



## Matters To Consider for the 2025 Annual Meeting and Reporting Season: Executive Compensation

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**Editor's note:** Brian V. Breheny, Raquel Fox, and Page Griffin are Partners at Skadden, Arps, Slate, Meagher & Flom LLP. This post is based on a Skadden memorandum by Mr. Breheny, Ms. Fox, Mr. Griffin, Marc S. Gerber, Joseph M. Yaffe, and Khadija L. Messina.

### Incorporate Lessons Learned From the 2024 Say-on-Pay Votes and Compensation Disclosures and Prepare for 2025 Pay Ratio Disclosures

Companies should consider their recent annual say-on-pay votes and best practices for disclosure when designing their 2025 compensation programs and communicating about those programs to shareholders. Companies should also review the latest say-on-pay trends, including overall 2024 say-on-pay results, factors driving say-on-pay failure (i.e., those say-on-pay votes that achieved less than 50% shareholder approval), say-on-golden-parachute results and results of equity plan proposals, as well as recent guidance from the proxy advisory firms Institutional Shareholder Services (ISS) and Glass Lewis.

### Overall Results of 2024 Say-on-Pay Votes

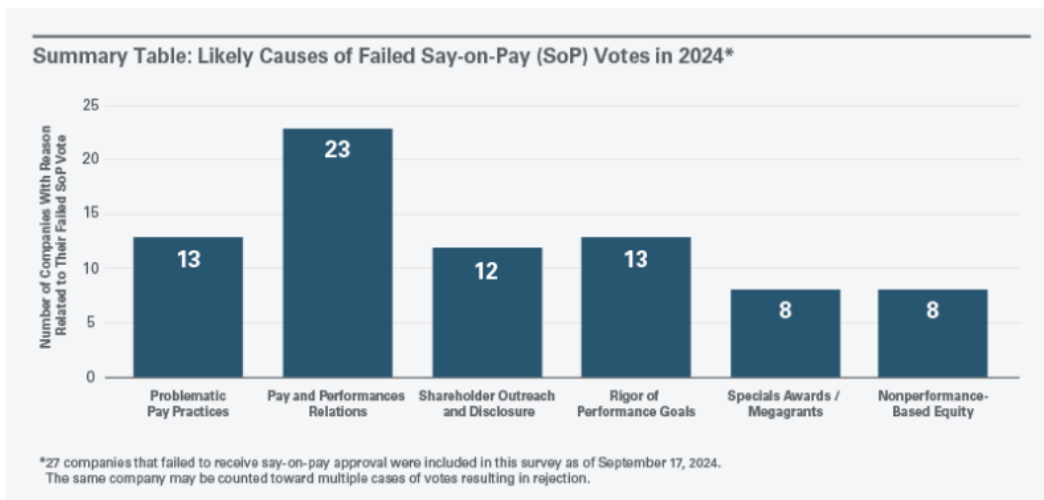
Below is a summary of the results of 2024 say-on-pay votes from Semler Brossy's annual survey. [\[1\]](#) Overall, say-on-pay approval results at Russell 3000 companies surveyed in 2024 were generally more favorable than those in 2023:

- Approximately 98.8% and 97.9% of Russell 3000 companies in 2024 and 2023, respectively, received at least majority support on their say-on-pay votes, with approximately 94% receiving above 70% support in 2024 and 93% receiving above 70% support in 2023. This demonstrates slightly increased say-on-pay support in 2024 compared with 2023.
- To date in 2024, approximately 88.9% of Russell 3000 companies and 92.3% of S&P 500 companies have received "For" recommendations on their say-on-pay voting items by ISS, a slight increase from the 87.2% and 90.4% "For" recommendations averages in 2023.

- Russell 3000 companies received an average say-on-pay vote result of 91% approval in 2024, which is slightly higher than the average vote result of 90% approval in 2023.
  - The average say-on-pay vote result exceeded 91% approval in 2024 across multiple industry sectors, including energy, utilities, consumer discretionary, materials, financials and consumer staples. 74% of Russell 3000 companies received more than 90% support, which is slightly higher than the 71% of companies receiving greater than 90% support at this time in 2023.
  - The communication services sector featured the lowest level of average support (compared with other industry sectors) at 89.2%.
- As of September 2024, approximately 1.2% of say-on-pay votes in 2024 for Russell 3000 companies resulted in failure to receive approval, which is below the 2.1% rejection rate for 2023.

## Factors Driving Say-on-Pay Failure

Overall, the most common factors shareholders cited when voting against say-on-pay proposals were pay and performance relation, problematic pay practices, rigor of performance goals, shareholder outreach and disclosure issues, nonperformance-based equity and special awards, as summarized in the chart below. [\[2\]](#)



Consistent with 2023 results, pay and performance alignment was among the leading causes of say-on-pay failure for 2024. Notably, although shareholder discontent with problematic pay practices significantly decreased from 21 instances in 2023 to 13 instances in 2024, the issue remained one of the most cited reasons for say-on-pay failure in 2024. Also, the tally shows that rigor of performance goals and shareholder outreach and disclosure issues have slightly outpaced special awards and nonperformance-based equity as leading causes of say-on-pay rejections.

# ISS Guidance

When evaluating pay practices, proxy advisory firms tend to focus on whether a company's practices are contrary to a performance-based pay philosophy. In December of each year, ISS publishes FAQs to help shareholders and companies understand changes to ISS compensation-related methodologies. In December 2023, ISS published its most recent general U.S. Compensation Policies FAQ. [3] As of the date of this checklist, ISS has not yet released its 2025 guidelines; the advisory firm is expected to release a full set of updated compensation FAQs in mid-December 2024, which will provide additional guidance for 2025. In October 2024, ISS published an interim United States Compensation Policies FAQ, [4] which included the following key updates:

- ISS indicated that effective for meetings occurring on and after February 1, 2025, ISS will not display a realizable pay chart for companies that have experienced multiple (two or more) chief executive officer (CEO) changes within the applicable three-year window (and otherwise, realizable pay will be displayed as before).
- ISS also indicated that for a company's clawback policy to be considered "robust," the policy must extend beyond the minimum requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act or Dodd-Frank) and explicitly cover all time-vesting awards. ISS further clarified that a clawback policy that adheres to the minimum requirements of Dodd-Frank will not be considered robust because those requirements generally do not cover all time-vesting awards. [5]

## Performance-Based Versus Time-Based Equity Awards

On November 18, 2024, ISS opened a public comment period on the proposed ISS benchmark policy changes for 2025. [6] One of the proposed policy changes relates to the relative mix between performance- and time-based equity awards, as summarized below.

Currently, ISS generally views a predominance of time-based (as opposed to performance-based) equity awards to be a significant concern at a company that has pay-for-performance misalignment. However, based on the 2024 Global Benchmark Policy Survey, [7] growing feedback from investors suggests a shift in perspective, largely due to concerns with poorly designed and disclosed performance-based equity programs that have nonrigorous performance measures. As a result, some investors are expressing a preference for time-based equity awards with extended vesting periods.

The ISS survey revealed that while 43% of investors supported maintaining ISS's current view on time-based awards, 70% of noninvestors preferred a change in approach so that time-based awards with extended vesting periods would be viewed positively, particularly if the vesting periods

are longer than four years. Both investors and noninvestors displayed strong support (66% and 58%, respectively) for a time-based vesting period of “at least five years.”

ISS is considering updating its policy for 2026 (or later). Effective for 2025 (for meetings on or after February 1, 2025), ISS stated that it intends to adapt the current framework by placing greater emphasis on the design and disclosure of performance-based equity awards, which may drive adverse say-on-pay recommendations for companies with pay-for-performance misalignments.

