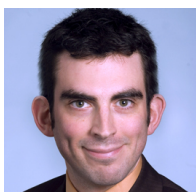


Market Trends 2020/21: Public Company Reporting and Corporate Governance

A Practical Guidance® Practice Note by
Alexander J. May and William R. Erlain, Jenner & Block LLP



Alexander J. May
Jenner & Block LLP



William R. Erlain
Jenner & Block LLP

This practice note provides an overview of the notable market trends in corporate governance and public company reporting in 2020 and early 2021 and the outlook for the remainder of 2021. The year 2020 was unique in many ways due to the widespread impact of the COVID-19 pandemic, forcing public companies and the Securities and Exchange Commission (the SEC) to adapt to a much more virtual world and one that was facing significant disruption to its operations and business models. However, many familiar regulatory trends persisted despite the pandemic, such as the SEC continuing to simplify and modify periodic reporting requirements at the end of the Trump administration and both institutional investors and proxy advisory firms advocating for increased diversity and environmental, social, and governance (ESG) reforms in response to social and environmental changes which occurred in 2020.

In addition, Delaware corporate cases impacting corporate governance continued to be decided in 2020 and early

2021. Most notably, the *Delaware Supreme Court in Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020), concluded that charter provisions designating federal courts as the exclusive forum for claims brought under the Securities Act of 1933, as amended (Securities Act) are facially valid, thereby impeding stockholders' ability to avoid federal statutory law in state court.

For additional practical guidance on public company reporting, see [Periodic and Current Reporting Resource Kit](#), [Financial Statements and Reporting Resource Kit](#), and [Publicity and Communications Resource Kit](#). For more information on corporate governance, see [Audit Committee Resource Kit](#), [Compensation Committee Resource Kit](#), [Corporate Governance in International Jurisdictions](#), and [Securities Exchange Compliance Resource Kit](#).

For other market trends articles covering various capital markets and corporate governance topics, see Market Trends.

SEC Final Rules – Regulation S-K Updates regarding MD&A, Selected Financial Data, and Supplementary Financial Information

The SEC revised a number of disclosure requirements in its final rule titled "[Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information](#)," published in January 2021. The amendments reflect the SEC's continued effort in recent

years to reduce the costs and burdens on registrants, to improve the readability and navigability and disclosures, and to discourage repetition and disclosure of immaterial information. Originally proposed in January 2020, the revisions to the management's discussion and analysis (MD&A), selected financial data, and supplemental financial information sections of Regulation S-K will take effect for all registrants for filings made for their first fiscal year ending on or after August 9, 2021. However, registrants are permitted to comply with any amended item starting February 10, 2021, provided that the early adoption to such amended item is adopted in its entirety.

Management Discussion and Analysis

The amendments to the MD&A disclosure requirements in Item 303 of Regulation S-K (17 C.F.R. § 229.303) seek to provide clarity and focus to registrants as they consider what information to discuss and analyze. In furtherance of this goal, a new "Objective" section was added as Item 303(a) to succinctly state the objectives of MD&A, which the SEC believes will help management teams better engage in thoughtful discussion and analysis about material information specific to the registrant's business.

In addition, the full fiscal year disclosure requirements that were formerly set out in Item 303(a) are now presented in Item 303(b) and have been streamlined and clarified as follows:

- **Instructions.** Historically, registrants were instructed to discuss the causes of any material changes from year to year in one or more line items in the financial statements. The amended instructions now require with respect to such material changes clarification of the "reasons underlying" the material changes in both quantitative and qualitative terms. In addition, the amended instructions clarify that, to the extent a registrant is required to disclose information by segment and/or other subdivisions of its business, product lines are a permitted subdivision.
 - **Liquidity.** The former disclosure requirement regarding liquidity has been generally restated in amended Item 303(b)(1)(i).
 - **Capital resources.** Item 303 formerly required registrants to discuss its material commitments for "capital expenditures" as of the end of the latest fiscal period, but the SEC recognized that capital expenditures may not be broad enough to solicit disclosure of all material cash commitments or requirements of a registrant's business. Therefore, amended Item 303(b)(1) expands the disclosure requirement to also cover descriptions of a registrant's material cash "requirements," including commitments for capital expenditures, as of the end of the latest fiscal period, the anticipated source of funds needed to satisfy such cash requirements, and the general purpose of such requirements.
 - **Describing trends.** The former disclosure requirements set out in Item 303(a)(3)(i)–(iv) have been consolidated and revised into amended Item 303(b)(2). Of particular note, former Item 303(a)(3)(ii) required registrants to disclose any known events that will cause a material change in the relationship between costs and revenue, whereas going forward registrants must disclose events that are "reasonably likely to cause" a material change in the relationship (such as known or reasonably likely future increases in costs of labor or materials, price increases, or inventory adjustments). This "reasonably likely" standard also applies elsewhere and throughout amended Item 303.
 - **Net sales and revenue.** Historically, if a registrant disclosed "material increases" in net sales or revenues in its financial statements, it was also required to provide a narrative discussion of the extent to which such "increases" are attributable to increases in prices, or to increases in the volume or amount of goods or services being sold, or to the introduction of new products or services. Amended Item 303(b)(2)(ii) clarifies that disclosure of any "material change" (rather than only material increases) in net sales or revenue is required, along with the same standard for narrative discussion regarding such material change.
 - **Inflation and price changes.** The prescriptive disclosure requirement regarding the impacts of inflation and price changes on a registrant's net sales, revenue, and income from continuing operations was eliminated. In its place, the SEC emphasized that registrants should take into consideration and disclose where appropriate the impact of inflation or changing prices that are part of a known trend or uncertainty that had, or is reasonably likely to have a material impact on net sales, revenue, or income from continuing operations.
 - **Off-balance sheet arrangements.** The SEC eliminated the prescriptive requirement to disclose off-balance sheet arrangements. Instead, pursuant to the principles-based instructions to amended Item 303(b), a registrant is required to discuss off-balance sheet arrangements if disclosure of such arrangements is particularly material or necessary to facilitate the understanding of other required disclosures.
 - **Contractual obligations table.** The SEC also eliminated the prescriptive requirement to disclose a contractual obligations table. The revision was triggered in part by the changes to the liquidity and capital resources
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disclosure requirements and in part because the former disclosure requirement is now provided in a registrant's financial statements. Registrants are still expected to discuss contractual obligations to the extent they are material or necessary to facilitate the understanding of other required disclosures.

- **Critical accounting estimates.** Amended Item 303(b)(3) requires disclosure where a registrant made accounting estimates or assumptions, where the nature of the estimates or assumptions is material, and where the impact of the estimates or assumptions on financial condition or operating performance is material. More granularly, registrants are now required to disclose, to the extent material, why the estimate is subject to uncertainty, how much each estimate has changed during the reporting period, and the sensitivity of the reported amounts to the methods, assumptions, and estimates underlying the estimate's calculation.

