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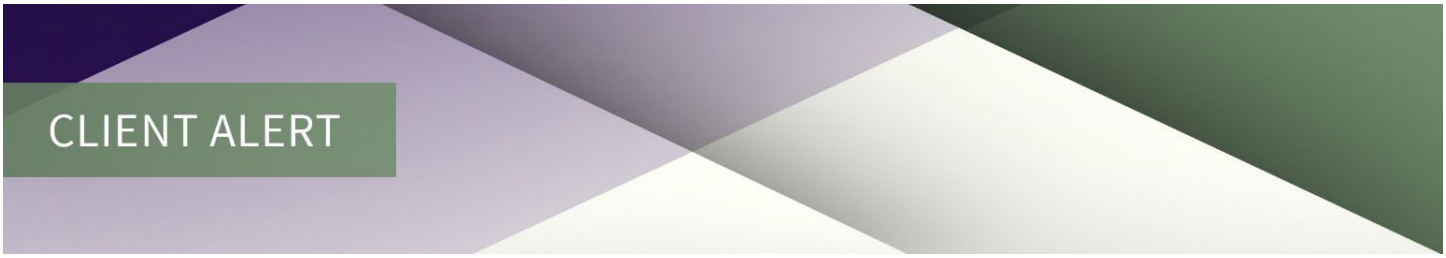

Key Considerations When Preparing the 2023 Form 10-K and 2024 Proxy Statement

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In this client alert we highlight recent regulatory developments and disclosure trends for public companies to keep in mind when preparing the Form 10-K for the year ended December 31, 2023 (the "2023 Form 10-K") and the proxy statement in connection with the 2024 annual meeting of stockholders (the "2024 Proxy Statement").[1]

I. 2023 Form 10-K

A. Cybersecurity Risk Management, Strategy and Governance

In July 2023, the Securities and Exchange Commission (the "SEC" or the "Commission") adopted final rules designed to enhance and standardize timely disclosures regarding cybersecurity risk management, strategy, governance, and incidents (the "SEC Cybersecurity Rules").[2] With regard to the disclosures on Form 10-K, the SEC Cybersecurity Rules impose the following obligations to provide disclosures regarding management's role in assessing and managing risks from cybersecurity threats:

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1 Many of these same developments and trends will be applicable to foreign private issuers.

2 *See* Final Rules on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, Exchange Act Release Nos. 33-11216; 34-97989; File No. S7-09-22 (Jul. 26, 2023). The SEC Cybersecurity Rules also added a new Item 1.05 on Form 8-K, where registrants must disclose a material cybersecurity incident within four days of management's determination that the incident is material, subject only to a narrow exception for national security issues.

i. Processes Disclosures

The SEC Cybersecurity Rules require the registrant to describe its processes, if any, for assessing, identifying, and managing material risks from cybersecurity threats, addressing applicable items specified in a new Item 106(b)(1) of Regulation S-K.[3] Additionally, the registrant must disclose whether any risks from cybersecurity threats, including as a result of any previous cybersecurity incidents, have materially affected or are reasonably likely to materially affect the company, including its business strategy, results of operations, or financial condition, and if so, how.[4] Other disclosure requirements include:

- whether and how the registrant's cybersecurity processes have been integrated into its overall risk management system or processes;
- whether the registrant engages assessors, consultants, auditors, or other third parties in connection with any such processes; and
- whether the registrant has processes to oversee and identify material risks from cybersecurity threats associated with its use of any third-party service provider.

ii. Governance Disclosures

Registrants will also be required to disclose internal governance structures designed to oversee cybersecurity risk. Specifically, registrants will have to provide a description of the board's oversight of material cybersecurity risks, and if applicable, identify any board committee or subcommittee responsible for such oversight, and describe the processes by which the board or such committee is informed about such risks.[5] Further, the SEC Cybersecurity Rules direct registrants to consider disclosing the following as part of a description of management's role in assessing and managing material cybersecurity risks:

- which management positions or committees are responsible for assessing and managing such risks, and the relevant expertise of such persons or members;

[3] 17 CFR 229.106(b)(1).

[4] 17 CFR 229.106(b)(2).

[5] 17 CFR 229.106(c)(1).

