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PROXY SEASON

SEC Staff Adopts Significant New Guidance Affecting Shareholder Proposals and Engagement

By Brad Goldberg, Beth Sasfai, Reid Hooper, and Michael Mencher

On February 11 and 12, 2025, the Staff of the Division of Corporation Finance (Staff) of the Securities and Exchange Commission (SEC) provided a pre-Valentine's Day treat for public companies and shareholders to digest in the form of two new significant sets of guidance with the potential to significantly reshape shareholder engagement and activism, including guidance on shareholder proposals submitted pursuant to Rule 14a-8 under the Securities Exchange Act of 1934 (Exchange Act) and institutional investor engagement:

- On February 11, 2025, the Staff published updated compliance and disclosure interpretation (C&DI) guidance on Regulation 13D-G beneficial ownership reporting that may have significant impacts on institutional investor engagement relating to both environmental, social and governance (ESG) and traditional corporate governance and executive compensation topics.
- On February 12, 2025, the Staff published Staff Legal Bulletin (SLB) 14M, which rescinds previous Staff guidance included in SLB 14L (published in 2021 and notably limited the ability to exclude shareholder proposals that raised issues with "broad societal impact") and reinstates guidance previously rescinded by SLB 14L.

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Regulations 13D and 13G C&DI Updates

The Regulation 13D-G reporting C&DIs published on February 11, 2025, amended prior C&DI 103.11 and added a new C&DI 103.12 to provide new and materially changed guidance on the circumstances in which investors engaging with companies may lose their eligibility to report beneficial ownership on the "short-form" Schedule 13G and be required to report on the "long-form" Schedule 13D.

As a reminder, Sections 13(d) and 13(g) of the Exchange Act require that beneficial owners of more than 5 percent of a voting class of equity securities registered under Section 12 of the Exchange Act report their beneficial ownership on a Schedule 13D or, if eligible, a Schedule 13G. The "long-form" Schedule 13D requires significant disclosure regarding, among other things, plans or proposals with respect to the company, transactions in securities of the company, and agreements with respect to securities of the company, as well as the reporting person's beneficial ownership of the relevant class. The "short-form" Schedule 13G requires substantially less disclosure, which is focused primarily on the reporting person's beneficial ownership of the relevant class.

Many institutional investors report on Schedule 13G in reliance on Rule 13d-1(b), which provides an exemption from reporting on Schedule 13D for qualified institutional investors (QIIs) that acquire shares in the ordinary course of business and without the purpose or effect of changing or influencing control of the company, or Rule 13d-1(c), which provides an exemption from reporting on Schedule 13D for non-QIIs with beneficial ownership of less than 20 percent and who acquire such shares without the purpose, or with the effect, of changing or

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influencing control of the company, also known as "passive investors."

In fact, investors who report on Schedule 13G in reliance on Rules 13d-1(b) and (c) are required to provide a certification accompanying their beneficial ownership report stating, in effect, that the 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 of the securities.

Under the prior iteration of C&DI 103.11, the SEC provided that much of what constitutes ordinary course institutional investor engagement with portfolio companies—including engagement on executive compensation, corporate governance matters (such as board declassification), or social or environmental policies—would not, on its own, constitute an attempt to change or influence control of such companies, and therefore preclude such investors from reporting on Schedule 13G. New C&DI 103.12 deviates from this permissive approach, emphasizing that such engagement may constitute an attempt to influence or control issuers if it involves an attempt to exert pressure on management to take specific actions. The updated guidance provides for a facts-and-circumstances approach that looks to "the subject matter of the engagement [and] the context in which the engagement occurs." As examples of engagement that may constitute attempts to influence control, C&DI 103.12 cites circumstances where an investor:

- "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."

Key Takeaways of New Regulations 13D and 13G C&DIs

- Investors who have historically reported their beneficial ownership on Schedule 13G as QIIs and passive investors will now need to closely consider this new guidance in determining whether their engagement tactics with companies on certain topics historically perceived as ordinary course engagement topics may now cause them to be viewed as holding their securities with a "purpose or effect of changing or influencing control of the issuer," and, therefore, trigger a loss of eligibility to report beneficial ownership on Schedule 13G. If so, such investors are required to report beneficial ownership on Schedule 13D within five business days of losing eligibility to report on Schedule 13G.
- The examples set forth in C&DI 103.12 reflect very common practices in investment stewardship engagement on the part of institutional investors that historically have relied on Rule 13d-1(b). C&DI 103.12 does provide that Schedule 13G eligibility generally would remain available for an investor whose engagement discussions merely cover such investor's "views on a particular topic and how its views may inform its voting decisions, without more." However, the distinction between such purely informative discussions and engagement that "pressures" management to adopt practices consistent with an investor's views will likely be extremely difficult to define in practice.
- Investors for whom Schedule 13G eligibility is a priority should carefully evaluate the ability to

continue company-specific engagement. Such evaluations may result in investors abandoning certain historical engagement tactics in favor of publicly available policies describing their positions and company disclosures when making voting determinations.

As a result, this new guidance has the potential to significantly reshape the corporate governance, executive compensation and ESG landscape, and the role of institutional investor stewardship therein.

Staff Legal Bulletin 14M

On February 12, 2025, the Staff issued SLB 14M, which addresses several aspects of Rule 14a-8 and the no-action letter process with the SEC. Most notably, SLB 14M rescinds SLB 14L in full, reinstates guidance previously rescinded by SLB 14L, and provides clarifying views of the Staff on the scope and application of the "economic relevance" exclusion provided by Rule 14a-8(i)(5) and the "ordinary business" exclusion provided by Rule 14a-8(i)(7).

This new guidance reverses approximately four years of Staff guidance and no-action letter precedent, which had effectively changed how the Staff reviewed and analyzed whether shareholder proposals were eligible for exclusion from proxy materials under Rule 14a-8. In contrast to SLB 14L, which many stakeholders believed raised the burden for companies seeking to exclude shareholder proposals and introduced uncertainty in the no-action letter process, particularly those related to environmental and social issues, it is widely expected that the guidance issued in SLB 14M will significantly lower the burden for companies seeking to exclude shareholder proposals, particularly regarding the application of Rules 14a-8(i)(5) and 14a-8(i)(7) and certain procedural deficiencies in connection with shareholder proposal submissions.

Generally, SLB 14M presents its approach as a return to the standards that, as described below, historically prevailed before the issuance of SLB 14L. The replacement of SLB 14L and reinstatement of prior Staff guidance appears to be one of the first of many steps by the SEC and Staff of a large-scale pull-back of rules and Staff guidance adopted and issued by the SEC under the prior Chair Gary Gensler's administration.

Rule 14a-8(i)(5)—Economic Relevance Exclusion

Rule 14a-8(i)(5), or the "economic relevance" exclusion, permits a company to exclude a proposal that "relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business."

As the Staff explained in SLB 14M, the SEC adopted the current version of Rule 14a-8(i)(5) in response to the Staff's interpretation of the prior iteration of the rule, which had resulted in the denial of no-action relief where the shareholder proposal reflected social or ethical issues, rather than economic concerns, raised by the company's business, and the company conducted any such business, no matter how small. The SEC felt the Staff's interpretation of the rule may have "unduly limit[ed] the exclusion."

The Staff's guidance in SLB 14M reverts the focus of the rule to a company-specific approach for analyzing exclusionary arguments under Rule 14a-8(i)(5), thereby effectuating the stated intent of the current version of the rule.

Changes to Application of Rule 14a-8(i)(5)

SLB 14M specifically provides "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."

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In other words, the Staff's analysis will focus on a shareholder proposal's significance to the company's business when it otherwise relates to operations that account for less than 5 percent of total assets, net earnings and gross sales. The Staff further stated that, because Rule 14a-8(i)(5) "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."

As a result, for those shareholder proposals that "raise social or ethical issues," a shareholder proponent "would need to tie those matters to a significant effect on the company's business" in order to avoid exclusion under Rule 14a-8(i)(5), and "[t]he mere possibility of reputational or economic harm alone will not demonstrate that a proposal is 'otherwise significantly related to the company's business.'" In contrast, and consistent with prior Staff guidance in this area, the Staff stated that it "would generally view substantive governance matters to be significantly related to almost all companies."

In addition, the Staff clarified that, in analyzing whether a proposal is "otherwise significantly related" under Rule 14a-8(i)(5), the Staff will not look to its analysis under Rule 14a-8(i)(7), which has at times informed the Rule 14a-8(i)(5) analysis in the past. The Staff also provided that by separating the analytical frameworks between Rule 14a-8(i)(5) and Rule 14a-8(i)(7), the intended purposes of each exclusionary basis under Rule 14a-8 would be more properly recognized.

Rule 14a-8(i)(7)—Ordinary Business Exclusion

Rule 14a-8(i)(7), or the "ordinary business" exclusion, permits a company to omit a shareholder proposal that "deals with a matter relating to the company's ordinary business operations." The policy underlying the ordinary business exclusion is based on two considerations.

The first is the "subject matter" of the proposal, that is, whether, as described in a 1998 SEC release, it refers to matters that are "so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight," with the rationale being that the resolution of these types of matters is considered to be more properly the province of management and the board of directors than of the shareholders. However, as noted in the 1998 release, proposals relating to these matters but focusing on significant social policy issues generally would not be excludable "because such issues typically fall outside the scope of management's prerogative." The second consideration is whether a proposal seeks to "micromanage" a company by probing too deeply into matters upon which shareholders would not be in a position to make an informed judgment.

With respect to the first prong of Rule 14a-8(i)(7), whereas SLB 14L had directed the Staff not to focus on the nexus between a policy issue and the company, but instead to focus on the social policy significance of the issue that is the subject of the shareholder proposal, SLB 14M states that the 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.'" With respect to the second consideration, SLB 14M reinstates the guidance on "micromanagement" previously rescinded by SLB 14L. These changes are more fully described below.

Changes to Application of Rule 14a-8(i)(7)

As discussed above, the SEC has stated that the policy underlying the "ordinary business" exclusion rests on two central considerations: the first relates to the shareholder proposal's subject matter, and the second relates to the degree to which the shareholder proposal "micromanages" the company.

