



GIBSON DUNN

SEC Updates

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1. Final SEC Rules

Pay vs. Performance – New Proxy Table

- The SEC recently adopted final rules, originally proposed in 2015, regarding pay versus performance disclosures, which will apply for calendar year end filer’s 2023 proxy statements
 - Disclosure rules do not apply to Emerging Growth Companies, Foreign Private Issuers and Registered Investment Companies
 - Scaled rules apply to Smaller Reporting Companies (“SRCs”) and new issuers
- The key component of the required disclosures is the following table, which will initially cover fiscal years 2020, 2021 and 2022, but will eventually cover information for a five-year period (2021 and 2022 for SRCs, eventually covering a three-year period, with no Peer Group TSR and no Company-Selected Measure):

PAY VERSUS PERFORMANCE

Year	Summary Compensation Table Total for PEO	Compensation Actually Paid to PEO	Average Summary Compensation Table Total for Non-PEO NEOs	Average Compensation Actually Paid to Non-PEO NEOs	Value of Initial Fixed \$100 Investment Based On:		Net Income	[Company-Selected Measure]
					Total Shareholder Return	Peer Group Total Shareholder Return		
2022								
2021								
2020								

Pay vs. Performance – Overview of Rule Requirements

- Must include narrative and/or graphical disclosure accompanying the table that uses the information presented in the table to provide a clear description of the relationship between:
 - Executive compensation actually paid to the CEO & the other NEOs and the company’s cumulative TSR across the last [five] fiscal years
 - Executive compensation actually paid to the CEO & the other NEOs and the company’s net income across the last [five] fiscal years
 - Executive compensation actually paid to the CEO & the other NEOs and the Company-Selected Measure across the last [five] fiscal years
 - The company’s TSR and the peer group TSR
 - **Note:** During first year of disclosure, issuers are required to report only three fiscal years (or two fiscal years for SRCs)
- Performance Measures
 - “Company-Selected Measure” included in the table to represent the “most important financial performance measure” used to link compensation actually paid to company performance in the most recently completed fiscal year. **Note:** Not required for SRCs.
 - Also must disclose a list of 3 to 7 financial performance measures (including the Company-Selected Measure) used to link compensation to performance. **Note:** Not required for SRCs.
 - As long as at least 3 *financial* measures are chosen, non-financial performance measures may also be included in this list
 - Note, for the 3 to 7 measures included in the list (other than the Company-Selected Measure), disclosure of the results of those measures is not required

Pay vs. Performance – Compensation “Actually Paid” is a Misnomer

- Calculation begins with “Total Compensation” from the Summary Compensation Table and makes two key adjustments with respect to (i) change in pension value and (ii) stock awards and option awards. **Note:** Pension adjustments not required for SRCs.
- Replaces “Change in Pension Value” component with (i) actuarial present value under all plans attributable to services rendered *during* the covered fiscal year (Service Cost) plus (ii) entire cost of benefits granted (or credit for benefits reduced) under plan amendment or plan initiation during the covered fiscal year that are attributed by the benefit formula to services rendered in periods prior to the amendment (Prior Service Cost)
- Replaces “Stock Award” and “Option Award” values with amount intended to measure the change in fair value of outstanding unvested awards at FYE, and awards that vest during the covered fiscal year, on a year-over-year basis, calculated as:
 - The fair value of all awards granted during the FY that are outstanding and unvested as of FYE, plus
 - The change in fair value (+/-) from prior FYE of awards granted in prior FY that are outstanding and unvested as of FYE, plus
 - The fair value as of the vesting date for any awards granted during the FY that vest in the same FY, plus
 - The change in fair value (+/-) from prior FYE as of the vesting date of awards granted in prior FY that vest during the FY, minus
 - The fair value as of the prior FYE for any awards granted in a prior fiscal year that are forfeited during the covered FY
- **Planning Point:** Many issuers are running new Black-Scholes/Monte Carlo simulations as of each FYE for options and performance-based awards and as of vesting dates for options. Pension plan actuaries should be engaged for NEO service cost cautions for issuers with defined benefit pension plans.

