Preparation for 2019 Fiscal Year-End SEC Filings and 2020 Annual Shareholder Meetings

Securities & Capital Markets Practice

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As our clients and friends know, each year Mintz provides an analysis of the regulatory developments that impact public companies as they prepare for their fiscal year-end filings with the Securities and Exchange Commission (the "SEC") and their annual shareholder meetings. This advisory discusses key considerations to keep in mind as you embark upon the year-end reporting process in 2020.

This year, the SEC implemented several new rules that public companies should consider as they prepare their year-end reports and filings, including rules covering disclosure of companies' hedging policies and amendments intended to simplify certain disclosure requirements affecting companies' Form 10-K filings. In addition to summarizing these changes, below we address several other significant developments and considerations that companies should focus on this year and provide an update on the policies and practices of the major proxy advisory firms.

SEC's Hedging Policies Rule Goes into Effect.

In December 2018, the SEC approved final rules requiring companies to disclose their hedging practices or policies for employees and directors. These rules implement the requirement of Section 955 of the Dodd-Frank Act, as originally enacted in 2015, by adding a new Item 407(i) to Regulation S-K. Most companies will be required to disclose their hedging policies for the first time in 2020. The rules are applicable to smaller reporting companies and emerging growth companies, although those companies will have an additional year to comply.

- **The required disclosure.** Companies must describe any practices or policies they have adopted regarding the ability of their employees (including officers) or directors to purchase securities or other financial instruments, or otherwise engage in transactions, that are designed to hedge or offset any decrease in the market value of equity securities granted as compensation, or held directly or indirectly by the employee or director. Companies may either disclose the practices or policies in full or provide summary disclosure, including who is covered by the policy and any categories of hedging transactions specifically permitted or prohibited. Companies without hedging practices or policies are required to disclose that fact or state that hedging transactions are generally permitted. Disclosure is required in proxy statements where action is to be taken on the election of directors.
- **Relationship to CD&A disclosure.** Item 402(b)(2)(xiii) of Regulation S-K already requires companies to disclose in their Compensation Discussion and Analysis ("CD&A") any policies regarding hedging the economic risk of share ownership, although only to the extent material to a discussion of executive compensation. The new rules do not eliminate this requirement, but allow companies to avoid duplicative disclosure in their proxy statements by a cross-reference to the hedging disclosure required by Item 407(i). Consequently, companies have the flexibility to either include the Item 407(i) hedging policy

We invite you to review our memorandum from last year, which analyzed regulatory changes that were new for fiscal year 2019, and we would be happy to provide you with another copy upon request. We also thank Cynthia Larose, Bret Leone-Quick, Brian Lam, Amanda Mei and Zachary Liebnick for their contributions to this memorandum.

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disclosure and Item 402(b)(2)(xiii) disclosure separately or incorporate the new Item 407(i) disclosure into the CD&A. Including the 407(i) disclosure within the CD&A would mean that it is covered by the compensation committee report and say-on-pay vote; while some companies may wish to avoid this, it is currently the approach taken by the majority of companies.

- **Considerations for 2020 proxy disclosure.** Most companies already disclose their hedging policies in their proxy statements on a voluntary basis, but companies should review and confirm that their disclosure meets the current requirements. For companies that have not yet adopted a policy or companies that have adopted relatively permissive policies, it is worth considering that most companies have adopted anti-hedging policies that include outright prohibitions on hedging transactions. In addition, Institutional Shareholder Services ("ISS"), Glass Lewis, and several institutional investors have gone on record as favoring strong anti-hedging policies for executives and may support shareholder initiatives proposing such policies.

SEC Simplifies and Modernizes Regulation S-K Disclosure Requirements.

In March 2019, the SEC adopted amendments[1] to modernize and simplify disclosure under Regulation S-K as mandated by the Fixing America's Surface Transportation (FAST) Act of 2015. The following is a summary of key changes that will impact a company's Form 10-K filing, most of which became effective on May 2, 2019:

- **Cover page** (Item 501(b)). Companies must disclose the national exchange or principal U.S. market, the trading symbol, and the title of each class of their securities on the cover page of Form 10-K (and Forms 8-K, 10-Q, 20-F, and 40-F).

- **Data tagging.** Companies are now required to tag all cover page data in Inline XBRL, subject to a three-year phase-in. The new rule applies to reports for fiscal periods ending on or after June 15 in 2019 and 2020, respectively, for large accelerated filers and accelerated filers, and to reports for fiscal periods ending on or after June 15, 2021 for all others.

- **Description of property eliminated** (Item 102). Companies no longer need to provide disclosure about physical property unless it is material to the company.

- **Historical periods in MD&A** (Item 303). Companies whose financial statements cover three years may now exclude discussion of the earliest year in their Management's Discussion and Analysis if such discussion was included in a prior filing unless such discussion would be material to a reader's understanding of the company's financial condition. The rules require companies to identify where such omitted discussion is located in the prior filing. In discussing their financial condition, companies are no longer required to include year-to-year comparisons of financial statement data, but instead may use any presentation that will enhance a reader's understanding of the company's financial condition.

- **Description of securities** (Item 601(b)(4)). Companies now must file the description of their securities required by Item 202 of Regulation S-K as an exhibit to Form 10-K. If a description of securities was previously filed as an exhibit and the information remains unchanged, the company may incorporate that exhibit by reference and provide a hyperlink to the previously filed exhibit. This disclosure should contain any modifications, whether or not material, to the company's registered securities made in the past year.

- **Reporting of Section 16 delinquencies** (Item 405). Companies now may rely on filed Section 16 reports to identify any Section 16 delinquencies (as opposed to copies furnished to the company). Also, the heading for the disclosure has been changed to "Delinquent Section 16(a) Reports," and the caption may now be omitted if there are no delinquencies to report. The amendments also eliminate the Form 10-K cover page checkbox relating to Section 16 delinquency disclosure in the Form 10-K or proxy statement.

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- **Exhibits.**
    - o **Streamlined confidential treatment** (Items 601(b)(2) and 601(b)(10)). Companies may now redact or omit commercially sensitive information in material contracts and certain other exhibits without submitting a confidential treatment request as long as the information is (i) not material, and (ii) likely to cause competitive harm to the company if publicly disclosed. Companies should be prepared to submit any redacted materials to the SEC upon its request. The amendments also codify the SEC's practice of not requiring the filing of confidential treatment requests to exclude personally identifiable information (such as bank account numbers, social security numbers, home addresses, and similar information) from exhibit filings.
    - o **Material contract lookback** (Item 601(b)(10)). While companies continue to be required to file material contracts that have not been fully performed by the filing date, only newly reporting companies will be required to also file other material contracts that were entered into within two years of the applicable report or registration statement.
    - o **Omission of schedules to certain material agreements** (Item 601(a)(5)). The amendments extend the existing accommodation for acquisition agreements, eliminating the requirement that companies attach schedules or similar attachments to documents filed as exhibits to their periodic filings. A list summarizing the contents of omitted schedules and attachments must be filed with each such exhibit.
    - o **Hyperlinks to documents incorporated by reference** (Rule 12b-23). Companies are already required to provide hyperlinks to documents filed as exhibits. The amendments expand the use of hyperlinks by requiring companies to provide hyperlinks to any information incorporated by reference if the information is available on EDGAR. The rules require hyperlinks to the relevant EDGAR filings, with a statement indicating both the document and the section within such document where the information can be found.
    - o **Incorporation by reference in financial statements.** The amendments prohibit companies from incorporating information outside of the financial statements by reference or cross-reference in the financial statements unless expressly permitted by other SEC rules or U.S. GAAP.
    - o **Five-year limitation on incorporation.** Companies are no longer prohibited from incorporating by reference documents that were filed more than five years ago.

