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PROXY SEASON

Five Mistakes Made with Preliminary Proxy Statements

By Broc Romanek

A preliminary proxy statement is a draft of the proxy that is filed with the Securities and Exchange Commission (SEC), in certain specified circumstances as required by an SEC rule, before the final, known as the "definitive" version, is filed. Here is something that can be called a niche area that you'll bump up against every so often if you deal with proxies regularly—the need to file a preliminary version of your proxy with the SEC before you can file the final definitive version and start delivering it. This is an important area to know because it can really screw up the timing of when you're allowed to deliver your proxy to shareholders.

Rule 14a-6(a) is worded so that all proxies are required to be filed in preliminary form unless the matters on your ballot fall within the eight carve outs listed in the rule. As it happens, the carve outs include many of the items that typically are on a ballot: director elections, ratification or approval of auditors, shareholder proposals, say on pay and say on frequency, and approval of employee equity plans or amendments (except for specific awards).

Then, beyond these eight carve outs, the Corp Fin Staff has issued a few interpretations to create carve outs beyond the rule. That said, there are plenty of circumstances that do trigger the need to file a proxy: charter amendments, an increase in authorized shares, specific awards under an equity plan, changing the company's name, and proxy contests.

Broc Romanek *is editor of* Cooley's TheGovernanceBeat.com *and* Insights.

Following are five mistakes related to preliminary proxy statements that are sometimes made (and a bonus note).

1. Forgetting Corp Fin May Delay a Proxy for Weeks

Rule 14a-6(a) states that a preliminary proxy statement must be filed at least 10 calendar days before the filing of the definitive proxy statement. The purpose of this 10-day period is to give the Corp Fin Staff a chance to screen the preliminary proxy statement and determine if it will review the filing. If the filing is indeed pulled for review, the Staff will likely issue written comments, in the form of a letter, that results in some back and forth. That takes time and can really screw up a tight timeline to get your proxies delivered timely before the annual shareholders meeting is held.

Not all preliminary proxies are selected for review, but they almost always are for proxy contests or a deal to go private. The date of filing the preliminary proxy with the SEC is considered day one if submitted on or before 5:30 pm ET. If the end of the 10-day review period ends on a weekend or a holiday, the company can file the definitive proxy as soon as EDGAR opens for the week. So, if you file on a Friday, two weekends will fall within your 10-day waiting period.

You can call the Corp Fin Staff to request early termination of this 10-day period if you're in a timing bind. Have your persuasive arguments ready—tight deadlines may be enough. The good news is, if you call and they tell you it won't be reviewed, you're good to go. You can file your definitive proxy and deliver.

If you file a preliminary proxy and you have not heard from the Staff within 10 calendar days from the date of your filing, you are free to print and mail at that point. You don't have to call the Staff to confirm that you're clear. It's sort of a strange process—you're clear if you don't hear anything from the Staff.

Some people still call the Staff, even though they don't need to. Some folks just like to be sure. If you do call the SEC, instead of telling you they're not going to review, they almost always say: "If you don't hear from us in 10 days, you are free to print and mail." So, you're not likely to hear some golden words from an SEC staffer, even though the language in Rule 14(a)-6(a) states, "or such shorter period … upon a showing of good cause."

Here's the bummer. If your preliminary proxy is picked for review, your timeline for printing and mailing your proxy can be affected. A Corp Fin review can last anywhere from 10 days to several weeks. So, you need to assume it's picked for review and build that into your T&R schedule. You may need to file a revised preliminary proxy to clear comments before you even file your definitive depending on the severity of the Staff's comments. The Staff will guide you here; you don't have to guess how severe their comments are. If you do file a revised proxy, provide a redlined version to the Staff to facilitate their review and get clearance as soon as possible.

Although the proxy rules don't require that the SEC officially "approve" or "clear" the preliminary proxy, you want to wait to file a definitive proxy until the Staff has indicated that it has no more comments. Some staffers take it personally if a company files the definitive before the preliminary is cleared. I know I did the one time that happened to me when I was on the Staff.

The upshot here is that if you know your ballot will include one or more items that trigger the need to file a preliminary proxy, you really do need to adjust your T&R so that you file this thing weeks before you intend to delivery your proxy to shareholders. Note 2 to Rule 14a-(6)(a) urges you to file the proxy on the "earliest practicable date." This is easier said than done for sure, because there often isn't that type of wiggle room in your schedule. But you "gotta do what you gotta do."

2. Filing a Revised Preliminary for Immaterial Changes

Note 1 to Rule 14a-6(a) requires companies filing a revised preliminary proxy retrigger the 10-day waiting period if the revised filing contains material revisions or a material new proposal that constitutes a "fundamental change." These are terms for which there is not much SEC Staff guidance; it's a facts and circumstances determination. Calling the Staff to ask if revisions are "material" or your new proposal is a "fundamental change" is a waste of time. They don't weigh in on that—you know your circumstances better than they do.

If the revised preliminary proxy contains an additional proposal that would not, on its own, have required a preliminary filing, such as an amendment to an equity compensation plan, there is a good argument that it's not a fundamental change. Sometimes companies file a preliminary proxy due to "Proposal A," but before the definitive proxy is filed, they decide to take action on a matter unrelated to Proposal A that results in changing the disclosure elsewhere in the proxy.

Some companies decide to do this update in the definitive proxy and don't file revised preliminary materials. They want to avoid resetting the 10-day clock, and do so under the argument that the presence of the new information doesn't trigger a requirement to file a preliminary proxy.

Because the Corp Fin Staff has broad discretion to decide what it wants to review and comment upon about once you file a preliminary proxy, it can be dicey to think you can assume that the information you change or add isn't going to be relevant to the Staff just because that information doesn't have anything to do with the proposal that triggered the preliminary filing in the first place.

But I do think this happens more often than not in practice because time is almost always tight and you don't have an extra 10 days to spare.

3. Filing for Shareholder Proposals

Rule 14a-6(a)(3) states that a preliminary proxy is not required due to the inclusion of a Rule 14a-8 shareholder proposal in the proxy—it is one of the carve outs. This is true even if the shareholder proposal is asking the company to declassify the board, which would require an amendment of the company's articles to effectuate, because the declassification proposal is merely precatory, it's advisory.

But if the company includes its own declassification proposal, it's a management proposal, not a shareholder proposal, even if it's worded the exact same way as a shareholder's proposal that it received, it would no longer be carved out.

4. Leaving Too Much Blank

Back in my early law firm days, an associate left so much of a preliminary proxy statement blank that the Staff kicked it back, saying it was so incomplete that it could not be considered a legitimate filing. It's very rare that the Staff makes that kind of ruling, and the associate got in big trouble. As he should have!

Although preliminary proxies are supposed to be preliminary and not final, the SEC Staff will not consider one to be "complete" and decide whether to review it unless nearly all of the required content is included. The Staff will tolerate only a few missing blanks: the date of the proxy statement and perhaps the number of holders as of the record date. Everything else should be completed.

So, it might not be quite final on your end, maybe you have a few small minor tweaks to make. But it should be pretty close to final—and definitely look final to the SEC. Remember that when you file a preliminary proxy, it's a publicly available document. It's on EDGAR, and the world can review it. It shows up in your filing stream on EDGAR as "PRE 14A"; the final proxy shows up as "DEF 14A."

5. Forgetting to File a Proxy Card or Forgetting To Mark the Preliminary Proxy and Proxy Card As "Preliminary"

A common mistake is forgetting to file a form of proxy card with the preliminary proxy. It's easy to forget filing this with the definitive proxy as it is, but doubly easy to forget when filing the proxy in preliminary form. Rule 14a-6(a) requires the filing of both the proxy statement and the form of proxy.

On the other hand, you don't have to file a preliminary "Notice of Internet Availability of Proxy Materials" as "additional soliciting materials" or as part of the filing of the preliminary proxy because the e-proxy rule, the Notice and Access rule (Rule 14a-16), is triggered by the distribution of proxy materials.

You do still have to file this notice as additional soliciting materials before you file the definitive proxy though, so you can deliver that before you deliver the final proxy to shareholders.

