MINTZ

Preparation for 2020 Fiscal Year-End SEC Filings and 2021 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 2021.

Everyone well knows that 2020 was a year unlike any other. COVID-19 created disruption and challenges for publicly traded companies across industries on an unprecedented scale, and during the spring of 2020, the SEC and the national stock exchanges quickly implemented a variety of accommodations for those issuers to try to address those challenges where possible. Most companies continue to feel the effects of the pandemic at some level, including altered levels of activity due to quarantines, travel restrictions, employee health concerns, and otherwise, and those effects will certainly need to be addressed in 2021 10-K reports. In addition, in 2020 many public companies began to take more deliberate steps to respond to and address social justice and issues of diversity and inclusion, including through heightened ESG (environmental, social and governance) disclosures. While it is too soon to say whether and how the SEC under a Biden Administration will address increasing investor and stakeholder demands for more regulatory focus on ESG matters, it is clear that the time has come for companies to incorporate ESG concepts as part of their ongoing board conversations and their routine disclosure practices. Mintz has been an active participant in the ESG movement for some time, and this past year established an ESG Practice to work with clients on these important issues.

Among the developments we discuss in this advisory are the embrace of "virtual" annual shareholder meetings; changes to the disclosure requirements in the Form 10-K sections on Business (including a new "human capital" subsection), Risk Factors, and Legal Proceedings; amendments to the shareholder proposal eligibility rules; and changes to the definitions of "accelerated filer" and "large accelerated filer." In addition, we address several other significant developments and considerations companies should focus on this year and provide an update on the policies and practices of the major proxy advisory firms.

We are hopeful that 2021 will bring a return to a greater sense of normalcy and reduced volatility for all of our clients.

Impacts of the COVID-19 Pandemic on Shareholder Meetings and Reporting

COVID-19–related government-mandated restrictions on gathering and travel required public companies to make a variety of operational and governance changes quickly and prompted government accommodations, as described below.

We invite you to review our memorandum from last year, which analyzed regulatory changes that were new for fiscal year 2019. We also thank Cynthia Larose, Bret Leone-Quick, Amanda Mei, Zachary Liebnick, Garrett Galvin and John J. Thomas III for their contributions to this memorandum.

Virtual Meetings

The COVID-19 pandemic resulted in an exponential increase in the number of virtual shareholder meetings held in 2020.[1] Most 2020 virtual meetings were held by audio rather than video means[2] with shareholder questions submitted through a virtual meeting portal, a practice that sometimes raised issues because these questions were not visible to all attendees. Some shareholders also expressed dissatisfaction with the audio-only virtual meeting format because they were not able to see the officers and directors of the participating company during the meeting. Current pandemic restrictions and health and safety concerns suggest that shareholder meetings in the first half of 2021 will likely continue to be held virtually or in a hybrid format. Companies preparing for a virtual meeting of shareholders should also focus on applicable corporate law requirements of the states in which they are incorporated, which govern the availability of virtual meetings, and on the evolving positions of regulators, proxy advisors, and investors.

State law requirements. The Governors of California, Massachusetts, and New York, among others, have issued COVID-19 orders temporarily permitting virtual shareholder meetings during the pandemic. Detailed information about some of these virtual shareholder meeting orders and requirements is available in our client advisories here (New York) and here (Massachusetts). Delaware law generally permits virtual-only meetings subject to certain shareholder participation rights, recordkeeping, and information requirements.

Institutional investors. The Council of Institutional Investors continues to express concern that virtual-only meetings do not approximate an in-person experience and may serve to reduce the board's accountability to shareholders. Some of these objections eventually may be withdrawn if virtual meeting technologies develop to more closely approximate the in-person meeting experience.

Proxy advisor policies. Proxy advisors Institutional Shareholder Services' ("ISS") and Glass Lewis' 2021 voting policies do not support a widespread pivot to virtual-only meetings post-pandemic, and these organizations expect companies holding virtual-only meetings to provide shareholders with electronic participation rights comparable to those available to shareholders who attend in-person meetings, as well as disclosure of the rationale for the decision to hold a virtual meeting. More on ISS' and Glass Lewis' positions on virtual meetings is available under **Proxy Advisors Voting Guidance Updates** below.

Until virtual meeting technology is able to offer a comparable experience to in-person attendance, it is unlikely that all stakeholders will support a permanent move to a virtual format for annual shareholder meetings.[3] Companies should continue to keep abreast of state-imposed restrictions on public gatherings, state corporation laws governing virtual meetings, institutional investor and proxy advisor policies, and shareholder concerns in order to prepare for contingencies and developments in this area. Companies should also investigate the virtual meeting services options that Broadridge and other service providers, such as stock transfer agents, have developed over the past year, focusing on how shareholders will be able to participate in the meeting in order to find an option that best meets the company's and its shareholders' needs.

COVID-19–Related Disclosures

MD&A. Last year, the SEC's Division of Corporation Finance (the "Staff") issued CF Disclosure Guidance: Topic 9 and Topic 9A (the "Guidance"), outlining a number of factors for companies to consider in assessing and disclosing the evolving impact of COVID-19 on their businesses. In light of the ongoing uncertainties due to the pandemic, the Guidance advises companies to keep their disclosures current by considering known and unknown factors or trends and discussing their impact on the company's financial condition, results of operations, short and long-term liquidity, and capital resources as necessary. Detailed information about the questions the Staff asks companies to consider as they evaluate their disclosure obligations related to the effects of the pandemic is available in our client advisory here. The Guidance also asks companies to consider the short- and long-term impact of any financial assistance they may have received under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") on the company's financial condition and whether the pandemic raises substantial doubts about the company's ability to continue as a going concern. This disclosure in the MD&A should give companies an opportunity to provide a useful narrative about how they have adapted and expect to continue to adapt to the impacts of COVID-19.

Executive compensation. In 2020, employers made a variety of adjustments to executive compensation practices to cope with the unprecedented financial impact of COVID-19. Initially, executive compensation responses were designed as cost-cutting measures to ease cash flow burdens and provide flexibility in uncertain times. Subsequently, employers have shifted their focus to providing sufficient incentives to retain key employees and spur recovery and longer-term growth. Adjustments to compensation due to the pandemic have taken a variety of forms. We outline the pros and cons of these approaches in our client advisory here. Both proxy advisors ISS and Glass Lewis expect disclosure of significant changes to a company's compensation due to the pandemic, including changes in performance targets, metrics, and measurement periods under its short-term and long-term incentive plans and the rationale for such changes to allow investors to evaluate the compensation committee's decisions. Additional guidance on proxy advisors' positions on pandemic-related compensation disclosure is available under **Proxy Advisors Voting Guidance Updates** below.

Perquisites. Public companies are required to provide disclosure in the Summary Compensation Table of perquisites provided to named executive officers if the aggregate value of such perquisites exceeds $10,000. On September 21, 2020, the Staff issued CD&I 219.05, providing new guidance on perquisites granted due to the pandemic. The guidance confirms that the SEC's current two-factor test will continue to be used to determine whether a benefit qualifies as a perquisite. Under this test, an item is not a perquisite if it is integrally and directly related to the performance of the executive's duties, but an item is a perquisite if it confers a direct or indirect benefit that has a personal aspect, without regard to whether it may be provided for some business reason or for the convenience of the company, unless it is generally available on a nondiscriminatory basis to all employees.

The guidance provides two examples of benefits and resources whose perquisite classification may have changed under the two-factor test due to pandemic conditions: 1) enhanced technology provided to enable an executive to work remotely from home as required by a stay-at-home order will generally not qualify as a perquisite; and 2) new health or personal transportation benefits provided to address new pandemic-related risks will qualify as perquisites unless they are generally available to all employees.

