

2024 Proxy Season Quick Reference Guide

The 2024 proxy season is just around the corner. This quick reference guide, which is intended to supplement Shearman & Sterling's 21st Annual *Corporate Governance & Executive Compensation Survey*, summarizes themes from the 2023 proxy season and developing trends to consider for 2024. It also identifies possible future changes in disclosure rules that public companies should consider for the upcoming proxy season and includes a "housekeeping checklist" designed to be a quick reference guide for proxy statement preparation.

CYBERSECURITY DISCLOSURES

The 2024 Annual Reports on Form 10-K or 20-F will be the first time that calendar year companies (both domestic companies and foreign private issuers, except Multijurisdictional Disclosure System (MJDS) filers) will be required to describe their cybersecurity risk management and governance frameworks, following the adoption of the SEC's cybersecurity rule in July 2023. Beginning in 2024, annual reports will need to include:

- information about processes used to identify, assess and manage material risks from cybersecurity threats;
- whether any cybersecurity risks (including those as a result of any previous cybersecurity incidents) have materially affected or are reasonably likely to materially affect the company;
- a discussion of the role of the board in cybersecurity governance, including the role of any board committee, and processes by which the board stays informed of cybersecurity risks; and
- a discussion of the role of management in assessing and managing material cybersecurity risks, including relevant expertise and processes used in addressing such risks.

A company's cybersecurity-related policies or plans themselves do not need to be filed, but it will be important to ensure that the disclosure accurately reflects any policies and plans that are in place. It is also important to ensure that disclosures about cybersecurity oversight in the proxy statement are consistent with the disclosures included in the annual report. Consider including a cross reference to the annual report cybersecurity disclosures in the proxy statement.

Although the SEC chose not to mandate disclosure about the cybersecurity expertise of directors, it has been an increasing area of focus by proxy advisory firms and certain institutional investors. Glass Lewis, for example, indicated in its 2024 guidelines that it may recommend voting against directors if it is not satisfied with the board's oversight of, or the company's response or disclosures relating to, cybersecurity-related issues where a company has been materially impacted by a cyberattack. Companies that have experienced significant cybersecurity incidents should consider how they are addressing possible questions about board expertise. These questions can be addressed by adding directors with additional experience to the board or through enhanced internal or third-party expert engagement with the board. Companies should continue to solicit information about their directors' cybersecurity expertise in their D&O questionnaires.

Also, cybersecurity incident reporting on Form 8-K became effective on December 18, 2023, which means domestic companies (other than smaller reporting companies, which have until June 15, 2024 to comply) must report cybersecurity incidents they determine to be material on Form 8-K within four business days of making the materiality determination. Companies should ensure that their disclosure controls, including training for impacted internal teams, have been enhanced to monitor this area.

DEVELOPMENTS IN APPROACH TO DIVERSITY AND RELATED DISCLOSURES

In 2023, more than 96% of the 100 largest U.S. listed companies (Top 100 Companies) included disclosure about diversity in their annual reports. Virtually all of these companies included a description of their initiatives to increase diversity in their workforce, in their C-suite and on their board. Some companies are setting both near-term and aspirational goals for workplace, executive and board diversity, with many using more objective metrics. Goal setting in this area reflects company culture and the views of a variety of stakeholders, including employees, customers, shareholders and shareholder advisory organizations. For example, ISS, Glass Lewis and State Street all have board diversity policies recommending shareholders vote against board slates that do not include minimum diversity thresholds.

At the same time, the United States Supreme Court's landmark decision in [Students for Fair Admissions v. President and Fellows of Harvard College](#), delivered in June 2023, may impact hiring practices and diversity initiatives. In this decision, the Court held that Harvard and UNC had violated the Equal Protection Clause of the Fourteenth Amendment by using race as a factor in making admissions decisions.

Although the direct holding of the case is limited to school admissions, the decision is already having consequences for private sector employment practices. Several lawsuits have been filed seeking to apply *Students for Fair Admissions* to Title VII of the Civil Rights Act of 1964, which protects employees and job applicants against discrimination in employment.¹

As companies prepare their human capital disclosure and consider compensation goal setting and associated disclosure, it is critical to review diversity-related disclosure in light of developing law and stakeholder expectations. Be sure to reflect any program and policy changes and be clear about overarching business goals that are supported by the company's approach to diversity.

