MINTZ

Preparation for 2021 Fiscal Year-End SEC Filings and 2022 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 (SEC) and their annual shareholder meetings. This memorandum discusses key considerations to keep in mind as you embark upon the year-end reporting process in 2022.

While 2020 was a year unlike any other, in 2021 COVID-19 continued to create disruption and challenges for publicly traded companies across industries. Moving into 2022, many companies continue to feel the effects of the pandemic as they deal with new variants, implement return to workplace programs and vaccine mandates, face difficulties in hiring and retaining employees, address supply and manufacturing challenges, and experience a rise in inflation, among other things, which will need to be considered and addressed in 2021 10-K reports.

In 2021, the SEC heightened its focus on ESG (environmental, social, and governance) disclosures by soliciting input on climate change disclosure, announcing the formation of its Climate and ESG Task Force in the Division of Enforcement, and publishing a sample comment letter on climate change disclosure, among other things. We expect continued pressure from investors, the SEC, proxy advisory firms, and other stakeholders in connection with establishing rules and standardized disclosure for various ESG topics and metrics. In addition, many public companies continue to take deliberate steps to respond to and address social justice and issues of diversity and inclusion. In 2021, there was continued momentum from stakeholders, Nasdaq rules, and state legislation toward increasing board diversity, including the new Nasdaq requirement for listed companies to provide a standardized Board Diversity Matrix in their disclosures. In 2022, companies should be incorporating ESG concepts into their ongoing board conversations and their routine disclosure practices. Mintz has been an active participant in addressing the ESG movement, and the Mintz ESG Practice continues to work with clients on these important issues.

Other developments we discuss in this memorandum include director overboarding, clawback policies, proxy advisor voting guidelines, proposed SEC proxy advisor reform, Rule 10b5-1 plans, key special purpose acquisition company (SPAC) accounting issues, recent amendments to New York Stock Exchange requirements for related person transactions, cybersecurity, and recent litigation impacting corporate governance and disclosure.

We invite you to review our memorandum from last year, which analyzed regulatory changes that were new for fiscal year 2020.
We also thank Meg G. Green, Ilse P. Johnson, and Patrick McDonough for their contributions to this memorandum.

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ESG Assumes Center Stage

The focus on ESG issues that began in earnest in 2020 and expanded during 2021 will continue to shape public company discussion and disclosure in 2022. Listed companies, their boards of directors, investors, employees, and regulators increasingly are taking ESG matters into consideration.

Climate Change

The SEC continued to focus on ESG matters this year, with particular emphasis on climate change–related risks and disclosure. SEC Chair Gary Gensler and several Commissioners made public statements throughout the year on topics related to the SEC's regulation of ESG disclosure.[1] In March 2021, Commissioner (and former Acting Chair) Allison Herren Lee solicited public input on climate change disclosure, noting the demand for climate change information and questions about whether current disclosures adequately inform investors.[2] Also in March 2021, the SEC announced the creation of a Climate and ESG Task Force in the Division of Enforcement that will concentrate on identifying ESG-related misconduct, such as material gaps in issuers' disclosure of climate risks under existing rules and compliance issues relating to investment advisers' and funds' ESG strategies.[3]

In September 2021, the SEC published a sample letter outlining comments that the Division of Corporation Finance may issue to companies regarding their climate-related disclosure (or the absence of such disclosure) in their SEC filings.[4] The comment letter focuses on compliance with the topics addressed in the SEC's 2010 interpretive release *Commission Guidance Regarding Disclosure Related to Climate Change*.[5] The 2010 interpretive guidance is an overview of existing rules that may require disclosure of climate change issues if material to the issuer, including in its description of the business, legal proceedings, risk factors, and management's discussion and analysis of financial condition and results of operations. In the 2021 sample letter, the SEC reiterated that it considers disclosure related to climate change to be subject to existing rules and noted that pending or existing legislation, regulations, and international accords, as well as the effects of transition risks related to climate change, may have a material effect on an issuer's business. The comment letter also indicated that the SEC may ask for an explanation if the climate-related disclosure in an issuer's publicly released corporate social responsibility report is more expansive than the climate-related disclosure in its filings with the SEC.

Proxy advisory firms have also included climate-related matters in their policy recommendations. Institutional Shareholder Services' (ISS) voting guidelines for 2022[6] recommend a vote against or withholding a vote from chairs of responsible board committees in cases where ISS determines that a company that is a significant greenhouse gas emitter is not taking the minimum steps needed to understand, assess, and mitigate climate change risks to the company and the larger economy.[7] Considering the enhanced focus on climate-related disclosure from the SEC, investors, and other stakeholders, companies should evaluate their disclosures regarding climate change risks and assess the impact that climate and environmental factors may have on their business.

Human Capital Management Board Oversight

Board-level oversight of human capital resources and management received increased attention in the last annual reporting season as companies responded to the evolving challenges of COVID-19 and the new human capital disclosure requirement for annual reports on Form 10-K. Item 101(c)(2)(ii) of Regulation S-K requires a company that is not a smaller reporting company to provide disclosure of its human capital resources, including 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 COVID-19 pandemic continues to give rise to complex human resource considerations, including vaccination mandates and return to workplace efforts, and the board of directors plays an important oversight role as companies navigate these programs and other novel issues. Companies that have not assigned human capital management oversight to a particular committee should note the growing trend at large-cap companies to give the compensation committee oversight of these matters.[8] Companies should also consider the growing trend to communicate human capital management strategy beyond the required annual report disclosure, including in proxy statements, on company websites, and in communications with employees.[9] While company management develops and implements the day-to-day operation of human capital initiatives, the board or an appropriate committee should stay informed about the company's progress, assess strategies and actions related to vaccination programs and other reopening plans, and provide guidance if warranted.

Board Diversity: Disclosure Outpaces Actual Diversity?

In 2021, we witnessed a marked increase in companies providing disclosure regarding the racial/ethnic composition of board members. This increase was driven by a variety of factors, including pressure from various stakeholders, pending Nasdaq regulations, state law changes, and, as discussed in last year's year-end memo, the creation of the Russell 3000 Diversity Disclosure Initiative.[10] However, despite this increase in disclosure, actual progress in increasing board diversity was (at least based on disclosed information) relatively modest in 2021.[11] As disclosure becomes more common, it remains to be seen how quickly board member diversity, particularly racial and ethnic diversity, will increase or be recognized by data monitoring providers. Prior to the introduction of regulations mandating disclosure, companies with diverse boards may have been more likely to voluntarily disclose their board composition or to ask board members to self-identify their diversity characteristics. As disclosure becomes more prescriptive and formulaic, through Nasdaq's new rules or through other state or federal law changes, we may continue to see an increase in disclosure rather than an increase in actual diversity, particularly with respect to racial/ethnic diversity. Companies should expect continued pressure for diversity from the Russell 3000 Diversity Disclosure Initiative and from other stakeholders.

New Nasdaq Board Diversity Rules.

Arguably, the most significant diversity regulatory development of 2021 was Nasdaq's new board diversity rules,[12] which take effect in 2022. The rules cover three main topics or concepts (i) the "Diversity Objective Rule," (ii) the "Disclosure Matrix," and (iii) the "Recruitment Services."

Diversity Objective Rule: A comply or explain approach.

This new rule requires most[13] Nasdaq-listed companies with boards of more than five members to have at least two self-identified "diverse" ("Diverse") members. Of the two self-identified directors, at least one director must self-identify as LGBTQ+ and/or an Underrepresented Minority, and at least one member must self-identify as Female.[14] Smaller reporting companies must have at least two Diverse members, including at least one member who self-identifies as Female. For smaller reporting companies, the second Diverse member may either also self-identify as Female, or self-identify as LGBTQ+ or an Underrepresented Minority. Boards with five or fewer members, including boards of smaller reporting companies with five or fewer members, are permitted to have only one Diverse member.[15] The rule has phase-in periods that vary depending on the applicable Nasdaq market as shown below.[16] Nasdaq published two informational guides: a guide for companies already listed or that will be listed as of August 6, 2022[17] and a guide for those listing on or after August 6, 2022.[18] Nasdaq also published a set of FAQs on the subject.

Nasdaq Transition Periods*			
	Initial Board Matrix	One Diverse Director or Provide Explanation**	Two Diverse Directors or Provide Explanation**
Nasdaq Global Select or Global Markets	August 8, 2022 or date the issuer files its 2022 proxy statement, whichever is later	August 7, 2023 (2 years)	August 6, 2025 (4 years)
Nasdaq Capital Market			August 6, 2026 (5 years)
Boards with 5 or fewer directors			N/A

*** This table summarizes the transition periods for companies listed on Nasdaq prior to August 6, 2021. Transition periods for companies listing on or after August 6, 2021 are detailed here.**

**** A company that files its proxy statement after these dates in each respective calendar year must explain why it meets, or does not meet, the objective at the time of its proxy filing (or, if the company does not file a proxy statement, in its Form 10-K or 20-F).**

Importantly, this new rule is not a true mandate or a prescriptive quota. Rather, companies that do not meet these requirements must provide an explanation as to why. From a Nasdaq compliance perspective, companies will have "substantial flexibility" in drafting these disclosures. According to Nasdaq, it will not "assess the merits of the explanation," and companies may even describe a "different approach." A company may disclose its explanation in its proxy statement, information statement, or on its website.[19]

Diversity Disclosure Rule: Standardized Matrix.