## Glass Lewis Guidance Glass

Lewis published its “2025 Benchmark Policy Guidelines for the United States” in November 2024, which included the following compensation updates in effect for the 2025 proxy season: [\[8\]](#)

- Glass Lewis indicated that to aid in the consideration of whether a change-in-control arrangement is double- or single-trigger, companies that allow committee discretion over the treatment of unvested awards should provide a clear rationale for the committee’s final decision about how such awards should be treated in the event of a change in control.

Glass Lewis also clarified the following in its 2025 policy guidelines:

- **Say-on-Pay Voting Recommendations:** Glass Lewis clarified that it approaches its analysis of executive compensation programs on a case-by-case basis. Glass Lewis reviews factors such as quantitative analyses, structural features, the presence of effective best-practice policies, disclosure quality and trajectory-related factors. With the exception of particularly egregious pay decisions and practices, no single factor would typically lead to an unfavorable recommendation without a review of the company’s rationale and its ability to align executive pay with performance and the shareholder experience.
  - Glass Lewis indicated that its evaluation of whether compensation is “egregious or excessive” for purposes of its say-on-pay voting recommendations includes an assessment of perquisites alongside cash bonuses, equity payments and severance payments.
  - Glass Lewis further indicated that in addition to the existing factors that may cause Glass Lewis to recommend voting against a say-on-pay proposal, the advisory firm will also view “adjustments to performance results that lead to problematic pay outcomes” negatively.

- Glass Lewis' evaluation for its "Good, Fair, Poor" rating scale will consider the rationale behind each compensation element in addition to the thoroughness of the discussion of all elements of compensation.
- Companies are expected to provide sufficient information in their proxy statements to enable shareholders to vote in an informed manner. Glass Lewis acknowledges that although regulatory rules, e.g., SRC disclosure standards, may permit the omission of key executive compensation information, companies should still provide sufficient information.
- **Company Responsiveness to Say on Pay:** Glass Lewis clarified that a company's proxy statement should discuss the compensation committee's response to low say-on-pay support.
- **Long-Term Incentives:** Glass Lewis elaborated on its generally negative view of cases where performance-based awards are significantly rolled back or eliminated from a company's long-term incentive plan, stating that such changes will be assessed based on the impact of such change on the alignment of executive pay and shareholder experience. Companies that fail the assessment may receive an unfavorable recommendation if the reduction in rigor and accountability in the company's pay program is not offset by meaningful revisions (e.g., to pay quantum and vesting periods).
  - Glass Lewis added "additional post-vesting holding periods to encourage long-term executive share ownership" to its list of elements that are common to most well-structured long-term incentive plans.
- **One-Time Awards:** Glass Lewis clarified that it reviews grants of supplemental awards on a case-by-case, company-by-company basis.
- **CEO Pay Ratio:** Even though the CEO pay ratio is not a determinative factor in Glass Lewis voting recommendations, Glass Lewis noted that the underlying data may help shareholders evaluate the rationale for certain executive pay decisions, such as increases in fixed pay levels.

## Recommended Next Steps

Overall, proxy advisory firms, institutional investors, the news media, activist shareholders and other stakeholders continue to shine a spotlight on companies' executive compensation programs.

- This year's proxy season provides an opportunity for companies to clearly disclose the link between pay and performance and efforts to engage with shareholders about executive compensation.

- As always, these disclosures should explain the company's rationale for selecting particular performance measures for performance-based pay and the mix of short-term and long-term incentives.
- Companies should also carefully disclose the rationale for any increases in executive compensation, emphasizing the link between such increase and specific individual and company performance.

In the year following a say-on-pay vote, proxy advisory firms conduct a thorough review of companies where say-on-pay approval votes fell below a designated threshold: 70% for ISS and 80% for Glass Lewis. ISS' FAQ explains that this review involves investigating the following:

- The breadth, frequency and disclosure of the compensation committee's stakeholder engagement efforts.
- Disclosure of specific feedback received from investors who voted against the proposal.
- Actions taken to address the low level of support.
- Other recent compensation actions.
- Whether the issues raised were recurring.
- The company's ownership structure.
- Whether the proposal's support level was less than 50%.

Taking actions to address to these factors can result in effective stakeholder engagement efforts and robust disclosures.

Looking ahead to 2025, companies that received say-on-pay results below the ISS and Glass Lewis review thresholds should consider enhancing disclosures of their shareholder engagement efforts in 2024 and the specific actions they took to address potential shareholder concerns. Companies that fail to conduct sufficient shareholder engagement efforts and to make these disclosures may receive negative voting recommendations from proxy advisory firms on say-on-pay proposals and compensation committee member reelection.

Recommended actions for such companies include the following:

- **Assess results of the most recent say-on-pay vote.** As part of this analysis, identify which shareholders were likely the dissenting shareholders and why.
- **Engage key company stakeholders by soliciting and documenting their perspectives on the company's compensation practices.** Analyze stakeholder feedback, determine recommended next steps and discuss findings with relevant internal stakeholders, such as the compensation committee and the board of directors.

- **Review ISS and Glass Lewis company-specific reports and guidance to determine the reason for their vote recommendations in 2024.** Carefully consider how shareholders and proxy advisory firms may react to planned compensation decisions for the remainder of the current fiscal year and recalibrate as necessary. For example, consider compensation for new hires, leadership transitions and any special one-time grants or other arrangements.
- **Determine, document and provide fulsome disclosure of the changes the company will make to its compensation policies** in response to shareholder feedback.
- **Disclose specific shareholder engagement efforts and results in the 2025 proxy statement.** Such disclosures should include information about the shareholders engaged, such as the number of them, their level of ownership in the company and how the company engaged them. This disclosure should also reflect actions taken in response to shareholder concerns, such as a company's decision to offer more detailed disclosures or to adjust certain compensation practices.

Companies that have not changed their compensation plans or programs in response to major shareholder concerns should consider disclosing (i) a brief description of those concerns, (ii) a statement that the concerns were reviewed and considered and (iii) an explanation of why changes were not made and how that decision was reached, including factors considered and the process followed.

## Say-on-Golden-Parachute Proposal Results

Say-on-golden-parachute votes historically have received lower support than annual say-on-pay votes. In 2024, average support for golden parachute proposals decreased slightly to 79% from 81% in 2023. [\[9\]](#) ISS notes that changes in the

say-on-golden-parachute failure rate tend to follow trends in the median golden parachute value. In 2024, the median CEO golden parachute compensation increased by 35%.

The failure rate for say-on-golden-parachute proposals reached an all-time high in 2024 at 17%, up from 12% in 2023.

## Equity Plan Proposal Results

Average support for equity plan proposals increased in 2024:

- 0.5% of equity plan proposals at Russell 3000 companies received less than a majority vote as of September 2024, compared to more than 1% in previous years (1.4% in 2023). [\[10\]](#)

- Average support for 2024 equity plan proposals as of September 2024 was 87.8%, greater than the 86.7% average support for equity plan proposals in September 2023. [\[11\]](#)

Most companies garner strong support from shareholders for equity plan proposals, regardless of the ISS recommendation:

- As of September 2024, Russell 3000 companies receiving an “Against” recommendation for equity plan proposals still received 75% support for equity plan proposals. [\[12\]](#)
- As of September 2024, the ISS “Against” recommendation rate for equity plan proposals was 29.5% (up from 27.9% in 2023).

### **ISS Equity Plan Scorecard**

- For meetings on or after February 1, 2024, ISS adjusted certain factor scores under the Equity Plan Scorecard (EPSC) for S&P 500, Russell 3000 and Non-Russell 3000 companies and for special cases for the Russell 3000/S&P 500 models (i.e., recent IPOs, spinoffs and bankruptcy emergent companies that do not disclose at least three years of grant data), which include: [\[13\]](#)
  - A decrease in the weighting of the company’s shareholder transfer value relative to peers, based on new shares requested plus shares remaining available plus outstanding grants and awards, for S&P 500 and Russell 3000 models.
  - A decrease in the weighting of the grant practices pillar for the S&P 500, Russell 3000 and Non-Russell 3000 models.
  - An increase in the weighting of the plan features pillar for the S&P 500, Russell 3000 and Non-Russell 3000 models.

