



CONSIDERATIONS FOR PREPARING YOUR 2023 FORM 10-K

GIBSON DUNN

November 29, 2023

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NEW SHARE REPURCHASE DISCLOSURES

01

Summary of New Share Repurchase Disclosure Rules

For companies that file on **domestic forms**, the New Rules will require a company to:

1. disclose **daily repurchase data in a new table filed as an exhibit** to Form 10-Q and Form 10-K;
2. indicate by a **checkbox** whether any **executives or directors traded** in the company's equity securities **within four business days** before or after the **public announcement of a repurchase plan or program** or the announcement of an increase of an existing share repurchase plan or program;
3. provide **narrative disclosure** about the company's repurchase program, including its objectives and rationales, in the filing; and
4. provide quarterly disclosure regarding the **company's adoption or termination of any Rule 10b5-1 trading arrangements, per new Reg. S-K Item 408(d)**.

The New Rules will apply to Forms 10-Q or Forms 10-K filed for the first full fiscal quarter beginning on or after October 1, 2023. For a calendar year company, this means that the new disclosures would **first appear in its 2023 Form 10-K for activity occurring during Q4 2023**.

On November 22, 2023, the SEC indefinitely stayed the effectiveness of the share repurchase rules following the Fifth Circuit's opinion requiring the SEC to correct the defects in the rule.

Tabular Presentation of Daily Repurchases

Beginning with the **first full fiscal quarter beginning on or after October 1, 2023** (which for a calendar year company is the 2023 Form 10-K), for a company that files on domestic forms, instead of reporting share repurchase data by month in the body of the filing, a company's Forms 10-Q and Forms 10-K will include a **new exhibit in XBRL-tagged format (Exhibit 26)** with a table reporting the noted information for each day on which shares were repurchased.

Asterisks indicate information currently reported on an aggregated monthly basis for each month of the quarter.

01	Date that the purchase of shares is executed
02	Class of shares repurchased
03*	Average price paid per share
04*	Total number of shares purchased
05*	Total number of shares purchased as part of a publicly announced plan
06*	Aggregate maximum number of shares (or approximate dollar value) that may yet be purchased under the publicly announced plan
07	Number of shares purchased on the open market
08	Number of shares purchased in transactions intended to qualify for the safe harbor in Rule 10b-18
09	Number of shares purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c), together with a footnote disclosing the date of adoption or termination of the Rule 10b5-1(c) plan

Checkbox Requirement for Officer and Director Trades Close in Time to Public Announcement of Repurchase Plan

Companies will be required to include in the new exhibit a **checkbox preceding the tabular disclosure**, indicating whether any **Section 16 officer or director purchased or sold shares** that are the subject of a publicly announced plan or program within **four business days** before or after the company's **announcement of a stock repurchase plan or program**, or the announcement of an increase in the number or amount of securities authorized to be purchased under an existing plan or program.

The SEC believes this checkbox requirement will help investors assess whether the issuer or its insiders are potentially engaged in self-interested or otherwise inefficient repurchases. In response to comments, the SEC confirmed that **a company may include additional disclosure to provide context to investors regarding any purchases or sales that trigger the checkbox requirement**, and the SEC even noted that such disclosure would be **required if material and necessary to prevent the required disclosures from being misleading**.

Companies that regularly engage in share repurchases typically announce a stock repurchase plan or program **once every 12 to 18 months**.

Sample of New Exhibit 26

We believe that Exhibit 26 can be omitted for quarters in which there were no company repurchases and no need to check the box during the period covered by the report, although the SEC has not expressly addressed this point.

ISSUER PURCHASES OF EQUITY SECURITIES

Use the checkbox to indicate if any officer or director reporting pursuant to Section 16(a) of the Exchange Act (15 U.S.C. 78p(a)), or for foreign private issuers as defined by Rule 3b-4(c) (§ 240.3b-4(c) of this chapter), any director or member of senior management who would be identified pursuant to Item 1 of Form 20-F (§ 249.220f of this chapter), purchased or sold shares or other units of the class of the issuer's equity securities that are registered pursuant to section 12 of the Exchange Act and subject of a publicly announced plan or program within four (4) business days before or after the issuer's announcement of such repurchase plan or program or the announcement of an increase of an existing share repurchase plan or program.

