MAYER • BROWN

Preparing for the 2015 Proxy Season

Harry R. Beaudry
Partner
+1 713 238 2635
hbeaudry@mayerbrown.com

Jennifer J. Carlson
Partner
+1 650 331 2065
jennifer.carlson@mayerbrown.com

Michael L. Hermsen
Partner
+1 312 701 7960
mhermsen@mayerbrown.com

Laura D. Richman
Counsel
+1 312 701 7304
lrichman@mayerbrown.com

November 5, 2014

Introduction and Overview

- Speakers
  - Mike Hermsen
  - Laura Richman
  - Harry Beaudry
  - Jen Carlson

Introduction and Overview (cont'd)

- Agenda
  - What's on the radar but not ripe for the upcoming proxy season
  - Say-on-Pay and other compensation related matters
  - Shareholder Proposals
  - Annual meeting and proxy statement matters

Introduction and Overview (cont'd)

- What's on the radar
  - Pay ratio disclosures
    - Rules proposed September 18, 2013
  - Pay for performance disclosures
  - Hedging policy disclosures
  - Listing standards with respect to recovery of incentive-based compensation in certain situations
  - Disclosure reform project
  - Shareholder proposal reform

Effective Compensation Disclosure in Proxy Statement

- Use proxy summaries for better overview and comparisons of pay for performance relationship
- Use CD&A to "tell the story" about compensation decisions and rationale; avoid boilerplate descriptions
- Say-on-pay has increased the importance of using executive summaries in CD&A
- Use of "layered" narrative, highlighting critical aspects of compensation and pay for performance early in CD&A

Compensation Presentation Highlights

- Hyperlinked table of contents
  - CD&A subsections and compensation tables
- Graphs and charts to communicate message
  - Disclosing TSR vs. CEO pay
  - Utilizing proxy performance graphs and variations thereof to address TSR
  - Utilizing graphs displaying pay and performance based on measures such as revenue and earnings per share growth
- Graphic tools
  - Color
  - Font
  - Layout
  - Symbols
- Plain English
- Realized pay

Compensation Discussion and Analysis

- Principles based
  - No boiler plate
- Clear discussion of performance targets
- Clear discussion of how compensation is calculated
- Peer group benchmarking discussion
  - Identify peer group
- Compensation risk
  - Not required to disclose absence of risk
  - Disclosure does not have to be in CD&A

Realized Pay Disclosures

- Realized pay is NOT required disclosure
- Compensation required to be reported in the summary compensation table often is realizable only if performance measures are met or stock price level is achieved
- In the summary compensation table equity-based awards must be included for the year granted, at grant-date fair value
- In realized pay disclosure, equity awards are typically included at the value realized when restrictions on stock awards lapse or options are exercised
- W-2 compensation used as measure of realized pay

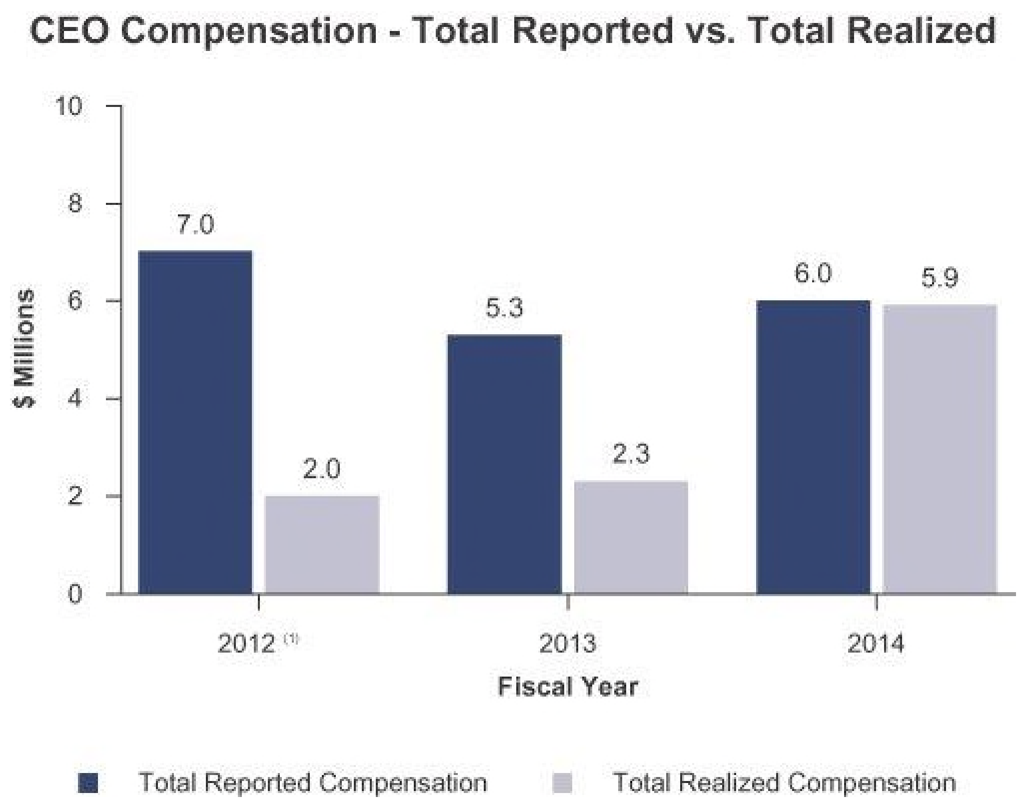
Realized Pay Columns: General Electric 2014 proxy statement

- GE includes W-2 realized compensation in its summary compensation and realized compensation table of its proxy summary, with columns labeled:
  - SEC total
  - SEC total without change in pension value
  - W-2 Realized comp.
- GE also provides a separate realized pay table, following the compensation committee report, reporting W-2 compensation, but noting that realized pay is not a substitute for total compensation
- GE provides information on calculation of realized pay in supplemental materials on its proxy website