PAY VERSUS PERFORMANCE YEAR 2

As we head into the second proxy season following effectiveness of the pay versus performance rules, companies should reflect on trends that emerged following year one, as well as additional extensive SEC Staff [C&D](#) guidance that was issued in 2023, which addressed a number of questions but also raised new ones.

Trends of note from year one include:

- **Placement.** Among the Top 100 Companies, pay versus performance disclosure was generally placed near the back of the proxy statement following the CEO pay ratio disclosure.
- **Peer Groups.** A majority of Top 100 Companies used the peer group index from their annual report performance graphs, while roughly one quarter used the peer group from their CD&A.
- **Company Selected Measure (CSM).** Companies have discretion in selecting a CSM, and among the Top 100 Companies, the most popular CSM metric was "adjusted earnings per share."

More information about pay versus performance trends can be found in [Shearman & Sterling's 21st Annual Corporate Governance & Executive Compensation Survey](#).

New SEC guidance on pay versus performance covers a number of technical areas, including the impact of certain transactions, award valuation, use of peer groups and smaller reporting company and emerging growth company status on pay versus performance disclosure. The guidance on equity awards that include a retirement vesting feature garnered the most interest. The September 2023 guidance indicated that such equity awards should be reported as vested upon achievement of retirement eligibility unless there are other remaining substantive conditions to vesting (mentioning only a market condition as an example of a substantive condition, although not indicating there could be

no other type of substantive condition). Then, in November 2023, the guidance was amended to state that substantive conditions would include, without limitation, market conditions or conditions that result in vesting upon the earlier of the award holder's actual retirement or satisfaction of the requisite service period. This guidance raises questions about how to disclose equity awards that include a retirement vesting feature that has not been closely focused on since 2014, when the SEC Staff provided commentary in a Q&A with the Joint Committee on Employee Benefits on this topic. Companies with equity awards that include a retirement vesting feature should closely review the terms of their equity awards and their disclosure approach on vesting timing to assess whether any changes are needed in light of the new guidance. Consideration should be given to the consistency of positions across all tabular compensation disclosure in the proxy statement.

COMMENT LETTER HOT TOPICS

The volume of SEC comment letters was up 64% year-over-year for the 12 months ended November 1, 2023, with a focus on the following disclosure areas:

MD&A: The MD&A remains one of the top comment letter focus areas. In its comments, the SEC Staff has emphasized the need for:

- increased specificity in disclosure of results of operations;
- specific disclosure of known trends or uncertainties, such as inflation;

¹ See, for example, *Harker v. Meta Platforms, Inc.* (S.D.N.Y. 2023), *Diemert v. City of Seattle* (W.D. Wash. 2022), *Netzel v. American Express Company* (D. Ariz. 2022), and [the letter](#) a coalition of 13 state AGs sent to Fortune 100 companies alleging that their DEI initiatives violate Title VII following *Students for Fair Admissions* and threatening to pursue legal action.



Shearman & Sterling's 21st Annual Corporate Governance & Executive Compensation Survey

Please also see our 21st Annual *Corporate Governance & Executive Compensation Survey*, where we review the major themes and developments from 2023 and analyze the associated data to provide detailed insights for this year. A copy is available [here](#).

- proper contextualization of key performance indicators so that they are not misleading, including indicating why they are useful, how they are used and if there are any underlying estimates or assumptions;
- robust discussion of critical accounting estimates that does not duplicate the financial statements; and
- the avoidance of boilerplate disclosure of interest rate risks and liquidity, particularly in the current economic environment.

Preparing for the 2024 annual report is a good time for a critical review of MD&A disclosures and related disclosure controls to ensure that disclosures are complete, company-specific and truly provide a view of the business “through the eyes of management,” especially as companies continue to grapple with economic volatility and the prospect of recession. In this regard, ensuring that the MD&A captures all material information discussed on the earnings call, in the earnings release and on the website continues to be an important exercise.

Non-GAAP Measures: In December 2022, the SEC Staff issued seven new or revised [C&Ds](#) concerning non-GAAP measures and, in 2023, issued several comments aligned with the new guidance. The comments focused on:

- whether non-GAAP measures might be misleading because they exclude “normal” or “recurring” operating expenses;
- whether certain non-GAAP adjustments to revenue or expenses have made the adjustments “individually tailored” such that they are misleading; and

- overall compliance with non-GAAP disclosure requirements, including equal prominence, reconciliations, usefulness and purpose of particular measures.