Pay vs. Performance – Footnote Disclosure for Adjustments

- The PvP rules require footnote disclosure of (1) each of the amounts deducted and added (provided as averages for the other NEOs), and (2) the name of each NEO included as PEO or in the average other NEO groups and the fiscal years in which such persons are included.
- The following is sample footnote tabular disclosure. One table would be used for the PEO and a second table would disclose averages for the other named executive officers.

Year	Summary Compensation Total (SCT Total)	Deductions from SCT Total(a)	Additions to SCT Total(b)	Compensation Actually Paid
2022				
2021				
2020				

(a) Represents the grant date fair value of equity-based awards granted each year and the change in pension value for each year previously reported in the Summary Compensation Table.

(b) Reflects the value of equity-based awards, as well as the service cost and prior service cost for our defined benefit pension plans, calculated in accordance with Item 402(v)(2)(iii).

- Additional detail on any assumptions in valuations that differ materially from those disclosed as of the grant date should also be provided.

Pay vs. Performance – Footnote Disclosure for Adjustments

- The following is an alternative sample footnote with narrative disclosure for equity award adjustments.
 1. Calculated as follows for [year]: \$[●], which is the Summary Compensation Table Total for the PEO, minus (ii) \$[●], which is the aggregate grant date fair value of stock and option awards granted to the PEO during the year, plus (iii) \$[●], which is the fair value as of the end of the covered fiscal year of all awards granted to the PEO during the covered fiscal year that were outstanding and unvested as of the end of the covered fiscal year, plus (iv) \$[●], which is an amount equal to the change as of the end of the covered fiscal year (from the end of the prior fiscal year) in fair value (whether positive or negative) of any awards granted in any prior fiscal year that are outstanding and unvested as of the end of the covered fiscal year, plus (v) \$[●], which is an amount equal to the change as of the vesting date (from the end of the prior fiscal year) in fair value (whether positive or negative) of any awards granted to the PEO in any prior fiscal year for which all applicable vesting conditions were satisfied at the end of or during the covered fiscal year, minus (vi) \$[●], which is an amount equal to the fair value at the end of the prior fiscal year for any awards granted in any prior fiscal year that failed to meet the applicable vesting conditions during the covered fiscal year, plus (vii) \$[●], which is the dollar value of any dividends or other earnings paid on PEO stock awards in the covered fiscal year prior to the vesting date that are not otherwise included in the total compensation for the covered fiscal year.
 2. Calculated as follows for [year]: \$[●], which is the average Summary Compensation Table Total for the other NEOs, minus (ii) \$[●], which is the average aggregate grant date fair value of stock and option awards granted to the other NEOs during the fiscal year, plus (iii) \$[●], which is the average fair value as of the end of the covered fiscal year of all awards granted to the other NEOs during the covered fiscal year that were outstanding and unvested as of the end of the covered fiscal year, plus (iv) \$[●], which is the average change as of the end of the covered fiscal year (from the end of the prior fiscal year) in fair value (whether positive or negative) of any awards granted to the other NEOs in any prior fiscal year that are outstanding and unvested as of the end of the covered fiscal year, plus (v) \$[●], which is an amount equal to the average change as of the vesting date (from the end of the prior fiscal year) in fair value (whether positive or negative) of any awards granted to the other NEOs in any prior fiscal year for which all applicable vesting conditions were satisfied at the end of or during the covered fiscal year, minus (vi) \$[●], which is the average fair value at the end of the prior fiscal year for any awards granted in any prior fiscal year that failed to meet the applicable vesting conditions during the covered fiscal year, plus (vii) \$[●], which is the average dollar value of any dividends or other earnings paid on other NEO stock awards in the covered fiscal year prior to the vesting date that are not otherwise included in the total compensation for the covered fiscal year.

