CompensationStandards.com

“Proxy Season Post-Mortem: The Latest Compensation Disclosures”

Tuesday, June 17, 2025

Course Materials

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2 to 3:30 p.m. Eastern [archive and transcript to follow]

Our annual webcast focusing on the “lessons learned” that companies can start carrying forward into the next proxy season. It's time to analyze what was disclosed and what was not in the 2025 proxy season! Join these experts:

- **Mark Borges**, Principal, Compensia and Editor, CompensationStandards.com
- **Dave Lynn**, Partner, Goodwin and Senior Editor, TheCorporateCounsel.net and CompensationStandards.com
- **Ron Mueller**, Partner, Gibson Dunn & Crutcher LLP

Among other topics, this program will cover:

1. 2025 Shareholder Engagement Challenges
2. 2025 Proxy Statements — DEI and Other E&S Developments
3. 2025 Proxy Statements — Executive Compensation Disclosures
    a. Say-on-Pay during the 2025 proxy season
    b. CD&A highlights
    c. Pay-versus-Performance disclosure
    d. Compensation clawbacks
    e. Perquisite disclosure
    f. Proxy advisory firm policies
    g. Equity award grant practices
4. Shareholder Proposals
5. Upcoming SEC Roundtable

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Course Outline

1. 2025 Shareholder Engagement Challenges

a. Schedule 13G eligibility CDIs

In February, the Staff of the SEC’s Division of Corporation Finance released updated Compliance & Disclosure Interpretations (“CDIs”) related to eligibility to report beneficial ownership on Schedule 13G under Exchange Act Rule 13d-1(b) or Rule 13d-1(c).

Question 103.11 was revised to state that a shareholder’s ability to file on Schedule 13G in lieu of the Schedule 13D otherwise required will be informed by the meaning of “control” as defined in Exchange Act Rule 12b-2, and language about the shareholder’s discussions with management has been deleted.

New Question 103.12 now separately describes that “discussion” factor, with significant changes from the previous language:

> **Question:** Shareholders filing a Schedule 13G in reliance on Rule 13d-1(b) or Rule 13d-1(c) must certify that the subject securities were not acquired and are not held “for the purpose of or with the effect of changing or influencing the control of the issuer.” Under what circumstances would a shareholder’s engagement with an issuer’s management on a particular topic cause the shareholder to hold the subject securities with a disqualifying “purpose or effect of changing or influencing control of the issuer” and, pursuant to Rule 13d-1(e), lose its eligibility to report on Schedule 13G?
>
> **Answer:** The determination of whether a shareholder acquired or is holding the subject securities with a purpose or effect of “changing or influencing” control of the issuer is based on all the relevant facts and circumstances and will be informed by the meaning of “control” as defined in Exchange Act Rule 12b-2.

The subject matter of the shareholder's engagement with the issuer's management may be dispositive in making this determination. For example, Schedule 13G would be unavailable if a shareholder engages with the issuer's management to specifically call for the sale of the issuer or a significant amount of the issuer's assets, the restructuring of the issuer, or the election of director nominees other than the issuer's nominees.

In addition to the subject matter of the engagement, the context in which the engagement occurs is also highly relevant in determining whether the shareholder is holding the subject securities with a disqualifying purpose or effect of "influencing" control of the issuer. Generally, a shareholder who discusses with management its views on a particular topic and how its views may inform its voting decisions, without more, would not be disqualified from reporting on a Schedule 13G. A shareholder who goes beyond such a discussion, however, and exerts pressure on management to implement specific measures or changes to a policy may be "influencing" control over the issuer. For example, Schedule 13G may be unavailable to a shareholder who:

- Recommends that the issuer remove its staggered board, switch to a majority voting standard in uncontested director elections, eliminate its poison pill plan, change its executive compensation practices, or undertake specific actions on a social, environmental or political policy and, as a means of pressuring the issuer to adopt the recommendation, explicitly or implicitly conditions its support of one or more of the issuer's director nominees at the next director election on the issuer's adoption of its recommendation; or

