Energy Companies: Compensation Governance Survey/Trends

Presentation for:
Executive Compensation Webinar Series
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Housekeeping: About Anthony "Tony" Eppert

Anthony Eppert
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- Tony practices in the areas of executive compensation and employee benefits

- Before entering private practice, Tony:
  - Served as a judicial clerk to the Hon. Richard F. Suhrheinrich of the United States Court of Appeals for the Sixth Circuit
  - Obtained his LL.M. (Taxation) from New York University
  - Obtained his J.D. (Tax Concentration) from Michigan State University College of Law
    - Editor-in-Chief, Journal of Medicine and Law
    - President, Tax and Estate Planning Society

Our Compensation Practice – What Sets Us Apart

- Compensation issues are complex, especially for publicly-traded companies, and involve the substantive areas of:
  - Tax,
  - Securities,
  - Accounting,
  - Governance,
  - Surveys, and
  - Human resources

- Historically, compensation issues were addressed using multiple service providers, including:
  - Tax lawyers,
  - Securities/corporate lawyers,
  - Labor & employment lawyers,
  - Accountants, and
  - Survey consultants

Our Compensation Practice – What Sets Us Apart (cont.)

- At Andrews Kurth Kenyon LLP, we have a holistic and full-service approach to compensation matters, that considers all substantive areas of compensation, including:

Housekeeping: Upcoming 2016 Webinars

- Upcoming 2016 webinars:
  - Identifying and Solving Pitfalls in Equity Compensation Administration (11/10/16)
  - The Importance of Miscellaneous Contractual Provisions: A Drafter's Perspective (12/8/16)

- Upcoming 2017 webinars:
  - Compensation: ISS Concerns & Mandates (Annual Program) (1/12/2017)
  - Equity Plans & Award Agreements: The Training Course (2/9/2017)
  - Compensation Committees: A Look at Liability & Fiduciary Issues (3/9/2017)
  - Compensatory Arrangements within Partnerships and LLC (4/13/2017)
  - Designing Equity Compensation Abroad (5/11/2017)
  - Expatriate & Secondment Agreements: Top 10 Issues to Consider (6/8/2017)
  - Pay Ratio Disclosure Rules: The A-Z Training Course (7/13/2017)
  - Trends in Designing Performance-Based Equity Awards (8/10/2017)
  - Preparing for Proxy Season: Start Now (Annual Program) (9/14/2017)
  - How to Properly Design a Nonqualified Deferred Compensation Plan (10/12/2017)
  - Navigating Employee v. Independent Contractor Classifications (11/9/2017)
  - Sharing the Dream: M&A Transactions & Retaining Key Employees (12/14/2017)

Purpose of this Presentation

- We reviewed the 2016 proxy statements that were filed by the top 25 companies (sorted by market capitalization) in the Russell 3,000 with the GICS code “Energy”
  - GICS = Global Industry Classification Standard

- The purpose of this presentation is to share our findings and conclusions with respect to compensation governance matters. To that end, this presentation covers various data points within:
  - Realizable pay and direct pay disclosure,
  - Shareholder engagement on compensation issues,
  - Equity plan amendments,
  - Extent to which peer companies are used,
  - Identifying the compensation consultants,
  - Tally sheets,
  - Annual incentive programs,
  - Long-term incentive programs,
  - Total shareholder return,
  - Perquisites,
  - Stock ownership policies, and
  - Clawback policies

Background and Methodology

- Our process for selecting an appropriate group of companies to review began with:
  - The Russell 3,000, which we narrowed by focusing only on those companies with the GICS code Energy
  - And within that subset of companies, we sorted the group by market capitalization (determined as of August 1, 2016) and pulled the 2016 proxy statements for the top 25 companies (though two of the otherwise top 25 companies were excluded from this survey and replaced with companies 26 and 27)

- The 25 energy companies included in this survey (the "***Survey Group***") are:

Anadarko Petroleum Corporation	**Devon Energy Corporation**	**Noble Energy, Inc.**
Apache Corporation	**EOG Resources, Inc.**	**Occidental Petroleum Corporation**
Baker Hughes Incorporated	**EQT Corporation**	**Phillips 66**
Cabot Oil & Gas Corporation	**Exxon Mobil Corporation**	**Pioneer Natural Resources Company**
Chevron Corporation	**Halliburton Company**	**Schlumberger Limited**
Cimarex Energy Co.	**Hess Corporation**	**Spectra Energy Corp**
Concho Resources Inc.	**Marathon Oil Corporation**	**Valero Energy Corporation**
ConocoPhillips	**Marathon Petroleum Corporation**	
Continental Resources, Inc.	**National Oilwell Varco, Inc.**	

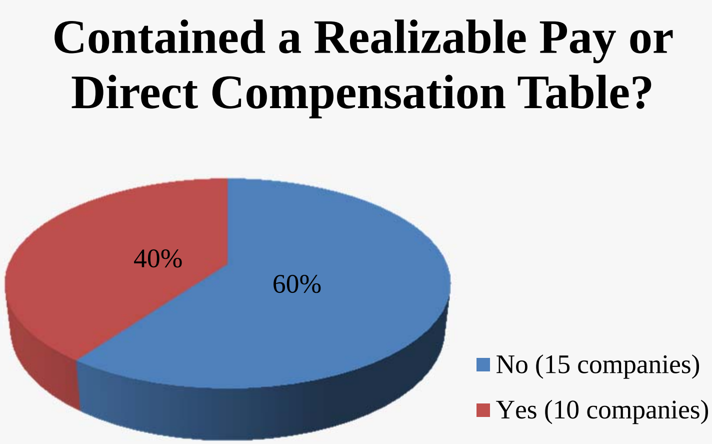
Background and Methodology (cont.)

- We reviewed the 2016 proxy statements of the Survey Group

- In compiling the data, we:
  - Excluded references to retirement benefits
  - Any NEO with partial compensation was not incorporated into the analysis
  - Compensation from the All Other Compensation column of the Summary Compensation Table was not incorporated into the analysis except to the extent to help identify perquisites

Realizable Pay/Direct Compensation Table: Survey Group

- Though every company in the Survey Group had an executive summary in their proxy statement that addressed the company's performance compared to executive pay, the majority of the Survey Group did not have a realizable pay table or a direct compensation pay table



- And only one company from the Survey Group provided CEO pay ratio disclosure

Shareholder Engagement Disclosure: Survey Group

- 15 companies in the Survey Group disclosed that they engaged with their shareholders on topics relating to compensation. The following are some highlights of that disclosure:
  - Held calls to the largest shareholders, and a webcast for all shareholders
  - Has an Annual Engagement Plan and Process. Executives engaged in more than 40 in-depth discussions with shareholders representing more than 28% of the outstanding shares
  - Adopted Shareholder Communication and Engagement Guidelines for management to engage with shareholders
  - Engaged with shareholders representing more than 40% of the outstanding shares
  - Reached out to the top 250 shareholders in both the spring and fall, representing about 50% of the outstanding shares
  - Reached out to shareholders representing more than 43% of the outstanding shares
  - Executives attended over 100 in-person shareholder meetings, including in-person meetings with 24 of the top 25 shareholders
  - Executives held more than 900 meetings. Requested meetings with shareholders holding over 60% of the outstanding shares and met with shareholders representing nearly 40% of the outstanding shares

Equity Plan Amendments: Survey Group

- 10 of the 25 companies in the Survey Group presented an equity plan amendment as a voting item in their 2016 proxy statement. The amendments fell into the following general categories (and a company could fall into one or more of the following):
  - 9 companies sought shareholder approval of an amendment to their equity incentive plan to increase the share reserve
  - 8 companies sought shareholder approval for 162(m) purposes (though the "ask" for one of these 8 was in order to have the sub-plan qualify under French law)
  - 1 company sought shareholder approval for 162(m) purposes of their annual incentive plan

Equity Plan Amendments: Survey Group (cont.)

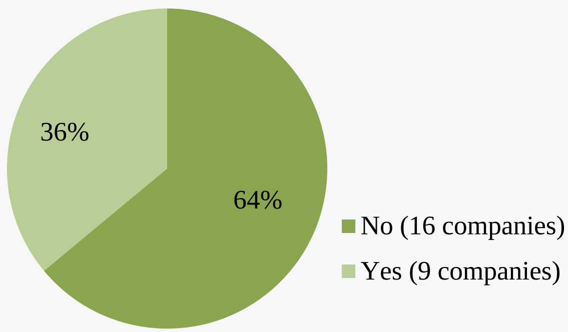
- Remember *Calma v. Templeton* (2015) and the issue of whether a "meaningful" shareholder approved share limit should apply for grants of equity to non-employee directors?

- There were 5 companies in the Survey Group that sought shareholder approval of non-employee sub-limits. The specifics of the amendments are as follows:
  - Approve an annual grant limit of 40,000 shares (covering stock options, RSAs and RSUs) to a non-employee director,
  - Approve an annual grant limit of $750,000 (cash and equity) to a non-employee director,
  - Approve an annual grant limit of 20,000 shares to a non-employee director, or if greater, such limitation not to exceed a grant date fair value (under ASC Topic 718) of $750,000,
  - Approve an annual share limitation not to exceed a grant date fair market value of $500,000 to a non-employee director, and
  - Approve an annual share limitation not to exceed a grant date fair market value of $300,000 to a non-employee director

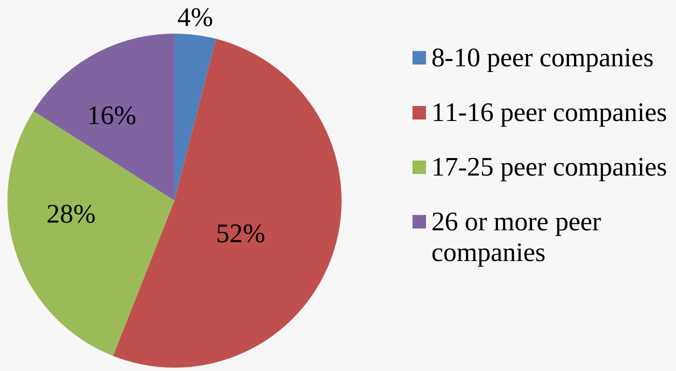
Number of Peer Group Members: Survey Group

- The practices within the Survey Group varied with respect to the use and number of peer group members for compensation-related purposes

More than 1 Peer Group?