There are no factor score adjustments for the special cases for the Non-Russell 3000 model. Further, there are no factor definition changes nor threshold passing score changes for any model.

## **Other Proxy Advisory Firm Takeaways**

Each year, companies should consider whether to update the compensation benchmarking peers included in ISS’ database. ISS uses these company-selected peers when it determines the peer group it will use to evaluate a company’s compensation programs. This year, ISS accepted these updates from November 11, 2024, to November 22, 2024. [\[14\]](#)

## **Plan for the Third Year of Pay-Versus-Performance Disclosures**

In August 2022, the SEC adopted final rules requiring public companies to disclose the relationship between the executive compensation actually paid to the company's named executive officers (NEOs) and the company's financial performance. Companies were required to incorporate this information into proxy or information statements that include executive compensation disclosure for fiscal years ending on or after December 16, 2022. Calendar-year companies included this disclosure for the first time in their proxy statements led in 2023. Companies should now incorporate lessons learned during the 2024 proxy season to prepare for the third year of pay-versus-performance (PvP) disclosure.

## Overview

Item 402(v) of Regulation S-K contains the PvP disclosure requirements, which consist of three main components: (i) a PvP table that includes metrics from the previous several years such as CEO and NEO "compensation actually paid" (CAP), cumulative total shareholder return (TSR) for the company and its peer groups, financial performance measures and the company's net income; (ii) a tabular list of financial measures that the company selected to link CAP to the performance metrics; and (iii) a description of the relationship between CAP and the company's performance metrics.

specifically, the PvP table requires disclosure of:

- The total compensation of the CEO and the average total compensation of the other NEOs, using the information required to be reported in a Summary Compensation Table.
- The compensation "actually paid" to the CEO and the average total compensation "actually paid" to the other NEOs, calculated in accordance with Item 402(v), along with footnote disclosure of any amounts deducted and added to total compensation of the NEOs to determine the amount of compensation "actually paid."
- The TSR of both the company and its peer group.
- The company's net income (under GAAP).
- A financial performance measure selected by the company that in the company's assessment represents the single most important financial measure used for the most recently completed fiscal year to link the company's performance to CAP to the company's NEOs.

**Listing Important Financial Measures:** Companies also must provide an unranked tabular list of at least three and up to seven financial performance measures (tabular list) that in each company's assessment represent the most important financial performance measures the company used for the most recently completed fiscal year to link CAP for the company's CEO and other NEOs to the company's performance. A company may include nonfinancial performance measures in this list if

those measures are among the most important performance measures used by the company to link CAP to performance and the company has disclosed at least three financial performance measures (or fewer, if the company uses fewer than three).

**Describing the Relationship Between Pay Versus Performance:** Using values reflected in the PvP table, a company is required to describe: (i) the relationship between (a) the CAP to the CEO and the average total CAP to the other NEOs and (b) the company's TSR, its net income and the company-selected measure (CSM); (ii) how the company's TSR relates to the TSR of its peer group; and (iii) the relationship between (a) the CAP to the CEO and the average total CAP to the other NEOs and (b) any supplemental measures voluntarily included in the PvP table. Companies can describe these relationships through a narrative discussion, a graphic presentation or a combination of both.

## Supplemental Disclosures

A company may supplement the disclosure by providing PvP disclosure (in tabular format or otherwise) based on other compensation measures such as "realized pay" or "realizable pay" if the company believes such supplemental disclosures provide useful information about the relationship between the compensation paid and the company's financial performance. The supplemental disclosure, however, may not be misleading or presented more prominently than the required PvP disclosure. In practice, such supplemental disclosures were not common in the first year of PvP disclosure.

## Covered Issuers

- All reporting companies that file proxies or information statements that require executive compensation disclosure are required to comply with this rule.
- SRCs are subject to scaled disclosure requirements, including a three-year period subject to a phase-in period for the first applicable filing in which disclosure for only the two most recently completed fiscal years is required. SRCs are not required to provide the peer group TSR or a CSM in the PvP table, or include a tabular list.
- Emerging growth companies (EGCs), FPIs and registered investment companies (other than business development companies) are entirely exempt from the disclosure requirements.
- A newly public company is required to file disclosure only for the years in which the company was a reporting company pursuant to Section 13(a) or Section 15(d) of the Exchange Act.

## Time Period

Companies must disclose the applicable information for their five most recently completed fiscal years (with three years required in the first year of PvP disclosure, and adding another year of disclosure in each of the two subsequent annual filings). Therefore, in 2025, calendar-year public companies will generally include data for the full five fiscal years in their PvP tables.

## Applicable Filings

- The PvP disclosure is required in any proxy or information statement that is required to include executive compensation disclosure, including those regarding the election of directors.
- The disclosure is not required in annual reports on Form 10-K, Securities Act registration statements or Exchange Act registration statements (e.g., registration statements on Form S-1 for IPO companies).

## PvP Lessons Learned From the 2024 Proxy Season

In 2023, the SEC released three sets of C&DIs relating to PvP disclosure. These C&DIs help clarify general disclosure and calculation requirements and provide guidance for identifying peer group(s) and CSM. [\[15\]](#) For a detailed summary of these C&DIs, please refer to our Matters To Consider for the 2024 Annual Meeting and Reporting Season checklist. [\[16\]](#) The SEC has not released any C&DIs related to PvP to date in 2024.

## SEC Comment Letters on PvP Disclosure

The SEC staff is reviewing and issuing comment letters on PvP disclosure. Comment letters have generally focused on insufficient relationship disclosure, failure to describe how non-GAAP CSMs are calculated from audited financial statements, failure to include net income (loss) as reported in the company's audited GAAP financial statements, and inaccurate CAP table headings/descriptions, among other issues. Below are common triggers for SEC comment letters on PvP disclosure:

- **Insufficient Disclosure**
  - Failing to include CAP footnote disclosure for prior years if it is material to an investor's understanding of the information in the PvP table for the most recent fiscal year (e.g., if the company corrects/revises CAP amounts disclosed for prior years but only includes CAP footnote disclosure for the most recent fiscal year).

- Failing to clearly describe the relationship between (a) CAP and (b) TSR, net income, CSM and any supplemental performance measures/metrics.
  - Stating that no relationship exists is not compliant (even if a particular measure such as net income is not used in setting compensation).
- **Calculation Errors**
  - Using a date other than the required measurement point for TSR calculations (i.e., the market close on the last trading day before the earliest fiscal year in the PvP table).
  - Valuing awards that vest during the year based on a year-over-year change, rather than valuing such awards as the difference between the fair value at the end of the prior fiscal year and the vesting date.
  - Calculating TSR based upon an initial fixed investment other than \$100.
  - Failing to show each of the numerical amounts deducted and added in CAP calculations.
  - Using net earnings (loss) attributable to shareholders instead of the net earnings (loss) amounts reported in the company's audited GAAP financial statements. (SEC staff is reconciling against such figures as reported in company filings).
- **CSM Errors**
  - Using a CSM with a measurement period that spans multiple years, even if the measurement period does not exceed one year.
  - Failing to disclose how the CSM is calculated from the audited financial statements if the CSM is not a financial measure under generally accepted accounting principles.
    - Incorporation by reference to a separate filing will not satisfy the disclosure requirement, only a cross-reference within the proxy statement is appropriate.
  - Failing to include the CSM in the tabular list.
- **Peer Group Errors**
  - Using a broad market index (instead of a peer group that is a published industry or line-of-business index, or, if applicable, companies used in the compensation discussion/analysis).