- the processes by which such persons or committees are informed about and monitor the prevention, detection, mitigation, and remediation of cybersecurity incidents; and
- whether such persons or committees report information about such risks to the board of directors or a committee or subcommittee of the board of directors.[6]

A more detailed discussion of the new cybersecurity disclosure requirements can be found in the Willkie Client Alert here.

B. Compensation Clawback

In June 2023, the SEC approved the listing standards and relevant amendments proposed by the New York Stock Exchange (the "NYSE") and the Nasdaq Stock Market ("Nasdaq") in connection with the clawback of erroneously awarded incentive-based executive compensation after an accounting restatement.[7]

Listed companies had until December 1, 2023 to adopt a compliant clawback policy, and will also need to comply with the following new requirements.

First, a registrant needs to add to its 2023 Form 10-K the following two (2) new check boxes that they must check if applicable:

- if securities are registered pursuant to Section 12(b) of the Act, indicate by check mark whether the financial statements of the registrant included in the filing reflect the correction of an error to previously issued financial statements; and
- indicate by check mark whether any of those error corrections are restatements that required a recovery analysis of incentive-based compensation received by any of the registrant's executive officers during the relevant recovery period pursuant to § 240.10D-1(b).

Further, registrants that were required to prepare an accounting restatement must disclose certain information about how they have applied their clawback policies, including the date and amount of

6 17 CFR 229.106(c)(2).

7 With respect to the SEC's approval of the NYSE's clawback listing standards, *see* https://www.sec.gov/files/rules/sro/nyse/2023/34-97688.pdf. With respect to the SEC's approval of Nasdaq's clawback listing standards, *see* https://www.sec.gov/files/rules/sro/nasdaq/2023/34-97687.pdf. For the text of the Nasdaq clawback listing standards and related material, *see* https://www.sec.gov/files/rules/sro/nasdaq/2023/34-97687-ex5.pdf. The rule covers not only a "Big R restatement" (an error in previously issued financial statements that is material to such financial statements) but also a "little r restatement" (an unreported error that would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period).

erroneously awarded compensation, and the names of, and amounts owed by, executive officers where amounts due are owed or forgone. While this disclosure is required under Part III, Item 11 (Executive Compensation) of Form 10-K, we expect impacted registrants typically will incorporate the disclosure by reference from their 2024 Proxy Statements containing other Item 402 disclosures.

A registrant will also need to file its Clawback Policy as an exhibit to its 2023 Form 10-K under new paragraph (b)(97) of Regulation S-K Item 601.

A more detailed discussion of the new compensation clawback disclosure requirements can be found in the Willkie Client Alert here.

C. Rule 10b5-1 Plan and Insider Trading Policy Disclosures

In December 2022, the SEC adopted amendments to Rule 10b5-1 under the Exchange Act and new related disclosure requirements (the "Rule 10b5-1 Plan Amendments")[8] As part of the Rule 10b5-1 Plan Amendments, the SEC adopted new Item 408(a) of Regulation S-K, which requires registrants to disclose in its 2023 Form 10-K whether any director or officer has adopted or terminated any Rule 10b5-1 plan or non-Rule 10b5-1 trading arrangement during the registrant's last fiscal quarter.[9]

Item 408(a) also requires registrants to provide a description of the material terms (other than pricing information) of such Rule 10b5-1 plan or non-Rule 10b5-1 trading arrangement. The required disclosures include:

- the name and title of the director or officer;
- the date of adoption or termination of the trading arrangement;
- the duration of the trading arrangement; and

[8] *See* Rule 10b5-1 and Insider Trading Arrangements and Related Disclosures, Exchange Act Release No. 96492 (Dec.14, 2022) [87 FR 80362 (Dec. 29, 2022)] (the "10b5-1 Plan Adopting Release").

[9] The Rule 10b5-1 Plan Amendments also add several new conditions to the availability of the affirmative defense under Rule 10b5-1(c)(1), including (1) a cooling-off period between entry into a Rule 10b5-1 plan and commencement of purchases or sales under the plan by persons (other than the issuer) relying on the affirmative defense, and (2) a limitation on the ability of persons other than the issuer to use multiple overlapping Rule 10b5-1 plans and limiting the use of single-trade plans by persons other than the issuer to one such single-trade plan in any 12-month period.