Number of Peer Companies



- Noteworthy is that:
  - The majority of the Survey Group disclosed the use of only one peer group
  - The breakdown of the 9 companies disclosing the use of more than 1 peer group is as follows: 7 companies used 2 peer groups, 1 company used 3 peer groups, and 1 company used 4 peer groups
  - Those in the upper tier of the Survey Group's market capitalization are more likely to incorporate energy and non-energy related peer group members (due to size and complexity of their organizations)
  - Only 4 Survey Group members disclosed using 26 or more peer companies (one of them having only one peer group and using the 35 companies within the E27 Survey Group)

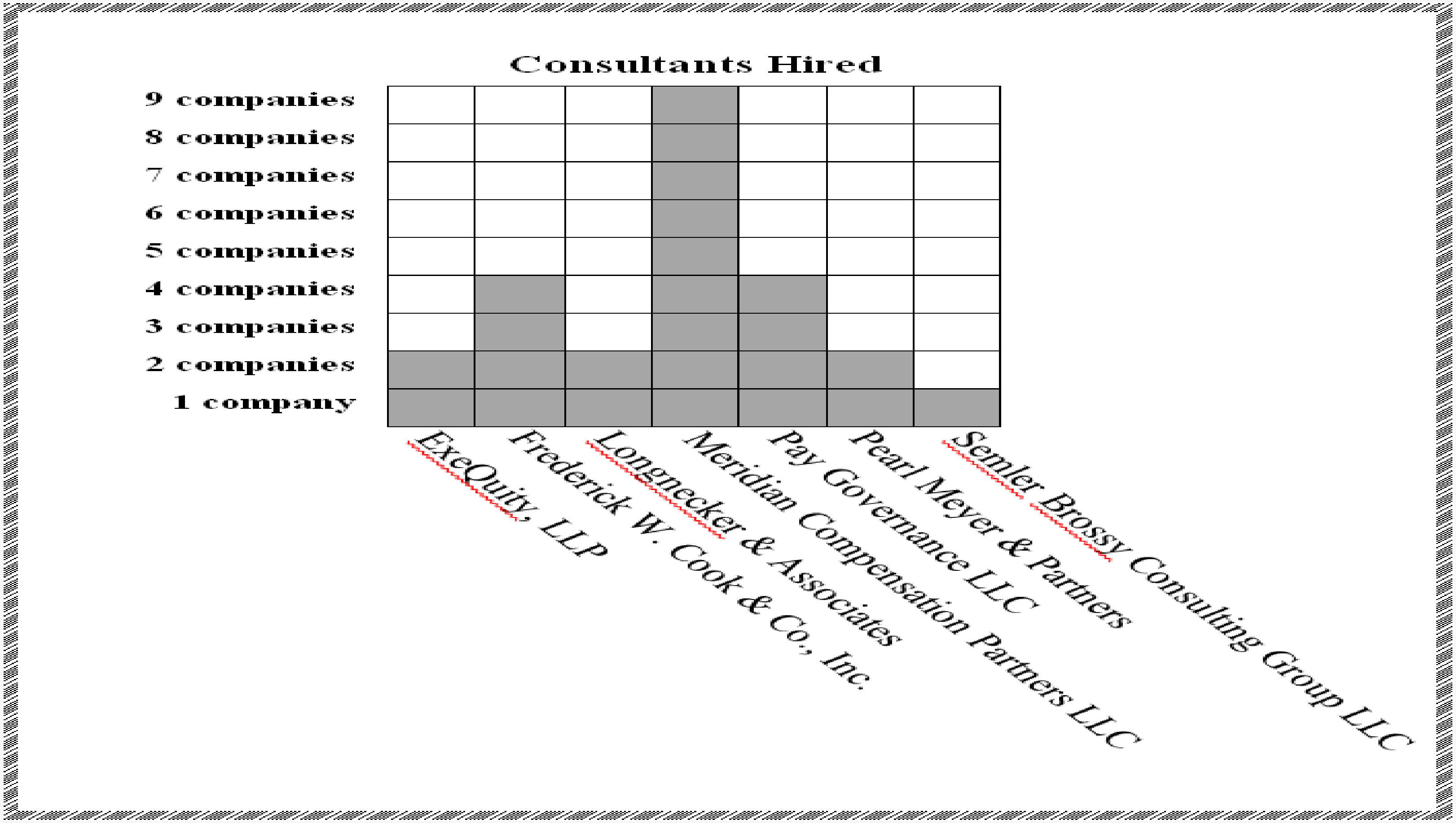
Compensation Consultants: Survey Group

- Ever wonder which compensation consultants were retained by the Compensation Committees of the Survey Group?

- The following compensation consultants were disclosed as being retained by the Compensation Committees of the companies in the Survey Group (alphabetized):
  - ExeQuity, LLP
  - Frederick W. Cook & Co., Inc.
  - Longnecker & Associates
  - Meridian Compensation Partners LLC
  - Pay Governance LLC
  - Pearl Meyer & Partners
  - Semler Brossy Consulting Group LLC

Compensation Consultants: Survey Group (cont.)

- With the exception of one company that disclosed using a compensation consultant but did not identify such consultant, the break down is as follows:



Tally Sheets: Survey Group

- Tally sheets can be instrumental to a director preserving his or her defense under the business judgment rule because tally sheets act as proof that the director made an "informed" decision, even if after-the-fact he or she made the wrong decision
  - A tally sheet lists each component of an executive's compensation and tallies it up (*i.e*., also called a "placemat")
  - Prior to making compensation decisions, a Compensation Committee should require use of a tally sheet that shows the full range of potential payments in various alternative scenarios (*e.g*., termination without Cause, for Good Reason, death, Disability, Change in Control, for Cause, etc.)

- Only 7 of the 25 companies in the Survey Group disclosed that the Compensation Committee uses tally sheets when making executive compensation decisions
  - Keep in mind that such disclosure is positive disclosure (*i.e*., not otherwise required), thus, 7 of 25 is not indicative of the market practice associated with tally sheets

Compensation: Annual and Long-Term

- The next set of slides set forth our findings with respect to:

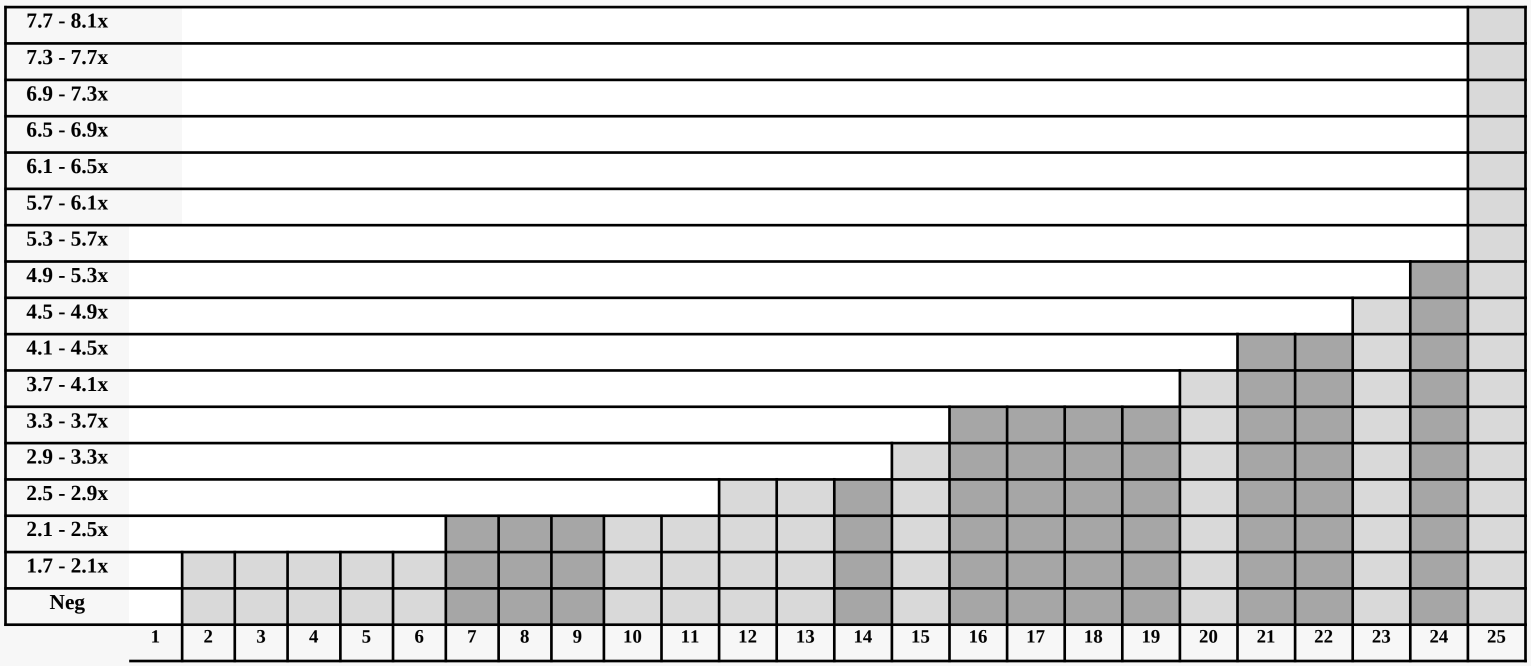
- The annual incentive:
  - The split between cash and equity as a percentage of Total Compensation,
  - Base salary as a percentage of Total Compensation,
  - Annual incentive as a percentage of Total Compensation,
  - The performance metrics for the annual incentive, and
  - Whether the annual incentive is settled in cash or stock

