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Preparation for 2022 Fiscal Year-End SEC Filings and 2023 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 2023.

In 2022, while disruptions of the COVID-19 pandemic, such as new variants, office closures and travel restrictions, have continued to fade, many public companies continue to face other significant challenges. These include inflation, higher interest rates, a difficult capital-raising environment, challenges in hiring and retaining employees and adapting to a more permanent remote or hybrid work environment, supply chain disruptions, impacts from the conflict in Ukraine, the effects of climate change and ongoing cybersecurity challenges and risks, among others. Challenges such as these will need to be considered and addressed in companies' 2022 Annual Reports on Form 10-K. Public companies will also need to assess whether their filer status has changed since last year and whether they are or are not eligible to avail themselves of the accommodations for smaller reporting companies or emerging growth companies this year.

In preparing for their 2023 annual shareholder meetings, we expect public companies will be considering the skills and qualifications of their directors and addressing gaps where applicable through their director nominations or ongoing board education for existing directors. In addition, we expect boards of directors will continue to consider issues of board diversity, overboarding and director interlocks as part of the nominations process. Public companies should also consider early in their annual meeting preparations whether they will be pursuing a stock option repricing to help improve employee retention and whether they will seek to amend their charter documents to provide for the exculpation of officers for breaches of the fiduciary duty of care, which is now permitted following recent amendments to Delaware law.

In 2022, the SEC has been very active in its rulemaking efforts. At the beginning of this year, the SEC's rule mandating universal proxy cards in contested director elections took effect. In addition, the SEC recently issued its final rules on pay-versus-performance disclosure, which will need to be included in proxy statements for 2023 annual shareholder meetings. The SEC also recently issued its final rule requiring the national securities exchanges to adopt rules to require listed companies to adopt clawback policies meeting certain strict requirements, and we anticipate most public companies will need to adopt new clawback policies in 2023 to comply with these rules. The SEC is also anticipated to issue its final rule on climate disclosure soon, and public companies should be taking steps now to prepare to comply with the new requirements. Beyond the climate disclosure rule, we also expect continued pressure from investors, the SEC, proxy advisory firms and other stakeholders in connection with establishing rules and standardized disclosure for various environmental, social and governance (ESG) topics and metrics. In 2023, companies should continue to incorporate ESG concepts into their ongoing board conversations and their routine disclosure practices. Mintz is a leader in assisting companies and their boards 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 proxy advisor voting guidelines, cybersecurity and recent litigation impacting corporate governance and disclosure.

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Updating the MD&A and Risk Factors in 2023

As we come to the end of 2022, public companies continue to be tested in many ways. From the COVID-19 pandemic over the past few years to continuing global political, economic, social and environmental challenges, companies have had to adapt to changing business conditions and evolving risks. As we begin 2023, companies should take a fresh look at their disclosures, particularly their risk factors and Management's Discussion and Analysis of Financial Condition (MD&A) section of their Annual Report on Form 10-K. Among other things, public companies are required to describe in the MD&A any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations, as well as any known trends or demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the company's liquidity increasing or decreasing in any material way and any known material trends, favorable or unfavorable, in the company's capital resources.[1] Public companies are also required to include in the risk factor section of Form 10-K a discussion of the material factors that make an investment in the company speculative or risky.[2] Importantly, risks that have begun to materialize should not be discussed in a hypothetical way. Instead, risk factors should describe how a risk has materialized and what the current risks are to the company.

In connection with closely reviewing and updating the MD&A and risk factor sections this year, below are a few key topics that companies should consider in particular this year to determine if and how they have affected or may affect the company's business:

Inflation and Market Conditions.

During the 12 months from October 2021 to October 2022, the U.S. Consumer Price Index rose approximately 7.7%, with energy prices increasing approximately 17.6%.[3] As a result of inflation, many companies have experienced and continue to experience increased costs for the supply of product components and raw materials, and companies may or may not be able to offset these cost increases by increasing the prices of their own products. To the extent companies increase their product pricing, it may result in fewer products sold. All of these factors may have an impact on revenues and earnings.

Interest Rates and Capital Markets.

As interest rates have and may continue to rise, the cost of borrowing has increased for many companies. In addition, the current environment continues to present challenges to companies seeking to raise funds through the capital markets. This may result in companies choosing to adjust their business plans to pursue strategies that may be less capital-intensive in the near term, for example, by delaying ramping production and commercial infrastructure or entering into new product lines. Life science companies may decide to delay new clinical trials or refocus their development efforts on fewer product candidates or fewer indications in an effort to extend their cash runway during this challenging environment in the capital markets.

COVID-19 Pandemic.

As many of the impacts of the COVID-19 pandemic over the past year, such as quarantines, travel restrictions and office closures, continue to fade, COVID-related disclosures should be revised to reflect any continuing impacts and risks that may arise in the event of a resurgence of the pandemic, through a new variant or otherwise. We would expect, however, that many companies will begin or continue to scale back their COVID-related disclosure to focus on these continuing impacts and risks rather than the more acute impacts that companies experienced early in the pandemic.

Human Capital Resources and the Labor Market.

Many companies continue to face significant competition for talent as the labor market remains tight. As employees have become accustomed to working from home or to other increased flexibility in working conditions during the pandemic, many companies need to adapt to a more permanent hybrid or remote working environment to continue to retain their workers. Due to both the tight labor market and inflation, many companies are also facing increased labor costs.

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Supply Chain Challenges.

Throughout the COVID-19 pandemic, many companies have experienced supply chain disruptions that have made it increasingly difficult to ensure a reliable and cost-effective supply of components and raw materials. In particular, companies dependent on single-supply sources and companies dependent on components in high demand with limited sources have faced increased risk. Dependence on supply sources in places with strict COVID-19 policies, such as China, has also led to increased risk for companies.

Ukraine Conflict.

In addition to the humanitarian crisis that has resulted from the conflict in Ukraine, the conflict has adversely affected global energy prices. In addition, many companies that have employees in Ukraine, sell products or services into Ukraine or are conducting other activities, such as clinical trials, in Ukraine have been and will likely continue to be impacted by the conflict.

Climate Change.

There continues to be a significant focus on the impact of business activities on climate change from regulators, proxy advisory firms, shareholders, employees and other constituents, regardless of whether the company operates in an industry that would be expected to have the greatest impact on climate change. Please refer to the section below entitled "Pending Climate Disclosure Requirements" for more information about the SEC's proposed climate disclosure rule and steps companies should consider taking now to prepare for the anticipated final rule.

Cybersecurity.

Cybersecurity continues to present significant risks to many companies, as the consequences for cybersecurity events are significant and the risks continue to change as technology evolves. Please also refer to the section below entitled "Privacy Legislation, Data Protection and Cybersecurity Disclosure" for more information about recent developments in cybersecurity.

Filer Status Transitions in a Volatile Stock Market

In 2020 and 2021, many public companies (particularly life science companies) benefitted from booming valuations. These increased valuations often resulted in more burdensome disclosure obligations under the Securities Exchange Act of 1934, as amended (the Exchange Act). As discussed in our article, once the value of a company's public float exceeds $700 million, regardless of whether it is actually producing revenue, it becomes subject to the more rigorous Exchange Act requirements of a large accelerated filer, which include, among other things, an accelerated filing schedule, more fulsome compensation disclosures, additional financial statement requirements and a requirement that its auditors attest to its internal controls. These disclosure obligations and, in particular, the auditor attestation requirement, are expensive and time-consuming. Though a company's status for the next fiscal year is determined as of the last day of a company's second fiscal quarter, many companies often need more than six months to prepare for these obligations.

Now that valuations seem to have receded, many of these companies (particularly those without revenues) now again qualify for non-accelerated filer and smaller reporting company status and are thus eligible to report as a smaller reporting company as soon as the first Quarterly Report on Form 10-Q following the second quarter determination. So, many companies in this situation are questioning whether they should again take advantage of these scaled disclosures or maintain the more rigorous internal controls implemented in connection with the auditor attestation requirements.

In short, there is no uniform answer to these questions. While most companies will not obtain auditor attestation of their internal controls unless it is truly required due to expense, we are seeing many companies continuing to follow the internal controls put in place in preparation for attestation as a matter of good practice. For the scaled smaller reporting company disclosures, companies are considering a variety of facts and circumstances, including (i) their shareholder base and whether their particular shareholders or potential investors have expressed an interest in or become accustomed to the additional disclosure provided, (ii) consistency and how likely it is that the company will again have to comply with more fulsome disclosure rules following their next filer status determination date, and (iii) the relative costs for continued compliance.

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Potential Proposals for 2023 Annual Meetings

Implementing Officer Exculpation for Public Companies Incorporated in Delaware

Effective as of August 1, 2022, Section 102(b)(7) of the Delaware General Corporation Law (DGCL) was amended to permit a Delaware corporation to include a provision in its certificate of incorporation to eliminate or limit the personal liability of certain officers of the corporation for monetary damages to the corporation or its shareholders for the breach of the fiduciary duty of care (an exculpation provision). Before this amendment, Section 102(b)(7) of the DGCL was only available to exculpate directors of a corporation from personal liability for the breach of the fiduciary duty of care, and remained unavailable to corporate officers.

With one exception, the amendments to Section 102(b)(7) permit the certificate of incorporation to eliminate or limit the liability of officers on the same basis as directors. More specifically, the certificate of incorporation is not permitted to eliminate or limit the liability of directors or officers for breach of the duty of loyalty to the corporation or its shareholders, for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, or for any transaction in which the officer or director derived an improper personal benefit. Unlike directors, however, Section 102(b)(7) does not allow the certificate of incorporation to eliminate or limit shareholder derivative claims against officers for breach of the fiduciary duty of care.