Clawback Rules – Overview

- **Background:** SEC adopted Dodd-Frank rules requiring stock exchanges to require listed companies to have “no fault” clawback policies providing for the mandatory recovery of incentive compensation
- **Effective Date:**
 - The Clawback Rule was published November 28, 2022.
 - Stock exchanges must propose listing rules consistent with the Clawback Rule by February 26, 2023.
 - Effective date of the stock exchange listing standards must be no later than November 28, 2023.
 - Issuers must adopt recovery policies consistent with the stock exchange listing standards no later than 60 days following the date such listing standards become effective.
 - Latest possible date for adopting a recovery policy is January 27, 2024 but could be earlier.
- **New Disclosure Requirements:**
 - File policy as 10-K/20-F/40-F exhibit
 - Indicate by check mark on cover page if financial statements reflect the correction of an error in previously issued financial statements, and if so, whether any such correction required a recovery analysis

Clawback Rules – Key Features – Covered Individuals and Trigger

- Covers current and former “executive officers”
 - “Executive Officer” generally tied to the Section 16 “officer” definition and includes the Principal Accounting Officer
- Triggered by an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement under the securities laws, including
 - Any required accounting restatement to correct an error in previously issued financial statements that is material to the previously issued financial statements (“Big R” restatements), or
 - Any required accounting restatement that would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period (“Little R” restatements)
- An individual’s misconduct or responsibility for the restatement is not relevant

Clawback Rules – Key Features – Covered Compensation

- Only apply to incentive-based compensation that is received during the three-year period preceding the date on which the issuer is required to prepare the accounting restatement
 - “Incentive-Based Compensation” includes performance-based cash and equity that is granted, earned, or vested based wholly or in part upon the attainment of a “financial reporting measure”
 - Measure determined and presented in accordance with the accounting principles used in preparing the issuer’s financial statements, and any measure derived wholly or in part from such measures, including stock price and total shareholder return
 - Incentive-based compensation deemed “received” in the issuer’s fiscal period during which the financial reporting measure specified in the incentive-based compensation award is *attained*, even if the payment or grant of the incentive-based compensation occurs after the end of that period
- Annual base salaries, discretionary bonuses and equity awards that are granted without regard to any financial reporting measure and vest solely based on continued service would not be covered

Clawback Rules – Key Features – Recoupment

- **Amount Recouped**: Amount of “incentive-based compensation” received by the executive officer in excess of what would have been received if the “incentive-based compensation” was determined based on the restated financial statements.
- **Discretion**: The Clawback Rule does not permit the exercise of discretion by the issuer. Amounts must be recouped unless certain narrow exceptions are met.
- **Exceptions**: No recoupment required if compensation committee, or in the absence of such a committee, a majority of the independent directors, determines that recovery would be impracticable and one of the following conditions is met:
 - Direct expense paid to a third party to enforce recoupment policy would exceed amount recovered and a reasonable attempt to recover such compensation was made and documented;
 - Recoupment would violate home country law; or
 - Recoupment would likely cause an otherwise tax-qualified, broad-based retirement plan to fail to meet applicable requirements.

10b5-1 Trading Plans – Overview

- **Background:** On December 14, 2022, the SEC adopted amendments to Exchange Act Rule 10b5-1 that impose conditions designed to prevent corporate insiders from abusing the affirmative defense to insider trading liability provided by Rule 10b5-1 plans while trading on material nonpublic information (“MNPI”). The final rules also impose several new disclosure requirements regarding companies’ insider trading policies and the use of Rule 10b5-1 plans by directors and officers intended to provide greater transparency to the market.

10b5-1 Trading Plans – Conditions and Limitations

- **Conditions and Limitations:** The rule changes amend the Rule 10b5-1(c)(1) affirmative defense to insider trading liability to include:
 - A cooling-off period for directors and officers of the later of: (1) 90 days following plan adoption or modification; or (2) two business days following the disclosure in certain periodic reports of the issuer's financial results for the fiscal quarter in which the plan was adopted or modified (but not to exceed 120 days following plan adoption or modification) before any trading can commence under the trading arrangement;
 - A cooling-off period of 30 days for persons other than issuers or directors and officers before any trading can commence under the trading arrangement or modification;
 - A condition for directors and officers to include a representation in their Rule 10b5-1 plan certifying, at the time of the adoption of a new or modified plan, that: (1) they are not aware of material nonpublic information about the issuer or its securities; and (2) they are adopting the plan in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b-5;
 - A limitation on the ability of anyone other than issuers to use multiple overlapping Rule 10b5-1 plans;
 - A limitation on the ability of anyone other than issuers to rely on the affirmative defense for a single-trade plan to one such plan during any consecutive 12-month period; and
 - A condition that all persons entering into a Rule 10b5-1 plan must act in good faith with respect to that plan.