(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
Execution Date	Class of Shares (or Units)	Total Number of Shares (or Units) Purchased	Average Price Per Share (or Unit)	Total Number of Shares (or Units) Purchased as Part of Publicly Announced Plans or Programs	Aggregate Maximum Number (or Approximate Dollar Value of Shares or Units) that May Yet Be Purchased Under the Publicly Announced Plans or Programs	Total Number of Shares (or Units) Purchased on the Open Market	Total Number of Shares (or Units) Purchased that are Intended to Qualify for the Safe Harbor in Rule 10b-18	Total Number of Shares (or Units) Purchased Pursuant to a Plan that is Intended to Satisfy the Affirmative Defense Conditions of Rule 10b5-1(c)
[insert additional rows as necessary for each day on which a repurchase was executed]								
Total:								

Narrative Disclosure - New Requirements

The New Rules require **narrative disclosures regarding repurchases during the quarter**, with XBRL block text tagging and detail tagging of the required narrative and quantitative information.

The Forms 10-Q* and Forms 10-K* must now disclose the following and refer to the particular repurchases in Exhibit 26 to which the narrative relates, if applicable:

- the objectives or rationales for each share repurchase plan or program;
- the process or criteria used to determine the amount of the repurchases;
- the number of shares purchased other than through a publicly announced plan or program, and the nature of the repurchase transactions, such as whether the purchases were made pursuant to equity compensation arrangements, tender offers, etc.; and
- any policies and procedures relating to purchases and sales of the company's securities by its officers and directors during a repurchase program, including whether there are any restrictions on such transactions.

* The Form 10-Q disclosure is under Part II, Item 2, captioned "Unregistered Sales of Equity Securities, Use of Proceeds, and Issuer Purchases of Equity Securities," and the Form 10-K disclosure is under Part II, Item 5, captioned "Market for Registrant's Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities." Each Item name has been updated by the New Rules to address the "Issuer Purchases of Equity Securities" topic.

SEC Guidance on New Narrative Disclosure Requirements

The SEC's Adopting Release indicates that the SEC expects that the narrative disclosure regarding "objectives or rationales" for share repurchases should **avoid "boilerplate" language** and "must provide investors with **sufficiently detailed information to evaluate an issuer's share repurchases.**"

Item 703(a) specifies that this information must **"refer to the particular repurchases in the table . . . that correspond to the different parts of the narrative."**

The Adopting Release provides a non-exhaustive list of the types of topics that may be included in such disclosures, such as:

- discussing how repurchases fit within the company's capital allocation plans;
- discussing the expected impact of the repurchases on the value of remaining shares;
- addressing the sources of funds for repurchases (such as "where the source of funding results in tax advantages that would not otherwise be available for a repurchase"); or
- addressing "the factors driving the repurchase, including whether their stock is undervalued, prospective internal growth opportunities are economically viable, or the valuation for potential targets is attractive."

Narrative Disclosure - Continuing Requirements

As is currently the case, if a company's repurchase plan or program was publicly announced, the disclosure also must state:

- the date each plan or program was announced;
- the dollar or share amount approved;
- the expiration date, if any, of the plan or program;
- each plan or program that has expired in the relevant period; and
- each plan or program that the company has determined to terminate prior to expiration, or under which the company does not intend to make further purchases.

While the above information **historically has been required in a footnote** to the monthly quantitative share repurchase disclosure table, the New Rules instead require that this disclosure be included in the **main text of the narrative discussion** (as the monthly table will no longer exist), which will be located in the same Items in the Forms 10-Q* and Forms 10-K* as the new narrative disclosures.

* The Form 10-Q disclosure is under Part II, Item 2, captioned "Unregistered Sales of Equity Securities, Use of Proceeds, and Issuer Purchases of Equity Securities," and the Form 10-K disclosure is under Part II, Item 5, captioned "Market for Registrant's Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities." Each Item name has been updated by the New Rules to address the "Issuer Purchases of Equity Securities" topic.