The corporate officers to which amended Section 102(b)(7) applies include the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer; the most highly compensated executive officers as determined under SEC rules; and other officers who have consented (or have been deemed to have consented) to be identified as an officer and to the appointment of the registered agent of the corporation for service of process.

Section 102(b)(7) is an enabling provision only and is not self-executing. For a corporation to eliminate or limit the liability of officers or directors authorized by Section 102(b)(7), the corporation would need to include an exculpation provision in its certificate of incorporation. Going forward, we anticipate that Delaware corporations that are being newly formed or are going public via an initial public offering, a business combination with a special purpose acquisition company (SPAC) or other method will routinely include an exculpation provision that covers both directors and officers in its certificate of incorporation. For existing public companies incorporated in Delaware, we anticipate many companies will consider amending their certificate of incorporation to extend their existing director exculpation provision to also cover officers, which will require them to obtain board and shareholder approval of the amendment to the certificate of incorporation. As a result, we anticipate that many companies will include a proposal in the proxy statement for their 2023 annual meeting for shareholders to approve amending the certificate of incorporation to provide for officer exculpation. Companies contemplating including such a proposal in their proxy statements for their upcoming shareholder meetings should consider the following:

Present a compelling rationale.

Boards of directors contemplating recommending a proposal to amend their certificate of incorporation to provide for officer exculpation should present a compelling rationale to shareholders to approve such proposal. These reasons may include that extending exculpation protection to officers may be necessary to attract and retain experienced officers, that the amendment would align with revisions to Delaware law and partially remedy inconsistent treatment of directors and officers, and that officer exculpation would apply in limited circumstances. Officer exculpation would be allowed only in connection with direct claims brought by shareholders, would not eliminate officers' monetary liability for breach of fiduciary duty claims brought by the corporation itself or derivative claims brought by shareholders in the name of the corporation, and would not limit the liability of officers for any breach of the fiduciary duty of loyalty to the corporation or its shareholders, any acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of the law, and any transaction from which the officer derived an improper personal benefit. In addition, while it is unclear whether D&O insurance carriers will give companies any credit on premiums for

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adopting officer exculpation, it is expected that broad adoption of officer exculpation provisions may help to temper D&O insurance premiums. However, some shareholders may deem it unnecessary to extend exculpation protections to officers and may claim that such protection could lead to careless behavior at the officer level, and that it may hinder the development of a company's risk management and oversight.

Assess shareholder composition and consider the possibility of ISS and Glass Lewis support.

Existing public companies should also consider how their existing shareholders and how proxy advisory firms, such as Institutional Shareholder Services Inc. (ISS) and Glass, Lewis & Co. (Glass Lewis), would view the proposal. Based on the *Americas Proxy Voting Guidelines Benchmark Policy Changes for 2023* published by ISS, ISS's general voting guideline is to vote proposals on officer indemnification and liability protection on a case-by-case basis. In its *Proposed ISS Benchmark Policy Changes for 2023*, ISS had originally proposed amending its existing guideline to recommend generally to vote for proposals providing for exculpation provisions in a company's certificate of incorporation to the extent permitted under applicable state law.[4] ISS later removed that recommendation from its 2023 guidelines, which indicates that ISS will consider the stated rationale for the proposed change. In contrast, the *2023 Policy Guidelines* published by Glass Lewis take a more explicit approach. Although Glass Lewis will closely evaluate proposals to adopt officer exculpation provisions on a case-by-case basis, it will generally recommend voting against such proposals eliminating monetary liability for breaches of the duty of care for certain corporate officers, unless compelling rationale for the adoption is provided by the board, and the provisions are reasonable.[5] Therefore, we expect that both ISS and Glass Lewis will consider such proposals on a case-by-case basis, and that both ISS and Glass Lewis will focus on the company's stated rationale for such proposals, while Glass Lewis will generally recommend voting against them. Important factors may include the limited scope of officer exculpation permitted by Section 102(b)(7), that the change will allow the certificate of incorporation to conform to state law, whether the particular company is not currently involved in litigation of a type that would be impacted by officer exculpation, and the nature and extent of any deficiencies in the company's corporate governance. We expect that companies will need to at least have a record of good corporate governance and present a compelling rationale to be positioned to potentially obtain proxy advisory firm support for their officer exculpation proposal. Companies should also assess their shareholder composition to determine the potential impact that a negative recommendation of the proxy advisory firms may have on the shareholder vote.

Adjust annual meeting timeline.

Companies that include only routine proposals in their proxy statement, such as the election of directors, the ratification of the selection of the company's auditors or the say-on-pay or say-on-frequency votes, would be able to proceed directly to filing a definitive proxy statement with the SEC. Under the SEC's proxy rules, a proposal to amend the certificate of incorporation to provide for officer exculpation, however, would require the company to file a preliminary proxy statement with the SEC. Under Rule 14a-6 under the Exchange Act, the company must then wait 10 calendar days after filing the preliminary proxy statement before filing its definitive proxy statement. If the SEC has not then notified the company of its intent to review the proxy statement during that 10-day period, the company may then proceed to file the definitive proxy statement with the SEC and mail the proxy materials to the shareholders. As a result, companies that plan to include such a proposal in their proxy statement should adjust their proxy statement filing timeline to include the additional 10 days necessary because a preliminary proxy statement will be required. In addition, because many companies incorporate by reference information from the definitive proxy statement into Part III of their Annual Report on Form 10-K, which is permitted only if the definitive proxy statement is filed within 120 days after the end of the fiscal year (i.e., by April 30, 2023, for companies with a fiscal year ending December 31, 2022), it will be particularly important for such companies that will be filing preliminary proxy statements to do so no later than early April to help ensure that their definitive proxy statement will be filed within that timeframe. If the company files the definitive proxy statement after that timeframe, it will need to timely file an amendment to its Form 10-K to include the Part III information. Furthermore, whenever a preliminary proxy statement is filed,

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the SEC could decide to review the preliminary proxy statement, in which case the SEC would typically notify the company within the 10-day period after the preliminary proxy statement is filed that the SEC plans to review and provide comments on the filing, which could result in delays to the annual meeting timeline. While the impacts on the annual meeting timeline are manageable, it is important for companies contemplating including such a proposal to decide in early 2023 whether they will move forward with such a proposal this year and plan their timeline accordingly.

For additional information about the recent amendment to Section 102(b)(7) and its implications for Delaware corporations, please see our Mintz Insights advisory, "*Elimination of the Duty of Care in Delaware?* Statutory Exculpation of Officers: Recent Amendment to Section 102(b)(7) of the Delaware General Corporation Law" (September 21, 2022).

Repricing Underwater Options

Option repricings are receiving renewed attention following recent declines in equity values in a variety of economic sectors. Many public companies have seen significant declines in share price in 2022 and are concerned that employees' "underwater" options are not providing adequate incentive and retention value. This is especially problematic in industries where the labor market is still tight and companies risk losing employees to competitors where new hire options will be granted at today's lower stock prices. Given the significant securities laws, governance, accounting, tax and exchange-related issues involved in a repricing, any proposed repricing will require substantial lead time and careful consideration of the issues to be addressed, including the following:

Repricing Format.

Repricing programs follow three general alternative formats. In a straight repricing, the terms of the option award are not changed other than to reset the exercise price to the current lower fair market value. Straight repricings are now less common as most repricings require shareholder approval, and proxy advisors and institutional investors generally disapprove of these repricings due to their perceived unfairness to shareholders. As an alternative, many companies consider structuring a repricing as a value-for-value exchange. This format allows option holders to forfeit awards in exchange for replacement awards that have the same value as the original options. Typically, this results in fewer replacement options being issued and may also include an extended vesting schedule. Under ASC 718, the accounting cost of repriced options is the fair value of the new grants less the current fair value of the forfeited options, and companies often propose an exchange where the accounting value of the new options approximates the value of the canceled awards, minimizing or avoiding added accounting cost. As a third approach, companies may consider a variation of the value-for-value exchange that cancels outstanding options in exchange for a replacement grant of restricted stock or restricted stock units. The benefit for employees of replacement with a full-value award is that in a continuing volatile market, restricted stock and restricted stock units will retain value even if the company's stock price continues to decline. For companies, one benefit of this third approach is reduced dilution to shareholders because fewer full-value awards will be needed to achieve the same award value.

Inclusion of Directors and Officers.

In order to better position the company to receive any necessary shareholder approval of the repricing, it may be advisable to exclude executives and directors from repricings that require shareholder approval. However, if incentivizing and retaining executives with underwater options is a concern, excluding them may be inconsistent with the goals of the repricing. Consequently, companies may consider including executives despite the increased risk of an adverse shareholder vote. In some cases, companies may allow executives to participate in the repricing on less favorable terms than other employees. Directors are less likely than executives to be included in a repricing. Director retention issues are often addressed separately through revisions to the company's director compensation policy to increase director compensation or to provide for a change from options to full value awards.

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Shareholder Approval.

As a result of changes to the Nasdaq and NYSE listing standards in 2003, listed companies must obtain shareholder approval of option repricings unless the underlying equity plan specifically allows options to be repriced. Under NYSE rules, a plan that does not contain a provision specifically permitting the repricing of options will be considered to prohibit repricing.[6] Nasdaq requires companies to use "explicit terminology" to clearly refer to the possibility of repricing.[7] ISS voting guidelines for approval of equity plans consider the inclusion of repricing authorization in an equity plan to be an "egregious" feature that triggers a negative recommendation on the plan regardless of how the plan otherwise scores on the ISS "equity plan scorecard." As a result, many companies have declined to include explicit equity plan repricing authorization in the company's equity plan, and consequently, shareholder approval of a repricing will be required. Moreover, even if repricing authority is contained in the equity plan, companies may be reluctant to proceed without shareholder approval if awards to executives and directors will be included in the repricing. If shareholder approval of the repricing is required, thoughtful attention should be paid to the preparation of the required proxy statement disclosure, including a considered rationale for the repricing and the benefits of the chosen repricing structure. As mentioned above, companies that include only routine proposals in their proxy statement are able to proceed directly to filing a definitive proxy statement with the SEC. A proxy statement containing a repricing proposal, however, must be filed in preliminary form with the SEC and may be filed in final form after 10 calendar days if there is no SEC review.