With respect to the subject matter prong of Rule 14a-8(i)(7), SLB 14M:

1. **Replaces the SLB 14L guidance that had broadened the scope of the "significant**

social policy" exception and replaces it with a company-specific approach. In determining whether a policy issue transcends ordinary business, the Staff historically considered the nexus between such policy issue and the company. The SLB 14M guidance represents a return to this historical framework under which the Staff analyzes whether a proposal raises 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. In other words, SLB 14M resets the Staff's focus on whether a particular policy issue raised by a proposal is significant to a particular company rather than the significance to society as a whole. Not surprisingly, SLB 14M affirms that such analysis will be made on a case-by-case basis.

2. **Reinstates the Staff's historical view that proposals involving "the management of the workforce, such as the hiring, promotion, and termination of employees," generally relate to ordinary business matters, as well as its historical approach of concurring in the exclusion of proposals that relate solely or primarily to general employee compensation and benefits.** SLB 14L had provided that proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company. SLB 14M rescinds this guidance.
3. **Does not reinstate the board analysis required under previous Staff guidance.** SLB 14M did not reinstate the portions of SLBs 14I, 14J and 14K encouraging the provision of a board analysis of whether a proposal raises a significant social policy issue. SLB 14M provides that a company may, but is not required to, submit a board analysis if it believes it will help the Staff analyze the no-action request.

With respect to the micromanagement prong of Rule 14a-8(i)(7), SLB 14M restores the Staff's guidance that had been in place before SLB 14L narrowed the scope of the micromanagement exclusion by:

1. **Reinstating the Staff's pre-SLB 14L approach, set forth in SLBs 14J and 14K, of concurring in the exclusion of proposals that "involve intricate detail, or seek to impose specific time-frames or methods for implementing complex policies,"** including social and environmental proposals requesting companies adopt time frames or targets, and those addressing senior executive and/or director compensation that seek intricate detail or seek to impose specific time frames or methods for implementing complex policies.
2. **Reinstating the Staff's pre-SLB 14L approach of concurring in the exclusion of proposals requesting reports if the substance of the report relates to the imposition or assumption of specific time frames or methods for implementing complex policies.** SLB 14L rescinded the guidance in SLB 14J addressing the application of the "micromanagement" prong to proposals requesting reports and did not itself specifically address proposals requesting reports.
3. **Abandoning SLB 14L's criteria for determining whether proposals probe matters "too complex" for shareholders, as a group, to make an informed judgment.** In assessing whether proposals related to disclosure, target setting and time frames probe matters "too complex" for shareholders, as a group, to make an informed judgment, the Staff will no longer require companies to demonstrate that a shareholder proposal does not reference a well-established national or international framework as was required pursuant to the prior guidance in SLB 14L. SLB 14M reinstates the guidance in SLB 14K, which provided that the Staff's concurrence with a company's micromanagement argument would be based on the Staff's assessment of the level of prescriptiveness of the proposal, rather than

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the Staff's view of the proposal as presenting issues that are too complex for shareholders to understand.

Appendix A, set at the end of this article, is a chart comparing the principles of application of the Rule 14a-8(i)(7) exclusion under SLB 14L to those under the new and reinstated guidance set forth in SLB 14M.

Additional Guidance Included in SLB 14M

In addition to the rescission of SLB 14L and the guidance noted above, SLB 14M also provides information related to other aspects of Rule 14a-8, including:

- **Staff to review no-action request arguments under the historical application of Rules 14a-8(i)(10), (i)(11) and (i)(12).** SLB 14M provides that the Staff considers no-action requests under operative SEC rules and applicable Staff guidance, and specifically notes that the amendments proposed by the SEC in 2022 to narrow the "substantial implementation," "duplication" and "resubmission" exclusions have not been adopted. Specifically, with respect to Rule 14a-8(i)(10), success rates steadily declined for substantial implementation arguments in the immediate aftermath of the 2022 proposed amendments, with a slight uptick in success of such arguments in recent years. With the issuance of SLB 14M and the Staff providing that it will analyze requests under the historical application of Rule 14a-8, and not pursuant to a proposed rulemaking, it is expected that substantial implementation arguments under Rule 14a-8(i)(10) and the success rate for such arguments will likely increase going forward.
- **Use of graphics and images in shareholder proposals and proof of ownership letters.** SLB 14M also republishes previous guidance related to the use of graphics and images (that is, a proposal may violate the procedural requirement of Rule 14a-8(d) providing that a proposal may not exceed 500 words if the total number of words in a proposal, including the words in the graphics and images, exceeds 500) and to proof-of-ownership letters that was originally contained in rescinded SLBs 14I and 14K, with some minor technical changes. Most notably, Staff clarifies a long-standing debate among Rule 14a-8 stakeholders by providing that it does not view Rule 14a-8 as requiring a company to send a second deficiency notice to a shareholder proponent if the company previously sent an adequate deficiency notice prior to receiving the proponent's proof of ownership and the company believes that the proponent's proof of ownership letter contains a defect.
- **Use of email.** In addition, SLB 14M includes new guidance on the use of email for submission of proposals, delivery of notices of defects and responses to those notices.

SLB 14M FAQs

Further, the Staff provided certain questions and answers related to how companies, shareholder proponents and their representatives may implement the provisions of SLB 14M.

The following is a summary of such questions and answers:

- **What guidance will the Staff consider when reviewing pending requests and should companies resubmit a request or submit supplemental correspondence in light of SLB 14M?** The Staff stated that it will consider the guidance in place at the time it issues a response to the no-action request. Accordingly, companies should review the guidance provided in SLB 14M in relation to arguments made in pending requests to consider whether to supplement exclusionary arguments included therein.
- **Can a company submit a new no-action request if the Rule 14a-8(j) deadline has passed?** The Staff stated that it will consider

the publication of SLB 14M to be "good cause" under Rule 14a-8(j) **only** if a new no-action request relates to legal arguments made in response to the guidance provided in SLB 14M; a finding of "good cause" would not be appropriate if a new request does not relate to SLB 14M guidance.

Finally, the Staff stated that it will endeavor to meet proxy print deadlines when responding to no-action requests considering the new guidance published in SLB 14M, and continued to encourage companies and shareholder proponents to collaborate on proposals in order to resolve submitted proposals prior to print deadlines.

What SLB 14M Means for Companies and Next Steps

- The refocusing of the "economic relevance" exclusion under Rule 14a-8(i)(5) on the SEC's intent when adopting the current version of the rule means that this exclusion will now become a viable basis for exclusion on its own and no longer be tied to the availability or unavailability of the "ordinary business" exclusion under Rule 14a-8(i)(7). This is a significant change in course from the Staff related to how the economic relevance exclusion has been recently applied. As a result, companies should review pending no-action requests, or revisit whether an argument should be made in a new request, to determine whether there is a viable exclusionary argument to be made under Rule 14a-8(i)(5) for those proposals not "otherwise significantly related to the company's business.
- The narrowing of the application of the social policy exception to the "ordinary business" exclusion under Rule 14a-8(i)(7) means that proposals involving issues that are of broad societal impact may nevertheless be excludable if they are not significant to the company receiving the proposal. In addition, the broadening of the "micromanagement" exclusion under Rule 14a-8(i)(7) means that climate proposals that seek to impose specific time frames or methods, for example, may once again be excludable. As a result, proposals that are overly prescriptive or seek to impose specific time frames or methods, or that are not significantly related to a company's business, will again likely be eligible for exclusion from proxy materials.
- Companies should review pending no-action requests to determine if a new or supplemental argument should be made pursuant to Rules 14a-8(i)(5) and (i)(7) when seeking exclusion of shareholder proposals that relate to the guidance provided in SLB 14M.
- For those companies that have not yet submitted no-action requests, even if their deadline to submit a request has passed, consideration should be given as to whether there are valid exclusionary arguments to be made in response to the SLB 14M guidance, particularly for those proposals that relate to environmental or social concerns.

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Appendix A		
Exemption	**New/reinstated guidance (source)**	**Rescinded SLB 14L guidance**
14a-8(i)(7) (subject matter prong)	States that the 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." (SLB 14M) States that a policy issue that is significant to one company may not be significant to another. (SLB 14M) States that the Staff'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. (SLB 14M)	States that Staff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal.
14a-8(i)(7) (subject matter prong)	States that proposals involving "the management of the workforce, such as the hiring, promotion, and termination of employees," generally relate to ordinary business matters. (SLB 14J) States that proposals that relate to general employee compensation and benefits are excludable under Rule 14a-8(i)(7). On the other hand, proposals that focus on significant aspects of senior executive and/or director compensation generally are not excludable under Rule 14a-8(i)(7). (SLB 14J) States that, in evaluating proposals that raise both ordinary business and senior executive and/or director compensation matters, the Staff examines whether the focus of the proposal is an ordinary business matter or aspects of senior executive and/or director compensation. Where the focus appears to be on the ordinary business matter, the proposal may be excludable under Rule 14a-8(i)(7). (SLB 14J)	States that proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company.
14a-8(i)(7) (subject matter prong)	States that the Staff will not expect a company's no-action request to include a discussion that reflects the board's analysis of the particular policy issue raised and its significance to the company. A company may submit a board analysis for the Staff's consideration if it believes it will help the Staff analyze the no-action request. (SLB 14M)	States that because the Staff is no longer taking a company-specific approach to evaluating the significance of a policy issue under Rule 14a-8(i)(7), it will no longer expect a board analysis as part of demonstrating that the proposal is excludable under the ordinary business exclusion.

Appendix A		
Exemption	**New/reinstated guidance (source)**	**Rescinded SLB 14L guidance**
14a-8(i)(7) (micro-management prong)	States that a proposal may probe too deeply into matters of a complex nature if it "involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies." The Staff applies this framework when evaluating whether a proposal micromanages a company and is therefore excludable. (SLB 14J) Notes that it applies the same framework to proposals that request studies or reports. A proposal that seeks an intricately detailed study or report may be excluded on micromanagement grounds. It also notes that the Staff would consider the underlying substance of the matters addressed by the study or report. Thus, for example, a proposal calling for a report may be excludable if the substance of the report relates to the imposition or assumption of specific time frames or methods for implementing complex policies. (SLB 14J) States that the Staff may agree that proposals addressing senior executive and/or director compensation that seek intricate detail, or seek to impose specific time frames or methods for implementing complex policies, can be excluded under Rule14a-8(i)(7) on the basis of micromanagement. (SLB 14J) States that in considering arguments for exclusion based on micromanagement, the Staff looks to whether the proposal (regardless of its precatory nature) seeks intricate detail or imposes a specific strategy, method, action, outcome or timeline for addressing an issue, thereby supplanting the judgment of management and the board. (SLB 14K) States that when analyzing a proposal to determine the underlying concern or central purpose of any proposal, the Staff looks not only to the resolved clause but to the proposal in its entirety. Thus, if a supporting statement modifies or refocuses the intent of the resolved clause, or effectively requires some action in order to achieve the proposal's central purpose as set forth in the resolved clause, the Staff takes that into account in determining whether the proposal seeks to micromanage the company. (SLB 14K)	States that the Staff will take a measured approach to evaluating companies' micro-management arguments—recognizing that proposals seeking detail or seeking to promote time frames or methods do not per se constitute micromanagement. Instead, the Staff will focus on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management. States that the Staff will focus on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management, but that the Staff would expect the level of detail included in a shareholder proposal to be consistent with that needed to enable investors to assess an issuer's impacts, progress toward goals, risks or other strategic matters appropriate for shareholder input.