SEC enforcement actions for misleading disclosures on pandemic impacts. On December 4, 2020, the SEC announced it had settled charges in its first enforcement action based on misleading disclosures concerning the impact of COVID-19 on a company's business, operations, and financial condition. The company subject to the action had made statements in press releases filed with the SEC that indicated its business was "operating sustainably" during the pandemic, when its internal reports showed that the company was rapidly losing significant cash and projecting a cash shortfall within months. The enforcement order found that although the company described some actions it had taken to preserve financial flexibility during the pandemic, it failed to disclose that it had notified its landlords that it was unable to pay rent due to the impacts of COVID-19 on its business. This enforcement action is being viewed as a shot across the bow, signaling the likelihood of additional investigations and enforcement actions related to false or misleading disclosures concerning the impact of COVID-19 on a company's business and operations. Accordingly, companies should expect their disclosures on these points to be scrutinized by the SEC.

SEC Filing Accommodations

Electronic and manual signatures and email delivery of certain paper documents. Many of the initial temporary actions taken by the SEC to provide issuers with relief from certain requirements under the securities laws because of the COVID-19 pandemic have now ended. A few COVID-19–related relief actions are still in effect, however, and the SEC has enacted permanent changes with respect to authentication of certain required signatures.

Electronic signatures. Rule 302(b) of Regulation S-T requires each signatory to an electronic filing (which include the certifications of the principal executive and financial officers required to be filed with annual and quarterly reports) to sign a signature page or other document authenticating, acknowledging, or otherwise adopting his or her signature that appears in typed form within the electronic filing (an "authentication document"). The authentication document must be executed before or at the time the electronic filing is made and must be retained by the company for five years. In December 2020, changes to Rule 302(b) went into effect that allow a signatory to an electronic filing to sign an authentication document through an electronic signature, in accordance with certain requirements that we discuss in our client advisory here.

COVID-19 relief for manual signatures.

Although the SEC expects compliance with Rule 302(b) to the fullest extent possible, because some may experience difficulties satisfying its requirements due to the COVID-19 pandemic, the SEC will not take enforcement action with respect to Rule 302(b), including with respect to the manually signed authentication document discussed in the previous paragraph for electronic signatures, if:

- a signatory retains a manually signed signature page or other document authenticating, acknowledging, or otherwise adopting his or her signature that appears in typed form within the electronic filing and provides such document, as promptly as reasonably practicable, to the filer for retention in the ordinary course pursuant to Rule 302(b);
- such document indicates the date and time when the signature was executed; and
- the filer establishes and maintains policies and procedures governing this process.

This relief will be available until the SEC provides public notice that it will no longer be in effect.

ESG

Human Capital Management in the Spotlight

The COVID-19 pandemic and the Black Lives Matter movement have sharpened the investment community's focus on board oversight of human capital management ("HCM"). HCM is the umbrella term used to refer to the myriad issues boards and management should address in governing their workforces: recruitment, development, worker engagement, diversity and inclusion at all levels, worker health and safety, compensation, company culture, and human rights issues in the supply chain. Prior to the pandemic, stakeholder interest in public company treatment of social justice issues, including board diversity, equal opportunities for women and underrepresented minorities in hiring and advancement, pay equity, and company public stance on social justice had increased. Since the pandemic's onset, the general public has become keenly interested in how public company boards have managed mandatory shutdowns and the ongoing return to work, underscoring the importance of board-level oversight of HCM.

Recently revised Item 101(c)(2)(ii) of Regulation S-K requires a company to provide annual report disclosure of its human capital resources, including the number of persons employed and any human capital measures or objectives that management focuses on, to the extent such disclosures would be material to an understanding of the company's business. The new requirement confirms the investment community's recognition that human capital and other intangible resources are increasingly essential assets and drivers of performance that require oversight at the board level. SEC comments indicate that the rule itself is principles-based to allow companies to tailor the disclosure to their particular circumstances and objectives. Possible subtopics to be addressed in this disclosure include: headcount data, workforce governance, workforce diversity statistics, pay equity, workforce training, talent acquisition and development, turnover rates, compensation, risk management, and company culture. A study[4] of Form 10-Ks filed by 50 large cap companies soon after the amended rule became effective shows a wide range of HCM disclosure both in terms of length and topics covered, with the majority of companies including headcount data, diversity and inclusion statistics, and employee development information.

Leading asset managers BlackRock and State Street Global Advisors have highlighted human capital management as a priority this year, and other institutional investors and investor coalitions are focused on various elements of HCM in their company engagements. ESG frameworks also are evolving to provide investors with an opportunity to compare peer companies' workforce disclosure. All companies should be preparing a cohesive narrative explaining how the workforce is being thoughtfully and strategically managed to minimize the impacts of COVID-19, to address social justice issues, and generally to describe how HCM principles are being used to build long-term value.

When making HCM disclosures, 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. Boards should be aware of the potential risks of making empty aspirational pledges in their proxy statements. See our discussion below under **Litigation over Board and Company Diversity and Discrimination** of recent shareholder derivative suits alleging false proxy statement disclosure regarding a stated commitment to diversity where adequate actions in support of these claims were not taken.

Focus on Board Diversity Expands Beyond Gender

Legislative developments and pressure from institutional investors continue to drive the trend toward greater diversity on public company boards. Boards became significantly more gender diverse in 2020: Russell 3000 Index company boards now have more than 20% female board representation. All boards in the S&P 500 have one female director, and two thirds have at least three. Progress in increasing racial and ethnic diversity on public company boards has been slower. ISS Analytics reports[5] that the ethnic diversity for Russell 3000 companies increased from 8.4% in 2008 to only approximately 10% in 2019. However, the Black Lives Matter movement and the disparate impacts of the pandemic have intensified focus on the racial and ethnic makeup of boards, and we expect trends toward greater racial, ethnic, and gender board diversity to gain further traction in 2021.

Institutional investors spotlight racial and ethnic board diversity. Leading institutional investors continue to support board gender diversity and have broadened their focus to include board racial and ethnic diversity in their company engagements and voting policies, with a newly increased focus on the board composition of smaller cap companies. In October 2020, a coalition of 22 institutional investors with more than $3 trillion in assets under management, launched the Russell 3000 Diversity Disclosure Initiative to encourage Russell 3000 companies to provide proxy statement disclosure of the racial and ethnic composition of their boards beginning in 2021. Some members of this coalition are considering voting policies under which they would issue negative recommendations against nominating committee members of non-disclosing companies.

State board diversity legislation. Since California's landmark board gender diversity statute (SB 826)[6] (discussed in our 2019 year-end client advisory here) became effective, fewer than 3% of 650 public companies headquartered in California and subject to its board gender diversity statute have all-male boards, down from 29% in 2018.[7] One of two cases challenging the constitutionality of this law has been dismissed, while the other will proceed to trial this year. This outstanding case should not limit compliance with SB 826 by companies headquartered in California. The state of Washington has also adopted gender-diversity requirements for companies incorporated in Washington, and Hawaii, Massachusetts,[8] Michigan,[9] and New Jersey[10] continue to consider board gender diversity bills modeled on the California law. On June 27, 2020, New York[11] joined Illinois and Maryland in requiring board gender diversity disclosure. Further, California recently adopted legislation[12] modeled on its board gender diversity statute mandating that publicly held companies headquartered in California have at least one director from an underrepresented community (Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or gay, lesbian, bisexual, or transgender) by the end of 2021, and up to three, depending on board size, by the end of 2022.

