Top 10 Headaches for Proxy Season

Presented by Lori Metrock and Bob Dow

Headache #1
Who are my NEOs?

- Each person who served as PEO and PFO in FY
- Next 3 highest paid executive officers serving at end of FY
  - Based on total compensation
- Plus up to 2 additional executive officers who were not serving at end of FY but would have been in next 3 highest paid group
- SRCs, EGCs:
  - Each person who served as PEO
  - Next 2 highest paid executive officers
  - Plus up to 2 additional EOs not serving at end of FY

Headache #2
What vote is required for my proposal?

- Varies based on proposal type
  - Mergers, other significant matters – outstanding shares
  - Most other proposals – votes cast
- Check state law and organizational documents
- Effect of abstentions and broker non-votes
- NYSE rule 312.07 revised Nov. 2021
  - Majority of votes cast – votes cast is calculated in accordance with state law and governing documents

Heachache #3

When do you need to add a non-GAAP reconciliation to your proxy statement?

- NOT required
  - If the measure is discussed in CD&A because it is a compensation performance measure
- Required
  - If presented anywhere in a proxy statement for any other purpose (i.e. to discuss the relationship between pay and performance or to justify certain levels or amounts of compensation)

Headache #4

My median employee left, how do I recompute my pay ratio?

- Registrants must redetermine the median employee (ME) no less frequently than once every 3 years
- However, the registrant may change the ME any year voluntarily, and
- *Must* change the ME if the employee leaves or becomes unrepresentative
    - E.g.: ME receives major promotion; change in composition of employee base.
- Choose a Consistently Applied Compensation Measure (CACM) (e.g. W-2 wages)
- Choose a date to measure (must be within 3 months of year-end)
- Ask HR or payroll provider to run a list ranked on the CACM
- SRCs, EGCs, and FPIs exempt until next full year after exiting that status

Headache #5
Percolating those perks!

We have to disclose our executives benefits, what could possibly go wrong?

- Perks frequently present challenges in these areas: identifying all perks; measuring perks; sensitivity of disclosure
- General rule: include and disclose aggregate perks for an NEO if >$10k; and itemize in FN each perk > $25k or 10% of all perks
- "Perk" =
  - Confers personal benefit,
  - Not available to all employees, and
  - Not integrally related to duties
- New CDI analyzes arrangements during COVID: technology, health, transportation
- Entire books have been written about the complexities of reporting airplane usage

Headache #6
HR says it will take 2 months to get those compensation numbers!

- Tell HR to speed it up (just kidding)
- Preparing the proxy compensation tables requires advance planning, coordination, and allowance for lead time
- Compile a preliminary list of potential NEOs
- Give the list to HR with a list of requirements well in advance of the deadline
- Allow time for validating the information and clarification
- Consider the communication challenge:
  - Most lawyers don’t understand benefits well and
  - HR may not know all the legal requirements

Headache #7

What securities do I include in the beneficial ownership table?

- Securities “beneficially owned”
  - Sole or shared voting or investment power
- Vested options and unvested options that vest within 60 days
  - Include underwater options too
- RSUs vesting within 60 days
- ESPP shares that will be acquired within 60 days
- Shares held indirectly (by spouse/family member)

Headache #8
Do I need to include a say-on-pay frequency vote?

- Required at least every 6 years
- Advisory
- Phase-in period for Say on Pay (and Frequency) when EGCs lose EGC status:
  - 3 years after IPO if EGC for less than 2 years after IPO
  - 1 year after losing EGC status for all other EGCs
- Keep in mind the related Item 5.07 8-K filing requirement re: Company's determination in light of shareholder vote
  - Can be delayed 150 days after shareholder meeting

Headache #9

Do I really need to update the D&O questionnaires?

- It's generally desirable to send and receive new questionnaires each year
  - Frequent changes in SEC disclosure requirements or exchange listing standards
  - The information becomes stale
  - Documentation of due diligence each year
- But everyone HATES these things
  - Hard to get them to fill them out completely or at all
- Alternatives if there has been no significant changes in the year:
  - Send a copy of last year's questionnaire plus updated summary of compensation and ask them to confirm
  - Fill in some items in the new questionnaire with prior answers that probably haven't changed
  - Of course, a full new questionnaire will be needed from each new D&O
- New challenge: asking for diversity data

Headache #10

Dealing with ISS recommendation on our plan proposal

- Any time the company submits a new or amended equity plan for SH approval, ISS will review it and develop a recommendation
- A recommendation against the plan may make it difficult to obtain SH approval
- ISS Equity Plan Scorecard
  - 3 pillars: Plan Cost; Plan Features; Grant Practices
- You need a strategy to deal with this issue
- Some plan features/issues which will cause problems with ISS:
  - Burn rate – handing out too many awards
  - Ability to reprice awards
  - Single-trigger CIC
  - Share recycling
  - Minimum vesting period (< 1 year)
  - Paying dividends before vesting

Thank you.