While Nasdaq may be flexible in how companies explain their lack of compliance with the Diversity Objective Rule, it is not as flexible with the form of its new "Board Diversity Matrix" requirement. In recent years, those seeking and advocating for board diversity often cited the lack of digestible, consistent diversity disclosure as an impediment to their efforts to increase diversity on boards. Therefore, effective as of the later of August 8, 2022 or the date a company files its proxy statement for its 2022 annual meeting, most[20] Nasdaq-listed companies must disclose a Board Diversity Matrix either on the company's website[21] or in the company's proxy statement. In order to foster consistency, the Board Diversity Matrix must be in a form that complies with the Nasdaq rules and guidance. Nasdaq has published samples of both acceptable and unacceptable versions of this matrix. The Board Diversity Matrix requires statistical reporting on board diversity characteristics (without reference to the status of individual directors), including the percentage of directors who decline to disclose. Companies disclosing for the first time must include the current year's information, and disclosures for subsequent years must include both the current and immediately prior year's information.

Nasdaq Recruiting Partnerships: Connecting Companies and Candidates.

When evaluating the Diversity Objective Rule, some were concerned about the recruitment costs and challenges companies may experience in having to find Diverse directors. Seemingly in response to these concerns and in connection with the adoption of the new rules, the Nasdaq rules now require Nasdaq to offer "Eligible Companies"[22] certain complimentary, third-party recruitment services. To this end, Nasdaq has established partnerships with companies such as Equilar, Athena Alliance, Him for Her, and Heidrick & Struggles to assist companies in identifying Diverse candidates.[23]

Federal Efforts: Gridlock in Beltway Politics.

In June 2021, the U.S. House of Representatives narrowly (215 FOR vs. 214 AGAINST) approved the Corporate Governance Improvement and Investor Protection Act (CGIIPA) in an attempt to require the SEC to establish rules and standardized disclosures for various ESG topics and metrics, including the reporting of board and executive officer diversity. A concoction of 11 different bills, CGIIPA would require a public company to disclose self-identified demographic data[24] regarding the members of its board, its board nominees, and, unlike the Nasdaq rules, its executive officers in its annual meeting proxy statement or information statement. CGIIPA is currently awaiting passage by the U.S. Senate. Even if CGIIPA (or similar legislation) fails to pass through the U.S. Congress, there is debate as to whether the SEC would have the authority to require these disclosures without congressional authority. The SEC has certainly made statements and taken actions to show its support for more robust ESG and diversity disclosure,[25] and current SEC rules and guidance already require discussion of a board's policies when these self-identified characteristics are considered in the board member nomination process.[26]

State Diversity Laws: Continued Momentum and Legal Challenges.

In 2021, states continued to develop legislation to encourage board diversity. This legislation can generally be classified as following two (or a mixture of two) approaches (i) composition mandates requiring a certain number of female directors and/or directors from underrepresented groups, or (ii) disclosure-only mandates requiring a state filing or other disclosure regarding board composition. The California statutes are perhaps the most well-known examples of composition mandates. These statutes require publicly held, exchange-traded companies with a principal place of business in California (based on their Exchange Act filings) to include, depending on the size of their boards, between one and three female directors by the end of 2021,[27] at least one director from an Underrepresented Community[28] by the end of 2021, and between one and three directors from an underrepresented community by the end of 2022.[29] Similar to Nasdaq, the California Secretary of State has published guides and decision trees to assist companies in their efforts to comply with these mandates.[30] There is debate as to whether these new California laws will ever be enforced, but according to the statutes themselves, companies failing to comply could potentially face fines ranging from $100,000 for the first violation to $300,000 for a second or subsequent violation.[31] Conservative interest groups and other activist shareholders have sought to legally challenge the statutes, and many of these cases are still in process. These suits allege, among other things, violations of the 14th Amendment of the U.S. Constitution and of the internal affairs doctrine. Interestingly, it appears that affected companies, the most obvious plaintiffs, have been hesitant to file suit. Despite the legal and regulatory uncertainties surrounding these statutes, many companies appear to be making an effort to comply and adopt the mandates as a best practice, possibly as the result of pressure from shareholders or other stakeholders. New York, on the other hand, provides an example of a more disclosure-only approach. In 2019, New York adopted a statute requiring for-profit companies doing business in New York to disclose female board membership through state regulatory filings.[32] By nature, this statute seems less controversial and is certainly less prescriptive than the California approach or even Nasdaq's more hybrid approach. Despite these ongoing legal challenges and the apparent lack of enforcement in some situations, there is an emerging view that compliance is simply a matter of best practice. It will be interesting to see whether that trend continues irrespective of enforcement.

Overboarding of Directors

As board service has become an increasingly demanding and time-consuming commitment, proxy advisory firms and institutional investors have intensified their focus on limiting the number of public company boards on which individuals can serve at any one time. These stakeholders have not yet adopted a uniform approach, although there are several observable trends. Investor viewpoints appear to be generally settling on a standard of one additional outside directorship for the company's CEO. Glass Lewis' policy is consistent with this approach, but ISS allows for two additional outside directorships for the CEO. Both ISS and Glass Lewis permit outside directors to sit on a total of five boards. Institutional investors also may be coalescing around a total of four directorships for outside directors as an acceptable standard. Despite what appears to be an emerging consistency on numbers, institutional investors continue to provide their own guidelines that sometimes differ from those of the proxy advisors and other investor institutions. As a result, in 2022, public companies will need to review the standards adopted by their significant shareholders as well as those adopted by ISS and Glass Lewis, and be ready to address any overboarding concerns in their discussions with institutional investors. Public companies should also be mindful of the standards of their important institutional investors as they focus on refreshing the board's membership and adding new diverse members to the board.

Beyond shareholder positions, public companies are paying increased attention to the concerns that originally led to overboarding guidelines, and considering whether existing directors and director nominees have sufficient time and attention to fulfill their responsibilities to the company and the board. Directors who serve on more public company boards than the various established limits are not necessarily unable to effectively fulfill their obligations. In fact, this year, Glass Lewis generally will apply the higher threshold of five total boards when a director serves only as an executive at a SPAC, in recognition of the special nature of these executive roles and the limited business operations of SPACs. Nonetheless, companies are increasingly adding explicit references to whether director candidates will have adequate time to fulfill their obligations to the list of qualifications for new and continuing director nominees in their nominating and governance committee charters, as well as in the allocation of committee memberships and committee chair positions.

The chart below shows the current overboarding guidelines of ISS, Glass Lewis, and selected institutional investors.

Proxy Advisory Firm / Institutional Investor	Maximum Allowable Public Company Board Memberships		
	Public Company CEO	Other Public Company Executive Officer	Outside Director
ISS	**3 total (2 outside)** *(negative vote recommendations only at outside boards)*	**5 total**	**5 total**
Glass Lewis [33]	**2 total** *(negative vote recommendations only at outside boards)*	**2 total** *(negative vote recommendations only at outside boards)*	**5 total**
BlackRock	**2 total (1 outside)**	**2 total (1 outside)**	**4 total**
State Street	**2 total**	**2 total** *(if NEO, service on a mutual fund board is not considered)*	**4 total; 3 for board chairs or lead independent directors**
Vanguard	**2 total (1 outside)** *(vote against only at outside boards)*	**2 total (1 outside)** *(if NEO, vote against only at outside boards)*	**4 total** *(vote against at each board, except generally where director serves as board chair or lead independent director)*
CalPERS	**2 total** *(vote against only at outside boards)*	**2 total** *(vote against only at outside boards)*	**4 total**
NYC Comptroller	**3 total** *(vote against only at outside boards)*	**4 total**	**4 total**

The Legacy of the COVID-19 Pandemic

As we begin 2022, many public companies are entering their third annual reporting season impacted by the COVID-19 pandemic. Over the past few years, the pandemic has had significant impacts on business operations and has resulted in numerous risks and uncertainties for public companies across industries. At this point, many public companies have well-developed disclosure about the impacts of the pandemic on their business and liquidity in the Management's Discussion and Analysis of Financial Condition (MD&A) section and the risks and uncertainties caused by the pandemic in the Risk Factors section of their periodic reports. Nonetheless, as we begin 2022, there are new impacts and new risks and uncertainties to be considered, and companies should take a fresh look at their COVID-19-related disclosure and make updates to address the current impacts of the pandemic, take account of risks that have materialized, and discuss any new risks and uncertainties that could have a material impact on the company's business. Public companies should also consider how the pandemic will continue to impact the format of their annual meetings.