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Appendix A		
Exemption	**New/reinstated guidance (source)**	**Rescinded SLB 14L guidance**
14a-8(i)(7) (micro-management prong)	States that where the Staff has concurred with a company's micromanagement argument, it was not because the Staff viewed the proposal as presenting issues that are too complex for shareholders to understand. Rather, it was based on the Staff's assessment of the level of prescriptiveness of the proposal. When a proposal prescribes specific actions that the company's management or board must undertake without affording them sufficient flexibility or discretion in addressing the complex matter presented by the proposal, the proposal may micromanage the company to such a degree that exclusion of the proposal would be warranted. (SLB 14K)	States that, in order to assess whether a proposal probes matters "too complex" for shareholders, as a group, to make an informed judgment, the Staff may consider the sophistication of investors generally on the matter, the availability of data, and the robustness of public discussion and analysis on the topic. The Staff also may consider references to well-established national or international frameworks when assessing proposals related to disclosure, target setting, and time frames as indicative of topics that shareholders are well-equipped to evaluate.
14a-8(i)(7) (micro-management prong)	Provides the following example: the Staff agreed that a proposal to generate a plan to reach net-zero greenhouse gas emissions by the year 2030 for all aspects of the business that are directly owned by the company and major suppliers – including but not limited to, manufacturing and distribution, research facilities, corporate offices and employee travel – was excludable on the basis of micromanagement. (SLB 14J) Provides the following example: the Staff agreed that a proposal seeking annual reporting on "short-, medium- and long-term greenhouse gas targets aligned with the greenhouse gas reduction goals established by the Paris Climate Agreement to keep the increase in global average temperature to well below 2 degrees Celsius and to pursue efforts to limit the increase to 1.5 degrees Celsius" was excludable on the basis of micromanagement. (SLB 14K)	Provides the following example: the Staff denied no-action relief for a proposal requesting that the company set targets covering the greenhouse gas emissions of the company's operations and products. The Staff concluded this proposal did not micromanage to such a degree to justify exclusion under Rule 14a-8(i)(7). Notes that many of the proposals addressed in the rescinded SLBs requested companies adopt time frames or targets to address climate change that the Staff concurred were excludable on micromanagement grounds, and states that going forward Staff would not concur in the exclusion of similar proposals that suggest targets or timelines so long as the proposals afford discretion to management as to how to achieve such goals.

OFFERINGS

Not So Black and White: Executing Capital Markets Transactions During Quarterly Blackout Periods

By John Ablan, Edward Best, Jennifer Carlson, and Susan Rabinowitz

With the new year upon us, many companies are contemplating capital markets offerings. However, companies often voluntarily impose a "blackout" on capital markets transactions beginning near the end of a fiscal period and ending shortly after the public announcement of results for that fiscal period or the filing of the related annual, quarterly or special report.

Companies impose these blackout periods to avoid issuing securities when there is a heightened risk that they may have, or be perceived to have, knowledge of the nearly or recently completed period's financial results or, in commonly used parlance, material non-public information (MNPI). Because it is difficult to predict in advance when financial information for a fiscal period will be available, many companies voluntarily impose blackout periods each quarter during which they don't issue securities and insiders are prohibited from transacting in company securities.

There are benefits to adhering to scheduled blackout periods, and companies often are well advised to wait until after they issue their earnings or file the related annual, quarterly, or special report before accessing the capital markets. However, a self-imposed blackout period does not, as a matter of law, prevent a company from issuing securities so long as the company satisfies all disclosure obligations.

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There may be compelling reasons to issue securities during a blackout period, such as an immediate need for funds or a desire to take advantage of a limited market opportunity. In these or other circumstances, companies seeking to sell securities during a self-imposed blackout period may, under appropriate circumstances and after consultation with their underwriters and counsel, be able to still satisfy their disclosure obligations in connection with the offering.

This article discusses factors to consider when contemplating a securities offering during a regularly scheduled blackout period. Different considerations are raised in connection with special blackout periods, such as those in connection with material corporate transactions, as well as those in connection with insider transactions in company securities, neither of which are discussed in this article.[1]

Blackout Periods: What, Why, and When

US federal securities laws do not, *per se*, impose blackouts on the ability of a company to issue securities.[2] However, when a company possesses information about itself that a reasonable investor would consider important in making an investment decision, the company must disclose that information or refrain from selling its securities.

Additionally, US federal securities laws impose liability on companies that sell securities on the basis of untrue statements of material facts or the omission of material facts necessary to make the company's statements not misleading. Therefore, when a company discloses MNPI, it must ensure its statements are accurate.

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While practices vary, regularly scheduled blackout periods generally begin shortly before, at or shortly after the end of a fiscal period and continue until shortly after the announcement of earnings for such fiscal period. The blackout period can be as short as a few weeks (for example, around the end of the first, second, or third fiscal quarters) or as long as a few months around the end of the fiscal year. While companies typically plan their funding schedules well in advance taking into account their blackout periods, uncooperative market conditions or unscheduled needs (for example, M&A transactions) can cause companies to consider selling securities during a blackout period.

So Is a Blackout Period More Gray than Black?

Whether a company can (or should) issue securities during a blackout period involves a balance of considerations and a determination of the comfort level of various constituents participating in the transaction, including the company's management and board (most likely represented by the audit committee or the chairman of the audit committee), underwriters, various counsel and auditors, as well as an evaluation of a number of legal and non-legal considerations.

Constituents

Management and the Board

Management and the board must evaluate how critical the funding need is, whether there are other reasonable funding alternatives available and the legal and non-legal risks of proceeding or not proceeding. For a public offering, the company, the company's principal executive, financial and accounting officers, and those directors who sign the registration statement have potential liability for material misstatements in, or omissions from, the registration statement and prospectus. For an unregistered offering, potential liability still exists under Rule 10b-5 of the Securities Exchange Act of 1934, as amended (Exchange Act). Even if there is no legal liability, the company may still face reputational harm if its reported results after the issuance are not in line with market expectations.

Underwriters

The underwriters of the offering also must be comfortable moving forward because underwriters have potential liability for material misstatements in, or omissions from, the registration statement and prospectus as well as potential liability under Rule 10b-5. Reputational issues may be even more acute for underwriters because they interact with investors on a daily basis on behalf of numerous clients and will not want to risk harming those relationships over a single offering.

Counsel

In registered and many exempt offerings, counsel for the company and the underwriters typically provide so-called "negative assurance letters" stating that after conducting due diligence, nothing came to their attention that caused them to believe that there are any material misstatements in, or omissions from, the offering documents. While they may not face the same type or level of potential liability as the company, its management and board and the underwriters, counsel will not be willing to issue their "negative assurance letters" unless they are comfortable with the proposed disclosure (or lack thereof).

Auditors

In registered and many exempt offerings, the company's independent auditors will issue a comfort letter to the underwriters providing certain assurances with respect to financial information included in the offering documents. The comfort letter is crucial in helping the underwriters establish a statutory due diligence defense for potential liability. While comfort letters do not typically provide comfort regarding the absence of information, the company's auditors will not be willing to issue their comfort letter unless they are comfortable with the proposed disclosure (or lack thereof).[3]

Legal and Non-Legal Considerations

"Just the Facts Ma'am!"

While it might be a bit of a cliché (and thanks to the old TV series Dragnet), the facts matter. Although it may seem obvious, a company cannot disclose facts of which it is unaware. It is important to diligence the company's financial closing process, including when data will become available to management as well as any changes to that information that may occur through the closing of the offering, and the company's timeline for preparation of its financial statements, including any internal or external review processes.

This may vary based on company-specific factors such as the type of business, industry and data aggregation processes. For example, a multinational conglomerate relying on various geographic and business segments to report into the parent company might experience a lag before a clear picture of the company's financial results are known, while other companies might track and have a sense of revenues and expenses on a more timely basis. It is important for all transaction participants to understand the drivers of the company's financial performance in order to determine comfort with disclosure, as the absence of some key pieces of information may make incomplete information less helpful. It is also important to diligence whether significant changes have historically occurred during the closing process or the internal or external review process.

Not All Offerings Are Created Equal

When evaluating whether the absence of financial information for a recently completed fiscal period is material, context is crucial. Rule 10b-5 states that omissions are looked at "in the light of the circumstances under which they were made."

Thus, the type of offering may impact the materiality analysis, with the same facts leading to different conclusions with respect to a debt offering versus an equity offering. In a debt offering, investors are primarily focused on the ability of the company to pay principal and interest on a timely basis and the consequent rating of the debt securities; thus, small changes in the company's quarterly earnings may not be material to a reasonable investor.

In the case of an equity offering, missing earnings expectations (whether in the form of guidance issued by the company or consensus estimates of securities analysts) might cause a significant drop in the company's stock price, resulting in disgruntled investors. Furthermore, an offering sold primarily to institutional investors may provide a different risk profile than an offering, whether debt or equity, primarily sold to retail investors.

If I Can't Wait, What Can I Do to Minimize the Risk?

If the company has concluded that it can't wait until its regularly scheduled earnings announcement and the offering participants have concluded that MNPI exists (or nonpublic information is close enough to "material" to cause concern), the company may choose to "pre-release" enough information to satisfy its disclosure obligations, often referred to as "flash numbers."