**NEW CYBERSECURITY
RISK MANAGEMENT,
STRATEGY, AND
GOVERNANCE
DISCLOSURES**

02

Companies must discuss their management and oversight of cybersecurity risks in the Form 10-K

- **Risk Management and Strategy:** Companies must describe their processes, if any, for assessing, identifying, and managing material risks from cybersecurity threats in sufficient detail for a reasonable investor to understand those processes. Disclosure should address, as applicable:
 - whether and how any such processes have been integrated into the company's overall risk management system or processes;
 - whether the company engages assessors, consultants, auditors, or other third parties in connection with such processes; and
 - whether the company has processes to oversee and identify such risks from cybersecurity threats associated with its use of any third-party service provider.
- Companies must also describe whether any risks from cybersecurity threats, including as a result of any previous cybersecurity incidents, have materially affected or are reasonably likely to materially affect the company, including its business strategy, results of operations, or financial condition and if so, how.
 - “*Cybersecurity Threat*” is defined as any potential unauthorized occurrence on or conducted through a company's information systems that may result in adverse effects on the confidentiality, integrity, or availability of a company's information systems or any information residing therein.

Governance

Companies must describe the board's **oversight of risks from cybersecurity threats**, including, if applicable, the board committee or subcommittee responsible for such oversight and the process by which the board or relevant committee is informed about such risks .

- Companies must also describe **management's role in assessing and managing material risks from cybersecurity threats**, as well as its role in implementing cybersecurity policies, procedures, and strategies. Disclosure should address, as applicable:
 - whether and which management positions or committees are responsible for assessing and managing such risks, and the relevant expertise of such persons or members in such detail as necessary to fully describe the nature of the expertise;
 - the processes by which such persons or committees are informed about and monitor the prevention, detection, mitigation, and remediation of cybersecurity incidents; and
 - whether such persons or committees report information about such risks to the board of directors or a committee or subcommittee of the board of directors.
- With respect to **management's expertise**, the instructions to Item 106 provide that it may include “[p]rior work experience in cybersecurity; any relevant degrees or certifications; any knowledge, skills, or other background in cybersecurity.”

Changes from Proposed Rules

Risk Management and Strategy

Notably, the final rule requires disclosure of “processes” rather than “policies and procedures,” with the SEC noting that the former avoids disclosing operational details that could be used by malicious actors and removes the question of whether companies without written policies and procedures should disclose that fact.

Other changes aimed at reducing the prescriptiveness of the rule include:

- the removal of the list of risk types (e.g., intellectual property theft, fraud, etc.), and
- the removal of certain disclosure items, such as:
 - the company’s activities undertaken to prevent, detect, and minimize effects of cybersecurity incidents, and
 - the company’s business continuity, contingency, and recovery plans in the event of a cybersecurity incident.

Governance

Exclusions from the final rule include:

- the proposed requirement to disclose whether and how the board integrates cybersecurity into its business strategy, risk management, and financial oversight; and
- details such as whether the company has a chief information security officer, the frequency of the board’s discussions on cybersecurity, and the frequency with which responsible management positions or committees report to the board on cybersecurity risk.

RULE 10B5-1 PLAN DISCLOSURES

03

Reminder: Quarterly Disclosure of Trading Arrangements

On December 14, 2022, the SEC adopted a final rule introducing disclosure requirements with respect to the adoption or termination of Rule 10b5-1 plans by Section 16 officers and directors.

In Forms 10-Q and 10-K, companies are required to disclose whether, during the company's last fiscal quarter, any director or officer **adopted or terminated (which includes certain modifications)** a Rule 10b5-1 plan or a "non-Rule 10b5-1 trading arrangement."

A "**non-Rule 10b5-1 trading arrangement**" is a written trading arrangement that complies with the old Rule 10b5-1 affirmative defense but does not comply with the new affirmative defense conditions.

For both types of plans, companies will also need to provide a description of the material terms, other than with respect to price, including:

- The name and title of the director or officer;
- The date of adoption or termination;
- The duration; and
- The aggregate number of securities to be sold or purchased.