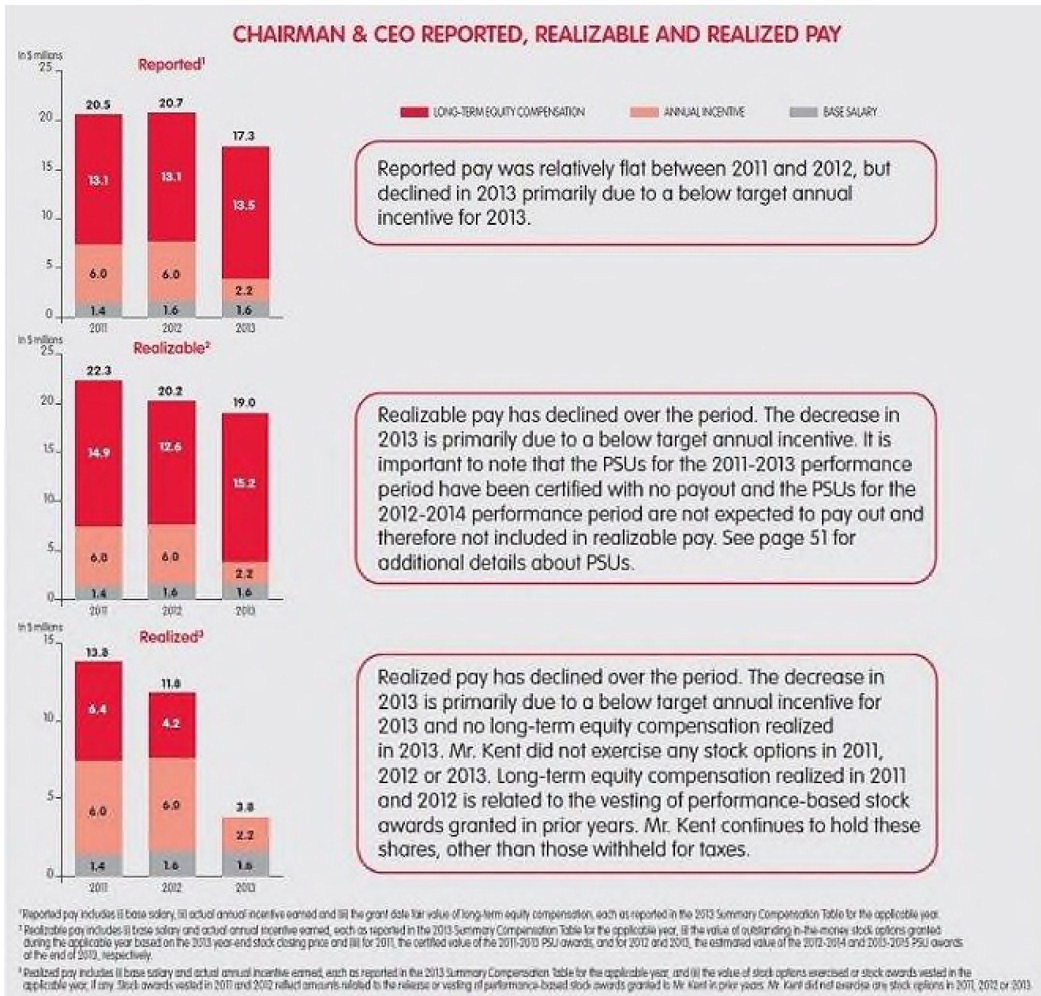
Realized Pay Columns:
Chiquita Brands 2014 proxy statement

- Chiquita's proxy summary includes Summary Compensation and Realized Compensation table
- SCT also has a realized pay column, with footnote explaining that:
  - realized pay is not a substitute for the SEC total
  - total realized pay represents:
    - total SEC compensation, minus
    - the aggregate grant date fair value of equity awards (as reflected in the Stock Awards and Option Awards columns), plus
    - the value realized from the vesting of restricted stock units before payment of withholding taxes and brokerage commissions
  - option vesting not included where options not exercised
  - and NEOs did not sell vested equity other than to pay taxes

Example of Realized Pay Bar Graph: Paychex Inc. 2014 proxy statement



Example of Realizable and Realized Pay Presentation: Coca Cola 2014 proxy statement



Reported pay was relatively flat between 2011 and 2012, but declined in 2013 primarily due to a below target annual incentive for 2013.

Realizable pay has declined over the period. The decrease in 2013 is primarily due to a below target annual incentive. It is important to note that the PSUs for the 2011-2013 performance period have been certified with no payout and the PSUs for the 2012-2014 performance period are not expected to pay out and therefore not included in realizable pay. See page 51 for additional details about PSUs.

Realized pay has declined over the period. The decrease in 2013 is primarily due to a below target annual incentive for 2013 and no long-term equity compensation realized in 2013. Mr. Kent did not exercise any stock options in 2011, 2012 or 2013. Long-term equity compensation realized in 2011 and 2012 is related to the vesting of performance-based stock awards granted in prior years. Mr. Kent continues to hold these shares, other than those withheld for taxes.

[1] Reported pay includes (i) base salary, (ii) actual annual incentive earned and (iii) the grant date fair value of long-term equity compensation, each as reported in the 2013 Summary Compensation Table for the applicable year.

[2] Realizable pay includes (i) base salary and actual annual incentive earned, each as reported in the 2013 Summary Compensation Table for the applicable year, (ii) the value of outstanding in-the-money stock options granted during the applicable year based on the 2013 year-end stock closing price and (iii) for 2011, the certified value of the 2011-2013 PSU awards, and for 2012 and 2013, the estimated value of the 2012-2014 and 2013-2015 PSU awards at the end of 2013, respectively.