Federal developments. The House bill "Improving Corporate Governance Through Diversity Act of 2019" (H.R. 5084), which would 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, remains under review in the Senate. On March 2, 2020, a bill entitled "Diversity in Corporate Leadership Act of 2020" (S. 3367) was introduced in the Senate, which would require the SEC to study and make recommendations on strategies to increase gender, racial, and ethnic diversity on public company boards. These bills or similar legislation are expected to have a greater likelihood of passage under a Biden Administration.

Nasdaq weighs in. In 2020, Nasdaq took a game-changing position by filing proposed rule changes with the SEC that would, if approved, require gender, racial, ethnic, and sexual orientation board diversity and board composition disclosure by Nasdaq-listed companies. We will continue to monitor the status and progress of this proposed rule for our Nasdaq-listed clients.

New proxy advisor guidelines on board diversity. Proxy advisors ISS and Glass Lewis issued policy updates on board diversity for 2021. For meetings to be held on or after February 1, 2021, ISS will continue generally to issue negative recommendations against nominating committee chairs (or other directors on a case-by-case basis) on all-male boards unless there was a woman on the board at the previous annual meeting and the board makes a firm commitment to increase gender diversity within a year. ISS also will highlight an apparent lack of racial or ethnic diversity (or disclosure thereof) in a company's report until February 1, 2022. Thereafter, ISS will issue negative recommendations against nominating committee chairs (or other directors on a case-by-case basis) at S&P 1500 and Russell 3000 companies where the board has no racial or ethnic diversity, or fails to disclose this lack of diversity absent a firm commitment to appoint at least one racially or ethnically diverse director within a year in situations where the board was racially or ethnically diverse in the previous year. Glass Lewis will continue generally to recommend against nominating committee chairs on all-male boards and may, depending on the circumstances, recommend a vote against other members of the nominating committee. This year, Glass Lewis will begin noting as a concern boards with fewer than two female directors, and beginning with shareholder meetings held after January 1, 2022, Glass Lewis generally will make negative recommendations against nominating committee chairs (and possibly other board members) on boards with fewer than two female directors for boards of seven or more. Glass Lewis may refrain from a negative recommendation on the basis of a board lacking gender diversity for companies outside the Russell 3000 index, or companies with boards that provide a sufficient rationale or plan to address the lack of diversity. Glass Lewis has also indicated it will issue negative recommendations against nominating committee chairs based on failures to meet state law board diversity composition or disclosure requirements, including those that address racial and ethnic diversity.

Disclosure. The SEC's recent amendments to Regulation S-K Item 101 (discussed directly below) did not include board diversity disclosure requirements, although companies may voluntarily provide this information to satisfy investor interest in board diversity. If a board or nominating committee considers self-identified diversity characteristics of nominees (e.g., race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background), the SEC expects the company to disclose those characteristics and how they were considered, provided the relevant nominees have consented to disclosure of this information. The 2021 Mintz D&O Questionnaire that many of our clients use includes optional questions about gender, race, ethnicity, and sexual orientation that can be used to elicit disclosure and consent on these points.

Regulatory Updates

SEC Updates Regulation S-K Description of the Business, Legal Proceedings, and Risk Factors Disclosure

In August 2020, the SEC adopted revisions to the disclosure requirements under Item 101 – Description of the Business, Item 103 — Legal Proceedings, and Item 105 — Risk Factors of Regulation S-K to modernize the required disclosures and provide investors with more meaningful information regarding a public company's securities. The following is a summary of key changes that became effective on November 9, 2020:

- **General Description of the Business (Item 101(a)).** Companies may now provide principles-based disclosure regarding the development of the business as frequently as appropriate and as material to an investor's understanding of the business. Further, companies may incorporate by reference, by use of a hyperlink, the most recent full discussion of the general development of the business from a prior filing and provide an update limited to material changes in the applicable period.
- **General Description of the Business (Item 101(c)).** Companies may now tailor the narrative description of the business to provide a principles-based disclosure based upon a non-exhaustive list of possible disclosure topics, including a description of the company's human capital resources, as opposed to the explicit list of disclosure topics provided in the item previously.

- **Legal Proceedings (Item 103).** Companies may now use hyperlinks or cross-references to other sections of a filing where details regarding legal proceedings are also provided. Further, the monetary sanctions threshold has been increased to $300,000 or such other amount that the company determines will result in the disclosure of all material proceedings.
- **Risk Factors (Item 105).** Companies must now include a concise risk factor summary, not to exceed two pages in length, if the risk factors section exceeds 15 pages, and risks must be organized under relevant headings for ease of reference. In addition, the disclosure standard contained in Item 105 has been changed from "most significant risks" to all "material" risks.

Changes to MD&A, Selected Financial Data, and Supplementary Information Disclosures

In November 2020, the SEC approved amendments to Items 301, 302, and 303 of Regulation S-K to modernize, simplify, and enhance certain financial disclosures in the MD&A as well as with respect to Selected Financial Data and Supplementary Information. The SEC stated that the changes are intended to sharpen the focus on material information by:

- eliminating Item 301 (Selected Financial Data); and
- modernizing and streamlining Item 302(a) (Supplementary Financial Information) and Item 303 (MD&A). Specifically, these amendments:
    - o revise Item 302(a) to replace the current requirement for quarterly tabular disclosure with a principles-based requirement for material retrospective changes;
    - o add a new Item 303(a) to state the principal objectives of MD&A;
    - o amend current Item 303(a)(1) and (2) (amended Item 303(b)(1)) to modernize, enhance, and clarify disclosure requirements for liquidity and capital resources;
    - o amend current Item 303(a)(3) (amended Item 303(b)(2)) to clarify, modernize, and streamline disclosure requirements for results of operations;
    - o add a new Item 303(b)(3) to clarify and codify the SEC's guidance on critical accounting estimates;
    - o replace current Item 303(a)(4), which related to off-balance sheet arrangements, with an instruction to discuss such obligations in the broader context of MD&A;
    - o eliminate current Item 303(a)(5), which related to tabular disclosure of contractual obligations, in light of the amended disclosure requirements for liquidity and capital resources and certain overlap with information required in the financial statements; and
    - o amend current Item 303(b), which related to disclosure with respect to interim periods (amended Item 303(c)), to modernize, clarify and streamline the item and allow for flexibility in the comparison of interim periods to help companies provide a more tailored and meaningful analysis relevant to their business cycles.

These amendments will become effective on February 10, 2021. Companies are required to comply with the rule beginning with the first fiscal year ending on or after August 9, 2021 (referred to as the "mandatory compliance date"), which for a December 31 year-end company will be its annual report for the year ended December 31, 2021. Companies will be required, however, to apply the amended rules in a registration statement and prospectus that on its initial filing date is required to contain financial statements for a period on or after the mandatory compliance date. Although registrants will not be required to apply the amended rules until their mandatory compliance date, they may comply with the final amendments any time after the effective date, so long as they provide disclosure responsive to an amended item in its entirety.

SEC Amends Definitions of Accelerated Filer and Large Accelerated Filer

In March 2020, the SEC adopted amendments to the definitions of "accelerated filer" and "large accelerated filer" under Rule 12b-2 of the Exchange Act. The amendments exclude certain smaller reporting companies ("SRCs") from these categories of issuers, exempting them from the requirement to provide an auditor attestation of internal control over financial reporting ("ICFR") under Sarbanes-Oxley Act Section 404(b) and providing them with extended SEC filing deadlines.[13] The amendments also revised the public float transition thresholds for exiting large accelerated filer status and becoming an accelerated filer from $500 million to $560 million (80% of the $700 million initial threshold for large accelerated filer status) and for exiting accelerated filer status and becoming a non-accelerated filer from $50 million to $60 million (80% of the $75 million initial threshold for accelerated filer status). Additionally, these amendments require issuers to include a checked box on the cover page of their annual reports on Forms 10-K, 20-F, and 40-F to indicate whether an auditor attestation is included in the filing. Based on the amendments, we have summarized below the requirements for making an initial filer status determination and for transitioning between the filer statuses.