The other thing to not forget is to mark your preliminary proxy statement, as well as the related form of proxy, as "preliminary." Rule 14a-6(e)(1) notes that all copies of preliminary proxies and forms of proxies should be clearly marked as "Preliminary Copies."

Bonus: Including a Cover Letter

This is really not a mistake, so I didn't count it toward the five listed here—more of a waste of time. When filing a preliminary proxy on EDGAR, some people include a cover letter to the SEC. They do this to argue that the ballot doesn't include anything that should trigger a review, even though there is something on the ballot that triggered the need to file a proxy.

Don't bother. It really won't help the Corp Fin Staff to decide whether to select the filing for review—they do their own independent analysis. Funny enough, Note 4 to Rule 14a-6(a) includes a reference to a cover letter for when a preliminary proxy is filed because it mentions an ongoing proxy

contest. Proxy contests are truly a different beast, and this note is in the rule to help flag the fact there is one for the Staff.

So, you do use cover letters for proxy contests, and quite often, those filings will be pulled for review by the Corp Fin Staff. Proxy contests are "solicitations in opposition" as defined in Note 3.

One last point is that some people send the Staff a markup of a preliminary proxy statement when they file a definitive proxy statement as a courtesy. That's an old habit from days gone by and not necessary anymore since the Staff has easy access to digital copies and can run their own comparison if they want.

Shareholder Engagement: Is the Power of Proxy Advisors and Institutional Investors Shifting?

By Lillian Tsu and Shuangjun Wang

Proxy advisory firms—principally ISS and Glass Lewis—and large institutional investors, such as Blackrock, Vanguard, State Street and Fidelity, have long played a central role in shaping shareholder voting outcomes at US public companies.

Historically, for a significant portion of US public company shares, especially retail holders and mutual fund and exchange-traded funds (ETF) investors, shareholder voting decisions are not made by the beneficial owners of the stock, but rather their investment advisers, who often follow the voting recommendations of proxy advisory firms and may use the voting principles of large institutional investors as guidance.

Recent backlash targeting proxy advisory firms and large institutional investors, such as the executive order issued by President Trump in December 2025, as well as a litany of committee hearings in the House of Representatives scrutinizing the influence and power of proxy advisory firms and various state Attorneys General investigations and lawsuits against ISS and Glass Lewis may result in a shift in how voting decisions may be made going forward.

Lillian Tsu *and* **Shuangjun Wang** *are partners of Cleary Gottlieb Steen & Hamilton LLP.*

Against the backdrop of these developments, the key question for US public companies and their boards is: Who will be driving voting outcomes—and how should companies respond?

The Traditional Framework

ISS and Glass Lewis have historically dominated the proxy advisory industry: according to statements made at a hearing before the Subcommittee on Capital Markets of the Committee on Financial Services of the House of Representatives on April 29, 2025 (the April Committee Hearing), ISS and Glass Lewis collectively "control 97 percent of the proxy advisory market."[1] Their voting recommendations have had significant influence over shareholder voting decisions in connection with director elections, say-on-pay advisory proposals, shareholder proposals and contested matters. They are viewed as a primary input for many institutional investors, which own an overwhelming majority of outstanding shares of publicly traded companies in the United States and have significantly higher rates of voting participation than their retail investor counterparts.[2] According to statements made at the April Committee Hearing, "when ISS or Glass Lewis recommend voting against a director, their clients are over 30 percent more likely to follow suit than

nonclients." Furthermore, according to a sample of voting records from 2017:

> 95 percent of institutional investors vote in favor of a company's "say on pay" proposal when ISS recommends a favorable vote while only 68 percent vote in favor when ISS is opposed (a difference of 27 percent). Similarly, equity plan proposals receive 17 percent more votes in favor; uncontested director elections receive 18 percent more votes in favor; and proxy contests 73 percent more votes in favors when ISS also supports a measure. . . . Glass Lewis favorable votes are associated with 16 percent, 12 percent, and 64 percent increases in institutional investor support for say on pay, equity plan, and proxy contest ballot measures. Furthermore, some individual funds vote in near lock-step with ISS and Glass Lewis recommendations, correlations that suggest that the influence of these firms is substantial.[3]

As a result of their influence over voting outcomes for proposals presented at a shareholder meeting, ISS's and Glass Lewis' voting guidelines and principles have had lasting impacts on public company governance profiles, as companies regularly tailor their governance decisions after considering how ISS and Glass Lewis may view such decisions.

What Is Changing?

Scrutiny of proxy advisory firms is not new and has been contentious. The Securities and Exchange Commission's (SEC) attention on proxy advisory firms and related regulatory oversight has been building for the past two decades, culminating in rules and interpretive guidance published in July 2020 that imposed moderate additional requirements on proxy advisory firms.[4] This guidance was later vacated by the US Court of Appeals for the DC Circuit affirming a lower court's decision in July 2025. More recently, scrutiny over the influence of proxy advisory firms has moved from the SEC to the executive and legislative branches of the US federal government—and with it, we are seeing reactionary changes from proxy advisory firms, institutional investors and companies alike.

Executive Orders

On December 11, 2025, President Trump issued an Executive Order, "Protecting American Investors From Foreign-Owned and Politically Motivated Proxy Advisors," to "increase oversight of and take action to restore public confidence in the proxy advisor industry, including by promoting accountability, transparency, and competition."[5] The Executive Order mandates the Chairman of the SEC to "review all rules, regulations, guidance, bulletins and memoranda relating to proxy advisors . . . and consider revising or rescinding . . . [any] that are inconsistent with the purpose of th[e] order, especially to the extent that they implicate 'diversity, equity, and inclusion' and 'environmental, social, and governance' policies."

The Executive Order follows a series of committee hearings in the House of Representatives that have heightened scrutiny on proxy advisors, including the April Committee Hearing, which described ISS and Glass Lewis as "the proxy advisory cartel" and was intended "to shine a light on how the proxy of [sic] process is functioning and, in many ways, failing today's markets."

Investigations and Lawsuits

Various state Attorneys General, including from Texas, Florida, and Missouri, have initiated investigations, launched enforcement actions and filed lawsuits against ISS and Glass Lewis, alleging that the proxy advisory firms have been misleading investors by pushing environmental, social, and governance (ESG) and diversity, equity, and inclusion (DEI) agendas instead of basing voting recommendations on impartial factors relating to financial performance and principles.[6]

ISS and Glass Lewis also have been facing antitrust/regulatory pressure as the US Federal Trade Commission (FTC) is investigating them for potential antitrust concerns—namely whether their dominant market positions and their influence over shareholder votes constitute anti-competitive behavior. Of particular concern to the FTC are conflicts of interest where a firm might both (1) advise a company's shareholders on how to vote, and (2) simultaneously provide consulting services to the company (for example, say-on-pay, equity plans)—raising "pay-to-play" or vote-influence issues.

Policies and Business Model Changes

ISS, Glass Lewis, and certain institutional investors recently have pared back their voting principles and guidelines relating to ESG shareholder proposals and DEI proposals in response to the current political climate. For example, in response to President Trump's executive order, "Ending Radical and Wasteful Government DEI Programs and Preferencing," from January 20, 2025, and to the rise of anti-ESG shareholder proposals in recent years, these firms and institutional investors have changed previous brightline guidelines to more nuanced case-by-case analyses on many ESG and DEI related proposals.

Furthermore, business model changes are underway for proxy advisor services, driven by a mix of factors, including investor demand for tailored voting strategies, regulatory/legislative scrutiny of the proxy advisor model over recent years and profit incentives (the ability to command premium pricing for customized reports). For example, Glass Lewis is moving away from its longstanding "benchmark" or "house policy" voting recommendation model. Starting in 2027, it will offer customizable perspectives (for example, management-oriented, governance-oriented, activism-oriented, sustainability-oriented) instead of a one-size-fits-all recommendation. We expect the business model and custom services to continue to evolve, with many mechanical details still to come. For example, ISS already has introduced services (for example, Gov360, Custom Lens) that decouple pure voting recommendations from its research, shifting toward more customizable client offerings rather than default advice.