- Failing to present the peer group TSR information for each of the years in the PvP table using the peer group for the most recent year in the table, if the peer group has not changed from the immediately preceding fiscal year.
- Failing to provide footnote disclosure explaining a change of peer groups and the cumulative TSR comparisons against the immediately preceding fiscal year.
- Failing to list all companies that comprise the peer group if it is not a published industry or line-of-business index.
- **Graphic, Format and Miscellaneous Issues**
  - Failing to ensure that additional disclosures are clearly identified as supplemental, are not misleading and are not presented more prominently than the required PvP disclosure.
  - Failing to use clear descriptions or legends accompanying the relationship disclosure to explain information in the graph.
  - Failing to use table headings that accurately reflect the amounts used to calculate CAP (e.g., describing as “year-over-year change in fair value of equity awards granted in prior years that vested in that year” because the rules require equity awards granted in prior years that vest during the relevant year to be valued as the difference between the fair value as of the end of the prior fiscal year and the vesting date, not “year-over-year” change in value).

## Preparing for 2025 PvP Disclosure

In addition to reviewing the company’s approach to PvP disclosure in the prior year and SEC guidance and comment letters, a company should generally consider the following as it prepares for the third year of PvP disclosure:

- Companies will need to include the full five years of data in their PvP tables (including the four years previously disclosed and data for the most recently completed fiscal year).
- Companies should update their CSMs as needed by evaluating the single most important financial performance measure (not otherwise included in the table) that the company used in the most recently completed fiscal year to link CAP to the company’s performance.
- Companies should consider their tabular lists of financial performance measures and update as needed to reflect the most important financial measures (including the CSM) used for the most recent fiscal year to link CAP to company performance.

- Companies should confirm that their measurement period for their CSMs do not span years (i.e., a CSM with a one-year period where the factor's calculated measurement period is more than one fiscal year).
- If a company will use a different peer group in its third-year PVP disclosure, the company must explain the reason for the change in a footnote and provide comparison information for both the old and the new peer groups.

Footnote disclosure of CAP adjustments is only required for the most recent fiscal year (if the company otherwise included CAP adjustments in prior years' disclosure and such prior years' disclosure is not otherwise material to an investor's understanding of the information in the PVP table for the most recent fiscal year).

## Prepare for 2025 Pay Ratio Disclosures

SEC rules require companies to disclose their pay ratios, which compare the annual total compensation of the median company employee to the annual total compensation of the CEO (pay ratio). [\[17\]](#)

Companies must consider annually when preparing the mandatory pay ratio disclosures whether the same median employee may be used again for the upcoming year, and, if not, what new factors to use to identify the median employee.

## Determining Whether To Use the Same Median Employee

Under Regulation S-K Item 402(u) Instruction 2, a company only needs to perform median employee calculations once every three years, unless it had a change in the employee population or compensation arrangements that could significantly affect the pay ratio. This requires companies to assess annually whether their workforce compositions or compensation arrangements have materially changed.

When selecting a median employee for pay ratio disclosures about compensation in fiscal year 2024, companies should consider the following:

- Companies that have been using the same median employee for three years will need to perform median employee calculations for fiscal year 2024.
- Companies that were originally planning to feature the same median employee as last year should not do so if their employee populations or employee compensation arrangements significantly changed in the past year.

- Companies should carefully consider how to incorporate furloughed employees, if applicable, in the median employee pool. [\[18\]](#)
- Companies should evaluate how headcount changes may impact their abilities to exclude certain non-U.S. employees from their pay ratio calculations under the commonly relied upon de minimis exception in Item 402(u)(4)(ii): Companies should calculate whether non-U.S. employees (a) in the aggregate and (b) by jurisdiction newly constitute or no longer constitute more than 5% of the company's total employees.
  - If a company's non-U.S. employees account for 5% or less of its total employees, the company may either exclude all non-U.S. employees or include all non-U.S. employees when identifying its median employee.
  - Alternatively, if over 5% of a company's total employees are non-U.S. employees, the company may exclude up to 5% of its total employees who are non-U.S. employees; provided that the company excludes all non-U.S. employees in a particular jurisdiction if it excludes any employees in that jurisdiction, and employees excluded under Item 402(u)'s data privacy exception count toward this limit.
  - Non-U.S. jurisdictions with employees that exceed 5% of a company's total employees may not be excluded from the pay ratio calculation under the de minimis exception, although they may be permitted to be excluded under the data privacy exception.

Even if a company uses the same median employee in its proxy statement led in 2025 as the company used in 2024, it must disclose that it is using the same median employee and briefly describe the basis for its reasonable belief that no change occurred that would significantly affect the pay ratio.

To determine whether a material change occurred, companies should continue to assess the following factors:

- How has workforce composition evolved over the past year?
  - Review hiring, retention and promotion rates.
  - Consider the applicability of exceptions under the pay ratio rules:
    - Determine whether to incorporate employees from recent acquisitions or business combinations into the consistently applied compensation measure (CACM). For example, for the fiscal year in which a business combination or acquisition becomes effective, a company may exclude individuals that become its employees as the result of the business

combination or acquisition, as long as the company discloses the approximate number of employees it is omitting and identifies the acquired business it is excluding.

- Determine whether the de minimis exception applies within the context of the company's 2024 workforce composition. As described above, under this exception, non-U.S. employees may be disregarded if the excluded employees account for less than 5% of the company's total employees or if a country's data privacy laws make a company's reasonable efforts insufficient to comply with Item 402(u).
  - Analyze how the workforce used for the CACM is distributed across the pay scale and how the distribution has changed since last year.
- How have compensation policies changed in the past year compared to the workforce composition? For example, an across-the-board bonus that benefits all employees may not materially change the pay ratio, while pay for new special commissions limited to a company's sales team would.
- Have the median employee's circumstances changed since last year? Consider changes to the employee's title and job responsibilities alongside any changes to the structure and amount of the employee's compensation, factoring in the company's broader workforce composition. Additionally, if the median employee role was terminated, companies must identify a new median employee.

Although the SEC provides companies with substantial flexibility in calculating their pay ratios, to satisfy the SEC staff and engage with investors, employees and other stakeholders, companies should continue to diligently document and disclose their pay ratio methodology, analyses and rationale.

## **Pay Ratio Disclosure Impacts on Investors, Stakeholders and Proxy Advisors**

In the [final rule on pay ratio disclosure](#), the SEC explained that the pay ratio disclosure is intended to provide shareholders with a company-specific metric to assist their evaluation of the company's executive compensation practices. [\[19\]](#) Accordingly, proxy advisory firms ISS and Glass Lewis include company pay ratios as an informational data point in their company reports. However, ISS does not consider pay ratio disclosure when making voting recommendations. [\[20\]](#) Similarly, while Glass Lewis recognizes that CEO pay ratio has the potential to provide additional insight when assessing a company's pay practices, the ratio is not a determinative factor when Glass Lewis issues a voting recommendation. [\[21\]](#)

Although pay ratio disclosure rarely influences the voting recommendations made by proxy advisory firms at this time, companies should remain aware that investors and other stakeholders may be comparing CEO pay ratios among companies and year-over-year at individual companies when assessing pay practices and making voting decisions.

## Prepare for New Option Grant Practice Disclosures

On December 14, 2022, the SEC adopted Regulation S-K Item 402(x), which requires companies (including SRCs and EGCs) [\[22\]](#) to disclose in annual reports on Form 10-K or proxy statements the company's policies and practices regarding the timing of awards of options in relation to the disclosure of material nonpublic information. Issuers will need to discuss:

- How the timing of awards is decided (e.g., whether such awards are granted on a predetermined schedule).
- How material nonpublic information is considered, if at all, when determining the timing and terms of awards.
- Whether disclosure of material nonpublic information is timed to affect the value of such awards.