The information must be reported using **XBRL tagging**.

Company Disclosure Requirements for Rule 10b5-1 Plans

The issuer repurchase rules adopted by the SEC require substantially similar quarterly disclosure regarding any Rule 10b5-1 plan adopted or terminated by **the company**.

- In contrast to the disclosure rules applicable to trading plans adopted by executives and directors, **companies are not required to disclose** whether they entered into an arrangement that meets the SEC's definition of a “**non-Rule 10b5-1 trading arrangement**.”
- The SEC also stated that it is **not imposing additional conditions on the availability of the Rule 10b5-1 affirmative defense for companies**, such as a cooling-off period, limitations on the use of multiple overlapping plans, or limitations on the use of single-trade plans.

Companies would have been required to comply with the new requirements beginning with the Form 10-K or Form 10-Q filed for the first full fiscal quarter beginning on or after October 1, 2023, which for calendar year-end companies would be the 2023 Form 10-K.

However, on November 22, 2023, the SEC indefinitely stayed the effectiveness of the share repurchase rules, including the new 10b5-1 requirements, following the Fifth Circuit's opinion requiring the SEC to correct the defects in the rule.

SEC COMMENT LETTER TRENDS

04

Comment Letter Trends

MD&A

- focused on disclosures relating to results of operations, requesting more specificity
- focused on disclosures regarding material period-to-period changes in quantitative and qualitative terms as prescribed by Item 303(b) of Regulation S-K
- requested that registrants make disclosures about known trends and uncertainties affecting their results of operations
- ensuring that key performance indicators are properly contextualized so that they are not misleading
- asked registrants to quantify and provide additional disclosure regarding significant components of financial condition and results of operations that have affected segment results
- focused on critical accounting estimates and liquidity and capital resources

Non-GAAP Financial Measures

- aligned with the Compliance and Disclosure Interpretations released last December
 - focus on whether operating expenses are “normal” or “recurring” (and therefore, whether exclusion from non-GAAP financial measures might be misleading)
 - whether certain non-GAAP adjustments to revenue or expenses have made the adjustments “individually tailored”
- compliance with Item 10(e) of Regulation S-K
 - prominence of non-GAAP measures, reconciliations, usefulness and purpose of particular measures
 - exclusion of normal, recurring cash operating expenses
 - use of individually tailored accounting principles

Segment Reporting

- whether a registrant’s operating segments are properly categorized
- reasoning behind the aggregation of similar segments (and the factors used to identify different segments)

Note: the SEC has taken issue with registrations disclosing multiple measures of segment profit or loss in the notes to the financial statements and has indicated that registrants should not attempt to circumvent non-GAAP requirements when taking this approach.

Climate Change

Final SEC rules on climate-related disclosure are still pending, but the SEC has continued to issue Form 10-K comment letters regarding companies’ climate-related disclosures under existing requirements.

COMPANY DISCLOSURE TRENDS

05

Climate Change

Items to consider in light of Staff comments made since the issuance of the SEC's sample comment letter related to climate change disclosure that it issued in 2021:

1. Tailor climate-related disclosures to the company's business and financial condition, rather than generic discussions on climate change.
2. Consider whether certain climate-related matters should be disclosed not only qualitatively, but also quantitatively.
3. For any climate-related disclosure included in the Form 10-K, take steps to adequately substantiate those disclosures.
4. As part of the disclosure controls and procedures for the 2023 Form 10-K filing, review the company's publicly-disclosed ESG materials, such as the company's sustainability report, to determine whether any of the information is or may become material under federal securities laws.