COVID-19 Disclosure in the MD&A

In considering updates to COVID-19 disclosure in the MD&A, public companies should keep in mind the overall objective of the MD&A, which is to provide the material information relevant to an assessment of the financial condition and results of operations of the company, to allow investors to view the company from management's perspective.[34] Under Item 303 of Regulation S-K (see our client advisory on SEC amendments to the MD&A requirements), the discussion and analysis must focus specifically on material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition, which includes descriptions and amounts of matters that have had a material impact on reported operations, as well as matters that are reasonably likely based on management's assessment to have a material impact on future operations.[35]

Earlier during the pandemic, in June 2020, the SEC's Division of Corporation Finance issued guidance[36] on its views regarding operations, liquidity, and capital resources disclosures that public companies should consider with respect to business and market disruptions related to the COVID-19 pandemic, which remains important guidance to consider when updating COVID-19-related disclosure in the MD&A and Risk Factors. In the guidance, the SEC noted the numerous operational adjustments that companies have made in response to the effects of COVID-19, including the transition to telework, supply chain and distribution adjustments, and suspending or modifying certain operations to comply with health and safety guidelines to protect employees, contractors, and customers, including in connection with a transition back to the workplace, and indicated that companies should carefully consider their obligations to disclose this information to investors as many of these changes would have a material effect on the company. The SEC also noted the range of financing activities that companies are using in response to the effects of COVID-19, including the use of credit facilities, public and private markets, supplier finance programs, and new or modified customer payment terms, and that it is important that companies provide robust and transparent disclosures about how they are dealing with short- and long-term liquidity and funding risks, particularly in the MD&A.

In addressing the MD&A requirements, including the SEC guidance, many public companies have included a separate discussion about the impacts of COVID-19 on the business in the MD&A. Depending on the impact on the particular company and industry, these impacts could include:

- **Customer impacts,** including how COVID-19 has impacted customer demand for company products and services and sales volume. These effects may include customer inability to purchase products due to illness, quarantine, or other restrictions, or a shift in consumers' product or channel preferences, with many consumers purchasing products online. For companies with customers in the health care industry, these impacts may include customers' reallocation of resources, funding, and attention away from a company's products and services and toward pandemic concerns.
- **Sales process impacts,** including that shutdowns and travel challenges may have impacted the ability to access customer sites or complete customer installations, or required alternative strategies for customer visits and trade shows or conference participation.

- **Employee impacts,** including the impact of work-from-home policies, the implementation of health and safety protocols in the workplace, restrictions on employee travel, and the increased demand on IT infrastructure due to remote work.

- **Supply and manufacturing impacts,** including the impact on foreign and domestic suppliers' ability to supply raw materials, components or finished products, manufacturing and delivery delays, transportation-related constraints, and increases in supply, manufacturing, and other product costs.

- **Industry-specific impacts,** for example, for drug development companies, the impact on clinical site initiation, enrollment of patients in clinical trials, timely completion and reporting of clinical trial results, and other effects on the research and development process.

- **Regulatory impacts,** such as the impact on the U.S. and non-U.S. regulatory review process for drug products and regulatory authorities' ability to conduct inspections of manufacturing facilities.

As companies enter 2022, they will need to continue to evaluate these effects and tailor their disclosure to the impacts on the company's business, and will also need to update their disclosure to address new impacts on the business, which may include:

- **The rise of new COVID-19 variants.** The effects of current or future variants, including potential shutdowns.

- **Return to workplace transitions and vaccine mandates.** The design and implementation of return to workplace transitions, including vaccine mandates, and the impact of such transitions on employee retention and morale.

- **Employee recruitment and retention.** Challenges in attracting, recruiting, and retaining employee talent.

- **Supply and manufacturing challenges.** The effects of ongoing or new supply and manufacturing challenges on the company's business.

- **Inflation.** The effects of inflation on the company's business, including the effects of product price increases on sales and the effects of increases in supply and manufacturing costs on the company's business.

- **Cybersecurity challenges.** The effects of the remote business environment on a company's cybersecurity efforts.

In addition to disclosing the key operational impacts of the pandemic on the business, consistent with the SEC guidance, companies should use the MD&A to address, among other things, the pandemic's impact on the company's overall liquidity and outlook, the sources and uses of capital, its ability to access capital, the costs of capital, and any risks to the company's ability to comply with debt covenants.[37]

COVID-19 Risk Factors

Beyond the MD&A, public companies will also need to re-assess and update their COVID-19-related risk factors to take account of any risks that have materialized, as well as discuss any new material risks to the business relating to COVID-19. Importantly, risks that have begun to materialize should not be discussed in a hypothetical way.[38] Instead, risk factors should describe how a risk has materialized and what the current risks are to the company. Therefore, it is important to review the COVID-19 risk factors to determine which risks have materialized and what updates will be necessary to reflect the company's current risks. In particular, companies should consider any new risks and uncertainties that may result from COVID-19 variants, return to workplace transitions, vaccine mandates, inflation, and other impacts discussed above or that may be particular to the company's business.

Virtual Meetings

Pandemic-related restrictions and health concerns spurred public companies to pivot to virtual and hybrid shareholder meetings in 2020, a trend that continued in 2021.[39] ISS and Glass Lewis remain concerned about the ability of companies to provide shareholders with electronic participation rights at virtual-only meetings that are comparable to those available at in-person meetings, and they expect robust disclosure on virtual meeting access and related procedures in the proxy statement.[40] In ISS' 2021 Global Benchmark Policy Survey,[41] 90% of the participating investors identified the following three factors as the most problematic practices related to virtual meetings: (i) management unreasonably curating questions to answer during the meeting, (ii) the inability to ask live questions at the meeting and no option to submit questions in advance, and (iii) question and answer opportunities not available to shareholders. A majority of these investors indicated that these problematic practices could result in a negative vote against directors. Companies repeating a virtual or hybrid meeting this year should review shareholder feedback received concerning prior meetings, consider proxy advisor concerns, and work with their virtual services provider to address any identified issues. Public companies incorporated in Massachusetts should note that the executive order permitting Massachusetts public companies to hold virtual-only shareholder meetings expired on August 14, 2021, although hybrid meetings continue to be permitted.

Regulatory and Listing Exchange Updates

New Rules Proposed for 10b5-1 Trading Plans

In December 2021, the SEC released proposed rules that would add new conditions to the existing affirmative defense under Rule 10b5-1 and new disclosure requirements regarding trading arrangements by issuers and their directors and officers.[42] Rule 10b5-1 trading plans are widely adopted by company insiders as a way to sell shares in a manner designed to protect insiders from claims of insider trading based on material non-public information. SEC Chair Gensler previewed the SEC's focus on Rule 10b5-1 trading plans in prepared remarks he delivered in June 2021.[43] In those remarks and his statement on the rule proposals, he referenced concerns about investor confidence and an interest in closing potential gaps in insider trading rules. Currently, although best practice standards and brokers that administer Rule 10b5-1 trading plans typically require a cooling-off period of 30–60 days, there is no mandatory waiting period under SEC rules between the date of adoption or amendment to a Rule 10b5-1 trading plan and the date of the first transaction executed under the plan. The SEC's proposal adds a minimum 120-day cooling-off period after the date of adoption or amendment before transactions under the plan may begin for plans adopted by company offers and directors. The proposed rules also limit overlapping trading arrangements and add certification requirements. Company officers and directors would be required to certify at the time of the adoption of the trading arrangement that they are not aware of material nonpublic information and that they are adopting the plan in good faith. The new disclosure obligations set forth in the proposal would require companies to disclose details about trading plans adopted during the reporting quarter and mandate disclosure of insider trading policies and procedures. Although the proposed rules have not taken effect, companies may consider whether they should impose requirements (such as the 120-day cooling-off period for officers and directors) for Rule 10b5-1 trading plans adopted or amended while the rules are pending.

SEC Reverses Course on Proxy Advisor Reform

In November 2021, the SEC proposed amendments that would walk back key reforms of its July 2020 final rules on proxy voting advice (Final Rules). The Final Rules, detailed in our earlier client advisory available here, confirmed that proxy voting advice is a solicitation for purposes of the federal proxy rules and provided new conditions to the exemption from the filing and information requirements of the federal proxy rules commonly relied on by proxy advisors, as well as two non-exclusive safe harbors for satisfying these conditions. These conditions require proxy advisors to disclose material conflicts of interest and information-sharing policies (sharing voting recommendations with the subject companies and notifying proxy advice clients of any company responses regarding such advice). The Final Rules also added examples of material misstatements or omissions related to proxy voting advice in a note to the anti-fraud provisions of Rule 14a-9. The proposed rules would rescind the exemptive condition that requires proxy advisors to adopt information-sharing policies and the examples of material misstatements or omissions relating to proxy voting advice currently included in the note to Rule 14a-9. The amendments retain both the codification of the SEC's position that proxy voting advice is a solicitation for purposes of the federal proxy rules and the exemptive condition requiring disclosure of material conflicts of interest.

On June 1, 2021, SEC Chair Gensler directed the SEC staff to consider further regulatory action on proxy voting advice and the SEC's Division of Corporation Finance announced that it would suspend enforcement of the Final Rules until the SEC had finished its review of the proposed rules.[44] The 30-day public comment period on the proposed rules ended on December 27, 2021, and many expect that the revisions will be adopted despite strong objections by the two SEC commissioners who voted against the proposal and other stakeholders. As any reversal will be contentious, it is possible that further rule changes will follow when one of the five SEC Commissioners is replaced.