- Discusses with management its voting policy on a particular topic and how the issuer fails to meet the shareholder's expectations on such topic, and, to apply pressure on management, states or implies during any such discussions that it will not support one or more of the issuer's director nominees at the next director election unless management makes changes to align with the shareholder's expectations. [Feb. 11, 2025]

b. How the 2025 proxy season unfolded

Investors took a range of approaches to engagement meetings during the 2025 proxy season following the new guidance.[1]

Those approaches include one or more of the following:

- Not engaging at all (*i.e.*, not taking meetings)
- Engaging but not participating (*i.e.*, taking meetings, but taking a "listen only" approach)
- Participating with a "listen first" approach, asking open-ended or less specific questions and not providing transparency around voting intentions
- Communicating that they prefer the company to do the outreach, set the agenda items and stick to the preset agenda topics
- Starting some or all meetings with a disclaimer around the intent not to influence control

There's even a range of approaches to when these changes are applied. Some investors are:

- Changing their approach across all portfolio companies
- Only changing their approach when engaging with companies where they are a 5% plus holder
- Only changing their approach on the topic of director elections

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[1] *See* TheCorporateCounsel.net's *Timely Takes* podcast episode on "The Staff's CDIs on Engagement Topics & 13G Eligibility" featuring Brian Breheny of Skadden, Rick Hansen of HP and Allie Rutherford of PJT Camberview; Skadden's client alert "Prepare for Changes to the Shareholder Engagement Process"; and FW Cook's blog "Evolving Shareholder Engagement Landscape and Bespoke Compensation Design."

Some investors have concerns about detailing their rationale for voting against a director after the meeting, even though the Staff may not have intended after-the-fact explanations as “exerting pressure.”

c. Engagement issues and trends

- Don’t do away with engagement — the long-run relationship building remains very important

- Be prepared for many different styles of meetings, and know how each investor is approaching engagement meetings before you engage (your proxy solicitor can provide)

- Know that silence is not acceptance — no questions or comments from an investor doesn’t mean they are supportive of a practice

- Address the “elephant in the room” — know pain points (specific to your company and also specific to the investor based on their policies) and address them proactively since they’re still likely to impact the investor’s vote. Companies need to be more proactive than ever — to get the meeting and set the agenda, already knowing the investor’s perspectives

- The differing approaches might mean that some investor voices and positions are much “louder” than others — there are many perspectives you’re not hearing in meetings

- Consider affirmatively responding to any investor disclaimer by saying something like, “We understand and we realize that’s not your intent,” which might make the investor more comfortable engaging and less worried that you won’t try to take the conversation further than they intend and then report the meeting to the SEC Staff

- Make sure your proxy and communication materials preemptively address concerns, including those specific to certain investor’s policies

2. 2025 Proxy Statements — DEI and Other E&S Developments

a. 2025 DEI disclosures

DEI disclosures in 2025 proxy statements and 2024 10-Ks have been impacted by recent developments, including:

- *Students for Fair Admissions v. Harvard* and private sector cases involving Section 1981 and Title VII of the Civil Rights Act
- Recent Executive Orders, including those titled "Ending Radical and Wasteful Government DEI Programs and Preferencing" and "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (and related technical guidance from the U.S. Equal Employment Opportunity Commission ("EEOC") — "What to Do If You Experience Discrimination Relating to DEI at Work" and "What You Should Know About DEI-Related Discrimination at Work")
- Vacatur of Nasdaq's "disclose or comply" board diversity rule (previously codified in Nasdaq Listing Rules 5605(f) and 5606)
- ISS's announcement that it will indefinitely halt consideration of certain diversity factors in making vote recommendations on director elections

Per data from DiversIQ, there's been about a 20% drop in the number of S&P 500 and the Russell 3000 companies that disclose at least one quantitative measure of board diversity in their proxies as of early April 2025.