Institutional Investor Voting Practices and Engagement

In recent years, institutional investors such as Blackrock and Vanguard have expanded their in-house governance and stewardship teams. Where historically voting guidelines and recommendations came from ISS and Glass Lewis, many institutional investors now have their own voting guidelines and are becoming less reliant on and more skeptical of proxy advisor recommendations.

Taking this one step further, on January 7, 2026, JPMorgan Chase's asset management unit announced that it would be "cutting all ties with proxy advisory firms, effective immediately" and is purported to be "the first large investment firm to entirely stop using external proxy advisors."[7] JPMorgan's asset management unit is one of the largest investment firms in the world, with more than $7 trillion in client assets, and previously had stopped using proxy advisors for voting recommendations in favor of using its own internal stewardship team.

In tandem with investors becoming more sophisticated and evaluating proposals on their own merits instead of fully relying on ISS and Glass Lewis for recommendations, companies are increasing direct shareholder engagement off-season and in proxy season with institutional and key investors. The increase in shareholder engagement has resulted in enhanced governance and compensation disclosure, as well as higher rates of withdrawn shareholder proposals during the proxy season.

The Influence of Proxy Advisors Is Evolving, Not Disappearing

For all the reasons noted above, the market has seen reduced automatic reliance on proxy advisor recommendations, and a growing divergence between

proxy advisor recommendations and investor voting outcomes. In recent years, there has been a greater emphasis on a company's shareholder engagement history and responsiveness to shareholder feedback in the evaluation of whether to vote with management.

On the other hand, while proxy voting recommendations may not be as influential as they once were, ISS and Glass Lewis continue to be relevant as sophisticated research tools for their clients. Their new products and business strategies, as discussed above, focus on customizable research support and resources, rather than on strict voting recommendations. Over time, we expect that proxy advisors will become one data point for consideration in investors' evaluations of proposals instead of the final decisionmaker.

Key Takeaways for US Public Companies and Boards

With this evolution, individual company shareholder engagement will become more crucial in persuading shareholders to support the recommendations of management and work with the company on governance and other changes that stakeholders believe to be beneficial. In fact, shareholder engagement should be considered by US public companies as a core governance function, and engagement strategies should keep in mind that proactive engagement can shape voting outcomes before the proxy season even begins. Shareholders may request engagement with members of the board in certain circumstances, and we may see directors playing a more visible role in shareholder dialogue going forward.

Investors have differing priorities, policies, and decisionmaking frameworks, and they are increasingly exercising greater independent judgment. As such, a company's engagement strategies should focus on key holders, not just proxy advisors, and disclosure and engagement presentations should be customized to focus on key issues for individual investors, including retail investors. Companies that invest in thoughtful, credible engagement will be better positioned for the proxy season, instead of solely relying on shaping their governance and other practices around one-size-fits-all voting recommendations of proxy advisors.

Notes

1. House Financial Services Committee, "Exposing the Proxy Advisory Cartel: How ISS & Glass Lewis Influence Markets" (April 29, 2025).
2. *See* David F. Larcker, Brian Tayan and James R. Copland, "The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry" (June 14, 2018).
3. *Id.*
4. For more information, see our July 2020 alert memo at *https://www.clearygottlieb.com/news-and-insights/publication-listing/the-sec-takes-action-on-proxy-advisory-firms*.
5. The White House, "Protecting American Investors From Foreign-Owned and Politically Motivated Proxy Advisors" (December 11, 2025).
6. *See* Ken Paxton, Attorney General of Texas, "Attorney General Ken Paxton Investigates Proxy Advisors Glass Lewis and ISS for Misleading Public Companies to Push Radical Agenda" (September 16, 2025); James Uthmeier, Attorney General of Florida, "Attorney General James Uthmeier Sues Proxy Advisory Giants for Deceiving Investors and Manipulating Corporate Governance" (November 20, 2025); Missouri Attorney General, "Attorney General Bailey Leads Fight Against Hidden ESG And DEI Agendas In Corporate America" (July 11, 2025).
7. Jack Pitcher, "JPMorgan Cuts All Ties With Proxy Advisers in Industry First," *Wall Street Journal* (January 7, 2026), available at *https://www.wsj.com/finance/banking/jpmorgan-cuts-all-ties-with-proxy-advisers-in-industry-first-78c43d5f*.

NEVADA LAW

Nevada Supreme Court Finds Knowing Violation of Regulations May Constitute Breach of Fiduciary Duty

By Sean Donahue

In *State Comm'r of Ins. v. Chur (Chur II)*,[1] the Nevada Supreme Court found that a knowing violation of administrative regulations may constitute a knowing violation of law under NRS 78.138(7)(b)(2). NRS 78.138(7) provides that a director is not individually liable to the corporation or its stockholders for any damages unless:

a. the presumption of the business judgment rule in 78.138(3) has been rebutted; and
b. it is proven that:
    1. the director's act or failure to act constituted a breach of his or her fiduciary duties as a director; and
    2. such breach involved intentional misconduct, fraud or *a knowing violation of law*.

In this case, the court acknowledged that a violation of administrative regulations may constitute violations of law under NRS 78.138(7)(b)(2) if it is proved that the directors violated the regulations knowingly.

Overview of the Court's Decision

This case arose from a lawsuit brought by the Commissioner of Insurance for the State of Nevada in its capacity as a receiver against directors of an insurance company. The directors were dismissed as defendants by the district court when the court denied the commissioner's motion for leave to amend the complaint. The commissioner sought leave to amend due to a change in law resulting from the court's decision in *Chur v. Eighth Judicial Dist. Court of Nev.* (*Chur I*).[2] *Chur I* changed the law regarding pleading standards for tort claims against directors. In *Chur II*, the court held that the district court abused its discretion in denying the commissioner's motion for leave to amend where an intervening decision by the court in *Chur I* changed the law.

In *Chur I,* the court held that directors cannot be held personally liable for gross negligence in the performance of their fiduciary duties. Personal liability may arise only from intentional misconduct, fraud or a knowing violation of law. Because the commissioner had only pleaded gross negligence in *Chur I,* the court directed the district court to grant the directors' motion for judgment on the pleadings resulting in their dismissal from the case. The court deferred to the district court whether to grant the commissioner leave to amend the complaint. As discussed above, the commissioner filed a motion for leave to amend the complaint.

The amended complaint alleged that the directors breached their fiduciary duties and that the business judgment rule did not protect those breaches. The commissioner asserted that the breaches involved intentional and knowing misconduct and/or knowing violations of law. The commissioner alleged that the conduct of the directors violated several Nevada statutes and regulations causing substantial damages. As discussed above, the district court denied the commissioner's motion for leave to amend.

In *Chur II,* the court held that leave to file an amended complaint should have been granted in

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light of the change in law pronounced in *Chur I*. It indicated that *Chur I* effected a material change in the law and that the district court should have permitted the amendment. The court concluded that the commissioner's proposed amended complaint was not futile because it sought to plead a permissible claim of intentional misconduct, where the previous complaint did not plead the breach of fiduciary duty claim under the standard that NRS 78.138(7) demands, as set forth in *Chur I*.

Key Takeaways

The plain text of the Nevada statute will control with Nevada judges interpreting the statute when necessary. This ruling is a good example of the Nevada Supreme Court interpreting what is meant by the "knowing violation of law" prong of NRS 78.138(7)(b)(2). In finding that a violation of administrative regulations may constitute a knowing violation of law for purposes of the statute, the court has added additional clarity to the meaning of the language in 78.138. As the case law in Nevada continues to develop, Nevada corporations and companies considering reincorporating in Nevada should continue to monitor Nevada legal developments.

Notes

1. State Comm'r of Ins. v. Chur, 2025 Nev. LEXIS 77 (Chur II).
2. Chur v. Eighth Judicial Dist. Court of Nev., 136 Nev. 68 (2020) (Chur I).

CEO SUCCESSION

Beyond the First 100 Days Rhetoric: How to Ensure the Long-Term Success of New CEOs

By Flávia Leão Fernandes, Marie-Osmonde Le Roy de Lanauze-Molines, Ty Wiggins, and Andrew White

Few ideas in leadership transitions carry as much weight as the "First 100 Days." Boards expect quick wins. Investors look for visible signals of confidence. Employees want immediate clarity on direction. The first 100 days have become a near-mythical window for proving a leader's legitimacy.