Until additional proxy advisor reforms are instituted, public companies must continue to rely on the avenues currently available for engagement with proxy advisors on their voting advice, which we outlined in our client advisory referenced above.[45]

SPAC Reporting Matters: Reclassifications and Restatements

The SEC has indicated on multiple occasions that it intends to more strenuously regulate certain aspects of SPAC IPOs and de-SPAC transactions, including through requiring more robust disclosure of potential conflicts of interest, the terms of any PIPE financing, the terms of any underwriter compensation arrangements, and the process for evaluating potential transactions, and through otherwise regulating or limiting the use of PIPE presentations, projections, and regulatory forward-looking statement safe-harbors.[46]

2021: Warrant Classification and the Year of Restatement. In spring 2021, the SEC issued a statement regarding warrant accounting treatment that resulted in many SPACs having to restate, and in some cases, amend and reissue previously issued and filed financial statements.[47] For context, SPACs often issue warrants in connection with their IPO or a financing transaction, and, historically, these warrants were typically recorded as equity rather than as a liability in their financial statements. The SEC's guidance focused on two main concepts: indexation and tender offer provisions. Specifically, the SEC took issue with warrants being indexed to the underlying security and classified as equity when the warrants contained features allowing varying settlement amounts that depended not on the underlying shares but on the holder of the warrant. The SEC also took issue with warrants classified as equity when events potentially outside of an issuer's control (e.g., a tender offer) could cause a warrant holder to receive cash when only certain holders of the underlying shares would also be able to receive cash.

To the extent this reclassification was material, some SPACs (and post-de-SPAC companies) were required to restate and reissue their previously filed financial statements. Others were able to restate without reissuance as they deemed the reclassification immaterial, and still others who had transactions in process were able to amend their warrants or restructure agreements in advance to permit the equity classification in light of the SEC's statement. While the SEC's guidance focused on SPACs and the classification of securities in SPAC transactions, the warrant features and provisions at issue, particularly the fundamental transaction/tender offer provisions, are common in non-SPAC transactions as well. As a precautionary measure, companies seeking to issue securities with these characteristics should address these classification questions before financial statements reflecting the issuance are actually issued.

2022: More Restatements to Come? Now that the warrant reclassification issues are fairly settled, the SEC appears to be focusing on yet another reclassification issue. The SEC's chief accountant has recently raised concerns about the long-standing practice by SPACs of classifying their Class A shares as permanent equity rather than temporary equity because such Class A shares are redeemable. Based on SEC guidance on redeemable equity instruments, ASC 480-10S99, "Distinguishing Liabilities from Equity,"[48] and EITF Topic D-98, *Classification and Measurement of Redeemable Securities*,[49] and, according to recent SEC communications with independent auditors, redemption provisions not solely within the control of the issuing company require shares subject to redemption to be classified outside of permanent equity. As a result, a number of SPACs recently restated or, in some cases, again restated their financial statements to address misclassification or potential misclassification issues.

Amendments to NYSE Listing Rules

Amendments to Shareholder Approval Rules. The New York Stock Exchange (NYSE) amended Sections 312.03(b) and 312.03(c) of the NYSE Listed Company Manual regarding shareholder approval of related party issuances and the issuance of 20% or more of a company's stock to bring the NYSE's rules into closer alignment with those of the Nasdaq.

Related party issuances. As amended, Section 312.03(b) now requires prior shareholder approval for issuances relating to more than 1% of the number of shares of common stock or voting power outstanding before the issuance to a director, officer, or substantial security holder (each a "Related Party") if the transaction is a cash sale for a price that is less than the Minimum Price, which is the lower of: (1) the Official Closing Price[50] immediately preceding the signing of the binding agreement; or (2) the average Official Closing Price for the five trading days immediately preceding the signing of the binding agreement. The amendments remove the shareholder approval requirement for issuances to a subsidiary, affiliate, or other closely related person of a Related Party or any company or entity in which a Related Party has a substantial direct or indirect interest (except where a Related Party has a 5% or greater interest in the counterparty as described below). Issuances to Related Parties in non-cash transactions above the 1% threshold continue to be subject to shareholder approval. Cash sales to Related Parties that meet the Minimum Price requirement remain subject to the same limitations as cash sales to all other investors, as discussed in more detail under **Transactions of 20% or more** below.

The amendments also provide that shareholder approval is required for any transaction or series of related transactions in which any Related Party has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction and the present or potential issuance of common stock, or securities convertible into common stock, could result in an increase in either the number of shares of common stock or voting power outstanding of 5% or more before the issuance. Even if the issuance to a Related Party meets the Minimum Price, the issuance can still be subject to shareholder approval under this new rule.

Transactions of 20% or more. As amended, Section 3.12.03(c) continues to require shareholder approval for issuances equal to or above the 20% threshold that are not a public offering for cash, but replaces the previous "bona fide private financing" exception with a new exception for issuances meeting the Minimum Price requirement in any financing (that is not a public offering for cash) in which the company is selling securities for cash. The amended rule provides, however, that, if the securities in such a financing are issued in connection with an acquisition of the stock or assets of another company, shareholder approval will be required if the issuance of the securities alone, or when combined with any other present or potential issuance of common stock in connection with the acquisition, is equal to or exceeds the 20% threshold.

The amended rules continue to require that any sale of stock to an employee, director, or service provider is also subject to the equity compensation rules in Section 303A.08 of the NYSE Listed Company Manual and that shareholder approval is required if any of the other NYSE shareholder approval rules apply to the transaction.

Amendments to Related Party Transaction Rule. The NYSE amended Section 314.00 of the NYSE Listed Company Manual with regard to the review and evaluation of related party transactions. The amended rule requires the audit committee or another independent body of the board of directors of an NYSE-listed company (rather than an appropriate group within the company) to conduct a prior review of all related party transactions for potential conflicts of interest and to prohibit a related party transaction if it is determined that the transaction is inconsistent with the interests of the company and its shareholders. The amendments also define "related party transaction" as a transaction required to be disclosed pursuant to Item 404 of Regulation S-K, which generally requires disclosure of any transaction with a director, officer, or significant shareholder if the amount involved in the transaction exceeds $120,000 and the related person had or will have a direct or indirect material interest in the transaction.[51] NYSE-listed companies should make sure that their policies and procedures require the review and pre-approval of related party transactions by the audit committee or another independent body of the board of directors and should review their audit committee charter and corporate governance guidelines to ensure compliance with the amended rule.

Amendments to Voting Standards. The NYSE amended Section 312.07 of the NYSE Listed Company Manual to clarify that "votes cast" are determined in accordance with the NYSE-listed company's governing documents and applicable state law. The amendment basically removes the NYSE's long-standing requirement to count abstentions as votes against a proposal and brings the NYSE listing rules in line with those of the Nasdaq. For companies incorporated in many states, including Delaware, the amendment allows a company to exclude abstentions from the "votes cast" on the matter if allowed under the company's governing documents. NYSE-listed companies should review the law of their state of incorporation, charter, and bylaws to confirm the treatment of abstentions at the upcoming annual meeting.

Compensation Matters

SEC Clawback Policy Redux

In October 2021, the SEC reopened the comment period on proposed rules for listing standards for the recovery of incorrectly awarded executive compensation under Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).[52] The proposed rules were originally released in July 2015,[53] and were the subject of comments at that time. The second comment period ended on November 22, 2021. If approved, the new rules would require the national listing exchanges to adopt standards in compliance with the proposed regulations. Therefore, even if the new rules are adopted by the SEC in early 2022, it will still take some time for the exchanges to have their listing standard requirements approved by the SEC, followed by a further implementation period for issuers.

Even though Dodd-Frank compliant clawback policies are not likely to be mandatory before mid-to-late 2022, reporting companies should begin to consider the issues they will need to address if and when the rule becomes effective. Under Section 954 of the Dodd-Frank Act, incentive-based compensation that is received during the three years prior to the date on which a company is required to prepare an accounting restatement must be recovered from current and former executive officers on a "no fault" basis if the incentive compensation paid exceeds the amount that would have been paid if the financial statements had been accurately stated. Incentive-based compensation is compensation that is awarded or earned based on the achievement of a financial reporting measure, including stock price or total shareholder return. All listed companies would be subject to the requirements of the proposed rule, including emerging growth companies, smaller reporting companies, and foreign private issuers.