Tender Offer Rules.

The SEC has taken the position that a stock option repricing in the form of an exchange program involves an investment decision by employees, and if the offer is addressed to more than a small number of executive officers, the proposal will constitute an issuer tender offer. As a result, these exchange programs must comply with the requirements of Exchange Act Rule 13e-4,[8] the issuer tender offer rule, which, among other things, mandates the filing of a Schedule TO with the SEC, the distribution of related materials to employees, and a 20-business-day period for employees to consider the proposal. Depending on the specific provisions of a company's equity plan and whether incentive stock options (ISOs) are to be repriced, it is possible that a straight repricing of stock options, where only the exercise price of the award is affected, will not implicate the tender offer rules. However, even in a straight repricing, if ISOs are repriced, the resulting need to restart the required ISO holding periods may result in options holders needing to make an investment decision as to whether the reduced exercise price is worth restarting their holding periods.

Say-on-Frequency

For companies that held a say-on-frequency vote six years ago, it is now time to revisit the say-on-frequency vote. Companies that held a say-on-frequency vote at their 2017 annual meeting are required to again include a non-binding resolution in their proxy statements to ask shareholders how often they want to conduct say-on-pay votes for the next six years: once a year, once every two years or once every three years. ISS policy guidelines recommend annual say-on-pay frequency, which ISS believes provides the most consistent and clear communication channel for shareholder concerns about companies' executive pay programs. Companies that are not at the six-year anniversary of their latest say-on-pay vote are not required to present a say-on-frequency proposal this year. However, companies that are transitioning out of emerging growth company status will also need to include a say-on-frequency proposal this year.

Form 8-K for Say-on-Frequency.

Companies that are required to conduct their say-on-frequency vote this year must remember to report, under Item 5.07 of Form 8-K, the company's determination as to how frequently it will hold the say-on-pay vote in the Form 8-K required to be filed within four business days of the shareholder meeting (or by amendment to that Form 8-K filed no later than 150 calendar days after the date of the shareholder meeting at which the say-on-frequency vote was taken), but in no event later than 60 days prior to the deadline for the submission of shareholder proposals under Rule 14a-8 under the Exchange Act, for the subsequent annual meeting.

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Universal Proxy Card Rules and Voting Disclosure

The SEC's final rule amendments regarding the use of universal proxy cards, which went into effect in January 2022, apply to all shareholder meetings involving contested director elections held after August 31, 2022.[9] The new rules require the use of a universal proxy card in contested director elections and require enhanced disclosure and voting options in all director elections. Shareholder activism remains strong, and the new universal proxy card rule is a reminder that companies should assess their vulnerability to activist campaigns, review defenses and consider appropriate bylaw amendments. In addition, companies should evaluate the composition of their boards, as discussed in the section below, "Evaluating Board Composition in Preparation for Director Nominations," and consider updates to board membership.

Changes Applicable to Contested Elections.

Pursuant to new Rule 14a-19,[10] in a contested election, a universal proxy card must be used by both management and shareholders soliciting proxy votes. The universal proxy card must list all duly nominated director candidates for election at the shareholder meeting, regardless of whether the candidates were nominated by management or by a shareholder. Prior to this rule change, management and shareholders soliciting proxy votes listed their respective director nominees on separate proxy cards. Shareholders voting by proxy in a contested director election were unable to vote for a combination of director nominees from competing slates (as they could if they voted in person at the shareholder meeting). Under the new rule, the universal proxy card will list all of the nominated director candidates. As a result, it may be more likely that shareholders vote for some candidates nominated by management and some candidates nominated by an activist shareholder, though it remains to be seen whether the new rule leads to significant changes in the number of proxy contests and the success (or partial success) of such campaigns.

Changes Applicable to All Director Elections (Including Uncontested).

The SEC also adopted changes to the form of proxy and proxy statement disclosure requirements applicable to all director elections. The voting standard for director elections is determined by state law and a company's governing documents, with director nominees generally elected under either a plurality voting standard or majority voting standard. Under new Rule 14a-4(b),[11] the SEC mandated that when applicable state law gives legal effect to votes cast against a nominee (such as under a majority voting standard), then in lieu of providing a means for shareholders to "withhold authority" to vote, the form of proxy must provide a means for shareholders to vote "against" each nominee and a means for shareholders to "abstain" from voting.

Under a plurality voting standard, a director nominee can be elected to the board with a single vote in favor of the nominee's election, and votes withheld or voted against the nominee have no impact on the outcome of the election. New Rule 14a-4(b) requires that, when applicable state law does not give legal effect to votes cast against a nominee (such as under a plurality voting standard), the form of proxy must not provide a means for shareholders to vote "against" any nominee and instead must clearly provide a means for shareholders to "withhold authority" to vote for each nominee, by following one of the methods set forth in the new rule.

Evaluating Board Composition

As nominating committees and boards of directors prepare to make director nominations for their 2023 annual shareholder meetings, there are a number of factors that should be considered in evaluating the composition of the board and whether changes should be made to ensure that the mix of skills and qualifications of the board members enables the board to operate effectively in providing oversight of management and the company's business and carrying out its fiduciary duties. In this section, we discuss the board matrix, a tool that is often useful to a nominating committee and board of directors in evaluating the composition of the board, and recent developments relating to director diversity, overboarding and director interlocks, which are important considerations in the nominations process.

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The Board Matrix

Boards typically have determined certain minimum qualifications that nominees must have to be recommended by the nominating committee for election by the shareholders. These minimum qualifications generally relate to core required attributes like integrity, commitment, time availability and absence of conflicts of interest. Beyond those minimum qualifications, boards should aim to have a diverse mix of skills, experiences and backgrounds that cover all of the competencies needed for the board to carry out its responsibilities. One tool that many companies use to assess the complement of skills and qualifications of directors is a board matrix. A board matrix is a chart that lists the specific skills and qualifications that the nominating committee and the board believes should be held by one or more directors on the board across one axis and the names of the directors along the other axis, with a check mark or other marking showing which directors meet which skill or qualification listed in the matrix. The list of skills and qualifications included in the matrix should be tailored to the specific company and determined by the board and the nominating committee. For example, these skills and qualifications could include, depending on the specific company, experience or expertise in the following areas: industry knowledge, business strategy, sales and marketing, risk management, specific regulatory knowledge, specific technology knowledge, operations, C-suite level experience, international business, ESG, cybersecurity, mergers and acquisitions, public policy, corporate governance, finance and accounting, and legal. The matrix can be a useful tool in helping the board and nominating committee determine what director skills and qualifications are most important for the particular company and assess how well the current board composition covers those skills and qualifications or where there may be gaps. To the extent there are gaps (for example, if there is no director with expertise in cybersecurity matters), the board may decide to address the gap by nominating a director who has that particular skill or qualification or have an existing director acquire those skills or qualifications through board education or other means. In addition, the matrix may also be useful for board succession planning to identify future gaps with respect to skills and qualifications possessed by current directors who may step down from the board in the next few years. By using a structured process like the development and evaluation of a board matrix, nominating committees and boards are better able to assess the board's composition as the nominating committee prepares to make its nominating decisions in the current year and for board succession planning for the future.

Board Diversity

In 2021, the SEC approved Nasdaq's board diversity rule, and states continued to develop legislation to encourage board diversity, as detailed in our last annual memorandum. The rules generally attempt to codify investor and stakeholder sentiment that inclusive board representation and transparent diversity information is good governance and might be material to the corporate mission. Board diversity laws and regulations are typically either disclosure-based (such as the Nasdaq rules), requiring disclosure of diversity characteristics or explanation as to why the company does not meet the minimum board diversity objective, or mandates (such as California's law), imposing monetary or other penalties for failure to meet minimum levels of board representation.

Over the past year, the SEC and states have faced challenges to the new rules and laws. In April and May 2022, California courts found that the California board diversity mandates violated the California constitution's equal protection clause. In August 2022, the United States Court of Appeals for the Fifth Circuit heard oral arguments in a case brought against the Nasdaq board diversity rule, and a decision is pending.

Despite the judicial challenges, many Nasdaq companies have sought to comply with the new rules, and the push for diversity in the board room from stakeholders remains. The Nasdaq board diversity rule has also played an important role in establishing uniformity in diversity disclosure. Companies evaluating nominees may wish to consider disclosure standards, input from stakeholders and the value diverse representation brings to their board.

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Overboarding of Directors

As board service has become an increasingly demanding and time-consuming commitment, proxy advisory firms and institutional investors have continued their focus on the total number of director positions they consider appropriate for individuals to hold at any one time. As in past years, 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. Companies are also including whether director candidates will have adequate time to fulfill their obligations in the list of qualifications for director nominees in their nominating and governance committee charters.