- The long-term incentive:
  - The forms of equity in use by the company;
  - Applicable vesting periods, including the split, if any, between time-based and performance-based vesting schedules;
  - The performance metrics for the long-term incentive; and
  - Long-term incentive pay as a percentage of Total Compensation

Compensation: Split of Cash/Equity as % of Total Compensation

- Using the numbers disclosed in the Summary Compensation Table, we calculated each CEO's cash compensation (base, bonus and non-equity incentives) as a percentage of Total Compensation, and each CEO's equity compensation as a percentage of Total Compensation, and then we divided the latter by the former to create a multiple for comparison purposes

CHART SHOWS THE CEO'S EQUITY COMPENSATION AS A MULTIPLE OF HIS/HER CASH COMPENSATION

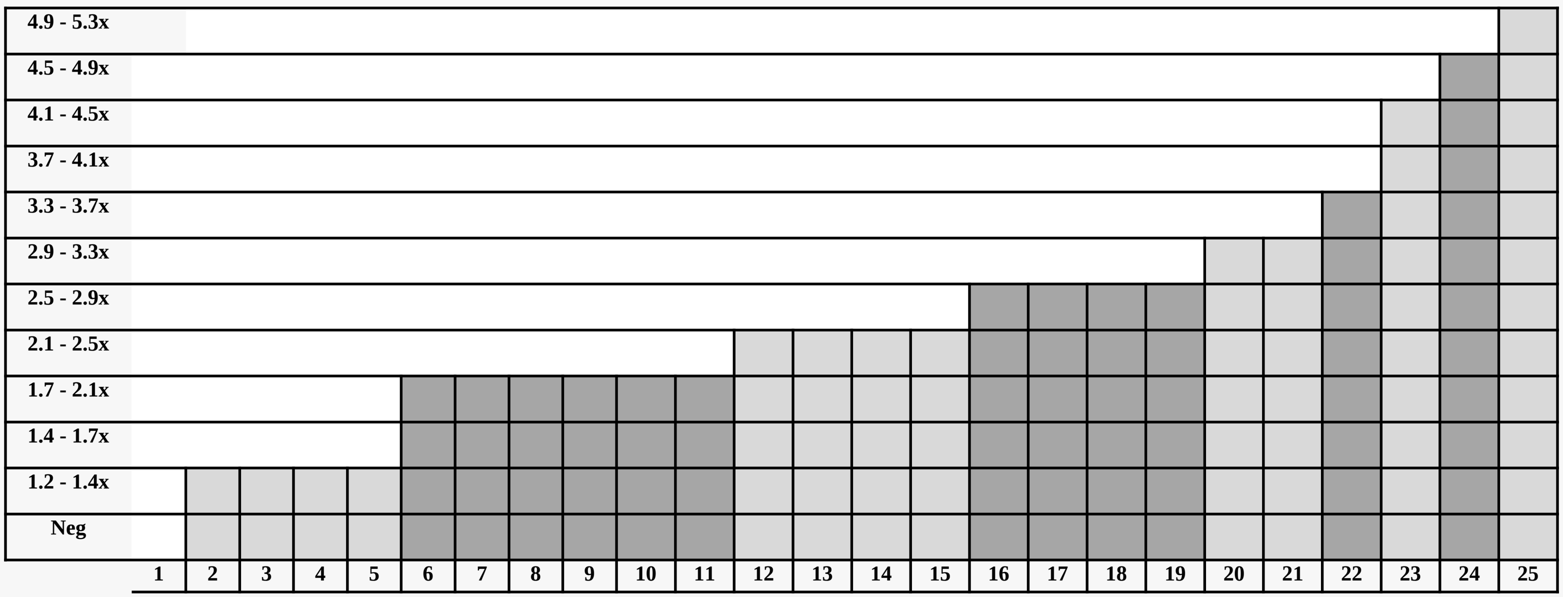


25 SURVEY GROUP COMPANIES

Compensation: Split of Cash/Equity as % of Total Compensation

- Using the numbers disclosed in the Summary Compensation Table, we calculated each NEO's (other than the CEO) cash compensation (base, bonus and non-equity incentives) as a percentage of Total Compensation, and each NEO's (other than the CEO) equity compensation as a percentage of Total Compensation, and then we divided the latter by the former to create a multiple for comparison purposes

CHART SHOWS THE AVERAGE NEO'S EQUITY COMPENSATION AS A MULTIPLE OF HIS/HER CASH COMPENSATION

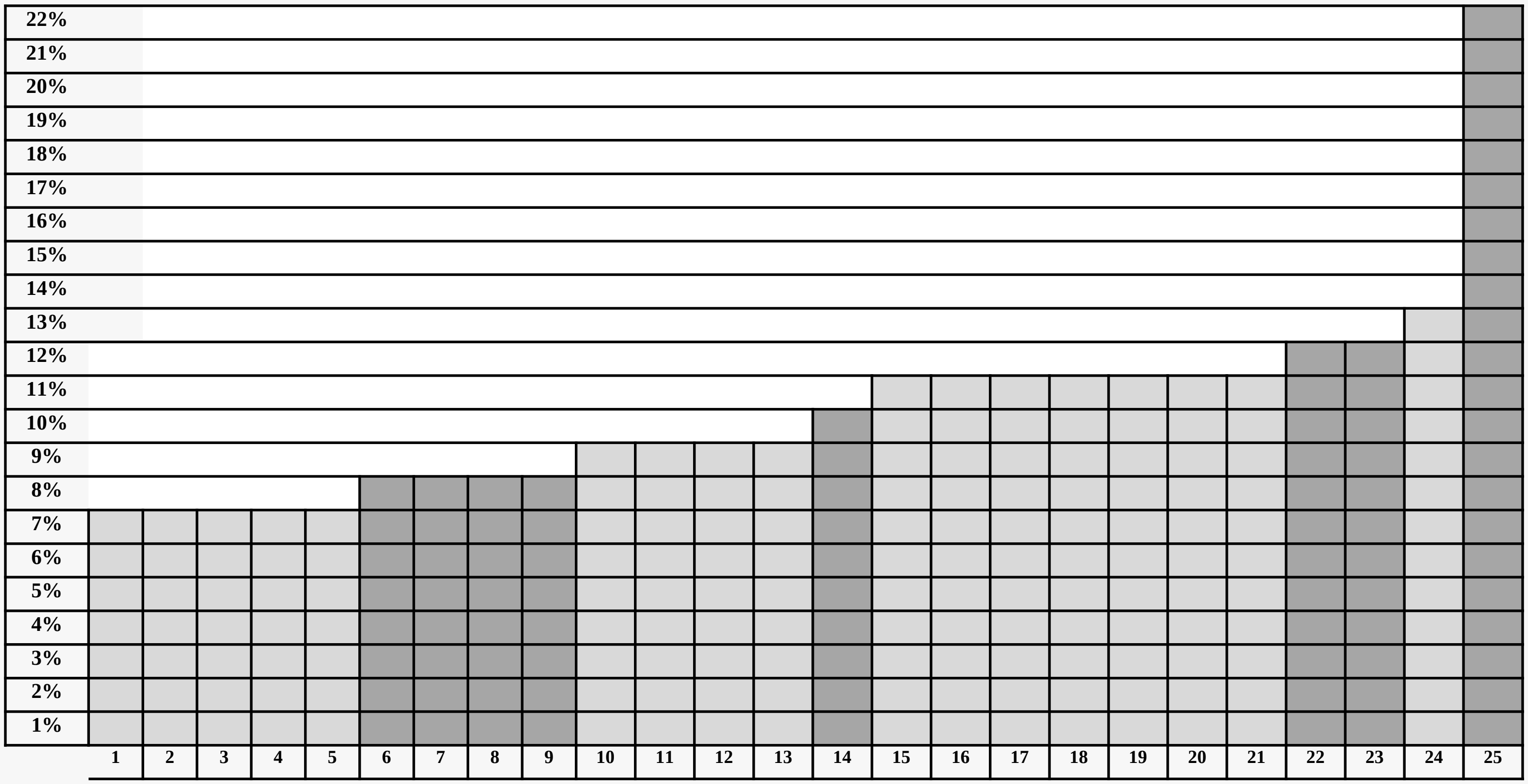


25 SURVEY GROUP COMPANIES

Compensation: CEO Base Salary as a % of Compensation

- Using the numbers disclosed in the Summary Compensation Table, we calculated each CEO's base salary as a percentage of Total Compensation