Current versions of clawback policies vary by industry and by the issuer's size and stage. Many companies currently have policies that are not "no fault," but which instead target financial statement restatements due to fraud or other misconduct of an executive. Some companies have broadened the standards of their policies to provide for recoupment in the case of other bad acts, such as violations of the company's code of conduct or actions that would constitute "cause" under an executive's employment arrangements. A minority of companies have adopted policies with the "no fault" clawback provision that will be required by the proposed rules. Proxy advisor ISS assesses a company's clawback policy under its "Equity Plan Scorecard" review. In its new guidelines for 2022, ISS clarified that it will not give credit to a company for having a clawback policy if the policy contains only the more limited "at fault" type of clawback.[54]

Companies may choose to retain their current policies if they are broader than the required standard, but may need to rework them to incorporate the Dodd-Frank requirement for a "no fault" standard in the case of covered financial statement restatements. The requirement to include a "no fault" clawback provision will also have procedural implications. In some respects a "no fault" standard will be easier to administer, without a requirement to determine the fault of the executive. However, there will still be the need to determine the amount to be recouped, which is based on a "reasonable estimate" under the proposed rules, as well as how the three-year lookback will be applied in various situations potentially covered by the proposed rule. Companies will also need to address the clawback of already paid compensation in light of state law principles and how best to incorporate clawback provisions into award agreements.

Perks in SEC's Crosshairs

The SEC signaled its continued focus on executive perquisite disclosure failures with three new settled administrative actions in 2021.[55] Prior to 2020,[56] enforcement actions against companies that failed to properly disclose perquisites, or "perks," in the summary compensation table of their proxy statements[57] were relatively uncommon. The intensification of investment community interest in executive compensation matters and the SEC's increasing use of data analytics to spot disclosure failures suggest that more enforcement actions in this area are likely.

In 2006 guidance,[58] the SEC did not define "perks" but instead established a two-pronged identification test. First, items or benefits that are integrally and directly related to the performance of an executive's duties do *not* qualify as perks, with "integrally and directly related" meaning necessary for an executive to fulfill his or her duties, regardless of whether the items in question are somehow beneficial to the company. The SEC has underscored that its test is intentionally broader than the "business purpose" test used to determine deductibility for tax purposes. Second, if an item fails the "integrally and directly related" test, it may still avoid classification as a perk if it is generally available on a non-discriminatory basis to all employees. This analysis is highly fact-sensitive and must be performed on a case-by-case basis.

The SEC's perquisite enforcement actions have generally targeted egregious disclosure failures involving extravagant perks, such as the personal use of company aircraft, payments for vacations abroad, and travel expenses for family members and friends. However, the SEC's increasing use of data analytics may result in more enforcement actions that do not involve obviously extravagant perks. The metrics used in the SEC's data analytics are unknown but may include notable differences in the amounts of perquisites claimed compared to past years and perquisite levels that significantly differ from those of peer companies. The SEC also may look for inconsistencies in perks disclosure across filings.[59] The adoption of the Inline XBRL software standard for filings is likely to make identifying underreporting of perks easier.

Enforcement action orders have been critical of companies that lack adequate internal controls, training for employees responsible for identifying and reporting perks, relevant policies, and in one instance, a robust D&O questionnaire process. The SEC may assess civil penalties for underreporting perks as well as non-financial penalties such as requiring the engagement of an independent consultant. In determining penalties, the SEC has taken into account company remedial efforts (e.g., enhancing internal controls, adopting perquisite policies, replacing executives,[60] and performing internal investigations) and cooperation, including sharing results of internal investigations with the SEC.

To prepare for the SEC's increased scrutiny of perquisites, public companies should consider taking steps to:

- understand their perquisites practices, including how current perquisite levels compare to past levels and peer company medians;
- adopt a policy that clarifies how perquisites fit into the company's overall compensation strategy;
- enhance internal accounting controls and formalize perquisite review policies (ensuring that perks recipients are never a part of the approval process);
- train all employees engaged in perquisite review and disclosure; and
- provide consistent perquisite disclosure throughout the proxy statement, including the CD&A.

Cybersecurity Risk Disclosure, Data Protection, and Privacy Legislation

As the pandemic continued into 2021, privacy and cybersecurity risks increased and regulatory agencies continued to issue alerts related to cybersecurity risks. For example, the New York Department of Financial Services released 16 alerts and "industry letters" in 2021 related to cybersecurity risks. The Cybersecurity and Infrastructure Security Agency (CISA) and the FBI issued nearly weekly alerts to businesses of all sectors, warning of various vulnerabilities and ransomware attacks. The third quarter of 2021 saw a significant increase in ransomware attacks, and the FBI issued multiple "flash alerts" during 2021 related to ransomware attackers. Globally, according to cybersecurity experts, ransomware attacks increased by 148% in the third quarter of 2021, with a reported 470 million ransomware attacks logged through November 2021. The demands have also increased, with 2021 seeing extortion demands in the millions of dollars, making 2021 the most costly year on record.

SEC Chair Gensler pledged in one of his first public speeches[61] after his confirmation that the SEC would continue to stay abreast of evolving technology and its impacts and would be prepared to bring cyber-related enforcement actions. Within a month, the SEC announced[62] that it had settled charges against First American Financial Corporation, a real estate settlement services company, for inadequate disclosure controls and procedural violations related to a cybersecurity vulnerability that was not disclosed for approximately six months after the company became aware of it. Without admitting or denying the SEC's findings, First American agreed to cease and desist from future violations and to pay a $487,616 fine. In mid-June, SEC enforcement staff sent information requests to a number of issuers and regulated entities requesting information about the recipients' previously undisclosed compromises, especially related to the high-profile "Solar Winds" software vulnerability discovered in late 2020 (which we discussed in last year's year-end memo). The close timing between the information sweep and the *First American* action indicates that the SEC Division of Enforcement may be ramping up its focus on cybersecurity disclosures and disclosure controls. Companies should continue to carefully consider the 2018 SEC interpretive guidance on public company disclosure obligations regarding cybersecurity risks and incidents that are material to investors, including financial, legal, or reputational consequences (which we discussed in our 2019 year-end memo).

Globally, legislation focused on data protection and privacy continues to evolve, and companies should be aware of the rules and potential risks of noncompliance applicable to the jurisdictions in which they do business. European data protection authorities rendered significant fines in 2021 under the European Union's General Data Protection Regulation (GDPR) and are expected to continue to impose large penalties for noncompliance. In particular, cross-border transfers of personal data from the EU to the United States continue to be subject to increased scrutiny and contractual requirements. Negotiations are ongoing between the U.S. Department of Commerce and the European Commission to agree on a new framework for cross-border transfers to replace the US-EU Privacy Shield Framework that was invalidated in 2020, but at present, U.S. companies that import data from the EU must navigate the complex requirements of the GDPR without a safe harbor. For companies doing business in China, the Personal Information Protection Law (PIPL) took effect on November 1, 2021 and presents significant compliance challenges. Violations could lead to fines ranging between $7.7 million and up to 5% of a company's previous year's business revenue. Compliance is complex due to gaps in regulations and the lack of interpretation. However, any market participants collecting or processing personal data in China (including that of employees) should be focusing on compliance with PIPL in 2022.

California's Attorney General continued enforcement efforts of the California Consumer Privacy Act (CCPA) this year. The CCPA is the most broad-reaching privacy legislation enacted in the United States and became effective on January 1, 2020. Enforcement of the CCPA began in July 2020, and the California Attorney General has issued a large number of "notices of non-compliance." In July 2021, the California Attorney General released an interactive tool enabling consumers to directly report certain perceived violations of the CCPA. Companies doing business in California are subject to the CCPA if the company meets one or more of the following criteria: (i) has annual gross revenues in excess of $25 million; (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. Notably, a business need not be "consumer"-facing to be covered by the CCPA; under the law, a "consumer" is any California resident. The regulations have significant operational effects on covered businesses, and compliance with CCPA should be well underway.

In addition, the California Privacy Rights Act (CPRA) was approved by California voters in November 2020 and will take full effect in January 2023. However, companies doing business in California should start planning compliance efforts in the first half of 2022, since once the CPRA is effective, there will be a "lookback period" that will apply to all data collected as of January 1, 2022.

In 2021, Virginia and Colorado also passed omnibus privacy laws, similar in many respects to the CCPA and GDPR. The Virginia Consumer Data Protection Act is effective as of January 1, 2023, and the Colorado Privacy Act is effective as of July 1, 2023. In general, both laws will require increased compliance efforts and may have a broad impact on companies doing business in these states. Companies should focus efforts on data mapping and understanding the scope of the new laws as they apply to the personal data they collect.

Congress did not advance federal privacy legislation in 2021. The Federal Trade Commission (FTC) will likely take on an expanded role with respect to privacy and cybersecurity oversight and enforcement and may have additional authority granted to it (along with additional funds). In a letter dated December 14, 2021, FTC Chair Lina Khan told U.S. Senators she plans to pursue new FTC rules to toughen data security and privacy practices in the technology industry.

Just as we experienced last year with the major "SolarWinds" software hack incident, there is another major software vulnerability for market participants to worry about now. On December 9, 2021, word broke regarding a malicious bug in a widely used piece of computer code called "Log4j." CISA has issued several statements regarding the vulnerability[63] and it is estimated to have affected tens of thousands of companies and their applications. Companies should carefully analyze the so-called "Log4j Shell" incident to determine whether it has affected, or could potentially affect, the company's 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.