[3] Realized pay includes (i) base salary and actual annual incentive earned, each as reported in the 2013 Summary Compensation Table for the applicable year, and (ii) the value of stock options exercised or stock awards vested in the applicable year, if any. Stock awards vested in 2011 and 2012 reflect amounts related to the release or vesting of performance-based stock awards granted to Mr. Kent in prior years. Mr. Kent did not exercise any stock options in 2011, 2012 or 2013.

MAYER • BROWN

Non-GAAP Disclosures in CD&A

- Target levels that are non-GAAP financial measures are not subject to Regulation G
  - Must disclose how the number is calculated from audited financial statements
- This approach is limited to CD&A disclosure of target levels and the disclosure of the actual results of the financial measure that is used as a target
- Other non-GAAP financial measures presented anywhere in the proxy statement are subject to the requirements of Regulation G
- For pay-related circumstances only, the required GAAP reconciliation and other information can be in a cross-referenced annex to the proxy statement
- If the non-GAAP financial measures are the same as those included in the Form 10-K, a prominent cross-reference to the Form 10-K pages containing the required GAAP reconciliation and other information is permitted

Say-On-Pay

- SEC Rule 14a-21(a) requires issuers to hold a separate non-binding shareholder say-on-pay vote to approve or disapprove compensation of named executive officers (say-on-pay)
- SEC Rule 14a-21(b) requires a non-binding shareholder vote on whether say-on pay votes should occur every 1, 2 or 3 years (say-when-on-pay)
- SEC Rule 14a-21(c) requires a non-binding shareholder vote on compensation when an acquisition, merger, consolidation or asset sale is being voted on (say-on-golden parachutes)

Say-On-Pay Vote

- Vote relates to approval of compensation of "named executive officers" (i.e., named in proxy compensation tables) generally as disclosed in the proxy statement, but not individual elements of compensation or corporate practice
- Say-on-pay must happen at least every 3 years, but is now typically an annual vote
- Vote results must be disclosed on Form 8-K within 4 business days of shareholders meeting
- Vote is "advisory" so cannot compel companies to do anything (although effect of significant shareholder disapproval, as well as ISS negative recommendations, will get companies' attention)
- Item 402(b) of Reg. S-K requires companies to disclose in their CD&A whether they considered the results of the most recent shareholder say-on-pay vote and, if so, how that consideration affected executive compensation decisions and policies

Communicating with Shareholders

- Say-on-pay has promoted communications with shareholders to convey important elements of compensation policy and receive shareholder input
  - Since vote itself does not reveal particular compensation issues, companies need shareholder reach-out to determine specific concerns
- Say-on-pay has heightened importance of such communications in view of potential negative recommendations by proxy advisers
- Key—Regular communication with shareholders throughout the year

2014 Say-on-Pay Russell 3000 Voting Results

- As of September 2014, 92.2% of Russell 3000 companies have passed all 4 years mandatory say-on-pay years, while 6.5% have passed in 3 years and failed in 1 year
  - Only 2.4% of Russell 3000 companies failed say-on-pay in 2014
- Russell 3000 companies that failed in 2013 received 36% more support on average in 2014 through the beginning of September 2014

Source: Semler Brossy 2014 Say-on-Pay Results (September 10, 2014)

Impact of Proxy Advisory Firms on Vote Results

- ISS “against” recommendation does not necessarily lead to a failed say-on-pay vote
- In 2014, ISS recommended that shareholders vote “against” say-on-pay at about 13% of Russell 3000 companies it evaluated
- On average, shareholder support was 28% lower when ISS recommended a say-on-pay vote “against”
- Of the Russell 3000 companies receiving an “against” recommendation from ISS, only 19% failed to receive at least 50% support for their executive compensation
  - An additional 39% only received support between 50%–70%

Source: Semler Brossy 2014 Say-on-Pay Results (September 10, 2014)

ISS Methodology

- ISS will generally recommend a vote “against” a company’s say-on-pay proposal if any of the following is true:
  – Significant misalignment between CEO compensation and company performance (pay-for-performance)
  – Maintaining significant problematic pay practices
  – Board exhibits poor communication and responsiveness to shareholders
- ISS may recommend votes “against” or “withhold” for compensation committee members and potentially full board if no say-on-pay on ballot or if ISS sees issues with problematic compensation practices or if the company does not respond adequately to compensation issues

ISS Peer Group Evaluations

- ISS selects peer group generally containing 14 to 24 companies based on
  - Market Cap
  - Revenue (sometimes asset) size
  - Global Industry Classification Standard (“GICS”) industry group
  - Company’s selected peers’ GICS industry group with size constraints
- For Russell 3000, ISS analyzes:
  - Peer Group Alignment
    - Degree of alignment between the company’s annualized total shareholder return (TSR) rank and CEO annualized total pay rank within peer group, each measured over a 3-year period
    - Multiple of CEO total pay relative to peer group median
  - Absolute alignment between trend in CEO pay and company TSR over a 5-year period
- If ISS believes there is significant long-term pay-for-performance misalignment, or for non-Russell 3000 companies if ISS thinks misaligned pay and performance are otherwise suggested, ISS will look to a number of other qualitative factors

Issuer Challenges to ISS Say-on-Pay Recommendations

- Companies receiving a proxy advisory negative recommendation sometimes file a response as additional definitive materials with the SEC
- No requirement to make such a response, but if one is to be used it must be filed with the SEC
- Response not likely to reverse ISS recommendation

Responses to Failed Say-on-Pay Disclosures: Common Review Measures

- Compensation committee review of the company's compensation policy
- Directly contacting shareholders holding a significant percentage of shares
- Obtaining feedback from outside compensation consultant
- Talking with proxy advisory firms
- Improving explanation of policy to shareholders

Responses to Failed Say-on-Pay Disclosures: Common Changes

- Compensation that is more performance-based
- Amendments to long-term incentive plans, employment agreements and/or change in control agreements
- Eliminated tax gross-ups
- Peer group adjustments
- Adoption of compensation guidelines
- Reduced or eliminated perquisites
- No excessive retirement benefits