CHART SHOWS THE CEO'S BASE SALARY AS A PERCENTAGE OF HIS/HER TOTAL COMPENSATION

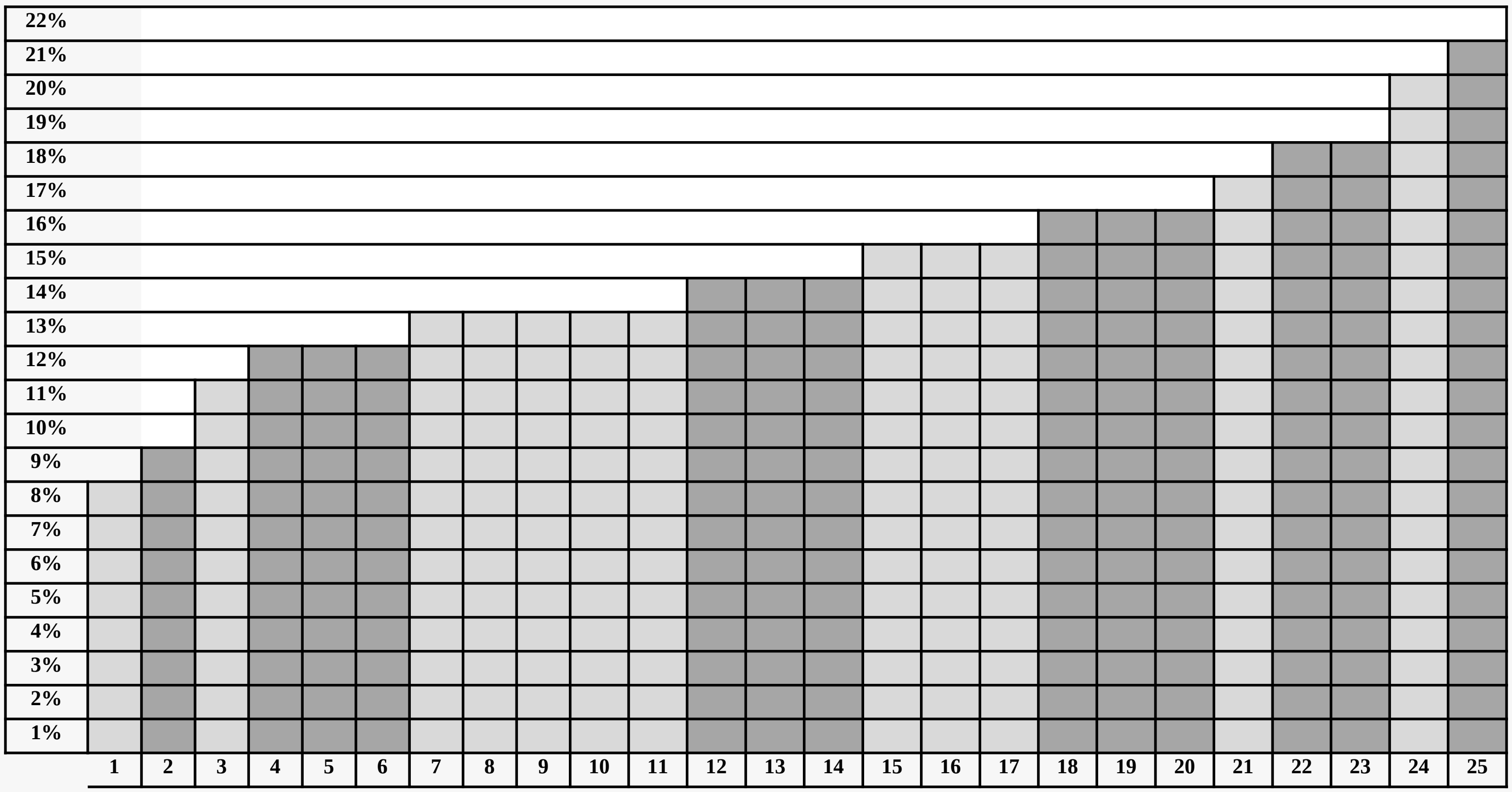


25 SURVEY GROUP COMPANIES

Compensation: NEO Base Salary as a % of Compensation

- Using the numbers disclosed in the Summary Compensation Table, we calculated the average NEO's (other than the CEO) base salary as a percentage of Total Compensation

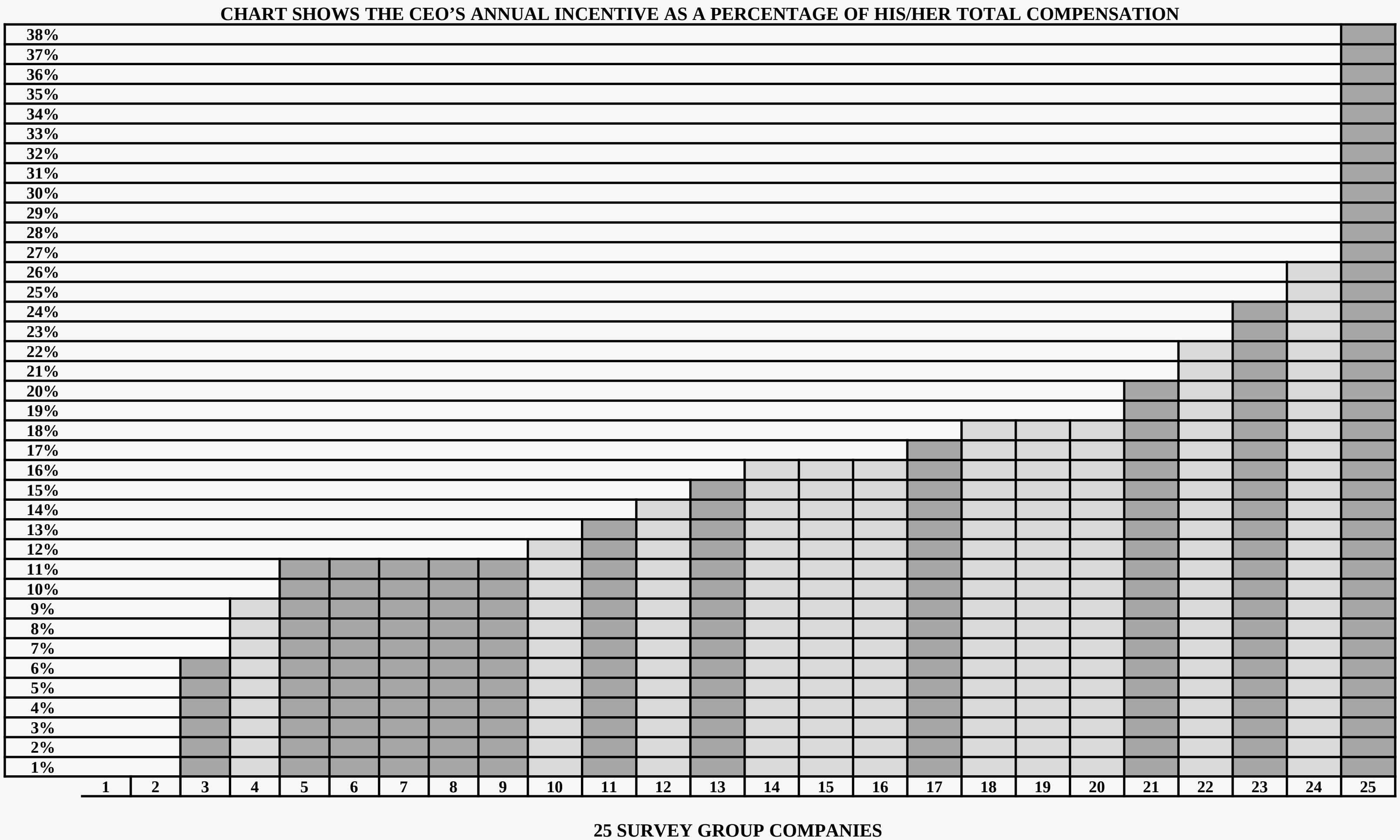
CHART SHOWS THE AVERAGE NEO'S BASE SALARY AS A PERCENTAGE OF HIS/HER TOTAL COMPENSATION



25 SURVEY GROUP COMPANIES

Compensation: Annual Incentives as % of Total Compensation

- Using the numbers disclosed in the Summary Compensation Table, we calculated the annual incentives as a percentage of Total Compensation for each of the CEOs



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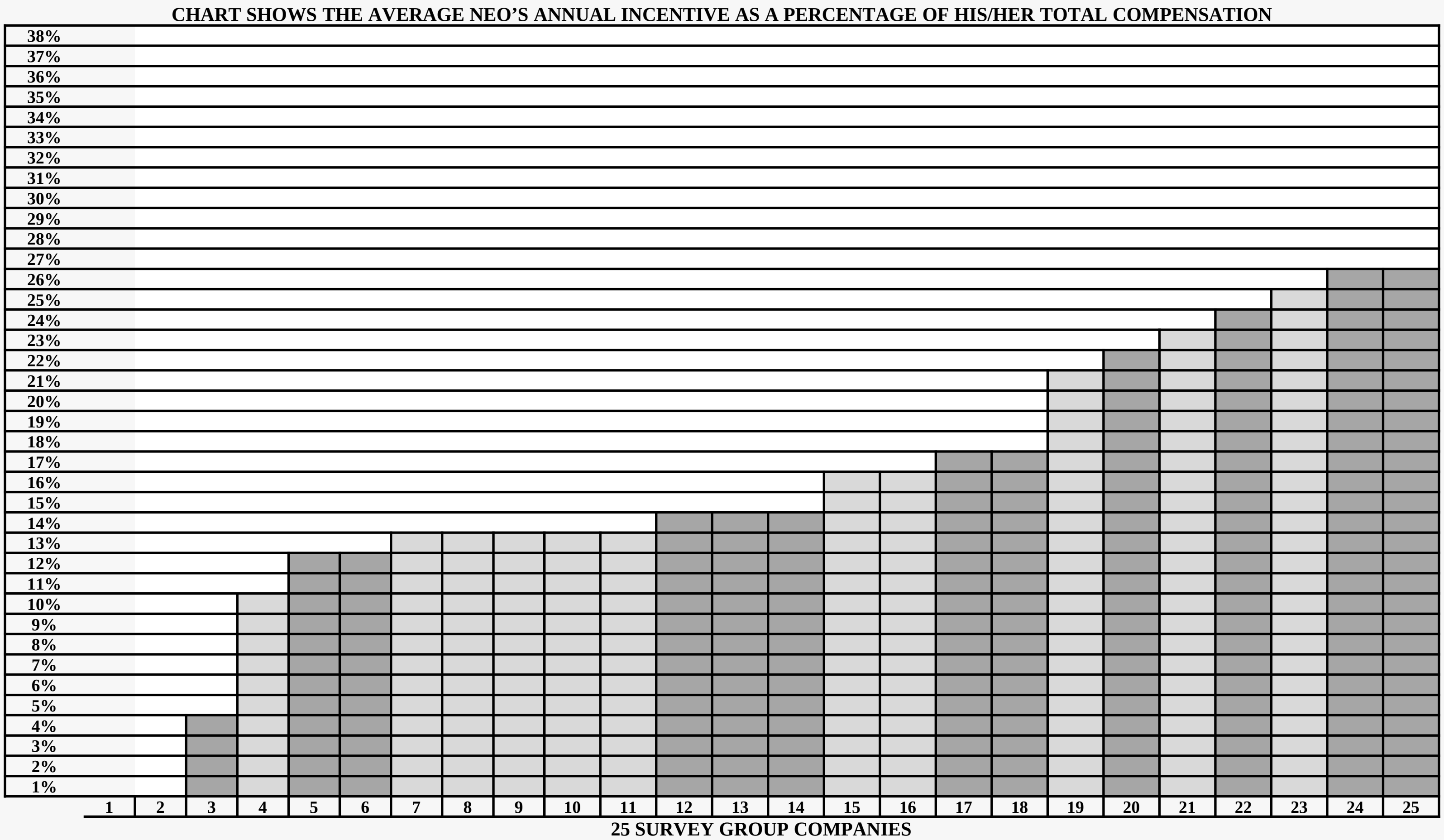
Compensation: Annual Incentives as % of Total Compensation