Litigation and Court Decisions Impacting Corporate and Governance Disclosures

In 2021, securities litigation involving SPAC transactions and COVID-19 disclosures dominated the landscape. The notable securities litigation decision from the United States Supreme Court, *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, did not provide any guidance with respect to disclosure issues and instead involved more technical legal arguments concerning price impact analysis at the class certification phase. Nevertheless, there were several other notable litigation developments providing some guidance with respect to disclosures and corporate governance issues. We also address an important 2022 Delaware Chancery Court decision regarding the applicability of fiduciary principles to SPAC sponsors.

Widespread Dismissals of Suits Brought Regarding Diversity, Equity, and Inclusion

In 2020 and into 2021, numerous suits were filed against directors for allegedly breaching their fiduciary duties with respect to insufficient oversight on diversity, equity, and inclusion issues and initiatives at their companies. These suits would typically cite to the numerous public disclosures that companies made relating their commitment to promoting diversity and creating an inclusive workplace for employees, and would then allege that directors failed to sufficiently satisfy their duty of oversight with respect to these issues. So far, these types of suits have been unsuccessful. The most common ground for dismissal has been that the plaintiff shareholder failed to make a pre-suit demand to the board of directors, and did not sufficiently plead that demand would have been futile. *See* *Lee v. Frost et al.*, Case No. 21-20885 (S.D. Fla. Sept. 1, 2021); *Esa v. NortonLifeLock Inc. et al.*, 20-cv-05410 (N.D. Cal. Aug. 30, 2021); *In re Danaher Corp. S'holder Derivative Litig.*, 20-cv-02445 (D. D.C. June 28, 2021); *Falat v. Sacks et al.*, 20-cv-01782 (C.D. Cal. April 8, 2021).

One part of the test for assessing demand futility is whether the complaint demonstrates that at least half of the directors could not have responded to a shareholder demand in a disinterested way because they faced a substantial risk of personal liability. The courts in *Lee*, *Esa*, *Danaher*, and *Falat* specifically found that the directors did not face a substantial risk of personal liability for allegedly failing to ensure that their companies sufficiently pursued diversity, equity, and inclusion because, among other reasons:

- the company's charter exculpated the directors from claims except for those based on bad faith or intentional misconduct;
- there is no general duty to maintain diversity under Delaware law;
- general and conclusory allegations did not establish a violation of any duty to provide oversight and to ensure compliance with laws;
- general public statements by the company about a commitment to diversity and inclusion were mere puffery, did not amount to verifiable statements of fact, and/or were not sufficiently alleged as being false;
- the allegations were insufficient to show that the directors knew that the allegedly false statements about diversity, equity, and inclusion were false; and
- allegedly misleading statements on diversity, equity, and inclusion initiatives in proxy materials seeking re-election of the directors did not have a sufficient causal link to the alleged injury or harm.

In sum, and based on the decisions issued to date, it does not appear as if litigation will serve as an effective forum for advancing diversity, equity, and inclusion initiatives at the corporate level.

Duty to Monitor/Supervise Claims Continued to be Brought Against Directors

In *In re Caremark Inter. Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996), the Delaware Chancery Court established the contours of when a board of directors could be held liable for a failure to provide proper supervision or oversight of a company's operations. Although it is difficult for shareholders to successfully plead proper *Caremark* claims, they remain a relatively popular theory (such claims were among those brought in the diversity, equity, and inclusion cases discussed above). This is because these claims are considered a breach of the duty of loyalty, which is not subject to the broad exculpation clauses nearly every company has that protect directors from personal liability.

Because it is relatively rare for *Caremark* claims to survive a motion to dismiss, it is always notable when they do. During this past year, the Chancery Court allowed *Caremark* claims to proceed against the board of directors of The Boeing Company based on allegations relating to the two fatal crashes of Boeing 737 MAX airplanes. *In re The Boeing Co. Derivative Litig.*, C.A. No. 2019-0907 (Del. Ch. Sept. 7, 2021). The court focused on the fact that "airplane safety was essential and mission critical to Boeing's business, and [was] externally regulated," and that in light of this fact, the board's alleged failure to implement a reporting or information system on this key issue properly stated a *Caremark* claim.

Decisions Providing Protection to Company Disclosures

The Supreme Court's decision in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015) provided guidance on what plaintiffs must do to successfully allege claims based on allegedly misleading statements of opinion contained in registration statements. Specifically, the Court held that statements of opinion can only be actionable if it is sufficiently alleged that: (i) the speaker did not really hold the belief he or she professed to have, (ii) the opinion contained a disclosure of a supporting fact that was untrue, or (iii) the statement of opinion omitted material facts about an issuer's inquiry into or knowledge of the opinion and those facts would conflict with how a reasonable investor would view the statement itself.

This pleading standard in *Omnicare* has subsequently been applied to claims brought under Section 10(b), and now the Ninth Circuit has held that standard is also applicable when shareholders try to bring claims under Section 14(a) and Rule 14a-9 based on allegedly misleading statements of opinion in proxy statements. *Golub v. Gigamon Inc.*, No 19-16975 (9th Cir. Apr. 20, 2021).

In *Wochos v. Tesla, Inc. et al.*, No. 19-15672 (9th Cir. Jan. 26, 2021) the Ninth Circuit affirmed the dismissal of claims brought under Section 10(b) and provided a reminder of the importance of ensuring that forward-looking statements are accompanied by meaningful cautionary language to gain refuge within the safe harbor provided by the Private Securities Litigation Reform Act. 15 U.S.C. § 78u-5(i)(1)(D). The *Wochos* case involved allegations that Tesla made numerous misleading statements about the production capabilities of its manufacturing facility for the Model 3. The plaintiffs alleged that several of Tesla's forward-looking statements actually contained statements of current or past facts, and so were not fully eligible for protection under the safe harbor. The court disagreed and noted that while many forward-looking statements can be seen as implying current or past progress towards achieving a certain goal, this does not otherwise disqualify such statements from the protection of the safe harbor.

Poison Pill Invalidated

With shareholder activism now a relatively steady presence for public and private companies alike, decisions providing guidance as to the steps companies can appropriately take in response are notable. One of the more common protections that companies facing an activist shareholder take is to adopt a shareholder rights plan, also known as a poison pill, which allows existing shareholders to purchase shares at a discount to dilute the ownership of an adverse shareholder. These types of plans, however, are subject to judicial scrutiny. This past year, the Delaware Chancery Court invalidated a shareholder rights plan in *The Williams Companies S'holder Litig.*, No. 19-15672 (Jan. 26, 2021).

Under Delaware law, shareholder rights plans are proper if there was a reasonable basis for identifying a potential threat, and the response by the company was reasonable in relation to the threat posed. Applying this standard, the *Williams* court first assessed the three potential threats identified by the company: (i) the potential threat posed by activists given market uncertainty due to COVID-19 and a lower stock price; (ii) the possibility that potential activists could pursue a short-term agenda; and (iii) the possibility of activists secretly and rapidly accumulating more than 5% of the company's stock. The court found the first two articulated threats were not sufficiently supported, but assumed — for purposes of its decision — that the third was. The court then held that the measures taken by the company in its shareholders rights plan were not reasonable in relation to this threat because it contained an extreme combination of factors, including a 5% trigger, expansive definitions of "beneficial ownership" and "acting in concert," and a narrow definition of "passive investor."

Delaware Fiduciary Principles Apply to SPAC Sponsors

The Delaware Chancery Court answered several open questions regarding the treatment of SPAC sponsors and directors under Delaware corporate law in its decision in *In re Multiplan Stockholders Litigation* issued on January 3, 2022 (discussed in detail in our client advisory here). The decision, which was the first Chancery Court opinion addressing direct claims asserted in connection with SPAC shareholder litigation, confirmed that well-established Delaware fiduciary principles apply to SPACs, which are structures that are relatively untested under Delaware law. The Chancery Court determined that the plaintiff's claims could proceed on the grounds that the SPAC failed to disclose to all shareholders information obtained during its due diligence of the target company, recognizing viable claims for breaches of the duties of loyalty and disclosure owed to shareholders. Specifically, the alleged withholding of this information by fiduciaries, if true, impaired the SPAC shareholders' right of redemption. The decision clarifies how critical it is that SPAC sponsors and directors ensure adequate disclosure of both potential conflicts and information obtained from due diligence about the target company in its proxy statement, other public statements, and in the documents recommending the combination transaction.

2022 Proxy Advisors Voting Guidance Updates

Noteworthy updates to the corporate governance and executive compensation policy guidelines of proxy advisors ISS[64] and Glass Lewis[65] (GL) are outlined in the chart below.