Responses to Failed Say-on-Pay Disclosures: Common Corporate Governance Changes

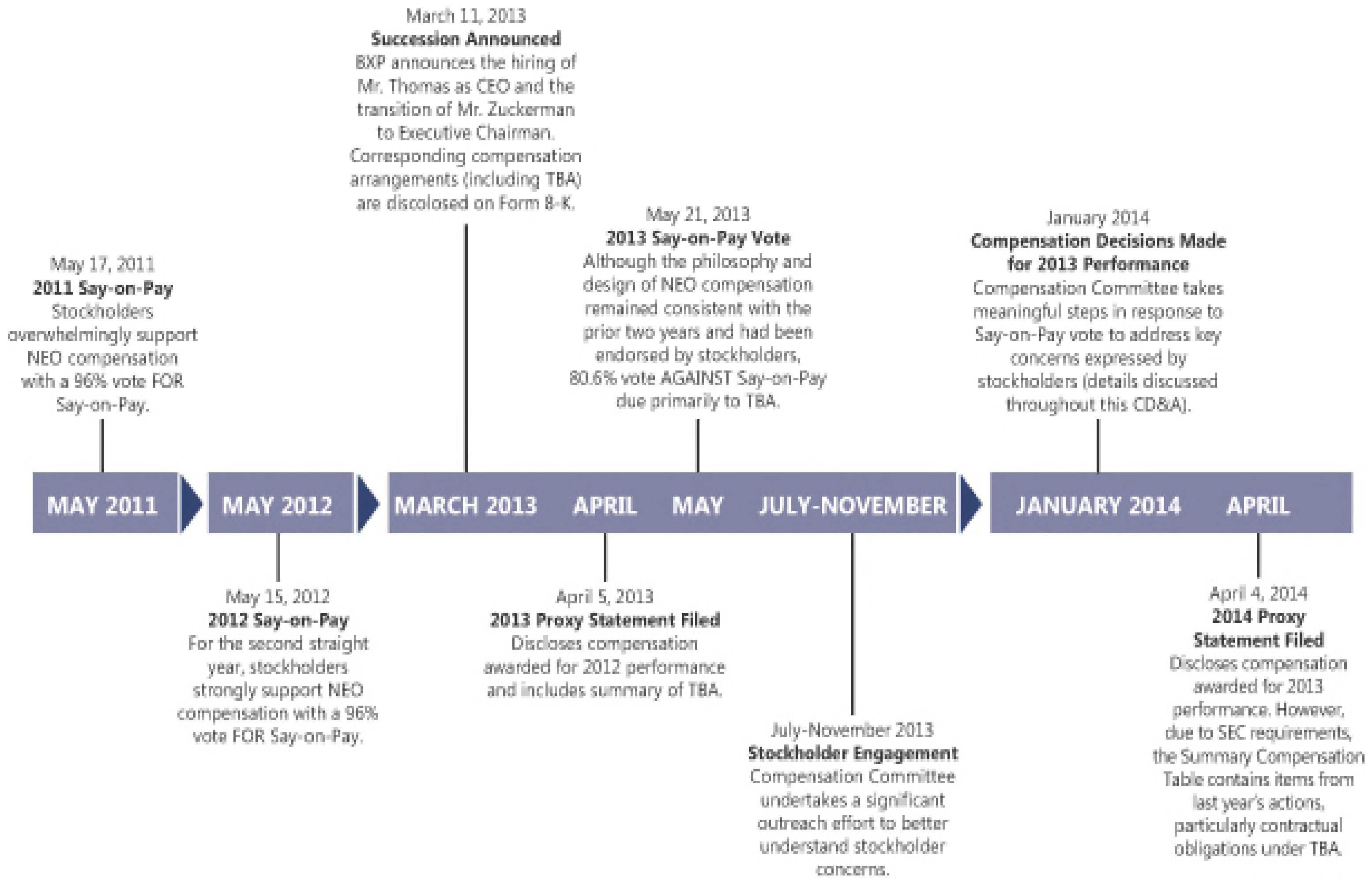
- Clawback policy
- Anti-hedging and anti-pledging policies
- Stock ownership and holding requirements
- Increased disclosure of revenue or other targets

Examples of Formats: Boston Properties

WHAT WE HEARD		HOW WE RESPONDED
The TBA with Mr. Zuckerman was widely viewed as excessive and was not well understood. Stockholders focused on the amount of compensation payable to Mr. Zuckerman under the TBA, particularly in light of his long tenure as Chairman, status as a founder of the Company and sizeable equity stake. Further, a number of stockholders noted that the timing of the announcement of Mr. Thomas' appointment as Chief Executive Officer and the TBA (less than one month before the mailing of the proxy statement) did not afford them an opportunity to fully appreciate the succession process and the importance of the TBA.	➲	**For 2013, the Compensation Committee did not pay Mr. Zuckerman anything beyond what was contractually due.** In connection with the Company's selection, for the first time in its history, of an outside candidate as Chief Executive Officer, the Compensation Committee viewed the TBA as a package designed primarily to secure Mr. Zuckerman's continued focus on the Company during a critical transition period. The Chief Executive Officer transition is going smoothly and Mr. Zuckerman is playing the effective role the Board anticipated. Although Mr. Zuckerman was eligible to receive discretionary compensation for 2013, in light of the Say-on-Pay vote the Compensation Committee did not award Mr. Zuckerman any additional compensation, despite his significant contributions to our performance.

28 BOSTON PROPERTIES, INC. | *2014 Proxy Statement*

Examples of Formats: Boston Properties (Cont'd.)