- Using the numbers disclosed in the Summary Compensation Table, we calculated the average annual incentives as a percentage of Total Compensation for each of the NEOs (other than CEO)



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Compensation: Annual Performance Metrics

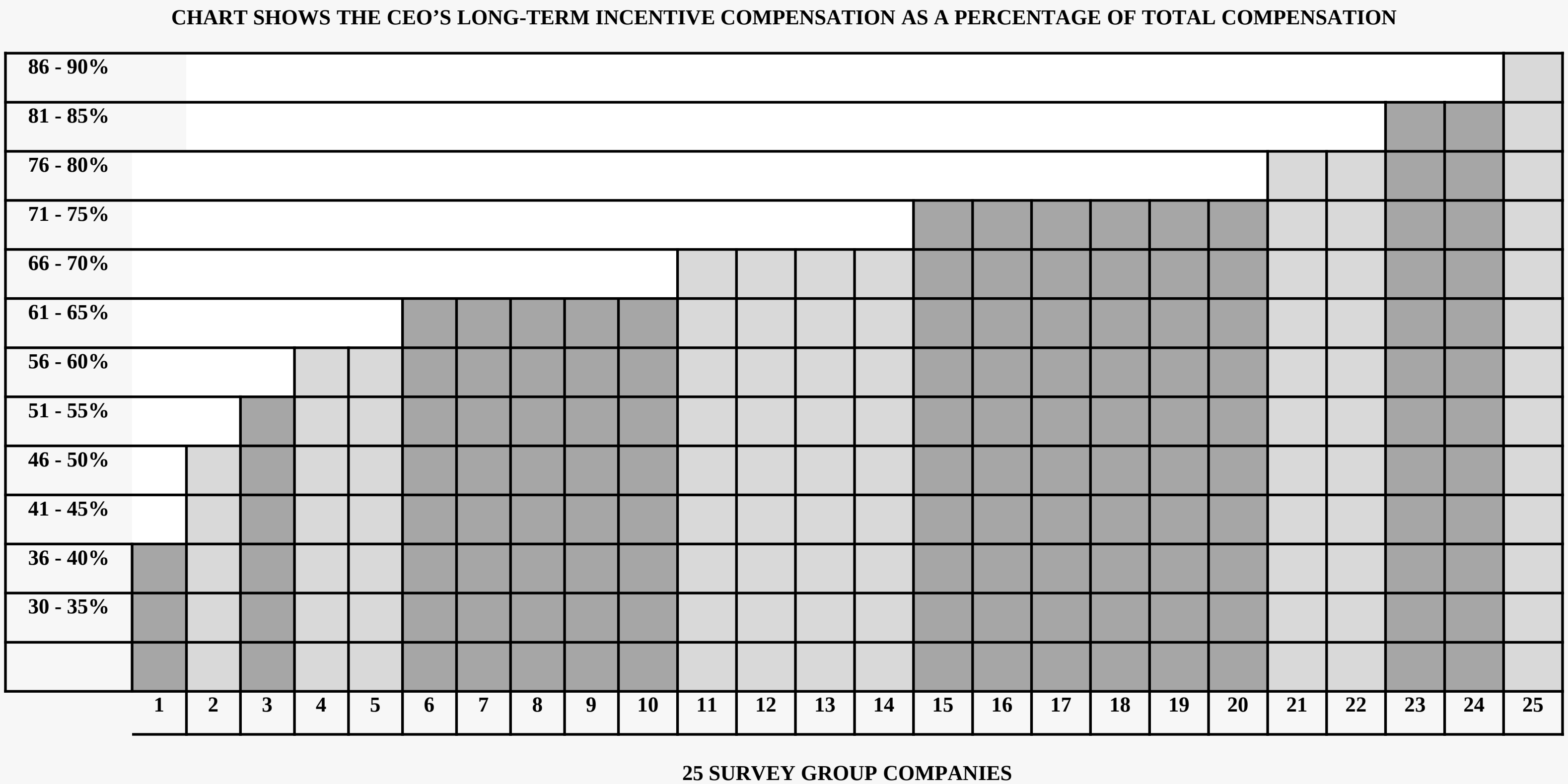
- For the companies in the Survey Group, the annual incentive is settled in cash. Worth noting is that one company pays 50% of the bonus on an annual basis, and the remaining 50% is deferred until a specified level of cumulative earnings per share is achieved

- As disclosed in the 2016 proxy statement, some of the most common performance metrics used by the companies in the Survey Group are:

Financial	Operational	Health
free cash flow	reserve replacement ratio	process safety rate
earnings per share growth	exploration and capital milestones	total recorded incident rates
return on capital employed	positive ROCE and ROE	process fluid containment
cash margins per barrel of oil equivalent	sales volume	lost workday rates
operating income per barrel	base volumes	safety observations
adjusted EBITDA	reserve additions	improvement in lagging indicators
	lease operating expense and controllable general and administrative costs	

Compensation: LTI as a % of the CEO's Total Compensation

- Using the numbers disclosed in the Summary Compensation Table, we calculated each CEO's long-term incentive compensation as a percentage of his/her Total Compensation



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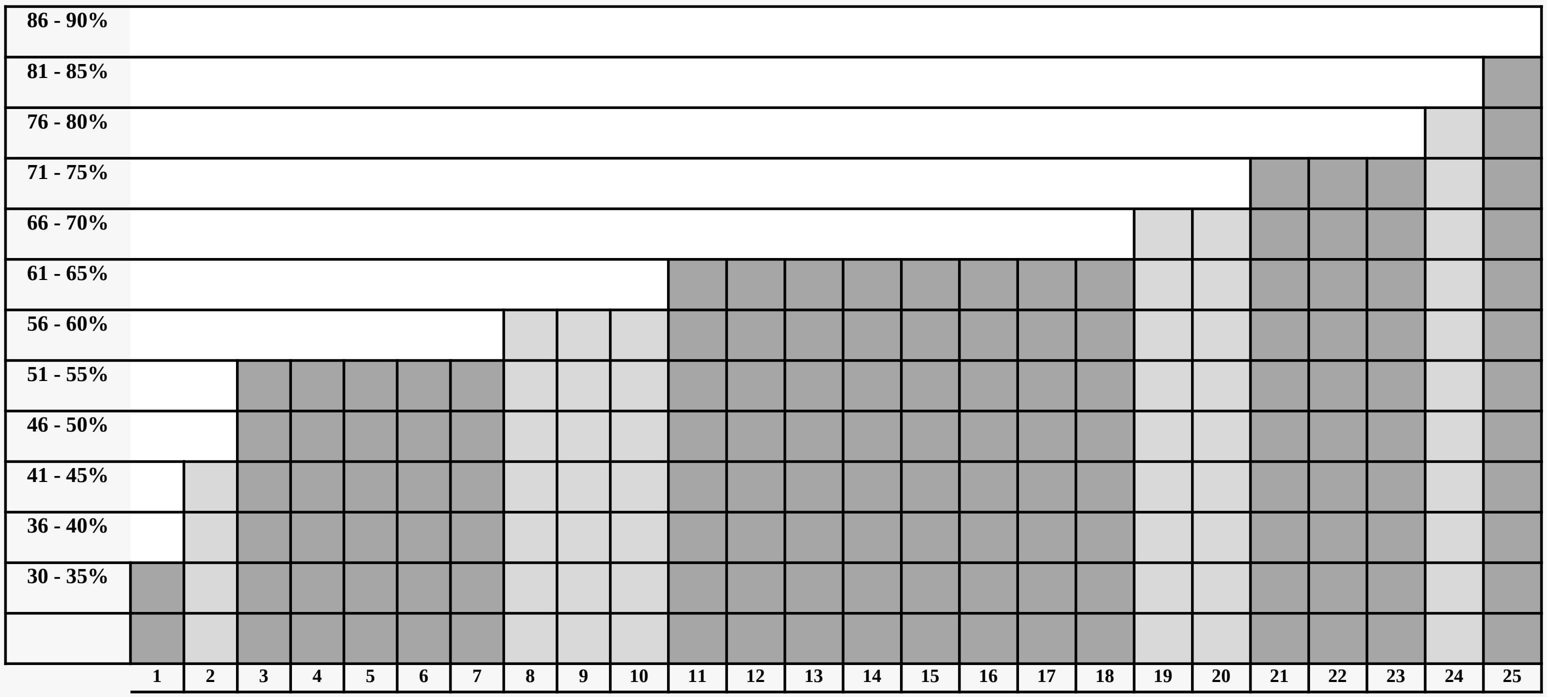
Compensation: LTI as a % of Average NEO's Total Compensation