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	**2 total** *(negative vote recommendations only at outside boards)*	**2 total** *(negative vote recommendations only at outside boards; service as an executive at a SPAC is not considered)*	**5 total; 3 for executive board chairs** *(mitigating factors may be considered; audit committee members are subject to additional considerations)*[12]
Black Rock	**2 total (1 outside)**	**2 total (1 outside)**	**4 total**
CalPERS	**2 total** *(vote against only at outside boards)*	**2 total** *(vote against only at outside boards)*	**4 total**
Fidelity	**3 total (2 outside)**	**Not specifically addressed**	**Not specifically addressed**
NYC Comptroller	**3 total** *(vote against only at outside boards)*	**4 total**	**4 total**
State Street	**2 total**	**2 total** *(applies to NEOs; service on a mutual fund or SPAC board is not considered)*	**4 total; 3 for board chairs or lead independent directors** *(service on a mutual fund or SPAC board is not considered; mitigating factors may also be considered)*
T. Rowe Price	**2 total (1 outside)**	**5**	**5**
Vanguard	**2 total (1 outside)** *(vote against only at outside boards)*	**2 total (1 outside)** *(applies to NEOs; 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; mitigating factors may also be considered)*

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Director Interlocks

When evaluating board composition and potential director nominees, boards and nominating committees should also consider whether directors or nominees also serve on a competitor's board of directors. In October 2022, the U.S. Department of Justice Antitrust Division (DOJ) announced that it required several directors to resign from simultaneously serving on the corporate boards of competitor companies. Section 8 of the Clayton Act provides that no person shall serve as the director or officer of two corporations when those corporations have capital of more than $41,034,000 or the companies have competitive sales of $4,103,400.[13] There are exceptions for when either corporation's competitive sales are less than two percent of that corporation's total sales or when the competitive sales of each corporation are less than four percent of that corporation's total sales. The Antitrust Division has required corporate directors to resign in the past over concerns that interlocking directorates may facilitate coordination between competitors and lessen competition. However, this recent announcement is notable because it shows an increased willingness by current Antitrust Division officials to pursue Section 8 violations and require interlocking directors to resign. The Antitrust Division highlighted that companies and corporate directors should expect continued enforcement of Section 8 by the Antitrust Division. Assistant Attorney General for Antitrust Jonathan Kanter noted that "The Antitrust Division is undertaking an extensive review of interlocking directorates across the entire economy and will enforce the law." Boards and nominating committees should, therefore, periodically assess whether any director or nominee serves on a competitor's board and evaluate whether that person can continue to serve on both boards in compliance with the Clayton Act. As part of this assessment, boards should also consider whether another company on whose board a director sits may become a competitor of the company in the future, based on the trajectory of the company's business and the other company's business.

For additional information about DOJ review of interlocking directorates, please see our Mintz Insights advisory, "DOJ Makes Good on Promise to Review Interlocking Directorates" (October 21, 2022).

Compensation Matters

New Pay-Versus-Performance Disclosure

In August 2022, the SEC released the final rule on the pay-versus-performance disclosure required under the Dodd-Frank Wall Street Reform and Consumer Protection Act. The long-awaited rule adds a new Item 402(v) to Regulation S-K, which is intended to address the Dodd-Frank mandate that companies disclose information that shows "the relationship between executive compensation actually paid and the financial performance of the issuer." Companies must include the new disclosure in proxy and information statements for fiscal years ending on or after December 16, 2022.

The final rules require a new table that will include the "total compensation" amounts included in the summary compensation table as well as a new calculation of compensation actually paid (CAP) that is derived from the total compensation of the summary compensation table with adjustments for pension benefits and equity awards (as described further below). The CAP amounts are disclosed alongside three measures of financial performance over the disclosure period: cumulative total shareholder return (TSR), net income, and a "company-selected measure." Based on the new tabular disclosure, companies must provide a clear description of the relationship between CAP and the three measures of financial performance. A description of the relationship between the company's TSR and the TSR of a peer group is also required. There is an additional requirement to include a list of the most important financial measures used by the company to link compensation actually paid to the named executive officers to company performance. Between three and seven measures are to be disclosed, with the most important measure to be included in the table as the "company-selected measure." The relationship between pay and performance must be addressed for both the principal executive officer and the average CAP of the company's other named executive officers. Initially, the disclosure period will cover the last three years, and then will expand to five years going forward.

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Applicability to Emerging Growth Companies, Foreign Private Issuers and Smaller Reporting Companies.

Emerging growth companies and foreign private issuers are exempt from the new rules. Smaller reporting companies are subject to reduced disclosure requirements. Smaller reporting companies are only required to provide disclosure for the most recent three years and are allowed initially to provide disclosure for two years, expanding to three years going forward. In addition, adjustments to CAP are not required with respect to pensions. Smaller reporting companies are also not required to provide peer group TSR, a company-selected measure or a list of the most important financial measures used to link CAP to performance.

Equity Award Calculations.

To prepare for the required disclosure, companies should begin coordinating with their finance, legal and human resources teams and outside advisors (valuation experts or compensation consultant, investor relations and legal counsel) to begin the required calculations of equity compensation. For most companies, this will be the most time-consuming aspect of the new disclosure. With respect to equity awards, the CAP disclosure in the new pay-versus-performance table essentially deducts the grant date fair value amounts reported in the summary compensation table and adds back in new amounts based on the value of outstanding awards that either vested during the year or remain unvested at year-end.

For awards with multiple vesting dates during the year, option awards valued based on a Black-Scholes model, and awards with market condition vesting criteria, the required calculations may require an outside valuation expert. For example, restricted stock unit awards have a straightforward valuation based on the company's stock price on the valuation date. However, as with grant date valuations under ASC 718, performance awards with a market-based condition (such as stock price or TSR) must be valued using a Monte Carlo simulation or similar calculation. For awards vesting based on non-market performance conditions (such as EPS, adjusted EBITDA or company business goals), valuations will take into account both stock price on the measurement date and the payout expectation for the award. Determining the appropriate valuation metrics for valuing options using a Black-Scholes formula also raises complications. We may see additional interpretive advice from the SEC on some of these issues later this year.

TSR Peer Group and Company-Selected Measure Decisions.

The rule provides for limited choice of which TSR peer group to use as a comparison to the company's TSR. Companies may choose either the peer group used for the company's performance graph required by Item 201(e) of Regulation S-K or the peer group used in the Compensation Discussion and Analysis (CD&A). Going forward, changes to the peer group will require disclosure of the reason for the change and a comparison of the company's TSR to the TSRs of both the previous and new peer groups. Given the changes to many companies' CD&A peer groups over time, companies may want to consider the advantages of using the performance graph index for this new disclosure. TSR is measured (as it is under Regulation S-K Item 201(e) for the performance graph) based on an investment of $100 at the start of the period using the company's stock price on the last trading day before the earliest fiscal year in the table through the applicable fiscal year-end date.

For an analysis of the company's list of most important financial measures used to link CAP to performance, companies may want to consider award metrics included in the current year's annual bonus and equity awards, and consult with the compensation committee and compensation consultant.

Location of Pay-Versus-Performance Disclosure.

The rules allow companies to determine where in the proxy statement to include the new pay-versus-performance table and related disclosures. We expect that companies will generally include the required disclosure outside of the CD&A at the end of the company's other tabular compensation disclosures. The rules do not require the new disclosure in the company's Form 10-K and registration statements, and the new disclosure will not be deemed to be incorporated by reference into any filing under the Securities Act of 1933 or the Exchange Act, except to the extent that the company specifically incorporates it by reference.

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Impact on the CD&A.

As noted above, we expect that the new disclosure will generally not be included in the CD&A unless the compensation committee uses the pay-versus-performance information to make compensation decisions. However, companies should review the new disclosure to determine whether the disclosure captures the intent of its executive compensation program. Seeing a draft of the pay-versus-performance table early in the year-end process and in advance of the preparation of the CD&A will help companies decide how to approach the table's related narrative disclosure and allow the compensation committee to approach the 2023 CD&A with the upcoming disclosures in mind, including consideration of how to best address any perceived disconnect between the new pay-versus-performance disclosure and the CD&A discussion.

For additional information about the new pay-versus-performance rules, please see our Mintz Insights advisory, "SEC Adopts Pay Versus Performance Compensation Disclosure Requirements" (September 26, 2022).

New SEC Clawback Requirements

In October 2022, the SEC adopted new Exchange Act Rule 10D-1, implementing Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which will require listed companies to implement policies providing for recovery (clawback) of erroneously awarded incentive compensation.[14] The new rule directs the national securities exchanges to establish listing standards that require issuing companies to (i) adopt and comply with written policies for the recovery of erroneously awarded incentive-based compensation for executive officers over a three-year period congruent with existing financial reporting requirements of Section 10D of the Exchange Act, and (ii) disclose their recovery policies in accordance with SEC rules. The clawback requirement will apply to all current and former executive officers of an issuer.

In a notable departure from the version of the clawback rules that was proposed in 2015, the final rules apply to all restatements, including both "little r" restatements that correct errors that are not material to previously issued financial statements but that would result in a material misstatement if the errors were left uncorrected in the current report, and "big R" restatements that correct errors that are material to previously issued financial statements. In the adopting release, the SEC noted that both types of restatements address material noncompliance of the issuer with financial reporting requirements, therefore warranting the application of the clawback policy.

Issuers and exchanges are responsible for ensuring that clawbacks are made where appropriate. Rule 10D-1 includes limited exceptions for impracticability, including circumstances where the cost of recovering the funds would exceed the funds to be recovered; recovery would violate home country law; or recovery would cause an otherwise tax-qualified retirement plan to fail to meet the requirements of the Internal Revenue Code. Companies must disclose their decision not to pursue recovery.

The SEC also adopted amendments to include new disclosure requirements related to the required clawback policies. The amendments to Item 402 of Regulation S-K, Form 40-F and Form 20-F (and for listed funds, Form N-CSR) require a listed issuer to file its clawback policy as an exhibit to its annual report and disclose how it has applied the policy. If applicable, an issuer must explain the date it was required to prepare an accounting restatement and the aggregate dollar amount of erroneously awarded compensation attributable to the restatement; the aggregate amount outstanding and any amounts from any current or former executive officer outstanding for 180 days or more; and details regarding reliance on the impracticability exceptions.