Including flash numbers in an offering document is not a panacea and comes with its own risks and challenges. Two of the primary risks of disclosing "flash numbers" are that the final results may differ significantly from the pre-released numbers and the pre-released numbers may not be sufficient to inform investors about the material aspects of the company's financial condition. To minimize potential risks, offering participants should address the following:

What Can and Should Be Disclosed

The company should first determine what financial information is available, reliable and will be able to provide a balanced picture of the period's results. For example, if the company is aware of information indicating that revenue exceeds expectations but net income is lower than expected, it should not disclose revenue only. Attention also should be drawn to any financial data that the company knows may demonstrate a material deviation from

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existing trends. Both income statement and balance sheet items should be considered in this analysis. If the company wants to include any non-GAAP information, it should consider whether a meaningful reconciliation is possible in light of the various outstanding components.

Ask the Tough Questions

Similar to the diligence conducted in determining whether disclosure needs to be made, the offering constituents should perform diligence on the origin/derivation of the flash numbers, the procedures that remain to be completed by the company's internal accounting staff and/or independent auditors, and the company's history of revisions to its preliminary financial results as compared to final results.

Consider Using Ranges

Rather than disclosing specific numbers, which imply a level of accuracy, the company should consider disclosing ranges that provide a sense of the company's financial performance while also indicating that final figures are not yet available. The SEC Staff has stated that a range should represent a narrow, meaningful estimate. Ranges that are too broad risk being insufficient to satisfy the company's disclosure obligations.

Include Appropriate Qualifiers and Explanations

The disclosure should be clear that the information is preliminary and is based on then-available information. Appropriate disclosure should also be included stating that the company's financial closing procedures are not yet complete and, therefore the company's final results may vary from the information provided.

It also should be made clear that the preliminary results were prepared by management and were not subject to audit, review or agreed-upon procedures of any audit firm, and therefore, there is no independent opinion or any other form of assurance with respect to those results. Finally, the company may need to include additional disclosure alongside the flash numbers explaining any differences from the prior comparative fiscal period.

Determine the "Art of the Possible" for the Comfort Letter

Underwriters expect that the financial information included or incorporated by reference in an offering document will be "comforted" by the company's auditors. However, auditors often categorically refuse to "tick-and-tie" flash numbers. A conversation with the auditors should be held to delve deeper into what procedures, if any, they can perform on the flash numbers. For example, figures taken from the general ledger, such as revenue, may be able to receive an "accounting records" tick-mark.

Special consideration also should be given to offerings that occur after a fiscal year-end but before the audit has been completed. The availability of both "tick-and-tie" and negative assurance comfort for fiscal year-end numbers may be impacted until the audit is considered "substantially complete," which often means that the company is all but ready to issue its complete audited financial statements. To the extent desired comfort is unavailable, the underwriters may be willing to accept a certificate from the company's chief financial officer attesting to certain financial information included in the offering document. The form of any such certificate should be tailored to the specific situation.

Flash Numbers May Need to Be Furnished on a Form 8-K

Item 2.02 of Form 8-K requires a company to "furnish" a Form 8-K containing any material nonpublic information regarding the company's results of operations or financial condition for a completed quarterly or annual fiscal period that the company or any person acting on its behalf discloses in a public announcement or release. SEC Exchange Act Form 8-K Compliance and Disclosure Interpretation 106.07 specifically requires a Form 8-K in the case of "preliminary" earnings disclosure for a completed quarterly period, even if some of the amounts are only estimates.

An additional Form 8-K would be required when the final results are publicly disclosed or when revised amounts are publicly disclosed. While the disclosure of information in the context of an unregistered offering (for example, a Rule 144A offering) may not constitute a "public announcement or release," disclosure of flash numbers in a private offering memorandum may trigger required public disclosure under Regulation FD, as further described below. Therefore, a public company would be well advised to furnish an Item 2.02 Form 8-K even for disclosure in a private offering memorandum.

Don't Forget About Regulation FD

Providing flash numbers in a prospectus or private offering memorandum may trigger required public disclosure under Regulation FD for public companies. The standard procedure is to file a Form 8-K including the flash numbers substantially simultaneously with the launch of the offering. The offering constituents should ensure that such a press release is drafted in a manner to avoid it being considered an "offer" of the securities under the U.S. federal securities laws.

Private companies that previously have issued securities pursuant to Rule 144A should consider making any such results simultaneously available on their website or in the data room established to comply with Rule 144(d)(4) in order to remove information asymmetry as between potential investors in the new offering and existing and potential investors in the company's existing securities.

What If I Can't or Don't Want to Disclose Flash Numbers and Can't Wait?

Because disclosing flash numbers is not completely free from risk, a company that needs to raise funds but either cannot or does not want to disclose the financial information needed to satisfy its disclosure obligations should consider, if the necessary facilities or programs are in place, borrowing under available bank facilities or issuing commercial paper and subsequently refinancing such borrowings after earnings are reported. While issuances of commercial paper are still subject to potential liability under Rule 10b-5, many companies gain comfort with the immateriality of quarterly earnings in the context of commercial paper issuances.

Notes

1. Insider transactions in company securities can implicate actual or perceived "insider trading issues." To avoid potential regulatory investigations, third-party lawsuits, reputational issues and potential leaks of material information, companies typically impose quarterly blackouts on insiders, even where insiders are already subject to a pre-clearance requirement, or only allow insiders to trade during designated "open window" (that is, non-blackout) periods.
2. Rule 3-12(a) of Regulation S-X requires that a company's latest financial statements included or incorporated by reference in a registration statement be as of a date less than 135 days (or 130 days in some instances) before the date that the registration statement is expected to become effective. In practice, this only restricts a company proposing to publicly offer securities shortly after the end of its fiscal year because the Form 10-K, with updated financial statements, is not due until after the 135-day deadline. In the case of a company that (1) has filed all Exchange Act reports that were due; (2) expects to report net income (after taxes but before extraordinary items and the cumulative effect of any changes in accounting principles) in the year just completed; and (3) has reported such net income in at least one of the two previous years, the SEC Staff provides a grace period taking reporting companies up to their Form 10-K due date. While not a technical blackout, this may limit the ability of certain companies that do not have an effective shelf registration to publicly offer securities shortly after their fiscal year-end.
3. Just like Regulation S-X provides a 135-day limit on the age of financial statements included in a registration statement, Auditing Standard 6101 (Letters for Underwriters and Certain Other Requesting Parties) limits the negative assurance that auditors may provide in comfort letters after such 135th day.

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FOREIGN PRIVATE ISSUERS

Internet Guidance for Foreign Private Issuers Conducting Unregistered Offerings: Is a Gatepost Still a Sign of the Times?

By Andrew Beck, Alyssa Caples, Peter Castellon, Dorothee Fischer-Appelt, Robert Grauman, Peter Halasz, Guy Lander, Rob Lando, Jim McDonald, Prabhat Mehta, Ash Qureshi, Ettore Santucci, and Evan Simpson

The SEC last issued guidance to foreign private issuers on the use of the Internet in 1998 (the 1998 Guidance). The 1998 Guidance discusses examples of measures that would be adequate to avoid Internet-based activities from being considered to take place "in the United States," providing different examples in the context of both US and foreign entities.

In the more than 25 years since the 1998 Guidance was issued, there have been considerable developments in market practices around the world surrounding Internet communications relating to securities offerings, making it timely to revisit the application of the 1998 Guidance, particularly to foreign private issuers.

This article focuses solely on the application of the 1998 Guidance to foreign private issuers posting disclosure on the Internet about or relating to an offering that is not being registered under the US Securities Act of 1933, as amended, and is not intended to address the different considerations that may apply to US domestic issuers. Furthermore, the article only deals with the registration requirements of Section 5 of the Securities Act and not jurisdictional issues or disclosure issues.[1]

The 1998 Guidance is important because, among other things, Internet-based activities in the United States that relate to securities offerings may result in unregistered offers and sales of securities that contravene the registration requirements of Section 5 of the Securities Act or that constitute "general solicitation" or "general advertising" disqualifying reliance on certain exemptions from registration under the Securities Act. Such activities may also constitute "directed selling efforts," disqualifying reliance on Regulation S under the Securities Act to conclude that registration is not required for the offers and sales of securities taking place outside the United States.

The 1998 Guidance was principles-based, setting out the following key principles with respect to offers and sales of securities under the Securities Act:

- Posting offering or solicitation materials on a website may, or may not, be considered activity taking place "in the United States" depending on the facts and circumstances.
- If the activity is deemed to take place "in the United States", then the registration requirements of US securities laws would apply to that activity, based on the requirement that all offers and sales in the United States be registered under US federal securities laws or be made under an available exemption.
- Internet offers, solicitations or other communications should be considered to be taking place

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"in the United States," and therefore subject to US registration requirements, if and only if they are "targeted to the United States."

- Market participants that implement measures reasonably designed to guard against sales or the provision of services in the United States should ***not*** be viewed as targeting persons in the United States with their Internet offers and the offers would not result in a registration obligation under Section 5.
- Measures that may be adequate for non-US issuers would not necessarily be adequate measures for US issuers. US issuers should undertake more restrictive measures than non-US issuers.

The 1998 Guidance included a statement that an offshore Internet offer made by a non-US offeror generally would *not* be considered to be targeted at the United States, if

1. It includes a prominent disclaimer stating it is *not* directed at persons in the United States, *and*
2. It employs procedures reasonably designed to guard against sales to persons in the United States.

As an example of a procedure designed to guard against sales in the United States, the 1998 Guidance suggested that the offeror could ascertain the purchaser's residence by asking for a mailing address or telephone number, and then block participation if a US mailing address or a telephone number with a US area code were provided. Procedures such as this, whether intended to block access to a website or certain portions of it by US persons or to preclude the receipt of securities or services in the United States, can be generally described as a "gatepost" designed to keep US persons out.

The 1998 Guidance was, however, very clear that the procedures it discussed, including the concept of a gatepost, were *not* intended to be exclusive and that other procedures that guard against sales in the United States could also be used to demonstrate that an offer, solicitation or other communication is not targeted at the United States.

The following are examples of communications where, consistent with the market practices and procedures currently being followed in certain jurisdictions, it generally may be concluded that the communication is *not* directed at persons in the United States.

Example I: Rule 135c Press Releases

A press release or announcement that substantially complies with the principles of Rule 135c can be posted on a foreign private issuer's website *without* a gatepost, even if the issuer is not a registrant and is not Rule 12g3-2(b) compliant or eligible.

Example II: Rule 135e Press Releases

A press release or announcement that complies with Rule 135e can be posted on a foreign private issuer's website without a gatepost so long as the material is posted in the same way as other documents that are *not* offering-related are posted on the website.