Companies should review their non-GAAP measures against the new guidance and ensure a robust process is in place to review all non-GAAP disclosures, particularly new measures or adjustments, for compliance.

Segment Reporting: The SEC Staff sought clarification on how companies identify operating segments and aggregate them into reportable segments. To address these inquiries, the SEC Staff may review information provided by companies on websites or in earnings calls or request documents used by the chief operating decision maker to support management’s conclusions. Additionally, the SEC Staff recently advised companies to check with the Staff before using more than one non-GAAP measure of profit or loss for a reportable segment in its financial statements, even though doing so is permitted by ASC 280.

Companies that have recently undertaken, or plan to undertake, a resegmentation should consider proactively preparing for SEC Staff queries by documenting specific details of their analysis of the characteristics of an operating segment under ASC 280 and critically reviewing segment reporting measures.

Revenue Recognition: ASC 606 requires disclosure of more qualitative and quantitative information regarding customer contracts than was previously required. SEC Staff comments addressed robustness of disclosures regarding:

- the nature and timing of performance obligations;
- transaction prices (including methods, inputs and assumptions used to estimate such prices and allocation to performance obligations);

- how variable consideration is estimated and its impact on transaction price;
- the method of revenue recognition, including timing of control transfer, recognition over time and accounting for licensing arrangements;
- judgments related to presentation of gross versus net revenue; and
- judgments related to the level of disaggregation disclosed and consistency of disaggregation disclosures throughout the filing and with information provided in other communications, such as investor presentations.

Such comments highlight the continued need for a thoughtful approach to revenue recognition and proactive documentation of significant judgments and estimates.

Climate Change: Additionally, while final SEC rules on climate-related disclosure are still pending, companies should continue to consider the SEC’s [2021 sample comment letter](#) related to climate change disclosure. The letter urges inclusion of:

- tailored and substantiated disclosures of climate-related impact on the business and financial condition;
- quantitative disclosure of impact where appropriate (e.g., in cases of significant climate-related capital projects); and
- information from sustainability reports in Exchange Act filings if it is material to understanding the company’s business or risks and opportunities.

While it is challenging to predict the potential future direction of SEC comments, we expect the above topics to continue to be important in 2024.

SHAREHOLDER PROPOSALS

In 2023, [over 960](#) shareholder proposals were submitted, as compared to [about 940](#) proposals submitted in 2022. The most popular shareholder proposal topics in 2023 (representing close to half of all shareholder proposals) were:

- shareholder approval of severance agreements;
- decreasing the special meeting threshold;
- climate change, including requests to adopt emission reduction targets, disclose climate transition plans, climate-related lobbying and climate risks;
- adding an independent board chair; and
- nondiscrimination and diversity, including proposals for third party audits of company impact on civil rights and DEI, DEI effectiveness reporting and disclosure of gender or racial pay gaps.

Of all proposals submitted in 2023, 65% were voted on, up 5% from proposals voted on in 2022. The percentage of proposals withdrawn decreased to 16% in 2023, compared to 26% in 2022, although notably, the percentage of social and environmental proposals withdrawn increased by 5% compared to 2022, with the majority withdrawn by agreement with proponents.

Support for shareholder proposals in 2023 remained limited. Less than 5% of proposals voted on garnered majority support, consistent with 2022. Average support for shareholder proposals decreased to 24% in 2023, down 7% from 2022, driven in part by lower average support for proposals on social and environmental topics, which decreased by 9% relative to 2022 despite a similar number of total proposals.

Reflecting the continued impact of SEC Staff Legal Bulletin 14L, only 222 no-action requests were submitted to the SEC Staff in 2023, representing a 25% decrease in the number of submissions from 2022. The SEC Staff granted approximately 58% of no-action requests, up 20% from 2022, though still significantly below the 71% success rate in 2021.

Although the no-action letter path appears to continue to be challenging for companies, the relatively low support for shareholder proposals and the tangible possibility of withdrawal indicates that dialogue with proponents, particularly on sustainability topics, may be an effective means to exclude a shareholder proposal.

SPOTLIGHT: SHARE REPURCHASES

In May 2023, the SEC adopted robust new rules concerning share repurchases, requiring domestic and foreign private issuers (except MJDS filers) to, among other things, disclose daily share repurchase activity on a quarterly basis, as well as provide quarterly (annual for foreign private issuers) narrative disclosures about the objective of share repurchases, the process or criteria used to determine repurchase amounts and any policies and procedures relating to trading in company securities by directors and officers during a repurchase program.