The rules and amendments take effect January 27, 2023. Exchanges are required to file proposed listing standards by February 27, 2023, and the listing standards must take effect no later than November 28, 2023. Issuers will be required to adopt a clawback policy no later than 60 days following the date on which the applicable listing standards become effective on the exchange. Issuers then must begin to comply with the disclosure requirements in proxy and information statements and the issuer's annual report filed on or after the date the issuer adopts its clawback policy.

For additional information about the new SEC clawback requirements, please see our Mintz Insights advisory, "SEC Adopts New Incentive-Based Compensation "Clawback" Rule" (November 30, 2022).

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SEC Regulatory Updates

Mandatory Electronic Filing of Form 144

The SEC is again seeking to shine a light on the trading activity of public company affiliates (generally executive officers, directors and greater than 10% shareholders). In addition to the new proposed disclosure obligations for 10b5-1 plans discussed below, the SEC is set to require the filing of Form 144 notices on EDGAR.

As background, affiliates have long been required to file Form 144 notices in connection with resales of public company securities involving more than 5,000 shares or an aggregate sales price of more than $50,000 in a three-month period.[15] However, unlike Section 16 filings, which generally must be filed within two business days of a completed acquisition or disposition of a company's securities, a Form 144 must be filed concurrently with the placement or execution of an order for a covered sale.[16] Though filing on the SEC's EDGAR system has long been available, the vast majority of these Form 144 notices are not filed on EDGAR. Rather, brokers typically file these forms on paper or by email. As discussed in our viewpoint on the subject, these paper and email filing methods made it challenging for those, including third-party watchdog groups such as The Washington Service,[17] seeking to monitor planned affiliate sales.

So, effective April 13, 2023, and partly in an effort to increase transparency, the SEC's new rule[18] will require affiliates to file Form 144 notices on EDGAR. The SEC published a filer manual[19] to aid affiliates and their brokers in making these filings, but, as described in the manual, some administrative planning is required. Issuers and filers (or their representatives) must obtain SEC filing codes (a process that can take a week or more) in advance of planning trades, and brokers will likely need to update their typical procedures to accommodate the EDGAR filing method. Substantively though, whether EDGAR access to Form 144 notice information will result in comparatively more SEC investigations, claims of insider trading or other plaintiffs' claims remains to be seen.

Pending Climate Disclosure Requirements

On March 21, 2022, the SEC unveiled its long-anticipated rules on climate disclosures, entitled "The Enhancement and Standardization of Climate-Related Disclosures for Investors."[20] If implemented as written, the proposed rules would require public companies to make significant additional disclosures regarding the impact of climate-related risks on their business.

It should be noted, however, that the SEC's proposed climate disclosure rules have not yet been finalized. Further, during the public comment period, these proposed rules received approximately 15,000 comments — an overwhelming and voluminous response — from individuals and organizations representing all aspects of modern American society. And these comments include not only simple statements either in favor or opposed to the rules, but also detailed proposals for further changes to the proposed climate disclosure rules. It is altogether possible that the final rules on climate disclosures will be adjusted significantly based upon the public response. (For example, common suggested changes — among both proponents and opponents of the proposed rules — were to omit the disclosure of Scope 3 greenhouse gas (GHG) emissions and to extend the length of the phase-in period before the proposed rules enter into force.)

Additionally, the proposed climate disclosures will almost certainly face significant legal challenges. The Republican SEC Commissioners have telegraphed continued opposition to these rules since the proposed climate disclosures were first suggested, and have publicly articulated various legal theories that could challenge these rules — in particular, that the SEC has exceeded its authority and so these proposed rules are *ultra vires*. In the aftermath of *West Virginia v. EPA*,[21] it is quite possible that the courts will favorably evaluate such challenges to the SEC's authority in this context.

Nonetheless, as a practical matter — even considering the likelihood that these proposed climate disclosures may ultimately be adjusted or even vitiated by a successful legal challenge — it is prudent to undertake certain steps to prepare for the possibility that the proposed climate disclosures will enter into effect.

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Proposed Key Disclosures.

The overall content of the SEC's proposed climate disclosure rules is in accordance with what many industry professionals had anticipated. The SEC has used the guidelines issued by the Task Force on Climate-Related Financial Disclosures (TCFD) as the basis for the proposed regulations. It has also relied upon the Greenhouse Gas Protocol (GHG Protocol) for a reporting framework with respect to GHG emissions. Nonetheless, these proposed rules represent a significant potential change that will have a substantial impact on market participants. If the rules are adopted as proposed, key SEC filings — including the Form 10-K — will require statements about GHG emissions and climate change. Public companies will have to report on how their boards of directors are responding to the challenge of climate change and identify whether any of their directors possess expertise on the issue. Notably, one impact of these proposed rules will be to provide additional information that could be utilized to initiate or maintain public pressure on companies.

The SEC's proposed climate disclosure rules are detailed, numerous and often technical. A few of the most salient disclosures are described briefly below.

First, under the SEC's proposed climate disclosures, public companies will have to disclose certain kinds of GHG emissions. The SEC has structured its proposed GHG disclosure rules in accordance with the GHG Protocol and its concept of "scopes," which distinguish between direct and indirect emissions. Simply stated, Scope 1 emissions are direct GHG emissions by the company, Scope 2 emissions are the GHG emissions that the company is indirectly responsible for based upon its consumption of electricity, and Scope 3 emissions reflect the indirect GHG emissions relating to the company's supply chain and products. However, recognizing the burden and difficulty of calculating Scope 3 emissions, the SEC has stated that Scope 3 emissions need only be disclosed if they are material (unlike Scope 1 and Scope 2 emissions, which are to be disclosed regardless of any materiality determination), that smaller reporting companies are exempt from such disclosures and that a limited safe harbor provision applies. These reporting requirements are scheduled to be phased in over a period of three years, depending on the type of disclosure and the size of the company.

Second, the SEC's proposed climate disclosure rules require that a company disclose "any climate-related risks" that are "reasonably likely to have a material impact," and that these material climate-related risks must be disclosed "over the short, medium, and long term."[22] (The SEC has not defined the relevant time periods corresponding with "short, medium, and long term.") Notably, the SEC has indicated that the forward-looking statement safe harbor established by the Private Securities Litigation Reform Act would apply to these disclosures. On a related note, the SEC has also mandated certain other disclosures relating to a company's internal assessment and evaluation of the potential impact of climate change, including, if applicable, "an internal carbon price" and any "scenario analysis . . . [pertaining to] foreseeable climate related risks."[23] In effect, the SEC is demanding that companies disclose their internal analyses concerning adaptions to climate change; however, the SEC is only mandating such disclosures if the company engages in such analysis — the SEC is not compelling companies to undertake this sort of analysis or specifying a particular methodology to adopt when engaging in such efforts.

Third, the SEC has proposed significant, prescriptive changes to corporate governance with respect to matters concerning climate change and related disclosures. The SEC's proposed rules would require, among other things, that a company disclose: (1) information concerning the board's oversight of climate-related risks as well as management's role in assessing and managing those risks; (2) whether any member of its board of directors has expertise in climate-related matters; (3) the processes and frequency by which the board discusses climate-related factors; (4) whether certain management positions are responsible for assessing and managing climate-related factors; and (5) the processes by which the responsible managers are informed about and manage climate-related factors. (In effect, by mandating disclosures about these topics, the SEC is encouraging companies to adopt governance structures aligned with these disclosure requirements.)

Overall, the SEC's proposed rules concerning climate disclosures will require public companies to disclose significantly more information, and, by implication, to focus on and adopt climate-conscious policies.

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Preparations for New SEC Rules.

Companies should take several steps in preparation for addressing the SEC's proposed climate disclosures.

First, companies should focus on generating, collecting and analyzing consistent and comparable data to respond to the proposed climate disclosures, particularly with respect to GHG emissions. These data should be actively monitored by managers and board members and incorporated, where appropriate, into internal metrics and goals.

Second, companies should undertake an internal assessment of the obligations and risks they face with regard to the proposed climate disclosure rules. In particular, companies should identify "any climate-related risks reasonably likely to have a material impact on [their] business or consolidated financial statements." [24] What is determined to be a material climate-related risk will necessarily vary by company. This assessment process should be properly documented.

Third, companies should begin implementing appropriate governance structures so that they are aware of, and can take steps to address, risks identified by the newly proposed climate disclosures, as well as aligning the governance approach with the SEC's guidance in the proposed climate disclosure rules. Directors should establish responsible committees and internal information and reporting procedures to ensure board members have proper oversight of these efforts, and to ensure that the responsible parties possess the necessary expertise.

While undertaking and implementing these various steps — namely, the development of significant governance and reporting structures — it is advisable that corporate executives and boards seek input from subject matter experts and experienced legal counsel to help design and adopt these innovations. Such input can discourage or forestall future regulatory action or litigation.

Finally, it must be emphasized that all of the various actions companies can undertake in order to prepare for the SEC's proposed climate disclosures will involve an expenditure not only of resources, but, significantly, of time. Realistically, it will not be possible to implement the necessary policies that can generate the requisite information in order to comply with the proposed disclosures without allotting sufficient time to do so. In order to fully prepare for these new disclosures, companies should embark on, at minimum, the initial steps of the processes outlined above without delay.