This assumes that the press release or announcement is posted with other press releases and announcements of the company. For example, if the issuer creates a web page or a microsite titled "rights offering" or "share placing" a different analysis would need to take place to determine whether a gatepost is needed.

If a foreign private issuer wants an announcement or press release to feature more prominently on the website than other announcements or press releases, it could consider relying on Rule 135c instead of Rule 135e or it could consider posting a rule 135c-compliant announcement or press release on its website (without a gatepost) and distributing a separate Rule 135e-compliant press release outside the United States. A press release or announcement may also be required to be posted on a third-party website by local law or regulation. (*See* Example IV.)

Example III: Offering Documents

An offering document for an *unregistered offering* and any related shareholder circular that is *not* specifically targeted to the attention of US investors

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may be posted on a foreign private issuer's website *without* a gatepost, so long as the documents contain appropriate legends and any US sales are made only in compliance with an available US exemption from registration. "Specifically targeted" would include posting an offering document with a US wrap or posting a separate version of the offering document that contains US disclosure not included in the local version.

"Specifically targeted" would also include posting an English-language offering document on a website where other documents are predominantly in another language. This assumes that the offering document is posted with other documents or presentations of the company with no greater prominence. For example, if the issuer creates a webpage or microsite titled "rights offering" or "share placing" and includes the offering document there, a different analysis would need to take place to determine whether a gatepost is needed.

In some jurisdictions, issuers are required to post announcements, press releases, offering documents or circulars on a third-party website. These third-party websites typically do not have gateposts. Examples of this practice include the following:

- English public companies are required to post all press releases on the RNS website and certain offering documents on the website of the FCA National Storage Mechanism.
- Spanish public companies are required to post all press releases on the website of the local regulator.
- Canadian public companies are required to post all material press releases and all public offering documents and continuous disclosure documents on SEDAR (the website operated by the Canadian securities regulatory authorities).
- German public companies are required to post ad hoc announcements on the website of the local regulator.

Example IV: Rule 135e Press Releases (Third-Party Websites)

Any Rule 135e-compliant press release that is required to be posted on a third-party website by local law or regulation may also be posted on the foreign private issuer's website ***without*** a gatepost, once it has been posted on the third-party website.

Example V: Offering Documents (Third-Party Websites)

Any offering document for an *unregistered offering* and any related shareholder circular that is required to be posted on a third-party website by local law or regulation may also be posted on the foreign private issuer's website ***without*** a gatepost, once it has been posted on the third-party website so long as the documents contain appropriate legends.

Example VI: Continuous Disclosure Documents

Any continuous disclosure document, current or periodic reporting document, or proxy document or circular required under local law or regulation, may be posted on a foreign private issuer's website *without* a gatepost, whether or not the document relates to an offering, so long as the material is posted in the same way as other documents are posted on the website as part of the foreign private issuer's home country disclosure compliance even if the foreign private issuer is conducting a registered offering or an *unregistered offering* at the time and so long as documents relating to the offering contain appropriate legends.

None of these documents should normally be considered targeted at the United States, unless extraordinary measures are taken to bring them specifically to the attention of persons in the United States.

Example VII: Ad Hoc Announcements

An ad hoc announcement is required to be made in certain jurisdictions by way of a press release or website posting for the purpose of disclosing material information.

If a foreign private issuer is required by a relevant regulatory authority or under applicable law to post an ad hoc announcement regarding an offering of securities on the issuer's website without a gatepost,

the issuer may do so, whether or not the issuer is making a bona fide offering outside the United States, so long as the announcement otherwise complies with Rule 135e and so long as the announcement does not contain any more information about the offering of securities than is required by the relevant regulatory authority or under applicable law.

As used in this article, *unregistered offering* includes any of the following:

- A combined Rule 144A/Regulation S offering
- An offering in the United States pursuant to another exemption combined with a Regulation S offering (for example a Section 4(a)(2)/Regulation S offering or a Regulation D/Regulation S offering or a Section 4(1½)/Regulation S offering)
- A stand-alone Regulation S offering
- A Regulation S offering that is concurrent with an SEC-registered offering

The examples in this article apply to both equity and debt offerings. The observations in this article are limited to offerings of conventional securities involving customary market participants and marketing processes.

We also assume customary scope of the Internet-based activities consistent with an issuer's general ordinary course practice (that is, in the same manner as non-offering related material) and without any unusual facts or circumstances.

For example, the initial launch of a publicly available website, initial publication of information in English, unduly prominent display of offering-related information within a website, unduly promotional rather than informational content, unusual links to offering-related content or creating dedicated webpages or microsites (for example, titled "rights offering" or "share placing") may raise specific issues not considered here. IPOs would generally need to be considered in a different light from a routine follow-on offering.

Investment banks and frequent issuers may have internal procedures that are more restrictive than the examples provided here. Those procedures might take into account reputational concerns and factors specific to the investment bank or issuer. Market participants should *always* check if internal procedures would apply a different result.

LinkedIn did not exist in 1998. Sometimes officers of foreign private issuers or bankers will post on LinkedIn about an IPO or other securities offering with which they were involved. The CEO might post a photograph ringing the bell at the local stock exchange on the first day of trading.

A post on LinkedIn would *not* constitute general solicitation, general advertising, or directed selling efforts in connection with an *unregistered offering* if it is posted after the transaction has priced and the book has closed, so long as the text of the post indicates finality.

- The post may *not* suggest that investors buy securities.
- The post may *not* comment on how the securities are trading.
- The post may *not* be forward-looking in any way.

Examples of posts that are acceptable include the following:

- "Thrilled to have helped the Widget Company on its offering."
- "It was a long journey, but the Widget Company finally had its first day of trading today."
- "Delighted to have helped the Widget Company reach this milestone."

We have intentionally only covered LinkedIn and *not* other social media.

Note

1. As with the 1998 Guidance, we are focused only on Internet-based activities which, were they deemed to occur "in the United States," would constitute an "offer" within the meaning of Section 5(c) of the Securities Act, a "public offering" within the meaning of Section 4(a)(2) of the Act, "general solicitation or general advertising" within the meaning of Rule 502(c) of Regulation D or "directed selling efforts" within the meaning of Regulation S.

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STATE LAW

Delaware's Rocky Year: What Lies Ahead?

By Mark E. McDonald, Roger A. Cooper, and Peter Carzis

For the first time in as long as anyone can remember, people began to seriously question whether Delaware would retain its dominance as the go-to jurisdiction for incorporating companies. There was an uproar following several decisions by the Delaware Court of Chancery that seemed to shake the market's confidence in Delaware law's venerable predictability.

One such decision invalidated shareholder agreement provisions that had long been commonplace and another found that a board had not validly approved a merger agreement because, as is typical, the board had not received a draft in final form. At the same time, a certain well-known CEO's $50 billion compensation package was struck down, leading him to publicly declare "Never incorporate your company in the state of Delaware."[1]

In the face of this public pressure, the Delaware legislature moved at unprecedented speed to amend the Delaware General Corporation Law (DGCL) in order to "overrule" several of the decisions that caused the most immediate concern (to the consternation of many, including the judges who had decided the cases that were overruled). But a sense of unease persists, especially regarding the Delaware courts' recent perceived hostility towards controlling stockholders.

For this reason, several controlled companies already have elected to leave Delaware for other jurisdictions such as Nevada or Texas. In one such case, the Delaware Court of Chancery found the decision to leave should be reviewed under the entire fairness test, although the Delaware Supreme Court quickly accepted an interlocutory appeal (which remains pending) to reconsider that issue.

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Still, notwithstanding the turbulence in Delaware, there has been no mass "DExit."[2] In large part, that is because it remains unclear whether other jurisdictions would "solve" the perceived problems Delaware is facing. Nevada and Texas, among others, have publicly sought to lure companies away from Delaware, including by setting up dedicated business courts intended to operate like the Delaware Court of Chancery and pointing to differences in their corporate statutes.

But it remains to be seen how these courts will operate in practice, and numerous questions abound as to how these states' corporate laws will be applied in the seemingly countless circumstances that have been addressed by Delaware's statutory and decisional law over many decades. Meanwhile, notwithstanding the grumbling, Delaware courts remain unparalleled in their sophistication on corporate issues and in their ability to decide complex cases expeditiously.

Below we summarize some of the key developments in Delaware law over the past year and give a preview of what we think is coming in 2025.

Moelis, Activision, Crispo, and the 2024 DCGL Amendments

Much of the controversy and uncertainty that characterized Delaware's acrimonious 2024 stemmed from three decisions in particular that many believed upset the status quo on key points of corporate law, and which, in turn, were legislatively overruled by Delaware lawmakers. The decision that garnered the most attention was *West Palm Beach Firefighters'*

Pension Fund v. Moelis & Co,[3] in which the Court of Chancery held that stockholder agreement provisions imposing a pre-approval requirement on certain board actions, which are common, were facially invalid under the DGCL.[4]

Following the decision's announcement, many observers noted an apparent misalignment between this outcome and conventional assumptions about the validity of such provisions—even the court tacitly conceded as much, chiding: "[w]hen market practice meets a statute, the statute prevails."[5] In response, the summer 2024 amendments to the DGCL added a new provision aimed at restoring the validity of that "market practice" by expressly permitting provisions that restrict or prohibit the corporation from taking specific actions.[6]

The legislative amendments also addressed the Court of Chancery's February 2024 decision in *Sjunde AP-fonden v. Activision Blizzard, Inc.*[7] In *Activision*, the court held that the Defendant's board had approved an insufficiently complete merger agreement, again as is common practice.[8] Here too the court eschewed alignment with market practice—warning that "[w]here market practice exceeds the generous bounds of private ordering afforded by the DGCL, then market practice needs to check itself."[9] Again, Delaware lawmakers responded with a return to what many believed had been the status quo: the DGCL was amended so as to pare back the specific requirements for "essentially complete" merger agreements for purposes of board approval.[10]

Finally, the DGCL amendments likewise overruled the Court of Chancery's decision in *Crispo v. Musk*,[11] in which the court had held that a merger agreement's lost-premium provision (giving the target company the right to seek lost premium damages against the buyer on behalf of its stockholders) was not enforceable either by the target company's stockholders or by the company itself.[12] In response to the perceived problems created by this decision (including that buyers may be able to walk away from a deal without having to pay the full costs of doing so), Delaware lawmakers amended the DGCL to permit parties to a merger agreement to allow the target company to sue the buyer for damages equal to "the loss of any premium or other economic entitlement" that the target stockholders would have received if the deal were consummated.[13]

Judicial Scrutiny of "Conflicted Controller" Transactions

2024 saw also a year in which the Delaware Courts directed increased skepticism toward controlling stockholders whose interests they perceived as in conflict with those of the corporation, including by increasing the scrutiny with which the fairness of conflicted-controller transactions is assessed. In *In re Match.com Derivative Litigation*,[14] for example, the Delaware Supreme Court expressly declined to review conflicted controller transactions outside of the "squeeze out" context under the Business Judgment Rule if they were approved by an independent committee of directors.