- Using the numbers disclosed in the Summary Compensation Table, we calculated the average NEO's (other than the CEO) long-term incentive compensation as a percentage of Total Compensation

CHART SHOWS THE NEO'S LONG-TERM INCENTIVE COMPENSATION AS A PERCENTAGE OF TOTAL COMPENSATION



25 SURVEY GROUP COMPANIES

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Compensation: Forms of Long-Term Incentives Granted

- The three primary vehicles are:
  - Restricted stock units (“***RSUs***”) and/or performance share units (“***PSUs***”),
  - Restricted stock awards (typically time based), and
  - Stock options

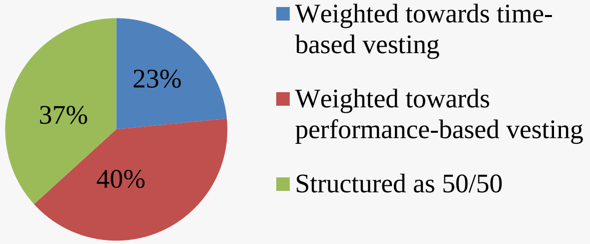
- Stock options
  - 13 of the 25 companies granted stock options
  - The vesting schedule for 12 of the 13 companies was ratably over 3 years, and the vesting schedule for 1 company was ratably over 5 years

- Time-based vesting schedules for RSAs
  - 11 of the 25 companies granted RSAs
  - The vesting schedule for the 11 companies was:
    - 1 company ratably over 2 years (40% 1st year and 60% 2nd year),
    - 1 company had a 3-year cliff vesting schedule,
    - 4 companies had vesting ratable over 3 years,
    - 2 companies had vesting ratable over 4 years,
    - 1 company had a 5-year cliff vesting schedule, and
    - 2 companies had vesting ratable over 5 years

Compensation: Long-Term Incentives Granted

- The following highlights the weighting between programs that are more heavily weighted towards time-based awards, programs more heavily weighted towards performance-based awards, and programs that are structured to be 50% performance based and 50% time based

Weighting of Time and Performance



- The following are various performance metrics that were used with performance-based LTI awards, with TSRs and return on average capital employed being used more frequently

Performance Metrics within LTI Awards				
return on average capital employed	free cash flow	total shareholder return	positive GAAP earnings per share	reserve replacement ratio
ROCE	CROCE	production per debt adjusted share	reserve adds per debt adjusted share	

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Total Shareholder Return: Background

- Generally, total shareholder return ("***TSR***") is defined as stock price appreciation/depreciation, plus reinvestment of dividends, over a measurement period.
  - Another way to look at it, is that TSR measures the return an investor would receive if he or she bought one share of common stock at the beginning of the measurement period, accumulated dividends during the measurement period, and then sold the common stock at the end of the measurement period

- There are two main formulas when addressing TSR programs
  - Absolute,
  - Relative, and
  - A combination of both

- An absolute TSR formula is calculated as follows:

$$TSR = \frac{\text{Ending Price} - \text{Beginning Price} + \text{Dividends}}{\text{Beginning Price}}$$

- The payout is then determined as a function of the company's TSR compared to predetermined goals (*i.e.*, it is not compared to the TSR of the peer group)

Total Shareholder Return: Background (cont.)

- A relative TSR program has the same math formula as an absolute TSR program; however, with a relative TSR program the payout is determined as a function of the company's TSR ranking/ratio compared to the TSR ranking/ratio of its peer group
  - For example, if the company's TSR percentile rank/ratio equals or exceeds x%, then the percentage of the target award earned equals x%

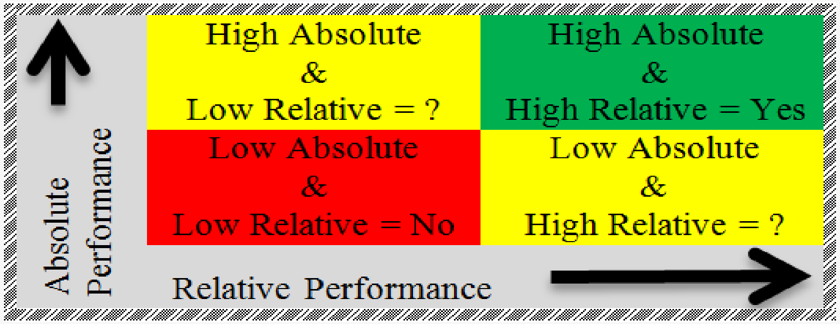
- The following represents a hypothetical (though typical) relative TSR program:

	Relative TSR Rank	Payout %
Maximum:	75th percentile	200%
Target:	50th percentile	100%
Threshold:	25th percentile	50%
Below:	Less than 25th percentile	0%

- In the above example, if the company's TSR rank relative to its peer group is at the 80th percentile, then the payout would be 200% of the target shares

<u>Total Shareholder Return: Negative Returns</u>

- What happens when there is no alignment between absolute TSR and relative TSR? For example:
  - Should management be rewarded when absolute TSR is high, but relative TSR is low (*i.e.*, a reward to reflect the gains realized by shareholders)?
  - Should management be rewarded when absolute TSR is low, but relative TSR is high (*i.e.*, a reward to reflect outperformance of the peer group)?



- Reason to address negative returns – Why should management be entitled to a payout for outperforming peers when shareholders lost money?

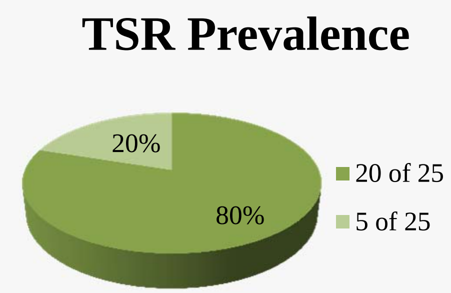
- Reason to ignore negative returns – Management should be paid for outperforming peers because shareholder loss could have been greater at a peer company
  - Additionally, the existence of a possible elimination of payout, a cap or a formula modifier would decrease the “fair value” of the award, thus possibly increasing the number of shares subject to the award

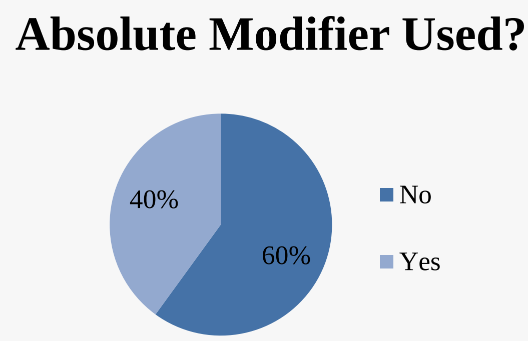
Total Shareholder Return: Negative Returns (cont.)

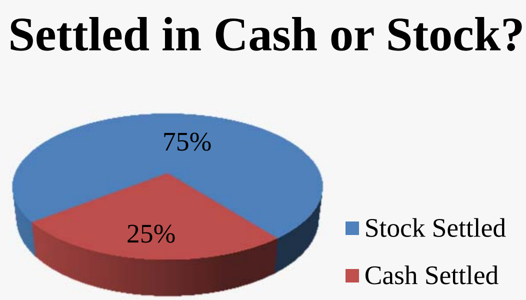
- Possible ways to address negative returns:
- 1st – Eliminate any payouts when absolute TSR is negative over the performance period
  - Consider too whether this should work in the reverse, to provide a payout when absolute TSR is high but relative TSR is low (*i.e.*, a reward to reflect the gains realized by shareholders)
- 2nd – cap the payout opportunity when absolute TSR is negative over the performance period
  - Such caps typically limit the payout to the target level
  - If applicable, the cap would apply irrespective of whether the relative TSR formula would have otherwise required a higher payout opportunity
  - Consider whether the cap should work in the reverse, to protect management in instances where absolute TSR is high but relative TSR is low (*i.e*, a reward to reflect the gains realized by shareholders)
- 3rd – have a formula modifier that downward adjusts the payout when the company has a negative return (*i.e.*, similar in formula to an upward adjustment that would apply if the company had positive TSR)

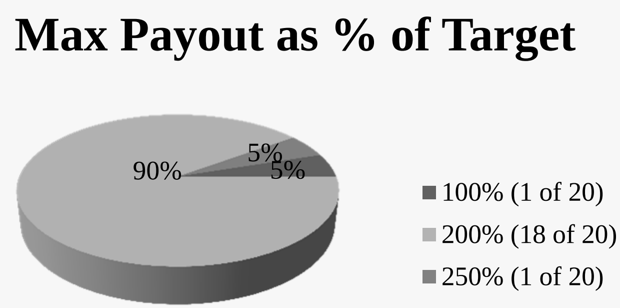
Total Shareholder Return: Survey Group

- 20 of the 25 companies in the Survey Group have a relative TSR program, and among them, 8 have an absolute modifier (*i.e.*, capping the award at target when absolute TSR is negative) and 15 of the companies settle the award in stock





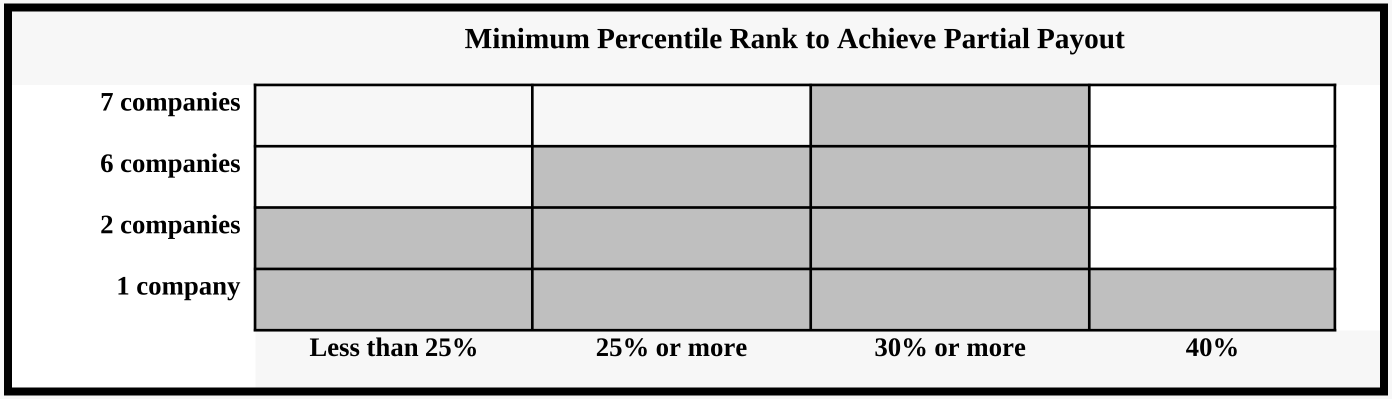




- All of the Survey Group used a 3-year measurement period

Total Shareholder Return: Survey Group (cont.)