Per Pearl Meyer, among the first 100 S&P 500 proxy filers, the prevalence of diversity measures in incentive programs sharply declined from 65% in 2023 to 35% in 2024.

b. 2025 Other E&S disclosures

The use of ESG measures seems to be reversing course with a renewed focus on financial measures. When used, investors look for metrics that have a clear connection to business strategy and for the plan to be designed so that significant weight is still given to the plan's financial metrics. They also look for transparent disclosure on the rationale for the metric and its weight.

3. 2025 Proxy Statements — Executive Compensation Disclosures

a. Say-on-Pay (required by Exchange Act Rule 14a-21 and Item 24 of Schedule 14A) during the 2025 proxy season

Per Semler Brossy, this year's Say-on-Pay results continue a positive multi-year trend of increasing Say-on-Pay support and fewer failures.

- Reminder: "Responsiveness" expected by proxy advisor policies when Say-on-Pay support is "low" (70% for ISS and 80% for Glass Lewis)

b. Compensation Discussion & Analysis highlights (Item 402(b) of Regulation S-K)

i. Shareholder engagement disclosure

ii. Incentive plan and award disclosure (Item 402(b)(2)(vi) and (vii) of Regulation S-K)

c. Pay-versus-Performance disclosure

i. Review of third-year proxy season disclosures under Item 402(v) of Regulation S-K adopted by the SEC in August 2022

ii. This proxy season was the first time proxy statements were required to include all five years of required disclosure

d. Compensation clawbacks under Exchange Act Rule 10D-1, Nasdaq Rule 5608 and Section 303A.14 of the NYSE Listed Company Manual

i. Form 10-K checkbox C&DIs

In early April, the Staff of the SEC's Division of Corporation Finance released six new Exchange Act Forms CDIs that address clawbacks-related checkboxes on the Form 10-K cover page and the timing of required Regulation S-K Item 402(w)(2) disclosures, paraphrased below:

- **104.20:** When an issuer reports a change to its previously issued financial statements in an annual report, it should determine whether "the financial statements of the registrant included in the filing reflect the correction of an error to previously issued financial statements" for purposes of the check box by looking to applicable accounting guidance on whether the change represents the correction of an error. The CDI notes that this includes "Big R" restatements and "little r" restatements but excludes "out-of-period adjustments" since the previously issued financial statements are not revised.

- **104.21:** Companies must mark the check box on the cover of an amended annual report to indicate that the restatement "required a recovery analysis of incentive-based compensation received by any of the registrant's executive officers during the relevant recovery period" pursuant to Exchange Act Rule 10D-1(b) even when: (1) no incentive-based compensation was received by any executive officers at all during the relevant time frame, or (2) incentive-based compensation was received but that incentive-based compensation was not based on a financial reporting measure impacted by the restatement (and explain).

- **104.22:** After filing an amended 20X3 10-K, an issuer includes the same restated financial statements in its subsequent 20X4 annual report. Assuming there are no additional restatements, the staff will not object to the check boxes remaining unmarked on the cover page of the 20X4 annual report. But the proxy or information statement filed during 20X5 that includes 20X4 executive compensation information pursuant to Item

402 must also include the disclosure of Item 402(w)(2) of Regulation S-K.

- **104.23:** If an issuer discovers an error in its previously issued 20X3 financial statements in 20X5 (prior to filing the 20X4 annual report), applies its recovery policy, determines that no recovery is required, checks both boxes on its 20X4 annual report and provides Item 402(w)(2) disclosure in its proxy or information statement incorporated by reference, the staff will not object if the 20X5 annual report does not include or incorporate by reference Item 402(w)(2) disclosure, notwithstanding that the restatement occurred "during … the [issuer's] last completed fiscal year" as long as there are no additional facts that would affect the conclusion of the prior Exchange Act Rule 10D-1(b) recovery analysis that no recovery is required.

- **104.24:** An issuer initially reports a restatement of an annual period in a form that does not include a cover page check box requirement — for example, a Form 8-K or a registration statement. If that annual period is presented in the issuer's financial statements in its next annual report, the issuer is required to mark that check box on the cover page of that annual report.