The problem is that this narrative, while powerful, is also overplayed. Early wins matter—but they do not alone secure a Chief Executive Officer's (CEO) success.

In fact, many of the challenges that determine a CEO's long-term success don't surface until well beyond the first 100 days: entrenched cultural resistance, stakeholder misalignment, strategy execution gaps, or the simple fatigue that follows the intensity of the early sprint. So, while a strong first impression is important, it can mask deeper vulnerabilities if it becomes the sole yardstick of success.

For boards and Chief Human Resource Officers (CHROs), the task is to shift the lens. The real test of CEO effectiveness lies not just in the opening months but in sustaining momentum through the first year and beyond.

Here, we explore why support during a CEO's "First 100 Days" is not enough, and what CHROs can do to ensure new CEOs are supported for long-term impact.

Flávia Leão Fernandes, Marie-Osmonde Le Roy de Lanauze-Molines, Ty Wiggins, *and* **Andrew White** *are members of Russell Reynolds Associates.*

The Difference Between CEO Onboarding and Transition

Onboarding and transition are often treated as the same process, but they serve very different purposes.

Onboarding helps a new CEO understand the organization—its structure, priorities, and people. Transition helps them take ownership of it—aligning strategy, culture, and relationships in ways that sustain performance over time.

Onboarding	**Transition**
Focuses on access and information	Focuses on leadership and impact
Lasts 1 to 3 months	Last 12 to 18 months
Helps leaders enter the role	Helps leaders excel in the role

The risk comes from an assumption that once onboarding ends, the hardest work is done. In reality, that's when it begins. Boards and CHROs need to build structured support to guide this—combining feedback, reflection, and coaching that keep the leader learning long after the introductions are over.

The First 100 Days: The Problem with the 100-Day Sprint

The "First 100 Days" narrative persists because it offers simplicity in a complex moment. It promises that success can be timed, measured, and delivered on schedule. But the reality of leadership is slower and deeper.

Sustained performance comes from pacing, not speed—from understanding before acting, and from building systems that continue to deliver long after the spotlight shifts.

The CEOs who succeed over time are those who listen first, decide later, and grow into the role rather than rushing through it.

Yet many CEOs feel pressure—often from themselves—to demonstrate immediate impact. They arrive eager to make their mark with detailed plans, early announcements, bold priorities, and structural changes designed to signal control.

The reality, however, is that meaningful progress depends on understanding the system before trying to reshape it. Acting without that understanding can create lasting damage.

During the early months, every new CEO must pause long enough to build context: how decisions are made, where influence sits, and what invisible rules govern behavior. Moving too fast risks fixing symptoms rather than causes—or triggering resistance before credibility is earned.

Effective boards and CHROs help create this space. They shift expectations from early activity to early insight, asking not what the CEO has changed but what they have learned. That subtle difference gives leaders permission to listen deeply, pace decisions, and build momentum on solid ground.

What Really Determines CEO Success: The Long Game of CEO Transition

The real work of a CEO transition unfolds across the first 12 to 18 months. By this stage, the excitement of appointment has faded, and the organization begins to test whether the new leadership will deliver real change.

Success depends on strengthening four interconnected areas of leadership that together define sustainable performance.

Together, the following four areas form the foundation of a successful transition. When boards and CHROs invest in structured support across each, they give CEOs the perspective and tools to lead deliberately—not just confidently—from the start.

1. Strengthening the Board Partnership

A CEO's relationship with the board is the most critical determinant of success. It shapes trust, decisionmaking speed, and ultimately strategic coherence. Early alignment is essential, but it also must be sustained.

Transition support helps new CEOs build that alignment deliberately. Structured onboarding briefings, facilitated chair–CEO sessions, and regular reflection checkpoints keep expectations visible on both sides. Over time, this turns governance from oversight into partnership—creating a board that advises, challenges, and supports with shared intent rather than surprise.

When this relationship works well, the CEO gains a source of stability and perspective that no other stakeholder can provide. This alignment also acts as a safeguard against resistance from other senior executives who may test or challenge the organization's power dynamics. When the board and CEO present a unified front, it reduces the risk of internal friction and strengthens the CEO's authority to drive strategic change. That shared stance gives the CEO the confidence and backing needed to implement their vision and foster a culture of trust and alignment across the leadership team.

2. Building the Right Leadership Team

No decision signals leadership intent more clearly than the people a CEO chooses to surround themselves with. Many newly appointed CEOs later reflect that they waited too long to make the right changes within their executive team. Early hesitation can constrain their ability to build a team aligned with their strategic vision and slow the organization's momentum. CEOs who take a deliberate, proactive approach—assessing fit, clarifying expectations, and shaping their teams early—create the alignment and trust needed to accelerate progress and sustain long-term performance.

The transition period is the opportunity to assess capability, define new expectations, and model collaboration across the enterprise.

Purposeful development accelerates this process. Assessments and facilitated team-effectiveness work help the CEO understand individual strengths and group dynamics. Coaching provides space to rehearse

the difficult conversations that often accompany top-team change—balancing empathy with clarity.

Through this work, CEOs move from inheriting a team to shaping one: creating a leadership group that reflects the strategy ahead, not the structure they found.

3. Translating Culture into Strategy

Culture determines how fast ideas move and how long they last. For a new CEO, accurately understanding the organization's unwritten rules is as important as mastering its formal ones.

Transition programs create room for that discovery. Diagnostics and listening exercises serve to show how the organization truly behaves—what it values, where it hesitates, and which practices drive or block results. Guided reflection then helps the CEO interpret what they've learned and decide where to act first.

The aim isn't to rewrite culture but to connect it more closely to strategy. When a CEO uses culture as a lever—reinforcing the attitudes that accelerate change and adjusting those that slow it—the entire system becomes more coherent.

Successful CEOs also recognize that culture is not static—it evolves alongside leadership and strategy. By engaging early with informal networks and influential culture carriers, new CEOs can surface both the organization's hidden strengths and its points of resistance. Purposeful participation in key rituals, storytelling, and recognition moments allows the CEO to signal priorities clearly and foster alignment across the enterprise.

4. Sustaining Perspective and Self-Awareness

The CEO role is inherently isolating. Every gesture is magnified, and candid feedback grows scarce. Without structured reflection, even the most grounded leaders can lose balance.

Transition support provides that anchor. Regular coaching sessions offer confidential space to process the intensity of the role, while stakeholder feedback ensures that perception and intent stay aligned. Many CEOs also benefit from external peer networks, where they can exchange insights free from internal politics.

This work isn't remedial—it's protective. Self-awareness preserves judgment under pressure, enabling leaders to respond thoughtfully rather than react instinctively. Over time, it also models the humility and openness the CEO expects from others.

Lessons for Boards and CHROs

Boards and CHROs shape the conditions that determine whether a transition stabilizes or stalls. Their responsibility extends beyond hiring the right leader to maintaining the right environment for that leader to succeed.

1. *Shift from milestones to momentum.* Treating the 100-day mark as a finish line creates false closure. The more useful approach is to invest in structured support through the whole transition period (a new CEO's first 12 to 18 months). This is what will lead to pacing, reflection, and long-term leadership maturity, allowing your organization to gain years of lasting impact, not 100 days of activity.
2. *Treat transition as risk management.* CEO transitions are among the highest-risk moments in an organization's lifecycle. When they fail, they fail expensively—eroding confidence, weakening teams, and damaging reputation. Structured transition support—coaching, mentoring, board facilitation, and diagnostic work—is an investment in stability, not a cost of caution.
3. *Make development continuous, not episodic.* Leadership growth doesn't stop at appointment. Over the first 18 months, patterns harden—good or bad. Boards and CHROs should build reflection checkpoints around months 6, 12, and 18 to test assumptions, recalibrate goals, and renew energy.
4. *Stay close.* Strong transitions start before appointment. Expose potential successors early to board dynamics, investor relations, and enterprise complexity. Once in role, proximity matters; the chair and CHRO should remain close, providing both challenge and counsel through regular, candid dialogue.