Instead, the Supreme Court held that the only way for defendants to shift the standard of review for such transactions from Entire Fairness to the Business Judgment Rule, as in the squeeze out context, is to comply with the full "MFW" framework (that is, the controlling stockholder commits "ab initio" to subject the transaction to the approval of both (a) an independent committee and (b) a majority of the minority stockholders).[15]

The Court of Chancery also arguably expanded what constitutes a "conflict" (or "non-ratable benefit" received by the controlling stockholder) in *Palkon v. Maffei*.[16] This decision concerned TripAdvisor's decision to leave Delaware and reincorporate in Nevada, an action motivated in part (as acknowledged in the proxy statement) by the controlling stockholder's and directors' desire for the greater legal protection afforded fiduciaries in Nevada.[17]

The *Palkon* Court held that the decision to relocate in this case was subject to the Entire Fairness standard since the transaction conferred a non-ratable benefit upon the Company's controller and other corporate fiduciaries, even though there was no threatened litigation at the time.[18] The Delaware

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Supreme Court, however, accepted an interlocutory appeal from this decision; that appeal remains pending.

The Court of Chancery's decision in *In re Sears Hometown and Outlet Stores, Inc. Stockholder Litigation* further expanded the responsibilities and challenges controllers face by holding that they may owe fiduciary duties to other stockholders even when they act purely as stockholders.[19] This dispute emerged when the corporation's majority shareholder disagreed with certain board members over a proposed liquidation plan that the controller believed would destroy value; ultimately, the controller prevented the plan from coming to fruition by taking action as a stockholder to remove two directors, and amend the bylaws to require that certain board actions be approved by at least 90 percent of the directors in two separate votes taken at least thirty business days apart.[20]

Minority stockholders then claimed that the controller had breached his fiduciary duties as a controlling stockholder by taking such action. Even though it has been traditionally understood that stockholders, even controlling stockholders, owe no fiduciary duties when exercising their stockholder-level powers (such as the right to vote their shares), the court held that "when exercising voting power affirmatively to change the status quo, a controlling stockholder owes a fiduciary duty of loyalty which requires that the controller not intentionally harm the corporation or its minority stockholders, plus a fiduciary duty of care."[21] The court thus reviewed the controller's removal of directors and changes to the bylaws under enhanced scrutiny. The court ultimately held that the controller's actions were not done in breach of his fiduciary duties because the controller demonstrated that he acted properly and in good faith to prevent the destruction of value that he believed the liquidation would cause.[22]

Finally, this expansion of a controlling stockholder's duties was coupled with a parallel expansion of what it means to *be* a controlling stockholder in the first place. In *Tornetta v. Musk*, a dispute over the Tesla's CEO's compensation, the Court of Chancery emphasized that a "mathematical majority of the corporation's voting power" represents only one of a number of "indicia of control."[23]

Arriving at a multifactorial analysis that "call[s] for a holistic evaluation of sources of influence," the court weighed pure voting power alongside additional criteria including "the right to designate directors," "decisional rules in governing documents that enhance the power of a minority stockholder or board-level position," and "the ability to exercise outsized influence in the board room, such as through high-status roles like CEO, Chairman, or founder."[24] As a result, the Chancery Court held that Musk was a controlling stockholder of Tesla despite holding only 21.9 percent of voting power, suggesting that a more capacious conception of the conflicted controller transaction may be ascendant in Delaware courts.[25]

Plaintiff Lawyer-Driven Attacks on Common Bylaw Provisions

Finally, 2024 also saw Delaware courts invalidate a number of provisions common among advance notice bylaws in *Kellner v. AIM Immunotech Inc.*, leading to attempts by plaintiffs' firms to challenge these and other bylaw or charter provisions in hopes of collecting fees.[26] The *Kellner* case stemmed from a longstanding proxy contest between AIM's board and certain activist stockholders; amidst this proxy contest, AIM amended its bylaws to add "advance notice" provisions that are common among public companies and designed to ensure stockholders are fully informed about any insurgent-backed slate.[27] Relying on these amendments, the board then rejected the alternate slate's nomination on the basis that the notice submitted in connection with their candidacy was deficient, and the stockholders challenged the amended provisions' validity.[28]

The Court of Chancery declared a number of these provisions invalid, finding that they stood to "inequitably imperil the stockholder franchise to no legitimate end."[29] These included provisions

requiring that the nominating stockholder disclose all arrangements, agreements or understandings (AAUs), which was expansively defined, among others.[30] Ultimately, however, the court found the board's rejection of the nomination to be valid due to the Plaintiffs' breach of certain other provisions that the court found to be enforceable.

On appeal, Delaware Supreme Court clarified that when bylaw provisions are facially challenged (that is, in the absence of a live proxy contest or similar dispute), the bylaws should be upheld if there is any circumstance in which they could be enforceable.[31] However, given the live proxy contest in this case, the Supreme Court applied enhanced scrutiny to the provisions at issue and agreed with the Court of Chancery that they were unenforceable, albeit only on an as-applied basis.[32]

While the Supreme Court's *Kellner* decision gives companies a powerful defense when stockholders assert facial challenges to their bylaw provisions, it has not stopped plaintiffs' firms from making such challenges, often in the form of "demand letters," and sometimes escalating into lawsuits.[33] Regardless of the focus of plaintiffs' firms, the *Kellner* decision provides important guidance for boards as they plan on a "clear day" for a potential proxy contest in the future.

Key Takeaways

- We expect the debate over the direction of Delaware corporate law to continue. Notwithstanding the enactment of the DGCL amendments in summer 2024, the controversy surrounding them and other issues has continued to spark lively discussions that go to the core of Delaware corporate law. Should Delaware provide corporate entities and their constituents–stockholders, boards, management, etc.–greater contractual freedom to order their affairs and enter into transactions as they see fit?

  Or should Delaware courts be more ready to intervene to ensure compliance with statutory and fiduciary duties and the fairness of transactions to minority or disinterested stockholders? While Delaware has historically sought to balance these priorities, they are undeniably in tension with each other. How to balance them will continue to be subject to the push-and-pull dynamic of evolving caselaw and a vigorous debate.
- At the same time, boards should pay attention to developments in Nevada, Texas and other states that seek to challenge the dominance of Delaware in the corporate law realm. As noted above, there are many unanswered questions as to how those states will deal with the corporate law issues that will inevitably arise. Over time, as more companies are incorporated in those states, some of those questions may be answered.
- Meanwhile, in Delaware, we expect in the near-term that transactions involving a controlling stockholder (or stockholder with arguably controlling influence) whose interests are in conflict (or arguably do not align) with the remaining stockholders will continue to attract the attention of the plaintiffs' bar.

  While the Delaware Supreme Court declined to provide a practical method of cleansing such transactions in the *Match.com* case, it remains to be seen whether the Delaware courts will nonetheless pare back such cases, for example by narrowing the type of "non-ratable benefits" that trigger entire fairness or tightening the standard for finding a stockholder to have control.
- We also expect continued focus by the plaintiffs' bar on commonplace bylaw provisions that are perceived to be in tension with the DGCL or otherwise subject to challenge. While the Delaware Supreme Court cut back on the circumstances in which stockholders can successfully challenge such provisions in the absence of a live dispute, boards may want to consider whether any amendments are desirable in advance of a potential dispute.

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Notes

1. *See* the post from Elon Musk on X (January 30, 2024).
2. *See* Stephen Bainbridge "DExit Drivers: Is Delaware's Dominance Threatened?" (September 6, 2024).
3. West Palm Beach Firefighters' Pension Fund v. Moelis & Co, 311 A.3d 809 (Del. Ch. 2024).
4. *Id.* at 870.
5. *Id.* at 881.
6. DGCL § 122(18).
7. Sjunde AP-fonden v. Activision Blizzard, Inc., No. 2022-1001-KSJM, 2024 WL 863290 (Del. Ch. February 29, 2024), *as corrected* (March 19, 2024).
8. *Id.* at *8-10.
9. *Id.* at *6.
10. DGCL § 268.
11. Crispo v. Musk, 304 A.3d 567 (Del. Ch. 2023).
12. *Id.* at 584-585.
13. DGCL § 261(a)(1).
14. In re Match.com Derivative Litigation, 315 A.3d 446 (Del. 2024).
15. *Id.* at 462-463.
16. Palkon v. Maffei, 311 A.3d 255 (Del. Ch. 2024), *cert. denied*, No. 2023-0449-JTL, 2024 WL 1211688 (Del. Ch. March 21, 2024).
17. *Id.* at 263-264.
18. *Palkon*, 311 A.3d, 283-284 (Del. Ch. 2024).
19. In re Sears Hometown and Outlet Stores, Inc. Stockholder Litigation, 309 A.3d 474 (Del. Ch.), *modified on reargument* (Del. Ch. 2024).
20. *Id.* at 492-504.
21. *Id.* at 516.
22. *Id.* at 518, 537-539.
23. *Id.* at 500.
24. *Id.* (*quoting* Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC, No. CV 11802-VCL, 2018 WL 3326693 at *27 (Del. Ch. July 6, 2018), *aff'd sub nom.* Davenport v. Basho Techs. Holdco B, LLC, 221 A.3d 100 (Del. 2019)).
25. *Id.* at 500-502.
26. Kellner v. AIM Immunotech Inc., 320 A.3d 239 (Del. 2024).
27. *Id.* at 246-251.
28. *Id.* at 251-252.
29. Kellner v. AIM ImmunoTech Inc., 307 A.3d 998, 1006 (Del. Ch. 2023), *judgment entered*, (Del. Ch. 2024), *and aff'd in part, rev'd in part*, 320 A.3d 239 (Del. 2024).
30. *Id.* at 1027-1035.
31. *Id.* at 258-263.
32. *Id.* at 263-266.
33. *See* Leslie Pappas, "Resignation Letter Bylaws Targeted In Five Del. Class Actions" (May 23, 2024).

