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2021 Proxy Season: Executive Compensation Considerations

The Covid-19 pandemic and related economic conditions have impacted executive compensation in a number of ways, and disclosure of these impacts is a salient issue for the 2021 annual proxy season. In addition to the myriad technical requirements governing annual proxy statements as set forth in Securities and Exchange Commission ("SEC") rules and guidance, proxy advisory firms such as Institutional Shareholder Services ("ISS") and Glass, Lewis & Co. ("Glass Lewis") have adopted frameworks for evaluating executive pay in the context of the pandemic. Companies should seek to ensure that their annual proxy statements comply with all applicable SEC requirements while also addressing the heightened scrutiny surrounding executive pay programs.

- ***Disclosing Adjustments to Annual Incentive Programs***. Mid-year adjustments to 2020 annual incentive plan performance metrics, measurement periods and payment thresholds will be analyzed closely, as will above-target payouts under revised programs. Companies should explain why the relevant adjustments were made (including how specific challenges rendered prior performance metrics stale) and should consider providing a comparison of resulting payouts with the payouts that would have applied under the original program design.

- ***Use of Discretion in Annual Incentive Determinations***. Compensation committees may apply positive discretion (for example, where poor financial performance resulted from circumstances beyond the executives' control) or negative discretion (for example, where actual performance results in above-target payouts that are inconsistent with other compensation reductions or layoffs/furloughs) to 2020 annual incentive payouts. Any exercise of discretion should be addressed in the Compensation Discussion and Analysis (the "CD&A"), and bonus payouts should be reported in the "bonus" column of the Summary Compensation Table (the "SCT") to the extent the application of discretion takes such awards out of the scope of "non-equity incentive plan compensation" pursuant to applicable SEC rules and guidance.

- ***Disclosing 2021 Developments***. Companies should consider whether changes to their 2021 incentive program designs influenced by their 2020 experiences and/or grants of supplemental equity awards made as part of their 2021 compensation programs affect a fair understanding of 2020 executive compensation and should therefore be discussed in the CD&A. In any event, companies are encouraged to disclose investor-friendly changes to plan design as compared to 2020; ISS has indicated that such changes may carry mitigating weight in its analysis of 2020 compensation. In addition, companies that have experienced a performance recovery in recent months may wish to discuss their recent performance results in the CD&A as Glass Lewis has indicated that a 2020 pay-for-performance disconnect may be mitigated if 2020 pay decisions are supported by post-year-end performance.

- ***Changes to In-Flight Long-Term Incentive Awards***. Given that long-term incentive awards are designed to reward performance over multi-year periods, ISS, Glass Lewis and investors may be more critical of mid-cycle changes to outstanding awards, including adjustments to applicable metrics or retroactive shortening of performance periods. Accordingly, it is important to provide a clear explanation of the rationale for such changes in the CD&A and to evaluate the need to disclose any associated incremental value for awards held by named executive officers in the SCT.

- ***Disclosing Impact of Salary Reductions***. It is advisable for companies that temporarily reduced executives' base salaries in 2020 to disclose how the temporary salary reductions were considered in 2020 annual incentive calculations.

- ***Perquisites Disclosure***. The SEC previously addressed whether benefits provided during the pandemic must be disclosed as perquisites in the SCT. The SEC reaffirmed that a benefit is not a perquisite if it is integrally and directly related to the performance of an executive's duties or otherwise generally available to all employees on a nondiscriminatory basis. Such determination is fact-specific, and while some benefits (such as enhanced work-from-home technology) may be integrally and directly related to performance of duties during the pandemic, other benefits (such as health-related or personal transportation benefits) may be perquisites unless provided on a nondiscriminatory basis to all employees.

- ***Disclosure of "Realized" or "Realizable" Pay***. Companies that granted supplemental awards or that chose to apply positive discretion to performance-based compensation payouts for 2020 may wish to include disclosure of the pandemic's impact on "realized" or "realizable" pay in the CD&A, which may be significantly lower than compensation as reported in the SCT, to provide relevant context for such decisions.

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