Rule 10b5-1 and Insider Trading

In December 2021, the SEC released proposed rules that would add new conditions to the existing affirmative defense under Rule 10b5-1, as discussed in our last annual memorandum.[25] The proposed rules also include disclosure requirements regarding insider trading policies, the adoption and modification of certain trading arrangements and the timing of equity compensation awards made to directors and officers in close proximity in time to the company's disclosure of material nonpublic information. The comment period for the proposed rules ended in April 2022, and the final rules are expected in April 2023. Although the proposed rules are not in effect, companies should be aware that the new disclosure requirements, once adopted, may apply to compensation actions taken during the 2023 fiscal year.

Mandatory Cooling-Off Period for Rule 10b5-1 Trading Plans.

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 nonpublic information. Much attention to the rule proposal has focused on the proposed requirement for company officers and directors to wait after adopting or amending a Rule 10b5-1 trading plan (a cooling-off period) for a minimum of 120 days before transactions under the plan may begin. Public comment letters filed with the SEC have both objected to and expressed support for the cooling-off period requirement.[26] 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. Although the proposed rules have not been adopted by the SEC, some companies have opted to impose the requirement of a 120-day cooling-off period for their officers and directors. Many companies, however, have continued to use a shorter cooling-off period, consistent with market practice prior to the proposed rule.

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In September 2022, the SEC signaled its continued interest in a 120-day cooling-off period in a cease-and-desist order issued in connection with an insider trading case. In the order, the SEC included a requirement for the respondent to adhere to a 120-day cooling-off period for his future Rule 10b5-1 trading plans.[27] The order was agreed to in connection with an action brought against executive officers of Cheetah Mobile, Inc., a mobile internet company. According to the SEC's order, the executive officers established a Rule 10b5-1 trading plan while aware of material nonpublic information about the company and sold securities under the Rule 10b5-1 trading plan prior to the company's disclosure of the relevant information. Notably, one of the undertakings imposed by the SEC's cease-and-desist order is a requirement that, for a period of five years from the date of the order, if the executive establishes a new Rule 10b5-1 trading plan or modifies the terms of an existing Rule 10b5-1 trading plan with respect to the company's securities, the executive must cause the terms of such Rule 10b5-1 trading plan to provide that no transactions pursuant to the Rule 10b5-1 trading plan or its modification shall occur until the expiration of a cooling-off period of at least 120 days from the adoption or modification of such Rule 10b5-1 trading plan.

Disclosure of Equity Grant Timing.

The Rule 10b5-1 and Insider Trading rule proposal also includes amendments to disclosure requirements for executive and director compensation. The proposed additional disclosure is designed to address concerns with option grant "spring-loading" (granting options immediately prior to the release of positive material nonpublic information) and "bullet-dodging" (delaying grant of a planned option award until after the release of material nonpublic information that is likely to decrease the company's stock price).

Under the proposal, an addition to Item 402 of Regulation S-K would require a table in the proxy statement listing each option award granted within 14 calendar days before or after the filing of a periodic report, an issuer share repurchase, or the filing or furnishing of a current report on Form 8-K that contains material nonpublic information. The table would set forth the number of securities underlying the award, the date of grant, the grant date fair value and the option's exercise price, along with the market price of the underlying securities on the trading day after disclosure of the material nonpublic information. In addition, narrative disclosure would be required in the proxy statement about the company's grant policies and practices regarding the timing of option grants and the release of material nonpublic information, including how the board determines when to grant options and whether the board or compensation committee takes material nonpublic information into account when determining the timing and terms of an award.

In anticipation of the final rules, which are expected in April 2023, companies may want to review their option grant practices and plan for future disclosure obligations.

Privacy Legislation, Data Protection and Cybersecurity Disclosure

Data privacy and cybersecurity continue to make headlines as data breaches and ransomware attacks increase in number and scope and rapid global regulatory changes increase the cost of compliance. In addition, nation-state-sponsored attacks are on the rise, as evidenced by the dedication of U.S. government resources to combat these threats and alert the business sector. In January 2022, President Biden signed a National Security Memorandum which sets out specific cyber requirements for government agencies and contractors, such as multifactor authentication, encryption, cloud technologies and endpoint detection services.[28] In March 2022, Congress passed, and President Biden signed, the Strengthening American Cybersecurity Act, which requires entities in 16 key sectors such as telecommunications, financial services and healthcare (critical infrastructure) to report cyber incidents within 72 hours and ransomware payments within 24 hours to the Department of Homeland Security's Cybersecurity & Infrastructure Security Agency (CISA).[29] CISA issues continuous updates through its Shields Up program, and in April 2022, CISA issued a fact sheet, "Guidance on Sharing Cyber Incident Information," to provide guidance on how to share information about unusual cyber incidents or activity.[30]

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Privacy Legislation Updates.

As we covered in our Mintz Insights advisories, an omnibus federal privacy act, the American Data Privacy and Protection Act, is stalled in Congress, and further action is unlikely in this session of Congress. In the absence of federal legislation, states continue to enact statutes and regulations that present companies with a patchwork of compliance obligations. 2023 will see new laws in Virginia (effective January 1, 2023), Connecticut (effective July 1, 2023), Colorado (effective July 1, 2023), and Utah (effective December 31, 2023). California's Privacy Rights Act (CPRA), amending the California Consumer Privacy Act (CCPA), also takes effect on January 1, 2023 and brings employee and business personal information under the law, requiring companies doing business in California to reassess compliance. State enforcement of data privacy and cybersecurity breaches has increased, along with the cost. California issued its first fine under the CCPA in the amount of $1.2 million, and the New York Attorney General has enforced its NY SHIELD Act by fining companies over $3,000,000.[31] In addition, the Federal Trade Commission has zeroed in on data privacy and security as a central role, and 2023 may see increased enforcement and regulation.

Proposed SEC Rules.

Of most interest, and importance, to market participants is the March 2022 publication by the SEC of draft rules (the Proposed Rules) proposing sweeping cybersecurity reporting and governance requirements. [32] The comment period for the Proposed Rules was open until May 2022, and the agency received thousands of comments, delaying the publication of final rules. According to the SEC's 2023 regulatory calendar, it is expected that final rules will be published in April 2023.

The Proposed Rules are extensive, and for details, please see our Mintz Insights advisory, "SEC Proposes New Cybersecurity Rules for Public Companies" (March 21, 2022). As a summary, the Proposed Rules are designed to standardize cybersecurity-related incident reporting, governance and risk management, and emphasize the increasing importance of cybersecurity as a dimension of corporate governance. Their stated purpose is to provide "consistent, comparable, and decision-useful" information to investors. If adopted as published, the Proposed Rules will require public companies to disclose: (1) any cybersecurity incidents within four business days of the company's determination that the incident is "material"; and (2) on an annual basis, describe its cybersecurity risk management policies and procedures, governance practices and to what extent board members possess cybersecurity expertise.

As defined in the Proposed Rules, several nonexclusive illustrative examples of "material" cybersecurity incidents include the accidental exposure or theft of sensitive business information or intellectual property, damage or loss of control of operational technology, ransomware attacks and threats to sell or publicly disclose sensitive company data. The Proposed Rules do not shed any further light on "materiality" in the context of cybersecurity incidents.

The Proposed Rules require disclosure of the following information to the extent it is known:

- when the incident was discovered and whether it is ongoing;
- a brief description of the nature and scope of the incident;
- whether any data was stolen, altered, accessed or used for any other unauthorized purpose;
- the effect of the incident on the company's operations; and
- whether the company has remediated or is currently remediating the incident.

The Proposed Rules would further require disclosure of any updates in successive Forms 10-Q and 10-K regarding:

- any material changes or updates to the cybersecurity incidents that were previously disclosed in Form 8-K; and
- any previously undisclosed and individually immaterial cybersecurity incidents that have become material in aggregate.

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It will be critical for public companies to have robust cybersecurity incident planning and infrastructure in place to enable such determinations and reporting capabilities.

The Proposed Rules also require companies to include expanded Form 10-K disclosures regarding policies and procedures they have adopted to identify and manage cybersecurity risks and threats, including (1) operational risk; (2) intellectual property theft; (3) fraud; (4) extortion; (5) harm to employees or customers; (6) violation of privacy laws and other litigation and legal risk; and (7) reputational risk.

Items that would require disclosure include whether:

- the company has a cybersecurity risk assessment program and if so, a description of the program;
- the company engages consultants, auditors or other third parties in connection with any cybersecurity risk assessment program;
- the company has policies and procedures to oversee and identify the cybersecurity risks associated with its use of any third-party service provider;
- the company undertakes activities to prevent, detect and minimize the effects of cybersecurity incidents;
- the company has business continuity, contingency and recovery plans in the event of a cybersecurity incident;
- previous cybersecurity incidents have informed changes in the company's governance, policies and procedures, or technologies;
- cybersecurity-related risk and incidents have affected or are reasonably likely to affect the company's results of operations or financial condition; and
- cybersecurity risks are considered part of the company's business strategy, financial planning and capital allocation.

The Proposed Rules also require public companies to disclose their cybersecurity governance at the board and management levels, as well as the board's oversight of cybersecurity risk.

Practical Considerations.

As we have written about in the past, while the SEC has long required companies to disclose information regarding cybersecurity incidents, as a practical matter, the Proposed Rules constitute a new regime of cybersecurity obligations. It remains to be seen what the final rules will look like, but public companies should have started to prepare for 2023 disclosures and ensure that cybersecurity risk is calculated within the board's risk management framework (or that of a designated board committee) and that clear risk management procedures are in place. The Proposed Rules identify a list of considerations that must be disclosed concerning cybersecurity strategies, which can be seen as a view into the SEC's expectations regarding what a robust cybersecurity program should look like.[33] Companies should also contemplate increasing cybersecurity expertise at the board level, including whether committee oversight would be appropriate.

