



## Practical Considerations for Preparing Your 2015 CD&A

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- **Compliance with SEC requirements.** Although the trend among companies is to make the CD&A into more of a “sales pitch” that can be persuasive to shareholders, companies should remember that the primary purpose of the CD&A is to present disclosure mandated by the Securities and Exchange Commission (SEC), which will be incorporated by reference into the Form 10-K and indirectly into certain registration statements. Companies should remember first and foremost to be mindful of required disclosures and reporting principles.
- **Executive Summary.** The use of executive summaries has become the norm for companies, in part, because it is an effective way to make a clear argument for the appropriateness of the executive compensation program. However, companies should remember to be concise and consistent with the rest of the document. The executive summary should provide an accurate preview of what will follow in the CD&A.
- **Compliance with Non-GAAP Rules.** If non-GAAP financial measures are going to be used in the executive summary or the CD&A, companies must remember to comply with Regulation G and Item 10(e) of Regulation S-K. Although the SEC provides some relief from Regulation G and Item 10(e) with respect to the use of non-GAAP financial measures that are performance target levels, companies will otherwise need to fully comply with Regulation G and Item 10(e) if non-GAAP financial information is included in the CD&A for other purposes. Companies typically provide reconciliations either in an annex to the proxy statement or, if a reconciliation is provided in the company’s Annual Report on Form 10-K that is incorporating by reference the proxy statement’s

Item 402 disclosure as part of its Part III information, by providing a prominent cross reference to the relevant pages of the Form 10-K.

- **Plain English.** As companies consider making enhancements to the CD&A, companies should remember to consider the plain English rules. Keep the target audience in mind when explaining complicated incentive compensation arrangements and avoid unnecessary duplicative disclosures.
- **Comfortable Performance Precedent.** During years in which a company's performance is very strong, it is tempting to supplement the CD&A with additional performance metrics that present performance and compensation levels in a positive light. However, companies should exercise caution, because whenever the CD&A is expanded to provide additional performance metrics or information, an expectation is created that such information is therefore material and will continue to be provided in future periods. If this information is not essential to meeting CD&A disclosure obligations, companies may regret having included such additional information and setting such a presentation precedent if performance and compensation levels diverge in future periods.
- **Avoid Lists of Best and Worst Pay Practices.** Best and worst compensation practices change and evolve over time, so be careful about what is labeled as a "best" or "worst" practice in the CD&A. For example, benchmarking was once a common practice used by many companies to set executive compensation, but it has recently come under scrutiny as a means for targeting compensation percentiles that could "ratchet up" total compensation. In addition, a company's specific situation may change in the future, and it may become beneficial to use certain "bad" practices to achieve certain results. For example, if a company labels perquisites such as golf club memberships, car leases or aircraft use as a bad practice, such company should be certain that it would never consider using such incentives to entice a crucial hire to join the company in the future.
- **Use of Graphics and Charts.** Many companies are now using graphics and charts in the CD&A to present visual disclosures of certain information. Graphics can sometimes be especially prone to many of the potential precedent pitfalls discussed above, as a company's circumstances can change from year to year and cause a "good" graphic in one year to become a "bad" graphic in subsequent years. Charts and graphics should be used, however, where they can enhance disclosures or increase a reader's understanding of the information being presented.

In light of the increased attention being paid to CD&A disclosures, companies should strive to keep up with current trends and market expectations for disclosures regarding executive compensation, while also maintaining complete and accurate disclosures in compliance with SEC regulations. As companies consider whether and how to implement evolving CD&A presentation practices, the foregoing factors should be considered in an effort to draft CD&A disclosures that are both appropriate for the particular company and compliant with applicable securities laws.

## Categories

Corporate Governance

Compliance

Executive Compensation

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