Other notable revisions to Item 303 include:

- **Interim periods.** Amended Item 303(c) replaces former Item 303(b) and now permits registrants to compare their most recently completed fiscal quarter to either (1) the corresponding quarter of the prior year (as was formerly required) or (2) the immediately preceding quarter. However, if in a subsequent Form 10-Q a registrant changes the comparison from the comparison presented in the immediately prior Form 10-Q, the registrant is required to explain the reason for the change and present both comparisons in the filing where the change is announced.
- **Safe harbor.** Former Item 303(c) acknowledged the application of a statutory safe harbor for forward-looking information provided in off-balance sheet arrangements and contractual obligations disclosures. Because such prescriptive disclosure requirements were eliminated, former Item 303(c) was eliminated as well. Such elimination is not intended to alter the application of statutory safe harbors, which protect eligible forward-looking statements in MD&A against private legal actions that are based on allegations of a material misstatement or omission, with certain exceptions.
- **Smaller reporting companies.** Former Item 303(d), which discussed certain disclosure obligations for smaller reporting companies (SRC), was also eliminated. SRCs are no longer subject to a prescriptive requirement to provide a contractual obligations table. As well, the disclosure of material cash requirements from known contractual or other obligations are now encompassed within a larger discussion and disclosure of liquidity and capital resources.

For additional information and practical guidance on MD&A, see [Management's Discussion and Analysis of Financial Condition and Results of Operations](#).

Selected Financial Data

Prior to the SEC's revisions in 2020, registrants (other than SRCs and certain emerging growth companies) were required by Item 301 of Regulation S-K (17 C.F.R. § 229.301) to furnish selected financial data in comparative tabular form for each of the registrant's last five fiscal years and any additional fiscal years necessary to keep the information from being misleading. But in light of advances in technology, investors now have other methods to access the information outside of Item 301 and thus the disclosure requirement adds complexity and additional costs without commensurate benefit to investors.

Accordingly, the SEC eliminated Item 301 with its latest amendments. Notwithstanding the removal of this specific disclosure requirement, the SEC noted that registrants should continue to consider whether trend information for periods earlier than those presented in the financial statements may be necessary as part of MD&A's objective to "provide material information relevant to an assessment of the financial condition and results of operations," including whether tabular presentation of relevant financial or other information may help a reader's understanding of MD&A. In 2021, some registrants have elected to early adopt revised Item 301 and thus eliminate the five-year table, but the practice is not universal.

Supplementary Financial Information

Item 302(a) of Regulation S-K (17 C.F.R. § 229.302(a)) is intended to provide information about changes to retrospective results. Prior to the revisions adopted in 2020, this item contained three distinct disclosure requirements for (1) quarterly financial data of specified operating results, (2) variances in these results from amounts previously reported on Form 10-Q, and (3) a description of the effect of any discontinued operations or unusual or infrequently occurring items recognized each quarter.

The adopted amendments seek to streamline these disclosure requirements in an effort to better highlight material retrospective changes to financial information. Specifically, disclosure will be required only where there are one or more retrospective changes that pertain to the statements of comprehensive income for any of the quarters within the two most recent fiscal years and any subsequent interim period for which financial statements are included or required to be included by Article 3 of Regulation S-X. Further, only retrospective changes that are deemed material, whether individually or in the aggregate,

are required to be disclosed, along with an explanation of the reasons for such material change and the financial data relevant to and reflecting such change.

SEC Final Rules – Regulation S-K Updates regarding Description of Business, Legal Proceedings, and Risk Factors

The SEC also revised the requirements relating to the description of business, legal proceedings, and risk factor disclosures of Regulation S-K in 2020 as part of its modernization and simplification efforts. The final rule titled "[Modernization of Regulation S-K Items 101, 103, and 105](#)" was published in October 2020 and became effective on November 9, 2020.

General Development of Business

Item 101(a) of Regulation S-K (17 C.F.R. § 229.101(a)) formerly required registrants to describe the general development of their business, to disclose their year and form of organization, and, to the extent applicable, to disclose any bankruptcy, material corporate transaction, or other material change in the mode of conducting business. The disclosure requirement generally covered the prior three years for SRCs and five years for all other registrants, unless the registrant had been in business for fewer years.

Amended Item 101(a) instead relies entirely on a materiality standard, whereby registrants are required to disclose information material to an understanding of the general development of their business. The SEC also eliminated the prescribed three- and five-year lookback periods, opting now to require registrants to disclose material business information regardless of the time frame it occurs.

In addition, amended Item 101(a) contains a list of four nonexclusive disclosure topics that registrants should consider but are not required to disclose. Most notable among these topics is the SEC's addition of "any material changes to a previously disclosed business strategy" to highlight the importance of keeping public information about the direction of the business fresh. The SEC elected to not require public companies to disclose their business strategy in general and the amended rule does not take a stance on whether disclosing a registrant's business strategy is "material to an understanding of the general development of the business."

And to further streamline disclosure obligations, the SEC amended Items 101(a) and 101(h) (relating to SRCs) to permit, but not require, registrants to reference a previously filed general description of the registrant's business in a report or registration statement and then provide any applicable updates for the reporting period. The general description of the business must be contained in one filing and hyperlinked into the filing containing the update. Importantly, the SEC did not make the "incorporate and update" rules mandatory, meaning registrants may still describe the general development of their business in one filing.

Description of Business

Former Item 101(c) of Regulation S-K (17 C.F.R. § 229.101(c)) required registrants to provide a narrative description of their business, with a focus on the registrant's dominant segment or each reportable segment. The rule also enumerated 12 disclosure topics, any of which had to be discussed if such information was material to understanding the registrant's business as a whole.

The final amendments to Item 101(c) clarified that the general import of the rule is to only disclose information about the business done or intended to be done that is material to an understanding of the business as a whole. The amended rule also includes a revised list of disclosure topics, which the SEC in large part reorganized and generalized from the former disclosure topic list (e.g., by removing dollar or percentage thresholds). Of particular importance, the amended list newly prompts registrants to consider whether a description of their human capital resources generally, and not just the number of persons employed by the registrant specifically, is material to disclose. Registrants to date have responded to this disclosure topic in varied fashion, discussing matters such as diversity and inclusion statistics; management's goals and objectives for hiring, training, and retention; compensation elements and programs; responses to COVID-19; and the registrant's views on labor issues. However, some registrants did not elect to provide the human capital disclosure, on the basis that it was not material.

In addition, the SEC expanded the disclosure topic relating to material effects of compliance with environmental laws to instead require disclosure of the material effects that compliance with government regulations, including environmental regulations, may have upon the capital expenditures, earnings, and competitive position of the registrant and its subsidiaries.

Legal Proceedings

Pursuant to Item 103 of Regulation S-K (17 C.F.R. § 229.103), registrants have been required to disclose material pending legal proceedings to which they or their property are party to. Registrants have been further required to disclose any proceedings under environmental law to which a governmental authority is a party if the registrant reasonably believes the proceeding will result in sanctions of at least \$100,000.

