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2023 PROXY SEASON UPDATES

In this article, the authors provide a high-level overview of certain updates for the 2023 proxy season ranging from pay versus performance disclosure requirements to the SEC's new clawback rule.

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On December 6, 2022, we hosted Katten's annual proxy season program and, along with representatives of Ernst & Young LLP and Meridian Compensation Partners, shared updates for the 2023 proxy season. During the presentation, we provided an overview of various matters for registrants to consider during the 2023 proxy season, a number of which are briefly discussed below.

PAY VERSUS PERFORMANCE DISCLOSURE

During the 2023 proxy season, most companies will need to comply with the SEC's new requirements concerning pay versus performance disclosure in proxy statements. Effective October 11, 2022, for all proxy and information statements that require compensation disclosure for fiscal years ending on or after December 16, 2022, all filers (other than foreign private issuers, registered investment companies, and emerging growth companies)[1] are required to provide a table disclosing specified executive compensation and financial performance measures for the registrant's five most recently completed fiscal years.[2] The table is shown in the appendix.

In addition, each filer is required to clearly disclose in its proxy statement: (1) the relationships between each of the three financial performance measures included in the table and the executive compensation actually paid to its principal executive officer and, on average, to its other named executive officers; (2) the relationship between the filer's total shareholder return ("TSR") and its peer group's TSR, and (3) a list of three to seven financial performance measures that it has determined are its most important measures. In selecting a peer group to which to compare its TSR, an issuer may use its proxy-disclosed compensation peer group, an industry or line-of-business index, or companies used in the issuer's performance graph that is disclosed in its annual report. Filers may, but are not required to, include non-financial measures in the aforementioned list if those measures are considered to be among the three to seven "most important" measures.

BOARD DIVERSITY

In August 2021, Nasdaq adopted board diversity rules that, subject to specified exceptions and accommodations, generally require a Nasdaq-listed company to have (or explain why it does not have) at least two "diverse" members of its board of directors consisting of one director who self-identifies as female and one director who self-identifies as an "under-represented minority" or LGBTQ+.[3] Such companies

[1] Smaller reporting companies ("SRCs") are permitted to provide scaled disclosures and are only required to provide information for two years for the first required filing. After that, SRCs will be required to disclose three years of information.

[2] Only three years of disclosure is required in the first proxy statement in which such disclosure is required. In each of the two subsequent years, another year of disclosure is required.

[3] The SEC's order approving Nasdaq's board diversity rule can be found in Release No. 34-92590.

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