- the aggregate number of securities to be sold or purchased under the trading arrangement.[10]

New Item 408(a) also requires disclosure of certain modifications or changes to a Rule 10b5-1 plan by a director or officer that would constitute the termination of an existing plan and the adoption of a new plan.[11] For the 2023 Form 10-K, the new Item 408(a) disclosures covering the fourth quarter of 2023 will first be required in new Part II, Item 9B (Other Information), provided that a registrant is required to include such disclosures in its 2024 Proxy Statement if it plans on meeting the Form 10-K requirement by incorporating such disclosure by reference from its 2024 Proxy Statement.

In addition, the Rule 10b5-1 Plan Amendments also added New Item 408(b) of Regulation S-K;[12] this new regulation requires a registrant to disclose whether it has adopted insider trading policies and procedures governing the purchase, sale, and other dispositions of their securities by directors, officers, and employees, or the registrant itself, that are reasonably designed to promote compliance with insider trading laws. If a registrant has not adopted such policies and procedures, it must explain why it has not done so. This disclosure must be made in annual reports on Form 10-K, and in proxy and information statements on Schedule 14A and Schedule 14C. A registrant is required to file a copy of its insider trading policies and procedures as an exhibit to its 2023 Form 10-K.

Further, new Item 402(x) of Regulation S-K was adopted by the SEC in the Rule 10b5-1 Plan Amendments to add tabular and narrative disclosure requirements regarding grants of options, stock option rights and similar option-like instruments made close in time to an issuer's disclosure of material nonpublic information and as to company policies regarding such grants.[13] For calendar year-end registrants, the new Item 408(b) disclosure, the new Item 402(x) disclosure and the filing of the insider trading policy as an exhibit to the Form 10-K will first be required in the 2024 Form 10-K to be filed in 2025 (although we expect companies to typically incorporate the narrative disclosure by reference from their 2025 proxy statements).[14]

A more detailed discussion of these new disclosure requirements can be found in the Willkie Client Alert here.

[10] 17 CFR 229.408(a).

[11] *Id*.

[12] *Supra* note 6.

[13] 17 CFR 229.402(x).

[14] *Supra* note 6.

D. Status of the SEC's Share Repurchase Disclosure Modernization Rules

In May 2023, the SEC adopted rule amendments to require more detailed disclosure about the repurchase of a registrant's registered equity securities, including requirements to:

- provide tabular disclosure of a registrant's aggregate daily quantitative repurchase activity as an exhibit to its periodic reports;
- provide a narrative disclosure about the registrant's repurchase programs and practices;
- disclose the registrant's adoption or termination of Rule 10b5-1 plans; and
- disclose whether any directors or officers traded within four business days before or after the announcement of such a plan or an increase in the amounts available for repurchase under an existing share repurchase plan.[15]

These rule amendments were originally scheduled to become effective beginning with the Form 10-K or Form 10-Q filed for the first full fiscal quarter beginning on or after October 1, 2023.

Soon after the share repurchase rule amendments were adopted in May 2023, they were challenged by the U.S. Chamber of Commerce and others in federal court. On October 31, 2023, the Fifth Circuit Court of Appeals issued an opinion finding that the SEC acted arbitrarily and capriciously, in violation of the Administrative Procedure Act, when it failed to respond to petitioners' comments and failed to adequately substantiate the purported benefits of the rule.[16] The court initially remanded the case with direction to the SEC to correct the defects in the rule within 30 days. After the SEC's request for more time was denied by the court, the SEC notified the court that it was unable to address the deficiencies. On December 19, upon the petitioners' motion, the Fifth Circuit vacated the SEC's rule amendments. Until there is further notice or action from the SEC, registrants are expected to continue to provide share repurchase disclosures as required under the pre-existing rules for the 2023 Form 10-K (i.e., the Regulation S-K Item 703 requirement to disclose information about share repurchases on a quarterly basis, aggregated at the monthly level).

[15] *See* Share Repurchase Disclosure Modernization, Exchange Act Release No. 34-97424 (May 3, 2023) [88 FR 36002].

[16] *Chamber of Comm. of the USA v. SEC*, No. 23-60255 (5th Cir. 2023).

