



IPO and Public Company Readiness: Advance Planning for 2025 and 2026 IPOs

Executive Compensation & Employee Benefits

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GIBSON DUNN

Today's Panelists



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Agenda

01 Introduction

02 Corporate Governance and Fiduciary Duties

03 Equity Compensation Plans

04 ERISA and Employee Benefits

05 Post-IPO Securities Law Compliance and Reporting

06 Attorney Bios

Introduction

01

IPO Readiness Considerations

- Public disclosure of compensation and equity plan information begins with IPO registration statement
 - Detailed disclosure of compensation information for top officers
 - Equity plan and grant information for executive officers
 - Public scrutiny of compensation information, perks, etc.
- Executive/employee motivation and retention
 - IPO is a time at which programs get reevaluated and updated as appropriate for a public company
- Underwriter due diligence
 - Underwriters seek to establish due diligence defense by conducting reasonable diligence
- Estate/wealth planning for individuals



Corporate Governance and Fiduciary Duties

02

Compensation Committee

- Listed companies required to have compensation committees to oversee executive compensation
 - Independent/non-employee directors required, subject to phase-in and controlled company exceptions
 - Charter lays out responsibilities of committee
 - Authority to approve vs. recommendation to full board
 - Authority to engage advisors
- Development of compensation philosophy
- Oversight of risk management re compensation
- Oversight of public disclosures regarding compensation



Fiduciary Duties

- Same fiduciary standards apply to compensation committee members as to all directors
 - Duty of care
 - Duty of loyalty
- Business judgement rule should apply absent conflicts of interest
- Entire fairness may apply in event of conflict of interest
 - Director compensation
 - Compensation of controlling stockholder



Equity Compensation Plans

03

Types of Plans / Programs

- Omnibus Equity Incentive Plan
- Employee Stock Purchase Plan
 - Qualified
 - Non-Qualified
 - Considerations for Cross-Border Issuers
- Directed Share Program
 - “Friends and Family”
 - IPO Participation
- Inducement Awards



Omnibus Plan: Types of Awards

- Stock Options
- Stock Appreciation Rights (cash/stock settled)
- “Full Value Awards”
 - Restricted Shares
 - Restricted Stock Units (cash/stock settled)
 - Other Share-Based Awards
- Cash Awards (incl. Omnibus Cash Bonus Plan)
 - Benefits of Including in Omnibus Plan
- Cross-Border Considerations
 - Sub-Plans



LTI Program Design

- Grant Timing
- Full Value / Non-Full Value Awards
- Time-Based / Performance-Based Awards
- Vesting Acceleration
 - Termination of Employment
 - Change in Control



Stock Exchange and Securities Requirements

- Pre-IPO Adoption/Establishment
 - Benefits of Evergreen
- Board Approval
- Shareholder Approval
 - Plans Requiring Shareholder Approval
 - Exceptions to Shareholder Approval
- Modifications Requiring Shareholder Approval



Basic Disclosure Framework

(stay tuned - more on this later!)

- Form S-1 / F-1
- Form S-8
- Form 10-K
 - Equity Plan Table
 - Filing Forms of Award
- Proxy Statement
 - Compensation Discussion & Analysis
 - Tables
 - Pay versus Performance
 - Option Grant Practices
- Section 16 Reporting



Institutional Investors / Proxy Advisors

- Engaging a Compensation Consultant
 - Benchmarking
- Disclosure
- “Pay for Performance” Paradigm
- Dealing with Volatility
- Ownership of Engagement



ERISA and Employee Benefits

04

Employment Agreements

- Importance of Due Diligence
- IRC 409A – New Considerations as a Public Company
- Executive Loans // SOX
- Disclosure and Filing Obligations
- Individual Agreements vs Severance Plans



Cash Bonus Plans

- Formulaic Plans
- Discretionary Bonuses
- Disclosure and Filing Obligations



H&W, Retirement Plans; Perquisites

- ACA Compliance
- Non-Discrimination Testing
- Perquisites and Other Benefits; Disclosure Obligations
- Importance of Due Diligence