Continued Focus on Board Diversity.

Pressure from institutional investors and legislators continued to drive the trend toward greater gender and, in some instances, racial and ethnic diversity on corporate boards in 2019. This trend is likely to continue as more stringent legislative and proxy advisory voting guidelines become effective.

- **Institutional investor pressure continues.** Leading asset managers such as BlackRock, State Street Global Advisors, and T. Rowe Price, and pension funds such as CalPERS,[2] the nation's largest pension fund, have adopted voting guidelines providing that they may vote against nominating committee members of portfolio companies with inadequate board gender diversity. The New York City Pension Funds revised their voting guidelines to vote against members of nominating committees of boards that lack meaningful gender and racial diversity, including boards where fewer than 20% of directors are women. Institutional investors have also engaged in letter-writing campaigns to companies without women on their boards requesting engagement and, in some instances, have voted against directors or have sponsored shareholder proposals on board diversity after unsatisfactory engagement.
- **New proxy advisor guidelines on board diversity.** Proxy advisory firms ISS and Glass Lewis issued policy updates on board diversity for 2020. Effective February 1, 2020,[3] ISS will begin issuing negative recommendations against nominating committee chairs (or other directors on a case-by-case basis) at S&P 1500 or Russell 3000 companies with all-male boards. ISS will consider a firm commitment in the company's proxy statement to appoint at least one woman director within a year as a mitigating factor. However, a firm commitment by companies without board gender diversity in previous years will only

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serve as a mitigating factor until February 1, 2021. ISS also clarified that having a woman on the board in previous years will no longer be considered an independent mitigating factor. Glass Lewis will continue its practice, begun in January 2019, of generally recommending voting against nominating committee chairs of all-male boards. Glass Lewis noted that during the 2020 proxy season, it will generally recommend voting against nominating committee chairs of companies with all-male boards that are subject to California's board gender diversity law (discussed below) and have not disclosed plans to achieve board gender diversity.

- **State legislation.** Last year, we highlighted that California became the first state to enact a board diversity statute based on a gender quota. California's SB 826 requires any public company headquartered in California, whether or not incorporated there, to have had at least one woman on its board by the end of 2019, and by the end of 2020, boards with five members must have at least two female directors and boards with six or more members must have at least three female directors. Noncompliance may result in fines, although the necessary enabling regulations have not yet been promulgated. Since SB 826 was enacted, 60 of the 94 public companies headquartered in California with all-male boards have added at least one female board member, and the number of female directors of public companies headquartered in California has increased by 23%.[4] The constitutionality of SB 826 is currently subject to challenges by conservative activist groups in both California state court and federal district court.[5] Until the courts rule, companies headquartered in California, regardless of where incorporated, should be developing a process for identifying women board candidate nominees. Michigan,[6] New Jersey,[7] and Massachusetts[8] are currently considering bills modeled on the California law, and Pennsylvania is considering a resolution[9] to encourage gender diverse public company boards by 2021. Illinois, Maryland, and New York have opted to pass legislation focusing on the reporting and disclosure of public company board composition based on gender (Illinois, Maryland, and New York) and race and ethnicity (Illinois). This reporting and disclosure model may gain traction in other states if the California statute is found to be unconstitutional.
- **Federal developments.** On February 6, 2019, the SEC's Division of Corporation Finance issued two Compliance & Disclosure Interpretations[10] providing that companies should identify directors' self-identified diversity characteristics, including gender, subject to each director's consent to such disclosure. On the same day, a bill titled "Improving Corporate Governance Through Diversity Act of 2019" was introduced in Congress to amend the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to require public companies to disclose the gender, race, and ethnicity of directors, nominees, and senior executive officers. The bill was passed by the House on November 19, 2019 and has been sent to the Senate for committee review.

Overboarding of Directors.

Investors are continuing to focus on the issue of "overboarding" of directors, and expectations are evolving as to the number of boards on which a director can serve without becoming overcommitted. Noting the significant time commitment board membership requires, investors are concerned that overboarded directors may not be able to fulfill their responsibilities. Increasingly, investors are adopting polices to withhold votes from directors they view as overboarded. ISS generally recommends that investors withhold their votes from director nominees who either are CEOs of public companies and serve on the boards of more than two public companies besides their own, or who are non-CEO directors and serve on more than five public company boards. Glass Lewis generally recommends that shareholders vote against any director who serves as an executive officer of a public company while serving on more than two public company boards (including their own company's board), and against any outside directors who serve on more than five public company boards. Blackrock and Vanguard have also adopted restrictive guidelines with respect to executive directors and will vote against a CEO, in the case of Blackrock, and any named executive officer, in the case of Vanguard, who sits on more than two public company boards, including their own. In the 2019 proxy season, Blackrock voted against 94 CEO directors who sat on more than two corporate boards. Other large institutional investors have also adopted their own overboarding policies. CalPERS will withhold votes from non-executive directors who sit on more than four public company boards and will withhold votes from an executive director who serves on more than

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two public company boards besides their own. The New York Pension Funds will generally oppose director nominees who sit on more than four public company boards and withhold support from a CEO director's nomination to boards other than their own, if the nominee serves on more than three public company boards. Surveys show that there has been a reduction in the number of boards on which directors sit, possibly as a result of institutional investor and proxy advisor pressure. In its *2019 Investment Stewardship Annual Report*, Blackrock reported that the percentage of non-CEO directors sitting on more than four boards decreased from 8.8% in 2008 to 6.7% in 2019. While overboarding is not as crucial as either gender diversity or board oversight in motivating investors to focus on board membership and composition, companies should be aware that a director nominee might receive reduced shareholder support in this year's upcoming elections if the number of the director's other public company board positions raises shareholder concerns.

Proxy Statement Disclosures of Director Skills.

An increasing number of public companies are disclosing director qualifications and skills by displaying them in a matrix rather than discussing them in a narrative format. Thirty percent of S&P 500 companies and 13% of Russell 3000 companies included skills matrices in their 2018 proxy statements, up from 14.8% for S&P 500 companies and 6.5% for Russell 3000 companies in 2016.[11] The skills and experience disclosed should reflect those that a board considers valuable for company oversight and may include (i) competency in various areas such as corporate governance, executive compensation, finance and financial reporting, government, legal and regulatory, environmental and sustainability, health and safety, investor relations, customer and product support, and technology, privacy, and cybersecurity, (ii) experience such as industry and leadership experience, and (iii) diversity attributes (e.g., gender, race, and ethnicity). The graphical presentation of skills in a matrix is said to enable investors to better understand the skill set required by a company for its board and to identify skills gaps on the board. The New York City Comptroller and the New York City Pension Funds have recommended that the skills, race, and gender of board members be presented in a board matrix format in proxy statements.[12]

Clawback and Forfeiture Policies.