E. Noteworthy Disclosure Trends for Risk Factors and MD&A Sections

Registrants should keep in mind the following disclosure points when preparing sections of the Form 10-K such as Risk Factors and Management's Discussion and Analysis of Financial Condition and Results of Operations:

i. Climate-Related Disclosures

In March 2022, the SEC proposed expansive new requirements for climate-related information, seeking to deal with (i) climate-related disclosures, (ii) climate-related impacts, (iii) governance, (iv) risk management, (v) financial statement metrics, (vi) GHG emissions, (vii) attestation of Scope 1 and Scope 2 emissions disclosures, and (viii) targets and goals.[17] These proposed rules, if adopted, would require registrants to include climate-related disclosures in their annual reports on Form 10-K in a separately captioned section and in the financial statements. Pending the release of the SEC's final climate disclosure rules, the SEC's 2021 Sample Letter to Companies Regarding Climate Change Disclosure provides the latest guidance in this area, including when information related to climate-related risks and opportunities may be required in disclosures in a company's description of business, legal proceedings, risk factors, and MD&A under the SEC's 2010 Climate Change Guidance.[18] A more detailed discussion of the SEC's proposed rules on climate-related information can be found in the Willkie Client Alert here.

When the final SEC rules are issued, it is expected that litigation challenges will promptly be filed in the federal courts. These challenges are expected to be based on First Amendment arguments (compelled speech) and the major questions doctrine as discussed by the United States Supreme Court in *West Virginia et al. v. Environmental Protection Agency*.[19]

Climate disclosures in public filings are still a focus of the Division of Corporation Finance.[20] In the comment process, the staff of the Division continues to frequently push issuers to provide a

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17 *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors (Mar. 22, 2022).

18 SEC, Sample Letter to Companies Regarding Climate Change Disclosures (September 2021), https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures.

19 985 F.3d 914 (2022).

20 Commissioner Allison Herren Lee, *Statement on the Review of Climate-Related Disclosure* (Statement, February 24, 2021), https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure.

quantitative analysis supporting claims that the disclosure is immaterial.[21] Registrants should ensure that their 10-K climate disclosures comply with the 2010 SEC guidance and the 2021 sample comment letter.

In October 2023, California adopted a new set of climate laws in the form of the Climate Corporate Data Accountability Act (the "CCDAA")[22] and the Climate-Related Financial Risk Act (the "CRFRA")[23] (collectively, the "California Climate Accountability Regime"). The CCDAA requires, among things, that any company with greater than $1 billion in annual revenues that does business in California file annual reports publicly disclosing its Scope 1, Scope 2 and Scope 3 GHG emissions, regardless of materiality, verified by an independent and experienced third-party provider. Scope 1 and Scope 2 reports would initially be due in 2026 for calendar year 2025 and Scope 3 reports would initially be due in 2027 for calendar year 2026.

The CRFRA requires companies with $500 million in annual revenues that do business in California to prepare and file biennial reports disclosing climate-related financial risk (in accordance with the framework published by the Task Force on Climate-Related Financial Disclosures) and measures they have adopted to reduce and adapt to that risk, with the first report due by January 1, 2026. The California Climate Accountability Regime applies to both public and private companies. The California Climate Accountability Regime now faces possible delay in implementation due to both a lack of funding by Governor Newsom's recent budget plan[24] and a federal lawsuit by a coalition of industry associations alleging violation of the First Amendment, Supremacy Clause, and other constitutional limitations.[25]

The European Union's Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464) (the "CSRD") may also impact U.S. companies that have an EU subsidiary or an EU branch and/or that generate significant net turnover in the EU. The CSRD requires these companies to disclose information necessary to understand the impact of their activity on sustainability matters as well as how sustainability matters affect the company's development, performance and position and will require detailed disclosure under the European Sustainability Reporting Standards. A more

21 KPMG, *Continued climate disclosure focus by SEC staff*, February 2024, https://frv.kpmg.us/reference-library/2024/continued-climate-disclosure-focus-by-sec-staff.html (the staff has sent letters to more than 80 issuers since the sample comment letter was issued in September 2021).

