

Morgan Lewis

2023 ANNUAL MEETING POSTMORTEM

**A RECAP OF TRENDS AND
WHAT'S TO COME**

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Overview

- I. Proxy Season Recap – A Post-Mortem of 2023
- II. A Preview of 2024
- III. Recap on Shareholder Proposals for the 2023 Proxy Season

2023 PROXY SEASON RECAP

Overview of 2023 Proxy Season

- Charter and Bylaw Amendments
- 2023 Pay Versus Performance
- Say on Pay Trends
- Trends in ESG Disclosures

Bylaw and Charter Amendments

Bylaw and Charter Amendments – Why?

- In November 2021, the SEC approved “universal proxy” rules
 - Proxy cards distributed by both public companies and activist stockholders in a contested director election must now include both sides’ director nominees
 - Applied to meetings commencing September 1, 2022
- In 2022, Delaware law was amended to authorize a provision in a certificate of incorporation limiting the personal liability of corporate officers for monetary damages for breaches of the duty of care
 - The inclusion of officer exculpation provisions requires amending the charter for Delaware corporations, and therefore must be brought for stockholder vote

Scope of Bylaw Amendments

Rule 14a-19 Changes

- These changes conform bylaws' timing and notification requirements of shareholder nomination procedures to those of Rule 14a-19, including through specific references to that rule and the voting solicitation threshold
- While atypical, changes to the advance notice period may have been required to comply with the new rule

Augmented Advance Notice Provisions

- Asks for more disclosure about nominating shareholders and director candidates
- Creates more opportunities for "foot faults" in perfecting advance notice
- Scope of these provisions vary, with some subject to scrutiny and legal challenges

Specific Changes to Bylaws

- Affirmative requirement that nominating stockholder –
 - State that they intend to comply with Rule 14a-19 (e.g., specific reference to solicitation threshold)
 - Provide reasonable evidence, prior to the meeting (e.g., five business days), that requirements of Rule 14a-19 have been satisfied
- Enhancement of advance notice provisions –
 - Include a “certification” provision as to business being brought before the meeting (with recertification requirements)
 - Requiring dissident to use full set delivery if company is doing full set delivery
 - Ensuring that debt holdings of the nominating stockholder are captured in addition to equity and equity-like holdings
 - Capturing stockholder/affiliate position in competitor
 - Description of investment strategy as it relates to the subject company

Pushback on Bylaw Amendments

- In November 2022, a firm known for representing activist shareholders published an open letter to public company directors expressing concern over certain bylaw amendment provisions, such as those requiring disclosure of:
 - the ownership interests of the nominating shareholder’s limited partners or distant family members in the company, competitors of the company or counterparties to any litigation involving the company;
 - the nominating shareholder’s past or future plans to nominate directors at other public companies; and
 - the nominating shareholder’s prior communications with other shareholders concerning its plans or proposals relating to the company
- Other provisions identified by practitioners as potentially problematic:
 - Requiring that nominee sit for interview with Board or a Board committee (some companies did include this requirement)
 - Requiring consent form other companies on which nominee serves as a director (or attest that no such consent is required)

Takeaways on Bylaw Amendments

- Revisions should be adopted on a “clear day” (i.e., without present activism concerns)
- Generally have not seen proxy advisory firms take issue with the “middle of the road” approach espoused by most companies
- If updating for only “company friendly” provisions, consider adding in “shareholder friendly” rights such as a lower threshold for calling special meeting or adding the right to act by written consent → **but only if this makes sense in light of the company’s defensive profile and facts and circumstances**
- Consider whether any other updates are needed or merited that go beyond the scope of universal proxy

Officer Exculpation Provisions

- Effective August 1, 2022, Section 102(b)(7) of the Delaware General Corporation Law ("DGCL") was amended to permit a Delaware corporation to include in its charter a provision to limit the personal liability of specified officers for breaches of their fiduciary duty of care
 - Prior to this amendment, Section 102(b)(7) only permitted exculpation of directors
- Implementing officer exculpation requires an amendment to the company's certificate of incorporation and, therefore, requires shareholder approval under Delaware law
 - ISS generally supportive of proposals to provide officer exculpation
 - Glass Lewis applied a more stringent perspective this proxy season
 - Most proposals were successful

Limits on Officer Exculpation Provisions

- Officers covered by DGCL 102(b)(7): the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer of the corporation, and any named executive officer, as disclosed in the company's proxy statement filed with the SEC
- DGCL Section 102(b)(7) does **not** protect against –
 - Derivative claims, claims for breach of the fiduciary duty of loyalty, for acts not in good faith or for intentional misconduct
 - Actions taken before the exculpation provision was adopted

2023 PAY VERSUS PERFORMANCE AND SAY ON PAY TRENDS

Pay Versus Performance – Overall Trends

- Total shareholder return (TSR) peer group
 - Most companies are using the industry index that is also used in the 10-K performance graph, as opposed to a company-designed, custom peer group that is disclosed in the CD&A and used to help determine NEO pay
 - This is as expected, as companies most likely want to avoid the requirement to explain year-over-year changes to the company-designed, custom peer group in future PVP disclosures
- Company-selected measure (CSM)
 - Most CSMs are tied to or some form of profit- or income-based measure
 - Earnings per share-based measures, EBITDA, and EBIT are generally the most common
- Compensation actually paid (CAP)
 - CAP amounts are varied, with many companies having CAP amounts that are below SCT totals for 2020 and 2022 and higher than SCT totals for 2021
 - CAP amounts are heavily influenced by stock price, so, in some cases, low stock prices in 2022 resulted in large negative CAP amounts