Determination of initial filer status

A company with a December 31 year-end is required to calculate its public float as of June 30 (the last business day of its most recently completed second fiscal quarter) to determine its SEC filer status for the next fiscal year.[14] Based on the public float calculation, the new SRC revenue test, and other requirements, the different filer categories are as follow[15]

- ***Large Accelerated Filer —*** a public float of $700 million or more and is not an SRC under the SRC revenue test referenced below;[16]
- ***Accelerated Filer —*** a public float of $75 million or more, but less than $700 million, and is not an SRC under the SRC revenue test referenced below;[17] or
- ***Non-Accelerated Filer —*** a public float of less than $75 million, qualifies as an SRC under the SRC revenue test referenced below, or does not otherwise meet the requirements of a large accelerated filer or an accelerated filer.

In addition to these categories of filers, a December 31 fiscal year-end company can also initially qualify as an SRC if at June 30 it has (1) a public float of less than $250 million or (2) annual revenues of less than $100 million for its most recently completed fiscal year for which audited financial statements are available and either (a) no public float or (b) a public float of less than $700 million. A company that is an SRC may take advantage of certain less stringent scaled disclosure requirements if it chooses to do so.

The following table provides a summary of the initial filer alternatives and notes whether the company is required to obtain a separate attestation of its ICFR from outside auditors and its future SEC filing deadlines:

Status	Public Float	Annual Revenues	Auditor Attestation Requirement*	Filing Deadlines
Large Accelerated Filer (not SRC)	$700 million or more	N/A	Yes	Annual Report (60 days after fiscal year-end) Quarterly Reports (40 days after fiscal quarter end)
Accelerated Filer (not SRC)	$250 million to less than $700 million	$100 million or more	Yes	Annual Report (75 days after fiscal year-end) Quarterly Reports (40 days after fiscal quarter end)

(Table continues...)

SRC and Accelerated Filer	$75 million to less than $250 million	$100 million or more	Yes	Annual Report (75 days after fiscal year-end) Quarterly Reports (40 days after fiscal quarter end)
SRC and Non-Accelerated Filer	$75 million to less than $700 million	Less than $100 million	No	Annual Report (90 days after fiscal year-end) Quarterly Reports (45 days after fiscal quarter end)
	Less than $75 million	N/A	No	Annual Report (90 days after fiscal year-end) Quarterly Reports (45 days after fiscal quarter end)

*Under the Jumpstart Our Business Startups Act (known as the JOBS Act), emerging growth companies are already exempt from the auditor attestation requirement. (A company generally qualifies as an emerging growth company until the earlier of (1) the last day of the fiscal year ending after the fifth anniversary of its initial public offering; (2) the last day of the fiscal year in which its total annual gross revenues are $1.07 billion or more; (3) the date on which it has, during the previous three year period, issued more than $1.0 billion in non-convertible debt; or (4) the date that it becomes a large accelerated filer.)

Entering and exiting a filer status after initial determination

If a company has already made its initial determination of its filer status, it will remain in that category of issuer until at a future determination date (i.e., a subsequent June 30) it meets the thresholds set forth in the following table:

Initial Filer Status	Subsequent Public Float	Resulting Filer Status
Large Accelerated Filer	$560 million or more	Large Accelerated Filer
	Less than $560 million, but $60 million or more	Accelerated Filer
	Less than $60 million	Non-Accelerated Filer
Accelerated Filer	$700 million or more	Large Accelerated Filer
	Less than $700 million, but $60 million or more	Accelerated Filer
	Less than $60 million	Non-Accelerated Filer
Non-Accelerated Filer	$700 million or more	Large Accelerated Filer
	Less than $700 million, but $75 million or more	Accelerated Filer
	Less than $75 million	Non-Accelerated Filer

In addition to these public float thresholds, the 2020 amendments also added the SRC revenue tests to the large accelerated filer and accelerated filer transition rules. As a result, a large accelerated filer or an accelerated filer also transitions to non-accelerated filer status if it is an SRC under the SRC revenue test discussed below.

As referenced above, a company can initially qualify as an SRC if it has (1) a public float of less than $250 million or (2) annual revenues of less than $100 million and a public float of less than $700 million. Once a company determines that it does not qualify as an SRC, it will remain unqualified as an SRC under the public float test under clause (1) above until it determines that it has a public float of less than $200 million and it will remain unqualified under the revenue test under (2) above until it determines that it meets the public float and annual revenue requirements set forth in the following table:

Prior Annual Revenues	Prior Public Float	
	None or less than $700 million	$700 million or more
Less than $100 million	Neither threshold exceeded	Public float — Less than $560 million; and
		Revenues — Less than $100 million.
$100 million or more	Public float — None or less than $700 million; and	Public float — Less than $560 million; and
	Revenues — Less than $80 million	Revenues — Less than $80 million.

EGCs and SRCs Now Subject to SEC Hedging Policies Rule

Last year, we reported that the SEC had approved final rules requiring public companies to disclose their hedging practices or policies for employees and directors by adding a new Item 407(i) to Regulation S-K. This year, smaller reporting companies and emerging growth companies, which were given an additional year to comply under the final rules, will need to 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.

SEC Amends Shareholder Proposal Eligibility Rules

Exchange Act Rule 14a-8 requires public companies to include certain qualifying shareholder proposals in their proxy statements. The purpose of this rule is to provide shareholders with the opportunity to present their own proposals for consideration at a shareholder meeting. Rule 14a-8 imposes several eligibility requirements on shareholders who wish to submit proposals for inclusion in a proxy statement. The initial eligibility standards required, among other things, that a shareholder may only submit one proposal per meeting, must have continuously owned at least $2,000 in value or 1% of the securities entitled to vote at the meeting for one year, and must limit any proposal to 500 words. On September 23, 2020, the SEC finalized amendments to the security ownership thresholds, procedural requirements, and resubmission thresholds with respect to these eligibility requirements in Rule 14a-8. These rules will apply to any proposal submitted for an annual or special meeting held on or after January 1, 2022.

These updates require a shareholder-proponent to have held 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. Transition rules apply to shareholders who are currently eligible to submit proposals under the current $2,000/one-year ownership threshold but currently do not satisfy the new requirements. The amendments require each shareholder to provide contact information and specific dates and times when they are able to meet with the company, either in person or via teleconference, no less than 10 nor more than 30 calendar days after submission of the shareholder proposal.

In addition, the amendments apply the one-proposal rule to "each person" rather than "each shareholder," which has the effect of preventing 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 SEC also added a requirement that shareholders who use a representative to submit their proposal for inclusion in a proxy statement must provide certain documentation regarding the representative.

The amendments to Rule 14a-8 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 prior rule provided 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 has now increased these thresholds to 5%, 15%, and 25%, respectively. New proposals that are not identical to an earlier proposal but address substantially the same subject matter as an earlier proposal that did not receive the applicable support are not eligible for inclusion in the company's proxy materials based on the new voting thresholds, addressing the concern that low resubmission thresholds allow proposals that have not received widespread shareholder support to nevertheless be included in proxy statements year after year with little chance of approval.

SEC Issues Final Rules for Proxy Advisors

On November 2, 2020, the SEC's long-awaited final rules governing voting advice provided by proxy advisory firms such as ISS and Glass Lewis became effective. The final rules confirm that proxy advice constitutes a solicitation under the federal proxy rules, and provide proxy advisory firms with a conditioned exemption from the filing and information requirements that would normally apply to such solicitations. A detailed description of the conditioned exemption and how companies might prepare for the new rules is available in our client advisory here.