Companies that do not yet have an executive compensation recoupment policy should consider adopting one, and those with clawback policies may want to update them in light of ongoing developments and evolving norms. Clawback polices have become increasingly common, as companies have determined that the SEC's proposed rules mandating clawback policies under Section 954 of the Dodd-Frank Act may never be finalized. Many companies have used the proposed Section 954 regulations to formulate their own policies. Those proposed regulations would require listed companies to adopt and disclose clawback policies to recover from current and former executive officers excess incentive-based compensation received during the three fiscal years preceding the date on which the company is required to prepare a financial restatement to correct a material error.

Implementing a clawback policy is viewed as good governance and responsive to investors' concerns. When an equity plan is being submitted to shareholders for approval, having a clawback policy improves a company's scores on the ISS Equity Plan Scorecard. Glass Lewis also takes the position that a company should have a clawback policy that at a minimum provides for recoupment in the event of a restatement of financial results or revision of performance indicators used to calculate bonuses. Some companies are modifying their existing clawback policies to go further than the minimum requirements of the proposed Dodd-Frank rules. Partly in response to #MeToo principles and various supervisory failures, companies are adding clawback triggers based on acts that result in significant reputational harm to the company or violate restrictive covenants. Policies are also being extended to cover executives who supervise employees who engage in misconduct. It is not yet clear whether these broadened policies will be enforceable in all jurisdictions, especially those with robust regulations that protect employees' wages.

To address concerns regarding enforceability and to further the underlying intent of existing clawback policies, companies are also considering whether their severance arrangements and the definitions of "cause" used in forfeiture provisions in employment agreements and equity grants should be extended to cover reputational harm to the company or adverse publicity. These provisions would apply only in the case of an employee's

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termination, but would allow for the forfeiture of unpaid bonuses and vested options in situations beyond the company's previous definition of misconduct constituting "cause."

Cybersecurity Risk Disclosure, Data Protection, and Privacy Legislation.

In the wake of many well-publicized cybersecurity breaches, cybersecurity disclosure is increasingly the focus of both shareholders and the SEC. Shareholders are calling for proactive management and transparency in cybersecurity risk mitigation. The SEC is also focused on cybersecurity risk disclosure, and companies must continue to carefully consider the February 2018 SEC interpretive guidance on public company disclosure obligations regarding cybersecurity risks and incidents that we discussed last year. The 2018 guidance reinforces prior guidance by reminding companies that the SEC's disclosure requirements apply to cybersecurity risks and incidents that are material to investors, including the financial, legal, or reputational consequences.

Building upon the 2018 guidance, on April 16, 2019, the SEC's Office of Compliance Inspections and Examinations (the "OCIE") issued a risk alert addressing the privacy-related obligations of registered broker-dealers and investment advisers (collectively, "Firms") under Regulation S-P. The risk alert provided guidance regarding frequent Regulation S-P deficiencies observed by the OCIE over the past two years and encouraged companies to review their written privacy policies and procedures and their implementation. The OCIE noted that some Firms had failed to provide adequate and accurate detail regarding their privacy practices in their notices, and others failed to provide notices at all. Further, some Firms had failed to adopt written procedures and policies to address "administrative, technical, and physical safeguards for protecting customer records and information" as required by Regulation S-P. The OCIE noted that certain Firms had used policies that were not "reasonably designed" to protect the nonpublic personal information of customers, while others had failed to implement or had incomplete policies and procedures.

Additionally, in a May 23, 2019 risk alert, the SEC noted that the OCIE had "identified security risks associated with the storage of electronic customer records and information by broker-dealers and investment advisers in various network storage solutions, including those leveraging cloud-based storage," including the failure of Firms to implement and use available security features offered by storage providers.

Further, in a December 9, 2019 release, the SEC approved a rule change requested by the Depository Trust Company ("DTC") that will, among other things, require entities that wish to connect to DTC through the Securely Managed and Reliable Technology (SMART) network or other means, to submit a written form containing specific representations regarding the entity's cybersecurity program and framework. Applicable entities would have to submit this cybersecurity confirmation as part of their application materials, and at least every two years. The SEC has also added to its cybersecurity enforcement capabilities. In December 2019, the SEC announced that Kristina Littman was named Chief of the Division of the OCIE's Cyber Unit, a national, specialized unit that focuses on protecting investors and markets from cyber-related misconduct.

Companies should be aware of data protection and privacy legislation in the jurisdictions in which they do business and the potential risks of noncompliance. As discussed in our advisory last year, the European Union's General Data Protection Regulation has gone into effect and has compliance costs and the potential for large fines and penalties. Further, the California Consumer Privacy Act (the "CCPA"), the most broad-reaching privacy legislation enacted in the United States, became effective on January 1, 2020. A company will be covered by the CCPA requirements if it does business in California and meets one or more of the following criteria: (i) has annual gross revenues in excess $25,000,000; (ii) alone, or in combination, annually buys, receives for the business' commercial purposes, sells, or shares for commercial purposes, the personal information of 50,000 or more California residents, households, or devices; or (iii) derives 50% or more of its annual revenues from selling the personal information of California residents. It is important to note that a business need not be "consumer"-facing to be covered by the CCPA; a "consumer" is any California resident.

A discussion of the CCPA requirements is beyond the scope of this advisory, but generally, the CCPA greatly expands the concept of "personal information," and businesses covered by the CCPA must (i) disclose the types of data they collect, the purpose of the data collection, and how the data will be used, (ii) support certain consumer rights, including a right to know what personal data has been collected, a right to deletion

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of all personal data, and obligations to pass such requests through to service providers, and (iii) expand organizational responsibilities pertaining to individual rights, accountability, and governance. If businesses covered by the CCPA engage in any activities defined as a "sale" of personal data, the CCPA requires that the business offer consumers the opportunity to opt out of such a sale. In addition to the commonly understood concept of a "sale," the term under the CCPA includes activities such as renting, releasing, disclosing, disseminating, or otherwise sharing personal information with another business or a third party for "monetary or other consideration." Furthermore, the CCPA will impact other entities that work with businesses subject to the CCPA, such as entities that provide services to these businesses, as well as third parties that businesses may choose to provide with personal information, as the CCPA imposes certain requirements upon them as well. Additionally, the CCPA also includes a private right of action and steep fines for noncompliance. The California Attorney General recently emphasized his office's intention to fully enforce the CCPA, and his office intends to issue final regulations implementing important provisions of the CCPA in the first quarter of 2020. The regulations will have significant operational effects on covered businesses. It is expected that other states will follow California's lead in 2020 and enact similar data privacy legislation.

In a related matter, on December 19, 2019, the SEC's Division of Corporate Finance issued guidance[13] on companies' disclosure obligations related to intellectual property and technology risks associated with international business operations, particularly in countries with lower levels of information security and intellectual property protections than are available in the United States. The guidance encourages companies to assess the risks related to the potential theft or compromise of their technology, data, or intellectual property in connection with their international operations, as well as how the realization of these risks might impact their business, including their financial condition and results of operations, and any effects on their reputation, stock price, and long-term value. These intellectual property and technology risks, if material to investment and voting decisions, should be disclosed in the company's Form 10-K.

Environmental, Social and Governance Disclosure.

As investment community interest in public companies' environmental and social profiles has increased, many companies are proactively providing more robust environmental, social and governance disclosure. E&S matters are varied, and include, among others, sustainability, climate change, human capital management, workforce diversity, and gender pay equity. There is increased awareness of these issues among investors and other groups, and a number of organizations that rate companies based on their initiatives in the environmental, social and governance arena, including ISS, Bloomberg, and Sustainalytics. As a result, companies and boards of directors are faced with challenges in determining how best to address ESG issues and integrate them into their business practices and disclosures, whether on the company's website or in its SEC filings.