Pay Versus Performance – Overall Trends

- Relationship between CAP and performance measures
 - Most companies are using graphs as a part of their description of the relationship between CAP and the performance measures
 - Very few companies elected to rely solely on narrative descriptions
 - Where both graphical and narrative descriptions were included, the degree of narrative explanation that accompanied the graphs varied
 - Supplemental narrative disclosure related to pay and performance alignment, explanations of the measures used in incentive plans, and explanations related to the impact of stock price or other performance
 - A few companies included SCT totals in their graphs to further depict how CAP differed
- According to an Equilar survey of 500 companies released in June 2023, 76.7% of companies showed a correlation between TSR and CAP and 23.3% of companies showed figures that moved in opposite directions

Pay Versus Performance – Overall Trends

- Tabular lists
 - In addition to the CSM, most companies included two to three measures in their tabular lists, with a total of three financial measures being the most common
 - The inclusion of non-financial measures was generally uncommon
 - Where non-financial measures were included, these often related to ESG measures
 - Most companies included a single list (as opposed to two lists (i.e., PEO and other-NEO lists) or multiple lists (i.e., individual PEO and NEO lists))
 - Many companies included a cross-reference to the CD&A for additional details on the measures (as opposed to including any supplementary disclosure in the PVP section)
- Location within Proxy
 - Most companies included the PVP section as a standalone section before or after their Pay Ratio disclosures

2023 Say on Pay – Overall Trends

- Average vote result of Say on Pay (SoP) proposals is slightly higher than support experienced in 2022
 - Approximately 91% (as of May 2023), as compared to approximately 90% in 2022
- Average SoP levels of support is also slightly higher than 2022
 - The percentage of companies receiving less than 90% support for their SoP is slightly lower than last year
 - The 2023 failure rate is slightly lower (1.5% as of May 2023, as compared to 2.8% in 2022)
 - Average SoP levels of support is also slightly higher than 2022
- ISS negative vote recommendations are significantly down
 - Only 6.5% of Russell 3000 companies and 8.2% of S&P 500 companies received an ISS “Against” recommendation (as of May 2023)
 - In 2022, 14.0% of Russell 3000 companies and 12.7% of S&P 500 companies received ISS “Against” recommendations

2023 Say on Pay – Overall Trends and Potential Impacts on Future Say on Pay Votes

- A disconnect in pay-for-performance remains the most cited rationale for investors voting against SoP proposals
 - Additional reasons for opposition include:
 - Special or one-off awards, especially instances of consecutive years of special awards
 - Payments and grants related to retirement or CEO transitions
 - Lack of disclosure and explanation of pay-related decisions, determinations, and matters
- Lower and more-aligned 2022 pay outcomes may be one of the reasons for less 2023 SoP oppositions
 - For example, 2022 annual bonus payouts were on average lower than 2021 annual bonus payouts and long-term incentive plan payouts generally matched shareholder return performance
- 2024 SoP votes and PVP disclosure
 - The new PVP disclosure did not seem to have much of an impact on 2023 SoP votes; however, whether investors and advisors will consider PVP disclosure with respect to future SoP proposals remains to be seen
 - ISS has noted that PVP may be a qualitative consideration when determining its SoP recommendations
 - Investors and advisors may update their guidelines for 2024 to include formal PVP considerations

Say on Pay – Things to Consider Now

- Recall that in the year following a SoP vote, the proxy advisors scrutinize companies where the SoP approvals fell below certain specified thresholds and will expect companies to address SoP in next year's proxy statement:
 - 70% approval for ISS
 - 80% for Glass Lewis
- Now is the time to think about engaging with institutional investors if SoP approval levels dipped below the above levels, or materially decreased year-over-year
- Consider how the 2024 CD&A will look and what the company will be able to point to in terms of changes made in response to a lower SoP or specific concerns raised by institutional investors

2023 ESG Proxy Disclosure

- During the 2023 reporting cycle, companies continued to focus on providing fulsome ESG disclosure against the backdrop of:
 - Heightened SEC scrutiny
 - Emphasis from institutional holders, stockholders and other stakeholders
 - Continued lack of clarity regarding new regulations, guidance, and standards

2023 ESG Proxy Disclosure

- Areas of focus:
 - Climate change
 - Supply chain and labor
 - Human capital management
 - Diversity, Equity, & Inclusion
 - Social initiatives
 - Community and philanthropic endeavors
 - Risk management of ESG and Board oversight of ESG
 - Executive compensation ESG metrics

2024 PROXIES – A PREVIEW

Trends for 2024

- Continued focus on ESG disclosures and appropriate risk management – with or without effective climate change disclosure rules
- Scrutiny of perquisite-related disclosure
- Officer exculpation provisions for Delaware corporations
- Don't forget clawback disclosures!

ESG in 2024 – Steps to Take Now

Board ESG Competence

- Experience
- Certifications
- Trainings
- Board education

ESG Risk Categories

- Physical
- Reputational
- Regulatory
- Supply chain
- Human capital

Benchmarking

- Peer
- Industry

ESG Disclosure Takeaways for 2024

- Time is now to add or enhance ESG risk management disclosure
 - Including Board oversight of ESG
 - Work backward from the disclosure to understand where your policies and internal procedures may need to be updated
- Consistency and accuracy of disclosure and omissions are paramount
 - Ensure that every assertion and statement can be backed up
 - Confirm that disclosure is uniform and consistent across all media and filings
- Check progress against stated goals
 - If goals have changed or will not be met within the previously-stated timeframe, updates must be made to corresponding public disclosures
- Audit your ESG disclosures!