SEC Expands "Accredited Investor" and "Qualified Institutional Buyer" Definitions

On December 8, 2020, the SEC finalized changes to the definitions of "accredited investor" and "qualified institutional buyer" that expand the potential investor base for private placements. The SEC first proposed these changes in December 2019, and the final rule adopts changes to these definitions substantially as proposed. The update also expands the entities considered "qualified institutional buyers" under Rule 144A, which generally provides a registration exemption for resales of securities by certain buyers. We address these amendments in more detail in our client advisory here.

Update on Insider Trading

Last year, the House of Representatives passed legislation designed to prevent public company insiders from trading on corporate information ahead of the investing public during the period between the filing of a Form 8-K to report a material event and the event that triggered the filing (the "8-K gap period"). If enacted by the Senate, the bill would direct the SEC to issue rules requiring public companies to establish policies reasonably designed to prevent trading by officers and directors during the 8-K gap period, subject to certain exceptions. The bill would codify the current practice of prohibiting insider trading through the use of company insider trading policies and pre-clearance procedures and impose standards on those policies. The bill would also extend insider trading prohibitions to all events triggering an 8-K report, regardless of the level of materiality of such information or whether it is likely to impact stock price (e.g., amendments to a company's code of ethics, changes in a company's accountants, and new executive compensation arrangements). Securities transactions that occur automatically or that are made pursuant to an advance election, such as those pursuant to Rule 10b5-1 trading plans, would be exempt under the proposed legislation. In CF Disclosure Guidance: Topic 9, the Staff advises that when companies are affected by COVID-19 or otherwise become subject to pandemic-related risk that would be material to investors, insiders who are aware of these matters should refrain from trading in the company's securities until such information is disclosed to the public. In its present form, the bill also provides that companies with non-compliant insider trading policies and practices could be subject to federal enforcement actions. As a matter of good governance and in light of the bill's substantial bipartisan support, public companies should consider whether their current policies and procedures are adequate to protect against the potential reputational risk of insider trades during the 8-K gap period.

Cybersecurity Risk Disclosure, Data Protection, and Privacy Legislation

2020 presented businesses with added challenges relating to increased exposure to privacy and cybersecurity risks as a result of pandemic-imposed remote workplaces. Global regulatory agencies issued guidance, and in some cases imposed reporting obligations, directly addressing cybersecurity risks. For example, the New York Department of Financial Services ("NYDFS") released an industry letter requiring that "each regulated institution submit a response to NYDFS describing the institution's plan of preparedness to manage the risk of disruption to its service and operations..." Among the issues the plan is required to address is "[a]n assessment of potential increased cyber-attacks and fraud." The Cybersecurity and Infrastructure Security Agency ("CISA") issued a wide-ranging alert urging businesses to adopt a heightened state of cybersecurity as they transition employees to remote working options. CISA recommended alerting employees to coronavirus-related phishing attempts. The third quarter of 2020 saw a significant increase in ransomware attacks, and the FBI issued multiple "flash alerts" during 2020 related to ransomware attackers. Globally, according to cybersecurity experts, ransomware attacks increased by 40% to 199.7 million cases in the third quarter of 2020. The demands have also increased, with 2020 seeing extortion demands in the millions of dollars.

Cybersecurity disclosure continues to be a 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 in our 2019 year-end advisory here. 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.

The SEC and its Division of Examinations (formerly the Office of Compliance Inspections and Examinations or OCIE) continue to alert regulated entities to cybersecurity risks and are encouraging market participants to review cyber practices, policies, and procedures, issuing three alerts and one statement relating to cybersecurity concerns, including ransomware and the impact of COVID-19.[18]

Companies should also be aware of data protection and privacy legislation in the jurisdictions in which they do business and the potential risks of noncompliance. The European Union's ("EU") General Data Protection Regulation has compliance costs and the potential for large fines and penalties. The cross-border transfer issues were complicated in 2020 by a landmark decision from the Court of Justice of the European Union, invalidating the US-EU Privacy Shield Framework, relied upon by many US companies as an acceptable means of legally transferring personal data from the EU to the US. The case of *Maximilian Schrems vs. Facebook* (Case C-311/18), called *Schrems II*, heightens the burden on US data importers to assess the impact of US national security laws on their businesses, and future actions of EU data protection authorities are difficult to predict. It is unclear whether a new administration will accelerate negotiations between the US Department of Commerce and the European Commission to agree on a new framework, but at present, cross-border transfers of personal data from the EU to the US are subject to increased scrutiny and contractual requirements.

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. As a reminder, 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 of $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. The California Attorney General recently emphasized his office's intention to fully enforce the CCPA, regardless of the COVID pandemic, and his office issued final regulations implementing important provisions of the CCPA in the first quarter of 2020, with enforcement effective as of July 1, 2020. The regulations have significant operational effects on covered businesses. An initiative called the California Privacy Rights Act, or CCPA 2.0, was approved by California voters in November 2020, and will further increase the compliance burdens on companies doing business in California.

Other states had introduced data privacy legislation similar to California's during 2020 legislative sessions, but the pandemic forced most state legislatures to deal with more pressing issues, and most proposed legislation failed to emerge from committee. It is expected that bills will be reintroduced in the 2021 legislative sessions and will have a wider impact on businesses. Privacy and cybersecurity are also expected to be issues taken up by the 117th Congress, particularly as a result of the December 2020 revelation of an apparent nation-state cyber-attack on a wide range of government agencies and private companies.[19] Companies should carefully analyze the so-called "SolarWinds" incident to determine whether it has affected, or could potentially affect, its cybersecurity infrastructure, or that of its major suppliers or other business partners and whether disclosure in the company's Form 10-K may be required.

2020 Litigation and Court Decisions Impacting Corporate Governance

The following summarizes some of the key decisions and trends in litigation from 2020 involving the federal securities laws and corporate governance issues.

Federal Forum Selection Provisions in Corporate Charters

On March 18, 2020, the Delaware Supreme Court upheld the validity of provisions in corporate charters requiring that any suits against a company arising under the Securities Act of 1933 be brought in federal court. *Salzberg v. Sciabacucchi*, No. 346, 2019 (Del. Mar. 18, 2020). The decision is notable because it provides Delaware corporations with a mechanism for avoiding the burdens and costs associated with litigating claims brought under Section 11 of the Securities Act in state court.

Section 11 imposes liability for untrue or misleading statements contained in registration statements. Because claims brought under Section 11 do not require a showing of fraudulent intent, reliance, or causation, it is often characterized as imposing nearly strict liability. The US Supreme Court's decision in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S.Ct. 1061 (2018) provided that plaintiffs could bring securities class actions alleging violations of Section 11 in state court. The ruling provided an advantage to plaintiffs when bringing Section 11 cases because state courts have been viewed as a more favorable forum for these types of claims for at least two reasons. The first is that state courts are much less likely than federal courts to dismiss a Section 11 securities class action at the pleadings stage. Second, depending on the state court and/or jurisdiction, plaintiffs may successfully argue that they should be allowed to proceed with merits discovery during the pendency of a motion to dismiss. Moreover, in the aftermath of *Cyan*, corporations more frequently faced the burden of having to defend identical suits brought under Section 11 in both state and federal courts.

The Delaware Supreme Court's ruling in *Salzberg*, therefore, provides a mechanism for corporations to avoid some of these disadvantages of litigating Section 11 claims in state court.

When Can Directors Be Liable for Failing to Provide Proper Supervision?