CRYPTOCURRENCY

Ten FAQs About "Crypto" for Corporate Directors

By Patrick Daugherty

1. What Is "Crypto"?

The term "crypto" is shorthand for "cryptographic asset," which generally is understood to be a digital asset whose features and ownership are coded on a blockchain and protected by cryptography. The first notable crypto asset was bitcoin,[1] created on January 3, 2009.

Other bitcoin-based crypto assets have been created since then. Bitcoin Cash (BCH), Bitcoin Satoshi's Vision (BSV) and Litecoin (LTC) are forks of the original Bitcoin protocol and related assets, while Wrapped Bitcoin (WBTC) is a digital asset backed by bitcoin but with enhanced functionality.

Thousands of other crypto assets have nothing to do with bitcoin. A few well-known examples are Ethereum (ETH), Ripple (XRP), Avalanche (AVAX), Cardano (ADA), USD Coin (USDC), Tether (USDT), Hyperliquid (HYPE), Stellar (XLM), Zcash (ZEC), Polkadot (DOT) and Dogecoin (DOGE). Dogecoin was originally a joke, but now has a market cap exceeding $20 billion. Each one of these, and innumerable others, has features that differ markedly from all others. I have personally analyzed more than 100 of them.

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2. Is Crypto Lawful?

It looked like various federal agencies were very active in enforcement actions in the industry after the Futures Exchange (FTX) debacle. The Securities and Exchange Commission (SEC) investigated and sued various companies and leaders in the crypto industry, but many teams continued to create and launch new blockchains, apps, and tokens. There were a number of important court cases that ended favorably, and also unfavorably, for market participants.

More importantly, and perhaps driven by the change in federal administration, many SEC lawsuits against crypto exchanges, trading firms, crypto development labs, and infrastructure providers have been dropped.

This does not mean that all crypto activities are lawful at all times and in all places. On the contrary, the applicable law is complex, involving securities regulation, commodities and derivatives regulation, banking regulation, taxation, money transmission regulation and sanctions compliance, to name just a few topics. With the notable shift in approach by the US federal government, the crypto industry is growing again.

3. What Is the Main Difference Between the Traditional Financial System and Decentralized Finance That Is Associated with Crypto Assets?

Traditional finance (sometimes called TradFi) differs from decentralized finance (DeFi) with respect to control. TradFi is controlled by banks and governments. DeFi is controlled by code. US dollar deposits, stocks and bonds are traditionally custodied in and by banks, broker-dealers, and clearing agencies

and are bought, transferred and sold using exchanges and those other TradFi institutions.

The assets are controlled by centralized entities and identifiable human beings. Most crypto assets, in contrast, can be held and transferred without an intermediary. They can be transferred using personal computers and the Internet from one person's "wallet" to another's wallet. Metamask and Ledger are two well-known wallet providers. This is "peer-to-peer" transfer. That said, there are centralized crypto exchanges, such as Coinbase and Crypto.com, that can be used to transfer and custody crypto assets.

There are decentralized exchanges, such as Uniswap, where crypto assets are bought and sold peer-to-peer, with no human involvement other than the buyer and the seller. The Cube Exchange is a hybrid exchange, combining centralized order-matching with decentralized custody and settlement.

4. What Do "Miners" Do? What Is Proof of Work? Proof of Stake?

Miners run nodes that enable the Bitcoin protocol (and a few others) to validate and execute a transfer of crypto assets. As a result of these activities, they create new bitcoin, which is the first and largest crypto asset (by market cap and dispersion), and a few other crypto assets.

Au: Should this be computation?

Miners "earn" bitcoin (or the other asset) by racing to the correct solution of a math problem whose solution requires massive compute. This is called "Proof of Work." The first miner to solve a given math problem (that is, complete the Proof of Work) wins the right to create the next block on the blockchain, which is then validated, through consensus, by others on the blockchain network. The miner earns bitcoin by creating the new block.

Through this process, miners collectively validate the distributed ledger that accounts for the ownership of all outstanding assets and the prior history of transfers of those assets. The miner also collects transaction fees from network users. Most blockchains, however, do not rely on Proof of Work to achieve consensus.

Instead, they rely on "Proof of Stake," of which there are multiple varieties. In a Proof of Stake system, token owners lock their tokens in a wallet, called a "stake," which functions like collateral. For example, 32 ETH (market-valued at roughly $100,000) can be bought and locked up to run an Ethereum validator.

A "stake" in that amount bestows the right to participate in Ethereum validation. Because bigger and older stakes are more likely to be chosen as a lead validator by a protocol's algorithm, some validators solicit delegations of authority from other validators and act for the delegators collectively. In doing so the delegates promise to share rewards with their delegators. The validator chosen by the algorithm for the next block will create that new block and broadcast it to the network. Other validators will then verify its legitimacy.

When consensus is reached, the lead validator will receive a reward, which (in the case of Ethereum) will be paid in ETH. Honest and speedy validation is incentivized because everyone knows that bad behavior will be punished by "slashing" (forfeiture) of staked tokens. The key point is that both Proof of Work and Proof of Stake are decentralized consensus mechanisms that are used to validate the state of a blockchain.

5. Are All Crypto Assets Based on Blockchain, and Do They Use Massive Amounts of Data Center Capacity and Energy?

All crypto assets are related to particular blockchains in one way or another. Some blockchains are permissioned, meaning that they are controlled by a person or identifiable group. Others, such as the Bitcoin blockchain, are permissionless, because they are decentralized. Proof of Work consumes massive amounts of energy, but the energy might be renewable.

An example is the use of hydro-electric power for bitcoin mining in northern New York. The use of energy by the industry as a whole is often overstated

by critics because Proof of Stake uses only about one percent of the energy consumed by Proof of Work and almost all crypto assets are now Proof of Stake assets.

6. What Is a "Stablecoin," and How Does It Compare to Crypto Assets Like BTC and ETH?

Stablecoins are digital assets denominated in a fiat currency (usually US dollars) that are normally backed by redeemable hard assets held in reserve. USDC, for example, is a stablecoin issued by a private party that is backed by Treasury bills and other short-term federal debt obligations. Stablecoins are typically overcollateralized. As a result, they trade at or very close to their US dollar target price. In the case of USDC, that price is $1.00.

Deviations from the target price are short-lived because arbitrageurs keep the market price close to value. Notably, stablecoin technology is not decentralized, like Bitcoin and Ethereum. On the contrary, stablecoin technology is controlled by identifiable sponsors and banks. Those who use stablecoins treat them as proxies for fiat currency. BTC and ETH, in contrast, do not have stable value, but are valued for other reasons.

BTC is commonly viewed as a store of value. Some consider it a partial hedge against fiscal and monetary irresponsibility by governments, particularly since it is hard-capped: There can never be more than 21 million bitcoin. ETH is used as "gas" on the Etherium blockchain, which is a decentralized, permissionless blockchain that serves as the base layer (L-1) for app development and deployment (L-2 and L-3).

7. What Are "Utility Tokens"?

Tokens that have one or more specific "uses" are sometimes called "utility tokens." An example is Filecoin (FIL), which is used as payment for decentralized data storage. (Storage fees are both paid and earned in FIL rather than US dollars.) Some utility tokens have been deemed securities under the *SEC v. W.J. Howey Co.*,[2] and its progeny.

Offers and sales of securities must comply with the securities laws. Other utility tokens are more accurately classified as non-security commodities, as to which the securities laws do not apply. The line between "security" and "non-security commodity" is fuzzy.

8. What Are the Benefits of DeFi over TradFi?

The main benefits of decentralized finance relative to banks and brokerage firms are speed and cost of execution and the maintenance of financial privacy. As an example, stablecoins valued at $100 million can be transferred to many locations around the world in less than a minute and at a transaction cost which can be less than $1.00. Financial privacy is especially important when sending or receiving payments from troubled regions, like Ukraine.

A more pedestrian use is remittances, which are often paid in crypto assets. Other crypto assets have features that fiat currency does not replicate. Particular crypto assets are used for discounts and payments within digital ecosystems where fiat currency is simply not accepted. When crypto industry advocates talk about "reinventing money," these are some of the features that they have in mind.