ESG Disclosure Takeaways and Best Practices

- Know (and educate your Board on) the difference between disclosing commitments/targets and stating aspirational goals
 - “Puffery” vs. actionable statement of firm commitment
- Use forward-looking statements where appropriate
- Be careful of inadvertent incorporation by reference
- Remember SEC review and scrutiny extends beyond ESG disclosure in SEC filings
 - Company websites, press releases, marketing materials, blogs, and CSR/sustainability reports are fair game

Perquisite-Related Disclosures

- Do not underestimate the importance of correctly reporting perquisites and personal benefits
- The SEC continues to investigate and bring charges against companies for failure to properly disclose perquisites provided to executives
 - Aircraft usage continues to be a hot topic

Officer Exculpation Provisions

- After taking a wait and see approach, Delaware corporations that did not seek to amend charters to address officer exculpation may wish to consider doing so in 2024
 - In 2024, may see an increased movement toward “standalone” charter amendments just for officer exculpation
 - If incorporating with other amendments, note unbundling requirements
- Ensure that Board and management understands what this provision does and does not accomplish
- Remember to build in time for Board approvals and filing of requisite preliminary proxy statement

Don't Forget Clawback Disclosures in 2024

- If required to prepare a restatement that triggers a clawback, must include disclosure (if applicable) beginning with the proxy statement for the 2024 annual meeting (and the Form 10-K for the fiscal year ending December 31, 2023, if not incorporated by reference from the proxy statement) under Item 402(w) of Regulation S-K
- Any erroneously awarded amount recovered pursuant to a clawback policy should be deducted from the amount reported in the applicable Summary Compensation Table column for the fiscal year in which it was initially reported as compensation and identified by footnote to the table

Quick Summary of Upcoming Disclosure Obligations

Disclosure Topic	Required Disclosure	Required Timing (12/31 FYE)
Insider Trading Policies & Rule 10b5-1	<u>Item 408(a)</u> . Quarterly disclosure in Forms 10-Q/K of whether any director or officer adopted, modified or terminated a Rule 10b5-1 plan or non-Rule 10b5-1 trading arrangement during the covered quarter and a description of the material terms of each such plan or arrangement	Narrative disclosure required beginning with the Form 10-Q for quarter ending June 30, 2023
	<u>Item 408(b)(1)</u> . Annual disclosure in proxy statement and, if not incorporated by reference from proxy statement, Form 10-K of whether issuer has adopted insider trading policies and procedures	Narrative disclosure required beginning with the 2025 proxy statement (and the Form 10-K for the fiscal year ending December 31, 2024, if not incorporated by reference from proxy)
	<u>Items 408(b)(2) and 601(b)(19)</u> . Annual filing of insider trading policies and procedures as exhibit to Form 10-K	Exhibit disclosure requirement kicks in for the Form 10-K for the fiscal year ending December 31, 2024
	<u>Item 402(x)(1)</u> . Annual disclosure in proxy statement and, if not incorporated by reference from proxy statement, Form 10-K of policies and practices regarding the timing of awards of options in relation to the disclosure of MNPI	Narrative disclosure will be required beginning with the proxy statement for its 2025 annual meeting (and the Form 10-K for the fiscal year ending December 31, 2024, if not incorporated by reference from proxy)
	<u>Item 402(x)(2)</u> . Annual tabular disclosure (in prescribed format) with information regarding any options granted in the last fiscal year to NEOs that were granted within four business days before or one business day after the filing of a Form 10-Q or 10-K or the filing or furnishing of a Form 8-K that discloses MNPI (other than an Item 5.02(e) Form 8-K)	Tabular disclosure will be required beginning with the proxy statement for 2025 annual meeting (and the Form 10-K for the fiscal year ending December 31, 2024, if not incorporated by reference from proxy)

Quick Summary of Upcoming Disclosure Obligations

Disclosure Topic	Required Disclosure	Required Timing (12/31 FYE)
Clawbacks	<u>Cover Page of Form 10-K</u> . Cover page of Form 10-K must include two check boxes that indicate (i) whether the f/s included in the filing reflect correction of an error to previously-issued financial statements and (ii) whether any of those error corrections are restatements requiring a clawback analysis	Form 10-K was amended to include the two checkboxes effective January 27, 2023, and companies must mark checkboxes as appropriate beginning with the Form 10-K for the fiscal year ending December 31, 2023
	<u>Item 601(b)(97)</u> . Annual filing of clawback policy required by stock exchange listing standards as exhibit to Form 10-K	Companies must file exhibit beginning with the Form 10-K for the fiscal year ending December 31, 2023
	<u>Item 402(w)</u> . Annual disclosure in proxy statement and, if not incorporated by reference from proxy statement, Form 10-K if, at any time during or after last completed fiscal year, issuer was required to prepare a restatement that required recovery of compensation pursuant to its clawback policy, or if there was an outstanding balance from a prior application of the clawback policy	Narrative disclosure required (if applicable) beginning with the proxy statement for its 2024 annual meeting (and the Form 10-K for the fiscal year ending December 31, 2023, if not incorporated by reference from the proxy statement)
	<u>Item 402(c)</u> . Annual disclosure in proxy statement and, if not incorporated by reference from proxy statement, Form 10-K of policies and practices regarding the timing of awards of options in relation to the disclosure of MNPI	Adjustments and footnote disclosure must be reflected beginning with the 2024 annual meeting proxy (as applicable)

Quick Summary of Upcoming Disclosure Obligations

Disclosure Topic	Required Disclosure	Required Timing (12/31 FYE)
Share Repurchases	<p><u>Item 408(d)</u>. Quarterly disclosure in Forms 10-Q and 10-K of whether issuer adopted, materially modified or terminated a Rule 10b5-1 trading plan or arrangement regarding its own securities during the covered quarter; if so, material terms of the plan or arrangement must be disclosed</p>	<p>Disclosure will be required beginning with the Form 10-K for the fiscal year ending December 31, 2023 (covering the fourth quarter of 2023)</p>
	<p><u>Item 601(b)(26)</u>. As quarterly exhibits to Forms 10-Q and 10-K, tabular disclosure (in prescribed format) of daily share repurchase activity during the covered quarter. Exhibits must also include a checkbox indicating whether any Section 16 officer or director purchased or sold shares that are the subject of a publicly announced plan or program within four business days of an announcement of stock repurchase plan or an increase of an existing repurchase plan or program</p>	<p>Exhibit will be required beginning with the Form 10-K for the fiscal year ending December 31, 2023 (covering fourth quarter of 2023)</p>
	<p><u>Item 703</u>. Quarterly disclosure in Forms 10-Q and 10-K of the following:</p> <ul style="list-style-type: none"> • Objectives or rationale for each share repurchase program and criteria used to determine the amount of repurchases; • The number of shares purchased other than through a publicly announced program and the nature of such repurchases; • Any policies and procedures relating to the purchases and sales of the issuer’s securities during a repurchase program by its officers and directors, including any restrictions on such transactions; and • For publicly announced repurchase plans or programs, the date each plan or program was announced, the dollar or share amount approved, the expiration date (if any) of each plan or program, each plan or program that has expired during the covered quarter and each plan or program the issuer has determined to terminate prior to expiration or under which the issuer does not intend to make further purchases 	<p>Disclosure will be required beginning with the Form 10-K for the fiscal year ending December 31, 2023 (covering the fourth quarter of 2023)</p>

