

2022 PROXY SEASON – MORE QUICK HITS

Jan 20, 2022

In our [November 2, 2021 blog post](#), we highlighted a number of considerations for the 2022 proxy season. Based on recent developments, the following are some additional items:

Review director independence determinations. On January 7, 2022, [Leaf Group Ltd.](#) agreed to a cease and desist order and \$325,000 penalty resulting from its failure to conduct an appropriate review of director independence, including by failing to send or collect independence questionnaires or having the board consider, discuss and make independence determinations. As a result, the SEC determined that the company's proxy and 8-K disclosures about director independence were materially misstated and that the company failed to maintain adequate disclosure controls and procedures with respect to independence.

Recommended practices companies may consider include:

- Requiring directors to complete independence questionnaires (typically as a part of annual D&O Questionnaires), following appropriate updating by counsel
- Coordinating with the accounting department to diligence any related person transactions
- Cross-checking disclosures by other public companies where an individual also serves as director
- Diligencing any appropriate items through web searches and/or querying the individual or his or her assistant or advisor
- Ensuring that any potential conflicts of interest or independence or other issues are presented to the board for consideration

Review controls and procedures for perquisites. As also noted in our [November 2, 2021 blog post](#), the SEC has recently brought a number of enforcement actions based on misleading disclosures about perquisites. To further underscore the point, in late November, [ProPetro Holding Corp.](#) and its [founder and former CEO](#) agreed to a cease and desist order and, in the case of the former CEO, a \$200,000 penalty, resulting from the company's failure to disclose (1) its payment of approximately \$400,000 of personal and travel expenses unrelated to the duties of the CEO, (2) its payment of

approximately \$50,000 in authorized but undisclosed perquisites and (3) two pledges of all of the CEO's shares of company stock in private real estate transactions. The expenses included \$250,000 in charges for travel on his personal aircraft and \$130,000 in personal charges on company credit cards. The SEC noted that the company did not have a formal policy for approval and use of private aircraft or a process for reimbursement of related expenses and that it had inadequate disclosure controls and procedures, including with respect to information elicited in D&O questionnaires. As a result, ProPetro's proxy statement materially understated the CEO's perquisites (and failed to disclose his pledge of shares in the beneficial ownership table).

Recommended practices companies may consider include:

- Adding or expanding perquisite questions in annual D&O Questionnaires
- Coordinating with the Compensation Committee and HR department to establish and enforce policies and procedures for approving perquisites
- Coordinating with the HR or Executive Compensation departments to document and track perquisites

Address new accounting guidance for "spring-loaded" equity awards. As discussed in our [December 3rd blog post](#), the SEC staff has issued [new guidance](#) for how companies should properly recognize and disclose compensation costs for "spring-loaded awards" made to executives, including considerations as to whether, in measuring compensation cost, to adjust market prices in light of material non-public good news to be announced shortly after the grant date. Companies should review their equity awards for potential application of the new guidance.

Continued SEC focus on climate change. As discussed in our [September 23, 2021 blog post](#), the SEC is placing increased focus on climate-related disclosures and released a sample comment letter to provide additional guidance on the application of its rules to climate change. More recently, and as reported by [Bloomberg Law](#), the SEC has issued climate-related comment letters to a number of issuers, resulting in additional risk disclosures regarding matters such as:

- Laws requiring commercial properties to comply with green building certification programs that may affect borrower ability to repay loans
- Extreme weather conditions that could delay customer payments, reducing the value of asset-backed securities
- Reputational issues arising from public perception about greenhouse gas emissions from products

Consider ISS and Glass Lewis updates. As discussed in our [January 18 blog post](#), ISS and Glass Lewis have issued their 2022 proxy season updates, with particular focus on board diversity and

board oversight of ESG matters.

Begin planning for universal proxies. As discussed in our [November 17 client alert](#), new universal proxy card rules will apply to proxy contests for shareholder meetings held after August 31, 2022 and proxy card voting option requirements will apply for shareholder meetings involving director elections held after the same date. New Rule 14a-5(e)(4) will require companies to disclose the deadline for notice by a dissident of a proxy contest solicitation for the company's next annual meeting. Although it may be unclear whether the rule will apply to the current proxy season, it is recommended that companies nonetheless disclose that deadline for the 2023 meeting in this year's proxy statement, even though that deadline would not override or supersede any advance notice bylaw requirements.

Covid considerations for shareholder proponents. On January 19, the SEC staff updated its [guidance](#) relating to conducting annual meetings in light of Covid concerns. With respect to presentation of shareholder proposals:

- The staff encourages issuers, to the extent feasible under state law, to provide shareholder proponents or their representatives with the ability to present their proposals through alternative means, such as by phone, during the 2022 proxy season
- If the proponent is not able to attend and present the proposal due to the inability to do so as a result of Covid considerations, the staff would consider this to be "good cause" under Rule 14a-8(h) should issuers seek to exclude a proposal pursuant to Rule 14a-8(h)(3)

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MEET THE TEAM



R. Randall Wang

St. Louis

randy.wang@bclplaw.com

+1 314 259 2149

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