

Annual proxy season: Are you ready for it?

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03:48

Video transcript



Jennifer Lennon (00:05): Thanksgiving is over, Taylor Swift has left the building, and holiday lights are going up, which can only mean one thing.

Ellie Kang (00:12): That's right, Jen. It's time for public companies to start preparing for the 2025 disclosure season.

Jennifer Lennon (00:20): So in this video, we'll be walking through some of the end-of-year considerations for public companies to consider to prepare themselves for success in the new year.

Ellie Kang (00:29): First, let's talk about equity plan maintenance. Public companies should think about whether their equity plans require any amendments that will be subject to shareholder or TSX approval.

Jennifer Lennon (00:41): And if that's the case, those amendments will need to be pre-cleared with the TSX. So public companies should ensure they have enough time to both amend the plan and prepare their circular disclosure to send the TSX well in advance.

Ellie Kang (00:55): That way, you will have a few weeks buffer before you need to finalize your circular. And also ensure that any amended or new plan satisfies the most recent guidelines from Glass Lewis and ISS, and give particular consideration to plan costs and dilution.

Jennifer Lennon (01:13): So finally, for issuers for cross-listed on any U.S. stock exchange must also ensure that they register shares that may be issued to U.S. residents by filing registration statement with the SEC.

Ellie Kang (01:26): Let's turn to the issue of executive share ownership guidelines. Increasingly, governments, groups and proxy advisory firms are recommending that executives meet their share ownership guidelines by holding shares instead of equity awards.

Jennifer Lennon (01:41): So this means that companies should encourage their executives to continually acquire shares, and they may want to consider adopting a DSU plan to assist executives to both accumulate shares as well as DSUs.

Ellie Kang (01:55): Alternatively, companies can require that a portion of any cash-settled equity awards must be used by the executives to buy shares in the open market until their share ownership targets have been satisfied.

Jennifer Lennon (02:09): So next, let's turn to say-on-pay proposals.

Ellie Kang (02:12): Many public companies conduct say-on-pay votes at their annual meetings to give shareholders an opportunity to vote on executive compensation.

Jennifer Lennon (02:22): Now, if a company receives less than an 80% approval of its say-on-pay vote, companies should really consider reaching out to shareholders to understand the reason behind the negative vote. Proxy circulars should also include some enhanced disclosures about any shareholder outreach activities, what concerns were raised and what the company is now doing to address those concerns.

Ellie Kang (02:44): Negative say-on-pay votes can impact shareholder votes for a company's compensation committee. So be proactive in addressing concerns about pay-for-performance misalignment and problematic pay practices in order to avoid surprises at the shareholder meeting. Jen, any final thoughts?

Jennifer Lennon (03:02): So now is a good time of year for companies to review their policies and mandates, including the clawback policies, to ensure they align with governance best practices. Another thing to think about is any changes to your named executive officer group, and consider in advance what changes that may implicate for your proxy circular disclosure.

Ellie Kang (03:24): Finally, review feedback from proxy advisory firms and governance bodies, and make sure you've addressed any concerns with your compensation programs, practices, and disclosure documents.

Jennifer Lennon (03:36): So, to learn more about positioning your company for the 2025 disclosure season, don't hesitate to reach out to any member of our team.

The 2025 proxy season is fast approaching, and public companies should prepare themselves well in advance. We offer the following checklist of certain year-end compensation considerations which can help public companies position themselves for success in the new year.

Item #1: Equity plan maintenance

Maintaining equity plans requires public companies to think ahead about whether the plan needs any amendments which would be subject to the approval of shareholders and/or the Toronto Stock Exchange (TSX). Draft the relevant amendments and proxy circular disclosure well in advance of finalizing the circular.