Litigation and Court Decisions Impacting Corporate Governance and Disclosures

Diversity, Equity and Inclusion initiatives, SPACs and the continued fallout from COVID-19 all played prominent roles in securities and corporate governance litigation in 2022. One of the more prominent decisions in these areas was *Crest v. Padilla*, Case No. 19STCV27561 (Los Angeles County Superior Court May 13, 2022) (now under appeal), which found unconstitutional California's statute requiring that California corporations and foreign corporations with principal places of business in California have a minimum number of women on their boards.[34] And while SPAC litigation and COVID-19 litigation also grabbed plenty of headlines in 2022, there were numerous other decisions worth noting, as set forth below.

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Continued Viability of SEC Administrative Proceedings

Two decisions out of the Fifth Circuit raise several questions over the SEC's continued ability to use administrative proceedings to enforce violations of federal securities laws. In *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), the petitioner was a hedge fund manager who was named as a respondent in an SEC administrative proceeding.[35] After an evidentiary hearing, the SEC found that he had engaged in securities fraud and imposed on him a civil penalty, disgorgement, and barred him from participating in various securities market activities. The Fifth Circuit vacated the SEC's order from the administrative proceeding because, among other reasons, (1) the administrative proceeding was unconstitutional because it deprived the petitioner of his right to a jury trial that was triggered by the SEC seeking a civil penalty, and (2) Congress impermissibly delegated to the SEC the ability to bring enforcement proceedings administratively or in court without providing an "intelligible principle" to guide how the SEC should exercise that delegated power.

On May 16, 2022, the U.S. Supreme Court granted certiorari in a decision by the Fifth Circuit from December 2021, *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021), which held that the petitioner had the right to challenge the constitutionality of the SEC's administrative proceeding against her prior to resolution of that proceeding.[36] While the jurisdictional question posed by *Cochran* is more procedural in nature, it still represents an erosion of the inviolability of the SEC's administrative proceedings.

Rejection of Shareholder Demand Can Be an Independent Breach of Duty

In *Garfield v. Allen*, 277 A.3d 296 (Del. Ch. 2022), the Court of Chancery held that a board's rejection of a shareholder demand itself gave rise to a breach of fiduciary duty claim that the shareholder could pursue.[37] In *Garfield*, the plaintiff alleged that a committee of the company's board of directors made an improper equity grant under the company's equity compensation plan. Notably, the plaintiff also brought a breach of fiduciary duty claim against each board member based on the allegation that the board refused to reverse the improper equity grant when he brought it to their attention in a demand letter he sent them. In recognizing the viability of this claim, the court observed that "[t]here is something disquieting about a plaintiff manufacturing a claim against directors by acting as a whistleblower and then suing because the directors did not respond to the whistle." But, despite this misgiving, the court went on to find that "[n]evertheless, the logic of the plaintiff's theory is sound: Delaware law treats a conscious failure to act as the equivalent of action, so if a plaintiff brings a clear violation to the directors' attention and they do not act, then it is reasonably conceivable that the directors' conscious inaction constitutes a breach of duty."

Breach of Duty of Loyalty Claims Against Directors Appointed by an Activist Shareholder

In *Goldstein v. Denner*, C.A. 2020-1061-JTL (Del. Ch. May. 26, 2022), the Court of Chancery refused to dismiss claims against two directors because it found the complaint adequately alleged that the directors, who had been appointed by an activist shareholder, were subject to non-exculpated claims for breach of the duty of loyalty.[38] The *Goldstein* case involved Sanofi's acquisition of Bioverativ, Inc. The plaintiffs asserted various claims for breaches of fiduciary duty against members of the Bioverativ board in connection with the sale process that greatly benefited the activist shareholder. Prior to the sale process, the activist investor had been able to appoint two individuals to the company's board. The plaintiffs brought breach of fiduciary duty claims against these two directors, and alleged that they were sufficiently interested in the sale (which benefitted the activist shareholder) so as to be subject to a claim for a breach of the duty of loyalty. In determining whether claims for breach of the duty of loyalty have been properly alleged against these two directors, the court observed how the allegations made it plausible to conclude that the activist shareholder "cultivates symbiotic relationships in which he helps individuals secure lucrative directorships on the boards of the companies," and in return, these individuals back his "goals in his activist campaigns." After examining the relationship between each of the two directors and the activist shareholder, the court ultimately determined that the allegations supported a rational inference that the directors did not act in good faith with respect to the sale process based on the relationship each of those two directors had with the activist shareholder, including being appointed to other boards by the activist shareholder. The court concluded that the complaint created plausible allegations that these two directors put the interests of the company aside in favor of the interests of the shareholder, both as gratitude for being appointed to the board and in expectation of future rewards.

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Second Circuit Weighs In on "Scheme" Liability Under Section 10(b)

Section 10(b) of the Exchange Act prohibits an individual from making misleading representations, but also prohibits a broader range of "non-representational" conduct that is fraudulent in nature — so called "fraudulent scheme" liability. Because claims alleging misleading representations can only be brought against the person who "made" the statement, Section 10(b)'s prohibition on fraudulent schemes can be used to impose direct liability under Section 10(b) on a broader range of persons. Over the years, courts have grappled with the question of what type of conduct is sufficient to allege a fraudulent scheme, as opposed to conduct that simply consists of misleading statements. In *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019), the Supreme Court provided some clarity on this issue by ruling that fraudulent scheme claims could be brought against a broker who personally disseminated a letter (that he did not write) that contained false and misleading statements.[39]

In *SEC v. Rio Tinto plc*, 41 F.4th 47 (2d Cir. 2022), the Second Circuit provided additional clarity — post-*Lorenzo* — of what a plaintiff must allege to bring a claim based on a fraudulent scheme.[40] The *Rio Tinto* case involved fraudulent scheme claims that the SEC brought against *Rio Tinto*'s CEO and CFO. The lower court dismissed the fraudulent scheme claims because all of the fraudulent scheme allegations were premised on allegedly misleading statements. On appeal, the Second Circuit affirmed this dismissal and explained that "misstatements and omissions can form *part* of a scheme liability claim, but an actionable scheme liability claim also requires something *beyond* misstatements and omissions, such as dissemination."

When Is There an Obligation to Disclose Government Investigations?

In *Noto v. 22nd Century Group, Inc.*, No. 21-0347 (2d Cir. May 24, 2022), the Second Circuit provided guidance on when a company is obligated to disclose that it is the subject of a government investigation.[41] While there is no general duty to make such a disclosure in every instance, the Second Circuit reiterated that such disclosure is necessary in order to make disclosures already made not misleading. But the details of the *Noto* case indicate that such a duty may exist much more broadly than previously believed.

The *Noto* case focused on disclosures made by a company admitting that its internal controls over financial reporting were not effective and that material weaknesses existed with respect to its financial reporting. The company further disclosed that it was taking remediation efforts. Ultimately, the company disclosed that it had tested a plan designed to eliminate the prior weaknesses. At the same time that it was making these disclosures, the plaintiffs alleged that the SEC was investigating the company's financial controls. But the company did not disclose the fact of the investigation. The Second Circuit stated that the company had a duty to disclose the existence of the SEC investigation because "the fact of the SEC investigation would directly bear upon the reasonable investor's assessment of the severity of the reported accounting weaknesses," and that the "nondisclosure remained a material omission even after the company represented that it had rectified the problem because the SEC investigation was ongoing."

Company's Strict Adherence to Advance Notice Bylaw Requirements Upheld

In *Strategic Investment Opportunities LLC v. Lee Enterprises*, C.A. No. 2021-1089-LWW (Del. Ch. Feb. 14, 2022), the court upheld a company's strict enforcement of an advance notice bylaw to reject a notice by a potential acquirer nominating three board member candidates to be voted on at the company's annual shareholder meeting.[42] The company rejected the nomination notice because it was not submitted by a shareholder of record (the acquirer and its affiliates were merely beneficial owners) and because it did not contain the information that the bylaws required it to contain. The potential acquirer then brought suit, alleging that the company violated its bylaws and that the board members breached their fiduciary duties in rejecting the nomination notice. The court first found that the nomination notice did not comply with the bylaws, and so its rejection was facially valid. But the court did not end its inquiry there and noted that it also must consider "whether the bylaw is being enforced fairly, in furtherance of a legitimate corporate purposes, or whether equity demands that it be set aside in the given context." In finding that enforcement of the bylaw was proper, the court focused on the facts that (a) the bylaw was adopted well before the take-over attempt, (b) the bylaw was neither facially problematic nor unreasonable, and (c) the board did not engage in any manipulative conduct designed to make the nomination process more difficult.

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2023 Proxy Advisors Voting Guidance Updates

Selected noteworthy updates to the U.S. corporate governance and executive compensation policy guidelines of proxy advisors ISS[43] and Glass Lewis[44] (GL) are outlined in the chart below.

	ISS	GL
Governance Updates		
Climate	For "high emitting companies" (identified by Climate Action 100+): Generally recommend against appropriate director(s) if company has not adequately disclosed climate risks and does not have appropriate GHG emission reduction targets covering the vast majority (95%) of its operational emissions.	For companies whose GHG emissions are a financially material risk (such as those identified by Climate Action 100+): May recommend against appropriate director(s) if company has not adequately disclosed climate risks (as recommended by TCFD) or does not have clear climate-related oversight responsibilities.
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 (or other directors on a case-by-case basis) of companies with no women on their board (unless there was at least one woman on board at last annual meeting and board commits to return to gender-diverse status within a year).	For Russell 3000 companies: Generally recommend against nominating committee chair of board with fewer than 30% female / non-binary directors. For non-Russell 3000 companies: Generally recommend against nominating committee chair of board with no female / non-binary directors. May refrain from negative recommendation if board discloses sufficient rationale or plan to address lack of diversity.
Underrepresented Community Diversity		For Russell 1000 companies: Generally recommend against nominating committee chair of board with no directors from an "underrepresented community" (including individuals self-identifying as Black, African American, North African, Middle Eastern, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, Alaskan Native, or gay, lesbian, bisexual or transgender). May refrain from negative recommendation if board discloses sufficient rationale or plan to address lack of diversity.