10b5-1 Trading Plans – Disclosure Requirements

- **Disclosure Requirements**: The amendments also create new disclosure requirements that include:
 - Quarterly disclosure by registrants regarding the use of Rule 10b5-1 plans and certain other written trading arrangements by a registrant’s directors and officers for the trading of its securities;
 - Annual disclosure of a registrant’s insider trading policies and procedures;
 - Certain tabular and narrative disclosures regarding awards of options close in time to the release of material nonpublic information and related policies and procedures;
 - Tagging of the required disclosures; and
 - A requirement that Form 4 and 5 filers indicate by checkbox that a reported transaction was intended to satisfy the affirmative defense conditions of Rule 10b5-1(c).

Universal Proxy – Overview

- **Background:** On August 31, 2022, the universal proxy rules adopted late in 2021 by the SEC became effective. The rules require that both public companies and activists include all director candidates on their proxy cards when soliciting shareholders in a contested director election.
- **Overview:**
 - Previous Rules – Companies and activists could distribute proxy cards with only their own slate of directors. Shareholders generally had a binary choice of casting their vote for the company’s slate on the company’s proxy card, or the activist’s slate on the activist’s proxy card.
 - New Rules – Each proxy card, regardless of who delivers it, must include the names of both the company and activist nominees. Such a proxy card allows shareholders to combine candidates from the separate slates submitted by the company and activist shareholder.

Universal Proxy – Expected Effects

- **More Successful Activist Candidates** – Shareholders will likely be more inclined to support one or two dissident nominees when they can do it on a universal proxy card, which should make it easier for activists to win at least one board seat.
- **Special Interest Groups May Take Advantage of Universal Proxy** – Special interest groups that have traditionally relied on the shareholder proposal process may start to propose competing directors.
- **More Contested Director Elections** – Economic barriers to activist campaigns will also be lowered as they will need to conduct fewer mailings and can use notice and access. Combined with the above, this will likely lead to more activist director campaigns.
- **Fewer Activists Winning Control** – While more likely to elect a few candidates to the board, the chance of activist slates winning majority control will likely be lower since shareholders can split their tickets.

Universal Proxy – Consider Bylaw Updates

- **Potential Changes to Address SEC Universal Proxy Card Rules**

- **Require activist to comply with new SEC rule and provide specific authority to the chairman to determine whether activist has complied:** allows company to enforce non-compliance w/o petitioning the SEC or a court (i.e., company can just disregard the nomination)
- **Require activist to provide evidence it has solicited 67% of shareholders:** positions the company to be able to enforce the 67% solicitation requirement
- **Require activist to solicit proxies in same manner as required of company:** prevents activist from running “low budget” campaign as it must deliver paper copies or use notice/access
- **Require director candidates to consent to being named in company’s or activist’s proxy card:** technical change to facilitate inclusion of nominees of both sides on each side’s proxy card
- **Reserve the “white proxy card” for use by the board in all contests**
- **Require certain additional info from activists/nominees**

- **Next Steps**

- Monitor developments on bylaw amendments
- Determine whether to amend bylaws prior to advance notice deadline
- Bylaw changes can be made with Board approval only