The issue of when directors can be liable for a breach of their fiduciary duties for failing to provide proper supervision or oversight continues to be litigated in Delaware. Known as "*Caremark*" claims (after the case that outlined the scope of these duties *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996)), these suits seek to hold directors liable when "(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Stone v. Ritter*, 911 A.2d 362 (Del. 2006). These types of breach of fiduciary duty claims are among the most difficult for a plaintiff to bring, but they are still being litigated with some regularity, and there were two such suits that — notably — survived a motion to dismiss in 2020.

In *Hughes v. Hu et al.*, C.A. No. 2019-0112-JTL (Del. Ch. Apr. 27, 2020), the court considered whether a suit could proceed against officers and directors of a company that had persistent problems with financial controls and reporting. After noting that "[t]he mere existence of an audit committee and the hiring of an auditor does not provide universal protection against a *Caremark* claim," the court went on to note that "the Company's

Audit Committee met sporadically, devoted inadequate time to its work, had clear notice of irregularities, and consciously turned a blind eye to their continuation." These problems allegedly continued for years without any correction. Based on these allegations, among others, the court concluded that the *Caremark* claims against the directors could survive.

In *Teamsters Local 443 Health Svcs. and Ins. Plan v. Chou et al.*, C.A. No. 2019-0816-SG (Del. Ch. Aug. 24, 2020), the court also refused to dismiss *Caremark* claims brought against corporate directors. That case involved a publicly traded company operating as a distributor of prescription drugs. The company acquired a subsidiary that was involved in criminal activity involving the distribution of an oncology drug. In refusing to dismiss the breach of fiduciary duty claims against the directors, the court relied on, among other things, the allegations that (1) the company's Corporate Security and Regulatory Affairs unit did not report directly to the board, (2) the board did not receive regular updates on compliance, despite the fact that the company operated in a highly regulated industry, and (3) the directors ignored several red flags, including an independent report that called into question the company's failure to have its subsidiaries (including the one involved in the criminal activity) integrated into the corporate compliance program and allegations made in a *qui tam* suit brought by a former employee. The notable takeaway from the court's decision in *Teamsters* is that a board's duty of oversight is, as a practical matter, even more important when the company operates in a highly regulated industry — in such cases, regulatory and legal compliance is "mission critical" for the company.

Shareholder Requests for Corporate Books and Records

Shareholders and potential plaintiffs have increasingly turned to Section 220 demands for corporate books and records as a way to gather information prior to bringing claims, or in an attempt to discover potential claims. In fact, the plaintiffs in both the *Hughes* and *Teamsters* cases discussed above successfully used Section 220 to get records to help build the foundation for their successful *Caremark* claims.

On December 10, 2020, the Delaware Supreme Court issued a decision, *AmerisourceBergen Corp. v. Lebanon County Employees' Retirement Fund et al.*, No. 60, 2020 (Del. Dec. 10, 2020), examining the threshold showing a shareholder needs to make with respect to certain types of Section 220 demands. The records demand at issue in this case was actually made by one of the shareholders who brought suit in the *Teamsters* case noted above.

Delaware law recognizes that a shareholder may properly seek corporate records in order to investigate corporate misconduct or breaches of fiduciary duty. The first issue that the *AmerisourceBergen Corp.* court considered was whether a shareholder needs to disclose its ultimate goals or objectives (such as filing a derivative suit) in connection with a request for books and records premised on an investigation of corporate wrongdoing. In rejecting the argument that a shareholder needs to disclose its ultimate purpose for requesting the information, the court held that "when the purpose of an inspection of books and records under Section 220 is to investigate corporate wrongdoing, the shareholder seeking inspection is not required to specify the ends to which it might use the books and records."

The second issue the *AmerisourceBergen Corp.* court considered was the somewhat open question of whether a shareholder seeking records to investigate potential corporate misconduct must demonstrate that the alleged misconduct would be actionable in order to get the records. After surveying numerous prior decisions by the Chancery Court that dealt with this issue, the *AmerisourceBergen Corp.* court ultimately held that — except for the rare situation where pursuing litigation was the only purpose for the request, and the litigation would clearly be barred by some sort of procedural hurdle (such as standing or statute of limitations) — the stockholder "need not demonstrate that the alleged mismanagement or wrongdoing is actionable."

The *AmerisourceBergen Corp.* decision, therefore, removed some potential arguments that corporations could try to make in order to deny or limit shareholder demands for corporate books and records.

Litigation over Board and Company Diversity and Discrimination

The *Caremark* duty discussed above has also most recently and prominently been invoked in a new wave of litigation brought against directors with respect to an alleged lack of diversity of the board and senior management and alleged (but insufficiently addressed) discriminatory practices within the companies themselves. These suits have been brought primarily in California and have targeted large companies such as Facebook, Inc., Qualcomm, Inc., and Oracle Corp. The lawsuits are generally premised on two legal theories:

1. Directors are liable under Section 14(a) and Rule 14a-9 of the Exchange Act for signing false or misleading proxy statements that declare the company's commitment to promoting diversity when, in reality, the company has not taken steps (or sufficient steps) to live up to the representations and commitments made in the proxy with respect to these issues.
2. Directors breached their fiduciary duties by failing to ensure that the company had proper internal policies and controls for halting or addressing unlawful discrimination, and/or by failing to sufficiently monitor and provide supervision with respect to these issues.

In addition to disgorgement and money damages, the lawsuits seek a wide range of corporate governance changes, including the replacement of board members and the replacement of the company's auditor. These cases are still at their early stages, but will be worth monitoring in 2021 in order to see what guidance the courts provide with respect to such claims.

Proxy Advisors Voting Guidance Updates

The following are some of the more noteworthy updates to corporate governance and executive compensation policies instituted by ISS and Glass Lewis for the coming year.

Governance Updates

In November 2020, ISS and Glass Lewis released updates of their voting policies for the 2021 proxy season.[20]

Environmental and social risk oversight failures. ISS' current voting policy provides that, under extraordinary circumstances, it will recommend a vote against individual directors, committee members, or the entire board for material failures of risk oversight, including bribery, large or serial fines or sanctions from regulatory bodies, significant adverse legal judgments or settlements, or hedging of company stock. This year, ISS added "demonstrably poor risk oversight of environmental and social issues, including climate change" to this list. Glass Lewis has also updated its environmental and social issues oversight policy to note as a concern any failure by large cap companies to provide clear proxy statement disclosure of board-level oversight of these issues, and, after January 1, 2022, will generally recommend against the governance chairs of such companies that fail to provide adequate disclosure of these issues.[21]

Board diversity and skills disclosure. In addition to the gender and racial/ethnic diversity positions discussed in **Focus on Board Diversity Expands Beyond Gender** above, beginning this year, Glass Lewis will track the quality of a company's proxy statement disclosure of its board diversity and skills mix, and for S&P 500 companies, its reports will include an assessment of disclosure of, among other things, current board self-identified racial/ethnic diversity characteristics and whether the board's nomination process requires that women and underrepresented minorities be considered in the initial pool of director nominees. This review may be a contributing factor in voting recommendations when additional board-related concerns have been identified. Glass Lewis has made public comments[22] indicating a preference for consistent disclosure of board skills using a consolidated matrix format.

Board refreshment. Under a new policy, ISS will generally vote on a case-by-case basis on management and shareholder proposals on director term limits, rather than generally recommending against these proposals as it had in the past. With respect to management proposals for term limits, ISS will focus on, among other things, whether the term limit design will be disadvantageous to outside directors or may, in general, be used in a discriminatory fashion. ISS will, however, continue to recommend against proposals seeking to impose age limits due to, among other things, concerns that they have been used to remove dissenting voices from the board. In the 2021 proxy season, Glass Lewis will begin to note as a concern instances where the average tenure of non-executive directors is 10 years or more and no new independent directors have joined the board in the previous five years. A finding of insufficient board refreshment will inform Glass Lewis' voting recommendations on other matters.