In July 2019, the House of Representatives' Financial Services Committee rejected a bill that would have instituted ESG reporting standards more closely aligned with those of the European Union, as well as climate change risk factor disclosure, but similar legislative efforts are likely to follow. In March 2019, SEC Chairman Clayton stated that "the historical approach of disclosing only the costs of compensation and benefits often is not enough to fully understand the value and impact of human capital on the performance and future prospects of an organization."[14] Chairman Clayton has also indicated that investors would benefit from an understanding of how a company views its human capital, specifically whether the company focuses on the rate of turnover, the percentage of the workforce with advanced degrees or relevant experience, and the relative difficulty of filling open positions. In August 2019, the SEC proposed a revision to Regulation S-K Item 101(c)[15] to replace the current requirement to disclose the number of employees with a requirement to disclose a description of a company's human capital resources, including any human capital measures or objectives that management focuses on in managing the business, to the extent such disclosures would be material to an understanding of the company's business.

The U.S. Chamber of Commerce has recently released a set of ESG reporting best practices intended to function as guidelines for producing voluntary ESG disclosure. The Chamber's initiative takes the position that each company should exercise discretion in determining which ESG factors and metrics are relevant to its business and warrant disclosure. Disclosure of ESG factors would be expected to vary among industries and from company to company.

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If a company decides to include voluntary ESG disclosure, it may be appropriate to describe the company's initiatives in aspirational terms rather than as specific commitments to future results, with cautionary language and disclaimers so as not to inadvertently provide potentially misleading information. Finally, given the different methodologies employed by ESG rating organizations and the possibility that a company's rating could vary significantly among rating organizations, companies should use caution when disclosing favorable ESG ratings.

Say-on-Pay Update.

As in past years, shareholder support of say-on-pay resolutions in the 2019 proxy season averaged above 90% across all companies, with a slight decrease in average support levels from the past two years. Say-on-pay continues to be perceived as a year-to-year item, in which success in past years is no guarantee of success in future years. Companies should not become complacent about achieving the necessary support, even if they have enjoyed strong support in prior years. The say-on-pay process continues to involve company focus on compensation-related disclosures in proxy statements, in particular, the CD&A, with both advocacy and disclosure in mind, and engagement with institutional shareholders in the months following the annual meeting to discuss pay practices.

We note a trend of companies including an introductory executive summary at the beginning of the CD&A to highlight key messages, define the company's views on pay-for-performance, and ensure the company has a reasonable narrative to support its decisions for last year's pay. A related trend of disclosing "realized" or "realizable pay" has also continued to assist shareholders in understanding the executive compensation value actually transferred during a fiscal year. ISS' standard research report now generally shows three-year realizable pay compared to the three-year granted pay for S&P 1500 companies. ISS will discuss realizable pay in its report when its quantitative analysis results in a "high or medium" concern that a company's compensation policies are not linked to overall corporate performance, and will also look at realized and realizable pay at smaller companies to assist in determining whether a company demonstrates a strong commitment to a pay-for-performance philosophy.

There are several common denominators that tend to generate negative say-on-pay votes for companies to keep in mind as they update their disclosure this year: (i) performance-based factors such as a significant misalignment between the company's performance and the CEO's pay; (ii) problematic pay practices such as excessive severance packages paid due to change in control or voluntary termination, backdating or adjusting the price of options, large discretionary cash bonus programs, excise tax gross-ups, and benchmarking compensation higher than the median of their peers; and (iii) factors unrelated to performance, such as poor communication and lack of responsiveness from compensation committees, particularly in response to shareholders regarding say-on-pay votes.

In assessing executive compensation, we continue to advise that boards of directors bear in mind that their ultimate goal is not to secure a successful say-on-pay vote, but rather to attract, retain, and incentivize executives who will contribute to the long-term value of the company. Companies should understand the executive compensation guidelines that ISS and similar groups promote, but should not allow these guidelines to override their own judgments as to the compensation programs and policies that are best for them.

Say-on-Frequency: Consider Need for Another Shareholder Vote.

For companies that held their first say-on-pay vote pursuant to the Dodd-Frank Act six years ago in 2014, it is now time to revisit the say-on-frequency vote by including a non-binding resolution in their proxy statements to ask shareholders how often they want to conduct say-on-pay votes for the next six years. As we reported last year, the dominant trend is toward an annual vote on frequency. Companies required to conduct their say-on-frequency vote this year must remember to report, under Item 5.07 of Form 8-K, the company's say-on-frequency determination in the Form 8-K to be filed within four business days of the shareholders meeting (or by amendment to that Form 8-K filed no later than 150 calendar days after the date of the shareholders meeting at which the say-on-frequency vote was taken, but in no event later than 60 days prior to the deadline for the submission of shareholder proposals under Rule 14a-8 of the Exchange Act for the subsequent annual meeting).

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2019 Litigation and Court Decisions Impacting Corporate and Governance Disclosures.

- **U.S. Supreme Court relatively quiet on corporate and governance disclosure issues.**

  In some ways, 2019 is notable for decisions that the U.S. Supreme Court did not make with respect to corporate disclosure issues. For example, the U.S. Supreme Court refused to grant certiorari for *Khoja v. Orexigen Therapeutics, Inc. et al.*, 899 F.3d 988 (9th Cir. 2018), which was a Ninth Circuit decision that involved, in part, the issue of whether public companies have a duty to update or correct prior disclosures that are allegedly rendered inaccurate by subsequent events or developments. In addition, the Court dismissed the appeal of *Varjabedian v. Emulex Corp. et al.*, 888 F.3d 399 (9th Cir. 2018) on procedural grounds. In *Emulex*, the Ninth Circuit held that a plaintiff could bring a claim under Section 14(e) of the Exchange Act by alleging that false statements in a tender offer were made negligently. The other circuit courts that have examined this question require a plaintiff to plead that the allegedly false statements were made intentionally, and not negligently.

  The most notable decision in 2019 by the U.S. Supreme Court concerning liability under the federal securities laws was *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019). But this decision, which involved a finding that an individual could be liable for disseminating false statements that had been "made" by another person, has little bearing on officers and directors of public companies who already sign (and can be held liable for) their company's public disclosures.

- **When are general statements in codes of conduct/ethics actionable?**

  In *Singh v. Cigna Corp, et al*., 918 F.3d 57 (2d Cir. 2019), the Second Circuit affirmed a dismissal of a securities class action suit based on alleged statements made by Cigna concerning its efforts to comply with its numerous regulatory requirements. The allegedly misleading statements included statements from Cigna's "Code of Ethics and Principles of Conduct," which it had made publicly available. In affirming the dismissal of claims, the *Cigna* court held that the statements in the Code of Ethics amounted to "general declarations about the importance of acting lawfully and with integrity" and simply constituted non-actionable "puffery." The court also noted how Cigna's public statements were "framed by acknowledgements of the complexity and numerosity of applicable regulations," and that these acknowledgements provided additional context for why general statements about regulatory compliance could not be actionable.