Proxy Voting Advice – Overview

- **Background:** On July 13, 2022, the SEC adopted final rules to repeal much of the 2020 rulemaking pertaining to proxy advisory firm advice, which had never gone into effect due to litigation and SEC actions.
- **Provisions that were rescinded:**
 - **Advance notice to companies of advice and distribution of company responses** – The requirements that proxy advisory firms make voting advice available to companies at or before dissemination to their clients and make available to their clients any written statements from companies in response to advice.
 - **Note on proxy advisory firm liability for advice** – The note clarifying that proxy voting advice constitutes proxy solicitation that is subject to liability for material misstatements or omissions, particularly for failure to disclose material information regarding methodology, sources of information, or conflicts of interest.
 - **Voting guidance to investment advisers** – Supplemental proxy voting guidance to investment advisers on their use of proxy advisory firms and reliance on the advisory firms’ electronic voting platforms.
- **Provisions that were kept:**
 - **Proxy advisory firm liability for solicitation** – Proxy voting advice remains subject to liability under the proxy rules, as the final rule clarifies that the removal of the note (discussed above) is not intended to alter the scope of liability or its application to proxy voting advice.
 - **Proxy advisor conflict of interest disclosure** – Proxy advisers must continue to disclose conflicts of interest.

Proxy Voting Advice – Response

- ISS had filed suit against the SEC upon the adoption of the 2020 rules.
- Following the adoption of the 2022 rules, the US Chamber of Commerce and the National Association of Manufacturers (NAM) each filed suit against the repeal of the 2020 rules.
- In October, the SEC moved for summary judgement against NAM, arguing that reversal was justified because the rules were "overwhelmingly opposed by the investors they were intended to benefit" and that it reconsidered the policy to better balance business and investor interests, taking into account the prior record and new comments.
- ISS is reportedly still pursuing its litigation over the remaining portions of the 2020 rules.

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2. Proposed SEC Rules

Climate Change – Overview

- **Background:** The SEC issued a rule proposal to enhance and standardize climate-related disclosures for investors on March 21, 2022.
- **Overview:** the SEC proposed new climate-related disclosure requirements for both domestic and foreign registered companies, including:
 - **Risks** – Climate-related risks and their actual or likely material impacts on the company’s business, strategy, and outlook;
 - **Governance/Risk Management** – The company’s governance of climate-related risks at both the board and management level, and relevant risk management processes, including whether the company has a board member with climate risk expertise;
 - **Emissions** – The company’s greenhouse gas (“GHG”) emissions, which, for accelerated and large accelerated filers and with respect to Scope 1 and Scope 2 emissions, would be subject to assurance (limited or reasonable, as indicated on the table on the following slide) and an attestation report from an independent attestation service provider; also with respect to Scope 3, but only if material or if GHG emissions reduction target/goal that includes Scope 3 emissions has been set;
 - **Financial Statements** – Certain climate-related financial statement metrics and related disclosures (such as the impact of climate-related events and transition activities) in a note to its audited financial statements; and
 - **Goals and Transition Plans** – Information about climate-related targets, goals and transition plan, if any, including how the company intends to meet the goal and data indicating any progress.

Cybersecurity Disclosure – Overview

- **Background**: The SEC issued a rule proposal on cybersecurity risk management, strategy, governance and incident disclosure on March 9, 2022.
- **Form 8-K Updates**: New item would require disclosure of material cybersecurity incidents within four business days after materiality determination (vs. date of discovery).
 - Materiality is determined using Supreme Court reasonable investor test.
 - Will not impact S-3 eligibility.
 - Would not allow for a reporting delay, even when there is an ongoing internal or external investigation related to the cybersecurity incident.
- **Proposed 10-K/10-Q Disclosure Requirements**:
 - Would require disclosure of any material changes, additions or updates to information required to be disclosed under Form 8-K and when a series of previously undisclosed, individually immaterial cybersecurity incidents become material in the aggregate.
 - Would require disclosure of the company’s policies and procedures, if any, to identify and manage cybersecurity risks and threats.
 - Would require disclosure regarding the role of the board of directors and management in cybersecurity governance.
- **Proposed Proxy Updates**: Proposed Item 407(j) of Regulation S-K would require companies to annually disclose (in proxy statements for their annual meetings of shareholders or their annual reports on Form 10-K) cybersecurity expertise, if any, of directors of the company.