	ISS	GL
Governance Updates		
Board Diversity		
Gender Diversity	As of February 1, 2023, current Russell 3000 / S&P 1500 policy expands to all companies: Generally recommend against nominating committee chair* of boards with no gender diversity (unless there was a woman on board at last annual meeting and board commits to add a woman within a year).	Russell 3000: Generally recommend against nominating committee chair of board with fewer than 2 female or non-binary directors or entire nominating committee of board without female/non-binary directors. Outside Russell 3000 and all companies with 6 or fewer directors: Generally recommend against nominating committee chair of board with no female/non-binary directors. In 2023, GL will switch to percentage measure: Generally recommend against nominating committee chair at Russell 3000 company with fewer than 30% female/non-binary directors. May refrain from negative recommendations when boards disclose sufficient rationale or plan to address lack of diversity.
Racial/Ethnic Diversity	As of February 1, 2022, generally recommend against nominating committee chair* of Russell 3000 and S&P 1500 companies without apparent racial/ethnic board diversity (unless there was racial/ethnic diversity at last annual meeting and board commits to add racially/ethnically diverse director within a year).	Generally recommend in line with applicable state laws mandating underrepresented minority board diversity.
Diversity and Skills Disclosure		S&P 500 companies with poor diversity proxy disclosure that fail to provide any disclosure in each of GL's diversity categories: May recommend against nominating/governance committee chair. Beginning in 2023 for S&P 500 companies without racial/ethnic disclosure: Generally recommend against nominating/governance committee chair. For annual meetings after August 8, 2022: Recommend against governance committee chair of Nasdaq-listed companies without required diversity disclosure.
Environmental and Social Risk Oversight		S&P 500 companies: Generally recommend against governance committee chair of companies without explicit disclosure on board-level oversight of E or S issues. Russell 1000 companies: Note as concern failure to provide clear disclosure on E&S risk oversight.

*** or other directors on a case-by-case basis.** *(Table continues)*

Climate		
Board Accountability	"Significant greenhouse gas emitters" (for 2022, companies on Climate Action 100 list): Generally recommend against chair of responsible committee* that has not taken minimum steps to address climate risks (in 2022: detailed disclosure of climate change risks and appropriate GHG emissions reduction targets).	
Say-on-Climate Proposals	Evaluate case-by-case on management and shareholder proposals requesting approval of company climate transition/ action plans (policy includes framework for analysis).	Generally recommend against shareholder proposals requesting annual shareholder say-on-climate vote. Evaluate case-by-case on management proposals.
Multi-Class Capital Structure with Unequal Voting Rights	As of February 1, 2023, generally recommend against relevant directors at companies (without regard to when they first became public companies) with common stock with unequal voting rights. Exceptions include: (i) newly public companies with sunsets of 7 years or less after IPO, (ii) *de minimus* unequal voting rights, and (iii) when minority shareholders receive protections (e.g., regular binding vote on whether to maintain capital structure).	Recommend against governance committee chair at companies with multi-class share structures and unequal voting rights not subject to reasonable sunset (7 years or less).
Waiver of Age/Term Policies		Generally recommend against nominating/ governance committee chair of board that waived term/age limits for 2 or more consecutive years, unless compelling rationale provided (e.g., consummation of corporate transaction).
Director Commitment of SPAC Executives		Apply higher overboarding ceiling (5 public company boards) to directors whose only executive role is at SPAC.
Role of Committee Chair of Staggered Board		On case-by-case basis, generally recommend against other committee members when committee chair who would receive negative recommendation is not up for election due to staggered board.
SPACs	Definition of "newly public companies" includes SPACs.	
Overly Restrictive Governance Provisions Following De-SPAC		Generally recommend against all directors of company taken public through de-SPAC transaction, who served at time of de-SPAC, if company adopted overly restrictive governance provisions (classified board, multi-class share structure or poison pill) if board members did not:(i) submit provisions to shareholder vote on advisory basis at de-SPAC shareholder meeting; (ii) commit to submitting provisions to shareholder vote at first post-de-SPAC shareholder meeting; or (iii) provide for reasonable sunset of provisions (classified board or poison pill: 3 to 5 years; multi-class share structure: 7 years).

*** or other directors on a case-by-case basis.** *(Table continues)*

Common and Preferred Stock Authorization	Eliminate separate dilution limits for low-performing companies (total shareholder return in bottom 10% of market). Companies with problematic use of capital subject to expanded lookback period: Recommend against share increases for poison pills with longer terms (5 to 10 years) not put to shareholder vote.	Generally recommend against preferred stock authorizations or increases, unless company discloses commitment to not use shares as anti-takeover defense, or to submit any poison pill to a shareholder vote prior to adoption.
Federal Forum Provisions		Clarified approach to generally recommend against governance committee chair when board adopts exclusive federal forum provision without shareholder approval.
Compensation Updates		
Equity Plans: Burn Rate Calculation	For meetings on or after February 1, 2023, apply value-adjusted burn rate calculation in stock plan evaluations to better measure value of equity awards.	
Clawback Policies	Equity Plan Scorecard points awarded only if policy authorizes "no-fault" recovery on financial restatements and covers most NEO compensation. No points awarded for commitment to establish policy after applicable Dodd-Frank rules finalized.	
COVID-19-Related Pay Decisions	Return to pre-pandemic approach: Midyear changes to metrics, performance targets and measurement periods, or programs that heavily emphasize discretionary or subjective criteria generally viewed negatively, except in some cases of continued severe economic impacts due to COVID-19.	
COVID-19-Related Pay Disclosures	Rationale for one-time awards should be disclosed—boilerplate language regarding "retention concerns" not viewed as sufficient rationale.	Disclosure of additional grants should provide thorough description of awards and clear explanation of necessity.
Responsiveness to Low Say-on-Pay Support	Return to pre-pandemic approach: Evaluate disclosure of engagement efforts, feedback on concerns that led to negative vote and actions to address concerns. Commitment to not repeat one-time awards expected if highlighted in negative feedback.	
Environmental and Social Performance Metrics Disclosure		Robust disclosure on rationale for selected metrics, target-setting process, and corresponding payout opportunities expected when E&S metrics used in variable incentive programs for NEOs. For qualitative E&S metrics, disclosure should provide thorough understanding of how metrics assessed.

2022 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 (Tuesday, March 1, 2022 for large accelerated filers with a December 31, 2021 fiscal year-end). Annual reports on Form 10-K are due 75 days after fiscal year-end for accelerated filers (Wednesday, March 16, 2022 for accelerated filers with a December 31, 2021 fiscal year-end) and 90 days after fiscal year-end for non-accelerated filers (Thursday, March 31, 2022 for non-accelerated filers with a December 31, 2021 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 on your annual reporting process again this year.

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ENDNOTES

1 See, *e.g.*, SEC, "Statement on the Review of Climate-Related Disclosure," Statement, February 24, 2021; SEC, "A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC," Speech, March 15, 2021; SEC "Prepared remarks at London City Week," Speech, June 23, 2021; SEC, "Enhancing Focus on the SEC's Enhanced Climate Change Efforts," Statement, March 4, 2021.

2 SEC, "Public Input Welcomed on Climate Change Disclosures," Statement, March 15, 2021.

3 SEC, "SEC Announces Enforcement Task Force Focused on Climate and ESG Issues," Press Release, March 4, 2021.

4 SEC, "Sample Letter to Companies Regarding Climate Change Disclosures," September 22, 2021.

5 SEC, *Commission Guidance Regarding Disclosure Related to Climate Change*, Interpretation, Release Nos. 33-9106 and 34-61469, February 2, 2010.

6 ISS, *United States, Proxy Voting Guidelines Benchmark Policy Recommendations Effective for Meetings on or after February 1, 2022*, December 13, 2021.

7 ISS, *United States, Proxy Voting Guidelines Benchmark Policy Recommendations Effective for Meetings on or after February 1, 2022*, December 13, 2021.

8 Ernst & Young, *What boards should know about ESG developments in the 2021 proxy season*, August 3, 2021.

9 Pearl Meyer, "Human Capital Management Disclosure: Emerging Best Practices," Pearl Meyer Advisor Blog, September 2021.

10 An initiative originally comprised of 20 institutional investors with more than $3 trillion in assets under management formed in October 2020 to encourage Russell 3000 companies to provide proxy statement disclosure of the gender and racial/ethnic composition of their boards. See, "Illinois State Treasurer Frerichs Calls on Russell 3000 Companies to Disclose Board Diversity Data," Press Release, October 28, 2020.

11 The Conference Board, *Corporate Board Practices in the Russell 3000, S&P 500 and S&P Midcap 400 | 2021 Edition*.

12 Nasdaq Listing Rules 5605(f) and 5606.

13 The rule does not apply to certain "Exempt Companies," which include "acquisition companies listed under Nasdaq IM-5101-2 (i.e., SPACs); asset-backed issuers, and other passive issuers (as set forth in Nasdaq Rule 5615(a)(1)); cooperatives (as set forth in Nasdaq Rule 5615(a)(2)); limited partnerships (as set forth in Nasdaq Rule 5615(a)(4)); management investment companies (as set forth in Nasdaq Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities, and Derivative Securities (as set forth in Nasdaq Rule 5615(a)(6)) that do not have equity securities listed on Nasdaq; and issuers of securities listed under the Nasdaq Rule 5700 Series." Nasdaq Rule 5605(f)(4).