Recap of 2023 Shareholder Proposals

Shareholder Proposals: SEC Rule 14A-8

Enables shareholders of public companies to submit proposals to be included in the annual proxy statement and to be voted on at the annual meeting:

- Sliding-scale requirement of a minimum amount of ownership (\$2,000 to \$25,000) over a one-, two-, or three-year period of time

Company can seek to exclude a proposal on either procedural or substantive grounds specified in Rule 14a-8

- SEC arbitrates with a no-action letter process

Proposals tend to fall into the following categories:

- Business practices -- 14a-8(i)(7)
- Environmental
- Social
- Governance
- Executive compensation

Shareholder Proposals – Recent Developments

Staff Legal Bulletin 14L (Nov, 3 2021)

- Rescinds staff legal bulletins 14I, 14J, 14K Refocuses “ordinary business” exception for proposals raising significant social policy issues on the policy issue, rather than impact on the company
- Board analysis no longer expected; Micromanagement exception curtailed
- Economic relevance exception inapplicable for proposals that raise issues of broad social or ethical concern related to the company’s business

SEC Rule Proposal (July 13, 2022)

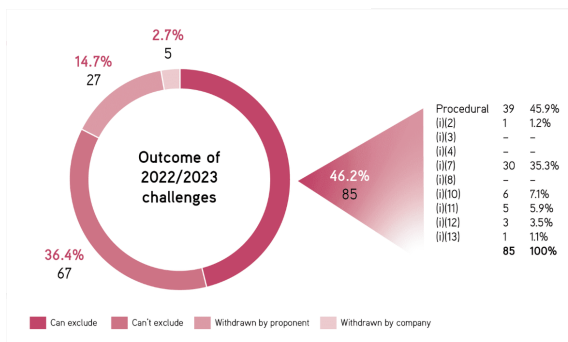
- To revise three of the substantive bases for exclusion of shareholder proposals:
 - substantial implementation exclusion
 - duplication exclusion
 - resubmission exclusion

SLB 14L has made it more difficult to challenge many proposals, particularly for those related to environmental and social issues.

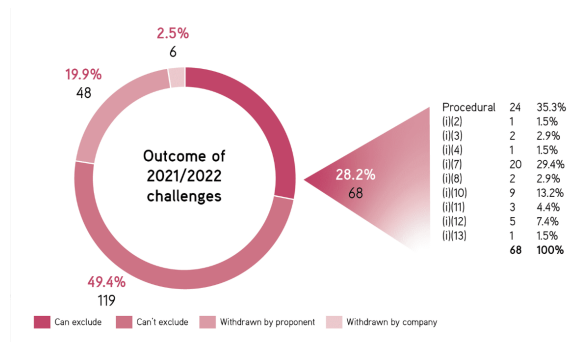
The SEC’s proposal would make it more difficult to exclude certain kinds of proposals.

Shareholder Proposals – Challenges to Inclusion

Outcome of 2022/2023 challenges



Outcome of 2021/2022 challenges



- Challenges were down year-over-year by 24%, from 241 to 184
- For those proposals that were challenged this season, the SEC allowed exclusions at a higher rate (46% v. 28%) and a greater number (85 v. 68)
- Procedural exclusions were up as a percentage of all exclusions (46% v. 35%) and in absolute number (39 v. 24)
- 14a-8(i)(7) "business process" exclusions were up as a percentage of all exclusions (35% v. 29%) and in absolute number (30 v. 20)
- The percentage of proposals withdrawn was in line with last season

Shareholder Proposals – Challenges to Inclusion

NCPPR sues the SEC in the Fifth Circuit (April 18, 2023)

- SEC allowed exclusion of NCPPR’s proposal submitted to Kroger
- Modelled after a 2019 CorVel proposal that the SEC ruled should be included
- Raised the potential risks associated with omitting “viewpoint” and “ideology” from its written equal employment opportunity (EEO) policy
- NCPPR argues:
 - viewpoint discrimination under the First Amendment
 - arbitrary and capricious agency action
 - action in excess of the SEC’s statutory authority under the Exchange Act
 - incorrect application of Rule 14a-8(i)(7)
- National Association of Manufacturers (“NAM”) has intervened, making broad First Amendment arguments against the 14a-8 process
- SEC motion to dismiss is pending
 - Is the SEC no-action letter an appealable final order?
 - Is this case moot because Kroger ultimately included NCPPR’s proposal?