22 Cal. Heath & Saf. Code § 38532.

23 Cal. Heath & Saf. Code § 38533.

24 Hayley Smith and Ian James, Newsom cuts $2.9 billion from California climate programs, delays an additional $1.9 billion, Los Angeles Times (3:00 a.m., PT, January 11, 2024), https://www.latimes.com/environment/story/2024-01-11/newsom-cuts-2-9-billion-from-california-climate-programs. Governor Newsom has stated that the implementation deadlines of the CCDAA and the CRFRA are likely unfeasible.

25 *Chamber of Com. of the U.S. v. Calif. Air. Res. Bd.*, C.D. Cal., No. 2:24-cv-00801, complaint January 30, 2024.

detailed discussion of the EU's proposed rules on climate-related disclosures can be found in the Willkie Client Alert here.

ii. Risks and Regulations Associated with Artificial Intelligence

The rapid growth and deployment of generative AI and related technologies is quickly changing the way 21st century companies do business, and the products and services they offer. Just as quickly, however, generative AI and related emerging technologies have raised a wide range of novel legal issues related to data protection, privacy, cybersecurity, and intellectual property, as well as ethical and reputational issues.

Regulators across industries are shoring up rules and regulations on a state, federal and international level. The National Association of Insurance Commissioners (the "NAIC") released on October 13, 2023 an updated draft AI model bulletin for all insurers licensed in a state that issues the model bulletin. See the recent Willkie Client Alert here for more details. On December 9, 2023, the European Parliament and the Council of the European Union announced a provisional agreement regarding the European Union's Artificial Intelligence Act ("EU AI Act"). As drafted, the EU AI Act will apply strict requirements to all providers, users, manufacturers, and distributors of AI systems used in the EU market, and contains several blanket prohibitions on specific AI uses.[26] See the recent Willkie Client Alert here for more details. In addition, the SEC recently proposed controversial rules relating to the use of predictive data analytics by broker-dealers and investment advisers.[27]

When updating their risk factors and regulatory developments in the MD&A sections, registrants should consider how AI has or could reasonably be expected to become a factor in their businesses and industries. As opposed to just using generic language, registrants should assess the specific exposures they have to the risks imposed by AI and the corresponding regulation seeking to address them. Depending on how significant such exposure is, registrants may choose to either include a standalone risk factor addressing AI-related risks, or refer to AI in existing risk factors as an example of the type of risk described.

[26] Daniel K. Alvarez, Laura E. Jehl, Susan Rohol, Kari Prochaska and Amelia Putnam, Europe Reaches Agreement on the EU AI Act, Willkie Farr & Gallagher Client Memorandum (December 18, 2023), available here.

[27] Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, Securities Exchange Act of 1934 Release No. 34-97990 (July 26, 2023), 88 Fed. Reg. 53960 (Aug. 9, 2023).

iii. Human Capital Management

In 2020, the SEC amended Regulation S-K Item 101 to require registrants to describe its human capital resources, including any human capital measures or objectives the company focuses on in managing its business, to the extent material to an understanding of the registrant's business taken as a whole (such as, depending on the nature of the registrant's business and workforce, measures or objectives that address the development, attraction and retention of personnel).[28] In response, registrants have provided a variety of disclosures, including enhanced disclosures related to human capital management and diversity, equity, and inclusion, as well as labor relations, both in quantitative and qualitative terms.

According to its fall 2023 rulemaking agenda, the SEC is expected to propose new human capital management disclosure rules during 2024. The SEC Chair Gary Gensler indicated that the coming proposal could include "a number of metrics, such as workforce turnover, skills and development training, compensation, benefits, workforce demographics including diversity, and health and safety."[29]

iv. Non-GAAP Financial Measures

In December 2022, the SEC's Division of Corporation Finance released C&DIs on registrants' use of non-GAAP financial measures and compliance with related disclosure requirements. We expect this to be a continued focus of the SEC in 2024. Companies should consistently review their use and disclosure of non-GAAP financial measures to ensure compliance with the relevant SEC rules and guidance, including the updated C&DIs.

v. Impacts of Geopolitical Conflicts

In May 2022, the SEC's Division of Corporation Finance published a sample comment letter containing guidance to companies on their disclosure obligations related to the impact of Russia's invasion of Ukraine and associated supply chain issues.[30] In addition, the staff of the Division has recently issued comments on registration statements as to the conflict between Israel and Hamas and the impact on the registrant's business. A registrant is expected to evaluate what, if any,

[28] *See* Modernization of Regulation S-K Items 101, 103, and 105, Exchange Act Release No. 33-10825 (October 2020) [85 FR 63726].