Examples of Formats: Alexandria Real Estate Equities

- Executive Summary Bullet Points
  - *Background*
  - *Compensation Committee Response – Stockholder Outreach*
  - *Compensation Committee Response – Changes Made in Response to Stockholder Concerns*
- Say-on-Pay Vote Results 2011-2013 Section of CD&A
- Compensation Committee Actions in Response to the 2013 Say-on-Pay Vote Section of CD&A
- Changes Made in Response to Stockholder Concerns Underlying the 2013 Say-on-Pay Vote Section of CD&A

Examples of Formats: Gentiva Health Services

- Executive Summary

  2013 Say-on-Pay Vote—Our Response

  - *Subheadings:*

    1. Shareholder outreach:

    2. Shareholder advisory firm outreach:

    3. Program design changes in response to say-on-pay vote:

       - Long-term performance program grants:
         - <u>Performance measurement period:</u>
         - <u>Total shareholder return ("TSR")</u>:
       - Recoupment ("Clawback") Policy:
       - Double trigger requirement for accelerated vesting in the event of a change in control:

Examples of Formats: Stillwater Mining Company

- Four Part CD&A
- Part 1: Response to May 2013 Say on Pay Vote and Summary of Executive Compensation Program Changes
  - Summary chart addressed 9 elements of pay design
  - Excerpt from summary chart:

Summary of Changes to the Executive Compensation Program 2013 vs. 2014

Pay Design	2013 Compensation Program	2014 Compensation Program
Pay Positioning	* Salary/annual incentive at 50th percentile * LTI between 50th and 75th percentile	* Total direct compensation (salary + annual incentive + LTI) at 50th percentile * No increases to salary or annual incentive targets for NEOs
Peer Groups and Survey Sources	* Median peer size of ≈ $1.5 billion revenue, or ≈ 2x our annual revenue at time of peer group review * Survey data from TowersWatson	* For pay purposes: Compensation Peer Group selection criteria revised Compensation Peer Group median at ≈ $700 million revenue, close to our annual revenue of ≈ $1 billion (as of most recent fiscal year end at time of analysis 12/31/12)

Examples of Formats: Stillwater Mining Company (cont'd.)

- Part 2: Changes to the 2014 Compensation Program
  - Examples of the charts used in this section:

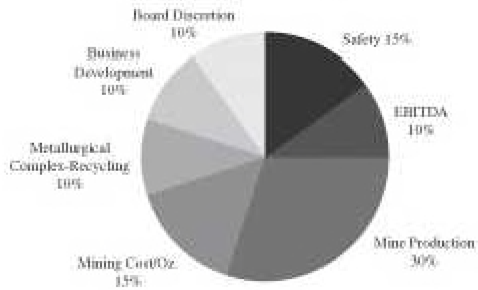
Long-Term Incentive Mix
2013 vs. 2014

Long-Term Incentive Vehicle	Time Horizon	2013 All Participants	2014 CEO, CFO, VP Mining Operations, VP Corporate Development	2014 Other NEOs/ Officers
Performance RSUs—Prospective 3-Year Performance	3-year prospective performance period, cliff vesting	NA	70%	60%
Time-Vesting RSUs	3-year ratable vesting	NA	30%	40%
Performance RSUs—Prior 1-Year Performance	Prior 1-year performance period, 3-year ratable vesting	100%	NA	NA

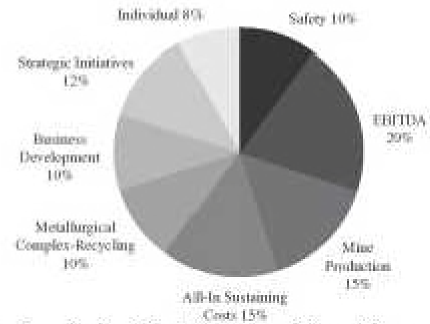
Examples of Formats: Stillwater Mining Company (cont'd.)

Annual Incentive Performance Measures and Weightings

2013 Annual Incentive Plan



2014 Annual Incentive Plan



Rationale for Measure Changes

* Increased weighting on EBITDA to strengthen direct tie to shareholder outcomes
* Reduced weighting on mine production volume to be in balance with mining costs
* Modified mining cost measure to include total costs in support of business strategy cost control objectives
* Modified metallurgical complex-recycling measures to emphasize earnings:
  – Directly via EBTDA (like EBITDA but including interest income)
  – Indirectly through cost control; kept production volume measure
* Substituted short-term strategic measures for unstructured board discretion to focus management on initiatives that will drive growth and/or operational efficiency (assessment may be quantitative or discretionary based on guidelines or milestones)
* Introduced an individual performance component to provide for some individual performance differentiation, where warranted

Rationale for Maintaining Other Measures

* Mine production and cost measures are critical drivers of earnings and within management control, (unlike revenue or earnings, which are directly subject to commodity price changes)
* As with mine production, metallurgical complex-recycling production measure is critical driver of earnings when coupled with cost controls
* Safety measure is the cornerstone of Stillwater's social license, and it is key to long-term operational stability and employee well-being
* Business development measure relates to optimizing future paths with Marathon and Altar projects

Examples of Format: Atlas Air Worldwide Holdings, Inc.

