and manner of disclosures being provided. Aggregated data may no longer satisfy investors. Additionally, in determining which skills to include in a skills matrix, companies should be reminded that these skills should be company-specific to focus on the skills the company believes are necessary for effective oversight of the company's business (including risk oversight) and its strategy.

2. **Diversity Considerations**. The 2023 proxy statement will be the second 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).[22]

   In December 2022, the SEC approved Nasdaq's rule amendment that extends the deadline for the requirement for companies to have, or explain why they do not have, at least one diverse director to December 31, 2023, but the pressure for board diversity information continues to grow. Since 2020, the Russell 3000 Board Diversity Disclosure Initiative has sent letters to Russell 3000 companies each year urging them to disclose the racial, ethnic and gender composition of their boards.[23] Although they estimated that the number of U.S. companies disclosing board diversity information increased 13-fold over the last two years, the letters sent in November 2022 were customized based on the level of disclosure companies have provided. Specifically, companies that already disclosed aggregated or summary diversity information of the

[20] For more information, *see* our alerts, "SEC Proposes Long-Awaited Climate Change Disclosure Rules" and "SEC Proposes Mandatory Cybersecurity Disclosure Rules."

[21] For more information, *see* our alert, "In Another Win for Shareholders, SEC Adopts New Rules for Universal Proxy Cards in Contested Director Elections."

[22] *See* Nasdaq FAQ 1753, available here.

[23] *See* "Russell 3000 Board Diversity Disclosure Initiative", available here.

composition of their boards are now being asked to disclose the attributes of *individual* directors, to enable investors to "assess racial, ethnic and gender diversity as separate components."[24]

In addition, both ISS and Glass Lewis, as well as many institutional investors, including BlackRock, Vanguard and State Street, have different definitions of, and policies with respect to, diversity. *See* **Appendix B**. For example, ISS and BlackRock consider diversity to be broader and include more categories than Nasdaq (for example, 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 a broader definition of diversity.

3. **Overboarding.** 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. 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 U.S. 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. Moreover, if one of these other company directorships is voluntarily disclosed, your proxy statement should make clear that the outside directorship is at a private company in order to avoid having that directorship inadvertently counted against the director under an overboarding policy. 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.**

III. Other ESG Issues: Human Capital, Climate and Political Spending

Both proxy advisory firms and institutional investors are focused on companies' ESG disclosures, and the proxy statement has increasingly become the home for such disclosures. Companies should consider the following when drafting their proxy statements this year:

1. **Human Capital Management.** Institutional investors have increasingly made human capital management disclosure and engagement a priority, and companies have increasingly supplemented disclosures required under Item 101(c) of Regulation S-K in their Form 10-K with additional information in the proxy statement. Additionally, shareholder proposals related to companies' workforces remain prominent, including proposals related to employee diversity, equity and inclusion ("DEI") matters (in 2022, these proposals averaged nearly 35% support, with one passing), recruitment and retention. Companies have also increasingly disclosed EEO-1 data on their websites and referenced this website disclosure in their proxy statements (in 2022, 36 Fortune 50 companies, or 72%, included EEO-1 references in their proxy statements), in part as a response to support for shareholder proposals on this topic and investor policies. For example, BlackRock has called on companies to disclose their EEO-1 survey responses and, starting in 2022, State Street adopted a policy to vote "against" the compensation committee chairs at companies that do not disclose their EEO-1 survey responses.

2. **Climate-Related Disclosures.** The SEC's proposed climate-related disclosure rules would dramatically increase the required climate-related disclosures included in SEC filings. The SEC's rule-making agenda has April 2023 as the time frame for the adoption of final rules, although many believe that litigation may slow down expected compliance dates, once final rules are adopted. In the interim, environmental and climate-related disclosures remain a priority for investors in 2023. Both ISS and Glass Lewis have voting policies with respect to climate-related disclosures that companies may want to consider when drafting proxy statements this year. For example, ISS will generally recommend against responsible committees/directors at companies that are significant greenhouse gas ("GHG") emitters through their operations or value chain, if the company is not taking the minimum steps needed to "understand, assess, and mitigate risks related to climate change

24 *See* sample letter, available here.

to the company and economy." Under ISS's 2023 policy, minimum steps for significant emitters include disclosures and appropriate GHG emissions reductions targets, namely "medium-term GHG reduction targets or Net Zero-by-2050 GHG reduction targets for Scope 1 and Scope 2 emissions." For those companies that have not or may not yet be prepared to set targets, disclosures that address the steps that are being taken may mitigate negative votes or voting recommendations. See **Appendix D**.