"Deadhand" poison pills. Under its existing voting guidelines, ISS issues negative recommendations against all director nominees (except new nominees who are considered on a case-by-case basis) if the company has a shareholder rights plan (also known as a "poison pill") that was not approved by shareholders. ISS noted that many companies adopted short-term poison pills with deadhand provisions (which dilute the shares of a target company during a hostile takeover attempt) and slowhand provisions (which prevent redemption of the poison pill for a specified period of time after a change of control) during the pandemic. Because these features typically limit or delay a board's ability to redeem or terminate a poison pill when board members are replaced, ISS revised its policy this year to recommend against all director nominees standing for reelection if the company has a poison pill with a deadhand or slowhand feature regardless of the pill term. ISS also may issue negative recommendations at the company's next annual meeting, regardless of whether the poison pill is still in effect at that time because it considers adoption of a deadhead or slowhand poison pill without shareholder approval to be a material governance failure.

Board performance

Responsiveness to low shareholder support. Under its existing compensation policies, when a company receives less than 70% support on its say-on-pay proposal, ISS reviews the disclosure of the board's shareholder engagement efforts and the specific feedback received from dissenting investors, and any actions or changes to pay programs and practices made to address investors' concerns. This year, ISS changed its responsiveness policy to provide that a company's proxy statement should specifically disclose how the pandemic has interfered with the company's ability to address shareholder concerns if the company is unable to make changes due to the pandemic. If compensation program changes are delayed or do not fully address investor concerns, a longer-term plan for addressing these concerns also should be disclosed.

SPAC governance. Glass Lewis added a new policy for SPACs (special purpose acquisition companies) this year. If a SPAC holds a special shareholder meeting to seek approval of an extension for the acquisition, Glass Lewis will support reasonable extension requests. Glass Lewis also will generally consider former executives of a SPAC who continue to serve as board members of the post-acquisition company to be independent unless there is evidence of an employment relationship or any continuing material financial interest in such company.

Problematic governance structures following IPOs and spinoffs. Glass Lewis clarified that when a board has approved overly restrictive governing documents following an IPO or spinoff, it will generally vote against members of the governance committee and may issue adverse recommendations against other board members if no governance committee exists or some governance committee members are not up for reelection. Additionally, when a company adopts a multi-class share structure with disproportionate voting rights or other anti-takeover mechanisms before its IPO, Glass Lewis will generally recommend voting against all board members who served at the time of the IPO if the board did not commit to submitting these provisions to a shareholder vote at the next shareholder meeting following the IPO or provide for a reasonable sunset of these provisions. If a multi-class share structure is submitted to a shareholder vote, Glass Lewis will review the level of support from unaffiliated shareholders in determining its voting recommendations.

Shareholder rights

Virtual shareholder meetings. Responding to the high number of virtual meetings held last year due to the pandemic, ISS introduced a new policy[23] this year to generally support management proposals permitting hybrid shareholder meetings provided that the intent of the proposals is not to preclude in-person meetings in the absence of health or safety concerns. ISS encourages disclosure of the circumstances under which virtual-only meetings would be convened and the opportunities provided to shareholders to participate electronically that are comparable to those available at in-person meetings. Glass Lewis lifted its temporary COVID-19–related policy exception for virtual shareholder meetings and will hold governance committee chairs responsible when companies that hold virtual meetings fail to provide robust proxy statement disclosure on whether shareholders can participate in the meeting as fully as they would at an in-person meeting (e.g., ability of shareholders to ask questions at the meeting, procedures for posting questions received during the meeting and the company's answers on its public website, and logistical details for meeting access and technical support).

Exclusive forum provisions

Federal forum selection. Following the Delaware Supreme Court's unanimous ruling confirming the validity of provisions designating federal courts as the exclusive forum for cases arising under the Securities Act (discussed above in **2020 Litigation and Court Decisions Impacting Corporate Governance**), ISS added a new policy to issue favorable recommendations for exclusive forum charter or bylaw provisions that specify "the district courts of the United States" as the exclusive forum for federal securities law matters but to generally recommend against such provisions if they restrict the forum to a particular federal district court.

State law matters. ISS also updated its policy to generally support charter or bylaw provisions designating courts in Delaware as the exclusive forum for state corporate law matters for companies incorporated in Delaware but will continue to vote on a case-by-case basis for state exclusive forum provisions designating states other than Delaware. ISS will generally vote against provisions that designate a state other than the state of a company's incorporation as the exclusive forum for corporate law matters, or that specify a particular local court within a state and may recommend against responsible directors if these provisions are not reversed or submitted to a shareholder vote by the next annual meeting.

Workforce shareholder proposals

Workforce diversity disclosure. In its 2021 Proxy Paper on ESG Initiatives,[24] Glass Lewis updated its guidelines to provide that it will generally recommend a vote in favor of shareholder proposals requesting disclosure of EEO-1 report data (i.e., company employment data categorized by race/ethnicity, gender, and job category).

Pay gap reporting, mandatory arbitration, and sexual harassment. ISS updated its existing policies to vote on a case-by-case basis on shareholder proposals requesting reports on: (i) pay gap data (relating to gender and racial or ethnic disparities) or policies and goals to reduce any pay gaps, (ii) company use of mandatory arbitration in employment-related claims, and (iii) company actions to prevent workplace sexual harassment or reports on risks posed by a company's failure to prevent such harassment, in each case, taking into consideration the company-related disclosure as compared to disclosure by peer companies and any related controversies involving the company. ISS will also consider any applicable local law prohibiting companies from categorizing employees by race or ethnicity when evaluating pay gap proposals and the company's current applicable policies when evaluating mandatory arbitration and sexual harassment proposals.

Compensation Updates

In its compensation-related FAQs updated for 2021,[25] ISS confirmed that the exceptional circumstances of the pandemic and its impact on company operations will be considered in ISS' qualitative evaluation, and confirmed that its preliminary COVID-19–related compensation guidance[26] published in October 2020 would apply in the 2021 proxy season with updates as necessary. Glass Lewis, on the other hand, emphasized that it would be applying its general principles of analysis to COVID-19–related compensation decisions, continuing to "always look at company actions through a contextual lens," but also introduced a number of compensation updates for the 2021 proxy season.

Pandemic-related salary reductions. ISS will give mitigating weight to temporary salary reductions provided they decrease total pay, particularly if targeted incentive payout opportunities are decreased to reflect the reduced salary.

Changes to bonus / annual incentive plans. While midstream adjustments to annual incentive programs (e.g., changes to goals, metrics, performance targets, and measurements periods) are typically viewed as problematic, ISS may view adjustments due to the pandemic as a reasonable response to the current economic downturn if the company provides clear disclosure of justifications for the changes and the resulting outcomes appear reasonable. ISS provided a list of possible disclosure topics to help investors evaluate COVID-19–related changes to annual incentive programs, including:

- specific pandemic-related challenges and how they made the original program terms outdated or the original performance targets impossible to achieve;
- rationale for any mid-year changes to an annual incentive plan and how such changes support investor interests;
- underlying criteria for performance-based one-time discretionary awards;
- board consideration of possible payouts in deciding to lower performance targets; and
- how payouts reflect executive and company performance, comparing the payouts with expected payouts under the original program.

Glass Lewis codified additional factors it will consider in assessing changes to a company's short-term incentive plan: whether a company has clearly disclosed the justification for any significant changes to plan structure, and whether performance goals have been lowered from the previous year. Glass Lewis also expanded its description of the application of upward discretion to add instances of retroactively prorated performance periods in addition to lowering goals mid-year and increasing calculated payouts.