The SEC revised Item 103 in two key ways. First, registrants are now expressly permitted to incorporate by cross-reference or hyperlink any overlapping disclosure in the MD&A or contingencies footnote to the financial statements (though many registrants already did so). Second, the dollar threshold for certain environmental proceeding disclosures was increased from a set \$100,000 to a default threshold of \$300,000. Amended Item 103 newly permits registrants to elect to use a higher threshold as long as it is “reasonably designed to result in disclosure of any [applicable environmental] proceeding that is material to its business or financial condition.” Such threshold may not exceed the lesser of \$1,000,000 or 1% of the registrant’s current assets on a consolidated basis, and registrants must disclose the threshold and any changes thereto in each periodic report.

Risk Factors

Item 105 of Regulation S-K (17 C.F.R. § 229.105) formerly required registrants to disclose the most significant factors that made an investment in the registrant or offering speculative or risky. The requirement also stated that disclosure must be concise and not include risks that could apply generically to any registrant or offering.

The SEC adopted a number of revisions in response to the increase in the average length of risk factor disclosures over time and to implement a more principles-based approach to disclosure. Amended Item 105 now requires disclosure of “material” risk factors (rather than significant), and such risk factors must be organized under relevant headings. If a registrant elects to continue disclosing any generic risk factors, such risk factors must be grouped under a heading titled “General Risk Factors.” In addition, registrants are required to provide a summary risk factor disclosure of no more than 2 pages if their full risk factor disclosure exceeds 15 pages. Based on a review of filings to date, most registrants have risk factors that are below 15 pages and thus have not provided a summary. For those registrants who have elected to provide a summary, a common format is a numbered list or bullet point list of the risk factor headings.

SEC Final Rules – Disclosure of Payments by Resource Extraction Issuers

Section 13(q) of the Securities Exchange Act of 1934, as amended (the Exchange Act), which was enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (111 P.L. 203), mandates the SEC to promulgate rules requiring resource extraction issuers to annually disclose certain payments made to the U.S. government or a foreign government. Accordingly, in December 2020, the SEC adopted a new Rule 13q-1 (17 C.F.R. § 240.13q-1) and an amendment to Form SD, marking the SEC’s third attempt to satisfy the rulemaking requirement.

The new rules will apply to any issuer that (1) is required to file Form 10-K, Form 20-F, or Form 40-F; (2) is engaged in the commercial development of oil, natural gas, or minerals; and (3) makes payments to the U.S. federal government or a foreign government related to this commercial development. The rules will require such issuers to disclose payments made to the U.S. federal government or a foreign government relating to the commercial development of oil, natural gas, or minerals. Disclosure must be provided by “project” (i.e., by national and major subnational political jurisdiction, though more granular detail is permitted).

The final rule titled “[Disclosure of Payments by Resource Extraction Issuers](#)” became effective March 16, 2021. There is a two-year transition period following the effective date, and thereafter issuers will be required annually to submit Form SD no later than 270 days following the end of their most recently completed fiscal year.

SEC Final Rules – Shareholder Proposals

Rule 14a-8 of the Exchange Act (17 C.F.R. § 240.14a-8) governs when registrants are required to include shareholder proposals in their proxy statement. In September 2020, the SEC adopted amendments that generally raised the bar to submit proposals, thereby reducing the amount of time and resources spent by registrants on proposals that are likely to fall short of receiving significant support.

The final rule titled “[Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8](#)” became effective January 4, 2021, and applies to any

proposal submitted for an annual or special meeting to be held on or after January 1, 2022. However, there are transition provisions for a shareholder that has continuously held at least \$2,000 of a registrant's securities entitled to vote on the proposal for at least one year as of January 4, 2021, and continuously maintains at least \$2,000 of such securities from January 4, 2021, through the date he or she submits a proposal, will be eligible to submit a proposal to such registrant, and need not satisfy the amended share ownership thresholds, for an annual or special meeting to be held prior to January 1, 2023.

For further guidance on shareholder proposals, see [Market Trends 2020/21: Shareholder Proposals](#).

Adopted Amendments

Historically, Rule 14a-8 required shareholders seeking to include a proposal in the registrant's proxy statement to have continuously held at least \$2,000 or 1%, of such registrant's voting securities for at least one year as of the date their submission. The amended rule replaces this threshold with a new tiered approach that requires continuous ownership of at least one of the following alternatives:

- \$2,000 for at least three years
- \$15,000 for at least two years
- \$25,000 for at least one year

In addition, the SEC also revised Rule 14a-8 to prohibit shareholders from aggregating their holdings to meet the above requirement, to prohibit persons from submitting separate proposals in their capacity as shareholders and as a representative of another shareholder, and to increase the threshold applicable to repeat proposals. With respect to the latter, the former rule permitted a shareholder proposal to be excluded if it is substantially the same subject matter as a proposal previously included in the registrant's proxy materials within the preceding five calendar years and such proposal's most recent vote within the preceding three calendar years received less than 3% (if voted on once), 6% (if twice), or 10% (if three or more times). Amended Rule 14a-8 instead uses the following thresholds:

- Less than 5% of the votes cast if previously voted on once
- Less than 10% of the votes cast if previously voted on twice
- Less than 15% of the votes cast if previously voted on three or more times

The increased thresholds reflect the practical concern that proposals receiving less support are unlikely to succeed in a future vote.

Potential Future Amendments

Former Acting Chair of the SEC Allison Herren Lee has [voiced her disagreement](#) with the amendments barring shareholders from aggregating their holdings to satisfy the ownership test and prohibiting any one shareholder from submitting or representing more than one proposal, going so far as to hint that rulemaking action may be taken to reverse these changes. In any case, she has directed the Division of Corporation Finance to review Rule 14a-8 to, among other things, "increase the number of proposals on the ballot that are well-designed for shareholder deliberation and votes." In addition, a resolution has been entered in the U.S. Senate to invoke the Congressional Review Act to essentially reverse the 14a-8 rules and prevent similar rules from being issued by the SEC in the future.

SEC Final Rules – Definition of Accelerated Filer and Large Accelerated Filer

Registrants that qualify as SRCs are eligible to comply with scaled disclosure obligations. However, in 2018, the SEC revised the definitions of SRCs, accelerated filers, and large accelerated filers, and an unintended consequence of these changes was that certain registrants satisfied the definition of both an SRC and an accelerated filer. As a result, these SRCs have not been able to avail themselves of all of the benefits of being an SRC.

The SEC remedied this situation in early 2020 by adopting further amendments to the definitions of accelerated filer and large accelerated filer under Rule 12b-2 of the Exchange Act (17 C.F.R. § 240.12b-2). The amended rule adds a fourth condition to such definitions to exclude registrants that are eligible to be an SRC and had annual revenues of less than \$100 million in the most recent fiscal year for which audited financial statements are available. In the same release, the SEC also revised the conditions for transitioning from an accelerated filer to a non-accelerated filer by increasing the threshold amounts and adding the SRC revenue test. Finally, the SEC revised the cover pages of Form 10-K, Form 20-F, and Form 40-F to include a check box indicating whether an ICFR (internal control over financial reporting) auditor attestation is including in the filing.