14 "'Diverse' means an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority, or LGBTQ+. 'Female' means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth… 'LGBTQ+' means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community… 'Underrepresented Minority' means an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities… 'Two or More Races or Ethnicities' means a person who identifies with more than one of the following categories: White (not of Hispanic or Latinx origin), Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander." Nasdaq Rules also provide for an alternative definition of "diverse" for certain "Foreign Issuers" based the country in which the issuer's principal executive office is located. Nasdaq Rule 5605(f)(2)(B).

15 Per the rule, if a company adds a director to its five-member board to comply, it would still be able to be treated as a smaller board under the rules until and unless it subsequently expands its board. Nasdaq Rule 5605(f)(2)(D).

16 Nasdaq, "Nasdaq's Board Diversity Rule-What Nasdaq-Listed Companies Should Know," Updated October 1, 2021.

17 Ibid.

18 Nasdaq, "Nasdaq's Board Diversity Rule-What New Companies Listing on Nasdaq Should Know," Updated October 1, 2021.

19 See Item 3 in both "Nasdaq's Board Diversity Rule-What Nasdaq-Listed Companies Should Know," Updated October 1, 2021 *and* "Nasdaq's Board Diversity Rule-What New Companies Listing on Nasdaq Should Know," Updated October 1, 2021.

20 See note 13 above.

21 Companies seeking to disclose on their website are also required to separately notify Nasdaq through the Nasdaq Listing Center with a URL link to the disclosure. See Item 2 in "Nasdaq's Board Diversity Rule-What Nasdaq-Listed Companies Should Know," Updated October 1, 2021 *and* Item 1 in "Nasdaq's Board Diversity Rule-What New Companies Listing on Nasdaq Should Know," Updated October 1, 2021.

22 An Eligible Company includes: (a) any listed Company that represents that it does not have (i) at least one director who self-identifies as Female; and (ii) at least one director who self-identifies as one or more of Nasdaq underrepresented minority categories; or (b) a listed Company that is a smaller reporting company, if it represents to Nasdaq that it does not have (i) at least one director who self-identifies as Female, and (ii) at least one director who self-identifies as Female or as in one of Nasdaq's Underrepresented Minority or LGBTQ+ categories, Nasdaq IM 5900-9.

23 Nasdaq, "Advancing Boardroom Diversity-A Guide to Resources and Partners," Nasdaq Resources.

24 Demographic data to include race, ethnicity, gender identity, and sexual orientation. U.S. House of Representatives Bill, H.R. 1187, Corporate Governance Improvement and Investor Protection Act, 117th Cong. Section 902.

25 SEC, "SEC Announces Enforcement Task Force Focused on Climate and ESG Issues," Press Release, March 4, 2021.

26 SEC Rules and Guidance, Item 401(e) of Regulation S-K and Compliance and Disclosure Interpretations 116.11 and 133.13.

27 Cal. Corp Code Section 301.3(b).

28 "Director from an underrepresented community" means an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender. Cal. Corp. Code Sec. 301.4(e)(1).

29 Cal. Corp. Code Section 301.4(b).

30 Office of the California Secretary of State, Diversity on Boards.

31 Cal Corp. Code Section 301.3(e)(1) and Cal. Corp. Code Section 301.4(d)(1).

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

33 Glass Lewis will also consider recommending against any audit committee member who serves on more than three public company audit committees, unless the audit committee member is a retired CPA, CFO, controller, or has similar experience, in which case the limit will be four committees, taking time and availability into consideration, including a review of the audit committee member's attendance at all board and committee meetings.

34 See Regulation S-K, Item 303(a).

35 Ibid.

36 SEC Division of Corporate Finance, "Coronavirus (COVID-19) — Disclosure Considerations Regarding Operations, Liquidity, and Capital Resources," CF Disclosure Guidance: Topic No. 9A, June 23, 2020.

37 Ibid.

38 The SEC has indicated, "Public companies must identify and consider the material risks to their business and have procedures designed to make disclosures that are accurate in all material respects, including not continuing to describe a risk as hypothetical when it has in fact happened." SEC, "Facebook to Pay $100 Million for Misleading Investors About the Risks It Faced From Misuse of User Data," Press Release, June 24, 2019.

39 Broadridge reports that it hosted 1929 virtual shareholder meetings during the first six months of 2021, up from 1494 in the same six-month period in 2020. 95% of these meetings permitted live questions from shareholders during the meeting and 98% of these meetings were virtual-only.

40 Glass Lewis, *Virtual Meeting Considerations for Issuers*, 2021.

41 ISS, *2021 Global Benchmark Policy Survey Summary of Results*, October 1, 2021.

42 SEC, *Rule 10b5-1 and Insider Trading*, Proposed Rule, Release Nos. 33-11013 and 34-93782, December 15, 2021.

43 SEC, "Prepared Remarks CFO Network Summit," Speech, June 7, 2021.

44 SEC Division of Corporation Finance, "Statement on Compliance with the Commission's 2019 Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice and Amended Rules 14a-1(1), 14a-2(b), 14a-9," Statement, June 1, 2021.

45 Since the publication of our earlier client advisory, ISS announced the January 10, 2022 launch of a new data verification portal, which allows US public companies, who are registered on ISS' Governance Analytics platform (platform), to review the accuracy of certain governance and compensation data points used in proxy research reports before votes are cast. Companies registered on the platform will receive e-mail notification when a company's 48-hour data verification window opens (to occur between the filing of a company's definitive proxy statement and prior to publication of ISS' proxy research report).

46 SEC, "What You Need to Know About SPACS — Updated Investor Bulletin," Investor Alerts and Bulletins, May 25, 2021 and SEC Division of Corporate Finance, "Special Purpose Acquisition Companies," CF Disclosure Guidance: Topic No. 11, December 22, 2020.

47 SEC, "Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies ("SPACs")," Statement, April 12, 2021.

48 Financial Accounting Standards Board, *Accounting for Redeemable Equity Instruments Amendment to Section 480-10-S99*, August 2009.

49 Financial Accounting Standards Board, *Classification and Measurement of Redeemable Securities*, EITF Topic No. D-98, 2008.

50 "Official Closing Price" means the official closing price on the NYSE as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities.

51 In the case of foreign private issuers, "related party transactions" are now defined as transactions required to be disclosed pursuant to Form 20-F, Item 7.B.

52 SEC, "SEC Reopens Comment Period for Listing Standards for Recovery of Erroneously Awarded Compensation," Press Release, October 14, 2021.

53 SEC, "*Reopening of Comment Period for Listing Standards for Recovery of Erroneously Awarded Compensation*," Release Nos. 33-10998 and 34-93311, October 14, 2021.

54 ISS, *United States Equity Compensation Plans Frequently Asked Questions*, December 17, 2021.

55 SEC, Administrative Proceedings, In the Matter of Gulfport Energy Corporation (and its CEO), February 24, 2021; In the Matter of National Beverage Corp., August 4, 2021; and In the Matter of ProPetro Holding Corp and Dale Redman, November 22, 2021.

56 In 2020, the following SEC Administrative Proceedings were settled: In the Matter of Argo Group International Holdings, Ltd., June 4, 2020; In the Matter of RCI Hospitality Holdings, Inc., September 21, 2020; In the Matter of Hilton Worldwide Holdings Inc., September 30, 2020.

57 Item 402(c)(2)(ix)(A) of Regulation S-K requires a public company to disclose perquisites and other personal benefits provided to named executive officers (NEOs) in the summary compensation table and the total compensation calculation in the company's proxy statement if the aggregate value of the NEO's compensation exceeds $10,000 in a fiscal year.

58 SEC, *Executive Compensation and Related Person Disclosure*, Final Rule, Release Nos. 33-8732A and 34-54302A, August 29, 2006.

59 SEC, Administrative Proceeding, In the Matter of RCI Hospitality Holdings, Inc., September 21, 2020.

60 Ibid.

61 SEC, "Remarks at 2021 FINRA Annual Conference," Speech, May 20, 2021.

62 SEC, "SEC Charges Issuer With Cybersecurity Disclosure Controls Failures," Press Release, June 15, 2021.

63 Cybersecurity & Infrastructure Security Agency, "Statement from CISA Director Easterly on "Log4j" Vulnerability," December 11, 2021; "CISA Issues Emergency Directive Requiring Federal Agencies to Mitigate Apache Log4j Vulnerabilities," December 17, 2021; "Apache Log4j Vulnerability Guidance," Updated December 28, 2021.

64 ISS, *United States, Proxy Voting Guidelines Benchmark Policy Recommendations Effective for Meetings on or after February 1, 2022*, December 13, 2021; ISS, *United States Compensation Policies Frequently Asked Questions*, December 17, 2021; ISS updated its COVID-19 Pandemic FAQs, for the 2022 proxy season generally based on feedback received from its recent roundtable discussions and its 2021 policy survey: ISS, *United States U.S. Compensation Policies and the COVID-19 Pandemic – Updated for 2022 U.S. Proxy Season Frequently Asked Questions*, December 7, 2021 and ISS, *United States Equity Compensation Plans Frequently Asked Questions*, Updated December 17, 2021.

65 Glass Lewis, *2022 Policy Guidelines United States*, November 15, 2021; Glass Lewis, 2022 Policy Guidelines ESG Initiatives, November 15, 2021.