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SEC Settlement With McDonald's and Ex-CEO Signals Potential Expansion of Executive Compensation Disclosure Requirements

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On January 9, the Securities and Exchange Commission (SEC) [announced](#) that it had reached a settlement with McDonald's and its former CEO, Stephen Easterbrook, for charges stemming from McDonald's 2019 termination of Easterbrook for violating company policy by engaging in "an inappropriate personal relationship" with a McDonald's employee. McDonald's was charged with failing to disclose material information to investors regarding Easterbrook's termination in what the dissenting commissioners called a "case of first impression." As a consequence of its cooperative and substantial assistance to the SEC staff, however, McDonald's ultimately avoided the imposition of monetary penalties.

According to the [SEC's order](#), McDonald's conducted an internal investigation in October 2019 into an allegation that Easterbrook had engaged in an inappropriate personal relationship with a McDonald's employee. During the course of that investigation, Easterbrook denied engaging in any other improper relationships with McDonald's employees and also withheld other "potentially relevant information" from McDonald's.

McDonald's subsequently terminated Easterbrook on November 1, 2019 because of the determination that he "violated Company policy and demonstrated poor judgment involving a recent consensual relationship" with an employee "in violation of the Company's Standards of Business Conduct regarding dating and fraternization." Although such a policy violation could have constituted a termination "for cause," McDonald's made the discretionary decision to enter into a separation agreement with Easterbrook, which provided for a termination without cause. This determination allowed Easterbrook to retain approximately \$44 million in equity compensation that otherwise would have been forfeited.

Then, in July 2020, McDonald's was made aware of another allegation against Easterbrook concerning an inappropriate personal relationship with a different employee. This precipitated a second internal investigation through which it was determined that Easterbrook had engaged in multiple other improper relationships with McDonald's employees. McDonald's promptly sued Easterbrook in the Delaware Court of Chancery to recover the compensation he received as part of his separation agreement. The parties reached a settlement in December 2021 in which Easterbrook agreed to return his cash severance, prorated bonus, proceeds from the sale of certain securities, and attorney's fees incurred by McDonald's. The settlement also mandated the forfeiture by Easterbrook of his outstanding equity and awards.

Easterbrook was charged with violating the antifraud provisions of Section 10(b) and Rules 10b-5(a) and (c) of the Exchange Act and Sections 17(a)(1)-(3) of the Securities Act. The SEC alleged that Easterbrook "knew or was

reckless in not knowing that misleading McDonald's in the course of a formal corporate process convened to, among other things, make a determination about his continued employment and his compensation, would influence McDonald's disclosures to investors, including disclosures in the company's periodic disclosures and its Definitive Proxy Statement."

Easterbrook was also charged with causing McDonald's to violate Exchange Act Section 13(a) and Rules 12b-20 and 13a-11 since neither McDonald's letter to its employees, its press release issued after Easterbrook's termination (both of which Easterbrook was given a chance to review), nor its 8-K announcing Easterbrook's termination disclosed information about Easterbrook's other improper relationships with additional McDonald's employees. As McDonald's has publicly stated, "[H]ad Easterbrook been candid with the company during the internal investigation, it would not have terminated him 'without cause.'"

McDonald's was charged with violating Section 14(a) and Rule 14a-3 of the Exchange Act for failure to provide certain disclosures with respect to executive compensation as required by Item 402 of Regulation S-K — specifically, all "material elements" of compensation of named executive officers and "material factors" regarding agreements that provide for payments to a named executive officer in connection with the officer's termination. The SEC alleged that McDonald's violation "arose from its failure to disclose that it used discretion in treating Easterbrook's termination as 'without cause' under the relevant compensation plan documents after determining that he violated the Standards of Business Conduct" and entering into the separation agreement that provided for Easterbrook to retain nearly \$44 million in equity-based compensation that otherwise would have been forfeited "absent the company's exercise of discretion." Specifically, McDonald's did not disclose this exercise of discretion to its investors when it filed its definitive proxy statement for fiscal year 2020 in April 2020, which recommended that shareholders approve the 2019 compensation of Easterbrook and, by extension, the terms of his separation agreement.

Both Easterbrook and McDonald's consented to the SEC's cease-and-desist order. The SEC ordered nearly \$53 million in disgorgement funds (which McDonald's has already received) and imposed a \$400,000 fine and five-year officer and director bar on Easterbrook. The SEC did not impose any financial penalty on McDonald's based on the "substantial cooperation" that McDonald's provided to the SEC throughout its investigation and McDonald's "affirmative remedial steps to recover value for its shareholders" through its settlement with Easterbrook.

SEC Commissioners Peirce and Uyeda [published a statement](#), announcing that they were unable to support the SEC's charges against McDonald's, which they claim were based on a "novel interpretation of the Commission's expansive executive compensation disclosure requirements." They expressed their concerns that this action "creates a slippery slope" that potentially expands Item 402's disclosure requirements related to executive compensation into "unintended areas" like "hiring and firing discussion and analysis." They claimed that this kind of regulatory expansion through enforcement is not reasonable and urged the SEC to publicly articulate its intention to expand what they consider "settled" disclosure requirements through rulemaking or formal guidance, as the SEC has done throughout the past 16 years since the establishment of these requirements.

In light of the potentially expanding disclosure requirements related to executive compensation, public companies should continue to seek advice as to how to best comply with these and other Item 402 requirements and remain alert for any subsequent guidance that the SEC may issue. However, this settlement is a significant recent

example of how companies can benefit from providing substantial assistance to the SEC staff in connection with an enforcement investigation.

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