Issuers will also need to disclose in a new table any options granted in the last completed scal year to NEOs that were granted within four business days before or one business day after the (i) ling of a periodic report on Form 10-Q or 10-K or (ii) ling or furnishing of a current report on Form 8-K that discloses material nonpublic information (other than a current report disclosing a material new option award grant under Form 8-K Item 5.02(e)). The table should include the following:

- Each award, including the grantee's name, the date of the grant, the number of securities underlying the award, the option's per-share exercise price and the grant-date fair value.
- The percentage change in closing market price of the securities underlying each award on the trading day before and after disclosure of the material nonpublic information.

Issuers should provide the information in an Interactive Data File (i.e., Inline XBRL) in accordance with the EDGAR Filer Manual.

## Timing

These disclosure requirements are effective for the proxy statement (or Item 11 of Form 10-K) that covers the first full fiscal year beginning on or after April 1, 2023 (or October 1, 2023, for SRCs). Companies with a fiscal year ending December 31, 2024, should include disclosure in the proxy statement for the 2025 annual meeting of shareholders. Note that Item 402(x) disclosure relates

only to grants of options, stock appreciation rights and “similar instruments with option like features” — it is not required for full-value awards such as RSUs or restricted shares.

## Accounting Considerations

This disclosure of equity grant timing also includes accounting considerations. In November 2021, the SEC issued Staff Accounting Bulletin No. 120 (SAB 120), which addresses how companies should recognize and disclose the cost of providing “spring-loaded” equity awards to executives for purposes of Accounting Standards Codification (ASC) Topic 718.

A “spring-loaded award” is a share-based payment award made prior to (and proximate to) the company’s disclosure of positive and previously material nonpublic information. Under SAB 120, a company that grants an equity award while in possession of positive material nonpublic information should consider whether adjustments to the following are appropriate when determining the fair-value-based measure of the award for purposes of ASC Topic 718:

- The current price of the underlying share; or
- The expected volatility of the price of the underlying share for the expected term of the share-based payment award. significantly, SAB 120 applies to all equity awards and not just awards of options.

Taken together, the new Item 402(x) disclosure requirements and SAB 120 indicate that compensation committees should be aware of the timing of equity grants and the public disclosure context in which the grants are made. While the interplay of grant timing and disclosure of material nonpublic information is often the focus in the context of stock options and positive disclosure, a company that grants full-value awards that are sized based on a market value for the underlying shares — and makes such a grant in advance of the public announcement of material nonpublic information — should at a minimum maintain a record of the deliberation regarding whether those awards were sized appropriately given the potential impact of the announcement on the award value. Companies should also revisit their policies on the timing of option grants and compare these new disclosure requirements to existing Compensation Discussion & Analysis requirements under Regulation S-K Item 402(b)(2)(iv) (effective since 2006), which apply to both options and full-value awards.

## Practical Considerations

Whether companies will react to this regulatory focus on grant timing by adopting policies with xed timing of grants or through other means (such as making grants only during open trading windows and not during the four business days before or one business day after earnings reports or the lings

of Forms 10-K, 10-Q or any 8-K disclosing material nonpublic information) remains to be seen. In anticipation of potential expanded scrutiny of the relationship between and the timing of material nonpublic information and equity awards, some companies are timing vesting and settlement of equity awards to occur during open trading windows.

## Review Clawback Policies

### Background

As required by the Dodd-Frank Act, in October 2022, the SEC adopted final rules (Rule 10D-1 of the Exchange Act) that directed the stock exchanges to establish clawback listing standards. The rule called for listed companies to develop and implement a policy providing for (i) the recovery of erroneously awarded incentive-based compensation received by current or former executive officers, as defined under Rule 16a-1(f) under Section 16 of the Exchange Act, and (ii) related disclosure obligations, even if there was no misconduct or failure of oversight on the part of an individual executive officer. [\[23\]](#)

Now that a full year has passed since the December 1, 2023, deadline to comply with implementation of the Dodd-Frank required policies, companies should reflect on and revisit their processes to use best practices going forward.

## Operational Matters for Dodd-Frank Clawback Policies

### Short-Term Action Items

- **File the clawback policy as an annual report exhibit and ensure the annual report cover page is updated.** The Dodd-Frank clawback rules require listed companies to file their clawback policies as exhibits to their annual reports on Form 10-K, 20-F or 40-F, as applicable. Companies should consider whether to voluntarily file any stand-alone supplemental clawback policies that exceed the Dodd-Frank clawback rules' requirements.
- **Review the look-back period.** While the rules provide for the recovery of erroneously awarded incentive-based compensation during the three years prior to the date of the accounting restatement, for the upcoming year, such look-back period does not apply, and instead is only required to apply to incentive-based compensation received on or after October 2, 2023. Therefore, the look-back period for 2025 will be less than the three-year requirement. For newly public companies, the look-back period is the later of October 2, 2023, or the date the company listed its securities on Nasdaq or the NYSE.

## Medium-Term Action Items

- **Determine which executive officer compensation is incentive-based compensation.** The Dodd-Frank clawback rules apply to “incentive-based compensation,” which is “any compensation that is granted, earned, or vested based wholly or in part upon the attainment of any financial reporting measure.” [24] Before a potential accounting restatement arises, listed companies should ascertain which of their executive officer compensation arrangements qualify as incentive-based compensation.
  - Annual performance-based bonuses set based on achievement of financial reporting measures qualify as incentive-based compensation, as do many equity awards that vest based on achievement of performance conditions, such as performance-based restricted stock units that vest based on financial reporting measures such as total stockholder return.
  - Other types of executive officer compensation may feature incentive-based compensation more implicitly as an underlying variable, making aspects of the compensation incentive-based. For example, if a company’s executive officer severance plan provides a pro rata bonus for the year of termination of employment that is paid based on actual company performance and is payable when bonuses are normally paid to actively employed executives, that element of severance could potentially be recoverable as erroneously awarded incentive-based compensation.
  - For companies that have a variety of ad hoc compensation arrangements with their executive officers, the importance of taking inventory of which arrangements would be incentive-based compensation is heightened. Such preparation can be crucial to positioning companies with complex and varying compensation arrangements to meet the requirement of recovering erroneously award incentive-based compensation “reasonably promptly” if their clawback policies are triggered.
  - Together with proxy statement reporting requirements and the challenges of administering executive compensation programs with many ad hoc executive compensation arrangements, the Dodd-Frank clawback rules offer another compelling reason to simplify and standardize a company’s executive compensation program.
- **Reflect on the rationale for and documentation of forms of executive compensation.** The scope of the “incentive-based compensation” definition in the SEC’s clawback rules means that time-based equity awards, bonuses and other forms of compensation that do not contain performance metrics can fall into the category of

“incentive-based compensation” if they are granted in consideration of attainment of a past financial reporting measure. For example, if, in recognition of outstanding revenue performance during 2023, a company granted cash bonuses in 2024 that vest solely based on time-vesting criteria over the next three years, those bonuses would be incentive-based compensation. Therefore, companies should be aware that if they are documenting the rationale for executive compensation as based on prior financial reporting measure performance (whether implicitly or explicitly) in compensation committee resolutions, the Compensation Discussion & Analysis sections of their proxy statements, their executive offer letters or otherwise, that rationale could bring compensation under the umbrella of incentive-based compensation that would have otherwise been excluded from clawback policies, and that could meaningfully increase the scope of recoverable compensation if a clawback policy is triggered.

- **Reinforce the importance of an open line of communication between the accounting, finance, HR and legal functions.** If an accounting restatement occurs, various functions such as accounting, finance, HR and legal, along with the company’s audit committee and compensation committee, will need to collaborate to determine (i) whether, and the extent to which, the accounting restatement triggers application of the clawback policy and (ii) the process for compensation recovery, if applicable.