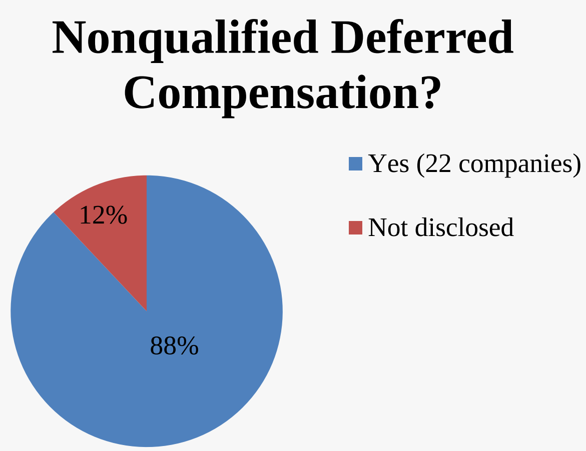
- In terms of the design, all of the Survey Group with a TSR program had a Rank design, though the threshold required to be achieved in order for a payout (even if a partial payout) varied from company to company as follows:

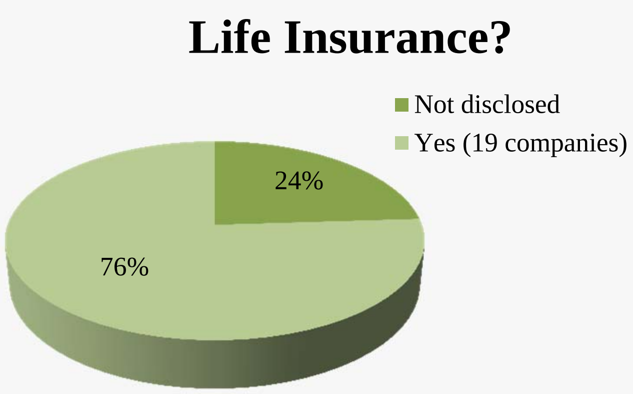


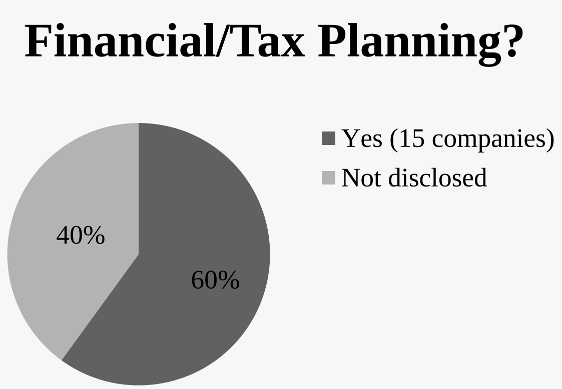
- Four companies with TSR programs were not incorporated into the above table for the following reasons:
  - Three of these companies did not disclose their threshold requirements in the proxy, and
  - One company provided that 50% of target would be achieved without regarding to a “last” ranking (*i.e.*, it disclosed as a 100% TSR program, but 50% of the TSR award only had a time-based vesting element)

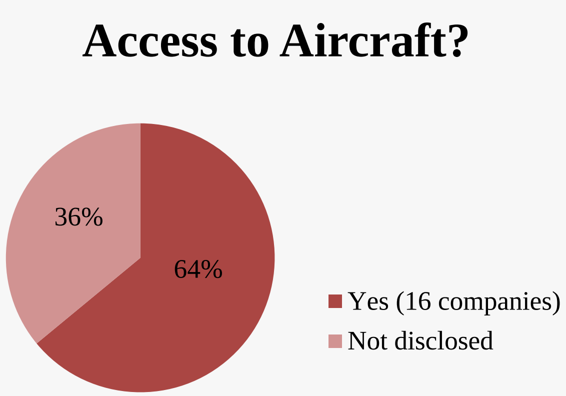
Perquisites

- The following were the most disclosed perquisites by companies in the Survey Group (not an exhaustive list, but captures the bulk of the perquisites):

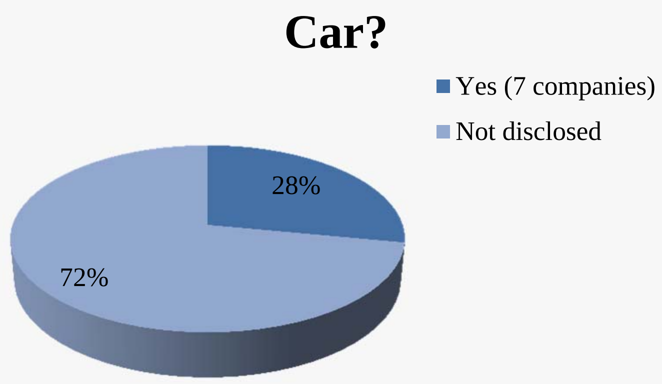


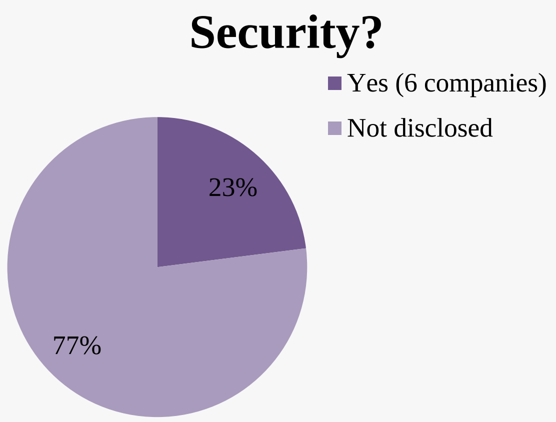


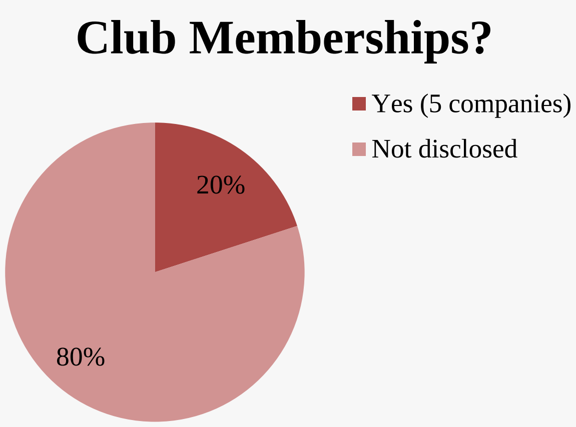


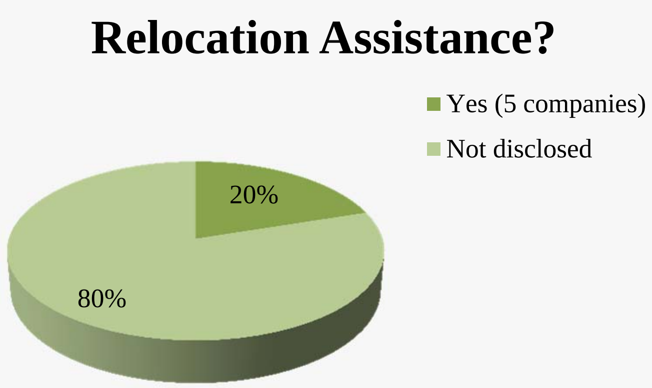


Perquisites (cont.)









Stock Ownership Guidelines: Background

- A stock ownership policy sets the parameters on the level of stock that must be owned
  - Such a policy increases the message to the company's shareholders that the latter can rely on the commitment of the executives to the company's long-term success (*i.e*., there is a direct alignment of interest with the company's long-term shareholders)
  - Helps bolster performance pay
  - Could act as a mitigating factor to negate risk assessment disclosure. Remember that companies must disclose the relationship between their compensation practices (for all employees) and their risk management philosophy, BUT ONLY IF such compensation programs are "reasonably likely to have a material adverse effect"
- Though a multiple of salary (*i.e*., a fixed value) is a most common stock ownership policy, consider using a fixed percentage/number of shares because the former is difficult to satisfy if the underlying stock price is volatile

Stock Ownership Guidelines: Background (cont.)