  In a subsequent case, however, a district court in the Second Circuit rejected arguments that *Cigna* compelled dismissal of claims based upon statements made in company policies (*In re Signet Jewelers Ltd. Sec. Litig.*, No. 16 Civ. 6728 (S.D.N.Y. June 11, 2019)). In refusing to dismiss the claims, the court first noted that Cigna did not change the rule that the overall context is critical for deciding whether general statements in a code of conduct could be actionable. The court then reasoned that Signet's statements in its published corporate policies that it made employment decisions purely on the basis of merit, disciplined misconduct in its ranks, and provided an avenue for reporting sexual harassment were actionable given the allegations of rampant sexual harassment throughout the company.

  Accordingly, while plaintiffs do generally face an uphill battle to establish liability based on general statements in publicly disclosed company policies, companies should still pay attention to these statements, and assess them in light of any relevant changing circumstances or developments.

- **Shareholder and director demands for production of emails and text messages under Section 220 of Delaware General Corporation Law find some success.**

  In *KT4 Partners LLC v. Palantir Tech. Inc.*, No. 281, 2018 (Del. 2019), the Delaware Supreme Court held that a shareholder was entitled to receive emails from Palantir in response to a demand for corporate books and records pursuant to Section 220 of the Delaware General Corporation Law. The court noted the general rule that "the Court of Chancery should not order emails to be produced when other materials (e.g., traditional board-level materials, such as minutes) would accomplish the petitioner's proper purpose." But in ordering that Palantir produce emails, the court noted that if a company

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“decides to conduct formal corporate business largely through informal electronic communications, it cannot use its own choice of medium to keep shareholders in the dark about the substantive information to which Section 220 entitles them.” The court then remanded the case to the lower court to determine the scope of the email the company would need to produce, which will, based on the court’s decision, likely include emails among and between Palantir’s officers and directors.

Going even further, the Court of Chancery in *Schnatter v. Papa John’s International, Inc.*, C.A. No. 2018-0542-AGB (Del. Ch. Jan. 15, 2019) ordered that directors and officers produce specified communications (including emails and text messages) from their personal devices. The court noted that “[t]he reality of today’s world is that people communicate in many more ways than before, aided by technological advances that are convenient and easy to use. Although some methods of communication (e.g., text messages) present greater challenges for collection and review than others, and thus may impose more expense on the company to produce, the utility of Section 220 as a means of investigating mismanagement would be undermined if the court were to rule out the need to produce communications in these formats.” While the *Papa John’s* case involved a demand for books and records by a director, and directors typically have broader rights to corporate records than shareholders do, it still serves as a reminder that courts are taking a practical approach to Section 220 demands and are not limiting such request to formal company documents maintained by the company itself.

- **Director liability for failure to sufficiently monitor company’s business.**

  The Delaware Supreme Court provided an illustration in *Marchand v. Barnhill et al.*, No. 533, 2018 (Del. 2019) of the rare circumstance of shareholders successfully pleading a derivative claim against directors for a failure to oversee a corporation’s operations in good faith. The *Marchand* case involved a derivative suit against directors of Blue Bell Creameries USA, Inc. in the aftermath of a deadly listeria contamination at Blue Bell. The court noted that directors have a duty to “put in place a reasonable board-level system of monitoring and reporting the corporation’s central compliance risks.” It rejected the argument that the company’s board satisfied this standard by, among other things, having employee manuals in place to require compliance, commissioning safety audits from time to time, and receiving the results of FDA inspections (which the company passed). In noting that this was insufficient to dismiss the breach of fiduciary duty claim, the court stated, “[a]t best, Blue Bell’s compliance with these requirements shows only that management was following, in a nominal way, certain standard requirements of state and federal law.” The directors also argued that they regularly had discussions at board meetings with management on various operational issues. But the court rejected this argument as well and noted, “[a]t every board meeting of any company, it is likely that management will touch on some operational issue.” The *Marchand* decision includes additional facts as to what the defendant officers and directors failed to do with respect to having a proper monitoring and reporting system in place, and despite the fact that some of these details are industry-specific, it provides some clarity on the scope of the duty of oversight.

SEC Proposes Amendments to Eligibility Requirements for Shareholder Proposals.

Exchange Act Rule 14a-8 requires public companies subject to the federal securities laws to include shareholder proposals in their proxy statements. The purpose of this rule is to provide shareholders with the ability to present their own proposals for consideration at a shareholders meeting. Rule 14a-8 imposes several eligibility requirements on shareholders who wish to submit proposals for inclusion in a proxy statement. The current rule requires, among other things, that a shareholder may only submit one proposal per meeting, must have continuously owned at least $2,000 or 1% of the securities entitled to vote for one year, and must limit a proposal to 500 words.

On November 5, 2019, the SEC issued a press release proposing amendments to these eligibility requirements. This update, the first since 1954, would require a shareholder-proponent to have continuous ownership of at least: (i) $2,000 of the company’s securities for at least three years; (ii) $15,000 of the company’s securities for at least two years; or (iii) $25,000 of the company’s securities for at least one year. The SEC also proposed an engagement component that requires delivery of a statement to the company from each shareholder-

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proponent that the proponent is able to meet with the company between 10 and 30 calendar days after submission of the proposal and provide relevant contact information to the company. In addition, the SEC proposed an amendment to apply the one-proposal rule to "each person" rather than "each shareholder," which would prevent a shareholder-proponent from submitting one proposal in the proponent's own name and simultaneously serving as a representative to submit a different proposal on another shareholder's behalf, both for consideration at the same meeting.

The proposed amendments also aim to modernize the current voting thresholds for the resubmission of proposals that were previously submitted for a vote at prior meetings and failed. The current rule provides that shareholder proposals that fail to achieve 3%, 6%, or 10% of shareholder approval when included in proxy statements once, twice, or three or more times, respectively, in the last five years, are not eligible for inclusion in a later proxy statement. The SEC is proposing to increase these thresholds to 5%, 15%, and 25%, respectively. The SEC noted its concern that low resubmission thresholds allow proposals that have not received widespread support from shareholders to nevertheless be included in proxy statements year after year with little chance of being approved. Similarly, the SEC proposed a "momentum requirement" that would allow companies to exclude shareholder proposals that concern substantially the same subject matter as a proposal previously voted on three or more times in the last five years, that would not otherwise be excludable under the proposed 25% threshold. Under the "momentum requirement," a proposal could be excluded if (i) the proposal most recently voted on received less than 50% of the votes cast, and (ii) support for the proposal declined by 25% or more compared to the immediately preceding shareholder vote on the matter.

SEC Advances Proxy Reform Agenda.

On November 5, 2019, the SEC proposed amendments[16] to the exemptions from the federal proxy rules for proxy voting advice in order to improve the accuracy, transparency, and completeness of such advice. These proposed amendments codify the SEC's August 21, 2019 interpretation and guidance on the applicability of the federal proxy rules to proxy advisor voting advice[17] (the "Guidance"). The amendments, which will not become final until sometime after the period for public comment closes in January 2020, include:

- **Amending definition of "solicitation" to include proxy voting advice.** The proposed amendments codify the SEC's position that proxy advice constitutes a solicitation under the federal proxy rules by amending the federal proxy rules' definition of "solicitation" in Exchange Act Rule 14a-1(l) to include proxy voting advice provided by any person who markets and sells their expertise as a provider of proxy voting advice, unless the advice is provided in response to an unprompted request.
- **Adding new conditions to exempt proxy voting advice from information and filing requirements.** The proposed amendments condition the availability of certain exemptions for proxy voting advice under Exchange Act Rules 14a-2(b)(1) and 14a-2(b)(3) from the information and filing requirements of the federal proxy rules on:
    - **Disclosure of material conflicts of interest.** Proxy advisors will be required to provide prominent and detailed disclosure of material conflicts of interest in their written proxy voting advice and on any electronic means of its delivery.
    - **New review and feedback period.** Proxy advisors will be required to give companies (and persons conducting competing solicitations) the opportunity to review and provide feedback on their voting advice prior to distribution, with the review period dependent on the length of time between the date on which the definitive proxy is filed and the date of the annual meeting. Proxy advisors must provide their proxy advice for a five-day period when a definitive proxy is filed 45 or more days before the date of the annual meeting and a three-day period when the definitive proxy is filed less than 45, but at least 25, days before the annual meeting. No opportunity for review will be available to companies that file definitive proxy materials fewer than 25 days before the annual meeting date. Following any review and feedback period, proxy advisors must provide companies and persons conducting competing solicitations with a final notice of voting advice no later than two business days before distribution to the proxy advisor's clients.