Clawback policies are typically thought to fall primarily under the purview of the HR and legal functions, but accounting and finance functions play crucial roles in identifying whether an event has occurred that has triggered the application of the clawback policy and how much compensation, if any, to recover. These primary functions should be made aware that an accounting restatement could trigger application of the clawback policy and that they have the obligation to alert the other functions if an accounting restatement due to the listed company’s material noncompliance with any financial reporting requirement under the securities laws has occurred. In short, companies should ensure that their accounting, finance, HR and legal functions are all aware of and understand the company’s clawback policy requirements and the need for prompt coordination and communication between company functions if an accounting restatement occurs.

#### **Long-Term/As-Needed Action Items**

- **If stock price or TSR is an input to incentive-based compensation, consider which advisor(s) to engage.** The Dodd-Frank clawback rules do not prescribe how to determine the amount of incentive-based compensation to recover if the underlying financial performance metric is stock price or TSR. Determining how an accounting restatement impacts stock price and TSR may entail technical expertise, specialized knowledge and significant assumptions. Moreover, under Item 402(1)(i)(C) of Regulation S-K, if recovery is triggered under the company’s clawback policy for a given scal year,

the company would be required to disclose an explanation of the methodology it used to determine how much incentive-based compensation related to stock price or TSR to recover, and the company must maintain and provide documentation of the determination in accordance with the listing standard.

Given the complexity of the analysis and the fact that aspects of the analysis will be disclosed externally, companies that have incentive-based compensation tied to stock price or TSR that experience an accounting restatement that triggers the company's clawback policy should consider engaging a third-party valuation expert to assist with evaluation and review.

- **Determine the means of recovering erroneously awarded incentive-based compensation.** Once erroneously awarded incentive-based compensation has been quantified, a company will need to assess how it intends to recover the amount, including the means and timing of recovery, as well as how the company plans to communicate any repayment obligation to its executive officers. Listed companies should keep in mind that certain states, such as California, have laws that generally prohibit the recovery of wages that have already been paid. [25] While the Dodd-Frank clawback rules are currently expected to preempt conflicting state law, litigation in the coming years may confirm whether and when the Dodd-Frank clawback rules apply and could indicate which means of recovery may reduce legal risk.
- **If the clawback policy is triggered, consider the tax consequences to the company and executive officers.** The Dodd-Frank clawback rules require recovery of erroneously awarded incentive-based compensation on a pre-tax basis. Therefore, if a company's clawback policy is triggered, the company will need to carefully assess how much of that compensation is or was properly deductible, and may be required to refund the Internal Revenue Service for deductions taken in previous years. Similarly, executive officers should work closely with tax advisers to determine how the officers' taxes are impacted by the clawback policy's application, including whether any offset is available under Section 1341 of the Internal Revenue Code of 1986, as amended, or otherwise, especially to the extent that the offset relates to erroneously awarded incentive-based compensation that was paid in a prior tax year.

The SEC's final rules noted "the extent to which a tax system allows current adjustments for tax paid in prior periods under assumptions that later prove incorrect is a matter of tax policy outside the scope of this rulemaking ... [but in] any event, we believe any resulting tax burden should be borne by executive officers, not the issuer and its shareholders." [26] Open questions about how compensation recovered under clawback policies should be taxed are expected to be answered in the coming years as companies begin implementing their clawback policies.

- **Disclose how the clawback policy has been applied during or after the last completed fiscal year.** The following disclosure requirements generally apply under Item 402(w) of Regulation S-K (or analogous disclosure provisions in the forms applicable to FPIs and listed funds), and the disclosure must be tagged in eXtensible Business Reporting Language (XBRL) format. Such disclosure applies in proxy or information statements that call for Item 402 disclosure or the listed company's annual report on Form 10-K (if not incorporated by reference to the proxy statement):
  - If during or after the last completed fiscal year, the listed company was required to prepare a restatement that required recovery of erroneously awarded incentive-based compensation under the company's clawback policy, or there was an outstanding balance as of fiscal year-end of erroneously awarded incentive-based compensation to be recovered from a previous application of the policy, the listed company is required to disclose:
    - i. (The date it was required to prepare the restatement.
    - ii. The aggregate dollar amount of erroneously awarded incentive-based compensation, including an analysis of how the amount was calculated (with enhanced disclosure if the financial reporting measure related to stock price or TSR).
    - iii. The aggregate dollar amount of erroneously awarded incentive-based compensation that remains outstanding at the end of the last completed fiscal year; provided that alternative disclosure would be required if the aggregate dollar amount of erroneously awarded incentive-based compensation had not yet been determined.
  - If recovery would be impracticable in accordance with the narrow exceptions in the Dodd-Frank clawback rules, the company is required to briefly disclose why recovery was not pursued and the amount of recovery foregone for each current and former named executive officer and for all other current and former executive officers as a group.
  - For each current and former named executive officer for whom, as of the end of the last completed fiscal year, erroneously awarded incentive-based compensation has been outstanding for 180 days or longer since the date the listed company determined the amount owed, the company should disclose the dollar amount of outstanding erroneously awarded incentive-based compensation due from each such individual.
  - If the company was required to prepare a restatement during or after its last completed fiscal year and concluded that recovery of erroneously awarded

incentive-based compensation was not required under the clawback policy, the company is required to briefly disclose the reasoning behind that conclusion.

- Any recoupment of compensation must be included in the company's Summary Compensation Table by subtracting the amount recovered from the amounts reported in that table for that year and quantifying the amount recovered in a footnote.

## Checkboxes on the Cover Page of Annual Reports

Companies must determine whether the checkboxes (copied below) on the cover page of the annual report are applicable regarding (i) the correction of accounting errors and (ii) a clawback analysis. These disclosures on the cover page of the Form 10-K, 20-F or 40-F must be tagged in XBRL format.

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

**Box 1:** Companies should perform a two-step process to determine whether to check Box 1:

1. Did the company correct any errors or make revisions to a previously issued financial statement or footnotes? The term "revision" encompasses (i) "Big R restatements," which correct a material error in the previously issued financial statement; (ii) "little r revisions or restatements," which correct an error that was immaterial to the previously issued financial statement (but correcting the error in the current period would materially misstate the current period); and (iii) any other changes.
2. Were such corrections or revisions due to accounting errors under Accounting Standards Codification (ASC) 250?
  - - Revisions due to the adoption of an accounting principle that applied to previous periods (i.e., retrospective changes) are not considered accounting errors.
    - Out-of-period adjustments are also not in this category.

- Correcting errors in the application of GAAP or other mathematical errors are considered accounting errors.

**Box 2:** Do any of those error corrections involve restatements that require a company to determine whether it must recover incentive-based compensation under the company's clawback policy?

## **Clawbacks Beyond the Dodd-Frank Requirements — Considering Whether To Amend or Supplement the Clawback Policy**

Compensation committees (or boards of directors, if applicable) should consider at least annually whether to update the clawback policy in response to market and/or industry trends, proxy advisory firm guidance, other clawback rules and other factors that arise in the coming years as the Dodd-Frank clawback rules are implemented.