The U.S. Chamber of Commerce and other business groups submitted a petition for review of the rules, alleging that the SEC failed to consider comments and provided an inadequate analysis of the cost and benefits of the rule. On October 31, 2023, the U.S. Court of Appeals for the Fifth Circuit found that the SEC had acted “arbitrarily and capriciously”² in adopting the rules, having failed to respond to the petitioners’ comments and conduct a proper cost-benefit analysis. The Court discussed specific quantitative analyses that could have been undertaken and gave the SEC 30 days to correct defects in the rules. On December 19, 2023, the Fifth Circuit vacated the rules.

What does this all mean? For purposes of the current annual reporting season, the rules are not applicable—no daily share repurchase disclosures and no narrative disclosures about share repurchase practices are required. We do not, however, think that the SEC is likely to give up on share repurchase disclosures, and we expect the SEC to either appeal this decision or come back with new rules.

² U.S. Securities and Exchange Commission, *In the Matter of Charter Communications*, File No. 3-21797 (Nov. 14, 2023) (available [here](#)).

Proxy Drafting and Annual Meeting Housekeeping Checklist

- ✓ **Corporate Governance and Executive Compensation Highlights.** Consider how to frame the proxy and CD&A summaries in a manner that presents the key portions of the governance and compensation story in a compelling and visually appealing manner. Highlights may include good governance practices, recent governance changes, board and executive diversity metrics, company performance highlights, workforce relations priorities and significant compensation actions.
- ✓ **Risk Management.** Consider whether the disclosures in the proxy statement related to the board's oversight of risk management reflect the key risks facing the company, including evaluations of compensation plans by the compensation committee and cyber and data security matters. Keep in mind that the SEC's [cybersecurity rules](#), first applicable to annual reports filed in 2024, require disclosure about the role of the board in cybersecurity risk oversight. See *Cybersecurity Disclosures* above.
- ✓ **New Disclosures.** As highlighted above, there is [new SEC guidance](#) on pay versus performance disclosure that companies should be mindful of heading into the second year of required pay versus performance disclosure in proxy statements. Companies must also file their clawback policy as an exhibit to their annual report and indicate (via checkboxes on the annual report cover page) whether the filing includes errors or corrections to previously issued financial statements and whether these errors or corrections led to analysis of the clawback of executive officer compensation.
- ✓ **Advance Notice Provisions.** The SEC issued additional [C&D](#) guidance in 2022 and 2023 concerning universal proxy disclosures, clarifying that an earlier deadline set by the advance notice provision of a company's bylaws supersedes the deadline in Rule 14a-19, and that if the company's bylaw provision does not require the information required in Rule 14a-19(b), then the company must state in its proxy statement the need to comply with the additional requirements. The guidance also clarifies that a soliciting party cannot use discretionary authority to vote shares represented by overvoted proxy cards or for remaining director seats up for election by undervoted proxy cards, although discretionary authority may be used to vote shares represented by a signed but unmarked proxy card in accordance with such party's voting recommendations. Companies should consider whether proxy statements require any additional disclosures in response to the new guidance, as well as become familiar with new guidance affecting voting, particularly if facing contested elections in 2024.
- ✓ **Preliminary Proxy Statement.** As a reminder, a preliminary proxy statement is required if the matters to be acted upon at the annual meeting include anything other than the election of directors, ratification of auditors, adoption of or amendments to employee benefit plans, say-on-pay and say-on-frequency votes or stockholder proposals. A preliminary proxy statement is thus required for amendments to the company's articles of incorporation. A preliminary proxy statement must be filed with the SEC at least ten calendar days before distribution to shareholders, which needs to be built into the timeline. The SEC clarified in [recent guidance](#) that if the preliminary proxy statement is filed before 5:30 pm ET, the day of filing counts as the first day of the ten-day period.
- ✓ **Equity Grant Timing.** The SEC has provided guidance on how to account for and disclose equity compensation awards granted shortly before certain material non-public information is released. [Amendments](#) to Rule 10b5-1 and Item 402(x) of Regulation S-K requiring tabular disclosure of option awards granted to NEOs within four business days before and after certain filings alongside changes in share price around the time of disclosure will take effect with respect to grants made in 2024 (with disclosure in the 2025 proxy statement). Companies should be mindful of this new disclosure requirement when making grants in 2024.