Share Repurchase Disclosures – Overview

- **Background**: The SEC issued a rule proposal on share repurchase disclosure on March 15, 2021.
- **Requirements**:
 - **New daily disclosure** of detailed information regarding share repurchases.
 - What: # of shares, average price, # purchased on open market, # under 10b-18 safe harbor, # with 10b5-1 plan.
 - When: new Form SR to be filed next business day after repurchase.
 - **New quarterly (10-Q) disclosure**
 - Mostly benign: e.g., rationale & process for repurchase, policies relating to insider purchases and sales during a repurchase program, reliance on 10b5-1 & 10b-18.
 - Except: new checkbox indicating if insiders purchased/sold w/in 10 business days of announcing buyback.

Shareholder Proposals – Overview

- **Background:** On July 13, 2022, the SEC issued a rule proposal that would significantly narrow three bases for excluding shareholder proposals.
- **Proposed Changes:**
 - **Substantial Implementation**
 - **Rule Proposal:** The staff would focus on the *essential elements* of a shareholder proposal to assess whether the company’s prior actions taken to implement the substance of the shareholder proposal are sufficiently responsive, as compared to the current standard which assesses whether a company’s practices *compare favorably*. In order to exclude a shareholder proposal, a company would need to have implemented *each of the essential elements* of the proposal.
 - **Duplication**
 - **Rule Proposal:** Proposals are duplicative only when they address the *same subject matter* and *seek the same objective by the same means* instead of when the two proposals have the *same principal thrust or focus*
 - **Resubmission**
 - **Rule Proposal:** The proposal would change the standard for the resubmission exclusion from “*substantially the same subject matter*” to “*substantially duplicates,*” using the same analysis as that basis.

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3. Trends in SEC Comment Letters

SEC Comment Letter Trends – Overview*

	Comment Letter Topic	Change		Comment Letter Topic	Change
1.	Non-GAAP measures		6.	Climate-related disclosures (not in top 10 in 2021)	
2.	MD&A		7.	Inventory and cost of sales (from #9)	↑
3.	Segment reporting		8.	Signatures/exhibits/agreements (from #6)	↓
4.	Revenue recognition		9.	Goodwill and intangible assets (from #7)	↓
5.	Fair value measurement		10.	Acquisitions and business combinations (not in top 10 in 2021)	

- SEC staff's recent focus on climate-related disclosure matters was a key contributor to the 10% increase (1,038 vs. 943)
- **66% of companies** receiving comments had a public float > \$700 million
 - 22% had a public float of \$75 - \$700 million
 - 12% had a public float of < \$75 million

SEC Comment Letter Trends – Emphasis on Macroeconomic Factors

Comment Focus Areas

- *Increased focus on effects of macroeconomic factors*
- *2022 factors to consider (non-exclusive)*
 - *War in Ukraine and related sanctions*
 - *COVID-19*
 - *Supply chain issues*
 - *Inflation*
- *Comments can be on all parts of 10-K (e.g., business, risk factors, MD&A, financial statement, non-GAAP)*
- *No generic disclosure*

SEC Comment Letter Trends – Climate-Related Disclosures

Comment Focus Areas

- *Quantifying material impacts of climate-related*
 - Physical effects
 - indirect consequences of regulation and business trends
 - CAPEX and compliance costs
 - Legislation, regulation and international accord
- *Information provided in CSR/ESG reports*
- *Multiple rounds of letters*

SEC Comment Letter Trends – Non-GAAP Measures

Comment Focus Areas

- *Whether a performance measure* is a non-GAAP measure
- *Equal or greater prominence* of the most directly comparable GAAP financial measure
- Disclosure of *why management believes* the non-GAAP measure is useful to investors
- *Reconciliation* to the most comparable GAAP financial measure
- *Effect of income taxes* on non-GAAP reconciliation
- *Appropriateness of adjustments* to eliminate smooth items identified as non-recurring

SEC Comment Letter Trends – MD&A

Comment Focus Areas

- ***Quantifying effects of factors*** driving material period-to-period changes
 - Including segments
- ***Consistency*** with discussions in earnings releases or calls
- ***Known trends or uncertainties***, including relating to operating results & meeting expected future cash requirements
- ***Critical accounting estimates***, including the judgments made in their application, and the likelihood of materially different reported results if different assumptions made
- ***Liquidity and capital resources***, including clear discussion of drivers of cash flows

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