Shareholder Proposals – Outcomes

2022-2023 Voting Results

Category	Total Submitted		Approved	Not Approved	Withdrawn	Success Rate
Business practices	16	2.5%	1	14	1	6.3%
Environment	90	14.0%	3	78	5	3.3%
Social	273	42.5%	5	228	10	1.8%
Governance	203	31.6%	19	161	3	9.4%
Executive comp	60	9.3%	2	52	2	3.3%
Total	642	100.0%	30	533	21	4.7%

2021-2022 Voting Results

Category	Total Submitted		Approved	Not Approved	Withdrawn	Success Rate
Business practices	36	6.3%	7	28	1	19.4%
Environment	65	11.3%	14	50	1	21.5%
Social	200	34.9%	17	179	4	8.5%
Governance	239	41.7%	41	195	3	17.2%
Executive comp	33	5.8%	5	26	2	15.2%
Total	573	100.0%	84	478	11	14.7%

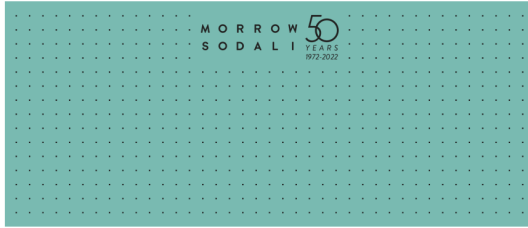
- More proposals this season; Social proposals up by 37%
- But fewer proposals are getting approved

Shareholder Proposals – Voting Outcomes

Season	Proposal type	Submitted	Approved	Not Approved	Withdrawn	Success Rate
Business practices						
2022-2023	Employment agreement concealment clauses	0	~	~	~	~
2021-2022	Employment agreement concealment clauses	8	4	4	0	50.0%
Environment						
2022-2023	Emission reduction	30	0	27	1	0.0%
2021-2022	Emission reduction	30	10	19	1	33.3%
Social						
2022-2023	Racial equity audit	16	0	14	2	0.0%
2021-2022	Racial equity audit	17	3	14	0	17.6%
Governance						
2022-2023	Special meeting-related	43	5	35	0	11.6%
2021-2022	Special meeting-related	107	10	97	0	9.3%
Executive comp						
2022-2023	Shareholder approval of termination pay	40	2	35	0	5.0%
2021-2022	Shareholder approval of termination pay	14	5	8	1	35.7%

- Shows a representative proposal type for each major category
- Shareholder support has dropped significantly for most proposal types

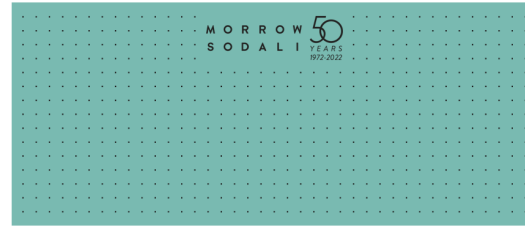
Trending Disclosures



2022-2023 Early Filers

DISCLOSURES IN ANNUAL REPORTS AND PROXY STATEMENTS
FOR SELECT NON-CALENDAR YEAR, FISCAL YEAR-END COMPANIES

Version 7.0 March 2, 2023



2023-2024 Early Filers PLUS

DISCLOSURES IN ANNUAL REPORTS AND PROXY STATEMENTS
FOR SELECT COMPANIES

Version 1.0 June ..., 2023

- Surveys of 10-K and DEF 14A disclosures by select public companies, which we send monthly to clients and friends
- About to launch for the 2023-2024 season
- Was focused on companies with non-calendar year FYEs, hence “Early Filers”
- Will now include 100 large companies with calendar-year FYEs, hence “Early Filers PLUS”
- Source for what follows

Trending Disclosures

10-Ks: September FYEs

COMPANY	INDUSTRY	10-K	BUSINESS	RISK FACTORS	MD&A	ESG	CYBER	HCM	ESG WEBSITE	SUSTAINABILITY REPORT
ACM	Aecom	Business Services	▷	▷	▷	▷	▷7	▷22	▷8	▷
APD	Air Products	Chemicals	▷	▷	▷	▷	▷8	▷14	▷9	▷
ABC	AmerisourceBergan	Health	▷	▷	▷	▷	▷24	▷22	▷6	▷
AAPL	Apple	Technology	▷	▷	▷	▷	▷14	▷11	▷4	▷
ARMK	Aramark	Business Services	▷	▷	▷	▷	▷6	▷20	▷7	▷
BOX	Becton Dickinson	Health	▷	▷	▷	▷	▷19	▷16	▷9	▷
DLB	Dolby	Technology	▷	▷	▷	▷	~	▷20	▷9	▷
DHI	D R Horton	Homebuilder	▷	▷	▷	▷	▷11	▷24	▷10	~
EMR	Emerson Electric	Technology	▷	▷1	▷9	▷17	▷8	▷12	▷8	▷
FICO	Fair Isaac	Business Services	▷	▷	▷	▷	▷	▷20	▷12	~
BEN	Franklin Resources	Financials	▷	▷	▷	▷	~	▷22	▷15	▷
HOLX	Hologic	Medical Devices	▷	▷	▷	▷	~	▷24	▷17	▷
JACK	Jack in the Box	Restaurants	▷	▷	▷	▷	▷12	▷19	▷6	~
JCI	Johnson Controls	Technology	▷	▷	▷	▷	▷17	▷14	▷8	▷
POST	Post Holdings	Food	▷	▷	▷	▷	▷22	▷30	▷12	▷
QCOM	Qualcomm	Technology	▷	▷	▷	▷	▷15	▷16	▷15	▷
RJF	Raymond James	Financials	▷	▷	▷	▷	▷31	▷21	▷10	▷
ROK	Rockwell	Industrials	▷	▷	▷	▷	▷10	▷8	▷19	▷
SBUX	Starbucks	Restaurants	▷	▷	▷	▷	▷19	▷14	▷2	▷
TSN	Tyson Foods	Food	▷	▷	▷	▷	▷5	▷10	▷6	▷
UGI	UGI	Energy	▷	▷	▷	▷	▷13	▷37	▷31	▷
V	Visa	Financials	▷	▷	▷	▷	▷13	▷26	▷12	▷
DIS	Walt Disney	Media	▷	▷	▷	▷	▷25	▷21	▷2	▷

- Covers evergreen sections such as Business, Risk Factors and MD&A
- Covers trending topics such as ESG, Cyber and HCM