Links to Institutional Investors' Most Recently Published Proxy Voting Guidelines

- [Amundi](#)
- [BlackRock](#)
- [Capital Group](#)
- [Cohen & Steers](#)
- [Fidelity](#)
- [Goldman Sachs Asset Management](#)
- [J.P. Morgan Asset Management](#)
- [Janus Henderson Investors](#)
- [State Street](#)
- [T. Rowe Price](#)
- [Vanguard](#)
- [Wellington](#)

Proxy Drafting and Annual Meeting Housekeeping Checklist (cont.)

- ✓ **Director Skills Matrix.** Review the director skills matrix to ensure it continues to reflect the skills, qualifications and expertise that are relevant for the company, such as experience in cybersecurity, data privacy, technology, human capital, climate and sustainability. Keep in mind that certain institutional investors and proxy advisory firms are increasingly expecting to see a director skills matrix that presents the skills, qualifications and expertise of each director. Cybersecurity expertise, in particular, while not required to be disclosed by the SEC, has been an area of increasing focus—see *Cybersecurity Disclosures* above. Although the SEC’s proposed amendments to its rules related to [climate disclosures](#) will not be effective for the 2024 proxy season, they include disclosure requirements related to director experience in climate-related matters.
- ✓ **Director Diversity.** Director diversity and diversity disclosures continue to be an area of focus for proxy advisory firms and institutional investors. Consider how the company’s board composition and diversity disclosures and targets compare to the latest proxy advisory firm guidelines and investor policies—see *Developments in Approach to Diversity and Related Disclosures* above. Note that in its 2024 guidelines, Glass Lewis clarified that for companies that do not meet its board diversity expectations, it may nonetheless refrain from recommending votes against relevant directors if the company discloses a timeline reflecting when additional diverse directors will be appointed.
- ✓ **Say-on-Pay and Say-on-Frequency.** Determine whether the 2024 proxy statement should include either a “say-on-pay” and/or “say-on-frequency” shareholder vote.
- ✓ **Corporate Governance Guidelines.** Review corporate governance guidelines to assess whether they continue to align with information presented in the governance section of the proxy statement. For example, consider updating to reflect changes in approach to board diversity, risk management and board oversight over cybersecurity, climate, sustainability and human capital.
- ✓ **Board Committee Charters.** Review all board committee charters to ensure that they appropriately allocate responsibility among the board committees for cybersecurity and data privacy, climate and sustainability and human capital. Where it is intended that more than one committee cover aspects of a particular issue, make sure there is not conflict among the committee charters. Assess whether diversity considerations are appropriately reflected in attributes identified for director nominees in the nominating/governance committee charter.

SPOTLIGHT: ENFORCEMENT ACTIONS

Rule 10b5-1 Repurchase Plan Challenge

In November 2023, the SEC announced a \$25 million settled enforcement action against Charter Communications. According to the SEC order,³ Charter adopted nine repurchase plans from 2017 to 2021 for operation during a closed trading window that did not comport with the requirements of Rule 10b5-1 because the plans included a so-called “accordion” feature. This feature was designed to align the amount of share repurchases with the cash the company raised in debt offerings to fund those repurchases. It was implemented through a provision in the repurchase plan that increased the dollar amount of shares to be repurchased under the plan if the company completed a debt offering where the stated use of proceeds included share repurchases. The SEC alleged that this impermissibly enabled the company to change the dollar amounts available for repurchases, and the timing of additional repurchases, because the company retained discretion over whether and when to complete debt offerings and, therefore, when to trigger the accordion provisions in the plans.

The SEC did not allege any insider trading; rather, it alleged that because the board’s authorization for repurchases occurring during closed trading windows was predicated on the use of Rule 10b5-1-compliant trading plans, the non-compliant trading plans at issue were not, in fact, authorized. This, in turn, violated the Exchange Act requirement to maintain internal accounting controls sufficient to ensure that corporate transactions are executed only in accordance with general or specific authorization.

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³ U.S. Securities and Exchange Commission, *In the Matter of Charter Communications*, File No. 3-21797 (Nov. 14, 2023) (available [here](#)).

Proxy Drafting and Annual Meeting Housekeeping Checklist (cont.)