- The length of the accumulation period within which executives must attain their ownership levels must be determined
  - A five year accumulation period is a most common time frame

- Or instead of the above, consider whether to also implement a holding requirement, which is another share retention tool:
  - For an indefinite period of time, require the executives to retain a certain percentage of his/her net profit shares until the required ownership levels are attained (in contrast to a term of years requirement within which the ownership percentage must be satisfied)
    - Net profit shares refers to the shares remaining after payment of any exercise price and/or taxes owed
    - Holding period could be indefinite; OR

  - Require the CEO to hold a percentage of net profit shares for a certain period of time (*i.e.*, a one-year holding period is common)

Stock Ownership Guidelines: Background (cont.)

- The "stick" or penalty for failing to satisfy a given stock ownership policy is not typically disclosed in a proxy statement. Such penalties can include:
  - Increased holding requirements,
  - Prohibiting sales of equity, and
  - Paying annual incentives in equity and not cash

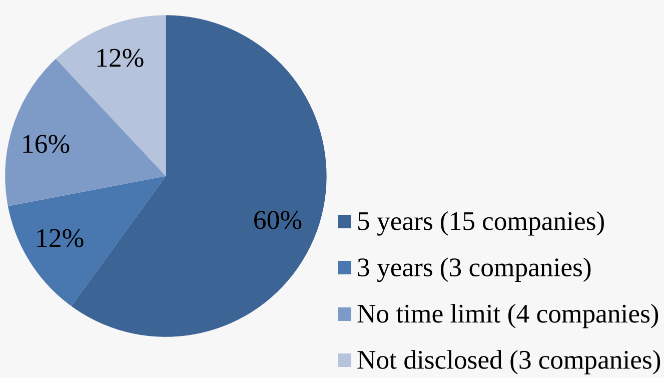
- And where satisfying a stock ownership policy would otherwise create undue hardship on an executive, a company could modify the stock ownership policy to incorporate hardship provisions
  - Question is whether to incorporate the hardship terms into the stock ownership policy, or instead to simply provide the Board or the compensation committee with the discretion to deviate from the requirement if a hardship is present

Stock Ownership Guidelines: Survey Group

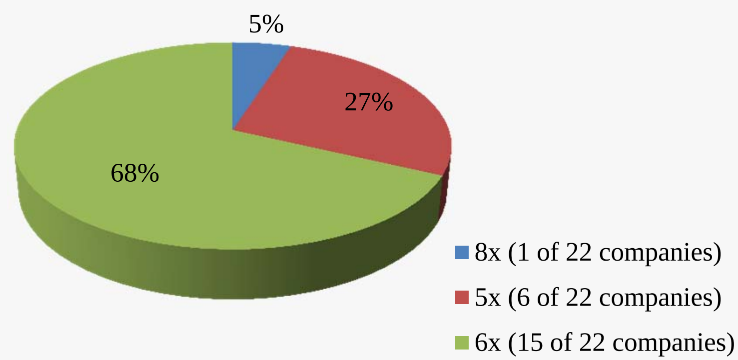
- All of the companies in the Survey Group disclosed a stock ownership policy

- A multiple of base salary is the most common for determining the “amount” to be subject to the stock ownership policy
  - 22 companies in the Survey Group used a multiple of base salary as the metric
  - 1 company required a percentage of total compensation
  - 1 company used a fixed number of shares (200,000 for the CEO and 70,000 for other executive officers)
  - 1 company disclosed having a policy, but did not disclose the amount subject to such policy

Number of Years to Attain Goal



CEO Base Salary Multiples



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Stock Ownership Guidelines: Survey Group (cont.)

- Addressing what forms of equity qualify towards satisfying the Survey Group company's stock ownership policy:
  - 11 of the 25 companies provided no disclosure on this subject
  - With the exception of the below, the 14 companies that provided disclosure on this topic generally include all shares and equity awards for purposes of the attainment levels (*e.g.*, 6x base salary)
    - However, 6 of the 14 companies provided that shares subject to stock options and performance-based equity awards (*e.g*., PSUs) would NOT count towards satisfying the policy

- In terms of enforcement, 17 of the 25 companies disclosed having a holding requirement as follows:
  - 1 company required holding of 30% of net shares,
  - 6 companies required holding of 50% of net shares,
  - 1 company required holding of 75% of net shares,
  - 7 companies required holding of 100% of net shares, and
  - 1 company disallowed future participation in long-term incentives and required that all short-term incentive compensation be used to purchase stock until the policy is satisfied

- Most of the companies did not disclose "who" is responsible for enforcement. Of those with disclosure, 5 companies disclosed it was the Compensation Committee and 2 companies disclosed it was the Board of Directors

Clawbacks: Background

- To date companies have been applying a variety of approaches while they await finalization of the clawback requirements under Dodd-Frank. These approaches include:
  - Do nothing and wait,
  - Adopt a "loose" policy that is expected to be amended in a more robust way once final rules are issued,
  - Have executive officers sign a contractual arrangement whereby each such executive agrees to comply with the Dodd-Frank clawback requirements (when effective) and any clawback policy adopted by the company as such is amended from time to time, and
  - Adopt a very formal and robust clawback policy

Clawbacks: Background (cont.)

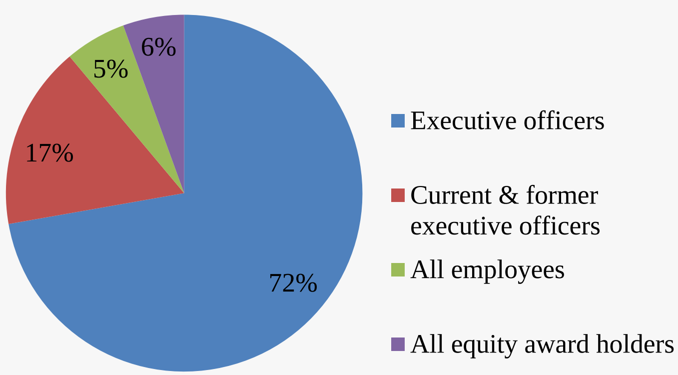
- As purposes of a quick review, the current requirements of the Dodd-Frank clawback include:
  - The clawback policy must be triggered any time the company is required to prepare an accounting restatement resulting from "material" noncompliance with any financial reporting requirement under the securities laws
    - In contrast, Section 304 applies only when a restatement of financial statements is "required" and is the result of "misconduct"
  - Once the clawback is triggered, it would apply to all "incentive-based" compensation paid to current and former executive officers
    - In contrast, Section 304 applies only to the CEO and CFO
  - The look back period for which incentive-based compensation is subject to clawback is the 3-year period preceding the date on which the restatement is required
    - In contrast, the look back period under Section 304 is 12 months
  - The amount subject to the clawback is the difference between the amount paid and the amount that should have been paid under the accounting statement

Clawbacks: Survey Group

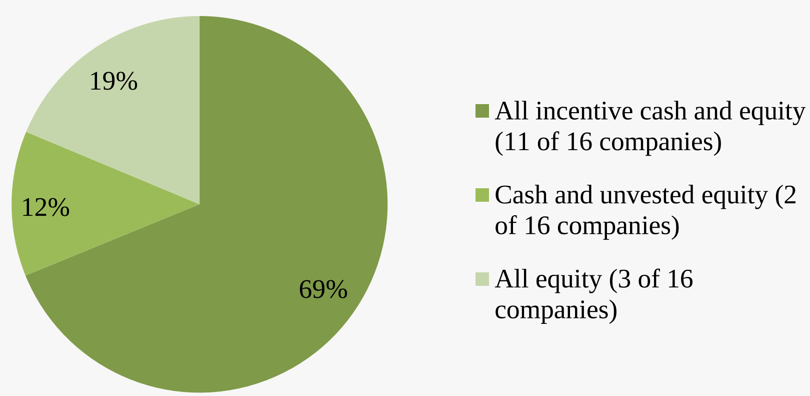
- Of the 25 companies in the Survey Group:
  - 20 companies disclosed having a clawback policy
  - 2 companies affirmatively stated they have no such policy (with one affirmatively stating that they would not adopt a policy until rules are finalized)
  - 3 companies provided no disclosure on the topic

- Of the 20 companies that disclosed having a clawback policy, the individuals covered by the policies and the compensation that was generally subject to the policy are as follows:

Covered Persons



Compensation Subject to Clawback

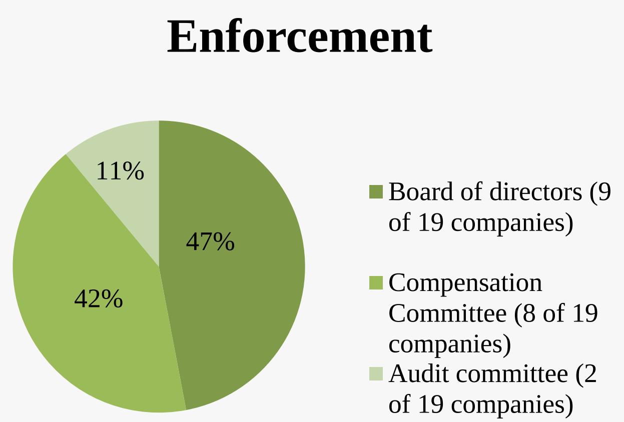


Clawbacks: Survey Group (cont.)

- Addressing the 18 Survey Group companies that disclosed their applicable "triggers"
  - 50% of them required some form of material and negative restatement of the financials and operating results
  - The other 50% followed a more traditions SOX approach by requiring "misconduct" and a restatement
  - And too, a number of the 18 companies included employment-related clawbacks such as termination for "cause," breach of restrictive covenants, etc.

- Only 4 of the Survey Group companies disclosed their look back period. And all 4 of these companies used a 3-year look back period

- In terms of enforcement, most of the Survey Group companies with disclosure on the topic relied upon their Board of Directors



Don’t Forget Next Month’s Webinar

- Title:
  - Identifying and Solving Pitfalls in Equity Compensation Administration

- When:
  - 10:00 am to 11:00 am Central
  - November 10, 2016

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