9. Should Corporate Treasuries Allocate Capital to Crypto Assets?

Early adopters include some payment companies and gaming companies. Other companies should consider the possible use of stablecoins for payments (especially international payments), idle cash (because they do generate yield) and sales to new customers. Financial firms have a wider range of possible uses including trade settlement, 24/7/365 changes to collateral positions, investment management, capital markets, and more. Banks, asset managers, payments companies, insurance companies and retailers with international customers that do not currently have a

stablecoin plan or working group are already behind their competitors and should reach out for help.

Major stablecoin sponsors, crypto exchanges and other industry experts are working with corporate treasuries and their legal advisors. Global companies especially need to consider the speed and cost advantages of stablecoins for at least some payments to and from regions that are under-served by reliable banks. Using stablecoins for transactions enables settlement to occur outside hours when ACH transfers can be made. Deals of every nature and size can be closed on weekends, using stablecoins for payment. Crypto assets other than stablecoins are less likely to be held in treasury, given their volatility, unless management and the board decide to invest in a particular asset or group of assets as part of the company's evolving business strategy.

A company might choose to do this in order to align itself with the crypto industry, or part of it, or because of a bullish conviction about a particular crypto asset. "Strategy," founded by Michael Saylor, is the best-known and biggest public company of that *genre*. All companies that choose to engage in transactions using crypto assets should be mindful of considerations that include tax, accounting, controls, systems, and broader regulatory compliance.

10. When Will More Companies Use Crypto?

Corporate use of crypto assets is increasing with the recent passage of the Guiding and Establishing National Innovation for U.S. Stablecoins Act (GENIUS Act). Bear in mind that there were no notable crypto assets before the creation of bitcoin. The industry is only 17 years old. For the first 16 years, crypto faced a number of challenges from legislators and regulators around the world, including the United States.

Blockchain is disruptive technology. The adoption curve of disruptive technology is said to be this: "First they ignore you. Then they laugh at you. Then they fight you. Then you win."

Notable progress was achieved a few months ago, in the summer of 2025, when the GENIUS Act was enacted with overwhelming bipartisan support, creating a class of legally permitted stablecoins in the United States. Broader "market structure" legislation is pending in Congress while the SEC and Nasdaq discuss how to "tokenize" publicly traded common stock and the federal agencies issue clarifying legal interpretations. As statutes are enacted and rules are written by the agencies and exchanges, broad lawful paths forward are becoming clearer, thereby enabling and encouraging broader adoption.

Notes

1. In this FAQ, "Bitcoin" with an upper case "B" refers to the protocol while "bitcoin" with a lower case "b" (or BTC) refers to the asset.
2. SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

EXECUTIVE PAY

Public Companies and Their Compensation Committees Should Keep in Mind

By Gillian Emmett Moldowan, David Rubinsky, Gregory Grogan, Jana Hymowitz, Gary Tashjian, Matthew Behrens, and Courtney Thomson

As we head into 2026, meaningful updates to proxy advisor firm pay-for-performance methodologies are top of mind. Further, 2026 is a year to watch for Securities and Exchange Commission (SEC) rulemaking that could streamline (or even entirely revamp) the executive compensation disclosure rules.

Proxy Advisory Voting Policy Updates

Glass Lewis and ISS Extend Quantitative Pay-for-Performance Evaluation Timelines

In August and November 2025, respectively, Glass Lewis announced a comprehensive overhaul of its pay-for-performance methodology (effective for the 2026 proxy season) and ISS published its updated benchmark policy guidelines for the 2026 proxy season.

According to these updates, Glass Lewis and ISS will now consider long-term alignment over a five-year period in their respective quantitative pay-for-performance screens, instead of a three-year period. ISS will also review the pay multiple of a Chief Executive Officer (CEO) versus the peer group median over both one-year and three-year periods, as opposed to only the most recent one-year period. These expanded timelines are intended to better reflect sustained performance trends and reduce the impact of one-time events and short-term market movements.

Gillian Emmett Moldowan, **David Rubinsky**, **Gregory Grogan**, **Jana Hymowitz**, **Gary Tashjian**, **Matthew Behrens**, *and* **Courtney Thomson** *are attorneys of Simpson Thacher & Bartlett LLP.*

Glass Lewis's Updated Pay-for-Performance Methodology

Glass Lewis's updated pay-for-performance methodology replaces the prior letter grade system with a multi-factor scoring model designed to provide greater comparability and transparency. Under the revised framework, Glass Lewis evaluates CEO and other named executive officer (NEO) pay alignment using multiple quantitative tests measured over the expanded five-year lookback period described above.

These tests compare executive pay to company performance using peer groups constructed by Glass Lewis based on broad industry and market criteria, rather than those selected by the company. In addition, even when a company achieves a satisfactory score on these quantitative tests, the presence of structural or design concerns (for example, one-time awards, short vesting periods, insufficient disclosure of performance goals) may reduce the company's overall pay-for-performance score.

ISS Increases Flexibility in Evaluation of Equity Pay Mix for Long-Term Time-Vesting Awards

ISS's updated benchmarking policy guidelines introduce some flexibility in its qualitative pay-for-performance review by recognizing time-based equity awards with extended vesting or meaningful post-vesting holding requirements as supportive of long-term alignment. Under ISS's 2026 benchmarking policy, time-based awards can constitute a majority, or even all, of an executive's equity pay mix

if they are sufficiently long-term and aligned with shareholder interests.

This represents a shift from prior years, when heavy reliance on time-vesting awards was more likely to draw concern absent strong performance-based elements in the overall compensation mix. ISS also clarified that it may consider realized pay outcomes in addition to granted and realizable pay, which would allow ISS to evaluate how incentive program structures ultimately function over time.

ISS Revises Policy on Problematic Non-Employee Director Compensation

ISS's updated benchmarking policy guidelines expand the circumstances in which ISS may issue recommendations "against" members of a compensation committee (or any other committee responsible for approving director pay). Under its revised policy, ISS may identify a "pattern" of problematic director pay if excessive or atypical non-employee director compensation occurs for two or more consecutive or non-consecutive years.

ISS also may issue an adverse recommendation in the first year if a company awards director compensation that is egregiously high or inappropriate (for example, performance awards, retirement benefits, problematic perquisites).

SEC Guidance on Schedule 13D and 13G Filings for Institutional Investors May Have Chilling Effect on Investors' Engagement with Issuers; ISS Adapts with More Flexible Approach to Evaluating Companies' Demonstration of Responsiveness to Low Say-on-Pay Support

On February 11, 2025, SEC's Division of Corporate Finance (Staff) issued updated and new Compliance and Disclosure Interpretations addressing beneficial ownership reporting on Schedules 13D and 13G, respectively. These updates expand the nature and scope of activities that the Staff views as "influencing control of the issuer."

This guidance could deter otherwise passive investors from engaging with issuers on topics such as compensation so as not to risk becoming ineligible to rely on Schedule 13G reporting and could require smaller social activist shareholders to become subject to Schedule 13D reporting. Due in part to the Staff's updated guidance, ISS's updated benchmarking policy guidelines adopt a more flexible standard for evaluating whether companies have been sufficiently responsive to low say-on-pay support (that is, below 70 percent).

ISS may consider a company's outreach efforts to be sufficiently responsive, even if the company's outreach efforts do not yield specific feedback, and will also evaluate a company's compensation actions taken in response to low say-on-pay support and its explanation of why those actions serve shareholders' long-term interests. Companies that received low say-on-pay support in their most recent say-on-pay vote should focus on including fulsome disclosure of shareholder outreach efforts, shareholder feedback received or not received, and changes made to the executive compensation program in response to such feedback.

Proposed SEC Rulemaking

On June 26, 2025, the SEC hosted a roundtable discussion on executive compensation disclosures with public company representatives, investors, and experts in connection with its first holistic assessment of the executive compensation disclosure rules in 20 years. A key piece of the discussion was focused on whether the benefits of certain disclosures are outweighed by the costs and burden of preparing those disclosures and if the current disclosure rules encourage overly lengthy and complex disclosures that obscure or go beyond information that is material to investors.

Responses to the SEC's solicitation of public comments on the executive compensation disclosure rules signal that upcoming rulemaking may address (1) streamlining and revamping the Summary Compensation Table and Compensation Discussion & Analysis disclosure, (2) updating the rules on perquisites disclosure (executive security arrangements in particular), and (3) improving the

Pay Versus Performance disclosure rules. Any rulemaking could potentially be effective in time for the 2027 proxy season.