The final rule titled "[Accelerated Filer and Large Accelerated Filer Definitions](#)" became effective April 27, 2020.

SEC Final Rules – Proxy Solicitation and Voting Advice

Prior to 2020, the SEC had published guidance stating its view that proxy voting advice is generally a “solicitation” under Section 14(a) of the Exchange Act and therefore subject to federal proxy rules. But because such guidance did not carry the force of law of a notice and comment rulemaking, the SEC formally adopted amendments to that effect in July 2020.

In particular, amended Rule 14a-1(l)(1)(iii) (17 C.F.R. § 240.14a-1(l)(1)(iii)) now specifies that the definition of solicitation includes “[a]ny proxy voting advice that makes a recommendation to a security holder as to its vote, consent, or authorization on a specific matter for which security holder approval is solicited, and that is furnished by a person that markets its expertise as a provider of such proxy voting advice, separately from other forms of investment advice, and sells such proxy voting advice for a fee.”

In the same release, the SEC also revised the exemption from Section 14(a)'s information and filing requirements that is traditionally relied upon by proxy voting advisory firms. Going forward, such firms will be required to disclose conflicts of interest and to timely make available their proxy voting advice to registrants in order to qualify for the exemption under Rule 14a-2(b)(9). And lastly, the SEC codified its prior guidance that the anti-fraud provision found in Rule 14a-9 applies to proxy voting advice.

The final rule titled “[Exemptions from the Proxy Rules for Proxy Voting Advice](#)” became effective November 2, 2020, but proxy advisory firms are not required to comply with the amendments to Rule 14a-2(b)(9) until December 1, 2021.

SEC Final Rules – Electronic Signatures

In early 1993, the SEC began to mandate certain filings be electronically submitted through EDGAR, and since that time Rule 302(b) of Regulation S-T (17 C.F.R. § 232.302(b)) has required registrants to manually sign a copy of electronic filings. While occasionally an inconvenience in normal times, the onset of the COVID-19 pandemic brought into focus how obtaining manual signatures can be sometimes impractical and is otherwise unnecessary in light of advances of technology.

As a result, the SEC revised Rule 302(b) to permit electronic signatures to electronic filings if the signing process encompasses all of the following:

- Requires the signatory to present a physical, logical, or digital credential that authenticates the signatory's individual identity
- Reasonably provides for non-repudiation of the signature
- Provides that the signature be attached, affixed, or otherwise logically associated with the signature page or document being signed
- Includes a timestamp to record the date and time of the signature

Corresponding revisions were also made to related rules under the Securities Act, Exchange Act, and Investment Company Act. The final rule titled “[Electronic Signatures in Regulation S-T Rule 302](#)” became effective December 4, 2020.

SEC Proposed Rules – Compensatory Offerings and Sales

In November 2020, the SEC [proposed revisions to Form S-8 and Rule 701](#) in order to modernize and simplify the rules governing compensatory offerings and sales. For Form S-8 specifically, the SEC seeks to clarify a number of existing rules, such as that:

- Multiple plans may be added to a single Form S-8 by filing an automatically effective post-effective amendment (subject to certain conditions)
- Registrants are not required to allocate registered securities among incentive plans
- Registrants may use a single Form S-8 for multiple incentive plans

The SEC is also proposing a number of amendments to existing rules, including:

- Permitting registrants to register the offer and sale of additional securities or classes of securities on Form S-8 by post-effective amendment
- Requiring registrants to pay a registration fee based on the aggregate offering price of all the securities registered
- Requiring registrants to pay the fee for all sales made pursuant to defined contribution plan offerings during a given fiscal year no later than 90 days after the registrant's fiscal year end

In a contemporaneously released proposed rulemaking, SEC also proposed to amend Form S-8 and Rule 701 to permit registrants, on a trial basis, to include “platform workers” in compensatory offerings. Such amendments would expire five years after the effective date, if adopted.

SEC Areas of Focus – COVID-19

The most significant business development of 2020 was the COVID-19 pandemic. Because its effects were (and continue to be) so wide-ranging, the SEC and its Division of Corporation Finance issued guidance and temporary rules to help registrants navigate unfamiliar disclosure issues and to ease the burden of regulation where appropriate.

For an overview of practical guidance on COVID-19 covering various practice areas, including capital markets, see [Coronavirus \(COVID-19\) Resource Kit](#).

Disclosure Guidance

In response to registrant and investor concern regarding appropriate disclosures, on March 25, 2020, the SEC’s Division of Corporation Finance released [guidance on disclosures concerning the COVID-19 pandemic](#). The guidance reaffirmed the same principles that govern disclosures generally and probed registrants to consider the varied ways they may be materially impacted by the COVID-19 pandemic. For example, registrants should assess whether the pandemic will (1) impact financial condition or results, (2) impact capital or financial resources, (3) cause material impairments, (4) impact demand for products and services, or (5) cause material disruption through travel restrictions and border closures. The Division also suggested registrants avail themselves of the safe harbors in Section 27A of the Securities Act and Section 21E of the Exchange Act for forward-looking information, as the pandemic and its effects continue to develop.

Additionally, the Division urged registrants to begin considering how the pandemic will impact their financial reporting as soon as possible, as more time may be needed to account for issues like impairment adjustments. However, to the extent a generally accepted accounting principles (GAAP) financial measure is not available at the time of an earnings release because more time is needed to make COVID-19 adjustments, the Division stated that it is open to companies “reconciling a non-GAAP financial measure to preliminary GAAP results that either include provisional amount(s) based on a reasonable estimate, or a range of reasonably estimable GAAP results.”

The Division released [additional guidance in June 2020](#) to add more probing questions for registrants to consider and to emphasize the need to disclose material issues relating to a registrant’s liquidity, capital resources, or any other financial dislocation caused by the COVID-19 pandemic. The Division also advised registrants to consider the short- and long-term effects of any federal COVID-19 relief they may receive and whether there is substantial doubt that the registrant can continue as a going concern. Similar thoughts on [financial concerns relating to COVID-19](#) were expressed by the SEC’s Office of the Chief Accountant in June 2020 as well.

Throughout 2020, registrants responded to the SEC’s guidance as well as to the realities of the COVID-19 impact on their businesses. Many registrants elected to provide robust risk factors regarding the varied effects of COVID-19 on their business, carefully consider their liquidity disclosures (including disclosures as a result of, or related to, their election to draw on credit agreements or access the capital markets), and tailor their MD&A to provide COVID-19-specific impacts (such as disclosure of supply chain issues). But as the impacts of COVID-19 begin to lessen in some markets and industries, registrants should consider how to update their public disclosures to accurately reflect how their business transitions to a more normalized environment.

Perquisites

As companies have shifted to remote working arrangements due to COVID-19, registrants considered whether the provision of certain perquisites (perks) to their executives required for working from home would be considered “all other compensation” under Item 402(c)(2)(ix)(A) of Regulation S-K (17 C.F.R. § 229.402(c)(2)(ix)(A)) and therefore required to be disclosed in their proxy statement.