SHAREHOLDER ACTIVISM

Friendly Activism?

By Michael R. Levin

Amid all of the greetings for the new year, we corresponded with an investor for the first time in many months:

> Us: Working on any activist things lately?
> Investor: I am not doing hostile deals anymore, only friendly ones, I learned the hard way that companies have too much of a home court advantage in Delaware.
> Us: So, no more activist investing?
> Investor: I still do activist investing, just on a friendly basis. Will only invest in boards that are willing to work with me.
> Us: Then it's just really "investing," right? Pretty much the same as a PE fund that conditions an investment on Board seats and business changes?
> Investor: I think it's still a form of active investing just on friendly terms.

A few thoughts occurred to us as we considered this.

What Do We Mean by "Friendly" Activism?

Our correspondent defines it as investing solely in companies with a board that will "work with" them. "Work with" connotes conveying a plan to the board and the board understanding, agreeing with, and adopting all or most of that plan.

Michael R. Levin *is founder and editor of* The Activist Investor.

This seems "active" in the sense that an investor actively designs a plan for a company and requires the board to adopt all or most of it. This contrasts active with passive. The latter requires merely picking stocks and allocating capital, without regard to what changes in the company that investor would like to see.

A passive investor could think about those changes, or go as far as writing a thesis and plan for the company. It might even share the plan with the company. For our purposes, *active* investing ends there, since the investor won't seek to force the company to adopt the plan. That's where *activist* investing begins.

Suppose the board does not agree to adopt it, or enough of it. The investor will then ... what, not invest in the company? Or, suppose the board begins to adopt it, but stops short of adopting the full plan, or doesn't adopt it fast enough. Does the investor sell their position? Or at least maintain it, now in a company that refuses to adopt the plan on which the investment thesis depends?

Is This Constructivist Investing?

Our exchange reminds us of the idea from a few years ago of some activists calling themselves "constructivist." It's not that, either. As we wrote then, "...all activist investing is by definition constructive." Friendly activism could be constructive, in the sense that it seeks to build rather than destroy value. But, it's not activism.

What Does Friendly Look Like?

Activism can be friendly, civil, and cordial. We need not yell or swear at each other, although that happens. Activists can even become friends with

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company leadership, but it would likely occur only after an activist situation works out.

We activists can begin with a friendly, understanding attitude toward leadership. We can disagree without being disagreeable. When disagreement delays urgently needed changes to the business, we escalate.

Activists have the willingness and resolve to confront a portfolio company. We can start quietly, encouraging company leadership to adopt a new course. Too often that leadership resists us, so we next try to force leadership to that course, one that it would not want to and will not do on their own.

Activists have only a few ways to escalate, too. We can threaten directors with losing their board position, and litigate if we have the time, money, energy, and a case. We can try public shame. A board that will protect a failing executive team probably doesn't care too much about what shareholders think, though.

Friendly Can Work

A friendly approach has its benefits. It costs less than activism and causes less stress. It likely returns less than activism. Most of all, it's not activism. Thinking about it this way reminds us what activism requires.

Also, Delaware? Companies have an advantage there? While we tend to think that, lately Elon Musk, Mark Zuckerberg, and a few others disagree.

EQUITY COMPENSATION

Don't Forget Accounting Rules When Accelerating Vesting of Stock-Based Awards

By Randy Wang and Josh Hess

In January, the Securities and Exchange Commission (SEC) settled charges against Celsius Holdings, Inc. for allegedly improper accounting when it modified equity compensation awards for six departing employees and retiring directors. The errors allegedly caused inaccurate financial statements due to the understatement of G&A expenses.

Without admitting or denying the SEC's findings, the company agreed to cease and desist from violating SEC rules and pay a $3.0 million civil penalty.

In addition, before the settlement, the company's CEO reimbursed the company for $1.5 million in profits from stock sales after the issuance of the erroneous financial statements. In addition, the CEO returned 18,000 RSUs or shares that were granted shortly before announcement of the erroneous financial statements. Although not mentioned by the SEC, Section 304 of the Sarbanes-Oxley Act provides that CEOs and CFOs shall reimburse companies for certain compensation or stock-sale profits where earnings are restated as a result of misconduct.

Takeaways

The case highlights the importance of coordinating review by Human Resources, accounting, and legal functions whenever companies take actions relating to equity compensation awards, such as accelerating vesting or otherwise modifying such awards.

Randy Wang and Josh Hess are attorneys of Bryan Cave Leighton Paisner LLP.

The company's remedial steps cited by the SEC (described at the end of this article) underscore the importance of maintaining:

- Disclosure and internal controls addressing modifications to stock-based compensation awards.
- Legal review of reporting and disclosure issues.
- An appropriate internal audit function.
- An effective disclosure committee.

Deeper Dive

The key facts are taken from the SEC Order. In the past, employees or directors of Celsius forfeited any stock awards when they left. However, in mid-2021, the company accelerated the vesting of awards, or allowed continued vesting, for six departing employees and retiring directors.

ASC 718 requires companies to re-value stock awards as of the date of any modification and record any additional value of the modified award over the fair value of the original award as incremental compensation costs over the remaining service period.

Re-valuing the awards would have increased their value and corresponding stock-based compensation expense. Here, the company failed to recognize such incremental expense and therefore materially understated G&A expenses in earnings releases furnished on Form 8-Ks and Form 10-Qs for Q2 and Q3 of 2021.

On March 1, 2022, Celsius filed a Form 8-K disclosing that its stock-based compensation expenses in Q2 and Q3 of 2021 had been materially understated. As a result, Celsius overstated net income by approximately 400 percent for Q2 2021, and understated net loss by approximately 130 percent for Q3 2021.

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On March 16, 2022, the company filed restated financial information in its 2021 Form 10-K. The corrections caused previously reported net income to become a net loss for the three- and nine-month periods ended September 30, 2021.

Return of Equity Awards; Reimbursement of Stock Sale Profits

After Celsius filed quarterly reports for Q2 and Q3 of 2021 with misstated financial statements, the company's CEO sold 20,000 Celsius shares on December 27, 2021, for a profit of $1,493,200. The CEO subsequently reimbursed that amount to Celsius.

On January 1, 2022, the company granted the CEO 18,000 restricted stock units. Of the 18,000 total RSUs, 12,000 had vested by January 2024. The CEO returned the 12,000 shares to Celsius. Celsius also cancelled the remaining 6,000 RSUs granted to the CEO before they would have vested in 2025.

Although not mentioned in the SEC Order, Section 304 of Sarbanes-Oxley provides that the CEO and CFO shall reimburse a company for any bonus or other incentive- or equity-based compensation, and any profits from stock sales, during the twelve months following the release of financial statements that require restatement as a result of misconduct.

Alleged Violations; Terms of Settlement

The SEC alleged violations of the Securities Exchange Act of 1934, including:

- Section 13(a) as a result of issuing materially inaccurate and misleading financial statements in Form 10-Qs and earnings releases furnished on Form 8-K relating to Q2 and Q3 of 2021.
- Section 13(b)(2)(A) as a result of understating expenses in the company's books and records associated with modified vesting terms in 2021 for stock awards for former employees and directors.
- Section 13(b)(2)(B) as a result of failing to maintain internal accounting controls that provided reasonable assurance that its stock-based compensation expense was recorded in accordance with GAAP.
- Rule 13a-15(a) as a result of not maintaining disclosure controls and procedures to ensure non-financial information was disclosed, as required.

In reaching the settlement, the SEC considered remedial actions taken by the company after it learned of the investigation, including:

- Retaining external legal counsel to advise on reporting and disclosure issues.
- Developing enhanced controls to address the evaluation and application of modifications to stock-based compensation awards.
- Creating an internal audit function.
- Establishing a disclosure committee.
- Hiring a new CFO.
- Hiring a Chief Legal Officer.
- Hiring a communications executive to review the company's filings.

An Early Look at New Proxy Disclosures Regarding Stock Option Grant Timing

By David M. Kaplan, Sheri P. Adler, James E. Earle, and Emily K. Davidson

The primary development in executive compensation disclosure for the 2025 proxy season is new Item 402(x) under Regulation S-K, relating to the disclosure of stock option grant timing policies and practices. Companies with fiscal years ending December 31 are now drafting these disclosures for the first time and are eager to see how other companies have complied with the new rule. This article reviews the rule itself, makes a few observations about the early filings, and attaches examples of early Item 402(x)(1) disclosures made by well-known issuers.

A Quick Review of The Rule

To review, Item 402(x) includes both narrative and tabular components.

Narrative Disclosure

First, Item 402(x)(1) requires issuers to provide a narrative disclosure describing their policies and practices regarding the timing of awards of options in relation to their release of material non-public information (MNPI), including:

a. How the board or compensation committee determines when to grant such awards (for example, whether the awards are granted on a predetermined schedule);
b. Whether (and if so, how) MNPI is taken into account when determining the timing and terms of an award; and
c. Whether the company has timed the disclosure of MNPI for the purpose of affecting the value of executive compensation.

For this purpose, the term "option" includes stock options, stock appreciation rights (SARs), and other instruments with option-like features.

Tabular Disclosure

Second, Item 402(x)(2) requires an issuer to make the tabular disclosure (shown in Exhibit 1) if, during the preceding fiscal year, it has granted an option to a named executive officer (NEO) within four business days before or one business day after the filing of a Form 10-Q, Form 10-K, or a Form 8-K that discloses MNPI (an MNPI window).

For this purpose, an option is deemed granted on its effective date, even if it approved on an earlier date. If no options were granted within an MNPI window, then the table may be omitted.

Item 402(x) disclosures were first required to be included in Form 10-Ks filed for fiscal years ending on or after March 31, 2024 (or for smaller reporting companies, September 30, 2024). However, as permitted by Securities and Exchange Commission (SEC) rules, most companies incorporate Item 402 disclosures by reference to proxy statements filed shortly after their Form 10-K. Therefore, early Item 402(x) disclosures started trickling out last summer.