- **104.25:** If an issuer determines in the fourth quarter that it is required to prepare restatements of its first, second and third quarterly periods of that year, the issuer is not required to mark any of the check boxes on the cover page of its annual report even if the issuer includes disclosures about the interim restatements in a footnote to the annual period financial statements. However, it must provide disclosure pursuant to Item 402(w) of Regulation S-K in its 10-K or proxy or information statement since, for purposes of that disclosure, an accounting restatement is not limited to one that impacts annual periods.

ii. Lessons and insights into recovery mechanics from recovery analysis disclosures

- Proxy statement disclosures required in the event of an accounting restatement under Item 402(w)(2) of Regulation S-K

e. Perquisite disclosure (required in the "All Other Compensation" column of the Summary Compensation Table under Item 402(c)(2)(ix))

i. Interesting disclosures

ii. State of executive security-related disclosure

- Based on a recent analysis from Equilar, an increasing number of S&P 500 companies are offering security perquisites as part of executive compensation packages — 31.3% provided some type of security perk in 2024 (a 27.8% rise between 2023 and 2024, and a 47.6% increase from 2021)

f. Proxy advisory firm policies

For 2025, ISS added the following new FAQ, which was also previewed by the proxy advisor when it announced the opening of the comment period on proposed changes to its benchmark voting policies:

> **[Question 34] ISS previously announced adaptations to the pay-for-performance qualitative review effective for the 2025 proxy season, relating to the evaluation of performance-vesting equity awards. What does this entail?**
>
> Beginning with the 2025 proxy season, ISS will place a greater focus on performance-vesting equity disclosure and design aspects, particularly for companies that exhibit a quantitative pay-for-performance misalignment. While ISS has historically analyzed the disclosure and design of

incentive programs as part of the qualitative review, investors have increasingly expressed concerns with the potential pitfalls surrounding performance equity programs. As such, existing qualitative considerations around performance equity programs going forward will be subject to greater scrutiny in the context of a quantitative pay-for-performance misalignment. Typical considerations include the following non-exhaustive list:

- Non-disclosure of forward-looking goals (note: retrospective disclosure of goals at the end of the performance period will carry less mitigating weight than it has in prior years);
- Poor disclosure of closing-cycle vesting results;
- Poor disclosure of the rationale for metric changes, metric adjustments or program design;
- Unusually large pay opportunities, including maximum vesting opportunities;
- Non-rigorous goals that do not appear to strongly incentivize for outperformance; and/or
- Overly complex performance equity structures.

Multiple concerns identified with respect to performance equity programs will be more likely to result in an adverse vote recommendation in the context of a quantitative pay-for-performance misalignment.

Based on a review by Compensation Advisory Partners, most companies are not disclosing performance goals that will apply to long-term incentive awards for the upcoming performance period, often out of concern of competitive harm, but it is more likely to be disclosed for relative measures (68% of reviewed disclosures) versus absolute measures (30% of reviewed disclosures)

g. Equity award grant practices

New Item 402(x) requires:

- Disclosure of policies and practices related to the timing of awards of options, SARs and/or similar option-like instruments in relation to the disclosure of material nonpublic information ("MNPI")

- New tabular disclosure to the extent that, during the fiscal year, any stock options, SARs or similar instruments were granted to named executive officers ("NEOs") during the period beginning four business days before and ending one business day after the filing of a 10-Q, 10-K or 8-K that discloses MNPI

Note that:

- *Item 402(x)(1) is not limited to NEOs.* This requires disclosure about any option grant policy generally.

- *Item 402(x) has no time limit.* A lot of companies stopped granting options in the last few years — moving to performance-based awards — but they still have options outstanding. It's unclear from Item 402(x) whether those companies need to address their policies and procedures under Item 402(x)(1).

- *Item 402(x) does not address Restricted Stock Units ("RSUs") or Performance Stock Units ("PSUs").* But some companies have written policies that apply not just to options, but also to grants of RSUs or PSUs. Many of these companies — including those that don't grant options — have elected to discuss these equity grant policies and practices — going beyond what is required but providing helpful information.