[29] Chair Gary Gensler, *Prepared remarks at London City Week* (Speeches and Statements, June 23, 2021), https://www.sec.gov/news/speech/gensler-speech-london-city-week-062321.

[30] SEC, Sample Letter to Companies Regarding Disclosures Pertaining to Russia's Invasion of Ukraine and Related Supply Chain Issues (May 2022), https://www.sec.gov/corpfin/sample-letter-companies-pertaining-to-ukraine.

impacts that these geopolitical conflicts may have on its business operations in the affected region, including the disruptions to its supply chain, and make adequate disclosures in light of such evaluation and the SEC guidance.

vi. People's Republic of China-Specific Disclosures

In July 2023, the SEC's Division of Corporation Finance published a Sample Letter to Companies Regarding China-Specific Disclosures, which exemplifies what the SEC's focuses are when reviewing registrants with substantial PRC exposures, including disclosure obligations under the Holding Foreign Companies Accountable Act, the material risks related to the role of the government of the PRC in their operations, and the material impacts of certain statutes, including the Uyghur Forced Labor Prevention Act.[31] Given the increased attention being paid to these issues by the SEC, companies should review their filings to confirm they comply with all PRC-specific reporting requirements.

vii. ESG

A number of securities lawsuits have been filed targeting ESG disclosures made by registrants in public filings. In addition, there has also been an increase in SEC enforcement actions relating to misleading statements in public filings regarding ESG. Registrants should carefully review such disclosures for accuracy and consistency.

F. XBRL Tagging

In September 2023, the SEC's Division of Corporation Finance published a Sample Comment Letter Regarding XBRL Disclosures, which highlights XBRL tagging issues and errors the SEC usually comes across in registrants' reports.[32] The sample comments focus on inconsistent disclosures, including:

- outstanding shares reported on the cover page and balance sheet being tagged with materially different values; and

[31] SEC, Sample Letter to Companies Regarding China-Specific Disclosures (July 2023), https://www.sec.gov/corpfin/sample-letter-companies-regarding-china-specific-disclosures.

[32] SEC, Sample Letter to Companies Regarding Their XBRL Disclosures (September 2023), https://www.sec.gov/corpfin/sample-letter-companies-regarding-their-xbrl-disclosures.

- using different XBRL elements to tag the same line item from period to period, without including an analysis as to how the company concluded that the results reported necessitated the change in the element.

The SEC's sample also addresses custom tagging and pay-versus-performance tagging issues.

II. 2024 Proxy Statement

A. Recent SEC Interpretations Related to Regulation 14A[33]

In November 2023, the SEC provided additional clarifications on certain rules related to proxy solicitations under Regulation 14A.[34] These newly released C&DIs cover topics such as how the "10 calendar day" period should be counted in Rule 14a-6 for registrants to determine when they may mail out the definitive proxy statement following the filing of a preliminary proxy statement (C&DI 126.03), how the soliciting party should make general reference to its filings through the legend (C&DI 132.03), and that a proposal will be considered to "involve" another matter for purposes of Note A of Schedule 14A when information about the other matter is material to the security holder's voting decision on such proposal (C&DI 151.02).

Also, through new C&DIs 139.07-139.09, the SEC sought to provide more guidance on how a soliciting party should exercise its discretionary authority under Rule 14a-4 with regards to overvoted proxy cards where authority has been granted to vote for more director nominees than the number of director seats up for election, undervoted proxy cards where authority is granted to vote for fewer director nominees than the number of director seats up for election, and signed but unmarked proxy cards.

- C&DI 139.07 denies the soliciting party's discretionary authority pursuant to Rule 14a-4(b)(1) to vote the shares represented by an overvoted proxy card on the election of directors because the shareholder has specified its choice(s) for the election of directors with an overvoted proxy card. Notwithstanding the foregoing, the C&DI does note that such shares can be voted on other matters included on the proxy card for which there is no overvote and can be counted for purposes of determining a quorum.