Key considerations

- Consider whether shareholder approval is required at the company's next annual general meeting. Do any equity plans require material amendments this year (for example, to increase the share reserve under the plan)—and if so, do TSX rules or the plan terms require shareholder approval? Are any evergreen equity plans due for shareholder approval? Are any new equity plans being adopted?
- Prepare draft amendments well in advance of pre-clearance requirements. Amendments to equity plans that require shareholder approval need to be pre-cleared by the TSX. Plan to provide draft amendments and the draft circular disclosure to the TSX as early as possible, at least a few weeks in advance of finalizing the circular.
- Ensure that any new or amended plan requiring shareholder approval satisfies the most recent guidelines from proxy advisory firms Glass Lewis and ISS, so they do not recommend that shareholders vote against the plan. Among other things, Glass Lewis and ISS give particular consideration to plan cost and dilution when making their voting recommendations.
- Issuers cross-listed on a U.S. stock exchange must also register any shares that may be issued to U.S. residents by filing a registration statement with the U.S. Securities and Exchange Commission. Supplemental listing applications may also be required for any U.S. stock exchange on which the company is listed.
- Companies should ensure that any plan under which U.S. participants are eligible to receive awards complies with or is exempt from applicable U.S. deferred compensation rules and complies with U.S. securities laws.

Item #2: Executive share ownership guidelines

There has been increasing focus among governance groups and proxy advisory firms on executives meeting their share ownership guidelines by holding shares rather than equity awards. Their view is that unvested or unearned awards (such as Performance Share Units and, in certain cases, Restricted Share Units) and stock options should generally not be counted for purposes of determining whether executives have met their ownership guidelines, but traditional Deferred Share Units (DSUs) can be counted.

Key considerations

- Executives should focus on continually building ownership of shares. To encourage this, companies could consider establishing an executive DSU plan or requiring that a portion of any cash-settled equity awards be used by executives to buy shares in the open market until the share ownership targets have been satisfied.
- Be consistent in the valuation method for equity incentives by picking either current value or acquisition price and using it throughout disclosures, irrespective of whether the chosen method results in the highest valuation.
- Consider disclosing the CEO's executive share ownership relative to total direct compensation in addition to the applicable share ownership guideline.
- Consider whether updates should be made to the executive share ownership policy.

Companies can address some of these concerns through disclosure rather than a formal change to policies, for example by disclosing the value of common shares, DSUs and other equity awards held by each executive by separate category rather than on an aggregated basis.

Item #3: Say-on-pay

Many public companies conduct say-on-pay votes at their annual meetings to give shareholders an opportunity to vote on executive compensation. Proxy advisory firms and other governance bodies expect a board response if a company receives approval of its say-on-pay resolution from less than 80% of voting shareholders.

Key considerations

- If a company receives less than 80% approval of its say-on-pay vote, conduct shareholder outreach to understand the reasons for the negative vote. Proxy circulars should also include enhanced disclosure about how the company has engaged with shareholders to address executive compensation, what concerns were raised and what specific actions the company has taken to address these concerns. It is advisable to begin considering what disclosure the company will provide in its next circular to address the prior year's say-on-pay vote.
- Negative say-on-pay recommendations and votes can also impact shareholder votes for the chair and other members of the issuer's compensation committee. If there is concern about pay for performance misalignment, large one-time grants, significant increases or anomalies in named executive officer pay or other problematic pay practices, issuers should begin working on their disclosure to explain the reason for such occurrences and consider whether proactive shareholder engagement would be prudent to avoid surprises at the shareholder meetings.

Final considerations

- Review clawback policies and consider updates to align with best practices.
- Review other company policies, mandates and delegations of authority, and consider appropriate updates.
- Assess potential changes to the named executive officer group and consider any disclosure implications associated with those changes.
- Ensure deadlines for annual elections for DSU and other plans are appropriately managed.
- Review any feedback received from Glass Lewis, ISS, shareholders and other governance bodies over the past year and consider if and how to address concerns with your compensation programs, practices and/or disclosure documents.
- Consider whether any U.S. compensation disclosure requirements or governance best practices should be incorporated into annual disclosures on a voluntary basis.

To discuss these issues, please contact the author(s).

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

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