- Overview—Compensation Program Updates After the 2013 Say-On-Pay Vote
  - Excerpt from chart addressing 9 areas of focus:

Area of Focus	What We Heard from Investors	Program Element Before 2013-14 Update	How We Responded in 2013-14
CEO Compensation Benchmarking	CEO's pay should be targeted at median	CEO pay targeted to 50th-75th percentile of compensation benchmarking peers	• For all future CEO pay decisions, total direct compensation targeted at median of benchmarking peer group. 2014 CEO annual incentive plan ("AIP") and long-term incentive plan ("LTI") award grants targeted at median of benchmark peer group • CEO LTI plan target award reduced by 100 percentage points, from 475% to 375% of base salary
CEO Annual Bonus Payout	Consider negative discretion to reflect special circumstances in addition to operating performance	2013 performance against stated objectives under the AIP would have supported a bonus of 145% of target to the CEO	• The Compensation Committee used downward discretion to reduce the bonus payout in 2013 by an additional $673,000 (an additional 65 percentage points), down to 80% of target • This is 40% below prior year payout all based on special circumstances of this year, including our 2013 total shareholder return

Examples of Formats: Volcano Corporation

- Excerpt from chart addressing 8 areas of concern:

Primary Stockholder Concern or Request	Compensation Committee Response
Request for better disclosure on the performance metrics for our short-term incentive plan and performance-based restricted stock unit awards, or PRSUs, actual performance levels, and determination of payout levels	We have significantly enhanced the disclosure regarding the performance metrics for our short term incentive plan and performance-based RSUs (PRSUs) by providing more detail about each performance metric and disclosing the weighting of each performance metric. Our 2013 short-term incentive plan was funded at only 50% of target based on achievement of 2013 performance goals, plan design and our pay-for-performance philosophy as further described under "2013 Compensation Decisions - 2013 Short-Term Incentive Plan." We terminated the sales commission plan for Mr. Quinoy and provided for his participation in our 2014 short-term incentive plan to align all of our NEO incentives to the same performance criteria.
Concern with benchmarking practices targeting pay at the 75th percentile of peers	We now target pay at the 50th percentile of peers.
Request for stronger link between pay and performance (including granting an increased portion of our equity awards that vest based on specific performance objectives)	• We removed options from the annual equity grant mix for our NEOs. • We increased the PRSU portion of the annual equity grant from 25% to 50%. • We now use objective corporate performance vesting metrics that create stockholder value. • Our Chief Executive Officer did not receive an increase in base salary for 2014.

Examples of Formats: Volcano Corporation (cont'd)

- Excerpt from chart comparing what they do and don't do:

Key Features of Our 2014 Executive Compensation Program

WHAT WE DO	WHAT WE DON'T DO
✓ We tie pay to performance by providing a significant amount of compensation that is at risk	×We do not have excise tax gross-ups for change-in-control severance benefits
✓ We use objective corporate performance criteria as the metrics for vesting of our PRSUs and funding of our short-term incentive plan	×We do not provide excessive perquisites
✓ We align pay and performance by selecting objective performance criteria that create stockholder value	×We do not allow hedging or pledging of Company stock
✓ We target pay at the 50th percentile of peers	×We do not provide our NEOs with guaranteed annual salary increases or guaranteed bonuses
✓ We have stock ownership guidelines	×We do not pay dividend equivalents on unvested restricted stock units
✓ We have a clawback policy	×We do not allow for repricing of underwater stock options (including cash-outs) without prior stockholder approval
✓ We pay reasonable cash compensation to our senior executives	×We do not maintain compensation programs that we believe create risks reasonably likely to have a material adverse impact on the Company
✓ We provide appropriate benefits to our senior executives	×We do not have a supplemental executive retirement plan that provides pension or other benefits to our NEOs
✓ We have maximum payout amounts for cash and stock paid to our senior executives	
✓ We retain an independent compensation consultant	
✓ We have "at-will" employment agreements with our NEOs	
✓ We have "double trigger" change-in-control cash compensation severance arrangements with our senior executives	
✓ We schedule and price equity grants to promote transparency and consistency	

Examples of Formats: OraSure Technologies Inc.

- As a general matter, our stockholders:

* * *

  - Supported the use of equity awards that vested upon achievement of objective performance metrics, but clearly recognized that:
    - TSR did not need to be a specific performance metric embedded in equity compensation and that other metrics, such as revenues or operating performance, could be used; and
    - Using TSR as a vesting metric may not be appropriate for the Company because of the volatility of its stock and the need to heavily invest in product and clinical development.

Examples of Formats: OraSure Technologies Inc. (cont'd.)

- CD&A disclosed that company considered this concern but did not change its time-based practice
  - . . .The Board strongly believes its current practice of using stock options for 60% of executive equity awards is equally effective to awarding restricted stock with vesting tied to increased TSR since in both cases the recipient of the award will receive no actual value unless our stock price increases after the grant date. Moreover, the Board was very concerned that the use of performance metrics might result in improper or unintended incentives for our executives. For example, a metric such as revenue growth or improved profitability might be a disincentive for management to invest in product development or complete an acquisition or divestiture that adversely affects our financial performance for the next year or two but is nevertheless beneficial to the Company over the long term. . . For these reasons, the Board determined not to adopt performance vesting at this time, but concluded that it would remain open to considering equity awards with performance vesting in the future as the Company's business continues to grow and mature.

Say-on-Pay Litigation

- First lawsuits were filed against a number of companies and their boards of directors where say-on-pay proposals failed to garner majority approval, alleging breaches of fiduciary duty
- Subsequent suits alleging insufficient compensation disclosures in the proxy statements, seeking to enjoin the shareholder vote unless the company provided additional compensation disclosures
  - In June 2014, Cheniere Energy postponed its meeting due to a lawsuit filed about 2 weeks before meeting which, among other things, sought to enjoin the meeting until corrective disclosures were made
- Some lawsuits challenging specific compensation actions, for example, based on failure to comply with Section 162(m) of the Internal Revenue Code
- Lawsuits were also filed regarding outside director compensation
- In addition to filed lawsuits, plaintiffs' law firms announced "investigations" of executive compensation at a number of companies
- Publicity surrounding pay-related lawsuits may have motivated more strenuous responses to negative ISS recommendations

Litigation Fact Pattern Allegations

- Pay not connected to performance despite pay for performance disclosures
- Negative vote on say-on-pay
- Company did not change compensation following vote
- Disclosure not adequate to permit vote
- Material omissions

Claims Raised by Litigation

- Directors breached duty of care and loyalty
- Misrepresentation/noncompliant disclosure in the proxy statement
- Failure to comply with Section 162(m)
- Corporate waste
- Consultants aided/abetted and/or breached contract
- Executives or directors unjustly enriched
- Issues with respect to stock plan approval
  - Vote counting and treatment of abstentions (Cheniere Energy case)