- By a similar rationale, C&DI 139.08 refuses to recognize the soliciting party's discretionary authority to vote the shares represented by an undervoted proxy card for the remaining director seats up for

[33] As discussed above, we also expect registrants to typically include the newly required executive compensation clawback and Rule 10b5-1 plan disclosures in their 2024 Proxy Statement and such disclosures will be incorporated by reference into their 2023 Form 10-K.

[34] SEC, Division of Corporation Finance, Compliance and Disclosure Interpretations (the "C&DIs") regarding Proxy Rules and Schedules 14A/14C (Last Updated on November 17, 2023), https://www.sec.gov/corpfin/proxy-rules-schedules-14a-14c-cdi.htm.

election. In such circumstances, the shares should be voted in accordance with the shareholder's specifications pursuant to Rule 14a-4(e).

- C&DI 139.08 allows the soliciting party to exercise discretionary authority with respect to matters as to which a choice is not specified by the security holder, so long as the form of proxy states in bold-faced type how the proxy holder will vote where no choice is specified.

B. Pay-Versus-Performance

The 2024 proxy season marks the second year since the registrants were required to provide narrative and tabular information related to pay-versus-performance disclosures. In addition to the final rules that the SEC adopted in August 2022 implementing the pay-versus-performance provisions of the Dodd-Frank Act, the SEC also released C&DIs[35] during 2023 relating to the following:

- how to calculate compensation actually paid to a named executive officer;
- requirements for disclosing peer group total shareholder return on a pay-versus-performance table;
- how to determine a company-selected measure used to link compensation actually paid to company performance;
- how to treat awards granted prior to an IPO, spin-off or other equity restructuring;
- how to select a valuation technique for purposes of determining the fair value of an equity-based award;
- the meaning of "vesting";
- the requirements for footnote disclosures;
- that pay-versus-performance disclosure is required to be included only in a company's proxy statement and is not required to be included in a company's Form 10-K; and
- the circumstances surrounding the loss of smaller reporting company or emerging growth company status.

[35] SEC, Division of Corporation Finance, C&DIs regarding Regulation S-K (Last Updated on November 21, 2023), https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm.

A more detailed discussion of the pay-versus-performance disclosure requirements can be found in the Willkie Client Alert here.

C. Proposed Amendments to Rule 14a-8

In July 2022, the SEC issued proposed rules (the "Proposed 14a-8 Amendments") updating certain bases for exclusion of shareholder proposals under Exchange Act Rule 14a-8, which if adopted would codify the current SEC staff positions as to exclusion under Rule 14a-8 of a shareholder proposal from the company's proxy statement on the bases of "duplication," "resubmissions" or "ordinary business."[36] These positions make it extremely difficult for registrants to exclude shareholder proposals on those bases. A more detailed discussion of the Proposed 14a-8 Amendments can be found in the Willkie Client Alert here.

Given the SEC staff's current reluctance to permit exclusion of shareholder proposals under Rule 14a-8, in January 2024, ExxonMobil ("Exxon") sidestepped the SEC's no-action process and filed a complaint in the U.S. District Court for the Northern District of Texas seeking a declaratory judgment to exclude a shareholder proposal from its proxy statement pursuant to Rule 14a-8 of the Exchange Act on the grounds of "duplication," "resubmissions" and "ordinary business."[37] On February 1, 2024, Exxon notified the District Court that those shareholders had withdrawn their proposal (perhaps because of cost reasons or perhaps not wanting to risk an unfavorable court decision that could be used by other companies as precedent). While this use of the litigation process may spur other registrants to also make similar filings, our sense is that the SEC's no-action process will continue to be the primary vehicle for companies to attempt to exclude shareholder proposals, given the expense of the court process, the expected amount of time to reach a decision and the deference courts may apply to SEC rules interpreting Rule 14a-8 (as opposed to SEC staff positions).

[36] See Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8, Exchange Act Release No. 93267 (July 13, 2022).

[37] *Exxon Mobil Corporation v. Arjuna Capital, LLC*, No. 24-cv-00069 (Northern District of Texas).

If you have any questions regarding this client alert, please contact either of the following attorneys or the Willkie attorney with whom you regularly work.

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