- Recent surveys have reported that a significant number of public companies have recoupment policies or provisions that exceed the Dodd-Frank requirements. [27] One survey of approximately 400 S&P 500 companies revealed that about 70% of company clawback policies disclosed before May 7, 2024, have at least one recoupment trigger besides accounting restatements. [28] Examples of the expanded triggers include: (i) breach of legal requirements or company policy, (ii) breach of fiduciary duty or fraud, (iii) misconduct with reputational or financial harm, (iv) administrative enforcement, (v) termination or criminal resolutions (e.g., charges of fraud, embezzlement and theft) and (vi) inappropriate conduct. [29] A separate survey of large cap companies found that 66% of the respondents reported having recoupment provisions covering a broader population than required by Dodd-Frank, and 67% of the respondents reported having recoupment provisions covering discretionary cash and/or time-based equity awards. [30] A third survey noted that companies that have expanded recoupment policies typically provide for discretionary authority to recoup compensation where the recoupment is beyond the requirements of the Dodd-Frank Act. [31]
- Glass Lewis' United States 2025 Benchmark Policy Guidelines, published in November 2024, strongly recommend that companies maintain clawback policies that permit recovery in circumstances that extend beyond the Dodd-Frank clawback rules' requirements. Specifically, Glass Lewis stated that recovery policies should permit companies to recover variable incentive payments (whether time-based or performance-based) "when there is evidence of problematic decisions or actions, such as material misconduct, a material reputational failure, material risk management failure, or a material operational failure, the consequences of which have not already been reflected

in incentive payments and where recovery is warranted” and regardless of whether the executive officer was terminated with or without cause. [32]

- Glass Lewis also expects robust disclosure about a company’s decision not to pursue recovery under a clawback policy, and, if applicable, how the company has corrected the disconnect between executive pay outcomes and negative impacts of executives’ actions on the company. [33] The absence of such enhanced disclosure could affect Glass Lewis’ overall say-on-pay recommendation. [34]
- Similarly, in October 2024, ISS released a new FAQ on Executive Compensation Policies. ISS noted that for a listed company to be perceived as having a robust clawback policy, the company’s clawback policy “must extend beyond the minimum Dodd-Frank requirements and explicitly cover all time-vesting equity awards.” [35] Clawback policies that do not cover all time-vesting equity awards will not be deemed robust.
- The impact of the DOJ’s Criminal Division’s three-year Pilot Program Regarding Compensation Incentives and Clawbacks remains to be seen. Under the pilot program, where a criminal resolution is warranted, public and private companies may qualify for reduced fines if they have implemented a compensation recovery program that permits recovery from employees who engaged in misconduct in connection with the conduct under investigation, or from others who both had supervisory authority and knew of, or were willfully blind to, the misconduct. [36]

CEOs and chief financial officers (CFOs) remain subject to the clawback provisions of the Sarbanes-Oxley Act of 2002 (SOX), which provide that if a company is required to prepare an accounting restatement because of “misconduct,” the CEO and CFO are required to reimburse the company for any incentive or equity-based compensation and profits from selling company securities received during the year following issuance of the inaccurate financial statements. If the Dodd-Frank clawback policy and SOX cover the same recoverable compensation, the CEO or CFO is not subject to duplicative reimbursement. Recovery under the Dodd-Frank clawback will not preclude recovery under SOX to the extent any applicable amounts have not been reimbursed to the listed company.

## Evaluate Hart-Scott-Rodino Act Implications on Executive Compensation

Officers and directors who hold at least \$119.5 million [37] in voting securities in their companies should consider the need to make Hart-Scott-Rodino (HSR) filings whenever these individuals increase their holdings through an acquisition of voting securities. A company’s annual preparation of its beneficial ownership table provides a regular opportunity to assess whether any of the

company's officers or directors may be approaching an HSR filing threshold. HSR counsel can advise when exemptions are available to obviate the need to file notifications.

For HSR purposes, an "acquisition" is the receipt of new voting securities, whether formally (technically) purchased or not. An acquisition is considered to occur only when the officer or director obtains beneficial ownership of the shares (i.e., receives the present right to vote for the board of directors). Therefore, acquisitions may include, without limitation:

- Grants of fully vested shares or restricted stock as a component of compensation.
- The vesting or settlement of time-based or performance-based restricted stock units.
- The exercise of stock options.
- Open market purchases of shares.
- The conversion of convertible nonvoting securities into voting shares.

Conversely, an officer or director would not be deemed to "acquire" shares underlying time-based or performance-based restricted stock units that have not vested, or shares underlying stock options that have not yet been exercised. These underlying shares do not constitute "voting securities" prior to vesting, settlement or exercise and thus do not require reporting under the HSR Act.

Generally, an "acquisition" can trigger a filing obligation. For example, an annual grant of voting securities pursuant to an officer's or director's long-term incentive plan can require HSR Act filings to be completed in advance of the grant, even if the value of the granted shares does not exceed a filing threshold and if the total percentage amount to be held after closing of the grant does not significantly increase the person's aggregate holdings. [38] By contrast, a filing requirement is not triggered solely by an increase in the value of an officer's existing holdings from \$115 million to \$120 million, for example, as a result of share price appreciation. However, if such officer subsequently wanted to exercise a stock option to acquire more voting securities, an HSR obligation could be triggered because the value of the officer's current holdings already exceeds the filing threshold.

The filing requirement is triggered whenever — after the acquisition of voting securities — the aggregate value of an officer or director's holdings of voting securities in the company meets or exceeds an HSR filing threshold (the lowest of which is triggered by exceeding \$119.5 million). [39] The value of the proposed acquisition [40] is added to the current value, not the historical purchase price, of current holdings to determine whether a threshold has been met or crossed.

Higher HSR reporting thresholds require additional HSR filings if an acquisition of voting securities causes an officer's or director's holdings to meet those thresholds. [41] The next two filing levels are

currently \$239.0 million or higher and \$1.195 billion or higher. An HSR ling is also required if the acquisition would cause the officer or director to own 25% of the issuer's outstanding voting securities, if that issuer is valued at greater than \$2.390 billion. Similarly, an HSR ling is required if the acquisition would cause the officer or director to own 50% of the issuer's outstanding voting securities, if that issuer is valued at greater than \$119.5 million.

If an HSR ling is required, both the individual and the company must make a ling and wait 30 days before completing the triggering acquisition. The filer has one year from the time of clearance to cross the applicable acquisition threshold and may make additional acquisitions for five years after the end of the waiting period with no further HSR lings; provided that the filer does not acquire sufficient shares to cross the HSR threshold above the level for which the notification was led.

The Federal Trade Commission (FTC) and the DOJ have historically followed an informal "one free bite at the apple" enforcement practice in response to certain missed HSR lings. This "free bite" may address all prior missed lings that occurred before the corrective ling. As a result, an officer or director who inadvertently failed to make a required HSR ling should notify the agencies by submitting a corrective ling detailing previous acquisitions, explaining the missed ling, and detailing how they plan to track and meet ling obligations in the future.

However, the FTC and the DOJ have otherwise pursued enforcement actions and may impose material civil penalties of up to \$51,744 per day [\[42\]](#) for each day of noncompliance if an executive officer or director subsequently fails to make a required HSR ling, even if such failure was truly inadvertent. [\[43\]](#) Therefore, officers and directors who have made corrective lings should be especially vigilant and consult HSR counsel regularly before a potential "acquisition" event is expected to occur. [\[44\]](#)

**Link to full report can be found [here](#).**

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<sup>1</sup>See Semler Brossy's report "2024 Say on Pay & Proxy Results" (Sept. 26, 2024). Unless otherwise noted, Semler Brossy's report is the source of pay ratio, say-on-pay and equity plan proposal statistics in this checklist. [\(go back\)](#)

<sup>2</sup>Id. [\(go back\)](#)

<sup>3</sup>See ISS' FAQ "United States Compensation Policies" (Dec. 14, 2023). [\(go back\)](#)

<sup>4</sup>See ISS' FAQ "United States Compensation Policies" (Oct. 11, 2024). [\(go back\)](#)

<sup>5</sup>For more information on clawback policy trends, see the "Clawback Policies" section of this checklist below. [\(go back\)](#)