Human Capital

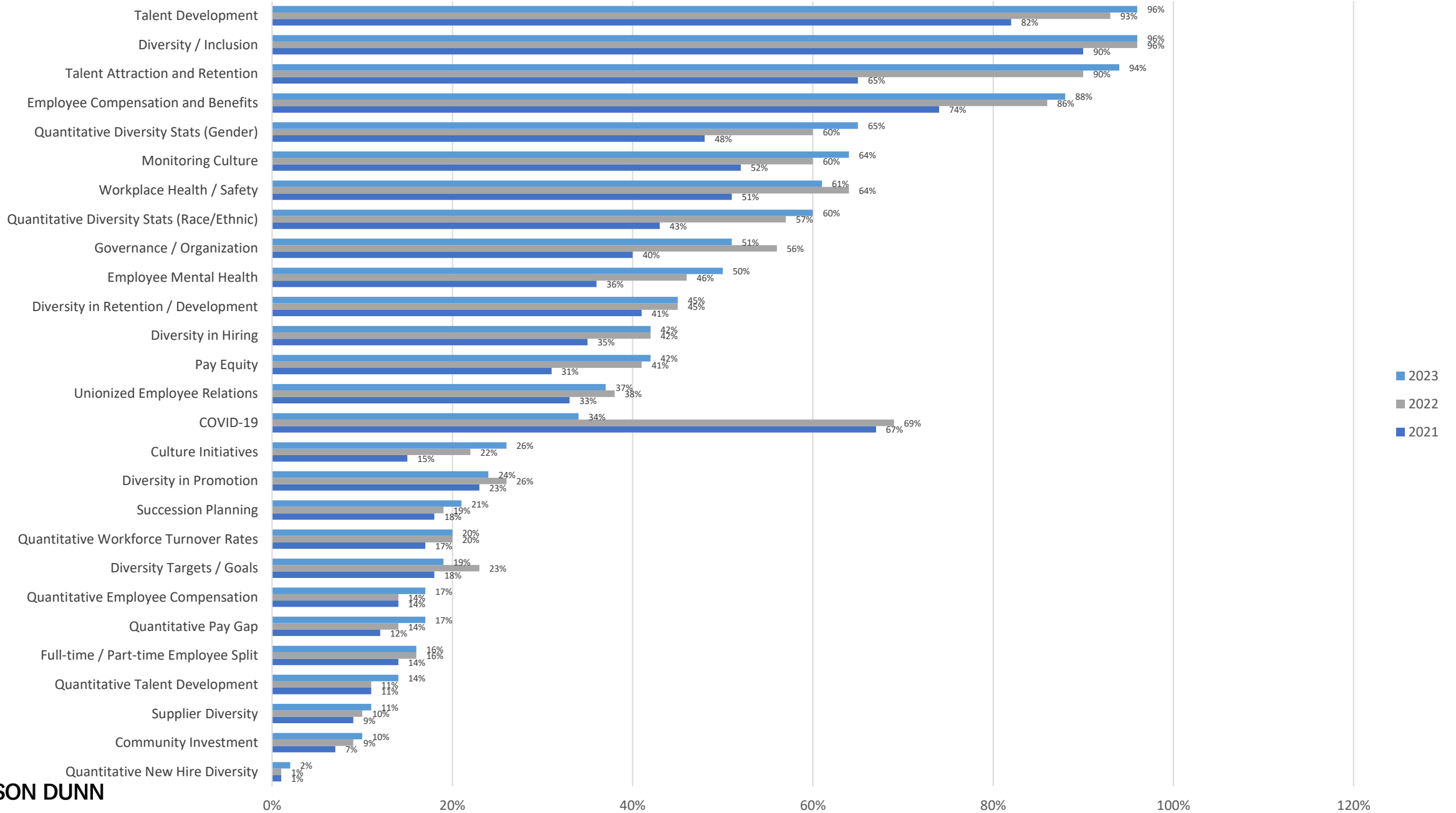
Principles-based requirement adopted in 2020:

- Description of human capital resources
- Measures or objectives for managing the business
 - E.g., development, attraction, and retention of personnel

SEC Investor Advisory Committee recommendations for expanded disclosures:

- **Headcount Metrics.** Disclose “[t]he number of people employed by the issuer, broken down by whether those people are full-time, part-time, or contingent workers.”
- **Turnover Metrics.** Disclose “turnover or comparable workforce stability metrics.”
- **Components of Compensation.** Disclosure of “[t]he total cost of the issuer’s workforce, broken down into major components of compensation.”
- **Demographic Data.** Companies would also be required to disclose “[w]orkforce demographic data sufficient to allow investors to understand the company’s efforts to access and develop new sources of talent, and to evaluate the effectiveness of these efforts.”
- **MD&A disclosure.** Disclose how the company’s “labor practices, compensation incentives, and staffing fit within the broader firm strategy.”