3. **Political Spending Policies and Contributions.** Contributions to political organizations, specific politicians, trade associations and other advocacy organizations have received increased scrutiny from shareholders in recent years. In the 2022 proxy season, five political contribution and lobbying-related shareholder proposals received majority support. In addition to proposals seeking transparency regarding political spending and lobbying, there were several proposals that focused on the "misalignment" between companies' espoused values and their political contributions, and those that went to a vote received significant support. Moreover, approximately two-thirds of S&P 500 companies now have a policy for board oversight of political spending, up from around 50% in 2020. Given high-profile, controversial issues in the news, such as abortion, racial justice, gun control and LGBTQ+ rights, management should monitor how that spending aligns with a company's public disclosures, and depending on their investor base, consider disclosure regarding their political spending policies in their proxy statements.

IV. Proxy Housekeeping Items

Our housekeeping items for 2023 proxy statements include the following:

1. ***Future Shareholder Proposal Information: Universal Proxy Rule Updates.*** For 2023 proxy statements, new disclosure is required for deadline and other information on future proposals that may be submitted under Rule 14a-19,[25] the SEC's new universal proxy rule that requires the use of a universal proxy card in contested elections.[26] 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.[27] In light of this and other SEC guidance, we believe that the preferable approach for companies this year is generally to specify in their proxy statements that their 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. 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.[28]

2. ***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 this year, note that NYSE rules no longer require any special treatment for abstentions and, like Nasdaq, now defer to a

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25 Rule 14a-5(e).

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

27 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.

28 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."

company's governing documents and applicable state law for the treatment of abstentions for such proposals.[29]

- Moreover, this year's Say-on-Frequency vote will require disclosure in the proxy statement of the voting standard used for this proposal. In the past, practice has 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.
- Lastly, note that recent 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.[30]

3. ***Remember to File Annual Reports on EDGAR.*** Starting this year, annual reports delivered to shareholders with a company's other proxy materials must be electronically submitted, in PDF format, through EDGAR on Form ARS.[31] 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 and must be filed regardless of whether the annual report is also posted on a company's website. 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. Given that the annual report will now be available on EDGAR, companies should be sure (as in the past) 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.

4. ***Shareholder Lists (Relevant Only to Delaware Corporations):*** Section 219 of the DGCL was amended in 2022 to *eliminate* the requirements that (i) a shareholder list be made available for inspection *during* the meeting and (ii) the notice of any virtual meeting disclose the information required for shareholders to access such list during the meeting. However, Section 219 still requires companies to make their shareholder list available for the 10 days *before* the meeting either on a reasonably accessible electronic network or at the company's principal place of business. If the company opts to use the electronic network for this 10-day period, it must still disclose in its notice the information required to gain access to such list. This disclosure has the potential to invite requests for the list from shareholders, so companies may be well advised to host the list at their principal place of business (in which case they would *not* need to include disclosure regarding the stockholder list in their notices).

5. ***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.

6. ***For NYSE-Listed Companies, Remember to Notify the NYSE of the Record Date at Least 10 Calendar Days Beforehand***. As the NYSE reminds companies in its 2023 Annual Guidance Letter,[32] 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 10 calendar days before the record date and this notification

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

30 *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).

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

32 *See* the letter, available here.

should be completed immediately after the board sets the record date.[33] Additionally, the NYSE clarifies in its 2023 Annual Guidance Letter that a record date cannot take place on a weekend or exchange holiday.

7. *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;[34] preparing a Form S-8; and preparing an equity plan prospectus and distributing to grantees pursuant to Rule 428 under the Securities Act).

The following White & Case Public Company Advisory Group members authored this alert:
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[33] *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.

[34] 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[35]

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."[36]

Year[37]	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)38		Net Income[39]	[Company-Selected Measure(6)][40]
					Total Shareholder Return	Peer Group Total Shareholder Return(5)		
2022								
2021								
2020								

35 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.

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

37 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.

38 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.

39 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.

40 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:[41]

[Adjustments to Determine Compensation "Actually Paid" for [PEO][Non-PEO NEOs][42]]	2022	2021	2020
[Pension Plans[43]			
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[44]			
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][45]]			
[Total Adjustments]			

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

[41] 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.