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- **Company response to proxy voting advice.** During the two-day final notice period, companies and other persons conducting competing solicitations may provide a statement of their views on such advice and request that the proxy advisor include a link to such statement in its proxy voting advice. Any such company statement would be subject to the anti-fraud provisions of the proxy rules and would be required to be filed with the SEC.

- **Subjecting proxy voting advice to anti-fraud provisions.** The proposed amendments clarify that Rule 14a-9 applies to proxy voting advice that is not subject to the proxy rules' information and filing requirements, and expand the list of examples of misleading statements and omissions in Rule 14a-9 to include misleading statements and omissions related to the failure to disclose the proxy advisor's (i) methodologies, sources of information, and conflicts of interest, or (ii) use of standards or requirements that materially differ from the SEC's standards or requirements.

  The new requirements, particularly those requiring proxy advisors to disclose their proprietary methodologies and third-party information sources, could undermine their existing business model. It is not surprising that ISS filed suit in federal district court against the SEC challenging the SEC's regulation of proxy voting advice as contrary to law and outside of the SEC's statutory authority under the Exchange Act. The outcome of this suit, which was filed on October 31, 2019, could lead to modification of the proposed amendments.

In August 2019, the SEC issued additional non-binding guidance,[18] in question and answer format, (the "IA Guidance") that clarifies the responsibilities of investment advisers when they rely on proxy voting advice. Essentially, the IA Guidance tasks investment advisors with ensuring greater accountability from proxy advisors on their voting recommendations by, among other things, suggesting a framework for vetting proxy voting advice. The IA Guidance confirms that an investment adviser's use of proxy advisory voting recommendations must be consistent with the adviser's fiduciary duties to clients under the Investment Advisers Act of 1940, as amended, and directs investment advisers to consider whether their proxy advisor has the requisite expertise and competence to analyze the subject matter of the relevant votes, effective methodologies for analyzing issues, reliable sources of information, and a process for obtaining feedback from issuers and its clients on its policies and methodologies.

SEC Extends Ability to Use Testing-the-Waters Communications to All Issuers.

On September 25, 2019, the SEC adopted Rule 163B under the Securities Act of 1933, as amended (the "Securities Act"), which extends the ability to use testing-the-waters ("TTW") communications to all issuers, not just emerging growth companies. These new rules became effective on December 3, 2019. TTW communications are oral or written communications by an issuer (or persons authorized to act on its behalf) with potential investors to determine whether such investors might have an interest in a contemplated registered securities offering, either before or after a registration statement is filed with the SEC. The purpose of TTW communications is to allow issuers flexibility to gauge market interest, tailor the size and other terms of the offering, and obtain feedback on a potential offering before incurring the costs of the registration process and disclosing sensitive financial and competitive information in a registration statement.

Under the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act"), Congress previously amended Section 5 of the Securities Act to allow emerging growth companies[19] to engage in TTW communications with qualified institutional buyers ("QIBs") and institutions that are accredited investors ("IAIs") by exempting such communications from the Securities Act's prohibition against making offers of securities before a registration statement has been filed (so-called "gun jumping"), or making written offers without including all of the information required to be included in a Section 10 prospectus. By extending these accommodations to all issuers, Rule 163B is intended to level the playing field among issuers and further facilitate capital formation. Rule 163B, therefore, is another tool that issuers may choose to use as part of their capital-raising activities. Below are several frequently asked questions about TTW communications under Rule 163B and the JOBS Act

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as well as communications that may be made by well-known seasoned issuers ("WKSIs")[20] under Rule 163 under the Securities Act. In addition, issuers subject to Regulation FD should consider whether their communications may also trigger Regulation FD disclosure and whether to take appropriate steps to ensure Regulation FD compliance, such as through wall-cross procedures or confidentiality agreements.

Frequently Asked Questions	TTW Communications under Rule 163B	TTW Communications under the JOBS Act	Communications by WKSIs under Rule 163
Which issuers may engage in these communications?	All issuers	Emerging growth companies only	WKSIs only
When may the issuer engage in these communications?	Before or after a registration statement is filed	Before or after a registration statement is filed	Before or after a registration statement is filed
Can underwriters acting on the issuer's behalf engage in these communications?	Yes	Yes	No
With which investors may the issuer engage in these communications?	QIBs and IAIs only	QIBs and IAIs only	All investors
Are these communications free-writing prospectuses, which must have legends and be filed with the SEC?	No, but the SEC may request that the communication be furnished to the SEC as part of the SEC's review of the registration statement	No, but the SEC may request that the communication be furnished to the SEC as part of the SEC's review of the registration statement	Yes, a legend is required and the communication must be filed promptly upon the filing of the registration statement (or amendment)
Are these communications deemed "offers" under the Securities Act, which are subject to Section 12(a)(2) liability as well as antifraud liability?	Yes	Yes	Yes

IRS Proposes Regulations Relating to the Revised Section 162(m) Deductibility Cap.

In December 2019, the Internal Revenue Service (the "IRS") issued proposed regulations[21] related to the changes to Internal Revenue Code Section 162(m) made by the Tax Cuts and Jobs Act of 2017 (the "TCJA"). The TCJA eliminated the exemption for performance-based compensation from Section 162(m)'s $1 million cap on executive compensation deductions. Highlights of the proposed regulations include:

- **Transition period for newly public companies eliminated.** The proposed regulations eliminate the three-year transition period that new public companies were able to take advantage of before they were required to fully comply with Section 162(m). Companies are now subject to the deduction limitation beginning in the year of their IPO.
- **Expanded definition of "public company."** The proposed regulations amend the definition of "publicly held corporation" in Section 162(m), extending its application from companies issuing any class of common equity securities required to be registered under Section 12 of the Exchange Act to those

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required to file reports under Exchange Act Section 15(d). The proposed regulations clarify that foreign private issuers, publicly traded partnerships, and issuers of public debt are covered by the definition.

- **Covered employees.** The regulations confirm that a covered employee is any employee of a publicly held company who: (i) is or was the CEO or CFO of the company during the taxable year; (ii) is one of the three most highly compensated executive officers during the taxable year (other than the CEO and CFO); or (iii) was a covered employee of the company (or any predecessor company) in any taxable year after 2016 (including years in which the company was not publicly held). In addition, the proposed regulations confirm that if a covered employee returns to provide services in any capacity to the company after termination as an employee, any deduction for compensation paid to the covered employee after the initial termination is subject to the deductibility cap.
- **Clarification of grandfathering rule.** The TCJA eliminated the exemption from Section 162(m)'s $1 million deductibility cap for performance-based compensation but grandfathered performance-based compensation under written binding contracts in effect on November 2, 2017, provided that such contracts were not materially modified or renewed. The proposed regulations confirm the grandfathering rule clarified in the IRS' August 21, 2018 Notice[22] that we discussed last year, and generally confirm that companies should look to state law to determine whether a potentially grandfathered award is considered legally binding.