Trending Disclosures

Annual Proxy Statements: September FYEs

COMPANY	INDUSTRY	PROXY STATEMENT	SUMMARY	CD&A	BOARD MATRIX	LEADERSHIP STRUCTURE	COMMITTEES	RISK OVERSIGHT	ESG
ACM	Aecom	Construction	▶	▶	▶	▶15	▶25	▶27	▶6
APD	Air Products	Chemicals	▶	▶	▶	▶9	▶	▶	▶
ABC	AmerisourceBergen	Health	▶	▶	▶	▶9	▶22	▶25	▶
AAPL	Apple	Technology	▶	▶	▶	▶12	▶	▶	▶
ARMK	Aramark	Business Services	▶	▶	▶	▶4	▶13	▶16	▶16
BOX	Becton Dickinson	Health	▶	▶	▶	▶23	▶	▶	▶31
DLB	Dalby	Technology	▶	▶	▶	~	▶20	▶19	~
DHI	D R Horton	Homebuilder	▶	▶	▶	▶	▶	▶	▶
EMR	Emerson Electric	Technology	▶	▶	▶	▶3	▶8	▶11	▶9
FICO	Fair Isaac	Business Services	▶	▶	▶	~	▶	▶	▶
FEN	Franklin Resources	Financials	▶	~	▶	▶	▶	▶	~
HOLX	Hologic	Medical Devices	▶	▶	▶	▶5	▶	▶	▶
JACK	Jack in the Box	Restaurants	▶	▶	▶	▶	▶	▶	▶
JCI	Johnson Controls	Technology	▶	▶	▶	▶6	▶41	▶33	▶31
POST	Post Holdings	Food	▶	▶	▶	▶16	▶	▶	▶
QCOM	Qualcomm	Technology	▶	▶	▶	▶	▶8	▶10	▶14
RJF	Raymond James	Financials	▶	▶	▶	▶	▶	▶	▶9
ROK	Rockwell	Industrials	▶	▶	▶	▶2	▶	▶	▶
SBUX	Starbucks	Restaurants	▶	▶	▶	▶9	▶	▶27	▶
TSN	Tyson Foods	Food	▶	▶	▶	▶iv	▶	▶	▶
UGI	UGI	Energy	▶	▶	▶	▶	▶	▶	▶4
V	Visa	Financials	▶	▶	▶	▶3	▶	▶	▶
DIS	Walt Disney	Media	▶	▶	▶	▶	▶	▶	▶

- Covers evergreen sections such as Summary, CD&A, Committees and Risk Oversight
- Covers trending topics such as Board Matrix, Leadership Structure and ESG

Pay vs. Performance

COMPANY

[American Electric Power](#)

[Bloomin' Brands](#)

[BoNY Mellon @83](#)

[Cincinnati Financial @67](#)

[Eli Lilly](#)

[Farmers & Merchants @44](#)

[IOVIA](#)

[Kimberly Clark](#)

[Owens Corning](#)

[Plus Therapeutics](#)

[Polaris](#)

[Rambus](#)

[Raytheon](#)

[Schlumberger](#)

[Servisfirst](#)

- SEC's disclosure rule on *Pay vs. Performance* is now in effect
- Here are examples of first filers
- SEC C&DIs (Feb 2023)
128D.01 through 128D.13
Interpretations 228D.01 and 228D.02
- Expanded coverage in *Early Filers PLUS*, and we'll track future developments

Trending Proxy Statement Disclosures: Board Leadership Structure

COMPANY	SEC 1	RESPONSE LETTER 1	SEC 2
Abbvie	▶	▶	▶
Adobe	▶	▶	▶
AMETEK	▶	▶	▶
Air Transport Services	▶	▶	▶
American Express	▶	▶	▶
Archrock	▶	▶	▶
AT&T	▶	▶	▶
Boston Properties	▶	▶	▶
Capital One	▶	▶	▶
Chesapeake Utilities	▶	▶	▶
Coca Cola	▶	▶	▶
Ebay	▶	▶	▶
Fidelity National	▶	▶	▶
Global Payments	▶	▶	▶
Humana	▶	▶	▶
IQVIA Holdings	▶	▶	▶
Lowe's	▶	▶	▶
Marten Transport	▶	▶	▶
MSCI	▶	▶	▶
PNC Financial	▶	▶	▶
Restaurant Brands	▶	▶	▶
ServiceNow	▶	▶	▶
Sherwin Williams	▶	▶	▶
Teladoc Health	▶	▶	▶
T Rowe Price	▶	▶	▶
Vertex Pharmaceuticals	▶	▶	▶
Warrior Met	▶	▶	▶

A sample of SEC comment letters and company responses.

"Please expand your discussion of the reasons you believe that your leadership structure is appropriate ..."

"Please expand upon the role that your Lead Independent Director plays in the leadership of the board. "

"Please expand upon how your board administers its risk oversight function."

Trending Proxy Statement Disclosures: Cybersecurity

COMPANY	INDUSTRY	DISCLOSURE	DIRECTOR SKILLS MATRIX	OVERSIGHT COMMITTEE
ADP	Business services	▷25	▷9	Audit
Apple	Tech	~	▷29	Audit
Applied Materials	Semiconductors	~	▷	Audit
Broadridge	Business services	▷39	~	Audit
Cardinal Health	Broadcom	▷30	~	Audit
Clorox	Household products	▷31	▷24	Audit
Coty	Beauty products	▷17	~	Special
FedEx	Freight	▷28	▷24	Cyber/Tech
Intuit	Software	▷	~	Audit
Jack in the Box	Restaurants	▷	~	Full board
KLA	Tech equipment	▷26	~	Audit
Lam Research	Tech equipment	▷16	▷3	Audit
Microsoft	Software	▷8	~	Full board
Oracle	Software	▷27	~	Audit (F&A)
Parker-Hannifin	Tech equipment	▷28	~	Full board
Paylocity	Software	~	▷22	Full board
Procter & Gamble	Household products	▷20	~	Audit
Qualcomm	Tech	▷	~	Audit
Starbucks	Restaurants	▷	~	Audit
Synaptics	Tech equipment	▷34	~	Audit
Sysco	Food	▷19	▷25	Technology
Tapestry	Apparel	▷16	▷22	Audit
Visa	Financial	▷	~	Audit
Walgreens Boots	Drug Stores	▷	~	Full board
Western Digital	Data storage	▷27	▷17	Audit

Insight into what companies are doing in advance of the SEC's rule proposal getting adopted.