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

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

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

[45] 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.

(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][46]: [●]][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 [●].[47]

(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 [●].][48]

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][49]
- 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][50]
2. [Performance Measure #2]
3. [Performance Measure #3][51]

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46 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.

47 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."

48 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.

49 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.

50 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.

51 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 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-

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."[52]

Year[53]	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
2022[54]						
2021						

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.

52 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.

53 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.

54 NTD: In the initial compliance year, SRCs must provide information in the table for their two most recently completed fiscal years and will be required to add another year of disclosure in their subsequent annual proxy or information statement.

Appendix B

ISS, Glass Lewis and Institutional Investor Policies on Board Diversity

Institution	Policy	Definition of "Diverse"
Nasdaq	Nasdaq's Board Diversity Rule[55] requires listed companies to: (1) **Diversity Disclosure:** by August 8, 2022,[56] publicly disclose board-level diversity statistics using a standardized template. (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).[57] 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 Russell 3000 or S&P 1500 companies, will generally recommend voting against the chair of the nominating committee (or other directors on a case-by-case basis) where there are no women 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

55 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.

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

57 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.

	the company's board. Effective for meetings on or after February 1, 2023, this policy will also apply to companies outside the Russell 3000 or S&P 1500.	
Glass Lewis	*Race/ethnicity:* For S&P 500 companies with "particularly poor disclosure" on racial/ethnic diversity, may recommend voting against the chair of the nominating and/or governance committee. "Particularly poor disclosure" means a failure to provide *any* disclosure on, among other items, the board's current percentage of racial/ethnic diversity and whether the board defines diversity explicitly to include gender and/or race/ethnicity. Beginning in 2023, if an S&P 500 company has not provided *any* disclosure of individual or aggregate racial/ethnic minority board demographic information, will generally recommend voting against the chair of the nominating and/or governance committee. *Gender:* For Russell 3000 companies, will generally recommend voting against the chair of the nominating and/or governance committee of a board with fewer than two gender diverse directors, 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. Beginning in 2023, for Russell 3000 companies, will generally recommend voting against the chair of the nominating and/or governance committee (or other members of the committee if the chair is not up for reelection) of a board that is less than 30% gender diverse. Same policy will continue to apply for companies outside the Russell 3000.	• Female • Racial/ethnic diversity • Will recommend in accordance with *mandatory* board composition requirements set forth in applicable state laws when they come into effect (*e.g.*,CA[58]).
BlackRock	Boards should aspire to 30% diversity of membership; companies are encouraged to have at least two directors on their board	• Female • Black or African American • Hispanic or Latinx

58 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.

	who identify as female and at least one who identifies as a member of an underrepresented group. BlackRock also asks that boards disclose: (i) the aspects of diversity that the company believes are relevant to its business and how the diversity characteristics of the board, in aggregate, are aligned with a company's long-term strategy and business model; (ii) the process by which candidates are identified and selected, including whether professional firms or other resources outside of incumbent directors' networks have been engaged to identify and/or assess candidates, and whether a diverse slate of nominees is considered for all available board nominations; and (iii) the process by which boards evaluate themselves and any significant outcomes of the evaluation process, without divulging inappropriate and/or sensitive details. To the extent that a company has not adequately accounted for diversity in its board composition within a reasonable timeframe, may vote against members of the nominating/governance committee for an apparent lack of commitment to board effectiveness. BlackRock looks to the largest companies (*e.g.*, S&P 500) for continued leadership.	• 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 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, if not, may vote against the chair of the nominating committee or board leader in the absence of a nominating committee.
	
	Beginning in 2023, will expect boards of Russell 3000 companies to have at least 30% percent women directors (may waive the policy if a company engages with State Street Global Advisors and provides a specific, time-bound plan for reaching 30% representation of women directors), and, if
		• Female
		• Underrepresented community – based on:
		  ○ Race
		  ○ Ethnicity

	not, may vote against the chair of the nominating committee or board leader in the absence of a nominating committee.	
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. As a best practice, expects to see board composition disclosure, at least in aggregate. Also expects companies to conduct a sufficiently broad search for director candidates. This search should go beyond traditional candidate pools and purposely consider candidates who will bring diverse perspectives into the boardroom.	• 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, U.S. 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).[59]
- ***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.[60]
- ***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.[61]

  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*:** 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.