- <sup>6</sup>See ISS' "Proposed ISS Benchmark Policy Changes for 2025" (Nov. 18, 2024).[\(go back\)](#)
- <sup>7</sup>See ISS' "2024 ISS Global Benchmark Policy Survey" (Oct. 10, 2024).[\(go back\)](#)
- <sup>8</sup>See Glass Lewis' "2025 Benchmark Policy Guidelines – United States" (Nov. 14, 2024).[\(go back\)](#)
- <sup>9</sup>See ISS' "Proxy Season Review – U.S. Executive Compensation" (Sept. 11, 2024).[\(go back\)](#)
- <sup>10</sup>See Semler Brossy's report "2024 Say on Pay & Proxy Results" (Sept. 26, 2024).[\(go back\)](#)
- <sup>11</sup>See id.[\(go back\)](#)
- <sup>12</sup>See id.[\(go back\)](#)
- <sup>13</sup>See ISS' FAQ "United States Equity Compensation Plans" (Dec. 11, 2023).[\(go back\)](#)
- <sup>14</sup>See ISS' "Company Peer Group Feedback" (2024).[\(go back\)](#)
- <sup>15</sup>See our February 28, 2023, client alert "SEC Guidance Clarifies Some Issues Regarding Pay-Versus-Performance Disclosure, but Leaves Questions Unanswered"; September 29, 2023, client alert "SEC Staff Issues Additional Pay-Versus-Performance Compliance & Disclosure Interpretations"; and November 27, 2023, client alert "SEC Staff Issues New and Revised Pay-Versus-Performance Compliance & Disclosure Interpretations."[\(go back\)](#)
- <sup>16</sup>See our December 12, 2023, checklist "Matters To Consider for the 2024 Annual Meeting and Reporting Season," pp. 19-21.[\(go back\)](#)
- <sup>17</sup>EGCs, SRCs and FPIs are exempt from the pay ratio disclosure requirement. Transition periods are also available for newly public companies.[\(go back\)](#)
- <sup>18</sup>For information on how to incorporate furloughed employees into pay ratio calculations, see "Incorporate Lessons Learned From the 2020 Say-on-Pay Votes and Compensation Disclosures and Prepare for 2021 Pay Ratio Disclosures — Prepare for 2021 Pay Ratio Disclosures" in our December 14, 2020, publication "Matters To Consider for the 2021 Annual Meeting and Reporting Season."[\(go back\)](#)
- <sup>19</sup>See the SEC's final rule release Pay Ratio Disclosure, Rel. Nos. 33-9877; 34-75610, p. 9 (Aug. 5, 2015), 80 Fed. Reg. 50104 (Aug. 18, 2015).[\(go back\)](#)
- <sup>20</sup>See ISS' "United States Executive Compensation Policies Frequently Asked Questions" (updated Oct. 11, 2024), p. 25.[\(go back\)](#)
- <sup>21</sup>See Glass Lewis' "2024 Benchmark Policy Guidelines – United States" (Nov. 16, 2023), p. 64.[\(go back\)](#)

<sup>22</sup>An SRC or EGC may limit the disclosures to (i) the company’s principal executive officer (PEO), (ii) the two most highly compensated executive officers other than the PEO who were serving as executive officers at the end of the last completed fiscal year and (iii) up to two additional individuals who would have been the most highly compensated if serving as executive officers at the end of the last completed fiscal year.[\(go back\)](#)

<sup>23</sup>For a review of the Dodd-Frank Act clawback rules and related disclosure requirements, see our November 2, 2022, client alert “SEC Adopts Final Clawback Rules and Disclosure Requirements” and our June 16, 2023, client alert “SEC Approves Stock Exchange Rules for Dodd-Frank Clawbacks.”[\(go back\)](#)

<sup>24</sup>See the SEC’s final rule release Listing Standards for Recovery of Erroneously Awarded Compensation, Rel. Nos. 33-11126; 34-96159 (Oct. 26, 2022), 87 FR 73076 (Nov. 28, 2022).[\(go back\)](#)

<sup>25</sup>See California Labor Code § 221.[\(go back\)](#)

<sup>26</sup>See the SEC’s final rule release Listing Standards for Recovery of Erroneously Awarded Compensation, Rel. Nos. 33-11126; 34-96159, p. 78 (Oct. 26, 2022), 87 FR 73076 (Nov. 28, 2022).[\(go back\)](#)

<sup>27</sup>See DragonGC’s report “Compensation Clawbacks Report” (May 7, 2024), FW Cook’s report “Clawback Policies: Beyond Compliance” (Sept. 13, 2024) and Meridian Compensation Partner’s report “2024 Corporate Governance and Incentive Design Survey” (Sept. 26, 2024).[\(go back\)](#)

<sup>28</sup>See DragonGC’s report “Compensation Clawbacks Report” (May 7, 2024).[\(go back\)](#)

<sup>29</sup>See id.[\(go back\)](#)

<sup>30</sup>See FW Cook’s report “Clawback Policies: Beyond Compliance” (Sept. 13, 2024).[\(go back\)](#)

<sup>31</sup>See Meridian Compensation Partner’s report “2024 Corporate Governance and Incentive Design Survey” (Sept. 26, 2024).[\(go back\)](#)

<sup>32</sup>See Glass Lewis’ “2025 Benchmark Policy Guidelines – United States” (Nov. 14, 2024).[\(go back\)](#)

<sup>33</sup>See id.[\(go back\)](#)

<sup>34</sup>See id.[\(go back\)](#)

<sup>35</sup>See ISS’s United States Executive Compensation Policies Frequently Asked Questions (updated Oct. 11, 2024).[\(go back\)](#)

<sup>36</sup>See the Department of Justice’s “The Criminal Division’s Pilot Program Regarding Compensation Incentives and Clawbacks” (March 3, 2023).[\(go back\)](#)

<sup>37</sup>The HSR Act establishes a set of notification thresholds that are adjusted annually based on changes to the gross national product. The initial filing threshold for 2024 is \$119.5 million and new thresholds will be established in the first quarter of 2025.[\(go back\)](#)

<sup>38</sup>Note that an increase in a shareholder's voting power (i.e., holding or acquiring voting securities that provide more than one vote per share) can trigger an HSR reporting obligation, even if new shares are not technically received. This can happen when there is a change in the voting power of a class of securities that are already held by an officer or director. HSR counsel can analyze the impact of this type of change on a company's filing requirements.[\(go back\)](#)

<sup>39</sup>Under 16 C.F.R. § 801.1(h), only the lowest threshold must be exceeded. All others must merely be met.[\(go back\)](#)

<sup>40</sup>Several rules govern the valuation of proposed acquisitions. Publicly traded voting securities are valued at the higher of the market price and the officer or director's acquisition price. Non-publicly traded voting securities are valued at the acquisition price, but if this has not been determined, at fair market value.[\(go back\)](#)

<sup>41</sup>See the FTC's New HSR Thresholds and Filing Fees for 2024 (Feb. 5, 2024) for all current notification thresholds.[\(go back\)](#)

<sup>42</sup>The HSR civil penalty amount is adjusted by the FTC each January based on the percentage change in the consumer price index. The maximum civil penalty for an HSR violation in 2024 is \$51,744 per day, and the new maximum will be established in January 2025.[\(go back\)](#)

<sup>43</sup>See the FTC's press releases "FTC Fines Capital One CEO Richard Fairbank for Repeatedly Violating Antitrust Laws" (Sept. 2, 2021) and "FTC Fines Clarence L. Werner, Founder of the Truckload Carrier Werner Enterprises, Inc. for Repeatedly Violating Antitrust Laws" (Dec. 22, 2021).[\(go back\)](#)

<sup>44</sup>The FTC additionally recently released a new final rule, "RIN 3084-AB46: Premerger Notification; Reporting and Waiting Period Requirements," relating to premerger filings. HSR filings must comply with this new rule beginning in mid-to-late January 2025. HSR and antitrust counsel can advise when exemptions are available to obviate the need to file notifications under this new rule.[\(go back\)](#)