4. Shareholder Proposals

In February, the Staff of the SEC's Division of Corporation Finance published Staff Legal Bulletin (SLB) 14M, which provides information for companies and shareholders regarding the operation of Exchange Act Rule 14a-8 governing shareholder proposals.

Most significantly, it rescinds the prior guidance in SLB 14L — which was published in 2021 and had made it easier for proponents to put environmental and social proposals to a vote.

- **NOTE:** Staff Legal Bulletins are not rules, regulations or statements of the Commission, and they are not approved or disapproved by the Commission, and they do not alter or amend applicable law or create new or additional obligations.

SLB 14M primarily addresses two of the substantive bases for exclusion of a shareholder proposal in Rule 14a-8 — the "economic relevance" and "ordinary business" exclusions under Rule 14a-8(i)(5) and (i)(7):

- **Rule 14a-8(i)(5)** permits exclusion of a proposal if it relates to operations which account for less than 5% of the company's total assets at the end of its most recent fiscal year, and for less than 5% of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business

- **Rule 14a-8(i)(7)** permits exclusion if the proposal deals with a matter relating to the company's ordinary business operations

Here's the now-current approach to the "economic relevance" exclusion under SLB 14M:

> The Division's analysis will focus on a proposal's significance to the company's business when it otherwise relates to operations that account for less than 5% of total assets, net earnings and gross sales. Under this framework, proposals that raise issues of social or ethical significance may be excludable, notwithstanding their importance in the abstract, based on the application and analysis of each of the factors of Rule 14a-8(i)(5) in determining the proposal's relevance to the company's business.[8]
>
> Because the rule allows exclusion only when the matter is not "otherwise significantly related to the company," we view the analysis as dependent upon the particular circumstances of the

> company to which the proposal is submitted. That is, a matter significant to one company may not be significant to another. On the other hand, we would generally view substantive governance matters to be significantly related to almost all companies.
>
> Where a proposal's significance to a company's business is not apparent on its face, the Commission has stated that a proposal may be excludable unless the proponent demonstrates that it is "otherwise significantly related to the company's business."[9] For example, as the Commission has stated, the proponent can provide information demonstrating that the proposal "may have a significant impact on other segments of the issuer's business or subject the issuer to significant contingent liabilities."[10] The proponent could continue to raise social or ethical issues in its arguments, but in accordance with these Commission statements it would need to tie those matters to a significant effect on the company's business. The mere possibility of reputational or economic harm alone will not demonstrate that a proposal is "otherwise significantly related to the company's business." In evaluating whether a proposal is "otherwise significantly related to the company's business," the staff will consider the proposal in light of the "total mix" of information about the issuer.
>
> In addition, the Division's analysis of whether a proposal is "otherwise significantly related" under Rule 14a-8(i)(5) has at times been informed by its analysis under the "ordinary business" exception, Rule 14a-8(i)(7). As a result, the availability or unavailability of Rule 14a-8(i)(7) has at times been largely determinative of the availability or unavailability of Rule 14a-8(i)(5). For clarity, the Division will not look to its analysis under Rule 14a-8(i)(7) when evaluating arguments under Rule 14a-8(i)(5). In our view, applying separate analytical frameworks will ensure that each basis for exclusion serves its intended purpose.

On the "ordinary business" exclusion, SLB 14M calls out that this exclusion rests on the central considerations of the proposal's subject matter and the degree to which the proposal "micromanages" the company. On the first prong, the Bulletin says (in part):

> [T]he staff will take a company-specific approach in evaluating significance, rather than focusing solely on whether a proposal raises a policy issue with broad societal impact or whether particular issues or categories of issues are universally "significant." Accordingly, a policy issue that is significant to one company may not be significant to another. The Division's analysis will focus on whether the proposal deals with a matter relating to an individual company's ordinary business operations or raises a policy issue that transcends the individual company's ordinary business operations.

On micromanagement, Corp Fin has reinstated Sections C.2 and C.3 of SLB 14J and Section B.4 of SLB 14K — these subsections are reprinted at the bottom of SLB 14M for convenience. However, SLB 14M does not reinstate the expectation for a no-action request to include a board analysis of the policy issue raised by the proposal.