Many are using their *Director Skills Matrix* to highlight board expertise as an alternative to designating a single expert.

Insight into the internal processes that companies are adopting for handling *cybersecurity incidents*.

We'll be adding sample 8-Ks disclosing *cybersecurity incidents*.

ESG Disclosures: SEC Comment Letters on 10-Ks

COMPANY	SEC 1	RESPONSE 1	SEC 2	RESPONSE 2	SEC 3	RESPONSE 3	SEC 4
Allele	▶	▶	▶	▶	▶	▶	▶
Dana	▶	▶	▶	▶	▶	▶	▶
Hawaiian Holdings	▶	▶	▶	▶	▶	▶	▶
Landstar System	▶	▶	▶	▶	▶		
Oneok	▶	▶	▶	▶	▶		
OGE Energy	▶	▶	▶	▶	▶		
Paccar	▶	▶	▶	▶	▶	▶	▶
A. O. Smith	▶	▶	▶	▶	▶		
Stericycle	▶	▶	▶	▶	▶	▶	▶
United Airlines	▶	▶	▶	▶	▶		
Whirlpool	▶	▶	▶	▶	▶	▶	▶

"We note that you provided more expansive disclosure in your Corporate Sustainability Report than you provided in your SEC filings ..."

ESG Disclosures: SEC Comment Letters on 10-Ks

"We note that you provided more expansive disclosure in your Corporate Sustainability Report than you provided in your SEC filings ..."

Letter	SEC	Hasbro
1	1-Jul	15-Jul
2	2-Aug	22-Aug
3	6-Sep	19-Sep
4	7-Oct	21-Oct
5	1-Nov	8-Nov
6	15-Nov	

Hasbro went through five rounds with the SEC..

We have direct links for "ESG" in our proxy statement and 10-K coverage..

ESG Disclosures: SEC Comment Letters on 10-Ks

COMPANY	SEC 1	RESPONSE LETTER 1	SEC 2	RESPONSE LETTER 2	SEC 3	RESPONSE LETTER 3	SEC 4	SUBSEQUENT 10-K
Dana	▶	▶	▶	▶	▶	▶	▶	▶
Philip Morris	▶	▶	▶	▶	▶			▶
Whirlpool	▶	▶	▶	▶	▶	▶	▶	▶
United Airlines	▶	▶	▶	▶	▶			▶

"Disclose the material effects of transition risks related to climate change that may affect your business, financial condition, and results of operations, such as market trends that may alter business opportunities, credit risks, or technological changes."

Inflation Disclosures

COMPANY	SEC 1	RESPONSE LETTER 1	SEC 2	SUBSEQUENT 10-K
Caterpillar	▶	▶	▶	▶
Deere	▶	▶	▶	▶
FedEx	▶	▶	▶	5/31 FYE
Thermo Fisher	▶	▶	▶	▶

“We note your disclosure that inflation could negatively affect your results of operations.In this regard, identify the types of inflationary pressures you are facing and how your business has been affected. In addition, please consider whether your disclosure about known trends and uncertainties in your MD&A should be also updated to account for inflationary trends.”

“please tell us specifically how supply chain issues have affected your cash flows, liquidity, capital resources, cash requirements, financial position, or results of operation and how you expect such issues to affect your business in the future. Please also elaborate on your mitigation efforts.”

Universal Proxy Cards

For proxy cards in contested director elections:

- Intended to replicate voting options available for in person voting at shareholder meetings
- Required formatting of proxies to neutrally identify and present management and dissident nominees
- Dissidents required to solicit at least 67% of voting power
- Parties will continue to file their own proxy statements

Notice requirements:

- Dissident notice 60 days before anniversary date of prior year's meeting
- Company notice 50 days prior to anniversary date of prior year's meeting
- Dissident proxy filing by later of 25 days prior to meeting and 5 days after company filing

Effective for shareholder meetings held after August 31st, 2022

Universal Proxy Cards (cont'd)

- Implemented by new Rule 14a-19(e)
- *Universal proxy cards* must include the names of both registrant and dissident nominees “and thus allow shareholders to vote by proxy in a manner that more closely resembles how they can vote in person at a shareholder meeting”
- [Final release 34-93596](#) (Nov 17, 2021) [Press release](#) [Fact Sheet](#)
- [Proposal release 34-79164](#) (Oct 26, 2016) [Fed Reg version](#) [Comment letters](#)

Universal Proxy Cards (cont'd)

Noteworthy examples so far:

- Apartment Investment and Management Company (NYSE: AIV)
Land & Buildings Investment Management, LLC
- Capital Returns Management, LLC's (CRM)
Argo Group International Holdings, Ltd. (Argo)

Alexandra Good



Ali counsels public companies and their boards of directors on matters relating to corporate governance and securities regulation. She specializes in advising clients on annual meeting and proxy-related issues, periodic reporting and disclosure requirements, Nasdaq and NYSE compliance, shareholder engagement, environmental, social, and governance (ESG), and executive compensation matters. Ali also has experience with public capital raising transactions and business combinations, including providing counsel to special purpose acquisition companies (SPACs) and target companies in “de-SPAC” transactions.