Other Key Reminders

Focus on Compensation Committee Process When Setting Compensation

Good process in the boardroom with an eye toward withstanding shareholder and regulatory scrutiny is critical. When setting compensation, be mindful of the independence of those making compensation decisions. Compensation committee members must exercise their duty of care and make sure they are fully informed and understand the terms of compensation arrangements.

Consideration should be given to engaging independent compensation consultants and outside counsel to provide robust peer data on award quantum and design and help prepare accurate and complete disclosure to shareholders. Delaware courts consistently have emphasized the importance of director independence and informed decision-making when compensation is challenged by plaintiffs.

Develop a Framework to Address the Impact of Tariffs on Performance Measurement

Proposed and potential tariffs may materially impact business performance in unpredictable ways, placing pressure on compensation committees to revisit existing performance metrics, which could in turn draw investor scrutiny. Developing a framework to assess continued applicability of performance metrics of existing awards, and goal-setting for future awards, ultimately will benefit management and investors.

Confirm Whether a Say-on-Pay Frequency Vote Is Required This Year

Confirm whether a say-on-pay frequency proposal is required in this year's proxy. Public companies generally are required to hold a non-binding, advisory say-on-pay frequency vote at least every six years, requesting shareholder advice as to whether say-on-pay votes should be held annually, biennially, or triennially.

Prepare for the 2027 Expansion of "Covered Employees" under IRC Section 162(m)

For the company's first taxable year beginning after December 31, 2026, the definition of "covered employees" subject to the $1 million compensation deduction limit under Section 162(m) of the Internal Revenue Code (IRC), as amended by the American Rescue Plan Act of 2021, will include the five highest compensated employees (not limited to executive officers) in addition to those currently required to be covered employees (that is, current and former NEOs).

These five additional employees are not subject to the "once a covered employee, always a covered employee" rule. As a result, companies may want to consider whether significant compensation awards can be paid in 2026 rather than 2027.

Personal Security Arrangements

Personal security for executives continues to be a top-of-mind topic, and was a key discussion topic at the SEC's June 2025 roundtable discussion where panelists encouraged the SEC to reconsider its interpretation of bona fide personal security expenses as a perquisite, highlighting the tension between real-world risk management and the current framework for perquisites disclosure under Item 402 of Regulation S-K.

While companies often view security (including outside of the traditional workplace) as necessary to an executive's ability to do the executive's job and something that should not be considered a perquisite, the SEC has previously indicated security is not considered "integrally and directly" related to an executive's position where security is provided at a personal residence or during personal travel.

The general consensus is that this guidance is outdated and that new guidance in the near-term that revisits this position would be welcome. Despite this market perspective, treating security

as a perquisite has real world impact: 13 of the 40 S&P 500 companies that received negative ISS recommendations in the first half of 2025 were cited as providing excessive security perquisites to their executives. Revised SEC perspective on this topic would be welcome.

Is Proxy Advisor Say-on-Pay Influence Waning?

By Mike Kesner, Linda Pappas, Olivia Wakefield, and Jon Weinstein

The Say-on-Pay (SOP) voting environment continues to shift with JPMorgan Chase's announcement that it is cutting ties with the proxy advisors. Although JPMorgan Chase has not yet announced any changes to its voting policies, the firm is eliminating its reliance on proxy advisors and moving to an AI-powered tool to aggregate and analyze data from public company filings to inform its voting decisions.

JPMorgan Chase's change in approach follows a similar shift by BlackRock and State Street in 2025 when BlackRock removed all references to the use of third-party research (that is, proxy advisors) in evaluating SOP and State Street explicitly stated that it did not follow ISS policies.

The level of influence of proxy advisors on SOP may also be affected by the Trump Administration's December 2025 executive order that targets proxy advisors and state-level legal actions against proxy advisors in both Texas and Florida. Further, proxy advisors themselves have implemented changes to their operating models, with Glass Lewis announcing a shift in 2027 to multiple voting policies rather than a singular benchmark policy.

Mike Kesner *is a partner,* **Linda Pappas** *is a principal,* **Olivia Wakefield** *is a managing partner, and* **Jon Weinstein** *is a managing partner of Pay Governance LLC.*

Large Institutional Investors Appear to Be Relying More on Internal SOP Voting Guidelines

Our review of the alignment between proxy advisor SOP voting recommendations and large institutional shareholder SOP voting patterns over the past five proxy seasons (2021–2025) reveals that institutional investors have been increasingly likely to diverge from proxy advisors. This divergence is likely most attributable to investors' increasing reliance on their internal voting guidelines and governance staff and a willingness to approach voting decisions on a case-by-case basis.

For example, in 2021 State Street voted against SOP at 56 percent of the companies for which ISS recommended an against SOP vote. By contrast, in 2025 State Street voted against only 5 percent of the companies for which ISS recommended an against SOP vote.

Similarly, in 2021 State Street voted against SOP at 30 percent of the companies for which Glass Lewis recommended an against SOP vote. By 2025, State Street voted against only 2 percent of the companies for which Glass Lewis recommended an against SOP vote.

Conclusion

The above said, it is likely that mid-size and smaller institutional investors will continue to rely on the proxy advisor firms for voting recommendations in the near-term due to the extensive amount of time and resources necessary to review and responsibly vote on a multitude of proxy voting decisions across a wide range of holdings.

Regardless, we also expect institutional investors of all sizes to harness the power of AI for data collection and the development of preliminary voting recommendations, which could further erode proxy advisor influence barring meaningful evolutions in proxy advisor offerings.

Finally, we note that proxy advisory firms have shown tremendous resilience over the years to adapt their business models to changing governance landscapes. For example, the current proxy advisor pivot toward voting recommendations that are more customized/customizable is likely to ensure a degree of relevance and help to respond to regulatory scrutiny in the face of multiple challenges.

Although the decline in proxy advisor influence among the largest investors may not fully extend to smaller and mid-size investors, the SOP and governance landscapes are increasing in complexity, thereby creating a more uncertain (but potentially less adverse) US SOP environment.

INSIDER TRADING

New York Attorney General Brings Unusual Insider Trading Action Relating to CEO's Stock Sales Pursuant to Rule 10b5-1 Plan

By Reed Brodsky, David Woodcock, Mark Schonfeld, Osman Nawaz, Tina Samanta, Jina Choi, and Jonathan Seibald

On January 15, 2026, the New York Attorney General (NYAG) sued Emergent BioSolutions, Inc.'s former CEO in New York State court for allegedly engaging in insider trading in violation of New York's Martin Act.[1] The NYAG's complaint alleges that the CEO sold Emergent stock pursuant to an Securities and Exchange (SEC) Rule 10b5-1 trading plan that he entered into while purportedly in possession of material non-public information relating to Covid vaccine manufacturing problems.[2] The NYAG simultaneously announced a settlement with Emergent for approving the CEO's Rule 10b5-1 plan while allegedly knowing that he possessed material non-public information.[3]

NYAG Allegations

In 2020, as part of Operation Warp Speed, Emergent publicly announced that it had entered into two contracts with AstraZeneca to help develop and manufacture a Covid-19 vaccine. In the week following these announcements, Emergent's stock price nearly doubled. Later in the year, Emergent allegedly experienced manufacturing issues, including a cross-contamination of a vaccine batch, which prevented Emergent from meeting its production schedule.

Reed Brodsky, David Woodcock, Mark Schonfeld, Osman Nawaz, Tina Samanta, Jina Choi, *and* **Jonathan Seibald** *are attorneys of Gibson, Dunn & Crutcher LLP.*

In an unsettled civil action against the CEO, the NYAG alleges that Emergent's CEO was aware of and continuously updated on manufacturing issues. In October 2020, the CEO started to implement an SEC Rule 10b5-1 trading plan for the exercise and sale of his Emergent stock options. In November 2020, while the alleged non-public manufacturing crisis continued, Emergent's in-house counsel reviewed, and Emergent allegedly approved, the CEO's Rule 10b5-1 plan.