Evolution of S&P 100 Companies' Human Capital Disclosures



Other Trends

Other disclosure trends to consider include:

- **Generative artificial intelligence**
 - E.g., effects on strategy, productivity, market competition and demand for products, investments, reputation, legal and regulatory risks
- **Geopolitical conflict**
 - E.g., Middle East, Russia/Ukraine, China/Taiwan, China/U.S.
- **Potential government shutdown**
 - E.g., Risk Factors, MD&A discussion of material losses
- **Inflation concerns**
 - SEC comment letters have focused on how current inflationary pressures have materially impacted a company's operations, mitigation efforts, and quantification of principal factors contributing to inflationary pressures
- **Interest rate concerns**
 - SEC comment letters have focused discussion of rising interest rates in Risk Factors and MD&A to identify actual impacts on the business

OTHER CONSIDERATIONS

06

Disclosure Controls and Procedures

SolarWinds (Cybersecurity)

Complaint alleges that SolarWinds made a number of false statements relating to:

1. compliance with the National Institute of Standards and Technology (NIST) Cybersecurity Framework;
2. using a secure development lifecycle when creating software for customers;
3. having strong password protection; and
4. maintaining good access controls.

Activision Blizzard (Workplace Misconduct)

SEC alleged the company “lacked controls and procedures designed to ensure that information related to employee complaints of workplace misconduct would be communicated to [company] disclosure personnel to allow for timely assessment on its disclosures.”

DXC Technology (Non-GAAP Financial Measures)

SEC alleged that the company materially increased its non-GAAP earnings by negligently misclassifying tens of millions of dollars of expenses as transaction, separation and integration-related (“TSI”) costs and improperly excluding these expenses as non-GAAP adjustments.

Charter Communications Inc. (Internal Accounting Controls)

SEC alleged failure to establish internal accounting controls to provide reasonable assurances that its trading plans were conducted in accordance with the board of directors’ authorization, which required the use of trading plans in conformity with Rule 10b5-1.

Characterization of Legal Proceedings

Reconsider relying on characterization of legal proceedings as “without merit” in legal proceedings disclosures after *City of Fort Lauderdale Police and Firefighters’ Retirement System v. Pegasystems Inc.*

- Company was ordered to pay over \$2 billion in damages in a prior lawsuit regarding trade secret misappropriation.
- 10-K disclosure stated:
 - “the claims brought against the defendants are without merit”
 - company had “strong defenses to these claims”
 - “any alleged damages claimed by [the plaintiff] are not supported by the necessary legal standard”
- Stock price dropped by ~16% after 10-K filed.
- In subsequent class action, court found that “a reasonable investor could justifiably have understood [the CEO]’s message that [the trade secret] claims were ‘without merit’ as a denial of the facts underlying [the] claims—as opposed to a mere statement that Pega[systems] had legal defenses against those claims.”
- Appropriate alternatives: “we intend to contest this matter vigorously” or “we have substantial defenses” (if supportable).

Updates for 2023 Form 10-K

Compensation Clawback Disclosures

- Two new checkboxes on cover page to indicate whether (i) the financial statements included in the filing reflect a correction of an error to previously issued financial statements and (ii) any such corrections are restatements that required a recovery analysis.
- Companies must file their clawback policy as Exhibit 97 to the Form 10-K.

EDGAR Next

- Public beta environment is open until March 15, 2024.

Glossy Annual Reports

- Required to furnish annual reports electronically on EDGAR in PDF format no later than the day first sent or given to shareholders.
- Should not be re-formatted, re-sized, or otherwise redesigned for purposes of the submission on EDGAR.

Cover Page XBRL Disclosures

- Confirm presenting outstanding share data consistently throughout Form 10-K.

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