Level and Type of Litigation Risk

- Directors acting in good faith may be protected by the business judgment rule
- Dodd-Frank expressly provided that the say-on-pay vote
  - Was non-binding
  - Did not overrule decisions of the board of directors
  - Did not change fiduciary duties
  - Did not add fiduciary duties
- Reputational risk
- Costs of litigation and potential settlements, even if successfully defended
- Risk of annual meeting being enjoined could impact other corporate initiatives

Shareholder Proposals in 2014

- Modest decrease in shareholder proposal activity
- Fewer shareholder proposals received majority support
- Social policy proposals were the most commonly submitted, but were not widely supported by shareholders
- Fewer corporate governance proposals submitted with greater focus on board composition
- Growing support for proxy access
- Activist investors becoming more active and influential
- Shareholder and proxy advisor outreach

Shareholder Proposal Topics – Corporate Governance

- Independent chair
  - Support for this proposal declined in 2014
  - If strong alternative structure, shareholders not likely to approve
- Majority voting
  - Those that failed were mostly at companies with plurality voting with a resignation policy
- Board declassification/annual director elections
  - Fewer proposals submitted and voted on in 2014
  - Strongly supported by shareholders

Shareholder Proposal Topics – Corporate Governance (cont'd.)

- Action by written consent
  - Concerns about disenfranchisement of some shareholders
- Right to call special meeting
  - Seek to enhance shareholder ability to call special meetings
- Cumulative voting
  - Institutional shareholders generally not in favor
- Supermajority voting
  - Seeks to eliminate supermajority voting provisions

Shareholder Proposal Topics – Corporate Governance (cont'd.)

- Proxy access proposals – trending upward?
- Proposed SEC Rule 14a-11
  - Would have required companies to include shareholder nominees for election to board in proxy statement
  - Vacated by the U.S. Court of Appeals for the District of Columbia
- Private Ordering
  - Rule 14a-8(i)(8) allows shareholders to propose proxy access procedures
  - Abercrombie & Fitch, Big Lots!, Nabors
  - Growing support for 3%, 3-year formula

Shareholder Proposal Topics – Corporate Governance (cont'd.)

- Board composition: tenure and diversity
  - Historically, little support for board composition proposals
  - Proposals often withdrawn when companies engage
  - Recent focus on board tenure:
    - Negative factor in ISS governance rating
    - Long tenure seen as "problematic" by 74% of institutional investors
    - May see increase in proposals in this area (Costco)
  - Shift in board diversity proposals
    - Greater emphasis on gender diversity
    - Progress report

Shareholder Proposal Topics – Political Spending / Lobbying

- *Citizens United* decision (U.S. Supreme Court – 2010)
- Remains the most popular shareholder proposal initiative
  - Most frequently submitted and voted on proposal in 2014
  - Most active proponent: New York State Common Retirement Fund
- Only modest support for these proposals:
  - Average support in 2014 was 21% of votes cast
  - Proposals that limit or prohibit political contributions or lobbying activities are the least popular
  - Proposals that focus on disclosure fare better, but none passed in 2014

Shareholder Proposal Topics – Environmental Issues

- Climate change
  - Typically a report on efforts to reduce greenhouse gas emissions
  - Also, financial risks arising from climate change, adoption of principles to reduce global warming
- Sustainability
  - File reports on sustainability efforts
- Other environmental issues
  - Hydraulic fracturing, coal-related proposals, recycling, water scarcity, oil sands, toxic substances

Shareholder Proposal Topics – Compensation Issues

- Significant drop in number of proposals voted on in 2014
  - 61 proposals voted on, averaging 25% support
- Proposal types:
  - Limit acceleration of vesting of equity awards upon a change of control
    - Four proposals received majority support, first time since 2010
    - Average support increased to 35%
  - Require executive officers to retain a percentage of stock awards through retirement
  - Other proposals covered a variety of compensation issues

Receipt of Shareholder Proposal

- Rule 14a-8
- Initial assessment of proposal and proponent
- Check for technical deficiencies immediately
  - Verify ownership
  - 500 words or less
  - Is it late?
  - Other
- Respond to proponent within 14 days of receipt
- Opportunity to cure deficiency

Evaluation of Shareholder Proposal

- Evaluate whether any other grounds for exclusion exist:
  - Relates to ordinary business operations
  - Not relevant to the company’s business
  - Substantially implemented
  - Company lacks power or authority to implement
  - Violates proxy rules
  - Improper under state law or violates the law
  - Involves personal claim or grievance
  - Other

Preparing the No-Action Request

- Deadline for submission – 80 days before definitive proxy
  - Otherwise, must obtain a waiver from SEC
- The No-Action request letter
  - Identify all plausible arguments for exclusion
  - Cite the most recent applicable authority
  - Submit to SEC and proponent (with other documentation)
- Proponent may submit rebuttal
- SEC may give proponent opportunity to cure deficiency

The Opposition Statement

- Must be sent to the proponent of the shareholder proposal not later than 30 days before the definitive proxy is filed
  - Prepare and send even if awaiting SEC no-action response
  - Shareholder proponent can object to false or misleading statements
- Research relevant proxy advisor voting policies and address in opposition statement
- Engage institutional shareholders and proxy advisors
- Consider whether additional soliciting materials should be prepared and filed

Compensation Committee Member Independence

- Stock exchange listing standards became effective in July 2013
- Compliance with compensation committee member independence standards was required for all companies as of the earlier of
  - The first annual meeting after January 15, 2014 and
  - October 31, 2014
- NYSE and Nasdaq provisions are very similar
- One major difference is that Nasdaq now requires a listed company to have a compensation committee

Compensation Committee Member Independence

- Members must satisfy general independence standards
- Board must consider the following factors
  - Source of compensation of the director
  - Whether the director is affiliated with the company, a subsidiary or an affiliate of a subsidiary
- Board must also consider all factors specifically relevant to determining whether the director’s relationships impact the ability to be independent from management

Compensation Committee Adviser Requirements

- Compensation committees may select a consultant, counsel or other adviser only after taking into account:
  - The provision of other services to the company by the person that employs the adviser
  - The amount of fees received from the company to the employer of the adviser, as a percentage of total revenue
  - The policies and procedures of the employer of the adviser that are designed to prevent conflicts of interest
  - Any business or personal relationship of the adviser with a member of the compensation committee
  - Any stock of the company owned by the adviser
  - Any business or personal relationship of the advisor of the employer of the advisor with an executive officer

Compensation Committee Adviser Requirements (cont'd.)