Proxy Advisory Voting Guidance Update.

Proxy advisory firms ISS and Glass Lewis released updates of their policies for the 2020 proxy season.[23] The following are some of the more noteworthy updates to their corporate governance and executive compensation policies instituted this year.

Governance Updates.

- **ISS introduces new climate scorecard.** In August 2019, ISS introduced a new Climate Awareness Scorecard, which will be incorporated into ISS proxy reports. The new scorecard compares a company's climate change disclosures and performance record against various applicable data sets and responds to investor interest in increased disclosure by companies on how they measure and assess climate change risk. The climate scorecard has three sections:
    - **Climate risk exposure** providing information on a company's industry risk and incident-based risk exposure (i.e., whether the company is violating applicable climate norms).
    - **Climate performance** evaluates a company's current climate performance by comparing its greenhouse gas emissions against the average emissions of its peer companies and provides a projection of its future climate performance by assigning the company a carbon-risk category and rating.
    - **Climate disclosure rating** evaluates the quality of a company's disclosures based on a review of company disclosures across four disclosure categories (climate governance, strategy, risk management, and metrics and targets) using the Task Force on Climate-related Financial Disclosures' standards.
- **Separate voting guidelines for problematic capital and governance structures for newly public companies.** ISS revised its Problematic Governance Structure for Newly Public Companies policy to create a separate policy for problematic capital structures at newly public companies and a framework for addressing acceptable sunset requirements.
    - **Problematic capital structures.** Under its new policy for problematic capital structures at newly public companies, ISS will generally recommend withholding votes from the entire board (except new nominees who will be considered on a case-by-case basis) if the company has implemented a multi-class capital structure with unequal voting rights before or in connection with its IPO unless there is a reasonable time-based sunset provision in place. In determining

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the reasonableness of a sunset provision, ISS will consider the board's disclosed rationale, the company's lifespan, and its post-IPO ownership structure. ISS has indicated that sunset provisions in excess of seven years will not be considered reasonable in any case. ISS will withhold votes from incumbent directors every year until the problematic capital structures have been removed.

  - **Problematic governance structures.** ISS confirmed its policy to generally recommend withholding votes from individual directors, committee members, or the entire board (except new nominees who will be considered on a case-by-case basis) if before or in connection with the company's IPO, the company or board adopts a charter or bylaw provision that is materially adverse to shareholders' rights, including supermajority voting requirements to amend the charter or bylaws and classified board structures.

- **Board and committee performance.**

  - **Exemptions for new nominees.** Under its current policy, ISS considers whether to hold a director responsible for problematic board actions taken before joining the board on a case-by-case basis when making a voting recommendation. ISS has amended its definition of "new nominee" to include only those directors who are being presented to the shareholders for election for the first time, clarifying that only those new nominees who have served for less than a year may be exempt from its problematic board actions policy. The new nominee definition has been moved from the Accountability section to the front of the Director Election section to clarify that it will apply to other policies in the Independence, Responsiveness, and Composition pillars.
  - **Director attendance.** Last year, ISS introduced a policy of generally recommending a vote against directors with "chronic poor attendance" defined as three or more consecutive years of poor attendance (attending less than 75% of board and applicable committee meetings) without a reasonable explanation. This year, ISS clarified that only nominees who served for less than a full fiscal year will be generally exempted from the attendance policy.
  - **Board attendance disclosure.** Glass Lewis updated its policy to generally recommend a vote against the governance committee chair when (i) a company fails to disclose board and committee meeting attendance, or (ii) attendance records are so vague that it is not possible to identify individuals who failed to attend a minimum of 75% of board and applicable committee meetings.
  - **Board composition.** On February 1, 2020, ISS will begin applying a policy introduced last year to recommend a vote against the chair of the nominating committee (or other directors on a case-by-case basis) of any S&P 1500 or Russell 3000 company with an all-male board as discussed in greater detail in *Continued Focus on Board Diversity* above. Glass Lewis' policy to generally recommend voting against the nominating committee chair of an all-male board took effect on January 1, 2019.

- **Auditor's fees.** Glass Lewis revised its policy for evaluating the performance of the audit committee to reflect its belief that shareholders cannot make an informed judgement on the independence of a company's external auditor without fee information, and will generally recommend against the audit committee chair if the company fails to disclose fees paid to its external auditor.
- **Exclusive forum clauses in bylaws.** Glass Lewis updated its policy of generally recommending against the chair of a governance committee that adopts an exclusive forum provision in its bylaws without shareholder approval to allow for exceptions where it can be reasonably determined that the clause is narrowly crafted to suit the unique circumstances facing the company.

Compensation Updates.

- **Say-on-pay and other compensation proposals.** Glass Lewis has expanded its list of reasons to vote against a say-on-pay proposal to include:

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- **Unfavorable contractual provisions.** Glass Lewis clarified that the following provisions in new or amended executive employment agreements are problematic, increasing the likelihood of a recommendation against a say-on-pay proposal: excessively broad change in control triggers, inappropriate severance entitlements, inadequately explained or excessive sign-on arrangements, guaranteed bonuses (especially as a multiyear occurrence), and failure to address any concerning practices in amended employment agreements.
- **Post fiscal year-end changes.** Glass Lewis' review of say-on-pay proposals will now include post fiscal year-end changes to executive compensation and one-time awards.
- **Responsiveness to low shareholder support.** Glass Lewis confirmed low shareholder support (less than 80%) for the say-on-pay proposal at the previous annual meeting followed by a failure to provide robust disclosure of engagement activities with specific changes responsive to shareholder feedback may result in its recommendation of a vote against a say-on-pay proposal. Glass Lewis may also recommend voting against members of the compensation committee of companies that are not pursuing appropriate measures to address low shareholder support.
- **Short-term incentives.** Glass Lewis clarified its short-term incentives policy to provide that it expects robust disclosure of the compensation committee's reasoning if it increased incentives mid-year, noting, however, that the presence of short-term incentives without other problematic features is not likely to result in a negative recommendation.

- **Compensation Committee Performance.** Glass Lewis will generally recommend withholding votes from the entire compensation committee if the board adopts a frequency for its say-on-pay vote that differs from the frequency approved by a plurality of shareholders.
- **Glass Lewis updates pay-for-performance model.** Glass Lewis will use a new provider of the peer group and pay-for-performance information that it uses to assess how well a company's executive compensation aligns with performance. Glass Lewis also clarified that it may issue negative recommendations against say-on-pay proposals and will generally recommend withholding votes from all compensation committee members if a company has a weak link between pay and performance, subject to certain factors that might mitigate against a negative recommendation such as overall incentive structure, significant forthcoming changes to the compensation program, or reasonable long-term payout levels.
- **ISS begins using EVA metrics in pay-for-performance.** ISS included various Economic Value Added ("EVA") metrics in its 2019 reports for informational purposes rather than as a replacement for GAAP financial metrics in its quantitative pay-for-performance screening. EVA is a standard used to analyze measure, project, value, and discount a company's underlying economic profit rather than its accounting profit. ISS will incorporate EVA metrics as a secondary financial performance assessment screen in its pay-for-performance model for annual meetings held on or after February 1, 2020.