Changes to long-term incentives. ISS will generally view mid-cycle changes to long-term incentives negatively, particularly for companies with quantitative pay-for-performance misalignment. For long-term incentives with award cycles beginning in 2020, ISS will view drastic alterations (e.g., shifts to predominantly time-vesting equity or short-term measurement periods) negatively, although modest changes (e.g., a switch to relative or qualitative metrics in the event of unclear long-term financial forecasting) might be viewed as reasonable. ISS expects companies to provide clear disclosure of any changes to these programs.

Glass Lewis added inappropriate performance-based allocations (i.e., allocations that significantly reduce performance-based awards) and significant roll-backs or eliminations of performance-based awards as new criteria that may contribute to a negative recommendation against a long-term plan. Glass Lewis expects that clearly disclosed explanations will accompany descriptions of long-term incentive plan equity granting practices, as well as any significant structural program changes or use of upward discretion.

Retention, replacement, and other one-time awards. ISS expects companies granting one-time awards in the year or following year in which performance-based incentives are forfeited to provide disclosure of the issues underlying the decision and an explanation of how the grant will support shareholder interests. ISS also expects that these awards will be reasonable in size and an isolated practice, structured to avoid possible windfalls (e.g., limitations on termination-related vesting), and have long-term vesting conditions that are strongly performance-based and linked to the conditions the award is meant to address.

Option exchanges and repricing. Glass Lewis remains generally opposed to option exchanges and repricings but has clarified that when a company's stock price has declined as part of a market-wide decline, it may view a repricing or option exchange proposal favorably if officers and directors are excluded from participation in the exchange, and the exchange is value-neutral or creates value.

Excise tax gross-ups. Glass Lewis updated its excise tax gross-up policy to provide that it may recommend a vote against a company's say-on-pay proposal and against the chair or members of the compensation committee when new excise tax gross-ups are added to specific change-in-control transactions, in addition to making a negative recommendation on the related golden parachute proposal.

Excluding terminated equity plan shares from SVT analysis. When an existing equity plan is terminated in connection with shareholder approval of a new plan, ISS generally includes any shares remaining in the terminated plan in its shareholder value transfer ("SVT") analysis because it relies on year-end disclosure, which typically occurs before the shareholders approve the new plan. ISS has clarified that companies that do not expect to grant any of these remaining shares before the plan is terminated can avoid their inclusion in the SVT analysis by providing the following disclosure in their Form 10-K or proxy:

- The total number of shares remaining available for future awards under the existing plan;

- The total number of full value awards and appreciation awards outstanding; and
- A commitment not to grant any existing plan shares as awards unless the successor plan is not approved by shareholders.

Changes to equity plan scorecard. The threshold passing scores will increase from 53 points to 55 points (out of 100) for Russell 3000 companies and from 55 points to 57 points (out of 100) for S&P 500 companies.

2021 burn rate benchmarks. ISS' burn rate benchmarks for 2021 remain largely unchanged or lowered compared to its 2020 benchmarks. However, higher benchmarks will apply for non–Russell 3000 companies in the health care equipment & services and software & services industries.

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 1, 2021 for large accelerated filers with a December 31, 2020 fiscal year-end). Annual reports on Form 10-K are due 75 days after fiscal year-end for accelerated filers (Tuesday, March 16, 2021 for accelerated filers with a December 31, 2020 fiscal year-end) and 90 days after fiscal year-end for non-accelerated filers (Wednesday, March 31, 2021 for non-accelerated filers with a December 31, 2020 fiscal year-end).

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. If the filing deadline would otherwise fall on a Saturday, Sunday, or federal holiday, the filing is due on the first business day following such deadline.

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 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 PWC, *Virtual shareholder meetings Lessons learned from 2020*.

2 Broadridge, a leading virtual meeting service provider, reported that it hosted 1,494 virtual shareholder meetings during the first six months of 2020, a majority of which were audio-only.

3 ISS Governance, *2020 Global Benchmark Policy Survey Summary of Results*, indicated that almost 80% of surveyed investors preferred hybrid to virtual-only meetings if pandemic-related restrictions do not continue to apply, September 25, 2020.

4 FW Cook, "10-K Filings Show a Variety of Approaches to the New Human Capital Resources Disclosure Rules," Alert, November 27, 2020.

5 ISS Analytics, *U.S. Board Diversity Trends in 2019*, May 31, 2019.

6 California Senate Bill No. 826.

7 California Partners Project, A Progress Report on Women's Representation on California Corporate Boards, October 14, 2020.

8 Massachusetts Bill S. 1879, An Act to Ensure More Women Serve on Corporate Boards of Directors.

9 Michigan Senate Bill 115, proposing to amend Michigan's Business Corporation Act.

10 New Jersey Senate Bill No. 798 and Assembly Bill No. 1982.

11 New York Senate Bill S. 4278, Women on Corporate Boards Study, signed into law on December 30, 2019.

12 California Assembly Bill No. 979 approved by the Governor on September 30, 2020.

13 While an auditor attestation of ICFR is not required for qualifying companies, these companies are still required to establish, maintain, and assess the effectiveness of ICFR; to provide certifications of financial reports by the principal executive officer and the principal financial officer; and complete a financial statement audit by an independent auditor who is required to consider ICFR in the performance of that audit.

14 Public float is the aggregate worldwide market value of voting and non-voting common equity of the company held by non-affiliates, by reference to the price at which the common equity was last sold, or the average of the bid and asked prices of the common equity, in the principal market for the common equity as of the particular date.

15 Foreign private issuers that apply US GAAP and file on domestic forms designated for domestic issuers are also excluded from the accelerated and large accelerated filer definitions if they qualify as an SRC under the SRC revenue test.

16 The company must also be subject to the SEC reporting requirements for a period of at least twelve calendar months and have filed at least one annual report.

17 See note 16 above.

18 SEC Office of Compliance Inspections and Examinations (renamed to Division of Examinations) "Cybersecurity: Ransomware Alert," Risk Alert, July 10, 2020; "Cybersecurity: Safeguarding Client Accounts against Credential Compromise," Risk Alert, September 15, 2020; "Select COVID-19 Compliance Risks and Considerations for Broker-Dealers and Investment Advisers," Risk Alert, August 12, 2020; "OCIE Statement on Operations and Exams – Health, Safety, Investor Protection and Continued Operations are our Priorities," Announcement, March 23, 2020.

19 Brian Krebs, "SolarWinds Hack Could Affect 18K Customers," Krebs on Security (blog), December 20, 2020.

20 ISS, *United States Proxy Voting Guidelines, Benchmark Policy Recommendations: Effective for Meetings on or After February 1, 2021*, November 19, 2020; Glass Lewis, *2021 Proxy Paper Guidelines An Overview of the Glass Lewis Approach to Proxy Advice United States*.

21 Glass Lewis, *2021 Proxy Paper Guidelines An Overview of the Glass Lewis Approach to Proxy Advice Environmental, Social & Governance ("ESG") Initiatives*.

22 Aon, "Setting the Bar for Proxy Disclosures with Glass Lewis" Q&A with Eric Shostal, SVP of Research and Engagement at Glass Lewis, The Spotlight, December 2020.

23 ISS Global Policy Board, *Impacts of the COVID-19 Pandemic ISS Policy Guidance*, April 8, 2020.

24 See note 21 above.

25 ISS, *United States Compensation Policies Frequently Asked Questions*, December 21, 2020; ISS, *United States Equity Compensation Plans Frequently Asked Questions*, December 21, 2020.

26 ISS, *U.S. Compensation Policies and the COVID-19 Pandemic Frequently Asked Questions*, October 15, 2020.