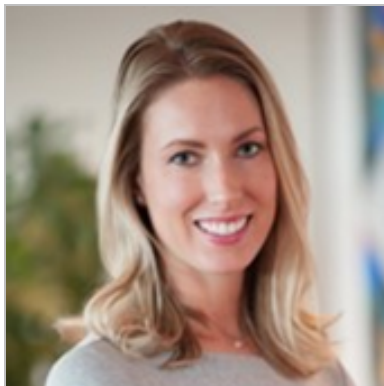
Ali is committed to keeping companies and their boards of directors up to date on the latest governance and disclosure issues and trends. In addition to regularly writing LawFlashes, she participates in the Morgan Lewis Public Company Academy by presenting on recent developments and hot topics.

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Celia focuses her practice on counseling public companies and their boards with respect to corporate governance, federal securities, stock exchange, shareholder engagement, and executive compensation matters. Drawing on her previous tenure as an attorney-advisor with the US Securities and Exchange Commission (SEC) in the Division of Corporation Finance, Celia has experience with securities disclosure issues that impact public companies' ongoing reporting obligations and proxy-related matters that impact public companies and their officers and directors. She also advises companies in connection with public capital raising transactions, including through IPOs, secondary offerings, and debt offerings. Celia currently serves as the deputy leader of the firm's capital markets and public companies practice and co-chairs the firm's environmental, social, and governance (ESG) and sustainable business team.

In keeping with Morgan Lewis's commitment to serving the public good, Celia serves as chair of the Pittsburgh office pro bono committee. Celia also is actively involved in the local arts community, including through her service on the board of directors of the Pittsburgh Opera.

A central tenet of Celia's practice is ensuring that companies and their boards are abreast of the latest disclosure, governance, and regulatory issues and trends. To this end, Celia often presents at events and webinars on topics relating to SEC initiatives and corporate governance and executive compensation hot topics and helps to lead the Morgan Lewis Public Company Academy.

While at the SEC, Celia received the 2011 Chairman's Award for Excellence, and was a member of the Rule 14a-8 Shareholder Proposal Taskforce.

Neil McCarthy



**Senior Director - Sales
Enablement & Business
Development
Morrow Sodali**

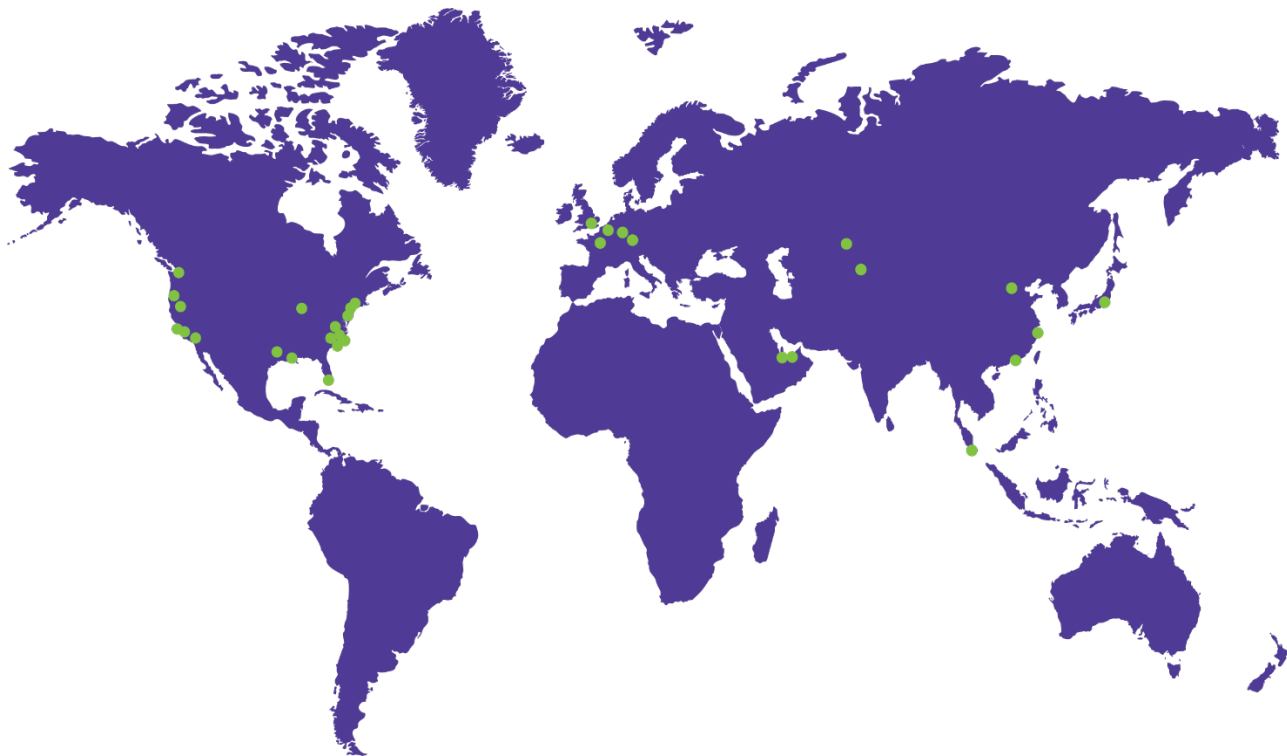
Neil McCarthy joined Morrow Sodali in 2022 as Senior Director, Sales Enablement & Business Development. Neil joined Morrow Sodali from Broadridge Financial Solutions, Inc. where, as the Senior Director, Disclosure Solutions, he developed and delivered educational programs expand awareness for their services to law firms. Prior to Broadridge, Neil was an M&A attorney at Skadden Arps, and an investment banker at Salomon Smith Barney and Bear Stearns. He also worked as an attorney for the US Treasury. He founded and built an information services firm for corporate lawyers, Lawyer Links, LLC, and has also served as legal counsel / corporate finance and M&A advisor to several start-up companies. Neil graduated from Harvard Law School and is an attorney in good standing in Massachusetts.

Our Global Reach

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Europe
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Middle East
North America

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