In September 2020, the SEC’s Division of Corporation Finance issued [C&DI Question 219.05](#) to confirm that registrants should use the traditional two-step analysis set out in Release 33-8732A for determining whether a perk is considered as “all other compensation.” Under this analysis, a registrant must consider whether the benefit is “integrally and directly related to the performance of the executive’s duties” or “generally available on a nondiscriminatory basis to all employees.”

Importantly, the SEC noted in C&DI Question 219.05 that what is “integrally and directly related” to an executive officer’s duties may be different during the COVID-19 pandemic as compared to past years. For example, “enhanced technology needed to make the executive’s home his or her primary workplace upon imposition

of local stay-at-home orders would generally not be a perquisite or personal benefit because of the integral and direct relationship to the performance of the executive's duties." But likewise, "items such as new health-related or personal transportation benefits provided to address new risks arising because of COVID-19, if they are not integrally and directly related to the performance of the executive's duties, may be perquisites or personal benefits even if the company would not have provided the benefit but for the COVID-19 pandemic, unless they are generally available to all employees."

Virtual Shareholder Meetings

In response to receiving many questions from registrants about hosting shareholder meetings during the COVID-19 pandemic, the staff of the SEC's Division of Corporation Finance and the Division of Investment Management [released guidance](#) in 2020 and 2021 on a number of matters. For example, the staff clarified that registrants should notify shareholders, intermediaries in the proxy process, and other market participants of their plan to host an entirely virtual or hybrid meeting in a timely manner and to disclose clear directions regarding how shareholders can remotely access, participate in, and vote at such meeting. In addition, if a registrant elects to host a shareholder meeting in person and a shareholder proposal is eligible to be presented at such meeting, the staff encouraged registrants to provide the shareholder proponents or their representatives with the ability to present their proposals through alternative means. However, the SEC clarified in 2021 that to the extent a shareholder proponent or representative is unable to attend the meeting and present the proposal due to the inability to travel or other hardships related to COVID-19, the staff would consider this to be "good cause" under Rule 14a-8(h) to exclude a proposal submitted by the shareholder proponent for any meetings held in the following two calendar years.

Temporary Rules

The SEC adopted a wide range of temporary rules during the spring and summer of 2020 to provide relief to administrative hardships relating to COVID-19. For example, the SEC permitted filers to gain access to EDGAR on a temporary basis without providing a notarized Form ID if they were unable to obtain the required notarization due to factors relating to COVID-19. The SEC also temporarily revised a number of requirements relating to Regulation Crowdfunding to make it easier for filers impacted by COVID-19 to utilize and comply with the regulation. To date the SEC has allowed some temporary rules to expire as business have adapted to the new working environment—such as the notarization exception for Form

ID—while it has extended other temporary rules that continue to serve a vital purpose—such as the increased access to Regulation Crowdfunding.

SEC Areas of Focus – LIBOR Transition Factors

The London Interbank Offer Rate, or LIBOR, is a reference interest rate which determines lending rates for various types of contracts and debt throughout the world. On March 5, 2021, the UK Financial Conduct Authority (FCA) officially announced that the one week and two-month U.S. dollar LIBOR settings, along with all sterling, euro, Swiss franc, and Japanese yen settings, will no longer be published immediately after December 31, 2021. All other U.S. dollar LIBOR settings will cease to be published immediately after June 30, 2023, though FCA will consider whether to require the administrator of LIBOR to continue publishing certain U.S. dollar LIBOR settings on a nonrepresentative, synthetic basis thereafter.

Market participants and regulators alike have been preparing for the sunset of LIBOR for years, and they continue to assess how existing agreements contemplate the termination of LIBOR and what alternatives exist for a new reference rate.

Alternative Reference Rates in the United States

In November 2020, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation [issued a joint statement](#) "to reiterate that they are not endorsing a specific replacement rate for LIBOR for loans." Instead, they advocate for banks to use whatever reference rates they deem to be appropriate, though loans should include fallback language in case a reference rate is discontinued.

In contrast, the Alternative Reference Rates Committee (ARRC)—a committee of private-sector entities convened by the Federal Reserve and other agencies to develop recommendations to facilitate the transition away from LIBOR—advocates for the use of the Secured Overnight Financing Rate (SOFR) as the main replacement to LIBOR. The committee issues voluminous guidance on SOFR and LIBOR fallback provisions, and as of March 2020, it publishes a variety of SOFR interest rates. In addition, New York enacted a LIBOR transition bill on April 6, 2021, that generally tracks the draft legislation proposed by ARRC. The new law will automatically replace LIBOR with a benchmark based on SOFR in contracts, securities, and instruments

upon the discontinuance of LIBOR. The law applies only if LIBOR is currently the reference rate and there is no other fallback language to replace it with another reference rate independent of LIBOR.

However, ARRC has identified a number of challenges to fully transitioning to SOFR by the time LIBOR is discontinued. For example, [in March 2021 it announced](#) that it “will not be in a position to recommend a forward-looking [SOFR] term rate by mid-2021” and that it “cannot guarantee that it will be in a position to recommend an administrator that can produce a robust forward-looking term rate by the end of 2021.” ARRC had originally sought to publish such a rate in the first half of 2021 if liquidity in SOFR derivatives markets developed sufficiently.

SEC Guidance

The SEC released a statement in July 2019 outlining its guidance on how market participants should address the transition away from LIBOR. For existing contracts, the SEC urged for comprehensive contingency planning to begin as soon as possible; and for new contracts, the SEC cited the ongoing efforts of the ARRC, the International Swaps and Derivatives Association, and other groups to develop new reference rates and fallback options. The statement also contained division-specific guidance, such as the Division of Corporation Finance’s advice to registrants to be specific when disclosing risks, to avoid boilerplate disclosures, and to explain how the board administers its oversight of the company’s risk.

More recently, the SEC’s Division of Examinations issued a risk alert in June 2020 to emphasize the risks associated with the discontinuation of LIBOR and to reiterate that registrant preparedness for the transition away from LIBOR is an examination program priority for fiscal year 2020. At the top of 2021, the Office of Municipal Securities issued its own statement discussing the risks of LIBOR’s discontinuance on the municipal securities market and the need for municipal obligors to make appropriate disclosures regarding such risks and any mitigating actions taken in response.

SEC Areas of Focus – International IP and Technology Risks

On December 19, 2019, the SEC’s Division of Corporation Finance published [guidance](#) on disclosing intellectual property and technology risks when registrants conduct business outside the United States, particularly in

jurisdictions without comparable levels of protection. The SEC noted that a registrant’s valuable information may be stolen through direct intrusion by private and state actors and through more indirect means, such as reverse engineering or other disclosures to third parties. Moreover, a registrant may be required to compromise its technology and intellectual property protections in order to conduct business in a certain jurisdiction.