  Evergreen provisions considered egregious. ISS evaluates equity plan proposals using its Equity Plan Scorecard which considers a plan's cost, features, and grant practices and will generally recommend a vote against a plan proposal that is not in the best interest of shareholders. This year, in response to a significant reduction in the number of equity plans submitted for shareholder vote, ISS added evergreen plan provisions to its list of "egregious factors" that will result in a recommendation to vote against a plan, regardless of the plan's performance under the Equity Plan Scorecard. ISS believes that evergreen provisions, which enable the automatic replenishment of shares in a plan's reserve without further action, could circumvent regular shareholder approval of equity plans, allowing the perpetuation of plans not in the best interest of shareholders.

  Excessive non-employee director compensation. On February 1, 2020, ISS will begin to apply the policy it introduced in 2018 to consider negative recommendations against compensation committee members or other directors responsible for non-employee director compensation upon finding a pattern of excessive non-employee director ("NED") compensation (top 2 to 3% of all comparable

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directors) in two or more consecutive years without disclosure of a compelling rationale or other clearly explained mitigating factors. To identify these outliers, ISS will compare individual NED compensation totals within the same two-digit Global Industry Classification Standard (GICS) group and index grouping (e.g., S&P 500). Under the updated methodology, ISS also will compare NEDs who serve in board leadership positions to other directors serving in the same category of leadership position within the same index and sector.

2020 Periodic Report Filing Deadlines.

For public companies that are large accelerated filers, annual reports on Form 10-K are due 60 days after the end of the fiscal year (Monday, March 2, 2020 for large accelerated filers with a December 31, 2019 fiscal year-end).[24] Annual reports on Form 10-K are due 75 days after fiscal year-end for accelerated filers (Monday, March 16, 2020 for accelerated filers with a December 31, 2019 fiscal year-end)[25] and 90 days after fiscal year-end for non-accelerated filers (Monday, March 30, 2020 for non-accelerated filers with a December 31, 2019 fiscal year-end).[26] If the filing deadline would otherwise fall on a Saturday, Sunday, or federal holiday, the filing is due on the first business day following.

In addition, quarterly reports on Form 10-Q filed by accelerated filers and large accelerated filers continue to be due 40 days after the end of the fiscal quarter. The Form 10-Q filing deadline for non-accelerated filers continues to be 45 days after the end of the fiscal quarter.

These filing deadlines do not affect the existing proxy statement filing deadline of 120 days after fiscal year-end for companies that choose to incorporate by reference the disclosure required by Part III of the Form 10-K from their definitive proxy statements.

* * *

Please contact the Mintz attorney who is responsible for your corporate and securities law matters if you have any questions regarding this information. We look forward to working with you to make this year's annual reporting process as smooth as possible.

* * *

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ENDNOTES

1 Fast Act Modernization and Simplification of Regulation S-K, Release No. 33-10618, March 20, 2019.

2 *CalPERS Proxy Voting Guidelines*, September 2019.

3 ISS *Americas Proxy Voting Guidelines Updates for 2020, Benchmark Policy Changes for U.S., Canada, and Latin America: Effective for Meetings on or After February 1, 2020*, November 11, 2019.

4 Greene, D., Intintoli V., Kahle, K., Do Board Gender Quotas Affect Firm Value? Evidence from California Senate Bill No. 826, *Journal of Corporate Finance*, October 2019.

5 Crest et al. v. Alex Padilla, in his official capacity as Secretary of State of the State of California complaint. Creighton Meland, Jr. v. Alex Padilla, in his official capacity as Secretary of State of the State of California complaint.

6 Michigan Senate Bill No. 1115 introduced and referred to committee on February 14, 2019.

7 New Jersey Assembly Bill No. A4726 referred to committee on November 26, 2019; New Jersey Senate Bill No. S3469 introduced and referred to committee on February 14, 2019.

8 Massachusetts Bill S.1879 (An Act to Ensure that More Women Serve on Corporate Boards of Directors) has an initial target effective date of January 1, 2022.

9 Pennsylvania's HR 114 encourages all publicly held corporations in Pennsylvania to have at least (i) one woman on boards with fewer than five directors, (ii) two women on boards with five to eight directors, and (iii) three women on boards with nine or more directors.

10 SEC Compliance and Disclosure Interpretations of Regulation S-K: Questions 116.11 and 133.13.

11 The Conference Board, *Corporate Board Practices of the Russell 3000 and S&P 500*, 2019 Edition.

12 New York City Pension Funds, *"Best Practices" in Board Matrices*, August 2018.

13 SEC, Division of Corporation Finance, CF Disclosure Guidance: Topic No. 8, Intellectual Property and Technology Risks Associated with International Business Operations, December 19, 2019.

14 Chairman Jay Clayton, Remarks to the SEC Investor Advisory Committee, March 28, 2019.

15 Modernization of Regulation S-K Items 101, 103, and 105, Release No. 33-10668, August 8, 2019.

16 Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, Release No.34-87457, November 5, 2019.

17 Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice, Release No. 34-86721, August 21, 2019.

18 Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Release No. IA-5325, August 21, 2019.

19 Under Rule 405 under the Securities Act, an "emerging growth company" is an issuer with total annual gross revenues of less than $1.07 billion during its most recently completed fiscal year, and an issuer remains an emerging growth company until the earlier of (i) the last day of the issuer's fiscal year during which it had total annual gross revenues of $1.07 billion or more, (ii) the last day of the issuer's fiscal year following the fifth anniversary of the date of its initial public offering, (iii) the date on which such issuer has, during the previous three-year period, issued more than $1.0 billion in non-convertible debt, or (iv) the date on which such issuer becomes a large accelerated filer.

20 Under Rule 405 under the Securities Act, a WKSI is generally an issuer that is a Form S-3-eligible filer having $700 million or more of public float and which is not an ineligible issuer, asset-backed issuer, registered investment company, or business development company.

21 Certain Employee Remuneration in Excess of $1,000,000 under Internal Revenue Code Section 162(m), December 20, 2019.

22 Notice 2018-68, Guidance on the Application of Section 162(m), August 21, 2018.

23 ISS, *Americas Proxy Voting Guidelines Updates for 2020*, see note 3 above; *2020 Proxy Paper Guidelines an Overview of the Glass Lewis Approach to Proxy Advice United States*.

24 A "large accelerated filer" is a public company that meets the following conditions as of the end of its fiscal year:

- has an aggregate worldwide market value of voting and non-voting common equity held by its non-affiliates ("public float") of $700 million or more, measured as of the last business day of its most recently completed second fiscal quarter (i.e., for December 31, 2019 fiscal year-end companies, its public float would be measured as of June 28, 2019);
- has been subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act for at least 12 calendar months; and
- has previously filed at least one annual report on Form 10-K.

25 An "accelerated filer" is a public company that meets all of the conditions set forth in note 24 above for large accelerated filers but has a public float of at least $75 million, but less than $700 million, measured as of the last business day of its most recently completed second fiscal quarter (i.e., for calendar fiscal year-end companies, its public float would be measured as of June 28, 2019).

26 A "non-accelerated filer" is a public company that is not a large accelerated filer nor an accelerated filer, as described in notes 24 and 25 above.

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