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

[60] 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.

[61] 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.

- ***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.

Appendix D

ESG Disclosure Policies of Institutional Investors

BlackRock:[62]

- **ESG Risk Oversight**: "Companies should have an established process for identifying, monitoring, and managing business and material ESG risks. Independent directors should have access to relevant management information and outside advice, as appropriate, to ensure they can properly oversee risk. We encourage companies to provide transparency around risk management, mitigation, and reporting to the board. We are particularly interested in understanding how risk oversight processes evolve in response to changes in corporate strategy and/or shifts in the business and related risk environment. Comprehensive disclosure provides investors with a sense of the company's long-term risk management practices and, more broadly, the quality of the board's oversight. In the absence of robust disclosures, we may reasonably conclude that companies are not adequately managing risk."

- **Environmental and Social Issues**: "BIS encourages companies to disclose their approach to maintaining a sustainable business model. We believe that reporting aligned with the framework developed by the Task Force on Climate-related Financial Disclosures ('TCFD'), supported by industry-specific metrics such as those identified by the Sustainability Accounting Standards Board ('SASB'), can provide a comprehensive picture of a company's sustainability approach and performance…Accordingly, we ask companies to:

    - Disclose the identification, assessment, management, and oversight of sustainability-related risks in accordance with the four pillars of TCFD

    - Publish investor-relevant, industry-specific, material metrics and rigorous targets, aligned with SASB or comparable sustainability reporting standards

  Companies should also disclose any supranational standards adopted, the industry initiatives in which they participate, any peer group benchmarking undertaken, and any assurance processes to help investors understand their approach to sustainable and responsible business conduct."

- **Climate Risk**: "We ask every company to help its investors understand how it may be impacted by climate-related risk and opportunities, and how these factors are considered within strategy in a manner consistent with the company's business model and sector. Specifically, we ask companies to articulate how their business model is aligned to a scenario in which global warming is limited to well below 2°C, moving towards global net zero emissions by 2050…In determining how to vote, we will continue to assess whether a company's disclosures are aligned with the TCFD and provide short-, medium-, and long-term reduction targets for Scope 1 and 2 emissions."

State Street:[63] Expects companies to address the following categories when developing their climate transition plans: Ambition (long-term climate-related ambition); Targets (interim GHG emissions reduction targets; alignment with temperature goals); TCFD Disclosure (TCFD-aligned disclosure; scenario analysis; emissions reporting and assurance); Decarbonization Strategy (transition plan integration into long-term strategy; decarbonization actions; carbon offsets utilization; decarbonization across the value chain); Capital Allocation Alignment (integration of climate considerations into capital allocation decisions; capital expenditure on low carbon strategies; carbon pricing; investments in decarbonization); Climate Policy Engagement (disclosure of climate change policies and positions; trade association review); Climate Governance (board oversight; management oversight); Physical Risk (physical risk assessment; physical risk management); Stakeholder Engagement (industry collaboration; investor engagement; climate expert engagement; internal engagement).

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62 *See* BlackRock Responsible Investment Guidelines - US.

63 *See* State Street's Disclosure Expectations for Effective Climate Transition Plans. Note that State Street is in the process of developing its disclosure expectations with respect to a "Just Transition."

Vanguard:

- **Climate-related risk**: "As a fiduciary, Vanguard views climate risk through the lens of materiality, seeking to determine whether climate-related factors pose a meaningful threat to long-term shareholder value. We support comprehensive and effective emissions disclosures and climate-related metrics and mitigation targets, such as those aligned with the goals of the Paris Agreement. Boards should be fully aware of climate risks and opportunities as part of a foundation for making the most sustainable long-term decisions. We look for companies to exhibit sound climate change risk management, including:
    - **Effective disclosure:** "Our interest is in transparency; when the market has relevant information, a company's stock price will more accurately reflect climate-related risk and opportunity. Climate-related disclosures should be aligned with investor-oriented frameworks such as those set forth by the TCFD, so that they may be compared over time and across peers.
    - **Risk mitigation**. Since 2015, the goals set forth in the Paris Agreement have become a widely accepted standard for countries and companies aiming to address climate change. Where climate change is a material risk, Vanguard encourages companies to set targets that align with these goals and to disclose them clearly."