- A listed company is required to conduct an independence assessment with respect to any advisor or consultant other than:
  - In-house counsel
  - Any adviser whose role is limited to
    - consulting on any broad-based plan that does not discriminate in scope, terms or operation in favor of executive officers or directors and that is generally available to all salaried employees
    - providing information that either is not customized for a particular company or that is customized based on parameters that are not developed by the adviser, and about which the adviser does not provide advice

Compensation Committee Adviser Requirements (cont'd.)

- Compensation consultant conflict of interest disclosure
  - Effective for 2013 proxy season
  - Disclose the nature of the conflict and how it is being addressed
  - Consider the same factors used for determining independence
- Changes may be necessary in compensation committee charters, corporate governance guidelines and D&O questionnaires

D&O Questionnaires

- Compensation Committee Independence
  - Any business or personal relationships with a compensation consultant retained, or proposed to be retained, by the company or the compensation committee?
  - Any consulting, advisory or other compensatory fee paid to the director by the company or any of its subsidiaries?
  - Is the director affiliated with the company, any of its subsidiaries, or an affiliate of any subsidiary?
- Iran Threat Reduction and Syria Human Rights Act of 2012
  - Inquire whether any director or officer has engaged in activities with respect to Iran or has knowledge of any company activities
- Any company-specific regulatory developments?

Proxy Advisors

- Many institutional investors retain proxy advisory firms to make recommendations about how to vote
- ISS and Glass Lewis publish voting policies with respect to compensation, governance, social responsibility and other matters
- Influence of proxy advisors varies:
  - Composition and voting profile of shareholder base
  - Divergence from proxy advisors on certain issues

Proxy Advisors (cont'd.)

- Proxy advisors may be subject to proxy rules and/or subject to regulation as investment advisors
- SEC and others have discussed additional regulation of proxy advisors
  - Disclosure of policies, procedures and research undertaken
  - Reporting and management of conflicts of interest
  - Proxy advisor registration
  - Filing voting recommendations with SEC

Proxy Voting Legal Bulletin

- June 30, 2014 Staff Legal Bulletin – Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms
- Responsibilities of Investment Advisors
  - Steps to demonstrate votes cast in clients' best interests
  - Considerations when retaining a proxy advisor
  - Accuracy of facts used in proxy advisors' recommendations
- Proxy Advisory Firms
  - When subject to proxy rules and when exempt
  - Steps for exemption and conflicts of interest

Vote Standards and Vote Counting

- Proxy statement required disclosure:
  - Vote required for approval of a matter or election of directors
  - Method by which votes will be counted, including treatment and effect of abstentions and broker non-votes
- Recent interest in vote standards and counting
  - Shareholder proposals to establish a “for and against” standard, ignoring abstentions and broker non-votes
  - Cheniere Energy litigation and DGCL §205 action regarding application of vote standards and counting under the DGCL, NYSE market rules and the company’s bylaws

Vote Standards and Vote Counting (cont'd.)

- Review voting standards required for each proposal
  - State law (DGCL, etc.)
  - Certificate of Incorporation and Bylaws
  - Corporate governance principles and other company guidelines
  - Exchange listing standards
- Determine early whether inconsistencies exist between state law, listing standards and company documents
- Provide clear and accurate disclosure
- Don't forget about quorum requirements

Form 8-K Voting Results (Item 5.07)

- Disclose voting results for each proposal on the ballot
  - Number of votes cast for, against or withheld, as well as abstentions and broker non-votes
  - For say-on-when-pay, disclose number of votes for each of 1 yr, 2 yrs and 3 yrs, as well as abstentions
  - Separate tabulation for each director nominee
  - File within four business days after the annual meeting
- Disclose company's decision in light of say-on-when-pay vote within 150 calendar days after the annual meeting

The Annual Meeting

- Meeting logistics – proper planning makes a big difference
  - Admission policy, registration and security
  - Manage media participation
  - Meeting script
  - Security
- Rules of conduct are essential
- Dealing with floor proposals
- Dealing with disruptive members of the audience
  - Schedule Q&A at the very end of the meeting
- Shareholder proposal must be presented by proponent (or representative)

Online/Virtual Meetings

- Allowed under state law and the company's certificate of incorporation and bylaws?
- Primary benefits of virtual meetings
  - Allows more shareholders to attend, view and participate
  - Shows commitment to transparency, cost and environment
- Primary drawbacks of virtual meetings
  - Legal restrictions and uncertainty
  - Technical difficulties
  - Concern over limited interaction among shareholders and D&Os
- Substitute vs supplement for in-person meeting

MAYER • BROWN

Thank you

Harry R. Beaudry
Partner
+1 713 238 2635
hbeaudry@mayerbrown.com

Michael L. Hermsen
Partner
+1 312 701 7960
mhermsen@mayerbrown.com

Jennifer J. Carlson
Partner
+1 650 331 2065
jennifer.carlson@mayerbrown.com

Laura D. Richman
Counsel
+1 312 701 7304
lrichman@mayerbrown.com

MAYER BROWN