(Table continues...)

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CA State Laws on Board Diversity		Generally refrain from recommendations pursuant to CA state law board composition requirements (as these laws are currently in the appeals process after being deemed unconstitutional in CA state court).
Disclosure of Director Diversity and Skills		For Russell 1000 companies: Generally recommend against nominating committee chair and/or governance committee chair of company that fails to provide disclosure regarding its directors' diversity / skills in its proxy statements. Also, generally recommend against governance committee chair of company with no disclosure of director racial / ethnic minority demographics.
Board Responsiveness		When 20% or more of shareholders vote against management, board needs to engage and respond. When a majority or more of shareholders vote against management, board needs to provide a "robust response." In controlled companies / companies with unequal voting rights, GL takes "one share, one vote" position.
Environmental and Social Risk Oversight		For Russell 1000 companies: Generally recommend against governance committee chair of company that fails to provide disclosure regarding board-level oversight of environmental and social issues. For Russell 3000 companies: GL now tracking board-level oversight of environmental and social issues.
Director Commitments		For Russell 1000 companies: Generally recommend against governance committee chair of company that fails to provide disclosure regarding board-level oversight of environmental and social issues. For Russell 3000 companies: GL now tracking board-level oversight of environmental and social issues.

(Table continues...)

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Cyber Risk Oversight		Generally refrain from recommendations regarding directors' oversight / disclosure of cyber-related issues, but may recommend against director(s) if there is significant harm to company's shareholders due to cyber-attacks where director oversight / disclosure was insufficient.
Multi-Class Capital Structure with Unequal Voting Rights	As of February 1, 2023: Generally recommend against relevant directors or entire board of a company with a common stock structure with unequal voting rights. Exceptions include: (i) newly public companies with sunsets of 7 years or less on the unequal voting rights provisions, (ii) when the super-voting shares are de minimus (less than 5% of total voting power), and (iii) when minority shareholders receive protections (e.g., regular binding vote on whether to maintain capital structure).	In companies with unequal voting rights, GL will generally take "one share, one vote" position.
Problematic Governance Structure of Public Companies	For a newly public company (a company having its first annual meeting after February 1, 2015, which includes companies emerging from bankruptcy, SPACs, spin-offs, direct listings and traditional IPOs): Generally recommend against relevant directors or entire board if the company has charter or bylaw provisions that are materially adverse to shareholder rights (e.g., a classified board structure or supermajority vote requirements to amend bylaws / charter). Inclusion of a sunset of 7 years or less on problematic structure provisions will be a mitigating factor.	
Officer Exculpation	Evaluate case-by-case on proposals regarding officer exculpation. Factors to consider include the extent to which proposal eliminates monetary damages for violating duty of care or for violating duty of loyalty. Generally recommend for exculpation provisions in a company's charter for directors and certain officers (president, CEO, CFO, COO, CLO, controller, treasurer, CAO, "named executive officers" in SEC filings and individuals agreeing to be identified as officers of a company) as permitted by relevant state law.	Evaluate case-by-case on proposals to adopt officer exculpation provisions, but generally recommend against if proposal eliminates monetary liability for certain officers' breaches of duty of care.

(Table continues...)

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Retirement Benefits and Severance		GL generally supports proposals that require shareholder approval of severance plan that exceeds 2.99 times amount of executive's base salary plus bonus (unless company has already adopted policies requiring such shareholder approval).
Short-Term and Long-Term Incentives		GL will raise concerns if performance-based percentage of executive's long-term incentive award is less than 50% (increased in 2023 from 33%); Adds language supporting responsible exercise of discretion by company's compensation committee on incentive payouts.
One-Time Awards, Front-Loaded Awards and Mega-Grants		Defines reasonable disclosure for one-time award grants as discussion of determination of the quantum and structure of the awards; Expands on concerns related to board's inability to adequately respond to unforeseen factors when using front-loaded awards; Generally recommend against compensation committee chair when grants of mega-grants have issues like excessive quantum, excessive dilution, lack of performance conditions or other concerns.
Pay for Performance		GL's pay-for-performance methodology is not impacted by the SEC's new pay vs. performance disclosure requirements.
Recoupment (Clawback) Provisions		GL will raise concerns for companies not yet meeting the soon-to-be-required SEC rules for exchange-listed companies.

2023 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 (Wednesday, March 1, 2023 for large accelerated filers with a December 31, 2022 fiscal year-end). Annual reports on Form 10-K are due 75 days after fiscal year-end for accelerated filers (Thursday, March 16, 2023 for accelerated filers with a December 31, 2022 fiscal year-end) and 90 days after fiscal year-end for non-accelerated filers (Friday, March 31, 2023 for non-accelerated filers with a December 31, 2022 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.

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* * *

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

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We also thank Megan McMillin for her contributions to this memorandum.

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ENDNOTES

1 See Item 303 of Regulation S-K, 17 CFR § 229.303.

2 See Item 105 of Regulation S-K, 17 CFR § 229.105.

3 U.S. Bureau of Labor Statistics, TED: The Economics Daily: *Consumer prices up 7.7 percent over year ended October 2022*, November 17, 2022.

4 ISS, *Proposed ISS Benchmark Policy Changes for 2023*, November 4, 2022. The open comment period on ISS's proposed changes to its benchmark voting policies was from November 4, 2022 to November 16, 2022. As of the date of publication of this memorandum, the final policy guidelines were not yet released.

5 Glass Lewis, *2023 Policy Guidelines United States*, November 17, 2022.

6 The New York Stock Exchange Listed Company Manual, Section 303A.08.

7 Nasdaq Stock Market Listing Rules, Rule 5635(c); and Nasdaq Interpretive Material IM-5635-1.

8 17 CFR § 240.13e-4.

9 SEC, *Universal Proxy*, Final Rule, Release No. 34-93596, January 31, 2022.

10 17 CFR § 240.14a-19.

11 17 CFR § 240.14a-4.

12 Glass Lewis's 2023 Policy Guidelines provide that it will consider recommending that shareholders vote against any audit committee member who sits 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.

13 Federal Trade Commission, *FTC Announces Annual Update of Size of Transaction Thresholds for Premerger Notification Filings and Interlocking Directorates*, Press Release, January 24, 2022.

14 SEC, *Listing Standards for Recovery of Erroneously Awarded Compensation*, Final Rule, Release Nos. 33-11126 and 34-96159, October 26, 2022.

15 17 CFR § 230.144(h)(1).

16 17 CFR § 230.144(h)(3).

17 See, e.g., The Washington Service and *The Wall Street Journal*, *Methodology: How the Journal Analyzed the Data on Insider Stock Sales*, June 29, 2022.

18 SEC, *Updating EDGAR Filing Requirements and Form 144 Filings*, Final Rule, Release Nos. 33-11070 and 34-95025, June 2, 2022.

19 SEC, Form 144 Resources for Filing Electronically.

20 SEC, *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, Press Release, March 21, 2022; SEC, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, Proposed Rule, Release Nos. 33–11042 and 34–94478, March 21, 2022.

21 *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022).

22 SEC, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, Proposed Rule, Release Nos. 33–11042 and 34–94478, March 21, 2022.

23 *Id*.

24 *Id*.

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

26 See, e.g., comment letters from the Council of Institutional Investors and NYC Office of Comptroller in support of the cooling-off period, and comment letters from ABA Securities Regulation Committee and Society for Corporate Governance with recommendations to reduce the time period.

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27 SEC, *In the Matter of Sheng Fu and Ming Xu*, Administrative Proceeding, File No. 3-21118, September 21, 2022.

28 The White House, *Memorandum on Improving the Cybersecurity of National Security, Department of Defense, and Intelligence Community Systems*, National Security Memorandum, January 19, 2022.

29 U.S. Congress, S. 3600, *Strengthening American Cybersecurity Act of 2022*, 117th Cong. (2022).

30 Cybersecurity and Infrastructure Agency, *Shields Up*, and Cybersecurity and Infrastructure Agency, *Guidance on Sharing Cyber Incident Information*, April 7, 2022.

31 New York State Office of the Attorney General, *A.G. Schneiderman Announces SHIELD Act To Protect New Yorkers From Data Breaches*, Press Release, November 2, 2017.

32 SEC, *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure*, Proposed Rule, Release Nos. 33-11038 and 34-94382, March 9, 2022.

33 *Id*.

34 *Crest v. Padilla*, Case No. 19STCV27561 (Los Angeles County Superior Court 2022).

35 *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022).

36 *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021).

37 *Garfield v. Allen*, 277 A.3d 296 (Del. Ch. 2022).

38 *Goldstein v. Denner*, C.A. 2020-1061-JTL (Del. Ch. 2022).

39 *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019).

40 *SEC v. Rio Tinto plc*, 41 F.4th 47 (2d Cir. 2022).

41 *Noto v. 22nd Century Group, Inc.*, No. 21-0347 (2d Cir. 2022).

42 *Strategic Investment Opportunities LLC v. Lee Enterprises*, C.A. No. 2021-1089-LWW (Del. Ch. Feb. 14, 2022).

43 ISS, *Americas, Proxy Voting Guidelines Benchmark Policy Changes for 2023*, November 30, 2022.

44 Glass Lewis, *2023 Policy Guidelines United States*, November 17, 2022; Glass Lewis, *2023 Policy Guidelines ESG Initiatives*, November 17, 2022.

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