Post-IPO Securities Law Compliance and Reporting

05

Types of Issuers

- Large Accelerated Filer
- Smaller Reporting Company (SRC)
- Emerging Growth Company (EGC)
- Foreign Private Issuer (FPI)



SEC Forms

- Form S-1 / F-1
- Form S-8
- Form 10-K
- Proxy Statement
- Form 8-K
- Section 16 Reporting
- Form S-4 / Schedule TO



Initial Filing (Form S-1 / F-1); Insider Filings (Forms 3 / 4 / 5)

- Form S-1 / F-1
 - Timing & Process are Key
 - Look-Back for Historical Compensation Disclosure
 - Type of Issuer
- Insider Filings (Forms 3 / 4 / 5)
 - Timing & Organization are Key
 - Triggers
 - Increased SEC Scrutiny



Form 10-K; Proxy Statement

- Form 10-K / Proxy Statement – Where to Disclose
- Content of Disclosure
 - Specific to Type of Issuer
 - Compensation & Discussion Analysis
 - Tables
 - Pay Ratio
 - Pay versus Performance
 - Option Grant Practices
- Compensation Committee Report
- Compensation Risk Assessment



Form 8-K

- Item 5.02 Triggers
 - Departure of Director (Special Circumstances)
 - Departure of Directors (No Special Circumstances); Departure of Certain Officers
 - Appointment of Certain Officers
 - Election of Director
 - Material Compensatory Plans, Contracts, Arrangements
- Item 5.07
 - Important; Can Often be Missed
 - SEC and Shareholder / Plaintiff Attorney Scrutiny
- Item 8.01 (“Other Events”)



Form S-8

- Registration Statement for Employee Benefit Plans
 - Equity plans (including pre-IPO plans covering outstanding awards)
 - Deferred compensation plans
- Timing of Initial S-8
- “Short-Form” S-8
- No Coverage for Equity Grants to Entity Consultants
- Auditor Consent
- S-8 Prospectus



Shareholder Voting on Compensation

- Say-On-Pay
- Say-On-Frequency (“say when on pay”)
- Equity Plan Approval
- “Golden Parachute” Approval



Dodd-Frank Clawback Rules

- Exchange-Specific Rules – Track SEC Rule
- No Exceptions Based on Type of Issuer
- Adoption of Policy
- Multiple Policies
- Filing Policy
- Disclosing Policy
- Form 10-K Check Boxes
- Disclosing Restatements; Clawbacks



Managing Proxy Proposals; Activism

- Compensation-related shareholder proposals
 - Most common shareholder proposal remains shareholder approval of severance agreements
 - Typically receive very low support (under 25%)
 - Adoption of mitigating policies typically sufficient to oppose the proposal
- Activism and compensation
 - Compensation rarely the sole topic of activist pressure
 - But very often used to support allegations of underperformance or poor management
 - Misalignment of compensation with peer group or actual performance common allegation



Attorney Bios

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Sean Feller is a partner in Gibson, Dunn & Crutcher's Century City office. He serves as Co-Chair of the firm's Executive Compensation and Employee Benefits Practice Group. His practice focuses on all aspects executive compensation and employee benefits. His practice encompasses tax, ERISA, accounting, corporate, and securities law aspects of equity and other incentive compensation plans; qualified and nonqualified retirement and deferred compensation plans and executive employment and severance arrangements. Mr. Feller has been recognized by his peers as one of *The Best Lawyers in America* in the area of Employee Benefits (ERISA) Law. In 2020 and 2022, he was ranked by *Chambers USA* as a Leading Lawyer in Los Angeles in the area of Employee Benefits and Executive Compensation.