To those ends, registrants have been instructed to disclose material risks of theft or compromise that are tailored to the registrant’s business. This includes consideration of the types of technology and intellectual property used in the business, the jurisdictions in which the registrant operates, and any concessions the registrant makes to its privacy and security standards. The SEC also noted that hypothetical disclosures may not be sufficient when the registrant has previously experienced or is currently experiencing an adverse event.

SEC Areas of Focus – Key Performance Indicators

Effective February 25, 2020, the SEC published [new guidance](#) on the discussion of key performance indicators (or KPIs) and metrics in MD&A, pursuant to Item 303(a) of Regulation S-K. The SEC reaffirmed that Item 303(a) requires the disclosure of information necessary for investors to understand the registrant’s financial condition and results. Additionally, to the extent a registrant decides to disclose certain key performance indicators and metrics, the SEC confirmed such information should follow any applicable requirements, such as Item 10 of Regulation S-K (i.e., non-GAAP measures), and “should not deviate materially from metrics used to manage operations or make strategic decisions.”

Item 303 of Regulation S-K further requires that the disclosure of metrics must be accompanied by all information necessary to make the disclosure not misleading. Determining what or how much information must be disclosed depends on the specific facts and circumstances, but the SEC generally expects to see (1) a clear definition of the metric and how it is calculated, (2) a statement indicating the reasons why the metric provides useful information to investors, and (3) a statement indicating how management uses the metric in managing or monitoring the performance of the business. If the registrant changes how a metric is calculated or presented from one reporting period to another, the SEC encourages a discussion of how and why the metric changed, to the extent it is material. Furthermore, the SEC announced an

enforcement action with respect to a company's KPIs in early 2020, so the SEC's attention to KPIs is more than just a theoretical guidance matter.

SEC Areas of Focus – Regulation FD

A trend to watch in 2021 will be the SEC's enforcement actions with respect to Regulation FD. In March 2021, the SEC's [enforcement division brought a case against AT&T and three of its investor relations employees](#). The SEC alleged the individuals contacted 20 sell-side analysts and provided nonpublic, material information regarding certain revenue and upgrade estimates in order to bring the analysts' coverage in line with what AT&T was expecting (but had yet to disclose). AT&T is disputing the allegations, indicating that, among other things, the [information was not material](#). Based on AT&T's statements, this matter will be litigated and the outcome may help inform future Regulation FD practice.

Governance Trends – Environmental, Social, and Governance Initiatives

Focus on ESG initiatives and compliance remained high in 2020 and early 2021. According to various estimates, sustainable or ESG-based investing assets (whose definition continues to evolve) now account for a significant minority of professionally managed assets in the United States, and it is estimated that sustainable or ESG-based assets will account for half or more of professionally managed assets in the next five to ten years.

Institutional investors continued to bolster their ranks to better scrutinize proxies and encourage change by discussions with company management to consider ESG activities as part of their business and operating plans. Furthermore, shareholders persisted in adding ESG issues onto company proxies in 2020 and into 2021. While early 2020 witnessed some lessened concern around ESG initiatives as a result of the COVID-19 pandemic, the second half of 2020 and early 2021 saw a renewed emphasis on ESG initiatives, particularly as a result of social unrest in the United States and climate change considerations. ESG initiatives will likely continue to grow and be a focus of investors and the investment community in the coming years.

For an overview of practical guidance on ESG initiatives and compliance covering various practice areas, including capital markets, see [Environmental, Social, and Governance \(ESG\) Resource Kit](#).

Industry Calls to Action

The Business Roundtable released its "Statement on the Purpose of the Corporation" on August 19, 2019, in which it underscored that companies must consider the interests of all stakeholders and not simply shareholders. The organization's list of commitments includes "protect[ing] the environment by embracing sustainable practices," "[d]ealing fairly and ethically with suppliers," and "[i]nvesting in . . . employees," among others. While the statement gained a significant amount of attention for apparently reducing the primacy of shareholders, the message to participants was that ESG was being considered very seriously by some of the United States' largest companies.

On the institutional investor front, on January 14, 2020, the chairman and CEO of BlackRock signed letters to CEOs and the company's clients in an appeal to take climate change more seriously. He warned of a forthcoming "significant reallocation of capital" based on the profound risk that climate change poses, and advocated that "sustainability should be our new standard for investing." A few weeks later, the CEO of State Street Global Advisors characterized addressing material ESG issues as "essential to a company's long-term financial performance" and noted that a company's performance on ESG issues "will soon effectively be as important as its credit rating."

In 2021, BlackRock followed up on their 2020 letters by issuing revised [stewardship guidelines](#) which highlighted BlackRock's "expect[ion] [for] companies to have clear policies and action plans to manage climate risk and realize opportunities presented by the global energy transition" and that "[c]ompanies should disclose actions they are taking to support a diverse and engaged workforce and, in those markets where we consider demographic diversity a priority, a demographic profile of its workforce." BlackRock emphasized that when key business risks or opportunities are not being addressed, then it will hold directors accountable by voting against responsible directors. Similarly, State Street Global Advisors updated their 2021 voting guidelines to "vote against the Chair of the Nominating & Governance Committee at companies in the S&P 500 . . . that do not disclose, at minimum, the gender, racial and ethnic composition of their boards." State Street has also developed an ESG scoring system named R-Factor, which it will use to evaluate responsiveness to ESG factors in 2022.

Goldman Sachs has also recently increased its commitment to promoting diversity on corporate boards. As of July 1, 2020, the firm began to only underwrite initial public offerings in the U.S. and Europe of companies that have at least one diverse director; and as of 2021, the requirement was raised to two diverse directors.

Disclosure and Standards

While institutional investors and prominent business organizations generally agree on the importance of ESG, the standards of responsible practices and disclosure requirements are, at best, a patchwork of frameworks, policies, and standards. Furthermore, responsible ESG practices in one industry might be different than in another industry, providing a lack of clarity for participants and registrants.

A number of domestic and international organizations have developed standards to help improve ESG disclosures, but no single standard has received overwhelming adoption. For example, the World Economic Forum published in early 2020 a list of proposed core metrics and disclosures on topics ranging from climate risk, ethical governance, diversity and inclusion, and community investment. The organization's hope is to close the gap between the well-established standards for disclosing financial information and the lacking framework for ESG matters. In addition, the International Organization of Securities Commissions (IOSCO) and IFRS Foundation Trustees are currently [developing a plan](#) to establish a Sustainability Standards Board to "sit alongside the International Accounting Standards Board (IASB) . . . with a view to delivering an effective system architecture for setting sustainability disclosure standards."

In the United States, the SEC currently does not have requirements to disclose specific ESG matters. However, former Acting Chair of the SEC Allison Herren Lee has been a vocal advocate for significant change. In March 2020, she remarked at an investment advisor conference that there is "overwhelming investor demand for consistent, reliable, and comparable disclosure," and noted a lack of such disclosure "undermines efficient capital allocation." More recently in [a speech given to the Center for American Progress](#), Ms. Lee spelled out the SEC's current plan of action:

Investors are demanding more and better information on climate and ESG, and that demand is not being met by the current voluntary framework. Not all companies do or will disclose without a mandatory framework, raising the cost, or resulting in the misallocation, of capital. Investors also aren't getting the benefits of comparability that would

come with standardization. And there are real questions about reliability and level of assurance for the disclosures that do exist. Meanwhile issuers are assailed from all sides by competing and potentially conflicting demands for information. That's why we have begun to take critical steps toward a comprehensive ESG disclosure framework aimed at producing the consistent, comparable, and reliable data that investors need.