Early Filings, and a Few Observations

Below for your reference are early Item 402(x)(1) narrative disclosures from several well-known issuers, which illustrate a range of approaches. We have the following observations and practice pointers based on the rules and early disclosures:

1. *Who Is Covered?* Unlike the Item 402(x)(2) tabular disclosure, the scope of Item 402(x)(1)

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Exhibit 1

Name*	Grant date	Number of securities underlying the award	Exercise price of the award ($/Sh)	Grant date fair value of the award	Percentage change in the closing market price of the securities underlying the award between the trading day ending immediately prior to the disclosure of material nonpublic information and the trading day beginning immediately following the disclosure of material nonpublic information
(a)	(b)	(c)	(d)	(e)	(f)
PEO					
PFO					
A					
B					
C					
* This list should be adjusted for each reporting company to reflect the company's roster of NEOs for a particular year (including a shorter list for smaller reporting companies and emerging growth companies).					

covers all option grantees, not just NEOs. Most early disclosures appear to be correctly addressing this point.

2. *What Period Is Covered?* Item 402(x)(1) requires that the disclosure address whether the issuer has timed the disclosure of MNPI for the purpose of affecting the value of executive compensation. However, the rule does not indicate the time period covered by this disclosure.

   On this point, some early disclosures have been limited to the most recently completed fiscal year (see for example, Visa), which we believe is a reasonable approach. Other issuers avoid the question by using artful language and, rather than stating that the issuer has never timed the disclosure of MNPI for the purpose of affecting the value of executive compensation, state that it is not the issuer's practice to do so (see for example, Estee Lauder).
3. *Silence Is Not an Option, Even if You Don't Grant Options.* Even issuers that do not grant options should not omit the 402(x)(1) disclosure altogether. Such an issuer must still indicate whether it has a policy or practice regarding option grant timing. If true, it would be appropriate to disclose that the issuer has no such policy or practice, because it does not grant (or has not in recent years granted) options.
4. *What Grants Are Covered?* Item 402(x) only covers stock options (and similar instruments, such as SARs) and some issuers have limited their disclosures accordingly (see for example, Estee Lauder). However, many issuers (see for example, Apple, Deere, Intuit, Visa) use the disclosure to explain their grant policies or practices with respect to all equity award types.

   We expect the latter approach to become very common, because for the many issuers granting exclusively restricted stock units and performance-based restricted stock units, saying that you have no policy or practice regarding the timing of option grants (see #3 above) begs the question of what your policy or practice is for other award types.
5. *Where Does the Disclosure Appear?* Some early filers have placed their Item 402(x)(1) narrative disclosures outside the Compensation Discussion and Analysis (CD&A). Others have included the 402(x)(1) disclosure within their CD&As (see for example, Apple, Visa). While either approach is acceptable, we prefer the CD&A placement given long-standing

SEC rules that include equity award timing among the illustrative list of items that could warrant discussion in the CD&A (see Item 402(b)(2)(iv)).

6. *Will Most Option Issuers Disclose That They Have Policies or Practices Governing the Timing of Option Grants?* Although Visa is the only issuer in the examples below that discloses a formal policy regarding equity award timing, all the issuers indicate that they have consistent practices governing option or equity award timing, and all work hard to describe their practices as consistent with good governance standards. In this regard, Item 402(x) is having its intended effect.

   The SEC was not in a position to prohibit option grants during MNPI windows. Indeed, such grants are generally lawful (although do have accounting consequences and raise fiduciary considerations). Nonetheless, the SEC was troubled by the practice and promulgated Item 402(x) to name and shame issuers into avoiding it. Early indications suggest that most issuers are quickly falling into line.

7. *Will Item 402(x)(2) Tabular Disclosures be Common?* As a corollary to #6 above, issuers have become increasingly conscious about scheduling their compensation committee meetings (or the effective dates of their option grants) to avoid making option grants during an MNPI window. While such grants will still occur on occasion, the Item 402(x)(2) tabular disclosure obligation is enough to discourage them in most cases.

8. *Caution Is Required.* If, like most other issuers, you intend to write your Item 402(x)(1) narrative disclosure to describe your equity grant practices as following good governance standards, don't oversell it. Issuers can often say (for example) that their compensation committee meetings are scheduled far in advance and generally occur after earnings are announced, and that they do not time the disclosure of MNPI for the purpose of affecting the value of executive compensation. But despite standard practices that reduce the likelihood that grants will be made when MNPI exists, such grants may nonetheless occur for a variety of reasons.

   For example, an issuer may consider it necessary or appropriate to grant equity to a newly hired senior executive immediately upon his or her start date. In such cases, issuers need to be able to show that the grants did not violate the practices they articulated. Moreover, to demonstrate responsible exercise of fiduciary duties in such cases, issuers may need to say that their compensation committees DID take the anticipated effects of the MNPI into account when sizing the grants.

Early Filers

Apple 2025 Proxy Statement, Page 54

Equity awards are discretionary and generally are granted to our named executive officers on the first day of the applicable fiscal year. In certain circumstances, including the hiring or promotion of an officer, the People and Compensation Committee may approve grants to be effective at other times. Apple does not currently grant stock options to its employees. Eligible employees, including our named executive officers, may voluntarily enroll in the employee stock purchase plan (ESPP) and receive an option to purchase shares at a discount using payroll deductions accumulated during the prior six-month period. Purchase dates under the ESPP are generally the last trading day in July and January. The People and Compensation Committee did not take material nonpublic information into account when determining the timing and terms of equity awards in 2024, and Apple does not time the disclosure of material nonpublic information for the purpose of affecting the value of executive compensation.

Deere & Co. 2025 Proxy Statement, Page 85

We provide the following discussion of the timing of option awards in relation to the disclosure of material nonpublic information, as required by

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Item 402(x) of Regulation S-K. The Company's long-standing practice has been to grant long-term incentive (LTI) equity awards on a predetermined schedule. At the first quarterly meeting of any new fiscal year, the Committee or, with respect to the CEO's equity award, the Board, reviews and approves the value and amount of the equity compensation to be awarded (inclusive of restricted stock units (RSUs), performance stock units (PSUs), and stock options) to executive officers. The grant of approved equity awards then occurs a week after the Board's first quarterly meeting. The first quarterly meeting of the Board typically occurs after the Company's release of the financial results for the prior fiscal year through the filing of a Current Report on Form 8-K and accompanying earnings release and earnings call, but before the filing of the Company's Annual Report on Form 10-K for that fiscal year.

The Committee does not take material nonpublic information into account when determining the timing and terms of LTI equity awards. Instead, the timing of grants is in accordance with the yearly compensation cycle, with awards granted at the start of the new fiscal year to incentivize the executives to deliver on the Company's strategic objectives for the new fiscal year.

The Company has not timed the disclosure of material nonpublic information to affect the value of executive compensation. Any coordination between a grant and the release of information that could be expected to affect such grant's value is precluded by the predetermined schedule. Over the last three years, the average percentage change in the value of the Company's common stock from the last trading day before the filing of the Company's Annual Report on Form 10-K to the trading day immediately following such filing is 0.91 percent, demonstrating that the release of the Company's Annual Report on Form 10-K, and any material nonpublic information contained therein, does not meaningfully influence the Company's stock price, and by extension, the value of stock options or other LTI equity awards at the time of grant.

Estee Lauder 2024 Proxy Statement, Page 71

Our Company has certain practices relating to the timing of grants of stock options. For option grants to our employees, including executive officers, grants of options are currently made by and at meetings of the Subcommittee on a predetermined schedule under our Share Incentive Plan. The Subcommittee does not currently take material non-public information into account when determining the timing and terms of stock option awards, except that if the Company determines that it is in possession of material non-public information on an anticipated grant date, the Subcommittee expects to defer the grant until a date on which the Company is not in possession of material non-public information. For option grants to our non-employee directors, as specified in the Director Share Plan such grants are automatically made on the date of each Annual Meeting to each non-employee director in office immediately following such meeting. It is the Company's practice not to time the disclosure of material non-public information for the purpose of affecting the value of executive compensation.

Intuit 2025 Proxy Statement, Page 60

Equity grants made to the CEO, Executive Vice Presidents, or other Section 16 officers must be approved by the Compensation Committee.

Timing of grants. During fiscal 2024, equity awards to employees generally were granted on regularly scheduled predetermined dates. As part of Intuit's annual performance and compensation review process, the Compensation Committee approves stock option, RSU and PSU awards to our NEOs within a few weeks before Intuit's July 31 fiscal year-end. The Compensation Committee does not grant equity awards in anticipation of the release of material nonpublic information and we do not time the release of material nonpublic information based on equity award grant dates.

Option exercise price. The exercise price of a newly granted option (that is, not an option assumed or substituted in connection with an acquisition) is

the closing price of Intuit's common stock on the Nasdaq stock market on the date of grant.

Visa 2025 Proxy Statement, Page 75

The Compensation Committee maintains a Policy on Granting Equity Awards (Equity Grant Policy), which contains procedures to prevent stock option backdating and other grant timing issues. Under the Equity Grant Policy, the Compensation Committee approves annual grants to executive officers and other members of the Executive Committee at a meeting to occur during the quarter following each fiscal year end. The Board has delegated the authority to Mr. McInerney as the sole member of the Stock Committee to make annual awards to employees who are not members of the Executive Committee and who are not subject to Section 16(a) of the Exchange Act (Section 16 officers). The grant date for annual awards to all employees has been established as November 19 of each year.

In addition to the annual grants, stock awards may be granted at other times during the year to new hires, employees receiving promotions, and in other special circumstances. The Equity Grant Policy provides that only the Compensation Committee may make such "off-cycle" grants to NEOs, other members of Visa's Executive Committee, and Section 16 officers. The Compensation Committee has delegated the authority to the Stock Committee to make off-cycle grants to other employees, subject to guidelines established by the Compensation Committee. Any off-cycle awards approved by the Stock Committee or the Compensation Committee are granted on the 15th day of the calendar month or on such other date determined by the Stock Committee, Compensation Committee, or the Board.

We do not grant equity awards in anticipation of the release of material, nonpublic information or time the release of material, nonpublic information based on equity award grant dates, vesting events, or sale events. For all stock option awards, the exercise price is the closing price of our Class A common stock on the NYSE on the date of the grant. If the grant date falls on a non-trading day, the exercise price is the closing price of our Class A common stock on the NYSE on the last trading day preceding the date of grant.

No off-cycle stock option awards were granted to NEOs in fiscal year 2024. During fiscal year 2024, we did not grant equity awards to our NEOs during the four business days prior to or the one business day following the filing of our periodic reports or the filing or furnishing of a Form 8-K that discloses material nonpublic information. We have not timed the disclosure of material nonpublic information for the purpose of affecting the value of executive compensation for NEO grants in fiscal year 2024.

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