5. Upcoming SEC Roundtable

In May, the SEC announced that it will host a roundtable discussion on executive compensation disclosure requirements on June 26. It will be held at the SEC's headquarters and open to the public (plus streamed live on SEC.gov). Chairman Atkins issued a statement saying,

> While it is undisputed that [the executive compensation] requirements, and the resulting disclosure, have become increasingly complex and lengthy, it is less clear if the increased complexity and length have provided investors with additional information that is material to their investment and voting decisions.
>
> It is important for the Commission to engage in retrospective reviews of its rules to ensure that they continue to be cost-effective and result in disclosure of material information without an overload of immaterial information.

He then includes the following questions for the staff to consider — and for members of the public to provide views on (before or after the event).

Executive compensation decisions: setting compensation and making investment and voting decisions

1. What is the process by which companies develop their executive compensation packages? What drives the development and decisions of compensation packages? What roles do the company's management, the company's compensation committee (or board of directors), and external advisors play in this development?

2. Current disclosure requirements seek to unpack these processes for investors. How can our rules be revised to better inform investors about the material aspects of how executive compensation decisions are made?

3. What level of detail regarding executive compensation information is material to investors in making their investment and voting decisions? Is there any information currently required to be disclosed in response to Item 402 of Regulation S-K that is not material to investors or that could be streamlined to improve the disclosure for investors? How do companies' engagement with investors drive compensation decisions and compensation disclosure?

Executive compensation disclosure: past, present, and future

4. The Commission substantially revised its executive compensation disclosure requirements in 2006 with requirements to provide, among other things, enhanced tabular disclosure of compensation amounts and a compensation discussion and analysis of the company's compensation practices. The rules were intended to provide investors with a clearer and more complete picture of the compensation earned by a company's executive officers. Have these disclosure requirements met these objectives? Do the required disclosures help investors to make informed investment and voting decisions? Given the complexity and length of these disclosures, are investors able to easily parse through the disclosure to identify the material information they need? In what ways could

disclosure rules be revised to return to a simpler presentation and focus?

5. The Dodd-Frank Act added several executive compensation related requirements to the securities laws, including shareholder advisory voting on various aspects of executive compensation. What types of disclosure do investors find material in making these voting decisions? Are companies able to provide such disclosure in a cost-effective manner? Do the current rules strike the right balance between eliciting material information and the costs to provide such information?

6. With the experience of almost 20 years of implementing the 2006 rule amendments, how can the Commission address challenges that either companies or investors have encountered with executive compensation rules and the resulting disclosures in a cost-effective and efficient manner while continuing to provide material compensation information for investors? For example, are there requirements that are difficult or costly to comply with and that do not elicit material information for investors? Are there ways that we can reduce the cost or otherwise streamline the compensation information required by the rules

Executive compensation hot topics: exploring the challenging issues

7. The Commission recently adopted rules implementing the requirements of Dodd Frank related to pay-versus-performance and clawbacks. Now that companies have implemented the new rules, are there any lessons we can learn from their implementation? Can these rules be improved? If so, how? For example, which requirements of these rules are the most difficult to comply with and how could we reduce those burdens while continuing to provide investors with material information and satisfy these statutory mandates?

8. Since adoption of the pay-versus performance rules, I have continued to hear concerns regarding the rule’s definition of

"compensation actually paid" (CAP). What has been companies' experience in calculating CAP and what has been investors' experience in using the information to make investment and voting decisions?

9. What has been companies' experience in applying the two-part analysis articulated by the Commission in 2006 with respect to evaluating whether perquisites for executive officers must be disclosed? How do disclosure requirements resulting from the test, and whether a cost constitutes a perquisite, affect companies' decisions on whether or not to provide a perquisite? For example, how has the application of the analysis affected evaluations relating to the costs of security for executive officers? Are there types of perquisites that have been particularly difficult to analyze? How do investors use information regarding perquisites in making investment and voting decisions?