The Rule 10b5-1 plan had a 60-day cooling-off period before the CEO could begin to trade.[4] In January 2021, after the cooling-off period expired, the CEO started to exercise his stock options and sell the shares he acquired pursuant to the 10b5-1 plan, completing the sales in February 2021 before the manufacturing issues had been disclosed to the market. The NYAG alleged that the CEO received total proceeds of about $10.1 million from the sale of stock, while Emergent received about $2.5 million from the CEO upon his exercise of his Emergent stock options at the designated exercise price. After concerns about Emergent's production issues became public, Emergent's stock price declined.

The NYAG charged the CEO with securities fraud in violation of New York's Martin Act, which the NYAG (and most courts) interpret as not requiring proof of intent. The NYAG is seeking disgorgement, damages, and injunctive relief.

Company Settlement

Notably, the NYAG reached a settlement with Emergent for alleged Martin Act violations related to the CEO's alleged insider trading. Emergent agreed

to pay a $900,000 penalty and to amend its insider trading policy to require officers and directors who seek approval of a Rule 10b5-1 plan to complete an enhanced trading pre-clearance form requiring them to make several representations. These representations include that the officer or director is aware of Emergent's insider trading policy, aware that it is unlawful to trade or enter into or modify a Rule 10b5-1 plan while in possession of material non-public information, and does not possess such information.

Notably, the settlement includes a pre-clearance form that defines what must be considered a "material incident" for the executives or officers certifying that they do not have such information in their possession—an area that is often subject to significant ambiguity and not clearly defined parameters. Emergent also agreed to provide quarterly reports to the NYAG for three years, which will include information relating to its directors' and officers' Rule 10b5-1 plans.

Significance

The case is extraordinary in multiple respects. First, it is unusual to bring charges against a company for the alleged insider trading of an officer or director. Companies typically are considered to be harmed by any such insider trading. The NYAG suggested Emergent benefited from the CEO's trading because Emergent received about $2.5 million in proceeds from the CEO's exercise of his stock options even though these proceeds represent a miniscule percentage of Emergent's roughly $1.8 billion in revenue in 2021. Moreover, when a CEO exercises options, the company typically issues new shares that dilute the ownership percentage of existing shareholders and may slightly reduce earnings per share.

Second, it is rare for state attorneys general to bring insider trading cases, which are the traditional purview of the US Department of Justice (DOJ) and the SEC. It is particularly surprising that the NYAG did so here, where the alleged insider trading involves an SEC Rule 10b5-1 plan and Emergent had entered into a negligence-based settlement with the SEC for alleged disclosure violations relating to the manufacturing issues.[5] It is also notable that the NYAG's settlement requires the company's executives and officers to sign a pre-clearance trading form that defines what is a "material incident" in a unique manner when seeking approval to trade the company's stock. There are significant benefits to a national standard when applying the SEC's rules and history of applying those rules in investigations and enforcement actions.

Third, it is unusual to charge an executive with insider trading when the executive obtained company counsel approval to enter into a 10b5-1 plan. The complaint against the CEO alleges that "[t]he investment adviser . . . sent an email to Emergent Senior Counsel requesting an update on Kramer's vesting schedule and asked him to review the Trading Plan." The NYAG's assurance of discontinuance with Emergent alleges that "[o]ver November 11 and 12, 2020, Emergent's Senior Counsel reviewed the CEO's Rule 10b5-1 Trading Plan and coordinated with the investment advisor for the CEO to sign."

The charging documents do not reflect the process that company counsel applied in the review of the 10b5-1 plan or what company counsel told the CEO and his investment advisor. Nor do the charging documents allege that the CEO possessed information that the Emergent Senior Counsel did not possess. These will be important issues in the litigation. Normally prosecutors and regulators are hesitant to bring charges against an officer or director who relies in good faith on company counsel to make determinations regarding whether the officer or director is in possession of material, nonpublic information.

This is because, while it is far easier to identify whether the nonpublic information is material in hindsight based on the impact of subsequent disclosures on the stock price, it is often very complicated to assess at a time when it is unknown how the information will be received by the market.

Fourth, the allegations in the charging documents raise a number of questions regarding the declining

performance of the company's stock price after the CEO's sales of stock and before any allegedly adverse public disclosures relating to the manufacturing problems. According to the NYAG's complaint, the company's stock price had already dropped significantly between the time of the CEO's stock sales and the disclosures, and this continuous decline was due to a number of developments unrelated to nonpublic contamination issues. This may pose an obstacle to proving the materiality of nonpublic information about the contamination at the time that the CEO entered into his 10b5-1 trading plan.

Perhaps most concerning, this case could potentially be a harbinger of expanded efforts by the NYAG and other state attorneys general to pursue insider trading and other securities fraud cases as the current Administration's enforcement priorities change.

According to a published statement by the Emergent CEO's lawyer, the DOJ and SEC both declined to bring charges in these circumstances. The NYAG's actions in this case stand in contrast to the approach the federal government has taken in the rare instances of enforcement actions involving Rule 10b5-1 plans. In 2024, the DOJ successfully prosecuted the former CEO of Ontrak for insider trading through a 10b5-1 plan adopted while in possession of material non-public information. In that case, the executive adopted a plan that provided for selling stock beginning immediately, notwithstanding advice the executive received from financial advisers that the plan should contain a cooling off period.

In 2023, the SEC brought a settled enforcement action against Charter Communications for using Rule 10b5-1 for stock buyback plans that permitted the company to change the amount and timing of the buybacks in correlation to debt offerings to fund the buybacks. The SEC contended that the company's plan violated the internal controls provision of Section 13(b)(2)(B) of the Securities Exchange Act because the plan did not conform to the board's authorization of a plan that complied with Rule 10b5-1. The Republican Commissioners dissented from the settled enforcement action as exceeding the scope of Section 13(b)(2)(B).

The NYAG alleges that it has jurisdiction to sue the CEO because the trades were executed on the New York Stock Exchange by his investment adviser's trading desk in New York, the Rule 10b5-1 plan was governed by New York law, and New York investors (including New York State employee retirement funds) traded Emergent stock during the relevant period. Based on these jurisdictional theories, the NYAG could have jurisdiction over an enormous number of public companies and their executives, such that the NYAG could set securities-related compliance requirements for SEC-reporting companies. This could lead to different and contradictory case law in state and federal courts regarding important securities enforcement issues.

Public companies and their executives need to know exactly what the rules are where their officers and directors live and engage in securities transactions. A patchwork of attorneys general applying different (and potentially inconsistent) state laws to those rules—much like in the "Blue Sky Law" days before the SEC's creation—would create adverse collateral consequences to the capital markets. Among other things, shareholders benefit when rules are applied consistently and on a national basis. The NYAG's actions raise the specter that public companies and their executives face a widely expanded and variable regulatory landscape when adopting and approving Rule 10b5-1 plans.

Notes

1. *See* Press Release, Office of the New York State Att'y Gen., Attorney General James Sues Former CEO of Emergent BioSolutions for Insider Trading (Jan. 15, 2026), *https://ag.ny.gov/press-release/2026/attorney-general-james-sues-former-ceo-emergent-biosolutions-insider-trading*.
2. *See* Complaint, New York v. Kramer, No. __ (Sup. Ct. N.Y. Cnty. Jan. 15, 2026), *https://ag.ny.gov/sites/default/files/court-filings/new-york-v-robert-g-kramer-complaint-2026.pdf*.

3. *See* Assurance of Discontinuance, *In re Emergent BioSolutions, Inc.*, Assurance No. 26-001 (Jan. 15, 2026), *https://ag.ny.gov/sites/default/files/settlements-agreements/emergent-biosolutions-inc-assurance-of-discontinuance-2026.pdf*.
4. In 2022, the SEC amended Rule 10b5-1 to require that plans for officers and directors contain a cooling-off period that is the later of (a) 90 days after the adoption or modification of the plan or (b) two business days following the filing of the Form 10-Q or Form 10-K for the fiscal period in which the plan was adopted or modified.
5. *See* Emergent BioSolutions, Inc., Securities Act Release No. 11371 (Apr. 7, 2025), *https://www.sec.gov/files/litigation/admin/2025/33-11371.pdf*.

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