In the near term, Ms. Lee has directed the Division of Corporation Finance to enhance its focus on climate-related disclosures, particularly through the lens of the disclosure guidance released in 2010. She also [issued a statement](#) on March 15, 2021, requesting public comment on climate disclosure, with a focus on determining appropriate data and metrics, whether it should be industry-specific and how to devise a sufficiently flexible framework.

In addition to climate-related disclosures, Ms. Lee has voiced a desire to work towards a comprehensive ESG disclosure framework. Near-term initiatives may focus on standalone guidance, such as providing additional guidance on human capital or considering more specific rules on board diversity.

One way that registrants are responding to calls for more ESG-focused action is by modifying the goals of their executive compensation policies. According to [an analysis by Equilar](#), 38 registrants within the Fortune 100 disclosed compensation metrics that incorporated ESG-related goals in the year prior to February 1, 2020. Most of these goals were tied into the registrant's annual incentive plan, with only one registrant explicitly tying its long-term incentive plan to an ESG metric. Equilar further broke down the ESG metrics by category and found that there is no clear standard as of yet, with some registrants electing to focus on diversity or culture, others on safety or the environment, and even some on human capital. Also of note is that many of the disclosed metrics are not entirely quantifiable, but rather they are evaluated as a matter of discretion.

It is likely that more registrants will follow suit over time and explicitly link executive pay to short- and long-term ESG initiatives. Change could be accelerated if shareholders voice their concerns through say-on-pay votes, though according to the Semler Brossy Consulting Group LLC, the [rate of failed say-on-pay proposals](#) has remained low—about 2%—for the last decade.

SEC Examination and Enforcement

The SEC's Division of Examination's [priorities for fiscal year 2021](#) stated that the Division will emphasize climate and ESG-related issues, including whether "systemically

important registrants” adequately account for the growing risks associated with climate change and whether ESG fund proxy voting policies and practices align with investors’ best interests and expectations.

In addition, in March 2021, a new Climate and ESG Task Force was formed within the SEC’s Division of Enforcement. The Task Force is charged with detecting “climate and ESG-related misconduct, including identifying any material gaps or misstatements in issuers’ disclosure of climate risks under existing rules and analyzing disclosure and compliance issues relating to investment advisers’ and funds’ ESG strategies.”

Governance Trends – Political Spending Disclosure

There has been much political discourse during 2020 and early 2021 due to the U.S. presidential election, COVID-19, and demonstrations around the world. A focus has been on registrants’ affiliations with and donations to political activities. In response, certain legislators have reintroduced the Shareholder Protection Act of 2021 in the Senate. The bill seeks to require shareholders to annually authorize a political activities budget, boards to authorize each expenditure over \$50,000 within such budget, and registrants to disclose the details of such votes, among other things.

It is unclear how successful the bill will be this time around, but nonetheless it is indicative of calls for further disclosure. Former Acting Chair of the SEC Allison Herren Lee has also advocated for additional political spending disclosure, but the latest Consolidated Appropriations Act prohibits the SEC from adopting any such rule.

Governance Trends – Board Composition

Registrants continue to focus on board composition and refreshment as a matter of internal corporate governance and in response to external calls from investors, institutions, and governments for more diversity. Strict tenure requirements remain somewhat rare, meaning that many registrants have to consider whether to add new board seats or move on from current directors in order to achieve the desired—and sometimes mandated—board composition.

For example, the [2020 Spencer Stuart Board Index](#) report (the Spencer Stuart Report) on companies in the S&P

500 found that “[o]f the 272 boards that appointed new independent directors during the 2020 proxy year, 28% increased the size of the board to add women (on a net basis after independent director departures).” However, the overall turnover rate for the 2020 proxy season was only 0.84 directors per board, and 25% of all boards made no change at all.

The 2021 proxy season is likely to continue the trend of recent years, but as discussed in more detail below, the adoption of more board diversity laws and regulations may accelerate how soon registrants take action.

Gender Diversity

According to the Spencer Stuart Report, every board in the S&P 500 had at least one female director as of the 2020 proxy season. However, women represented only 28% of all directors, an increase from 26% in 2019 and 16% in 2010. Within the Russell 3000, the [Corporate Board Practices](#) report for the 2019 proxy season found that only 18.5% of all directors are women, with the energy (12.7%), healthcare (17.2%), and information technology (17.4%) industries having the lowest share. Both reports also indicate that women continue to hold a minor share of board chair and CEO positions.

Racial and Ethnic Diversity

Boards continue to add racially and ethnically diverse directors to their ranks. The Spencer Stuart Report found that 22% of new S&P 500 independent directors are minorities, defined as African American/Black, Asian, or Hispanic/Latino. Among the top 200 companies by revenue, 97% had at least one minority director, up from 93% last year and 89% in 2010.

Age Diversity

While many other diversity metrics have trended up and down in recent history, the average age of independent directors has been relatively stable. The average age of all independent directors, new independent directors, and first-time independent directors in the S&P 500 is 63.0 years old, 57.8 years old, and 54.0 years old, respectively, and none of these measures has changed by more than 1.3 years since 2010.

According to the Spencer Stuart Report, only 6% of registrants in the S&P 500 have set term limits for nonemployee directors. And while over two-thirds of the S&P 500 disclose a mandatory retirement age, nearly all such registrants set the age at or above 72 years old.

Governance Trends – Rules Related to Board Diversity

In addition to the calls for action made by institutional investors and proxy advisors, recently a number of new board diversity initiatives have been proposed or enacted by state governments, the federal government, and a U.S. securities exchange.

Federal Level

In November 2019, the U.S. House of Representatives passed a bill that would require certain corporations to disclose in Exchange Act filings the gender, race, ethnicity, and veteran status of their board of directors, nominees, and executive officers. While an increasing number of companies elect to provide this information on an individual or aggregate basis in their proxy statements in response to institutional investor requests, it is not specifically required by current rules under the Securities Act or Exchange Act. No significant progress was made on the bill in 2020, but it was reintroduced in the Senate in February 2021.

Similarly, the SEC has not adopted a rule obligating registrants to satisfy any minimum board diversity standard, but Items 401(e)(1) and 407(c)(2)(vi) of Regulation S-K require registrants to disclose any diversity characteristics that are considered when evaluating director nominees. Diversity is [on the minds at the top levels of the SEC](#), but no firm plans to implement additional rules have been publicly announced.