Mr. Feller's practice has focused on:

- Designing and implementing stock and other incentive plans
- Designing, implementing and advising clients on deferred compensation plans, 401(k) plans and ESOPs, SERPs and tax-qualified defined benefit pension plans, as well as health and welfare plans and other types of fringe benefits
- Advising public company clients on securities law compliance involving a comprehensive range of compensation plans
- Advising public company clients on securities law disclosure requirements involving executive and director compensation
- Advising companies, boards and management teams on compensation and benefits in mergers and acquisitions
- Designing and negotiating executive and director compensation arrangements

Mr. Feller received his law degree from Columbia Law School in 2000. He earned a Bachelor of Science from Cornell University in 1997. He is admitted to practice in the States of New York and California.

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Columbia University
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Ekaterina (Kate) Napalkova is a partner in the New York office of Gibson, Dunn & Crutcher and a member of the Employee Benefits and Executive Compensation Practice Group.

Kate advises public and private companies, private investment funds, boards of directors and management teams on a broad range of compensation and employee benefits matters. Her advice focuses on the compensation and employee benefits aspects of mergers and acquisitions, restructurings, public offerings, spin-offs and other corporate transactions. She is experienced in the negotiation and implementation of benefit and compensation plans, as well as compensation-related securities reporting and corporate governance matters.

Chambers USA has ranked Kate as a leading lawyer for the third straight year and *Legal 500* has recognized her as a key lawyer.

Before joining Gibson Dunn, Kate served as a partner at an international law firm. She received her law degree cum laude in 2009 from the Fordham University School of Law, where she also served as the editor-in-chief of the Fordham International Law Journal. She is admitted to practice in New York and California.

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Stewart L. McDowell is a partner in the San Francisco office of Gibson, Dunn & Crutcher. She is a Co-Chair of the firm's Capital Markets Practice Group and a member of the firm's Corporate Department.

Ms. McDowell represents companies, investors and underwriters in a variety of complex capital markets transactions, including IPOs, convertible and non-convertible debt and preferred equity offerings, PIPEs and liability management transactions. She also represents companies in connection with U.S. and cross-border M&A and strategic investments, SEC reporting, corporate governance and general corporate matters.

Ms. McDowell is ranked by *Chambers USA* for Capital Markets: Debt & Equity (California and Western United States). She is frequently ranked by *The Best Lawyers in America*® as a "Lawyer of the Year," most recently for 2023 Banking and Finance Law in San Francisco. *Expert Guides* named her to its 2021 and 2022 *Guide to the World's Leading Women in Business Law* and to the 2022 *Banking, Finance and Transactional Guide*. *The Recorder* named Ms. McDowell as a "Women Leader in Tech Law" for four years in a row.

Ms. McDowell received her law degree from the University of Virginia School of Law in 1995 and her Bachelor of Arts degree from Princeton University in 1991.

Ms. McDowell is a member of the California State Bar and the New York Bar Association.

Ms. McDowell is on the board of UPWARD, a global networking organization accelerating the advancement of executive women, and a member of the Steering Committee of the Allegro Circle of the San Francisco Ballet.

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University of Virginia
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Gina Hancock is an associate in the Dallas office. She practices in the firm's Executive Compensation and Employee Benefits Department. Gina has significant experience with executive compensation, complex domestic and international transactional matters, initial public offerings, health and welfare benefit plan, retirement plan, and related matters. Her practice focuses on all aspects of equity compensation; employee stock purchase plans; 401(k), pension and nonqualified deferred compensation plans; executive employment, severance, retention, change in control and restrictive covenant agreements; incentive compensation; and cafeteria and other welfare benefit plans. She also provides advice with respect to general corporate governance and disclosure matters.

Gina is recognized by *Chambers USA 2024* as a Associate to Watch and on the 2024 and 2025 *Best Lawyers: Ones to Watch® in America* lists for Employee Benefits (ERISA) Law.

Gina graduated from Georgetown University Law Center in 2015, where she served on The Tax Lawyer. In 2012, she earned a Bachelor of Science in Business Administration, Accounting, *summa cum laude*, with honors, from Oklahoma State University.

Prior to joining Gibson Dunn, Gina was an Executive Compensation and Benefits associates at Vinson & Elkins LLP in Dallas.

Gina is admitted to practice law in the State of Texas.

EDUCATION

Georgetown University
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