- ✓ **D&O Questionnaires.** Ensure D&O questionnaires are up to date and consider including questions regarding board demographics to be able to respond to rating surveys and assessments, as well as questions to address director skills matrices and any new skills included in them, such as cybersecurity expertise. Also, update the D&O questionnaire to state that information, particularly demographic information, will be used for proxy statement and related disclosures.
- ✓ **Compensation Committee Independence.** Review the compensation committee members' independence under [NYSE](#) or [Nasdaq](#) listing standards, [ISS's non-independent non-executive director test](#) and under Section 16 of the Securities Exchange Act.
- ✓ **Perquisite Disclosure.** Review perquisite disclosure to ensure compliance with the SEC's guidance on perquisite analysis. Inaccurate perquisite disclosure has resulted in an increased number of SEC enforcement actions in recent years—see *Spotlight: Enforcement Actions*. The mere fact that a benefit is provided for a business reason is not sufficient to conclude that the benefit is not a perquisite.
- ✓ **Sustainability and Culture Compensation Metrics.** For companies that include sustainability metrics in their incentive plans, make sure appropriate disclosure is provided, including a thorough description of how qualitative sustainability performance metrics will be assessed.
- ✓ **Equity Plan Adoptions or Amendments.** If adopting or amending an equity compensation plan, make sure that any disclosure complies with [Item 10](#) of Schedule 14A, the plan provides adequate limits on director compensation (including any cash compensation) and be mindful of [changes to burn rate calculations](#) within the ISS Equity Plan Scorecard that took effect for meetings held on or after February 1, 2023, and the [updates](#) to ISS's Proxy Voting Guidelines disfavoring equity plans giving boards full discretion over awards in the event of a change in control.
- ✓ **Institutional Investor and Proxy Advisory Firm Guidelines.** Review updates to the voting policies of applicable major investors, [ISS](#) and [Glass Lewis](#). [ISS compensation policy changes](#) for the 2024 season were released last month and should be considered when preparing for this proxy season.
- ✓ **Alternative Pay Disclosures.** Consider whether to include (or continue to include) alternative pay disclosures—such as realized or realizable pay—in light of the addition of the new pay versus performance table while being mindful that shareholders may ask questions to the extent these disclosures are omitted or modified in future years.
- ✓ **Shareholder Engagement.** Consider how you are describing engagement efforts in the proxy statement, particularly where voting results from the last annual meeting indicate developing investor concerns. Disclose any material governance updates implemented as a result of engagement with shareholder proposal proponents—see *Shareholder Proposals* above.

SPOTLIGHT: ENFORCEMENT ACTIONS (CONT.)

This shows us that an adjustment built into the “grid” for a repurchase plan that remains in the company’s discretion will not comply with Rule 10b5-1, which is not surprising. The *Charter* enforcement action, however, indicates that even if there is not insider trading, the SEC may still find ways to charge companies for failure to comply with Rule 10b5-1.

Charter is another in a series of actions (including those against [Activision Blizzard](#) and [First American Financial Corporation](#)) where the SEC has not found there to be an underlying principal violation, such as insider trading or a material representation, but instead has sought to stretch the traditional boundaries of internal controls or disclosure controls and procedures to find a securities law violation because a company’s underlying process was, in the view of the SEC, lacking. See [SEC Demands Stronger Disclosure Controls in Recent Enforcement Actions](#) for more information.

Executive Perquisites Disclosure Challenge

In June 2023, the SEC announced a settlement⁴ with Stanley Black & Decker (SBD) for failure to properly disclose executive perquisites and other personal benefits, or “perks.” In the SBD action, the SEC alleged that from 2017 through 2020, SBD failed to disclose approximately \$1.3 million in perks provided to four executive officers and a director.⁵ One major sticking point for the SEC was that SBD “listed zero dollars in compensation attributable to the officers’ and director’s use of corporate aircraft” during a period that the SEC alleged these five individuals had made extensive use of the corporate aircraft for both business and personal use.

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⁴ U.S. Securities and Exchange Commission, *In the Matter of Stanley Black & Decker, Inc.*, File No. 3-21497 (Jun. 20, 2023) (available [here](#)).

⁵ In accordance with Item 402 of Regulation S-K, as part of Summary Compensation Table disclosure, companies must disclose the total value of all perks provided to each named executive officer who receives perks (in the aggregate) with a value of at least \$10,000 in a given year. Where perks disclosure is required, companies must identify all perks by type and must quantify any perk that exceeds \$25,000 or 10% of total perks.