Nasdaq Listing Rules

In December 2020, Nasdaq filed a proposal with the SEC to adopt new listing rules related to board diversity and disclosure. In particular, the proposed rules would require all registrants listed on Nasdaq's U.S. exchange to "publicly disclose consistent, transparent diversity statistics regarding their board of directors." The proposed rules would also require most Nasdaq-listed registrants to have, or explain why they do not have, at least one director who self-identifies as female and at least one director who self-identifies as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, two or more races or ethnicities, or as LGBTQ+. Foreign private issuers and SRCs would be permitted to satisfy this requirement by having two female directors.

Nasdaq revised its proposal in February 2021 to, among other things, permit registrants with five or fewer directors to satisfy the recommended diversity objective by having one director from a diverse background rather than two.

The SEC extended the comment and review period in March 2021 because of this recent amendment and in light of the mixed public comments received to date.

California

Publicly held domestic and foreign public corporations with their principal executive offices (as disclosed in their Form 10-K) in California were required to have at least one female (self-identified) board director by the end of 2019. The next benchmark will be the end of 2021, at which point boards with six or more directors will need to have at least three female directors, and boards with five directors will need to have at least two female directors.

More recently, [California passed legislation](#) that requires the same corporations to have at least one director from an underrepresented community on their boards by the end of 2021. If a board has five to eight directors, it will be required to have at least two directors from underrepresented communities, and board with nine or more directors must have at least three such directors. The law defines "directors from an underrepresented community" to be a person who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.

New York

Beginning on June 27, 2020, domestic corporations and foreign corporations doing business in the state were required to report the total number of directors on their board and the total number of female directors. Such reports will be made in their routine filing statement and the state will aggregate the information.

Other States

Many other state legislatures have heeded calls from their constituents to introduce new board diversity laws. Of the states that have successfully passed legislation, some require a minimum number of diverse directors—such as Washington—while others only impose reporting obligations—such as Maryland. However, it has not been uncommon for legislation to make little to no progress for over a year after being introduced, such as the case in Massachusetts, Michigan, and Pennsylvania.

Governance Trends – Forum-Selection Clause Litigation

In March 2020, the Delaware Supreme Court issued their decision in *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020), holding that forum-selection clauses in corporate

charters are facially valid. As a result, corporate defendants may be able to require that shareholders bring any securities lawsuits in federal rather than state court, closing a door the U.S. Supreme Court left open in *Cyan, Inc. v. Beaver Cty. Empls. Ret. Fund*, 138 S. Ct. 1061 (2018).

The Delaware Supreme Court's ruling has great significance for registrants incorporated in Delaware that face liability under the federal securities laws. Under the Securities Act, plaintiffs may choose to bring an action in either state or federal court. But after the U.S. Supreme Court held in *Cyan* that if the case is filed in state court, the defendant company is not permitted to remove it to federal court, securities plaintiffs increasingly flocked to state courts. To avoid the risk of having to defend securities claims in state court, the defendant corporations in *Salzberg* each added federal forum provisions to their certificates of incorporation prior to their public offerings, which required shareholders to bring securities lawsuits in federal court only. Plaintiffs sought a declaratory judgment that the provisions were invalid under Delaware law. The Court of Chancery granted summary judgment to plaintiffs, reasoning that the "constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware's corporate law."

In reversing the Court of Chancery, the Delaware Supreme Court held that because federal forum provisions regulate the "management of the business" and the "conduct of the affairs of the corporation," they are facially valid under Section 102(b) of Delaware's General Corporation Law. As the court put it, Delaware corporation law "allows immense freedom for businesses to adopt the most appropriate terms for the organizations, finance and governance of their enterprise." And while Delaware law protects shareholders' ability to bring internal corporate claims in Delaware courts, such as those alleging breaches of fiduciary duties by the board, it "does not address the propriety of forum-selection

provisions applicable to other types of claims." Finally, the court concluded that federal forum provisions do not violate federal law or policy.

Federal forum provisions likely will continue to be a point of contention in Securities Act litigation, however. The Delaware Supreme Court declared the provisions "facially valid" but noted that they may not be valid in every circumstance: "Charter and bylaw provisions that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose." Corporations and litigators should therefore continue to watch the Delaware courts for developments as parties bring as-applied challenges. Transactional lawyers drafting corporate charters for new Delaware corporations should be mindful of the opportunity to include federal forum provisions as a protective measure to avoid having to litigate federal securities claims in state court.

Governance Trends – D&O Insurance Market

Registrants that renewed a D&O insurance policy in 2020 or early 2021 likely experienced an increase in their premium and a significant one at that. Premiums have continued to trend upwards in recent years, in part due to an increase in securities litigation claims. Among these, derivative lawsuits that allege event-based wrongdoings—such as senior leaders failing to adequately respond to issues like data breaches, cybersecurity events, product liability, or failure to address governance reforms—are increasing in frequency and severity. More recently, claims alleging a failure to adequately respond to the COVID-19 pandemic, especially in instances when the registrant has become insolvent, have added to the overall pressure on premiums in addition to the rise in special purpose acquisition companies.

Alexander J. May, Partner, Jenner & Block LLP

Alexander (Alex) J. May has an extensive practice focused on capital markets transactions, securities offerings, and corporate governance matters. Mr. May represents public and private companies in a variety of registered and unregistered offerings and SEC registrants in disclosure, compliance and public reporting under the Securities Act of 1933 and Exchange Act of 1934, including proxy statements and executive compensation disclosure. In addition, Mr. May represents boards of directors and their committees in complex and emerging corporate governance and fiduciary duty matters.

As a partner in the firm's Corporate Department, Mr. May has significant experience advising a number of the firm's public and private clients on complex securities transactions, including registered and unregistered offerings of equity and debt and in secondary offerings by selling stockholders. Mr. May has experience across a number of different industries, including food and beverage, automotive and other manufacturing industries.

Mr. May has advised many public companies in disclosure, compliance and reporting, including the design and content of proxy statements and counseling on complex executive compensation disclosures. Mr. May frequently advises clients on new and emerging SEC and stock exchange compliance matters, environmental, social and governance (ESG) best practices, and corporate governance obligations under Delaware and Illinois law. Mr. May has also advised a number of public and private companies in mergers as well as asset purchases and divestitures.

Mr. May is an author of *Directors and Officers Liability* by the Law Journal Press. Mr. May also provides other securities and corporate governance updates to the firm's clients, including new SEC rulemakings, guides to the annual reporting and proxy season, and practice tips for public companies.

William R. Erlain, Associate, Jenner & Block LLP

William (Bill) R. Erlain is an associate in the firm's Corporate Department.

Mr. Erlain received his JD from Northwestern University Pritzker School of Law in 2019. While in law school, he served as production editor for the *Northwestern Journal of Technology and Intellectual Property* and worked with the Northwestern University Bluhm Legal Clinic's Center on Negotiation and Mediation. Additionally, he completed a judicial externship with the Honorable Jorge L. Alonso of the Northern District of Illinois.

Mr. Erlain received his BA in economics, *magna cum laude*, from Illinois Wesleyan University in 2012 and was a visiting scholar at the University of Oxford from 2011-2012. Prior to law school, he worked in the actuarial and predictive analytics department of a Fortune 500 company.

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