Proxy Drafting and Annual Meeting Housekeeping Checklist (cont.)

- ✓ **Non-GAAP Financial Measures.** To the extent non-GAAP measures are included in the proxy, including the CD&A, other than with respect to performance target levels, review for compliance with applicable disclosure requirements (equal prominence, explanation and reconciliation). Consider the SEC [C&DIs](#) on non-GAAP measures issued in December 2022 and September 2023—see *Comment Letter Hot Topics* above.
- ✓ **XBRL Disclosures.** In September 2023, the SEC published [a sample comment letter](#) regarding XBRL disclosures. The letter covers a non-exhaustive list of common XBRL oversights and questions, including omission of appropriate tagging for pay versus performance disclosure, the reason for use of custom XBRL tags or changing tags from period to period and use of different scales to present data on common shares outstanding on the cover page and in the balance sheet, resulting in tagging with materially different values. Companies should consider taking a fresh look at XBRL compliance.
- ✓ **HSR Thresholds and Filing Fee Amendments.** Use proxy preparation time to also check on compliance on other matters, such as HSR reporting requirements. [Effective February 27, 2023](#), the size-of-transaction threshold increased to \$111.4 million from \$101 million in 2022. Additional filing fee tiers were also introduced, effectively lowering fees for the smallest transaction size, while increasing fees for larger transactions. Fees for transactions valued at over \$1 billion increased from a maximum of \$280,000 to a range of \$400,000 to \$2.25 million, depending on size.
- ✓ **Ensure Disclosure Is Updated to Reflect Changes in Applicable Local Laws.** Many states and localities have passed new legislation or amended existing legislation covering areas such as diversity, taxation, restrictive covenants, privacy, equal pay and pay transparency. Changes in applicable law, such as recent changes with respect to non-competes, can impact the terms of executive arrangements that are described in the proxy. Consider how changes in applicable laws impact company policy and practice to ensure compliance, and update disclosure as needed.
- ✓ **Changes to Forms 4 and 5.** Be aware of [changes to Forms 4 and 5](#) that took effect on April 1, 2023 that require identifying transactions made pursuant to a Rule 10b5-1 plan in the filing and the disclosure of gifts on Form 4 within two business days of the gift transaction.

SPOTLIGHT: ENFORCEMENT ACTIONS (CONT.)

According to the SEC, the amount of \$1.3 million primarily reflects the executives' and director's personal use of corporate aircraft over the applicable period. This enforcement action is part of a larger trend in active enforcement of compliance with perk disclosure rules by the SEC.⁶

Although perks disclosure and related SEC enforcement is not new, the assessment of what benefits are considered perks continues to be an important, and at times challenging, exercise for companies. In light of the SEC's continued emphasis on enforcement in this area, companies should carefully review their internal processes for tracking all benefits provided to executive officers and identifying which benefits are perks under the two-part test put in place by the SEC: (1) whether the benefit is "integrally and directly related" to job performance and (2) whether it provides for a personal benefit, unless the benefit is generally available on a non-discriminatory basis to all employees. It is important to note that the "integrally and directly related" test is not the same as determining whether the benefit has a business purpose or also benefits the company. Where a perk is identified, proper disclosure is essential. While it is important to ensure that all perks are properly disclosed, particular attention should be given to disclosure of aircraft use, as the SBD enforcement action is the latest of several enforcement actions focusing on personal use of corporate aircraft.⁷

⁶ See the 2020 enforcement action against Hilton Worldwide Holdings, Inc., and the 2021 enforcement actions against Gulfport Energy Corp., National Beverage Corp., and ProPetro Holding Corp.

⁷ The Hilton, Gulfport Energy Corp., National Beverage Corp., and ProPetro Holding Corp. enforcement actions all included failures to disclose aircraft-related perks, either through use of corporate aircraft or chartered airfare.

LOOKING AHEAD

The SEC's rulemaking agenda continues to be active. [Climate change rules](#) are up for final adoption in the first half of 2024. A rule proposal on human capital and diversity disclosure is expected, as well. In the meantime, companies should use 2024 to prepare to comply with [recent rule amendments](#), which require filing insider trading policies and disclosing option grant timing beginning in 2025.

[Sign up for our client alerts](#) to stay up-to-date on these and other developments.

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